Submission in Response to the Competition Policy Review Draft Report (National Access Regime) November 2014

Rio Tinto Submission responding to the Competition Policy Review Draft Report (National Access Regime)

1 Executive Summary

1 Rio Tinto welcomes the opportunity to provide a submission commenting on the Competition Policy Review Panel's Draft Report. This submission focusses in particular on Chapter 21 of the Draft Report dealing with the National Access Regime.[1]

2 Rio Tinto wishes to make the following submissions to the Review Panel:

(a) ***the declaration process should be removed from Part IIIA:*** the declaration process in Part IIIA no longer serves any useful purpose but has the potential to impose very significant costs to the detriment of the national economy. There are no benefits in retaining the declaration process for the following reasons:

- the categories of infrastructure that should be regulated (and that the Hilmer Report envisaged would be subject to Part IIIA) are now regulated under industry specific regimes. Those regimes are adapted to the circumstances of the particular industry and are often highly sophisticated, particularly in comparison with Part IIIA. There is little work left for the declaration process to do;
- in the few industries where there is continuing debate about whether regulation is appropriate, notably in relation to airports and multi-user ports, the real issue (as the Review Panel observes) is one of monopoly pricing rather than access to bottleneck facilities. The declaration process in Part IIIA is unlikely to be an effective mechanism to address any issues that might exist in those industries; any such issues would be better addressed, if necessary, through industry specific regulatory regimes;
- not surprisingly given the above, very few services have been declared under Part IIIA and very few applications for declaration have been brought in recent years. Where services have been declared, declaration has not led to any meaningful public benefit; and
- although the threat of declaration and the 'effective access regime' mechanism may at one time have had a role to play in ensuring that State access regimes were introduced and were consistent, that is no longer the case.

Conversely, retaining the declaration mechanism has the potential to impose very significant costs. These costs include (in increasing order of importance):

- the costs imposed on industry participants in dealing with declaration applications;
- the disincentives to invest that the threat of declaration creates for parties considering investing in greenfield infrastructure; and
- most significantly, the enormous costs that could be imposed if, as a result of regulatory error, a facility was declared contrary to the national interest.

If the declaration process were removed from Part IIIA, Rio Tinto would support the few existing declarations being 'grandfathered' and the access undertaking mechanism being retained. These issues are discussed further in ***section 2*** below;

[1] Part IIIA of the *Competition and Consumer Act 2010* (Cth) (***CCA***).

(b) ***if declaration is retained, single user, integrated, export orientated infrastructure should be excluded:*** if, contrary to Rio Tinto's submission above, the declaration process is retained, then the declaration process should not apply to single user, integrated, export orientated infrastructure. Imposing third party access on a vertically integrated system that is used for the export of goods is likely to impose very significant costs and provide few, if any, benefits for Australian consumers. This issue is discussed in ***section 3*** below;

(c) ***declaration criteria:*** if the declaration process is retained then Rio Tinto agrees with the Review Panel's recommendations in relation to declaration criteria (a), (b) and (f). This issue is discussed in ***section 4*** below;

(d) ***role of the Australian Competition Tribunal:*** Rio Tinto strongly agrees with the Review Panel's recommendations in relation to the role of the Australian Competition Tribunal (***Tribunal***). In particular, if declaration is retained the Tribunal should be able to undertake a full merits review of decisions under Part IIIA and its task should not be limited to material that was before the National Competition Council (***NCC***) or the designated Minister. Consistently with this recommendation, it is essential that the Tribunal should be able to conduct a full merits review of the Minister's finding in relation to the public interest. Given the significant timing and other constraints on the Minister's decision making process, there should be no presumption that the Minister's findings in relation to public interest should prevail. This issue is discussed in ***section 5*** below; and

(e) ***access and pricing regulator:*** finally, if the declaration process is retained, then the body that makes recommendations to the Minister about declaration should be a separate body to the body responsible for making decisions in relation to access arbitrations. To combine the two functions in the one body creates a risk of bias in favour of regulation (or at least potentially gives rise to the appearance of such bias). This issue is discussed in ***section 6*** below.

2 The declaration process should be removed from Part IIIA

2.1 Introduction

3 In Rio Tinto's view the declaration process in Part IIIA no longer serves any useful purpose, but has the potential to impose very significant costs to the detriment of the national interest. The declaration process should be removed from Part IIIA. Set out below is a discussion of the benefits and costs of retaining the declaration process under Part IIIA.

2.2 Retaining declaration process generates no benefits

Key bottleneck infrastructure is now regulated under industry specific access regimes

4 As the Draft Report observes, one of the major recommendations of the Hilmer review was to introduce competition into various industries, that at the time remained largely in public ownership.[2] Doing this required the separation of the industries in question into their contestable and monopoly elements, with the contestable businesses requiring access to the monopoly infrastructure concerned. Part IIIA was introduced to provide a common framework for access to monopoly infrastructure where such access was necessary to allow competition to develop in the relevant contestable markets. It is important to recall that Part IIIA was not introduced to regulate monopoly pricing; it was introduced to facilitate access to such bottleneck facilities where necessary to introduce competition into certain industries.

[2] Draft Report, p.265.

5 Critically, as the Draft Report highlights, it soon became clear that each industry had distinct physical, technical and economic characteristics and that it was preferable to address access issues on an industry by industry basis.[3] As the Draft Report notes:

- electricity transmission and distribution networks are now subject to regulation under an industry specific regime established by the National Electricity Law;
- gas transmission and distribution pipelines are subject to regulation under an industry specific regime established by the National Gas Law;
- in the telecommunications industry access to fixed line infrastructure is governed by an industry specific access regime established under Part XIC of the CCA;
- the interstate rail network is subject to an access undertaking given by Australian Rail Track Corporation (***ARTC***) to the Australian Competition and Consumer Commission (***ACCC***) and intra-state rail networks in many States and Territories (particularly government owned or formerly government owned rail networks) are subject to access regimes established in those States and Territories;
- ports are subject to various regulatory frameworks established in the State or Territory in which the port is located;
- airport facilities are not regulated by an industry specific access regime and are not currently the subject of any declaration.[4]

6 It is important to note that the industry specific regimes that have developed are highly sophisticated, tailored regimes that have evolved considerably since they were introduced to meet the requirements of the specific industry. In almost all cases they are considerably more detailed and sophisticated than the negotiate-arbitrate model that applies to declared infrastructure facilities under Part IIIA.

7 As a result of the establishment of these industry specific regimes there is now very little work for the declaration process under Part IIIA to do. This is illustrated by the fact that in the last 5 years there have been only four applications for declaration of infrastructure, all of which were either withdrawn or rejected.

Date	Infrastructure concerned	Outcome
22 March 2010	Herbert River tramway network – narrow gauge cane tram network located in the Herbert River district	Not declared
19 May 2010	Queensland Rail Queensland coal rail network - application made in the context of the Queensland rail privatisation and certification of the Queensland rail access regime	Withdrawn
27 September 2011	Jet fuel supply infrastructure at Sydney Airport	Not declared
8 August 2014	Domestic terminal service at Terminal 2 at Sydney Airport	Withdrawn

8 The NCC itself has acknowledged that in recent years, applications under Part IIIA have been sporadic, and its workload highly variable, and that future access applications will continue to be relatively few and intermittent.[5]

[3] Draft Report, p.265.

[4] Draft Report, p.266.

9 In summary the original policy objectives of the Hilmer Review have been achieved through the introduction of industry specific regimes and there is little (if any) work remaining for the declaration process in Part IIIA to do.

Remaining issues concern monopoly pricing not access regulation

10 Issues are sometimes raised in relation to the adequacy of regulation applying in relation to airports and multi user ports (notably following privatisation). The Draft Report flags the fact that there is some potential for airports and multi-user ports to become the subject of access regulation under Part IIIA in the future.[6] As these facilities are intended for multi-usage and the owners and operators of them are in the business of providing a service to third parties, there is no incentive to exclude usage. The issue which seems to have arisen is a suggestion that monopoly charges are being levied for the use of the infrastructure concerned.

11 Given its origins in the Hilmer Review, Part IIIA is not designed or intended to address issues of monopoly pricing, rather it is intended to address questions of access to bottleneck facilities where such access is required in order to facilitate competition in potentially contestable markets. Neither the declaration criteria nor the negotiate arbitrate framework of Part IIIA are really designed to address the issues of monopoly pricing in those industries. As a result, if there are issues of monopoly pricing in relation to airports or ports, those issues (if they exist) are best addressed through industry specific regulation of the type that has been applied elsewhere, rather than by retaining the Part IIIA declaration mechanism.

Declaration process has not generated any public benefits

12 Not surprisingly, given the two points made above, very few services have been declared under Part IIIA and where services have been declared that declaration has not led to any meaningful public benefit.

13 As the Draft Report observes:

(a) there are only two services currently declared under Part IIIA – the Tasmanian rail network and the BHPB Goldsworthy iron ore railway;[7] The Tasmanian railway network declaration is in effect a voluntary declaration proposed by the Tasmanian Government. We understand that there have been no applications for access to the Goldsworthy railway since it was declared;

(b) since its enactment in 1995, there have been only four other services declared under Part IIIA (and these declarations have all since either expired or been revoked);[8]

14 This strongly suggests that the declaration process has not generated any public benefits.

15 In the case of Rio Tinto's Pilbara rail lines, had the rail infrastructure been declared, the costs imposed on Rio Tinto and the national economy would have been enormous and would have vastly exceeded the theoretical benefits of access identified by the Tribunal.[9]

16 It has also been suggested that the threat of declaration facilitates the negotiation of commercial access outcomes. In Rio Tinto's view this is not the case. As discussed above, most infrastructure where access issues could appropriately arise are subject to industry specific regimes and it is

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[5] Public Statement from David Crawford, NCC President: *'National Competition Council - change of approach to provision of secretariat services'* accessed on 29 October 2014 at http://ncc.gov.au/images/uploads/NCCSecretariatServices-001.pdf .

[6] Draft Report, p.267.

[7] Draft Report, p.266 (Tasmanian railway network, declared in 2007 and BHPB's Goldsworthy iron ore railway, which was declared in 2008).

[8] Draft Report, pp.266-7.

[9] This is discussed in further detail in ***section 3*** below.

those regimes rather than Part IIIA that would facilitate commercial negotiations. In areas where terms and conditions of access are contentious, such as airports and multi-user ports, tailored solutions from industry-specific regulation would be a better solution, rather than the threat of declaration and regulation under Part IIIA which applies indiscriminately to all infrastructure.

17 There are a number of access undertakings that have been accepted by the ACCC under Part IIIA which do serve a useful purpose[10] and Rio Tinto is not calling for the abolition of the access undertaking mechanism.

Declaration process not necessary to ensure consistency between State regimes

18 It is sometimes suggested that the potential for declaration is what has caused the States and Territories to introduce industry specific access regimes and that if the threat of declaration was removed the States and Territories would in turn remove their own industry specific access regimes. It is also sometimes suggested that the fact that declaration cannot be obtained where there is an 'effective access regime in place', which regime must satisfy certain criteria set out in the Competition Principles Agreement, encourages consistency of State access regimes.

19 In relation to the first point, this argument may have had some validity when the Hilmer reforms were first being implemented. In Rio Tinto's submission, however, there is now little (if any) risk of States and Territories abolishing, for example, the National Electricity Law, the National Gas Law or the various state based rail access arrangements such as the Queensland rail regime administered by the Queensland Competition Authority, if the threat of declaration was removed. The benefits of those regimes are well understood including by State and Territory governments. The regimes each have a life of their own independently of Part IIIA.

20 Similarly, in relation to the 'consistency argument', although this may have had some validity in the mid-1990s, it is simply no longer correct. This can be seen from how few regimes have been certified as effective and how few applications for certification have been made. It can also be seen in the way that industry specific regimes have evolved (for example, the regulatory regimes applying in the electricity and gas sectors were amended to become more consistent as a result of policy decisions of State and Territory governments, which had nothing to do with the threat of declaration under Part IIIA or effective access regime criteria).

2.3 Retaining declaration process potentially imposes very significant costs

21 Retaining the declaration process potentially imposes very significant costs on Australian industry to the detriment of the national interest. These costs are discussed briefly below (in increasing order of importance).

22 First, and most obviously, dealing with declaration applications imposes costs on the industry participants concerned and on governments (through the need to fund relevant decision makers). Because Part IIIA concerns nationally significant infrastructure, significant resources are likely to be devoted to dealing with any declaration application.

23 Secondly, and as is widely recognised, the threat of declaration creates uncertainty for investors considering constructing new infrastructure. The threat of declaration means a potential investor in a major piece of infrastructure is uncertain as to whether the assumptions it is making, for example, about prices it thinks will be achieved based on commercial negotiations might be eroded by future regulation following declaration. Increasing uncertainty in this way must necessarily dampen incentives to invest in infrastructure and make positive investment decisions more difficult.

[10] Draft Report, p.266 (ARTC and Hunter Valley rail networks, and the Cooperative Bulk Holdings bulk wheat port terminal in WA).

24 Finally (and in Rio Tinto's view most significantly) there is always a risk with the declaration process that a facility could be declared contrary to the national interest as a result of regulatory error. Because the infrastructure concerned is by definition nationally significant, enormous costs could be imposed on the Australian economy as a result. This can be seen from the costs that would have been imposed had Rio Tinto's rail network been declared, as discussed in further detail in ***section 3*** below.

2.4 Conclusion

25 In summary, the declaration process in Part IIIA no longer serves any useful purpose but has the potential to impose very significant costs. As the Draft Report observes,[11] Australia is unique among comparable countries in having a general access regime that may potentially apply to any privately owned infrastructure facility. Australia, like other countries, should rely on the industry specific access regimes that have been developed. The time is now right for the declaration process to be removed from Part IIIA.

26 Rio Tinto would support the few existing declarations being 'grandfathered' and the access undertaking mechanism being retained.

3 If Part IIIA is to be retained, single user integrated, export-oriented infrastructure should be excluded from access regulation

27 If the Review Panel disagrees with Rio Tinto's primary submission that the declaration process should be removed from Part IIIA, Rio Tinto agrees that the National Access Regime must be 'confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third party access.'[12]

28 In order to achieve this objective, Rio Tinto submits that single user infrastructure used primarily for the export of goods that is closely integrated with the production of those goods should be excluded from declaration under Part IIIA. The relevant integration could take the form of the infrastructure and production process having a common owner or a common operator.

29 The need for such an exclusion is made more acute because the High Court's decision in relation to the production process[13] exception means the exception is unlikely to ever apply (see section 5 of Rio Tinto's original submission to the Review Panel).

30 An exception for single user integrated, export-oriented infrastructure is appropriate because the costs of imposing third party access on such infrastructure are likely to be very high with few if any benefits for Australian consumers.

31 Where infrastructure is integrated with the production of goods and has a single owner or operator, the production process and the operation of infrastructure are likely to be highly co-ordinated. Introducing a third party user onto such infrastructure will necessarily interrupt that coordination and create inefficiencies.

32 This was of course a central issue in the Pilbara railways access litigation. In the original proceedings before the Tribunal[14] there was evidence which demonstrated that Rio Tinto operated its mines, rail and port facilities in the Pilbara as a single integrated operation with the objective of producing iron ore that meets specifications for export from two ports, one at Dampier

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[11] Draft Report, p.264.

[12] Draft Report, p.54.

[13] *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145.

[14] *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 (***Re Fortescue***).

and the other at Cape Lambert.[15] The Tribunal also accepted that in the management of the Rio Tinto rail system, flexible scheduling was adopted to cope with the inherent variability of the production system, particularly variability that was the result of unexpected events. Flexibility to re-schedule across the mines, rail, ports and shipping was found to be essential to minimise the impact of these events and their flow-on effects.[16]

33 The Tribunal accepted that a large range of costs were likely to arise from mandated sharing through access, including:

- inefficiencies resulting from congestion. To put this in context, if congestion caused by mandated access resulted in a 25% decline in train consist efficiency (a reasonable assumption for the key routes in the rail system) the extra consists required to achieve the same throughput would cost in the order of $2.5 billion at 2010 prices;[17]
- loss of flexibility in scheduling in a system that is currently very flexible, with moment to moment changes being made to accommodate such things as unexpected ore quality changes, breakdowns, unavailability of manpower, maximising the value of opportunistic maintenance windows, etc;
- inevitable delays to Rio Tinto's planned expansion programs that would arise if third parties were involved in, or affected by, such programs. The Tribunal accepted that such delays were inevitable and that on a 'conservative assumption' the cost to revenue of expansion delays would be in the order of $10 billion;[18] and
- delays in introducing new technologies and operating practices designed to achieve an increase in efficiency and throughput.

34 As a result the Tribunal found in relation to Rio Tinto's Hamersley rail line that there was 'the very real possibility – indeed probability – that [the benefits of declaration] could be dwarfed by the costs'.[19] It is reasonable to assume that significant costs of the types described above would always be caused where third party access is imposed on single user, integrated infrastructure.

35 Where such infrastructure is used to produce and export goods, third party access is unlikely to generate any benefits for Australian consumers. Where goods are being exported it is highly likely they are being exported into a competitive global market and that access to infrastructure is not necessary to allow competition in such markets. These global commodities markets are of course far removed from the industries that the Hilmer report was concerned about when it recommended the introduction of Part IIIA. In any event, where export markets are concerned the end consumers are not Australian consumers. As the Review Panel observed in relation to cartel conduct the objective of the CCA is to protect the welfare of Australians.[20]

36 In summary, single user integrated, export-oriented infrastructure should be excluded from the declaration process under Part IIIA if, contrary to Rio Tinto's primary submission, a declaration regime under Part IIIA is retained. Such an exclusion would assist to ensure that Part IIIA is limited to exceptional cases where the benefits outweigh the costs of regulated third party access.

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[15] *Re Fortescue,* [289].

[16] *Re Fortescue*, [350].

[17] There was evidence before the Tribunal that the cost of each train consist is in the order of $100 million: *Re Fortescue*, [1003]

[18] *Re Fortescue,* [1328].

[19] *Re Fortescue*¸ [1319].

[20] Draft Report, p.223.

4 The declaration criteria

4.1 Criteria (a) and (b)

37 Although it is only relevant if Rio Tinto's primary submission is not accepted, Rio Tinto agrees with the Review Panel's recommendations in relation to criteria (a) and (b).

38 In addition to the ease with which criterion (b) can be assessed under a private profitability test (when contrasted with a natural monopoly test), as noted in the Draft Report,[21] there are further reasons why the private profitability test is the appropriate test for criterion (b), which were identified in Rio Tinto's earlier Submission to the Review Panel and in Rio Tinto's submissions to the Productivity Commission.[22]

4.2 Criterion (f)

39 Rio Tinto also agrees with the Review Panel's recommendations that criterion (f) should be amended in order to strengthen the public interest test.[23] That is, criterion (f) would be better drafted as an affirmative test that requires the public interest to be promoted, as opposed to access being 'not contrary to' the public interest. Rio Tinto also notes, and agrees with, the Review Panel's view that all factors that bear upon the overall public interest should be taken into account in the declaration decision.[24]

5 Role of The Tribunal

40 Rio Tinto strongly agrees with the Review Panel's recommendations in relation to the role of the Tribunal, particularly that the Tribunal should be able to undertake a full merits review under Part IIIA and should not be limited to material that was before the NCC or the Minister.

41 The ability to seek merits review from the Tribunal promotes sound decision making and is the best way to ensure that the correct decisions are reached based on a rigorous, expert examination of all the facts. This in turn fosters confidence in the process, facilitates decisions about investments being made by infrastructure owners and potential access seekers alike and provides a climate that does not discourage investment in infrastructure, in contrast to the situation that would prevail if there were no such independent review process.

42 The Tribunal has demonstrated in a number of contexts, including recently in relation to mergers, that it can deal with complex matters in a timely manner. For example, the Tribunal recently dealt with an application for authorisation made by AGL Energy Limited (***AGL***) in relation to its proposed acquisition of Macquarie Generation within three months.[25] The Tribunal received 'voluminous material' prior to the hearing and received documentary and affidavit evidence from AGL and the ACCC. Counsel for AGL and the ACCC were permitted to test relevant evidence by cross examination. The Tribunal described this process as 'efficient, focused and helpful'.[26]

43 In summary, Rio Tinto believes that allowing the Tribunal to undertake full merits review of Part IIIA, including receiving new evidence, promotes sound decision making and is an essential

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[21] Draft Report, p.271.

[22] 'Rio Tinto Iron Ore Submission to the Productivity Commission's National Access Regime Review' dated 8 February 2013 and 'Rio Tinto Iron Ore Submission in Reply to the Productivity Commission Draft Report' dated 5 July 2013.

[23] Draft Report, p.272.

[24] Ibid.

[25] In *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] A Corp (***AGL Authorisation Application***).

[26] *AGL Authorisation Application*, [138].

protection for all parties. The Tribunal has demonstrated that Tribunal reviews need not result in significant delays in the decision making process.

44 If the Tribunal is permitted to conduct full merits reviews of declaration decisions, it is important that it should be able to consider all of the declaration criteria afresh. In the Pilbara railways access litigation, the High Court expressed the view that the Tribunal should be *slow to depart* from the Minister's assessment of the public interest in relation to criterion (f).[27] The effect of this limitation seems to be that the Tribunal must start with the assumption that the decision maker's assessment of the public interest under criterion (f) is correct and establish an error in the reasoning process before it can disturb the Minister's decision.

45 Rio Tinto submits that there is no reason to impose this limitation on the Tribunal. All of the declaration criteria are ultimately directed to the single question of whether or not declaration is in the public interest. Assessing whether declaration is in the public interest requires the decision maker, amongst other things, to make a factual assessment about the impact that access would have on the operation of the facility. As discussed above, in the Pilbara rail access litigation this required the decision maker to understand, amongst many things, the effect that access would have on the operation of the rail line, on future expansions of the rail line and on the future introduction of new technologies. These were all factual questions that required a detailed understanding of Rio Tinto's operations and were not matters of political judgement.

46 For the reasons given in the Draft Report, the Tribunal is clearly much better equipped to make these types of factual assessments than either the NCC or the Minister. It is only at the Tribunal stage that primary evidence is typically produced and where there is a power for interested parties to cross examine witnesses. The fact that the Minister's reasoning process is not as comprehensive or thorough as that of the Tribunal can be seen from the nature of the declaration decisions each publishes. Typically, the Minister's reasons are brief and provide very limited insight into the reasoning process adopted by the Minister, usually re-stating the main conclusions reached by the NCC, without any thorough analysis of the matters that informed those conclusions.[28] This is not surprising given the other demands on the Minister's time and the 60 day period allowed for the Minister to make a decision.

47 If the Tribunal's ability to undertake an unfettered merits review of the Minister's assessment of the public interest under criterion (f) is not reinstated, Rio Tinto considers that there is a significant risk that future declaration decisions will be made based on untested assertions in submissions and decision makers' intuitions rather than through a detailed examination of the facts from the bottom up. This greatly increases the risk of incorrect decisions being made that cannot be challenged on review, potentially to the great detriment of Australia's economic performance.

48 In order to achieve the Review Panel's objective of 'facilitating a thorough examination of the costs and benefits of the decision', the High Court's suggested limitation on the Tribunal's ability to review a decision under criterion (f) must be expressly removed.

49 In short, an unfettered right for the Tribunal to weigh the costs and benefits of access is paramount. Criterion (f) is the criterion under which such an assessment would occur if, as recommended by the Review Panel, the private profitability test is retained under criterion (b). If

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[27] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, [112]: *'In neither case is it to be expected that the Tribunal, reconsidering the Minister's decision, would lightly depart from a ministerial conclusion about whether access or increased access would not be in 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 such a finding would be made, except in the clearest of cases, by reference to some overall balancing of costs and benefits.'*

[28] The occurrence of 'deemed' decisions by the Minister raises further difficulties if the Tribunal's ability to review the Minister's assessment of the public interest continues to be fettered according to the High Court's limitation.

the High Court's limitation on the Tribunal's ability to review the Minister's decision under criterion (f) were not removed, it would be preferable to revert to a net social benefit test under criterion (b) (which requires an assessment of all costs associated with meeting market demand using one facility be taken into account). Otherwise there would be no scope for the Tribunal to undertake such an analysis on an unfettered basis. With the greatest respect to any Minister, for reasons including the limitation on the period of time in which a decision must be made, it is unrealistic to think that his or her decision can take into account all relevant matters for the purposes of undertaking a thorough examination of the costs and benefits of the declaration decision.

6 Access and Pricing Regulator

50 Rio Tinto notes the Review Panel's proposal to transfer the functions of the NCC and ACCC under Part IIIA to a new national access and pricing regulator, and its reasons for doing so.

51 Rio Tinto considers that there may be a benefit in maintaining a separation between the body that makes a declaration recommendation in relation to a facility and the body that administers access arbitrations for declared facilities.

(a) There may be a perception that a combined body would be biased in favour of declaration given that declaration may in due course generate work for the body as the regulator. Even if that perception is incorrect, the perception alone may undermine confidence in the process.

(b) There are advantages in the arbitration body bringing a fresh mind to bear in considering any access dispute. The body charged with determining whether a facility meets the declaration criteria may bring entrenched views about the issues relevant to any such dispute. For example, based on Rio Tinto’s experience it is likely that such issues will have been dealt with on a hypothetical basis during the declaration phase and the relevant body will likely have taken a position on such issues in deciding to recommend declaration.

52 The Review Panel may therefore consider it would be prudent to retain a separation of these functions, perhaps by giving the proposed new Australian Council for Competition Policy the declaration recommendation function.