



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

## Applications for Authorisation

Lodged by

**BHP Billiton Iron Ore Pty Ltd for itself and on behalf of  
BHP Billiton Minerals Pty Ltd, BHP, BHP Billiton  
Marketing AG, Itochu Minerals & Energy Of Australia  
Pty Ltd, Mitsui Itochu Iron Pty Ltd, Mitsui Iron Ore  
Corporation Pty Ltd, JFE Steel Australia (YD) Pty Ltd,  
and JFE Steel Corporation**

in respect of agreements relating to the extraction, blending  
and sale of iron ore from the Pilbara Region, Western  
Australia.

**Date: 14 December 2005**

**Authorisation Nos:** A90981  
A90982  
A90983  
**Public Register No:** C2005/1573

**Commissioners:**  
Samuel  
Sylvan  
Martin  
McNeill  
Smith  
Willett

## Summary

The Australian Competition and Consumer Commission proposes to grant authorisation to the arrangements under the JW4 Joint Venture, to BHP Billiton Iron Ore Pty Ltd, and the entities identified as being participants in the JW4 Joint Venture.

It is proposed to grant authorisation to the arrangements under the JW4 Joint Venture for a period of 15 years from the commencement of the venture.

### The applications

On 20 September 2005, BHP Billiton Iron Ore Pty Ltd (BHPBIO) lodged applications seeking authorisation for conduct arising out of agreements establishing the JW4 Joint Venture for the mining, processing, and sale of iron ore from the Yandi region in Western Australia. The iron ore will be sold to purchasers in Japan.

Applications A90981, A90982, and A90983 were made under subsections 88(1) and 88(8) of the *Trade Practices Act 1974* (the TPA) concerning a series of contracts (the Transaction Documents) formed between the JW4 Joint Venture participants to:

- make or give effect to a contract or arrangement or arrive at an understanding, where a provision of that proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the TPA
- make or give effect to contract or arrangement or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA
- engage in conduct that constitutes or may constitute the practice of exclusive dealing, within the meaning of section 47 of the TPA.

The Applicant also requested that authorisation be granted to future participants in the JW4 Joint Venture under section 88(14)(b) of the TPA. The TPA deems that, in these circumstances; the authorisation is subject to a condition that the Applicant notifies the ACCC, when required, of any change to the names of the participants in the JW4 Joint Venture.

BHPBIO lodged the applications on behalf of itself and the following parties (the Applicants):

- BHP Billiton Minerals Pty Ltd (BHPBM)
- BHP Billiton Marketing AG (BMAG)
- Itochu Minerals & Energy Of Australia Pty Ltd (IMEA)
- Mitsui Iron Ore Corporation Pty Ltd (MIOC)
- Mitsui Itochu Iron Pty Ltd (MII)
- JFE Steel Australia (YD) Pty Ltd (JFE)
- JFE Steel Corporation (JFE Steel).

### **Assessment of public benefits and anti-competitive detriments**

The ACCC has considered the public benefits and anti-competitive detriments that are likely to flow from the JW4 Joint Venture. The ACCC has identified significant public benefits that are likely to flow from the agreements, including increased exports and significant economic benefits to the WA and Australian economies and to the economy of the Pilbara.

The ACCC considers that these public benefits outweigh the limited anti-competitive detriments identified as likely to flow from the Agreements.

### **Term of authorisation**

The ACCC proposes to grant authorisation to applications A90981, A90982, and A90983 for a period of 15 years from the commencement of the JW4 Joint Venture.

## Table of contents

Summary.....	i
Table of contents .....	iv
<b>1. Introduction.....</b>	<b>1</b>
Authorisation process.....	1
<b>2. Background to the industry .....</b>	<b>2</b>
Steel production .....	2
Iron ore industry.....	2
Australian iron ore industry .....	3
<b>3. The Applications and Submissions.....</b>	<b>6</b>
<b>4. The Agreements .....</b>	<b>11</b>
<b>5. Possible Competition Issues Identified by the Applicants.....</b>	<b>15</b>
<b>6. Statutory Provisions.....</b>	<b>19</b>
Statutory tests.....	19
Definition of public benefit and public detriment.....	19
Application of the tests .....	20
<b>7. ACCC Assessment .....</b>	<b>21</b>
Relevant Market.....	21
Future with and without test .....	21
Public benefits.....	22
Anti-competitive detriments .....	23
<b>8 Draft Determination .....</b>	<b>24</b>
The Applications .....	24
Statutory Test.....	25
Term of Authorisation.....	26

## **1. Introduction**

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (TPA). A key objective of the TPA is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2 The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as ‘authorisation’.
- 1.3 Broadly, the ACCC may authorise businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.4 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

### **Authorisation process**

- 1.5 Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons.
- 1.6 The TPA requires that the ACCC then issue a draft determination in writing proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.7 Once a draft determination is released, the Applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination’s operation and effect. The ACCC will also usually invite interested parties to lodge written submissions on the draft determination.
- 1.8 The ACCC then reconsiders the application, taking into account the comments made at the conference (if one is requested) and any further submissions received, and issues a written final determination.
- 1.9 This document is a draft determination in relation to the applications for authorisation lodged by BHPBIO concerning the agreements establishing the JW4 Joint Venture.

## 2. Background to the industry

2.1 Iron ore is primarily used to make the iron required for steel production. Approximately 90 per cent<sup>1</sup> of iron ore produced in Australia is exported. The remaining 10% is sold within Australia's domestic market to iron and steel manufacturers.

Besides iron ore, steelmaking may also include:

- Coking coal
- Limestone
- Scrap metal
- Direct reduced iron (DRI) or its briquetted form, hot briquetted iron (HBI)
- Pig iron
- Ferroalloys.<sup>2</sup>

2.2 The price of Australian iron ore is highly dependant on the demand for iron ore within the global steel market. The price that steel mills are willing to pay for iron ore is linked to the ore's chemistry (eg the amount of iron it contains) and form.

2.3 The price for different types of ore takes into account variations in quality, with higher grade lump ores attracting higher prices. Other factors, such as security and reliability of supply, and the diversification of supply sources play a secondary role.<sup>3</sup>

### Steel production

2.4 Steel is produced by one of two basic methods: the blast furnace and basic oxygen furnace (BF/BOF) method or the electric arc furnace (EAF) method.

2.5 The most common is the BF/BOF method, which involves smelting iron ore in the blast furnace and then using the resulting product to make steel in a basic oxygen furnace. The EAF method uses a combination of scrap metal and virgin iron units such as HBI, DRI or pig iron as feedstock that is melted to produce steel.

### Iron ore industry

2.6 The iron ore industry, like the steel industry, has become increasingly globally orientated following a significant process of consolidation led by some of the world's largest diversified resource companies.

2.7 Consolidation has led to global iron ore production now being dominated by three highly diversified resource companies: Companhia Vale do Rio Doce

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<sup>1</sup> IBIS World Industry Report B1311 *Iron Ore Mining In Australia* 7 October 2004, p. 8.

<sup>2</sup> Peter Ferber, *The Australian Steel Industry in 2001*, Department of Industry, Tourism and Resources (2002), pp 11 – 15.

<sup>3</sup> IBIS World Industry Report B1311 *Iron Ore Mining In Australia* 7 October 2004, p. 6.

(registered in Brazil); Rio Tinto (registered in England); and BHP Billiton (registered in England and Australia). Companhia Vale do Rio Doce is the only company of these three not currently operating in Australia.

### **Australian iron ore industry**

- 2.8 Australia is the world's second largest exporter of iron ore behind Brazil.<sup>4</sup> In 2003/04 exports amounted to around 194.9 million tonnes.<sup>5</sup> During 2003/04, Australia's major export markets were Japan (40%), China (34%), South Korea (14%) and the EU (7%).
- 2.9 Australia has abundant resources of iron ore and is able to produce it at low cost. Australia is presently the lowest cost producer of iron ore together with Brazil. The majority of Australia's iron ore mines operate in the Hammersley Ranges in the Pilbara region of Western Australia (approximately 97%), where the largest iron ore reserves are located (estimated at 32 billion tonnes). Minor production also occurs in Tasmania (1%) and South Australia (2%).<sup>6</sup>
- 2.10 The proximity of the Pilbara to East Asian markets has given Australian iron ore producers a significant transport advantage in this region. The Chinese market has become increasingly significant over the past few years with exports rising by 14.4 million tonnes in 2002/03 and a further 12.3 million tonnes in 2003/04.<sup>7</sup>
- 2.11 It has been suggested that China will account for 70 per cent of the projected growth in world steel production over the next five years, and that Australian iron ore producers are in a stronger position to benefit from this growth than their major competitors.<sup>8</sup> Iron ore shipped from WA reaches East Asian markets in about two weeks sailing time at a cost of approximately US\$4 per tonne, compared to Australia's main rival, Brazil, from which iron ore can be shipped in around six weeks sailing time and at an approximate cost of US\$6 per tonne.
- 2.12 Overseas demand for iron ore has resulted in a steady increase in the volume of iron ore mined in Australia. Table 1 below, summarises the volume of iron ore that has been mined in recent years, with projections for expected volumes to be mined in the future.

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<sup>4</sup> IBIS World Industry Report B1311 *Iron Ore Mining In Australia* (7 October 2004), p. 5.

<sup>5</sup> Ibid p. 6.

<sup>6</sup> Ibid p. 8.

<sup>7</sup> Ibid p. 8.

<sup>8</sup> ABARE media release, 6/3/02 'China to dominate growth in world iron ore and steel markets', Available at <http://www.abare.gov.au/htdocs/pages/events/ol2002/mediareleases/olo213.htm>.

**Table 1: Actual and Projected Iron Ore Production<sup>9</sup>**

<b>Year</b>	<b>Production (Million tonnes)</b>
<i>Actual Production</i>	
1999 - 2000	159.8
2000 - 2001	175.6
2001 - 2002	185.3
2002 - 2003	198.9
2003 - 2004	222.2
<i>Projected Production</i>	
2004 - 2005	237.0
2005 - 2006	244.0
2006 - 2007	252.0
2007 - 2008	260.0
2008 - 2009	267.0

- 2.13 Even with strong demand for iron ore from the Pilbara region there are still significant barriers to entry. For example, the cost of developing infrastructure to support a mining operation (including site development, construction of a processing plant, and the provision of transportation to a port) requires any potential entrant to have access to a large amount of capital.

#### *Market Share*

- 2.14 BHP and RioTinto dominate the iron ore market in Australia through their operations in the Pilbara Region of Western Australia. A market share summary is provided at Table 2 below.

**Table 2: Market Share Summary<sup>10</sup>**

<b>Company</b>	<b>Market Share 203/04</b>
BHP Billiton Iron Ore & partners	37.47%
Hamersley Iron & partners (Rio Tinto)	45.00%
Portman Ltd	2.4%
Ivanhoe (Tasmania)	2.0%
Other	13.13%
<b>TOTAL</b>	<b>100%</b>

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<sup>9</sup> IBIS World Industry Report B1311 *Iron Ore Mining In Australia* (7 October 2004), p. 26.

<sup>10</sup> Ibid pp 19-21.

- 2.15 BHPBM's share of the Australian iron ore market is estimated at 37 per cent and Rio Tinto's at approximately 45 per cent. The industry dominance of BHP and Rio Tinto appears to be reinforced by issues related to ownership of and access to the rail infrastructure necessary to transport iron ore that is mined in remote areas of Australia to the port.<sup>11</sup>

*Iron Ore Prices*

- 2.16 Australia is a low-cost producer of iron ore. Prices are set in reference to international benchmarks negotiated each between Japanese steel mills and iron ore producers.

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<sup>11</sup> National Competition Council (March 1999) 'Application by Robe River Iron Associates for Declaration of a Rail Service Provided by Hamersley Iron Pty Ltd – Discussion Paper'.

### **3. The Applications and Submissions**

#### **Authorisations A90981, A90982, and A90983**

- 3.1 On 20 September 2005, BHPBIO lodged applications A90981, A90982 and A90983 with the ACCC seeking authorisation for conduct arising out of agreements establishing the JW4 Joint Venture.<sup>12</sup>
- 3.2 The purpose of the JW4 Joint Venture is for the mining, processing and sale of iron ore from the Yandi mining area in the Pilbara region of Western Australia. The iron ore will be sold to purchasers in Japan.
- 3.3 The applications sought authorisation for:
- the making of agreements through a series of contracts (the Transaction Documents) which may have the purpose or effect of substantially lessening competition; and the giving effect to their provisions which may constitute exclusionary provisions
  - the engaging in conduct pursuant to the Transaction Documents which may constitute the practice of exclusive dealing, including minimum purchase requirements, restrictions upon re-supply and supply being conditional on the purchaser acquiring iron ore from other suppliers.
- 3.4 In addition, the applications for authorisation were expressed so as to apply to:
- any other person who subsequently becomes a party to the Transaction Documents after the Transaction Documents are made, either in addition to or in place of an existing participant within the meaning of section 88(10) of the TPA
  - any other contract, arrangement or understanding that is made in similar terms to the Transaction Documents within the meaning of sections 88(13), (14), and (15) of the TPA.

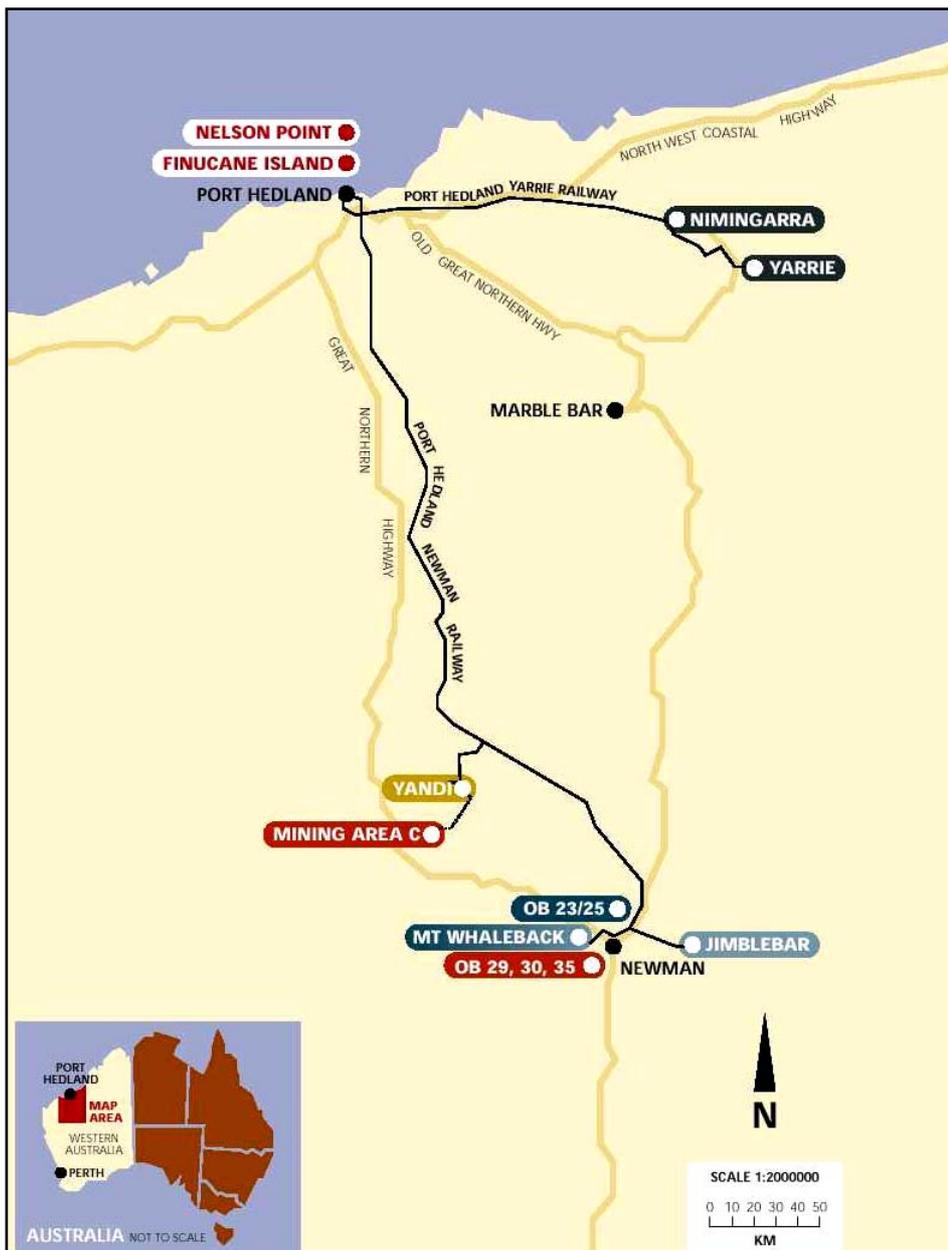
#### **The Applicants**

- 3.5 BHPBIO lodged the applications on behalf of itself and the following parties (the Applicants):
- BHP Billiton Minerals Pty Ltd (BHPBM)
  - BHP Billiton Marketing AG (BMAG)
  - Itochu Minerals & Energy Of Australia Pty Ltd (IMEA)
  - Mitsui Iron Ore Corporation Pty Ltd (MIOC)
  - Mitsui Itochu Iron Pty Ltd (MII)
  - JFE Steel Australia (YD) Pty Ltd (JFE)
  - JFE Steel Corporation (JFE Steel).

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<sup>12</sup> BHPBIO also lodged a notice under section 26A of the *Foreign Acquisitions and Takeovers Act 1975* with the Foreign Investment Review Board.

Figure 1 Location of Yandi, Newman and Port Hedland



3.6 Relevant details of all Applicants are as follows:

*BHPBIO*

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

*BHPBM*

BHP Billiton Minerals is part of the BHP Billiton Ltd Group, formed in 2000 through the merger of BHP Pty Ltd and Billiton Ltd. Currently, BHPBM has four main iron ore mines in the Pilbara region: Mount Newman, Goldsworthy,

Yandi and Area C. These mines include numerous satellite ore bodies within the tenement areas.

#### *BMAG*

BHP Billiton Marketing AG purchases all the iron ore production of BHP Billiton Minerals in Western Australia under longstanding arrangements and sells the 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, 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 is also a subsidiary of Mitsui & Co Ltd. Based in Australia, MIOC is involved in the mining and sale of iron ore.

#### *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.

## **The Applicants' supporting submission**

### *Market Definition*

- 3.7 The Applicants submitted that the relevant market for the purpose of the Applications is the worldwide market for iron ore.<sup>13</sup>
- 3.8 The Applicants contended that even if there was a separate product market for 'seaborne' iron ore, it would not affect the analysis for the purposes of an application for Authorisation.<sup>14</sup>

### *Counterfactual*

- 3.9 The Applicants submitted that if the arrangements under the Transaction Documents are not allowed to go ahead, there is a real risk of:
- reduced sales of iron ore from the Pilbara region
  - reduced trade between Australia and Japan due to JFE Steel sourcing iron ore from outside Australia
  - preventing opportunities for Australia to expand into other export markets for iron ore.<sup>15</sup>

### *Public Benefits*

- 3.10 The Applicants submitted that the agreements establishing the JW4 Joint Venture will provide the following public benefits:<sup>16</sup>
- increased employment and long-term investment, particularly in the remote regions of north-western Western Australia
  - generating greater certainty for future investment and employment in the Pilbara region
  - the opportunity for Australian industry to secure long-term structured transactions ahead of other international competition
  - increased efficiencies, export-revenue and government royalties
  - key long-term commercial benefits to the Australian industry and the economy by encouraging long-term relationships based on mutual trust, friendship and understanding between key participants in the Japanese steel industry and key Australian export markets
  - the Western Australian government will receive approximately A\$330 (US\$240) million in royalties over the life of the Export Sales Agreements.

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<sup>13</sup> BHPBIO Submission 19 September 2005 paragraph 8.5.

<sup>14</sup> Ibid.

<sup>15</sup> BHPBIO Submission 19 September 2005, Part 11.

<sup>16</sup> Ibid.

### *Public Detriment*

- 3.11 The Applicants submit that there is no public detriment likely to arise from the proposed arrangements.
- 3.12 The Applicants also submit that the proposed arrangements relate almost entirely to export segments of the market, and that there will be little, if any, effect on competition in any domestic market.<sup>17</sup>

### **Submissions from interested parties**

- 3.13 The ACCC sought submissions from interested parties in relation to the applications for authorisation and the public benefit and detriment claims made by BHPBIO.
- 3.14 The ACCC received brief submissions in support of BHPBIO's application for authorisation from:
- Henry Walker Eltin Contracting Pty Ltd (HWE)
  - The Western Australian Department of Industry & Resources (WADIR).
- 3.15 Henry Walker Eltin viewed the creation of employment opportunities and associated investment in support services to be benefits that would flow from authorising the JW4 Joint Venture.
- 3.16 The WADIR supported the JW4 Joint Venture because of the increased royalty payments and economic benefits to the State. The WADIR also noted that the Minister for State Development recently approved the JW4 Joint Venture Sublease pursuant to the *Iron Ore (Marillana Creek) Agreement Act 1991*.

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<sup>17</sup> BHPBIO Submission 19 September 2005, Part 11.

## **4. The Agreements**

- 4.1. The structure of the JW4 Joint Venture is established and set out in the Transaction Documents. The Transaction Documents provide the terms and conditions of the contractual arrangements between the Joint Venture participants.
- 4.2. The Transaction Documents comprise the following eight agreements:
- JW4 Joint Venture Agreement
  - Management Agreement
  - Sub-lease Agreement
  - Deeds of Cross Charge
  - Domestic Sales Agreements
  - Export Sales Agreements
  - Deed of Undertaking
  - Novation Agreement.
- 4.3. The Transaction Documents are commercial in confidence. The Applicants have provided the ACCC with copies of the Transactions Document for its consideration, but those documents are not publicly available. A summary of the Transaction Documents was provided in the Applicant's submission and is reproduced below.
- 4.4. Specifically, the purpose of the Transaction Documents and consequential agreements are to:
- establish a long-term trading relationship with a purchaser of iron ore in Japan
  - expand the Yandi mining area through the commencement of mining operations at a deposit known as 'Western 4', which is not currently being exploited
  - mine, crush, screen, handle, store and stockpile iron ore produced from the Yandi mining area in the Pilbara Region
  - prove the commercial viability of steel makers using iron ore products that contain a substantial proportion of 'lower channel iron deposits'
- 4.5. By way of overview, the JW4 Joint Venture, as described in the Applicant's supporting submission, will operate as follows:
- BHPBM, IMEA, MIOC and JFE will establish the unincorporated JW4 Joint Venture
  - the JW4 Joint Venture will relate to the expansion of mining operations in the Yandi area and to commence mining in a deposit known as 'Western 4'
  - the activities of the JW4 Joint Venture do not extend to the marketing, sale or disposal of the product
  - BHPBIO will be the sole and exclusive manager of the Joint Venture
  - the Joint Venture will sub-lease the Western 4 Project Area from the Yandi Participants who presently own the iron ore in the Yandi region.

- the JW4 Joint Venture participants will each sell the mined iron ore to the Yandi Participants (BHPBIO, MIOC and IMEA) who will crush and further process the iron ore for subsequent delivery to the port
- JFE Steel will subsequently purchase the iron ore from the Yandi participants, as well as other, vendors.

## **Particulars of the Transaction Documents**

4.6. In its supporting submission BHPBIO has described the Transaction Documents in the following terms:<sup>18</sup>

### *JW4 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 the expiration of the period of 11 years from commencement of the JW4 Joint Venture; and 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, the JW4 Joint Venture will terminate on the expiration of 15 years from the commencement of the JW4 Joint Venture.

### *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 in accordance with the programmes and budgets set by the management committee. The management committee consists of representatives of each of the JW4 Participants.

### *Sub-lease Agreement*

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 will not commence until the formation of the JW4 Joint Venture.

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

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<sup>18</sup> BHPBIO Submission 19 September 2005 at paragraph 4.7.

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 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.

### *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.

### *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).

### *Export Sales Agreements(x3)*

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

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

### *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.

### *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 behalf of the Yandi Participants in respect of all other matters.

## **5. Possible Competition Issues Identified by the Applicants**

- 5.1. The Applicants identified several elements of the Transaction Documents and the Proposed Transactions that raised potential competition issues. Many of these potential competition issues only arose where it was accepted that the Applicants (or any two or more of them) are in competition with each other (for the purposes of section 45A, 4D and 45(2) of the TPA).
- 5.2. On the basis that the relevant market for iron ore is worldwide, the Applicants submitted that it is unlikely any of the Proposed Transactions could lessen competition in that market.
- 5.3. The Applicants did, however, raise several potential competition concerns if it was possible to identify a relevant domestic market in which the Applicants are competitors. The potential competition concerns raised by the Applicants are set out below.
- 5.4. The ACCC notes the Applicants' confirmation that with the exception of the Transaction Documents and arrangements specifically addressed in the Applicants' supporting submission, the Applicants have not identified any matters that may be likely to give rise to competition concerns under the TPA.

### **Potential price fixing contract, arrangement or undertaking**

The discussion below is an extract from the submission made by BHPBIO (footnotes omitted).

#### *Domestic Sales Agreements*

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.

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.

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.

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**

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.

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. 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 process 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.

### ***MAC<sup>TM</sup> Export Sales Agreement***

In the case of the MAC<sup>TM</sup> 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 MAC<sup>TM</sup> Export Sales Agreement.

### ***Third line forcing***

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 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***

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.
- (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".

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)***

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.

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.

- 5.5 The Applicants also note that, on the basis that the geographic dimension of the relevant market is worldwide, 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.
- 5.6 The Applicants further state that, 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.
- 5.7 For the purposes of considering an Application for authorisation, it is not necessary for the ACCC to determine whether the conduct constitutes a breach of the TPA. If it is reasonable for the parties to believe there is a risk of a breach, then authorisation can be sought. Consequently, no conclusion about whether the competition issues raised by the Applicants constitute breaches of the TPA is warranted in this Determination.

## 6. Statutory provisions

### Statutory tests

6.1. Under subsection 90(6) of the TPA, the ACCC may grant authorisation in respect of a *proposed* contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition, or for exclusive dealing,<sup>19</sup> if it is satisfied that:

- the contract, arrangement or understanding would be likely to result in a benefit to the public, and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.

6.2. Under subsection 90(8) of the TPA, the ACCC may grant authorisation in respect of:

- a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision, or
- proposed conduct to which subsections 47(6) or (7) applies

provided it is satisfied that the proposed contract, arrangement or understanding, or the proposed third line forcing conduct, would result or would be likely to result, in such a benefit to the public that it should be allowed to be made and given effect to.

6.3. The ACCC's evaluation of the Applications is in accordance with the statutory tests outlined above. Broadly, the ACCC is required to assess the likely public benefits and detriment arising from the proposed arrangements.

### Definition of public benefit and public detriment

6.4. In considering these Applications the ACCC must assess both the public detriment flowing from the arrangements and the public benefit arising from the arrangements. The two must then be weighed to determine which is the greater. If the public benefit outweighs the public detriment, the ACCC may grant authorisation.

6.5. If not, authorisation will be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

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<sup>19</sup> Other than sections 47(6) and 47(7).

- 6.6. Public benefit is not defined by the TPA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>20</sup>
- 6.7. Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:
- ...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.<sup>21</sup>

### **Application of the tests**

There is some variation in the language between the tests in sections 90(6) and 90(8) of the TPA.

- 6.8. The Tribunal has found that the tests are not precisely the same.<sup>22</sup> In particular the Tribunal considered that the test under section 90(6) was limited to a consideration of those detriments arising from a lessening of competition but that the test under section 90(8) was not so limited.
- 6.9. However, the Tribunal has previously stated that with respect to the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>23</sup>
- 6.10. Consequently, when applying either test, the ACCC can take most, if not all, public detriment likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 6.11. In many authorisation applications, all detriments likely to result from the conduct appear to arise from a lessening of competition. The ACCC considers this to be the case in this matter.

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<sup>20</sup> *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677.

<sup>21</sup> *Ibid* at 42683.

<sup>22</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

<sup>23</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty. Ltd. and Amatil Ltd. for review* (1981) ATPR 40-200 at 42,763, 42766.

## 7. ACCC Assessment

- 7.1. The ACCC's evaluation is in accordance with the statutory tests outlined in Chapter Six of this draft determination. As required by the test, it is necessary for the ACCC to assess and weigh the likely public benefit and detriment arising from the arrangements and conduct for which authorisation is sought.

### Relevant market

- 7.2 The ACCC and the Tribunal have recognised the existence of international and worldwide markets in iron ore. For example, the ACCC has in the past accepted that because Australia exports the majority of its iron ore production and the commodity is internationally traded, the iron ore market should be considered on a worldwide basis.<sup>24</sup>
- 7.3 The Australian Bureau of Agricultural and Resource Economics, DMPR and the Commonwealth Department of Industry, Tourism and Resources (DITR)<sup>25</sup> have considered the market for iron ore to be global.
- 7.4 The ACCC is of the view that, generally, there is sufficient substitutability between export and domestic iron ore. The ACCC consequently considers that the relevant market for the purposes of these Applications is most likely the worldwide market for the production and supply of iron ore.
- 7.5 The ACCC considers that it may be possible that a narrower market definition could be adopted such as the market for 'seaborne' iron ore. However, the ACCC does not consider that a narrower definition would affect its assessment of this matter.

### Future with and without test (the counterfactual)

- 7.6 The ACCC uses the 'future with-and-without test' established by the Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the arrangements and conduct for which authorisation is sought.<sup>26</sup>
- 7.7 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by the arrangements and conduct in the future if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is often referred to as the counterfactual.
- 7.8 On the issue concerning the appropriate counterfactual to adopt, the Applicants have submitted that the Transaction Documents are conditional upon the ACCC granting authorisation to the proposed arrangements. The Applicants also

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<sup>24</sup> ACCC Media Release, 'ACCC not to intervene in Rio Tinto's proposed takeover of North', MR209/00. Available at <[www.accc.gov.au/media/mediar.htm](http://www.accc.gov.au/media/mediar.htm)>.

<sup>25</sup> Peter Ferber (May 2002) *The Australian Steel Industry in 2001*, Department of Industry, Tourism and Resources, pp 11 – 15.

<sup>26</sup> See, for example, *Re Australian Performing Rights Association* (1999) ATPR ¶41-701.

suggested that JFE Steel would explore alternative arrangements for the supply of iron ore outside of Australia if authorisation was not granted.

- 7.9 The ACCC is of the view that without authorisation an alternative agreement may be struck, however, the ACCC also recognises that forming any alternative agreement is uncertain as to content and time, and there is consequently a risk that a new agreement acceptable to all parties may not be reached in the foreseeable future.
- 7.10 The ACCC therefore considers that the relevant counterfactual for assessing the proposed arrangements is one where the JW4 Joint Venture does not proceed and the proposed arrangements are not secured in the near future.

### **Public benefits**

- 7.11 The ACCC considers that a number of public benefits would arise from the Proposed Transactions.
- 7.12 Firstly, the exports secured under the proposed Transaction Documents represent significant and immediate economic benefits to the Pilbara economy which could create immediate and longer term employment opportunities within the Pilbara.
- 7.13 Second, the ACCC considers that securing export contracts with Japanese companies, in light of strong Japanese demand for Australian iron ore exports, will provide long terms benefits to the Australian economy by encouraging further opportunities to increase the range of goods exported to Japan.
- 7.14 Third, the contribution to the Australian, WA and regional economies from the export sales secured by the Transaction Documents is likely to be significant and may encourage longer term investment in projects and infrastructure and increases in long term employment opportunities.
- 7.15 Fourth, the royalties to be paid to the WA Government may be applied towards investment in projects and infrastructure across WA resulting in increased short and longer term employment and investment in WA.
- 7.16 Finally, the Agreements may also provide public benefits by proving the viability of Lower Channel Iron Deposits (LCID). LCID ore is of lower quality than Upper Channel Iron Deposit (UCID) ore, which is the ore that is predominantly mined in the Yandi region. JFE believes it has the technology to effectively use LCID ore in the manufacturing of steel. There is consequently a longer term target of blending LCID ore with the UCID ore. If this blending were to eventuate, it could result in significant public benefits by extending the life of the Yandi mining area by approximately 5 years which may, in turn, extend employment and investment opportunities in this region and establish a market for LCID ore which does not currently exist.

### **Conclusion on public benefit**

- 7.17 The ACCC considers that the proposed arrangements will generate significant public benefits which would be unlikely to be realised in the foreseeable future if the proposed arrangements are not authorised.

## **Anti-competitive detriments**

- 7.18 Generally, agreements between competitors to provide a service at a common fixed price are likely to lessen competition as opposed to a scenario in which each of the service providers individually determines the price it will charge. This may be exacerbated where the arrangements also include elements of exclusionary provisions or exclusive dealing. However, the extent to which such agreements will impact upon competition will depend on the specific circumstances.
- 7.19 The Agreements for which authorisation is sought relate chiefly to the export segment of the market and the effect on competition in the domestic segment of the market is likely to be minimal. The ACCC also notes that the Agreements have been made in the context of a joint venture proposal.
- 7.20 The ACCC considers that there are little, if any, anti-competitive detriments that arise from the Proposed Transactions.

## **Balance of public benefits and anti-competitive detriments**

- 7.21 The ACCC considers that there is a significant public benefit that is likely to flow from the Proposed Transactions that outweighs the limited detriment.

## **Rail access**

- 7.22 The ACCC acknowledges that the ability for third parties to gain access to BHP Billiton's railway infrastructure has been an issue in similar previous authorisation applications lodged by the Applicant.<sup>27</sup> These rail access issues do not appear to arise to the same extent under this current authorisation application.
- 7.23 The ACCC notes the recent draft decision of the National Competition Council (NCC) in response to an application by Fortescue Metals Group Ltd (FMG) for declaration of the service provided by the Mt Newman railway line owned by BHP Billiton. The NCC released a draft recommendation that the service provided by the Mount Newman railway line be declared under Part IIIA of the TPA. Any final decision to declare this service would provide access seekers with an enforceable right to negotiate access to the railway line with BHP Billiton and binding arbitration if the parties fail to reach an agreement.<sup>28</sup>
- 7.24 Consistent with the views it has previously expressed in earlier determinations, the ACCC considers that third party access to essential infrastructure is a matter for consideration outside of, and independent to, this authorisation process.

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<sup>27</sup> For example, rail access issues arose concerning BHP Billiton's Mount Newman railway line in the recent Wheelara Joint Venture application released 2 June 2005. Available at <<http://www.accc.gov.au/content/index.phtml/itemId/597372/fromItemId/347229>>.

<sup>28</sup> National Competition Council Media Release (4 November 2005). Available at <<http://www.ncc.gov.au/pdf/DERaFoPR-001.pdf>>.

## 8. Draft Determination

### The Applications

8.1 On 20 September 2005, BHPBIO lodged applications A90981, A90982 and A90983 with the ACCC. BHPBIO lodged the applications on behalf of itself and the following parties (the Applicants):

- BHP Billiton Minerals Pty Ltd (BHPBM)
- BHP Billiton Marketing AG (BMAG)
- Itochu Minerals & Energy Of Australia Pty Ltd (IMEA)
- Mitsui Iron Ore Corporation Pty Ltd (MIOC)
- Mitsui Itochu Iron Pty Ltd (MII)
- JFE Steel Australia (YD) Pty Ltd (JFE)
- JFE Steel Corporation (JFE Steel).

The Applications were made under sub-sections 88(1) and 88(8) of the *Trade Practices Act 1974* (TPA) concerning a series of contracts (the Transaction Documents) formed between the JW4 Joint Venture participants to:

- make or give effect to a contract or arrangement or arrive at an understanding, where a provision of that proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the TPA
- make or give effect to contract or arrangement or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA
- engage in conduct that constitutes or may constitute the practice of exclusive dealing, within the meaning of section 47 of the TPA.

8.2 The Transaction Documents underpinning the JW4 Joint Venture are:

- JW4 Joint Venture Agreement
- Management Agreement
- Sub-lease Agreement
- Deeds of Cross Charge
- Domestic Sales Agreements
- Export Sales Agreements
- The Deed of Undertaking
- The Novation Agreement.

8.3 The Applications were expressed as seeking authorisation for other proposed arrangements to be made in similar terms between future and existing participants in the JW4 Joint Venture pursuant to section 88(13) of the TPA.

8.4 The applications were also expressed as applying to any other person who subsequently becomes a party to the Joint Venture, either in addition to or in place of an existing participant implicitly pursuant to section 88(10) of the TPA.

8.5 The Applicants have requested that authorisation be granted to future participants in the JW4 Joint Venture under section 88(14)(b) of the TPA.

### **Statutory Test**

8.6 For the reasons outlined in Chapter Seven of this draft determination, the ACCC is satisfied that in all the circumstances the making of the contracts and the giving effect to the provisions of the Agreements for which authorisation is sought under subsection 88(1) and 88(8) of the TPA:

- would be likely to result in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

8.7 The ACCC is satisfied that, in all the circumstances, the conduct for which authorisation is sought under subsection 88(8) of the TPA in respect of proposed conduct to which subsections 47(6) or (7) apply would be likely to result in such a benefit to the public that it should be allowed to take place.

8.8 The ACCC is also satisfied that, in all the circumstances, the conduct for which authorisation is sought under subsection 88(1) of the TPA in respect of provisions which may be exclusionary provisions would be likely to result in such a benefit to the public that it should be allowed to be made and given effect to.

### **Draft determination**

8.9 The ACCC therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant authorisation to applications A90981, A90982 and A90983.

8.10 Specifically, authorisation is granted for:

- the making of the agreements, pursuant to the Transaction Documents, for the purposes of establishing and operating the JW4 Joint Venture and the giving effect to their provisions which provisions have or might have the purpose or effect of substantially lessening competition or which might constitute exclusionary provisions
- the engaging in conduct pursuant to the Transaction Documents for the purposes of the JW4 Joint Venture which conduct constitutes or may constitute the practice of exclusive dealing
- other proposed arrangements to be made in similar terms between any existing participants in the JW4 Joint Venture and future, pursuant to section 88(13) of the TPA.

8.11 The ACCC notes that in its application, BHPBIO identified instances of potential anti-competitive conduct arising from the Transaction Documents. BHPBIO requested that these Transaction Documents remain confidential and not be made publicly available. As a result of this, while the ACCC has consulted with

interested parties regarding the potential competition effects of the Transaction Documents with reference to a summary description of the proposed conduct, it has not been able to undertake this consultation with reference to the specific provisions contained in the Transaction Documents.

- 8.12 The ACCC also notes BHPBIO's confirmation that, with the exception of the conduct arising from the Transaction Documents specifically addressed in BHPBIO's supporting submission, BHPBIO has not identified any other matters that may be likely to give rise to competition concerns under the TPA. The ACCC, having considered the potential competition effects of the Transaction Documents, has not identified any additional competition issues.
- 8.13 The Applicants have requested that authorisation be granted to future participants in the JW4 Joint Venture. As a result, under s88(14)(b) authorisation is deemed to be subject to the condition that where there is a change to the names of the parties, the participants notify the ACCC of any change to the participants in the Joint Venture. The ACCC proposes to require that such notice be provided within 30 days.

#### **Term of authorisation**

- 8.14 The ACCC proposes to grant authorisation for a period of 15 years from commencement of the JW4 Joint Venture.<sup>29</sup>

#### **Further submissions**

- 8.15 The ACCC will now seek further submissions from interested parties. In addition, the Applicant or any interested party may request that the ACCC hold a pre-decision conference pursuant to section 90A of the TPA.

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<sup>29</sup> This is subject to the ability for persons to apply for a review of this decision to the Australian Competition Tribunal.