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resourcing the future

Response to the Draft Report of the

Competition Policy Review

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1. EXECUTIVE SUMMARY

1.1 The Competition Policy Review Panel's Draft Report makes an important contribution to progressing future microeconomic reform in Australia. It seeks to reinvigorate best practice competition principles, provides recommendations for the removal of anti-competitive restrictions and identifies opportunities to remove, streamline and simplify regulation that is placing unnecessary costs on the economy.

Draft Recommendations supported by BHP Billiton

1.2 BHP Billiton endorses a number of the Panel's Draft Recommendations, many of which are issues on which BHP Billiton previously provided submissions to the Panel. In particular, BHP Billiton:

- agrees that the fundamental competition principles identified by the Panel should apply subject to a public interest test, and that Australian governments should ensure that unnecessary restrictions on competition are removed (Draft Recommendations 1 and 11);
- agrees with the Panel's views regarding the need for the competition law provisions of the *Competition and Consumer Act* 2010 (**CCA**) to be simplified and to keep pace with international best practice, consistent with Draft Recommendations 17 and 18;
- strongly endorses and agrees with the Panel's proposal to simplify the joint venture exception for cartel conduct, repeal the price signalling provisions in Division 1A of Part IV of the CCA, and introduce a competition test into the prohibition on third line forcing (Draft Recommendations 22, 24 and 27);
- supports increased scrutiny and reporting on Australian Competition and Consumer Commission (**ACCC**) enforcement of the secondary boycott provisions in the CCA (Draft Recommendation 31); and
- agrees that the authorisation and notification provisions in the CCA should be simplified and extended to encompass a "block exemption" framework (Draft Recommendations 34 and 35).

1.3 BHP Billiton also reiterates its view that the Panel might usefully encourage the ACCC to take a leadership position in relation to international "buy-side" cartel issues.

The National Access Regime

1.4 BHP Billiton agrees with the Panel that there is "a very important debate" to be had about the impact of the National Access Regime in Part IIIA of the CCA on efficiency in the Australian mining sector. BHP Billiton welcomes the Panel's insightful contribution on this critical issue.

1.5 In response to the Panel's questions regarding the future application of the National Access Regime, the costs associated with that regime (particularly in the mining sector), and whether that regime should be confined in scope, BHP Billiton submits that:

- The Part IIIA declaration regime may once have had a role in facilitating effective regulation of monopoly utilities infrastructure, in order to foster competition in related markets. That role is now unnecessary, and is no longer credible. Such infrastructure, including the categories identified by the Hilmer Review as requiring access or other regulation, is typically and most appropriately regulated outside of the Part IIIA declaration regime.
- The other category of infrastructure to which the Part IIIA declaration regime has been applied, and could be expected to be applied in future, is privately developed single-user export infrastructure, used in competitive global export markets. The application of the Part IIIA declaration regime to such infrastructure:
    - is unnecessary – access regulation cannot promote competition in an end market that is already competitive, and the discipline of end market competition strongly incentivises the infrastructure owner to use its resources, including its infrastructure, as efficiently as possible;

- imposes very substantial costs, and delivers no practical benefits, as BHP Billiton's experience in the Pilbara demonstrates.

- The dual role of the Panel's proposed national access and pricing regulator would need careful consideration were the Part IIIA declaration regime to be retained.

1.6 BHP Billiton refers the Panel to the submission by Professors Ergas and Fels on these issues, and their conclusion that a compelling argument can be made for repealing the Part IIIA declaration regime.[1]

1.7 BHP Billiton encourages the Panel to recommend that the Part IIIA declaration regime be:

- retained only insofar as it relates to services that have already been declared (such that the rights of access to those services, and the related arbitration framework, are retained in accordance with the terms of those declarations); and

- amended to preclude any future applications for declaration.

1.8 If the Part IIIA declaration regime is retained without making these amendments, substantial reform will be required in order to address the significant deficiencies in that regime. This would be a large and difficult task. Previous experience suggests that such reform is likely to introduce rather than resolve concerns with this regime. These considerations reinforce BHP Billiton's view that the Part IIIA declaration regime should have no prospective application. Nonetheless, if the Panel is minded to recommend that this regime should be retained, BHP Billiton encourages the Panel:

- to recommend that the Part IIIA declaration regime should not apply to privately developed single-user export infrastructure; and

- to consider carefully the substantial overhaul which would be required to address the significant deficiencies of the Part IIIA declaration regime.

1.9 The application of the Part IIIA declaration regime to privately developed single-user export infrastructure has been the subject of ongoing policy debate for over a decade, none of which has resulted in meaningful reform. If the Panel considers that it does not have sufficient information to enable it to recommend reform to the scope of the Part IIIA declaration regime, BHP Billiton strongly encourages the Panel to recommend that this critical issue be evaluated by an appropriately qualified and well-resourced independent body.

Mergers and unilateral conduct

1.10 BHP Billiton supports the retention of the existing ACCC informal merger clearance process, which is flexible and efficient in most cases. BHP Billiton further supports the proposal (set out in Draft Recommendation 30) to introduce a revised "formal" merger review process which is consistent with the "framework" laid out by the Panel in the Draft Report, provided that that process makes appropriate provision for information gathering, decision making timelines and full merits review of the ACCC's decisions by the Australian Competition Tribunal (**Tribunal**). The Tribunal should not be limited to considering the record before the ACCC, and should have the power to hear directly from relevant witnesses.

1.11 BHP Billiton makes two observations on the Panel's proposed misuse of market power prohibition. First, to be consistent with equivalent international prohibitions, the Australian prohibition should only apply to unilateral conduct which involves an "abuse" of market power. The "take advantage" element of the current prohibition serves this purpose effectively. The fact that this element involves some subtlety and difficulty in application is not a sufficient reason to remove it. Secondly, BHP Billiton is concerned that the second limb of the Panel's proposed defence will be difficult to establish in many industries, even for patently pro-competitive conduct, due to the need to establish the conduct's likely effect on (Australian) "consumers". This will be particularly difficult where conduct occurs in up-stream markets which are far-removed from any immediate impact on consumers.

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[1] Professors Henry Ergas and Allan Fels, "Submission to the Competition Policy Review", November 2014 (**Ergas/Fels Submission**), page 64. See further paragraph 3.4 of BHP Billiton's submission, below, in relation to the submission by Professors Ergas and Fels.

2. INTRODUCTION

The Draft Report – an important contribution to Australian microeconomic reform

2.1 BHP Billiton believes that societies and economies can be strengthened by policy and regulatory settings that are risk-based and support an open and competitive process rather than protecting individual interests or competitors.

2.2 In this regard, the Competition Policy Review Panel's Draft Report is an important contribution to progressing future microeconomic reform in Australia. It seeks to reinvigorate best practice competition principles, provides recommendations for the removal of anti-competitive restrictions and identifies opportunities to streamline and simplify inefficient regulation that is placing unnecessary costs on the economy.

2.3 This is particularly important at a time when businesses such as BHP Billiton are working hard to accelerate sustainable improvements in productivity in competitive global markets. Australian competition policy should foster competitive market disciplines, promote innovation and encourage investment in productive long-term projects and infrastructure. To the extent that competition policy reforms result in the removal of 'behind the border' protectionist measures in areas such as coastal shipping, then this will also boost trade flows and promote Australia's reputation for open markets.

2.4 BHP Billiton has embedded more than US$6.6 billion of sustainable, annualised productivity-led gains over the last two years. Gains like this across the resources sector are critical to lifting global competitiveness and thereby maintaining the sector's strong economic contribution into the future, including to government tax revenues. Australia will need to move quickly to address the competitiveness gap to remain a preferred supplier of resources into Asia and capture the full benefit of Asia's economic transformation. Strong reform of Australia's competitive framework will complement the resources sector's own efforts to restore – and sustain – its productivity and competitiveness by lowering costs.

2.5 It is within this broader context that BHP Billiton's submission on the Draft Report:

- highlights key areas where we support the Panel's Draft Recommendations;
- responds to the important issues canvassed by the Draft Report in relation to the future application of the Part IIIA declaration regime, particularly in the mining sector;
- outlines our views on proposed changes to the merger review process; and
- offers our perspective on proposals in relation to dominant firm unilateral conduct, particularly as it relates to conduct in up-stream markets, where commerce and conduct is far-removed from any immediate impact on consumers.

Draft Recommendations supported by BHP Billiton

2.6 BHP Billiton particularly endorses the Panel's Draft Recommendations referred to in the following paragraphs. These are issues on which BHP Billiton had previously provided submissions. If the Draft Recommendations are taken up, they will have a significant, positive impact on the competitiveness and effectiveness of Australian markets, and hence the Australian economy.

2.7 *"Fundamental competition principles"*: The Panel has identified several fundamental competition principles in Draft Recommendation 1. They include the principle that:

- Government legislation and policy should not restrict competition;
- Governments should promote consumer choice;
- third-party access to "significant bottle-neck infrastructure" should be granted (only) where it would promote both a "material increase in competition" and the public interest; and

- independent authorities should set and administer prices for natural monopoly infrastructure providers.

2.8 BHP Billiton agrees that these principles should be applied subject to a 'public interest' test, such that:

- the principles apply unless the costs of implementing the principles outweigh the benefits; and
- any legislation or government policy restricting competition must only be adopted if the restriction is in the public interest AND the objectives of the policy or legislation cannot otherwise be achieved without restricting competition

2.9 *Review of Australian regulation*: In accordance with Draft Recommendation 11, BHP Billiton agrees that Australian governments should review their regulations to ensure that unnecessary restrictions on competition are removed. Further, as recommended, any regulation or government policy which restricts competition must:

- demonstrably be in the public interest; and
- continue in force only where the objectives of the policy or regulation can be achieved only by restricting competition.

2.10 This approach, if adopted, should result in:

- Australian trade policy being formulated and implemented with competitive Australian and international markets firmly in mind; and
- restrictive legislation such as the *Coastal Trading (Revitalising Australian Shipping) Act* 2012[2] and the *Australian Jobs Act* 2013, being carefully reviewed so as to ensure any restriction on competition is clearly minimised and otherwise in the public interest.

2.11 *"Simple, predictable and reliable" competition law*: In relation to Draft Recommendations 17 and 18, and consistent with the broad objective of a "fit for purpose" competition law which is "clear, simple, predictable and reliable", BHP Billiton particularly agrees with the Panel's views that:

- "Law that is complex imposes costs on the economy",[3] particularly in contributing to business and regulatory uncertainty; and
- "The competition law provisions of the CCA would benefit from simplification, while retaining their underlying policy intent"[4] – particularly so as to remove overly-specified and redundant provisions; and
- "The law should also keep pace with international best practice", so as to ensure that the scope of the Australian law is correct and that "the language and approach used is as simple as possible".[5]

2.12 *Changes to the substantive competition law:* BHP Billiton strongly endorses and agrees with Draft Recommendations 22, 24 and 27, that:

- the cartel conduct law should be simplified, particularly by the inclusion of a broad exemption for joint ventures and similar forms of business collaboration, which do not have the purpose or likely effect of substantially lessening competition;

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[2] See also Draft Recommendation 5 that, "cabotage restrictions should be removed, unless they can be shown to be in the public interest and there is no other means by which public interest objectives can be achieved", page 30 of the Draft Report.

[3] Page 38 of the Draft Report.

[4] Page 38 of the Draft Report.

[5] Page 188 of the Draft Report.

- the "price signalling" provisions in Division 1A of Part IV should be repealed and section 45 should be extended to cover "concerted practices" which have the purpose or likely effect of substantially lessening competition;[6] and

- "third line forcing" conduct should only be prohibited where it has the purpose or likely effect of substantially lessening competition.

2.13 *Secondary boycotts:* Consistent with BHP Billiton's view that the secondary boycott provisions in the CCA should be retained, BHP Billiton supports Draft Recommendation 31, which recommends increased scrutiny and reporting on ACCC enforcement of the secondary boycott provisions.

2.14 *"Block exemptions":* BHP Billiton agrees that the authorisation and notification provisions in the CCA should be simplified, and particularly that they should be extended so as to encompass a "block exemption" framework such as the approach used in the UK and EU, as per Draft Recommendations 34 and 35.

2.15 *"Buy-side" cartel enforcement:* BHP Billiton has a clear interest in ensuring, so far as is possible, that international 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. BHP Billiton reiterates its view that the Panel might usefully 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.[7]

3. NATIONAL ACCESS REGIME

Introduction

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

3.2 In the mining sector, efficient investment in and use of infrastructure is essential in order for businesses to be able to compete in the global markets in which their products are sold.

3.3 The Panel rightly identifies that there is "a very important debate"[8] to be had about the impact of the National Access Regime in Part IIIA of the CCA on efficiency in the Australian mining sector, and BHP Billiton welcomes the Panel's insightful contribution on this critical issue.

The approach proposed in the Draft Report

3.4 In addition to the submissions set out in this document, BHP Billiton refers the Panel to the joint submission made to the Panel by Professors Henry Ergas and Allan Fels. BHP Billiton requested and funded Professors Ergas and Fels to prepare that submission, in order to set out their views on the questions raised by the Panel regarding the National Access Regime. Professors Ergas and Fels have prepared a detailed analysis, based on their extensive experience, of the costs and benefits associated with the Part IIIA declaration regime, and the many policy challenges which would need to be addressed if that regime is retained.

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[6] If this recommendation is implemented, BHP Billiton considers that guidance from the ACCC on the enforcement and application of the new law may be useful.

[7] By way of just one example, the recent ACCC Annual Report describes cartel conduct in "supply-side" terms (at p31): "A cartel involves businesses agreeing with their competitors to fix prices, rig bids, share markets or restrict supply of products and services."

[8] Draft Report, page 268.

3.5 BHP Billiton agrees with the Panel that the scope of the Part IIIA declaration regime should be confined.[9] BHP Billiton further supports the Panel's approach to considering the costs and benefits likely to be associated with the future application of that regime, and the Panel's view that:

> *"Unless it is possible to identify those facilities or categories of facilities [to which the application of Part IIIA is required], it is difficult to reach a conclusion that the regulatory burden and costs imposed by Part IIIA on Australian businesses are outweighed by economic benefits, or that the benefits can only be achieved through the Part IIIA framework."*[10]

3.6 BHP Billiton welcomes the Panel's focus on these issues, and their particular relevance to the Australian mining industry.

3.7 It is now almost a decade since the application of economic regulation, including the Part IIIA declaration regime, was rightly identified as "the greatest impediment to the development of infrastructure necessary for Australia to realise its export potential" by the Exports and Infrastructure Taskforce.[11]

3.8 The Panel's review is a critical opportunity to recommend meaningful reforms to address these continuing challenges.

Box 1. – The Exports and Infrastructure Taskforce Report

The Exports and Infrastructure Taskforce was established to identify and report to the then Prime Minister on "any bottlenecks, of a physical or regulatory kind, in the operation of Australia's infrastructure that may impede the full realisation of Australia's export opportunities." In its May 2005 report, the Taskforce identified that:

> *"The greatest impediment to the development of infrastructure necessary for Australia to realise its export potential is the way in which the current economic regulatory framework is structured and administered. It is adversarial, cumbersome, complicated, time consuming, inefficient and subject to gaming by participants. There are too many regulators and regulatory issues are slowing down investment in infrastructure used by export industries."*
>
> *"There is a stark contrast here. Where Australia's logistics chains are vertically integrated and are subject to much less economic regulation, the response to increased global demand has been timely, effective and efficient."*[12]

The Taskforce considered the impact of applying the Part IIIA declaration regime to export infrastructure, and concluded that excluding the application of that regime to "vertically integrated, tightly managed, logistics chains, especially those related to our export industries … would minimise the risk that access regimes would disrupt and undermine the very areas of the economy that have performed best in the management of export related infrastructure."[13]

[9] Draft Report, page 269: "The Panel agrees that the scope of the Regime should be confined because of the potential costs of regulation."

[10] Draft Report, page 269.

[11] Exports and Infrastructure Taskforce 2005, "Australia's Export Infrastructure, Report to the Prime Minister," Canberra, May 2005, page 2 (**Exports and Infrastructure Taskforce Report**).

[12] Exports and Infrastructure Taskforce Report, page 2.

[13] Exports and Infrastructure Taskforce Report, page 40.

Responding to the Draft Report – Panel's first question

The Panel's first question: to what categories of infrastructure might Part IIIA be applied in the future, particularly in the mining sector, and what costs and benefits would arise from access regulation of that infrastructure?

3.9 In response, BHP Billiton submits as follows:

- On any view, Part IIIA declaration processes should **not** be applied to privately developed single-user export infrastructure which is used in competitive global export markets.
- This view is reinforced when one considers the very substantial costs, and few if any benefits, which result from imposing the Part IIIA declaration regime on privately developed single-user export-oriented infrastructure used in competitive global markets.
- The Part IIIA declaration process may have had a role in facilitating effective industry regulation of infrastructure, where access in those industries may have fostered competition in related markets. However, that role is now not necessary, and is no longer credible.
- In the case of (natural monopoly) infrastructure which is a non-integrated utility, price and service terms commonly do need to be regulated. However, the Part IIIA declaration process is not necessary in that context: instead, there are other regulatory regimes which serve that purpose. As the Panel found, "issues of monopoly pricing can be addressed through regulatory frameworks other than Part IIIA".[14]

No regulation required for privately developed single-user export infrastructure

3.10 In BHP Billiton's view, access regulation is unnecessary where privately developed single-user export infrastructure is used in competitive global export markets. This is because the discipline of that end market competition strongly incentivises the infrastructure owner to use its resources, including its infrastructure, as efficiently as possible.

3.11 In this situation, the owner has no incentive to deny access in order to foreclose competition, since the end market is already competitive, and the owner would achieve no anti-competitive benefit by preventing the access seeker from participating in it. Accordingly:

- the owner could be expected to share the infrastructure if it is efficient for the owner to do so on commercial terms that will be attractive to an access seeker;[15] and
- if the owner elects not to share that infrastructure, that decision will reflect the fact that there are no mutually beneficial terms on which access could be provided by the infrastructure owner and used by an access seeker, in light of the costs (both direct and indirect) and benefits which would arise from doing so.[16]

3.12 This is not the type of case identified by the Hilmer Review[17] as requiring third party access, since the granting of access in this scenario will not promote competition in any significant market – instead, the downstream commodity market is already competitive.

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[14] Draft Report, page 267.

[15] There are various infrastructure assets owned or operated by BHP Billiton which BHP Billiton chooses to make available for use by other mining businesses. These include the Moranbah Airport which is operated by BHP Billiton Mitsubishi Alliance, the BHP Billiton operated Redmont camp to which BHP Billiton provides access for FMG and Hancock Prospecting, and BHP Billiton's Cowra and Turner camps which are made available to Hancock Prospecting.

[16] See also Ergas/Fels Submission, pages 7 and 58.

[17] Hilmer Report 1993, National Competition Policy: Report by the Independent Committee of Inquiry AGPS, Canberra (**Hilmer Review**). See also Ergas/Fels Submission, part 2.3 (pages 16 and 17).[18] Productivity Commission Inquiry Report No 66, 25 October 2013, National Access Regime (**Productivity Commission Report**), page 10.

Access regulation of privately developed single-user export infrastructure imposes substantial and unjustified costs

3.13 In identifying that the Part IIIA declaration regime has no useful role to play in relation to single-user export infrastructure used in competitive global markets, the Productivity Commission, in its 2013 Report relating to the National Access Regime, noted that access regulation in this context is not only unnecessary, but harmful. Specifically, it observed that applying access regulation in this context:

> *"risks lowering efficiency and, in the long term, adversely affecting incentives to invest in markets for infrastructure services."*[18]

3.14 As noted above, the Exports and Infrastructure Taskforce had made a very similar point eight years previously.

3.15 BHP Billiton's experience in responding to Fortescue Metal Group's (**FMG**'s) applications for declaration of the Pilbara iron ore railways demonstrated that both the prospect and the application of the Part IIIA declaration regime to privately developed single-user export infrastructure can impose substantial costs. BHP Billiton described these costs in detail in its submission in response to the Panel's Issues Paper.[19] Those costs include:

- the costs of responding to a Part IIIA declaration application;
- the operational costs from *imposing* access on nationally significant, privately developed single-user export infrastructure, such as capacity losses and many operational inefficiencies caused by moving from single-user to multi-user operations, and costs associated with delays to expansions, technological innovation and operational improvements; and
- the costs associated with the *prospect* of declaration and access – most significantly, the incentives to defer, cancel or downsize an infrastructure investment in order to manage or reduce the risks associated with the potential future application of access regulation.

3.16 The submission by Professors Ergas and Fels further considers and evaluates the substantial costs associated with the application of the Part IIIA declaration regime in this context.[20]

The Part IIIA declaration regime plays no role in promoting competition

3.17 The Part IIIA declaration regime was introduced to provide access where it is required to promote competition in one or more dependent markets. However, as the Draft Report notes, in practice, that role has now been filled by industry-specific forms of access regulation.

> *"For the most part, the bottleneck infrastructure assets that were cited by the Hilmer Review as requiring access regulation have been regulated by industry-specific regimes … [which] are either established under a co-operative legislative scheme of the States and Territories (eg the National Electricity Law and the National Gas Law) or schemes established by individual States and Territories (e.g. port regulation)."*[21]

3.18 The Part IIIA declaration regime is making no further beneficial contribution in this context. This is evident from the fact that the only facilities which are currently declared under Part IIIA are the Tasmanian rail network, and BHP Billiton's Goldsworthy railway. Despite declaration in 2007 and 2008 respectively, to date, there is only the one State-owned rail freight operator in Tasmania (TasRail) and no one has sought access to the Goldsworthy railway.

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[18] Productivity Commission Inquiry Report No 66, 25 October 2013, National Access Regime (**Productivity Commission Report**), page 10.

[19] See paragraphs 6.12 to 6.29 of BHP Billiton's *Submission to the Competition Policy Review*, June 2014 (**BHP Billiton's First Submission**).

[20] Ergas/Fels submission, part 2.2.2 (from page 8) and part 4.1.4 (from page 40).

[21] Draft Report, page 267.

3.19 Initially, the Part IIIA declaration regime may arguably have played a role in the early introduction of industry-specific access regimes, to the extent that governments and infrastructure owners faced the "threat" of declaration and ACCC arbitration if they did not develop their own regimes. However:

- That "threat" is no longer necessary: industry-level access regulation is now firmly established. The widespread adoption of access arrangements as part of recent expansions to multi-user coal infrastructure is a clear illustration of the fact that such industry-specific access regulation is well accepted, and that that regulation does not depend on the Part IIIA declaration regime.

- That "threat" is no longer credible: the threat of an application for Part IIIA declaration of infrastructure facilities, especially those used in competitive international product markets, does not credibly encourage negotiation of access arrangements outside of Part IIIA. As is evident from the experience to date, the costs associated with providing access to such infrastructure are likely to be so substantial that there is no prospect of a mutually acceptable negotiated outcome.

3.20 Professors Ergas and Fels consider in detail in their submission the role that the Part IIIA declaration regime has played in achieving the objectives of the Hilmer Review. They conclude that:

> *"The objective of facilitating third party access to essential infrastructure has largely been achieved, albeit much of it outside of Part IIIA.*
>
> *Declaration itself has played no role in this transformation. Declaration has not resulted in third party access, nor in any of the ensuing competitive and other benefits that were hypothesised to occur. Instead, it has been a source of considerable costs."*[22]

Monopoly utilities should continue to be regulated outside of the Part IIIA declaration regime

3.21 In many cases it will be appropriate for non-integrated utility infrastructure (such as non-integrated airports, gas pipelines, electricity transmission lines etc) to be subject to price and service regulation. However this regulation should and does occur outside of the Part IIIA declaration regime.

3.22 Monopolies were a key focus of the Hilmer Review's recommendations. The monopolies it considered were often government owned; in some cases they were statutorily created or protected, and in some cases they were part of broader businesses comprising both monopoly and contestable elements. The Hilmer Review recommended several "regulatory and structural reforms" designed to "increase the competitive pressures" in monopoly or otherwise poorly contestable industries – specifically:

- review and reform of regulation that unjustifiably restricted competition, in particular regulation that restricted market entry or competitive conduct;[23]

- structural reform of public monopolies, including a presumption in favour of vertical separation of public monopolies;[24] and

- introduction of an access declaration regime, to facilitate a right of access where that access was "essential, rather than merely convenient" to promote competition and the public interest.[25]

3.23 The Hilmer Review identified that where those measures were not practicable or sufficient, "some form of price-based response may be appropriate", and recommended the introduction of price monitoring and surveillance as a "residual and second best option".[26]

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[22] Ergas/Fels Submission, page viii.

[23] Hilmer Review; see generally chapter 9.

[24] Hilmer Review; see generally chapter 10.

[25] Hilmer Review, page 251; also see generally chapter 11.

[26] Hilmer Review, page 269 and 289; see generally chapter 12.

3.24 Aside from this hierarchy, and its preference for structural over price-based reforms, there was arguably a blurring of what is the appropriate approach to regulation of monopoly utilities (as distinct from integrated "bottleneck" infrastructure, where a denial of access foreclosed competition in related markets):[27]

> *"Where the owner of the "essential facility" is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically-related markets maximises its own profits. Like other monopolists, however, the owner of the facility is able to … derive monopoly profits at the expense of customers and economic efficiency. In these circumstances, the question of "access pricing" is substantially similar to other monopoly pricing issues, and may be subject, where appropriate, to the prices monitoring or surveillance process outlined in Chapter 12."*

3.25 A footnote to this text identified that "whether the issues arising in relation to a particular facility would be best addressed under the access regime or prices oversight process would be considered on a case-by-case basis."[28]

3.26 Today, however, it is clearly recognised, as the Draft Report notes, that "issues of monopoly pricing can be addressed through regulatory frameworks other than Part IIIA".[29] In particular, the Part IIIA declaration regime is no longer required in this context.

3.27 There are now in existence many detailed, industry-specific arrangements for price surveillance and monitoring of monopoly industries, as well as more prescriptive regimes governing pricing and service standards applicable to monopoly infrastructure, which are completely outside of the Part IIIA declaration regime.[30]

3.28 BHP Billiton is aware that there are isolated instances, particularly in the context of airport services, of access seekers invoking the Part IIIA declaration process to secure improved terms of access from a non-integrated monopoly utility infrastructure owner.[31] Those access seekers may contend that the Part IIIA declaration process still has a role to play in the efficient regulation of monopoly utilities.

3.29 However, in BHP Billiton's view, this limited, strategic use of the Part IIIA declaration process should not justify its continued existence and wide-ranging negative impact across the Australian economy. It is clearly a "second-best" alternative, where the "first-best" outcome is to apply an effective regulatory framework in relation to the price and terms of the particular monopoly utility.

3.30 BHP Billiton is concerned to ensure that there is effective regulation of non-integrated and multi-user public infrastructure facilities in Australia. It has very significant commercial interests in the effective regulation of prices and access terms of infrastructure such as the Aurizon Networks' Central Queensland Coal Network rail infrastructure. However, that infrastructure, as just one (very significant) example, is regulated by the access undertakings specifically tailored to that context and approved by the Queensland Competition Authority.

3.31 If the Panel is concerned that Australian governments will not otherwise ensure effective regulation of prices and terms for monopoly utilities – especially as utility assets, such as ports or airports, are "privatised" by a sale or lease into private hands – the Panel should look to address that concern directly. BHP Billiton submits that an intergovernmental agreement (with elements of commitment and monitoring) is likely to be the most effective option, and far preferable to preserving the Part IIIA declaration regime to be used only in this limited, "second best" context.

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[27] Hilmer Review, pages 240-1.

[28] Hilmer Review, page 241 (footnote 3).

[29] Draft Report, page 267. Further, the Panel has identified quite separate "principles" in relation to "third-party access to significant bottle-neck infrastructure" (which should be granted "where it would promote a material increase in competition in dependent markets and would promote the public interest") on the one hand, and in relation to the regulation of utilities (to the effect that "independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers"), on the other (see Draft Recommendation 1 on page 24 of the Draft Report).

[30] See Ergas/Fels Submission, pages 35-36 and part 4.2.1 (from page 44).

[31] See for example the recent Tiger Airways application (filed in July 2014, and withdrawn in August 2014), in which Tiger sought "improved and increased access" to the Sydney Airport terminal it was already using, to accommodate growth in its fleet operating out of Sydney.

Responding to the Draft Report – Panel's second question

The Panel's second question: should Part IIIA be confined in its scope?

3.32 The Part IIIA declaration regime should have no prospective application.

3.33 BHP Billiton submits that the continued application of the Part IIIA declaration regime is unnecessary, and is harming Australian export industries. In particular:

- the Hilmer Review's objectives in recommending an access declaration regime are now achieved under industry-specific and other regulatory regimes, and the continued existence and use of these alternative forms of regulation does not rely on the Part IIIA declaration regime;
- there is no need to retain the Part IIIA declaration regime to address monopoly pricing issues, since these issues can be and are, or should be, appropriately addressed under other frameworks;
- the key remaining infrastructure to which the Part IIIA declaration regime has been applied to date is privately developed single-user export infrastructure; and
- applying the Part IIIA declaration regime to such infrastructure:
  - is not necessary to achieve the competition objectives for which the Hilmer Review recommended the introduction of an access declaration regime; and
  - imposes very substantial costs, and delivers no practical benefits, as BHP Billiton's experience in the Pilbara demonstrates.

3.34 BHP Billiton refers the Panel to the careful consideration of these issues in the submission by Professors Ergas and Fels. In particular, that submission evaluates the impact of the Part IIIA declaration regime compared to a counterfactual in which declaration was no longer available. Based on that analysis, Professors Ergas and Fels conclude that:

- to date, no competitive (or any other associated) benefits have arisen from declaration;
- the costs associated with the Part IIIA declaration regime have demonstrably been substantial, and it seems highly unlikely that costs of a similar magnitude would have been incurred under the counterfactual;
- looking forward, potential benefits from the Part IIIA declaration regime can be expected to be limited; and
- any such potential benefits would be achieved only at very considerable cost, having regard to the very large economic costs associated with declaration of privately developed single-user export infrastructure.[32]

3.35 Based on that analysis, Professors Ergas and Fels themselves conclude that a compelling argument can be made for repealing the Part IIIA declaration regime.[33]

[32] See Ergas/Fels Submission, Table 1-1 "Part IIIA declaration provisions: cost benefit analysis" (page ii), and pages 55 to 56.

[33] Ergas/Fels Submission, page 64.

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

3.36 BHP Billiton encourages the Panel to recommend that the Part IIIA declaration regime should be:

- retained only 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
- amended to preclude any future applications for declaration.

3.37 This approach would not alter the ability for access to be granted and regulated under other regulatory frameworks. In particular, State, Territory and industry-specific regimes, and Part IIIA undertakings and certified access regimes, as well as other frameworks would not be affected by this approach. 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 remaining prospective potential application of the Part IIIA declaration regime.

3.38 In these circumstances, a recommendation by the 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.

Implementing the Panel's proposals will not be sufficient

3.39 If the Part IIIA declaration regime is to be retained in a form that allows the making of declaration applications in future, it must be substantially reformed so as to address the following critical challenges:

- How can the declaration criteria be revised to ensure that declaration:
  - only occurs when declaration and access are likely to achieve significant net public interest benefits, having regard (as recommended by the Hilmer Review) to "the significance of the relevant industry to the national economy" and "the expected impact of effective competition in that industry on national competitiveness";[34] and
  - does not occur when declaration and access would cause substantial costs?
- What types of infrastructure should be exempt from the Part IIIA declaration regime, and how can the definition of "service" (by reference to "production process" and other elements) be amended to do this?
- How can the Part IIIA declaration regime be reformed so that decision makers have the time, resources, powers and skills to perform the very complex fact finding and analysis required of them, and do not make decisions which are likely to impose substantial costs?[35]

3.40 If the Part IIIA declaration regime is to be retained, significant changes will be required in order to address the challenges outlined above. However, past experience suggests that incremental reform may increase rather than resolve those challenges.

3.41 The Panel's views of the declaration criteria and the role of the Tribunal provide principled and useful analysis of some of these important issues. However, they are only a small subset of the reforms required to "target" the Part IIIA declaration regime to the vanishingly small number of cases in which declaration might facilitate a competition and public interest benefit which was not already achieved by

[34] Hilmer Review, page 251. This is particularly significant when considering criterion (a) – see the discussion in paragraphs 3.7 to 3.9 of the Annexure to this submission.

[35] As the Panel notes on page 274 of the Draft Report, "the costs of getting the decision wrong are likely to be high".

an alternative regulatory regime. BHP Billiton refers the Panel to the submission by Professors Ergas and Fels on this point, and its careful review of the nature and necessity of those reforms.[36]

3.42 BHP Billiton submits that the magnitude and difficulty of the overhaul of the Part IIIA declaration regime that would be required to target the regime in this way, and the improbability that it would be effective to resolve the key challenges with that regime, point to the conclusion that the Part IIIA declaration regime should have no prospective application.

Potential alternative approaches

3.43 Notwithstanding BHP Billiton's submission that the Panel should recommend reforms to preclude any further applications for declaration under Part IIIA, the Panel may be concerned that it does not have sufficient information to make such a recommendation at this point in time.

3.44 If so, BHP Billiton encourages the Panel:

- to focus attention on the definition of "production process" so as to preclude the Part IIIA declaration regime from applying to single-user infrastructure used in the production of (export) commodity products; and
- to go further with its examination of how Part IIIA might be amended to address some of its most significant deficiencies.

3.45 Notes on these points are set out in the Annexure to this submission.

3.46 Alternatively, if the Panel considers that it does not have sufficient information to enable it to recommend reform to the scope of the Part IIIA declaration regime (and in particular its application to single-user infrastructure used in the production of (export) commodity products), BHP Billiton strongly encourages the Panel to recommend that this matter be evaluated by an appropriately qualified and well-resourced independent body. The issue of the application of the Part IIIA declaration regime to such infrastructure has been the subject of ongoing policy debate and recommendations for over a decade, none of which has resulted in meaningful reform. Even if the Panel is not itself able to make a conclusive recommendation on this point, the Panel would make a material and practical contribution towards achieving the objectives of this Review if it recommended that an appropriate body be specifically charged with making such a recommendation.

4. MERGERS AND UNILATERAL CONDUCT

Merger regulation

4.1 BHP Billiton has not previously made submissions to the Panel in relation to Australian merger regulation.[37]

4.2 In BHP Billiton's view, the substantive provision set out in section 50 of the CCA, which prohibits an acquisition which has the "effect, or would be likely to have the effect, of substantially lessening competition in any [Australian] market", is appropriate, effective and consistent with international best practice.

4.3 BHP Billiton supports the retention of the existing ACCC informal merger clearance process, which is flexible and efficient in most cases.

4.4 BHP Billiton also supports the proposal (set out in Draft Recommendation 30) to introduce a revised "formal" merger review process which is consistent with the "framework" laid out by the Panel in the Draft Report, and which contains the following elements (shortly stated):

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[36] Ergas/Fels Submission, part 3 (from page 19) and parts 5.1 and 5.2 (from page 57).

[37] Note though, that BHP Billiton is a member of the Merger Streamlining Group which put a submission forward to the Review Panel in June 2014 – see http://competitionpolicyreview.gov.au/files/2014/06/MSG.pdf.

- the ACCC will be the primary decision maker;
- the ACCC may approve a merger where it is satisfied either that the merger does not substantially lessen competition, or that it results in public benefits which outweigh any anti-competitive detriments;
- there should be no (or only minimal) prescriptive information requirements in the process, but the ACCC may be empowered to require the production of business and market information;
- there should be strict timelines on the process; and
- decisions of the ACCC should be subject to full, de novo "merits review"[38] by the Tribunal, and the Tribunal should have the power to hear directly from employees of the businesses concerned, and other relevant industry and expert witnesses where that would assist the Tribunal; the Tribunal should not, in conducting its merits review, be limited to considering the record which was before the ACCC.

Unilateral conduct

4.5 BHP Billiton has followed with interest the public debate in Australia over the form, operation and objectives of section 46 of the CCA.

4.6 BHP Billiton offers the following perspectives on two elements of the proposals in relation to dominant firm unilateral conduct:

(a) An "abuse" of market power or dominance

To be consistent with equivalent international prohibitions, the Australian regulation of unilateral conduct by dominant firms should ideally retain the central element that the firm with substantial market power must have "abused"[39] that power. The Draft Report observes that the "meaning (of "take advantage") is subtle and difficult to apply in practice".[40] However, identifying anti-competitive, unilateral conduct by reference to whether it "takes advantage of" or "abuses" substantial market power is a challenge which is confronted by competition regulators and courts around the world, as they investigate and adjudicate unilateral dominant firm conduct. In BHP Billiton's view, that subtlety, and some difficulty in application, are not, of themselves, sufficient reasons to dispense with the "take advantage" element, which is consistent with regulation in this area among many of the major international competition law regimes.

(b) Defence element: "long term interests of consumers"

The proposed alternative form of section 46 includes a two-pronged defence, to the effect that conduct will not be prohibited where:

- it would be "a rational business decision by a corporation which did not have substantial market power"; AND
- it would be "likely to have the effect of advancing the long-term interests of consumers".

BHP Billiton is concerned that the defence will be difficult to establish in many industries, even if the conduct is patently pro-competitive, due to the evidentiary burden of having to establish the likely effect of the conduct on (Australian) "consumers". This will be most difficult where the conduct occurs in up-stream markets, where commerce and market conduct is far-removed from any immediate impact on consumers.

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[38] A 'merits review' is proposed by the Panel at page 203 of the Draft Report, whereas the text of Draft Recommendation 30 is less prescriptive as to the nature of that review.

[39] An "abuse" of a dominant position is the central element to the prohibition under Article 102 TFEU. This element is conceptually very similar to the requirement under the current form of section 46 that there must have been a "taking advantage" (or "use") of substantial market power.

[40] Draft Report, page 208.

ANNEXURE

CAN FURTHER REFORM ADDRESS THE FUNDAMENTAL CHALLENGES RAISED BY THE PART IIIA DECLARATION REGIME?

1. The challenges to be addressed if the Part IIIA declaration regime is retained

1.1 If the Part IIIA declaration regime is not repealed, that regime must, as the Panel notes, be "targeted to ensure that third-party access is only mandated where it is in the public interest".[41] This "targeting" would require reforming Part IIIA to address the following substantial challenges:

- How can the declaration criteria be revised to ensure that declaration:
  - only occurs when declaration and access are likely to achieve significant net public interest benefits, having regard (as recommended by the Hilmer Review) to "the significance of the relevant industry to the national economy" and "the expected impact of effective competition in that industry on national competitiveness";[42] and
  - does not occur when declaration and access would cause substantial costs?
- What types of infrastructure should be exempt from the Part IIIA declaration regime, and how can the definition of "service" (by reference to "production process" and other elements) be amended to do this?
- How can the Part IIIA declaration regime be reformed so that decision makers have the time, resources, powers and skills to perform the very complex fact finding and analysis required of them, and do not make decisions which are likely to impose substantial costs?[43]

1.2 The dual role of the Panel's proposed national access and pricing regulator would also need careful consideration were the Part IIIA declaration regime to be retained.

1.3 Over the last 10 years, the Part IIIA declaration regime has been subject to numerous reforms and reform proposals seeking to address these questions (see Box 2). Such reforms, when made, introduce further uncertainty about how the regime will be applied in future. In some cases they have made incremental progress towards addressing the challenges outlined above (the introduction of the materiality threshold into declaration criterion (a) is a key example). In other cases they have had no impact and remain unused (such as the introduction of provisions to facilitate "access holidays").[44] Other reforms, such as legislative amendments which reduced the time limits for the Tribunal's decision and sought to limit its powers, are likely to increase rather than resolve the challenges associated with Part IIIA decision marking (and the Panel's view on the role of the Tribunal is a reflection on the fact that these amendments exacerbated rather than resolved existing problems with the Part IIIA declaration regime).

1.4 If the Part IIIA declaration regime is retained, wholesale changes will be required in order to address the challenges outlined above. However, past experience suggests that those further reforms may themselves increase rather than resolve the challenges associated with the Part IIIA declaration regime, and may in turn then require further reform of that regime.

1.5 The Panel's views of the declaration criteria and the role of the Tribunal provide principled and useful analysis of some of these important issues, and BHP Billiton addresses those views below. However,

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[41] Draft Report, page 273.

[42] Hilmer Review, page 251. This is particularly significant when considering criterion (a) – see the discussion in paragraphs 3.7 to 3.9 of this Annexure.

[43] As the Panel notes on page 274 of the Draft Report, "the costs of getting the decision wrong are likely to be high".

[44] See Division 2AA of Part IIIA of the CCA.

the Panel's views address only a small subset of the many issues which would need to be addressed in order to "target" the Part IIIA declaration regime as the Panel suggests. BHP Billiton submits that the magnitude and difficulty of the overhaul of the Part IIIA declaration regime that would be required to target it in this way, and the improbability that it would be effective to resolve the key challenges with that regime, point to the conclusion that the Part IIIA declaration regime should be repealed.

Box 2. – Ongoing reforms to the Part IIIA declaration regime

The Part IIIA declaration regime has been subject to numerous reforms and reform proposals, which have sought to address the key challenges associated with that regime.

- **The declaration criteria:** a materiality threshold was introduced into criterion (a) in 2008; criterion (e) was rewritten and the old criterion (d) was repealed in 2010; and the ongoing debate about the interpretation of criterion (b) has been the subject of three decisions in the Pilbara railways case. Following this the Productivity Commission recommended introducing a legislative version of the natural monopoly test in 2013. Now the Panel proposes further refinement of the declaration criteria.
- **Exempting particular infrastructure:** the need to exempt certain infrastructure from the Part IIIA declaration regime was addressed by the Export and Infrastructure Taskforce in 2005 (see Box 1 above), and by the introduction in 2010 of a mechanism for "access holidays" by which services provided by newly developed infrastructure could be determined to be ineligible for declaration (to date that mechanism has not been used). Further, following the three decisions in the Pilbara railways case on the "production process" exception, the Productivity Commission was urged to but did not recommend reform to this exception in 2013. Now the Panel is considering whether the scope of the Part IIIA declaration regime should be confined to the categories of infrastructure identified by the Hilmer Review.
- **Time, resources, powers and skills of Part IIIA decision makers:** new time limits were introduced for the National Competition Council (**NCC**) and the Tribunal in 2006, and then again in 2010; the role and powers of the Tribunal were revised by statute in 2010, and then further addressed in the High Court's 2012 decision in the Pilbara railways case. In 2013, the Productivity Commission recommended that Part IIIA be amended so that the Minister should be deemed to have followed the NCC's recommendation (and not deemed to have decided not to declare a service) if they do not publish a decision within 60 days. The Productivity Commission also recommended that when conducting an arbitration under Part IIIA, the ACCC should have the power to order a provider to undertake an expansion to accommodate a third party. In 2014 the NCC ceased to maintain its own dedicated secretariat. Now, the Panel recommends reinstating key features of the Tribunal's role as it was understood prior to the statutory reforms and High Court decision identified above; it also proposes that the functions of the NCC and the ACCC regarding declaration should be transferred to a new Commonwealth access regulator.

2. "Production process"

2.1 At present, the "production process" exception is ineffective to prevent declaration in circumstances where declaration and access would impose substantial costs and few, if any, benefits, including in the context of privately developed single-user export infrastructure. Had this exception applied in the Pilbara railway proceedings, significant time and cost associated with those proceedings could have been avoided.

2.2 BHP Billiton encourages the Panel to focus attention on the definition of "production process" so as to preclude the Part IIIA declaration regime from applying to single-user integrated infrastructure used in the production of (export) commodity products. BHP Billiton refers the Panel to the consideration of this issue in the submission by Professors Ergas and Fels.[45]

2.3 There are likely to be several ways in which the "production process" exception could be tailored for this purpose. For example, BHP Billiton previously submitted to the Productivity Commission that the exception should be amended so that the definition of "service" excludes the use of "a production

[45] Ergas/Fels Submission, part 3.4 (from page 27) and part 5.1 (from page 58).

process and of any material part of a production process".[46] Alternatively, the Exports Infrastructure Taskforce proposed that the "production process" exception be amended, to "prevent the imposing of third party access in vertically integrated, tightly managed, logistics chains, especially those related to our export industries."[47] BHP Billiton strongly encourages the Panel to address this issue in its final report.

3. The Panel's view of the declaration criteria

3.1 The Panel has expressed the view that the declaration criteria should be targeted so that:

- criterion (a) should require that access on reasonable terms and conditions through declaration would promote a material increase in competition in a dependent market;
- criterion (b) should require that it would be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and
- criterion (f) should require that access on reasonable terms and conditions through declaration would promote the public interest.[48]

3.2 BHP Billiton previously expressed concern with the Productivity Commission's 2013 recommendations regarding the declaration criteria, on the basis that the Productivity Commission made those recommendations without having undertaken a full cost benefit analysis, and therefore without having developed a complete understanding, of the costs and benefits associated with the application of the Part IIIA declaration regime in practice.[49] While the Panel has not had the opportunity or resources to undertake such an analysis, BHP Billiton nonetheless responds to the Panel's view on those criteria below.

Declaration criterion (b) – uneconomical to develop another facility to provide the service

3.3 BHP Billiton strongly supports the Panel's view that declaration criterion (b) should test whether it is privately profitable for anyone to develop another facility to provide the service sought to be declared. The Panel's approach is vastly superior to the natural monopoly test proposed by the Productivity Commission,[50] and the Panel's proposed private profitability test:

- correctly assesses whether access is "essential" in order to promote competition in dependent markets, by testing whether there is a practically 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 to develop an alternative facility.

3.4 However, BHP Billiton does not support the Panel's view that the "private test" adopted by the High Court should be modified, so that the word "anyone" in criterion (b) excludes the incumbent provider of the facility. The prevailing interpretation of criterion (b) allows consideration of probative evidence that the provider could profitably develop another facility, which is relevant to the question whether an efficient access seeker could profitably enter a dependent market. Considering such information is

[46] BHP Billiton's submission to the Productivity Commission's Inquiry into the National Access Regime, 15 February 2013, page 16.

[47] Exports and Infrastructure Taskforce Report, page 40.

[48] Draft Report, page 273.

[49] BHP Billiton's First Submission, see section 6 generally.

[50] BHP Billiton's First Submission, paragraphs 6.50 - 6.53.

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).

3.5 Accordingly, BHP Billiton supports the Panel's rejection of the "natural monopoly" test, and its endorsement of a "private profitability" test for criterion (b), but urges the Panel to endorse the High Court's prevailing interpretation of that criterion. BHP Billiton also refers the Panel to the discussion of declaration criterion (b) in the submission by Professors Ergas and Fels.[51]

Declaration criterion (a) and declaration criterion (f)

3.6 BHP Billiton supports the Panel's view of the role of declaration criterion (a) and declaration criterion (f), but considers that the Panel's view on those criteria provides an incomplete response to current concerns regarding those criteria.

Criterion (a)

3.7 BHP Billiton agrees with the Panel that criterion (a) should assess whether *declaration* (rather than simply access) would promote competition in a dependent market. The need for this amendment arises out of a previous Part IIIA declaration case, in which declaration occurred on the application of an access seeker which already had access to and was using the relevant service, but sought declaration in order to bring its use of that service under the Part IIIA arbitration framework.[52] This is clearly not the scenario in which the Hilmer Review contemplated that access declaration should apply (since access was already being provided and so was not required in order to promote competition in a dependent market). The Panel's view appropriately points toward criterion (a) being amended accordingly, so that criterion (a) would not be satisfied in such cases.

3.8 However, the Panel's view of criterion (a) does not address another critical concern with this criteria. As noted above, the Hilmer Review recommended that declaration should facilitate access where access 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."*[53]

3.9 However criterion (a) tests only whether access would promote a material increase in competition in *any* market, regardless of whether increasing competition in that market could have any national significance – ie, significance for national competitiveness. In practice this means that criterion (a) can almost always be satisfied, provided that a "market" can be identified in which access would promote a material increase in the conditions for competition, regardless of whether that promotion is likely to occur, or to be of any material benefit. For example, the Tribunal found that criterion (a) was satisfied in relation to the Goldsworthy railway, because it considered that access would promote a material increase in the conditions for competition in the market for rail haulage for deposits in the vicinity of the Goldsworthy railway. BHP Billiton is the only supplier and the only customer in that "market". In the almost six years since the Goldsworthy railway was declared, no party has sought access to the Goldsworthy railway or otherwise sought to enter that "market", and declaration has had no impact on competition in that "market". The promotion of competition in that "market", even had it occurred, could have no expected impact on national competitiveness. As this example illustrates, criterion (a) requires further reform to ensure that in future declaration does not occur based on the remote prospect of access promoting competition in an immaterial "market", causing no consequence of any national significance, and no benefit to national competitiveness. BHP Billiton also refers the Panel to the discussion of declaration criterion (a) in the submission by Professors Ergas and Fels.[54]

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[51] Ergas/Fels Submission, part 3.1 (from page 19) and part 5.2 (from page 61).

[52] Virgin Blue's application for declaration of services at Sydney Airport, made in 2002. Note also Tiger Airways' application to the NCC (filed in July 2014, and withdrawn in August 2014), in which Tiger sought "improved and increased access" to the Sydney Airport terminal it was already using, to accommodate growth in its fleet operating out of Sydney.

[53] Hilmer Review, page 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.

[54] Ergas/Fels Submission, part 3.2 (from page 22) and part 5.2 (from page 60).

Criterion (f)

3.10 BHP Billiton supports the Panel's view that criterion (f) should require the relevant decision maker to be positively satisfied that "access on reasonable terms and conditions through declaration" would "promote" (rather than "not be contrary to") the public interest. This approach would appropriately strengthen the public interest test. Importantly, it would also assess the public interest consequences of access "through declaration", and so ensure that criterion (f) assessed the incremental consequences of access through declaration, rather than assessing consequences of access simpliciter (which may already exist if access is being provided at the time at which declaration is sought – see, eg, paragraph 3.7 above).

3.11 However, the Panel's view on this issue leaves key matters unaddressed. For example, despite the Panel's view, the risk remains that decision makers applying this criterion may, in a manner similar to the Productivity Commission in its review of Part IIIA, simply assume that significant costs of access will be addressed by access terms and conditions, and as such are not relevant to the assessment of the public interest under this criterion. The Tribunal's decision in the Pilbara rail access case clearly demonstrates that such an assumption is ill-founded. However, the Panel's view of criterion (f) would not preclude such an assumption being made and would leave open the possibility that declaration may occur in circumstances where it is assumed without foundation that the substantial costs associated with access can be addressed by appropriate access terms and conditions. This risk is likely to be greater if, as the Panel proposes, a single Commonwealth access regulator becomes responsible both for making declaration decisions and for determining access terms and conditions.

3.12 BHP Billiton also refers the Panel to the discussion of declaration criterion (f) in the submission by Professors Ergas and Fels.[55]

4. The Panel's view on the role of the Australian Competition Tribunal

4.1 BHP Billiton agrees with the Panel's view that:[56]

> *"The Australian Competition Tribunal fulfils an important role in both the development and the administration of Australia's competition law.*
>
> *Decisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of getting the decision wrong are likely to be high.*
>
> *The Panel favours empowering the Tribunal to undertake merits review of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits."*

5. The role and powers of the Tribunal should be enhanced

5.1 BHP Billiton's experience with the Part IIIA declaration regime has shown that applications for declaration of privately developed single-user export 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.

In this context, the role of the Tribunal is crucial in order to ensure that difficult decisions on declaration are correctly made (see Box 3). However, statutory reforms to confine the time limits which apply to the Tribunal, and the High Court's 2012 decision regarding the Tribunal's role, raise significant concerns

[55] Ergas/Fels Submission, part 3.3 (from page 25) and part 5.2 (from page 62).

[56] Draft Report, page 274.

about whether the Tribunal will be able to perform this essential function in future cases.[57] Accordingly, BHP Billiton encourages the Panel to recommend that:

- the Tribunal should be empowered to undertake full, de novo merits review of access declaration decisions;
- the Tribunal should have express powers:
  - to make afresh all decisions made by the Minister on the application of the declaration criteria; and
  - in doing so, to conduct a full cost benefit analysis under criterion (f), without being bound by, or otherwise "slow to find to the contrary" of,[58] the Minister's decision relating to the public interest under criterion (f);
- the Tribunal should have the express power to hear directly from employees of the businesses concerned, and other relevant industry and expert witnesses where that would assist the Tribunal; and
- the Tribunal should not, in conducting its merits review, be limited to considering the record which was before the Minister.

Box 3. – The crucial role of the Australian Competition Tribunal

The Tribunal is the only one of the three current decision makers under the Part IIIA declaration regime with the resources and skills to apply the key declaration criteria, to determine the complex issues involved in declaration proceedings fully and accurately, and to make the correct decision.

- **Decision making:** The Tribunal has the capacity to make the complex factual, legal and economic assessments required by Part IIIA declaration applications. The judicial members of the Tribunal bring to the process essential skills concerning the receipt of evidence and questioning of witnesses, and independent, critical evaluation of conflicting evidence and contentions. Part IIIA decision makers are often required to resolve disputes raised by large volumes of complex information and analyse difficult technical and commercial matters. It is uncontroversial that where there are material inconsistencies a decision maker "may well find that it cannot resolve inconsistencies between its information and written submissions from the person concerned without … a hearing".[59] The analogous experience with determination of difficult applications for merger clearance underlines this point.[60] That is, it is not possible for many complex issues to be resolved "on the papers" where there is no opportunity to question in person the individuals who provide that information. This is a key reason why judicial analytical skills are so vital to the Part IIIA declaration process. The combination of these skills, along with the appropriate commercial and economic skills of non-judicial Tribunal members[61], means that the Tribunal is far better placed than either the NCC, the Minister or any new Commonwealth access regulator to make correct decisions on the declaration criteria.
- **Calling for relevant evidence:** The Tribunal is also better able to identify and call for the production of additional specific information relevant to its task. For example, in the Pilbara rail access proceedings, the Tribunal requested the NCC to provide it with information about the development plans of junior iron ore miners; it also ordered the conduct of a specific rail capacity modelling task at the parties' expense.

[57] See also Ergas/Fels Submission, part 3.6 (from page 30).

[58] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 (14 September 2012) at [112].

[59] *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 516 (Aickin J).

[60] *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCA 967. See also *Australian Gas Light Company v ACCC* (No 3) [2003] FCA 1525.

[61] Section 31 of the CCA.

6. The Panel's views do not resolve other critical issues

6.1 There are many challenges involved in ensuring that decision makers under Part IIIA have the time, resources, skills and powers required to obtain necessary information and make decisions on declaration applications. These challenges were addressed in BHP Billiton's previous submission to the Panel,[62] and are summarised in Box 4. The Panel's views on the Tribunal are an important element of addressing these challenges. However, they do not address other critical matters, such as the need for the time limits that apply to the NCC's process to allow time for a provider to provide decision makers with the critical and complex information required for them to make their decision, and the need for all decision makers to have the time, resources, skills and powers necessary to apply the declaration criteria correctly.

Box 4. – Substantial challenges involved in the Part IIIA declaration process

The decision making process under the Part IIIA declaration regime involves several critical challenges:

- 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 (if not all) 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.
- The NCC and Minister, like the Tribunal, 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 challenges in the Pilbara railway cases, even before recent legislative amendments to some of those timelines. Absent reform to the Part IIIA declaration regime, 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. This will encourage parties to 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.

Unless these challenges are acknowledged and addressed, there is a substantial risk that the Part IIIA declaration regime will be applied to facilitate access in inappropriate cases in future.

6.2 The creation of a new Commonwealth access regulator, as proposed by the Panel, may possibly assist in addressing some of these concerns if it is appropriately skilled and resourced. However even if appropriately skilled and resourced, such a regulator will take time to develop institutional expertise and experience regarding its Part IIIA functions.

6.3 Accordingly, it will be essential that the Tribunal is empowered to undertake full merits review of decisions by the proposed new Commonwealth access regulator.

7. The powers of the arbitrator under the Part IIIA declaration regime

7.1 BHP Billiton's previous submission to the Panel expressed concern regarding the Productivity Commission's proposal that the ACCC (as the current arbitrator of access disputes under Part IIIA) should have the power to direct a provider of a privately developed single-user facility to expand that facility to accommodate a third party.[63] The submission by Professors Ergas and Fels also raises concerns regarding this power.[64]

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[62] BHP Billiton's First Submission, paragraphs 6.54 - 6.57.

[63] There is a critical distinction to be drawn here between the existence of such a power in relation to a privately developed single-user facility, and the existence of such a power in relation to infrastructure which has historically been developed, regulated and used on the basis that it is

7.2 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 consideration alone is a sufficient basis on which to conclude that no such power should exist.

7.3 As a matter of practice, a mandatory expansion power, when exercised in the context of a privately developed single-user facility, 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, how would critical commercial risks be allocated? How would complex technical and operational issues, on which reasonable minds might legitimately differ, be resolved – and at whose expense? How would real time decisions be made about the conduct of expansion works, and who would bear the cost associated with a decision which was more expensive than a reasonable alternative? 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 the mandatory expansion of privately developed single-user infrastructure would inevitably impose extensive delays and costs on the infrastructure owner.

7.4 BHP Billiton encourages the Panel to consider the complex issues raised by the existence of such an intrusive, heavy handed and complex power to direct a provider to expand a privately developed single-user facility for the benefit of a third party. In BHP Billiton's view, it is unlikely that this power could be included in the Part IIIA declaration regime without imposing very substantial additional cost and complexity.

8. The way forward

8.1 If the Part IIIA declaration regime is to be retained, it is vital that it be comprehensively reformed, in order to target the declaration criteria and relevant exemptions to ensure that:

- access is only declared where it would promote the public interest; and
- Part IIIA decision makers have the time, skills, resources and powers required to make correct decisions.

8.2 The Panel's views in the Draft Report propose useful and principled reforms to the Part IIIA declaration regime. However, those reforms are only a small subset of the total reforms that would be required to meet those challenges.

8.3 The Part IIIA declaration regime is now unnecessary in light of the widespread and effective use of industry-specific and other forms of infrastructure regulation. Further, it imposes substantial costs, particularly when applied to privately developed single-user export infrastructure. Past experience suggests that attempts to reform that regime have, at best, been only incrementally effective. BHP Billiton submits that this context reinforces its submission that the Panel should recommend that the Part IIIA declaration regime have no future application.

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and will continue to be multi-user infrastructure. The regulated multi-user coal infrastructure in Queensland and NSW are examples of this second type of infrastructure. See further BHP Billiton's First Submission, page 53.

[64] Ergas/Fels Submission, part 3.5 (from page 29) and part 5.2 (page 63).