

10 June 2014

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Professor Harper

COMPETITION POLICY REVIEW

1. This is a submission by Fortescue Metals Group Limited (**Fortescue**) in relation to the Competition Policy Review that is currently underway.

Infrastructure Access

2. Fortescue broadly supports most of the recommendations of the Productivity Commission as set out in the National Access Regime Report No. 66 (October 2013).
3. In particular, Fortescue supports the recommendation of the Productivity Commission in relation to criterion (b) – the uneconomic to duplicate test.¹ In addition to amending Part IIIA of the *Competition and Consumer Act* to implement that recommendation, we suggest that a similar amendment be made to the National Gas Law, so as to facilitate third party access to offshore gas infrastructure.
4. In addition, we consider that there is some improvement that could be made with respect to State-based rail access regimes. In particular, we consider that there is a lack of consistency in the regulation of access to railways in Western Australia.
5. The Pilbara Infrastructure Pty Ltd (**TPI**), a wholly owned subsidiary of Fortescue, owns and operates a railway in the Pilbara, which forms part of Fortescue's

¹ Recommendation 8.2 p33 of the Productivity Commission Inquiry Report, National Access Regime (25 October 2013). The Productivity Commission recommended amending s44G(2)(b) and 44H(4)(b) of the *Competition and Consumer Act* 2010 (Cth) so that criterion (b) is satisfied where total foreseeable market demand over the declaration period could be met at least cost by the facility.

integrated supply chain. TPI's railway is subject to the *Railways (Access) Act 1998 (WA)* and the *Railways (Access) Code 2000 (WA)* (**WA Rail Access Regime**).

6. Aside from the WA Rail Access Regime, there are three other regulatory regimes that apply to the other railways in the region, namely:
 - BHP Billiton Iron Ore's Goldsworthy railway is declared under Part IIIA of the Competition and Consumer Act;
 - BHP Billiton Iron Ore's Mt Newman railway and Rio Tinto Iron Ore's Hamersley and Robe railways are unregulated; and
 - the new railway currently under construction by Roy Hill Infrastructure Pty Ltd will be the subject of the WA Rail Access Regime until an access undertaking for haulage is accepted and regulated by the ACCC.
7. The lack of consistency in the regulation of access to railways in Western Australia was one of the main reasons the National Competition Council did not recommend the certification of the WA Rail Access Regime in 2010. The National Competition Council considered that the lack of consistency could be addressed by the Western Australian Government developing and adopting a principled policy that addresses how access to rail will be governed. The National Competition Council stated²:

In the Council's view an overarching policy is necessary to provide the consistency in approach to access regulation that is necessary for certification of an access regime having regard to the objects of Part IIIA, in particular s44AA(b). The Council's strong preference is for such a policy to be enshrined in legislation of general application, rather than relying on implementation on a case by case basis in project specific State Agreement Acts.

8. We agree with the National Competition Council. However, the Minister did not agree and certified the WA Rail Access Regime for a period of five years.

Government-Provided Goods and Services

9. Fortescue considers that a review of Australian ports is necessary to ensure ports offer competitive and commercial pricing to port users.
10. Fortescue relies solely on the Port Hedland Port to export its iron ore to its customers. The Port Hedland Port Authority (**PHPA**), established under the *Port Authorities Act 1999 (WA)*, is responsible for the operation and management of the Port.

² National Competition Council, "Final Recommendation: Application for Certification as an Effective Regime – section 44M of the Trade Practices Act", 13 December 2010 at para 2.11.

11. The PHPA is a monopoly and its ability to raise prices and charge levies is unconstrained by competition. The PHPA is a statutory corporation and must, according to the *Port Authorities Act 1999*, act in accordance with prudent commercial principles and endeavour to make a profit.³ However, these commercial objectives should not override the PHPA's functions to (among other things) facilitate trade and the development of business arrangements that encourage efficient port utilisation for the economic benefit of the State and the country. Recent significant price increases and the introduction of port levies at Port Hedland Port suggest that a review of ports is necessary to determine whether monopoly prices are being charged and whether constraints should be imposed to ensure ports offer competitive and commercial pricing to port users.
12. The absence of competition at Port Hedland Port is exacerbated by the limited or lack of competition in the provision of services within the port precinct. An example of this is the provision of towage services at Port Hedland Port. BHP Billiton currently holds the only towage licence at Port Hedland Port and has held this licence exclusively (albeit under a non-exclusive agreement) for decades. While the PHPA has now commenced a process for a second towage licence following a review of towage services by the ACCC, the PHPA has indicated that it will be at least four years before a second licensee will be in operation. The PHPA has also indicated that if a second licence is granted, under its current licence, BHP Billiton will not be under an obligation to continue to offer towage services to non-BHP Billiton vessels.

Please contact Emma Miller (emiller@fmgl.com.au) if you would like to discuss any matters raised in this letter or if you require further information.

Yours sincerely



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³ Section 34 of the *Port Authorities Act 1999* (WA).