bhpbilliton

resourcing the future

Submission to the Competition Policy Review

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1 Executive Summary

Addressing Australia's Productivity Challenge

1.1 BHP Billiton welcomes the Australian Government's decision to initiate a review of Australia's competition law and policy. We appreciate the opportunity to contribute to this important debate, and in so doing draw on our perspectives as a large global company, with operations in many countries and experience of different regulatory regimes around the world.

1.2 Open markets and societies and free trade in goods and services and ideas, create the right conditions for long-term development and prosperity. Open markets promote innovation, competition and productivity. Societies and economies can be strengthened by good competition policy and regulation; that is risk-based and supports an open and competitive process rather than protecting individual interests or competitors.

1.3 It is essential that Australia sustains an investment climate that is internationally competitive and boosts the nation's productive capacity. This includes a stable and consistent approach to competition policy, infrastructure, foreign direct investment, tax and industrial relations.

1.4 To remain internationally competitive, it is important Australian companies, large and small, are able to innovate more easily and produce, sell and distribute increased volumes of produce at lower cost, in shorter times and more efficiently. Whilst the "heavy lifting" on productivity improvements will be achieved at the company level, BHP Billiton very much welcomes the Australian Government's commitment to ensure Australia's overarching policy framework reinforces industry's drive for productivity and competitiveness.

1.5 More specifically, BHP Billiton believes there should be a re-commitment to the "guiding principle" under the Competition Principles Agreement that all forms of legislation and regulation, "*should not restrict competition unless it can be demonstrated that, (a) the benefits of the restriction to the community as a whole outweigh the costs; and (b) the objectives of the legislation can only be achieved by restricting competition*".[1] In practice this means:

- identifying and addressing existing legislation and regulation that reinforces anti-competitive market structures; and
- ensuring that a robust cost benefit analysis underpins future legislation and regulation.

Defining the Objectives of Australia's Competition Policy

1.6 In BHP Billiton's view, Australian competition policy should encourage:

- productivity improvements, innovation and global competitiveness of Australian industry;
- investment in productive, long term projects and infrastructure; and
- competitive markets.

1.7 Through this submission, BHP Billiton offers recommendations for reforms to the existing competition policy landscape that would achieve these objectives, including:

- alignment of competitive principles with Australia's international trade policy;
- addressing regulation that undermines productivity;
- reforming the regulation of third party access under the National Access Regime; and
- simplification of Australia's competition law.

1.8 An overview of BHP Billiton's perspective and recommendations for reform in these areas is provided in this Executive Summary.

[1] Competition Principles Agreement, 1995, between the Commonwealth and the State and Territory governments clause 5(1)

The International Dimension of Australia's Competition Policy

1.9 To generate further opportunity for economic growth and welfare creation for Australia it is important that the country's international trade policy is consistent with its domestic competition policy (and vice versa). In order to do this, Australia should:

- remove or reduce "behind-the-border" domestic regulation that is anti-competitive or protectionist in nature;
- consult with the Australian Competition and Consumer Council (ACCC) and business in implementing its international trade policy; and
- ensure that Australia's trade agreements require Australia's trading partners to observe these same standards.

1.10 Australia should also execute and implement appropriate multi-lateral trade agreements such as the WTO Bali Trade Facilitation Agreement, and multi-lateral agreements which seek to facilitate growth of international trade in services.

Regulation Undermining Australia's Productivity

1.11 A fundamental element of Australia's competition policy is that legislation should not restrict competition unless it is demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

1.12 In the years following the Competition Principles Agreement, the Commonwealth and the states conducted a wide-ranging review of their legislation to remove unnecessarily anti-competitive regulation. Notwithstanding the commitment that governments would conduct a further review every 10 years thereafter, in BHP Billiton's view, that process has lost momentum and increasingly, regulation is introduced without sufficient regard to its potential competitive impact.

1.13 Australia's competitiveness, productivity and attractiveness for investment will be further enhanced if Australian governments renew their commitment to the guiding principle under the Competition Principles Agreement, and to conducting thorough competitive impact assessments of both existing and proposed regulation.

1.14 In BHP Billiton's experience, the following regulations potentially restrict competition and reduce productivity:

- **The Australian Jobs Act 2013.** This legislation imposes an unnecessary regulatory burden on businesses undertaking projects involving capital expenditure of $500 million or more, by requiring the preparation and implementation of an Australian Industry Participation Plan in relation to those projects. BHP Billiton already has a substantial focus on local procurement strategies where local products are competitive with available alternatives. This legislation adds unnecessary cost and complexity in relation to procurement for major capital projects and duplicates existing state government requirements as well as corporate practice.
- **Western Australia's Domestic Gas (Domgas) Policy.** By requiring the reservation of gas for domestic consumption, this policy risks significantly reducing investment in gas supply. This may, perversely, result in domestic supply shortfalls and in Australia not taking full advantage of its resource endowment, including maximising the opportunity to export LNG into international markets.
- **The Coastal Trading (Revitalising Australian Shipping) Act 2012.** This legislation introduced a licensing system and labour standards which make it more difficult and costly for foreign flagged vessels to provide interstate and intrastate shipping services. This substantially reduces competition in the sector, increases the cost of interstate and intrastate shipping, and decreases the competiveness of Australian products, which rely on this form of transport.
- **Environmental and Project approvals.** BHP Billiton supports the Australian Government's intention to streamline environmental approval processes to reduce unnecessary costs associated with duplication and double handling of assessment and approval processes, and doing so without reducing environmental protections.

1.15 Wherever new regulation is being considered by government, comprehensive, independent Regulatory Impact Statements (**RIS**), including a cost/benefit analysis, should be undertaken, together with a transparent consultation on the draft RIS with those most affected.

Infrastructure Access – National Access Regime

1.16 The potential for nationally significant single user infrastructure to be "declared" under the National Access Regime imposes substantial economy wide costs which impede investment and productivity. This is an example of why it is imperative to understand the practical impact of existing and proposed legislation.

1.17 In particular, the National Access Regime in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) provides for "declaration" of services provided by nationally significant infrastructure, including single user infrastructure. If a service is declared, the provider of the service must negotiate the terms of access with third parties, with recourse to arbitration of disputes by the ACCC. There is no equivalent statutory declaration regime in comparable overseas jurisdictions.

1.18 The Hilmer Review in 1992-1993 emphasised that declaration could "*undermine incentives for investment*" and should be applied "*sparingly*".[2]

1.19 The Hilmer Review's objective of introducing competition into former public monopoly industries has now largely been achieved through the use of State, Territory and industry specific access regimes. The Part IIIA declaration regime has contributed little towards this objective.

1.20 BHP Billiton has extensive experience with the application of the Part IIIA declaration regime to nationally significant single user infrastructure, through responding to Fortescue Metals Group Limited's (**FMG's**) applications for declaration of track access on BHP Billiton's Pilbara iron ore railways. This experience demonstrates that the costs of applying the Part IIIA declaration regime in this context can include billions of dollars in lost exports and GDP, arising from:

- significant capacity losses and operational inefficiencies associated with accommodating an access seeker on a previously single user facility;
- delays to expansions, innovation and operational improvements, caused by the provider's need to negotiate with an access seeker about the impact of changes to its operations; and
- uncertainty about whether and on what terms access must be provided to third parties, which is a key disincentive to private investment in nationally significant infrastructure.

1.21 The Productivity Commission undertook a review of the National Access Regime in 2012 and 2013, but it did not:

- undertake a full cost benefit analysis of the National Access Regime having detailed regard to the costs associated with that Regime (notwithstanding that its own terms of reference required such an analysis);
- seek to address concerns about the proposed power for the ACCC to direct a provider to expand its facility, or the ineffective "production process" exception to the definition of the "services" which can be declared under the Part IIIA declaration regime;
- seek to resolve the uncertainty which would be created by its proposed amendment to declaration criterion (b);
- address the inadequate time and resources available to decision makers under the Part IIIA declaration regime; or
- otherwise evaluate the consequences of the Part IIIA declaration regime in the context of nationally significant single user infrastructure.

1.22 Accordingly, BHP Billiton recommends that the Review Panel does not adopt the Productivity Commission Review's recommendations regarding the Part IIIA declaration regime.

1.23 In BHP Billiton's experience, the costs associated with the application of the Part IIIA declaration regime to nationally significant single user infrastructure greatly outweigh any potential benefit, as described in detail in this submission.

1.24 Accordingly, BHP Billiton submits that the Review Panel should recommend that the National Access Regime be amended to preclude future declaration applications.

[2] Hilmer Report 1993, *National Competition Policy: Report by the Independent Committee of Inquiry* AGPS, Canberra;

1.25 Such a recommendation would recognise that there is no demonstrable public interest justification for the lost GDP, investment, exports, productivity, efficiency and innovation associated with the government regulation that occurs via the Part IIIA declaration regime. However this recommendation would not propose any change to access regulation under State or Territory regimes, industry specific regimes, or access undertakings. Making this recommendation would be a material and practical contribution towards achieving the purposes of this Review.

Australian Competition Law

1.26 The current Australian competition law is unnecessarily complex and focused on statutory form. This has an adverse impact on compliance costs, business confidence and consistency with international competition regulation.

1.27 BHP Billiton supports Australian competition law:

- being clearer in its focus on competitive behaviour;
- including less complex statutory provisions;
- adopting ways to reduce the need for complex, expensive and lengthy authorisation and other regulatory processes to permit legitimate co-operative and other conduct; and
- being more consistent with the regulatory approach in other major jurisdictions such as the United States and the European Union.

1.28 In particular:

- consideration should be given to the use of economics-based exemptions, and informal enforcement guidance, in preference to authorisation or registrations.
- BHP Billiton encourages more effective and focused regulatory attention on anti-competitive, "buy-side" cartel conduct, both in Australia and around the region.
- there are clear examples of unnecessary "red tape" in relation to the exceptions for joint ventures under the cartel rules, and third line forcing conduct. Both demand attention to eliminate unnecessary cost to business and government.
- the information disclosure prohibitions in Division 1A of Part IV of the CCA should be repealed: while BHP Billiton supports effective, generally applicable regulation of information disclosure, if applied more broadly, these provisions would add significant cost and complexity to the compliance burden, particularly in the context of legitimate engagement with trading platforms, market indices and benchmarking exercises.

1.29 It is appropriate generally to maintain separate legislative regimes for each of competition and industrial relations. However, it is desirable to make some fine-tuning changes in the CCA in relation to the intersection between these two areas.

Opportunity

1.30 Through this Review, the Australian Government has an opportunity to consider reforms that promote innovation, competition and productivity, thereby strengthening the Australian economy and society.

1.31 BHP Billiton's perspective on the existing policy and regulatory environment, and suggestions for areas to reform, are based on its experience an employer, investor, producer, consumer and trading partner in Australia and in the global market, with a strong commitment to productivity and competition.

1.32 BHP Billiton commends this submission to the Review Panel as it considers opportunities to reform critical public policy settings as part of an overarching commitment to restoring Australia's competitive edge.

2 Addressing Australia's Productivity Challenge

BHP Billiton – a leading global resources company

2.1 BHP Billiton is a leading diversified resources company with a workforce comprising approximately 129,000 employees and contractors, working at 141 locations in 26 countries. We are among the world's top producers of major commodities including iron ore, metallurgical and energy coal, conventional and unconventional oil and gas, copper, aluminium, manganese, uranium, nickel and silver. Our operations supply customers and meet the resources demands of developed and emerging economies around the world. It is a proudly Australian company[3], with a long history dating back to 1885, and headquarters that have always been in Australia.

2.2 BHP Billiton welcomes the Australian Government's decision to initiate a review of Australia's competition law and policy. We appreciate the opportunity to contribute to this important debate, and in so doing draw on our perspectives as a large global company, with operations in many countries and experience of different regulatory regimes around the world.

Ensuring a competitive investment climate

2.3 Open markets, societies and free trade, in goods and services and ideas, create the right conditions for development. Open markets promote innovation, competition and productivity. BHP Billiton believes that societies and economies can be strengthened by good competition policy and regulation that is risk-based and supports an open and competitive process rather than protecting individual interests or competitors.[4]

2.4 It is essential that Australia sustains an investment climate that is internationally competitive and boosts the nation's productive capacity, including a stable and consistent approach to competition policy, infrastructure, foreign direct investment, tax, industrial relations and an ability to capitalise on innovation. Box 2A below sets out how such an investment climate assists BHP Billiton in the pursuit of its own strategy.

Box 2A

The Benefits of a Competitive Investment Climate: BHP Billiton's Experience

BHP Billiton has a strong interest in competitive markets around the world, for our products and the inputs we procure. The company's strategy is to own and operate large, long-life, expandable, upstream assets, diversified by commodity, geography and market. We are focused on developing and growing our diversified portfolio of tier one assets, over the long term. To operate, invest in and develop our operations effectively, BHP Billiton looks to:

- transparent, predictable and consistent regulatory environments across the geographies in which we operate; and
- competitive markets for the products we sell and procure.

Such an investment climate assists BHP Billiton to:

- invest in and grow our business throughout economic cycles;
- increase production capacity through productivity enhancements, such as debottlenecking, up-skilling staff and enabling efficiencies and collaboration across our businesses;
- run our production assets at full capacity, so as to minimise per unit costs; and
- secure the efficient, competitive market price of the day for the commodities we produce and market.

[3] In FY2013, BHP Billiton generated approximately 70% of its profits in Australia. Annually, BHP Billiton spends over US$19 billion in Australia which supports more than 9,000 local businesses. BHP Billiton is Australia's largest taxpayer and, in FY2013, the company's tax and royalty payments were approximately US$9 billion, which was more than three-quarters of our global tax payments.

[4] Hilmer Report 1993, *National Competition Policy: Report by the Independent Committee of Inquiry* AGPS, Canberra; Business Council of Australia, *Action Plan for Enduring Prosperity* July 2013

Addressing the productivity challenge

2.5 Through the lens of its specific economic activity, BHP Billiton believes Australia is in a strong position to capitalise on its already enviable prospects. Decades of mining experience, a highly skilled workforce, a track record of innovation, proximity to Asia, world-class ore bodies and extensive infrastructure are the foundations for such optimism. However, these foundations alone will not be enough in a market where the competition for investment is fierce and Australia begins to face an ageing population and skills shortages. Since 2001, Australia's mining productivity has been consistently declining and productivity in Australia's mining industry is poor in comparison to international competitors.[5] It is vital for Australia to become more productive. To remain competitive, it is important Australian companies large and small are able to innovate more easily and produce, sell and distribute increased volumes of produce at lower cost, in shorter times and more efficiently.

Box 2B

Achieving Sustainable Productivity Improvements – BHP Billiton's Experience

In the interests of its shareholders and resource owners, BHP Billiton is working hard to accelerate sustainable improvement in productivity. The Company is dedicated to working smarter to safely deliver greater volume growth from existing equipment at lower unit cost. By creating an environment where our people excel and strive to be more competitive, we are improving processes and systems to enable better management and planning of work which also contributes to a safer work environment for our people. Our commitment to improve productivity across the organisation has the potential to create significant value for shareholders and other stakeholders. At 31 December 2013, annualised productivity led volume and cost efficiencies totalling US$4.9 billion[6] were embedded and this is expected to increase to US$5.5 billion by the end of the 2014 financial year.

2.6 As Box 2B demonstrates, productivity improvements start and are led at an enterprise level. Indeed, it is at the level of the individual economic entity where Australia's productivity and competitiveness challenge will ultimately be addressed. Simultaneously, there is a critical supporting role to be played by the public policy environment within which these economic entities are operating, and confronting, Australia's productivity challenge.

2.7 BHP Billiton, therefore, strongly welcomes the Australian Government's commitment to addressing critical public policy settings as part of an overarching commitment to restoring Australia's competitive edge.

2.8 More specifically BHP Billiton believes there should be a re-commitment to the "guiding principle" under the Competition Principles Agreement, that all forms of legislation and regulation, "*should not restrict competition unless it can be demonstrated that, (a) the benefits of the restriction to the community as a whole outweigh the costs; and (b) the objectives of the legislation can only be achieved by restricting competition*".[7] In practice this means:

- identifying and addressing existing legislation and regulation that reinforces anti-competitive market structures; and
- ensuring that a robust cost benefit analysis underpins future legislation and regulation.

[5] Eslake, S. 2011, 'Productivity: the lost decade', Paper presented to the annual policy conference, Reserve Bank of Australia, Sydney, 15 August.

[6] Represents annualised volume and/or cash cost efficiencies embedded within the December 2013 half year result relative to the baseline 2012 financial year.

[7] Competition Principles Agreement, 1995, clause 5(1).

3 Defining the Objectives of Australia's Competition Policy

Defining the Objectives of Australia's Competition Policy – Summary

In BHP Billiton's view, Australian competition policy should encourage:

- productivity improvements, innovation and global competitiveness of Australian industry;
- investment in productive, long term projects and infrastructure; and
- competitive markets.

Introduction

3.1 One of the major challenges for the Review Panel will be to determine the key outcomes of Australia's competition policy in the years ahead. In BHP Billiton's view, they should include:

(a) promoting innovation and productivity in Australian industry generally, including labour market flexibility;

(b) removing regulatory disincentives to develop and invest in nationally significant, productive infrastructure;

(c) reviewing Commonwealth and state legislation to eliminate unnecessary and anti-competitive regulation; and

(d) simplifying Australia's competitive conduct rules, so as to be clear and readily explicable to business people, and consistent with international standards.

3.2 These objectives are inter-twined andeach of them featured in the Hilmer Review of Australia's Competition Policy in 1992 and 1993.

3.3 The Hilmer Review fundamentally changed and improved Australian industry and markets. However, since the Hilmer Review's recommendations were implemented and ran their course, BHP Billiton has observed the following developments in competition policy in Australia:

(a) a shift from an economy-wide impetus for innovation, lower barriers to entry and greater productivity, to a focus on developing competition conduct rules for particular sectors such as grocery, fuel and banking;

(b) the emergence of many forms of infrastructure regulation, regulating multi-user, former government-owned infrastructure, but resulting in far less successful and more costly outcomes elsewhere;

(c) far less attention being given to the competitive impact of regulation, at both state and federal levels – ultimately at the cost of industry productivity; and

(d) serial amendments to the CCA that have reduced its efficacy as clear business regulation and increased compliance costs, particularly for international businesses.

3.4 In this section, BHP Billiton identifies three critical behaviours which Australia's competition policy should encourage. They are:

- productivity improvements and innovation;
- investment in long term resources projects and infrastructure; and
- competitive markets.

3.5 Each of these behaviours will be advanced by attention to the competition policy objectives mentioned above – to the advantage of the Australian economy.

Striving for productivity improvements

3.6 In today's world of increased commodity supply, and where producers are price takers, it is critical that natural resource assets are operated at full capacity and as efficiently as possible, to minimise unit production costs.

3.7 In this submission we identify activity and regulatory measures that undermine the efficient operation of assets. These include:

- **third party access regimes** which adversely affect the infrastructure owner's ability to efficiently co-ordinate production and operations from mine to customer;
- **anti-competitive conduct** by suppliers of goods and services;
- **specific regulations** which reinforce anti-competitive market structures or conduct;
- **labour disputes** which are insufficiently regulated;
- **excessive legal costs** arising from the need to comply with form-based laws regulating legitimate forms of co-operation between competitors such as joint production and shared infrastructure;
- **third line forcing rules** which unnecessarily limit a company's ability to direct contractors to procure (eg construction) services from preferred sub-contractors or to direct suppliers to use third party providers (for example, of efficient bill payment services).

Investment in long term resources projects and infrastructure

3.8 All of the industries in which BHP Billiton operates involve large, long term capital commitments. As reported by the Productivity Commission in November 2013[8], major projects play a vital role in the future of Australia's prosperity by "*lifting national income, creating employment opportunities, raising productivity and generating revenue for governments*". In FY2013 BHP Billiton invested in 14 major projects in Australia, with a total capital budget in excess of US$16 billion.[9]

3.9 Consistent regulation, that is predictable over the long term, assists companies in making large scale capital investments and will increase the attractiveness of Australia as a place to invest in major projects across all industries. Consistent regulation requires Australian governments and regulators to take a longer-term view and focus on consistent and effective enforcement of settled law (although acknowledging the need for incremental changes over time).

3.10 Throughout this submission we identify regulatory measures that have the potential to undermine investment. In summary these include:

- **Third Party Infrastructure Access:** In Australia, the introduction in 1995 and subsequent application of Part IIIA of the CCA has significantly affected the regulatory framework which applies to BHP Billiton's iron ore operations. The application of Part IIIA (or any regulations like it) to privately-owned, integrated, single-user resources infrastructure is unique in BHP Billiton's experience around the world. The infrastructure concerned was first established in the 1960s, and involved the assumption of very substantial risks by BHP Billiton's shareholders. The subsequent application of Part IIIA to this infrastructure has the potential to fundamentally change the rules for its use and technical development. This in turn creates substantial uncertainty, which deters investment in nationally significant infrastructure (see Boxes 6E and 6F).
- **Domestic Reservation of Production:** As both a large consumer and supplier, our experience in global energy markets demonstrates that markets operate most efficiently when independent from direct external intervention. Domestic gas reservation policies are a form of such intervention, with the intent to reduce free market equilibrium price levels. BHP Billiton opposes the Western Australian Domestic Gas (Domgas) Policy as it is inconsistent with free trade and ultimately leads to inefficient market outcomes including the potential for under-investment and supply shortfalls. These outcomes are perversely, the

[8] http://www.pc.gov.au/projects/inquiry/access-regime/report

[9] Represents BHP Billiton share of capital budget over life of the following projects.: Macedon US$1,050m, Bass Strait Turrum US$1,350m, Bass Strait Longford Gas Conditioning Plant US$520m, North West Shelf North Rankin B Gas Compression US$850m, North West Shelf Greater Western Flank-A US$400m, WAIO Jimblebar Mine Expansion US$3,220m, WAIO Port Hedland Inner Harbour Expansion US$1,900m, WAIO Port Blending and Rail Yard Facilities US$1,000m, WAIO Orebody 24 US$698m, Daunia US$800m, Hay Point Stage Three Expansion US$1,505m, Caval Ridge US$1,870m, Appin Area 9 US$845m, and Newcastle Third Port Project Stage 3 US$367m.

opposite outcomes to that intended. Instead, the focus of energy market reform should be on promoting efficient, transparent markets in a way which fosters the timely development of the nation's resource endowment whether that be domestic gas or LNG.

- **Regulatory Approvals:** The requirement that companies obtain express regulatory approvals for conduct that involves public benefits such as (i) authorisations for certain forms of co-operative development and offtake arrangements; and (ii) notifications for exclusive dealing and third line forcing (which, especially in the case of third line forcing, may be required regardless of the arrangement's likely impact on competition) contrasts with the approach of other established competition law jurisdictions, such as the United States and the European Union, where greater reliance is placed on self-assessment of competition law risk by the parties to an arrangement. Requiring the parties to obtain express approvals for these types of arrangements introduces, at best, a significant degree of delay and uncertainty, and at worst may deter and endanger investments being made at all.
- **Competition Law:** Several features of Australia's competition laws (including the current form of the joint venture exception, among others addressed in this submission) undermine confidence in making investments and raise compliance and legal counselling costs, as compared to elsewhere in the world.

Competitive markets

3.11 BHP Billiton seeks to ensure that open and competitive markets should determine pricing and output in the industries in which we operate. For our commodities, we seek to secure the price of the day on the day. To that end, BHP Billiton supports the evolution of more liquid and transparent commodity markets. Tools available to increase spot market liquidity and transparency have included the growth of electronic commodity transaction platforms and market indices based on individual transaction prices, accurately reported.[10] Such markets provide clearer and more accurate signals for decision-making regarding short run production/output, as well as on medium to long term capital investments. More liquid and transparent commodity markets function more efficiently and are ultimately more competitive.

3.12 BHP Billiton supports the effective regulation of conduct that distorts competitive markets. By effective regulation we mean:

- the prohibition of, and effective enforcement against, cartel conduct across all market participants, including buyers;
- ensuring accurate price/volume transaction reporting (on which market indices are based) and legitimate conduct on open market trading platforms;
- avoiding over-regulation of markets and trading platforms, which reduces liquidity;[11] and
- avoiding deterring legitimate forms of price discovery (or legitimate and efficiency-enhancing cost-benchmarking) through application of complex competition laws.

[10] Market evolution has in some cases been rapid. In iron ore, for example, BHP Billiton was among the first market participants to champion the emergence of independent price indices for iron ore fines in 2008-09. Following this move, iron ore consumers promptly adopted index pricing in long term contracts, in place of what had traditionally been protracted annual pricing negotiations. This delivered a substantial productivity gain for suppliers and consumers alike. In 2012, BHP Billiton co-founded the globalORE iron ore electronic transaction platform and was an early user of the China Beijing Mercantile Exchange (CBMX) iron ore electronic transaction platform. In just five years, we have moved from a situation in which most of our iron ore was delivered to end users under rigid long term annual fixed price contracts, to a position where a considerable portion of our output, including that sold under long term contracts, will be sold and resold – sometimes several times – between production and consumption. This resulted in a much more flexible and dynamic marketplace in which all participants benefit from reliable indicators of current market pricing.

[11] BHP Billiton welcomes prudent regulation of the markets in which it operates, but over-regulation can lead to unintended consequences. For example, a number of jurisdictions are considering closer regulation of the reporting of transaction prices to independent publishers of price indices or benchmarks. This follows investigations in the financial services sector such as LIBOR, and the publication of Principles by the International Organisation of Securities Commissions (IOSCO) for implementation by member countries. While the Principles are welcome, certain aspects of the proposed implementation of these rules, in jurisdictions such as the European Union, risk unintended consequences such as discouraging companies from reporting data and in turn leading to less reliable and trusted indices.

4 The International Dimension of Australia's Competition Policy

The International Dimension of Australia's Competition Policy – Summary

This submission focuses primarily on Australia's domestic competition policy. However, it is important that Australia's international trade policy also fosters competition and free trade. In order to do this, Australia should:

- remove or reduce "behind-the-border" domestic regulation that is anti-competitive or protectionist in nature;
- ensure that, through consultation with the ACCC and business, Australia's domestic competition policy is consistent with the country's international trade commitments (and vice versa); and
- ensure that such trade agreements require Australia's trading partners to observe these same standards.

Australia should also execute and implement appropriate multi-lateral trade agreements such as the WTO Bali Trade Facilitation Agreement, and multi-lateral agreements which seek to facilitate growth of international trade in services.

The significance of international trade to the Australian economy

4.1 International trade has the power to create national wealth and jobs and grow resilient economies. Technology, communications and transportation make the world 'smaller' and bring goods, people and ideas together in a global market.

4.2 Promoting free trade and competition in international markets should be a critical element of Australia's international trade policy.

4.3 This reflects the fact that the Australian economy is heavily trade exposed, and trade liberalisation benefits the Australian economy. For example:

- one in five Australian jobs is export-related and export-related jobs tend to be better paid;
- the surge in the terms of trade in Australia over the last decade has been associated with a 40% increase in average household income; and
- Australian companies which engage in global supply chains enjoy an above-average rate of value-add for their goods and services.[12]

4.4 The resources industry is one of Australia's most globalised industries. Energy, mining and minerals processing has been a major driver of growth, investment and higher living standards, particularly over the last decade. For example:

- the resources industry last year accounted for 18% of gross value add – or $250 billion of the nation's output – as well as 1.1 million jobs (or ~10% of total employment) across a diverse range of professions;[13] and
- in 2012-13, Australia's resources and energy sector earned $176 billion in export revenue, 58.5% of Australia's total export revenue. Coal and iron ore are Australia's two largest export industries which together accounted for 35% of Australia's total export earnings in 2011-12.[14]

4.5 BHP Billiton's success relies on our ability to trade. Since 2001, our Western Australian iron ore production has tripled. Along with other producers who have also invested heavily, BHP Billiton has significantly and sustainably increased Australia's national income through greater international trade in this critically important

[12] Export Council of Australia http://www.export.org.au/eca/advocacy/trade-policy

[13] Source: "Industry Dimensions of the Resource Boom: An Input-Output Analysis", Vanessa Rayner and James Bishop, Research Discussion Paper 2013-02, February 2013, Economic Research Department, Reserve Bank of Australia

[14] Bureau of Resources and Energy Economics, *Resources and energy statistics 2013* http://www.bree.gov.au/sites/default/files/files//publications/res/annual_res_2013.pdf

resource. Open markets allow businesses, such as BHP Billiton, to access the capital, the components and the knowledge to make the business as competitive and productive as possible.

4.6 Critically, with the emergence of global supply chains, goods are increasingly "made in the world", with components and partial assemblies frequently traded several times across borders before the final product reaches the end user. A Standard Chartered report[15] finds that the import content of goods finally exported has risen to 40% of total exports from 20% of total exports in the 1990s and is forecast to reach 60% in 2030. This change is forcing structural adjustments in the Australian economy and in the way business procures and creates its products. Exporters are also importers. Increasingly, trade is in tasks rather than products.

4.7 However global trade growth is still well below pre-global financial crisis levels, despite a recovery in global GDP growth. Trade policy across the G20, while largely avoiding the introduction of overt trade barriers, has seen a significant increase in non-tariff barriers that have an anti-competitive effect. Government sanctioned public restrictions are potentially more harmful to competition (for example, onerous licensing requirements, restricting market access) than bilateral arrangements between companies because the market structure and practices they support are less capable of being eroded by new entry or other market forces. Australian and United States laws regarding coastal shipping, and laws which allow special privileges for state-owned enterprises are key examples of such government sanctioned public restrictions. Such restraints prevent the full benefits of open trade being realised, including global GDP and jobs growth and as a stimulus to innovation. Only changes to the law can undo restraints imposed by government.[16]

4.8 The G20 has recognised that international trade is the world's growth engine by placing it front and centre in the year of Australia's 2014 G20 Presidency. Trade growth will be an important element in achieving the additional collective 2% growth target over five years set by the G20 Finance Ministers. Government and business will need to work together to create an outcome that could mean an extra US$2 trillion in global economic activity and tens of millions of new jobs.[17]

The intersection of competition and trade policy

4.9 When considering Australia's competition policy, the Review Panel should consider the implications of Australia's domestic competition policy on its international trade policy (and vice versa). The same principles that shape Australia's domestic competition policy play a role in defining its international trade policy[18]. Applying such principles can help to promote competitive markets for Australian exports, and to ensure that Australian industry and consumers obtain the benefit of competitively priced imports.

4.10 Several important steps can be taken to achieve this objective.

(a) Australia's Preferential Trade Agreements (**PTA**s) increasingly require our trading partners to implement and enforce robust domestic competition policy (in relation to private and public enterprise), as a means to open international markets to Australian businesses. Australia and its trading partners should commit to these obligations as an important feature of PTAs. There may be a role for domestic regulators such as the ACCC to assist in identifying appropriate domestic policy standards to be implemented through these obligations.

(b) Australia and its trading partners should commit to winding back tariff and non-tariff protection measures. Winding back tariff based measures can help to create a level playing field for Australian businesses. For example, under the recently tabled Korea Australia Free Trade Agreement (**KAFTA**), Korea will extend to Australia the preferential access it already provides to Australia's major competitors, including the United States, European Union, Chile and ASEAN countries. Under KAFTA, all tariffs will be removed on Australian manufacturing, energy and resources within 10 years. Similar benefits can be achieved by removing domestic non-tariff protectionist measures within Australia. Section 5 of this submission identifies several domestic regulations, for example, *The Australian Jobs Act* and the *Coastal Trading Act*, which can reduce the international competitiveness of Australian businesses that

[15] Standard Chartered, Global Trade Unbundled,9 April 2014

[16] "Enhancing welfare by attacking anti-competitive market distortions" Abbott, A., & Singham, S (2011) http://www.ftc.gov/sites/default/files/attachments/key-speeches-presentations/ssrn-id1977517.pdf

[17] Treasurer Joe Hockey, Media Release "Conclusion of G20 Finance Ministers and Central Bank Governors Meeting in Sydney," (February 2014) http://jbh.ministers.treasury.gov.au/media-release/006-2014/.

[18] The foundation of a country's trade policy is domestic policy settings, whether they serve a protectionist or liberalising purpose - Mike Adams, Nicolas Brown and Ron Wickes, "Increasing Australia's Prosperity: the contribution of trade policy," Minerals Council of Australia Background Paper, (March 2014); http://www.minerals.org.au/file_upload/files/reports/mca_increasing_australias_prosperity_March_2014_FINAL.pdf

are subject to these regulations. Removing barriers to the development of global supply chains is another key area of focus.

(c) Australia and its trading partners should ensure that PTAs are consistent with WTO rules and contain appropriate accession arrangement. These outcomes will be important to ensure they are trade liberalising. Ideally, PTAs must go beyond simply satisfying those rules, to set the pace on the next wave of trade liberalisation, by dealing innovatively with matters such as obligations to implement competition policy, the treatment of trade in services, and dispute resolution.

(d) Barriers to trade in services need to be better understood and addressed through both domestic reform and international coordination, with comprehensive chapters included in PTAs and regional trade agreements such as the Trans Pacific Partnership (TPP). Domestic policies that prevent or restrict international trade in services should be reduced and removed. Examples include restrictions on highly skilled people moving across borders to provide services (including the recognition of qualifications and unnecessarily burdensome visa restrictions), and restrictions on the geographies in which businesses may locate their operations. To this end, it will be important to finalise agreements such as the Trade in Services Agreement (which represents around 70% of the global trade in services), the Information Technology Agreement (which represents around 97% of the global trade in IT products) and an agreement on environmental goods.

4.11 Reforms such as these are critical to ensure that Australian businesses and consumers can benefit from competitive international markets for goods and services.

5 Addressing Regulation which Undermines Australia's Productivity

Addressing regulation which undermines Australia's productivity – Summary

Australia's competitiveness, productivity and attractiveness for investment will be further enhanced if Australian governments renew their commitment to the "guiding principle" under the Competition Principles Agreement, and to conducting thorough competitive impact assessments of both existing and proposed regulation.

In BHP Billiton's experience, current forms of regulation that restrict competition and reduce productivity include:

- **The Australian Jobs Act 2013.** This legislation imposes an unnecessary regulatory burden on businesses undertaking projects involving capital expenditure of $500 million or more, by requiring the preparation and implementation of an Australian Industry Participation Plan in relation to those projects. BHP Billiton already has a substantial focus on local procurement strategies where local products are competitive with available alternatives. This legislation adds unnecessary cost and complexity in relation to procurement for major capital projects and duplicates existing state government requirements as well as corporate practice.
- **Western Australia's Domestic Gas (Domgas) Policy**. By requiring the reservation of gas for domestic consumption, this policy risks significantly reducing investment in gas supply. This may, perversely result in domestic supply shortfalls and in Australia not taking full advantage of its resource endowment, including maximising the opportunity to export LNG into international markets.
- **The Coastal Trading (Revitalising Australian Shipping) Act 2012**. This legislation introduced a licensing system and labour standards which make it more difficult and costly for foreign flagged vessels to provide interstate and intrastate shipping services. This substantially reduces competition in the sector, increases the cost of interstate and intrastate shipping, and decreases the competiveness of Australian products which rely on this form of transport.
- **Environmental and Project approvals**. BHP Billiton supports the Australian Government's intention to streamline environmental approval processes to reduce unnecessary costs associated with duplication and double handling of assessment and approval processes, and do so without reducing environmental protections.

Wherever new regulation is being considered by government, comprehensive, independent regulatory impact statements, including a cost/benefit analysis, should be undertaken, together with a transparent consultation on the draft Regulation Impact Statement (RIS) with those most affected.

The importance of a rigorous competitive impact assessment

5.1 A fundamental element of Australia's competition policy is that legislation should not restrict competition unless it is demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.[19]

5.2 In the years following the Competition Principles Agreement, the Commonwealth and the states conducted a wide-ranging review of their legislation to remove unnecessarily anti-competitive regulation with a commitment to continue reviewing every 10 years thereafter.[20] In BHP Billiton's view, that process has lost momentum and regulation is increasingly introduced without sufficient regard to its potential competitive impact.

[19] See clause 5(1) of the Competition Principles Agreement, 1995 between the Commonwealth and the State and Territory governments.

[20] See clause 5(6) of the Competition Principles Agreement.

5.3 Australia's competitiveness, productivity and attractiveness for investment will be further enhanced if Australian governments renew their commitment to conducting thorough and timely competitive impact assessments of both existing and proposed regulation.[21]

Areas for particular focus: current Australian regulation

5.4 The Review Panel's Issues Paper requests the identification of current regulation across the economy that restricts competition and reduces productivity. BHP Billiton has identified several examples below and outlines the impact on the Company.

The Australian Jobs Act 2013

5.5 The *Australian Jobs Act 2013* (the **Jobs Act**) came into force on 27 December 2013. Under the Jobs Act developers of major projects with a capital expenditure of $500 million or more are required to prepare and implement an Australian Industry Participation Plan with the objective of ensuring "full, fair and reasonable" opportunity to Australian industry to supply goods and services to the project.

5.6 The Company's strong and diverse presence in Australia is in large part due to legal and regulatory systems conducive to major project development. In contrast, the Jobs Act imposes an unnecessary administrative, resourcing and cost burden on BHP Billiton at a time when the industry must address both competitiveness and productivity challenges. Compliance will increase the sourcing timeline and resources required to procure goods and services, contributing to project delays and the already high cost of doing business in Australia. It is unclear how submitting proponents to the onerous requirements of the Act will benefit local participation, particularly in circumstances where the uptake of local content is already high.

Box 5A: BHP Billiton Procurement in Australia

All BHP Billiton operations are required to implement local procurement plans to support local and regional businesses. Last year the BHP Billiton Group spent in excess of US$19 billion sourcing goods and services from more than 9,000 Australian businesses.

Our business case for sourcing goods and services from local vendors wherever possible is twofold. Firstly, we are committed to ensuring the benefits of our operations flow directly to the communities in which we operate. Secondly, the cost imperative to source locally is driven by virtue of the remoteness of our operations. In circumstances when we do procure from overseas it is because the product presents the best value, fit for purpose or specification and/or is only available internationally.

5.7 The Jobs Act demonstrates how unintended consequences can arise when no thorough impact assessment is undertaken on proposed new legislation. While worthy in its intent, the Jobs Act duplicates obligations at the state level and the specific disclosure and engagement parameters that a large public company such as BHP Billiton must reasonably abide by. For example:

- achieving compliance will necessitate the disclosure of information that may be market sensitive or detrimental to potential suppliers, far in advance of ASX disclosure requirements; and
- the Jobs Act imposes several onerous market engagement obligations on project proponents that go beyond regular business practices.

5.8 More generally, Australian regulation such as the Jobs Act adds complexity and restricts the ability of business to procure freely across global supply chains. The current Australian Government is in the process of considering the operation of the Jobs Act, which we welcome. While BHP Billiton supports the objectives of the Jobs Act, it believes the legislation, in parallel with state obligations, undermines productivity and adds onerous and unnecessary reporting and compliance requirements on major projects.

[21] In the UK the Office of Fair Trading (now replaced by the Competition & Markets Authority) has issued guidance to government departments on how to undertake a competition impact assessment of proposed legislation. See http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft876.pdf. The current UK Government has adopted a policy of encouraging legislation to be pro-competitive in nature – see sections 1.4.14 to 1.4.19 of https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf

Western Australia's Domestic Gas (Domgas) Policy 2006

5.9 As one of the country's largest oil and gas producers and a significant consumer of energy BHP Billiton takes a balanced view on energy market development. Based on our experience in global energy markets, BHP Billiton considers that markets deliver better outcomes when free from direct external intervention.

5.10 Consistent with this principle, BHP Billiton opposes the Western Australian Government's domestic gas reservation policy, as expressed in previous submissions made by BHP Billiton on this issue.[22]

5.11 This form of government market intervention risks significantly reducing investment in gas supply, thereby raising the potential for under-investment and supply shortfalls. These are outcomes which Western Australia has already experienced in recent years. Given the stated intent of the Western Australia Domestic Gas Policy is to lower domestic gas prices below free market equilibrium prices it leads to market conditions that can place an additional economic burden on LNG projects as well as domestic only projects for example, Macedon. This coupled with flat demand growth and a higher cost environment creates significant uncertainty with progressing new developments in Western Australia.

5.12 This form of government market intervention risks significantly reducing investment in gas supply, thereby raising the potential for under-investment and supply shortfalls. These are outcomes that Western Australia has already experienced in recent years. Arguably, recent shortfalls in Western Australia were driven by delays to investment decisions created by the additional economic burden of the Western Australia Domestic Gas Policy on future LNG projects as well as increasing the investment uncertainty for domestic only projects for example, Macedon.

5.13 This is further supported by historical precedents in the United States (Well-head Price Controls pre *Natural Gas Policy Act 1978*) and the UK (*Gas Fired Power Plant Moratorium 1998*). They demonstrate that where governments seek to intervene directly in gas markets through price regulation or a direction to use one form of energy over another, the result is a delay in the development of future gas supplies with consequent negative economic impact for the country.

5.14 The benefits of free trade are further supported by economic analysis undertaken recently in Australia (by, McLennan Magasanik Associates[23] and Deloitte Access Economics[24]) and the US (NERA[25]). This analysis has shown that whilst the development of LNG exports may impose additional costs on domestic gas users in terms of a higher gas price, these costs are outweighed by the benefits arising from export revenue resulting in a positive contribution to the economy overall.

5.15 The Australian Government is currently in the process of preparing a White Paper on Energy Policy with the stated objectives of easing cost pressure on energy in Australia, increasing our international competitiveness and growing our export base. Subsidised domestic gas prices will detract from this agenda to the detriment of the broader economy; particularly in conjunction with a weakening Asian LNG market and an increasing cost environment that will already put pressure on Australia's competiveness in international LNG markets.

5.16 BHP Billiton acknowledges the need for ongoing reform of Australia's energy markets and welcomes the White Paper process as a critical part of this process. Energy market reform should promote efficient, transparent markets which deliver commercial outcomes, and therefore in the absence of evidence based market failure, markets and the industries supporting them should be allowed to work with minimal government intervention. The current domestic gas reservation policy operating in Western Australia has neither been effective in lowering prices, nor conducive to a secure and efficient gas supply environment. Such a policy should not be replicated federally or in any other state jurisdictions.

5.17 It is clear that Australian domestic gas markets are working. In the last 12 months, BHP Billiton as a supplier has been involved in, and competed for, multiple gas sale agreements in both Eastern and Western Australia (noting the markets are separate and disconnected). These agreements have been both short and long term, to different market sectors (retail, industrial, power generation), large and small gas quantities and for gas sales. This new

[22] For example, BHP Billiton's 2006 submission to the WA Department of Industry and Resources (now State Development) consultation on Securing Domestic Gas Supplies; BHP Billiton's submission as a JV partner in the North West Shelf during the ACCC's authorisation process; and BHP Billiton's submission to the 2012 Commonwealth Energy White Paper.

23 Queensland LNG Industry Viability and Economic Impact Study, McLennan Magasanik Associates report for the Queensland Department of Infrastructure and Planning, February 2008.

[24] The economic impacts of gas reservation, Deloitte Access Economics (DAE) report for APPEA, October 2013.

[25] Macroeconomic Impacts of LNG Exports from the United State, NERA Consulting for the US Department of Energy, December 2012

business demonstrates that significant quantities of natural gas continue to be made available and contracted in the Eastern and Western Australian domestic gas markets and parties have been able to agree mutually acceptable terms including price.

5.18 Policies where Government might appropriately focus include: accelerating efforts to bring on supply, market reform, streamlined approval processes; removal of resource development constraints and facilitation of infrastructure. These are policy responses that will respond to any tightening in the market and the structural shift in the market to ongoing higher prices.

The Coastal Trading (Revitalising Australian Shipping) Act 2012

5.19 The *Coastal Trading Act* came into force on 1 July 2012 with the objective of making Australian flagged vessels more competitive with foreign flagged vessels. The Act introduced a system of licenses which made it more difficult for foreign flagged vessels to secure interstate and intrastate work and also made associated changes to the *Fair Work Act 2009* to ensure that Australian labour standards (and costs) were applied to foreign crews on foreign registered ships.

5.20 Under the new licensing system, foreign-registered ships temporarily operating on the coastal trade must undertake at least five voyages in twelve months, and the loading dates, origin and destination, cargo types and volumes must be specified at the start of that period. It is also a specific requirement of the licensing system that foreign registered ships can only carry cargo if there are no Australian-flagged ships that can do so.

5.21 The effect (and intent) of these measures is to shield Australian ships supplying coastal shipping services from competition by foreign vessels. The consequence has been an immediate and significant increase in the cost of shipping material around the Australian coast as well as increased complexity and administration. For operations such as our TEMCO manganese alloy smelter in Tasmania the cost of coastal shipping is a key input and any increase in this can have an adverse effect on profitability. More broadly, the measure has eroded Australia's competitiveness and has had the perverse effect of reducing the number of Australian flagged vessels. Global supply chains also mean that Australian companies import components to produce manufactured goods. Increased costs to business make their products less competitive in the global market.

5.22 The Department of Infrastructure is currently conducting a formal review of the legislation. BHP Billiton believes it is vital that the unintended consequences and additional cost and administrative burdens that have resulted from the Act are addressed. This would most simply be done by repeal of the Act and reverse to previous arrangements.

Environment and Project Approvals

5.23 BHP Billiton supports the Australian Government's intention to streamline approval processes to remove unnecessary duplication. In particular, we welcome the agreement reached at the Council of Australian Governments in December 2013 to introduce a "One-Stop-Shop for approvals". Both this and the "Streamlining of Offshore Petroleum Approvals" processes are positive steps towards reducing the regulatory burden on companies.

5.24 Streamlining the regulatory burdens for environmental and major projects approvals could realise economy-wide benefits in the billions of dollars each year[26]. Importantly, this can be done without any reduction in the levels of environmental protection that Australians rightly expect and which BHP Billiton is committed to delivering.

5.25 BHP Billiton supports national reform and practical measures to reduce the duplication and double-handling of assessment and approval processes. Current arrangements result in delays and uncertainty for business, slowing job creation and economic growth.

5.26 For example, it took 41 months to secure approvals for BHP Billiton's Caval Ridge Mine, a new open cut coal mine, with relatively low environmental risk, utilising well understood methods and management activities and located adjacent to a very similar mine in the already developed Bowen Basin. Final approval included 1,100 Federal and State conditions for a project with relatively low environmental risk.

5.27 Any approvals system should be governed by four core principles: it should be streamlined, with clear roles and responsibilities, be outcomes focused and flexible, and should also be strategic and practical.

5.28 Reform, through the one-stop-shop initiative, should include:

[26] Productivity Commission, *Back to the Future: Resourcing Australia's Productivity Growth* 2009.

- evidence-based approvals processes and co-operative and collaborative processes between agencies and across jurisdictions;
- a streamlined, harmonised approvals process between the Commonwealth, States and Territories;
- a commitment to process and timelines, including agreed assessment timetables;
- accreditation of State Offset policies to remove significant duplication; and
- use of 'strategic assessments' as a strategic planning tool to identify outcomes that project developments can manage towards and provide project certainty at the same time.

5.29 BHP Billiton recognises that the majority of the competitiveness and productivity challenge rests at the feet of industry itself. However, governments must also respond in order to boost the nation's productive capacity. They can do this by providing an investment climate that is internationally competitive and an enabling policy framework.

6 Infrastructure Access – National Access Regime

Infrastructure Access – National Access Regime – Summary

Policy origins: the Hilmer Review

- "Declaration" under the National Access Regime allows access obligations to be imposed on providers of nationally significant, privately developed, single user infrastructure. There is no equivalent statutory declaration regime in comparable overseas jurisdictions.
- The origin of this declaration regime was the Hilmer Review (1993), which sought to introduce competition into markets which depended on "essential facilities". The Hilmer Review was particularly concerned to introduce competition into "areas previously reserved to public monopolies". However the Hilmer Review also emphasised that declaration had the potential to "undermine incentives for investment," and should be applied "sparingly".
- The objective of introducing competition into former public monopoly industries has now largely been achieved through the use of State, Territory and industry specific access regimes. The declaration process under the National Access Regime has contributed little towards this objective.

Costs of applying the declaration regime to nationally significant single user infrastructure

- The costs associated with applying the declaration regime to nationally significant single user infrastructure can include billions of dollars in lost exports and GDP, arising from:
  - significant capacity losses and operational inefficiencies associated with accommodating an access seeker on a previously single user facility; and
  - delays to expansions, innovation and operational improvements, caused by the provider's need to negotiate with an access seeker about the impact of changes to its operations.
- Applying the declaration regime to nationally significant single user infrastructure also creates uncertainty about whether and on what terms access must be provided to third parties, which is a key disincentive to private investment in nationally significant infrastructure.

The Productivity Commission Review's recommendations regarding the declaration regime

- The declaration regime has been the subject of ongoing review and amendment, and was most recently reviewed by the Productivity Commission during 2012 and 2013.
- The review did not include a rigorous cost benefit analysis of the National Access Regime (notwithstanding its terms of reference). Further, it did not address concerns about the proposed power for the ACCC to direct a provider to expand its facility, or the ineffective "production process" exception. The review proposed an amendment to declaration criterion (b) which would create significant uncertainty if adopted, and did not address the inadequate time and resources available to decision makers under the declaration regime.

The future of the declaration regime

- In BHP Billiton's experience, the costs associated with the application of the declaration regime to nationally significant single-user infrastructure greatly outweigh any potential benefit.
- BHP Billiton submits that the Review Panel should recommend that the National Access Regime be amended to preclude future declaration applications and acknowledges that doing so would not result in any change to access regulation under State or Territory regimes, industry specific regimes, or undertakings.

Introduction

6.1 Investment in major infrastructure, and productive use of that infrastructure, are critical to achieving a strong Australian economy that drives continued growth in living standards.

6.2 Infrastructure is vital to BHP Billiton's business and efficient and productive infrastructure investments and operations are a key focus for BHP Billiton.

6.3 BHP Billiton uses both single and multi-user infrastructure, under various regulatory regimes. In Australia BHP Billiton has developed, operates and uses a vertically integrated, single user, mine, rail and port system to produce and export iron ore from Western Australia. BHP Billiton uses both single and multi-user infrastructure to export metallurgical coal from Queensland and New South Wales, and uses multi-user rail and port infrastructure to export energy coal from New South Wales. In addition, BHP Billiton uses and in some cases also develops electricity, gas, water, airport and other forms of infrastructure as critical elements to many of BHP Billiton's operations. In BHP Billiton's experience, multi-user infrastructure operations are significantly less efficient than single user operations.

6.4 The Terms of Reference require the Review Panel to consider whether one of the forms of access regulation which applies to BHP Billiton – the National Access Regime in Part IIIA of the CCA – "*is adequate*". BHP Billiton's submissions on this issue focus on the Part IIIA declaration regime, and do not address other avenues for third party access. Specifically, BHP Billiton:

- describes the Hilmer Review's objective in recommending the establishment of a national declaration regime, including its concern to introduce competition into markets characterised by monopoly, and to ensure that that regime did not deter investment in nationally significant infrastructure;
- describes BHP Billiton's experience of the costs associated with the Part IIIA declaration regime, including operational impacts and delays from requiring a provider to accommodate a third party on a previously single user facility, and disincentives for investment in nationally significant infrastructure;
- identifies why a thorough evaluation of these costs was critical to the Productivity Commission's inquiry into the National Access Regime (**the Productivity Commission Review**), and submits that the Review Panel should not endorse the Productivity Commission Review's recommendations regarding reform of the Part IIIA declaration regime; and
- further submits that the costs of retaining the Part IIIA declaration regime exceed any benefits from that regime, such that the Review Panel should recommend that the National Access Regime be amended to preclude future applications for Part IIIA declaration.

Background

6.5 Part IIIA of the CCA establishes a statutory regime (**National Access Regime**) which creates four key legal avenues for third party access to nationally significant infrastructure.

- **Declaration:** any person can apply to the National Competition Council (**NCC**) for a recommendation to the designated Minister that access to a service provided by a particular facility should be "declared". In order to declare the service, the Minister must be satisfied of five statutory criteria. Declaration creates an enforceable right for any third party to negotiate access terms with the provider of the service, with disputes to be referred to the ACCC for arbitration.
- **Certification:** a responsible State or Territory Minister can apply to the NCC for a recommendation to the designated Minister that an access regime in that State or Territory be certified as an "effective access regime". In order to certify a regime, the Minister must be satisfied that the regime complies with certain principles contained in the Competition Principles Agreement 1995. If a regime is certified, services subject to that regime cannot be declared under Part IIIA, and the State/Territory regime prevails.
- **Undertakings:** a person who is or expects to be the provider of a service may give a written undertaking to the ACCC setting out the terms and conditions on which they will provide access to the service. If the ACCC accepts the undertaking, the service it covers cannot be declared under Part IIIA, and the arrangements proposed in the undertaking prevail.

- **Competitive tender processes:** Part IIIA allows the ACCC to "approve" competitive tender processes for the construction and operation of government owned facilities, where (among other things) the ACCC is satisfied that the tender process will result in reasonable terms and conditions of access to services provided by the facility. If the ACCC approves a competitive tender process, the services provided by the facility cannot be declared while the approval is in force; the approval can be revoked if the provider does not comply with the reasonable access terms and conditions resulting from the competitive tender process.

The policy origins of the Part IIIA declaration regime: the Hilmer Review

6.6 In 1993, the Hilmer Review recommended the introduction of a legal regime to enable access to essential facilities to be "declared" in:

> *the limited category of cases where access to the facility was essential to permit effective competition and the declaration was in the public interest having regard to the significance of the industry to the national economy and the expected impact of effective competition in that industry on national competitiveness.*[27]

6.7 The Hilmer Review was particularly concerned to introduce competition "to areas previously reserved to public monopolies",[28] and its proposed declaration regime was one of several reform recommendations it made in pursuit of that objective (see Box 6A).

6.8 However, the Hilmer Review also emphasised the need "to carefully limit" the application of access obligations, and noted that failure to do so would potentially "undermine incentives for investment".[29] The Hilmer Review was acutely aware of the potential costs associated with the regime it proposed, and carefully considered those costs when developing its recommendations.

6.9 The Hilmer Review's observations remain an appropriate guide to policy making today.

[27] Hilmer Report, p xxxii. The Part IIIA declaration regime did not follow the precise recommendations made by the Hilmer review; however the differences between the Hilmer review's recommendations and the Part IIIA regime as adopted are not material for the purpose of this submission.

[28] Hilmer Report, p 242.

[29] Hilmer Report, p 248.

Box 6A

Background: the Hilmer Review's 1993 report

Recommendation: establish a national declaration regime[30]

The Hilmer Review recommended "the establishment of a new legal regime under which firms can be given a right of access to essential facilities when the provision of such a right meets certain public interest criteria." The objective of this regime was to introduce competition to markets which depended on those "essential facilities". The Hilmer Review recommended the introduction of a single, national regime, in order to avoid perceived concerns with the use of State and Territory regimes and industry specific regulation.

Policy context: focus on government owned or privatised infrastructure[31]

The Hilmer Review was particularly concerned with the need to introduce competition "to areas previously reserved to public monopolies", and noted that "almost all cases" of essential facilities identified to it were in the public sector. It considered that the introduction of a national declaration regime seemed "likely to play a pivotal role" in introducing competition in these areas (although it also noted that there were "many examples" of privately owned essential facilities). Nonetheless, the Hilmer Review noted that "a frequent feature" of the facilities and industries declaration sought to address was "the traditional involvement of government … either as owner or extensive regulator." The Hilmer Review made this and other recommendations in the context of significant national debate about privatisation and other reform of public monopolies. The Hilmer Review's recommended reforms also addressed structural reform of public monopolies, surveillance of monopolistic pricing, and competitive neutrality between government and private enterprise.

A key imperative: applying access sparingly, to avoid investment disincentives[32]

The Hilmer Review was acutely aware that access regulation involved significant governmental interference with private enterprise:

> *As a general rule, the law imposes no duty on one firm to do business with another. The efficient operation of a market economy relies on the general freedom of an owner of property and/or supplier of services to choose when and with whom to conduct business dealings and on what terms and conditions. This is an important and fundamental principle based on notions of private property and freedom to contract, and one not to be disturbed lightly.*

In this context, the Hilmer Review considered that declaration should occur only where access was "essential, rather than merely convenient," and that the regime should "carefully limit" the potential for declaration, since "failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment." It placed "special emphasis" on the need to ensure that declaration "did not undermine the viability of long-term investment decisions, and hence risk deterring future investment in important infrastructure projects." It observed that "due account of the likely impact on incentives to invest should be made in determining whether or not to create a right of access …" These priorities were clearly reflected in the Hilmer Review's recommendations.

The experience since the Hilmer Review

6.10 The Part IIIA declaration regime has led to declaration of only six services (see Box 6B).

- Two declarations are currently in force – the declaration of track access on BHP Billiton's Goldsworthy railway (to which no one has sought access) and the Tasmanian railway network.
- Only one declaration resulted in an access arbitration (the declaration of services provided by Sydney Water's sewage reticulation network), but the access seeker did not pursue their application, and that declaration was then superseded by a State regime.
- The other three declarations have expired.

[30] Hilmer Report, pp 239, 242, 249.

[31] Hilmer Report, pp 239, 242, 250, 251; the other reform recommendations referred to here are addressed in chapters 10, 12 and 13 of the Hilmer Report.

[32] Hilmer Report, p 242, 248, 251.

Box 6B

The track record with Part IIIA declaration: six in 19 years

Year declaration commenced	Declared service	Outcome
1997	Airport services at Melbourne International Airport	Declared; declaration expired in 1998.
2000	Airport services at Sydney International Airport	Declared; declaration expired in 2005.
2005	Airport services at Sydney Airport	Declared; declaration expired in 2010.
2005	Sewage transmission on Sydney Water's sewage reticulation network	Declared; the access seeker did not pursue access following the ACCC's arbitration determination in July 2007. Declaration revoked in October 2009, following certification of the access regime under the *Water Industry Competition Act 2006* (NSW).
2007	Track access to the Tasmanian railway network	Declared; declaration is in force.
2008	Track access to the Goldsworthy railway	Declared; declaration is in force; no party has sought access.

6.11 The vast majority of access regulation has occurred outside of Part IIIA declaration, under State, Territory and/or industry specific regimes (see Box 6C). In many cases, these regimes apply to formerly government owned infrastructure, and/or infrastructure which was developed as multi-user infrastructure. In many cases, these regimes are also tailored to a particular infrastructure type or industry context (eg there are industry specific regimes regarding access to electricity transmission lines, gas pipelines, telecommunications infrastructure and government owned or privatised railways).

Box 6C

The Hilmer Review's objective has largely been achieved – but not by Part IIIA declaration

"Essential" infrastructure identified in the Hilmer Review	Declared under Part IIIA?	Regulated under another regime?
Electricity transmission grids	No	Yes, eg under the National Electricity Law.
Local telephone exchange networks	No	Yes, under Part XIC of the CCA.
Major pipelines	No	Yes, under the National Gas Law.
Ports	No	Yes, under several State legislative frameworks and other avenues, including State leases.
Airports	Services at Melbourne and Sydney airports briefly declared	Yes, some analogous regulations under the *Airports Act 1996* (Cth) (demand management provisions), and through the ACCC's monitoring of prices, costs and profits at nominated airports under s 95ZK of the CCA.
Government owned or privatised railways	Track access to Tasmanian railway network declared	Yes, several railways, under a number of legislated State access regimes, and a Part IIIA undertaking

Costs associated with applying the Part IIIA declaration regime to single user infrastructure

6.12 In BHP Billiton's experience, the costs associated with the Part IIIA declaration regime can be extremely high, particularly when it applies to intensively used, single user infrastructure (see Box 6D).

Costs associated with accommodating a third party on single user infrastructure

6.13 The Part IIIA declaration regime is intended to apply as a "back stop" to other forms of access regulation. It is designed to allow access to facilities where no alternative avenue exists.

6.14 This means that one of the key types of infrastructure to which the Part IIIA declaration regime applies is infrastructure which has been developed and operated as single user infrastructure.

6.15 BHP Billiton's experience with the Part IIIA declaration regime in this context has shown that applications for declaration of single user infrastructure require analysis of complex technical, operational, commercial and economic issues. For example, the Pilbara railway cases required investigation and analysis of technical matters such as how to measure railway capacity, the metallurgical properties of iron ore, tidal constraints at Port Hedland, steel making, and the impact of operating different rail wheel profiles on BHP Billiton's railways. They also included broader economic issues, such as the impact of delays to expansions on exports and GDP. The regulatory process required to undertake this investigation and analysis can be protracted and costly.[33]

6.16 In addition, responding to a Part IIIA declaration application can involve significant costs. For example, between 2004 and 2012 BHP Billiton devoted substantial resources to responding to FMG's applications for declaration of

[33] For example: a critical issue in the Pilbara proceedings was the capacity of the Newman railway – what did "capacity" mean, how could it be measured, was there "spare" capacity to accommodate third parties? The NCC used *static* modelling to assess capacity, but following cross-examination, all parties agreed that *dynamic* modelling should be used as it was significantly more reliable. The Tribunal commissioned its own dynamic modelling, conducted by modellers experienced with the relevant railways, on assumptions developed with the parties' input, at BHP Billiton's and Rio Tinto's expense. This produced the necessary information in a rigorous and commercially realistic manner, and enabled the Tribunal to question the modellers and test their results. This process was factually, technically and intellectually complex, and time and resource intensive. This quality of inquiry is vital in order to apply the declaration criteria correctly. It is doubtful whether this quality of analysis will be possible in future cases, given the time limits that apply to the NCC, and the fact that the Tribunal's review will in future be substantially based on the information put before the NCC and the Minister.

the Pilbara iron ore railways. Only BHP Billiton's Goldsworthy line was ultimately declared. The overall cost of all applications and associated court proceedings was in the order of hundreds of millions of dollars.

6.17 Mandating access to nationally significant single user infrastructure can impose substantial operational costs, particularly when the infrastructure is already intensively used (See Box 6D). Those costs include:

- significant capacity losses and other operational inefficiencies caused by moving from single user to multi-user operations; and
- delays to expansions, technological innovation and operational improvements.

6.18 It is vital that these costs be understood when evaluating or reforming the Part IIIA declaration regime.

Box 6D

Access to single user infrastructure imposes substantial operational costs and inefficiencies

- **Costs associated with capacity shortfalls:** Mr Stephen O'Donnell, who conducted the Goonyella Coal Chain Capacity Review for the Queensland government, gave evidence in the Pilbara railway cases. He considered that it is generally necessary to build an additional 10 to 20% of capacity into a timetabled multi-user system to achieve the same throughput as could be achieved if the system was operated flexibly under a single user/operator's control. He considered that depending on the type of regime applied, access to BHP Billiton's railways could have reduced capacity by over 20%.[34]
- **Costs associated with delays to expansions, technological innovation and operational improvements:** In the Pilbara railway proceedings:
  - The Australian Competition Tribunal (**Tribunal**) gave particular weight to evidence that a three month delay to Rio Tinto's iron ore expansions would result in costs in the order of A$10 billion in lost export revenues and A$4 – 6 billion in lost GDP. It considered that such delays would occur where a provider was required to negotiate and agree with third party users on changes on its railways, including adopting new operating practices, introducing new technologies and undertaking capacity expansions. It considered that those delays could not be avoided by contractual or regulated terms, and that average delays may be longer. The Tribunal's conclusion was based on extensive evidence from all parties; it has not been questioned in the related legal appeals.[35]
  - Mr Marcus Randolph, then Chief Executive, Ferrous and Coal for BHP Billiton, testified that third party access to the Newman railway was then the highest value item on BHP Billiton's internal risk register, and was valued at $7.9 billion. He testified that BHP Billiton could "rebuild a completely independent railroad" for less than that amount, and had considered spending $2 billion to do this, rather than incur the costs associated with access.[36]

[34] Affidavit of Mr Stephen O'Donnell, 21 December 2007, at 25; affidavit of Mr Stephen O'Donnell, 31 March 2009, at 20 and 21.

[35] *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1265]-[1267], [1296], [1298]. This figure was an estimate of the impact of delays to Rio Tinto's expansions, and did not include the impact of delays to BHP Billiton's expansions.

[36] Transcript of oral evidence before the Australian Competition Tribunal, 17 November 2009, Mr Marcus Randolph, at 2285 and 2305.

How the possibility of access affects infrastructure investments

6.19 Even the prospect of Part IIIA declaration can significantly affect the costs and incentives facing investors in nationally significant infrastructure. This is because the prospect of Part IIIA declaration increases uncertainty, and so fundamentally undermines an investor's ability to answer critical questions about the value of their investment. As the ACCC has acknowledged,[37] it is simply not possible to design access regulation that avoids creating any distortions to infrastructure investment incentives (see Box 6E).

Box 6E

The Part IIIA declaration regime creates uncertainty which deters investment in nationally significant infrastructure

For an owner (or potential owner) of nationally significant single user infrastructure, the prospect of Part IIIA declaration increases uncertainty, and therefore deters investment. The prospect that access obligations will be imposed on such infrastructure undermines an owner's ability to answer critical questions, such as:

- **What do I get for my money?** For example, how much capacity will my money buy, and how much of that capacity can I use?
- **Must I allow others to use the infrastructure?** If so, when, how much, and on what terms must I accommodate them?
- **How can I use my infrastructure?** For example, what operational, legal or other constraints will affect how I use it? Do I need another party's consent to make changes to my infrastructure or operations?
- **Who, if anyone, will have priority to use the infrastructure?** If no one has priority, does this mean my use of the facility can be displaced by a third party?

An owner facing the prospect of Part IIIA declaration does not know how much system capacity will be allocated to third parties, or how much capacity will be lost by adopting regulated, multi-user operations.[38] They do not know what the access terms will be, or how they will affect the owner's business. For example, will they be required to segregate their infrastructure operations from the rest of their business to protect the third party's confidential information? What impact will access have on the owner's ability to undertake technological and operational improvements?

6.20 This uncertainty makes infrastructure investment decisions more challenging, and ultimately deters investment, including by encouraging investors to reduce the scale of their investments. The prospect that infrastructure will become subject to access obligations also increases the costs of investing in infrastructure, since investors incur costs to manage these risks. These difficulties are amplified when there is uncertainty about the future application, interpretation or amendment of the Part IIIA declaration regime (see Annexure 2), since this affects the investor's ability to assess whether Part IIIA declaration is likely to occur, and the terms on which it could be required to provide access.

6.21 Importantly, the prospect of Part IIIA access declaration can also discourage infrastructure investment by potential access seekers. In particular, access seekers may defer or cancel their own infrastructure investments if they have the alternative of seeking Part IIIA declaration, and thereby using another investor's infrastructure, rather than investing their own capital.

6.22 Box 6F describes some of the practical evidence regarding investment disincentives and increased costs which arise from the *prospect* that particular infrastructure might be declared under Part IIIA, even if declaration or access does not occur. As a result, these costs and risks relate not just to declared facilities, but potentially to all investments in nationally significant infrastructure in Australia. It is critical to understand and evaluate these costs when evaluating or considering reform to the Part IIIA declaration regime.

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[37] Productivity Commission 2013, National Access Regime, PC Report no. 66, Canberra (**PC Report**), p 228, quoting ACCC, *Productivity Commission Review of the National Access Regime, ACCC Submission to Issues Paper*, February 2013, p 47.

[38] The Hilmer review foresaw this concern: "With privately-owned facilities, in particular, it would be appropriate to ensure that an obligation to provide access does not unduly impede an owner's right to use its own facility, including any planned expansion of utilisation or capacity." (*Hilmer Report*, p 256 (footnotes omitted)).

Box 6F

Even the prospect of Part IIIA declaration causes economy wide costs

- **Reducing the scale of investments:** The Australian experience with access regulation has demonstrated that there are substantial challenges involved in facilitating efficient expansion of infrastructure which may become subject to access regulation. One clear example is the practice adopted by some investors seeking to expand gas pipelines, who have limited the size of their expansions, as the natural gas pipeline industry struggles with a regulatory access environment that is not conducive to incentivising incremental capacity. This has involved relevant expansions being designed to match only contracted, rather than reasonably foreseeable, demand, even though larger scale expansions would have benefited from powerful scale economies. This downsizing of expansions, and foregoing of efficiencies, is a clear example of the challenges associated with expansion of infrastructure which may become subject to access regulation.[39]

- **Costs of managing regulatory risk**: the prospect that infrastructure may become subject to regulated access obligations can also result in infrastructure investors taking steps to hedge that risk. This can include, for example, negotiating appropriate indemnities, incurring higher advisory costs (eg legal costs) in relation to an investment, and potentially undertaking additional work regarding the scoping of an investment (eg to identify the capacity to be created by the investment). Engaging in these activities to manage the risk associated with the future application of access obligations adds cost and complexity to infrastructure investments.

The limited benefits associated with the Part IIIA declaration regime

6.23 Given that very limited access has resulted from Part IIIA declaration (as distinct from other forms of access regulation), it is doubtful that there are any benefits from Part IIIA declaration, let alone benefits that would justify costs of the scale outlined above.

6.24 Certainly, in BHP Billiton's experience, the declaration of the Goldsworthy iron ore railway in 2008 has not achieved any public benefit. One of the key bases on which that railway was declared was the finding that access would promote a material increase in competition in a rail haulage market within "a corridor around" the Goldsworthy railway. The Goldsworthy railway has now been declared for six years. To date, no party has sought access to the Goldsworthy railway, and BHP Billiton is not aware of anything to suggest that the Goldsworthy declaration has resulted in any public benefit. At best, this experience suggests that benefits from that declaration are negligible, and clearly insufficient to outweigh the public and private time and resources involved in the declaration process in that case.

6.25 Further, it is not clear whether there are many circumstances in which further applications for Part IIIA declaration are likely to be brought (as acknowledged by the NCC's expectation that "access applications will continue to be relatively few and intermittent"[40]), let alone to achieve material benefits. Rather, the majority of the work required to address the access "problem" identified by the Hilmer Review has been accomplished outside of the Part IIIA declaration regime. Nonetheless, the substantial costs associated with access to nationally significant single user infrastructure (even if access only occurs in one or a small number of such instances), and the economy wide costs caused by the prospect of Part IIIA declaration (regardless of whether declaration occurs) mean that the Part IIIA declaration regime is likely to impose substantial costs even if future applications for Part IIIA declaration are relatively rare.

6.26 It is instructive to note that no comparable overseas jurisdictions maintain equivalent "backstop" legislative access regimes. Further, the somewhat analogous "essential facilities" doctrine in the United States, which originated with two cases on group boycotts, has to date not been expressly recognised by the United States Supreme Court in the context of assessing a unilateral refusal to deal.[41]

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[39] PC Report, p 232.

[40] Statement issued by David Crawford, President of the NCC, "National Competition Council - change of approach to provision of secretariat services", available at: http://ncc.gov.au/images/uploads/NCCSecretariatServices-001.pdf (accessed 19 May 2014).

[41] *Verizon Comm's v. Law Offices of Curtis V. Trinko,* 540 U.S. 398, 410-11 (noting that the Court has not yet expressly recognised the essential facilities doctrine in connection with a monopolist's unilateral refusal to deal with a rival). The lower U.S. courts that have considered the issue have required four elements to establish liability under the essential facilities doctrine: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI Comm's v AT&T*. 708 F. 2d 1132, 1132-33 (7th Cir. 1983).).

6.27 Some may argue that there are benefits associated with the existence of the Part IIIA declaration regime, which are achieved regardless of whether declaration and access occurs under that regime. For example, factors previously identified as benefits from the National Access Regime (including Part IIIA declaration) which do not rely on the granting of declaration or access, include:

- The potential for the *prospect* of declaration to improve economic efficiency if it encourages commercial parties to reach negotiated access outcomes outside of Part IIIA, which in turn reduce monopoly pricing, increase competition in related markets, or result in more efficient investment in infrastructure services or dependent markets.
- The potential for the National Access Regime (including Part IIIA declaration) to improve the quality of State and Territory access regimes by playing a "demonstration role".
- The potential for the National Access Regime (including Part IIIA declaration) to prevent States and Territories adopting less efficient, ad hoc approaches to access regulation.[42]

6.28 In BHP Billiton's experience, the prospect of Part IIIA declaration has not encouraged the negotiation of access outside of the Part IIIA declaration regime because the costs associated with access are so high as to preclude a negotiated outcome (as discussed in paragraph 6.72 below)[43]. Further, as outlined in Box 6C, the objectives identified by the Hilmer Review have been largely achieved through industry specific regulation, Part IIIA undertakings and State/Territory regimes. In these circumstances, it is questionable whether there is any utility in the purported "demonstration" role of the Part IIIA declaration regime, given the abundance of other forms of access regulation which are able to serve this role. It also appears doubtful that the existence of the Part IIIA declaration regime could prevent ad hoc State or Territory approaches to access – it certainly does not appear to have done so to date, and it is questionable whether preventing ad hoc approaches should be considered a benefit in any event.

6.29 Even if these benefits could be shown to exist, and to be attributable to Part IIIA declaration rather than other regimes, they could not justify the substantial costs and investment disincentives that arise from the prospect of Part IIIA declaration of nationally significant single user infrastructure.

The Productivity Commission Review's recommendations on the Part IIIA declaration regime

6.30 The Productivity Commission Review of the National Access Regime was an important opportunity to assess the operation and effect of that regime. The Competition Policy Review Panel's Issues Paper asks whether the Productivity Commission Review's recommendations should be adopted, noting the Australian Government's intention to respond to the Productivity Commission's final report (**PC Report**) following the Panel's review.[44]

6.31 BHP Billiton made extensive submissions to the Productivity Commission regarding the complex commercial, technical and operational issues raised by the Part IIIA declaration regime, and the substantial costs associated with Part IIIA declaration of single user facilities. Following the release of the Productivity Commission Review's draft report, BHP Billiton also urged the Productivity Commission to include a rigorous cost benefit analysis of the Part IIIA declaration regime, based on available evidence, before recommending changes to that regime.[45]

[42] PC Report, p 215, 243, 245.

[43] The substantial costs at stake from access may be one reason why the provisions allowing "access holidays" (referred to as "ineligibility decisions" in division 2AA of Part IIIA) have not been used.

[44] Issues Paper, p 31.

[45] BHP Billiton, *Submission to the Productivity Commission's Inquiry into the National Access Regime,* 15 February 2013; BHP Billiton, *Submission to the Productivity Commission's Inquiry into the National Access Regime,* 12 July 2013.

Box 6G

BHP Billiton concerns with the Productivity Commission Review's recommendations regarding the Part IIIA declaration regime

The terms of reference for the Productivity Commission Review of the National Access Regime required the Productivity Commission to comment on the "full range of economic costs and benefits" associated with the National Access Regime.

However, the review involved only a limited qualitative analysis of some of the costs and benefits associated with access regulation. In doing so, the review:

- did not engage with critical evidence on the costs associated with the Part IIIA declaration regime, such as BHP Billiton's internal evaluation of third party access as a $7.9 billion risk to its business; and
- made assumptions that regulation could "solve" some of the most difficult issues associated with access, such as the adverse impact of regulation on investment incentives, without identifying a factual basis for those assumptions.

The review's recommendations have similar shortcomings. For example, the review:

- recommended that the ACCC should have the power to direct a provider to expand its facility to accommodate a third party, but did not seek to understand or resolve the challenging issues raised by that recommendation. Instead, it recommended that the ACCC be required to publish "guidelines" to solve issues that the Productivity Commission Review did not address;
- recommended that the High Court's "private profitability" interpretation of declaration criterion (b) be replaced with a "natural monopoly" test which would introduce uncertainty into the application of the Part IIIA declaration regime;
- did not recommend reforms to address the fact that the "production process" exception is ineffective to prevent the costly disaggregation of nationally significant production processes; and
- did not address the significant time and resource constraints facing Part IIIA decision makers.

It may be that a rigorous and practical cost benefit analysis of the Part IIIA regime will support the adoption of some of the review's recommendations. For example, such an analysis might show that the recommendations regarding declaration criteria (a) (promotion of completion) and (f) (public interest) are well founded in practice, as well as in principle. However, none of the review's recommendations should be adopted unless they are shown by such an analysis to be well founded.

The review did not include a rigorous cost benefit analysis

6.32 The first item in the terms of reference for the Productivity Commission Review of the National Access Regime required the Productivity Commission to:

> *"examine the rationale, role and objectives of the Regime, and Australia's overall framework of access regulation",*

and comment on:

> *"the full range of economic costs and benefits of infrastructure regulation, including contributions to economic growth and productivity."*[46]

6.33 The Productivity Commission Review was uniquely well placed among Australian regulators to undertake this analysis, with reference to available evidence. However, the review involved what it described as "*a qualitative assessment of the available data*", and on that basis concluded that the National Access Regime is "*likely to generate net benefits to the community*".

[46] David Bradbury MP, *Terms of Reference – Inquiry into the National Access Regime,* 25 October 2013, paragraph 1, available at http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/125.htm&pageID=003&min=djba&Year=&DocType=0 (accessed 31 May 2014).

6.34 The review:

- identified broad categories of costs and benefits attributed to the National Access Regime; and
- undertook a limited qualitative exposition of those categories without detailed consideration or evaluation of the nature and extent of those costs and benefits.[47]

6.35 In adopting this approach:

- the review did not evaluate critical evidence on the costs associated with Part IIIA declaration. For example, it noted testimony to the Tribunal that third party access was valued at $7.9 billion in BHP Billiton's risk register (see Box 6D). However, the review merely used this evidence to "illustrate" costs associated with access. Surprisingly, it concluded that "there are likely to be net benefits" from the National Access Regime without evaluating evidence that one of the largest producers in Australia's highest value export industry[48] assessed third party access as a $7.9 billion risk to its business. The review considered that this evidence could not be "used to inform a quantitative cost–benefit analysis", because, among other reasons, "it is not clear how BHP Billiton has calculated the value of this risk … and the circumstances in which the risk would be realised." The Productivity Commission Review engaged with BHP Billiton on other matters, but did not seek to engage on this issue.[49]
- The review assumed that regulation could "solve" some of the most complex issues associated with access, but did not address those issues itself. For example, it noted that access regulation has the potential to alter investment incentives (see Boxes 6E and 6F) but observed generally that "well-designed and implemented access regulation can promote efficient investment."[50] However, the review did not identify any concrete factual basis for that conclusion, or analyse the task that would be involved in designing access terms which would achieve this goal.

6.36 The Productivity Commission Review justified its approach on the basis that it lacked sufficient quantitative data.[51] However, incomplete data is a regular feature of policy analysis, and can be addressed by a proper qualitative evaluation and comparison of costs and benefits.[52] The review could have assessed the scale of the costs and benefits relevant to its analysis. Had it done so, it may have made substantiated observations on their relative significance, and on whether regulation could, in practice, avoid those costs or achieve those benefits.

The power to direct a provider to expand its facility

6.37 The Productivity Commission Review recommended that the CCA be amended to confirm that the ACCC has the power to direct a provider to expand its facility to accommodate a third party (**mandatory expansion power**).[53]

6.38 Ordering a provider to expand a nationally significant single user facility to accommodate a third party would raise extremely challenging issues in principle and practice.

6.39 As a matter of principle, the notion that the owner of a privately developed, single user facility should be directed to expand its facility to benefit a competitor is fundamentally inconsistent with the concept of a market-based economy. This fact alone is a sufficient basis on which to conclude that no such power should exist.

6.40 As a matter of practice, a mandatory expansion power would raise substantial commercial and operational issues regarding the financing and design of an expansion, the contracting of expansion works, real time decision making about delivery of the expansion, and the allocation of cost and risk associated with the expansion. For example:

- If the owner of single user infrastructure was required to fund a mandated expansion, and recover a return on that investment through regulated access charges, how would the risks of default by or insolvency of the access seeker be addressed?
- If a mandatory expansion was funded upfront by an access seeker:

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47 PC Report, pp 10 and 215 – 217.

48 Australian Bureau of Statistics, "Australia's Top 25 Exports, Goods and Services", available at: http://dfat.gov.au/publications/tgs/CY2013-goods-services-top-25-exports.pdf, accessed 24 May 2014.

49 PC Report, p 218, 245.

50 PC Report, p 244.

51 PC Report, pp 216 – 221.

52 For example, in another context, see the Commonwealth Government Best Practice Regulation Handbook, 2010, p 11.

53 PC Report, recommendation 8.10, p 35.

- How would important technical issues about the design of an expansion be resolved? For example, if an access seeker wanted an expansion to be undertaken using materially lighter weight (and cheaper) rail sleepers than the provider used (ie because the access seeker ran lighter trains) how would this issue be resolved? Who would choose the contractors to build that infrastructure?
- How would real time decisions be made about the conduct of expansion works? For example, if a provider chose to permit greater time and cost than initially planned, in order to undertake quality checks that an access seeker considered unnecessary, who would determine whether those checks were conducted, and at whose expense?

6.41 These are complex issues that are difficult to resolve and require very careful consideration. The process of finding a solution to these issues in relation to a mandatory expansion of single user infrastructure would inevitably impose extensive delays and costs on the infrastructure owner. In the context of FMG's application to access Rio Tinto's Pilbara rail infrastructure, the Tribunal considered that negotiations with a third party regarding expansion of that sole user infrastructure for the provider's own purposes could cause delays of 3 months or significantly more, at a potential cost of over A$10 billion in lost exports.[54] The issues raised by a mandatory expansion of a single user facility to benefit an access seeker would be much more complex.

6.42 The power to direct expansions of privately developed, single user infrastructure should be distinguished from the application of a mandatory expansion power in the context of regulated multi-user coal infrastructure in Queensland and NSW.[55] For example, the Central Queensland Rail Network was privatised in circumstances where the owner and operator of that infrastructure had full knowledge of, and the acquisition through privatisation was subject to, a pre-existing mandatory expansion obligation. It is reasonable to expect that similar arrangements will be adopted if ARTC is privatised in future. Additional differences between the application of a mandatory expansion power in the context of a privately developed single user facility, and the application of that power in the context of infrastructure which has historically been developed, regulated and used as multi-user infrastructure, are addressed in Annexure 1.

6.43 The Productivity Commission Review did not substantively engage with these complex issues, responding only by recommending that the ACCC "*develop and publish guidelines*" on how it would exercise this power "*in practice such that it is expected to generate net benefits to the community*".[56] This suggests that the review did not fully appreciate the difficulties involved in addressing these issues before making any recommendation about this power.

Identifying when services should be declared

6.44 The Productivity Commission Review recommended amendments that would target Part IIIA to the relevant "economic problem", to ensure that declaration would only occur when access regulation would address:

> *"an enduring lack of effective competition, due to natural monopoly, in markets for infrastructure services where access is required for third parties to compete effectively in dependent markets."* [57]

6.45 However, the review did not rigorously engage with the challenges associated with this task, as shown by its treatment of the "production process" exception, and its proposed amendment to declaration criterion (b).

The production process exception

6.46 Under the Part IIIA declaration regime, a "service" may be declared if it satisfies the declaration criteria. However the definition of "service" does not include "the use of a production process", except to the extent that that use is an integral but subsidiary part of the service sought to be declared.[58]

6.47 BHP Billiton sought to rely on this exception when FMG applied for declaration of a track access service on BHP Billiton's Pilbara railways. However, the High Court held that the exception did not prevent FMG from seeking

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[54] *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1265]-[1267],[1296], [1298]. This figure was an estimate of the impact of delays to Rio Tinto's expansions, and did not include the impact of delays to BHP Billiton's expansions.

[55] For example, Aurizon for the Central Queensland Rail Network and ARTC for the Hunter Valley Rail Network.

[56] PC Report, recommendations 8.9 and 8.10, p 35.

[57] PC Report, p 2.

[58] CCA, s44B. The wording, although not the effect, of this exception reflects the Hilmer review's observation that the declaration criteria it proposed would not be satisfied "in relation to products, production processes or most other commercial facilities" (footnotes omitted): *Hilmer Report*, p 251.

declaration of the track access service, because that particular service did not comprise the use of BHP Billiton's production process.[59]

6.48 Consequently, the production process exception will not apply if an access seeker identifies a service provided by a facility that is a part of a production process, as long as the service is not *the use of* the production process itself. For example, the production process exception did not preclude declaration of the Newman railway, even though that railway was used solely as part of BHP Billiton's single user production process,[60] and even though providing access to it would have caused very substantial costs (such as delays to investments in innovation and expansion on those lines, as described in Box 6D). Critically, those were costs associated with disaggregating a nationally significant single user production process. Had this exception applied, significant time and cost associated with the Pilbara proceedings could have been avoided. Instead, a key outcome of the extended and costly Part IIIA declaration process was the same outcome which would have been reached if the production process exception had applied: the Newman railway was not declared.

6.49 The Productivity Commission Review received submissions on these issues. These included submissions that the production process exception should be amended, or an alternative exception should be adopted, so that declaration could not occur where access to a service would cause substantial costs that could be expected to outweigh any associated benefits. The review could have proposed reforms to achieve this purpose, but instead noted that the production process exception is "imperfect", but could "prevent declaration in obvious cases", and concluded that it should be retained without amendment.[61] The review had an opportunity to seek to preclude Part IIIA declaration in cases where access would involve costly disaggregation of nationally significant production processes. Had the nature of those costs been fully appreciated the review might have felt a stronger imperative to make use of that opportunity.

The review's recommendation on declaration criterion (b)

6.50 Declaration criterion (b) tests whether "*it would be uneconomical for anyone to develop another facility to provide the service*".[62] The High Court held that criterion (b) should be applied by asking whether anyone in, or able to enter, the market for the relevant service would find it privately profitable to develop another facility to provide that service. The High Court also held that "anyone" includes the incumbent facility operator.[63]

6.51 However, the Productivity Commission Review recommended that declaration criterion (b) should be amended, so that criterion (b) would be satisfied (and declaration would not be precluded):

> *… where total foreseeable market demand over the declaration period could be met at least cost by the facility. Total market demand should include the demand for the service under application as well as the demand for any substitute services provided by facilities serving that market. The assessment of costs under criterion (b) should include an estimate of any production costs incurred by the infrastructure service provider from coordinating multiple users of its facility.*[64]

The Productivity Commission Review recommended that if this proposal was not adopted, criterion (b) should be amended so that "anyone" did not include the provider of the incumbent infrastructure.[65]

6.52 These recommendations, if implemented, would introduce further uncertainty regarding the application of the Part IIIA declaration regime (see Box 6H). The review did not evaluate or suggest a solution to these practical concerns.

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[59] *BHP Billiton Iron Ore Pty Ltd v National Competition Council; BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45, at [37] – [43].

[60] *BHP Billiton Iron Ore Pty Ltd v National Competition Council; BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45 at [37].

[61] PC Report, 150.

[62] CCA s 44G(2)(b), s 44H(4)(b).

[63] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [105].

[64] PC Report, Recommendation 8.2, p 33.

[65] PC Report, Recommendation 8.3, p 33.

Box 6H

The Productivity Commission Review's recommendation on criterion (b) creates uncertainty

The review's recommendations on criterion (b) (described in paragraph 6.51) raise difficult questions which would introduce substantial uncertainty regarding the application of this criterion. For example:

- Is the question whether a facility can meet "total market demand" assessed with respect to the actual capacity of a facility or its theoretical expanded capacity? "Capacity" is an economic concept as much as a technical concept – what assumptions will the decision maker make about the operation of the facility, the infrastructure and operations which support it, and the design and delivery of any hypothetical expansion considered under this test?
- The assessment of "cost" will necessarily involve forecast rather than actual costs. What measure will be used to assess these future costs – does "cost" refer to forecast actual costs, or a forecast of costs that satisfy a regulatory efficiency benchmark? Does "cost" include a return on investment? Opportunity costs? Consequential loss? Social costs?
- How would "total foreseeable market demand" be measured? For example, where demand is linked to demand in global commodities markets (as would be the case if the test was applied in relation to the Pilbara railways), total foreseeable demand will vary significantly, particularly over a 20 year period (ie a declaration period). How would decision makers analyse such data? Who would bear the consequences if their estimate was critical to determining whether the service was declared, but turned out to be unrealistic?

6.53 BHP Billiton does not support the review's recommendations on criterion (b), particularly in circumstances where the prevailing "private profitability" interpretation of criterion (b) is strongly preferable to the review's recommendations, both as a matter of principle and practice.[66] In particular, the prevailing interpretation of the private profitability test:

- correctly assesses whether access is "essential" in order to promote competition in dependent markets, by testing whether there is a feasible (ie profitable) alternative to seeking access;
- is practical to apply, since it posits a question which investors routinely ask and answer when deciding whether to make an investment. Such a practical, real world interpretation reduces uncertainty regarding the application of criterion (b); and
- correctly considers whether it would be privately profitable for anyone, including the provider, to develop an alternative facility. Evidence that the provider could profitably develop another facility is relevant to the question whether an efficient access seeker could profitably enter a dependent market; considering this issue is important in order to ensure that declaration only occurs where it is essential to promote competition (and does not, for example, occur to facilitate entry by an inefficient access seeker).

The Productivity Commission Review did not address the challenges facing Part IIIA decision makers

6.54 The key decision makers under the Part IIIA declaration regime do not have sufficient time or resources to undertake the detailed and complex factual analysis required to apply the declaration criteria.

6.55 Some of the key challenges are:

- Infrastructure providers often do not have advance notice of a declaration application, and so must supply extensive information about their facility, operations, business and industry in an extremely short time period, in order for Part IIIA decision makers to comply with brief statutory timeframes.
- In many cases, the services sought to be declared are likely to be third party services that the provider does not already provide – this increases the challenge involved in assembling the necessary information, because the provider must address a state of the world with which it has no previous experience.
- Part IIIA decision makers are subject to statutory timeframes which are not consistent with the complex, factually intense nature of the investigation and analysis they are required to undertake. This raised

[66] For a more detailed discussion of these and related issues, see Professor Allan Fels AO, *Submission to the Productivity Commission Inquiry into the National Access Regime*, pp 50 – 54.

challenges in the Pilbara railway cases, even before recent legislative amendments to some of those timelines.

6.56 Those challenges will be heightened in future cases, since the 2010 amendments to Part IIIA require the original record which was before the Minister to form the basis of the Tribunal's review.[67] Now parties will endeavour to provide considerably more information to the NCC and Minister than in the past, but without a commensurate increase in the time periods which apply to the NCC or the Minister. These challenges will be heightened by the fact that the NCC will soon cease to maintain a dedicated secretariat.[68]

6.57 Although the review acknowledged some of these critical challenges,[69] the Commission's recommendations did not address them.

The future of Part IIIA

6.58 The fundamental question referred to the Review Panel regarding the National Access Regime (including the Part IIIA declaration regime) is whether that Regime is "adequate".

6.59 Considering that question in relation to the Part IIIA declaration regime requires:

- considering the objective the Hilmer Review sought to achieve by recommending the introduction of a national declaration regime, and the contribution of the Part IIIA declaration regime to achieving that objective; and
- assessing whether the costs of regulatory intervention through the Part IIIA declaration regime are outweighed by the benefits from that regime.

The Hilmer Review's objective

6.60 As described earlier in this submission, the Hilmer Review recommended the introduction of a national declaration regime in order to provide access to essential infrastructure "sparingly", in cases where access:

- was essential to introduce competition into dependent markets (particularly markets characterised by public monopoly); and
- otherwise satisfied specific public interest criteria.

Has the Part IIIA declaration regime achieved the Hilmer Review's objective?

6.61 Since the Hilmer Review and the introduction of the National Access Regime, the Hilmer Review's objective has largely been achieved, but not by the Part IIIA declaration regime.

6.62 In practice, as outlined in Box 6C, the vast majority of infrastructure access has occurred under other avenues. Those other avenues include access under a wide range of regimes, including Part IIIA undertakings, certified regimes, industry specific regimes, and other access arrangements. This experience has demonstrated that, contrary to the Hilmer Review's concerns at that time, reliance on State/Territory regimes and industry-specific regimes has facilitated rather than prevented:

- the application of access obligations to introduce competition in markets formerly characterised by public monopoly (such as has occurred through access regulation of government owned or privatised railways, both under Part IIIA undertakings and through state regimes); and
- the development of essentially national, rather than state-based, markets in key network industries (such as has occurred in gas and electricity, under the regimes established by the *National Gas Law* and the *National Electricity Law*).[70]

6.63 In contrast, few declarations have occurred under the Part IIIA declaration regime, and future applications are likely to "be relatively few and intermittent."[71]

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[67] CCA, s44ZZOAA.

[68] Statement issued by David Crawford, President of the NCC, "National Competition Council - change of approach to provision of secretariat services", available at: http://ncc.gov.au/images/uploads/NCCSecretariatServices-001.pdf (accessed 19 May 2014).

[69] PC Report, pp 291 – 293.

[70] *Hilmer Report*, pp 248 – 249. Those pages also record that BHP Ltd's submission to the Hilmer Review argued that if an access regime was to be introduced in addition to section 46 of the (then) *Trade Practices Act 1974* (Cth), that regime "should be quarantined to particular industries, rather than apply to all businesses."

6.64 In those limited cases where declaration has occurred, there has been limited access, and hence limited potential for Part IIIA declaration to contribute to achieving the purpose identified by the Hilmer Review. Of the six declarations which have occurred, the majority have expired and/or been superseded by alternative regulation. Only two declarations are still in force – the declaration of:

- BHP Billiton's Goldsworthy railway (to which no party has sought access); and
- the Tasmanian railway network.

6.65 Access regulation outside of the Part IIIA declaration regime has played the major role in achieving the key objectives identified by the Hilmer Review. The Part IIIA declaration regime has played little if any role in achieving those objectives, and the costs and benefits associated with that regime must be assessed in this context.

Assessment of the costs and benefits of regulatory intervention through Part IIIA declaration

6.66 The Part IIIA declaration regime involves a very intrusive form of regulatory intervention. If a facility is declared, this forces substantial reorganisation of nationally significant industries. The costs of that intervention are extremely high when, as in the Pilbara railway cases, access would disaggregate nationally significant, intensively used, single user infrastructure which is critical to the efficiency and productivity of Australia's largest export industry.

6.67 As described in this submission, the experience with Part IIIA to date has provided evidence and robust estimates of the magnitude of the costs associated with this form of regulatory intervention – ie, with mandating access to single user facilities. Those costs include:

- significant capacity losses and operational inefficiencies which arise from accommodating an access seeker on a single user facility – in the context of BHP Billiton's Pilbara iron ore railways, these capacity losses have been estimated at potentially 10 – 20% or more;[72] and
- delays to expansions, technological innovation and operational improvements, which arise from the provider's need to negotiate with an access seeker about the impact of changes to the provider's own business on the access seeker's operations – in the context of Rio Tinto's Pilbara iron ore railways, these costs were estimated in the order of A$10 billion in lost export revenues and A$4 – 6 billion in lost GDP.[73]

6.68 Importantly, the costs of the Part IIIA declaration regime also include the costs associated solely with the existence of that regime – ie, costs incurred in relation to all nationally significant infrastructure thought to be capable of declaration under Part IIIA , regardless of whether declaration is sought. In particular, the existence of the Part IIIA declaration regime increases uncertainty about whether and on what terms access must be provided to third parties – this is a key disincentive to private investment in nationally significant infrastructure, and encourages investors to reduce the scale of their investments (see Box 6F). This uncertainty is amplified, and the consequent disincentives are larger, when there is uncertainty about the future application, interpretation or amendment of the Part IIIA declaration regime.

6.69 In BHP Billiton's experience, the Part IIIA declaration regime has not achieved material benefits, let alone benefits that might justify the imposition of these substantial costs.

6.70 As described above, the Part IIIA declaration regime has produced few declarations, and limited access; it has made little contribution to achieving the objectives of the Hilmer Review. The question remains whether the simple existence of the Part IIIA declaration regime achieves any benefits, notwithstanding the limited occurrence of declaration and access under that regime. For example, it is arguable such benefits might include those described in paragraph 6.27 above, such as the possibility that the "threat" of Part IIIA declaration has encouraged parties to provide access on commercial terms outside of the Part IIIA declaration regime.

6.71 In BHP Billiton's experience, the prospect of Part IIIA declaration of nationally significant single user infrastructure has not resulted in any such benefits. In particular, the "shadow" of Part IIIA declaration has not encouraged

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[71] Statement issued by David Crawford, President of the NCC, "National Competition Council - change of approach to provision of secretariat services", available at: http://ncc.gov.au/images/uploads/NCCSecretariatServices-001.pdf (accessed 19 May 2014).

[72] First affidavit of Mr Stephen O'Donnell, dated 21 December 2007, paragraph 25; second affidavit of Mr Stephen O'Donnell, dated 31 March 2009, paragraphs 20 and 21.

[73] *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1265]-[1267],[1296], [1298]. This figure was an estimate of the impact of delays to Rio Tinto's expansions, and did not include the impact of delays to BHP Billiton's expansions.

negotiation of access arrangements outside of Part IIIA. This reflects the extremely high costs associated with mandating access to, and thereby disaggregating, nationally significant, intensively used, single user infrastructure. In these circumstances, the costs associated with providing access are so substantial that there is no prospect of a mutually acceptable negotiated outcome. This suggests that there is limited potential for the Part IIIA declaration regime to have prompted, absent declaration, the provision of negotiated access to nationally significant single user facilities. The experience with the Pilbara railways demonstrates that in this context, the stakes are simply too high for the parties to reach a negotiated outcome.

6.72 In BHP Billiton's experience the Part IIIA declaration regime has not achieved benefits, through declaration, access or otherwise, which might justify the costs associated with applying that regime to nationally significant single user infrastructure.

The Part IIIA declaration regime should be amended to preclude future declaration applications

6.73 The Review Panel is charged with identifying circumstances where government intervention is not justified in the public interest. The discussion above demonstrates that the Part IIIA declaration regime can result in extensive negative impacts on the efficiency and productivity of nationally significant infrastructure, with the Pilbara railway cases as an immediately available case study.

6.74 In this context, the power to "declare" such infrastructure is a particularly intrusive form of government intervention. This form of intervention does not achieve practical benefits which would justify the retention of the Part IIIA declaration regime in the public interest – even when specifically tasked to undertake a cost benefit analysis of the National Access Regime, the Productivity Commission Review was not able to identify concrete benefits associated with Part IIIA declaration.

6.75 However, there are substantial and ongoing costs associated with maintaining the Part IIIA declaration regime, which will continue to impede investment in nationally significant infrastructure for as long as that regime exists.

6.76 In BHP Billiton's experience, the costs associated with applying the Part IIIA declaration regime to nationally significant single user infrastructure substantially outweigh any associated benefits. On this basis, BHP Billiton submits that the Review Panel should recommend that the Part IIIA declaration regime:

- should be retained insofar as it relates to services that have already been declared (such that the rights of access to those services, and to arbitration of disputes in relation to the terms of such access, are retained in accordance with the terms of those declarations); and
- should be amended to preclude future applications for declaration.

6.77 This approach would not alter the ability for access to be granted and regulated under access regulation which occurs outside of the Part IIIA declaration regime, and which has played the key role in achieving the objective that the Hilmer Review considered could be achieved by access declaration. In particular, State and Territory regimes, industry specific access regimes, and access undertakings would not be affected by this approach.

6.78 However, this approach would, recognise that there is no demonstrable public interest justification for the lost GDP, investment, exports, productivity, efficiency and innovation associated with the government regulation that occurs via the Part IIIA declaration regime.

6.79 In these circumstances, a recommendation by the Review Panel that Part IIIA be amended to preclude future declaration applications would be a material and practical contribution towards achieving the purposes of this Review.

7 Australian Competition Law

Australian Competition Law - Summary

Australian competition law is unnecessarily complex and focused on statutory form. This impacts on compliance costs, business confidence and consistency with international competition regulation.

BHP Billiton supports Australian competition law:

- being clearer in its focus on competitive behaviour;
- including less complex statutory provisions;
- adopting ways to reduce the need for complex, expensive and lengthy authorisation and other regulatory processes to permit legitimate co-operative and other conduct; and
- being more consistent with the regulatory approach in other major jurisdictions such as the United States and the EU.

In particular:

- Consideration should be given to the use of economics-based exemptions, and informal enforcement guidance, in preference to authorisation or registrations.
- BHP Billiton encourages more effective and focused regulatory attention on anti-competitive, "buy-side" cartel conduct, both in Australia and around the region.
- There are clear examples of unnecessary "red tape" in relation to the exceptions for joint ventures under the cartel rules, and third line forcing conduct. Both demand attention to eliminate unnecessary cost to business and government.
- The information disclosure prohibitions in Division 1A of Part IV of the CCA should be repealed: while BHP Billiton supports effective, generally applicable regulation of information disclosure, if applied more broadly, these provisions would add significant cost and complexity to the compliance burden, particularly in the context of legitimate engagement with trading platforms, market indices and benchmarking exercises.
- It is appropriate generally to maintain separate legislative regimes for each of competition and industrial relations. However, it is desirable to make some fine-tuning changes in the CCA.

Introduction

7.1 BHP Billiton's production, marketing and mergers and acquisition activities give it direct experience of the application and enforcement of competition laws in many countries around the world. In analysing existing and proposed arrangements in global commodity markets, the company has become familiar with competition law regimes or specific national competition laws that depart from international best practice.

7.2 In BHP Billiton's experience, Australian competition law is characterised by:

- an overly codified, statutory approach, both as to defining prohibited conduct and providing for exemptions to such conduct;
- a focus on form rather than the underlying economic activity which it seeks to regulate;
- an implicit reluctance to allow companies to self-assess the economic impact and potential competition law risk associated with a particular course of conduct (instead, having to apply detailed statutory exceptions or to seek authorisation for arrangements, even where they are competitively benign); and
- several departures from commonly adopted regulatory approaches elsewhere in the world.

7.3 This results in:

- needing to obtain specific Australian competition law advice, even at an initial stage of a project (whereas an economics-based, "rule of reason"[74], analysis might be appropriate elsewhere) and even where any potential competitive impact in Australia may be minor;
- the regulator and courts – and thus, the businesses regulated by them – looking more to the statutory form of regulation than the underlying economic impact of business conduct;
- needing to restructure arrangements or to take other measures (often in conjunction with counterparties, leading to protracted negotiations) to address potential Australian competition law problems which result in no meaningful improvement in competition;
- long and costly authorisation applications and notifications for conduct that involves public benefit and that may technically contravene the CCA, even in cases raising few if any competition law issues on a "rule of reason" analysis;
- challenges in providing pragmatic counselling.[75]

7.4 Drawing on its experience, in this section, BHP Billiton provides its views on the following aspects of Part IV of the CCA:

- the form of Australian competition law being more in line with its underlying objectives;
- enforcement against cartel behaviour;
- the application of the cartel offences to legitimate co-operation arrangements between competitors;
- the law on facilitating practices and information exchange;
- third line forcing; and
- the industrial relations provisions of the CCA.

The form and underlying objective of Australian competition law

7.5 As the Review Panel will be aware, the object of the CCA is:[76]

> *"… to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."*

7.6 The "promotion of competition" is critical in BHP Billiton's view. While several of the leading Australian cases confirm the supremacy of promoting competition over concerns with other factors, such as the interests of any one or more competitors, in applying the CCA,[77] this is a theme that could be usefully reinforced by the Review Panel, in BHP Billiton's view. In doing so, the Review Panel should encourage the following desirable themes in its review:

- Australian competition regulation (in whatever form it takes) must focus principally on the underlying economic impact of conduct on competition; and
- the form of Australian competition law should be such that this objective is always clearly in view.[78]

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[74] There are several references in this section to a "rule of reason" analysis of conduct. This refers to the assessment of conduct in the United States under the *Sherman Act* 1890, by reference to its likely competitive and efficiency impact.

"In condemning collaborations that unreasonably restrain trade, Sherman Act Section 1 seeks to guarantee the public the benefits of competition. This goal focuses the reasonableness inquiry on the competitive effects of challenged behaviour relative to such alternatives as its abandonment or a less restrictive substitute. To gauge such effects, we must ask how a challenged practice might restrain or harm competition, how it might benefit the parties and society, and whether some alternative behavior would be preferable." Areeda, *Antitrust Law*, Vol VII, paragraph 1500.

[75] For example, advising on compliance with the complexities of information exchange regulations under Division 1A of Part IV of the CCA (which involve 13 prescribed exemptions, complex interaction with continuous disclosure requirements, and several difficult definitional issues).

[76] See s2 of the CCA.

[77] See for example, *Queensland Wire Industries v BHP* (1989) 167 CLR 177, paragraphs 23 and 24, per Mason CJ and Wilson J

[78] See Kirby J in *Visy Paper v ACCC* (2003) 216 CLR 1, at paragraph 70 (having described the language of s47 of the CCA as "obscure"): "*It is in the context of such legislative opacity and unwieldiness that it is essential in my view, to adopt a construction of the TPA (as it then was) that achieves the apparent purposes of that Act by furthering the objectives of Australian competition law. Keeping such purposes in mind helps to shine the light essential to finding one's way through the maze created by the statutory language. Even then, there is a substantial danger of losing one's way in the encircling gloom*."

7.7 Broadly, the codified, statutory approach to setting out Australia's competition regulation has meant that the regulator and courts – and thus the businesses regulated – have tended to look more to the statutory form of the Australian legislation than the underlying economic impact of business conduct, in its application. This is at odds, to some degree at least, with the approach taken in relation to competition law in the EU and the United States[79], among other jurisdictions. In regulating competitive conduct, those jurisdictions tend, in BHP Billiton's experience, to be properly more focused on the economic (and efficiency)[80] impact of business conduct in assessing its legality, than on specific exemptions or requirements for mandatory notifications.

7.8 For these reasons, BHP Billiton is broadly supportive of the Review Panel considering a refocusing of Australian competition regulation on simpler, normative prohibitions, which involve greater emphasis on the economic impact of business conduct, rather than on its statutorily described form.

7.9 Simpler regulation and a greater focus on the underlying economic effect of such arrangements would:

- minimise the need for precautionary authorisation applications for conduct that has benign competitive effects, but which may technically contravene the CCA;
- provide businesses with relative certainty as to the application of the CCA without the need to engage with the ACCC;
- reduce the size and complexity of the CCA; and
- align with other competition law regimes, which would facilitate common, more efficient approaches to competition law compliance across international operations, without risk of contravention or any undue harm to competition in Australia.

7.10 It is possible that this alternative approach may come at a cost of losing some certainty, in the short term. Australian courts have decided cases on many of the provisions of the CCA for several decades, and there is an increasingly settled body of law in Australia on the current provisions. Further, a broader, more normative form of regulation (such as that in the US or EU) provides scope for regulators and courts to take a wider view – for example, as to what conduct properly falls within the "object of restricting competition" concept under Article 101 Treaty on the Functioning of the European Union. However, against these concerns, BHP Billiton places a high value on increasing consistency among the world's major competition agencies and the legislation under which they operate. Further convergence with major international competition regimes such as the US and EU (and those which follow the EU approach, including several developing competition law regimes in the Asia-Pacific region), will assist in attracting international business and investment to Australia, as well as facilitate efficient international compliance management, to the benefit of Australian and international businesses alike.

7.11 As an intermediate approach, some of the detailed statutory analysis under the Australian law could be avoided if pragmatic steps such as the following were introduced:

- *de minimis exemptions* from contraventions of the anti-competitive conduct prohibitions in sections 45 and 47, for companies which have market shares or business revenues below certain thresholds, or for small transactions;[81]
- *block exemptions* from the anti-competitive conduct prohibitions in sections 45 and 47 for particular types of competitor co-operation arrangements (eg joint purchasing, research & development) and vertical supply arrangements where the parties have market shares below certain thresholds;[82] and

[79] As the Review Panel will be aware, alternative models are to be found in the European and US regulations on these forms of business conduct, set out in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in the EU (which have been followed in many new Asia-Pacific competition regimes), and in Sections 1 and 2 of the *Sherman Act* 1890 in the US.

[80] In the EU, even if conduct is self-assessed by the parties as having an anti-competitive object or effect, they may also consider efficiency outcomes – see Article 101(3) of the TFEU, which exempts anti-competitive arrangements which nevertheless contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which neither: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; nor (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. The "rule of reason" analysis in the United States also has regard to efficiency outcomes.

[81] For example, the EU Notice on Agreements of Minor Importance states that agreements between actual or potential competitors accounting for a combined market share of less than 10% in any market affected by such agreement, or less than 15% where the parties to the agreement are not actual or potential competitors, will usually not appreciably affect competition in breach of Article 101 (1) of the Treaty on the Functioning of the European Union.

- *enforcement guidance from the ACCC* which provides clear, pragmatic and reliable guidance on those types of competitor co-operation and vertical supply arrangements which it is unlikely to investigate (for example, by providing for appropriate safe-harbours), similar to such guidance published by competition agencies in the United States, EU and Canada.

Substantive cartel prohibition in Australia

7.12 BHP Billiton believes in competitive markets for our products, operating in accordance with the fundamentals of supply and demand, free from artificial distortions of output or pricing. Accordingly, BHP Billiton supports the full enforcement of competition laws against those companies who engage in cartel behaviour.

7.13 BHP Billiton considers the Australian law prohibiting cartel conduct to be adequate and the ACCC and the Commonwealth Director of Public Prosecution to have sufficient powers to investigate and prosecute such conduct effectively and in accordance with international standards.

7.14 However, BHP Billiton has several observations in relation to the application and enforcement of the Australian cartel provisions to:

- anti-competitive buyer cartels, both within and outside Australia;
- legitimate forms of co-operation among competitors; and
- information exchanges and other forms of facilitating practices between competitors.

Buy-side cartels

7.15 BHP Billiton has encountered collusive arrangements among buyers of commodities which BHP Billiton has produced and sold in countries in which there has been little or no competition law enforcement.

7.16 As competition law has developed in many international jurisdictions, there has been a clear regulatory focus on traditional "sell-side" cartel conduct, but in many cases, far less focus on anti-competitive, "buy-side" conduct. BHP Billiton has been and remains concerned that there is ineffective enforcement of cartel laws in relation to "buy-side" cartel conduct.

7.17 Buy-side cartels can be very damaging to effective and competitive markets. Principally, collusive conduct which suppresses the prices at which buyers are prepared to bid for products is likely:

- in the short term, to reduce the volumes produced and sold – which can significantly impact on demand and supply outcomes in downstream markets;
- in the longer term, to distort entry and expansion signals for (potential and current) producers in those product markets, resulting in under-investment in production in those markets; and
- to spill over into other activities and markets in which the buyers participate, including secondary trading for the products acquired, as well as in downstream product markets, facilitating anti-competitive outcomes beyond the initial acquisition by the buyers.

7.18 In the United States, there has been reasonably consistent application of the prohibition of "buy-side" cartel conduct.[83] There have also been significant investigations into "buy-side" cartel behaviour in Europe.[84] Further,

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[82] For example, EU competition law (and the equivalent national laws of the EU Member States) is supported by a series of wide-ranging "Block Exemptions", which typically exempt a category of agreements from competition law subject to (a) the market shares of the parties to the agreement; and (b) the absence of certain "hardcore restrictions" that the European Commission has encountered in such agreements and which are deemed especially harmful. The EU's competition authorities draw on their past experiences to create not only block exemptions but also detailed underlying guidance intended to enable companies to "self assess" or obtain legal advice at relatively low cost. Block exemptions are updated, typically every 10 years or so, in order to reflect recent experience and market evolution. Current EU block exemptions include (i) the Joint R&D block exemption (Commission Regulation No 1217/2010 of 14 December 2010); (ii) the Specialisation block exemption (Commission Regulation No 1218/2010 of 14 December 2010); (iii) the Vertical Restraints block exemption (Commission Regulation 330/2010 of 20 April 2010); and (iv) the Technology Transfer block exemption (Commission Regulation (EU) No 316/2014 of 21 March 2014). There are also examples of other non-EU regimes which follow a similar approach having adopted or considered adopting block exemptions (for example Hong Kong).

[83] See for eg *Mandeville Island Farms Inc v American Crystal Sugar Co* 334 US 219 (1948); *National Macaroni Mfrs. Ass'n v FTC* 345 F. 2d 421 (7th Cir. 1965); *Reid Bros Logging Co v Ketchikan Pulp Co* 699 F. 2d 1292 (9th Cir. 1983); *Law v NCAA* 134 F. 3d 1010 (10th Cir. 1998). There have been several recent human resources/hiring cases, where potential collusion among employers as "buyers" of employee services has been investigated. See Todd v Exxon Corp 275 F 3d 191 (2d Cir. 2001), and the so-called Silicon Valley no-poach proceedings, In re High-Tech Employee Antitrust Litig. No 11-CV-02509-LHK (N.D. Cal, 2014).

the European Commission's published Guidelines on Horizontal Co-operation Agreements set out guidance in relation to "joint purchasing" activities, which includes that:

> *"Joint purchasing arrangements restrict competition by object if they do not truly concern joint purchasing, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation."*[85]

7.19 In Australia, there have been several cases in which companies have admitted involvement in an illegal "buy-side" cartel.[86] However, the CCA includes provisions permitting competing buyers of products:

- to agree on the prices at which goods or services will be "collectively acquired, whether directly or indirectly" by those buyers (in circumstances where there have been no cases decided providing any guidance on the meaning of the words quoted); [87] and
- to collectively negotiate the terms on which they will acquire products, once the relevant conduct has been authorised under Part VII Division 1 of the CCA[88], or notified (and the notification allowed to stand) under Part VII Division 2 of the CCA.[89]

7.20 Joint buying (or "collective acquisition") exemptions do feature in other competition law regimes around the world, and the collective bargaining notification procedures ought only to permit conduct which has a public benefit which outweighs its anti-competitive detriment. However, the existence of these features in the Australian CCA might suggest that there is a lesser focus on prohibiting anti-competitive cartel arrangements among buyers of products in Australian markets.

7.21 In both domestic and international markets, BHP Billiton has a clear interest in ensuring, so far as is possible, that those markets are not the subject of anti-competitive cartel conduct among buyers. As a major exporter of commodities from Australia, BHP Billiton considers that this outcome is also in the national interest.

7.22 To be clearer on the issue of buy side cartels, and as part of its role to enforce the cartel prohibitions effectively, BHP Billiton believes that the Review Panel should encourage the ACCC:

- to take a leadership position in relation to international "buy-side" cartel issues in its engagement with regulators across the Asia-Pacific region, and more broadly; and
- to ensure that its enforcement of Australian cartel regulation extends to policing illegal "buy-side" cartels effectively – which may involve taking further steps to explain or develop the law on "collective acquisitions" and the limits of conduct among buyers which may properly be notified under the collective negotiations provisions referred to above.

Legitimate forms of co-operation among competitors – Joint Ventures

7.23 Co-operation among competitors can be efficient and pro-competitive in many contexts. BHP Billiton is particularly concerned that the current Australian competition law in relation to one such context – joint ventures – is unclear, overly prescriptive and is potentially affecting the development of major resources projects.

7.24 Joint ventures among rival firms necessarily invite consideration of the application of the cartel and other competition laws. They may for example, involve agreement among the participants (some of whom at least may be competitors) that:

- the joint venture will produce a commodity for supply only to the participants and not to other persons;

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[84] See (Case COMP/C.38.281/B.2) – Raw Tobacco Italy, in 2005, involving collusion among 4 major tobacco producers in relation to the acquisition of raw tobacco. Also, in September 2012, the European Commission opened an investigation, still ongoing at the time of writing, into possible collusion by buyers of lead scrap – see http://europa.eu/rapid/press-release_MEMO-12-722_en.htm?locale=en.

[85] Paragraph 205, European Commission "*Guidelines on the Applicability of Article 101 on the Functioning of the European Union to horizontal co-operation agreements*", 2011.

[86] *TPC v Monier Roofing Ltd* [1996] ATPR 41-464 and *TPC v Simsmetal* [1996] ATPR 41-449.

[87] See s44ZZRV, which provides for an exception to the cartel prohibition in Part IV Division 1A, with the defendant bearing the evidential burden to make out the defence.

[88] For eg: *Re Endocoal Ltd* (A91350, March 2013), two coal producers were permitted to seek to collectively bargain with suppliers of port and below-rail services; *Re Cockatoo Coal Ltd* (A91338, February 2013), six coal producers were permitted to collectively negotiate the terms of water supply by SunWater.

[89] For eg: Re *Nuss Removals* (2013), notification allowed to stand in relation to collective negotiation of rebates on rail freight rates by several furniture removalists. Re *Australian Wagering Council Limited* (2014), notification withdrawn after the ACCC proposed to object in relation to collective negotiation by 10 wagering firms to acquire rights for wagering services from the National Rugby League.

- the participants will not compete with the joint venture's business including potentially for a period after leaving the joint venture; or
- the prices for sale of the products produced by the joint venture shall be as determined by the management of the joint venture or the joint venture participants.

7.25 It has long been recognised around the world that there are clear pro-competitive benefits from firms co-operating to build and operate new business ventures. This is especially the case in the energy and resources sector, where exploration for, and exploitation of, major resources involve:

- very large amounts of sunk capital;
- long lead times, and considerable market risk;
- many other risks, including physical/technical risks, sovereign risk, and environmental and regulatory risks; and
- increasingly, the application and development of leading, and sometimes proprietary, technology.

7.26 For these reasons, many competition law regimes around the world do not apply rules in relation to cartel conduct to legitimate joint venture activities. For example, arrangements between joint venturers (which are not a "naked" cartel) are assessed in:

- the United States[90] under the "rule of reason"; and
- the EU, UK and other EU Member States pursuant to a similar "effects"[91] test.

7.27 The treatment of joint ventures under Australian competition law is unnecessarily complex and confusing. As the Review Panel will be aware, in short:

(a) there is an *exception* to the application of the criminal and civil prohibitions of "cartel provisions", set out in Division 1 of Part IV of the CCA,[92] which applies only in relation to a cartel provision which:

(i) is "for the purposes of a joint venture"; and

(ii) is contained in a "contract"[93],

and where the joint venture:

(iii) is "for the production and/or supply of goods or services"; and

(iv) is carried on jointly between the parties (whether via and incorporated vehicle or not); and

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[90] As the US Supreme Court recently reaffirmed in *Texaco Inc. v Dagher*, 547 U.S. 1 (2006), joint venture arrangements that involve an efficiency-enhancing integration of the parties' activities are evaluated under the "rule of reason" to determine their overall competitive effect. Under the rule of reason approach, the collaboration's expected pro-competitive benefits are balanced against its potential anti-competitive effects, taking into account the nature of the agreement and market circumstances (*Id* at p3). The assessment takes into account also the restrictions imposed by a legitimate business collaboration on non-venture activities. Areeda, *Antitrust Law* vol.VII, paragraph 1478b, explains that, in evaluating competitor collaborations that are not "naked" cartel arrangements (ie those without any arguably redeeming competitive virtue) "the courts examine not only the immediate harms and benefits of a venture, but also the likely consequences of all that is reasonably necessary to carry it out, the expected ways in which the venture will act vis-à-vis its parents and their competitors, and the probable spillovers on the parents' other activities. Thus a well-considered decision legalizing the creation of a joint venture necessarily expresses approval of all that is inherent and reasonably ancillary to it.".

[91] Joint ventures in the EU are assessed in one of two ways:

(i) Where the JV will operate to a significant extent independently of its parents (a "full function" JV), the JV is assessed under the merger control rules (triggering in most cases a mandatory filing by the parents when the JV is formed and when it undergoes subsequent significant structural changes, provided filing thresholds are crossed). This process examines whether the JV is likely to result in a significant impediment to effective competition; or

(ii) Where the JV is likely to remain dependent on its parents, it is assessed in the same way as any other agreement, using the general competition law rules. No filing is triggered. Instead, the parents must "self- assess" with the aid of documents such as the EU Horizontal Co-operation Guidelines. In this context, broadly, EU law will examine (i) whether the JV will lead to economic benefits, such as productivity gains, the promotion of technical or economic progress, the development of new products or processes, or expansion into new markets; (ii) whether any restriction the JV places on competition is less than truly "indispensable" to achieving the economic gains identified; (iii) whether consumers will obtain a fair share of any efficiencies or other savings the JV achieves; (iv) whether the parents of the joint venture are subject to restrictions which are not necessary for the achievement of these objectives; and (v) whether the JV has the potential to eliminate competition in any market relevant to the JV.

[92] See sections 44ZZRO and 44ZZRP.

[93] Or, in the alternative, per an agreement which each party intended and reasonably believe to be a contract.

(b) there is a *defence* to the prohibition of making or giving effect to "exclusionary provisions",[94] where the exclusionary provision:

(i) (again) "for the purposes of a joint venture"; and

(ii) the exclusionary provision does not have the purpose or likely effect of substantially lessening competition.

7.28 BHP Billiton has considered the application of these complex provisions to existing and prospective joint ventures. In doing so, we have encountered the following practical challenges:

(a) a corporation may be required both to raise the *defence* and to seek to invoke the *exception* (in relation to each of which, it bears the burden of proof) in relation to the same conduct, so as to avoid contravention of the various potentially applicable prohibitions;

(b) unless each element of the exception is made out, the parties may be criminally liable for agreeing upon, or giving effect to, the otherwise bona fide commercial terms of the joint venture, with exposure to up to 10 years imprisonment for those executives "knowingly concerned in" the conduct;

(c) in order to comply with the exception, all arrangements between the joint venturers that might contain a cartel provision, must be set out in a "contract" between them,[95] which raises considerable difficulties in addressing ongoing management arrangements that empower the joint venture's parents' representatives on its board to agree to particular sales contracts or customer approvals, for example;

(d) each of those arrangements between the joint venturers which might contain a cartel provision must also be "for the purposes of a joint venture";[96] and

(e) it must be clear that the joint venture is engaged in the "production and/or supply of goods or services", which may not extend to common and generally pro-competitive activities such as joint research or exploration or, commonly, holding business assets.

7.29 In BHP Billiton's experience, these challenges mean that Australia's competition law in relation to joint ventures:

(a) is an outlier among international competition law regimes, imposing requirements not found elsewhere;

(b) involves considerable legal counselling and compliance costs in the formation, administration and throughout the life of the joint venture; and

(c) raises concerns among senior management within each JV partner, given the potential for criminal prosecution in the event of non-compliance with these technical requirements.

7.30 In BHP Billiton's view, the detailed statutory requirements of the joint venture exceptions in Division 1 of Part IV merit review. These requirements contribute no more towards effective, practical compliance with the objectives of the Australian competition law, than would a simple exception to the cartel rules for any arrangements struck bona fides "for the purposes of a joint venture".

7.31 For these reasons, BHP Billiton strongly submits that joint venture[97] arrangements between (current or potential) competitors should not contravene the cartel or exclusionary provision prohibitions in the CCA where they are "for the purposes of the joint venture". Adopting this approach would:

(a) leave in place other provisions of the CCA to regulate joint venture arrangements which have an anti-competitive purpose or likely effect;[98]

(b) be flexible enough to encompass all forms of legitimate joint ventures and joint venture arrangements involving rival firms, without unintended omissions;

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[94] See s76C of the CCA.

[95] Or at least contained within an arrangement which was intended to be a contract, and which the parties reasonably believed to be a contract – see s44ZZRO(1A).

[96] That the arrangements which would otherwise contain cartel provisions should be "for the purposes of the (legitimate) joint venture" is a reasonable requirement – but that characterisation must be made out in relation to each potential cartel provision under these sections of the CCA.

[97] Note that there is already a detailed definition of "joint venture" set out in s4J of the CCA.

[98] BHP Billiton notes that there have been (and are likely to be) very few investigations/prosecutions in relation to the arrangements involved in significant, public joint venture activities involving competing firms. Thus, the enforcement burden of having to assess joint venture arrangements under s45 (rather than as potential cartel conduct) is unlikely to be significant.

(c) be broadly consistent with regulation on these issues in the United States, EU and other jurisdictions; and

(d) not impact negatively on confidence, as joint ventures are embarked upon.

Disclosure of information among competitors

7.32 For nearly a decade,[99] there has been considerable debate in Australia in relation to the limits of permissible disclosure among rivals of competitively sensitive information. This debate has resulted in the introduction of Division 1A of Part IV of the CCA dealing with "anti-competitive disclosure of pricing and other information", in the banking sector.[100]

7.33 BHP Billiton has a clear interest in, and supports, the effective, uniform and clear regulation of the disclosure of information among competing firms. In efficiently regulating its own affairs and ensuring full compliance with competition laws wherever it operates, BHP Billiton would be concerned if Australia were to adopt laws which apply to its operations (as a producer and marketer of raw materials) and which impose very different standards in relation to information exchange than apply elsewhere around the world.

7.34 Currently, the Australian law (aside from Division 1A of Part IV, which applies to the banking sector), is broadly consistent with the principles commonly adopted elsewhere around the world.

(a) The Australian cartel prohibition prohibits making or giving effect to an understanding (or any more formal arrangement) among competitors, which has the purpose, effect or likely effect of fixing prices among them, or otherwise has an anti-competitive purpose or likely effect.[101]

(b) In Europe, Article 101 prohibits an agreement or "concerted practice" between rivals, the object or effect of which is to restrict competition. In relation to the disclosure of information among rivals, the European case law points to a more restrictive approach than in Australia - one in which unilateral disclosure of one company's strategic intentions may be presumed to be accepted by its rivals who, in turn, will adapt their market conduct accordingly (unless those rivals publicly distance themselves from that disclosure), thus pointing to the existence of a concerted practice with an anti-competitive object or effect.[102]

(c) In the US, Section 1 of the *Sherman Act* proscribes a "contract, combination or conspiracy" in unreasonable restraint of trade. Collective practices which reduce the competitive uncertainty between rivals may facilitate such an anti-competitive contract, combination or conspiracy. On this basis, "facilitating practices" such as exchange of competitively sensitive pricing information, or even a unilateral disclosure of future strategies which is taken up and used by a rival, may contravene the US prohibition.[103]

7.35 Division 1A of Part IV was introduced into the CCA in June 2012. Across ten detailed sections, and currently applicable only in the banking sector, it introduces new (civil) prohibitions, to the effect that (in short) a corporation must not:

- make a "private disclosure to competitors" (which is a defined term) of information in relation to the price of goods or services, which is not "in the ordinary course of business";[104] nor

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[99] The decision of the Full Federal Court in *Apco Service Stations v ACCC* [2005] FCAFC 161 seems particularly to have sparked the debate.

[100] See regulation 48 of the *Competition and Consumer Regulations*.2010.

[101] There is some controversy in Australia on this issue. The *Apco* case (ibid) in Australia, in which there were unilateral communications among competitors disclosing pricing intentions, suggests that Australian regulation in this area is more permissive – by inference at least, from the acquittal in that case. Cf the European position, "When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour." (see European Commission Guidelines on Horizontal Co-operation Agreements, paragraph 62. This sort of conduct may be proscribed in Australia by the cartel rules or, more broadly, by the prohibition of making or giving effect to an understanding, which has the purpose or likely effect of substantially lessening competition. There are few cases on point in Australia. Note however, that the ACCC is currently conducting an investigation into "the competition effects of price information sharing arrangements" among petrol retailers in Australia – see Monitoring of the Australian Petroleum Industry, ACCC, September 2013, p13.

[102] See European Commission "Guidelines on the Applicability of Article 101 on the Functioning of the European Union to horizontal co-operation agreements", 2011, paragraphs 55 to 110 for a summary of the European regulatory position.

[103] The US DoJ/FTC publication "Statements of Antitrust Enforcement Policy in Health Care" 1996 provides guidance on permissible exchange of pricing information (at Statement 6). Absent "extraordinary circumstances" the Agencies propose not to challenge independent collection and aggregation of pricing data among competitors of price data more than 3 months old, conducted among at least 5 providers, and in which the published data cannot be dis-aggregated.

[104] See s44ZZW of the CCA.

- disclose (to anyone) information in relation to the price of goods or services, the capacity to supply goods or services or the "commercial strategy of the corporation", for the purpose of substantially lessening competition in a market.[105]

7.36 Following those provisions in the legislation is a long list of exceptions to these new prohibitions (in relation to issues such as accidental disclosure, disclosure to an agent, disclosure authorised by law or in compliance with continuous disclosure requirements, or disclosure to an "unknown" competitor, for example).

7.37 BHP Billiton submits that the introduction of the special information disclosure prohibitions set out in Division 1A of Part IV of the CCA is not a useful addition to the CCA. While BHP Billiton supports the general policy objective of prohibiting anti-competitive information disclosure, these provisions (wherever they apply) put Australian regulation of information disclosure among rivals substantially at odds with other international regulatory regimes. Should these provisions be applicable more broadly, they will add very significant cost and complexity to the compliance burden for BHP Billiton and other enterprises engaged in cross-border trade, particularly in the context of legitimate participation in trading platforms, market indices and benchmarking exercises.

7.38 BHP Billiton urges the Review Panel to recommend that the provisions in Division 1A of Part IV be repealed. In their place, BHP Billiton encourages the ACCC to enforce the existing cartel and anti-competitive conduct provisions of the CCA in relation to anti-competitive information exchanges among rivals. Having done so, if it is then clear that there is a deficiency in the Australian law, any further amendment to the CCA in relation to information exchange among rivals should be confined to amending the existing cartel and anti-competitive conduct provisions in a way which is consistent with international regulation in this area.

Third line forcing

7.39 Broadly speaking, "third line forcing" refers to conduct whereby a corporation's supply of a good or service (or of a discount or other benefit associated with that supply), is conditional on the acquirer of that good/service acquiring a good or service from an unrelated third party.

7.40 Third line forcing conduct is prohibited under s47 of the CCA *per se*; that is, without any regard to its competitive purpose or likely effect in each case.[106] In BHP Billiton's experience, this is a regulatory setting which is unique to Australia among those major economies of the world with established competition law regimes.

7.41 Many competition law regimes around the world include a prohibition in relation to product "tying" – the supply of a product on condition that another product is also acquired. However, product tying is almost universally only prohibited where the conduct is found to have an anti-competitive purpose, objective or effect, and generally only where the supplier enjoys substantial market power or a dominant position.[107]

7.42 In Australia however, the third line forcing prohibition is not only *per se* in character, but it also has a very extensive reach, by virtue of the *Queensland Aggregates* decision of the Full Federal Court.[108] That decision suggests that, by way of practical example, where a company hires an earth-moving contractor on condition that the contractor must acquire particular safety equipment from a specified or approved supplier:

- the contractor will "supply" a "service" – earth-moving services – to the company, in the ordinary meaning of those words (but no third line force arises because the contractor is not requiring the company to acquire any other product from another supplier); however
- the company is "supplying" a "service" to the contractor (as those terms are defined under the CCA, per *Queensland Aggregates*), by having granted the contractor the rights under, or benefit of, the contract for work, and, having done so on condition that the contractor must acquire another product (the safety

[105] See section 44ZZX of the CCA.

[106] See subsections 47(6), (7), (8) and (9), together with ss47(10). The conduct is *per se* prohibited. In short, these provisions prohibit the supply of a product by Supplier A on condition that the customer also acquire a product from Supplier B (which is not a related body corporate of Supplier A).

[107] In the United States, tying arrangements have historically been condemned as per se illegal, but in recent years there has been a move towards rule of reason assessment. See *Illinois Tool Works v Independent Ink*, 547 U.S. 28, (2006), "Over the years, … this Court's strong disapproval of tying arrangements has substantially diminished." (p5). In the EU, tying arrangements have been evaluated using an effects-based approach, having regard to whether a dominant firm, coercion and/or foreclosure is involved, and whether there is an objective justification for the arrangements.

[108] *Queensland Aggregates Pty Ltd v TPC* (1981) 57 FLR 314.

equipment) from another, unrelated, supplier, the company will have contravened the third line forcing prohibition.

7.43 The technicalities extend yet further:

(a) some arrangements which might constitute third line forcing can be commercially restructured so that the prohibition is avoided, but without any change to the likely competitive impact of the arrangement in each case;

(b) third line forcing may be "notified" to the ACCC,[109] so that it is then permitted, absent any objection from the ACCC, and in most cases no objection has been forthcoming;

(c) where notification is contemplated, it is only the company (and not the contractor), in the example above, which may "notify" the ACCC for that exemption – even though both the company and contractor are "involved" in the contravening conduct and thus potentially liable.

7.44 Each of these factors potentially introduces important and difficult issues, especially if the company and contractor have differing commercial objectives or appetites for engagement with the ACCC, or receive conflicting advice.

7.45 BHP Billiton's experience is that there are many instances in which common forms of commercial conduct, which would otherwise be pro-competitive, or at least competitively benign, may be prohibited by the third line forcing rules in Australia (unless restructured or notified). Examples are:

(a) requesting contractors to purchase or hire equipment from a particular vendor so as conveniently to ensure that health and safety standards are maintained;

(b) requesting suppliers to acquire equipment, parts or other inputs to the products/services they provide to BHP Billiton so as to ensure compatibility and performance outcomes;

(c) requiring vendors to acquire a licence or approval from a third party in order to transact with BHP Billiton;

(d) requiring suppliers to use a particular piece of software to provide data to BHP Billiton or others; and

(e) a supplier of machinery to BHP Billiton requiring BHP Billiton to engage particular contractors for its delivery or installation.

7.46 There is good evidence that very few instances of third line forcing give rise to substantive impacts on competition. As noted above, a corporation proposing to engage in third line forcing conduct may "notify" the ACCC under s93 of the CCA. Once notified, after 14 days the prohibition will not apply, and will continue not to apply, unless the ACCC has, in turn, notified the applicant that it is satisfied that the third line forcing conduct has net public detriments.[110] As the Review Panel will be aware:

- there is a great number of such notifications filed with the ACCC each year;[111]
- very few of these notifications are the subject of a notice from the ACCC under ss93(3A) (to the effect of removing the exemption from the prohibition).[112]

7.47 Corporations such as BHP Billiton are required to expend significant corporate resources in assessing where a third line forcing issue may arise, and (where it does so) considering alternative corporate or commercial structures and/or notification of the conduct. Also, even where BHP Billiton is not the proponent of a third line forcing arrangement (such as where it may be the second supplier), it may nevertheless incur similar costs in considering the implications of the proposed arrangements for it, as well as become involved in detailed consideration of the structure and its implications by the ACCC, upon the proponent of the arrangement filing a notification. Box 7A below sets out a recent example of this occurring to BHP Billiton, in which it incurred significant costs.

[109] See s93 of the CCA

[110] See s93 (3A) of the CCA.

[111] Over 450 "exclusive dealing" notifications were allowed to stand (and thus, the conduct permitted) by the ACCC in 2013, the vast majority of which were in relation to third line forcing conduct. See ACCC website.

[112] In 2013, no third line forcing notifications were revoked, and only 1 was withdrawn. See ACCC website.

Box 7A – Third Line Forcing - a recent example

BHP Billiton recently experienced significant delay and expense resulting from a third line forcing notification made to the ACCC by the Port Hedland Port Authority[113]. The notification was lodged in September 2012, leading to a lengthy review that ended on 19 December 2013 with a decision to take no action at this time.

Regardless of the substantive issues at stake[114], the notification provoked an ACCC review at a stage where many of the relevant commercial agreements remained subject to negotiation, meaning the review was in many ways a distraction for the parties involved. Had there been no per se third line forcing prohibition, it would have been open to third parties to complain to the ACCC and trigger an informal investigation under more general CCA provisions once the final picture had become clear.

Instead, the mandatory notification requirement produced a 15-month process, during which time the facts underlying the ACCC's analysis were evolving and in circumstances where it was arguable as to whether a third line force or exclusive dealing arrangement actually existed. Dealing with the process incurred significant management time and legal fees.

7.48 The dual arrangement of the *per se* prohibition in relation to third line forcing conduct, accompanied by a notification process under s93 is, in BHP Billiton's view, a clear example of unnecessary "red tape", which imposes unnecessary costs on business to no regulatory advantage. In particular:

- In the competitive, predominantly international markets in which BHP Billiton operates, third line forcing conduct will very rarely have an anti-competitive effect. This is the case equally in many domestic Australian markets, in BHP Billiton's view. A measure of this is the large number of third line forcing notifications which are filed and remain on foot (so as to permit the otherwise illegal conduct), without any objection from the ACCC.
- Where third line forcing conduct has an anti-competitive purpose or likely effect, it should, as with other forms of exclusive dealing or product tying arrangements, be the subject of an effective prohibition – that prohibition exists in the form of s47, as well as s45 generally.

7.49 BHP Billiton submits that third line forcing conduct should not be *per se* prohibited. Instead, it should be regulated as other forms of exclusive dealing conduct are under the CCA – illegal only where the conduct has the purpose, effect or likely effect of substantially lessening competition.

The industrial relations provisions of the Competition and Consumer Act

7.50 It is usual for competition laws and labour laws to be regulated under separate regimes. The longstanding position in Australia is that acts done in connection with a contract of employment are generally outside the range of competition laws (see section 51(2)(a) of the CCA). There is a particular exception in the case of boycott activity. BHP Billiton considers that maintaining separate regimes continues to be appropriate but suggests that consideration be given to some ways in which the intersection between the two regimes can be improved.

The interaction between Australian industrial relations and competition laws – industrial action supporting pattern bargaining

7.51 During much of the period while the employment exemption from the competition legislation has operated, there was no capacity under industrial relations laws to take industrial action with legal immunity as is now reflected in section 415 of the *Fair Work Act 2009*. This capacity was first introduced in 1994[115] and has continued since then largely unchanged. It has significantly altered the balance of power in industrial relations.

7.52 It is timely to consider whether excluding employment matters from the range of competition laws remains appropriate when protected industrial action is used to impose industry wide arrangements. It is not in itself controversial that industrial agreements might take a similar shape across competitors within an industry or amongst participants in an industrial project. However, use of protected industrial action to impose common terms across an industry can have the practical consequence that entry to the industry and competition within the

[113] Notification N96171

[114] The various submissions made by the parties are available on the ACCC website: http://registers.accc.gov.au/content/index.phtml/itemId/1081258

[115] *Industrial Relations Act 1988,* sections 170PG and 170PM.

industry are restricted. Those enacting the legislation for protected industrial action did not have this intention. Rather, the legislation was intended to support genuine employee claims in the context of single enterprise bargaining.

7.53 Sections 409(4), 412 and 422 of the *Fair Work Act* remove protection for industrial action in support of *pattern bargaining* claims. This is an expression drawn from North American labour relations. It is defined in the Fair Work Act to mean claims designed to impose common terms in more than one enterprise agreement.[116] However, the particular exclusion from protected industrial action has been so narrowly interpreted by the Fair Work Commission and its predecessors that the pattern bargaining practice and problem go unchecked.[117] The result is high cost and uniform terms and conditions of employment to the detriment of the economy.

7.54 An exceptional intervention in industrial relations through the predecessor of the CCA was considered appropriate to stamp out anti-competitive secondary boycotts in the late 1970s (section 45DDff). This intervention proved very beneficial for the economy. A similarly beneficial effect can and should be achieved through the CCA in respect of the wrongful use of industrial action to support common industrial claims outside legitimate enterprise bargaining where there are anti-competitive consequences.

7.55 It is suggested, therefore, that the employment exception in section 51(2)(a) of the CCA be adjusted so that it does not apply to acts done in the form of industrial action (whether or not protected industrial action) engaged in by a union or persons in concert with others for the purpose, and likely to have the effect, of imposing on employers substantially common terms and conditions of employment throughout an industry or industry sector.

The interaction between Australian industrial relations and competition laws – defences to boycott conduct

7.56 Sections 45D to 45EB deal broadly with unlawful boycott conduct. The employment exception in section 51(2)(a) does not operate in respect of these sections. Defences are provided in section 45DD.

7.57 The secondary boycott provisions have stood the test of time and it is vital they be retained. BHP Billiton submits, however, that some potential improvements should be considered in the way they operate in light of contemporary circumstances.

7.58 Section 45DD(1) says that boycott conduct by a person is not unlawful if the dominant purpose for which the conduct is engaged in is substantially related to the employment conditions of that person or a fellow employee. Section 45DD(2) is to similar effect but brings trade unions into its shield. Section 45DD(3) gives protection to boycott conduct by a person if (a) the dominant purpose for which the conduct is engaged in substantially related to environmental protection or consumer protection and (b) engaging in the conduct is not industrial action.

7.59 Industrial campaigns are sometimes supported by picket activity[118] which could transgress the prohibitions in sections 45D, 45DA, 45DB and 45E. In order to avoid legal sanction, those behind the campaign can disguise the connection with the relevant union by persuading apparently unconnected groups to become involved in support of some other complaint.[119] The courts have come to deal with this, in part, through the grant of representative orders, at least where the boycott takes the form of a picket.[120]

7.60 Each of the defences in section 45DD should only operate in isolation. They should not be available where persons imposing the boycott do so in concert with others not entitled to the same defence. It is suggested that the features of section 45DD be amended so that:

- an industrial relations defence (section 45DD(1) or (2)) is not available where the boycott activity is engaged in by persons in concert with others engaging in an activity identified in section 45DD(3); and
- the definition of *industrial action* in section 45DD(4) is altered so that it expressly includes both picketing and conduct identified in the definition which is motivated, whether or not as a dominant purpose, by industrial relations claims by any person or group.

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[116] See section 412 of the *Fair Work Act*

[117] See the decision of the Full Bench of the Australian Industrial Relations Commission in *Trinity Garden Aged Care and Another*, 21 August 2006, PR973718, where the description of common claims was interpreted as applying only in respect of claims which are identical in every way. It is a simple matter for unions advancing industry-wide claims to camouflage the industry nature of the claims.

[118] Generally speaking, engaging in a picket will not qualify as industrial action: *Davids Distribution Pty Ltd v NUW* (1999) 91 FCR 463 at [68] – [76].

[119] See, for example, *Transfield Construction v CEPU* [2002] FCA 1413 Merkel J and *Director of the Fair Work Building Inspectorate v AMWU* [2013] FCA 82, Marshall J.

[120] See, for example, *McDonald's Australia Limited v Watson and Others* [2013] VSC 502.

ANNEXURE 1

BHP BILLITON'S EXPERIENCE OF ACCESS REGULATION IN RELATION TO ITS AUSTRALIAN IRON ORE AND COAL OPERATIONS

1 BHP Billiton's iron ore business – experience with the Part IIIA declaration regime

Introduction

1.1 BHP Billiton's Pilbara iron ore business operates a vertically integrated, single user mine, rail and port system. To maximise capital efficiency, the mine, rail and port operations are tightly coupled. To maximise system throughput on a daily basis and over the medium term, BHP Billiton requires whole of system control, flexibility to respond to unforeseen events, and the ability to undertake continuous improvement and trials. BHP Billiton's integrated control centre in Perth means that this control is becoming more integrated.

1.2 BHP Billiton has invested approximately US$24 billion in its Pilbara iron ore operations over the last 10 years, and in FY2013 achieved its thirteenth consecutive record annual production from these operations.[121] BHP Billiton production guidance for its Pilbara iron ore operations is 217 mt of iron ore from its Pilbara iron ore operations in FY2014 (measured on a 100% basis).[122] Almost all of the iron ore produced by BHP Billiton's Pilbara iron ore business is exported.

FMG's applications for declaration of the Pilbara iron ore railways

1.3 Between June 2004 and early 2008, FMG applied for Part IIIA declaration of rail track access services provided by BHP Billiton's Newman and Goldsworthy railway lines, and by Rio Tinto's Hamersley and Robe River railway lines. The NCC recommended that all four services be declared; in May 2006 the Honourable Peter Costello MP was deemed not to have declared the Newman railway service, and in October 2008 the Honourable Wayne Swan MP declared the services on the Goldsworthy, Hamersley and Robe River railways.

1.4 The parties sought review of the four Ministerial decisions by the Tribunal, which ultimately heard the four proceedings together during the period from September 2009 to February 2010. The NCC participated in these proceedings. The effect of the Tribunal's decision, in June 2010, was that the Newman and Hamersley services were not declared, and the Goldsworthy and Robe River services were declared (although the Robe River declaration was only for 10 years).

1.5 The Tribunal's decisions concerning only the Rio Tinto railways were appealed to the Full Court of the Federal Court. The Full Court's decision, in May 2011, had the effect that the services on those railways were not declared. BHP Billiton was a party to, and the NCC participated in, that appeal.

1.6 The High Court granted FMG special leave to appeal, and heard the appeal in March 2012. BHP Billiton was a party to, and the NCC participated in, that appeal. In September 2012, the High Court set aside the Full Court's orders, quashed the Tribunal's decisions on the Hamersley and Robe River services, and remitted those proceedings to the Tribunal.

1.7 On 8 February 2013, the Tribunal set aside the Minister's decisions to declare the Hamersley and Robe River services, bringing an end to the remitted proceedings before the Tribunal (subject to any appeals). BHP Billiton was not involved in the remitted proceedings.

Related court proceedings

1.8 Two further court proceedings arose from FMG's declaration applications. The first concerned whether the first rail track access services FMG sought to have declared constituted the "use of a production process", such that they were excluded from the definition of "service" under Part IIIA (see s 44B). This issue was considered by the

[121] BHP Billiton ASX announcement, "BHP Billiton Limited 2013 AGM Speeches", 21 November 2013, p 9 (speech by Andrew Mackenzie).

[122] BHP Billiton ASX announcement, "Andrew Mackenzie presents at the Bank of America Merrill Lynch Metals, Mining & Steel Conference", 13 May 2014, slide 4.

Federal Court, the Full Court of the Federal Court, and the High Court. The High Court held that the track access services did not comprise the "use of a production process", and so were "services" under Part IIIA. The second proceeding concerned FMG's definition of the Newman "service" in the Tribunal proceedings.

2 BHP Billiton's coal business – experience with access regulation outside of the Part IIIA declaration regime

2.1 Infrastructure and access regulation have developed very differently in Queensland compared to other States and Territories. Queensland has the largest multi-user coal railway network in Australia and more coal export terminals than any other State or Territory. The railways and ports have predominantly been developed by governments as multi-user open access facilities and the general access regime is the most detailed of any State or Territory in Australia.

2.2 The general access regime is contained in the Queensland Competition Authority Act 1997 (Qld). The access regime was introduced to regulate two very significant (originally) government-owned multi-user, open access facilities:

- the Dalrymple Bay Coal Terminal (**DBCT**) was built by the Queensland Government in 1983 and is located 38km south of Mackay in central Queensland. When it opened, DBCT was the largest export bulk coal port in the world. DBCT was designed as an open access, multi-user coal export terminal allowing different miners to share the cost of export infrastructure without having to build their own individual coal terminals; and
- the Central Queensland Coal Network (as it is known today) was developed as a government-owned multi-user open access facility designed to service the major global coal mining projects which commenced in the Bowen Basin in the early 1960s. As the demand for coal grew, so did the need for purpose-built heavy haulage railway lines and the network of railways expanded to become the largest export coal rail network in Australia.

2.3 Other ports have been developed in Queensland on a multi-user basis. These ports were initially much smaller than DBCT and are not subject to the same degree of detailed access regulation. For example, the RG Tanna coal export terminal at the Port of Gladstone was constructed in the early 1980s as a public multi-user facility and the Abbott Point Coal Export Terminal (**APCT**) was built in 1984 as a public multi-user facility (it was privatised in 2011). More recently, the Wiggins Island Coal Export Terminal (**WICET**) is being developed as a multi-user terminal funded by users and is (as a condition of the original mandate granted by the government) subject to an access policy.

2.4 BHP Billiton has considerable experience seeking access to infrastructure in Queensland, and has invested heavily to optimise the efficiency of its complex integrated logistics chain (including at nine mines, in four interconnected rail networks, and at four ports).

2.5 BHP Billiton centrally coordinates its full coal chain to maximise efficiency and throughput using an internal integrated operations team. This team manages the “BMA Coal Chain” (**BMACC**) which is unique to the Queensland coal systems as it optimizes throughput across a number of networks and all ports in the Bowen Basin. This is a complex task requiring highly specialist systems, processes and skills, which BHP Billiton has invested heavily to develop, maintain and refine. In addition, because this co-ordination team has visibility over all BHP Billiton’s supply chain components (from product stockpile levels right through to shipping demand) it is able to most cost effectively and efficiently take planning and operational decisions to manage constraints (arising in particular from the multi-user rail system and multi-user ports) in order to maximise throughput.

2.6 BHP Billiton has interests in eleven coal mines in the Bowen Basin of Central Queensland, including nine open-cut mines (Goonyella/Riverside, Blackwater, Peak Downs, Saraji, Caval Ridge, Daunia, Norwich Park, South Walker Creek and Poitrel) and two underground mines (Crinum and Broadmeadow). Over the years, BHP Billiton has invested significantly in these mines to improve their efficiency, flexibility and co-ordination with the rest of the logistics supply chain. Further, BHP Billiton, through BMACC, has invested significant effort in developing and working closely with supply chain participants to understand capability in all aspects of the supply chain to better manage throughput. It has also entered into contracting arrangements and invested in infrastructure directed at managing variability to maximise the capability of identified capacity constraints in the supply chain.

2.7 For example, BHP Billiton has invested in mine-side facilities which enable coal to be stockpiled at the mine and provide efficient coal handling and loading at the mine. This enables BHP Billiton to better manage the inherent

variability of the coal supply chain and allows trains to be loaded as soon as they arrive at the mine, thereby mitigating in part delays and inefficiencies..

2.8 The coal produced by these mines is exported to customers overseas through a number of ports. In Queensland, BHP Billiton owns and manages the Hay Point Coal Terminal (**HPCT**) and also accesses multiple other ports namely, APCT, RG Tanna and DBCT. BHP Billiton has invested heavily at HPCT to maximise the efficiency of the port and its interaction with the associated coal chain (including rail and mine). Improvements have been made to facilitate the stockpiling and blending of coal at HPCT, which enables ships to be loaded on a near constant basis and achieves much greater relative throughput than at cargo assembly ports like DBCT. In 2011, BHP Billiton committed to a significant expansion of the HPCT, which will increase the nameplate capacity of the terminal to 55Mtpa from 2015, at a cost of approximately US$3 billion (100%).

2.9 Coal is transported from the mines to the ports by rail. BHP Billiton has entered into (above-rail) haulage arrangements and (below-rail) access arrangements. The below-rail arrangements have been negotiated with the former government-owned monopoly service provider Aurizon Network in the context of the detailed multi-user regulated access regime. BHP Billiton has made significant investments in securing sufficient below rail capacity to enable it to manage variability in the other parts of the coal chain and facilitate overall efficiency.

2.10 Seeking access to government-owned multi-user rail and port infrastructure in a regulated environment has provided BHP Billiton with considerable experience managing complex integrated operations across the full onshore logistics chain (mines, rail and ports). Some of the issues raised by access regulation in the context of single user operations (eg in the context described in section 1 of this Annexure) do not arise in the same way in this context, where infrastructure has historically been developed, regulated and used on the basis that it is and will continue to be multi-user infrastructure (see, for example, Box A).

2.11 Nonetheless, in BHP Billiton's experience, multi-user infrastructure operations are significantly less efficient than single user operations.

Box A – application of a mandatory expansion power in the context of established multi user infrastructure

There are critical distinctions between a power for a regulator to direct a provider to expand a facility which has been privately developed as a single user facility, and an equivalent power in relation to infrastructure which has historically been developed, regulated and used on the basis that it is and will continue to be multi-user infrastructure, such as the regulated multi-user coal infrastructure in Queensland and NSW.[123]

- The Central Queensland Rail Network was privatised in circumstances where the acquirer/future access provider (who are infrastructure investors) knew that it would be subject to a pre-existing mandatory expansion obligation. It is reasonable to expect that similar arrangements will be adopted if ARTC is privatised in future. However, there is no equivalent prospective certainty where such a power is applied retrospectively to privately developed, single user infrastructure.
- Investment in expansions of multi-user networks and associated rail corridor growth typically have a primary purpose of increasing the capital base of the infrastructure provider (which is a primary driver of infrastructure investors). In contrast, BHP Billiton's purpose when investing in its Pilbara iron ore railways is to invest in its iron ore business, not to increase the capital base associated with the infrastructure that supports that business. Consequently, whereas a mandatory expansion power may be consistent with the business focus of a provider of established multi-user infrastructure, it can be fundamentally inconsistent with the business focus of a provider which uses single user infrastructure in a vertically integrated, single user production system.
- The Central Queensland and Hunter Valley multi-user rail networks have a well-established customer base which comprises a large number of users. This means that the providers' risks associated with access to this infrastructure are spread among several users and potential users of that infrastructure. This contrasts with a situation where, for example, a provider of a single user facility could, if declared under the Part IIIA declaration regime, be required to provide access in circumstances where only one party sought to use the facility. This would require the provider to assume significant risk associated with that user.
- Several other features of the legal and regulatory framework which has been developed around multi-user coal infrastructure in NSW and Queensland mean that it is not practical or economically desirable for a party other than the owner of that infrastructure (eg a third party) to expand that infrastructure. These include powers relating to the compulsory acquisition of land, and legislated investment frameworks, which would not be expected to exist in the same way in relation to single user facilities.

[123] Such as Aurizon for the Central Queensland Rail Network and ARTC for the Hunter Valley Rail Network.

ANNEXURE 2

LEGISLATIVE REFORM AND STATUTORY INTERPRETATION REGARDING THE PART IIIA DECLARATION CRITERIA AND THE KEY DECISION MAKERS UNDER THE PART IIIA DECLARATION REGIME

1 Legislative reform

Year	Legislative reform
1995	Part IIIA introduced
2006	• Criterion (a) amended to require that access "promote a material increase" in competition, rather than "promote" competition. • NCC time limit introduced, requiring the NCC to use best endeavours to make its recommendation within 4 months, unless that period was extended • Tribunal time limit introduced, requiring Tribunal to use best endeavours to make its decision within 4 months, unless that period was extended
2010	• Repeal of criterion (d) – that access to the service can be provided without undue risk to human health or safety • Amendment of criterion (e) – that access to the service is not already the subject of an effective access regime –replaced with a longer form criterion • Introduced more restrictive NCC time limit, providing a standard period of 6 months, but with prescribed allowances for extensions and "stopping of the clock" • Introduced more restrictive Tribunal time limit, providing a standard period of 6 months, but with prescribed allowances for extensions and "stopping of the clock" • Limitation of the materials before the Tribunal to the record which was before the Minister, plus any additional information requested by the Tribunal by written notice, being information it considered "reasonable and appropriate" to its task.

2 Statutory interpretation

Year	Statutory interpretation – key developments
2000	**Sydney Airports case (Tribunal):**[124] the Tribunal applied a social cost benefit test for criterion (b)
2006	**Sydney Airports case (Tribunal)**[125] The Full Court of the Federal Court found that criterion (a) requires comparison of competition with and without *access*, as distinct from competition with and without *declaration*. This was significant in this case, because the Full Court's interpretation had the effect that criterion (a) could be satisfied, and the relevant service could be declared, notwithstanding that access to the service was already being provided. Accordingly, in this case, criterion (a) did not measure the incremental promotion of competition that could be achieved by declaration; rather, it assessed the promotion of competition that "access" would achieve compared to "no access", even though access was already being provided (and hence at least some of that promotion of competition could be assumed to have been achieved regardless of whether the service was declared).

[124] *Re Sydney International Airport* [2001] ACompT 1.

[125] *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146.

Year	Statutory interpretation – key developments
2010	**Pilbara railways case (Tribunal):**[126] the Tribunal: • considered that criteria (a) and (f) require consideration of access on reasonable terms and conditions • applied a natural monopoly test for criterion (b) (could the facility meet reasonably foreseeable potential demand for the service at lower cost than two or more facilities?)
2011	**Pilbara railways appeal (Full Court):**[127] the Full Court of the Federal Court • applied a private profitability test for criterion (b) (is it privately profitable for anyone, excluding the provider, to develop another facility?) • held that in criterion (f) (public interest), "access" means access on reasonable terms and conditions
2012	**Pilbara railways appeal (High Court):**[128] (Note that the High Court's decision considered the Part IIIA declaration regime as it stood prior to the 2010 amendments described above.) • Criterion (b): The High Court held that the correct interpretation of criterion (b) requires asking whether there was anyone in or able to enter the market for the relevant service who would find it economical, in the sense of privately profitable, to develop another facility to provide that service. The High Court held that "anyone" includes the incumbent facility operator. • Criterion (f): The High Court held that the phrase "public interest" in criterion (f) allows consideration of a range of matters which "is very wide indeed", and that conferring on the Minister the power to decide whether criterion (f) is satisfied "is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office". The High Court observed that the Tribunal would not be expected to lightly depart from a ministerial conclusion on the public interest; in particular, "if the Minister has not found that access would not be in the public interest, the Tribunal should ordinarily be slow to find to the contrary, and it is to be doubted that any such finding would be made, except in the clearest of cases, by reference to some overall balancing of costs and benefits". • The Tribunal's role: the Tribunal's role is not to undertake a hearing "de novo", but to reconsider the Minister's decision with reference to the material before the Minister, supplemented, if necessary, by additional information obtained by exercise of the Tribunal's powers to require information or assistance from the NCC under s 44K(6)). The Part IIIA declaration regime "neither permits nor requires a quasi-curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared".

[126] *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2.

[127] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58.

[128] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.