

19 February 2010

Our reference  
AS.MDEA.10024545

**By email: richard.chadwick@accc.gov.au**

Dr Richard Chadwick  
General Manager, Adjudication Branch  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

Dear Dr Chadwick

## **North West Iron Ore Alliance - application for collective bargaining authorisation (Application)**

We write in response to the submissions received by the ACCC in relation to the Application as part of the ACCC's market inquiries. NWIOA is grateful for the opportunity to make a further submission in response to some of the issues raised in the submissions made by BHP Billiton (BHPB) and the Western Australian Department of Treasury. Our further comments are set out below.

### **Submission by the Department of Treasury and Finance of Western Australia**

NWIOA welcomes the support for the Application provided by Western Australia Department of Treasury.

NWIOA wishes, however, to clarify one aspect of the Department's submission which suggests that best practice would require NWIOA to submit a commercially negotiated solution to the ACCC or the National Competition Council (NCC) for regulatory approval. NWIOA believes that this suggestion is misplaced because if NWIOA is successful in commercially negotiating an access arrangement with an infrastructure owner, this private treaty would not be intended to operate as either a state-based access regime or an access arrangement under Part IIIA and therefore would not fall for review by either body. The primary reason that NWIOA is seeking a collective bargaining authorisation to negotiate a commercial rail haulage/access agreement stems from the fact that no effective access regime has been implemented through state-based legislation, nor have any access undertakings been negotiated with the ACCC.

With respect to the concern expressed by the Department of Treasury and Finance as to exclusivity of access, NWIOA advises that it does not intend to hinder in any way additional third party access by seeking exclusive access arrangements with infrastructure owners. NWIOA is also open to the possibility of welcoming other access seekers into its membership.

Locked Bag 1  
Royal Exchange NSW 1225  
DX 170 Sydney  
www.middletons.com

Level 26  
52 Martin Place  
Sydney NSW 2000  
Australia  
telephone: +61 2 9513 2300  
facsimile: +61 2 9513 2399

Partner  
Murray Deakin  
telephone: +61 2 9513 2335  
murray.deakin@middletons.com

Contact  
Adele Sutton  
telephone: +61 2 9513 2390  
adele.sutton@middletons.com

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**Submission by BHPB**

NWIOA notes that BHPB does not oppose its Application.

However, to the extent that BHPB's comments are directly relevant to NWIOA's Application, NWIOA sets out its response below.

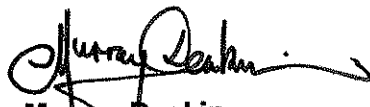
NWIOA does not accept BHPB's assertions in respect of its proposed joint venture with Rio Tinto and NWIOA maintains the views it expressed in relation to the desirability of the collective bargaining authorisation in the face of that proposed joint venture.

BHPB has queried whether the collective negotiation process is practical, particularly if NWIOA does not have access to competitively sensitive production forecast information from its members. NWIOA wishes to clarify that it accepts that it may have to obtain competitively sensitive production forecast information but that this information gathering process will be confined to information that is essential for negotiating rail haulage/access arrangements. In addition, the information received by NWIOA will be commercial in confidence as between NWIOA and the provider of the information.

BHPB has also asserted that NWIOA has overstated the relative size of its members' projects. Whilst NWIOA believes that the figures quoted in its Application are accurate, to the extent that total production in the Pilbara may be greater than suggested, NWIOA submits that, as a result, NWIOA's share of that market would be lower. This would strengthen our submission that the level of foreclosure that might result from the authorisation, if granted, would be insignificant in the context of the total market.

Please do not hesitate to contact me if you have any further questions.

Yours faithfully



Murray Deakin  
Partner

copy to: Steven Mackay, Middletons  
Catherine Pinchin, NWIOA