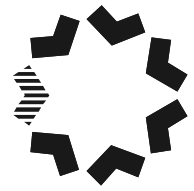


NATIONAL
COMPETITION
COUNCIL



Robe Railway

Application for declaration of a
service provided by the
Robe Railway under
section 44F(1) of the
Trade Practices Act 1974



Final Recommendation

29 August 2008

Table of Contents

Abbreviations and glossary of terms	6
1 Council processes and final recommendation	13
Final recommendation.....	15
2 The application.....	16
The application and applicant.....	16
The service sought to be declared	16
The facility.....	17
The service provider	17
The decision maker	18
Other Pilbara railway applications	19
Issues regarding the application	19
3 Access regulation under Part IIIA.....	24
Objectives of access regulation	24
Submissions on access regulation policy	25
Declaration of a service	27
The character of regulation under Part IIIA	28
The declaration criteria.....	31
4 Criterion (a) – Promotion of competition.....	33
Legal requirements	33
The dependent market(s)	35
The market for haulage services.....	43
The market for iron ore tenements	49
Conclusion on criterion (a)	57
5 Criterion (b) – Uneconomical to develop another facility	58
Legal requirements	58
Application and submissions	59
Alternative tests for assessing criterion (b)	68
The Council’s assessment	69
Conclusion on criterion (b)	81
6 Criterion (c) – National significance	82
Legal requirements.....	82

Application and submissions	82
The Council’s assessment	83
Conclusion on criterion (c).....	83
7 Criterion (d) – Health and safety.....	84
Legal requirements	84
Application and submissions	84
The Council’s assessment	85
Conclusion on criterion (d)	88
8 Criterion (e) – Effective access regime	89
Legal requirements	89
Access undertakings	89
Application and submissions	90
The Council’s assessment	91
Conclusion on criterion (e)	93
9 Criterion (f) – Not contrary to the public interest	94
Legal requirements	94
Application and submissions	97
The Council’s assessment	117
Conclusion	137
10 Section 44F(4) – Develop a facility for part of the service	141
Legal requirements	141
Application and submissions	141
The Council’s assessment	142
Conclusion on section 44F(4).....	144
11 Section 44H(8) – Duration of declaration	145
Legal requirements	145
Application and submissions	145
The Council’s assessment	146
Conclusion on section 44H(8).....	147

Appendix A Public consultation	148
Appendix B Map of the Robe Railway	153
Appendix C Arbitration of access disputes under Part IIIA	155
Appendix D Summary comparison of relevant regulatory and related features impacting major east coast coal transport facilities and Pilbara railways with and without access	158
References	160

Figures and tables

Figure 5-1 Relationship between investment and capacity by type of railway expansion	72
Figure 5-2 Schematic of the Robe Railway showing the intersection with the Hamersley Railway	74
Table 5-1 Potential demand for the Robe Service	77

Confidential material

Confidential material has been omitted from the body of this recommendation as indicated by empty square brackets []. The confidential material has been included in a confidential appendix which has been provided to the decision making Minister and the Minister’s advisors. This confidential appendix is not included in publicly available copies of the recommendation.

Abbreviations and glossary of terms

above rail	Assets and equipment such as locomotives and ore cars that operate on a railway
above rail service	A service provided using above rail assets and equipment usually for the purpose of hauling or moving freight and/or passengers by rail
ACCC	Australian Competition and Consumer Commission
AGS	Australian Government Solicitor
AMEC	Association of Mining and Exploration Companies
API	Australian Premium Iron Joint Venture
Applicant	The Pilbara Infrastructure Pty Ltd
ARTC	Australian Rail Track Corporation
Atlas Iron	Atlas Iron Limited
below rail	Fixed railway assets such as tracks, sleepers, signalling and monitoring equipment
below rail service	A service which constitutes the use of the below rail infrastructure necessary for running trains, but does not include the use of trains and other above rail assets
BHP Billiton Iron Ore	Collectively BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd
BHP Billiton Minerals	BHP Billiton Minerals Pty Ltd
BHPBIO	See BHP Billiton Iron Ore
BHPBIO White Paper	A white paper authored by BHPBIO titled <i>Regulation for the future of Australia's natural resources sector</i> and associated appendices submitted by BHPBIO (BHPBIO, Sub 1 Annexure 1 and appendices)
Cape Lambert Iron Ore	Cape Lambert Iron Ore Limited
CBS	Capacity Balancing System
CCIWA	Chamber of Commerce and Industry Western Australia
clause 6 principles	The principles set out in clause 6 of the Competition Principles Agreement – 11 April 1995 (As amended to 13 April 2007)

consist	In railway terminology, a consist describes the group of rail vehicles that make up a train, or a group of locomotives connected together for multiple unit operation
Council	National Competition Council
criterion (a)	Section 44G(2)(a) of the TPA
criterion (b)	Section 44G(2)(b) of the TPA
criterion (c)	Section 44G(2)(c) of the TPA
criterion (d)	Section 44G(2)(d) of the TPA
criterion (e)	Section 44G(2)(e) of the TPA
criterion (f)	Section 44G(2)(f) of the TPA
designated Minister	The Minister designated to make the decision on whether or not to declare the service subject to the application for declaration in accordance with the requirements under Part IIIA of the TPA—for this application, the Hon. Wayne Swan MP, Treasurer
Finucane Island section	The section of the Goldsworthy Railway running from the Goldsworthy Junction to Finucane Island
Fisher Report	A report from Dr Brian Fisher, commissioned by Rio Tinto Iron Ore (RTIO, Sub 1 Annexure 4)
Fortescue	Fortescue Metals Group Ltd
Full Court	Full Court of the Federal Court
GDP	Gross Domestic Product
Goldsworthy Agreement Act	<i>Iron Ore (Mt Goldsworthy) Agreement Act 1964</i> (WA)
Goldsworthy Application (comprising Parts 1-3)	An application by TPI for a recommendation under Part IIIA of the TPA that a service provided by the railway owned by the Mt Goldsworthy Joint Venture participants be declared
Goldsworthy Joint Venture	An unincorporated joint venture consisting of: BHP Billiton Minerals Pty Ltd; Mitsui Iron Ore Corporation Pty Ltd; and ITOCHU Minerals and Energy of Australia Pty Ltd
Goldsworthy Railway	The railway line from a location near Yarrie to a location near Finucane Island within the port of Port Hedland and associated infrastructure, which is the facility that would be used to provide the Goldsworthy Service

Goldsworthy Service	A service which is sought by the Applicant to be declared. The Goldsworthy Service is a 'rail track' or 'below rail' service using the Goldsworthy Railway
Goldsworthy Service Providers	The owners and operators of the Goldsworthy Railway facility that would be used to provide the Goldsworthy Service
GSP	Gross State Product
Hamersley Agreement Act	<i>Iron Ore (Hamersley Range) Agreement Act 1963 (WA)</i>
Hamersley Application (comprising Parts 1-4)	An application by TPI for a recommendation under Part IIIA of the TPA that a service provided by the railway owned by Hamersley Iron Pty Ltd and other entities be declared
Hamersley Iron	Hamersley Iron Pty Ltd (a wholly owned subsidiary of Rio Tinto)
Hamersley Service	A service which is sought by the Applicant to be declared. The Hamersley Service is a 'rail track' or 'below rail' service using the Hamersley Railway
Hamersley Service Providers	Collectively Hamersley Iron, the participants of the Robe River Iron Associates, HI-Yandi and Pilbara Iron Pty Ltd. These entities are the owners and operators of the Hamersley Railway facility that would be used to provide the Hamersley Service
haulage service	See above rail service
HI-Yandi	Hamersley Iron-Yandi Pty Ltd (owner of the railway line from Juna Downs to Yandicoogina)
Hope Downs joint venture	An unincorporated 50:50 joint venture between Rio Tinto Limited and Hancock Prospecting Pty Limited
IPART	Independent Pricing and Regulatory Tribunal
JORC	Australasian Joint Ore Reserves Committee
Junior explorers	A generally smaller company that is exploring for mineral resources but is not yet producing mineral commodities
MCA	Minerals Council of Australia

Mt Newman Joint Venture	An unincorporated joint venture comprising the following participants: BHP Billiton Minerals Pty Ltd; Mitsui-Itochu Iron Pty Ltd, and ITOCHU Minerals and Energy of Australia Pty Ltd
Mt Newman Recommendation	The Council's final recommendation (23 March 2006) on the application by Fortescue for declaration of the Mt Newman Service
Mt Newman Service	A rail track service using the Mt Newman Railway running from a rail siding near Mindy Mindy to Port Hedland, which is the subject of the Mt Newman Recommendation
mtpa	million tonnes per annum
Myers/O'Bryan Opinion	A legal opinion from Mr A. J. Myers QC and Mr M.H. O'Bryan submitted by BHP Billiton Iron Ore regarding the powers of the ACCC to determine access disputes (BHPBIO, Sub 2 Attachment 4)
NWIOA	North West Iron Ore Alliance
OECD	Organisation for Economic Cooperation and Development
Part IIIA	Part IIIA of the <i>Trade Practices Act 1974</i> (Cth)
Pilbara Iron	Pilbara Iron Pty Ltd (a wholly owned subsidiary of Rio Tinto Limited, which has the exclusive right to manage and operate on an integrated basis the railway assets of Hamersley Iron, HI-Yandi and the Robe River Iron Associates)
Proposed Pilbara Rail Haulage Regime	A regime the Western Australian Government is developing for access to rail haulage services for iron ore in the Pilbara
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997</i> (Qld)
rail haulage service	See above rail service
rail track service	See below rail service
rake	A set of ore cars usually numbering around 100 cars. An iron ore train is usually described in terms of rakes rather than ore cars.
Rio Tinto Iron Ore	Rio Tinto Iron Ore Pty Ltd (a division of Rio Tinto Limited responsible for iron ore operations)
Robe Agreement Act	<i>Iron Ore (Robe River) Agreement Act 1964</i> (WA)

Robe Application (comprising Parts 1-3)	An application by TPI for a recommendation under Part IIIA of the TPA that a service provided by the railway owned by the Robe River Iron Associates be declared
Robe Railway	The railway line running from a location near Mesa J to Cape Lambert and associated infrastructure, which is the facility that would be used to provide the Robe Service
Robe River Iron	The Robe River Iron Associates (an unincorporated joint venture comprising the following participants: Robe River Mining Co Pty Ltd; Mitsui Iron Ore Development Pty Ltd; North Mining Limited; Cape Lambert Iron Associates; and Pannawonica Iron Associates)
Robe Service	A service which is sought by the Applicant to be declared. The Robe Service is a 'rail track' or 'below rail' service using the Robe Railway
Robe Service Providers	Robe River Iron Associates and Pilbara Iron Pty Ltd. These entities are the owners and operators of the Robe Railway facility that would be used to provide the Robe Service
SMS	Simulation Modelling Services Pty Ltd
State Agreement companies	The mining companies subject to State Agreements
State Agreement Acts	<i>The Iron Ore (Hamersley Range) Agreement Act 1963 (WA), Iron Ore (Mt Goldsworthy) Agreement Act 1964 (WA), Iron Ore (Robe River) Agreement Act 1964 (WA) and Iron Ore (Yandicoogina) Agreement Act 1996 (WA)</i>
State Agreements	The agreements entered into between the State of Western Australia and mining companies
Taskforce Report	A report to the Prime Minister by the 'Exports and Infrastructure Taskforce' (RTIO, Sub 1 Annexure 13)
the haulage services market	With respect to each of the Goldsworthy, Hamersley and Robe applications the haulage services market is the market for haulage services for iron ore on the relevant railway in the vicinity of that railway
the iron ore tenements market	The market for tenements that contain iron ore in the Pilbara
TPA	<i>Trade Practices Act 1974 (Cth)</i>

TPI	The Pilbara Infrastructure Pty Ltd (also the Applicant, a wholly owned subsidiary of Fortescue and manager and operator of Fortescue's railway)
track service	See below rail service
Tribunal	Australian Competition Tribunal
WA Rail Access Regime	<i>Railways (Access) Act 1998</i> (WA) and the <i>Railways (Access) Code 2000</i> (WA)
Yandicoogina Agreement Act	<i>The Iron Ore (Yandicoogina) Agreement Act 1996</i> (WA)
Yarrie section	The section of the Goldsworthy Railway running between Yarrie and the Goldsworthy Junction

1 Council processes and final recommendation

- 1.1 On 18 January 2008, The Pilbara Infrastructure Pty Ltd applied to the National Competition Council (**Council**) for a recommendation under Part IIIA of the *Trade Practices Act 1974* (Cth) (**TPA**) that a service provided by a railway owned by the Robe River Iron Associates be declared for a period of 20 years (**Robe Application**).¹
- 1.2 The Council also received applications for recommendations under Part IIIA of the TPA that a service provided by the railway owned by Hamersley Iron Pty Ltd and other entities (**Hamersley Application**) and a service provided by the railway owned by the Mt Goldsworthy Joint Venture participants (**Goldsworthy Application**) each be declared for a period of 20 years.
- 1.3 The Council has prepared a separate recommendation in respect of each of the three applications. Parts of the Council's consideration are common to more than one application and several parties made submissions in relation to more than one application (or indicated that submissions in relation to one or more specific application should be taken into account in relation to other applications 'where relevant'). Where this is the case the content of the three recommendations is similar or identical. Where issues, submissions or analysis are specific to a particular application (or applications) the Council has included these in its consideration of that application(s) and in the relevant recommendation.
- 1.4 The Council conducted a public consultation process in preparing the draft recommendation in relation to the Robe Application. The Council received submissions from the following organisations:
 - Rio Tinto Iron Ore
 - Government of Western Australia
 - Association of Mining and Exploration Companies
 - Minerals Council of Australia
 - Chamber of Commerce and Industry Western Australia.
- 1.5 The Council received a submission from BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd (collectively **BHP Billiton Iron Ore**) in response to the Goldsworthy Application. BHP Billiton Iron Ore requested that the Council take that submission into its consideration of the Robe Application, to the extent that the submission is relevant. The North West Iron Ore Alliance also provided submissions to the Hamersley Application and the Goldsworthy Application that contained information relevant to this application.

¹ See paragraphs 2.1-2.3 regarding the Robe Application.

- 1.6 The Council released a draft recommendation in relation to this application on 20 June 2008. The draft recommendation stated that the Council had reached a preliminary view that the Robe Application satisfied each of the declaration criteria set out in section 44G(2) of the TPA as well as the other requirements relating to declaration set out in Part IIIA. The draft recommendation therefore stated that, based on the information available to the Council at the time of publishing the draft recommendation, the Council intended to recommend to the designated Minister that the Minister declare the service for a period of 20 years.
- 1.7 The Council sought submissions from interested parties in response to the draft recommendation by 21 July 2008. Submissions on the draft recommendation were received from:
- The Pilbara Infrastructure Pty Ltd
 - Rio Tinto Iron Ore
 - Association of Mining and Exploration Companies
 - Minerals Council of Australia
 - North West Iron Ore Alliance
 - Mr Nick Wills-Johnson.
- 1.8 The Council received a submission from BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd (collectively **BHP Billiton Iron Ore**) and a submission from Atlas Iron Ltd in response to the draft recommendation on the Goldsworthy Application. Those parties requested that the Council take their submissions into its consideration of the Robe Application, to the extent that the submissions are relevant. The Council also received a submission from South Spur Rail Services in response to the draft recommendation on the Goldsworthy Application, which requested that the Council note the interest of South Spur Rail Services in the Robe Application.
- 1.9 All submissions received by the Council were published on its website. Additional information relating to the Council's public consultation process is contained at appendix A.
- 1.10 In preparing this recommendation, the Council has taken into account the submissions received, information provided during meetings with specific parties and organisations, and other information obtained from publicly available sources.
- 1.11 The Council has fully considered all of the arguments made in all submissions received. The Council notes that a number of the submissions received in response to the draft recommendation contained re-stated information and arguments made in earlier submissions. In such cases the Council has not necessarily specifically referred to the subsequent submission in this recommendation.

1.12 In accordance with section 44GA of the TPA the Council used its best endeavours to make a recommendation on this application for declaration to the designated Minister within the standard period of four months beginning on the day it received the application. However, the Council was unable to make its recommendation within the standard period, and, pursuant to section 44GA of the TPA, on 12 March 2008, the Council extended the standard period of four months by a period of 104 days, until 29 August 2008. Several factors contributed to this outcome:

- this is one of three applications relating to iron ore railways in the Pilbara that the Council has sought to address concurrently
- the applications contained limited information, and in the case of the Hamersley Application and the Goldsworthy Application some time elapsed before sufficient information was provided to enable proper consideration of the applications to commence
- all three applications are complex with the service providers in particular making extensive submissions on a number of aspects of the applications
- in the case of the Hamersley Application, the Council's power to consider the application was subject to a legal challenge by Hamersley Iron Pty Ltd (a wholly owned subsidiary of Rio Tinto Limited) (while this did not of itself delay the Council's work it diverted significant Council resources)
- the service providers relevant to this application and the Goldsworthy and Hamersley applications requested additional time to provide their submissions on the applications, and the Council considered additional time was warranted.

1.13 This recommendation was provided to the designated Minister on 29 August 2008.

Final recommendation

1.14 For the reasons set out in this recommendation report, the Council is of the view that the Robe Application satisfies each of the declaration criteria set out in section 44G(2) of the TPA and meets the other requirements relating to declaration set out in Part IIIA.

1.15 The Council recommends that the designated Minister (Hon. Wayne Swan MP, Treasurer) declare the Robe Service² for a period of 20 years.

² The Robe Service is defined at paragraph 2.5.

2 The application

The application and applicant

- 2.1 On 18 January 2008, The Pilbara Infrastructure Pty Ltd (**Applicant**) applied to the Council under Part IIIA of the TPA for a recommendation that the service provided by a railway line owned by the Robe River Iron Associates be declared for a period of 20 years (**Robe Application Part 1**).
- 2.2 The Applicant is a wholly owned subsidiary of Fortescue Metals Group Ltd (**Fortescue**). The Applicant stated that it will operate Fortescue's rail and port operations in the Pilbara.
- 2.3 On 31 January 2008, the Applicant submitted a report by Simulation Modelling Services Pty Ltd (**SMS**) containing rail capacity modelling, supplementing its application (**Robe Application Part 2**). On 6 February 2008, in response to information provided by the legal representatives of the Robe River Iron Associates regarding the participants comprising the Robe River Iron Associates, the Applicant submitted a letter further supplementing its application (**Robe Application Part 3**). Together with the Robe Application Part 1, these documents constitute the **Robe Application**.

The service sought to be declared

- 2.4 The term 'service' is defined for the purposes of Part IIIA in section 44B of the TPA:

service means a service provided by means of a facility and includes:

- (a) the use of an infrastructure facility such as a road or railway line;
- (b) handling or transporting things such as goods or people;
- (c) a communications service or similar service;

but does not include:

- (d) the supply of goods; or
- (e) the use of intellectual property; or
- (f) the use of a production process;

except to the extent that it is an integral but subsidiary part of the service.

- 2.5 The service which is sought by the Applicant to be declared (**Robe Service**) is described at [3.3] and [3.4] of the Robe Application Part 1 as follows:

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...

The Robe Service would also include the use of all associated infrastructure necessary to allow third party trains and rolling stock to move along the Robe Railway between points of interconnection, including, but not limited to:

- (a) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of the railway);
- (b) bridges;
- (c) passing loops;
- (d) train control systems, signalling systems and communication systems;
- (e) sidings and refuges to park rolling stock;
- (f) maintenance and protection systems; and
- (g) roads and other facilities which provide access to the railway line route.

- 2.6 The Applicant stated that it seeks access to the Robe Service in order to be able to offer an above rail haulage service to mining companies seeking to move bulk materials between any two points on the Robe Railway, including without limitation interconnection points with other rail networks and railway lines. Such a service is described as an *all points* service.³

The facility

- 2.7 The facility that would be used to provide the Robe Service is the railway line running from a location near Mesa J to Cape Lambert and associated infrastructure (**Robe Railway**).
- 2.8 A map showing the location of the Robe Railway is included as appendix B.

The service provider

- 2.9 The Council understands that:
- the Robe River Iron Associates own the railway line from a location near Mesa J to Cape Lambert

³ The significance of the *all points* nature of the Robe Service is discussed at paragraph 2.25.

- the Robe Railway is managed by Pilbara Iron Pty Ltd (**Pilbara Iron**) (a wholly owned subsidiary of Rio Tinto Limited).
- 2.10 The Robe River Iron Associates is an unincorporated joint venture comprising the following participants:
- Robe River Mining Co Pty Ltd
 - Mitsui Iron Ore Development Pty Ltd
 - North Mining Limited
 - Cape Lambert Iron Associates and
 - Pannawonica Iron Associates.
- 2.11 The Cape Lambert Iron Associates consist of:
- Nippon Steel Australia Pty Ltd
 - Sumitomo Metal Australia Pty Ltd and
 - Mitsui Iron Ore Development Pty Ltd.
- 2.12 The Pannawonica Iron Associates consist of:
- Nippon Steel Australia Pty Ltd and
 - Sumitomo Metal Australia Pty Ltd.
- 2.13 Robe River Mining Co Pty Ltd and North Mining Limited are wholly owned subsidiaries of Rio Tinto Limited.
- 2.14 On the basis of the information set out in paragraph 2.9, the Council considers that the providers of the Robe Service are the Robe River Iron Associates and Pilbara Iron Pty Ltd (**Robe Service Providers**).

The decision maker

- 2.15 The Council provides its final recommendation in relation to the Robe Application to the designated Minister, who, pursuant to section 44H of the TPA, decides whether to declare or not declare the Robe Service. In this matter the Hon. Wayne Swan MP, Treasurer, is the designated Minister.
- 2.16 The designated Minister must publish the declaration or decision not to declare the Robe Service and the reasons for the decision within 60 days of receiving the Council's final recommendation. The Council makes its final recommendation public as soon as practicable after the designated Minister makes and publishes his decision.
- 2.17 Should the designated Minister not make a decision within the prescribed time, the application is deemed to have been declined, pursuant to section 44H(9) of the TPA.

2.18 The designated Minister's decision may be reviewed (upon application) by the Australian Competition Tribunal (**Tribunal**).

Other Pilbara railway applications

2.19 The Applicant has submitted two other applications to the Council for the declaration of similar services provided by other railway lines in the Pilbara, which the Council is considering concurrently with the Robe Application. The two other applications are:

- the Goldsworthy Application, which was submitted on 16 November 2007, and
- the Hamersley Application, which was submitted on 16 November 2007.

2.20 The Council has released separate recommendations in relation to the Robe, Hamersley and Goldsworthy applications.

2.21 The Council previously considered an application by Fortescue for a recommendation that a service provided through the use of the Mt Newman Railway from a rail siding near Mindy Mindy to Port Hedland (**Mt Newman Service**) be declared. On 23 March 2006, the Council recommended that the Mt Newman Service be declared for a period of 20 years (**Mt Newman Recommendation**). The Mt Newman Service was deemed not to have been declared after the designated Minister made no decision within 60 days of receiving the Council's recommendation. On 9 June 2006, Fortescue sought review of the designated Minister's deemed decision by the Tribunal. That review is before the Tribunal.

2.22 While the Robe Service is different from the Mt Newman Service, there are, nevertheless, areas where the Council's analysis of each declaration application has involved substantially similar considerations. Accordingly, in developing this recommendation, the Council has drawn where relevant upon its analysis in the Mt Newman Recommendation. Where this has been done it has been identified in this recommendation.

Issues regarding the application

2.23 Rio Tinto Iron Ore raised several issues regarding the form and nature of the Robe Application and the Council's jurisdiction to consider the application. These issues are outlined in this section. Insofar as these relate to the Council's ability to deal with this application, the Council's conclusions in respect of these issues are also set out in this section. Where an issue has an impact on other parts of the Council's consideration of this application, the issue is also addressed in the relevant section of this recommendation.

Section 44F(1) requires a ‘particular service’

- 2.24 Rio Tinto Iron Ore submitted that the Robe Application Part 1 lodged on 18 January 2008 failed to identify a ‘particular service’ for which declaration is sought. The company suggested that because the application provides for use of the Robe Service between all points on the Robe Railway, the application seeks declaration of an ‘infinite number of services’. It argued that this does not comply with section 44F(1) of the TPA, which requires that applications under Part IIIA be made in respect of a particular service. Rio Tinto Iron Ore suggested that the requirement that applications relate to a particular service is necessitated by the need for the Council (and presumably other parties to the decision making process) to determine whether the declaration criteria are satisfied, and ‘the infinite number of services that in substance have been applied for makes it impossible to meaningfully apply the declaration criteria’ (RTIO, Sub 1 at [1.5]).
- 2.25 In this application, the Applicant has sought declaration of what has become known as an *all points* service, as distinct from a *point to point* service. The distinction is that this application seeks access to run trains between any two places on the Robe Railway rather than between two pre-specified points on the railway. Unlike the earlier application in respect of the Mt Newman Service where Fortescue sought access to run trains between its Mindy Mindy deposit and Port Hedland,⁴ the Applicant in this case has sought a broader level of access so that it (and potentially other access seekers) can offer haulage services to a range of potential customers who may wish to have ore transported from different mine locations to one or more ports accessible through use of the Robe Railway, possibly in conjunction with other railways or means of transport. All points access also increases the number of mine operators that might be able to use the service to transport ore.
- 2.26 The Council agrees with Rio Tinto Iron Ore’s general submission that an application must be made with sufficient particularity as to the service to which it relates, to enable the Council (and other parties involved in the decision making process) to understand what is being sought and to make the assessments and judgments required under Part IIIA.
- 2.27 In the Council’s view the approach to the requirement that applications are made in respect of a particular service as suggested by Rio Tinto Iron Ore is too narrow. In the Council’s view, there is no requirement that applications must specify a ‘point to point’ service.
- 2.28 The approach taken by the Applicant is consistent with the practice of the Council and the approach of the Tribunal. In *Re Services Sydney Pty Limited* [2005] ACompT 7 the

⁴ In its Mt Newman Recommendation, the Council recommended declaration of a service from a point near Mindy Mindy to Port Hedland, but noted that precise points of connection are appropriately regarded as conditions of access to be negotiated between the parties or, if necessary, the subject of arbitration under section 44V of the TPA.

Tribunal considered an argument by Sydney Water Corporation that the services for which Services Sydney Pty Limited were seeking declaration lacked sufficient specificity because the transportation service should be defined as a ‘point to point service’ and the interconnection service should be defined in terms of specific points of interconnection. The Tribunal did not accept that argument and, stated (at[17]):

Sydney Water argued that the services for which Services Sydney are seeking declaration lacked sufficient specificity, that the transportation service should be defined as a point to point service and the inter-connection service should be defined in terms of specific points of inter-connection. The Tribunal does not accept this argument. If a service is declared, access will potentially be available to anyone seeking it, not just Services Sydney. The Tribunal agrees with the NCC that the definition of the services for the purpose of declaration needs to be sufficiently broad to be relevant to alternative entry plans. The specific location of inter-connection points is something that can be determined as part of the negotiation and arbitration of the terms and conditions of access.

- 2.29 The particular service for which the Applicant is seeking declaration is sufficiently described and delineated so that the Council considers that it is able to gather appropriate information, conduct the assessments and make the judgments necessary to fulfil its responsibilities under Part IIIA.
- 2.30 The Council does not accept Rio Tinto Iron Ore’s submission that the application is invalid on these grounds.

Production process exception

- 2.31 Rio Tinto Iron Ore submitted that the Council does not have power to deal with or make a recommendation in respect of the Robe Application because each of the services for which declaration is sought is a production process and excluded from the definition of ‘service’ by paragraph (f) of section 44B of the TPA. BHP Billiton Iron Ore raised the same concern in relation to the Goldsworthy Application.
- 2.32 The extent of the ‘production process exception’ provided by paragraph (f) of the definition of ‘service’ in section 44B of the TPA has been the subject of judicial consideration at several levels. The authority that the Council must apply is that established by the decision of the Full Court of the Federal Court (**Full Court**) in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234.⁵
- 2.33 In that case the Full Court held that the production process exception will apply only where the service the subject of the application for declaration either uses all the steps in a production process, or uses one or more of the steps and such use is of a kind and character that on the facts constitutes the use of the production process.

⁵ On 29 and 30 July 2008 the High Court heard an appeal against this decision. However, until the High Court hands down its decision, the Council must apply the Full Court’s decision.

Applying this construction, the Full Court found that the production process exception did not apply to the services sought by Fortescue which included the use of parts of the Mt Newman and Goldsworthy railway lines, because on the facts Fortescue's use of those services was not of a kind or character that was the use of a production process.⁶

- 2.34 In the Council's view, the relevant circumstances leading to the Full Court's decision in respect of the Mt Newman and Goldsworthy railways are indistinguishable from the circumstances of this application.
- 2.35 The Council considers that it is not prevented from dealing with this application on the grounds that the Robe Service constitutes the use of a production process for the purposes of the production process exception in paragraph (f) of the definition of 'service' in section 44B of the TPA.

Changes or additions to the Robe Application

- 2.36 Rio Tinto Iron Ore submitted that 'TPI [the Applicant] has, by a variety of documents, purportedly amended and supplemented its declaration application, including altering the service providers against whom declaration is sought' and that 'Part IIIA does not include any mechanism to permit declaration applications to be amended in this way' (RTIO, Sub 1 at [1.9]).
- 2.37 Following advice to the Council from solicitors acting for the Robe Service Providers (which was provided to the Applicant by the Council) that the application submitted on 18 January 2008 had incorrectly specified the parties involved in the various joint ventures associated with the Robe Railway, the Applicant wrote to the Council on 6 February 2008 advising of its revised understanding as to the providers of the Robe Service (as discussed above, this forms the Robe Application Part 3).
- 2.38 Precise information as to the identities and role of the various parties involved in provision of a service such as the Robe Service may be difficult for an applicant for declaration to determine. This is an example of the information asymmetry that the Applicant considered it and other applicants for declaration face.
- 2.39 In the Council's view to require that the Applicant withdraw its application and resubmit an updated application, in circumstances such as have arisen here, would not accord with the purpose of Part IIIA and would create an anomalous result.
- 2.40 The Council considers that it may allow an applicant to provide supplementary material, particularly in circumstances where the clarification occurs early in the process and no prejudice is suffered by any party. The Council considers that these circumstances are met in the case of the Robe Application.

⁶ *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234 at [179].

2.41 The Council considers that the provision of supplementary information of the type provided in this case by the Applicant does not invalidate its application.

3 Access regulation under Part IIIA

Objectives of access regulation

- 3.1 Generally, a competitive market is the best means of determining the prices and other terms of access to the services provided by infrastructure or other facilities. Where such services are provided in markets that are effectively competitive, access is most likely to be provided where it is efficient, and at appropriate prices, and regulation is unnecessary.
- 3.2 In a limited number of cases, however, the underlying economics associated with the provision of specific infrastructure or similar services are such that one facility can meet current and reasonably anticipated demand at a lower cost than two or more facilities. Where participation in what would otherwise be competitive markets is dependent on access to the services of such a facility, competition is likely to be significantly constrained with consequent losses in efficiency and innovation, unless mechanisms exist to ensure that access is available on appropriate terms. Alternatively the economy would be burdened with inefficient and wasteful duplication of costly facilities.
- 3.3 Access regulation aims to promote effective competition in markets that depend on using the services of facilities that cannot be economically duplicated. The intended outcome is that competition in dependent markets is promoted and inefficient duplication of costly facilities avoided.
- 3.4 Access regulation seeks to ensure that facilities that are uneconomic to duplicate are shared on terms that allow efficient access to dependent markets by third parties, while maintaining a facility owner's usage rights and maintaining an appropriate commercial return on an owner's investment. Such an approach retains appropriate incentives and rewards for infrastructure investment but prevents infrastructure owners from exploiting their power over dependent markets.
- 3.5 Australia's national regime for regulating third party access, enacted in 1995, is set out in Part IIIA of the TPA.
- 3.6 Part IIIA provides three alternative pathways for a party seeking access to an infrastructure service. These are:
 - declaration, which provides access seekers with a legal right to negotiate terms and conditions for access with the service provider of a declared service
 - an effective access regime established by a state or territory (a service that is subject to a regime certified under Part IIIA is immune from declaration),
or

- a voluntary access undertaking made by a service provider and accepted by the Australian Competition and Consumer Commission (**ACCC**).
- 3.7 In the declaration pathway, an application for declaration of a service provided by means of a facility⁷ is the first step in a process by which access seekers can obtain a legal right to negotiate for use of a service and gain recourse to arbitration by the ACCC in the event of an access dispute that cannot be resolved by commercial negotiation.
- 3.8 Declaration provides a mechanism for determining whether the services provided by a particular facility should be subject to regulation. Parties seeking access to a particular service(s) can apply to the Council for a recommendation that the service(s) be declared. The Council then considers whether the service should be declared in terms of the legislated declaration criteria and advises a designated Minister as to whether he or she should make a declaration in the particular case. Ministerial decisions on declaration applications are subject to review by the Tribunal.
- 3.9 In 2006 the Australian Government amended the TPA by, among other things, inserting an objects clause to set out the purpose of Part IIIA. Section 44AA specifies that the objects of Part IIIA are 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.

Submissions on access regulation policy

- 3.10 The Council received a number of submissions in response to its call for submissions on the three applications for declaration and on its draft recommendations. Most submissions focussed on one or more of the three applications under consideration by the Council and addressed the declaration criteria and other relevant considerations under Part IIIA. The Council has considered these submissions as appropriate in the relevant parts of this recommendation.
- 3.11 Some submissions addressed broader issues relating to whether access regulation is appropriate in relation to these railways or more generally. Most of these submissions also included specific comments in relation to one or more of the applications. In a small number of cases submissions made general comments only.

⁷ Under Part IIIA services provided by a facility may be declared. The facility is not declared, and ownership or control of the facility is not changed as a result of declaration.

3.12 The Western Australian Government stated that effective third party access is conducive to improved efficiency and competitiveness but expressed a preference for such access to be achieved through commercial negotiations. The Government recognised, however, that with monopoly infrastructure there is a clear and rational incentive for owners to exercise market power and a need for an effective safety net for access seekers if negotiations prove unsatisfactory. The Government noted that track access through the declaration process has the potential to allow third parties to transport iron ore from the hinterland to port but recognised the concerns of infrastructure owners. It expressed concern that the Part IIIA processes have not delivered the certainty that all parties require, and can be time consuming.

3.13 The Chamber of Commerce and Industry Western Australia (**CCIWA**) provided a paper generally outlining the principles it believes should guide competition policy. In relation to access regulation the CCIWA paper stated that:

Businesses should have legal avenues to pursue the use of nationally significant infrastructure services owned and operated by others on commercially negotiated terms. Where commercially negotiated terms and conditions are not possible, implementing authorities must be sensitive to the implications of their decisions including possible disincentives to future investment that may result from mandated access and it is important that where access is given it is on 'reasonable' terms and conditions and at 'fair' prices. (CCIWA, Sub 1 at p10)

3.14 The Minerals Council of Australia (**MCA**) opposed all three declaration 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. The MCA suggested that the Council should 'embrace the following criteria' in considering the applications:

- 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;
- 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. (MCA, Sub 1 at p7)

- 3.15 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.
- 3.16 Although the Council has a role in advising the Australian Parliament in relation to access policy and the operation of Part IIIA (see, for example, section 290 of the TPA), in making its recommendation in relation to an application for declaration the Council is required to apply the law as it is enacted and in a manner consistent with the objectives set out in the TPA.
- 3.17 Nevertheless, the Council generally considers that Part IIIA accords with many of the desired policy aims expressed in the policy oriented submissions noted above.
- 3.18 Declaration is only available in limited situations and even if a service is declared, commercial negotiations over access terms and prices are expected to occur. Recourse to regulation through the mechanism of ACCC arbitration is only available in the event of an access dispute that cannot be resolved through commercial negotiation. Even if a service is declared an access seeker may not get access through arbitration.
- 3.19 The objectives of Part IIIA (see paragraph 3.9) and the provisions governing both declaration decisions and arbitration of access disputes explicitly recognise the relevant interests of the various parties affected, including the legitimate interest of service providers in preserving their use of a service and making a commercial return on their investment in infrastructure and other facilities. Part IIIA also allows for a broad consideration of the public interest that permits consideration of the effects of a declaration on investment activity.
- 3.20 The Council has no capacity to apply different standards for declaration to those set out in Part IIIA. A number of the suggestions of the MCA are inconsistent with the relevant statutory requirements under Part IIIA and in the Council's view several of the suggestions would likely give primacy to the interests of service providers over those of access seekers in ways that would be contrary to the national interest.
- 3.21 In relation to the introduction of an efficiency override, the Council notes that the declaration criterion in section 44G(2)(f) requires the Council to recommend against declaration unless it is satisfied that access is not contrary to the public interest. The Council is satisfied that in the event that the costs of providing access are large and the benefits from any additional competition small, it would be required to recommend against declaration.

Declaration of a service

- 3.22 Declaration may only occur if the declaration criteria set out in section 44G(2) of the TPA (relating to the Council's recommendation) and section 44H(4) (relating to the

designated Minister's decision) are satisfied, and certain other requirements of Part IIIA are met.

- 3.23 If a service is declared, then Part IIIA provides recourse to arbitration by the ACCC where service providers and access seekers are unable to agree on one or more aspects of access to a declared service (section 44S of the TPA). The TPA also prohibits the hindering of access to declared services (section 44ZZ) and provides for a range of enforcement proceedings in such an event (section 44ZZE).
- 3.24 Declaration does not provide access seekers with an automatic right to use a declared service. It does, however, provide a basis for negotiation and recourse to arbitration by the ACCC where commercial negotiations fail.

The character of regulation under Part IIIA

- 3.25 Declaration of services under Part IIIA is the first step in a multi part process for promoting competition in markets that depend on access to a service provided by a nationally significant facility that is uneconomical to duplicate, and avoiding inefficient duplication of costly facilities.
- 3.26 The situation that Part IIIA addresses is where access to such a service is unavailable or only available at prices or on conditions that prevent third parties from competing effectively, and as a result competition in a dependent market is limited. While the price at which such a service may be provided is an important issue, regulation under Part IIIA is not directed at monopoly or excessive prices *per se*.
- 3.27 Declaration is only available where the declaration criteria are satisfied. Then declaration simply opens the door to a process for negotiating access and resolving access disputes that might otherwise prevent access seekers using the declared service thus preventing the prospect of a material increase in competition in one or more dependent market. Where a service is declared a negotiate/arbitrate process is activated which seeks to ensure access to such services is available on appropriate terms.
- 3.28 The negotiate/arbitrate process that results from the declaration of a service is a light handed intervention designed to maximise opportunities for commercial resolution of access issues, minimise regulatory intervention and protect the legitimate interests of service providers so as to ensure that incentives for efficient investment are maintained. This approach only involves a regulator to the extent that parties are unable to reach a commercial agreement and then only to the extent necessary to determine a matter at issue.
- 3.29 It is important to distinguish the character of regulation that might occur as a consequence of declaration from general "price control", "rate of return regulation" and other broader, more intrusive, industry regulation—where access issues are likely

to be only one of a range of issues and a primary focus is likely to be on restraining monopoly prices or promoting “fair and reasonable” prices.

- 3.30 The contrast between the form of regulation which results from declaration of a service under Part IIIA and more intrusive approaches to regulation is illustrated in the recently enacted regime for regulation of natural gas pipelines⁸ where two forms of regulation are available—*light regulation* (involving a negotiate/arbitrate regime for settling access disputes) and *full regulation* (under which pipeline owners are obliged to submit comprehensive access arrangements for approval by the Australian Energy Regulator). The consequences of declaration are to impose a light regulatory regime similar to that under the light regulation alternative for gas pipelines.
- 3.31 Declaration does not necessarily lead to regulated access through application of an ACCC arbitration determination. In any event, declaration cannot rise to blanket regulation of the relevant services or facilities operated by a service provider. Providers of declared services to which an access seeker has rights under an ACCC arbitration determination are subject to a prohibition against preventing or hindering access to those services, but they are not required to seek approval from a regulator in relation to their day to day business decisions or their technology or investment choices, nor do access seekers have a veto in relation to such matters.
- 3.32 Declaration cannot result in any change in ownership or control of a facility, nor does it allow for regulatory intervention except in the event that access seekers and service providers are unable to reach commercial agreement and an access dispute is notified. The primary mechanism for determination of access terms is commercial negotiation. However in the event of an access dispute the ACCC has broad scope to make orders to resolve such a dispute—although it must do so within the terms set out in Part IIIA, including in particular the criteria set out in section 44X and the safeguards in relation to the rights of service providers and existing users discussed in paragraphs 3.37 and 3.38.
- 3.33 Therefore, comparisons between the outcomes of regulation under Part IIIA and other forms of regulation under different regulatory regimes and in different circumstances are difficult to make. Any such comparison must be done carefully, taking into account the different forms of regulation and the different factual circumstances.
- 3.34 Ironically if service providers adopt an excessively disputative or litigious approach to access requests because they have made erroneous assumptions about the consequences of declaration, then they may increase the extent of regulatory intervention due to the consequential need for arbitration of a greater number of access disputes.

⁸ Refer *National Gas (South Australia) Act 2008*.

3.35 Misunderstanding of the requirements of declaration may also, perversely, increase the costs that service providers incur if their perceptions of the obligations placed on providers of declared services either distort negotiations with access seekers—causing access providers to acquiesce to access claims that are not sustainable under the terms of Part IIIA—or give rise to overreactions which increase the number and scope of access disputes.⁹

3.36 The ACCC’s arbitration role is governed by section 44X of the TPA which provides:

- (1) The Commission must take the following matters into account in making a final determination:
 - (aa) the objects of this Part;
 - (a) the legitimate business interests of the provider, and the provider's investment in the facility;
 - (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
 - (c) the interests of all persons who have rights to use the service;
 - (d) the direct costs of providing access to the service;
 - (e) the value to the provider of extensions whose cost is borne by someone else;
 - (ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;
 - (f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
 - (g) the economically efficient operation of the facility;
 - (h) the pricing principles specified in section 44ZZCA.¹⁰

⁹ Similar consequences could of course flow from access seekers making ambit claims in relation to access or overestimating their position under the criteria governing resolution of access disputes.

¹⁰ Relevant sections of the TPA governing the arbitration of access disputes are replicated in appendix C. This includes section 44ZZCA, which provides that the prices of access to a service should be set so as to generate expected revenue that is at least sufficient to meet the efficient costs of providing access and includes a return on investment commensurate with the regulatory and commercial risks involved. It also allows for multi part pricing and price discrimination when this aids efficiency, but not where a vertically integrated access provider seeks to favour its own operations. The section also requires that access prices should provide incentives to reduce costs and improve productivity.

- 3.37 In addition, the ACCC is specifically prohibited from making an access determination that would prevent an existing user having sufficient capacity to meet its reasonably anticipated requirements, and no determination can result in a transfer of ownership of any part of a facility. Where expansion or enhancement of a facility is needed to accommodate access seekers, a service provider can be required to undertake such expansion, but the costs of this are to be met by the access seekers along with interconnection costs.¹¹
- 3.38 If the ACCC is unable to arrive at access terms that appropriately recognise the interests of an infrastructure owner, then it does not have to require the provision of access to a declared service.¹² The ACCC also has powers to deal with vexatious access disputes, or disputes not pursued in good faith, by terminating arbitrations.

The declaration criteria

- 3.39 Applications for the declaration of a service are made to the Council. The Council has regard to the declaration criteria and other prescribed factors and, following a public consultation process, makes a recommendation to the designated Minister as to whether or not to declare the service. The designated Minister must then either declare the service or decide not to declare it (section 44H of the TPA). As noted earlier, the Minister is required to make a decision within 60 days of receiving the Council's recommendation. If no decision is made in that time the application is deemed to be declined.
- 3.40 The designated Minister's decision is subject to review by the Tribunal, which stands in the shoes of the Minister and, in effect, remakes the Minister's decision.
- 3.41 The Council cannot recommend that a service be declared unless it is satisfied that all of the following criteria (set out in section 44G(2) of the TPA) are met:
- (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

¹¹ See also the discussion the ACCC's powers at paragraphs 9.183 to 9.186.

¹² Section 44V(3) of the TPA.

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

3.42 The Council must also consider whether it would be economical for anyone to develop another facility that could provide part of the service (section 44F(4)) and the duration of any declaration (section 44H(8)).

3.43 The Council must be affirmatively satisfied that all of the declaration criteria 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.

3.44 The same criteria apply to the designated Minister's decision as to whether or not to declare the service and to the Tribunal's consideration on review.

3.45 The Council's consideration of this application against the declaration criteria and section 44F(4) follow in chapters 4 to 10 of this recommendation.

4 Criterion (a) – Promotion of competition

Legal requirements

- 4.1 Section 44G(2)(a) (**criterion (a)**) provides that the Council cannot recommend that a service be declared unless it is satisfied that access (or increased access) to the service would promote a material increase in competition in at least one market other than the market for the service. The markets in which competition might be promoted are commonly referred to as ‘dependent markets’. The issue is whether access would improve the opportunities and environment for competition in dependent markets such as to promote materially more competitive outcomes. The assessment is concerned with the process of competition, rather than any particular commercial interests or pursuits of individual competitors, including an applicant for declaration, given that the right to access that may result from declaration is not limited to the party which made the application for declaration.
- 4.2 In assessing whether criterion (a) is satisfied, the Council:
- identifies whether there is one or more dependent (upstream or downstream) market
 - considers whether the dependent market(s) is separate from the market for the service to which access is sought, and
 - assesses whether access (or increased access) would promote a materially more competitive environment in the dependent market(s) thereby promoting a material increase in competition.
- 4.3 Criterion (a) has been the subject of relatively recent legislative amendment and judicial consideration, which are relevant to interpreting the criterion. These legislative and judicial developments have resulted in the clarification that the Council must be satisfied that access would promote a material increase in competition and the provision of guidance on the interpretation of the term ‘access’. The developments were subsequent to the Council’s Mt Newman Recommendation. The implications of these changes are discussed in the following two sections of this chapter.

Access must promote a material increase in competition

- 4.4 The *Trade Practices Amendment (National Access Regime) Act 2006* (Cth), which commenced in October 2006, amended criterion (a) to introduce the requirement that access (or increased access) to the service promote ‘a material increase’ in competition in at least one market (whether or not in Australia), other than the market for the service.

- 4.5 The additional words now contained in criterion (a), ‘a material increase’, indicate that the change in competition promoted by access must be more than trivial. The Explanatory Memorandum to the Trade Practices Amendment (National Access Regime) Bill 2005 (Cth) states that the original drafting of criterion (a) did ‘not sufficiently address the situation where ... declaration would only result in marginal increases in competition. The change will ensure access declarations are only sought where increases in competition are not trivial’.¹³
- 4.6 The addition of this materiality element to criterion (a) does not alter this criterion’s focus on the ‘promotion of competition’ and continues to require a consideration of whether access (or increased access) will remove or reduce competitive constraints in the dependent market(s) or otherwise improve the conditions and environment for competition. If this is the case, and the change is material, then criterion (a) will be satisfied.

The meaning of ‘access’ (or ‘increased access’)

- 4.7 In the case of *Sydney Airport Corporation Ltd v Australian Competition Tribunal* [2006] FCAFC 146 at [81] the Full Court held that the relevant criterion (a) inquiry involves a ‘comparison between access and no access and limited access and increased access’. The Full Court then said (at [81]) that the words of the TPA ‘do not say that it is necessary to examine whether declaration of the service would promote competition; they say “access or increased access ... would promote competition”’ (Council emphasis).
- 4.8 The Full Court noted, at [82], that it did not agree that ‘declaration under Part IIIA’ was a surrogate for ‘access under Part IIIA’ (Council emphasis) and disagreed with an approach ‘whereby “access” becomes “declaration under Part IIIA”’. The Full Court held (at [83]) that the word access is being used in its ordinary English sense and that all criterion (a) requires is:
- ... a comparison of the future state of competition in the dependent market with a right or ability to use [the] service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service.
- 4.9 Prior to this decision, the Council’s approach and that of the Tribunal had been to interpret ‘access’ as meaning the right to negotiate access to a declared service under Part IIIA, in effect that ‘access’ was synonymous with ‘declaration’. Following the Full Court’s decision, the Council has altered its assessments under criterion (a) to apply the Full Court’s approach.

¹³ Trade Practices Amendment (National Access Regime) Bill 2005 (Cth), Explanatory Memorandum at item 16, and p21.

- 4.10 The Council has applied the Full Court approach in considering this application for declaration of the Robe Service.
- 4.11 The Applicant has argued that the Full Court’s approach makes criterion (a) easier to satisfy. The Council considers that criterion (a) is satisfied only where access would promote a material increase in competition in a dependent market. If a dependent market is already effectively competitive, then access would be unlikely to promote an increase in competition that is material. Conversely where there are high barriers to entry or other conditions that foreclose additional competition in a dependent market, which are unrelated to the facility that provides the service to which access is sought, then access may not result in a material promotion of competition. In both of these situations at least, the outcome from applying criterion (a) is likely to be the same irrespective of whether any effect on competition results from ‘declaration’ or ‘access’. Irrespective of the interpretation of the term ‘access’ in criterion (a), the other declaration criteria significantly limit the range of facilities that might provide services that could be declared and the scope for declaration more generally.

The dependent market(s)

- 4.12 This section addresses the first two steps in assessing criterion (a) identified in paragraph 4.2 above, namely identifying relevant dependent markets and confirming that these are separate from the market for the service for which declaration is sought — the Robe Service. The assessment of the effect of access on competition in the dependent markets identified and whether this amounts to a material increase follows.
- 4.13 Markets are commonly defined in terms of product(s) and/or service(s) and the geographic area to which they relate:
- The product/service dimension of a market identifies the set of product(s) and/or service(s) that are sufficiently substitutable¹⁴ to be traded in a relevant market as defined.
 - The geographic dimension of a market identifies the area within which substitution in demand and supply is sufficient for the product(s)/service(s) traded at different locations to be considered in the same market.
- 4.14 Where products or services pass through a number of entities or levels in a supply chain, it is also useful to describe the market in terms of the function being considered. The functional dimension identifies which of a set of vertically related markets is being considered. In the context of considering applications for declaration

¹⁴ In *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976) 25 FLR 169 at [190], the Trade Practices Tribunal held that a market was ‘the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run’. (Council’s emphasis)

the functional dimension of market definition can often be important in distinguishing a dependent market from the market for the service for which declaration is sought. The Council seeks to identify and describe relevant dependent markets in these terms.¹⁵

- 4.15 Having identified relevant dependent markets, it is then necessary for the Council to determine whether these are separate from the market for the Robe Service that is the subject of this application for declaration.
- 4.16 Separate product/service markets exist if their respective products/services are not strongly substitutable for one another. Similarly, separate geographic markets exist where products/services in one geographic location are not strongly substitutable for those in another location. Where two or more markets are characterised by a common product/service and geographical area, they may nevertheless be separate distinct markets where they involve transactions at different functional levels. For markets to be regarded as functionally separate, the transaction costs involved in the separate provision of the product/service must not be so large as to prevent separate provision being feasible, that is, vertical integration of the different levels is not inevitable (the ‘economically separable’ test). In addition, for functional levels to be separate, each must involve assets that are sufficiently specific and distinct such that the assets cannot readily produce the output of the other level: that is, substitution in supply is not readily achieved (the ‘asset specificity’ test).
- 4.17 The application of the ‘economically separable’ test was discussed by the Tribunal in *Re Services Sydney Pty Limited* [2005] ACompT 7 at [117] where the Tribunal described one approach to the test as requiring the consideration of whether the complementarities of vertical integration are such as to dictate vertical integration. The Tribunal noted that this approach is consistent with that adopted in *Re Sydney International Airport* [2000] ACompT 1 where it stated at [97]:

Though in the past usually vertically integrated track services and the running of passenger or freight trains can be, and increasingly are, provided separately. As such, they operate in functionally distinct markets, even though there is perfect complementarity between them. To put it another way these complementarities do not appear to give rise to economies of joint production that dictate the services must be performed within the same economic entity.

¹⁵ Sometimes a ‘time’ dimension is also an important element of a market definition. However, in the Mt Newman Recommendation the Council found that the time dimension was unlikely to be relevant, and therefore limited its considerations to the product/service, geographic and functional dimensions of the relevant markets as defined. The Council has taken the same approach and reached the same conclusion in relation to the Robe Application as it is considering substantially the same markets.

Application and submissions

- 4.18 The Applicant argued that if access to the Robe Service were available, then it would offer haulage using its own locomotives and rolling stock to mining companies seeking to move bulk materials on the Robe Railway. It stated that the effect of access to the Robe Service would be to promote a material increase in competition in dependent markets, being the markets for:
- rail haulage services on the Robe Railway (transporting commodities—bulk minerals in particular iron ore—by rail) on the Robe Railway and in the Pilbara, and
 - prospective iron ore or other bulk mineral tenements in the vicinity of the Robe Railway and in the Pilbara (Robe Application Part 1, at [8.1]).
- 4.19 The Applicant submitted that the market for rail haulage services and the market for railway track services (the Robe Service) are functionally distinct (Robe Application Part 1, at [8.8]-[8.10]). It noted that the distinction is supported by the Tribunal’s decision in *Sydney International Airport* [2000] ACompT 1 at [97] (see paragraph 4.17) and recognised in *Pacific National v Queensland Rail* [2006] FCA 91 at [935]-[966].¹⁶
- 4.20 The Applicant further submitted that there is a functional distinction between the market for tenements that contain iron ore and the market for the production of iron ore. It stated that the activities involved in prospecting, initial exploration and tenement development can be undertaken by different firms from those that subsequently mine and market iron ore (Robe Application Part 1, at [8.59]).
- 4.21 The Applicant submitted that it is unaware of any party that had had its freight transported on the Robe Railway (Robe Application Part 1, at [8.76(a)]). It noted that Robe River Mining Co Pty Ltd (prior to its takeover by Rio Tinto Limited) had attempted unsuccessfully to negotiate access to the Robe Service.
- 4.22 The Applicant argued that without a right or ability for third parties to use the Robe Service, the Robe Service Providers would continue to deny non-associated entities access to a haulage service on the Robe Railway, or would be the only entity providing haulage services on the railway. Where the Robe Service Providers continue to refuse to provide a haulage service to non-associated entities, then only the entities related to the service providers will be able to transport iron ore from their mines to port facilities or between their mine sites and processing facilities in the vicinity of the Robe Railway. The Applicant argued that the Robe Service Providers

¹⁶ In *Pacific National v Queensland Rail* [2006] FCA 91, the Federal Court cited economists’ evidence tendered by the competing litigants, each of whom accepted that there were separate markets for ‘rail infrastructure’ and ‘linehaul services’ (at [941]-[942]). The court found that separate markets existed for narrow gauge and standard gauge rail infrastructure (at [954]), and further that separate markets existed for linehaul services in different geographical areas of Australia with different rail gauges (at [965]-[966]).

have an incentive to exercise their market power in the market for track services to adversely affect competition in the market for rail haulage services and further that they have an incentive to use their control over rail infrastructure to prevent the development and mining of iron ore tenements by third parties. In regard to tenements, the Applicant submitted that by denying access to the Robe Service, the Robe Service Providers can:

seek to ensure that iron ore tenements in the vicinity of the facility are not mined out by competing producers and that the price of tenements is maintained at a low level. This is because they will be underdeveloped and, in the absence of rail transport, unattractive to other investors. [The Robe Service Providers] can, at the same time, avoid the cost and risk associated with developing and retaining the mining tenements itself. (Robe Application Part 1, at [8.74])

- 4.23 By contrast, the Applicant submitted that with third party access to the Robe Service, there would be two or more providers of haulage services on the railway (itself and the Robe Service Providers), and that as a result of the competition between itself and the Robe Service Providers, the latter would have less ability and incentive to charge monopoly prices for haulage services on the Robe Railway (Robe Application Part 1, at [8.49]). In addition, the Applicant stated that ‘the pool of potential purchasers of iron ore tenements in the Pilbara, particularly in the vicinity of the Robe Railway would be expanded’, which ‘will enable the development and exploitation of tenements by junior explorers and will result in prices for tenements more closely reflecting the prices that might be achieved in a competitive market’ (Robe Application Part 1, at [8.101]).
- 4.24 In its submission on the draft recommendation, the Applicant stated that the global iron ore market is not effectively competitive (TPI, Sub 1 at p1-3). It submitted that the global supply of iron ore is properly considered on the basis of seaborne ore supply and distinct geographic markets for the Asia-Pacific and Atlantic basins. The Applicant argued that recent increases in prices achieved by Rio Tinto Iron Ore and BHP Billiton Iron Ore and differences in prices between customer groups illustrate that Australian producers have market power. The Applicant further argued that access to the Goldsworthy Service will promote competition in the global market for iron ore by increasing the potential for supply, stating that because competition from other Pilbara-based miners will have the same geographical advantage as Rio Tinto Iron Ore and BHP Billiton Iron Ore, they will have a greater effect on competition than other suppliers (TPI, Sub 1 at p3).
- 4.25 Rio Tinto Iron Ore submitted that the dependent markets identified by the Applicant are in fact all elements of a single (competitive) global iron ore market that also includes the market for the Robe Service (RTIO, Sub 1 at [7.21] and [7.29]; RTIO, Sub 2 at [1.14] and [4.1]). It stated that the companies that acquire or trade in iron ore tenements also produce or intend to produce iron ore or intend to trade in iron ore, and there is an absence of evidence to suggest the existence of a market whose

participants seek only to develop and sell iron ore tenements (rather than to also sell iron ore). Rio Tinto Iron Ore provided a paper by Dr Philip Williams (Frontier Economics) to support this view (RTIO, Sub 1 Annexure 11). On ‘the functional separation between the rail track and related functions of mining (including prospecting and development) and transportation’ Dr Williams concluded at [110] that:

First, that separate markets will not be tenable if the evidence suggests that vertical integration is critical to achieving efficiencies in mining and transportation activities. The second point is that the functional boundaries to any dependent markets should be consistent with the facts about the market in question. This means that one cannot infer from there being functional separation in other circumstances that it is appropriate to find functional separation in the circumstances of RTIO's rail network in the Pilbara.

4.26 In the event that the dependent markets identified by the Applicant are to be considered, Rio Tinto Iron Ore’s view is that access would not promote a material increase in competition in any such markets (RTIO, Sub 1 at [1.21]-[1.24]; RTIO, Sub 2 at [1.14] and [4.2]). The main elements of Rio Tinto Iron Ore’s analysis of the markets identified by the Applicant are that:¹⁷

- there have been no transactions in relation to rail haulage of iron ore in the Pilbara (which reflects the likely diseconomies from access to track services) and (if the Applicant were required to bear or pass on to users of any rail haulage service the full costs of access) there is no potential for transactions to occur, with the Applicant finding it cheaper to use its own railway (TPI Railway) and port facility and build extensions to serve particular deposits
- it has no incentive or ability to affect competition in any rail haulage market because it does not provide a rail haulage service (so is not making ‘monopoly rents’ from haulage charges)
- the evidence of significant trading of tenements and interests in companies with tenements in the Pilbara demonstrates that it is not leveraging any market power in relation to haulage in the Pilbara tenements market: indeed in the absence of access a tenement holder and Rio Tinto Iron Ore have ‘every commercial incentive’ to reach an agreement sharing the profits from development of the deposit, whereas the only effect of access would be to create the potential to transfer profits from itself to the Applicant
- access would only lead to the establishment of the Applicant as a monopoly rail haulage operator, and
- the Applicant has not identified how iron ore that it would transport using the Robe Railway will be shipped from a port.

¹⁷ Rio Tinto Iron Ore stated that in any case there will be no spare capacity on key segments of its railways to accommodate third parties.

- 4.27 BHP Billiton Iron Ore, although not providing a submission on the Robe Application or draft recommendation, requested that its submission on the Goldsworthy Application and draft recommendation be considered where relevant. In its submission on the Goldsworthy Application, BHP Billiton Iron Ore did not explicitly identify what it considered to be the relevant dependent market(s), but stated generally that the Council could not be satisfied that access to the Goldsworthy Service will promote a material increase in competition in any dependent market. In its submission on the Goldsworthy draft recommendation, BHP Billiton Iron Ore stated that the Council could not be satisfied that access to the Goldsworthy Service would promote a material increase in competition in the Pilbara-wide iron ore tenements market and the rail haulage services market (BHPBIO, Sub 2 at [1.9]). While much of BHP Billiton Iron Ore's supporting rationale was specific to the Goldsworthy Railway¹⁸ (and so is not considered in this recommendation), the company's arguments suggested that it, like Rio Tinto Iron Ore, sees the dependent markets identified by the Applicant as part of the (competitive) global iron ore market. In relation to the Goldsworthy Railway, for example, it argued that the very small amounts of ore that might be produced by the projects and the possible projects in the vicinity of the railway could not have any appreciable effect on the extent of rivalry in the global iron ore market or any other relevant market.
- 4.28 The Western Australian Government, in a submission on the Robe, Hamersley and Goldsworthy applications, discussed the effects on competition in the market for rail haulage services and in the market for iron ore tenements in the Pilbara. The Association of Mining and Exploration Companies (**AMEC**), in a submission on the Robe, Hamersley and Goldsworthy applications, identified a market for the transport of bulk mineral commodities (particularly iron ore) between mine sites and export ports in the Pilbara and a market for iron ore tenements.
- 4.29 In his submission on the Hamersley, Robe and Goldsworthy draft recommendations, Mr Nick Wills-Johnson argued that the dependent markets identified by the Council should be viewed as links in the logistics chains which deliver iron ore to a competitive global iron ore market (NWJ, Sub 1). He submitted that the global market for iron ore is competitive, and that therefore there will be no monopoly rents from a logistics chain which feeds this market, and no monopoly rents from any link in the logistics chain (NWJ, Sub 1).

The Council's view on the dependent markets

- 4.30 The Council considers that the most relevant dependent markets for the Robe Application are:

¹⁸ See BHPBIO, Sub 1 at [15.7].

- the market for haulage services for iron ore on the Robe Railway in the vicinity of the Robe Railway (**the haulage services market**) and
- the market for tenements that contain iron ore in the Pilbara (**the iron ore tenements market**).

4.31 In the Mt Newman Recommendation the Council identified three distinct dependent markets that it considered to be separate from the service that was the subject of the application for declaration. These were the market for the haulage of iron ore by rail in the Pilbara, the market for iron ore tenements in the Pilbara and the global market for iron ore. The Council considered that the global market for iron ore was already effectively competitive and that it therefore followed that access would not promote competition in that market (Mt Newman Recommendation at [7.148]-[7.179]).

4.32 The Council notes the Applicant's view as to the competitiveness of the global iron ore market (see paragraph 4.24), but, in light of the Council's conclusions in relation to the markets for haulage services and iron ore tenements, the Council is of the view that it is unnecessary for it to examine the competitiveness of the global iron ore market in detail to be satisfied that access to the Robe Service would materially promote competition in another market(s).

4.33 The Council is aware of a proposal by BHP Billiton to merge with Rio Tinto Limited, which should it occur would be a significant transaction in the context of the global iron ore market. At this time, the question as to whether the transaction will occur is speculative. As discussed at paragraph 4.32, it is not necessary to determine whether the merger would have an impact on the competitiveness of the global iron ore market, given that the Council is satisfied that access would materially promote competition in other dependent market(s).

4.34 The Council considers that the markets identified in paragraph 4.30 are separate from the market for the Robe Service for which access is sought for a number of reasons.

4.35 The distinction between a market for use of rail infrastructure and related services such as the Robe Service and that for the carriage on trains using that infrastructure is commonly accepted, including by most parties making submissions in respect of this application. As submitted by the Applicant, separate markets of these kinds have been identified in decisions of the Tribunal and the Federal Court in situations that are relevant to the Council's consideration of this application.

4.36 The market for the Robe Service is a market in which heavy haul railway track and associated infrastructure services are provided and acquired. The relevant dependent markets are markets for iron ore rail haulage services on the Robe Railway and tenements in the Pilbara that contain iron ore. Bearing in mind the views expressed by Dr Williams on behalf of Rio Tinto Iron Ore, the Council does not believe that the degree of integration between the operation of rail infrastructure and the operation of trains on such infrastructure is such that the two must invariably be undertaken by

one entity. That Rio Tinto Iron Ore operates both the Robe Railway infrastructure and the trains that run on that infrastructure is a choice largely born of historic development and a range of commercial objectives not all of which necessarily relate to optimising efficiency.

4.37 Finally the Council notes that the rail assets required to provide iron ore railway track services¹⁹ are distinct from those required to provide iron ore rail haulage services.²⁰

4.38 There would appear to be little scope for the dependent market for iron ore tenements in the Pilbara and the market for the Robe Service not to be seen as distinct and separate markets. On any comparison, the products/services involved are quite different, such that substitution is unrealistic. The vertical integration of tenements trading and the provision of railway track services is not inevitable and the two activities are economically separable. The two activities also employ assets that are quite specific and distinct, that is, the assets used to produce rail track services would not appear to be able to be readily used to trade iron ore tenements.

4.39 Similarly the Council considers that there is little justification for concluding that the market for the Robe Service, the market for iron ore haulage services on the Robe Railway and the market for iron ore tenements in the Pilbara are merely elements of the global market for iron ore. Adoption of such a broad approach to market definition would obscure any meaningful competitive analysis.²¹ A broad range of products and services is used in the process of supplying iron ore to meet global demand and the degree of substitutability among many of these is low. The process of supplying iron ore involves a range of different and distinct transport markets—markets for rail and international shipping, many financial markets and markets in many geographic locations, each with different demand and supply conditions. Even where some of these products and services have significant common characteristics they are often dealt with at different functional levels in the process of supplying iron ore, levels that are economically separable and use assets that are specific and distinct.

4.40 The Council is satisfied that there are at least the two dependent markets identified at paragraph 4.30 and that these are separate from the market for the Robe Service. The Council, in the next sections, therefore considers criterion (a) on the basis of those two markets.

4.41 The Council accepts there may be other markets that might also be relevant, such as a market for mineral tenements more generally or for tenements containing minerals

¹⁹ Including railway tracks, sidings, switches and signals and track maintenance services.

²⁰ Including locomotives, rolling stock and maintenance services for this equipment.

²¹ It is commonly accepted that the definition of markets in competition law (and competition analysis more generally) is purposive — the purpose is to assist in identifying market power and competitive constraints that arise.

other than iron ore, or for haulage of other mineral ores or mineral ores more generally. However, in light of the fact that iron ore constitutes the vast bulk of Pilbara mineral ore production, the Council considers that these markets are likely to be significantly less important than the respective markets relating to iron ore and that analysis of the broader markets would in any event be dominated by consideration of iron ore. The Council sees no need therefore to extend its analysis to examining competition outcomes in these other markets. If criterion (a) is met for one or both the identified dependent markets, then whether or not competition is materially promoted in other additional dependent markets is not determinative of the Council's recommendation. If criterion (a) is not met in relation to the two identified markets centred on iron ore, then it would not be likely to be met for other markets where transport options other than rail may be viable and where smaller volumes of higher value ores are shipped.

The market for haulage services

- 4.42 The Council considers that the product/service dimension of the haulage services market is appropriately described as the service of transporting iron ore by rail from a producer's mine site to a port facility (or to a processing facility). As noted above, iron ore constitutes the vast bulk of Pilbara mineral ore production by volume so a conclusion focussing on iron ore will likely hold even if the product/service market dimension were to be expanded to include the haulage of other ores.
- 4.43 The Council considers that the geographic dimension of the market for haulage services is largely determined by the area within which it may be economic to access a haulage service provided on the Robe Railway. While the boundaries may be difficult to define with precision, the geographic dimension of the market for haulage services is generally a geographic envelope within the Pilbara encompassing tenements proximate to the Robe Railway. In considering the possible area of this geographic envelope, the Council notes that the Applicant identified the likely purchasers of haulage services on the Robe Railway as those companies with announced tenements located within a distance of about 50 kilometres of the Robe Railway (Robe Application Part 1, at [3.11]). The Council considers that this is a reasonable indicator of the likely geographic dimension of the market for haulage services. There may be some companies with tenements outside this envelope that could economically access a haulage service on the Robe Railway, and some within the envelope that could not, but these exceptions are likely to be few in number and are not material to the overall consideration of criterion (a).
- 4.44 In the current circumstances (without access) only the Robe Service Providers could provide a haulage service on the Robe Railway though at present they do not provide such a service. With access, the potential providers of the service of transporting iron ore by rail from mine sites proximate to the Robe Railway to a port facility or

processing facility are the Robe Service Providers and any party that gains access to the track services provided by the Robe Railway.

- 4.45 The third party demand for haulage services on the Hamersley Railway comes from producers and potential producers of iron ore proximate to the Robe Railway whose deposits of iron ore are of insufficient magnitude to support the construction of a new railway and the purchase and operation of rolling stock or who choose for other reasons to seek haulage of iron ore from another party. The Applicant identified five companies with announced prospective iron ore tenements in the vicinity of the Robe Railway that it anticipated might wish to purchase rail haulage services on the Robe Railway (Robe Application Part 1, at [3.10]).

Application and submissions

- 4.46 As noted above, the Applicant stated that without access to the Robe Service there will be no haulage available to third parties. Were access available, it submitted that it would offer haulage using its own locomotives and rolling stock. It submitted that the effect would be to materially promote competition in the markets for haulage services for iron ore and other bulk minerals on the Robe Railway by providing a service available to those with whom the Robe Service Providers are unable to reach agreement or a competing service that will provide competitive pressure for any haulage service offered by the Robe Service Providers.
- 4.47 Rio Tinto Iron Ore submitted that all functional activities associated with the relevant dependent markets identified by the Applicant are encompassed by the global iron ore market, which is already effectively competitive. Rio Tinto Iron Ore argued, as a consequence, that access would not promote competition in a market other than that for the service to which access is sought. Additionally, it argued that, even if that submission is not accepted, the markets for rail haulage and rail track services are not separate. Rio Tinto Iron Ore went on to argue that, if that submission is also not accepted, then access would not promote competition in any haulage market because: the Applicant can use its own railway line to offer haulage services; access to ports is uncertain; it had no incentives to lessen competition; and that access would only lead to the establishment of the Applicant as a monopoly rail haulage operator (RTIO, Sub 1 at [7.60]-[7.68]).
- 4.48 BHP Billiton Iron Ore considered that the Council could not be affirmatively satisfied that access (in its submission access to the Goldsworthy Service) will promote a material increase in competition in any dependent market for a range of reasons (BHPBIO, Sub 1 at [15.7]). As noted above, like Rio Tinto Iron Ore, BHP Billiton Iron Ore's rationale suggests that the company sees the market for iron ore rail haulage services as part of the (competitive) global iron ore market. In its submission on the Goldsworthy draft recommendation, BHP Billiton Iron Ore submitted that the Council's conclusion that access to the Goldsworthy Service would promote a material increase in the market for haulage services is inconsistent with the fact that

the ACCC does not have the power under Part IIIA to order BHP Billiton Iron Ore to duplicate the Finucane Island section of the Goldsworthy Railway (BHPBIO, Sub 2 at [5.11]). In support of this submission, BHP Billiton Iron Ore attached to its submission a legal opinion from Mr A. J. Myers QC and Mr M. H. O’Bryan (the **Myers/O’Bryan Opinion**), which argues that the ACCC is not empowered by section 44V(2) of the TPA to require a service provider to expand a facility (BHPBIO, Sub 2 Annexure 4). The Myers/O’Bryan Opinion is discussed in detail in chapter 9 (paragraphs 9.85 to 9.88 and 9.183 to 9.186). (BHP Billiton Iron Ore’s other reasoning in relation to competition outcomes was essentially specific to the Goldsworthy Service so the Council has not specifically considered it in this recommendation.)

- 4.49 The NWIOA’s submission on the draft recommendations set out its members’ projected tonnages for the next twelve years. The NWIOA stated that, based on these tonnages alone, it is feasible that if access were granted, a third party operator could enter the haulage market in this region (NWIOA, Sub 3 at [2.1]).
- 4.50 South Spur Rail Services made a submission on the Goldsworthy draft recommendation, and requested that the Council also note its interest in the declaration of the Hamersley and Robe Services. South Spur Rail Services agreed with the Council’s conclusions in the draft recommendations that access to the Goldsworthy, Hamersley and Robe railways would promote a material increase in competition in the market for rail haulage services (SSRS, Sub 1 at p2). Further, South Spur Rail Services stated that if access were granted, it ‘would be prepared to offer hook and pull services on the nominated railways for 3rd parties’ (SSRS, Sub 1 at p2).
- 4.51 The Western Australian Government stated that there is no alternative competitive transport option to rail for tenements located in the Pilbara hinterland (recognising that road transport may be economic for tenements nearer the coast) (WA Gov, Sub 1 at [3.1]). The Government also referred to the significant negative externalities associated with road haulage, including environmental and social costs, which it considered would need to be addressed by firms transporting iron ore by road.
- 4.52 The Western Australian Government outlined its long sought policy objective that the third party access clauses in State Agreements²² would result in the carriage of third party freight by the State Agreement companies. It advised however that no independent access seeker has been able to negotiate satisfactory haulage arrangements. The Government commented that:

The third party access provisions contain relatively high level obligations and lack the detail required to bring about third party access. It is, therefore, not

²² The Western Australian Government referred to various agreements entered into between it and mining companies as ‘State Agreements’. In the case of the Robe Railway the relevant State Agreement is set out in the *Iron Ore (Robe River) Agreement Act 1964* (WA) (**Robe Agreement Act**). See chapter 8 for a discussion of Western Australian access regimes for railway track and haulage services.

surprising, in hindsight, that those State Agreement access provisions have not proved to be an effective vehicle for any new market entrants. (WA Gov, Sub 1 at [6.4])

- 4.53 The Western Australian Government noted that it is currently developing a state rail haulage regime—the Pilbara Railways (Third Party Haulage) Regime—intended to provide for haulage of iron ore on the Pilbara railways on ‘fair and reasonable terms’, with the haulage service provided by the infrastructure owner. The Government considered that if the proposed state rail haulage regime is enacted, then access to track services under Part IIIA may result in a material increase in competition in the market for haulage services to the extent that the Applicant or other access seekers can compete with the services provided under the proposed regime but would not result in a material increase in competition in the market for iron ore tenements (because access would not achieve a material increase in competition above that resulting from the state rail haulage regime). However, the Government cautioned that there are ‘considerable barriers’ to implementing the proposed state rail haulage regime. It advised that it is yet to approve the final form of the regime, which it will then need to enact. It also advised that the regime would not be unilaterally implemented across all Pilbara rail infrastructure facilities, so that implementation will require the mutual consent of the State Agreement companies (WA Gov, Sub 1 at [6.7]).
- 4.54 Regarding port access and capacity, the Western Australian Government noted that significant increases in export volumes have resulted in port facilities operating at or near capacity, but that it is investigating options that should meet medium and long term demand for port facilities in the Pilbara. It stated that:

The Government is currently investigating a range of options to meet medium and long-term demand for port capacity in the Pilbara.

An ongoing policy objective will be to ensure that there are common use facilities available for relatively small tonnage bulk commodity exporters.

It is therefore the Government’s conclusion, that while port capacity may be constrained in the short term, this is not an issue that planning and negotiation between the Government, its port authorities and exporters cannot resolve. (WA Gov, Sub 1 at [2.11]-[2.13])

The Council’s assessment

- 4.55 In considering whether access will promote competition a key issue is whether the provider of a service has the ability and incentive to exercise its market power to adversely affect competition in dependent markets. The Robe Service Providers, as vertically integrated iron ore producers and providers and potential providers of rail track and haulage services, have an incentive to exercise market power in the market for track services in order to exclude or limit competition in the market for haulage

services on the Robe Railway. By denying access to the Robe Service the Robe Service Providers can prevent the emergence of a competing provider of haulage services.

- 4.56 Rio Tinto Iron Ore's arguments as to why access to the Robe Service would not materially promote competition in any dependent market, including the market for haulage services considered here, are not persuasive. As discussed above, the Council does not accept the argument that all relevant activities fall within a generalised global iron ore market, and that the haulage market is not separate from the market for the underlying rail track service (see paragraphs 4.34 to 4.38).
- 4.57 Without third party access, only the Robe Service Providers could offer a haulage service for iron ore in the geographic envelope proximate to the Robe Railway. Given that the Robe Service Providers do not offer a haulage service to unrelated parties, the effect of preventing the emergence of alternative haulage services is that no rail haulage services are available for independent parties seeking to develop and mine tenements near the Robe Railway and export iron ore. This restriction has consequential effects in the market for iron ore tenements in the Pilbara, which are relevant to the consideration of Rio Tinto Iron Ore's claims that access to the Robe Service would result at most in a transfer of profits between itself, the Applicant and tenement holders and that it has no incentive to limit competition. The Council discusses these consequential effects in the market for iron ore tenements in the Pilbara in the next section.
- 4.58 In the Council's view, there is likely to be potential demand for haulage services on the Robe Railway. The high export returns to iron ore currently being achieved would appear to provide a commercial opportunity to parties to offer a haulage service to meet such demand. As stated by the NWIOA, based on its members' projected tonnages alone, it is feasible that if access were granted, a third party operator could enter the haulage market in this region. Possible service providers include the Applicant, which has indicated it would develop and offer a rail haulage service using its own locomotives and rolling stock, the Robe Service Providers, which would be encouraged to offer a rail haulage service because they would obtain no value in maintaining restrictions once access is available and potentially other mining interests (either in their own right or in cooperation) and rail haulage companies without current Pilbara interests or with only limited involvement. For example, as noted above, South Spur Rail Services stated that it would be willing to offer 'hook and pull' services for third parties. Even if there were no new entry, the ability and incentive of the Robe Service Providers to withhold haulage services would likely be constrained by the potential for entry.
- 4.59 The Council generally agrees with the Western Australian Government that it 'should not examine issues of port access in deciding whether to [recommend that the designated Minister] declare the Pilbara iron ore railways' (WA Gov, Sub 1 at [2.13]). The Council considers that it is able to be satisfied that criterion (a) is met without examining in detail or resolving issues of port access.

- 4.60 The Council does not consider that certainty regarding specific port access is a necessary precondition to satisfying criterion (a). While it accepts that there are capacity constraints in relation to port facilities that may impact on haulage services on the Robe Railway, at least in the short term, it notes that there are a range of prospective port developments under consideration such that these constraints are unlikely to persist in the medium or long term. There are strong commercial drivers for expansion of port facilities to support continued growth in iron ore exports from the Pilbara, including third party ore that is likely to be hauled on the Robe Railway. In this regard the Council notes the statements by the Western Australian Government reported above that the Government is currently investigating a range of options to meet medium and long-term demand for port capacity in the Pilbara and that its objective will be to ensure that there are common use facilities available for relatively small tonnage bulk commodity exporters.
- 4.61 The Council notes that there are no existing arrangements to provide for, and regulate the terms of, access to rail track services that would constrain the ability of the Robe Service Providers to exercise market power. The only access regime governing access to track services in Western Australia—the WA Rail Access Regime—does not cover any of the Pilbara iron ore railways including the Robe Railway.²³
- 4.62 Neither the current and proposed arrangements for access to (above rail) haulage services prevent the Robe Service Providers from exercising their market power to deny a haulage service. Despite the clear intention of the Robe Agreement Act that the rail infrastructure owner carry the freight of third parties on its railways (to the extent possible without unduly prejudicing or interfering with operations), there have been no agreements for the carriage of third party freight on the Robe Railway. The proposed Pilbara Railways (Third Party Haulage) Regime is not yet in existence (and in any case the Western Australian Government has not guaranteed its enactment and future certification) so there is no effective regime governing the provision of haulage services.
- 4.63 Further, there is no other existing railway that could provide track or haulage services in the geographic envelope proximate to the Robe Railway, which might serve to constrain the ability of the Robe Service Providers from exercising their market power. The Hamersley Railway, which might be useful to some parties with tenements located proximate to the Robe Railway, is operated in the same interests as the Robe Railway. The route of the TPI Railway (which provides for access to track services and on which the Applicant has said it will offer an iron ore haulage service) means that services on that railway are unlikely to be useful to most parties with tenements in the vicinity of the Robe Railway. (The Council notes that if the proposed Kennedy Railway²⁴ is constructed it may provide a haulage option (when linked with

²³ See paragraph 8.21 for information on the WA Rail Access Regime.

²⁴ The Kennedy Railway is a rail line proposed by the Applicant to run from Fortescue's Solomon deposit to the TPI Railway.

the TPI Railway) for a small number of tenement holders in the vicinity of the Robe Railway.) The routes of the Goldsworthy Railway and, to a lesser extent, the Mt Newman Railway mean that those railways are unlikely to be a useful alternative for tenement holders in the vicinity of the Robe Railway.

- 4.64 In relation to BHP Billiton Iron Ore’s submission that the ACCC is not empowered by section 44V(2) of the TPA to require BHP Billiton Iron Ore to expand the Goldsworthy Railway, and that therefore the Council cannot conclude that access would promote a material increase in competition in the market for haulage services, for the reasons set out in chapter 9 (paragraphs 9.183 to 9.186) the Council does not accept that view.
- 4.65 Accordingly, the Council is satisfied that an entity in the position of the Robe Service Providers would have the incentive and ability to adversely affect competition in the market for haulage of iron ore in the geographic envelope proximate to the Robe Railway. Given this incentive and ability, the Council is satisfied that the market is not subject to effective competition.
- 4.66 The Council considers that the availability of third party access to the Robe Service would have a material effect on competition in the market for iron ore haulage services on the Robe Railway. At present there is no haulage service available for use by parties that are independent of the Robe Service Providers. At best without access, even were the Robe Agreement Act to operate as intended, there would be only a single provider of iron ore haulage services on the Robe Railway. With access there is the likelihood of new entry—the Applicant has indicated that it would provide a rail haulage service and there is the prospect that other entities would also offer such a service. The all points nature of the service for which access is sought is likely to enhance the pro-competitive effects of access by allowing haulage to be provided between a number of locations. On any reasonable view these outcomes would constitute a material promotion of competition beyond what would be, without third party access, at best a monopoly.

The market for iron ore tenements

- 4.67 A ‘tenement’ is the right under licence to carry out prospecting, exploration or mining activity in respect of a specific piece of land. The right is created when a party takes out a licence (to prospect, explore or mine, as the case may be) in relation to that land, and endures for as long as that licence—or another licence—remains in place (for example, a party that wishes to progress from exploration activity to mining activity may replace an exploration licence with a mining licence).
- 4.68 Transactions in tenements²⁵ may take different forms including a transfer of the licence (for consideration, and subject to official approval in some cases) or the

²⁵ While deposits of different minerals may co-exist on a mineral tenement, the Council has

formation of joint venture arrangements whereby the entity holding the licence shares the proceeds from exploiting the tenement with another entity, usually in return for capital for further development or to construct the mining infrastructure. These transactions are, in effect, different ways of transferring the right to develop a proven deposit. In some situations the purchase of shares in a corporate entity that holds a licence to exploit a tenement can, in effect, amount to a transfer of rights in respect of a tenement or group of tenements, but generally the Council does not regard trading in the shares of mining companies as transactions within the iron ore tenements market.

- 4.69 The Council considers that the geographic dimension of the market for tenements containing iron ore is Pilbara wide. The pattern of development of the Pilbara iron ore industry shows that some mining companies (including Rio Tinto Iron Ore and BHP Billiton Iron Ore) have developed and acquired tenements throughout the Pilbara.²⁶ More recently Fortescue has also acquired tenements across a broad spread of the Pilbara. Some smaller explorers have more localised interests in particular areas of the Pilbara, although it is likely this reflects more their overall level of involvement rather than a narrower geographic view as to where they would choose to prospect and look to develop tenements.
- 4.70 At the functional level, there is a chain of activities associated with a tenement containing iron ore. In general, the steps in this chain encompass ground acquisition and reconnaissance (from obtaining an exploration licence through to reconnaissance drilling to determine resource potential), resource definition (encompassing scoping and feasibility and related studies to determine the preferred development option and a broad estimate of its cost including appropriate ore cut-off grades), project approval and funding once the feasibility of a project is confirmed, project construction (based on the preferred development option determined through the earlier feasibility studies), project commissioning (involving testing of project components to ensure they and the system as a whole are capable of delivering design rates of production), and finally the production and marketing of iron ore.
- 4.71 The earlier steps in this chain—those associated with acquisition, reconnaissance, and feasibility studies to define ore reserves—are generally functionally distinct from the later project construction and commissioning, and iron ore production and

focussed its consideration on tenements that predominantly contain iron ore. As noted elsewhere, iron ore dominates in the Pilbara.

²⁶ The Pilbara iron ore industry was originally controlled by four entities (Hamersley Iron Pty Ltd, Robe River, Mt Newman Joint Venture and Mt Goldsworthy Joint Venture). By 2000, ownership was concentrated in the hands of BHP Billiton (controlling the Mt Newman and Mt Goldsworthy joint ventures) and Rio Tinto Limited (controlling Hamersley Iron Pty Ltd and Robe River), with a third potential producer (Hancock Prospecting Pty Ltd) in development. Rio Tinto Iron Ore purchased a 50 per cent interest in Hancock Prospecting Pty Ltd's Hope Downs iron ore project (establishing the Hope Downs joint venture) in 2005.

marketing. Smaller exploration companies may hope to evolve into large producers akin to Rio Tinto Iron Ore and BHP Billiton Iron Ore and exploit their reserves in their own right, but many, at least in current circumstances, will either choose or be obliged to sell part or all of their reserves (either because they lack the funding or other capability to develop a deposit and export ore and/or, in the present circumstances, because they lack access to rail track services or a rail haulage service to get their product to market). Moreover, some exploration companies may deliberately adopt a business strategy to 'add value' to their company by locating iron mineralisation, conducting feasibility studies to the extent of determining the inferred resource and then seeking joint venture partners for subsequent development, or even selling their interests in the project without conducting feasibility studies. The Council's view, accordingly, is that the functional dimension of the dependent iron ore tenements market focuses on the trading of tenements that are likely or shown to contain a defined ore reserve.

- 4.72 The Council notes that the Pilbara iron ore tenements market is a market within Australia and involves the interests of parties that have explored for and identified iron ore reserves in the Pilbara and are seeking to develop these in their own right, enter into joint ventures or transfer the right on commercial terms set in a competitive market. In this market Rio Tinto Iron Ore and BHP Billiton Iron Ore are generally buyers. This market is distinct from the market for iron ore, which is a commodity that is traded in a competitive global market, and involves transactions primarily between large iron ore producers (including Rio Tinto Iron Ore and BHP Billiton Iron Ore) and a number of international steel makers.

Application and submissions

- 4.73 As noted above, the Applicant considered that the market for tenements containing iron ore in the Pilbara is not currently competitive, with the key barrier being the lack of access to rail haulage. It stated that without access to a rail haulage service, tenement owners have no viable means of getting iron ore products from their mine to a port and/or between a mine site and processing facilities located in the vicinity of the Robe Railway, and that the effect of this constraint is to limit purchasers of tenements largely to the parties that have their own rail and port infrastructure, the parties that plan to develop their own rail and port infrastructure and the parties that can access infrastructure such as the TPI Railway. The Applicant considered that the consequence of this limited pool of purchasers is that tenements will continue to be underdeveloped and underpriced. By contrast, it considered that where third parties have a right or ability to use the Robe Service, they will have greater ability to exploit tenements. This would encourage a larger pool of potential purchasers of tenements, with the result that the prices of tenements would more closely reflect the prices that would be achieved in a competitive market.

- 4.74 Rio Tinto Iron Ore argued that any tenements market is not a separate market from the global iron ore market²⁷ and that even if there is such a market then it would be global rather than centred on the Pilbara. Even if there is a tenements market confined to the Pilbara, Rio Tinto Iron Ore considered that any such market would already be competitive. It cited as evidence the current significant purchases of tenements and interests in companies with tenements in the Pilbara by companies other than itself and BHP Billiton Iron Ore. It also argued that access would not promote a material increase in competition in any Pilbara tenements market (if such a market could be considered to exist) because the Applicant would find it cheaper to provide rail haulage services using its own railway (and where necessary build spurs to serve particular deposits) and that any additional access to track services would not increase the likelihood of the Applicant or any other party actually providing a rail haulage service (so there will be no material further promotion of competition in any tenements market).²⁸ Further Rio Tinto Iron Ore submitted that ‘the costs of access (especially the diseconomy costs) would dwarf the cost of a deposit owner constructing its own infrastructure’ and that in the absence of evidence from the Applicant that ore could be shipped through a port (such as Fortescue’s facility at Port Hedland), the Council could not be satisfied that declaration of track services would result in a material promotion of competition in a Pilbara tenements market. Rio Tinto Iron Ore also argued that access to track services would not result in a tenement being developed that would not be developed without access because it (and presumably BHP Billiton Iron Ore) and the owner of a tenement would have ‘every commercial incentive’ to reach an agreement sharing between them any profits that would arise from the development of the deposit. Rio Tinto Iron Ore would have no incentive to prevent iron ore from such a deposit from entering the global market (because the global iron ore market is already competitive).
- 4.75 As stated above, BHP Billiton Iron Ore considered that the Council could not be affirmatively satisfied that access (in its submission access to the Goldsworthy Service) will promote a material increase in competition in any dependent market for a range of reasons (BHPBIO, Sub 1 at [15.7]). In its submission on the draft recommendation, BHP Billiton Iron Ore stated that the Council had failed to explain in the draft recommendation why the Pilbara-wide market for iron ore tenements is not already effectively competitive, given the existence of other railway lines in the Pilbara, such as the TPI Railway (BHPBIO, Sub 2 at [5.9]). BHP Billiton Iron Ore also submitted that the Council’s conclusion that access to the Goldsworthy Service would promote a material increase in the market for iron ore tenements is inconsistent with the fact that the ACCC does not have the power under Part IIIA to order BHP Billiton Iron Ore to duplicate the Finucane Island section of the Goldsworthy Railway (BHPBIO, Sub 2 at [5.11]). As discussed above, in support of this submission, BHP

²⁷ See the discussion at paragraph 4.25.

²⁸ As noted previously, Rio Tinto Iron Ore stated that in the case of its own railways there will be no spare capacity on key segments to accommodate third parties.

Billiton Iron Ore provided the Myers/O'Bryan Opinion, which argues that the ACCC is not empowered by section 44V(2) of the TPA to require a service provider to expand a facility. The Myers/O'Bryan Opinion is discussed in detail in chapter 9 (paragraphs 9.85 to 9.88 and 9.183 to 9.186).

- 4.76 In its submission on the draft recommendation, the NWIOA argued that there are various iron ore tenements in the vicinity of the Hamersley, Robe and Goldsworthy Railways, and that access to those railways may make the development of many of the iron ore tenements in the vicinity of those railways financially feasible, which would lead to more competition in the market for iron ore tenements (NWIOA, Sub 3 at [2.1]). The AMEC made a similar submission, and argued that expanding the transport options for iron ore miners and potential miners would improve the viability of mining on iron ore tenements, which would make those tenements more attractive. Accordingly, it considered that with access there would be greater propensity for trading in iron ore tenements (AMEC, Sub 1 at [2.1.16]).
- 4.77 The Western Australian Government agreed that a competitive haulage market could increase competition in the Pilbara tenements market. It noted qualifications to this view, pointing to the need for a tenement to be located close enough to an existing railway to justify the construction of a spur line to the railway and to the need for a tenement to be located sufficiently distant to a port to rule out road transport as an economic transport alternative. It observed that, at 2007 iron ore prices, output in excess of 20-30 million mtpa of quality grade ore would be required to make it commercially viable for a producer to construct its own railway. The Government acknowledged the potential for Rio Tinto Iron Ore and BHP Billiton Iron Ore, as vertically integrated companies, to have an ability and incentive to exercise market power in the tenements market, but was not aware of any circumstances where this had occurred (WA Gov, Sub 1 at [2.4]).
- 4.78 The Western Australian Government recognised the importance of port infrastructure to the iron ore logistics chain and considered that access to rail infrastructure services alone would not result in a significant increase in competition in dependent markets. It recognised that the recent surge in world iron ore demand has led to significant pressure on infrastructure (including ports). It considered however that the limits on access to port facilities do not mitigate the need for third party access to the services provided by rail infrastructure. As noted above, the Government is currently investigating a range of options to meet medium and long term demand for port capacity in the Pilbara, including the construction of new ports and the expansion of existing ports. Its stated policy objective is to ensure there are common use facilities available for relatively small tonnage bulk commodity exporters (WA Gov, Sub 1 at [2.12]). The Western Australian Government concluded that:

While port capacity may be constrained in the short term, this is not an issue that planning and negotiation between the Government, its port authorities and exporters cannot resolve. In any event, the Government does not believe

that current port capacity constraints diminish the requirement for effective third party access to Pilbara iron ore rail infrastructure. (WA Gov, Sub 1 at [2.13])

The Council's assessment

- 4.79 Until recent times when record setting iron ore prices have been achieved, it was unlikely that any but the largest iron ore deposits could sustain the development of the infrastructure, including rail, needed to enable exports. As a result, without third party access to rail infrastructure services, a business's capacity to mine a tenement and export iron ore depended on it entering an arrangement with the owner of the proximate rail infrastructure for the sale of ore at the mine or an agreement to establish a joint venture development/marketing arrangement. While such arrangements might be commercially negotiated they were likely to occur only on terms that suited the owner of the rail infrastructure.
- 4.80 Without access to rail infrastructure services, tenement owners will have a reduced ability to develop their tenements (because returns will be less without access to rail transport, and tenement owners will be less likely to be able to raise the funding necessary to develop a deposit). Moreover potential purchasers of iron ore tenements will have less incentive to purchase a tenement if there is no viable means of transporting the mined ore for processing or export. This is likely to lessen the value of tenements and generally make acquisition of tenements by third parties less attractive than in a competitive market.
- 4.81 It is not difficult to envisage that these outcomes would be attractive to an entity that is a vertically integrated iron ore producer and provider or potential provider of rail infrastructure services. An entity in such a position could obtain considerable benefit from using its ability to control access to rail infrastructure services (by preventing the emergence of a competing provider of haulage services through their control over rail infrastructure and not offering a haulage service themselves) to constrain its competitors' capacity to develop and mine their iron ore tenements and export iron ore. Such action would among other things increase the likelihood that there is a valuable portfolio of iron ore assets (warehoused by other entities) that can be available to the vertically integrated producer and (potential) provider of rail infrastructure services on favourable terms and at times of their choosing.
- 4.82 While there are some exceptions where tenements can be developed without access to the Robe Service (for example by accessing the TPI railway or where a tenement is fortuitously located), these exceptions are likely to be relevant for only a small proportion of iron ore tenements in the Pilbara. The Council's view is that the exceptions are unlikely to constrain to any great extent the ability of entities that both provide rail infrastructure services and compete in the tenements market from exercising their market power in the tenements market. Accordingly, the Council considers that an entity in such a position would have both the incentive and ability

to limit competition in the Pilbara iron ore tenements market²⁹ and therefore the Pilbara iron ore tenements market is not subject to effective competition.

4.83 In the Council's view access to the Robe Service is likely to reduce the ability and incentives for large integrated iron ore producers/haulage service providers to limit competition for the acquisition of tenements by refusing to offer haulage services to non-associated parties.

4.84 The Council accepts that there are some situations where the effects of access to the Robe Service may have a more limited impact on competition. In particular:

- At current price levels, there is some dedicated infrastructure development occurring that will enable exports from the larger inland deposits. In these circumstances the additional costs involved in developing a railway compared to accessing an existing railway on appropriate terms can be absorbed within the overall project costs and value.
- There are some smaller deposits located nearer to existing or planned port facilities that may be able to sustain the cost of developing railway infrastructure on a dedicated or joint basis to enable exports or that can be exported using road transport.
- Some tenement owners may choose to forgo some profits by investing in railway facilities for strategic reasons, including avoidance of the uncertainty as to the effectiveness and timeliness of access that might be available through Part IIIA. Given that Rio Tinto Limited and BHP Billiton have both historically refused access and strongly resisted the application of access regulation, and the time that has elapsed in dealing with the issue of access to the Mt Newman Railway, that view is understandable even if from a national interest perspective the railway investment that results is wasteful and unnecessary.
- Where a tenement is fortuitously located such that the major producers may compete to acquire the tenement or the ore it contains triggering some competition. In these situations, the effect of restricting access to the Robe Service on competition in the tenements market would be less.
- Into the future, the presence of Fortescue as a developing iron ore producer and railway infrastructure owner may also enhance competitive activity in the market for iron ore tenements.

4.85 Where a tenement contains sufficient ore such that the tenement holder may choose to build a railway despite the costs of doing so, the effect of restrictions on access to

²⁹ In some ways Fortescue/TPI is in a similar position, although these companies have publicly committed to offer haulage services on the TPI Railway (for which there is a regime that provides for access to rail track services) and of course any access that results from declaration of the Robe Service is not limited to the Applicant.

the Robe Service on competition will be less pronounced, and consequently promotion of competition due to access will be less. Access to a rail track service will have less impact for mines located near to a railway that can transport iron ore by road. However, haulage by road is viable only for short distances or for low volumes during the early stages of mine development such that access to road haulage will not significantly affect competitive outcomes in the tenements market in general.

- 4.86 Tenements containing large ore bodies, or those which might economically use road transport, represent collectively a relatively small proportion of total iron ore reserves and mining interests in the Pilbara. There are significant numbers of smaller independently-owned tenements that will remain stranded without access to existing rail infrastructure.
- 4.87 The Council is not persuaded by claims that port constraints will prevent access from resulting in a material promotion in competition in the tenements market for the same reasons as it was not persuaded by these claims in respect of the rail haulage market. The Council is not required to confirm or verify each element of a project involving access before it can be satisfied that there would be a material promotion of competition. It needs only to be satisfied that there are options to overcome obstacles to the promotion of competition.³⁰ While the Council accepts that there are some shorter term capacity and user access issues for port facilities at Dampier/Cape Lambert and Port Hedland, it notes that the Western Australian Government is supporting the development of port facilities at sufficient capacity to support the trade in Pilbara iron ore such that port access is unlikely to be a constraint on competition in the tenements market.
- 4.88 In relation to BHP Billiton Iron Ore's submission, and the Myers/O'Bryan Opinion that suggests that the ACCC is not empowered by section 44V(2) of the TPA to require BHP Billiton Iron Ore to expand the Goldsworthy Railway, and that therefore the Council cannot conclude that access would promote a material increase in competition in the market for iron ore tenements, for the reasons set out in chapter 9 (paragraphs 9.183 to 9.186) the Council does not accept that view.
- 4.89 The Council considers that third party access will have a material effect on competition in the market for tenements. Access would generally allow significantly greater choice for tenement owners. It would allow them greater opportunity to develop their tenements and market iron ore. It would enable a greater array of potential purchasers of tenements and joint venture partners, reducing the scope for

³⁰ The Council notes that in *Re Services Sydney Pty Limited* [2005] ACompT 7 (at [150]) the Tribunal took account of among other things significant technical hurdles faced by the access seeker (such as acquiring the means to effect substantial tunnelling under land owned by numerous private and public parties) but considered that it was not possible to rule out a structure being developed whereby such a project could be achieved if the possibility of access became a reality.

the exercise of market power in relation to the acquisition of tenements. This would likely increase the worth of tenements and stimulate exploration for iron ore, feasibility testing to define ore reserves, project construction and the production and export of additional iron ore. The Council also considers that the all points nature of the service to which access is sought may enhance the pro-competitive effects of access by increasing the number of tenements effected. Access would therefore be likely to promote a material increase in competition in the tenements market.

Conclusion on criterion (a)

4.90 The Council concludes that access to the Robe Service would promote a material increase in competition in both the market for haulage services for iron ore on the Robe Railway and the market for iron ore tenements in the Pilbara and that these markets are separate from the market for the Robe Service.

4.91 The Council considers that the Robe Application satisfies criterion (a).

5 Criterion (b) – Uneconomical to develop another facility

Legal requirements

5.1 Section 44G(2)(b) of the TPA (**criterion (b)**) requires that the Council be satisfied that ‘it would be uneconomical for anyone to develop another facility to provide the service’ sought to be declared. This criterion seeks to ensure that declaration is limited to situations where the development of additional facilities would increase costs, waste economic resources and generally be contrary to Australia’s national interest.

5.2 Criterion (b) is concerned with Australia’s national interest not the private interests of any particular parties. The Council and the Tribunal have consistently found that the appropriate test for assessing whether criterion (b) is met is a social test and that the term ‘uneconomical’ should be construed in a social cost benefit sense rather than in terms of private commercial interests. In *Re Sydney International Airport* [2000] ACompT 1 the Tribunal explained (at [205]) that:

If “uneconomical” is interpreted in a private sense then the practical effect would often be to frustrate the underlying intent of the Act. This is because economies of scope may allow an incumbent, seeking to deny access to a potential entrant, to develop another facility while raising an insuperable barrier to entry to new players (a defining feature of a bottleneck). The use of the calculus of social cost benefit, however, ameliorates this problem by ensuring the total costs and benefits of developing another facility are brought to account.

5.3 In this context, the assessment of criterion (b) centres on identifying whether a facility exhibits natural monopoly characteristics such that a single facility is capable of meeting likely demand at lower cost than two or more facilities. In these circumstances it is uneconomical to duplicate the facility and society’s resources are most efficiently used and costs minimised if additional facilities are not developed. In *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 the Tribunal stated (at [137]):

[the] test is whether for a likely range of reasonably foreseeable demand for the services provided by means of the pipeline, it would be more efficient, in terms of costs and benefits to the community as a whole, for one pipeline to provide those services rather than more than one.

5.4 Under this approach, criterion (b) limits declaration to the services of facilities with natural monopoly characteristics. The key characteristics of a natural monopoly relate to the presence of significant economies of scale and/or economies of scope in the production of the service or services the facility provides, the existence of substantial fixed (or capital) costs and relatively low variable (or operating) costs, and large and lumpy investment costs.

- 5.5 Network facilities including those in the energy, telecommunications and transport sectors (including railways and roads) typically exhibit natural monopoly characteristics. Some other large infrastructure facilities such as some ports and airports may also exhibit natural monopoly characteristics.

Application and submissions

The Applicant

- 5.6 The Applicant submitted that the Robe Railway and associated infrastructure is uneconomic to duplicate. It submitted that ‘detailed modelling is not required to make this out’ (Robe Application Part 1, at [7.2]). It considered that the relevant test is not the social test advocated by the Council and Tribunal but an alternative test of whether the increase in demand on the railway would cause the owner/operator to build a second railway rather than augment the current railway assets. The Applicant based its argument upon a paper by Professor Gans (Robe Application Part 1, Attachment 4). Professor Gans’ paper is discussed at paragraphs 5.41-5.42.
- 5.7 In the alternative the Applicant submitted that if the Council applies the ‘social test’ then the Robe Railway should still be considered to be uneconomic to duplicate because the social costs of expanding or augmenting the network to meet the additional demand would be significantly exceeded by the social costs of replicating the entire Robe Railway for the following reasons.
- Replicating the 210 kilometre long Robe Railway would cost between \$735 million and \$945 million³¹, based upon the actual costs incurred by TPI to construct the TPI Railway, of approximately \$3.5 million to \$4.5 million per kilometre. The cost of expanding the Robe Railway by constructing individual sidings or duplicating sections of track is much lower.
 - The Applicant would contribute to the investment necessary to expand the capacity of the Robe Railway or compensate for any loss of efficiency that results from access.
 - Although any estimate of foreseeable demand is inherently uncertain, the Applicant expected Rio Tinto Iron Ore’s foreseeable demand to be approximately 180 mtpa (by 2012-14). The Applicant was unable to determine the level and timing of the access to the Robe Service that it would require. By way of an example, it identified five companies that have tenements within approximately 50 kilometres of the Robe Railway. Such companies potentially have demand for the Robe Service (directly or indirectly). The Applicant also considered that other bulk mineral explorers in the area may potentially have demand for the Robe Service.

³¹ The Robe Railway is, in fact, about 242 kilometres long, thus replicating that length of track would cost about \$847-1089 million.

- The Applicant considered that the capacity of a fully duplicated stretch of railway is about 400 mtpa. It presented rail modelling (conducted by SMS) that indicates that duplicating the Western Creek to Cape Lambert section of the Robe Railway would provide capacity of around 325 mtpa (Robe Application Part 2). The Applicant considered that this expansion will be implemented as part of Rio Tinto Iron Ore's plans to expand exports from Cape Lambert port to 180 mtpa.

5.8 The Applicant indicated that there are a number of practical impediments to replicating some sections of the Robe Railway that would either increase the cost of replicating those sections or may make it impossible. These include:

- The Robe Railway was constructed on the optimal path between Mesa J mine and the port at Cape Lambert. Therefore anyone seeking to replicate the facility would be forced to adopt a second best path between the two points.
- The Robe Railway runs through the Millstream Chichester National Park and it is unlikely that the Western Australian Government would permit construction of another railway through the park.
- Given the existence of the Robe Railway, which is capable of being expanded to accommodate additional demand, the Government is likely to be unwilling to authorise a new rail network serving the same routes.
- Anyone wishing to build a new railway would need to acquire additional land, which creates the potential for them to encounter heritage and environmental problems. Such problems are less likely to occur where someone seeks to expand the capacity of an existing railway because it takes place within the existing corridor of land.

Rio Tinto Iron Ore

5.9 Rio Tinto Iron Ore did not support the Applicant's proposed alternative social test for assessing criterion (b) or the social test that the Council (and other bodies) have applied in past decisions.

5.10 In support of this view Rio Tinto Iron Ore provided a report it had commissioned from Professor Ordover (RTIO, Sub 1 Annexure 9) that argued that neither test is appropriate. Professor Ordover stated (at section 4) that 'if reasonable forecasts of the likely future aggregate demand from all the parties cannot plausibly be made and there is, therefore, a reasonable prospect that additional facilities may have to be brought into the market then the existing facility should not be declared'. Rio Tinto Iron Ore further stated that criterion (b) requires, in respect of all sections of the Robe and the Hamersley railways, that foreseeable demand be forecast and then an

analysis be undertaken to assess whether the facility can serve the range of foreseeable demand for the service at less cost than two or more facilities.

5.11 Rio Tinto Iron Ore submitted that a private investment test should be applied when considering the declaration criteria, particularly criterion (b). It considered that ‘a private investment test is suggested by the natural meaning of the words in criterion (b)’ and that ‘there are sound economic and public policy reasons for applying a private investment test’ (RTIO, Sub 1 at [1.16]). It presented a report by Professor Kalt to support its view (RTIO, Sub 1 Annexure 7), which argued that a private investment test is most appropriate for assessing criterion (b), pursuant to which access should be declared only when insurmountable barriers to entry make duplication infeasible. In all other situations the marketplace should regulate access. In the alternative, Professor Kalt argued that the Applicant had failed to provide an accurate and reliable quantification of the volume and time pattern of demand and that, consequently, the Council cannot be satisfied the facility is a natural monopoly or that, in turn, criterion (b) is met.

5.12 Regardless of the test applied, Rio Tinto Iron Ore considered that:³²

criterion (b) does not ask whether it would be uneconomic 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). (RTIO, Sub 1 at [1.17])

5.13 Rio Tinto Iron Ore suggested that other facilities that allow, or could be developed to allow, track access enabling ore to be transported from mines for the purpose of being sold on the global iron ore market could be potential substitutes for the Robe Service and the Hamersley Service.

5.14 Even applying a natural monopoly test, Rio Tinto Iron Ore submitted that it is impossible for the Council to be satisfied that criterion (b) would be met, particularly in this case, where the Applicant seeks an all points service (rather than a point-to-point service, such as in the case of Fortescue’s application for access to a track service on the Mt Newman Railway). Rio Tinto Iron Ore’s arguments in support of this view are summarised below.

- The Applicant has applied, in effect, for an infinite number of services, none of which it has particularised. Rio Tinto Iron Ore noted that this is acknowledged by the Applicant (which described its estimate of demand as no more than an ‘educated guess’). Rio Tinto Iron Ore considered that demand for such an all points service is ‘unknowable’ and is potentially very high (RTIO, Sub 1 at [1.2]).

³² The Chichester Railway is known as (and generally referred to in this recommendation as) the TPI Railway.

- It is impossible to forecast reasonably foreseeable demand for the services the Applicant is seeking to have declared, given the lack of detail in the description of the services to which it seeks access and the uncertainty about the development of iron ore resources in the Pilbara over a 20 year period. Demand could possibly range from nil to hundreds of millions of tonnes a year.
- Without specifying the particular services that the Applicant wishes to have declared, it is 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 may be economic to duplicate the Robe Railway or Hamersley Railway over short distances. Cape Lambert Iron Ore Limited (**Cape Lambert Iron Ore**) has announced that it has an Australasian Joint Ore Reserves Committee (**JORC**) compliant resource of 2.5 billion tonnes (at 30 per cent iron ore content) located approximately 10 kilometres from the port of Cape Lambert. Rio Tinto Iron Ore stated that '[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 the Applicant 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' (RTIO, Sub 1 at [6.20]).
- Fortescue's construction of the TPI Railway and its proposal to build the Kennedy Railway (a proposed railway line linking Fortescue's Solomon prospect to the TPI Railway and in turn to Port Hedland) show that there are no practical or economic obstacles to constructing an alternative facility to meet third party demand.

5.15 Rio Tinto Iron Ore did not provide an estimate of third party demand for the Robe Service, but considered that it could potentially be very high, noting the following.

- An all points service would permit the raiing of bulk materials between any two points on its rail network (RTIO, Sub 1 at [5.17] and [5.57]).
- There are a number of companies with tenements close to the Robe and Hamersley railways. Rio Tinto Iron Ore identified:
 - 22 companies in relation to the Robe Railway 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, and
 - 34 companies or individuals in relation to the Hamersley Railway, which have 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 (RTIO, Sub 1 at [6.29]).

- Australia is experiencing unprecedented demand for its iron ore and the consensus among industry analysts is that this is unlikely to change in the foreseeable future (RTIO, Sub 1 at [3.20]).

- 5.16 Rio Tinto Iron Ore stated that neither it, the Council nor the Applicant ‘can predict with any confidence whether, and how many, new third party mines will be developed, and where they might be developed’ (RTIO, Sub 1 at [5.17]). Demand depends on the success of exploration programs that have yet to be undertaken, the demand and price for iron ore, and on the extent to which customers’ quality requirements change from those currently demanded. Rio Tinto Iron Ore contended that many projects now being undertaken would not have progressed to their current status without substantial demand and price increases.
- 5.17 In terms of its own demand, Rio Tinto Iron Ore indicated that its export capacity is currently around 195 mtpa. It is implementing expansions to increase production and supply capacity (including joint venture operations) to a rate of 320 mtpa by 2013 and is considering a further expansion to 420 mtpa (RTIO, Sub 1). Rio Tinto Iron Ore commissioned a report by Port Jackson Partners, which suggests that Rio Tinto Iron Ore must expand its Pilbara export capacity to more than 500 mtpa by 2027, if it is to maintain its current market share in an environment of relatively strong demand (RTIO, Sub 1 Annexure 5).
- 5.18 Rio Tinto Iron Ore claimed that it ‘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’ (RTIO, Sub 1 at [3.44]). It considered that capacity estimates presented by the Applicant overstate the capacity of the Hamersley and Robe railways. It based its view on a report it commissioned from TSG Consulting that is critical of the Applicant’s modelling (see RTIO, Sub 1 Annexure 8).
- 5.19 Further Rio Tinto Iron Ore argued that it would be less costly for any third party to build a facility to link to other rail networks or ports than invest in expanding its facilities.
- 5.20 Rio Tinto Iron Ore considered that inefficiencies would arise from moving from a single user to multi user status railway. It stated that estimates by Mr Stephen O’Donnell that suggest such a change would result in between 10-20 per cent of system capacity being lost because of the scheduling that has to be imposed to cater for multiple users compared with a situation that pertains in a single user system (RTIO, Sub 1 at [5.54]).³³ Rio Tinto Iron Ore suggested that the losses would likely

³³ The affidavit of Mr Stephen O’Donnell appears at BHPBIO, Sub 1 Annexure 16. Mr O’Donnell stated at [25] that ‘[b]ased on my experience working with multi-user systems, it is my view

exceed this if access seekers were permitted to operate manually driven trains on a system that would otherwise be fully automated (RTIO, Sub 1 at [5.67]).³⁴ Rio Tinto Iron Ore further added that the Council in its draft recommendations did not address the fact that operating costs will be higher for TPI trains on its rail network than on the TPI railway due to reduced axle loads. It considered that these cost should be accounted for in assessing criteria (b) and (f) (RTIO, Sub 2 at [2.68]).

- 5.21 Rio Tinto Iron Ore considered that the cost of developing another facility to cater to third party demand for the Robe Service would be considerably less than that quoted by the Applicant. It considered that the comparison could be based on the cost of connecting third party mines to Fortescue’s proposed Kennedy Railway (RTIO, Sub 1 at [6.59]). Rio Tinto Iron Ore considered that to accommodate access would require a duplicate rail line be built—a 250 kilometre parallel facility from Rosella to Dampier or Lambert—at an estimated cost of about \$1 billion (RTIO, Sub 1 at p70).
- 5.22 In responding to the Council’s draft recommendations Rio Tinto Iron Ore reiterated the points from its original submission outlined above. In addition, Rio Tinto Iron Ore was critical of the Council’s approach to assessing foreseeable demand for the Hamersley and Robe railways. It noted that the Council had identified only three deposits for which companies may seek to use the Hamersley and Robe services to transport ore to port over the medium term. It stated that it was unclear as to why the Council had excluded other potential demand, given the very significant number of tenement holders in the Pilbara and exploration work being carried out in the Pilbara, driven by global iron ore demand (RTIO, Sub 2 at [2.71]). While Rio Tinto Iron Ore accepted that a ‘precise’ forecast of demand is not required, it considered that some meaningful estimate is required in this case. Consequently, Rio Tinto Iron Ore considered that the Council ‘cannot be satisfied that demand would not be very high indeed, and so it cannot be satisfied that it would not be economical for someone to build another facility to meet that demand’ (RTIO, Sub 2 at [11.1]).
- 5.23 Rio Tinto Iron Ore was also critical of the Council’s theoretical approach to assessing criterion (b). It noted that the Council draws on a Queensland Rail submission to the Productivity Commission, without reference to the particular conditions of the its rail network (RTIO, Sub 2 at [2.64]). It further stated that:

In keeping with its highly theoretical approach, the NCC says that in applying Criterion (b), you should ask not what minimum facility would need to be built

that as a result of the rigid timetable operation which usually exists in a multi user system it is generally necessary to build an additional 10 to 20% capacity into the system to achieve the same throughput as could be achieved with flexible operation of that system, under the control of a single user and operator’.

³⁴ The Council notes that any inefficiency introduced into rail operations as a result of access is properly considered in relation to criterion (f), but the consequences are also relevant to estimations of capacity needed to meet likely demand, which is considered under criterion (b).

to enable a third party to get its ore to port and sell it on the international iron ore market, but rather, what it would cost **to replicate the entire Hamersley rail network**. This highly theoretical approach cannot have been intended by the drafters of the legislation and cannot be correct. The correct question should be: would the capital costs of expansion be materially less than the cost of building an alternative facility that serves the same operational end, ie transporting ore from the mine to a port?(Rio Tinto Iron Ore’s emphasis)(RTIO, Sub 2 at [3.7])

5.24 In commenting on this Rio Tinto Iron Ore reiterated that:

In any event, ... the diseconomy costs that access would cause would dwarf the cost of constructing another facility, even if the entire RTIO rail network is to be duplicated.

As a result, it is impossible for the NCC to be satisfied that it be uneconomical for anyone to develop another facility to provide the service. (RTIO, Sub 2 at [3.8]-[3.9])

5.25 It stated that society’s resources would be most efficiently used if additional facilities are developed rather than Rio Tinto Iron Ore being compelled by a regulator to expand its facilities to meet third party demand (RTIO, Sub 2 at [1.12]).

5.26 Rio Tinto Iron Ore contended that the Council’s draft recommendations relied on the ACCC having the power to compel the service providers to expand the capacity of the railways. It stated that it is not clear that the ACCC has such a power (RTIO, Sub 2 at [2.63]). BHP Billiton Iron Ore also made a similar claim, which it supported with the Myers/O’Bryan Opinion. The Myers/O’Bryan Opinion is discussed in detail in chapter 9 (paragraphs 9.85 to 9.88 and 9.183 to 9.186).

Other parties

5.27 BHP Billiton Iron Ore outlined a number of principles that it believes the Council should apply in assessing criterion (b). Its arguments can be summarised as follows.

- The Council should be mindful of the recent amendments to the objects clause in Part IIIA and, specifically, the requirement to take into account the promotion of efficient investment in infrastructure.
- The Council should not interpret criterion (b) in an unduly restrictive manner. The Council should assess ‘whether it is economical for anyone to develop another facility that could provide a service which is functionally the same as the service to which access is sought’ (BHPBIO, Sub 1 at [16.6]).
- The Council should apply a private investment test in interpreting criterion (b). However, if applying a social test the Council should ask ‘whether a single facility can serve the entire range of reasonably

foreseeable demand for a service, and if it can, whether it can do so at lower cost (from society's perspective) than two or more facilities'.

- 5.28 Further BHP Billiton Iron Ore considered that the approach taken by Professor Gans to interpreting criterion (b) is of no assistance to the Council and is misconceived in a number of respects. In support of this view BHP Billiton Iron Ore provided papers by Concept Economics (BHPBIO, Sub 1 Annexure 17) and the Allen Consulting Group (BHPBIO, Sub 1 Annexure 18) that review the paper by Professor Gans.
- 5.29 On the issue of uncertainty about the level of potential third party demand, BHP Billiton Iron Ore submitted that the Council should consider whether the declaration criteria under section 44G(2) are satisfied only by reference to those scenarios of third party access that have sufficient certainty (BHPBIO, Sub 1 at [12.1]). The NWIOA appeared to adopt a similar approach in relation to the Hamersley Railway in a submission on the Hamersley Application. No other parties commented on current or foreseeable demand of third parties.
- 5.30 In responding to the draft recommendations, BHP Billiton Iron Ore reiterated its belief that the costs and diseconomies likely to result from access would be significant (BHPBIO, Sub 2 at p26). It considered that while the Council had acknowledged that diseconomies may exist, the Council had ignored the size of the diseconomies. BHP Billiton Iron Ore considered that by using this approach criterion (b) would always be met for a heavy haul railway that is capable of being expanded (BHPBIO, Sub 2 at [4.11]).
- 5.31 The MCA concurred with the affidavit of Mr O'Donnell (see BHPBIO, Sub 1 Annexure 16) which stated that access may reduce the operational efficiency and system capacity of the railways by around 10-20 per cent (MCA, Sub 1 at p2).
- 5.32 The Western Australian Government agreed with the Applicant that there may not be economic alternatives to the Robe Service for transporting iron ore in the Pilbara. It submitted that:
- there is no alternative competitive transportation mode, including road transport, for tenements in the Pilbara hinterland
 - with some exceptions the railways in the Pilbara are remote from one another and therefore generally have a 'captive' regional market, and
 - 'only for large tonnages would it become commercially viable for a company to consider the construction of a railway in its own right. ...At 2007 iron ore prices, it is likely that tonnages in excess of 20 to 30 million tonnes per annum of quality grade ore are needed to potentially make it commercially viable for a producer to construct their own railway' (WA Gov, Sub 1 at [3.1]).

- 5.33 The Western Australian Government submitted that it is difficult for access seekers to assess rail infrastructure capacity because of the information asymmetries that exist between the infrastructure owners and access seekers (and interested parties) (WA Gov, Sub 1 at [3.2]).
- 5.34 The Western Australian Government acknowledged that lost flexibility could be a major issue for rail infrastructure owners under the track access approach. Nevertheless, it argued (supported by independent expert advice) that ‘expansion of a railway to a double-tracked facility would be a more cost effective (and efficient) solution than two or more rail facilities operating in parallel to the existing track’ (WA Gov, Sub 1 at [3.4]).
- 5.35 Other submitters also considered that criterion (b) is met. The AMEC pointed to the likely significant cost of replicating a railway, such as the Goldsworthy, Hamersley and Robe railways. The association submitted that the cost is likely to exceed the financial capacity of, in particular, smaller emerging producers. In its submission to the Hamersley Application, the NWIOA made similar claims. It presented modelling, developed using parameters based on the Goldsworthy and Hamersley railways, which compared the cost of transporting iron ore (on a net tonne basis) over various distances using:
- a haulage service on an existing railway
 - a newly constructed dedicated railway, and
 - road transport.

Over a distance of 75 to 150 kilometres (akin to the Goldsworthy and Robe railways), transport costs using a new railway would be some five to six times higher than using an existing railway, while transport costs using trucks would be some two to three times higher (NWIOA, Sub 2 at [2.5]; NWIOA, Sub 3, pp6-7). Over longer distances of about 400 kilometres (like the Hamersley Railway), a requirement to construct a new railway would result in transport costs of about double those when using an existing railway, while the costs using trucks would be some four to five times higher when compared to using an existing railway (NWIOA, Sub 1 at [2.5]; NWIOA, Sub 3, pp6-7). The NWIOA doubted whether constructing a new railway would be feasible on the basis of cost, and pointed to other constraints such as lack of available land, and social and environmental issues such as dust, noise, habitat impacts and water management. It considered that modes of transport, other than rail, are only likely to be feasible over relatively short distances and for low volumes.

- 5.36 In its submissions the NWIOA identified only one member company—Brockman Resources—that may seek to access the Hamersley Service and/or a section of the Robe Railway over the next 12 years. The NWIOA identified five projects—Marillana, Mt Florance, Duck Creek, Mt Stuart, West Hamersley—operated by Brockman Resources that represent potential demand of up to 35 mtpa by 2020 for the Hamersley and Robe services (NWIOA, Sub 3 at p5). The NWIOA stated that:

Based on these tonnages alone, it is feasible that if third party access was granted, a third party operator could enter the haulage market in this region. In addition, should the market for iron ore tenements increase with the option of access to the Railways, there could be a further increase in the requirement for iron ore haulage services, thus increasing the likelihood of additional third party haulage operators entering the market. (NWIOA, Sub 3 at p5)

- 5.37 In responding to the draft recommendations Atlas Iron, a member of the NWIOA, contended that ‘the cost of constructing an alternative railway is prohibitive when considering the extra projected tonnage of Atlas Iron and other junior miners in the region’ (Atlas, Sub 2 at [5.16]).
- 5.38 No other parties commented on current or foreseeable demand of third parties for the Hamersley Service.

Alternative tests for assessing criterion (b)

- 5.39 Both the Applicant, Rio Tinto Iron Ore and BHP Billiton Iron Ore expressed a view that an alternative test to that currently applied should be used for assessing criterion (b). Both BHP Billiton Iron Ore and Rio Tinto Iron Ore reiterated this view in responding to the Council’s draft recommendations.
- 5.40 BHP Billiton Iron Ore and Rio Tinto Iron Ore considered that a private investment test should be applied when considering criterion (b).
- 5.41 The Applicant sought an extension of the criterion (b) social test. Following the approach of Professor Gans (Robe Application Part 1, Attachment 4), the Applicant suggested that in a case where capacity is constrained, the relevant test for satisfaction of criterion (b) should be whether the social benefits of having the duplicate facility built and operated by one service provider would outweigh the net social benefits of duplication with separate operators.
- 5.42 Further, Professor Gans expressed the view that ‘in reality a social test is difficult to apply because demand will fluctuate, providing more opportunities for seekers to access the infrastructure without creating a capacity issue and because overall demand growth will be an estimate’ (Robe Application Part 1, Attachment 4 at p14). He therefore proposed an evidentiary test, which he illustrated with an example in which the demand of all access seekers is transferred to the infrastructure provider. He stated that ‘[t]hen, 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’ (Robe Application Part 1, Attachment 4 at p14). This would be assessed based on ‘how [the service provider] would manage expansions in its own demand. If in its strategic documents there is no evidence that it would build a duplicate network to manage this demand, then the above test would force a regulator to conclude that the facility was, in fact, uneconomic to duplicate’ (Robe Application Part 1, Attachment 4 at p15).

- 5.43 BHP Billiton Iron Ore and Rio Tinto Iron Ore both included papers in their initial submissions that are critical of the approach taken by Professor Gans (see BHPBIO, Sub 1 Annexures 17-18; RTIO, Sub 1 Annexure 9).
- 5.44 Given the approach of the Tribunal to the interpretation of criterion (b) (which is outlined in paragraph 5.2), the Council believes the test it must apply in assessing criterion (b) is a social test and that the term 'uneconomical' should be construed in a social cost benefit sense rather than in terms of private commercial interests. Both the Council and the Tribunal have previously found that a private investment test is not the appropriate test.
- 5.45 While the test under criterion (b) is a social test, this test is to be applied in the context of determining whether 'it would be uneconomical for anyone to develop another facility to provide the service'. In the Council's view the application of the test in the way proposed by Professor Gans is not supported by the words of Part IIIA.
- 5.46 As the Council does not intend to depart from the approach to consideration of criterion (b) that it and the Tribunal have usually adopted, it does not consider it necessary to discuss further the critiques of Professor Gans's approach by Professor Ordover (RTIO, Sub 1 Annexure 9), Concept Economics (BHPBIO, Sub 1 Annexure 17) and The Allen Consulting Group (BHPBIO, Sub 1 Annexure 18).
- 5.47 The Council remains of the view that it should not alter the test used for assessing criterion (b).

The Council's assessment

- 5.48 In considering whether criterion (b) is satisfied the Council:
- considers whether there are any alternative facilities that could provide the Robe Service
 - considers the economic characteristics of heavy haul railways, including those characteristic of the Pilbara railways, to determine whether they exhibit natural monopoly characteristics
 - considers likely current and forecast demand for the Robe Service arising from the service provider's haulage needs and those of third parties where access available
 - examines whether foreseeable demand can be met within the capacity (current and planned) of the Robe Railway, and
 - where access is likely to result in demand exceeding capacity, compares the likely costs of expanding the Robe Railway to meet the excess demand with the costs of constructing an alternative facility to meet the extra demand of access seekers.

Alternative facilities that could provide the Robe Service

- 5.49 The Robe Railway runs for approximately 242 kilometres from near the Mesa J Mine to Cape Lambert in the Pilbara (see appendix B for a map).
- 5.50 The Applicant has sought access to the Robe Railway that will enable it to access the track (and associated infrastructure) to enable trains to run between any two points on the railway. The service for which declaration is sought would potentially allow trains to come on and go off the track at all points. Practically the actual points of connection will depend on the transport requirements of the customers for the Applicant's (or other access seekers) haulage services. The Robe Service Providers use the Robe Railway and Hamersley Railway as a network to provide haulage services from the Robe Service Providers' and the Hamersley Service Providers' mines to either Dampier or Cape Lambert. The Hamersley Railway cannot, however, provide an equivalent service to the Robe Railway as it generally serves a different set of locations.
- 5.51 Rio Tinto Iron Ore submitted that other railways could provide the service sought by the Applicant. It suggested that the TPI Railway or the proposed Kennedy Railway (which will link to the TPI Railway and in turn to Port Hedland) might, with the addition of connecting spur lines, meet the same operational needs as access to its railways. It reiterated this view in response to the Council's draft recommendations.
- 5.52 It appears to the Council that at best these other railways might allow for track access enabling an access seeker to pick up ore at some of the mine locations that a haulage service based on access to the Robe Railway could. However, any rail access service that might be provided by other Pilbara railways would not permit the Applicant or another access seeker to connect at the majority of the points that would be accessible if there is access to the track service provided by the Robe Railway. The provision of track access services from different facilities allowing haulage from some common pick up points but not others, and transport to different ports or potential ore processing locations via different routes does not, in the Council's view, amount to provision of the Robe Service by way of an alternative facility.
- 5.53 The Council considers that there are no alternative facilities that could provide the Robe Service. The issue of whether another facility could be developed to provide part of the Robe Service is considered in chapter 10.

Presence of natural monopoly characteristics

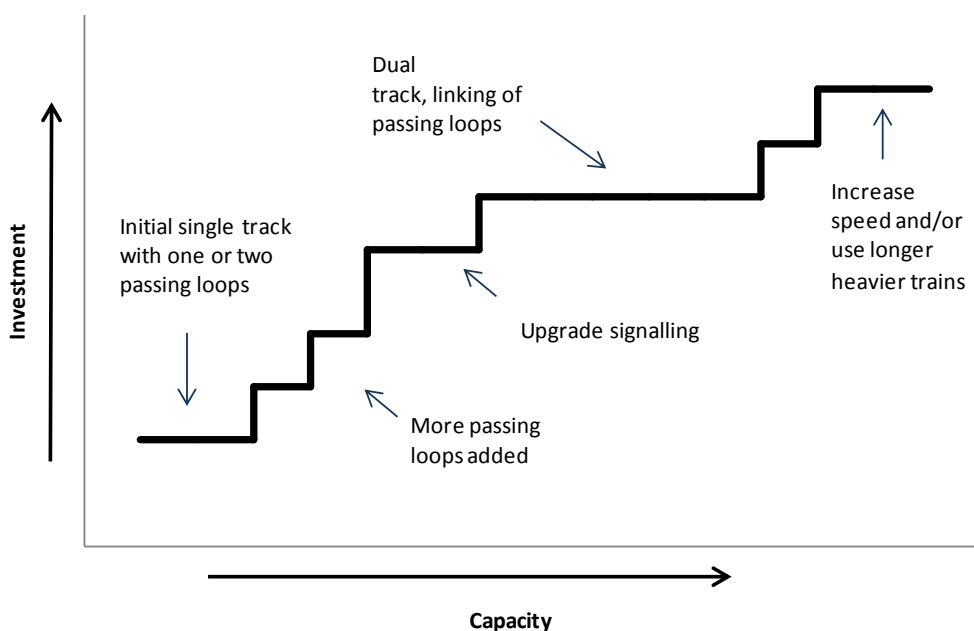
- 5.54 A natural monopoly is said to exist if, given the level of demand for a good or service, one facility can produce the required output at lower cost than can two or more facilities.

- 5.55 The basic conditions for natural monopoly generally relate to the nature of costs and investment—such as the ‘lumpiness’ of investment and related economies of scale and/or economies of scope.
- 5.56 It is generally accepted that a natural monopoly is more likely to exist where capital costs are large relative to variable costs (implying high average costs compared with marginal costs).
- 5.57 The provision of services of the type for which declaration is sought in this application involves:
- construction of the rail infrastructure, and includes the purchase of land, earthworks, track construction and installation of signalling equipment
 - maintenance and renewal of the rail infrastructure, including repairs and replacement of track, signals and platforms
 - coordination and management of traffic on the rail infrastructure, including train control and implementation of safe working procedures.
- 5.58 The provision of this infrastructure requires a significant capital investment in track and signalling infrastructure, which the Applicant estimated would cost around \$735-945 million to replace. While ongoing maintenance costs and other operational costs associated with the railway service are significant, they are relatively small compared to the capital costs incurred in developing the facility or indeed the costs of operating the trains and other above rail services that run on the rail infrastructure that provides the service for which declaration is sought in the Robe Application.
- 5.59 Queensland Rail (2006) estimated, using a life cycle cost framework, that for a typical freight railway, capital costs account for approximately 60 per cent of total costs and maintenance (such as inspections, ballast and track replacement, and rail grinding) accounts for around 25 per cent of total costs. The remaining 15 per cent are operating costs. Heavy haul bulk rail systems, such as the iron ore railways in the Pilbara, typically involve the greatest construction and maintenance costs per kilometre because of the significant wear and tear impact of the heavy trains on the track (based on Queensland Rail 2006). Terrain and climatic conditions also affect per unit track construction and/or ongoing maintenance costs. Nevertheless it is apparent that the Pilbara iron ore railways exhibit high investment costs relative to more modest ongoing operational costs, a typical characteristic of natural monopolies.
- 5.60 Once committed, much of the infrastructure costs of a railway, such as the cost of earthworks and track formation, are sunk (unrecoverable). While rails, sleepers and ballast could potentially be moved from one rail corridor to another, the expense involved largely precludes this.

5.61 In addition, the capacity of a railway can often be expanded significantly at a relatively low incremental cost through discrete additions of capacity in the form of passing loops and upgraded signalling. Once incremental expansion options are exhausted (typically this occurs once passing loops are around 10 kilometres apart) the track must be duplicated or multiple tracked. This involves a much more substantial investment, but delivers a disproportionately large increase in capacity compared to the construction of a similar length of track on a stand-alone basis. The OECD (2001) reported, for example, that expanding from single to double track roughly quadruples capacity with a less than doubling of costs. Figure 5-1 provides an illustration of the relationship between investment costs and selected capacity expansion options.

5.62 While Rio Tinto Iron Ore considered that the Council had not taken account of the particular conditions of its rail network, the Council considers it unlikely that the relationship between investment and capacity expansion options varies significantly according to the use of a railway. That is, the relative costs of constructing new rail facilities compared to expanding existing facilities does not depend on whether it is dedicated to passenger traffic, freight traffic or used to accommodate a range of transport tasks including passenger, freight and bulk commodities. Nor is it likely that the relationship is significantly affected by whether or not a rail operation is linked to other upstream or downstream operations. Such features may, however, affect the timing of particular investment choices and the absolute cost of implementing any particular expansion option. For example, to take best advantage of the economies that can be achieved across their operations, the integrated iron ore producers in the Pilbara coordinate rail investments with other activities at the mine and port.

Figure 5-1 Relationship between investment and capacity by type of railway expansion



Source: Adapted from Queensland Rail (2006).

5.63 Heavy haul railways appear to have relatively high capital costs relative to variable costs and investment tends to be of a discrete and 'lumpy' nature. It appears that heavy haul rail systems are able to achieve significant economies of scale that persist as output levels increase. These features of heavy haul railways suggest that the Robe Railway is likely to be a natural monopoly—such that a single below rail operator is likely to be able to deliver services at lower cost than two or more track operators over a wide range of demand levels and that it is only when the use of a railway approaches the maximum scope of its potential capacity that it would become economical to develop another facility.

Demand for the Robe Service

5.64 Demand for the Robe Service will arise from the haulage requirements of the Robe Service Providers. Other parties with iron ore resources in the vicinity of the Robe Railway may also have demand for the Robe Service. This could include a mining company that wishes to access the Robe Service to haul on its own account or a mining company that seeks to use haulage services offered by other rail freight operators that have access to the Robe Service—this potentially includes the Applicant and other iron ore haulers or specialised rail freight operators.

5.65 There are currently many companies that are exploring and developing tenements in the vicinity of the Robe Railway. Realistically, however, only some of the tenements in the area will contain sufficient iron ore to be viably mined, only a proportion of the total ore resource will be extracted and sold in any given period. Only a proportion of the companies in the vicinity of the Robe Railway will seek to transport ore using the Robe Service.

5.66 Over the past few years iron ore production in the Pilbara has significantly outstripped expectations because actual demand for iron ore exports and the price of iron ore has been much higher than expected. A range of industry forecasts and planned investment activity in the Pilbara indicate that demand for iron ore is expected to grow at a relatively rapid rate and prices remain high for a sustained period.

5.67 The Council accepts there are difficulties in determining with precision likely future demand for the Robe Service. The Council agrees with Professors Ordover and Kalt that the all points service sought by the Applicant and a lack of specificity as to sources, levels and route requirements of demand for haulage services (and hence access to the Robe Service) make numeric estimates of demand requirements, and comparisons with achievable capacity and the costs of expanding the Robe Railway, problematic. However, the Council does not believe that such a calculation is an essential requirement of criterion (b).

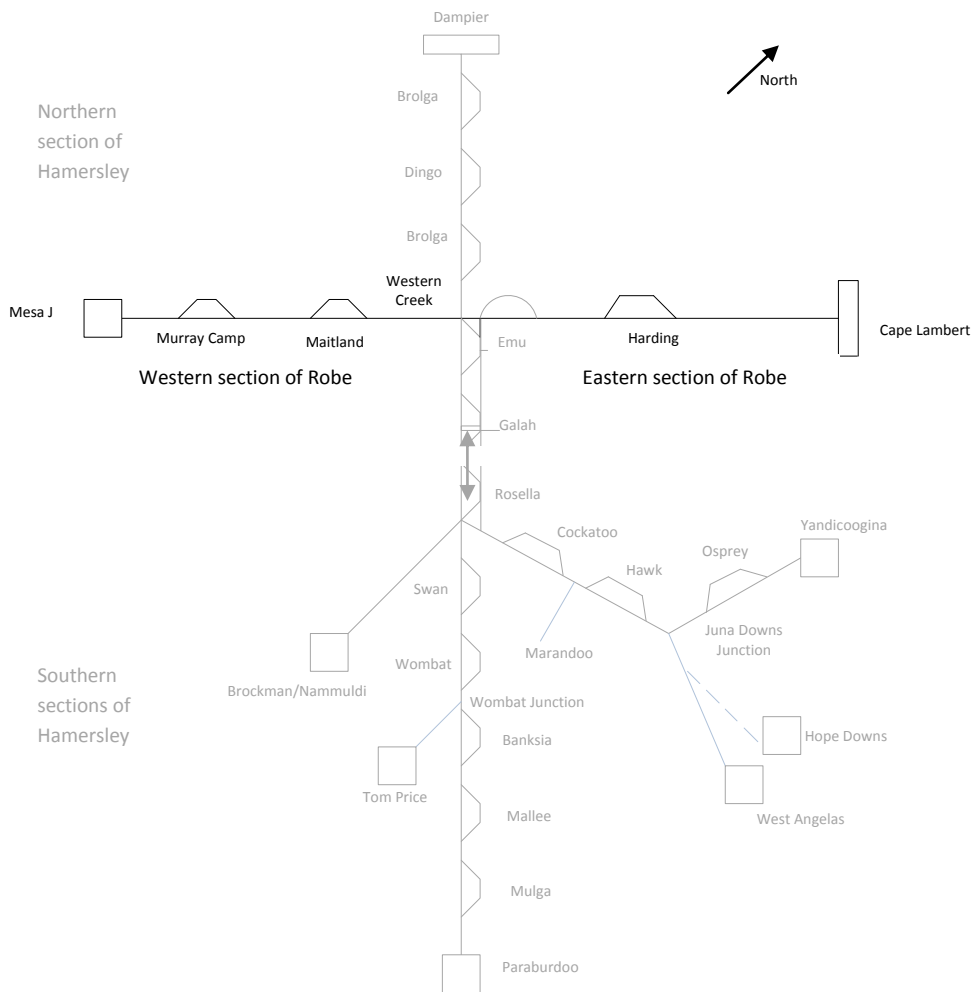
5.68 The Council believes that even broad indicative estimates of demand will assist it to consider criterion (b) by informing the overall judgment required in assessing

whether the criterion is met. The Council does not accept that if precise calculations cannot be made criterion (b) can never be satisfied and the application must fail.

5.69 At present Pilbara Iron (a wholly owned subsidiary of Rio Tinto Limited) has the exclusive right to manage and operate the railway assets that form the Robe and Hamersley railway network. Pilbara Iron is thus the exclusive user of the Robe Service on behalf of the Robe Service Providers.

5.70 Pilbara Iron operates the Robe Railway and Hamersley Railway on an integrated basis. Where the Robe and Hamersley railways intersect at the Emu/Western Creek junction, Pilbara Iron can switch trains from the Robe Railway to the Hamersley Railway and vice versa to provide haulage services from the mines on either railway to either Port Dampier or Cape Lambert (see Figure 5-2). In particular, the eastern section (from the Emu/Western Creek junction to Cape Lambert) of the Robe Railway is increasingly likely to be used to carry ore from mines connected to the Hamersley Railway.

Figure 5-2 Schematic of the Robe Railway showing the intersection with the Hamersley Railway



Note: Based on the configuration of the Robe and Hamersley railways in 2006.

- 5.71 In 2007 Pilbara Iron hauled a total of 54 million tonnes of iron ore on the Robe Railway. As outlined in paragraph 5.17, Rio Tinto Iron Ore plans to expand its iron ore production to approximately 320 mtpa by about 2013. Rio Tinto Iron Ore expects that by around [], its production and exports could grow to around 420 mtpa and that it may need to expand production beyond 500 mtpa by 2027 if it is to maintain its current market share (RTIO, Sub 1 Annexure 5). It currently has sufficient capacity to export around 140 mtpa from Dampier and about 80 mtpa from Cape Lambert (planned for the end of 2008). To operate at rates of 320-420 mtpa Rio Tinto Iron Ore proposes to increase its capacity to export from Cape Lambert. It does not at this stage plan to increase its capacity to export from Port Dampier beyond 140 mtpa. Thus most additional export volumes will be carried on the eastern section of the Robe Railway.
- 5.72 Information provided by Rio Tinto Iron Ore suggests that Pilbara Iron's maximum demand for the Robe Service on the western section will remain at about 30-32 mtpa over the short to medium term. Its demand for use of the eastern section of the Robe Railways is expected to be [].
- 5.73 In addition to Pilbara Iron's demand for the Robe Service, the Applicant, Rio Tinto Iron Ore and other parties indicated that there are a number of iron ore explorers and developers in the vicinity of the Robe Railway that may have demand for the Robe Service in the reasonably foreseeable future.
- 5.74 Furthermore, should both the Robe Service and the Hamersley Service be declared there may be an opportunity for the Applicant, or other haulage operators, to access a connection service allowing it to offer services using a combination of the track services on the Hamersley Railway and the Robe Railway to allow transport between mines in the Robe Railway and the Hamersley Railway catchments to either Dampier or Cape Lambert. This would allow access seekers to offer much the same services as is currently provided by Pilbara Iron to the Robe Service Providers and the Hamersley Service Providers.
- 5.75 In light of the Applicant's request for an all points service, given the buoyant exploration and development activity in the Pilbara region and high demand for iron ore globally, Rio Tinto Iron Ore considered that it is not possible to estimate demand because there is potentially an infinite number of services that could be sought.
- 5.76 The Council agrees that an all points service, as sought by the Applicant, would allow access seekers to offer a range of haulage services between different locations. Indeed the ability to offer a service from, or between, a range of locations seems necessary in order for a haulage service to be of value to different customers with mines in different locations.

5.77 While there are a range of ways access seekers might seek to use the Robe Service the Council considers that the economics of transporting bulk minerals, particularly relatively low value bulk minerals such as iron ore, suggest that iron ore producers will generally look for the quickest and cheapest means of getting their ore to port. Therefore the Council considers that the most likely pattern of demand for the Robe Service will focus on the following services:

- a service between a mine in the Robe Valley and Cape Lambert, using the Robe Service for the length of the Robe Railway
- a service between a mine in the Robe Valley and the intersection with the Hamersley Railway, using the Robe Service on the western section of Robe Railway, and
- a service between the intersection with the Hamersley Railway and Cape Lambert, using the Robe Service on the eastern section of the Robe Railway.³⁵

5.78 The Council considers that it is most likely that any processing of ore in Australia would occur at the mine or the port and therefore this activity would not substantially change the pattern of third party demand for the Robe Service. Further the Council considers that the economics of transporting bulk minerals are such that it is unlikely that anyone would seek a backhaul service for an extended distance on the Robe Railway.

5.79 In order to estimate third party demand for the Robe Service in the short and medium term, the Council has sought to identify the parties who could potentially use the Robe Service (directly or indirectly) over the next five to ten years. The Council considers that only iron ore companies that already have projects with suitably defined resources and relatively advanced production plans, supported by appropriate scoping or feasibility studies, are likely to be in a position to seek to use the Goldsworthy Service over the short to medium term.

5.80 The information available to the Council (as published in submissions and by iron ore explorers) indicates that while there are many tenements being actively explored in the vicinity of the Robe Railway, there are relatively few companies that have announced plans to produce iron ore. The Council is able to identify three projects, which represent potential drivers of demand for the Robe Service over this time period. These are as follows.

- For potential use of the Robe Service for the length of the Robe Railway or for the western section of the Robe Railway:

³⁵ The services described in the second and third points assume access to the Hamersley Railway is available, enabling access seekers to offer haulage using the Robe Railway and Hamersley Railway in conjunction.

- (i) The West Pilbara projects (operated by the Australian Premium Iron Joint Venture (**API**)), which are located south west of Pannawonica. API is expecting the projects to commence production in around 2012 based on producing 10-20 mtpa.
- For potential use of the Robe Service on the eastern section of the Robe Railway:³⁶
 - (ii) The Marillana project (owned by Brockman Resources Limited), which is located 100 kilometres north-west of Newman. Brockman Resources Limited is expecting to produce 1 mtpa in 2009 rising to 25 mtpa by the end of 2015.
 - (iii) The Phil’s Creek project (owned by Iron Ore Holdings Limited), which is close to Yandicoogina. Iron Ore Holdings Limited is expecting to commence production in 2010 at a rate of 1.5 mtpa.

5.81 Table 5-1 sets out the Council’s estimate of potential demand for the Robe Service over the next five to ten years.

Table 5-1 Potential demand for the Robe Service

Source	Timeframe	Western section	Eastern section
		Mesa J to Western Creek/Emu	Western Creek /Emu to Cape Lambert
Pilbara Iron	Short term	30-32	[]
	Medium term	30-32	[]
Third parties	Short term	0	0-12
	Medium term	10-20	25-47 ^a
Total	Short term	30-32	[]
	Medium term	40-52	[] ^a

^a Since the release of the draft recommendations Brockman Resources has revised the expected production rates for the Marillana project. This has led to an expected increase in the lower bound estimate for third party demand of 5 mtpa in the medium term, but has no effect on the upper bound estimate of demand.

Source: RTIO, Sub 1; NWIOA, Sub 1; company web site.

5.82 There is scope for demand to grow beyond these levels in the longer term and for other sources of demand to emerge given continuing high demand for iron ore and consequent price increases but at this stage it is unclear where this demand might occur and at what levels.

³⁶ This assumes that the companies are able to access the Robe Service via another service (such as the Hamersley Service).

5.83 The Council would not necessarily expect each access point that may be used by an access seeker to be negotiated on an individual basis or to be available on the same access terms or charges. The Council envisages that access to some parts of the Robe Railway may involve particular issues and give rise to greater costs, and hence higher access charges, than others. In particular, access prices may be relatively higher and the terms of access more restrictive for services on congested sections of the track where the use of 'installed capacity' is already high. Indeed, Rio Tinto Iron Ore presented modelling by TSG Consulting indicating that the marginal benefits of adding additional trains to the system are likely to diminish more rapidly as a railway approaches capacity (RTIO, Sub 1 at Annexure 8). It may be that access to services on some parts of the railway will not be available where congestion is acute and allowing third party access would reduce a service provider's ability to meet its own requirements.³⁷ While this may preclude the Applicant or another access seeker from providing haulage to/from certain points, this appears consistent with the requirements of Part IIIA (including in particular section 44W(1)(a)). Such terms or limitations might be negotiated between the service provider and an access seeker. Should an access dispute arise it could also be considered by the ACCC in the context of the specific situation.

Capacity of the Robe Railway

5.84 The Applicant presented modelling of the capacity of the Robe Railway. This modelling indicates that the maximum haulage capacity of the Robe Railway, as configured in 2006, is about 145-149 mtpa on the eastern section and about 50 mtpa on the western section. The Applicant's modelling suggested that capacity could be increased to about 325 mtpa by double-tracking the eastern section of the Robe Railway. Rio Tinto Iron Ore's export expansion plans imply an expansion of capacity in that section of the Robe Railway. The western section of the Robe Railway (from Mesa J to Western Creek) would likely remain about 50 mtpa unless additional investment was also directed at that part of the railway.

5.85 Comparing this likely capacity with the Pilbara Iron's estimated use of the Robe Service in 2006 indicates surplus capacity across the railway. Compared with Rio Tinto Iron Ore's 2008 production plans and those going forward, however, the modelling suggests there is little or no surplus capacity on either the western or eastern sections of the railway as currently configured or as a result of modelled expansion scenarios.

5.86 Over the medium term and long term it is unlikely that demand for the Robe Service can be accommodated within currently configured capacity given expectations for relatively strong demand growth over the period.

³⁷ This may require the development of an alternative facility to provide part of the service for which declaration is sought. This issue is discussed in chapter 10.

- 5.87 Where likely demand outstrips installed capacity, Part IIIA envisages that it may be necessary for a facility to be expanded to meet demand for a service arising from access. Under the provisions of Part IIIA, where a facility needs to be expanded to meet demand for a declared service, access seekers must negotiate with the service provider for the required capacity expansion. The negotiated options for expanding capacity for iron production and iron ore exports can extend beyond railway capacity and may include options at the mine and port. It is open to parties to negotiate commercially on such matters and it may be the interests of all parties to do so.
- 5.88 The Applicant acknowledged that it would need to negotiate and pay for necessary expansions. The Applicant stated:

In the event that capacity constraints impinge on Robe's operations as a result of the service being offered by TPI, then as part of any negotiations or arbitration subsequent to declaration, TPI would expect to have to invest in expanding the capacity of the Robe Railway or to compensate Robe for any loss of efficiency that resulted (Robe Application Part 1, at [7.21]).

- 5.89 As with other terms relating to access, an inability for access seekers and service providers to reach a commercial arrangement for the provision and funding of expansions may give rise to an access dispute that is subject to arbitration by the ACCC. While the Myers/O'Bryan Opinion submitted by BHP Billiton Iron Ore argues that the ACCC is not empowered by section 44V(2) of the TPA to require a service provider to expand a facility, for the reasons set out in chapter 9 (paragraphs 9.183 to 9.186), the Council does not accept that that view is correct.

The cost of expansion compared to duplication

- 5.90 In the previous section the Council found that the Robe Railway, as currently configured, may not accommodate the likely demand for the Robe Service over the medium to long term. In these circumstances it will still be uneconomical to duplicate a facility where an existing facility can (continue to) be expanded to meet the additional demand at a lower cost than building a new railway could. In these situations criterion (b) requires an assessment of whether it is less costly to meet the demand for the service sought to be declared by expanding the existing facility or by developing and operating another facility.
- 5.91 The Applicant submitted that based on the construction costs for the TPI Railway, the cost of constructing a railway in the Pilbara is around \$3.5-4.5 million per kilometre—or roughly \$12-20 million per loop/siding of 3-5 kilometres in length (Robe Application, Part 1 at [7.19]). Using these estimates, the cost of replicating the Robe Railway would be \$859-1149 million. This assumes a single track configuration with minimal sidings and therefore represents the minimum requirement for providing an all points service to Cape Lambert that is equivalent to that provided by the Robe Railway.

-
- 5.92 The alternative to constructing a new facility is to expand the existing Robe Railway to accommodate third party demand. Rio Tinto Iron Ore's current expansion plans envisage double tracking the eastern section of the Robe Railway. Beyond this there is a range of further options available to expand capacity. Such further expansion is likely to be essential to meeting Rio Tinto Iron Ore's export ambitions.
- 5.93 The least cost and most efficient option for expanding the Robe Railway will depend on a range of considerations, including the existing configuration of the railway and the available land easement. Importantly planning the most appropriate expansion will also need to take account of the source of increased demand—the location and production rate of the mines—and the likely destination point—existing or new port facilities. Without this information it is impractical to specify how the Robe Railway might be expanded to meet likely demand and the costs of doing so.
- 5.94 As discussed earlier, railways generally exhibit natural monopoly characteristics. As such, continued expansion of an existing facility would involve less cost than the construction of a new facility across a wide range of demand levels. This is because expansion will generally involve construction of additional sidings or passing loops, or in some cases double or multiple tracking of relatively short sections of track. It is unlikely that the size and costs of an expansion project will approach those involved in constructing a new railway to provide the Robe Service. Furthermore, because some of the major construction costs of a railway, such as the acquisition of land for the railway easement, earthworks, signalling infrastructure, and construction of bridges and tunnels, are avoided when expanding an existing railway, it is likely that expansion will almost always be cheaper than duplicating a facility. As noted in the previous section construction costs can account for over half the cost of a heavy haul railway over its life. It is also likely that the costs of gaining additional regulatory approvals to expand an existing railway will be less than those for a new railway development. It is only when a railway is at or approaching the maximum scope of its potential capacity that economies of scale are exhausted and it becomes economical to develop a duplicate facility.
- 5.95 Expansion of an existing railway is also likely to result in lower environmental and social impacts than the development of a new facility, although these impacts are hard to express in terms of costs savings.
- 5.96 There may, however, be some costs associated with the sharing of infrastructure services that will offset some of the expected costs savings from access. As noted above the Applicant expects that as part of negotiating the terms and conditions of access it may be required to compensate a service provider for any loss of efficiency that resulted from third party access (see paragraph 5.88). The potential for and magnitude of such diseconomies are discussed in relation to criterion (f) in chapter 9.
- 5.97 There is no evidence to suggest that the Robe Railway is distinguishable from railways that exhibit natural monopoly characteristics or is close to or at maximum potential

capacity. Therefore expanding the Robe Railway to accommodate third party demand is likely to be more economical than duplicating the facility.

Conclusion on criterion (b)

- 5.98 The Council considers that, although in its current and planned configurations the Robe Railway may not have sufficient capacity to meet likely demand for the Robe Service, the costs of expanding the existing railway to meet likely demand are likely to be significantly less than those associated with duplicating the facility.
- 5.99 The Council is satisfied that it would be uneconomical to develop another facility to provide the Robe Service and therefore considers that the Robe Application satisfies criterion (b).

6 Criterion (c) – National significance

Legal requirements

- 6.1 Section 44G(2)(c) of the TPA (**criterion (c)**) seeks to ensure that only those facilities that the Council is satisfied are of national significance can be the subject of a declaration under Part IIIA of the TPA. The Council must be satisfied that the facility is of national significance, having regard to one or more of the following matters specified in criterion (c):
- the size of the facility
 - the importance of the facility to constitutional trade or commerce, or
 - the importance of the facility to the national economy.
- 6.2 While declaration focuses on access to a service rather than a facility, criterion (c) relates to national significance of the facility providing the service. Given that section 44G(2)(c) specifies ‘or’ after each of the specific matters it is clear that criterion (c) will be satisfied if any one of the three factors is met.³⁸
- 6.3 Section 44G(2)(c)(ii) refers to the importance of the facility to constitutional trade or commerce. Section 44B of the TPA defines ‘constitutional trade or commerce’ to mean any of the following:
- trade or commerce among the States
 - trade or commerce between Australia and places outside Australia, or
 - trade or commerce between a State and a Territory, or between two Territories.

Application and submissions

- 6.4 The Applicant submitted that the facility in question is around 210 kilometres in length, which would cost approximately \$735-945 million to replicate and that accordingly, the Robe Railway is of national significance based on its size and cost alone (Robe Application Part 1, at [9.2]).
- 6.5 The Applicant submitted that the Robe Railway is also important to constitutional trade or commerce, on the basis that it supported exports valued at around US\$2.5 billion in 2006 (Robe Application Part 1, at [9.3]). The Applicant also submitted that the Robe Railway is of national significance due to its role in the iron ore trade and its impact on the national economy.

³⁸ See *Re Services Sydney Pty Limited* [2005] ACompT 7 at [180].

- 6.6 The Western Australian Government submitted that the Robe Railway is of national significance on the basis of all three factors listed in criterion (c). The Western Australian Government noted that the Pilbara region is the source of the majority of iron ore produced in Western Australia, and the whole of Australia. The Pilbara region accounts for 95 per cent of Australia's iron ore production.
- 6.7 The Western Australian Government stated that in 2006-07, the value of Western Australian iron ore production increased to a new record of \$15.75 billion (WA Gov, Sub 1 at [4.2]). During this year, Western Australia produced more than 250 million tonnes of iron ore. The Western Australian Government submitted that the iron ore industry is a major contributor to Western Australia's economy, employment and regional development (WA Gov, Sub 1 at [4.2]). As stated by the Western Australian Government:

[The iron ore industry] is the second largest industry contributor to the State's economy, behind only the petroleum sector. Royalties received by the State from this industry amounted to approximately \$851 million for the financial year 2006/07. The industry generates significant export revenue, pays substantial taxes to the Australian Government and is a major driver of regional development in the north west of Australia through the significant employment and social benefits it brings to communities in the Pilbara. (WA Gov, Sub 1 at [4.3])

- 6.8 The AMEC also submitted that the Robe Railway is of national significance on the basis of all three factors listed in criterion (c). The AMEC stated that the volume of iron ore exported, together with the export value of that iron ore, highlights the economic importance of the railway infrastructure (AMEC, Sub 1 at [2.3.8]).

The Council's assessment

- 6.9 The Council received a number of submissions outlining the reasons why the Robe Railway is a facility of national significance. The Council did not receive any submissions stating that the Robe Railway is not a facility of national significance.
- 6.10 The Council is satisfied that the Robe Railway is of national significance having regard to the size of the facility, the importance of the facility to constitutional trade or commerce and its importance to the national economy.

Conclusion on criterion (c)

- 6.11 The Council considers that the Robe Application satisfies criterion (c).

7 Criterion (d) – Health and safety

Legal requirements

- 7.1 Section 44G(2)(d) of the TPA (**criterion (d)**) requires that the Council be satisfied that access to the Robe Service can be provided without undue risk to human health or safety. This involves a consideration of:
- the nature of the potential risks associated with access, and
 - whether access can be provided in a manner that removes or appropriately manages any such risks.

Application and submissions

- 7.2 The Applicant stated that if the Robe Service is declared, it will operate in accordance with best practice and comply with all relevant safety and other legislation (Robe Application Part 1, at [10.1]). The Applicant also stated that it will ensure that its operations are safely and effectively integrated with existing 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. The Applicant anticipated that if the Robe Service were declared, it would be operating a rail haulage service on its own railway by the time access became available, meaning that it would be familiar with the health and safety requirements of the Western Australian Government (Robe Application Part 1, at [10.2]).
- 7.3 The Applicant acknowledged that its trains would effectively be under the control of the controller of the Robe Railway (Robe Application Part 1, at [10.3]). Finally, the Applicant anticipated that the terms of access agreed or negotiated would include terms to ensure a similar standard of safety as currently applies to the facility (Robe Application Part 1, at [10.4]).
- 7.4 Both the Western Australian Government and the AMEC were of the view that track access can be provided without undue risk to human health or safety (WA Gov, Sub 1 at [5.3]; AMEC, Sub 1 at [2.4.1]). The Western Australian Government confirmed that all access seekers' rail operations would be subject to regulation under the *Rail Safety Act 1998* (WA). The AMEC suggested that access might reduce risks to human health and safety due to reduced transport of ore by road, although in the Council's view this factor is more relevant to criterion (f) than criterion (d).
- 7.5 Rio Tinto Iron Ore argued that the Council cannot be satisfied that access can be provided without undue risk to health and safety because the Applicant had not outlined a specific safety regime. It submitted:

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'. (RTIO, Sub 1 at [8.4])

- 7.6 Rio Tinto Iron Ore also argued that allowing multiple users on to the Robe Railway would give rise to a decline in safety. Specifically, Rio Tinto Iron Ore stated:

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...

...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...

...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... (RTIO, Sub 1 at [8.7]-[8.9])

- 7.7 Rio Tinto Iron Ore also considered that if it were to introduce automated trains there would be an increased likelihood of accidents arising from concurrent use of the Robe Railway by manned and unmanned trains. It submitted:

...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. (RTIO, Sub 1 at [8.10])

The Council's assessment

- 7.8 Criterion (d) is concerned with the potential for access to be provided in a manner that does not impose undue risks to health and safety. The Council does not accept Rio Tinto Iron Ore's submission that the Applicant must describe or document specific arrangements concerning safety issues before the Council can be satisfied that access can be provided without undue risk to health and safety. Such an approach is inconsistent with the language of criterion (d) and would impose a requirement that applications for declaration include an unrealistic level of specificity and detail. It should also be noted that the language of criterion (d) suggests that it is not concerned with whether the proposed use of the service by a specific third party would impose risks to health and safety, except insofar as a third party's proposal may

provide evidence of the ability of an access agreement to avoid such risks. In this respect, the Applicant has stated that it anticipates that the terms of access agreed or negotiated would include terms to ensure a similar standard of safety as currently applies to the Robe Railway.

- 7.9 There are a number of potential risks to human health and safety inherent in operating all heavy haul railways as well as many other facilities of the type that are likely to be subject to declaration applications. Such risks have led to a significant emphasis on occupational health and safety by the Robe Service Providers and also to significant regulatory interventions to mandate and enforce a high standard of safety and safety procedures. In the Council's view it is reasonable to expect that it would be a requirement of any access arrangement, whether resulting from declaration or otherwise, that these standards and procedures are maintained.
- 7.10 The Council is of the view that negotiations between the relevant parties, and if necessary the determinations of the ACCC, in relation to appropriate access terms and conditions are capable of satisfactorily addressing the likely risks which might arise from the presence of a third party's trains on the Robe Railway. For example, access terms can provide for:
- specifications of locomotives and rolling stock to be used by the third party
 - requisite skills, qualifications and training requirements for personnel involved in the operation and maintenance of a third party's locomotives and rolling stock
 - maintenance standards and systems which are compatible with the standards and systems of the service provider
 - use of appropriate safety equipment and systems, and
 - use of safety monitoring systems.
- 7.11 The Council notes that pursuant to section 44X(1)(f) of the TPA, the ACCC is specifically required to take into account the operational and technical requirements necessary for the safe and reliable operation of any facility in determining access disputes.
- 7.12 There is no evidence to suggest that the Robe Railway control system would be unable to safely accommodate an increase in the number of trains. There is no evidence of any significant difficulties experienced in integrating additional trains into the control system of the Robe Service in the past, and there are proposals to introduce additional trains in the future.
- 7.13 The Council is not persuaded by Rio Tinto Iron Ore's argument that the integration of a second (or subsequent) operator's trains onto the Robe Railway will result in undue risk to health and safety. While this might arguably introduce an added degree of complexity to the control and scheduling operations, there will only be one controller

on any rail facility and the provision of access under Part IIIA of the TPA would not change that situation. Declaration of the Robe Service will not result in any change in the management and control of the Robe Railway.

- 7.14 Continuing to have a single controller would allow for management of operational risks associated with multiple users because one party would remain responsible for control of the Robe Railway and, therefore, the management and coordination of all train pathways including scheduling and signalling. An access seeker's trains would be required to follow operational instructions in the same manner as a service provider's own trains.
- 7.15 Appropriate negotiations or arbitration outcomes could also address issues that might arise if Rio Tinto Iron Ore were to introduce a system involving automated, driverless trains. The possibility that an access seeker might also be required to make changes to accommodate a move to the use of automated trains by Rio Tinto Iron Ore, or even be required to move to automated trains itself, would be a matter for negotiation between the parties or if necessary arbitration by the ACCC in a particular situation. Rio Tinto Iron Ore noted that it is theoretically possible to operate a mix of manned and automated trains and that it will itself be introducing automated trains progressively.
- 7.16 The Robe Railway is regulated under the *Rail Safety Act*, which requires the owner and operator of the Robe Railway to be accredited under that Act. Access would not alter this situation. Any access seeker would also need to be accredited as an operator under the Act. Accreditation requires, among other things, owners and operators to put in place a documented rail safety management plan and ensure the proper maintenance of rail infrastructure and proper operation of train control, signalling and communication systems. Accreditation provides assurance that railway organisations have in place the competency, capacity and systems necessary to operate safely.
- 7.17 In addition to the *Rail Safety Act*, the owners and operators of all trains using the Robe Railway are governed by specific occupational health and safety legislation.
- 7.18 The Council noted the Applicant's submission that it is likely to be familiar with Western Australian health and safety requirements, which would include the *Rail Safety Act*, as it is operating trains on its own railway in the Pilbara, which is also subject to that Act. This may assist this particular access seeker in meeting its obligations under the *Rail Safety Act*.
- 7.19 The Council is of the view that the requirement that any access seeker seeking to operate trains on the Robe Railway be accredited under, and comply with, the *Rail Safety Act* will ensure that its operations will be carried out in a manner that ensures no undue risk to health or safety. Regulation of complex and potentially hazardous infrastructure in multiple user situations is not an uncommon situation facing safety

regulators, and the Council is unaware of any evidence to suggest that the regulation of rail safety would be made less effective as the result of access.

Conclusion on criterion (d)

7.20 The Council considers that the Robe Application satisfies criterion (d).

8 Criterion (e) – Effective access regime

Legal requirements

- 8.1 Section 44G(2)(e) of the TPA (**criterion (e)**) provides that the Council must not recommend that a service be declared unless it is satisfied ‘that access to the service is not already the subject of an effective access regime’.
- 8.2 In deciding whether a regime established by a state or territory constitutes an effective access regime, the Council must apply the ‘clause 6 principles’,³⁹ must have regard to the objects of Part IIIA,⁴⁰ and, subject to section 44DA,⁴¹ not consider any other matter (section 44G(3) of the TPA).
- 8.3 Where a service is the subject of an access regime that has been certified as an effective access regime by the relevant Commonwealth Minister under Part IIIA, the Council must follow that decision unless it believes that, since certification, there have been substantial modifications to the access regime or to the clause 6 principles (section 44G(4)). Similar provisions bind the designated Minister in relation to certified access regimes (section 44H(6)).

Access undertakings

- 8.4 The Council must not recommend declaration of a service that is subject to an access undertaking that has been accepted by the ACCC under section 44ZZA of the TPA (section 44G(1)). Neither may the designated Minister declare such services (section 44H(3)).
- 8.5 The ACCC has not accepted any access undertakings in relation to the Robe Service. Therefore, the Council is not prevented in this regard from recommending that the Robe Service be declared.

³⁹ The ‘clause 6 principles’ are set out in clause 6 of the Competition Principles Agreement between the Commonwealth and all states and territories of Australia, initially entered into on 11 April 1995, and amended several times, most recently on 13 April 2007.

⁴⁰ The objects of Part IIIA are set out in section 44AA of the TPA (see paragraph 3.9 of this recommendation).

⁴¹ Section 44DA of the TPA provides that the Council, in applying the clause 6 principles, must treat each individual relevant principle as having the status of a guideline rather than a binding rule.

Application and submissions

Applicant

- 8.6 The Applicant made submissions regarding criterion (e) in relation to the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA) (together, the **WA Rail Access Regime**) (Robe Application Part 1, at [11.6]-[11.9]), the *Iron Ore (Robe River) Agreement Act 1964* (WA) (Robe Agreement Act) (Robe Application Part 1, at [11.10]-[11.11]) and a State-based regime currently being developed by the Western Australian Government for access to rail haulage services for iron ore in the Pilbara (**Proposed Pilbara Rail Haulage Regime**) (Robe Application Part 1, at [11.12]-[11.16]).
- 8.7 The Applicant submitted that none of these access regimes is effective in respect of the Robe Service.
- 8.8 The Applicant stated that the WA Rail Access Regime has not been certified as an effective access regime under Part IIIA, and in any case does not apply to the Robe Railway.
- 8.9 The Applicant submitted that the Robe Agreement Act (unlike the Robe Service) does not provide for access to the below rail service provided by the Robe Railway; it does not allow third parties to access the Robe Railway to transport goods using their own rolling stock.
- 8.10 Regarding the Proposed Pilbara Rail Haulage Regime, the Applicant submitted that it is not known whether it will ever commence operation and, if it does, whether it will operate effectively to give third parties access to haulage services on Pilbara railways. The Applicant further submitted that the proposed regime could not be an effective access regime for the Robe Service under criterion (e) given that it would require the Robe Service Providers to provide a haulage service and would not provide for third parties to access the relevant rail tracks to enable third parties to run trains or provide haulage services.

Western Australian Government

- 8.11 The Western Australian Government referred to the Robe Agreement Act and similar agreements entered into between the State and mining companies in the 1960s collectively as the 'State Agreements'. It noted the adoption of third party access clauses in the State Agreements requiring haulage be provided for third parties' freight (and passengers), citing the following from the Robe Agreement Act:

[the State Agreement companies must] ... operate their railway in a safe and proper manner and where and to the extent that they can do so without unduly prejudicing or interfering with their operations hereunder carry freight and transport the passengers of the State and of third parties on the railway subject

to and in accordance with by-laws (which shall include provision for reasonable charges). (WA Gov, Sub 1 at [6.2])

- 8.12 The Western Australian Government stated that clauses in the State Agreements such as the clause above ‘clearly demonstrates the Government’s long sought policy objective that State Agreement companies carry third party freight, provided that it does not unduly prejudice, or interfere with, their operations’ (WA Gov, Sub 1 at [6.2]). The Western Australian Government went on to note:

However, to date, no independent access seeker has been able to negotiate satisfactory access arrangements with these Agreement companies. It is difficult to conclude therefore, that these State Agreement rail access provisions have been effective.

These State Agreement Acts were executed well before access regulation had developed to any material degree in any industry in Australia. The third party access provisions contain relatively high-level obligations and lack the detail required to bring about third party access. It is, therefore, not surprising, in hindsight, that those State Agreement access provisions have not proven to be an effective vehicle for any new market entrants. (WA Gov, Sub 1 at [6.3]-[6.4])

- 8.13 The Western Australian Government also discussed the Proposed Pilbara Rail Haulage Regime. It submitted that it ‘is undertaking the development of a State-based haulage regime for the Pilbara iron ore carrying railways’ (WA Gov, Sub 1 at [1.12]). The Western Australian Government intends that the Proposed Pilbara Rail Haulage Regime be certified as an effective access regime under Part IIIA of the TPA, but noted that there is no guarantee that either legislative enactment or certification of the regime will occur (WA Gov, Sub 1 at [1.20]). Furthermore, the Western Australian Government noted that it is not anticipated that the Proposed Pilbara Rail Haulage Regime will be unilaterally implemented across all rail infrastructure in the Pilbara and that therefore it will require the mutual consent of the State Agreement companies (WA Gov, Sub 1 at [6.7]).

Other parties

- 8.14 The AMEC submitted that the Robe Application satisfies criterion (e), citing the Applicant’s submissions in support (AMEC, Sub 1 at [2.5]).
- 8.15 None of the other parties who made submissions to the Council on the Robe Application made submissions in relation to criterion (e).

The Council’s assessment

- 8.16 The Council has considered whether the Robe Service is already subject to an effective access regime in terms of general rail regulation in Western Australia, the Robe Agreement Act, or the Proposed Pilbara Rail Haulage Regime. In doing so, it is

necessary first to note the distinction between the Robe Service and rail haulage services.

The Robe Service is a rail track service

- 8.17 As discussed earlier, the Robe Service is an all points ‘rail track’ or ‘below rail’ service, which would enable the Applicant or other access seekers to run their own trains along the Robe Railway.
- 8.18 Rail track services may be distinguished from ‘haulage’ or ‘above rail’ services, in which a service provider offers haulage services including the provision of locomotives and rolling stock. This is a conventional distinction that underpins economic and legal analysis of railway services in Australia and elsewhere.
- 8.19 The Applicant seeks access to the Robe Service to enable it to offer a rail haulage service to third parties seeking to move bulk minerals between any two points on the Robe Railway.
- 8.20 The distinction between rail haulage and rail track services, and the fact that the market for haulage services on the Robe Railway is distinct from the market for the Robe Service, is discussed in chapter 4 in relation to criterion (a).

Western Australian Rail Access Regime

- 8.21 Currently, the only access regime that applies to rail track services in Western Australia is the WA Rail Access Regime. Pursuant to section 4(2) of the *Railways (Access) Act* and section 5(1) of the *Railways (Access) Code*, the railways to which the WA Rail Access Regime applies are those listed in schedule 1 of the Code. As noted by the Applicant, the Robe Railway is not listed in that schedule.
- 8.22 Given the WA Rail Access Regime does not apply to the Robe Service, the Council finds that the WA Rail Access Regime is not an effective access regime for it.

Robe Agreement Act

- 8.23 The Robe Agreement Act includes a provision regarding the operation of the Robe Railway that requires the railway operator to carry the freight of third parties in certain circumstances, including where to do so would not unduly prejudice the operations of the joint venturers (section 9(2)(a) of schedule 1, quoted at [8.11]).
- 8.24 The Robe Agreement Act has not been certified as an effective access regime under Part IIIA. Moreover, as noted by the Western Australian Government, ‘no independent access seeker has been able to negotiate satisfactory access arrangements with these [State] Agreement companies’ (WA Gov, Sub 1 at [6.2]).

- 8.25 In any case, any access rights provided under the Robe Agreement Act are haulage rights, not rail track access rights. The Robe Agreement Act does not, in any circumstances, place any obligation on the State Agreement companies to allow third parties to use the tracks to transport freight using third parties' own trains.
- 8.26 Accordingly, the Council finds that the Robe Agreement Act does not provide an effective access regime for the Robe Service.

Proposed Pilbara Rail Haulage Regime

- 8.27 On 10 June 2008 the Western Australian Government released for public comment its draft Pilbara Railways (Third Party Haulage) Regime and a public consultation paper, with a view to seeking submissions from industry participants and the public generally. Following the six week public consultation process, the Western Australian Government plans to consider the outcomes of the consultation, the preferred format of the regime and how it could be implemented.
- 8.28 At this time the Council cannot be confident as to the content and timing of the Proposed Pilbara Rail Haulage Regime. As the Western Australian Government recognises, considerable barriers exist to the regime's ultimate implementation.
- 8.29 In any event, were the Proposed Pilbara Rail Haulage Regime in effect, the intention is that it would apply to haulage services, not rail track services. As discussed in chapter 4, the Council considers that haulage services are functionally distinct from rail track services, such that a regime providing effective access to the former does not provide effective access to the latter for the purposes of criterion (e).
- 8.30 The Council notes, however, that the operation of a demonstrably effective regime regulating the availability and pricing of haulage on the Robe Railway would be a significant factor in considering criterion (f). Such a situation may also be relevant to criterion (a). To the extent that haulage is an acceptable substitute for running trains and meets the requirements of mine operators to transport ore for export, it may be that the additional competition that would arise from access may be immaterial if haulage is already available and subject to appropriate regulation. Alternatively it may be that access to rail track services is properly viewed as complementary to a regime relating to haulage services. At this stage, however, these issues are speculative at most.

Conclusion on criterion (e)

- 8.31 The Council considers that the Robe Service is not subject to an effective access regime and that the Robe Application satisfies criterion (e).

9 Criterion (f) – Not contrary to the public interest

Legal requirements

9.1 Section 44G(2)(f) of the TPA (**criterion (f)**) provides that the Council cannot recommend that a service be declared unless it is satisfied ‘that access (or increased access) to the service would not be contrary to the public interest’.

9.2 When applying the equivalent test in section 44H(4)(f) of the TPA, the Tribunal stated in *Re Services Sydney Pty Ltd* [2005] ACompT 7 at [192]:

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 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).

9.3 The term ‘public interest’ is not defined in the TPA but the Council considers that this term allows consideration of a broad range of issues, including but not limited to:

- ecologically sustainable development
- social welfare and equity considerations, including community service obligations⁴²
- government legislation and policies relating to matters such as occupational health and safety, industrial relations, and access and equity
- economic and regional development, including employment and investment growth
- the interests of consumers generally or of a class of consumers
- the competitiveness of Australian businesses, and
- the efficient allocation of resources.

9.4 Consideration of criterion (f) does not revisit the issues considered under the other declaration criteria. Rather it draws on the Council’s conclusions in relation to those criteria. For example, where the Council has concluded that access will promote a material increase in competition in one or more dependent markets, this will give rise to benefits that should be included in the assessment of criterion (f). Similarly where access will aid in avoiding duplication of a facility that exhibits natural monopoly

⁴² Community service obligations are common in relation to supply of infrastructure services especially to consumers; although there are no explicit community service obligations applying to Pilbara railways.

characteristics, this too will lead to benefits that are appropriately considered under criterion (f).

- 9.5 In the Robe Application, the Applicant submitted that '[w]here criteria (a) to (e) are satisfied, there is a presumption that access is in the public interest' (Robe Application Part 1, at [12.1]) and that there is no reason to rebut this presumption in relation to this matter.
- 9.6 In its submission on the Robe and Hamersley applications, Rio Tinto Iron Ore rejected the suggestion that there was a presumption of the kind suggested by the Applicant.
- 9.7 If the Applicant is suggesting that the benefits arising from the satisfaction of the other declaration criteria flow through to be considered along with other matters in assessing criterion (f), then the Council agrees. If by the use of the term 'presumption' the Applicant intends that special status or weight should be given to these factors, then that would be more than the Council's approach involves.
- 9.8 The Applicant also submitted that in considering whether access would be contrary to the public interest, the Council should not take into account any costs that may flow from declaration. The Applicant based this submission on the Full Court of the Federal Court's finding in *Sydney Airport Corporation Ltd v Australian Competition Tribunal* [2006] FCAFC 146⁴³ that the word 'access' in section 44H(4)(a) (and therefore in criterion (a)) should take its ordinary English meaning and the Full Court's rejection of an approach 'whereby "access" becomes "declaration under Part IIIA"'. Although this finding arose in the context of the Full Court's consideration of criterion (a), the Applicant noted that words are presumed to have a consistent meaning throughout a statute (Robe Application, Part 1 at [12.2]).
- 9.9 Rio Tinto Iron Ore rejected the Applicant's submission that the Full Federal Court's finding that 'access means access' in relation to criterion (a) also applies to criterion (f), and therefore the costs of regulation should not be counted in considering criterion (f).
- 9.10 While the Council accepts that words ordinarily have the same meaning throughout a statute, the Council does not accept that regulatory and other costs that flow from the declaration of a service are excluded from the consideration of criterion (f).
- 9.11 In the Council's view, the purpose of criterion (a) is different from criterion (f). As the Tribunal has noted criterion (f) 'enables 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)' (*Re Services Sydney Pty Ltd* at [192]). The Council considers that this must include consideration of any regulatory or other costs that flow from the declaration of a particular service.

⁴³ See also paragraphs 4.7-4.11 of this recommendation.

- 9.12 The Council does, however, accept that the costs of making and dealing with an application for declaration arise from the enactment of Part IIIA and would be incurred irrespective of whether the application succeeds and declaration, or more broadly access, occurs and therefore these costs are not a factor in considering criterion (f).
- 9.13 Rio Tinto Iron Ore also submitted that paramount importance should be given to the efficient operation of and investment in infrastructure under criterion (f), because of the introduction of the objects clause in section 44AA of Part IIIA.
- 9.14 The Council agrees with Rio Tinto Iron Ore that the effects of access on the efficient operation of infrastructure, including a service provider's operations, should be considered under criterion (f), as should any effects on investment that might result from access to the Robe Service. The Council does not, however, accept that these factors should be given extra weight in that consideration.
- 9.15 A number of other parties submitted that criterion (f) should be interpreted in a particular way in relation to the Robe Application, or that novel qualifications or additions to the criterion should be adopted. A number of these policy related submissions appeared to address what the submitter considers the law relating to access should be, rather than what it necessarily is. These submissions are addressed in chapter 3 of this recommendation and are not considered further here.
- 9.16 The Council also notes the proposition that the consideration of criterion (f) requires a quantitative cost benefit analysis.⁴⁴ In the Council's view this is unrealistic. Quantitative information and estimates may assist in assessments of the type the Council is required to undertake under criterion (f), but in practice many important cost and benefit factors that need to be considered do not lend themselves to quantification. In such situations attempts to provide quantification require assumptions to be made in relation to key issues and judgments. An excessive focus on quantification can lead to complex and largely irrelevant arguments about the numbers while the substantive issues are overlooked.
- 9.17 The Council considers that in answering criterion (f) it is required to be satisfied that the overall costs to the Australian public that arise from access to, in this case, the Robe Service do not exceed the overall benefits.
- 9.18 If the likely costs exceed the likely benefits then access would be contrary to the public interest, so criterion (f) is not satisfied and the Council would be required to recommend against declaration. This assessment is necessarily on the basis of 'likely' costs and benefits as the access (or increased access) is prospective. The assessment also involves consideration of likelihood in the sense that the Council must consider

⁴⁴ BHP Billiton Iron Ore reiterated its view that criterion (f) requires a quantitative cost benefit analysis in its submission in response to the draft recommendation (BHPBIO, Sub 2 at pp24-25). The Council's views on this issue remain as stated above.

the chance that certain outcomes (and associated costs or benefits) will occur. For example, a very costly outcome with a low chance of occurring may not outweigh a smaller benefit which is more certain.

Application and submissions

Applicant

- 9.19 In the Robe Application the Applicant set out a number of benefits to the public that would result from access. The Applicant also addressed a range of issues that might be seen to give rise to costs and why in its view such costs would not occur.
- 9.20 The Applicant submitted that the Robe Service would enable rail haulage services to be offered to potential users of the Robe Railway, possibly in competition with any rail haulage services that might be offered by the Robe Service Providers. Competition for these services would result in more competitive terms being offered for rail haulage on the Robe Railway, in turn promoting competition in the market for iron ore tenements in the Pilbara, which the Applicant stated is in the public interest (Robe Application Part 1, at [12.3]).
- 9.21 The Applicant submitted that access would not result in an adverse impact on incentives to invest in railways:
- because the terms of access should ensure that the Provider receives a commercial return for granting such access which will increase the return on existing infrastructure and ensure that any additional investment required in infrastructure as a result of access is paid for by the access seeker. (Robe Application Part 1, at [12.4])
- 9.22 The Applicant submitted that access would not have a net adverse effect on the efficient use of the Robe Railway, stating that railways enjoy economies of scale such that increased throughput would lower the average cost of transporting bulk materials on it. To the extent the Robe Service Providers suffered a loss of efficiency as a result of access by third parties, the Applicant submitted that such lost efficiency could be restored as a result of additional investment in the railway by the access seeker or compensated for in the access price (Robe Application Part 1, at [12.5]).
- 9.23 The Applicant submitted that '[i]t is in the public interest to see existing rail infrastructure utilised to its full capacity before the environmentally damaging impact of building an alternate railway is considered' (Robe Application Part 1, at [12.6]).
- 9.24 The Applicant made a public interest argument in relation to native title rights, stating that it is 'in the public interest to see existing rail infrastructure utilised to its full capacity before adversely impacting Native Title Rights by constructing a new railway over land over which existing Native Title Rights are enjoyed' (Robe Application Part 1, at [12.7]).

Rio Tinto Iron Ore

- 9.25 Rio Tinto Iron Ore made extensive submissions in support of its argument that the Council should not be satisfied under criterion (f) in relation to the Hamersley Service and the Robe Service. It submitted that its rail and port infrastructure is among the most efficient in the world, and that this efficiency would be jeopardised by allowing third parties access. Rio Tinto Iron Ore submitted that ‘changing the RTIO Rail Network from a single user vertically integrated facility, to a regulated multi user facility’ would give rise to very large costs that should be considered by the Council in assessing criterion (f).
- 9.26 Rio Tinto Iron Ore submitted a report from Port Jackson Partners (RTIO, Sub 1 Annexure 5) modelling the economic impact of expansion delays Rio Tinto Iron Ore say would arise from its rail network becoming a multi user facility.
- 9.27 Port Jackson Partners was instructed by Rio Tinto Iron Ore to assume that delays to expansion projects would occur, and then to quantify the economic impact of such delays over a 20 year period. Three ‘alternative impeded expansion path scenarios’ were modelled:
- RTIO experiences ongoing delays that cause every two-year expansion to take six months longer than planned and of the company’s total lost production, 80 per cent is captured by offshore producers.
 - RTIO experiences ongoing delays that cause every two-year expansion to take eighteen months longer than planned and of the company’s total lost production, 80 per cent is captured by offshore producers.
 - RTIO experiences ongoing delays that cause every two-year expansion to take six months longer than planned and of the company’s total lost production, 50 per cent is captured by offshore producers. (RTIO, Sub 1, Annexure 5 at [4.4.2])
- 9.28 Port Jackson Partners concluded that these scenarios would lead to a net revenue loss with a net present value of between \$11.7 billion and \$31.2 billion, depending on the scenario chosen (RTIO, Sub 1 at [5.43]).
- 9.29 Rio Tinto Iron Ore also engaged Access Economics to provide a report assessing ‘the economy-wide impact of the RTIO Rail Network becoming a multi-user facility’ for the Western Australian economy and the Australian economy over 20 years (RTIO, Sub 1 Annexure 6). This report drew on the conclusions of Port Jackson Partners in quantifying the costs of delayed capacity expansions (see paragraphs 9.26-9.28) and the costs arising from lost system capacity that Rio Tinto Iron Ore submitted would arise if the Hamersley Service and the Robe Service are declared (see paragraphs 9.53-9.57). In the scenario where each Rio Tinto Iron Ore expansion project is delayed by 12 months, and 80 per cent of lost sales are captured by overseas competitors, Access Economics estimated that over 20 years Western Australia’s Gross State

Product (**GSP**) would be reduced by \$13.4 billion and that Australia's Gross Domestic Product (**GDP**) would be reduced by \$14.1 billion. If, further, a 15 per cent loss in system capacity occurred as a result of the multi user inefficiencies Rio Tinto Iron Ore submitted will arise, Access Economics estimated the losses would increase to \$28.9 billion (to the Western Australian GSP) and \$29.6 billion (to the Australian GDP) (RTIO, Sub 1 at [5.97]-[5.98]).

9.30 In response to the draft recommendation, Rio Tinto Iron Ore submitted a supplementary report from Port Jackson Partners, reviewing the assumptions on which their first report was based (RTIO, Sub 2 Annexure 1). Port Jackson Partners discussed the likely length of time it would take to resolve disputes between access seekers and service providers (stating that most negotiations between them would end in dispute). They concluded that it was reasonable to assume that such disputes would take 12 months to resolve, combining 'negotiation time' and 'arbitration time'. Port Jackson Partners reasoned that the time taken to resolve disputes would lead to an equivalent delay in expansions. They stated that '[access seekers] may seek to delay the access provider's expansion plans for their own commercial objectives' (RTIO, Sub 2 Annexure 1 at [3.9.2]). They disagreed with the Council's view that access issues could be dealt with in parallel with expansion planning. Port Jackson Partners referred to the 'actual experience' of the Dalrymple Bay Coal Terminal in support of their conclusions.

9.31 Rio Tinto Iron Ore grouped the costs arising from its railway network becoming a multi user facility into four categories:

- delays to expansion
- displacement costs
- loss of system capacity, and
- disincentives to invest.

9.32 These cost categories are discussed further starting at paragraph 9.35.

9.33 Rio Tinto Iron Ore further submitted that access to the Hamersley Service or the Robe Service 'would not promote competition in any market or generate any other public benefits',⁴⁵ that the Applicant had not articulated any tangible benefits that would flow from access to the Hamersley Service or the Robe Service⁴⁶ and that the benefits that the Applicant had claimed would arise from access to either service in fact would not do so.⁴⁷

9.34 In relation to possible benefits from access, Rio Tinto Iron Ore submitted that:

⁴⁵ RTIO, Sub 1 at [5.2].

⁴⁶ RTIO, Sub 1 at [5.104].

⁴⁷ RTIO, Sub 1 at [5.104]-[5.121].

- the Applicant has not provided any evidence that it will provide a rail haulage service on the Hamersley and Robe railways, in the form of a business case for that service or the identity of customers who would purchase it
- any rail haulage services offered by the Applicant would not increase competition in any market
- its railways are already at full capacity and will continue to be so for the foreseeable future which negates the Applicant's argument that it is in the public interest for the Hamersley and Robe railways to be used to their full capacity before alternative railways are developed
- no public interest benefit would arise from haulage services being made available to companies holding 'stranded ore' reserves because there are alternatives to the Hamersley and Robe railways for transporting viable deposits to port
- where deposits are not sufficiently viable to support construction of their own infrastructure or extension of the Applicant's open access infrastructure, they would also not be viable if they had to bear the diseconomy costs that Rio Tinto Iron Ore submitted would arise from third party access and therefore access would amount to subsidisation by Rio Tinto Iron Ore, which would be economically inefficient and against the public interest, and
- if a deposit would be viable only with access to the Hamersley Railway or the Robe Railway, and Rio Tinto Iron Ore could carry the ore without impeding its operations, then it would have an incentive to reach a commercial agreement with the owner of the deposit.

Delays to expansions

9.35 Rio Tinto Iron Ore submitted that:

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 ... By contrast the coal industry has failed to capture the same opportunity, which was equally available to it. (RTIO, Sub 1 at [5.19])

9.36 In support of this submission Rio Tinto Iron Ore referred to a report it had commissioned from Dr Brian Fisher (**Fisher Report**) (RTIO, Sub 1 Annexure 4). Rio Tinto Iron Ore noted the Fisher Report included a comparison of the performance of Australia's iron ore and coal industries between 1998 and 2006. The company noted that for both iron ore and coal, there was a significant upswing in price during that period from around 2002 onward, underpinned by the industrial transformation of

China. However, while Australia's seaborne iron ore exports accelerated from a growth rate of 4.4 per cent per annum between 1998 and 2002 to 10.5 per cent per annum between 2002 and 2006, the growth rate of Australia's seaborne coal exports 'remained on a relatively steady path of 4.5 per cent per annum, notwithstanding the significant surge in demand and price' (RTIO, Sub 1 at [5.22]).

9.37 Rio Tinto Iron Ore stated that:

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'. (RTIO, Sub 1 at [5.24], citing Annexure 4 at p6)

9.38 Rio Tinto Iron Ore stated that the above proposition is supported by conclusions in the report to the Prime Minister by the 'Exports and Infrastructure Taskforce' (**Taskforce Report**) (RTIO, Sub 1, Annexure 13). Dr Fisher was the chair of this taskforce. In the context of criterion (f), Rio Tinto Iron Ore identified a number of statements made in the Taskforce Report in relation to capacity problems in Australia's infrastructure for the coal export industry, and comparing the performance of that industry with the performance of Australia's iron ore export industry.

9.39 Rio Tinto Iron Ore cited parts of the Taskforce Report that, similarly to the Fisher Report, noted historical differences between the performance of Australia's export industries for coal from the east coast and iron ore from the Pilbara, emphasising that the iron ore export industry's export chains are vertically integrated, with single users making investment and capacity allocation decisions with little regulatory intervention, and positing these characteristics as causes of that industry's superior performance when compared to Australia's coal industry (RTIO, Sub 1 at [5.25]).

9.40 Rio Tinto Iron Ore concluded that 'expansions to multi-user infrastructure are not undertaken, or are delayed, when compared with expansions to a single-user integrated operation' (RTIO, Sub 1 at [5.31]).

9.41 Rio Tinto Iron Ore then went on to argue why access will cause delays in expansions. It stated that 'delays are inevitable in a multi-user environment', arising out of what it called the 'consent requirement' and the 'consultation/participation requirement'.

9.42 The 'consent requirement' arises from the need for an access provider to obtain an access-seeker's consent or acquiescence before there is any expansion or modification to a facility. Rio Tinto Iron Ore submitted that the need to obtain an access seeker's consent arises in practice even if the terms of access do not require the access provider to obtain it, and further stated that 'terms of access will always guarantee each user certain minimum rights to obtain track access' (RTIO, Sub 1 at [5.33]). By way of example Rio Tinto Iron Ore submitted that:

- project works will commonly involve a reduction in the capacity of the affected areas, which access seekers could delay if they had an absolute right to capacity or rights around the timing and extent of such works
- changes to the physical rail infrastructure, such as to the rail gauge, axle loads or communications systems would affect users and any rights to capacity, and
- changes to network operating practices such as: a move to automated trains; a change in train equipment or new track protection equipment; a move to a flexible scheduling system which requires larger stockpiling systems; changes to train lengths which may also require consequential changes to loading or unloading systems; would affect rights to capacity and therefore require access seekers' approval.

9.43 Rio Tinto Iron Ore submitted that where there are changes that affect the right of a third party user, and it is in the user's interests to object, then the user would invariably do so, and that the resolution of such disputes would likely delay the expansion project. It submitted that such disputes and delays would occur even where the access provider had the right to make decisions as to expansions under the terms of access where those rights were subject to a reasonability criterion, because third party users would argue that expansions are unreasonable where it suits them. Rio Tinto Iron Ore submitted that '[i]t 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' (RTIO, Sub 1 at [5.36]).

9.44 The 'consultation/participation requirement' is one Rio Tinto Iron Ore submitted would arise from access for similar reasons as the 'consent requirement'. Rio Tinto Iron Ore submitted that it could be expected that access terms would allow 'co-users' the right to be consulted or to request or consider participation in expansions, and therefore the decision making process is likely to take longer than in a single user situation. Rio Tinto Iron Ore submitted that the consultation/participation requirement would likely arise irrespective of access terms given the right of co-users to trigger an access dispute under Part IIIA, noting section 44V(2)(d) of the TPA (which states that the ACCC's general power to make determinations on an access dispute includes the power to require the service provider to extend the facility). Rio Tinto Iron Ore submitted that, because of this 'right', 'as a practical matter, the facility owner would need to coordinate its own expansions with any third party users ... who require expansions' (RTIO, Sub 1 at [5.37]). Rio Tinto Iron Ore stated that, for various reasons, divergent interests are likely to arise within a set of multi users as to when and how capacity should be expanded, and that the process of resolving these interests is likely to delay expansions.

9.45 Rio Tinto Iron Ore submitted that '[i]t 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' (RTIO, Sub 1 at [5.38]).

- 9.46 In relation to the likely length of delays caused by an access dispute, Rio Tinto Iron Ore noted that the requirement in the TPA for the ACCC to arbitrate disputes within six months is only a best endeavours requirement, which can be extended. Rio Tinto Iron Ore submitted that disputes are likely regarding access to the Robe Service given the complexity of the issues involved. It further submitted that the length of delays caused by such disputes is not limited to the time the ACCC takes to arbitrate them, but also includes a period of negotiation prior to arbitration and possible appeal processes following arbitration (RTIO, Sub 2 at [2.24]).
- 9.47 In response to the Council's draft finding that access would be unlikely to cause delays near the extent projected by the service providers and their consultants because, inter alia, it would be possible to negotiate access issues in parallel with planning expansions, Rio Tinto Iron Ore submitted that the Council had misunderstood the way expansions are planned and conducted. It argued that meaningful work on expansions cannot commence until the scope of that work is defined and agreed. The scope of work cannot be defined until there is agreement between all participants as to the configuration of the expansion, 'who will be, or could be, using it now and in the future', whether additional capital works should be undertaken now to reduce the incremental cost of future expansions, and who would pay. Rio Tinto Iron Ore discussed the significant risks of shifting scope in the context of such expansions (RTIO, Sub 2 at [2.25]-[2.28]).
- 9.48 Rio Tinto Iron Ore also submitted with its response to the draft recommendation a further report from Dr Fisher, in which he responded to a request to analyse the assumptions that had been made by Port Jackson Partners and Access Economics (RTIO, Sub 2 Annexure 2). (Those assumptions were drawn from Dr Fisher's first report.) In his second report, Dr Fisher reiterated his view that allowing third party access to Rio Tinto Iron Ore's Pilbara railways would result in each of its two year expansion projects taking six, twelve or eighteen months longer than they otherwise would have, and that those delays would cause non-Australian producers to take up the resulting lost market share. Dr Fisher considered that those scenarios are conservative and that the delays in fact may be longer.

Displacement costs

- 9.49 Rio Tinto Iron Ore submitted that it is expanding its rail and port facilities as fast as possible to cater for its needs and that therefore, any access rights given to third parties to use the Hamersley and Robe railway network, or expansions done for their benefit, would occur at the expense of capacity or expansion plans that would otherwise be used for the benefit of Rio Tinto Iron Ore.
- 9.50 Rio Tinto Iron Ore submitted there is 'ample evidence' to support the proposition that it is expanding as fast as it can. It stated that it and its contractors currently have significant vacancies for engineering staff, that it will need to increase its Pilbara workforce by about 1800 employees between 2008 and 2013 under current

expansion plans, and that such staff ‘will need to be obtained in an environment of acute skilled labour shortages in Western Australia’ (RTIO, Sub 1 at [5.47]). Rio Tinto Iron Ore submitted that these problems are exacerbated by long lead times for obtaining equipment and facilities.

- 9.51 Rio Tinto Iron Ore submitted that it is difficult to quantify displacement costs as it is very difficult to estimate demand for haulage tonnages that may arise following declaration. It extrapolated from the Port Jackson Partners report that a displacement of 20 mtpa capacity would, over a 20 year period, result in 369 million tonnes of lost Rio Tinto Iron Ore sales, representing lost revenue of \$22.3 billion. Rio Tinto Iron Ore further asserted that its displaced ore would result in losses to Australia because ‘it is highly likely that the quality ... of the new product will be lower than the high quality RTIO ore that it displaces’. It submitted that a 10 per cent reduction in the quality of the displaced ore would result in a cost to Australia over 20 years of approximately \$2 billion (RTIO, Sub 1 at [5.51]-[5.52]).
- 9.52 In its response to the draft recommendation, Rio Tinto Iron Ore raised section 44ZZN of the TPA, a constitutional saving provision requiring the Commonwealth to pay compensation to any person whose property is acquired by arbitral determination without sufficient compensation. It submitted that ‘declaration and access would amount to an acquisition of property rights conferred on RTIO (eg. RTIO’s rights of exclusive possession conferred by its State Agreements’) (RTIO, Sub 2 at [2.42]).

Loss of system capacity

- 9.53 Rio Tinto Iron Ore submitted that multi party usage of a rail network results in operating inefficiencies and therefore lost overall capacity when compared to single usage. It cited in support an affidavit affirmed by Mr Stephen O’Donnell filed by BHP Billiton Iron Ore in the Tribunal proceeding related to the Mt Newman Railway.⁴⁸ In his affidavit, Mr O’Donnell stated:

Based on my experience working with multi-user systems, it is my view that as a result of the rigid timetable operation which usually exists in a multi-user system it is generally necessary to build an additional 10 to 20% capacity into the system to achieve the same throughput as could be achieved with flexible operation of that system, under the control of a single user and operator. (BHPBIO, Sub 1 Annexure 16 at [25])

- 9.54 Rio Tinto Iron Ore noted the Applicant’s submission that it would accept flexible operating arrangements on the Robe Railway and work to ensure that its access does not unduly prejudice the Robe Service Providers. Rio Tinto Iron Ore stated that even without fixed timetables, some degree of coordination, scheduling, negotiation and interaction between the Robe Service Providers and the Applicant, and significant

⁴⁸ Confidential information in this affidavit was redacted in the version submitted to the Council by BHP Billiton Iron Ore.

loss of system capacity, is inevitable. Rio Tinto Iron Ore submitted such losses would result from a reduced rate of information flow between users in a multi user system, and the fact that users' incentives will differ. While a single user has an incentive to maximise the throughput of the entire system, in a multi user system each user is only concerned to maximise throughput of its own ore. In Rio Tinto Iron Ore's view, this would create responses to issues, for example a train breaking down, that are comparatively less efficient.

- 9.55 Rio Tinto Iron Ore noted that it had announced plans to introduce 'driverless trains' on its rail network on a progressive basis from mid-2009, and asserted that the introduction of third party trains on its railways would adversely impact these plans. Rio Tinto Iron Ore submitted that any third party trains using the Robe or Hamersley services would be manned trains, because the applications for declaration did not extend to the company's remote operations centre in Perth and it is unlikely that the facility could be declared given the intellectual property exception to the definition of 'service'.
- 9.56 Rio Tinto Iron Ore submitted that the introduction of third party manned trains would deprive it of some of the efficiencies it would otherwise have gained through the use of driverless trains, and that an intermingling of manned trains and driverless trains is also likely to cause additional clashes and inefficiencies.
- 9.57 Rio Tinto Iron Ore attempted to quantify the costs of lost system capacity. It submitted that any capacity lost would need to be replaced by capacity expansions, which would occur at the expense of expanded capacity that would otherwise be available to it. Given Mr O'Donnell estimated that 10-20 per cent additional capacity would be required to maintain throughput in the situation described at paragraph 9.53 above, Rio Tinto Iron Ore estimated the costs based on a 15 per cent loss of its production over a 20 year period. It submitted that, based on extrapolation from the Port Jackson Partners report, this would result in forgone sales of 923 million tonnes, representing revenue with a net present value of \$31.4 billion. If 80 per cent of the loss were captured by non-Australian producers, Rio Tinto Iron Ore submitted the cost to Australia would be 738 million tonnes, or lost revenues with a net present value of \$25.1 billion.
- 9.58 In response to the draft recommendation, Rio Tinto Iron Ore further submitted that whether costs to it caused by lost capacity are compensated through access prices is:

beside the point. The losses of system capacity caused by third party use are real, as even the NCC acknowledges. They cannot be ignored for the purposes of assessing whether access would be in the public interest (RTIO, Sub 2 at [2.53]).

Disincentives to invest

9.59 Rio Tinto Iron Ore submitted that access to the Hamersley Service or the Robe Service would create a disincentive to future investments in infrastructure. This would arise, Rio Tinto Iron Ore submitted, from changing from single user, vertically integrated infrastructure to a multi user system. It cited a number of sources in support of this argument, including the following.

- The views expressed in the Taskforce Report (cited at paragraph 9.38 above).
- The Productivity Commission's 2000 report *Progress in Rail Reform*, in which the Commission stated:

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. (RTIO, Sub 1 at [5.81])

and further:

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. (RTIO, Sub 1 at [5.81])

- Dr Fisher, who stated in his report:

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. (RTIO, Sub 1 at [5.83])

9.60 Rio Tinto Iron Ore again highlighted the differences between the performance of Australia's coal and iron ore industries as evidence supporting its argument that multi user transport chains are ineffective in promoting investment in infrastructure, submitting that owners and users with competing interests reduce investment confidence.

9.61 Rio Tinto Iron Ore also submitted that the ACCC, in making its determination in relation to the Capacity Balancing System (**CBS**) in the Hunter Valley coal chain, had recognised that the existence of that system was 'reducing the incentive for the development of a long term solution to these ongoing issues' and had stated that one of the public detriments of the CBS was its impact on investment in the Hunter Valley coal chain (RTIO, Sub 1 at [5.85]-[5.86]).

9.62 Rio Tinto Iron Ore argued that it is vital for Australia’s economy that there be sufficient investment in infrastructure, and cited comments from the Taskforce Report, the Reserve Bank of Australia and the Australian Government in support of this view (RTIO, Sub 1 at [5.74]-[5.77]). Rio Tinto Iron Ore also submitted that the Hilmer Report noted that an access regime needed to provide appropriate protection to facility owners to avoid undermining incentives for investment (RTIO, Sub 1 at [5.78]-[5.80]).

BHP Billiton Iron Ore

9.63 BHP Billiton Iron Ore included a white paper at annexure 1 of its first submission titled *Regulation for the future of Australia’s natural resources sector (BHPBIO White Paper)*.⁴⁹ In this paper BHP Billiton Iron Ore argued that mandating third party infrastructure access is beneficial only where:

- sharing access does not introduce material inefficiency for the overall system, net of additional transaction and ‘friction’ costs⁵⁰
- capacity is sufficient, or incentives are sufficient for ongoing timely and efficient investment in capacity to meet future needs, and
- facility owners are able to—in the absence of such regulation—exercise market power and foreclose beneficial competition.

9.64 BHP Billiton Iron Ore submitted that none of the conditions for the first criterion above is met for export oriented bulk commodity industries, and implied, therefore, that declaration of the Goldsworthy Service (and the Hamersley and Robe services) is not in the public interest.⁵¹

9.65 BHP Billiton Iron Ore identified a number of costs it submitted would arise from access to the Goldsworthy Railway, at least some of which would be potentially applicable to the Hamersley and Robe applications. The costs identified relate to:

⁴⁹ BHPBIO, Sub 1 at Annexure 1. The BHPBIO White Paper appended and drew upon papers by Hausman and Fitzgerald (Allen Consulting Group Pty Ltd). These papers are considered by the Council in its discussion of the BHPBIO White Paper.

⁵⁰ Shared access was argued not to introduce material inefficiency into the overall system for operations requiring ongoing investment in capacity expansion where seven conditions were met, namely, (i) the operation is vertically separable, (ii) sharing assets does not impede operational efficiency, (iii) all key operational and commercial terms are ‘contractable’, (iv) the asset is a natural monopoly, (v) capacity requirements can be forecast with low uncertainty, (vi) the returns offered to the infrastructure provider are market-based, and (vii) beneficial competition is enabled.

⁵¹ Although BHP Billiton Iron Ore’s submissions on the costs of access are in the context of its Goldsworthy Railway, the Council has considered the underlying arguments in its assessment of criterion (f), especially where an issue has not been raised in other submissions.

- costs and feasibility of expanding the Goldsworthy Railway
- regulatory costs
- loss of production
- deterring or delaying optimisation of rail operations
- deterring or delaying efficient investment
- environmental costs
- loss of ‘facilities-based competition’
- diseconomies and inefficiencies of multi user systems compared to single user systems, and
- impacts of regulation.

9.66 In response to the draft recommendation, BHP Billiton Iron Ore further submitted that:

- whether or not capacity and efficiency losses are recompensed in access prices they must still be counted by the Council in assessing criterion (f) as costs weighing against the public interest (BHPBIO, Sub 2 at pp17-18), and
- the ACCC is not empowered to make determinations requiring a service provider to undertake capital works to expand a facility providing a declared service. Further, to the extent the ACCC does have any power to require expansions, it is not prevented from requiring the service provider to bear the costs of doing so (BHPBIO, Sub 2 at [3.45]-[3.51] and Attachment 4). This submission is detailed further below at paragraphs 9.85-9.88.

Costs of expanding the Goldsworthy Railway

9.67 BHP Billiton Iron Ore submitted that at least the Finucane Island section of the Goldsworthy Railway would need to be double tracked in order to accommodate third party access to the Goldsworthy Service. It submitted that the costs of doing so ‘if it were to be feasible, would be in the order of \$100-\$120 million’ (BHPBIO, Sub 1 at [13.4]).

Regulatory costs

9.68 BHP Billiton Iron Ore submitted that the Council should consider regulatory costs, including the direct costs of the Part IIIA access regime and opportunity costs. It submitted that the costs of regulation are likely to be very significant given the range and complexity of issues that can arise under an access dispute (and therefore the six month best endeavours target for the ACCC to resolve such disputes is unlikely to be met), the availability of appeal mechanisms and ‘the opportunity to “game” the system’ (BHPBIO, Sub 1 at [13.6]; BHPBIO, Sub 2 at [3.13]-[3.14]).

Loss of production

9.69 BHP Billiton Iron Ore submitted that third party access to the Goldsworthy Service would result in a loss of operational flexibility on both the Goldsworthy Railway and the Mt Newman Railway, because its ability to adjust its operations ‘within real time’ to capitalise on circumstances of high demand spikes would be restricted. It submitted this would result in lost production and potentially indirect costs related to reduced reliability of supply. It further submitted that operational failures by third party users would occur from time to time, which would lead to further lost production.

Deterring or delaying optimisation of rail operations

9.70 BHP Billiton Iron Ore submitted that third party access would deter or delay optimisation of railway operations because third parties with smaller operations would have no incentive to agree to investments in new technologies or innovative operating practices. Such delay and deterrence would be likely because of the need for consultation, and the lack of agreement and regulatory intervention between third party users such as the Applicant and BHP Billiton Iron Ore, who would be likely to have different commercial objectives.

9.71 In response to the draft recommendation, BHP Billiton Iron Ore submitted a paper in relation to four access undertakings:

- by the Australian Rail Track Corporation (**ARTC**) to the ACCC under Part IIIA
- by Queensland Rail to the Queensland Competition Authority (**QCA**) under the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**)
- by the ARTC, the Rail Infrastructure Corporation and RailCorp to the Independent Pricing and Regulatory Tribunal (**IPART**) under the *Transportation Administration Act 1988* (NSW), and
- by BBI (DBCT) Management to the QCA under the QCA Act.

9.72 BHP Billiton Iron Ore noted that each of these access undertakings required the infrastructure owner to consult with access seekers before undertaking a capacity expansion, that approval is required from the regulator regarding including the cost of the expansions in the regulatory asset base, and in the Queensland cases require a specified percentage of access seekers to approve expansions. BHP Billiton Iron Ore submitted this showed that it is unlikely that the ACCC-determined access terms would allow service providers to proceed with expansions unilaterally (BHPBIO, Sub 2 at [3.17]-[3.20]).

Deterring or delaying efficient investment

9.73 BHP Billiton Iron Ore submitted that the likely differing commercial objectives of it and third party users such as the Applicant would also deter or delay investments in

export infrastructure. It submitted that such delays in responding to increased demand for iron ore would result in substantial opportunity costs. The potential for such costs would enable the Applicant to ‘game’ the regulatory process for its own ends increasing the potential for opportunity costs, inefficient investment and regulatory error.

- 9.74 In response to the draft recommendation, BHP Billiton Iron Ore submitted that access issues could not be dealt with in parallel with expansion planning. It stated ‘[a] party involved in an arbitration is unlikely to proceed with progressing expansion planning and implementation in the environment of uncertainty that will be created by an arbitration about the terms of access’ (BHPBIO, Sub 2 at [3.15]-[3.16]). BHP Billiton Iron Ore submitted that obtaining the agreement of parties internal to BHP Billiton Iron Ore’s vertically integrated operation is quite unlike obtaining agreement of third parties given the former are under its control. It stated ‘[t]he proposition that construction can commence before agreement is reached with other users and operators in the system is manifestly untenable’ (BHPBIO, Sub 2 at [3.41]-[3.44]).
- 9.75 BHP Billiton Iron Ore submitted a paper describing three cases in which ACCC determinations of access and prices under the Gas Code⁵² had been challenged in court proceedings. BHP Billiton Iron Ore argued its paper illustrated that such challenges could result in substantial delays, that there is uncertainty regarding the ACCC’s ability to determine access matters, and that such uncertainty has an adverse impact on investment in infrastructure (BHPBIO, Sub 2 at Annexure 2).
- 9.76 Like Rio Tinto Iron Ore, BHP Billiton Iron Ore referred to the ACCC’s determination regarding the CBS for the Hunter Valley coal chain, arguing it supported its view that access would reduce incentives to invest in infrastructure (see paragraph 9.61 above).
- 9.77 BHP Billiton Iron Ore referred to a paper it submitted entitled ‘Costs of delays to investment in infrastructure as a result of regulatory intervention’ (BHPB, Sub 1 Annexure 14). This paper estimated the following costs to BHP Billiton Iron Ore.
- The cost of delaying its ‘RGP4’ expansion project by one year is in the order of \$900 million.
 - The cost of delaying its subsequent likely expansion project by two years has a net present value of \$1 737 million.
 - The cost of delaying later expansion projects by one year each (on the assumption that one expansion project of similar scope to RGP4 is approved each year) has a net present value of some \$2 000 million.
- 9.78 BHP Billiton Iron Ore concluded that the ‘total cost to BHPBIO of the delays caused by the introduction of a Regulator would be in excess of \$4 600 million’, ignoring the cost of delays post 2015, assuming all expansions would be delayed by ‘a Regulator’, and

⁵² National Third Party Access Code for Natural Gas Pipelines (**Gas Code**)

assuming that regulation would not cause any of the potential expansions to become uneconomic (BHPB, Sub 1 Annexure 14 at [10]-[23]).

Loss of 'facilities-based competition'

9.79 BHP Billiton Iron Ore submitted that in addition to reducing incentives to invest in export infrastructure, third party access would create an additional cost in the form of lost 'facilities-based competition', which, it argued would otherwise provide an incentive for an increase in production. It submitted that, therefore, '[a]llowing use of another producer's railway line is likely to have a dampening effect on that party's production' (BHPBIO, Sub 1 at [13.20]).

Diseconomies and inefficiencies of multi user systems compared to single user systems

9.80 Like Rio Tinto Iron Ore, BHP Billiton Iron Ore argued that '[t]here is a wealth of evidence that production and logistics systems which are integrated single-user systems under unified control are markedly more efficient than multi-user systems' (BHPBIO, Sub 1 at [13.22]). It included with its submission affidavits filed in the Tribunal proceeding concerning the Mt Newman Railway (or extracts or non-confidential versions of them) affirmed by Mr Michael Van Der Worp, Manager of Rail Operations for BHP Billiton Iron Ore's Pilbara operations (BHPBIO, Sub 1 Annexure 3, Mr Andrew Neal, a consultant who proposes to give evidence for BHP Billiton Iron Ore as an expert in the rail industry (BHPBIO, Sub 1 Annexure 15) and Mr Stephen O'Donnell, a consultant who proposes to give expert evidence for BHP Billiton Iron Ore in relation to issues that arise in common user supply chain systems when compared to single user systems (BHPBIO, Sub 1 Annexure 16).

9.81 To the extent that the arguments of Mr Van Der Worp, Mr Neal and Mr O'Donnell are relevant to the Council's assessment of whether the Robe Application satisfies criterion (f), those arguments have either been made by Rio Tinto Iron Ore, whose arguments are summarised above, and/or were made by BHP Billiton Iron Ore in the body of its submission, again referred to above. To the extent the material in those affidavits is relevant, the Council has considered it in considering the Robe Application.

Impacts of regulation

9.82 BHP Billiton Iron Ore submitted that the most significant cost of access was that associated with regulation, which it argued would:

(a) have an adverse impact on Australia's global competitiveness in resources during a time of high demand;

(b) introduce economic inefficiencies in the operation and use of, and investment in, export infrastructure; and

(c) reduce social surplus for Australia. (BHPBIO, Sub 1 at [13.27])

9.83 BHP Billiton Iron Ore referred the Council to the BHPBIO White Paper in support of its argument on the impact of regulation. It set out BHP Billiton Iron Ore’s arguments as to why the conditions for beneficial access referred to at paragraph 9.63 above are not met, and the consequences of that.

9.84 The BHPBIO White Paper annexed a paper by Professor Jerry Hausman titled ‘Economic Analysis of Mandatory Access Provision’ (BHPBIO, Sub 1 Annexure 01-A2). Professor Hausman argued for the existence of ‘three failures of regulation of access infrastructure that lead to under investment by the incumbent’, being:

- asymmetric risk: ‘the incumbent investments are irreversible so they will exist in good times or bad times but the access seeker only purchases access in good times’
- mispriced options to invest: ‘regulation uses a measure of “total service long run incremental cost” ... so it misprices the option to invest by failing to take into account the option to wait’, and
- free option to access seekers: ‘[an access regime] grants a “free option” to the access seeker who has the option to demand service if times are good but to cease to buy the service if time[s] turn bad’. (BHPBIO, Sub 1 Annexure 01-A2 at p14).⁵³

ACCC powers to require expansion to accommodate access

9.85 BHP Billiton Iron Ore submitted a legal opinion from Mr A. J. Myers QC and Mr M. H. O’Bryan (the Myers/O’Bryan Opinion) regarding the powers of the ACCC to determine access disputes (BHPBIO, Sub 2 Attachment 4). This opinion concluded that the TPA does not empower the ACCC to require BHP Billiton Iron Ore to expand the Goldsworthy Railway (or more generally, to require service providers to expand facilities providing services declared under Part IIIA). The Myers/O’Bryan Opinion stated that while section 44V(2)⁵⁴ empowers the ACCC to make determinations dealing with any matter relating to access by a third party to a declared service, and that:

[a]n argument can be made that requiring the provider to expand the facility may facilitate access to the service by the access seeker, and therefore expansion is a matter relating to access. Conversely, a determination that requires an access provider to undertake capital works to construct a second rail track or additional sidings or passing loops is not a determination that truly

⁵³ Many of the other issues addressed in Professor Hausman’s paper are taken up in BHP Billiton Iron Ore’s submissions and addressed by the Council in that context.

⁵⁴ Each of the legislative provisions referred to in this section is extracted in appendix C.

relates to access to the declared service, being the use of the existing railway (and not an expanded railway) (BHPBIO, Sub 2 Attachment 4 at [18]).

- 9.86 The Myers/O’Bryan Opinion stated that under section 44V(2)(d), the ACCC is expressly empowered to ‘require the provider to extend the facility’ but that a distinction must be drawn between ‘extend’ and ‘expand’. The opinion concluded that the ACCC is not empowered to require a service provider to expand a railway (by for example constructing additional sidings or passing loops to enable more trains to use a railway) under section 44V(2)(d), or otherwise.
- 9.87 The Myers/O’Bryan Opinion also considered that section 44W(1)(a) of the TPA, which prevents the ACCC from making a determination that would prevent an existing user from obtaining a sufficient amount of the service to meet its reasonably anticipated requirements, would also prevent the ACCC requiring an expansion of capacity where ‘a requirement to expand a facility has the potential to reduce the capacity of the facility during the period of the expansion by disrupting the use of the facility’ (BHPBIO, Sub 2 Attachment 4 at [29]).
- 9.88 Further, the Myers/O’Bryan Opinion disagreed with the Council’s assertion in the draft recommendation that section 44W(1)(e) (which prevents providers from paying for *extensions* to a facility) prevents an access provider from being required to bear any costs of undertaking an *expansion*. Consistent with the view on the distinction between ‘extend’ and ‘expand’, the opinion concluded that this limitation applies only to an extension or maintaining an extension, not to an expansion.

The Western Australian Government

- 9.89 The Western Australian Government stated that its view is that the Hamersley, Robe and Goldsworthy applications satisfy the criteria for declaration in Part IIIA.
- 9.90 In relation to criterion (f), the Western Australian Government submitted:

As in previous submissions, the Government believes that third party access will ensure that the Pilbara iron ore industry maintains its competitive edge internationally, and strengthen its share of the global market. Effective access arrangements may contribute to an increase in the volume of iron ore available for the export market by helping avoid unnecessary infrastructure duplication and facilitating investment in production. (WA Gov, Sub 1 at [7.1])

- 9.91 The Western Australian Government further stated:

Effective third party access to existing infrastructure is conducive to improved efficiency and competitiveness, by avoiding sub-optimal development and economic duplication of rail infrastructure. This takes into consideration the adverse environmental and social impacts of unnecessary duplication of rail infrastructure, including land corridors, in the Pilbara. (WA Gov, Sub 1 at [1.4])

- 9.92 The Western Australian Government stated that it is concerned that owners of monopoly infrastructure such as the Robe Service Providers have ‘a clear and rational incentive to exercise market power and provide access to the market only on the monopoly provider’s terms and conditions’ (WA Gov, Sub 1 at [1.5]). It submitted that the Hamersley, Robe, and Goldsworthy railways are natural monopolies when considering the transportation of bulk ores from the Pilbara hinterland to Pilbara ports.
- 9.93 The Western Australian Government noted that the State Agreements under which the Hamersley, Robe, and Goldsworthy railways were developed were intended to allow third parties to access haulage services on the railways, though access seekers have not been able to negotiate satisfactory arrangements under them. The Western Australian Government stated that it supports the development of a third party access regime for Pilbara railways that adopts a negotiate/arbitrate procedure. It noted its preference for a haulage regime such as the Proposed Pilbara Haulage Regime over a track access regime such as the Robe Service, noting that in a haulage model ‘the infrastructure owner remains the sole railway operator to ensure overall system efficiency’ (WA Gov, Sub 1 at [1.7]). It noted, however, that there are barriers and uncertainties connected with the implementation of its Proposed Pilbara Haulage Regime (see chapter 8 on criterion (e) for further discussion of this regime).
- 9.94 The Western Australian Government did however note ‘the significant concerns expressed by infrastructure owners with respect to the possibility of providing track access’ (WA Gov, Sub 1 at [1.11]).

Association of Mining and Exploration Companies

- 9.95 The AMEC submitted that the Robe Application satisfied criterion (f). It considered that the public interest would be served by increased access to the Robe Service because it would stimulate iron ore mining activity in the Pilbara, which in turn would increase employment and raise additional taxes and royalties for the State of Western Australia and the Australian Government (AMEC, Sub 1 at [2.6.3]). It believed that it would be more efficient for access seekers to use the existing infrastructure rather than replicate that infrastructure.

North West Iron Ore Alliance

- 9.96 The NWIOA made a submission in response to the Hamersley Application, including some comments that the Council considers are relevant to its consideration of criterion (f) for the Robe Application.
- 9.97 The NWIOA stated that if access to the Hamersley Service is not allowed the only alternative for its members for delivering iron ore from mine to port would be road transport and that if its members had to rely on road transport, production would be significantly restricted with a consequent loss in revenue to affected members and

royalty payments to Western Australia. The NWIOA submitted, regarding the Hamersley Application:

[t]he road transport option is uneconomical because iron ore is a relatively low value product per unit volume and mass. In addition the current Western Australian State Government and Minister for Planning and Infrastructure Hon. Alannah MacTiernan have articulated a clear preference for rail over road haulage and it is unclear whether the necessary Government approvals (including environmental) will be forthcoming for huge tonnages of ore by road. (NWIOA, Sub 1 at pii)

9.98 The NWIOA noted that reducing the rate at which iron ore resources could be exploited would reduce incentives for further exploration and development of other prospective tenements. It further stated that if sufficient revenue is generated through exporting iron ore the income can be directed towards the development of new tenements for the long term sustainability of the individual mining companies (NWIOA, Sub 1 at p10).

9.99 The NWIOA made a further submission in response to the draft recommendations for the Hamersley, Robe and the Goldsworthy applications. It reiterated its view that access to each of the Hamersley, Robe and Goldsworthy services is in the public interest. It submitted that the service providers had not substantiated their arguments that access would cause efficiency losses. The NWIOA further submitted that there is existing experience of providing for third party access to railways, and a number of precedents for the kinds of contracts and other documentation that would be required for providing for terms of access, and this should assist in minimising the impact of access on efficiency (NWIOA, Sub 3 at [2.6]).

Minerals Council of Australia

9.100 The MCA stated it does not support the declaration of the Robe Service or the services provided by any privately-owned iron ore railway in the Pilbara. It considered that the declaration of the Robe Service would be inconsistent with the objects clause of Part IIIA. In particular, the MCA considered that mandated third party access would not be beneficial where the gains from competition resulting from access are small, if not inconsequential, relative to the efficiency losses that access entails. It considered that in this case, access to the Robe Service would severely disrupt Rio Tinto Iron Ore's complex integrated production process leading to an inefficient outcome. The MCA stated that third party access to the Robe Service would:

- reduce the operational efficiency and system capacity of the Robe Railway by around 10–20 per cent, citing the affidavit of Mr O'Donnell (see paragraph 9.53 above)
- have a chilling effect on the incentive to invest in infrastructure, such as the Robe Railway, both from the perspective of the access provider that is

required to share its facility with rivals and by reducing or eliminating the access seeker's incentive to invest because they are able to 'free ride' on the service provider's investment

- lower productivity through a decrease in operational efficiency on account of lower throughput, higher unit costs, and reduced capacity and flexibility in 'accumulating and blending' various grades of ore to meet product specifications
- lead to a loss in Australia's market share of seaborne trade in iron ore, as a consequence of international producers expanding output in response to anticipated reductions in Australian exports, and
- result in a significant loss in Australian wealth and revenue (MCA, Sub 1 at p2).

9.101 The MCA made a further submission in response to the draft recommendation, arguing against access to privately owned infrastructure. As with its first submission, this submission was largely policy related and did not specifically address the criteria to be assessed by the Council under the TPA. The following arguments made by the MCA may be considered new matters.

- The MCA stated the Council appeared to assume that railway ownership by the service providers is 'a historical accident and that they are operated with a primary aim to keep domestic competitors out'. It asserted that such an assumption would be mistaken. Railways ownership by the service providers reflected the imperatives of the international iron ore market (MCA, Sub 2).
- The MCA referred to consultations with members who used the east coast coal export chains. It agreed with Dr Fisher's view that the problems in those chains were caused by their multi user nature. The MCA therefore did not agree with the Council that comparisons with the coal industry were not instructive in relation to the Goldsworthy, Hamersley and Robe applications (MCA, Sub 2).
- It noted the following comment by the Reserve Bank in its June 2008 Bulletin.

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 supply chain of large producers tend to be vertically integrated.

The MCA stated that the Reserve Bank had noted Mr O'Donnell's studies in coming to this view (MCA, Sub 2).

Chamber of Commerce and Industry Western Australia

9.102 The CCIWA submitted that:

Businesses should have legal avenues to pursue the use of nationally significant infrastructure services owned and operated by others on commercially negotiated terms. Where commercially negotiated terms and conditions are not possible, implementing authorities must be sensitive to the implications of their decisions including possible disincentives to future investment that may result from mandated access and it is important that where access is given it is on 'reasonable' terms and conditions and at 'fair' prices. (CCIWA, Sub 1 at p1)

The Council's assessment

Benefits from access

9.103 From its consideration of criterion (a) in chapter 4 of this recommendation the Council has concluded that access to the Robe Service would promote a material increase in competition in the market for haulage services for iron ore on the Robe Railway and the market for iron ore tenements in the Pilbara.

9.104 Given current demand and prices for iron ore it may be commercially viable (although undesirable in a social cost benefit sense) to construct railway facilities to support the development of larger, higher quality or more fortuitously located, iron ore deposits. Arguably the benefits flowing from enhanced competition in relation to these tenements may be small. However, as discussed in chapter 4 there are significant numbers of tenements for which access to existing rail infrastructure is essential for competition and where enhanced competition will produce significant benefits.

9.105 In relation to criterion (b), in chapter 5, the Council concluded that it would be uneconomical to develop another facility to provide the Robe Service, and that should it be necessary to expand the existing railway to meet likely demand, such an expansion is likely to involve significantly less cost than building a new railway to duplicate the facility which provides the Robe Service. Access will, therefore, assist in avoiding inefficient and wasteful investment in unnecessary additional railway infrastructure.

9.106 Both these outcomes will produce benefits that are in the public interest. Based on its assessments in relation to criteria (a) and (b) the Council agrees with the submissions of the Applicant that access to the Robe Service will enable haulage services to be offered on the Robe Railway by persons other than the Robe Service Providers, which would result in more competitive terms for rail haulage on the Robe Railway and increased competition in the market for iron ore tenements in the Pilbara. The Council also accepts the submissions of the NWIOA, the AMEC and the Western Australian Government identifying the role that access would play in accelerating

development of mines and adding to Australia's iron ore exports, while avoiding economically inefficient duplication of infrastructure.

9.107 The Council also considers that access will produce benefits to the public in terms of less use of relatively costly and inefficient road transport and in terms of the associated reduction in the adverse environmental and social consequences of road transport compared to rail. The Council agrees with the submissions of the NWIOA that rail transport of iron ore is environmentally and socially preferable to road transport of iron ore, given the comparatively greater environmental impact of road transport and the impact of increased traffic congestion from road trains and their attendant road safety and maintenance impacts. As noted by the NWIOA, the Western Australian Minister for Planning and Infrastructure has articulated a preference for rail over road haulage for these reasons. Transporting iron ore by rail is more efficient than road haulage in almost all circumstances.

9.108 The Council agrees with the Applicant that minimising unnecessary duplication of rail infrastructure in the Pilbara will create a public interest benefit in the form of a reduced impact on native title rights. Avoiding unnecessary duplication will also reduce the effects on the environment associated with developing additional infrastructure.

9.109 Based on its conclusions on criteria (a) and (b) above, the Council does not accept the arguments of Rio Tinto Iron Ore and BHP Billiton Iron Ore that access will not give rise to public interest benefits.

9.110 The Council rejects Rio Tinto Iron Ore's suggestion that the Council should draw an adverse inference from the fact that the Applicant had not submitted a business plan or identified customers who would purchase its haulage service. The Council has previously taken the view that it is not necessary for an applicant for declaration to present a detailed business plan as to its proposed use of the relevant service to make out a case for declaration.⁵⁵ The task of the Council is not to assess the viability of an applicant's business plan, but to assess whether the service sought meets the criteria for declaration. This has also been consistently held by the Tribunal.⁵⁶ In the Council's view it would frustrate the purpose of Part IIIA if an applicant is required to develop a full business model before the availability of access to the service has reached a sufficient level of certainty. Indeed under the provisions of Part IIIA it is entirely possible that a party which ultimately obtains access resulting from a declaration application may not be the applicant.

9.111 The Council does not accept Rio Tinto Iron Ore's submission that access would not increase competition in any market. Such a submission is contrary to the Council's

⁵⁵ See for example NCC 2004 at [10.7].

⁵⁶ *Re Sydney International Airport* [2000] ACompT 1 at [19]; *Re Services Sydney Pty Ltd* [2005] ACompT 7 at [136].

conclusions in relation to criterion (a) that access would increase competition in the market for rail haulage services on the Robe Railway and in the market for iron ore tenements in the Pilbara. Similarly, given the Council's conclusions under criterion (b), it does not accept the argument that no benefits can arise from access in light of Rio Tinto Iron Ore's view that its railways are operating at full capacity and that this will continue to be the case for the foreseeable future. If required, expansion of the Robe Railway to meet an access seeker's needs (and at an access seeker's expense) is preferable to the construction of new railways from an overall economic and social perspective. Further, access would only be granted to access seekers who can establish that capacity is available for the particular access rights they seek (either upon current configuration of the railway or under an expansion funded by the access seeker), and where such access would not displace existing users, as discussed further below.

- 9.112 The Council accepts that in some limited situations there may be alternatives to access to the Pilbara railways to enable some currently stranded iron ore reserves to be exploited, such as road transport or the construction of alternative railways. However, the Council notes that rail transport is a considerably more efficient and socially preferable option for transporting iron ore than road transport. The Council also notes that in respect of some iron ore reserves in the vicinity of the Robe Railway road will not be a viable option. Therefore, the Council considers that access to those railways would create a material public interest benefit by enabling exploitation of a greater range of stranded ore reserves.
- 9.113 The Council does not agree that iron ore deposits not justifying the construction of dedicated railways would necessarily not be viable where the owner had to bear the diseconomy costs to the incumbent users of providing access, and that access therefore amounts to economically inefficient subsidisation of new deposits by the service providers. As discussed below, the Council considers that the service providers have overestimated the diseconomy costs of access. In any event under the provisions of Part IIIA the terms and prices for access must include a commercial return on a service provider's rail infrastructure investments and compensation to the service provider for costs arising from access. Part IIIA does not require any form of subsidisation of access seekers or their customers. As discussed below, the Council considers it likely that new deposits could be efficiently exploited via access to the Robe Service, at prices and on terms that include compensation to the Robe Service Providers for diseconomy costs, in a manner that involves less overall cost to the Australian economy than would be the case without access. This is a public interest benefit to the Australian economy.
- 9.114 Rio Tinto Iron Ore submitted that it has a commercial incentive to reach agreement with iron ore tenement holders whose ore it could carry without impeding its operations. Given the company's interests and involvement in the dependent markets this is not the case. As discussed in chapter 4 the Robe Service Providers have an ability and an incentive to limit competition in these markets. Furthermore, the

Council notes that both Rio Tinto Iron Ore and BHP Billiton Iron Ore have not to date reached a commercial agreement to carry iron ore without acquiring a substantial ownership interest in the tenement or the revenue from its exploitation and despite the intention that such haulage occur under the relevant State Agreement Act. The Council also notes that declaration does not preclude parties negotiating and agreeing terms for haulage of iron ore.

Costs from access

- 9.115 Rio Tinto Iron Ore and BHP Billiton Iron Ore have set out a range of consequences arising from access to the Robe Service (and to their Pilbara railways generally) that they submitted would lead to costs from access, such that access would be contrary to the public interest. Rio Tinto Iron Ore submitted reports from Port Jackson Partners and Access Economics, and BHP Billiton Iron Ore submitted an internally generated report, that predicted the costs to the companies and Australia from access to their railways would be tens of billions of dollars.
- 9.116 The Council considers that such claims are based on improbable scenarios and unsubstantiated or overly pessimistic assumptions and fail to recognise the range of safeguards within Part IIIA that seek to prevent adverse consequences from access.
- 9.117 Rio Tinto Iron Ore did not initially instruct either Port Jackson Partners or Access Economics to critically analyse the key premises on which their modelling was based; instead, the firms were instructed to assume that access would result in substantial expansion delays and lost production.
- 9.118 In the Council's view the results of the modelling undertaken by Port Jackson Partners and Access Economics, and the various internal analyses, were an inevitable consequence of the assumptions they were instructed to apply, and are unlikely to in fact result.
- 9.119 In response to the Council's draft recommendation, Rio Tinto Iron Ore provided supplementary reports from Port Jackson Partners and Dr Fisher which commented upon the assumptions on which they had based their initial reports.⁵⁷ However, these reports addressed the assumptions on the basis of a misunderstanding of the effects of declaration and the nature of the regulatory consequences that may follow under the negotiate/arbitrate regime that applies to declared services.
- 9.120 In chapter 3 of this recommendation, the Council discussed the character of regulation under Part IIIA (see paragraphs 3.25 to 3.38). In the Council's view, understanding and recognising the differences between the negotiate-arbitrate regime that applies to declared services and the broader, usually significantly more

⁵⁷ No additional report from Access Economics was submitted.

intrusive, forms of industry regulation that apply in most other regulatory situations is essential to properly assessing the potential effects of declaration.

9.121 In general, the Council considers that BHP Billiton Iron Ore, Rio Tinto Iron Ore and a number of other parties have misunderstood or mischaracterised the nature of regulation that might occur under Part IIIA. This misunderstanding is illustrated by submissions and supporting reports that rely on the relevance of regulatory arrangements applicable to the east coast coal chains or regulatory requirements associated with approval of detailed access undertakings, price or revenue caps and other requirements under the Gas Code, when considering the likely effects of declaration on the operation of the Pilbara railways. In the Council's view comparisons with regulation under different regulatory regimes and in different circumstances must be undertaken with care and address the differences in the regulatory regimes and the factual circumstances. Comparisons without this assessment are of little, if any, relevance in considering the costs that might flow from declaration.

9.122 Port Jackson Partners' supplementary report did not address the circumstances that would exist were the Hamersley Service or the Robe Service declared. In particular the report did not recognise that the existing rail operator would remain the dominant user of each railway, with its requirements and interests protected by legislation and prioritised over those of new access seekers. The Council considers that assumptions that access seekers gain significant power over a service provider's facility are unfounded. Further, the Council disagrees with the approach of Port Jackson Partners (and others) whereby the likely length of time taken to resolve an access dispute necessarily equates to a delay.

9.123 Likewise, the Council is not persuaded by Dr Fisher's second report. That report repeated the arguments of his first report without addressing the particular regulatory regimes and circumstances that would apply were the Hamersley or Robe services to be declared.

9.124 Rio Tinto Iron Ore grouped the adverse consequences of access into four categories:

- delays to expansion (see paragraphs 9.35-9.48)
- displacement costs (see paragraphs 9.49-9.52)
- loss of system capacity (see paragraphs 9.53-9.58), and
- disincentives to invest (see paragraphs 9.59-9.62).

9.125 A number of the adverse consequences identified by BHP Billiton Iron Ore also fall within these categories, but in addition BHP Billiton Iron Ore envisaged costs of access arising from:

- costs of expansion to meet access seekers demand

- regulatory costs
- deterrence or delay in optimisation of rail operations
- environmental costs, and
- loss of facilities based competition.

9.126 The Council assesses each of the categories of costs identified by Rio Tinto Iron Ore and/or BHP Billiton Iron Ore below.

9.127 More generally the Rio Tinto Iron Ore, BHP Billiton Iron Ore and other submissions which draw on or repeat the companies' claims that declaration would be contrary to the public interest suggested that access will convert single vertically integrated infrastructure operations into a regulated multi user facility with 'inevitable losses in efficiency'. Rio Tinto Iron Ore and BHP Billiton Iron Ore illustrated this loss in efficiency with repeated references to comparisons between what they see as the effective response of their iron ore export facilities to the sudden upturn in demand from China and the uncoordinated and ineffective response of eastern Australian coal exporters to a similar upturn in demand for coal.⁵⁸ The companies drew on parts of public reports and submissions to suggest the key cause of the difference in responses relates to access regulation and multiple users of infrastructure in the coal industry.

9.128 The reasons for the problems in Australia's east coast coal export industry are varied and complex and there is no single explanation 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. Notably no service or facility in the east coast coal supply chain is declared under Part IIIA.

9.129 In appendix D the Council has set out a summary comparison of the principal features of the regulatory and other relevant factors impacting on the major port and rail services for export of east coast coal, and the Pilbara iron ore railways with and without access. This illustrates the range of differences between the east coast coal

⁵⁸ This differentiation between the performance of Australian iron ore and coal exporters is not universal. The Reserve Bank in its June 2008 Bulletin article quoted by the MCA in its submission on the Council's draft recommendations (refer MCA, Sub 2 and paragraph 9.101) noted 'while coal and iron ore export volumes have risen at a solid pace this decade, this increase was nonetheless modest given the surge in demand from developing Asia. The slow supply response reflects a number of factors including labour and equipment shortages, long lead times for investment, and transport capacity problems.' The Bank also noted that 'Australia's global market share in its two largest exports – iron and coking coal – has remained fairly stable over the past few years. In contrast, despite solid growth in exports, Australia's market share in thermal coal declined, largely because of the rapid expansion in exports from Indonesia and Russia'.

examples and the Pilbara railways and among the east coast circumstances. These differences include the following.

- Most relevant infrastructure facilities on the east coast are government-owned and operated by government corporations or under long term lease arrangements, whereas the Pilbara railways are privately owned and operated and will remain so even if some services provided by such facilities are declared.
- East coast facilities are operated under a range of cooperative mechanisms or under operational separation rules, whereas the Pilbara railways are operated by their major users—a situation that will remain unchanged in the event of declaration.
- East coast port facilities have eight or more significant users, whereas even with declaration the Pilbara railways will have a single dominant user and only a small number of other likely users. Transport of coal on east coast railways is also complicated by a larger number of load points and higher numbers of trains carrying relatively small tonnages. East coast coal trains must also share rail tracks with other freight and passenger trains (coal trains must give way to passenger trains). In the Pilbara trains carrying iron ore run on dedicated specialised railways.
- Pilbara railways are operated as part of vertically integrated arrangements spanning mines, rail track services, above rail operations, ports and in some cases shipping. By comparison vertical integration is rare in the east coast coal supply chain and there is no vertical integration between rail and port operations.
- Most relevant east coast facilities are regulated under comprehensive access arrangements by state regulatory bodies. These arrangements require approval of reference tariffs or revenue caps, valuation of regulatory asset bases and approval of investments that will add to that base and in some cases mechanisms to ration limited capacity. Without declaration, Pilbara railways are not subject to regulation. With declaration they would become subject to the negotiate/arbitrate regime in Part IIIA but as discussed elsewhere this is markedly different to the regulation that applies to the relevant east coast rail and port facilities.
- Decisions on investment in the Pilbara railways are primarily a matter for the owners and operators of the particular railway. With declaration, some accommodation of access seekers may be required. Decisions on investment in east coast rail and port facilities are far more complicated. There are additional considerations involved, including government ownership and requirements for Ministerial approval. In some cases a requirement to serve all users on a first come first served basis also restricts

the ability to enter into long term take-or-pay type arrangements which might otherwise be used to mitigate investment risk.

9.130 The Council fundamentally disagrees with the view 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. The Council considers that generalised conclusions drawn across a range of different factual circumstances are unconvincing.

9.131 In this case, no party arguing against declaration acknowledged or considered the character of regulation of services declared under Part IIIA, the ongoing dominant role of the existing service providers and the safeguards for service providers, or explained how the very significant costs alleged to arise from Part IIIA access could occur despite those safeguards.

9.132 Recognition of the importance of ensuring a service provider's (existing and reasonably anticipated future) use of its facility is a key element of regulation under the negotiate-arbitrate regime in Part IIIA. Part IIIA contains a range of provisions governing the arbitration of access disputes and specific limitations on arbitration determinations by the ACCC which are designed to ensure the availability, prices and other conditions of access balance the interests of service providers and access seekers and achieve a positive national benefit. Service providers and other existing users of the services of declared facilities are given priority in a range of situations. Some of the most relevant provisions of Part IIIA are extracted in appendix D. Notably, when the ACCC is making a determination on an access dispute regarding a declared service, it:

- does not have to allow access
- cannot prevent an existing user from obtaining a sufficient amount of the service to meet its current and reasonably anticipated future requirements, as at the time a dispute arises
- must have regard to the service provider's legitimate business interests
- cannot make the service provider pay for extensions or interconnections to the facility
- must, in setting any access price, take into account the need to give a return on investment commensurate with relevant regulatory and commercial risks, the direct costs of providing access and the economically efficient operation of the facility
- can make a determination dealing with any matter relating to the dispute, and
- must use its best endeavours to resolve the dispute within six months.

9.133 The TPA also includes provisions allowing the ACCC to terminate arbitrations of vexatious or trivial disputes.

9.134 Many of the provisions outlined above are directly aimed at avoiding the outcomes that Rio Tinto Iron Ore and BHP Billiton Iron Ore submitted will result from the declaration of the Pilbara railways. These provisions also apply in circumstances where the Tribunal is reviewing the ACCC's determination of an access dispute.

9.135 In the absence of evidence as to why these safeguards are generally ineffective or would be ineffective in this particular situation the Council must accept that the TPA will operate as intended and that the ACCC in undertaking arbitrations and making access determinations (and the Tribunal in conducting reviews and 're-arbitrating' disputes) will act in accordance with these provisions.

9.136 In relation to the specific categories of costs that were submitted would arise from Part IIIA access, the Council makes the following assessments.

Delays to expansions

9.137 It was argued that access to the Pilbara railways under Part IIIA would inevitably result in delays to expansions. Rio Tinto Iron Ore argued that delays would result because it would need to obtain the consent of access seekers before conducting expansions, either because terms of access would require the consent of other users, or because access terms would 'always' guarantee other users minimum track access rights, which would result in a de facto requirement for consent for any expansion or optimisation plan that affects those rights.

9.138 The Council considers that access under Part IIIA would be unlikely to have these effects given the legislative scheme of Part IIIA, and that the extent and impact of any such delays have been overestimated by the service providers. To the extent that access disputes and the need for arbitration may require time to resolve, the Council notes that the TPA requires the ACCC to use its best endeavours to resolve arbitrations within a six month period. The ACCC's determinations are subject to appeals to the Tribunal. The Tribunal must use its best endeavours to decide reviews of determinations by the ACCC within four months. Both bodies have extensive powers to manage arbitrations, including powers to make interim determinations, to back date determinations and to award costs. They can be expected to use these powers to ensure arbitrations are conducted so as to promote the objectives of Part IIIA, avoid unnecessary or costly delays and sanction parties who seek to 'game' through an access dispute.

9.139 In any case, the Council does not accept that the time taken to resolve an access dispute necessarily equates to a delay. In this regard, the Council also notes various comments, including those by the service providers, as to the planning and commercial evaluation that is associated with the expansion and development of

infrastructure projects. The Council considers that at least some access related issues can be dealt with in parallel with other activities and within overall planning timeframes so as to minimise delay. The Council accepts that it may be necessary for service providers to devote additional resources to addressing access related issues in their planning processes and to adapt their processes to allow for appropriate notice to parties with negotiated access or with access under an ACCC determination. The costs properly attributable to these actions could be included in access charges.

9.140 Generally, however, the Council considers that the service providers have overstated the position of access seekers in relation to declared services. There is no requirement in Part IIIA for access terms set by an ACCC determination to require the consent of third party users before expansions are conducted; there is no 'consent requirement'. Neither is there any requirement in Part IIIA for access terms to guarantee minimum access rights, nor anything preventing a determination that, for example, provides that access is subject to the expansion and optimisation plans of the service provider notified to third party users. Such access terms are entirely possible, where necessary and appropriate, given the arbitration protections for the service provider discussed above. In the Council's view questions of appropriate terms and conditions of access which allow access without incurring undue costs of delay are questions most appropriately dealt with as part of any arbitration process. The Council believes the potential for delays can be appropriately dealt with in that process.

9.141 Further, the preferred option for allowing access to a declared service is through commercial negotiation. Access seekers must negotiate in good faith before bringing an access dispute to the ACCC for determination. Expansions to railways and related infrastructure are necessarily planned many years in advance of work commencing. For example, BHP Billiton Iron Ore has currently announced and approved expansion plans for its Pilbara infrastructure extending over three years into the future, with further (unapproved) expansion plans extending to 2015. Given these time frames, the Council considers it feasible for parties negotiating in good faith to resolve issues relating to the impact of any third party access on expansion and optimisation plans before the commencement of those plans is significantly delayed, or at least, that Rio Tinto Iron Ore's and BHP Billiton Iron Ore's estimates of the extent of any delays to expansions are exaggerated.

9.142 In relation to the 'consultation/participation requirement' that Rio Tinto Iron Ore submitted would exist following access, it is not clear to the Council if this would exist in the manner submitted, or that it would result in delayed expansions. The Council accepts that service providers would likely need to give notice of expansion plans to other users, and consult other users in relation to them. However, this does not necessarily imply that those expansion plans would be subject to veto or undue delay, especially given the time frames in which such expansions are planned.

- 9.143 These arguments are premised on a particular view as to the differences between, on the one hand, a situation where a single party is involved in a decision and, on the other hand, a situation where multiple parties are involved in the decision and ‘axiomatically’, the outcome of the decision is delayed. This view ignores the fact that expansion decisions currently made by the service providers necessarily take place over substantial time periods and already involve a number of parties, both those within the service provider groups who have competing internal priorities, and outside the service providers, such as sub-contractors and planning, safety and environmental regulatory agencies. The Council does not consider that access under Part IIIA on appropriate conditions would necessarily delay expansion or optimisation outcomes if the process is managed appropriately.
- 9.144 The evidence cited by the service providers in support of the view that Part IIIA access would result in delays to expansions is the contrasting performances of Australia’s east coast coal and Pilbara iron ore industries. As discussed above (paragraphs 9.127 to 9.130), the Council considers this comparison unconvincing given the differences between the two industries and the differences between regulation under Part IIIA and the regulatory arrangements applicable to the east coast coal chain. The Council does not accept that the performance of the east coast coal industry establishes that access under Part IIIA would result in equivalent expansion delays.
- 9.145 In response to the draft recommendation, Rio Tinto Iron Ore, BHP Billiton Iron Ore and some others criticised the Council’s draft findings in relation to the potential for access to the Robe Service to delay expansions to the Robe Railway. The criticisms were premised on the views of those parties that the Council had not taken proper account of the time that will be taken to resolve access disputes, the likelihood that terms of access under Part IIIA would effectively give other users a veto over expansions and their assertions that planning and execution of expansions cannot proceed until there is certainty as to Part IIIA access issues.
- 9.146 The Council continues to consider that the service providers have significantly overstated the likelihood of access seekers and third party users seeking to, or being able to, successfully hold up expansions by resort to Part IIIA rights and processes. This flows from the service providers’ misunderstanding of the character of regulation of declared services discussed above and in chapter 3.
- 9.147 Both Rio Tinto Iron Ore and BHP Billiton Iron Ore criticised the draft recommendation for failing to accept what the latter called ‘the real world evidence’ of regulated, multi-user export infrastructure in the east coast coal chains and the poor performance of those coal chains. For reasons already set out, the Council continues to consider that the east coast coal chains are different in many important and relevant respects to the Pilbara iron ore chains. The extent of these differences means that, if the latter’s railways are declared, there can be no useful comparison

between the two. The east coast coal chains are not ‘real world evidence’ of the effect of declaration of the Robe Service.

9.148 Similarly the Council does not consider the four access undertakings referred to by BHP Billiton Iron Ore are of relevance to the declaration of the Pilbara railways. Only one of those access undertakings was given under Part IIIA, and that was in an entirely different context. The assertion that those access undertakings are instructive as to the consequences of declaration of services provided by the Pilbara railways again illustrates a mischaracterisation of the effects of declaration under Part IIIA, and a failure to consider the particular circumstances that would exist in the Pilbara were the Hamersley, Robe or Goldsworthy services declared. In particular no user in those situations was protected by Part IIIA safeguards for the service provider, or equivalent provisions.

9.149 The Council continues to consider that it is unlikely that, as explained above at paragraphs 9.140 to 9.142, terms of access to the Robe Service would be set so as to give third party users an effective veto over expansions. Given the situation likely to exist over the proposed period of declaration, with the Service Provider remaining vertically integrated and the dominant user of the service, and given the legislative protection and prioritisation of the Service Provider’s use and interests, it may be that the ACCC will expect reasonable efforts to inform and consult with access seekers. However it is highly unlikely that the ACCC will set access terms giving third parties an effective veto over expansions or to permit ‘gaming’ of the arbitration process in the way suggested. It is also unlikely that the ACCC would determine an access dispute in a way that enabled access seekers to significantly shape a service provider’s investment activities to their own ends. Determinations allowing an access seeker veto or undue involvement in planning development of a declared facility would frustrate the objectives of Part IIIA and would likely be contrary to the safeguard provisions noted above. These are just some of the mechanisms which the ACCC could adopt to avoid risk of delay. There are undoubtedly other mechanisms. This confirms the Council’s view that appropriate terms and conditions of access to avoid delay are a matter for arbitration.

9.150 The Council acknowledges that the ACCC’s decisions are subject to review processes which may delay resolution of access disputes (although the Council generally believes the role of the Tribunal should be regarded as an important means of ensuring regulatory decisions follow the law, rather than an additional or unnecessary regulatory burden). The Council also accepts that a period of negotiation is likely to precede an arbitrated access dispute and will also add to the time taken to resolve an access dispute. The Council accepts that not all access disputes may be able to be resolved within six months, despite the best endeavours of the ACCC and other parties. However, the Council does not consider it reasonable to suggest all access issues will take an extended period to resolve or that the time taken to resolve a particular issue or dispute will lead to an equivalent delay to an expansion project. While the Council acknowledges that there may be some uncertainty as to how the

ACCC would resolve a particular access dispute, it does not accept that until such uncertainty is entirely resolved a service provider would be paralysed, and could not proceed with expansions of a railway or planning for this.

9.151 The Council considers this is an unreasonably pessimistic view of the likely results of access that again fails to acknowledge the legislative safeguards designed to protect the position and interests of the service providers and prioritise them over access seekers. Most investment and other business decisions are subject to uncertainties and risks. For example, there are risks that expansion works will not receive environmental or planning approvals, or that a reduction in iron ore prices will affect the value of or need for an investment, yet the service providers commonly weigh these risks and proceed with planning expansions pending resolution of these issues. The Council considers it more likely that the service providers would take advice and undertake a realistic assessment of the legal risks involved, and would proceed where the likely benefits of doing so outweigh the likely risks.⁵⁹ To do otherwise would be to act against their own interests by forgoing the benefits of acting earlier.

9.152 Under a negotiated access agreement or arbitrated access determination access seekers may need to be given an opportunity to have their expected needs incorporated into such plans (at their cost) if they can do so in a timely fashion. However, a service provider's investment activities are not likely to be allowed to be held captive to access seeker's delays or mismatched planning processes.

Displacement costs

9.153 No service providers explained to the Council how access to their railways by third parties under Part IIIA would displace the service providers' capacity in circumstances where the ACCC is prohibited from making a determination on an access dispute that prevents an existing user from obtaining a sufficient amount of the declared service to meet its current and reasonably anticipated future requirements. If a particular third party seeks particular access rights to a declared service that would have the effect of displacing the service provider, then the service provider would presumably not agree. If the third party wished to persist with seeking access, then the matter would be taken to arbitration. Where a service provider establishes that access would prevent it obtaining sufficient access for itself, such access could not be granted. Whether such a situation arises in the circumstances of a particular access dispute is a matter to be determined on the facts of that particular case by the ACCC.

9.154 The Council accepts the service providers' submissions that labour and facility shortages currently prevailing in the Pilbara will have an impact on their ability to

⁵⁹ It is also worth noting here that (as discussed further below) in setting the price of access when arbitrating an access dispute the ACCC must take into account the risks taken by the service provider in making the investment and ensure that it is compensated in accordance with those risks.

expand rail and other infrastructure, but the Council does not see how forcing access seekers to add to demand for such resources by constructing unnecessary additional facilities would assist with that issue. If the supply of necessary resources is such that additional expansion projects to meet access seekers' needs cannot be accommodated, and that can be established in a particular case, then it seems to the Council that any resulting access dispute is unlikely to be resolved in favour of an access seeker.

9.155 The Council considers it debatable that a requirement to provide access under Part IIIA amounts to acquisition of property but in any event, considers it is highly unlikely that the granting of access could result in an unjust acquisition of property requiring compensation by the Commonwealth under section 44ZZN of the TPA, as Rio Tinto Iron Ore submitted it may. The Council considers that the provisions of Part IIIA will ensure service providers are justly compensated for any access they must provide. This is the clear intent of the access pricing provisions. The Hilmer Report, when discussing the access regime it proposed in the context of constitutional requirement for property to be acquired on just terms, stated that 'this requirement should be met by the proposed requirement that the owner receive a fair and reasonable access fee' (Hilmer Report, p348). In the unlikely event that that insufficient recompense is available under Part IIIA, it may be appropriate that section 44ZZN would operate in favour of service providers to ensure their position.

9.156 The Council finds that displacement costs are unlikely to arise from access to the Robe Service.

Loss of system capacity

9.157 The Council accepts that access to a railway by third parties is likely to result in some costs to the service providers in the form of lost system capacity and other diseconomies. These costs will be incorporated in likely charges either as a result of negotiated terms of access or if needs be an arbitration. If these costs are large, then it is likely that the costs of access will be correspondingly high and the demand for access lower. In some cases the costs and hence access charges may be so large that access will not occur.

9.158 Generally, the Council considers that the figure of 10-20 per cent capacity impact referred to in Mr O'Donnell's affidavit is unlikely to occur as a result of access to the Robe Service. BHP Billiton Iron Ore and Rio Tinto Iron Ore submitted, on the basis of Mr O'Donnell's affidavit, that Part IIIA access to the Pilbara railways would lead to a 10-20 per cent loss of throughput.

9.159 Mr O'Donnell's evidence is not that Part IIIA access to the Robe Service, or to single user railways, would result in a 10 to 20 per cent impact on throughput, but that this impact may result from 'rigid timetables' that 'usually' exist in a multi user system.

Both Rio Tinto Iron Ore and BHP Billiton Iron Ore cited paragraph 25 of Mr O'Donnell's affidavit. Mr O'Donnell then went on to say:

It may be possible to run a multi-user rail system in a flexible manner, but it would require a sophisticated operational framework, and it would be difficult to implement in a system that was capacity constrained. In addition, the commercial and contractual arrangements governing a flexible operational framework in a multi-user system would be extremely complex. (BHPBIO, Sub 1, Annexure 16 at [26])

9.160 Mr O'Donnell acknowledged that flexible scheduling arrangements are possible, but would be difficult and complex to implement. The Council notes that, if access rights are granted through negotiation or arbitration, it is entirely possible, even likely, given the protections provided to the service provider and the conditions prevailing in the Pilbara iron ore chains, that arrangements for access could require the access seeker to accept flexible scheduling arrangements under the overall control of the service provider. Such arrangements may be more complicated but given the sophistication with which BHP Billiton Iron Ore and Rio Tinto Iron Ore operate the Council considers it is reasonable to assume that such arrangements could be implemented and access seekers will have to operate within such an environment or risk access being unavailable in a particular situation.

9.161 In response to the draft recommendation, Rio Tinto Iron Ore and BHP Billiton Iron Ore criticised the fact the Council did not accept Mr O'Donnell's view that converting a single user railway system to a multi user system would result in a 10-20 per cent loss in capacity. Rio Tinto Iron Ore submitted that the Council had focused on Mr O'Donnell's statements that such capacity losses result from rigid timetables, and ignored his conclusion that the issues he discussed are 'inherent in multi-user systems', and that while they may be mitigated by terms of access, such terms 'are not able to deal effectively with' the issues he argues arise in multi user rail systems (RTIO, Sub 2 at [2.52]). This is not the case; the Council considered Mr O'Donnell's entire affidavit (and all other material submitted to it in relation to the Robe Application), but it is not persuaded by the arguments. While Mr O'Donnell put his views about 'multi-user systems' in general, he did not analyse the specific circumstances that would exist in the Pilbara were the Robe Service declared under Part IIIA. Further, he supported his views by repeated references to the Goonyella supply chain, which is different in a number of relevant respects from the circumstances that would exist on the Hamersley Railway were access granted to the Hamersley Service so as not to provide a useful comparison, as explained in detail above.

9.162 In relation to Rio Tinto Iron Ore's intentions to introduce driverless trains, the Council notes that the company has stated any intermingling of manned trains and driverless trains would deprive Rio Tinto Iron Ore of capacity, but that it will introduce such trains on a progressive basis. To the extent that an access seeker's use of manned

trains imposes additional costs on a service provider these could be expected to be included in the relevant access charges (either through appropriate recognition of these costs in commercial negotiations or if needs be through arbitration). In some situations such costs might oblige an access seeker to also use driverless trains. It is not clear to the Council why third party trains could not also be driverless or otherwise compatible with Rio Tinto Iron Ore's system. The Robe Service includes 'all associated infrastructure necessary to allow third party trains to move along the Robe Railway', and the ACCC has the power to make determinations regarding any matter relating to an access dispute. It is therefore not clear to the Council why access could not be provided to Rio Tinto Iron Ore's remote operations centre or remote train control systems following declaration of the Robe Service and/or the Hamersley Service, if that became necessary to permit access. Rio Tinto Iron Ore referred to the intellectual property exception in the definition of 'service' in section 44B of the TPA, but that exception does not apply where the relevant intellectual property is an integral but subsidiary part of the service. In any case, this issue is speculative given that no Pilbara railway service provider currently operates driverless trains nor has it been found necessary for an access seeker to operate on such a basis to gain access on appropriate terms.

- 9.163 The Council considers that generally the costs to the service provider resulting from lost system capacity and diseconomies of scope that would occur as a result of a particular third party's access to the Robe Service are capable of being anticipated and compensated through access pricing. It further considers that third party access seekers can be incentivised to minimise their impact on the service provider through access terms, which, to take a hypothetical example, could provide for penalty payments where a train breaks down and the third party fails to clear it within periods currently achieved by the service provider.
- 9.164 There may be some residual risk of capacity and efficiency losses that would result from access to the Robe Service that access terms and pricing cannot entirely anticipate or ameliorate, and the Council has considered this cost in assessing criterion (f). However, the Council does not accept that the extent of these costs is likely to be near the quantum argued by the service providers.
- 9.165 The Council does not agree with Rio Tinto Iron Ore's and BHP Billiton Iron Ore's submissions that capacity and efficiency losses that are recompensed in access prices should be counted as matters weighing against the public interest in assessing criterion (f). While such costs exist irrespective of which party bears them, an access seeker would not choose to take up access unless the costs of such access are less than the benefit to it from access, and less than the cost that it would have to meet to achieve the same result without access. Compared to an appropriate counterfactual where access is not available, the overall costs are less, and this represents a public interest benefit to Australia.

Disincentives to invest

9.166 The Council of course accepts submissions that it is important for Australia's economy that there is sufficient investment in infrastructure. This is consistent with the objectives of Part IIIA as set out in section 44AA of the TPA. The Council accepts that the enactment of Part IIIA by the Australian Parliament, and the possibility of declaration of services provided by facilities that are uneconomical to duplicate, created some additional risk for investors in these kinds of facilities that they may not receive the same level of return from their investment that they otherwise would have. This 'regulatory risk' is attendant on the establishment of the Part IIIA regime. Some similar risk would likely have followed from any form of intervention aimed at addressing the policy issues underlying Part IIIA. It is reasonable to assume that the Government and Parliament considered that these costs were outweighed by the benefits to Australia from effective regulation of access in the circumstances allowed for under Part IIIA. As noted at paragraph 9.12 costs that merely arise from the enactment of Part IIIA would be incurred irrespective of whether the application succeeds and declaration, or more broadly access, occurs, and therefore these costs are not a factor in considering criterion (f).

9.167 Part IIIA provides for service providers to receive a risk-adjusted commercial return on declared infrastructure. Investors in infrastructure can therefore expect that if infrastructure is declared and a third party access seeker successfully seeks mandated access through arbitration, they will receive an appropriate return on their investment. This fact will form the background to access negotiations and encourage a negotiated access arrangement that allows an appropriate return on investment.

9.168 There is one possible element of the return on a particular investment for which Part IIIA does not seek to compensate an infrastructure investor that is required to provide access, and that is any monopoly profits arising from its power in a dependent market. To quote the Hilmer Report (at p263):

If there are indeed profit implications associated with the application of an access regime, the revenues in question will have been obtained at the expense not only of consumers but of a more efficient economy generally.

9.169 Access under Part IIIA is designed to eliminate such monopoly profits. To the extent that the application of Part IIIA discourages investment that is predicated on such profits, this is not a cost as it does not discourage *efficient* investment in infrastructure.

9.170 The ACCC is a sophisticated regulatory body. The ACCC in a range of decisions across a range of industries has accepted the importance of maintaining appropriate commercial returns for investment lest such investment be inefficiently deterred. In any event it is obliged to allow appropriate commercial returns and to consider investment effects in determining access prices and other terms in any arbitration of an access dispute.

9.171 BHP Billiton Iron Ore argued that mandatory access provision results in a less than commercial return because it fails to properly recognise and price the ‘real option’ available to infrastructure investors from being able to determine whether and when to expand an existing facility or undertake some similar investment, and the ability to defer such a decision. This is another way of approaching some of the arguments discussed above regarding the costs from access. This approach to stating some of the potential costs of access is becoming more common in consideration of regulatory issues. There is ongoing debate as to the validity of this approach, and in particular the circumstances where it may be relevant and its significance. In principle it appears to the Council that the costs of a lost opportunity to undertake a railway expansion for its own benefit, because that expansion opportunity is used to meet the requirements of an access seeker, is able to be incorporated in access prices and terms where appropriate. In practice, this may involve difficulties in determining the amount involved. In the Council’s view this is an issue that can only be properly considered within a particular factual context and is appropriately a matter for consideration between parties in a negotiation or in an ACCC arbitration if one or other party seeks to address this matter.

9.172 Regarding Rio Tinto Iron Ore’s submission that the ACCC had accepted the capacity balancing system for the Hunter Valley coal chain is having an adverse impact on investment in the coal chain, the Council does not accept that this is relevant to its consideration of the Robe, Hamersley or Goldsworthy applications.

9.173 In relation to incentives to invest in the Pilbara iron ore railways the Council considers that there is likely to continue to be an incentive for the incumbent owners to invest in railway construction, expansion and optimisation if Part IIIA access is available. Iron ore exporters are currently generating large profits given unprecedented and sustained demand and prices for iron ore, and have expansion plans extending several years to further profit from high demand and prices. The Council does not believe that Part IIIA access would cause the service providers to act against their interests by ceasing expansion and forgoing further profits, especially given that access rights can only be such as not to displace the service providers’ use and guarantee them commercial returns where they have spare capacity. Of course, it is not certain that the current high level of demand for iron ore will continue into the future, however, to the extent that it does not, it is reasonable to expect that demand for access will also reduce.

Costs of expansion to meet access seekers’ demand

9.174 BHP Billiton Iron Ore appeared to suggest that the costs of railway expansions to meet the needs of access seekers should be considered as a cost in assessing criterion (f). While these are costs that might flow from access, in the circumstances where declaration might be available these costs will be less than the costs of building an alternative railway facility or the benefits forgone if access is unavailable.

Rather than giving rise to a cost to be considered in criterion (f) the avoidance of the costs of the alternatives is a benefit as described at paragraph 9.105.

Regulatory costs

9.175 The Council accepts that declaration and Part IIIA access create regulatory costs that must be considered under criterion (f). These are the costs that service providers may incur in conducting negotiations with access seekers and responding to the arbitration of access disputes. They also include the costs of the ACCC and other public bodies in carrying out their functions in relation to a declared service.

9.176 BHP Billiton Iron Ore submitted that regulatory costs are potentially very high given, among other things, 'the opportunity to "game" the system' (BHPBIO, Sub 1 at [13.6]). In this regard the Council notes there is provision to limit the costs of unnecessary or repeated arbitrations. The ACCC has the ability under section 44Y of the TPA to terminate arbitrations where the access seeker has not negotiated in good faith, where the request for arbitration is vexatious, misconceived or lacking in substance, or where the access sought has already been considered by the ACCC or is governed by an existing agreement.

9.177 More generally unless and until an access seeker has achieved agreement with the service provider, or has received an ACCC determination or court order in its favour, the service provider is free to do what it chooses with the service and the facility. If a court ordered an interim injunction against a service provider restricting its freedom of action in relation to the facility the usual practice would be to only do so where the access seeker gave an undertaking as to damages. The Council considers that this would substantially ameliorate the risks of gaming through engagement with the legal process.

Deterrence or delay in optimisation of rail operations

9.178 The Council does not accept BHP Billiton Iron Ore's argument that Part IIIA access to the Pilbara railways is likely to deter or delay the optimisation of rail operations and investment in new forms of technology. It is not true that third parties with smaller operations than the service providers would have no incentive to make investments in new technologies or innovative operating practices. All users of the railways are likely to have some incentive to maximise the quantity of ore they carry and minimise the cost of doing so, or at least to minimise the costs of their gaining access and hence the access charges they face. This is likely to provide access seekers with incentives to support operational optimisations and technological advances.

9.179 Further, as noted above in the context of arguments regarding lost system capacity, given the legislative protection of the service providers' capacity and interests, as well as the circumstances existing in the Pilbara iron ore export chains, any access rights given could be flexible rights preserving the service providers' overall control of the

system. For similar reasons, it seems to the Council that prudently negotiated or arbitrated terms of access would provide for the possibility of operational optimisations and technological advances and obligations to pay for them or to otherwise provide commercial incentives for all users to contribute towards maximising the efficiency of the system, and would give the service provider a leadership role in this process.

Environmental costs

9.180 The Council does not agree with BHP Billiton Iron Ore's submission that access to the Goldsworthy Service, or to the Pilbara railways in general, will lead to environmental costs in the form of construction of expansions and increased train traffic on the railways. While it is true that expansions to existing railways and increased rail traffic are likely to have some adverse environmental impact, in the Council's view such impacts are likely to be substantially lower than the environmental impacts of constructing entirely new railways.

9.181 Similarly, while increased train traffic on a railway may lead to adverse environmental impacts, the Council considers that such impacts are likely to be much lower than the environmental and social costs of using road transport to move equivalent amounts of iron ore. An increase in rail transport that lowers the volume of road transport is a public interest benefit, as discussed above at paragraph 9.107.

Loss of 'facilities-based competition'

9.182 The Council does not agree with BHP Billiton Iron Ore's view that Part IIIA access leads to a cost in the form of lost 'facilities-based competition'. Part IIIA access is only provided to facilities that are uneconomical to duplicate. The Council has concluded under criterion (b) that it is uneconomical to develop another facility to provide the Robe Service. In these circumstances any facilities based competition would be from an inefficient source. It is economically inefficient and wasteful for Australia to duplicate such facilities; avoiding this outcome is a purpose of Part IIIA. The 'loss' of multiple and competing 'natural monopoly' facilities is a public interest benefit to Australia, not a cost.

ACCC powers

9.183 The Council has given careful consideration to the Myers/O'Bryan Opinion regarding the ACCC's powers noted above at paragraphs 9.85 to 9.88. BHP Billiton Iron Ore submitted that as a consequence of the conclusions in this opinion, the ACCC is unable to order an expansion of the Robe Railway to accommodate access seekers and therefore: access cannot promote a material increase in competition (as additional capacity is required to allow use by access seekers) and criterion (a) cannot be satisfied; additional new railways will need to be developed for access seekers,

meaning that criterion (b) cannot be satisfied; and consequently criterion (f) is also not satisfied.

9.184 The Council sought an opinion on the relevant ACCC powers from the Australian Government Solicitor (**AGS**). The AGS considered that the expansion of a facility is generally capable of being characterised as a ‘matter relating to access’ within the meaning of section 44V(2) of the TPA, because the expansion of a facility can clearly facilitate access in certain cases and therefore can be said to ‘relate to access’. The AGS considered that interpreting section 44V(2) so as to admit a power to require the expansion of a facility would promote the objects of Part IIIA. The AGS noted that the High Court has emphasised the need first to consider the objects or purpose of a legislative provision when interpreting it.⁶⁰ The AGS considered that the matters listed in subsections 44V(2)(a)-(e) are given as examples of matters relating to access.

9.185 Regarding the question of who must pay for expansions to a facility, the AGS was of the view that subsection 44W(1)(e) prevents the ACCC from making a determination requiring the service provider to pay for an extension in whole or in part, regardless of its value to a service provider. (In this regard, the AGS considered the word ‘extending’ in this subsection is not limited to elongation and includes enlarging the scope or increasing the capacity of the subject matter.) While this prevents the ACCC requiring a service provider to contribute to the costs of an extension even where it too may benefit, the AGS considered that the value of an expansion to a service provider is a matter that the ACCC can take into account when determining the price and other terms of access.

9.186 The Council acknowledges that there are differences of legal opinion on these issues. It considers that the narrow interpretation of the ACCC’s powers submitted by BHP Billiton Iron Ore is far from being clearly correct, such that the Council might be unable to be satisfied that declaration criteria (a), (b) or (f) are met in relation to the Hamersley Application. The Council considers that interpretations of the ACCC’s powers that are consistent with the objects of Part IIIA, and that are open, are to be preferred and the Council has considered this application on that basis.

Conclusion

9.187 The Council has considered the benefits and costs that are likely to result from access to the Robe Service. In the Council’s view benefits arise from:

- a material promotion of competition in the market for haulage services for iron ore on the Robe Railway and in the market for iron ore tenements in the Pilbara

⁶⁰ In cases such as *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 and *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384.

- accelerated development of iron ore mines in the Pilbara by smaller mining companies and resulting additional iron ore exports
- avoiding unnecessary and inefficient duplication of railway facilities
- avoiding use of inefficient road haulage or other transport options
- avoiding additional impacts on native title rights associated with development of new railway facilities, and
- reduced adverse impact on the environment.

9.188 While most of these forms of benefit will only arise in relation to a relatively small but significant component of the Pilbara iron ore industry, given that the two largest participants (BHP Billiton Iron Ore and Rio Tinto Iron Ore) already have access to their own railways, the Council considers the benefits from access are significant.

9.189 In particular, where access will allow additional iron ore exports to occur, and to occur more quickly than would otherwise be the case, without reducing exports from existing sources, the benefits of access to Australia are likely to be significantly in excess of any costs. Similarly, where access allows additional mine operators to transport ore using existing railway capacity (or capacity that can be added through incrementing an existing railway rather than constructing an entire new railway) and the railway owners rights are properly addressed, there are significant benefits for Australia.

9.190 The Council has considered the costs of access suggested by Rio Tinto Iron Ore, BHP Billiton Iron Ore and other parties making submissions under the categories suggested by one or other of these companies:

- costs and feasibility of expanding the Robe Railway
- regulatory costs
- loss of production
- deterring or delaying optimisation of rail operations
- deterring or delaying efficient investment
- environmental costs
- loss of ‘facilities-based competition’
- diseconomies and inefficiencies of multi user systems compared to single user systems, and
- impacts of regulation.

9.191 In the Council’s view a number of the claimed costs are unlikely to result from access to the Robe Service as they are precluded from arising by provisions of the TPA that specifically address the concerns raised.

- 9.192 The Council considers that there is some risk that access may delay some operational, and in particular investment, decisions. It will be important for the negotiating parties, the ACCC and the Tribunal to have regard to any costs of delay in undertaking their roles in relation to declared services to minimise such costs. Some of the costs that could flow from access can and will likely be included in access charges but there may be some other residual costs that would give rise to adverse considerations under this criterion. Generally, however, the costs attributed to access by the parties opposed to access are significantly overstated or are based on unrealistic assumptions.
- 9.193 Commercial considerations and the operation of Part IIIA will militate against costs arising from access to the Robe Service. If in any particular situation where access is sought the levels of disruption to a service provider's operations are excessive then it is highly likely that the price of access would be high and other terms would be significantly restricted. In these circumstances an access seeker is likely to pursue other opportunities rather than seek access, thus avoiding the costs that are of concern. The ACCC may also conclude that in the particular circumstances in which an access dispute arises, the costs or other consequences of allowing access may be such that access should not be allowed. In the Council's view it is necessary and appropriate that any such situations are considered in the context of the arbitration of an access dispute, rather than as a basis for denying declaration.
- 9.194 The Council considers that access to the Robe Service will give rise to some costs in complying with regulatory requirements and participating in regulatory processes that follow from declaration and/or access to the service.
- 9.195 There will also be a cost arising from the risk of regulatory error and in particular the risk that arbitrated access prices or terms may encourage inefficient outcomes. These outcomes could result from access prices or other terms being set too low or too high. It may be that the consequences should the former situation arise are of more concern given the relative contribution of the service providers to Australia's iron ore exports. However in the Council's view the quite specific provisions that govern access determinations, and in particular those that establish specific requirements regarding the interests of service providers, and the review and oversight arrangements in relation to these determinations are such that the risk of regulatory error is small.
- 9.196 When proper consideration is given to the safeguards in Part IIIA against adverse outcomes from access in specific situations, the Council considers the costs of access that are not adequately dealt with through the arbitration process are likely to be low.
- 9.197 The Council considers that the likely benefits of access to the Robe Service will outweigh the likely costs and access is not contrary to the public interest.

9.198 The Council considers that the Robe Application satisfies criterion (f).

10 Section 44F(4) – Develop a facility for part of the service

Legal requirements

10.1 Section 44F(4) of the TPA provides that:

In deciding what recommendation to make [in relation to an application for declaration], the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.

10.2 The designated Minister must also consider this issue in deciding whether or not to declare a service (section 44H(1) of the TPA).

Application and submissions

10.3 Both Rio Tinto Iron Ore and BHP Billiton Iron Ore suggested that other railway lines or the construction of new links to existing railway lines (such as the TPI Railway) and road transport provide alternatives to the services for which declaration is sought.

10.4 BHP Billiton Iron Ore noted in relation to the Goldsworthy Application that the operation of the Finucane Island section of the Goldsworthy Railway is very different to the Yarrie section. In particular, the Finucane Island section is used to transport ore originating along both the Goldsworthy and Mt Newman railways to port facilities at Finucane Island. The capacity of the section has been expanded to a greater extent than the rest of the Goldsworthy Railway. BHP Billiton Iron Ore submitted that the Finucane Island section of the Goldsworthy Railway is heavily congested and further expansion of its capacity may be difficult or costly.

10.5 In discussions with the Council, BHP Billiton Iron Ore suggested that as a result of these factors, it may be economical for third parties to develop an alternative railway link for the Finucane Island section of the Goldsworthy Service. It advised that it had sought approval to develop a new section of railway linking its Mt Newman Railway from a point upstream of the junction between the Mt Newman and Goldsworthy railways to the Finucane Island port facilities. The company submitted that in the event that the Council considered that it would be economical for anyone to develop another facility that could provide part of a service for which declaration was sought, the Council should decline to recommend declaration of that service. In discussions, the company pointed to the Explanatory Memorandum to the Competition Policy Reform Bill 1995 (Cth) as supporting this view.

10.6 Rio Tinto Iron Ore suggested that a similar situation arises in respect of the eastern section of the Robe Railway running into Cape Lambert, which carries ore originating

from mines adjacent to the Robe Railway and increasingly also ore from mines along the Hamersley Railway (see paragraph 5.70).

The Council's assessment

- 10.7 The Council considered earlier whether alternative railways or new railway links amount to alternative facilities to provide the Robe Service and concluded that they do not (paragraphs 5.49 to 5.53).
- 10.8 The Council also considered the viability of road transport and rejected this as an alternative to the Robe Service except in limited circumstances.
- 10.9 The Council considered whether there are likely to be specific mines for which an alternative track access service could be economically developed that would, either in its own right or in conjunction with another facility, provide an alternative to the Robe Service.
- 10.10 To the extent that allowing a train to be run to a mine to uplift ore might be regarded as use of part of the Robe Service, this may be a possibility. However it seems unlikely that a facility that is seen as an 'alternative' would then enable the train to run to another point on the Robe Railway. In this sense the alternative would provide only part of the Robe Service. Furthermore the scope for such alternative facilities to be economically developed appears very limited and at best these would allow for a possible alternative service for a few of the points within the all points service sought using the Robe Railway.
- 10.11 It is also unclear how the costs of developing a facility to provide an alternative track access service would compare to the costs of accessing the Robe Service and whether the alternative is economical to develop. The Council notes that as with criterion (b) 'economical' needs to be considered in a social cost benefit context. The fact that a commercial party may find it viable to develop such a facility in a particular situation does not necessarily mean it is economical from a national interest view point.
- 10.12 The situation that arises in relation to the eastern section of the Robe Railway (and the Finucane Island section of the Goldsworthy Railway) is somewhat different. It may be that congestion on these sections, and costs and limits on further expansion will require the development of a new facility. If a part of a facility that provides a service for which declaration is sought is more congested than other parts then it may be more likely to require expansion as a result of access being available. In itself this is not a barrier to declaration. As noted elsewhere, Part IIIA anticipates that facilities may need to be expanded to accommodate access seekers and provides for this expansion to be undertaken and the cost met by those seeking access.
- 10.13 It would only be where the costs of expanding the particular part of a facility were so large that it became viable (in a social cost benefit sense) to develop and then use a

new facility, instead of expanding and using the existing facility, that an issue would arise.

- 10.14 In this case it appears that the eastern section of the Robe Railway is more heavily used than the other part of the railway and may at some point require expansion to meet the needs of access seekers. As noted at paragraph 5.83 the Council anticipates this may give rise to higher access charges and a greater likelihood that access seekers will need to meet the costs of expansion. This is likely to limit the demand for access to this part of the Robe Service.
- 10.15 At this stage it is not clear to the Council that the likely costs of any necessary expansion of the eastern section of the Robe Railway are such that it is economical to develop an alternative facility to provide that part of the Robe Service (that is a facility to provide track access from the Western Creek/Emu junction to Cape Lambert).
- 10.16 It also appears likely that the higher access charges that would likely be associated with using this part of the Robe Service will limit the use access seekers make of this part of the Robe Service in favour of transporting ore to new port facilities that may be accessible without using this part of the Robe Service.
- 10.17 In the Council's view even if the circumstances described above were able to be properly considered to amount to the development of facilities to provide part of the Robe Service and it might be economical to develop another facility to bypass the eastern section of the Robe Railway, they would not necessarily give rise to a circumstance where the Council should not recommend declaration when the declaration criteria are otherwise met.
- 10.18 The Council has considered the explanatory memorandum referred to by BHP Billiton Iron Ore (see paragraph 10.5). This states that:
- [i]f the Council decides that it would be economical for someone to develop a facility that could provide part of the service, it could decline to recommend declaration of the service as defined by the applicant. The applicant could then seek declaration of the service redefined to exclude that part that is economical for someone to provide. (Competition Policy Reform Bill 1995 Explanatory Memorandum at [180])
- 10.19 While this explanation identifies one course of action open to the Council it is clear from the words used in the explanatory memorandum and the second sentence of section 44F(4) that the Council is not obliged to follow that particular course. In the event that the Council were to come to the view that a part of the facility used to provide the Robe Service is economical to duplicate, the Council considers that it should exercise its discretion in accordance with the objects of Part IIIA.

Conclusion on section 44F(4)

10.20 The Council does not consider that it is economical for anyone to develop another facility to provide part of the Robe Service.

11 Section 44H(8) – Duration of declaration

Legal requirements

- 11.1 Section 44H(8) of the TPA requires that if the designated Minister declares the service, the declaration must specify the expiry date of the declaration. This can be a specified date and/or can involve a specified event that triggers expiry of a declaration. The expiry date determines the duration of declaration, which can vary according to the circumstances of each application. Further, section 44I(1) of the TPA states that a declaration begins to operate at a time specified in the declaration. The specified time cannot be earlier than 21 days after the declaration is published. Pursuant to section 44I(2), if an application for review of a declaration is made to the Tribunal, the declaration does not begin to operate until the Tribunal makes its decision on the review.
- 11.2 In considering the appropriate duration of declaration, the Council has regard to the importance of long term certainty for business—including access seekers, service providers and other affected parties. It also considers that declaration should apply for long enough to ensure that the benefits expected from declaration are able to be realised. This requires that the rights granted by declaration be in place long enough to influence the pattern of competition in relevant upstream or downstream markets.
- 11.3 Against these considerations must be balanced the potential for technological development, reform initiatives and future market evolution. Further, the Council considers that access regulation governing services, including the right granted by declaration, should be reviewed periodically. The expiry of a declaration provides such an opportunity. The Council notes, however, that any declaration can be revoked on the recommendation of the Council (section 44J of the TPA). The Council may make such a recommendation if it considers that the declaration criteria are no longer met. This would allow the Council to reconsider a declaration recommendation in the event of a significant development that impacted on the basis for its recommendation. For example, if the Proposed Pilbara Rail Haulage Regime was implemented and effective the Council could revisit whether criteria (a) and (f) continue to be satisfied.

Application and submissions

- 11.4 The Applicant seeks declaration for a period of 20 years. It submitted that this would provide sufficient time to:
- explore for and develop resources that are suitable for transport using the Robe Service, and
 - enter into long term contracts for the transport of bulk products (Robe Application Part 1, at [13.1]).

- 11.5 The Western Australian Government supported the Applicant's claim for a declaration of 20 years duration. It submitted that:

[t]his timeframe encompasses an average mine life, provides for long-term security to both infrastructure owner and third parties, and allows for the write down of large capital expenditures.

Within this timeframe access seekers and infrastructure providers should be able to negotiate the term of the agreement appropriate to a case-by-case assessment. (WA Gov, Sub 1 at [8.1]-[8.2])

- 11.6 In its submission on the draft recommendation, the NWIOA stated that it believes that a 20 year period for declaration is inadequate, and that a declaration of 25 years duration would be more appropriate, and would provide the NWIOA's members with a sufficient timeframe to develop their mines. The NWIOA submission stated that a declaration of 25 years duration accommodates production ramp up time, negotiations covering access and haulage terms and conditions, lead time on procuring rolling stock and the assumption of an average mine life of 20 years once maximum ore extraction is achieved (NWIOA, Sub 3 at [2.8]). The AMEC made a similar submission, stating that 'it seems far more appropriate to declare the railway services for at least a 25 year period' (AMEC, Sub 2 at p1).

- 11.7 No other party commented on the duration of declaration in relation to the Robe Service.

The Council's assessment

- 11.8 Declaration, should it occur, may result in the development of competitive rail haulage services, greater exploration and development efforts and new investment in below rail infrastructure and associated mine and port infrastructure in the Pilbara. Such commitments generally require a long time to plan and execute. It may potentially take new and emerging producers longer than the existing players to undertake such projects because of their relative lack of experience, greater difficulty in raising finance and because of the greenfield nature of some of the investments required.
- 11.9 In the Mt Newman Recommendation the Council recommended declaration for a period of 20 years. The Council considered that 20 years would provide sufficient certainty for all parties to undertake investment and implement other decisions in response to declaration.
- 11.10 The Council considers that the circumstances are not substantially different in this case. Further, the Council notes that under section 44J of the TPA any party can apply to the Council for a declaration to be revoked. For example, should the Proposed Pilbara Rail Haulage Regime (discussed in chapter 8) eventuate and result in effective regulation of haulage on the Robe Railway, this might in due course give rise to an

application for revocation. However, the uncertainty as to whether the proposed regime will eventuate and be effective, and the distinct possibility that such a regime and continued declaration would act in a complementary manner to facilitate efficient access, means that it would be premature to take this regime into account in considering the duration of declaration. In considering an application for revocation the Council must have regard for the objects of Part IIIA and would assess whether competitive circumstances have changed such that the declaration criteria are no longer satisfied.

11.11 Notwithstanding the submissions of the NWIOA and the AMEC, which advocate a declaration period of 25 years, the Council is not convinced a longer declaration period than that sought by the Applicant is warranted. The Council considers, however, that a declaration period of less than 20 years is unlikely to provide sufficient certainty for potential users or their mine operator customers. The Council considers that access rights granted by declaration should be reviewed periodically, and that the expiry of a declaration provides one such opportunity. At the time of expiry, the declaration would be reviewed, and if conditions were still appropriate for declaration, access rights would continue.

Conclusion on section 44H(8)

11.12 The Council recommends that the Robe Service be declared for a period of 20 years.

Appendix A Public consultation

- A.1 The Council conducted a public consultation process in preparing its draft and final recommendations on the Goldsworthy, Hamersley and Robe applications. On 5 February 2008 the Council published a notice in *The Australian* which called for submissions on the Goldsworthy, Hamersley and Robe applications. The Council also gave notice to the service providers and wrote to likely interested parties inviting submissions on the applications. The submissions received in response to these notices and invitations are set out in Table A-1.
- A.2 On 20 June 2008 the Council released its draft recommendations on the applications and called for submissions in response to those draft recommendations. The submissions received are set out in Table A-2.
- A.3 Most submitters provided one submission in response to all three applications. Atlas Iron provided a submission in response to the Goldsworthy Application only. The NWIOA provided a separate submission on each of the Hamersley and Goldsworthy applications. BHP Billiton Iron Ore provided a submission in response to the Goldsworthy Application and asked that the Council take that submission into account where relevant in its consideration of the Hamersley and Robe applications. Rio Tinto Iron Ore provided a submission in response to the Hamersley and Robe applications and asked that the Council take that submission into account where relevant in its consideration of the Goldsworthy Application.
- A.4 Similarly, most submitters provided one submission in response to all three draft recommendations. The Council notes that while the submission by Mr Nick Wills-Johnson only specifically addresses the Goldsworthy Application, he requested that his submission also be accepted as a submission in relation to the Hamersley and Robe applications. BHP Billiton Iron Ore and Atlas Iron each provided a submission in response to the Goldsworthy draft recommendation and asked that the Council take its submission into account where relevant in considering the Hamersley and Robe applications. South Spur Rail Services submitted in response to the Goldsworthy draft recommendation only but asked that the Council note its interest in the declaration of the Hamersley and Robe services. Rio Tinto Iron Ore provided a single submission in response to both of the Hamersley and Robe draft recommendations. It asked that the Council take account of the issues of principle addressed in its submission in considering the Goldsworthy Application.
- A.5 In addition to the formal consultation process the Council also met with the Applicant, the service providers and several other parties and organisations.

Table A–1 Submissions received in response to the Goldsworthy, Hamersley and Robe applications

Submission reference	Submitter/details
AMEC, Sub 1	The Association of Mining and Exploration Companies
Appendix A	Tenements within 100 km of existing Pilbara rail infrastructure
Atlas, Sub 1	Atlas Iron Limited (re the Goldsworthy Application only)
Attachment A	Atlas Iron's Pilbara projects
BHPBIO, Sub 1	Supplied by Blake Dawson on behalf of BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd
Annexure 1	BHP Billiton 2008, <i>Regulation for the future of Australia's natural resources sector</i> , (BHPBIO White Paper)
Annexure 01-A1	Appendix A: Case studies
Annexure 01-A2	Hausman, J (MacDonald Professor of Economics, MIT) 2008, 'Economic analysis of mandatory access provision'
Annexure 01-A3	Fitzgerald, V (The Allen Consulting Group) 2008, 'Issues posed by infrastructure regulation in Australia's bulk commodity export sectors'
Annexure 2	Map of the Goldsworthy Railway Line, Pilbara
Annexure 3	Affidavit of Michael Van De Worp, Australian Competition Tribunal, File no. 5 of 2006, affirmed on 14 December 2007
Annexure 4	Railroad locality South Hedland and surrounding areas, existing infrastructure
Annexure 5	Application for Mining Tenement (WA), Miscellaneous licence, 7 March 2008
Annexure 6	Railroad locality FMG Yarrie Railroad connection to existing railroad options
Annexure 7	Affidavit of Richard Anthony Harmsworth, Australian Competition Tribunal, File no. 5 of 2006, affirmed on 20 December 2007
Annexure 8	Affidavit of Richard Derek Miller, Australian Competition Tribunal, File no. 5 of 2006, sworn on 20 December 2007
Annexure 9	Maps showing the Kennedy railway line, the TPI Railway line and the proposed rail spur to the Glacier Valley tenement
Annexure 10	Location of the five projects identified by TPI Pilbara
Annexure 11	'Comments on the projects/prospects identified by The Pilbara Infrastructure Pty Limited', Report of Richard Anthony Harmsworth

Continued on the next page

Table A–1 continued

Submission reference	Submitter/details
Annexure 12	Ripper, E MLA (Deputy Premier, WA), 'Fortescue Metals Group application to access BHP Billiton's Mount Newman Railway line', Pers. Comm., 2 May 2006
Annexure 13	'Port Hedland Harbour', Orthophoto map, 2005
Annexure 14	'Costs of delays to investment in infrastructure as a result of regulatory intervention'
Annexure 15	Affidavit of Andrew Laurie Neal, Australian Competition Tribunal, File no. 5 of 2006, affirmed on 16 November 2007
Annexure 16, Annexure 16-A1, Annexure 16-A2	Affidavit of Stephen O'Donnell, Australian Competition Tribunal, File no. 5 of 2006, affirmed on 21 December 2007
Annexure 17	Concept Economics 2008, <i>On Gans' evaluation of criterion (b) in long-haul rail services</i>
Annexure 18	The Allen Consulting Group, <i>Comment on Joshua Gans, The evaluation of criterion (b) in long-haul rail services</i>
CCIWA, Sub 1	Chamber of Commerce and Industry Western Australia
Attachment A	CCIWA 2006, <i>Competition Policy in Western Australia</i> , A discussion paper, Business leaders series, Perth
MCA, Sub 1	Minerals Council of Australia
NWIOA, Sub 1	North West Iron Ore Alliance (re the Hamersley Application only)
Appendix A	Background information on members of the NWIOA
Appendix B	Map of the Hamersley Railway
NWIOA, Sub 2	North West Iron Ore Alliance (re the Goldsworthy Application only)
Appendix A	Background information on members of the NWIOA
Appendix B	Map of the Goldsworthy Railway and Mount Newman Railway
Appendix C	Map of Port Hedland
Appendix D	Projects near Goldsworthy Railway
Appendix E	Projects near Mount Newman Railway
Appendix F	Map of tenements near Goldsworthy Railway and Mount Newman Railway

Continued on the next page

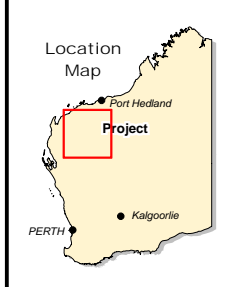
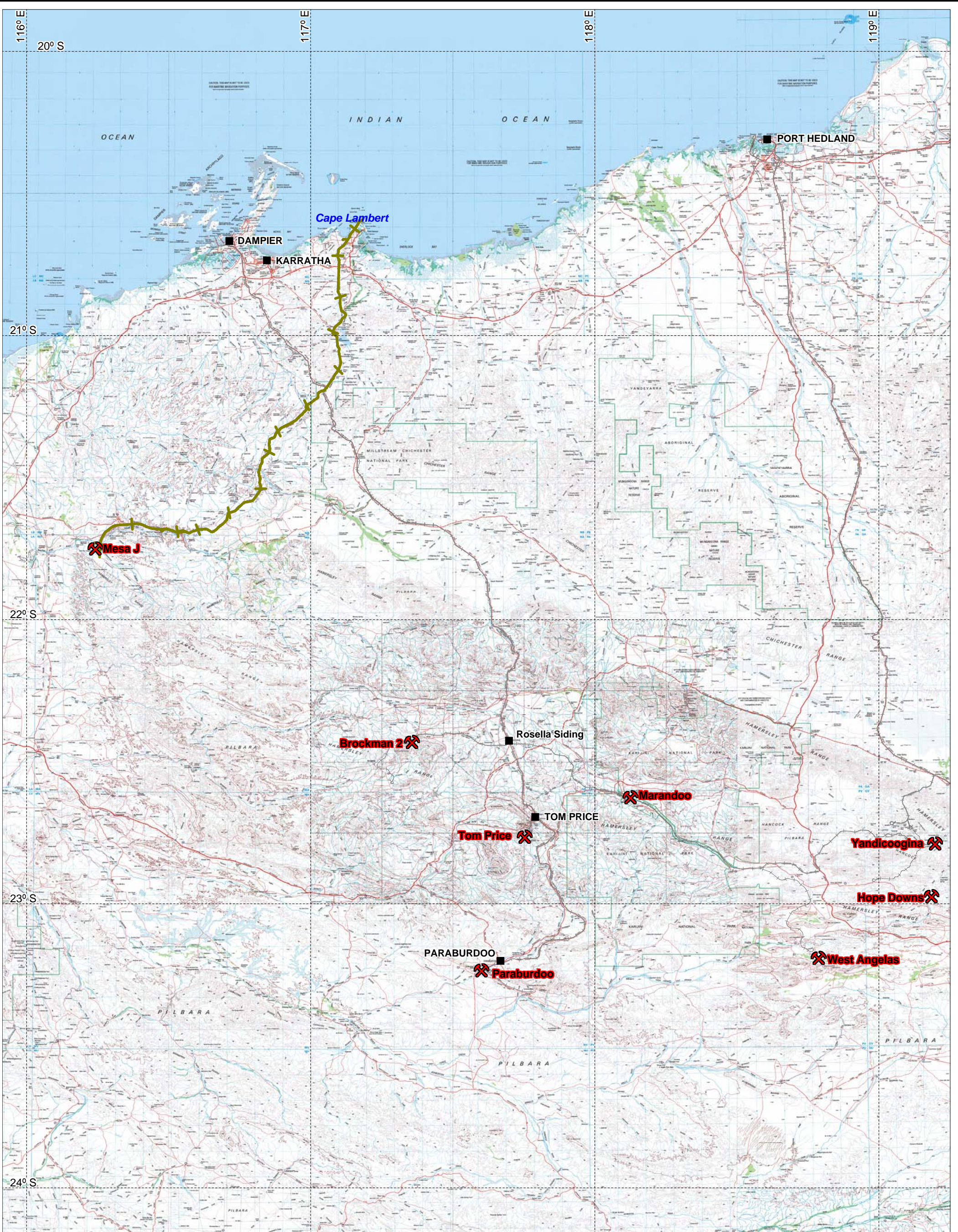
Table A–1 continued


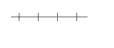


Submission reference	Submitter/details
RTIO, Sub 1	Supplied by Allens Arthur Robinson on behalf of Rio Tinto Iron Ore (re the Hamersley and Robe applications) (general release and confidential versions)
Annexure 1	Information about third party developments and tenements in the Pilbara
Annexure 2	Tenements review
Annexure 3	Market for tenements (changes in ownership/joint ventures/offtake agreements/new applications)
Annexure 4	Report by Brian Fisher (Fisher, B 2008, <i>Economic evaluation of the relative efficiencies of multi-user and single user rail and port facilities</i>)
Annexure 5	Report of Port Jackson Partners (PJP 2008, <i>Economic evaluation of the impact of lost iron ore production and share</i>)
Annexure 6	Report of Access Economics
Annexure 7	Report of Professor Joseph Kalt
Annexure 8	Report of TSG Consulting (general release and confidential versions)
Annexure 9	Report of Professor Janusz Ordover
Annexure 10	Report of CANAC Railway Services (general release and confidential versions)
Annexure 11	Report of Dr Philip Williams (Williams, P 2008, <i>TPI application for declaration of the Hamersley and Robe rail track service — criterion (a)</i> , A report prepared for Allens Arthur Robinson)
Annexure 12	Report of Dr Brian Fisher and Roger Rose, 'Export infrastructure and access: key issues and progress', <i>Australian commodities</i> (June Quarter 2006)
Annexure 13	Report to the Prime Minister by the Exports and Infrastructure Taskforce, 'Australia's Export Infrastructure' (May 2005)
WA Gov, Sub 1	Government of Western Australia
Attachment 1	Application of track access versus haulage regime
Attachment 2	Letter from Ripper, E MLA (Deputy Premier, WA) to the Hon. P H Costello MP (Treasurer) re Fortescue Metals Group application to access BHP Billiton's Mount Newman Railway line
Attachment 3	'Major new iron ore port planned for the Pilbara', Government media statement (Planning and Infrastructure, 17 January 2007)
Attachment 3	Predonivnik 2008, 'Pressure mounts on port facilities', <i>WA Business News</i> , 13 March

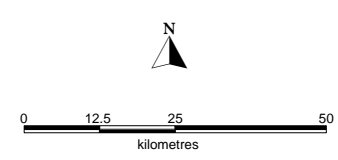
Table A–2 Submissions received in response to the Goldsworthy, Hamersley and Robe draft recommendations


Submission reference	Submitter/details
AMEC, Sub 2	The Association of Mining and Exploration Companies
Atlas, Sub 2	Atlas Iron Limited
BHPBIO, Sub 2	Supplied by Blake Dawson on behalf of BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd
Attachment 1	Review of the requirements of access undertakings accepted by Australian regulators
Attachment 2	Examples of ACCC determinations overturned
Attachment 3	Less regulation of large scale export oriented infrastructure could assist in Australia growing supply
Attachment 4	Myers, AJ (QC), In the matter of BHP Billiton Iron Ore Pty Ltd and application for declaration of the Goldsworthy rail line, Memorandum of advice, 21 July 2008
Attachment 5, Appendix A (see also BHPBIO, Sub 1)	BHP Billiton 2008, <i>Regulation for the future of Australia's natural resources sector</i> , BHPBIO White Paper, Appendix A: Case Studies.
Attachment 5, Appendix B (see also BHPBIO, Sub 1)	Hausman, J (MacDonald Professor of Economics, MIT) 2008, 'Economic analysis of mandatory access provision'
Attachment 5, Appendix C (see also BHPBIO, Sub 1)	Fitzgerald, V (The Allen Consulting Group) 2008, 'Issues posed by infrastructure regulation in Australia's bulk commodity export sectors'
MCA, Sub 2	Minerals Council of Australia
NWIOA, Sub 3	North West Iron Ore Alliance
Appendix A	Background information on members of the NWIOA
Appendix B	Map of the Goldsworthy Railway and Mount Newman Railway & NWIOA projects
Appendix C	Map of the Hamersley Railway and Robe Railway & NWIOA projects
NWJ, Sub 1	Nick Wills-Johnson
RTIO, Sub 2	Supplied by Allens Arthur Robinson on behalf of Rio Tinto Iron Ore
Annexure 1	Supplementary report of Port Jackson Partners (PJP 2008, <i>Economic Evaluation of the Impact of lost Iron ore production and share—review of key assumptions</i>)
Annexure 2	Supplementary report of Dr Brian Fisher (Fisher, B 2008, <i>Response to the NCC's draft recommendations in relation to the Hamersley Railway Network and Robe Railway</i>)
SSRS, Sub 1	South Spur Rail Services
TPI, Sub 1	The Pilbara Infrastructure Pty Ltd

Appendix B Map of the Robe Railway



-  Robe Railway
-  Other Rail Networks
-  Select Major Mines
-  Select Localities



 Fortescue Metals Group Ltd	
Robe River Rail Network Throughout the Pilbara	
Author: J Tapp	Date: 16/11/2007
Drawn By: Jen Thomson	Revision: 08/01/08
Dwg No: 07_440_0108_COR(Map1)	Report No:
Projection: Long/Lat (GDA94)	Scale: 1:1250000

Appendix C Arbitration of access disputes under Part IIIA

Part IIIA of the TPA sets out a number of provisions governing how the ACCC (the Commission) must arbitrate an access dispute. The key provisions relevant to considering the Hamersley Application are: sections 44V(2)-44V(5); section 44W; section 44X; section 44XA; section 44Y; and section 44ZZCA.

Section 44V(2)-44V(5): Determination by Commission

- 44V(2) A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:
- (a) require the provider to provide access to the service by the third party;
 - (b) require the third party to accept, and pay for, access to the service;
 - (c) specify the terms and conditions of the third party's access to the service;
 - (d) require the provider to extend the facility;
 - (da) require the provider to permit interconnection to the facility by the third party;
 - (e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.
- 44V(3) A determination does not have to require the provider to provide access to the service by the third party.
- 44V(4) Before making a determination, the Commission must give a draft determination to the parties.
- 44V(5) When the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.

Section 44W: Restrictions on access determinations

- 44W(1) The Commission must not make a determination that would have any of the following effects:
- (a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified;
 - (b) preventing a person from obtaining, by the exercise of a pre notification right, a sufficient amount of the service to be able to meet the person's actual requirements;
 - (c) depriving any person of a protected contractual right;

- (d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;
- (e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility;
- (f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility.

Section 44X: Matters that the Commission must take into account

44X(1) The Commission must take the following matters into account in making a final determination:

- (aa) the objects of this Part;
- (a) the legitimate business interests of the provider, and the provider's investment in the facility;
- (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (c) the interests of all persons who have rights to use the service;
- (d) the direct costs of providing access to the service;
- (e) the value to the provider of extensions whose cost is borne by someone else;
- (ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;
- (f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
- (g) the economically efficient operation of the facility;
- (h) the pricing principles specified in section 44ZZCA.

44X (2) The Commission may take into account any other matters that it thinks are relevant.

Section 44XA: Target time limits for Commission's final determination

44XA(1) The Commission must use its best endeavours to make a final determination within:

- (a) the period (the standard period) of 6 months beginning on the day it received notification of the access dispute; or
- (b) if the standard period is extended—that period as extended.

Section 44Y: Commission may terminate arbitration in certain cases

- 44Y(1) The Commission may at any time terminate an arbitration (without making a final determination) if it thinks that:
- (a) the notification of the dispute was vexatious; or
 - (b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
 - (c) the party who notified the dispute has not engaged in negotiations in good faith; or
 - (d) access to the service should continue to be governed by an existing contract between the provider and the third party.
- 44Y(2) In addition, if the dispute is about varying an existing determination, the Commission may terminate the arbitration if it thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form.

Section 44ZZCA: Pricing principles for access disputes and access undertakings or codes

- 44ZZCA The pricing principles relating to the price of access to a service are:
- (a) that regulated access prices should:
 - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
 - (b) that the access price structures should:
 - (i) allow multi-part pricing and price discrimination when it aids efficiency; and
 - (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
 - (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

Appendix D Summary comparison of relevant regulatory and related features impacting major east coast coal transport facilities and Pilbara railways with and without access

	East coast coal ports		East coast coal railroads		Pilbara railways (BHP and Rio Tinto railways)	
	Dalrymple Bay Coal Terminal	Port Waratah	Goonyella railway system	Hunter Valley railway system	No access	With access
Ownership	Queensland Government Long term lease to BBI (DBCT) Management Pty Limited (50 year lease with further 49 year right of renewal)	NSW Government Leased on “common user” basis to entity owned by users	Queensland Rail (QR) (a Queensland Government Owned Corporation)	NSW Government Track leased to ARTC on long term basis	Various mining joint ventures	Various mining joint ventures
Operator	Dalrymple Bay Coal Terminal Pty Ltd (an unincorporated joint venture of user coal producers) on behalf of BBI (DBCT) Management Pty Limited	Users group owned entity	QR Network Access (Below Rail)	ARTC (Below rail) (Previously NSW Rail Infrastructure Corporation)	Rio Tinto Iron Ore or BHP Billiton Iron Ore entities	Rio Tinto Iron Ore or BHP Billiton Iron Ore entities
Users	8-10 coal mining companies	Various coal mining companies	QR National (Above rail)(operational separation within QR required under QCA Act) Pacific National (Asciano) Miners’ self provision of above rail services possibility	Pacific National (Asciano) QR National Other possible users in prospect Miners’ self provision of above rail services possibility	Vertically integrated iron ore mines operated by or in joint ventures with the BHP Billiton Iron Ore or Rio Tinto Iron Ore	Vertically integrated iron ore mines operated by or in joint ventures with the BHP Billiton Iron Ore or Rio Tinto Iron Ore One or more access customer for below rail services
Vertical integration (owner/ operator & users)	Only through participation in operator	Only through joint user participation in operating entity	Operation separation of QR above and below rail activities No integration with rail users	No	Yes	Yes, for major user on each railway
Regulation of access	Access undertaking approved by QCA sets access prices (including a revenue cap) and allows for contracted user capacity to be scaled in event of constraints	Not regulated (although subject to common user lease requirement)	Reference tariff as part of access undertaking to QCA	NSW rail access regime To be replaced by ARTC undertaking to ACCC	No effective regulation	Negotiate/ arbitrate regime under Part IIIA

Relevant regulatory body	QCA		QCA	IPART ACCC in future		ACCC as arbitrator
Other access related regulation	ACCC authorisation of capacity sharing arrangements until 2009—allowing queue management system	Lease provides for common user requirements—use is on a first come first served basis ACCC authorisation of capacity sharing arrangements until 2009—allowing queue management system	Operational separation of above and below rail activities of QR		State Agreement Acts. Possible WA rail haulage regime	State Agreement Acts. Possible WA rail access regime
Investment decision making	BBI is investment decision maker. Access undertaking requires BBI to undertake expansions when 60% of users agree and 60% of additional capacity is contracted on take or pay basis	Common user lease apparently restricts ability to enter into long term contracts with users and related funding and risk sharing arrangements	QR investments plans require Ministerial approval	Investment subject to regulatory tests if to be rolled into asset base	Owner and operator decision	Owner and operator decision—subject to any relevant terms negotiated with access seekers or determined by an ACCC arbitration

References

- Centre for International Economics and Pacific Road Finance 2005, Submission to the Infrastructure Taskforce, 9 May 2005, Canberra.
- Hilmer Report. See Independent Committee of Inquiry into a National Competition Policy.
- Independent Committee of Inquiry into a National Competition Policy (Chair: Prof F G Hilmer) 1993, *National Competition Policy*, AGPS, Canberra.
- Kendall, R 2007, *Australian commodities*, December Quarter, ABARE, Canberra.
- Mt Newman recommendation. See NCC 2006.
- NCC (National Competition Council) 2004, *Application by Services Sydney for declaration of sewage transmission and interconnection services provided by Sydney Water, Final recommendation*, Melbourne
- 2006, *Final recommendation: Fortescue Metals Group Ltd application for declaration of a service provided by the Mt Newman railway line under section 44F(1) of the Trade Practices Act 1974*, Melbourne.
- OECD 2001, *Railway reform, regulation of freight transport markets*, European Conference of Ministers of Transport, Paris.
- Queensland Rail 2006, *Review of the economic costs of freight infrastructure and efficient approaches to transport pricing*, QR submission to Productivity Commission, Sub. no. 53.
- WorleyParsons 2007, *Port planning study and ultimate development plan, Update 2007*, report prepared for the Port Hedland port Authority.

Tribunal and court decisions

- BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234
- CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384
- Hamersley Iron Pty Ltd v National Competition Council* (1999) 164 ALR 203
- Hamersley Iron Pty Ltd v National Competition Council* [2008] FCA 598
- Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85
- Pacific National v Queensland Rail* [2006] FCA 91
- Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976) 25 FLR 169
- Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2
- Re Services Sydney Pty Limited* [2005] ACompT 7
- Re Sydney International Airport* [2000] ACompT 1
- Sydney Airport Corporation Ltd v Australian Competition Tribunal* [2006] FCAFC 146

Acts and other instruments

- Competition Policy Reform Bill 1995 (Cth), Explanatory Memorandum
- Iron Ore (Hamersley Range) Agreement Act 1963* (WA)

Iron Ore (Mt Goldsworthy) Agreement Act 1964 (WA)

Iron Ore (Robe River) Agreement Act 1964 (WA)

Iron Ore (Yandicoogina) Agreement Act 1996 (WA)

Mines Safety and Inspection Act 1994 (WA)

National Gas (South Australia) Act 2008 (SA)

Queensland Competition Authority Act 1997 (Qld)

Rail Safety Act 1998 (WA)

Rail Safety Regulations 1999 (WA)

Railways (Access) Act 1998 (WA)

Railways (Access) Code 2000 (WA)

Trade Practices Act 1974 (Cth)

Trade Practices Amendment (National Access Regime) Act 2006 (Cth)

Trade Practices Amendment (National Access Regime) Bill 2005 (Cth), Explanatory Memorandum

Transportation Administration Act 1988 (NSW)