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# An Excess of Access? The Uses and Abuses of Part IIIA of the Trade Practices Act in the Resources Sector

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## SUMMARY

*The legislative access regime in Pt IIIA of the Trade Practices Act was one of the most significant reforms to Australia's competition laws and system of regulation to result from the Hilmer Inquiry in 1993 and took effect in 1995. It established for the first time in Australia a legal regime to facilitate competitive access to the services of certain facilities of national significance.*

*Part IIIA is based on the notions that competition, efficiency and public interest are increased by overriding the exclusive rights of the owners of monopoly or bottleneck essential facilities to determine the terms of the conditions on which they will supply their services. In Pt IIIA the focus is upon facilities of national significance that it would be uneconomic to duplicate or replicate and that supply services, access to which would promote competition in another market.*

*The operation and effect of Pt IIIA is of particular relevance to, and significance for, the Australian resources sector. The resources sector utilises many facilities of national significance and access arrangements have been in issue a number of times between participants in that sector, especially in relation to utility industries like gas and electricity production and distribution.*

*Whilst there have been few successful applications of Pt IIIA to private resources infrastructure, there is reason to believe that they will become more common, and have greater prospects of success, in future.*

## INTRODUCTION

"Part IIIA is based on the notion that competition, efficiency and public interest are increased by overriding the exclusive rights of the owners of "monopoly" facilities to determine the terms of the conditions on which they

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> will supply their services. In Part IIIA the focus is upon facilities of national significance that it would be uneconomic to duplicate or replicate and that supply services, access to which would promote competition in another market."[1]

Part IIIA of the Trade Practices Act was one of the most significant reforms to Australia's competition laws and system of regulation to result from the Hilmer Inquiry in 1993.[2] Part IIIA was inserted into the Act and took effect in 1995.[3] Part IIIA and established for the first time in Australia a legal regime to facilitate competitive access to the services of certain facilities of national significance. The operation and effect of Pt IIIA is of particular relevance to, and significance for, the Australian resources sector. The resources sector utilises many facilities of national significance and access arrangements have been in issue a number of times between participants in that sector, especially in relation to utility industries like gas and electricity production and distribution.

The need for legislated access arrangements was also perceived following the privatisation and deregulation of many government owned or controlled industries during the 1990s. The privatisation and deregulation of former utility industries such as electricity, gas and water distribution, long distance rail transport, ports, airports and telecommunications required mandatory access arrangements. Mandatory access was designed to stimulate and facilitate upstream and downstream competition where previously government monopolies had rendered such competition difficult or impossible. These principles were enshrined in the Competition Principles Agreement and the Agreement to Implement the National Policy and Related Reforms entered into between the Commonwealth, State and Territory governments in April 1995, shortly before Pt IIIA came into effect.

It was realised in 1995 that access arrangements could promote competition not only in former government monopoly industries but also in other industries which had the characteristics of, or a tendency towards, natural monopoly, or where there were bottlenecks is essential in service provision. Natural monopolies occur where it is unlikely that competition on the supply side will lead to a more efficient or productive distribution of the relevant goods or services supplied. A good example is a railway line with excess capacity between a remote mining region and a sea port. Bottlenecks arise where it is impossible, for geographic or other reasons, to duplicate an essential facility, such as an airport (Sydney airport being the prime example in Australia).

Often natural monopolies and bottlenecks coincide. In cases of natural monopoly and bottlenecks, it is essential that mandatory access arrangements be implemented so that the maximum possibility of upstream and downstream competition arising out of shared use of the facility on commercial terms can be stimulated. Otherwise there is a risk that the natural monopoly or the bottleneck might cause or contribute to further inefficiencies (such as capacity constraints,

[1] *Re Australian Union of Students* [1997] ATPR 41-573.
[2] National Competition Policy Review 1993.
[3] *Competition Policy Reform Act* 1994.

under-utilisation or monopolisation) in markets upstream or downstream of the monopoly or bottleneck facility.

It is noteworthy that the majority of access arrangements which have been put in place, whether by industry codes (such as the national electricity and gas codes) or by individual access arrangements, involve what may loosely be described as transport infrastructure. Access has generally been sought and granted to the services provided by facilities which were established for the transmission of electricity, gas pipeline distribution, access to airport, rail and port infrastructures and access to telecommunications networks in that very specialised sector. These services have historically exhibited both monopoly and bottleneck characteristics and legislative regimes have been required to make them accessible to upstream and downstream competitors.

For example, in the *Duke Eastern Gas Pipeline* case,[4] the Australian Competition Tribunal decided that the service provided by means of the Eastern Gas pipeline was a haulage service for the transport of gas between one point on the pipeline to another. The Tribunal said: "The question of what constitutes the services provided a pipeline is fundamentally a mixed question of fact and the proper construction of [the legislative definitions], rather than a matter of economic analysis. Every haulage service will of necessity be from one point to another. That is the commercial service actually provided by a pipeline operator to its customers"[5]. The Tribunal also noted: "the service may be of different uses to the producers in the origin market or to the customers in the destination market, but it is the same service. No market analysis is necessary or appropriate in the description of the services provided by the pipeline. However, questions of market definition and market power do arise in the context of criterion (a)" (ie of s 44G(2) – see below).

## THE LEGISLATIVE SCHEME OF PART IIIA

The scheme of Pt IIIA of the *Trade Practices Act* is based upon the declaration of a "service" provided by means of a "facility". Section 44F(1) of the Act provides that:

> "The designated Minister, traditionally [the Treasurer or his Parliamentary Secretary], or any other person, may make a written application to the Council asking the [National Competition] Council to recommend under section 44G that a particular service be declared."

The National Competition Council (NCC) is required to inform the provider of the service of its receipt of such an application (unless the provider is the applicant): s 44F(2)(a). It is then required to recommend to the Treasurer either that the service be declared or not: s 44F(2)(b).

4 [2001] A Comp T 2.
5 *Duke EGP*, ibid, para 69.

Section 44G limits the National Competition Council's power to recommend the declaration of a service. Section 44G(1) provides that the Council cannot recommend declaration of a service that is the subject of an access undertaking under s 44ZZA. Section 44ZZA provides that a person who is, or expects to be, a provider of a service may give a written undertaking to the Australian Competition and Consumer Commission (the ACCC) in connection with the provision of access to the service – see further below.

## CRITERIA FOR DECLARATION

Section 44G(2) also denies the Council power to recommend declaration of a service unless it is satisfied of the existence of all the matters set out in s 44G(2). Those matters are:

(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
(b) that it would be uneconomical for anyone to develop another facility to provide the service;
(c) that the facility is of national significance, having regard to:
    (i) the size of the facility; or
    (ii) the importance of the facility to constitutional trade or commerce; or
    (iii) the importance of the facility to the national economy;
(d) that access to the service can be provided without undue risk to human health and safety;
(e) that access to the service is not already the subject of an effective access regime;
(f) that access (or increased access) to the service would not be contrary to the public interest.

The Council must also consider whether it would be economical for anyone to develop another facility that could provide part of the service: s 44F(4).

When the Council makes a declaration recommendation, the Treasurer is also required (like the Council) either to declare the service or decide not to declare it: s 44H(1). The Treasurer's decision is constrained by exactly the same criteria as constrain the Council: s 44H(3) and (4). Provision is made for review of such decisions of the Treasurer by the Australian Competition Tribunal: s 44K, s 44L, s 44O.

Declaration is intended to be the first step towards an effective access regime. If a declaration in respect of a service has been made by the Treasurer and if a third party is unable to agree with the provider on one or more aspects of access to the declared service, either the provider or the third party may notify the ACCC in writing that an access dispute exists: s 44S.

## ARBITRATION OF ACCESS DISPUTES

Provision is also made in Pt IIIA for the arbitration by the ACCC of access disputes. The parties to such an arbitration are, by virtue of s 44U, the provider, the third party, and "any other person who applies in writing to be made a party and is accepted by the Commission as having a sufficient interest". Unless it terminates an arbitration under s 44Y, the Commission must make a written determination on access by the third party to the service: s 44V(1).

Section 44V(2) and (3) provides:

"(2) The determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:
  (a) require the provider to provide access to the service by the third party;
  (b) require the third party to accept, and pay for, access to the service;
  (c) specify the terms and conditions of the third party's access to the service;
  (d) require the provider to extend the facility;
  (e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

(3) The determination does not have to require the provider to provide access to the service by the third party."

Section 44W(1) provides:

"(1) The Commission must not make a determination that would have any of the following effects:
  (a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified;
  (b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements;
  (c) depriving any person of a protected contractual right;
  (d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;
  (e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility."

The matters that the Commission must take into account in an arbitration are set out in s 44X(I) of the Act. They are:

"(a) the legitimate business interests of the provider, and the provider's investment in the facility;
(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
(c) the interests of all persons who have rights to use the service;

(d) the direct costs of providing access to the service;
(e) the value to the provider of extensions whose cost is borne by someone else;
(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
(g) the economically efficient operation of the facility."

There is provision (in s 44ZP) for review by the Tribunal of the ACCC's award in an access arbitration. There is also provision (in s 44ZR) for appeal by a party to an arbitration, from the decision of the Tribunal under s 44ZP to the Federal Court, but only on a question of law.

Section 44B defines certain key words and expressions for the purposes of Pt IIIA.

"These include: 'provider' which, in relation to a service, means the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service;
and
'service' means a service provided by means of a facility and includes:
(a) the use of an infrastructure facility such as a road or railway line;
(b) handling or transporting things such as goods or people;
(c) a communications service or similar service;
but does not include:
(d) the supply of goods; or
(e) the use of intellectual property; or
(f) the use of a production process;
except to the extent that it is an integral but subsidiary part of the service."

Also "third party", in relation to a service, means a person who wants access to the service or wants a change to some aspect of the person's existing access to the service.

As can be seen from the provisions set out above, Pt IIIA gives the ACCC very significant administrative, regulatory and quasi-judicial roles in relation to access matters. In particular, the ACCC must arbitrate disputes concerning access to facilities which are declared to be essential facilities under Pt IIIA. The ACCC also has a role in the assessment of undertakings given by owners or operators of essential facilities. The significance of an access undertaking is that, once such an undertaking has been accepted by the ACCC, the service in question can no longer be declared. Access undertakings are addressed further below.

## PART IIIA IN THE RESOURCES SECTOR

It is a remarkable fact that in the nearly 10 years since Pt IIIA of the *Trade Practices Act* was first enacted, there has been relatively little activity under Pt IIIA in any sectors of the Australian economy outside the major transport infrastructure and utility sectors. In the field of private natural resources facilities,

despite the fact that a great deal of nationally significant infrastructure exists, there have been very few applications, and as yet no successful applications, for access to private facilities of national significance. It is possible that this phenomenon has something to do with the decision of the Federal Court of Australia in *Hamersley Iron Pty Ltd v National Competition Council & Ors*.[6]

## THE HAMERSLEY IRON CASE

*Hamersley Iron* was the case in which the Pilbara iron ore miner, Robe River Iron Associates made an application to the National Competition Council under s 44F(1) of the *Trade Practices Act* asking the NCC to recommend to the Commonwealth Treasurer that the Pilbara rail track service owned and operated by Hamersley Iron Pty Ltd (a Rio Tinto subsidiary) was declared under Pt IIIA of the *Trade Practices Act*. The application for declaration included all of the infrastructure of the Hamersley rail track service, including the lines, signals, controls, and maintenance and protection systems, but did not include any of Hamersley's own locomotives, rolling stock or operational personnel.

Hamersley Iron Pty Ltd used all those existing rail track services in its Pilbara iron ore mining operations in order to transport ore from its mines and to make up batches of ores of differing grades, composition and quantities from the several different iron ore mines which Hamersley operated in the Pilbara. Hamersley submitted that each of its mines in the Pilbara operated, with the assistance of the Hamersley rail track service, as if it were an individual pit within a larger mining enterprise. Hamersley therefore submitted (crucially, in the end result of the case) that each step in its mining, transportation and delivery operation, including the use of the rail track service for the carriage of iron ore, was done in accordance with a "recipe" for its final iron ore product and was part of an integrated operation designed to make the final iron ore product available for export. The rail track service was said to be an integral part of a process of blending and stockpiling that final export grade product at its Dampier port facility at the end of all of Hamersley's mining, transportation and treatment operations, prior to the exportation itself.

In the *Hamersley Iron* case, Hamersley sought declarations from the Federal Court that the rail track service was not a "service" within the meaning of s 44B of the Act and therefore the National Competition Council did not have power to accept or to consider an application for access to the service by Robe, or to make any declaration pursuant to s 44F(2)(b) of the Act. Hamersley also sought a declaration that it had a contractual right under its original concession agreement with the State of Western Australia to sole and exclusive possession of the rail track service. This right was submitted to be a "protected contractual right" under s 44W(5) of the Act. The latter declaration was not granted on the basis that the question became hypothetical once the former declaration was granted in Hamersley's favour.

[6] (1999) 164 ALR 203.

## THE MEANING OF "SERVICE" IN PART IIIA

A critical question in the *Hamersley Iron* case was the proper construction and effect of the definition of the word "service" in s 44B of the Act. As noted earlier, "service" is defined to mean "a service provided by means of a facility" and includes the use of an infrastructure facility (such as a road or railway line), handling or transporting things (such as goods or people), and a communications or similar service.

But "service" does not include the supply of goods, the use of intellectual property or the use of a production process except to the extent that "it" (ie, the supply of goods or intellectual property, or of use of a production process) is an "integral but subsidiary part of the service."

The intended meaning of the last part of the definition of "service" is quite extraordinarily and unnecessarily obscure. The obscurity arises from the generality of the subject matter indicated by the definition, which employs such broad concepts as "the use of an infrastructure facility", "handling or transporting things", "a communications service or similar service", "the supply of goods", "the use of intellectual property" and "the use of a production process". The definition is rendered more obscure by the closing words of the definition, which contain an exception to an exception and also depend upon the elusive concept of a supply of goods or a use of intellectual property or a production process that is "an integral but subsidiary part of the service". These drafting obscurities are compounded when it is appreciated that the "service" itself is the very thing being defined.

## THE REASONING IN HAMERSLEY IRON

The members of the Robe River joint venture included the major resources companies North Limited, Mitsui, Nippon Steel and Sumitomo. They operated an existing mine at Pannawonica, which was linked by railway to their port and processing facilities at Cape Lambert on the Pilbara coast. Robe was at that time planning to develop a new mine at West Angelas, in the vicinity of Hamersley's iron ore mine at Yandicoogina. A smaller company, Hope Downs Iron Ore, held the rights to an undeveloped iron ore deposit at Hope Downs, also in the vicinity of Hamersley's Yandicoogina mine. Yandicoogina is about 65 kms north east of West Angelas and Hope Downs had also approached Hamersley seeking access to its railway for the purpose of transporting ore from the Hope Downs proposed mine to the port at Dampier.

The service to which Robe sought access was the bulk iron ore rail track transportation service provided by the Hamersley Rail infrastructure facility. Robe did not seek access to any rail haulage service which might be available in relation to that facility. In summary, Robe sought the NCC's recommendation that it have access to the rail track service provided by means of Hamersley's facilities,

including the lines, signalling, control, maintenance and protection systems, but not including any locomotives, rolling stock or operational personnel. Robe intended to use its own rolling stock and other facilities to carry its iron ore from its mine at West Angelas to its processing facilities at Port Walcott on the Pilbara coast.

The case turned essentially upon the meaning of the word "service" in s 44B of the Act and, in particular, the exception relating to the "use of a production process, except to the extent that it is an integral but subsidiary part of the service". The evidence showed that Hamersley's mining and production processes involved the winning of the ore, the crushing, screening and blending of the ore, transporting the ore to the port and then stockpiling and further blending the ore at the port to achieve the export product grade necessary for exportation and the final re-screening of the ore prior to export.

Kenny J identified the critical question in the case as whether the Hamersley rail track service was or was not a "service" within the meaning of s 44B of the Act. This question was submitted by Hamersley to depend upon the subsidiary question whether the service involving the use of the Hamersley railway line involved the use of a production process.

Kenny J concluded that the expression "production process" ordinarily meant "the creation or manufacture by a series of operations of some marketable commodity" (at [32]). As Kenny J described it, "the expression 'production process' in the definition of 'service' in s 44B of the Act means, in my view, a series of operations by which a marketable commodity is created or manufactured. Hamersley's production process in the Pilbara extends, on this view, from its commencement of mining operations at the mines to the completion of the product that it sells, namely export product. There was no evidence to show that Hamersley produces a marketable commodity at an earlier stage".

The critical question, as Kenny J observed, was whether the service in respect of which Robe sought a declaration recommendation was, or involved the use of, Hamersley's production process. Robe submitted that the only service to which it sought access was the use of the Hamersley main line freight haulage system and its associated infrastructure, other than Hamersley's locomotives and carriages. It did not seek access to any other service constituted by (or involving) the transportation of ore, or its blending or assembling into stockpiles at the port. Robe submitted therefore that the service that it sought, by obtaining access to Hamersley's railway line, was different from any service provided by means of that line to Hamersley itself. The service was different because Robe would be using the line necessarily at different times to carry its own rolling stock and locomotives under the control of its own employees and to transport its own iron ore from its own mine to its own port. Robe submitted that it therefore followed that Hamersley's existing and future concurrent (but separate) use of the railway as an integral part of its production process was irrelevant. Kenny J rejected that submission.

Kenny J concluded that the definition of "service" in s 44B of the Act made clear that a "service" was something separate and distinct from a "facility" (following *Rail Access Corp v New South Wales Minerals Council Ltd*[7]). Kenny J reasoned that, even though one facility may provide a number of different kinds of service or different instances or occasions of the same kind of service, it did not follow that Robe sought access to a service that was relevantly different in kind to that provided to Hamersley by means of Hamersley's railway line. The service that Robe sought access to was the use of Hamersley's railway line and its associated infrastructure. Kenny J found that exactly the same service was provided by the rail track infrastructure to Hamersley as was provided to Robe and therefore there was no material difference in the nature of the service to which access was sought by Robe. This, of course, ignores altogether the fact that what Robe sought was access to the unutilised excess capacity of the Hamersley railway infrastructure, necessarily at times other than those during which Hamersley was using the line and its associated facilities.

Kenny J considered that the ends or uses to which Hamersley put the railway line were relevant to the question whether the service which Robe sought was, or involved the use of, a production process. Accordingly the critical question in the case was whether the use by Robe of the railway line and its associated infrastructure owned and operated by Hamersley would involve the use of a production process utilised by Hamersley to manufacture its export product. Robe expressly disavowed reliance upon the exception within the exception to the definition ie that the use of the production process was "integral but subsidiary" in the provision of the service. This was because Robe did not concede that the rail track facility was nay part of Hamersley's production process.

Kenny J concluded that Hamersley's use of the line and its associated infrastructure was but one in a series of operations that resulted in the creation of the Hamersley iron ore export product. The use of the rail line facilities was not merely to convey ore by rail from the mines to the port, but part of a process used in order to make up the recipe that Hamersley had formulated for the creation of a particular batch of its export product. That recipe required the line to be made available for Hamersley's use. Accordingly, the judge concluded, Hamersley's use of the railway line was an integral, indeed an essential, operation in Hamersley's production process. Hamersley's use of the railway line was an operation upon which all other operations in Hamersley's business depended for the creation of its export product.

Kenny J was fortified in her conclusions by reference to the 1993 Hilmer Report on Competition Reform. The effect of that report was found to be that, among other things, the supply of goods, the use of intellectual property and the use of a production process were all expressly excluded from Pt IIIA by the terms of the legislation (ie by s 44B) rather than by administrative discretion (except to the extent that any of those services was an "integral but subsidiary part" of another service provided by means of a facility). Kenny J concluded that the

[7] (1998) 158 ALR 323 at 330.

purpose of the exclusions was to permit appropriate utilisation of infrastructure by third parties and at the same time protect the viability of investments made by those who had invested in the relevant processes of production.

However, it is important to bear in mind that the Competition Principles Agreement (cl 6(4)(j)) states the principle that an owner may be required to extend or permit the extension of a facility used to provide a service where that is necessary. The Agreement also states some conditions applicable to extensions, including that the extension is technically and economically feasible is consistent with the safe and reliable operation of the facility; (the owner's legitimate business interests in the facility being protected); and that the terms of access for the third party take; into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension. The ACCC has stated that it regards as reasonable the desire of any service provider to recoup the cost of any extension, whether through recurrent user charges or by seeking direct payment for the extension from the access seeker.

Kenny J concluded that it would not defeat the purpose of Pt IIIA to construe the exemption in the definition of service as extending to an operation which was both integral and essential (or non-subsidiary) to a production process, as the Hilmer Report had itself envisaged. In other words, reliance on the "exception to the exception" in the definition of "service" would not have assisted Robe in the *Hamersley Iron* case.

## SUBSEQUENT EVENTS

The Hamersley Iron railway access litigation had an unusual denouement. Hope Downs Management Services Pty Ltd (which had been added to the Hamersley Iron litigation upon its own motion) and the NCC both appealed to the Full Federal Court from Kenny J's judgment. Four days before the appeal came on for hearing, Robe River sent a letter to the NCC giving notice pursuant to s 44F(5) of the *Trade Practices Act* that its application for a declaration recommendation had been withdrawn. Hamersley thereupon submitted to the Full Federal Court that it should not proceed to hear the appeal, which should be dismissed because the issue was now moot. Hope Downs submitted that the appeal should continue because it had a direct interest in the outcome of the litigation as a potential applicant for access to the rail service if the railway became a declared service. It was also concerned that since, it had been added as a party to the litigation, there was a risk that the disposition of the matter by Kenny J's judgment and the dismissal of the appeal might give rise to an issue estoppel against it under the res judicata principle.

Hamersley thereupon offered a number of undertakings to the court, including that it would not, in relation to any application made in future by Hope Downs or a related corporation under Pt IIIA of the *Trade Practices Act*, contend that Kenny J's judgment below gave rise to any issue estoppel or res judicata as against

either Hope Downs or the NCC and that it would pay the costs of Hope Downs and the NCC. Despite the fact that the NCC urged the Full Federal Court (Black CJ, Lee and Goldberg JJ) to continue on and hear the appeals because of the important issues of principle which were said to be raised by the appeal, the Full Federal Court ordered that the appeals be stayed because it concluded that there was nothing to be gained from the appeals proceeding. Accordingly the appeals were forever stayed.[8]

## THE FORTESCUE METALS APPLICATION

After the *Hamersley Iron* case concluded, access to private resources facilities infrastructure was stilled for some time. However, just last month a new application was made.

On 15 June 2004, the NCC received an application under Pt IIIA from Fortescue Metals Group Ltd (FMG) for declaration of a service provided through the use of a private rail facility.

The service the application seeks to have declared is described as the use of the facility, being:

- that part of the Mt Newman Railway line which runs from a rail siding that will be constructed near Mindy Mindy in the Pilbara to port facilities at Nelson Point in Port Hedland, and is approximately 295 kilometres long; and
- that part of the Goldsworthy Railway line that runs from where it crosses the Mt Newman Railway line to port facilities at Finucane Island in Port Hedland, and is approximately 17 kilometres long.

The Service Provider is identified in the Application as BHP Billiton Minerals Pty Ltd, Mitsui-Itouchu Iron Pty Ltd and CI Minerals Australia Pty Ltd (trading as joint-venturers) and BHP Billiton Iron Ore Pty Ltd.

The NCC will consider the application through a public process, due to commence shortly. The decision maker for this application will be the Parliamentary Secretary to the Treasurer, Mr Ross Cameron MP.

The railway lines to which Fortescue Metals seeks access are the Goldsworthy railway line, which is approximately 210 kms in overall length and is currently used to carry iron ore from mines in Yarrie to Port Hedland and the Mt Newman railway line, which is approximately 425 kms in length and is currently used to carry iron ore from mines in Mt Newman and Yandi to Port Hedland. Fortescue Metals is a publicly listed company with a focus in the Australian iron ore industry and owns iron ore resources and is developing a processing plant at Mt Nichols, as well as a railway from Mt Nichols to FMG's planned shipment facilities at Port Hedland.

[8] See *Hope Downs Management Services Pty Ltd v Hamersley Iron Pty Ltd & Ors* [2000] ATPR 41-733 at 40,504.

FMG has a number of projects in the Pilbara region and acquired tenements in the Mt Nichols area in the Pilbara in 2001. It is completing a drilling program to delineate iron ore reserves in that area. FMG holds tenement interests covering more than 12,000 sq kms and presently estimates the resources on these tenements as likely to exceed 3 billion tonnes. FMG is also an equal partner with Consolidated Minerals Limited in an incorporated joint venture called Pilbara Iron Ore Pty Ltd. The joint venture is nearing the completion of its resource identification at Mindy Mindy. The access application is made by FMG on its own behalf and its capacity as a joint venture shareholder and the operations manager of Pilbara Iron Ore Pty Ltd.

FMG has applied to have two parts of the relevant railway lines declared under Pt IIIA of the Act, namely that part of the Mt Newman railway line running from a rail siding to be constructed near Mindy Mindy in the Pilbara to port facilities at Nelson Point in Port Hedland (a distance of approximately 295 kms) and that part of the Goldsworthy railway line from the point where it crosses the Mt Newman railway line to port facilities at Finucane Island in Port Hedland (a distance of approximately 17 kms). The services to which access is sought include the facility's associated infrastructure, including railway tracks, structures over or under the rail tracks, bridges, passing loops, control signalling and communication systems, sidings and refuges, maintenance and protection system and roads and other facilities providing access to the railway. FMG does not seek access to any rail haulage service and so the application is not directed to the provider's locomotives or its rolling stock used in relation to the facility.

FMG is well aware of the potentially problematic decision in the *Hamersley Iron* case. In its application to the NCC, FMG states that its understanding is that the *Hamersley Iron* case turned upon the fact that the train loads from the different Hamersley Iron mines carrying different grades of ore were timed to arrive at the Dampier port in a planned sequence to facilitate stockpiling and blending operations at the port in order to produce an export product ready for loading onto vessels. FMG draws particular attention in its application to comments critical of the decision in *Hamersley Iron* published in the *Trade Practices Law Journal* [9]and in the *Australian Law Journal*.[10]

FMG is careful to assert that it is not seeking access to the provider's production process. "Instead FMG confirms that it is seeking access to the service provided by the facility to use FMG's own rolling stock to transport its own iron ore and its own iron ore products, as is expressly permitted under s 44B(a) of the Act."

FMG draws particular attention to the statement in the NCC's publication[11] in which the NCC stated: "the Council considers that the finding in the Hamersley

[9] (2000) 8 TPLJ 40 and 206.

[10] Gamersfelder "Why the Decision in *Hamersley Iron* May Not Be Good Law" (2000) 74 ALJ 621.

[11] "The National Access Regime: A Guide to Part IIIA of the Trade Practices Act 1974, Part B: Declaration" (December 2002).

Iron decision that Hamersley's use of its railway line is a part of its production process is a finding of fact specific to the circumstances of that decision. Further, the Council considers that only in very few instances would the facts support a conclusion that a service provided by means of an infrastructure facility (such as a railway) is a part of a facility owner's production process". FMG also submits that its use and the provider's use of the facility are quite independent and the declaration of the service would promote the objectives of Pt IIIA of the Act.

FMG is careful to observe that the service providers in respect of the Mt Newman and Goldsworthy railway lines do not run their operations in a similar manner to the way in which Hamersley Iron ran its operations. Instead the service providers sell 10 distinct iron ore products, many of which are sourced from a single mine or mining area. These include various ore grades in lump or fines states from the different mines they operate, some of which are blended at Port Hedland and others of which are shipped directly from the various mines for transhipment at the port.

FMG also drew attention to the recent decision of the Full Court of the Supreme Court of Western Australia in *Hancock Prospecting Pty Ltd & Ors v BHP Minerals Pty Ltd & Ors.*[12] In that case the court observed that the Iron Ore (Mt Newman) Agreement required the Mt Newman Iron Ore Company Limited (a predecessor of the owners of the present railway) to negotiate and enter into contracts with third parties to carry the iron ore products of third parties if operating a mine in the vicinity.

FMG submits that access to the service would promote competition in six separate markets, namely:

(a) iron ore production within Australia and other countries;
(b) production, development and exploitation of other minerals and products in the Pilbara region;
(c) ownership, development and exploitation of iron ore tenements;
(d) the haulage of iron ore and other minerals from various mine sites in the Pilbara;
(e) sale of iron ore and other minerals, both as sold at the mine and also as sold at export terminals; and
(f) export of the products from Port Hedland by rail, road and sea.

FMG describes the rail service as "a classic example of a bottleneck facility, in that access to the service is necessary to any operator in the markets [described above] to be able to effectively compete in those markets". FMG also submits that it would be uneconomical for anyone else to develop another facility to provide that service, having regard to the nature and location of the facility, together with the volume of product required to be transported. The only feasible means of transport is by rail which is stated to cost approximately $1.50 per tonne to transport from Mindy Mindy to Port Hedland. Use of haulage trucks to transport the iron ore would cost in excess of $50 per tonne (assuming that 200 tonne trucks were permitted to travel on the public highway).

[12] [2003] WASA 259 (6 November 2003).

FMG estimates the capital cost of constructing an alternative railway to be in the vicinity of $400m. FMG has analysed the facility and believes that it is capable of accommodating approximately 150 mtpa with only minimal additional expenditure to increase the capacity of the existing track. The service currently carries 90 mtpa which leaves available spare capacity of 60 mtpa. FMG also submits that the available excess capacity indicates that the line is a natural monopoly and "is typical of facilities with substantial fixed costs and low operating costs, giving rise to economies of scale".

Because the facts in the FMG application are practically identical to the *Hamersley Iron* case, the outcome will be watched with interest by resources and competition lawyers.

## ACCESS UNDERTAKINGS

As was noted earlier, the natural end result of an access application or an access dispute is an access undertaking arrived at consensually or by arbitration. The purpose of undertakings under Pt IIIA is to give owners or operators of essential facilities the ability to eliminate uncertainty concerning the conditions of access which will apply to the service. This can be done by agreeing upon appropriate access arrangements with the ACCC in advance.

Section 44ZZA(1) of the *Trade Practices Act* states that the provider of a service may give a written undertaking to the ACCC in connection with the provision of access to a service. The ACCC is given a broad discretion to accept a proposed undertaking or not, taking into account the following relevant matters:

(a) the legitimate business interests of the provider;
(b) the public interest, including the public interest in competition in markets both in and outside Australia;
(c) the interests of persons who might seek access to the service;
(d) whether access to the service is already the subject of an access regime;
(e) whether the undertaking is in accordance with an access code that applies to the service; and
(f) any other matters that the Commission thinks are relevant.

The ACCC has stated that its overriding objective in connection with access undertakings is to ensure that access to facilities covered by undertakings is provided in a way that promotes competition and economic efficiency, consistent with the objectives of Pt IIIA and the criteria it establishes.[13]

Section 44ZZJ of the *Trade Practices Act* provides that the ACCC may apply to the Federal Court for an order against a service provider, if it considers that the service provider has breached the terms of an access undertaking. The ACCC has observed that, because undertakings must be enforceable in the Federal Court, this

[13] See: "Access Undertakings – A guide to Part IIIA of the Trade Practices Act" ACCC, 1999, p 4.

has implications for the matters that should be addressed in an undertaking and the language used in undertakings.

## THE LEGITIMATE BUSINESS INTERESTS OF THE SERVICE PROVIDER

The ACCC says that its analysis of the legitimate business interests of a service provider focuses upon the commercial considerations affecting the service provider itself. The ACCC takes into account the provider's obligations to its shareholders and other stakeholders, including the need for the owners to earn a commercial return on any exploitation of the relevant facility. The ACCC says that it will make appropriate allowance for the fact that facilities which are made subject to Pt IIIA are typically capital intensive in nature, requiring considerable investment in specialised and dedicated assets.

The ACCC takes the view that the pricing principles which are included in access undertakings should permit service providers to gain returns on their investments which are commensurate with the risks involved in making those investments. The ACCC does not regard itself as responsible to protect service providers from normal commercial risks, but says that it recognises that "higher levels of non-diversifiable risks need to be reflected in expected returns". The ACCC will generally accept provisions in an access undertaking which are directed at recouping the costs of modifications or extensions which may be required to facilities in order to facilitate access where capacity or other constraints exist in the current configuration.

Where existing contracts affect the availability of access, the ACCC accepts that such contracts must be honoured and accordingly existing firm and binding contractual obligations between the service provider and third parties using the facility will not normally be subject to the provisions of the undertaking. The ACCC also accepts that it is appropriate for service providers to specify reasonable terms and conditions of use of infrastructure facilities in order to limit damage, or for safety reasons; for example, by specifying rates of use or maximum loadings and so on. The ACCC also accepts that there may be community service obligations imposed upon service providers by governmental regulation which must be taken into account and allowed for in any access regime.

The ACCC says that it pays particular regard to the question whether the proposed access arrangements will promote the fundamental objective of the *Trade Practices Act*, namely enhancing the welfare of Australians through the promotion of market competition and economic efficiency. In particular, the Commission will not allow for the recovery through an access regime of any element of monopoly profit which an access provider may forego as a result of increased competition in an upstream or downstream market by reason of access undertakings.[14] This is consistent with the definition of "legitimate business

[14] This is consistent with the statement in the Explanatory Memorandum to the *Competition Policy Reform Act* 1995, p 217.

interests" contained in paras 6(4)(i) and (ii) of the Competition Principles Agreement.

The ACCC is obliged to assess access undertakings by reference (inter alia) to the interests of potential third party users of facilities. The ACCC considers that this means that it must consider the extent to which access arrangements generate benefits for final end users or consumers of the products or services created out of the access given to the facility and thereby to the community in general. The Commission has stated that it will not accept undertakings which deal with access in a way which would be inconsistent with the promotion of efficient competition in any relevant upstream or downstream market.

In this context the Commission considers:

- whether the undertaking provides access to those services which users will require for the purpose of their own provision of goods or services in their own markets;
- whether the access terms and conditions are reasonable;
- whether the undertaking incorporates any non-price barriers to access;
- whether the undertaking produces incentives for the service provider to improve efficiency;
- where pricing is based on asset valuations, whether the approach to valuing the assets is appropriate taking into account the circumstances of the undertaking;
- whether the processes for negotiating and setting prices are clear and transparent;
- whether sufficient information is available to enable users to engage in meaningful negotiations with the prospect of achieving outcomes reflecting the legislative objectives of Pt IIIA; and
- whether the ongoing operational arrangements are such that third party users are reasonably informed about the availability of access to the service.

## PUBLIC INTEREST ASSESSMENTS

Apart from the legislative statements of the overriding public policy of advancing competition (contained in ss 2 and 44ZZA of the *Trade Practices Act*), the Commission is also required to take into account the public interest principles stated in cl 1(3) of the Competition Principles Agreement which were inserted as a regulatory criterion for assessing industry access codes by reg 6J, added to the *Trade Practices Regulations* in 1997. Those principles require that regard also be had to:

(a) laws and policies relating to ecologically sustainable development;
(b) social welfare and equity considerations (including community service obligations);

(c) laws and policies relating to occupational health and safety and industrial relations;
(d) economic and regional development, employment and investment growth;
(e) consumer interests;
(f) the competitiveness of Australian businesses; and
(g) the efficient allocation of resources.

The Commission also has regard to the list of factors which it and the Australian Competition Tribunal ordinarily apply as recognised public benefits for the purpose of authorisation applications. These include:

(a) the promotion of competition in the relevant industry;
(b) fostering business efficiency and improved competitiveness;
(c) the expansion of employment and the prevention of unemployment;
(d) improvements in the quality and safety of goods and services; and
(e) the expansion of consumer choice.

## RECENT DEVELOPMENTS

### 2004 Productivity Commission Review of National Competition Policy Arrangements

In April this year the Treasurer gave terms of reference to the Productivity Commission under Pts 2 and 3 of the *Productivity Commission Act* 1998. The terms of reference noted that the National Competition Policy had been adopted by the Federal, State and Territory governments in 1995 and that it was time to undertake a major review of the achievements to date and the anticipated future agenda of the National Competition Policy. The Treasurer announced an inquiry to be held by the Productivity Commission in order for it to report on the impact of the National Competition Policy agenda and all related reforms undertaken to date by the Federal, State and Territory governments, including their impact on the Australian economy and on the Australian community more broadly.

The Productivity Commission's assessment is required by its terms of reference to consider the impacts of the reforms on economic indicators such as growth and productivity, and also to consider significant distribution impacts, including particularly on rural and regional Australia, and the contribution of the National Competition Policy in achieving other policy goals. The inquiry is also intended to investigate those areas which offer opportunities for significant gains to the Australian economy from removing impediments to efficiency and by enhancing competition, including through a possible further legislation review and reform program, together with an analysis of the scope and expected impact of such competition related reforms.

The Commission is instructed by the terms of reference to take into account the desire of the Federal Government to focus new review and reform activities on areas where there is clear evidence of significant potential gains, particularly in relation to

Australia's international competitiveness, the efficiency of domestic markets for the benefit of Australian consumers. It is also charged to ensure that possible reform activity considers appropriately the adjustment and distributional implications of new policy and its contribution to achieving other governmental policy goals. The Productivity Commission is also instructed to take into account, but not replicate, any current or recent review activities, including in areas such as the Council of Australian Governments' work on energy and water and the Commission's own review of the competition provisions of the *Trade Practices Act*.

The Productivity Commission's issues paper issued in April 2004 notes that its terms of reference require the Commission to undertake two distinct tasks. The first is to assess the initial and ongoing impacts of the National Competition Policy and related reforms undertaken to date. The second is to report on areas which offer further opportunities for significant gains to the Australian economy from removing impediments to efficiency and enhancing competition. The issues paper also observes that Australia has enjoyed extraordinarily strong economic performance and growth during the last decade and that recent Australian microeconomic reforms generally, of which the National Competition Policy is an important element, might be playing a significant role in Australia's recent economic performance.

In particular, the issues paper observes that the prices which Australian consumers and businesses have been paying for basic infrastructure services, such as gas, electricity and telecommunications, have been declining in real terms in the past decade, whereas charges for other services which have previously been regarded as public goods, such as water and roads, have been rising to reflect more closely their actual costs of supply. The Productivity Commission identifies energy and water as two key areas in respect of which there remains considerable work to be done to ensure that all of the benefits of the National Competition Policy are fully realised. It also observes that there is scope for significant changes in the economics of Australia's transport systems. It gives as examples modified charging regimes for road users to encourage more efficient road usage, funding alternatives for infrastructure investment and maintenance that might provide the community with better value for funds expended, and promoting more effective competition between road and rail transport to facilitate a more efficient mix of transport services.

Whilst it does not appear that the Productivity Commission presently intends directly to address the effect or operations of Pt IIIA of the *Trade Practices Act* in the resources sector, there is no doubt that many of the aspects of the Commission's proposed work will be relevant to competition in energy and resources markets.

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