

21 July 2008

Mr John Feil
Executive Director
National Competition Council
PO Box 250
MELBOURNE VIC 3001

Dear Mr Feil,

Minerals Council of Australia Submission on the Draft Recommendations of the National Competition Council for the declaration of the Robe, Goldsworthy and Hamersley Railways.

This Submission is made by the Minerals Council of Australia (MCA).

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry nationally and internationally in its contribution to sustainable development. The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, and environmentally and socially responsible attuned to its communities' needs and expectations.

The MCA made a submission to the National Competition Council on May 1 when it was considering these applications for declaration. This submission responds to the draft recommendations published by the NCC on June 20.

Summary

The Minerals Council of Australia remains opposed to the declaration of the Robe, Goldsworthy and Hamersley railways under Part IIIA of the Trade Practices Act 1974 (TPA) notwithstanding the reasons given in favour of recommendation by the NCC. MCA submits that the recommendation should be reversed on national interest grounds and pursuant to the NCC's criteria.

The MCA considers that the NCC appears to have misunderstood the economic issues at stake and acted beyond the framework established by the Act.

In particular the NCC appears to have:

- failed to appreciate the state of the international commodities market and the scale of the task of maintaining and expanding market share in a globally competitive environment and with it the real threat of capital flight its declarations might cause;
- underestimated how disruption to complex and highly integrated production processes will lead to inefficient economic outcomes;
- failed to grasp the infrastructure imperative that is now at the heart of the nation's economic development agenda, instead coming up with a draft determination that stands to cannibalise existing assets;
- erroneously dismissed comparisons with the east coast coal industry and the debilitating influence of multi-user arrangements in those particular markets; and
- allowed its mission to creep well beyond the original intent and philosophy of the competition reforms that created both the NCC and the access regime.

The MCA also maintains that the propositions raised in our original submission are valid, namely that the declaration would have no sound economic and legal basis because it would be:

- inconsistent with the original intent of the “*production process exemption*” of Part IIIA, and the economic orthodoxy of what constitutes “*production*”, adding to the confusion and uncertainty manifest in the judicial ambiguity of the interpretation of this clause and the intent of Part IIIA;
- inconsistent with the “*objects clause*” of Part IIIA (inserted by the Trade Practices Act Amendment National Access Regime 2005) which contains both an economic efficiency objective and a competition objective – mandated third party access is not beneficial where the gains from competition as a result of third party access are small if not inconsequential relative to the efficiency losses third party access entails;
- disruptive to the economic operation of and investment in these vertically integrated production and supply chains with the potential of reducing the operational efficiency and system capacity of the railways by around 10-20%;
- detrimental to the incentive to invest in such infrastructure and have a chilling effect both from the perspective of the investor required to share a facility with their rivals and by reducing or eliminating the incentive to invest on the part of the access seeker who can 'free ride' on the access provider's investment; and
- detrimental to productivity by decreasing the operational efficiency on account of lower throughput, higher unit costs, and reduced capacity and flexibility in “*accumulating and blending*” various grades of product to meet product specifications.

The fundamental weakness of the NCC's reasons for its draft recommendations is that it fails to take account of the potential for loss of market share of seaborne trade in iron ore (as a consequence of international producers expanding output in response to lower growth in Australian exports) and the significant potential loss in Australian wealth and revenue for what are, at best, trivial offsetting benefits.

The global market ...

The market for resource commodities is one of the most dynamic and competitive in the world. Barriers to trade are generally lower than for other goods and services trade around the world. The NCC acknowledges this point by stating “*the Council remains of the view that the global iron ore market is effectively competitive*”¹.

The international commodities market is growing at a rapid pace. The global population is expected to grow from 6.5 billion people today to 8 billion by 2030 with 97 per cent of the growth to come from developing countries. Demand from China and India is accelerating at a pace not seen before. Economic consultants, Access Economics, describe it as a “*new global revolution*”.

Half the world is having an industrial revolution. That is raising not merely global growth, but doing so in a particularly commodity hungry manner, as demand for industrial commodities grows fastest in the income range of \$US 3-15,000 per head...

*By the time that process is complete [the world] will look back on the strongest period of sustained global growth since the industrialisation of the West. Moreover, that boom will have completely transformed the global demand for industrial commodities.*²

On projections calculated by Access Economics for the MCA, global iron ore production will need to grow 54 per cent over 2006 levels to meet world demand in 2020. (By comparison coal production will need to increase 45 per cent. Nickel production will have to more than double). This demand undermines arguments that it is uneconomic for other players to develop their own infrastructure.

¹ National Competition Council, Draft recommendations on declaration of the Goldsworthy Railway, p 38.

² Access Economics, Global commodity demand scenarios, May 2008, Executive Summary, p i.

The recent improvements in price and demand have induced an acceleration of investment in productive infrastructure, ABARE reported in May. In the six months to April 2008, 22 major minerals and energy projects, with a total capital expenditure of \$11.3 billion, were completed³. A further 97 projects are at an advanced stage with projected capital expenditure of \$70.5 billion. Access Economics estimates that mining and metals projects on paper represent \$134 billion, whereas three years ago the figure was \$79 billion.

The nature of the market demand challenge explains why companies have sought to build integrated production processes that incorporate rail networks. The volumes that will be expected to maintain the nation's market share are certainly considerable. But, in addition, the demands of customers for different varieties and grades of product and the need for both more flexibility and certainty in delivery place greater pressure on suppliers to operate effectively and efficiently. Certainty of investment in those production processes - from the pit-face to the customer - will be essential in convincing companies to invest in that extra capacity. Factors that reduce this uncertainty may lead minerals companies to invest in production facilities – vertically integrated mines, railways and ports – in other competing nations.

MCA has argued previously to the NCC and does so again that the markets for tenements, extraction, transport and sale are not, in this case, as “economically separable” as the NCC asserts.

The infrastructure and productivity imperative...

Ensuring this rapidly growing commodity demand is met will require a re-evaluation of infrastructure needs. While this is a matter for the market and of Commonwealth and State policy in other places, MCA argues that it should have a direct impact on the NCC's deliberations.

The NCC, has a duty under the TPA, through the Objects clause to Part IIIA, 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.

This issue has taken on new prominence in the recent years as the realisation that the nation has suffered from infrastructure bottlenecks has engendered renewed policy discussion and investment.

As Access Economics argues in its report on the infrastructure challenge for the mining industry:

If Australia fails to expand its production base at optimal pace, then we are foregoing that income to another region or country. And if that happens, the production gap, once opened, will not be easily closed. History tells us that as global supply starts to make inroads on demand it quickly becomes far more difficult to find the capital from global markets to expand.⁴

The MCA argues that the Objects clause of the Part IIIA of the TPA require the NCC to consider the broader economic issues as it judges the technical aspects of competition.

The scale of the market outlined in the previous section presents two issues. First, it re-enforces the arguments of BHP Billiton Ltd and Rio Tinto Ltd about the integrated nature of their production processes. The NCC appears to argue in its Draft Declaration that the ownership of the railways and their operation is an historical accident and that they are operated with a primary aim to keep domestic competitors out. This view is fundamentally mistaken and would be a misleading assumption upon which to base a declaration. Both the scale of production and the increased variety of what is produced is driven by the demands of the international market, not a convenient choice by a domestic player.

Second, it lessens the argument that it is uneconomical for other players to develop their own infrastructure. The NCC contends that there are no existing or planned railways that would compete with the existing Pilbara railways. This assessment is not supported by the Access Economics global market scenarios. The parent group of the applicant in this case, Fortescue Metals Group constructed a 260 kilometre railway from a mine to a new dock facility capable of exporting 45 Mtpa at Port Hedland. As FMG itself has said in its promotional material:

³ Australian Bureau of Agricultural and Resource Economics, Minerals and Energy – Major Projects Development, April 2008.

⁴ Access Economics, op. cit., v.

*It is often stated that these are remarkable times with the convergence of many factors, particularly surging commodity demand from China, providing an environment conducive to achieving great outcomes.*⁵

The MCA submits that over the long term, mandated third party access:

- chills the incentive to invest in facilities that might subsequently be declared; and
- reduces or entirely eliminates the incentive to invest on the part of the access seeker who can gain by 'free-riding' on the access providers' investment.

The infrastructure imperative is about encouraging as much development as possible rather than cannibalising what already exists. If major Australian iron producers fail to expand their production capacity quickly enough they will permanently lose market share to low cost overseas producers.⁶ Expanding capacity is not achieved by an access regime that both increases the scope for disruption and dissuades the owners of that infrastructure from expanding related operations. It is economically inefficient and shortsighted to seek to limit infrastructure development at a time when a fundamental structural shift in global demand has opened up the opportunity for strong and sustained growth in Australia's iron ore exports.

The east coast comparison...

The NCC's draft recommendation is also flawed in its dismissal of comparisons between the performance of the east coast networks, which mainly carry coal, and the Pilbara railways. The NCC says:

The reasons for the problems in Australia's east coast coal export chain are varied and complex and there is no single reason for the apparently poor performance of the east coast coal industry in responding to a sudden unexpected increase in demand.

There are some common features of this industry and the Pilbara iron ore industry— for example they both involve relatively complex logistics — but there are a range of differences including ownership structures, public sector involvement, planning arrangements and the form of regulation. Notably no part of the east coast coal supply chain is regulated under Part IIIA.

*The Council has considered the views of the service providers and their consultants that access to Pilbara railways under Part IIIA would transfer the problems of the east coast coal industry to the Pilbara iron ore industry. However, the Council fundamentally disagrees, and considers these arguments are based upon simplistic assumptions and are unconvincing.*⁷

In the Goldsworthy draft recommendation, the NCC also notes that the fact that "BHP Billiton Iron Ore operates both the Goldsworthy Railway Infrastructure and the trains that run on that infrastructure is a choice largely born of historical development and a range of commercial objectives not all of which necessarily relate to optimising efficiencies."⁸

This assertion is not supported by evidence. The difference of ownership, organisation, history and motive goes to the heart of the issues before the Council.

Since the recent improvement in demand, the iron ore sector has increased its throughput at the ports by much more than the coal sector. Over the period 1998 to 2006 the world seaborne coal trade grew 68.1 per cent, yet over the same period Australia's coal exports grew by 38.4 per cent. Over the same period the seaborne trade for iron ore grew 76.1 per cent, while Australia's grew by 81.4 per cent.

The result for market share was obvious: coal slipped from 36.1 per cent of world market share to 30.7 per cent. Iron ore maintained its overall share against increased competition just below 40 per cent (39.6 per cent compared with 38.5 per cent).

⁵ Fortescue Metals Group Ltd Newsletter, November 2007.

⁶ Port Jackson Partners, Economic Evaluation of the Impact of Lost Iron Ore Production and Share, April 2008, p12-13.

⁷ NCC, Hamersley Draft Declaration page 113

⁸ NCC, Goldsworthy Draft Declaration

While the NCC argues that there is “no single reason” for the poor performance of the east coast operators, the MCA, through its consultation with leading members who use the systems, submits there are some very clear reforms to consider and comparisons to be made.

Australia’s multi-user multi-owner export infrastructure chains – track, trains and ports - are currently, and forecast to remain for several years to come, a supply capacity constraint limiting Australia’s ability to fully capture the opportunities of the strongest global market growth in a generation. These export system struggle to efficiently and effectively meet the increasing global demand for coal products incurring significant demurrage and export opportunity costs and, creating a disincentive to invest in future capacity. This is notwithstanding a significant increase in public and private investment in capacity.

Australia’s multi-user, multi-owner export supply chains are characterised by:

- poorly coordinated disparate interests in systemic planning and utilisation of existing and future capacity;
- suboptimal alignment of track, train and port system capacity and economic interests;
- poor accountability for performance in market responsive pricing and inequitable sharing of risk and reward;
- lack of predictability in regulation and jurisprudence of capacity access and system delivery and property rights; and
- lack of economic incentive to innovate and improve operations.

These circumstances give rise to a lack of certainty for Australia’s coal exporters of reliable access to export infrastructure capacity, which is not only causing large and immediate losses to Australia’s export earnings, but also risks stifling and constraining on-going investment in future upstream mining infrastructure.

In this environment the MCA argues the primary and immediate reform imperative is to address the systemic failures in the current commercial operating paradigm and regulatory system. Private sector investment is not, nor potentially, the limiting factor in building capacity and operating it efficiently and effectively.

MCA argues a strategic framework of reforms centred on market-based solutions should emphasise:

- the primacy of the market in the provision and operation of export infrastructure for alignment of economic interest, performance and equity;
- minimum effective nationally consistent regulation where government intervention is only justified in market failure and the demonstrable capacity to remedy;
- whole of system coordinated planning for vertical integration of operations; and
- commercial structures that deliver economic drivers for capacity and efficiency, and provide certainty of access to export infrastructure.

The former Executive Director of the Australian Bureau of Agricultural and Resources Economics and Chairman of the 2005 Prime Minister’s Taskforce on Exports and Infrastructure, Dr Brian Fisher, in his submission to the NCC on behalf of Rio Tinto Ltd, is unequivocal that transport arrangements are the key factor.

Indeed the fundamental difference in this respect between the coal and iron ore industries in Australia is that coal exporters rely on multi-user, regulated infrastructure whereas the major iron ore exporters utilize single-user, owner operated integrated infrastructure.

Although it is the case that there are several variants within multi-user systems, for example with respect to independent or joint user ownership, the common denominator is that these facilities have not been expanded as rapidly as the single user facilities to meet the surge in global commodity demand.⁹

Dr Fisher rightly argues that multi-user regulated infrastructure is clearly associated with a disaggregation of interests compared with the single user model. This disaggregation is a fundamental flaw in the multi-user systems because the parties invariably look after their own welfare even if it is against the interest of the industry/facility as a whole.

⁹ Brian Fisher, Economic Evaluation of the Relative Efficiencies of Multi-user and Single User Rail and Port Facilities, April 2008, p 11.

Whilst there may be some difference in the ways in which the Pilbara and east coast coal transport and handling systems would work in a multi-user environment if access were to be granted to the Pilbara single user systems the most important element leading to delay would be introduced – namely, multiple players with different aims and constraints would be required to negotiate an agreed outcome before any significant changes to the facility (whether capital or operation nature) could be implemented. This will inevitably lead to delays in taking such decisions similar to those that have been observed in the east coast coal facilities.¹⁰

As Dr Fisher correctly concludes the granting of ex-post access would not only reduce the efficiency of the system for individual users but it would also “lead to the loss of real option values and the crowding out of low cost exports thus resulting in a further reduction in economic welfare for Australia as a whole”.

The NCC, as an apparent aside, notes there is no Part IIIA access regime in place on the east coast for coal. It seems difficult to then argue that arrangements similar to what would be in place if there were such access arrangements – that is, multi-user agreements – do not serve as a genuine comparison.

Further, the NCC acknowledges some capacity constraints may be created.

There may be capacity constraints and other factors that will affect the level and range of services that a provider of haulage on the Goldsworthy Railway may be able to provide, however, these are not such that no haulage service of value to potential users can exist.¹¹

The NCC should also re-consider its view in light of the Reserve Bank’s most recent assessments.

Capacity constraints in transport infrastructure have been an ongoing impediment to growth in bulk resources export volumes. In 2005, the Bank produced a survey of existing coal and iron ore supply chains, including estimates of the likely scale of rail and port expansions by 2007. While actual transport capacity for iron ore increased by 27 per cent relative to an anticipated rise of 15 per cent, the increase in coal transport capacity was below expectation, rising by 8 per cent compared with an expectation of 13 per cent.

One reason why supply chain expansions have been particularly difficult in the coal industry is that the fragmented ownership structure has complicated attempts to co-ordinate simultaneous investments, in contrast to the iron ore industry where the supply chains of large producers tend to be vertically integrated.¹²

The Reserve Bank notes the studies of Dr Stephen O’Donnell – which have been submitted to the NCC by both BHP Billiton Ltd and Rio Tinto Ltd – which focuses on the lack of investment in capacity due to the fragmented ownership structures and the lack of vertical integration. Stakeholders are working to overcome the problems. The Reserve Bank estimates that coal capacity will increase 17 per cent over the next two years while iron ore will increase 36 per cent. These figures are based on publicly released plans – plans that potentially face revision in the light of the NCC’s draft decision.

The NCC is wrong to suggest that the economic modeling submitted by Rio Tinto Ltd suggesting - losses in one scenario of \$30 billion - are simplistic or unconvincing.¹³ Again, the MCA argues that NCC has ignored the economic reality facing the industry. It suggests that simply opening the door on competition on privately owned, privately operated infrastructure will serve the economic imperatives that are meant to guide its actions. The east coast transport example shows this will not be the case. The NCC is wrong to discount the impacts of the diseconomies that will harm decisions on capacity expansion, technological change, maintenance and scheduling.

Mission creep...

The NCC is dismissive of the MCA’s submissions on the political and economic philosophies that underpin Part IIIA of the Act.

¹⁰ *ibid*, p15.

¹¹ *ibid*, p 45.

¹² Reserve Bank of Australia, Monthly Bulletin, June 2008, p 9.

¹³ Port Jackson Partners, *op. cit.*, p8.

*The Minerals Council of Australia (MCA) opposed all three declarations applications. The MCA considered that there is no sound economic or legal policy basis for declaration of the private iron ore railways in the Pilbara. The MCA based this view on its understanding as to the origins and intent of Part IIIA and the production process exception, and its belief that the costs of access are significant and the benefits trivial.*¹⁴

MCA submits its analysis is based firmly in the historical record. The access provisions of the Hilmer Reforms¹⁵ were informed by the “essential facilities” doctrine developed under United States jurisprudence¹⁶. The US practice supports the view that access may be granted if it improves competition. However, from an economic point of view, competition is only a means to an end. The end is economic efficiency. Hilmer noted that in some cases the doctrine had been interpreted too widely in situations ranging “from local telephone networks to football and basketball stadiums”¹⁷.

Conscious of the dangers of over-riding property rights, Hilmer had a number of qualifications on any access regime to be created in Australia. The qualifications included:

- the need to “carefully limit the circumstances in which one business is required by law to make its facilities available to another” because the “failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment”.¹⁸
- the need for access should be “essential” to permit effective competition in a downstream or upstream market.¹⁹
- Noting that the facilities and industries most likely to meet these requirement would be those where there was “traditional involvement of government in these industries, either as an owner or regulator”.²⁰
- Noting that if applied to privately owned facilities “it would be appropriate that an obligation to provide access does not unduly impede an owners right to use its own facilities, including any planned expansion of utilisation or capacity”.²¹

The Hilmer Review understood the need to limit the scope of any national access regime. As the MCA argued in its previous submission, while there were differences between the final form of Part IIIA and the Hilmer recommendations, it retained the emphasis on imposing substantive hurdles on the granting of access.

In his second reading speech implementing the changes to the TPA in 1995, then assistant Treasurer George Gear, emphasised that access provisions were geared towards essential facilities in general and former government owned assets, in particular. Ultimately, he said, the ability of the economy to grow and provide jobs and an improved standard of living depends on how well the productive potential of the economy is employed and enhanced. The changes would help the nation’s governments implement structural reform of monopolies including

*access to services provided by means of essential facilities and elimination of net competitive advantages enjoyed by government businesses where they compete with the private sector.*²²

In the debate that followed, Mr Gear gave a salutary warning:

*As I said in my second reading speech, we are not introducing competition for competition’s sake; we are introducing competition where it is for the public benefit.*²³

¹⁴ NCC, Hamersley Draft Declaration, p 25.

¹⁵ Independent Committee of Inquiry into Competition Policy in Australia, National Competition Policy, AGPS (1993). Hence forth described as Hilmer Report.

¹⁶ Hilmer Report, p 241.

¹⁷ Ibid. p 244.

¹⁸ Ibid. p 248.

¹⁹ Ibid. p 251.

²⁰ Ibid.

²¹ Ibid. p 256.

²² Commonwealth Parliament of Australia, Hansard, 30 June 2005, p 2793.

²³ Hansard, ibid, p 2819.

The MCA remains concerned that the NCC draft decision reinforces a trend that economic reform is assisted simply by opening the doors to competition without proper consideration of the broader implications. A decade and a half after the Hilmer reforms there is a danger that the view of “competition for competition sake” appears to be gaining currency.

Amendments to the TPA in 2006 reinforce the need for caution. The creation of a new objects clause and the material impacts test recognised the submission made by the Productivity Commission to the then Treasurer Peter Costello in its 2001 review of the Act.

The Productivity Commission noted the potential 'chilling' effect of access regulation on investment in essential infrastructure services was the main concern. Investment, it said, may be deterred for two reasons.

- Potential exposure to access regulation is likely to increase the general level of risk attaching to investment in essential facilities. The inevitable regulatory discretion involved in the implementation of such regulation, and perceptions that regulatory decisions are likely to be biased in favour of service users, are among the factors that contribute to regulatory risk. These sorts of risks attach to investment in any regulated activity. However, the scale of investment in essential infrastructure, and the fact that, once in place, the assets are 'sunk' with few alternative uses, mean that regulatory risk can be a more critical factor in the investment decision and may sometimes deter projects.
- Investments in essential infrastructure will also be deterred if regulated terms and conditions are not expected to provide a sufficient return. A particular problem here is that the possibility of earning higher than normal profits if a project proves to be very successful may be required to balance the possibility that the project will fail. However, once a facility is operating, it will generally be impossible for regulators to delineate any upside returns from genuine monopoly rent — that is, returns in excess of those necessary to justify the investment. Regulatory pricing arrangements that (inadvertently) appropriate upside returns (so called 'regulatory truncation') can be a significant source of inefficiency arising from access regulation.²⁴

The Productivity Commission noted that third party access and the resulting benefits to service users were only possible “if there is continuing investment in the essential infrastructure services themselves”. While there were costs from monopoly pricing, “such behaviour cannot threaten the continued availability of the services concerned”.

*This asymmetry in potential outcomes highlights the priority that access regulation must give to ensuring that there are appropriate incentives for efficient investment.*²⁵

Material harm...

The MCA maintains that “efficiency” is a prime economic factor to be considered in the NCC assessment. The response of the NCC to submissions on this point is perplexing. The NCC seeks to suggest that it is a matter for Government rather than the regulator to consider, but then claims it has taken the issues into account.

The Council is also aware of calls for the inclusion of an 'efficiency override' in the declaration process to ensure declaration is not available where the efficiency of a service provider's operations would be impaired by access...

*Nevertheless, the Council generally considers that Part IIIA accords with many of the desired policy aims expressed in the policy oriented submissions noted above.*²⁶

The calls referred to are, presumably, those of the Exports and Infrastructure Taskforce that reported to then Prime Minister John Howard in 2005. It recommended that there should be a means to exempt integrated facilities from the operation of Part IIIA of the TPA, and specifically:

²⁴ Productivity Commission, Review of the National Access Regime, 2001, p xix.

²⁵ Ibid.

²⁶ NCC, Goldsworthy Draft Declaration, p 26.

- that there should be an “*efficiency override*” for applications for declaration of export related facilities under Part IIIA or its associated regimes; and
- that the “*production process exemption*” should be amended so as to make it “*clear that the purpose of the exemption is to prevent the imposing of third party access in vertically integrated, tightly managed, logistics chains, especially those related to our export industries*”.

Changes to the law in that form were not adopted at the time. But this is not to say the economic principles underpinning them are not relevant to the NCC’s deliberations in a general sense. This is particularly the case for the “*production process exemption*”.

As argued previously the Hilmer Report recommended that declaration should apply to facilities and industries in which government had traditionally been involved, but not to “*products, production processes or most other commercial facilities*”.²⁷ Since the initial direction there have been varied interpretations put forward. The production process exemption was first considered by the Federal Court in the *Hamersley case*.²⁸ In that matter, an iron ore producer was attempting to obtain access to the privately owned iron ore railways in the Pilbara of Western Australia. Hamersley argued that the railway lines were part of a highly integrated sequence of “steps” for the production of iron ore. The Federal Court accepted this submission, and found that the railway line was “*integral and essential to the highly integrated series of operations that constitute Hamersley’s production process*”,²⁹ and that the production process exemption should therefore apply.³⁰

In *BHP Billiton Iron Ore Pty Ltd v The National Competition Council*³¹ – a case considering the same exemption, and also in the iron ore context – the Federal Court (at first instance) found that the Hamersley decision had been “*plainly wrong*” in the sense that a production process should be understood narrowly to define a process “*which in itself makes or creates one thing into another*”.

The confusion resulting from the divergent views in Hamersley and the first-instance decision in BHPBIO have been compounded by the appellate court in the latter. The Full Court did not consider that either case had been correctly decided, yet applied a complex and expansive alternative that in effect means that if a service is a “step” in a production process, access can be granted to it.

As the MCA argued initially in its submission to the NCC, the obvious criticism of this decision is that it leaves, to borrow an old phrase, the conveyor belts in Henry Ford’s production line amenable to declaration. In response to this criticism, the Full Court added a qualifier: where the operation is *highly* integrated and the request for access would be “invasive and disruptive”, the request for access to a single step of the production process is equivalent to access to the entire process. The exact scope of such a test, or how such a test would operate, was not explained by the Court and for that reason was strongly criticised in the dissenting opinion.

Conclusion:

The NCC appears not to have had proper regard to the national interest in its draft declaration through a narrow economic assessment that favours intervention. In the review of its decision the MCA recommends the NCC consider the following criteria:

- that competition be substantially promoted by declaration, as opposed to the current consideration where it is sufficient if the improvement in competition is non-trivial;
- that competition be promoted in a market that is substantial and of national significance, other than the market in which the service is being provided, before the service is declared;
- that the declared service be essential to competition in the market in which competition will be promoted, where “essential” means that the facility is indispensable to participate in that market;

²⁷ Report by the Independent Committee of Inquiry, p. 251.

²⁸ *Hamersley Iron Pty Ltd v National Competition Council* [1999] 164 ALR 203.

²⁹ *Hamersley Iron Pty Ltd v National Competition Council* [1999], para 51.

³⁰ *Hamersley Iron Pty Ltd v National Competition Council* [1999], para 41.

³¹ *BHPBIO*

- that the production process exemption prohibit or strictly limit access where doing so would disrupt a vertically integrated production process; and
- be satisfied that granting access is in the public interest, including in terms of promoting economic efficiency, and in so doing, take account of the costs and risks of regulatory error.

Should you wish to discuss the Minerals Council's submission further please do not hesitate to contact me directly.

Yours sincerely,

QuickTime™ and a
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are needed to see this picture.

MITCHELL H HOOKE
CHIEF EXECUTIVE OFFICER