



Roy Hill Infrastructure Pty Ltd

Submission to Competition Policy Review

November 2014

1 Introduction

- 1.1 This submission is made by Roy Hill Infrastructure Pty Ltd (RHI), the company in the Roy Hill group which is the owner of Roy Hill's rail and port infrastructure assets. RHI is a wholly owned subsidiary of Roy Hill Holdings Pty Ltd.
- 1.2 On completion, the Roy Hill Project will comprise:
- (a) a 55 million tonnes per annum (mtpa) low cost open pit iron ore mine located in the Pilbara region of Western Australia, approximately 115 kilometres north of Newman and 277 kilometres south east of Port Hedland;
 - (b) a new 344 kilometre standard gauge heavy haul railway which will transport the 55mtpa of product from the Roy Hill Mine to a dedicated port stockyard facility at Port Hedland; and
 - (c) an iron ore port facility at the port of Port Hedland purpose built to reliably export the 55mtpa of product.
- 1.3 This submission responds to the invitation from the Panel (on page 269 of the Competition Policy Review Draft Report, September 2014) to comment on:
- “the categories of infrastructure to which Part 111A might be applied in the future, particularly in the mining sector, and the costs and benefits that would arise from access regulation of that infrastructure; or*
- Whether Part 111A should be confined in its scope to the categories of bottleneck infrastructure cited by the Hilmer Review.”*

2 First Submission

Submission - The same access regime should apply to each privately owned railway and each privately owned port facility in the Pilbara region.

- 2.1 After completion of the Roy Hill Project, there will be four major privately owned railway systems and port facilities in the Pilbara region of Western Australia. Each system is governed by a separate and different third party access regime.
- 2.2 The West Australian Rail Access Regime (WARAR) commenced in 2001. The WARAR comprises the Railways (Access) Act 1998 (WA) and the Railways (Access) Code 2000 (WA). The WARAR was certified for a period of 5 years as an effective access regime under section 44N of the Competition and Consumer Act 2010 (which forms part of Part 111A of the Competition and Consumer Act 2010) on 11 February 2011. The effect of that certification is that railways that are subject to WARAR will not be subject to the National Access Regime (NAR) until February 2016.

Infrastructure governed by Old State Agreements

Railways

- 2.3 The WARAR does not cover the older privately owned railway lines in the Pilbara (namely the Mt Newman and Goldsworthy railway lines owned and operated by BHP Billiton Iron Ore Pty Ltd (BHPB) and the Hamersley and Robe River lines owned by Rio Tinto Ltd (Rio Tinto)). The Mt Newman railway line was ratified under the *Iron Ore (Mount Newman) Agreement Act 1964 (WA)* and commenced operation in 1969. The Goldsworthy railway was ratified under the *Iron Ore (Mount Goldsworthy) Agreement Act 1964 (WA)*.
- 2.4 Rio Tinto's State Agreement for its Hamersley railway was ratified under the *Iron Ore (Hamersley Range) Agreement Act 1963 (WA)*. Rio Tinto's State Agreement for its Robe railway was ratified under the *Iron Ore (Robe River) Agreement Act 1964 (WA)*.
- 2.5 In respect of third party haulage services on the railway, each State Agreement provides as follows:

"Throughout the continuance of this Agreement the Company shall... operate its railway in a safe and proper manner and where and to the extent that it can do so without unduly prejudicing or interfering with its operations hereunder allow crossing places for roads stock and other railways and transport the passengers and carry the freight of the State and third parties on the railway subject to and in accordance with bylaws (which shall include provision for reasonable charges) from time to time to be made altered and repealed as provided in subclause(3) of this clause and subject thereto or if no such by-laws are made or in force then upon reasonable terms and at reasonable charges (having regard to the costs of the railway to the Company) PROVIDED THAT in relation to its use of the said railway the Company shall not be deemed to be a common carrier at common law or otherwise."

(the BHPB Newman State Agreement, clause 9(2)(a), the Rio Hamersley State Agreement, clause 10(2)(a), the Rio Robe State Agreement, Schedule 1, clause 9(2)(a) and the BHPB Goldsworthy State Agreement, Schedule 1, clause 9(2)(a))

Port

- 2.6 In relation to third party access to port and wharf facilities, each State Agreement provides as follows:

"Throughout the continuance of this Agreement the Company shall... subject to and in accordance with by-laws (which shall include provision for reasonable charges) from time to time to be made and altered as provided in subclause (3) of this clause and subject thereto or if no such by laws are made or in force then upon reasonable terms and at reasonable charges (having regard to the cost thereof to the Company) allow the State and third parties to use the Company's wharf and harbour installations, wharf machinery and equipment and wharf and harbour services and facilities PROVIDED THAT such use shall not unduly prejudice or interfere with the Company's operations hereunder."

(the BHPB Newman State Agreement, clause 9(2)(f), the Rio Hamersley State Agreement, clause 10(2)(f), the Rio Robe State Agreement, clause 9(2)(f) and the BHPB Goldsworthy

State Agreement, clause 9(2)(f), although the provisions of the BHPB Goldsworthy State Agreement differ slightly, although not materially, from this provision))

- 2.7 In 1987 BHPB and its joint venture partners entered into a Rail Transport Agreement (RTA) with the State of Western Australia. Under the RTA, BHPB (and its joint venture partners):

“... shall as and when required carry the iron ore products of a third party over the third party railway system [] in accordance with detailed contractual arrangements, consistent with the provisions of this Schedule and with such additional provisions as the parties may agree, to be negotiated between [BHPB] and the third party.”

The RTA provides that when agreement cannot be reached on the detailed contractual arrangements of haulage, the arrangements will be determined by an independent expert, whose determination is to be final and binding.

- 2.8 Therefore, third party access to the Mt Newman, Goldsworthy, Hamersley and Robe railways, and the port facilities associated therewith, is not governed by the WARAR. Instead third party access to that infrastructure is governed by the relevant State Agreements and the NAR.

The TPI State Agreement

Railway

- 2.9 The TPI State Agreement covers the railway linking Fortescue Metals Group (FMG) Cloud Break and Christmas Creek mine operations to FMG’s port facilities at Port Hedland. The TPI State Agreement provides that the WARAR applies to the FMG railway and, as a result of the WARAR being a certified access regime under Part 111A, the WARAR is the exclusive access regime covering the FMG railway.
- 2.10 Further, the TPI State Agreement imposes additional obligations on FMG concerning access, such as a requirement to use all reasonable endeavours to promote access to and attract customers for, the FMG railway (clause 16(7) of the TPI State Agreement).

Port

- 2.11 Under the TPI State Agreement FMG is under an obligation to maintain an access regime for access to its “Port Facilities” and any “Additional Infrastructure” (clause 18(2) of the TPI State Agreement). The Minister for State Development approved FMG’s Port Access regime in July 2009. In addition, FMG must use reasonable endeavours to promote access to, and attract customers for, its “Port Facilities” and “Additional Infrastructure” (clause 18(7) of the TPI State Agreement).
- 2.12 The TPI Port Access Regime regulates third party access to the “Covered Services” at FMG’s Port Facilities under the TPI State Agreement. FMG is also under an obligation, provided such investment can be justified commercially, to invest in additional infrastructure to

expand the capacity of its “Port Facilities” and “Additional Infrastructure” to accommodate an increase in the demand for access.

The Roy Hill State Agreement

Rail

- 2.13 Under the Roy Hill State Agreement, the Roy Hill railway is subject to the WARAR until the ACCC accepts an undertaking from Roy Hill for the provision of haulage services under Part 111A. Although clause 15(6)(b) of the Roy Hill State Agreement reflects Roy Hill’s initial intention to provide a written undertaking to the ACCC for the provision of haulage services over the Roy Hill railway and to obtain the ACCC’s acceptance of the undertaking by the Railway Operation Date (which date is currently expected to be in Q3 2015), Roy Hill is currently assessing whether it should proceed with the written undertaking, to be agreed with the ACCC, or allow third party access to the Roy Hill Railway to continue to be governed by the WARAR.

Port

- 2.14 The Roy Hill State Agreement does not impose an obligation on RHI to provide third party access to its port facilities. These obligations instead are imposed on RHI by the lease and licence entered into by RHI with the Port Hedland Port Authority (PHPA Lease and Licence), which is registered at Landgate.
- 2.15 The effect of the PHPA Lease and Licence is that the WARAR will apply to the Port Railway (which is that part of the railway within the Port) until the ACCC approves an undertaking under Part 111 A of the NAR. In relation to the Port Facilities, the PHPA Lease and Licence provides only that:

“[RHI] agrees to provide to third parties services available by use of the Port Facilities for the export of Iron Ore Products during ramp up of the Project to full production. Such agreement must be on reasonable commercial terms provided that the provision of those services does not adversely affect the Lessee’s use of the Port Railway and the Port Facilities.” (clause 13.10 of the PHPA Lease and Licence)

Conclusion

- 2.16 When construction of the Roy Hill project is complete, there will be four privately owned rail systems and port facilities in the Pilbara region of Western Australia. They will be governed by separate and different third party access regimes. There is no apparent reason (economic or otherwise) why the four railways and port facilities should be governed by different access regimes. The fact that different regimes apply to different rail and port facilities is:
- (a) discriminatory, in that the regimes impose different obligations on owners and access seekers. For example, Roy Hill is required to prepare a standard rail access agreement (under clause 15(8) (a) of the Roy Hill State Agreement) and the segregation arrangements, the train management guidelines, the statement of

policy, costing principles , and the overpayment rules specified in clause 15(8)(b) of the Roy Hill State Agreement. These documents are to be made available to access seekers. It is a significant cost burden imposed on Roy Hill not only to produce these documents but also to implement the procedures set out in the documents (such as the segregation arrangements). It has been estimated that the costs of producing the documents so that they can be made available to access seekers will be in excess of \$250,000. There will be significant additional ongoing compliance costs. Neither BHPB nor Rio Tinto is required to produce these documents under their respective State Agreements.

- (b) inefficient, in that any potential access seeker would be required to assess the practicalities of making an application under each regime before deciding which regime or regimes to make application under.

Roy Hill is not aware of any reason why the same regime should not apply to all four railway systems and port facilities.

3 Second Submission

Submission - Part 111A should NOT apply to the four privately owned railways and port facilities in the Pilbara

- 3.1 The NAR is a regulatory framework by which third parties may seek access to infrastructure owned and operated by others. The NAR aims to provide an economically efficient structure for the operation of, use of, and investment in infrastructure. The genesis of the NAR was the Hilmer Committee report which in 1992 proposed the establishment of a new national legal regime under which businesses would be given the right of access to essential facilities when the provision of such a right satisfies certain public interest criteria. However the Hilmer Committee was conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another.
- 3.2 Access regulation is intended to address an enduring lack of effective competition, due to a natural monopoly in markets for infrastructure services where access is required for third parties to compete effectively in dependent markets. Where an infrastructure service provider is not constrained from using market power, denial of access or monopoly pricing can lead to inefficiencies which impose costs on the community. Access regulation is intended to address these allocative inefficiencies and facilitate lower prices for consumers.
- 3.3 The benefits of access regulation however must outweigh the costs of that regulation. The benefits are more likely to outweigh the costs where there is a monopoly provider of infrastructure services. Competition between service providers will generally be preferable to access regulation in markets where two or more service providers are able to provide the same service (or an effective substitute service). However a monopoly position in a market is not sufficient by itself to warrant access regulation, if there are close substitutes.

The Pilbara Experience

Benefits of Access Regulation

3.4 Since the introduction of the NAR, no third party has obtained access to a privately owned Pilbara railway through the use of Part 111A of the NAR. Only one railway has ever been declared under Part 111A - BHPB's Goldsworthy railway. Although that declaration has remained in force since 2008, no party has ever sought to commence negotiations for an access arrangement with BHPB. The only other applications to have privately owned Pilbara railways "declared" have not been successful.

3.5 BHPB has said of the declaration of the Goldsworthy iron ore railway:

"Certainly in BHP Billiton's experience, the declaration of the Goldsworthy iron ore railway in 2008 has not achieved any public benefit. One of the key bases on which that railway was declared was the finding that access would promote a material increase in competition in a rail haulage market within "a corridor around" the Goldsworthy railway. The Goldsworthy railway has now been declared for six years. To date no party has sought access to the Goldsworthy railway, and BHP Billiton is not aware of anything to suggest that the Goldsworthy declaration has resulted in any public benefit. At best the experience suggests that benefits from that declaration are negligible, and clearly insufficient to outweigh the public and private time and resources involved in the declaration process in that case."
(paragraph 6.24 of BHPB's submission to the Competition Policy Review Panel June 2014)

3.6 An argument for the retention of Part 111A is that the threat of a declaration under Part 111A constrains the abuse of market power. An owner of infrastructure may be encouraged to provide access on reasonable and fair terms if the owner considers that the declaration of a service is possible. That argument is however not applicable to Pilbara rail and port infrastructure, because no third party has successfully negotiated a third party access arrangement with the owner of infrastructure in the Pilbara. Therefore, it cannot be said that an owner of infrastructure has been encouraged to provide third party access as a consequence of the existence of Part 111A, as it has never happened.

3.7 In relation to the privately owned Pilbara railways and the privately owned Pilbara port facilities, the NAR has not delivered any benefits to third party access seekers whatsoever. No access has ever been provided through the mechanics of Part 111A, and the prospect of a declaration under Part 111A has not sufficiently encouraged any owner of infrastructure to provide access to a third party.

Costs of Access Regulation

3.8 In contrast, the cost burden imposed on parties by the NAR has been significant.

3.9 The Productivity Commission (at page 215 of the Productivity Inquiry Commission Report No 66, 25 October 2013) has accepted that the NAR imposed a wide range of additional cost burdens:

- (a) the NAR may result in economic distortions including adverse effects on investment caused by regulatory risk, regulatory error and asymmetric truncation;
- (b) costs incurred by the NCC, ACCC and other Government bodies in administering and refining the NAR;

- (c) administrative and compliance costs for businesses associated with applying for, or participating in the process of, a recommendation or decision under the Regime, and ongoing costs of negotiating and meeting the requirements of access regulation, such as production costs from co-ordinating multiple users of infrastructure; and
- (d) strategic behaviour such as lobbying may also impose costs for the parties involved.

3.10 BHP has stated (at paragraph 6.16 of its submission to the Competition Policy Review) as follows:

“For example, between 2004 and 2012 BHP Billiton devoted substantial resources to responding to FMG’s applications for declaration of the Pilbara iron ore railways. Only BHP Billiton’s Goldsworthy railway was ultimately declared. The overall cost of all applications and associated court proceedings was in the order of hundreds of millions of dollars.”

Conclusion

- 3.11 Since 1996 the NAR has delivered no benefits whatsoever to third parties who have sought, or might have sought, access to Pilbara infrastructure assets. In contrast, the costs incurred by owners in seeking to comply with the NAR, by access seekers attempting to take advantage of the rights conferred on access seekers by the NAR, or by the NCC and other Government bodies in administering the NAR, have been significant. Accordingly Roy Hill is of the view that the NAR should not continue to apply to any privately owned railway or port facility in the Pilbara region of Western Australia.
- 3.12 If the Committee accepts this submission that the NAR should not apply to the four privately owned railways and port facilities in the Pilbara, but nevertheless is of the view that an access regime of some type should apply to those railways and ports, Roy Hill submits that the WARAR would be the appropriate regime to apply to the railways. Although it is not within the scope of the Committee’s terms of reference, Roy Hill would submit that changes to the WARAR would make that regime more efficient and equitable. Nevertheless, in contrast to the NAR (which, in connection with the railway and port facilities in the Pilbara region, has not delivered any benefits to access seekers whatsoever) the WARAR has delivered some benefit (albeit perhaps minor) to access seekers – namely, Fortescue has entered into a rail haulage agreement with the BC Iron joint venture entity, and Brockman continues to pursue its rights to access Fortescue’s railway in accordance with the legal rights conferred on Brockman by the WARAR.

Roy Hill Infrastructure Pty Ltd

19 November 2014