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Our reference
SJR DANP 1388 9676

BLAKE DAWSON WALDRON

L A W Y E R S

990981-990983

Mr Scott Gregson
General Manager, Adjudication,
Australian Competition & Consumer Commission
Level 35, The Tower
360 Elizabeth Street
MELBOURNE VIC 3000

19 September 2005

Application for Authorisation JW4 Joint Venture

We act for the parties to a proposed unincorporated joint venture to be known as the "JW4 joint venture", and enclose the following on behalf of the joint venture parties:

1. authorisation application (Form A);
2. authorisation application (Form B);
3. authorisation application (Form E);
4. confidential submission in support of the above applications; and
5. our cheque for \$10,500 in respect of the filing fee for the 3 applications.

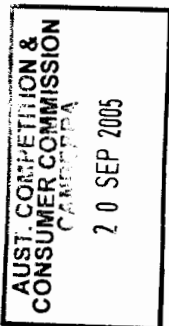
The authorisation with respect to each of the attached applications is sought for a period of 15 years.

Our clients' confidential submission contains commercially sensitive information relating to moneys payable by the joint venture participants as well as specific price related information. The sections containing this confidential information are clearly marked "Confidential" in the enclosed confidential submission.

Our clients request, pursuant to s 89(5) of the *Trade Practices Act*, that the material marked "Confidential" be excluded from the ACCC's public register. In order to assist the ACCC, we also enclose a separate, "non-confidential" version of our clients' submission which has had the confidential material redacted from it.

We also enclose CONFIDENTIAL copies of the following Transaction Documents referred to in the Submission for the ACCC's consideration:

1. JW4 Joint Venture Agreement (see paragraph 4.7(a) of the Submission);



MELBOURNE
SYDNEY
BRISBANE
PERTH
CANBERRA
LONDON
PORT MORESBY
JAKARTA
SHANGHAI

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Mr Scott Gregson
Australian Competition and Consumer Commission

Page 2

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2. Management Agreement (see paragraph 4.7(b) of the Submission);
 3. Sub-lease (see paragraph 4.7(c) of the Submission);
 4. Deeds of Cross Charge (x4) (see paragraph 4.7(d) of the Submission);
 5. Domestic Sales Agreements (x4) (see paragraph 4.7(e) of the Submission);
 6. Export Sales Agreements (x3) (see paragraphs 4.7(f) of the Submission);
 7. Deed of Undertaking (see paragraph 4.7(g) of the Submission); and
 8. Novation Agreement (see paragraph 4.7(h) of the Submission).

The Transaction Documents contain detailed confidential commercial arrangements, and the disclosure of the precise form and structure of these arrangements may deliver a commercial advantage to domestic and international rivals of the parties to the transaction.

Accordingly, our clients also request pursuant to s 89(5) of the *Trade Practices Act* that the Transaction Documents be excluded from the ACCC's public register.

In the meantime, please contact Daniel Preston if you have any queries in relation to the attached applications.

Yours faithfully



Form A

Commonwealth of Australia

Trade Practices Act 1994 ---- Sub-section 88(1)

EXCLUSIONARY PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section:

- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act; and
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1. (a) *Name of Applicant (See Direction 2)*

BHP Billiton Iron Ore Pty Ltd (ABN 46 008 700 981) (**BHPBIO**)

This Application is to be read and determined together with each of the following applications (which will be referred to as the (**Related Applications**)):

(i) **Form B: Agreements Affecting Competition:**

Application for Authorisation by BHPBIO in respect of the Transaction Documents (as described in paragraph 2(a) of this Application), dated the same date as this Application; and

(ii) **Form E: Exclusive Dealing:**

Application for Authorisation by BHPBIO in respect of the Transaction Documents (as described in paragraph 2(a) of this Application), dated the same date as this Application.

(b) *Short description of business carried on by applicant:*

Mining and production of iron ore.

- (c) *Address in Australia for service of documents on the applicant:*

Ms Lian Davies
Counsel
BHP Billiton Limited
Level 17
225 St Georges Terrace
PERTH WA 6000
Phone: (08) 9320 4169
Email: lian.l.davies@bhpbilliton.com

2. (a) *Brief description of contract, arrangement or understanding and, where already made, its date.*

The combination of the contracts (collectively described as the **(Transaction Documents)**) is as follows:

- (i) **JW4 Joint Venture Agreement** entered into on 21 July 2005 between:
BHP Billiton Minerals Pty Ltd (**BHPBM**)
ITOCHU Minerals & Energy Of Australia Pty Ltd (**IMEA**)
Mitsui Iron Ore Corporation Pty Ltd (**MIOC**)
JFE Steel Australia (YD) Pty Ltd (**JFE**)
(collectively, the **JW4 Participants**).
- (ii) **Management Agreement** between the JW4 Participants and BHPBIO, entered into on 21 July 2005.
- (iii) **Sub-lease** from BHPBM, MIOC and IMEA (being the participants in the Yandi Joint Venture and collectively referred to as the **Yandi Participants**) to the JW4 Participants for the purpose of carrying out the activities of the JW4 Joint Venture, entered into on 21 July 2005.
- (iv) **Deeds of Cross Charge** entered into by each of the JW4 Participants securing all moneys which each participant may become liable to pay to the manager and/or any other JW4 Participant in favour of each other, entered into on 21 July 2005.
- (v) **Domestic Sales Agreements** between each of the JW4 Participants and the Yandi Participants entered into on 21 July 2005 under which each the JW4 Participants separately agree to sell their share of the iron ore produced by the JW4 Joint Venture to the Yandi Participants.

- (vi) **Export Sales Agreements** entered into on 21 July 2005 between:
 - (A) BHP Billiton Marketing AG (**BMAG**), MIOC and IMEA (as vendors of finished iron ore products produced on behalf of the participants in the Yandi Joint Venture (**Yandi Vendors**)) and JFE Steel Corporation (**JFE Steel**);
 - (B) BMAG, IMEA and Mitsui-Itochu Iron Pty Ltd (**MII**) (as vendors of finished iron ore products produced on behalf of the participants in the Mount Newman Joint Venture (**Newman Vendors**)) and JFE Steel; and
 - (C) BMAG, IMEA and MIOC (as vendors of finished iron ore products produced on behalf of the participants in the Mount Goldsworthy Mining Associates Joint Venture (**Goldsworthy Vendors**)) and JFE Steel.
- (vii) **Deed of Undertaking** entered into on 21 July 2005 between BMAG, IMEA, MII, MIOC and JFE, pursuant to which procedures are set out for the calculation of the aggregate quantity of products that JFE Steel will purchase annually pursuant to the Export Sales Agreements.
- (viii) **Novation Agreement** between BHPBIO in its capacities as agent for both the JW4 and Yandi Joint Ventures, and Henry Walker Eltin (**HWE**), which novates the current contract for various services in relation to the Yandi mining operations.

Authorisation Condition Precedent

The Transaction Documents are subject to a condition precedent that the ACCC makes a final determination to grant the authorisations on acceptable terms and those authorisations on acceptable terms come into force for the purposes of section 91(1A) of the Act on or before one year after the date of execution.

For the information of the ACCC, a notice under 26A of the Foreign Acquisitions and Takeovers Act 1975, and an accompanying submission, has been lodged with the Foreign Investment Review Board (**FIRB**) in respect of the acquisition of an interest in land by JFE, being the Sub-lease from the Yandi Participants of the land where the joint venture is to be operated.

- (b) *Brief description of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions (See **Direction 4**)*
 - (i) **Domestic Sales Agreements**

Under the operation of the provisions of the Domestic Sales Agreements, each of the JW4 Participants are to separately sell all of the Product to the Yandi Participants.

If the JW4 Participants were, or were likely to be, competitive with each other in relation to the supply of Product for the purposes of section 4D(2) of

the Act, then the provisions of the Domestic Sales Agreements pursuant to which the JW4 Participants are to sell the Product to the Yandi Participants, may have the potential to be an exclusionary provision if the substantial purpose of those provisions was to prevent, restrict or limit the supply of the iron ore by all or any of the JW4 Participants to particular persons or classes of person.

If the Yandi Participants were, or were likely to be, in competition with each other in relation to the acquisition of iron ore for the purposes of section 4D(2) of the Act, then it is arguable that the arrangement between the Yandi Participants that they will acquire Product in fixed proportions from each JW4 Participant, may constitute an exclusionary provision, if the substantial purpose of those provisions was to prevent, restrict or limit the acquisition of the Product by all or any of the Yandi Participants from any particular persons or classes of persons.

(ii) **Export Sales Agreements**

Under the Export Sales Agreements, the Yandi, Newman and Goldsworthy Vendors are each to separately supply specified quantities of finished iron ore products to JFE Steel. If:

- (A) each of the Yandi Vendors were, or were likely to be, competitive with each other;
- (B) each of the Newman Vendors were, or were likely to be, competitive with each other;
- (C) each of the Goldsworthy Vendors were, or were likely to be, competitive with each other; or
- (D) each of Yandi, Newman and Goldsworthy Vendors were, or were likely to be, competitive with each other

in relation to the supply of the relevant finished iron ore products for the purposes of section 4D(2) of the Act, then the provisions of the Export Sales Agreements pursuant to which the various participants are to sell the relevant finished iron ore products to JFE Steel (and the proportion of such products to be supplied by each of them in each case) may have the potential to be an exclusionary provision if the substantial purpose of those provisions was to prevent, restrict or limit the supply of finished iron ore products by all or any of the relevant participants to particular persons or classes of persons.

(c) *Names and addresses of other parties or proposed parties to contract, arrangement or understanding.*

For the purposes of, and so as to have the benefit and protection conferred by section 88(6) of the Act:

- (i) BHP Billiton Minerals Pty Ltd
(ABN 93 008 694 782)

Level 17
200 St Georges Terrace
PERTH WA 6000

- (ii) BHP Billiton Iron Ore Pty Ltd (ABN 46 008 700 981)
Level 17
200 St Georges Terrace
PERTH WA 6000
- (iii) BHP Billiton Marketing AG
Jochlerweg 2
PO Box 105
CH6341
Switzerland
- (iv) ITOCHU Minerals & Energy Of Australia Pty Ltd (ACN 009 256 259)
Level 22
Forrest Centre
221 St Georges Terrace
PERTH WA 6000
- (v) Mitsui Iron Ore Corporation Pty Ltd (ABN 16 050 157 456)
Level 24
Forrest Centre
221 St Georges Terrace
PERTH WA 6000
- (vi) Mitsui Itochu Iron Pty Ltd (ABN 84 008 702 761)
Level 24
Forrest Centre
221 St Georges Terrace
PERTH WA 6000
- (vii) JFE Steel Australia (YD) Pty Ltd (ACN 115 008 921)
Suite 3/A
52 Martin Place
SYDNEY NSW 2000
- (viii) JFE Steel Corporation
2-3 Uchisaiwai-cho 2-chome
Chiyoda-ku
Tokyo 100-0011
JAPAN

3. Names and addresses (where known) of parties and other persons on whose behalf application is made.

(a) This Application is made on behalf of :

- (i) BHPBM;
- (ii) BHPBIO;

- (iii) BMAG;
- (iv) MII;
- (v) MIOC;
- (vi) IMEA;
- (vii) JFE; and
- (viii) JFE Steel.

(b) In addition:

- (i) the authorisation being applied for by this Application is to be expressed so as to apply to or in relation to each other person who:
 - (A) in the case of an authorisation to make the Transaction Documents, becomes a party to the Transaction Documents after the Transaction Documents are made; or
 - (B) in the case of an authorisation to give effect to a provision of the Transaction Documents becomes a party to the Transaction Documents, at a time after the authorisation of the Transaction Documents is granted,

within the meaning of section 88(10) of the Act.

- (ii) this Application is expressed to be made also in relation to other proposed contracts, arrangements or understandings that will be in similar terms to the Transaction Documents within the meaning of sections 88(13), (14) and (15) of the Act.

4. (a) *Grounds for grant of authorisation*

Authorisation is sought on the grounds set out in the submission to the ACCC lodged in support of this Application and each Related Application (**Submission**).

(b) *Facts and contentions relied upon in support of those grounds (See Notice 1)*

The facts and contentions relied on by the applicants in support of these grounds are set out in the Submission.

5. *This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the above-mentioned contract, arrangement or understanding.*

(a) *Is this application to be so expressed?*

Yes, each other proposed contract, arrangement or understanding in similar terms to the Transaction Documents for the purposes of sub-sections 88(13), (14) and (15) of

the Act, being each other proposed contract, arrangement or understanding in similar terms to the Transaction Documents that may be made between:

- (i) a person who becomes, at some time in the future, whether in addition to or in place of, one of the JW4 or Yandi Participants or the Newman, Yandi or Goldsworthy Vendors; and
 - (ii) each person who is an existing or continuing JW4 Participant at that time.
- (b) *If so, the following information is to be furnished:*

- (i) *the names of the parties to each other contract, arrangement or understanding:*

Not applicable, as no other contract or arrangement has been made or understanding has been arrived at in similar terms to the Transaction Documents as at the date of this Application.

- (ii) *the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application (See Direction 5 and Notice 2)*

Such of the JW4 or Yandi Participants or Yandi, Newman or Goldsworthy Vendors at the time any such other contract, arrangement or understanding in similar terms to the Transaction Documents may be proposed to be made. Other than to state that the other parties to each other proposed contract, arrangement or understanding in similar terms to the Transaction Documents for the purposes of sections 88(13), (14) and (15) of the Act will be each person who becomes a JW4 Participant or Yandi Participant or a Yandi, Newman or Goldsworthy Vendor in the future and each existing participant at that time, the names of those other parties are not known as at the date of this Application.

6. (a) *Does this application deal with a matter relating to a joint venture (See section 47 of the Trade Practices Act 1974)*

Yes. This Application deals with a matter relating to:

- (i) the JW4 Joint Venture; and
- (ii) the JW4 Participants.

- (b) *If so, are any other applications being made simultaneously with this application in relation to that joint venture?*

Yes, each of the Related Applications.

- (c) *If so, by whom or on whose behalf are those other applications being made?*

Each of the Related Applications is being made by BHPBIO in its own right and on behalf of the other parties identified above together with rights being exercised and

reserved under sub-sections 88(6), 88(13), 88(14) and 88(15) in the same manner as expressed in this Application.

7. *Name and address of person authorised by the applicant to provide additional information in relation to this application*

Ms Lian Davies
Counsel
BHPB Billiton Limited
Level 17
225 St Georges Terrace
PERTH WA 6000
Phone: (08) 9320 4169
Email: lian.l.davies @bhpbilliton.com

Dated 19 September 2005

Signed ~~by~~/on behalf of the applicant

.....S. Ridgeway.....
(Signature)

.....Stephen John Ridgeway.....
(Full Name)

.....Parter, Blake Dawson Waldron.....
(Description)

DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1(b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished:
 - (a) in so far as the particulars of any of them have been reduced to writing by lodging a true copy of the writing; and
 - (b) in so far as the particulars or any of them have not been reduced to writing by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced to writing.
5. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

NOTICES

1. In relation to item 4, your attention is drawn to sub-section 90(8) of the *Trade Practices Act 1974* which provides as follows:

"(8) The Commission shall not –

 - (a) make a determination granting:
 - (i) an authorisation under sub-section 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorisation under sub-section 88(7) or (7A) in respect of proposed conduct or
 - (iii) an authorisation under sub-section 88(8) in respect of proposed conduct to which sub-section 47(6) or (7) applies; or
 - (iv) an authorisation under sub-section 88(8A) for proposed conduct to which section 48 applies; unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or
 - (b) make a determination granting an authorisation under subsection 88(I) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to."
2. If an authorisation is granted in respect of a proposed contract, arrangement or understanding the names of the parties to which are not known at the date of the application, the authorisation shall, by sub-section 88(14) of the *Trade Practices Act 1974*, be deemed to be expressed to be subject to a condition that any party to the contract, arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.

Form B

Commonwealth of Australia
Trade Practices Act 1974 ---- Sub-section 88(1)

AGREEMENTS AFFECTING COMPETITION:**APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act; and
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1. (a) *Name of Applicant (See Direction 2)*

BHP Billiton Iron Ore Pty Ltd (ABN 46 008 700 981) (**BHPBIO**)

This Application is to be read and determined together with each of the following applications (referred to as the **Related Applications**):

(i) **Form A: Exclusionary Provisions**

Application for Authorisation by BHPBIO in respect of the Transaction Documents (as described in paragraph 2(a) of this Application), dated the same date as this Application; and

(ii) **Form E: Exclusive Dealing:**

Application for Authorisation by BHPBIO in respect of the Transaction Documents (as described in paragraph 2(a) of this Application), dated the same date as this Application.

(b) *Short description of business carried on by Applicant:*

Mining and production of iron ore.

(c) *Address in Australia for service of documents on the applicant*

Ms Lian Davies
Counsel
BHPB Billiton Limited
Level 17
225 St Georges Terrace
PERTH WA 6000
Phone: (08) 9320 4169
Email: lian.l.davies@bhpbilliton.com

2 (a) *Brief description of contract, arrangement or understanding and, where already made, its date.*

The combination of the contracts (collectively described as the (**Transaction Documents**)) is as follows:

- (iii) **JW4 Joint Venture Agreement** entered into on 21 July 2005 between:
BHP Billiton Minerals Pty Ltd (**BHPBM**)
ITOCHU Minerals & Energy Of Australia Pty Ltd (**IMEA**)
Mitsui Iron Ore Corporation Pty Ltd (**MIOC**)
JFE Steel Australia (YD) Pty Ltd (**JFE**)
(collectively, the **JW4 Participants**).
- (iv) **Management Agreement** between the JW4 Participants and BHPBIO, entered into on 21 July 2005.
- (v) **Sub-lease** from BHPBM, MIOC and IMEA (being the participants in the Yandi Joint Venture and collectively referred to as the **Yandi Participants**) to the JW4 Participants for the purpose of carrying out the activities of the JW4 Joint Venture, entered into on 21 July 2005.
- (vi) **Deeds of Cross Charge** entered into by each of the JW4 Participants securing all moneys which each participant may become liable to pay to the manager and/or any other JW4 Participant in favour of each other, entered into on 21 July 2005.
- (vii) **Domestic Sales Agreements** between each of the JW4 Participants and the Yandi Participants entered into on 21 July 2005 under which each the JW4 Participants separately agree to sell their share of the iron ore produced by the JW4 Joint Venture to the Yandi Participants.
- (viii) **Export Sales Agreements** entered into on 21 July 2005 between:
 - (A) BHP Billiton Marketing AG (**BMAG**), MIOC and IMEA (as vendors of finished iron ore products produced on behalf of the participants in the Yandi Joint Venture (**Yandi Vendors**)) and JFE Steel Corporation (**JFE Steel**);

- (B) BMAG, IMEA and Mitsui-Itochu Iron Pty Ltd (**MII**) (as vendors of finished iron ore products produced on behalf of the participants in the Mount Newman Joint Venture (**Newman Vendors**)) and JFE Steel; and
 - (C) BMAG, IMEA and MIOC (as vendors of finished iron ore products produced on behalf of the participants in the Mount Goldsworthy Mining Associates Joint Venture (**Goldsworthy Vendors**)) and JFE Steel.
- (ix) **Deed of Undertaking** entered into on 21 July 2005 between BMAG, IMEA, MII, MIOC and JFE, pursuant to which procedures are set out for the calculation of the aggregate quantity of products that JFE Steel will purchase annually pursuant to the Export Sales Agreements.
 - (x) **Novation Agreement** between BHPBIO in its capacities as agent for both the JW4 and Yandi Joint Ventures, and Henry Walker Eltin (**HWE**), which novates the current contract for various services in relation to the Yandi mining operations.

Authorisation Condition Precedent

The Transaction Documents are subject to a condition precedent that the ACCC makes a final determination to grant the authorisations on acceptable terms and those authorisations on acceptable terms come into force for the purposes of section 91(1A) of the Act on or before one year after the date of execution.

For the information of the ACCC, a notice under 26A of the Foreign Acquisitions and Takeovers Act 1975, and an accompanying submission, has been lodged with the Foreign Investment Review Board (**FIRB**) in respect of the acquisition of an interest in land by JFE, being the Sub-lease from the Yandi Participants of the land where the joint venture is to be operated.

2 (b) *Names and addresses of other parties or proposed parties to the contract, arrangement or understanding:*

For the purposes of, and so as to have the benefit and protection conferred by section 88(6) of the Act:

- (i) BHP Billiton Minerals Pty Ltd
(ABN 93 008 694 782)
Level 17
200 St Georges Terrace
PERTH WA 6000
- (ii) BHP Billiton Iron Ore Pty Ltd (ABN 46 008 700 981)
Level 17
200 St Georges Terrace
PERTH WA 6000

- (iii) BHP Billiton Marketing AG
Jochlerweg 2
PO Box 105
CH6341
Switzerland
- (iv) ITOCHU Minerals & Energy Of Australia Pty Ltd (ACN 009 256 259)
Level 22
Forrest Centre
221 St Georges Terrace
PERTH WA 6000
- (v) Mitsui Iron Ore Corporation Pty Ltd (ABN 16 050 157 456)
Level 24
Forrest Centre
221 St Georges Terrace
PERTH WA 6000
- (vi) Mitsui Itochu Iron Pty Ltd (ABN 84 008 702 761)
Level 24
Forrest Centre
221 St Georges Terrace
PERTH WA 6000
- (vii) JFE Steel Australia (YD) Pty Ltd (ACN 115 008 921)
Suite 3/A
52 Martin Place
SYDNEY NSW 2000
- (viii) JFE Steel Corporation
2-3 Uchisaiwai-cho 2-chome
Chiyoda-ku
Tokyo 100-0011
JAPAN

3. *Names and addresses (where known) of parties and other persons on whose behalf application is made*

(a) This Application is made on behalf of :

- (i) BHPBM;
- (ii) BHPBIO;
- (iii) BMAG;
- (iv) MII;
- (v) MIOC;
- (vi) IMEA;
- (vii) JFE; and

(viii) JFE Steel.

(b) In addition:

- (i) The authorisation being applied for by this Application is to be expressed so as to apply to, or in relation to, each other person who:
- A. in the case of an authorisation to make the Transaction Documents, becomes a party to the Transaction Documents after the Transaction Documents are made; or
 - B. in the case of an authorisation to give effect to a provision of the Transaction Documents becomes a party to the Transaction Documents, at a time after the authorisation of the Transaction Documents is granted,

within the meaning of section 88(10) of the Act.

- (ii) This Application is expressed to be made also in relation to other proposed contracts, arrangements or understandings that will be in similar terms to the Transaction Documents within the meaning of sections 88(13), (14) and (15) of the Act.

4 (a) *Grounds for grant of authorisation*

Authorisation is sought on the grounds set out in the submission to the ACCC lodged in support of this Application and each Related Application (**Submission**).

(b) *Facts and contentions relied upon in support of those grounds (See Notice 1)*

The facts and contentions relied on by the applicants in support of these grounds are set out in the Submission.

5. *This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the above-mentioned contract, arrangement or understanding.*

(a) *Is this application to be so expressed ?*

Yes, each other proposed contract, arrangement or understanding in similar terms to the Transaction Documents for the purposes of sub-sections 88(13), (14) and (15) of the Act, being each other proposed contract, arrangement or understanding in similar terms to the Transaction Documents that may be made between:

- (i) a person who becomes, at some time in the future, whether in addition to or in place of, one of the JW4 or Yandi Participants or the Newman, Yandi or Goldsworthy Vendors; and
- (ii) each person who is an existing or continuing JW4 Participant at that time.

(b) *If so, the following information is to be furnished:*

(i) *the names of the parties to each other contract, arrangement or understanding:*

Not applicable, as no other contract or arrangement has been made or understanding has been arrived at in similar terms to the Transaction Documents as at the date of this Application.

(ii) *the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application (See Direction 5 and Notice 2)*

Such of the JW4 Participants at the time any such other contract, arrangement or understanding in similar terms to the Transaction Documents may be proposed to be made. Other than to state that the other parties to each other proposed contract, arrangement or understanding in similar terms to the Transaction Documents for the purposes of sections 88(13), (14) and (15) of the Act will be each person who becomes a JW4 Participant or Yandi Participant or a Yandi, Newman or Goldsworthy Vendor in the future and each existing participant at that time, the names of those other parties are not known as at the date of this Application.

6 (a) *Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974) ?*

Yes. This Application deals with a matter relating to:

(i) the JW4 Joint Venture; and

(ii) the JW4 Participants.

(b) *If so, are any other applications being made simultaneously with this application in relation to that joint venture?*

Yes, each of the Related Applications.

(c) *If so, by whom or on whose behalf are those other applications being made?*

Each of the Related Applications is being made by BHPBIO in its own right and on behalf of the other parties identified above together with rights being exercised and reserved under sub-sections 88(6), 88(13), 88(14) and 88(15) in the same manner as expressed in this Application.

7. *Name and address of person authorised by the applicant to provide additional information in relation to this application*

Ms Lian Davies
Counsel
BHPB Billiton Limited
Level 17
225 St Georges Terrace
PERTH WA 6000
Phone: (08) 9320 4169
Email: lian.l.davies @bhpbilliton.com

Dated 19 September 2005

Signed ~~by~~/on behalf of the applicant

S. Ridgeway
(Signature)

Stephen John Ridgeway
(Full Name)

Parker, Blake Dawson Waldron
(Description)

DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1(b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished --
 - (a) in so far as the particulars of any of them have been reduced to writing by lodging a true copy of the writing; and
 - (b) in so far as the particulars or any of them have not been reduced to writing by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced to writing.
5. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

NOTICES

1. In relation to item 4, your attention is drawn to sub-sections 90(6) and (7) of the *Trade Practices Act 1974* which provide as follows: -

“(6) The commission shall not make a determination granting an authorisation under sub-sections 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct, unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if

 - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
 - (b) the proposed covenant were given, and were complied with; or
 - (c) the proposed conduct were engaged in, as the case may be.

“(7) The Commission shall not make a determination granting an authorisation under sub-section 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding, or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.”
2. If an authorisation is granted in respect of a proposed contract, arrangement or understanding the names of the parties to which are not known at the date of the application, the authorisation shall, by sub-section 88(14) of the *Trade Practices Act 1974*, be deemed to be expressed to be subject to a condition that any party to the contract, arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.

Form E

Commonwealth of Australia
Trade Practices Act 1994 --- Sub-section 88(8)

**EXCLUSIVE DEALING:
APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(8) of the *Trade Practices Act 1974* for an authorisation under that sub-section to engage in conduct that constitutes or may constitute the practice of exclusive dealing.

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1. (a) *Name of Applicant (See Direction 2)*

BHP Billiton Iron Ore Pty Ltd (ABN 46 008 700 981) (**BHPBIO**)

This Application is to be read and determined together with each of the following applications (referred to as the **Related Applications**):

(i) **Form A: Exclusionary Provisions**

Application for Authorisation by BHPBIO in respect of the Transaction Documents (as described in paragraph 2(a) of this Application), dated the same date as this Application; and

(ii) **Form B: Agreements Affecting Competition**

Application for Authorisation by BHPBIO in respect of the Transaction Documents (as described in paragraph 2(a) of this Application), dated the same date as this Application.

(b) *Short description of business carried on by Applicant:*

Mining and production of iron ore.

(c) *Address in Australia for service of documents on the applicant*

Ms Lian Davies
Counsel
BHP Billiton Limited
Level 17
225 St Georges Terrace
PERTH WA 6000
Phone: (08) 9320 4169
Email: lian.l.davies@bhpbilliton.com

2. (a) *Description of the goods or services in relation to the supply or acquisition of which this application relates*
- (i) the mining and extraction of iron ore from the "Western 4" pit of the Yandi mining area located in the Pilbara Region of Western Australia (**Project Area**); and
 - (ii) the sale of finished iron ore products for export, ex-Port Hedland.

Transaction Documents

The combination of the contracts (collectively described as the (**Transaction Documents**)) is as follows:

- (i) **JW4 Joint Venture Agreement** entered into on 21 July 2005 between:
 - BHP Billiton Minerals Pty Ltd (**BHPBM**)
 - ITOCHU Minerals & Energy Of Australia Pty Ltd (**IMEA**)
 - Mitsui Iron Ore Corporation Pty Ltd (**MIOC**)
 - JFE Steel Australia (YD) Pty Ltd (**JFE**)(collectively, the **JW4 Participants**).
- (ii) **Management Agreement** between the JW4 Participants and BHPBIO, entered into on 21 July 2005.
- (iii) **Sub-lease** from BHPBM, MIOC and IMEA (being the participants in the Yandi Joint Venture and collectively referred to as the **Yandi Participants**) to the JW4 Participants for the purpose of carrying out the activities of the JW4 Joint Venture, entered into on 21 July 2005.
- (iv) **Deeds of Cross Charge** entered into by each of the JW4 Participants securing all moneys which each participant may become liable to pay to the manager and/or any other JW4 Participant in favour of each other, entered into on 21 July 2005.
- (v) **Domestic Sales Agreements** between each of the JW4 Participants and the Yandi Participants entered into on 21 July 2005 under which each the JW4 Participants separately agree to sell their share of the iron ore produced by the JW4 Joint Venture to the Yandi Participants.
- (vi) **Export Sales Agreements** entered into on 21 July 2005 between:
 - (A) BHP Billiton Marketing AG ("**BMAG**"), MIOC and IMEA (as vendors of finished iron ore products produced on behalf of the participants in the Yandi Joint Venture (**Yandi Vendors**)) and JFE Steel Corporation (**JFE Steel**);
 - (B) BMAG, IMEA and Mitsui-Itochu Iron Pty Ltd (**MII**) (as vendors of finished iron ore products produced on behalf of the participants in the Mount Newman Joint Venture (**Newman Vendors**)) and JFE Steel; and

- (C) BMAG, IMEA and MIOC (as vendors of finished iron ore products produced on behalf of the participants in the Mount Goldsworthy Mining Associates Joint Venture (**GoldsworthyVendors**)) and JFE Steel.
- (vii) **Deed of Undertaking** entered into on 21 July 2005 between BMAG, IMEA, MII, MIOC and JFE, pursuant to which procedures are set out for the calculation of the aggregate quantity of products that JFE Steel will purchase annually pursuant to the Export Sales Agreements.
- (viii) **Novation Agreement** between BHPBIO in its capacities as agent for both the JW4 and Yandi Joint Ventures, and Henry Walker Eltin (**HWE**), which novates the current contract for various services in relation to the Yandi mining operations.

Authorisation Condition Precedent

The Transaction Documents are subject to a condition precedent that the ACCC makes a final determination to grant the authorisations on acceptable terms and those authorisations on acceptable terms come into force for the purposes of section 91(1A) of the Act on or before one year after the date of execution.

For the information of the ACCC, a notice under 26A of the Foreign Acquisitions and Takeovers Act 1975, and an accompanying submission, has been lodged with the Foreign Investment Review Board (**FIRB**) in respect of the acquisition of an interest in land by JFE, being the Sub-lease from the Yandi Participants of the land where the joint venture is to be operated.

(b) *Description of the conduct that would or may constitute the practice of exclusive dealing (See Direction 4)*

(i) **Exclusive dealing** (other than third line forcing)

The following practices under the Transaction Documents may constitute the practice of exclusive dealing for the purposes of section 47 of the Act (subject to sub-section 47(10)):

- (A) the minimum tonnage obligations under the Domestic Sales Agreements;
- (B) the minimum purchase obligations under the Export Sales Agreements; and
- (C) the restrictions upon re-supply set out in the Export Sales Agreements.

- (ii) **Third line forcing** (sub-section 47(6), 47(8) and 47(9))
- (A) If the supply of Product by each of the JW4 Participants to the Yandi Participants pursuant to the Domestic Sales Agreements is conditional upon the Yandi Participants acquiring Product from the other JW4 Participants, then sub-section 47(6) may possibly apply.
 - (B) If the supply to JFE Steel of finished iron ore products by each of the Yandi Vendors pursuant to the provisions of the Yandi Export Sales Agreement is conditional upon JFE Steel acquiring a volume of finished iron ore products from each of the other Yandi Vendors, then sub-section 47(6) may possibly apply.
 - (C) If the supply to JFE Steel of finished iron ore products by each of the Newman Vendors pursuant to the provisions of the Newman Export Sales Agreement is conditional upon JFE Steel acquiring a volume of finished iron ore products from each of the other Newman Vendors, then sub-section 47(6) may possibly apply.
 - (D) If the supply to JFE Steel of finished iron ore products by each of the Goldsworthy Vendors, pursuant to the provisions of the MACTM Export Sales Agreement, is conditional upon JFE Steel acquiring a volume of finished iron ore products from each of the other Goldsworthy Vendors, then sub-section 47(6) may possibly apply.
 - (E) If the supply to JFE Steel of finished iron ore products pursuant to any of the Yandi, Newman or MACTM Export Sales Agreements is conditional upon JFE Steel acquiring finished iron ore products pursuant to any of the other Export Sales Agreements, then sub-section 47(6) may possibly apply.
 - (F) If the Sub-lease is construed as being a grant by the sub-lessor to each JW4 Participant separately (as tenants in common), and if that Sub-lease is conditional upon a related body corporate (JFE Steel) of one of the JW4 Participants (JFE) acquiring one or more finished iron ore products under the Export Sales Agreements with the Goldsworthy Vendors and/or the Newman Vendors, then sub-section 47(8) may possibly apply.
 - (G) Alternatively, if in any of the above scenarios the relevant supplier refused to supply the relevant goods or services for the reason that the acquirer did not acquire, or did not agree to acquire the relevant goods or services, then either or both of sub-section 47(7) and/or section 47(9) may possibly apply.

3. (a) *Class or classes of person to which the conduct relates*

- (i) The classes of person are:
- (A) each of the JW4 Participants;
 - (B) each of the Yandi Participants;
 - (C) each of the Yandi Vendors;

- (D) each of the Newman Vendors;
- (E) each of the the Goldsworthy Vendors;
(each a **Relevant Venture Party**)
- (F) BHPBIO;
- (G) JFE; and
- (H) JFE Steel

(collectively, with the Relevant Venture Parties, **Relevant Parties**); and

- (I) any other person who becomes a Relevant Party.

(ii) This Application is made on behalf of:

- (A) BHPBM;
- (B) BHPBIO;
- (C) BMAG;
- (D) MII;
- (E) MIOC;
- (F) IMEA;
- (G) JFE; and
- (H) JFE Steel.

(b) In addition:

- (i) the authorisation being applied for by this Application is, in accordance with section 88(8A) of the Act, to be expressed so as to apply to the applicant, each of the other persons identified in paragraph 3(a) of this Application and in relation to each other person who becomes a Relevant Party or member of a Relevant Venture Party, whether in place of, or in addition to, any Relevant Party or any of the parties presently comprising each Relevant Venture Party;
- (ii) this Application is also expressed to be made also in relation to other proposed contracts, arrangements or understandings that will be in similar terms to the Transaction Documents within the meaning of sub-sections 88(13), 88(14) and 88(15) of the Act, being each of the proposed contracts, arrangements or understandings in similar terms to the Transaction Documents that may be made between:
 - (A) a person who becomes, at some time in the future, whether in addition to or in place of an existing participant, a Relevant Party or a member of a Relevant Venture Party; and

(B) each person who is an existing or continuing JW4 Participant at that time.

(iii) The names of the parties to any proposed contract, arrangement or understanding in similar terms to the Transaction Documents which are known at the date of this Application to the applicant, and each of the entities identified at paragraph 3(a) of the Application. Other than to state that the other parties to each proposed contract, arrangement or understanding in similar terms to the Transaction Documents for the purposes of sub-sections 88(13), 88(14) and 88(15) of the Act will be persons who are, or will be from time to time a Relevant Party or Relevant Venture Party, the names of those other parties are not known as at the date of this Application.

(b) *Number of those persons:*

(i) *at the present time:*

As set out in paragraph 3(a) above (other than sub-paragraph (I)).

(ii) *estimated within the next year*

Unknown.

(c) *Where the number of persons stated in item 3(b)(i) is less than 50, their names and addresses*

Particulars are set out in the Transaction Documents and also in the Related Applications.

4. (a) *Grounds for grant of authorisation*

Authorisation is sought on the grounds set out in the submission to the ACCC lodged in support of this Application and each Related Application (**Submission**).

(b) *Facts and contentions relied upon in support of those grounds (See Notice 1)*

The facts and contentions relied on by the applicants in support of these grounds are set out in the Submission.

5. (a) *Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974) ?*

Yes. This Application deals with a matter relating to:

(i) the JW4 Joint Venture; and

(ii) the JW4 Participants.

(b) *If so, are any other applications being made simultaneously with this application in relation to that joint venture?*

Yes, each of the Related Applications.

(c) *If so, by whom or on whose behalf are those other applications being made?*

Each of the Related Applications is being made by BHPBIO in its own right and on behalf of the other parties identified above together with rights being exercised and reserved under sub-sections 88(6), 88(13), 88(14) and 88(15) in the same manner as expressed in this Application.

6. *Name and address of person authorised by the applicant to provide additional information in relation to this application*

Ms Lian Davies
Counsel
BHPB Billiton Limited
Level 17
225 St Georges Terrace
PERTH WA 6000
Phone: (08) 9320 4169
Email: lian.l.davies @bhpbilliton.com

Dated 19 September 2005

Signed ~~by~~/on behalf of the applicant

.....
S. Ridgeway
(Signature)

.....
Stephen John Ridgeway
(Full Name)

.....
Partner, Blake Dawson Waldron
(Description)

DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on the behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1(b), describe that part of the applicant's business in the course of which the conduct is engaged in.
4. Where particulars of a condition or of a reason of the type referred to in sub-sections 47(2) to (9) (inclusive) of the *Trade Practices Act 1974* have been reduced in whole or in part to writing, a copy of the writing is to be furnished with the application.
5. In item 3(a), describe the nature of the business carried on by the persons referred to therein.
6. In item 3(b)(ii), state an estimate of the highest number of persons with whom the applicant is likely to deal in the course of engaging in the conduct at any time during the next year.

NOTICE

In relation to item 4, your attention is drawn to sub-section 90(6) of the *Trade Practices Act 1974* which provides as follows:-

“(6) The Commission shall not make a determination granting an authorisation under sub-section 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an Exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of a proposed conduct, unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if-

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in,

as the case may be.”

Non-Confidential Submission

Dated 19 September 2005

NON-CONFIDENTIAL SUBMISSION

**APPLICATION FOR AUTHORISATION OF A JOINT
VENTURE AGREEMENT AND OTHER
TRANSACTION DOCUMENTS FOR THE PURPOSE
OF MINING AND SELLING IRON ORE AND
RELATED TRANSACTIONS**

**BHP BILLITON MINERALS PTY LTD
BHP BILLITON IRON ORE PTY LTD
BHP BILLITON MARKETING AG
ITOCHU MINERALS & ENERGY OF AUSTRALIA
PTY LTD
MITSUI IRON ORE CORPORATION PTY LTD
MITSUI-ITOCHU IRON PTY LTD
JFE STEEL AUSTRALIA (YD) PTY LTD
JFE STEEL CORPORATION**

19 September 2005

1 Introduction

1.1 This submission supports the Applications for authorisation under Division 1 of Part VII of the Act in relation to:

- (a) making the contracts and arrangements that together comprise the Proposed Transactions;
- (b) giving effect to the contracts and arrangements that together comprise the Proposed Transactions; and
- (c) engaging in conduct under or pursuant to, and in the fulfilment of, the Proposed Transactions.

The Applications and this submission are made on behalf of, and for the benefit of, all of the Applicants.

1.2 Definitions for words or expressions used in this submission are set out in the Glossary at the end of this submission.

Confidentiality

1.3 Wherever it is marked as "CONFIDENTIAL", the information contained in the Applications, this submission and any other document provided to the ACCC in connection with the Applications, is confidential and may not be disclosed to any person without the prior written consent of the Applicants. The Applicants claim that this information is exempt from disclosure under the *Freedom of Information Act* 1982 (Cth).

2 The Applications

2.1 The Applications comprise the following applications under Division 1 of Part VII of the Act:

- (a) Section 88(1) of the Act: Form A (exclusionary provisions).
- (b) Section 88(1) of the Act: Form B (agreements affecting competition and potential price fixing).
- (c) Section 88(8) of the Act: Form E (exclusive dealing in the potential form of third line forcing).

3 Procedural matters

Public knowledge of the Proposed Transactions

3.1 The Proposed Transactions have been announced to the public.

Accordingly, we confirm that the ACCC is free to undertake market inquiries in relation to the Proposed Transactions.

Entry into the Transaction Documents and condition precedent

- 3.2 The Transaction Documents were entered into on 21 July 2005. However, they are subject to a condition precedent that the ACCC makes a final determination to grant the authorisations on acceptable terms, and those authorisations on acceptable terms come into force for the purposes of section 91(1A) of the Act, on or before one year after the date of execution.

FIRB notification

- 3.3 For the information of the ACCC, a notice under section 26A of the Foreign Acquisitions and Takeovers Act 1975, and an accompanying submission, has been lodged with the Foreign Investment Review Board in respect of the JW4 Participants' investment in a new business and acquisition of an interest in land (being the interest in the Project Area to be acquired by the JW4 Participants from the Yandi Participants under the Sub-lease).

4 Proposed Transactions

- 4.1 Broadly, the purposes behind the JW4 Joint Venture are to secure a long-term export trading relationship with a purchaser of iron ore in Japan and to extend the life of the mining operations situated at the Yandi mining area through the expansion of the current mining operations at that location.

Presently

Iron ore is presently being produced from ore mined at a mining area known as the Yandi mining area, located in the Pilbara region of Western Australia. The Yandi mining area comprises a number of discrete ore deposits. The relevant mining operations are managed by BHPBIO as manager, on behalf of the owners of the ore, being the Yandi Participants.

The ore mined from the Yandi mining area is crushed and screened at the mine and then transported to Port Hedland for blending (with other ore from the Yandi mining area) and sale, predominately for export.

JW4 Joint Venture

The JW4 Joint Venture relates to the expansion of the current mining operations within the Yandi mining area through the commencement of mining operations at a deposit within the Yandi mining area not presently being exploited. This deposit is known as "Western 4".

It is proposed that the JW4 Joint Venture will sub-lease the Project Area, being the area in which the "Western 4" deposit is located, from the Yandi Participants. Prior to, or upon formation of, the JW4 Joint Venture, the Yandi Participants will establish a mine in the Project Area. While the Yandi Participants may commence production from that mine prior to the formation of the JW4 Joint Venture, the JW4 Participants will take over all production upon formation of the JW4 Joint Venture.

- 4.2 The express terms of the Proposed Transactions are set out clearly and unambiguously in the Transaction Documents. The Transaction Documents

represent the entire understanding of the parties in respect of the subject matter of the Proposed Transactions.

4.3 It is proposed that the JW4 Joint Venture will be created by BHPBM, IMEA, MIOC and JFE entering into an unincorporated joint venture in the following proportions:

- BHPBM 68%;
- JFE 20%
- IMEA 6.4%; and
- MIOC 5.6%.

4.4 The objects of the JW4 Joint Venture are:

- to operate a mine within the Project Area for the extraction of Product;
- to mine and handle Product and haul it to the Delivery Point;
- to carry out research and development in order to prove the commercial viability of steel makers using iron ore products that contain a substantial proportion of lower channel pisolite iron deposits;
- to rehabilitate any areas within the Project Area where the JW4 Joint Venture has ceased mining operations;
- to deliver Product in kind to the JW4 Participants at the Delivery Point; and
- to do all things ancillary to any of the above as determined by the management committee or by the manager of the JW4 Joint Venture under the provisions of the Management Agreement.

4.5 The parties have entered into a series of agreements for the purposes of the JW4 Joint Venture, the nature of which are described at paragraph 4.7 below.

Applicants

4.6 We set out below further information regarding the Applicants:

BHPBM

BHPBM is part of the BHP Billiton Ltd group of companies, and engages in the mining of iron ore and other minerals. Currently, BHPBM has iron ore mining interests in four mining areas within the Pilbara region of Western Australia. These are known as the Mount Newman, Yandi, Area C and Goldsworthy mining areas.

JFE

JFE is a newly incorporated company, the sole business of which will be the mining of iron ore in the Project Area. JFE is part of the group of companies held by JFE Holdings, Inc., a company listed on the Tokyo Stock Exchange, the Osaka Securities Exchange and the Nagoya Stock Exchange which focuses on its core businesses of steel and engineering.

JFE STEEL

JFE Steel is Japan's second largest steel producer and uses advanced technologies to efficiently produce high-quality steel products. Accordingly, it is a significant global purchaser of iron ore products. It is part of the group of companies held by JFE Holdings, Inc.

BHPBIO

BHP Billiton Iron Ore is a subsidiary of BHP Billiton, and manages iron ore operations, and produces finished iron ore products, on behalf of BHPBM and its co-joint venturers in the Pilbara.

BMAG

BHP Billiton Marketing AG purchases all the iron ore production of BHPBM in Western Australia under longstanding arrangements and sells the iron ore in its own right.

IMEA

ITOCHU Minerals & Energy of Australia is a consolidation of all the overseas subsidiaries of the Japanese conglomerate Itochu Corporation with resource development interests in Australia for iron ore, coal, aluminium, and crude oil. Itochu Corporation of Japan is a large general trading company, acting as an intermediary in the import, export and distribution of goods and services globally.

MII

Mitsui-Itochu Iron Pty Ltd is a consolidated subsidiary of Mitsui & Co., Ltd a Japanese corporation. Mitsui & Co., Ltd trades in metal products, minerals, machinery, electronics and information, chemicals, energy (LNG), consumer products and services and value creation. Mitsui & Co., Ltd is the world's fifth largest owner of iron ore exporting companies. Based in Australia, MII is involved in the mining and sale of iron ore.

MIOC

Mitsui Iron Ore Corporation Pty Ltd is also a subsidiary of Mitsui & Co., Ltd. Based in Australia, MIOC is involved in the mining and sale of iron ore.

Transaction documents

- 4.7 The Transaction Documents which describe the arrangements between the parties the subject of this application are:

(a) **Joint Venture Agreement**

The JW4 Joint Venture Agreement between BHPBM, JFE, IMEA and MIOC establishes the JW4 Joint Venture. It sets out the following provisions that may be relevant for the purposes of a competition analysis:

- The activities of the JW4 Joint Venture do not extend to the marketing, sale or disposal of Product, (clause 3.3(a)), or the delivery of Product beyond the nominated delivery point (clauses 3.2, 3.3 and 6.2).
- However, each JW4 Participant has the right to receive its share of the Product in kind at the Delivery Point and to separately market and dispose of that share (clause 6.1).
- Nothing in the Transaction Documents prevents a JW4 Participant from mining and marketing iron ore from sources outside the Project Area in competition with the operations the subject of the JW4 Joint Venture (clause 6.3).
- The JW4 Joint Venture will end, in the ordinary course, upon the later of:
 - (i) the expiration of the period of 11 years from commencement of the JW4 Joint Venture; and
 - (ii) the extraction of 106 million tonnes of Product from the Project Area,

and otherwise upon the occurrence of certain specified termination events (clause 15.1). However, notwithstanding the above, if it has not otherwise terminated in the meantime, the JW4 Joint Venture will terminate on the expiration of 15 years from the commencement of the JW4 Joint Venture.

(b) **Management Agreement**

The Management Agreement between the JW4 Participants and BHPBIO appoints BHPBIO as the sole and exclusive manager of the JW4 Joint Venture. BHPBIO is to manage, supervise and conduct all JW4 Joint Venture activities on behalf of, and as agent for, each of the JW4 Participants, and in accordance with the programmes and budgets set by the management committee. The management committee consists of representatives of each of the JW4 Participants.

(c) **Sub-lease**

The Sub-lease is a sub-lease of the Project Area from the Yandi Participants to the JW4 Participants for the purpose of carrying out the activities of the JW4 Joint Venture. The Minister for State Development for the State of Western Australia (being the Minister responsible for administering the agreement ratified by the State of Western Australia under the *Iron Ore (Marillana Creek) Agreement*

Act 1991) has consented to the Sub-lease, but it will not commence until after the formation of the JW4 Joint Venture.

CONFIDENTIAL :

END CONFIDENTIAL.

If IMEA or MIOC default under the terms of the JW4 Joint Venture Agreement and fail to remedy that default, the Qualifying Participant has the right to acquire IMEA or MIOC's interest in the JW4 Joint Venture and the Sub-lease. If JFE defaults under the terms of the JW4 Joint Venture Agreement and fails to remedy that default, the Qualifying Participant has the right to elect to terminate the JW4 Joint Venture Agreement. If the Qualifying Participant defaults under the terms of the JW4 Joint Venture Agreement and fails to remedy that default, the non-defaulting JW4 Participants may elect to terminate the JW4 Joint Venture Agreement by unanimous agreement. If there is no Qualifying Participant and a JW4 Participant defaults under the terms of the JW4 Joint Venture Agreement and fails to remedy that default, the non-defaulting JW4 Participants may elect to terminate the JW4 Joint Venture Agreement by unanimous agreement.

(d) **Deeds of Cross Charge**

The Deeds of Cross Charge are entered into by each of the JW4 Participants. Under the Deeds of Cross Charge, each JW4 Participant secures all moneys which it may become liable to pay to the manager and/or any other JW4 Participant in favour of each other JW4 Participant and the manager.

(e) **Domestic Sales Agreements (x4)**

Pursuant to four separate Domestic Sales Agreements between each JW4 Participant and the Yandi Participants, the JW4 Participants are to sell iron ore to the Yandi Participants as follows:

- the Yandi Participants must give a requirements notice specifying the total tonnage of Product they require from each individual JW4 Participant in each year (clause 3.2); and
- the Yandi Participants must ensure that all Product becomes the subject of a requirements notice in the Contract Year in which it is produced or, failing that, in a subsequent Contract Year (clause 3.6).

CONFIDENTIAL:

END CONFIDENTIAL.

Product sold under the Domestic Sales Agreements will be delivered to the Delivery Point, with title to pass to the Yandi Participants at the Delivery Point.

The Domestic Sales Agreements (and consequential arrangements) are required as part of the Proposed Transactions in order to address JFE

Steel's wish not to accept any risks entailed in the handling of the Product after delivery at the Delivery Point, the transporting of the Product to the port and the processing of the finished product the subject of the Yandi Export Sales Agreement.

(f) Export Sales Agreements (x3)

The agreements that comprise the Export Sales Agreements are separate agreements between JFE Steel and each of:

- (i) the Yandi Vendors for the supply of finished iron ore products comprising ore mined from the Yandi mining area (**Yandi Export Sales Agreement**);
- (ii) the Newman Vendors for the supply of finished iron ore products comprising ore mined from the Newman mining area (**Newman Export Sales Agreement**); and
- (iii) the Goldsworthy Vendors for the supply of finished iron ore products comprising ore mined from the Area C mining area (**MACTM Export Sales Agreement**).

Under the three Export Sales Agreements, JFE Steel is to purchase iron ore for export from Australia ex Port Hedland from the Goldsworthy Vendors, the Newman Vendors and the Yandi Vendors respectively. In each year, JFE Steel must acquire the minimum quantities set out in clause 4 of the Export Sales Agreements.

BMAG is a party to the Export Sales Agreements by virtue of a longstanding arrangement with BHPBM, pursuant to which BMAG purchases all of BHPBM's finished iron ore products from Western Australia and then markets and sells those finished iron ore products in its own right. Accordingly, although BHPBM is a party to the relevant joint ventures (being the Yandi Joint Venture, Mount Newman Joint Venture and the Mount Goldsworthy Mining Associates Joint Venture), it is not a party to the Export Sales Agreements.

The term of the Export Sales Agreements will expire at the end of the Contract Year in which the 15 year anniversary of the commencement date of the JW4 Joint Venture Agreement occurs, unless terminated earlier for default or by agreement (clause 14).

It is also to be a condition of the supply of iron ore to JFE Steel that the iron ore will be used in steel mills owned by JFE Steel or majority owned by a related body corporate of JFE Steel (clause 3.3).

Iron ore will be delivered to JFE Steel at the loading port at Nelson Point or Finucane Island (both of which are situated within the port at Port Hedland) with title and risk to pass at the time the iron ore is discharged from the loading devices into the vessel.

(g) Deed of Undertaking

As part of the commercial structure of the JW4 Joint Venture, JFE Steel (as parent company of JFE) has agreed to enter into the Export Sales Agreements.

The Deed of Undertaking specifies the procedure for determining the aggregate quantity of finished iron ore products that JFE Steel has agreed to purchase under the Export Sales Agreements in each Contract Year.

(h) **Mining Contract Novation Agreement**

The Mining Contract Novation Agreement novates the current contract for management services, mining services, ore processing services, train loading services and related work in relation to the Yandi mine site and creates the Yandi/JW4 Mining Contract with BHPBIO to be a party in two capacities - namely, as disclosed agent for and on behalf of the JW4 Participants in respect of certain matters and as disclosed agent for and on behalf of the Yandi Participants in respect of all other matters.

5 The reasons for the Applications

- 5.1 The Applications are made for the reason that there are provisions of the Transaction Documents and the Proposed Transactions that may have the potential to contravene a provision of Part IV on a technical basis. This is discussed further in Section 7.
- 5.2 Section 88(1) of the Act refers to the making of a contract or arrangement a provision of which *would be*, or *might be*, an exclusionary provision or *would have* or *might have* the effect, of substantially lessening competition within the meaning section 45 and applies similar language in relation to giving effect to a provision of a contract or arrangement.

Section 88(8) refers to engaging in conduct “that *constitutes* or *may constitute* the practice of exclusive dealing”.

Accordingly, the Act provides for the grant of an authorisation in relation to a contract, arrangement or conduct that *might* or *may* constitute a contravention. As the Australian Competition Tribunal observed in *Re Applications by Australasian Performing Rights Association*¹:

“Rather, the issue was whether ACCC should grant authorisation having regard to the tests provided in s90 of the TPA. The power to grant authorisation exists where the making or giving effect to a provision of the contract, arrangement or understanding ‘might be’ of a prescribed kind. It is irrelevant that the application for authorisation may be unnecessary.”

In *Re Concrete Carters Association*², the Tribunal said:

¹ (1999) ATPR ¶ 41-701 at 42,937.

² (1977) 31 FLR 193 at 245-246.

“... where an applicant believes on what appeared to him to be good grounds, that his conduct (if not authorised) may be in breach of the Act and he applies for authorisation accordingly, the tribunal’s duty, on an application for review, is to decide the application on the public benefit grounds spelt out in the Act and it is not one of those grounds that the application might appear to be unnecessary.”

- 5.3 Given the nature and purpose of the Transaction Documents, it may well be that the Applicants are not “in competition with each other” (for the purposes of section 45A) or “competitive with each other” (for the purposes of section 4D) in relation to the Transaction Documents or the Proposed Transactions. But for the contracts, arrangements and conduct that together comprise the Transaction Documents and the Proposed Transactions the JW4 Participants do not compete with each other. Further, there are practical constraints on the extent to which the JW4 Participants might otherwise compete for sales of iron ore ex the Project Area, in any event – see for example, paragraph 9.4 below.

Support for this view can be found in the ACCC’s determination of the application for authorisation of certain joint venture arrangements in relation to Gladstone Power Station.³ In that application, it was submitted that the joint venturers should not be considered in competition with one another for the purposes of electricity supply and that supply of electricity by the joint venturers on the same terms and conditions (including a common price) would not contravene section 45 as an exclusionary provision or section 45A as price fixing. Similarly, it was submitted that the acquisition of services from the “nominated generator” should not be price fixing by reason of the “collective acquisition” exemption in section 45A(4). The ACCC granted the authorisation to make the arrangements, but did not comment upon the issue of whether the joint venturers were not “in competition with each other”. The ACCC applied the “net public benefit” test as set out in the relevant sub-sections of section 90.

- 5.4 The Applicants are aware of, and maintain reliance upon, section 45(6) of the Act so that to the extent that provisions of the Transaction Documents may involve the practice of exclusive dealing, those provisions will fall for any competition assessment under section 47, not section 45.
- 5.5 Accordingly, the fact that the Applicants are making the Applications does not mean, and is not to be construed as meaning, that making or giving effect to the arrangements proposed in the Transaction Documents or otherwise engaging in conduct under, or pursuant to, the Proposed Transactions, contravenes, or is likely to contravene, any provision of Part IV of the Act.

In any event, the issues for determination by a court in the event of a contravention or an alleged contravention of a provision of Part IV of the Act are different from those for determination when an authorisation is sought⁴. Further, the mere act of making application for authorisation is not to carry with it any presumption as to the arrangements in question contravening a provision of Part IV of the Act.

³ *Comalco Limited - Gladstone Power Station* (1999) ATPR (Com) ¶50-277.

⁴ *Re Queensland Co-Operative Milling Association Ltd* (1976) 25 FLR 169 at 180.

6 The potential competition issues

- 6.1 If there is any risk of the Applicants (or any two or more of them) being found to be in competition for the purposes of section 45A or sections 4D and 45(2), the following elements of the Transaction Documents and the Proposed Transactions can be identified as potential technical competition issues:

Domestic Sales Agreements

- 6.2 The Domestic Sales Agreements may not exclusively relate to the export of iron ore for the purposes of section 51(2)(g) of the Act.
- 6.3 All of the JW4 Participants will individually acquire in kind, and then sell, all of the Product which has been jointly produced by them in proportion to their respective interests in the JW4 Joint Venture. Accordingly, the exemption from price fixing contained in section 45A(2)(a) should apply to these arrangements so as to avoid a contravention of sections 45/45A.
- 6.4 Where the Yandi Participants “collectively acquire” Product from each of the JW4 Participants pursuant to the Domestic Sales Agreements, the exemption under section 45A(4) is likely to apply. However, if for any reason, that exemption does not apply, the acquisition of Product by the Yandi Participants under the individual Domestic Sales Agreements, could technically give rise to a price fixing issue.
- 6.5 Given the interrelationship between the Domestic Sales Agreements and the Export Sales Agreements (see below), a further technical price fixing issue could arise under section 45A(7). That is, there could be some potential for the re-supply of Product by the Yandi Participants or any one of them to JFE Steel under the Export Sales Agreements to be considered to be subject to an arrangement between the JW4 Participants as to the price at which the Yandi Participants or any one of them are to re-supply Product to JFE Steel.

Export Sales Agreements

- 6.6 Given that the Export Sales Agreements relate exclusively to the export of iron ore from Australia, they are likely to be covered by section 51(2)(g) of the TPA, and accordingly, excluded from the application of Part IV.⁵
- 6.7 The scope of operation of section 51(2)(g) of the Act is unclear and it only protects a provision that relates exclusively to the export of goods from Australia. Other provisions of a contract that do not have that “exclusive” nexus will not be protected.

The Export Sales Agreements anticipate that any iron ore products supplied to JFE Steel will be fully exported from Australia. The Export Sales Agreements identify the delivery point for the various iron ore products as either the Finucane Island or Nelson Point loading facilities at Port Hedland.

⁵ With the exception of sections 45D, 45DA, 45DB, 45E, 45EA, or 48 (see section 51(2)), and subject to compliance with the notification requirements set out in s51(2)(g).

Further, the Export Sales Agreements provide that the iron ore products are sold on an FOB basis with title and risk to the iron ore products passing at the time they are discharged from the loading devices into the vessels.

However, if, for some reason, section 51(2)(g) does not apply to the Export Sales Agreements, there is a possibility that the present arrangements may give rise to a concern under section 45A to the extent that:

- (i) the Yandi Vendors agree on the price at which they will sell finished iron ore to JFE Steel;
- (ii) the Goldsworthy Vendors agree on the price they will sell finished iron ore products to JFE Steel; and
- (iii) the Newman Vendors agree on the price they will sell finished iron ore products to JFE Steel.

Yandi Export Sales Agreement

It is submitted that, in circumstances where the Yandi Participants acquire iron ore at the Delivery Point and then crush, screen, and blend the ore comprising the finished iron ore products prior to sale, they have engaged in a production process⁶ as part of the joint venture activities of the Yandi Participants. Accordingly, the Yandi Vendors would be able to benefit from the joint venture exception set out in section 45A(2)(a).

Newman Export Sales Agreement

In the case of the Newman Export Sales Agreement, the iron ore the subject of the agreement, is crushed, screened, blended and transported prior to sale, in pursuance of the activities of the Mount Newman Joint Venture. Accordingly, it is submitted that the provisions of section 45A(2)(a) would apply to any arrangement between the Newman Vendors with respect to the sale of the iron ore pursuant to the Newman Export Sales Agreement.

MACTM Export Sales Agreement

In the case of the MACTM Export Sales Agreement, the iron ore the subject of the agreement is crushed, screened, and blended prior to sale, in pursuance of the activities of the Mount Goldsworthy Mining Associates Joint Venture. Accordingly, it is submitted that the provisions of section 45A(2)(a) would apply to any arrangement between the Goldsworthy Vendors with respect to the sale of the iron ore pursuant to the MACTM Export Sales Agreement.

Third line forcing

- 6.8 There are several third line forcing concerns arising on the proposed arrangements. The potential third line forcing issues can be summarised as follows:
- (a) Each of the JW4 Participants separately supplies the Product to the Yandi Participants. It could therefore be argued that each JW4

⁶ See *Hamersley Iron v NCC [1999] FCA 867*.

Participant supplies Product to the Yandi Participants on condition that the Yandi Participants acquire Product from the other JW4 Participants.

- (b) Each of the Yandi Vendors supplies iron ore to JFE Steel in proportion to its (or its related corporation's) interest in the Yandi Joint Venture. It could therefore be argued that each Yandi Vendor supplies iron ore on condition that JFE Steel acquires iron ore from each of the other Yandi Vendors.
- (c) Pursuant to the commercial arrangements surrounding the JW4 Joint Venture, JFE Steel has agreed to enter into the Newman and MAC™ Export Sales Agreements, in addition to the Yandi Export Sales Agreement. It could therefore be argued that the Yandi Vendors (or each of them) supply iron ore to JFE Steel on condition that JFE Steel acquires iron ore products from both the Newman Vendors and the Goldsworthy Vendors.
- (d) A further potential third line forcing issue could arise under the Sub-lease in relation to sections 47(8)(c) and 47(9)(d) of the Act. This could occur where the Sub-lease is construed as being a grant by the sublessor to each JW4 Participant separately (as tenants in common). If that is the case, it may be asserted that the grant of the sub-lease by the sublessor to a JW4 Participant is on the condition that the related body corporate (JFE Steel) of one of the JW4 Participants (JFE) will acquire iron ore under the Export Sales Agreements with the Goldsworthy Vendors and the Newman Vendors.

None of these third line forcing concerns clearly arises on the arrangements proposed. However, it is possible that each "may constitute" the practice of exclusive dealing.

Exclusionary provisions

- 6.9 It is the view of the Applicants that the Transaction Documents and the Proposed Transactions do not give rise to any exclusionary provision for the following reasons:
- (a) None of the JW4 Participants is competitive with, or likely to be competitive with, any other JW4 Participant in relation to Product.
 - (b) The "purpose" of the arrangements between the various parties is clearly to ensure the profitable production of iron ore in the Project Area, to secure long term sales of iron ore into the Japanese steel industry. There is no purpose to prevent, restrict or limit supply or acquisition of any iron ore.⁷

⁷ *On the basis of the High Court's decision in News Ltd v South Sydney [2003] HCA 45 (Souths), a proscribed purpose must be the subjective purpose of the parties at the time of making the arrangements.*

- (c) In any event, there is no arrangement in respect of “particular persons or classes of persons” or “particular persons or classes of persons in particular circumstances or on particular conditions”.⁸

6.10 Without prejudice to these views, given the complexity of the arrangements between all the parties under the Transaction Documents and the Proposed Transactions and the marketing arrangements under each of the forms of sales agreements, for an abundance of caution, the Applicants also apply for authorisation of any provision of those arrangements that might be an exclusionary provision.

Exclusive dealing (other than third line forcing)

6.11 The following practices may constitute the practice of exclusive dealing for the purposes of section 47 of the Act:

- (a) the minimum tonnage obligations under the Domestic Sales Agreements;
- (b) the minimum purchase obligations under the Export Sales Agreements;
- (c) the minimum purchase obligations under the Deed of Undertaking; and
- (d) the requirement that iron ore acquired under the Export Sales Agreements be used in steel mills owned by JFE Steel, or majority owned by one of its related bodies corporate, which may constitute a prohibition upon re-supply.

6.12 Obviously, none of these provisions can contravene section 47 of the Act unless it has the purpose, or has or is likely to have the effect, of substantially lessening competition in a relevant market in Australia.

As discussed in section 8, the geographic dimension of the relevant market is worldwide and it is most unlikely that any of the Proposed Transactions could lessen competition in that market (or indeed, any other geographic market) to any degree at all.

Again, with an abundance of caution, provisions in the Transaction Documents which may constitute the practice of exclusive dealing are included in the Applications in order to ensure that the authorisations sought by the Applicants encompass the whole of the Transaction Documents and the Proposed Transactions.

7 The technical nature of the competition issues

7.1 The technical nature of many of the potential competition issues is emphasised by the underlying fact that Product will be blended with ore extracted from other sources by the Yandi Participants to produce the relevant finished iron ore products, which will then be exported from Australia.

⁸ Pursuant to the High Court's decision in *Souths*, an exclusionary provision must be specifically directed at a person or class – it is not sufficient that an arrangement have an incidental effect on a person or class of persons.

Further, this technical aspect is further exemplified by the fact that the sale of the Product occurs prior to crushing at the mine, where the ore is in a form not capable of further handling prior to crushing. The fact that there will be a series of commercial transactions that take place in order to achieve that result, should be irrelevant.

Additionally, the proposed arrangements only vary slightly from the arrangements already in place with respect to the production of finished iron ore products that comprise ore from the Yandi area.

That is, the only substantive change arises through the introduction of the Product into a process that already exists with respect to the ore currently mined in the Yandi mining area. This occurs prior to the primary crushing of the ore, from which point, all of the tasks associated with the production of the relevant finished iron ore products continue as they presently function. All of the other arrangements (with the exception of the Export Sales Agreements with JFE Steel and the Deed of Undertaking) are already in place, and do not give rise to any competition concerns.

The potential technical concerns addressed above arise purely because of the Yandi Participants' dilution of their interest in the Project Area, and the proposed JW4 Joint Venture.

Accordingly, the requirement of the various parties to enter into the series of transactions that are reflected in the Transaction Documents, even if they were to create technical competition issues, has no discernable effect upon competition upon any market, or any part of a wider market, in Australia.

7.2 The technical nature of the potential competition issues is as follows:

- (a) If there were any potential price fixing issue, it would arise because of the deeming provisions of section 45A.
- (b) Similarly, if there were any "exclusionary provision" issues, they would arise by reason of the technical and narrow drafting of section 4D.
- (c) Similarly, if there were any potential third line forcing issues, they would also arise by reason of the technical and narrow drafting of sections 47(6), (7), (8)(c) and (9)(d).
- (d) Section 45A may be limited to parties who are in competition with each other in a market *in Australia*. This arises from the meaning given to "competition" in section 45(3).

However, there is the technical prospect of parties in Australia being competitive in relation to overseas buyers and this would raise the further technical question of whether that form of "competition" (in the sense of it relating to export sales) should be competition in an Australian market.

In each case, the arrangements will not have the purpose or effect of substantially lessening competition, as a matter of fact – instead it is the deeming effect of the provisions mentioned above which gives rise to any possible contravention.

- (e) It is clear that a contravention of section 45(2) (making or giving effect to an exclusionary provision), does not depend upon identification of a market. While “competition” as it appears in section 45 (and section 45A) is defined in section 45(3) by reference to competition in an Australian “market”, and hence an argument arises that the prohibition of exclusionary provisions applies only to entities which are “competitive with each other” in an Australian market⁹, section 4D itself is not expressed in terms which clearly require such a construction¹⁰.

In any event however, sections 4D and 45(2) could apply if the parties are competitive in Australia in relation to the supply of goods or services to non-Australian buyers¹¹.

Similar technical issues arise in relation to third line forcing. Third line forcing conduct as defined in sections 47(6), (7), (8) and (9), does not directly relate to a “market” or “competition” and, it could be argued that the conduct need not be limited to conduct in Australia.

- 7.3 In conclusion, the potential “competition issues” referred to above, are very much technical in nature. They do not disclose any meaningful anti-competitive effect on any relevant markets. There is no real restrictive or exclusionary competitive effect associated with the Proposed Transactions. The primary object of the Proposed Transactions is to facilitate the production and export of iron ore. There is, therefore, no public detriment by reason of any potential anti-competitive effect.

8 Market definition

- 8.1 The first task is the identification of the relevant market. This is “the essential first step”. As stated in *Re Queensland Independent Wholesalers Limited*¹²:

“Generally, the market is the network of actual and potential transactions between buyers and sellers of goods or services that are, or could be, in close competition. However, for the Tribunal’s purposes, we seek to identify the area or areas of close competition relevant to authorisation. As has been stressed repeatedly in Tribunal determinations, ‘the specification and analysis of the market has significance not just for the identification of detriment but also for the establishment of benefit’.”

- 8.2 Section 4E of the *Trade Practices Act* provides that, unless the contrary intention appears, “market” means a market in Australia.

⁹ See sections 45(3) and s4E, from which a meaning for the term “competitive with each other” may be inferred.

¹⁰ See *Trade Practices Commission v. TNT Management Pty Ltd* (1985) 6 FCR 1 and *ASX Operations Pty Ltd v. Pont Data Australia Pty Limited (No. 2)* (1991) 27 FCR 492.

¹¹ *ASX Operations* at 498.

¹² (1995) ATPR ¶41-438 at 40,949.

However, the ACCC and the Tribunal have recognised the existence of international and worldwide markets¹³ in the context of the *Trade Practices Act*.

Market definition for iron ore

8.3 Recent decisions of the European Commission provide some assistance in relation to iron ore. The following assessments of the European Commission can be drawn from those decisions:

- (a) Iron ore represents a separate product market from other minerals¹⁴.
- (b) In the *Caemi/CVRD* decision, it would appear that the Commission formed the view that there is a separate seaborne market, on the basis the participation in the “seaborne” trade requires sufficient infrastructure such as railway suitable for the transportation of very large tonnages and deepwater harbours. Mining companies which have no such infrastructure at their disposal cannot compete on export markets and supply mainly their home markets.
- (c) As metals and minerals are actively traded as commodities on a global basis, the relevant geographic market is worldwide. The European Commission has made this determination specifically in relation to iron ore (*Rio Tinto/North; Caemi/CVRD*).

8.4 The *Rio Tinto/North* acquisition was also considered by the ACCC. The ACCC appeared also to conclude that:

- (a) there is a separate product market for each of iron ore, copper and gold; and
- (b) that the geographic market in each case is likely to be worldwide.

The ACCC also observed that while the merged entities’ share of Australian iron ore production would be substantially higher than its global shares, the proposal’s impact on competition in Australian markets was minimal.

8.5 It is submitted that the relevant market for the purposes of the Applications is the worldwide market for iron ore¹⁵. Even if there is a separate product market for “seaborne” iron ore, it would not affect the analysis for the purposes of an application for authorisation under Division 1 of Part VII of the Act.

The underlying reason for this submission is that the Transaction Documents present very considerable public benefits in Australia and no public

¹³ For example, in the *RGC/Westralian Sands* merger the ACCC accepted that there was a world market for the supply of feedstock for chloride-root pigment production. The ACCC noted that the merger would reduce from 2 to 1 the number of non-integrated suppliers to domestic pigment manufacturers, but took into account the fact that the merged firm will compete in a world market against strong overseas competitors.

¹⁴ Case No. COMP.M.2062 - *RioTinto/North* (1 August 2000).

¹⁵ In its final determination with respect to the Wheelarra Joint Venture authorisation application (published 2 June 2005), the ACCC concluded that given the substitutability of export and domestic iron ore, there was likely to be a worldwide market for the production and supply of iron ore (at paragraph 6.49).

detriments in Australia. This will be the case regardless of the geographic dimension given to the iron ore market (or even a seaborne iron ore market).

9 Underlying rationale for the Proposed Transactions

- 9.1 Separately from the Export Sales Agreements, JFE Steel has already entered into various short term sales contracts for the purchase of various types of iron ore from each of the Yandi Vendors, Goldsworthy Vendors and Newman Vendors.

The primary difference between the existing sales contracts and the Export Sales Agreements is that the Export Sales Agreements include a long term obligation on JFE Steel to acquire a minimum quantity of dry metric tonnes from each of the Newman, Yandi and Goldsworthy Vendors in each Contract Year.

Further, the arrangements contemplated by the Transaction Documents provide JFE Steel an interest in the operations of the mine to be established in the Project Area and, in current conditions of limited supply of iron ore, this will secure for it a long-term, low risk supply source of iron ore, through the Export Sales Agreements.

- 9.2 The purchasing obligations contained in the Export Sales Agreements are central to the Proposed Transactions, which will not go ahead without them.

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However, the Yandi Participants have, and will, incur a substantial level of capital expenditure in establishing the mine in the Project Area.

Other than in special identified circumstances, the JW4 Participants will not be contributing directly to capital expenditure in relation to the JW4 Joint Venture. Further, the JW4 Participants have no obligation to contribute to capital expenditure outside of the Project Area.

- 9.3 Bearing the above in mind, the Yandi Participants will only agree to a deal in which they accept disproportionate capital risk if they are guaranteed definite demand (and financial return) for the additional volumes of iron ore produced (both by them and by the Newman and Goldsworthy Participants).

Notwithstanding the potential increased returns to the Yandi Participants resulting from the production and sale of finished iron ore products containing Product, if JFE Steel's long term purchasing obligations were not secured as they have been in the Transaction Documents, the Yandi Participants would not enter into the transaction.

- 9.4 The Project Area contains ore with geological features that impact on the ability of the Yandi Participants to presently market it. In particular, that ore

contains substantial lower channel pisolite iron deposits. Accordingly, the objects of the JW4 Joint Venture include the carrying out of research and development in order to prove the commercial viability to steel makers of using iron ore products that contain a substantial proportion of lower channel pisolite iron deposits.

- 9.5 JFE Steel has an advanced research capability with respect to lower channel pisolite iron deposits and is interested in further developing this. The research and development the JW4 Joint Venture intends to conduct is hoped to lead to the production and sale of lower channel pisolite iron deposits within the Project Area, which would not otherwise be commercially feasible. If this occurs, it would extend the lifespan of the mining operations in the Yandi mining area and promote a more productive use of the available iron ore resource.

10 The test for authorisation

Sections 90(6) and 90(8) of the Act

- 10.1 Section 90(6) of the Act provides that the ACCC must be satisfied in all the circumstances that the provision of the proposed contract or the proposed conduct would result, or would be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract were made or the proposed conduct were engaged in. Section 90(6) does not apply to a provision that is or may be an exclusionary provision or to conduct to which sub-section 47(6) or (7) applies.

Section 90(8) applies in relation to a provision that may be an exclusionary provision and to proposed conduct to which sub-section 47(6) or (7) applies. Although section 90(8) is drafted in different terms from section 90(6), the Tribunal has observed that, in substance, the tests in the two sections are the same¹⁶.

Accordingly, for all practical purposes, the public benefit and public detriment test is applied under both sub-sections.

The steps to be taken

- 10.2 The steps to be taken in assessing the Applications can be summarised as follows:

- (a) The assessment of the relevant market (as discussed in Section 8).

In general terms, the assessment of benefit and detriment “can only be made in the overall context of the function performed by the applicants, of the industry in which they operate and of the market or markets which would be affected by such conduct”¹⁷.

¹⁶ *Re 7-Eleven Stores Pty Ltd* (1994) ATPR ¶41-357 at 42,654, *Australasian Performing Rights Association* (1999) ATPR ¶41-701 at 42,935 and *Australian Wool Growers Association Limited* [1999] AcompT 4.

¹⁷ *Re Concrete Carters Association (Vic)* (1977) 31 FLR 193 at 202; *Australasian Performing Rights Association* at 42,936.

- (b) The “future with-and-without” test is to be applied.

In weighing relevant public benefits and detriments, it is necessary to compare the position which would, or would be likely to exist, in the future, on the one hand if authorisation were to be granted, and on the other hand if it were absent.

In assessing an application for authorisation, particular provisions are not to be assessed in isolation from each other. It is important that benefit or detriment is determined by considering the proposed arrangements and conduct as a whole. As the Tribunal has observed:

“It is the sum of its parts, some of which in their effect are anti-competitive; but others have positive benefits.”¹⁸

- (c) It is necessary to identify a “counterfactual” in order to apply the “future with-and-without” test. That is, the ACCC needs to consider the circumstances which are most likely to prevail in the absence of the proposed arrangements; that alternative being the “counterfactual”.
- (d) In assessing the public benefit and public detriment the “future with-and-without” test involves the ACCC:
- (i) identifying the public benefits and public detriments; and
 - (ii) weighing those public benefits and public detriments.

Public benefits and public detriments

10.3 Public benefit refers to¹⁹:

“Anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.”

Public detriment refers to²⁰:

“Any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.”

10.4 In considering public benefit, the following principles must be taken into account:

- (a) The assessment of efficiency and progress must be from the perspective of society as a whole and that efficiency itself encompasses allocative efficiency, production efficiency and dynamic efficiency.
- (b) As the Tribunal has observed²¹:

¹⁸ *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997) ATPR ¶41-593 at 44,220.

¹⁹ *Re AGL Cooper Basin Natural Gas Supply Arrangements* at 44,215.

²⁰ *Ibid.*

“We cannot rely upon the functioning of competitive markets to deliver everything ‘of value to the community generally’.”

- (c) The analysis under sections 90(6) and 90(8) is separate and different from the analysis required in the context of section 45 or section 47 of the Act.
- (d) The making of an application for authorisation does not carry with it any presumption that the arrangements to be authorised are likely to contravene a provision of Part IV of the Act. The ACCC’s determination upon the applications for authorisation is to be made according to the requirements set out in section s90(6) and 90(8) of the Act.

10.5 The ACCC has described the concept of “public benefit” as follows²²:

“Although public benefit is not defined in the Act, the concept of public benefit is given a wide ambit and may encompass any conduct that produces direct or indirect benefits to the Australian public. Private benefits that accrue to the applicants or some other limited group are not relevant unless they also have a beneficial impact on the public at large. Moreover, general statements about public benefits should be supported by factual material.”

This reference to “private benefit” needs to take into account the observations of the Tribunal in *Re Rural Traders Co-Operative (WA) Ltd*²³:

“Before a benefit (or detriment) can properly be regarded as a benefit (or detriment) to the public for the purposes of the assessment of public benefit ... it must be seen as a benefit (or detriment) to the community generally. This does not mean that private benefit or private detriment are necessarily irrelevant. Injury to an individual can itself, in many circumstances, constitute a detriment to the community generally. Injustice to an individual will commonly do so. The encouragement or enabling of an individual to pursue legitimate ends or to attain legitimate awards may well be beneficial to the community generally. When a benefit or a detriment to a particular individual or segment of the public is presented as a relevant benefit or detriment to the public ... the Tribunal must assess whether the benefit or detriment to the individual or group can properly be so categorised. That assessment will ordinarily involve the consideration of whether the community generally has an interest in the individual or group so benefited or disadvantaged and whether the benefit or detriment involves detriment or benefit to other individuals or groups.”

The ACCC has adopted the Tribunal’s observations in *Rural Traders* in its Merger Guidelines²⁴. The ACCC noted that “the concept of a benefit to the

²¹ *Re 7-Eleven Stores Pty Ltd* (1994) ATPR ¶41-357 at 42-677.

²² *Mereenie Producers - Gasgo Sales Agreement* (1999) ATPR (Com) ¶50-271 at 53,130.

²³ (1979) ATPR ¶40-110 at 18,123.

²⁴ June 1999 at para.6.42.

public is not limited to a benefit to consumers, a benefit to a private party which is of value to the community generally is a public benefit”.

- 10.6 Although it is submitted that the Transaction Documents and the Proposed Transactions are not anti-competitive in any way (taking into account the very technical nature of any potential competition issues as discussed in Section 7), it is worth noting the view of the Tribunal that²⁵:

“It is erroneous to equate anti-competitiveness with detriment. Anti-competitive behaviour may in certain circumstances be a positive benefit.”

The approach to adopt - the essential features

- 10.7 It is clear that the establishment of mining activities in the Project Area and the employment, efficiencies, export revenue, and government royalties and other benefits that it will create, are very substantial public benefits.

The transactions that are reflected in the Transaction Documents are a crucial factor underpinning the establishment of mining activities in the Project Area, ensuring the extension of the mine life of the Yandi area operations and in securing sales revenue for the Yandi Vendors, Goldsworthy Vendors and Newman Vendors.

The transactions also provide key long-term commercial benefits to the Yandi, Newman and Goldsworthy Participants and Australian industry, by providing JFE Steel (through its subsidiary, JFE) with the opportunity to participate in Australian iron ore mining operations. By doing so, the proposed arrangements will further develop the existing relationships of the Yandi Participants, Newman Participants and Goldsworthy Participants with a key participant in the Japanese steel industry, being a key Australian export market.

Without the transaction, the very substantial public benefits in terms of employment and export-generated royalty revenue may be significantly deferred or diminished.

- 10.8 In this regard, it is useful to refer to the approach of the Tribunal in *Re Applications by Australasian Performing Rights Association*²⁶. In that decision, the Tribunal was considering the articles and rules of the Australasian Performing Rights Association (APRA). The Tribunal applied the following approach:

“The input and output arrangements, in particular, underpin the essential functioning of APRA. In applying the ‘future with-and-without’ test, the future without the essential elements of the input and output arrangements would in all likelihood be no collecting society at all. No one has suggested that such a future should be encouraged.

...

²⁵ *Re Media Council of Australia (No. 2)* (1987) ATPR ¶40-774 at 48,419.

²⁶ (1999) ATPR ¶4141-701 at 42,988.

We think that the proper approach is that which has been followed in the overseas inquiries and decisions which we have reviewed: Is a particular feature of APRA's Articles and Rules essential to the operation of APRA as an efficient collection society? ... Only if a particular feature is not essential would it then be appropriate to consider whether that feature, standing alone, has a net public benefit."

- 10.9 This means that if a contract, code, constitution, rules or other arrangement results, or is likely to result, in a benefit to the public, all the essential features must be considered as part of the whole. If they are integral to the overall public benefit, they cannot be assessed in isolation and will be preserved. It is only those features which are not essential which may be considered on a "stand alone" basis.

It is submitted that this is the approach that should be adopted in relation to the Applications. In doing so, all of the essential features of the Transaction Documents and the Proposed Transactions must be seen as part of the overall public benefit and cannot be isolated or assessed on a "stand alone" basis.

11 The elements of the public benefit

The development and expansion of markets in Asia, and in particular in Japan, requires that iron ore producers have an eye to the future and seek to develop long-term mutually beneficial relationships based upon trust and understanding. The development of such relationships requires a longer-term commitment than can be achieved through mere spot sales agreements or short term supply contracts.

In the near term, there are immediate benefits to BHP Billiton and its co-participants in the relevant joint ventures and to the Australian economy, of having secured the export sales arrangements for very large volumes of iron ore with JFE Steel involved in the transaction.

The following minimum volumes have been contracted in the Export Sales Agreements which form part of the Proposed Transactions:

CONFIDENTIAL

END CONFIDENTIAL

The revenue from sales over the life of the Export Sales Agreements are estimated to be approximately US\$4.3 billion, of which royalties to the State of Western Australia will be approximately US\$240 million.

These sales have been secured by BHP Billiton and its co-joint venturers against competition from suppliers outside of Australia, in part, by offering JFE Steel (through its subsidiary, JFE) a degree of participation in the mining operations at the Project Area, as discussed above.

If the Proposed Arrangements had not been agreed upon, it is likely that JFE Steel would have sought a similarly structured transaction, potentially from Brazilian, South African or Indian producers, BHP Billiton and its co-joint

venturers would not have secured the sales referred to above, and the wider benefits to the local and Australian economies would not have been achieved.

The transaction will also underpin the long-term viability and success of the operations in the Yandi mining area.

In addition to these near term benefits flowing from these arrangements, the proposed arrangements will:

- generate greater certainty for future investment, and employment for people located in the Pilbara;
- provide the Australian iron ore industry with a more secure platform for future development and sales growth in the supply of iron ore into Japan; and
- through fostering good relationships between BHP Billiton and its co-joint venturers and JFE Steel, provide BHP Billiton and its co-joint venturers with opportunities to expand exports of other steel-making commodities, such as manganese and coking coal to JFE Steel and also the potential to expand exports of other products in their mineral and petroleum portfolios.

It is critical, in order to secure the longer term future of the Pilbara iron ore industry, to ensure that suppliers such as BHP Billiton and its co-joint venturers, continue to develop relationships with leading Japanese steel makers.

The proposed arrangements will have the effect of securing increased production and output levels from the Pilbara iron ore industry for supply into markets such as the Japanese steel industry and the development of stronger commercial relationships between participants in the Japanese steel industry and the Australian iron ore industry. This in turn will provide the Australian iron ore industry, and the Pilbara region of northern Western Australia, with greater certainty as to its future economic viability.

In order to supply iron ore to JFE Steel under the proposed arrangements (as well as meet other demand), BHP Billiton and its co-joint venturers have invested, and are continuing to invest heavily in further infrastructure and production capacity in the Pilbara region.

The investment in capacity expansion required to fulfil the potential 16 million tonne per year delivery obligation under the Proposed Transactions and the associated construction projects and ongoing management of the infrastructure, will generate significant employment opportunities in Western Australia. The jobs directly and indirectly created will enhance the economic viability of regional centres such as Port Hedland.

Further, if the Proposed Transactions do not proceed, there is a real likelihood that, over the period of the proposed arrangements, significant volumes of iron ore might otherwise be purchased by JFE Steel from suppliers in other countries.

Public Detriment

The Applicants submit that there is no public detriment arising from the Proposed Transactions.

The arrangements for which the Authorisations have been sought relate almost entirely to the export segments of the market, and there will be little, if any, effect on competition in any domestic market.

The future with and without test

In the circumstances, the Applicants submit that in the absence of the arrangements, there is a real risk of reduced sales of iron ore from the Pilbara region generally for the reasons set out above. Further, there is a real risk of reduced trade between Australia and Japan (resulting from JFE Steel sourcing iron ore from suppliers outside Australia), and that is also likely to affect the long-term economy and prospects of the Pilbara. It may also represent a missed opportunity to expand Australia's export industry for iron ore and a variety of other products into Japan.

If the Proposed Transactions do not go ahead then, among other things:

- the Australian public (particularly those in the remote regions of north-western Western Australia) will not benefit from the increase in employment and investment that these arrangements will underwrite;
- the Australian public will not benefit from the increase in export-generated sales and royalty revenue;
- BHP Billiton and the Australian iron ore industry will have lost the opportunity to develop a platform for sales growth in Japan; and
- the potentially substantial and beneficial multiplier effects which would arise throughout the whole Australian economy due to increased economic development arising from the Proposed Transactions would not occur, and so Australia's competitiveness at national, regional and international levels would not have this opportunity to improve.

Public Benefits not achievable without the Proposed Transactions

The benefits set out above will not be achieved unless the Proposed Transactions proceed. Further, the form of the Proposed Transactions has been carefully negotiated and agreed in order to achieve the desired outcomes of the parties, as well as the public benefits stated – there is no acceptable alternative arrangement open to the parties.

Equally, the Proposed Transactions cannot be adjusted in any way. The precise structure of the whole of the Proposed Transactions, as set out in the Transaction Documents, is the result of extensive negotiations between the parties, and reflects the commercial bargain between the parties and the levels of risk that they are prepared to accept. For this reason, these arrangements are essentially inseverable.

Particularly, the participation by JFE in the mining operations in the Project Area (and the consequential arrangements in relation to sale under the Domestic Sales Agreements) is necessary in order to deliver many of the benefits referred to above.

It is on the strength of those arrangements that stronger, long-term relations with JFE Steel (and possibly other important iron ore customers) will be developed further.

JFE Steel, as a condition of entering into the proposed arrangements, wished to participate (through its subsidiary, JFE) in the mining operations in the Project Area, but also wished to ensure a more certain level of return than that of a traditional joint venture partner. All the Product is to be sold back to the Yandi Participants at a certain price so as to generate a relatively less variable return to JFE Steel than would ordinarily be the case in a mining project, reducing the financial risk of both its investment and its commitment to take the substantial volumes of iron ore products to be sold under the proposed Export Sales Agreements.

12 Conclusion

In short:

- there is no appreciable anti-competitive (or other) detriment associated with the Proposed Transactions. Against that, there are several important public benefits which will accrue from the Proposed Transactions, particularly securing commitments to a large volume of export sales of iron ore products to Japan, against competing producers in other countries;
- securing demand for iron ore products from the Pilbara region;
- underwriting further development of, and investment in, the iron ore mining and associated infrastructure in the Pilbara region;
- securing employment and development in the Pilbara region;
- providing an opportunity to grow the trade in steel-making commodities between Australia and Japan, to the benefit of Australia's export industries; and
- securing the benefits attributable to the multiplier effects flowing from increased export sales from Australia, and investment in infrastructure in Australia.

If you have any enquiries concerning this transaction please contact:

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13 Glossary

For the purposes of this submission:

ACCC is the Australian Competition and Consumer Commission.

Act is the *Trade Practices Act 1974*.

Applicants means BHPBM, BHPBIO, BMAG, IMEA, MII, MIOC, JFE and JFE Steel.

Applications are the Applications for authorisation under Division 1 of Part VII of the Act in the form prescribed by the Trade Practices Regulations and attached to this submission.

BHPBM is BHP Billiton Minerals Pty Ltd ABN 93 008 694 782 of Level 17, 225 St Georges Terrace, Perth, WA.

BHPBIO is BHP Billiton Iron Ore Pty Ltd ABN 46 008 700 981 of Level 17, 225 St Georges Terrace, Perth, WA.

BMAG is BHP Billiton Marketing AG of Jochlerweg 2, PO Box 105, CH6341, Baar, Switzerland.

Contract Year means a year commencing on and including 1 April and ending on and including the following 31 March except that:

- (a) the first Contract Year will run from the commencement date of the JW4 Joint Venture Agreement until the following 31 March; and
- (b) the last Contract Year will commence on 1 April and end on the date of expiration or earlier termination of the JW4 Joint Venture Agreement.

Deeds of Cross Charge means the agreements referred to in paragraph 4.7(d).

Delivery Point means any of the following points on or about Mineral Lease ML270SA, as directed by the Yandi Participants:

- (a) the ore receival point at the interim crushing plant;
- (b) the ore receival point at the main crushing plant;

- (c) an ore stockpile, including any long term stockpile or medium term stockpile; or
- (d) any other area nominated by the Yandi Participants.

Goldsworthy Participants means the participants in the Mount Goldsworthy Mining Associates Joint Venture comprising, at the date of this submission, BHPBM, IMEA and MIOC.

Goldsworthy Vendors means each of BMAG, IMEA and MIOC.

IMEA is ITOCHU Minerals & Energy of Australia Pty Ltd ACN 009 256 259 of Level 22, Forrest Centre, 221 St Georges Terrace, Perth, WA.

JFE is JFE Steel Australia (YD) Pty Ltd ACN 115 008 921 of Suite 3/A, 52 Martin Place, Sydney, NSW.

JFE Purchaser means JFE or a related body corporate of JFE.

JFE Steel is JFE Steel Corporation of 2-3 Uchisaiwai-cho 2-chome, Chiyodaku, Tokyo 100-0011, Japan.

JW4 Joint Venture is the joint venture proposed to be entered into by BHPBM, IMEA, MIOC and JFE.

JW4 Joint Venture Agreement means the agreement referred to in paragraph 4.7(a).

JW4 Participants are the participants in the JW4 Joint Venture, being BHPBM, IMEA, MIOC and JFE.

Management Agreement means the agreement referred to in paragraph 4.7(b).

MII is Mitsui-Itochu Iron Pty Ltd ABN 84 008 702 761 of Level 24, Forrest Centre, 221 St Georges Terrace, Perth, WA.

MIOC is Mitsui Iron Ore Corporation Pty Ltd ABN 16 050 157 456 of Level 24, Forrest Centre, 221 St Georges Terrace, Perth, WA.

Mount Goldsworthy Mining Associates Joint Venture means the unincorporated joint venture known as the Mount Goldsworthy Mining Associates Joint Venture.

Mount Newman Joint Venture means the unincorporated joint venture known as the Mount Newman Joint Venture.

Newman Participants means the participants in the Mount Newman Joint Venture comprising, at the date of this submission, BHPBM, MII and IMEA.

Newman Vendors means each of BMAG, MII and IMEA.

Product means iron ore from the Project Area.

Project Area means the part of Mineral Lease ML270SA in the Pilbara region of Western Australia the subject of the Sub-lease.

Proposed Transactions means the proposed transactions identified and described in Section 4 of this submission.

Qualifying Participant means BHPBM (or, if BHPBM ceases to be a JW4 Participant, any JW4 Participant that holds an interest of greater than 50% in the JW4 Joint Venture).

Sub-lease means the sub-lease described in paragraph 4.7(c).

Transaction Documents means the transaction documents identified and described in section 4.7 of this submission.

Yandi Export Sales Agreement means the Export Sales Agreement between the Yandi Vendors and JFE Steel.

Yandi Joint Venture means the unincorporated joint venture known as the Yandi Joint Venture.

Yandi Participants means the participants in the Yandi Joint Venture comprising, at the date of this submission, BHPBM, MIOC and IMEA.

Yandi Vendors means each of BMAG, MIOC and IMEA.