Australian Competition & Consumer Commission

Draft Determination

Application for authorisation

lodged by

NWIOA Ops Pty Ltd

to engage in collective negotiations with the providers of rail infrastructure in the Pilbara region of Western Australia

Date: **4 March 2010**

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Walker
Willett

Authorisation no.: A91212

Public Register no.: C2010/172

Summary

The ACCC proposes to grant conditional authorisation to the North West Iron Ore Alliance to engage in collective negotiations with the providers of rail infrastructure in the Pilbara region of Western Australia. The ACCC proposes to grant authorisation for a period of 15 years.

On 4 February 2010 the North West Iron Ore Alliance lodged an application for authorisation on behalf of its shareholders Atlas Iron Limited, Brockman Resources Limited and FerrAus Limited.

The NWIOA is seeking to collectively negotiate the terms and conditions, including price, under which above rail haulage services and/or below rail track access will be acquired in the Pilbara region from BHP Billiton, Rio Tinto and Fortescue Metals Group and any other similar providers in the future.

The ACCC considers that the proposed arrangements would be likely to deliver public benefits in the form of transaction cost savings. Additionally, the proposed arrangements may facilitate improvements in the level of input the NWIOA has in their contractual negotiations for the provision of the services and a small benefit by contributing to more efficient infrastructure investment.

The ACCC considers that the proposed arrangements are unlikely to result in public detriments.

In light of the above, the ACCC considers that the public benefits would outweigh any public detriment that may arise from the proposed arrangements.

The ACCC proposes to grant authorisation subject to the condition that the ACCC is informed of changes to the parties involved in the proposed collective negotiation arrangements, to assist the ACCC's assessment of the ongoing competitive impact of the proposed arrangements.

Given the long term nature of the investments and to allow the parties to collectively negotiate any changes that may be required to the collectively negotiated contract(s), the ACCC considers that a 15 year period of authorisation is appropriate in this instance.

The ACCC has decided to grant interim authorisation to the NWIOA. Interim authorisation will commence on 4 March 2010 and will remain in place until the ACCC's final decision takes effect or until the ACCC decides to revoke interim authorisation.

The ACCC will now seek further submissions from the applicants and interested parties in relation to this draft determination prior to making a final decision. The applicants or interested parties may also request a conference be held to make oral submissions on the draft determination.

Contents

1. THE APPLICATION FOR AUTHORISATION 1

2. BACKGROUND TO THE APPLICATION 4

THE APPLICANT 4
THE IRON ORE INDUSTRY 4

3. SUBMISSIONS RECEIVED BY THE ACCC 9

4. ACCC EVALUATION 12

THE MARKET 12
THE COUNTERFACTUAL 16
PUBLIC BENEFIT 16
Meaningful improvement in commercial outcomes 17
Transaction cost savings 18
More efficient infrastructure investment 19
ACCC conclusion on public benefits 19
PUBLIC DETRIMENT 19
Voluntary participation in the collective bargaining arrangements 20
Coverage or composition of the group 20
ACCC CONCLUSION ON PUBLIC DETRIMENTS 21
BALANCE OF PUBLIC BENEFIT AND DETRIMENT 21
LENGTH OF AUTHORISATION 22

5. DRAFT DETERMINATION 23

THE APPLICATION 23
THE NET PUBLIC BENEFIT TEST 23
CONDITIONS 23
CONDUCT FOR WHICH THE ACCC PROPOSES TO GRANT AUTHORISATION 24
CONDUCT NOT PROPOSED TO BE AUTHORISED 24
INTERIM AUTHORISATION 24
FURTHER SUBMISSIONS 25
ATTACHMENT A — THE AUTHORISATION PROCESS 26
ATTACHMENT B — CHRONOLOGY OF ACCC ASSESSMENT FOR APPLICATION A91212 27
ATTACHMENT C — THE TESTS FOR AUTHORISATION AND OTHER RELEVANT PROVISIONS OF THE ACT 28

List of abbreviations

BHPB	BHP Billiton Limited
FMG	Fortescue Metals Group Limited
NCC	National Competition Council
NWIOA	NWIOA Ops Pty Ltd
PRAIC	Pilbara Rail Access Interdepartmental Committee
the participants	members of the collective bargaining group
the services	Services for the provision of above rail haulage services and rail track access
service providers	BHP Billiton Limited, Rio Tinto Limited, Fortescue Metals Group Limited and any other service provider in the future

1. The application for authorisation

1.1. On 4 February 2010 NWIOA Ops Pty Ltd (the NWIOA) lodged application for authorisation A91212 with the Australian Competition and Consumer Commission (ACCC).

1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act* 1974 (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

1.3. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of this application is contained in Attachment B.

1.4. The NWIOA has requested that the application be assessed according to the streamlined collective bargaining process. Under this process, the ACCC seeks to issue its draft determination within 28 days of receiving a collective bargaining application, and a final determination within three months of receiving the application. The streamlined process aims to provide greater certainty to the assessment timetable for collective bargaining applications.

1.5. Application A91212 was made under:

- section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).

- section 88(1) of the Act to make and give effect to 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 the Act.

1.6. The NWIOA has applied for authorisation on behalf of its shareholders Atlas Iron Limited, Brockman Resources Limited and FerrAus Limited. The NWIOA is seeking to collectively negotiate the terms and conditions, including price, under which above rail haulage services and/or below rail track access will be acquired in the Pilbara region from BHP Billiton, Rio Tinto and Fortescue Metals Group and any other service provider in the future (the service providers).

1.7. The NWIOA seeks authorisation for a period of 15 years.

The arrangements

The negotiation process

1.8. The NWIOA submits that it will obtain the necessary information (eg a pricing model containing proposed costs, capacity volumes, rates of return, and non-price terms and

conditions) from a service provider on which to assess its particular pricing and service offer. The information will be reviewed by NWIOA and/or the participants, acting through a representative committee.

1.9. The NWIOA submits that the confidentiality of the commercially sensitive information obtained from a service provider will be preserved by way of confidentiality agreements executed by all NWIOA personnel who receive the information.

1.10. The NWIOA will then conduct commercial negotiations based on the information provided, reporting outcomes and seeking input from the participants, again through a representative committee. The NWIOA expects that each participant will obtain independent expert and legal advice through the negotiation phase.

1.11. The NWIOA advises that the negotiation process undertaken by the NWIOA does not involve the NWIOA seeking commercially sensitive information from the participants.

1.12. The NWIOA advises that the issues to be covered in the collective negotiations will generally include:

- services to be provided
- service levels (including capacity of services and facilities)
- service provider responsibilities
- participant responsibilities
- interface co-ordination
- rail spurs, rolling stock and connection points
- pricing principles
- fees and charges
- capacity allocation
- capital expenditure
- general rail haulage operations
- allocation rules for common use facilities
- liability and indemnity
- termination
- statutory authorisations
- dispute resolution.

1.13. At the conclusion of negotiations, the NWIOA will advise each participant that the agreement with the service provider is in a form that it can commend to that participant for its consideration. Each participant will then determine whether the terms of the agreement are acceptable.

1.14. The NWIOA anticipates that if a participant wishes to accept the terms decided through the collective negotiation process that it will enter into a bilateral contract with the relevant service provider. The NWIOA considers that bilateral contracts may facilitate

any amendments that may need to be agreed between the parties that accommodate their specific circumstances.

Other parties

1.15. The NWIOA seeks authorisation to extend to future parties to the arrangement, namely:

- future shareholders of the NWIOA from time to time and
- others (who do not own or operate rail infrastructure) who approach the NWIOA to secure access to available rail infrastructure in the Pilbara.

1.16. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

Interim authorisation

1.17. At the time of lodging its application, the NWIOA requested interim authorisation on the basis it would:

- enable negotiations with service providers to commence as soon as possible
- allow for an early assessment of the likely costs of acquiring the services associated with the transportation of iron ore to the relevant port
- enable the NWIOA to attempt to take advantage of the current market conditions and legal/regulatory environment to provide the best opportunity possible for the participants to gain access to the services and effectively compete.

1.18. On 4 March 2010 the ACCC granted interim authorisation to enable the NWIOA to collectively negotiate with the service providers in respect of the services described in this draft determination.

1.19. This interim authorisation does not extend, however, to the making or giving effect to any subsequent contract between the NWIOA or members of the collective bargaining group and a service provider.

2. Background to the application

2.1 The information set out in this section is obtained largely from information provided by the applicant and submissions from interested parties.

The applicant

2.2 The NWIOA represents the interests of certain junior producers of iron ore in the Pilbara region of Western Australia.

2.3 The NWIOA submits that its role is to:

- provide a forum for the junior iron ore producers to deal with common interests and issues
- represent the interests of the producers to governments and others interested in the iron ore mining industry
- co-ordinate, subject to regulatory approval, the collective bargaining of rail haulage and/or rail access for the producers in the Pilbara and
- develop and operate port terminal facilities for the export of iron ore.

2.4 The NWIOA's current shareholders are Atlas Iron Limited, Brockman Resources Limited and FerrAus Limited. These producers are currently conducting intensive exploration, evaluation and feasibility programs covering a range of iron ore deposits in the Pilbara region.

2.5 To date, the NWIOA submits that none of its members have been able to successfully negotiate access to the services provided by BHPB or Rio Tinto's railways.

The iron ore industry

2.6 Iron ore is a globally traded commodity used almost exclusively in the manufacture of steel. Steel makers generally use a mix of the following three forms of iron ore:

- lump – a 'direct shipping' form, between six and 30 mm in diameter
- fines – a 'direct shipping' form, less than six mm in diameter and
- pellet – a processed form, generally between 16 and 20 mm in diameter.

2.7 The iron ore industry is expected to generate revenue of approximately $27.64 billion in 2009-10, compared with $9.71 billion in 2004-5.

2.8 The modern iron ore industry in Western Australia has existed since the 1960s. Four major iron ore projects were established: Hamersley Iron, the Mount Newman Joint Venture, the Mount Goldsworthy Joint Venture and Robe River. Ninety seven per cent of Australia's iron ore production originates in the Hamersley Ranges in the Pilbara region of Western Australia. The major mines currently operating in Australia are either owned, operated or controlled by BHPB, Rio Tinto and Fortescue Metals Group (FMG).

Iron ore operations of BHPB, Rio Tinto and FMG

2.9 BHPB's iron ore operations in Australia include:

- a series of mining joint ventures in which BHPB has a controlling interest
- the Mount Newman & Mount Goldsworthy heavy haulage railway systems and
- the Nelson Point & Finucane Island port facilities at Port Hedland.

2.10 Rio Tinto's iron ore operations in Australia include:

- a series of mining joint ventures in which Rio Tinto has a controlling interest
- the Pilbara Iron Pty Ltd and the Pilbara Rail Company Pty Ltd, through which Rio Tinto operates heavy haulage railway systems and
- port facilities at both Cape Lambert and Dampier.

2.11 FMG was formed in 2003 and is a producer and trader of seaborne iron ore. FMG has tenements spanning 71,400 km^2 in the Pilbara region of Western Australia. Information available on FMG's website indicates that FMG has approximately 1.625 billion tonnes of reserve delineated from less than 10 per cent of its Pilbara tenements.

2.12 FMG commenced construction of a port, rail and mine project (Cloudbreak) in the Pilbara region in February 2006 and shipping from the project commenced in May 2008.

Transportation of iron ore

State Agreements

2.13 Prior to BHPB and Rio Tinto's original Pilbara iron ore projects being established, both companies committed to an agreement with the Western Australian state government (the State Agreements).

2.14 The State Agreements provided for:

- the lease of state land to the mining company for all mining operations, townships, railway corridors and port facilities
- the construction of mining and processing infrastructure, railways and ports by the mining company and
- access to the rail infrastructure for third parties.

2.15 The State Agreements initially incorporated haulage of iron ore, non-iron ore product and passengers, but more recent State Agreements, such as the Pilbara Infrastructure Pty Ltd State Agreements have included track access provisions as detailed in the *Railways (Access) Code 2000*.

2.16 The State Agreements allow the extension of any rail line from a producer's new operations to connect with existing lines. The Pilbara Rail Access Interdepartmental Committee (PRAIC) 2008 Public Consultation document notes that the State Agreements originally envisaged that rail haulage would be based on a user pays principle, with the third party also required to pay for any expansion to the railway required to haul their iron ore.

2.17 However it is relevant to note that to date, access has not been granted pursuant to any of the State Agreements.

Forms of third party access

2.18 There are two types of third party access to rail infrastructure – track access and haulage access.

2.19 A rail track access regime differs from a rail haulage regime in the following ways:

- the provider of a rail haulage service owns and has full control over its rail track (or "below rail") infrastructure, all its "above rail" equipment (such as locomotives and wagons) used to haul third party product and its own operational and safety standards
- under a rail haulage regime, the infrastructure owner and the access seeker must negotiate and endeavour to agree upon the terms, conditions and pricing for both above and below rail services
- under a rail track access regime, the access seeker will only secure access to the infrastructure owner's below rail infrastructure and will need either to secure from others or provide itself the "above rail" equipment (such as locomotives and wagons) to transport its products along the rail track.

Above rail haulage services and below rail services

2.20 The collective bargaining group is seeking access to both above rail haulage and below rail services.

2.21 The NWIOA advises that above rail haulage services may include:

- rail haulage services including train assistance at loading facilities and unloading facilities
- provision of connection points from the provider's railway line, to the rail spur line, loading facilities and unloading facilities
- maintenance and operation of the provider's railway line, connection points and rail spurs during the services period
- operation, repair and maintenance of rolling stock for the duration of the services period and
- programming, control and scheduling of rail haulage (including train allocation) to meet customers (eg the producers) rail haulage requirements.

2.22 Below rail services include access to the following:

- railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of the railway)
- bridges
- passing loops
- rain control systems, signalling systems and communication systems
- sidings and refuges to park rolling stock
- maintenance and protection systems and
- roads and other facilities which provide access to the railway line route.

2.23 Where commercial negotiation fails, absent litigation, there are currently two avenues open to junior iron ore miners seeking to secure transportation services from BHPB or Rio Tinto in the Pilbara:

- seek a rail haulage service pursuant to the State Agreements or
- seek access to a rail track under Part IIIA of the Act.

The State Agreements

2.24 In relation to the State Agreements, the ACCC notes that independent producers may apply for and negotiate a freight carriage service with BHPB or Rio Tinto on those parties' existing railways in the Pilbara. By way of illustration, in *Hancock Prospecting Pty Ltd & Ors v BHP Minerals Pty & Ors* [2003] WASCA 259, the Western Australian Court of Appeal declared that Hancock was a 'third party' for the purposes of the *Rail Transport Agreement 1987 (WA)* giving, in the circumstances of that case, Hancock the ability to enforce the terms of that agreement against BHPB in relation to rail access for Hancock's Hope Downs mine.

Part IIIA applications for third party access

2.25 In June 2004, FMG made an application to the National Competition Council (NCC) under Part IIIA of the Act for the declaration of BHPB's Mount Newman rail line as a "service." While the NCC recommended that the services provided on this line be declared, in May 2006 the then Treasurer, the Hon. Peter Costello MP, did not adopt the NCC's recommendation.

2.26 On 16 November 2007, the NCC received an application under Part IIIA of the Act from The Pilbara Infrastructure Pty Ltd (TPI), a wholly owned subsidiary of FMG. TPI sought the declaration of Rio Tinto's Hamersley and Robe River rail lines and BHPB's Goldsworthy rail lines. The NCC recommended that these services be declared and in October 2008, the Treasurer, the Hon. Wayne Swan MP, accepted the NCC's

recommendation that the railways be opened to third party access, declaring that from 19 November 2008, access seekers could apply for 20 year long access rights.

2.27 These applications are currently the subject of a review by the Australian Competition Tribunal. The declarations have been stayed pending the Tribunal's decision.

Pilbara Rail Access Interdepartmental Committee

2.28 In May 2006 the Western Australian State Government established PRAIC to jointly develop an access regime for haulage on the Pilbara iron ore railways, initially between the State Government and BHP Billiton, but with potentially wider application throughout the Pilbara.[1]

2.29 The PRAIC regime seeks to set up a framework for access to the rail track infrastructure (below rail services) of certain vertically integrated iron ore mine operators in the Pilbara, as well as their rolling stock, locomotives, and wagons (above rail services).

2.30 In September 2009, the PRAIC released its report to the WA Government on the outcomes of the public consultation process, as well as the final draft of the Haulage Regime. It has not been formally adopted by the WA Government at this stage.

[1] Government of Western Australia, Department of Treasury and Finance, http://www.dtf.wa.gov.au/cms/content.aspx?id=714

3. Submissions received by the ACCC

3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

3.2. Broadly, the NWIOA submits that under the proposed collective bargaining arrangements:

- more efficient capital, price and service quality outcomes are likely to occur
- the collective bargaining process may act as a restraint on the use of market power by the service providers in respect of individual lines and collectively within the Pilbara region
- there will be no negative impact on the global iron ore markets
- markets for the supply of rail haulage and below rail services will benefit from the efficiencies generated and
- there are few or no anti-competitive effects.

3.3. The ACCC sought submissions from around 60 interested parties potentially affected by the application, including government departments, iron ore producers, industry associations and other industry participants.

3.4. The ACCC received one submission from BHP Billiton Limited (BHBP) and one submission from the Western Australian Government. A summary of the public submissions received from interested parties follows.

Western Australian Government

3.5. The Department of Treasury and Finance WA, the Department of Transport WA and the Department of State Development WA (the WA Government) provided a joint submission supportive of the proposed collective bargaining arrangements and the NWIOA's application for interim authorisation. The WA Government submits that the ACCC should ensure that granting interim authorisation does not preclude or hinder any third party that is not represented by the NWIOA from negotiating access arrangements with an infrastructure provider.

3.6. The WA Government notes that third party access to the iron ore railways has been a long held policy objective of successive Western Australia governments that was incorporated in the original iron ore State Agreements Acts from the 1960s. However, to date, no independent third party has been successful in gaining access to the Pilbara railways.

3.7. The WA Government submits that permitting the NWIOA to collectively negotiate with infrastructure providers may give the represented "junior" firms greater

negotiating power, helping to improve the balance between the parties and resulting in a greater probability of access being achieved. The WA Government suggests that this will apply even more so if the proposed iron ore production joint venture between BHPB and Rio Tinto proceeds.

3.8. The WA Government suggests that allowing third party access to the Pilbara iron ore railways will ensure economically efficient use of the Pilbara railway infrastructure. Furthermore, access would be beneficial for the Western Australian economy, and the Australian economy as a whole, as it would promote the viability of more mining operations and facilitate a greater volume of iron ore exports from a wider range of sources. The WA Government notes that this does not necessarily mean that iron ore producers will lose market share to those entities that gain access. The output of any firm that gains access is likely to substitute for output from less efficient producers in the global iron ore market.

3.9. The WA Government further submits that the desired outcome from these collective negotiations is the achievement of an effective access regime. The WA Government considers that if the NWIOA is able to agree on a framework for access with an infrastructure provider, it would be best practice for the framework to be submitted to the ACCC or the NCC for approval. This regulatory scrutiny is, in the WA Government's view, essential to ensure that any access framework agreed by the parties balances their legitimate business interests, facilitates the economically efficient operation of the infrastructure and is generally in the public interest.

BHP Billiton Limited

3.10. BHPB does not oppose the application for authorisation but sought to clarify some of the statements made by the NWIOA in its application.

3.11. BHPB rejects NWIOA's contention that BHPB has a "substantial degree of market power" in any relevant market.

3.12. BHPB submits that the global iron ore market is highly competitive and BHPB faces vigorous competition in the production and sale of iron ore from Vale, FMG, Anglo American and many other existing, low cost global iron ore suppliers, including Rio Tinto.

3.13. BHPB considers that if there is a market for "iron ore transportation services" (or any narrower market) it has clear operational economic incentives to preserve the fully integrated, single-user nature of its rail system to maximise its economically efficient operation. BHPB submits that it would face serious operational inefficiencies and uncompensated operational costs if it were to compromise the fully-integrated, single-user status of its rail system. BHPB states that, unless otherwise required to do so, it is unlikely to participate in any such market.

3.14. BHPB submits that the proposed collective negotiation process outlined in the NWIOA's submission may be difficult to apply practically, particularly the proposal that "the negotiation process undertaken by NWIOA does not involve NWIOA seeking commercially sensitive information from the participants." BHBP suggests that it is difficult to conceive how the NWIOA could meaningfully negotiate access terms with service providers without access to sensitive information such as production forecasts.

3.15. BHPB contends that the NWIOA's submissions do not acknowledge the practical necessity that any arrangements negotiated would have to be consistent with, and feasible to implement under, any regulatory regime prevailing under Part IIIA of the Act, the WA track access legislation (which applies to FMG), the *Rail Transport Agreement 1987,* and any other potential regulatory overlay. BHPB considers this may not be practically or commercially possible in the current context. BHPB notes for example that Part IIIA establishes rules concerning the priority of service allocation as between third parties. BHPB submits that these issues are relevant to the contended public benefit accruing from any collective negotiations in relation to private arrangements as to iron ore transportation.

3.16. BHPB notes that the NWIOA's submissions contend that any foreclosure of junior miners as a result of authorisation would be insubstantial. However, BHPB submits that the figures used overstate the relative size of the NWIOA's projects – in particular, they compare the NWIOA's forecast 2014 production with Pilbara production in 2006-7 (pre-FMG) and Pilbara production in 2009-10. BHPB submits that both of these comparisons understate the likely total Pilbara production in 2014.

NWIOA's response to interested party submissions

3.17. The NWIOA sought to clarify one aspect of the WA Government's submission which suggests that best practice would require the NWIOA to submit a commercially negotiated solution to the ACCC or the NCC for regulatory approval. If the NWIOA is successful in commercially negotiating an access arrangement with an infrastructure owner, the NWIOA considers this would be a private treaty and not intended to operate as either a state-based access regime or an access arrangement under Part IIIA.

3.18. The NWIOA advises that it does not intend to hinder any additional third party access by seeking exclusive access arrangements with infrastructure owners. The NWIOA is open to the possibility of welcoming other access seekers into its membership.

3.19. The NWIOA notes that BHPB has queried whether the collective negotiation process is practical. The NWIOA accepts that it may have to obtain competitively sensitive production forecast information but that this will be confined to information that is essential for negotiating rail haulage/access arrangements. In addition, the information received by the NWIOA will be commercial in confidence as between the NWIOA and the provider of the information.

3.20. The NWIOA notes BHPB's submission that the NWIOA overstated the relative size of its members' projects. The NWIOA believes the figures provided in its application are accurate, but to the extent that total production in the Pilbara may be greater than suggested, this means the NWIOA's share of the market would be lower. The NWIOA considers that this strengthens its submissions that the level of foreclosure that might result from the authorisation would be insignificant in the context of the total market.

3.21. The views of the NWIOA and interested parties are discussed further in the ACCC's evaluation of the collective bargaining arrangements in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) and by following the links to this matter.

4. ACCC Evaluation

4.1. The ACCC's evaluation of the collective bargaining arrangements is in accordance with the tests found in the following sections of the Act:

- sections 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding other than an exclusionary provision, unless it is satisfied in all the circumstances that:
  - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(6) 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 or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
  - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
  - the benefit, in the case of section 90(5A) 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 or arrangement were made or given effect to, or in the case of section 90(5B) 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.

4.2. For more information about the tests for authorisation and relevant provisions of the Act, please see Attachment C.

The market

4.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

4.4. The NWIOA submits that the relevant markets are likely to be:

- the primary markets for the supply of above rail haulage services and below rail track access in the Pilbara and
- the global market for the supply of iron ore.

Supply of above rail haulage services and below rail infrastructure

4.5. The NWIOA's submission notes that various regulatory regimes provide for either rail track access or a rail haulage service. The NWIOA submits that, at present, there are

two avenues potentially open to 'junior' iron miners to secure transportation of their iron ore in the Pilbara. These are:

- by seeking a rail haulage service pursuant to the State agreements; or
- by seeking access to rail track under Part IIIA of the Act.

4.6. The NWIOA's submission outlines the difference between these two forms of third party access to rail infrastructure. It notes that the provider of a rail haulage service owns and has full control over its rail track (below rail) infrastructure and all of its 'above rail' equipment (such as locomotives and wagons) used to haul third party products. The NWIOA submits that a rail haulage regime involves the infrastructure owner and the access seeker negotiating the terms for use of both the rail track and above rail equipment. In contrast, under a rail track access regime, the access seeker will only secure access to the infrastructure owner's rail track, and will need either to secure from others or provide itself the 'above rail' equipment.

4.7. The NWIOA submits that iron ore producers are potential customers in markets for above rail haulage services and below rail track access.

4.8. The NWIOA submits that a rail haulage regime does not offer the same services as a rail access regime. The NWIOA further submits that arguably, a haulage regime effectively encompasses two separate markets and services; firstly a market for access to the rail track and associated below track infrastructure, and secondly a market for the above rail freight services. The NWIOA considers that, while a rail haulage service offers a one stop shop for an iron ore producer, it has the disadvantage of not allowing the iron ore producer to obtain a freight service from an alternative rail operator, in the event the infrastructure owner charges uncompetitive prices for its freight services.

4.9. In support of its submission, the NWIOA notes that in *Re Specialised Container Transport* (1997) ATPR (NCC), the NCC considered the provision of a rail track to be a different functional market to that of the provision of freight transport services.

ACCC's view

4.10. The NWIOA shareholders either currently undertake or have plans to undertake iron ore production in the Pilbara region of Western Australia for export purposes. As outlined further above, the applicants are seeking to collectively negotiate with owners of rail infrastructure the terms of rail transportation of iron ore from their mines to the coast for export, in the Pilbara region. In this regard, the activities of the NWIOA shareholders overlap with respect to their potential acquisition of above rail haulage services and below rail track access from infrastructure owners.

4.11. On the issue of whether above rail haulage services and below rail track access form separate functional markets, the ACCC notes that, in assessing applications for access to rail lines in the Pilbara, the National Competition Council recently considered among other things that:

- the degree of integration between the operation of rail infrastructure and the operation of trains on such infrastructure was not such that the two must invariably be undertaken by one entity; and

- the rail assets required to provide iron ore track services are distinct from those required to provide iron ore rail haulage services.[2]

4.12. The ACCC also notes that the NWIOA's submission recognises the possibility of acquiring the supply of above rail freight services from an alternative rail operator, separate to the infrastructure owner.

4.13. In a matter concerning the application for declaration of sewage interconnection and transportation services[3], the Australian Competition Tribunal alluded to various tests in determining whether the services under consideration constituted separate functional markets. The Tribunal considered the efficiencies of vertical integration, as well as assessments of transactions costs and service delivery costs (for example, if there was a demand for the service at a price which covered these combined costs, then a market could be said to exist).

4.14. In the context of the present application for authorisation, the ACCC considers that it is not necessary to precisely define whether the supply of above rail haulage services and below rail track access fall into a single market or two separate functional markets.

4.15. In respect of the product dimension of the relevant market or markets, the ACCC considers that it would not be appropriate to consider a broader area of competition for iron ore transportation generally involving both rail and road (truck) transportation. In this regard, the ACCC notes that the high cost of road relative to rail transport means that it plays a limited role in iron ore transportation. Generally, it would appear that trucking may only be considered suitable for transporting iron ore over short distances where mines are located very close to the port. The ACCC notes the WA Government's submission to the NCC's consideration of third party access to Pilbara railways, where it considered that there was no alternative competitive transport option to rail for tenements located in the Pilbara hinterland, noting that road transport may be economic for tenements nearer the coast. [4]

4.16. On this basis, the ACCC considers that road transportation is not a close substitute for rail transport of iron ore in the Pilbara region.

4.17. The ACCC also notes the NWIOA's submission that in over 40 years, no access has been granted by BHBP and Rio Tinto to independent third party iron ore producers in the Pilbara region. In this regard, the NWIOA shareholders are *potential* customers of above rail haulage and below rail track access. The ACCC considers that the absence of actual customers does not preclude the existence of any relevant market or markets for the supply/acquisition of above rail haulage services and below rail track access.[5]

4.18. The ACCC notes that, with regard to the geographic scope of the relevant markets for the provision of above rail haulage services and below rail track access, iron ore

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[2] National Competition Council Final Recommendation *Application for declaration of a service provided by the Goldsworthy Railway under section 44F(1) of the Trade Practices Act 1974* 29 August 2008 http://www.ncc.gov.au/images/uploads/Goldsworthy_FR-001.pdf

[3] *Re Services Sydney Pty Limited [2005] ACompT 7 (21 December 2005).*

[4] WA Gov, Sub 1 at [3.1]. http://www.ncc.gov.au

[5] See *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Co Ltd and Another* (1989) 83 ALR 577, Toohey J at 600**.**

producers are unlikely to consider services that are not within reasonable proximity to their project sites a viable alternative.

4.19. For the purposes of assessing this collective bargaining application, the ACCC considers that it may be appropriate to consider the impact of the proposed arrangements in the context of the provision of services in an area no wider than the Pilbara region in Western Australia, taking into account that the NWIOA comprises a group of miners in various locations in the Pilbara region seeking to collectively bargaining with the service providers.

4.20. On the basis of the above, and for the purposes of assessing this application for authorisation, the ACCC is of the view that it is sufficient to consider the impact of the proposed conduct in relation to the supply/acquisition of above rail haulage services and below rail track access, in the Pilbara region of Western Australia.

Global iron ore market

4.21. The NWIOA notes that the ACCC[6] and the NCC[7] have previously considered international/worldwide markets for the supply of iron ore. The ACCC has in the past accepted that because the majority of Australia's iron ore production is exported and the commodity is internationally traded, the iron ore market may be considered in a global context.

4.22. The NWIOA anticipates that its facilitation will allow an alternative source of iron ore to be offered by the participants to that presently offered by the mining incumbents (i.e BHPB, Rio Tinto and FMG).

ACCC's view

4.23. In its Public Competition Assessment of the proposed acquisition of Rio Tinto by BHPB in 2008, the ACCC considered the impact of the proposed acquisition in four markets for the supply of iron ore:

- the global seaborne supply of iron ore lump
- the global seaborne supply of iron ore fines
- the national (Australian) supply of iron ore lump
- the national (Australian) supply of iron ore fines.

4.24. The NWIOA shareholders currently engage in or propose to engage in the production and export of iron ore. To the extent that the conduct may facilitate NWIOA iron ore producers acquiring access to above rail haulage services and below rail track access, it may in turn sustain or enhance their participation in the above markets. The ACCC therefore considers that the proposed conduct may impact these markets; in particular, the markets for the global seaborne supply of iron ore.

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[6] Determination by ACCC relating to an application for authorisation by BHP Billiton Minerals Pty ltd & Others in respect of agreements relating to the extraction, transportation, blending and sale of iron ore from the Pilbara Region – 2 June 2005, p. 27.

[7] Final Recommendation by NCC dated 23 March 2006 in respect of application for declaration of a service provided by Mount Newman railway line under section 44F(1) of the *Trade Practices Act 1974*, p. 135.

4.25. To the extent that the NWIOA may supply Bluescope Steel (the only Australian buyer of iron ore) the ACCC considers that competition in the national market for the supply of iron ore may also be affected.

Market for iron ore tenements

4.26. The ACCC notes that the NCC has previously considered that there is a separate functional market for iron ore tenements as distinct from the market for iron ore,[8] however for the purposes of assessing the current application, the ACCC considers it is not necessary to examine whether iron ore tenements form a separate market.

The counterfactual

4.27. The ACCC applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.[9]

4.28. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the 'counterfactual'.

4.29. The NWIOA submits that notwithstanding the State agreements in relation to Pilbara infrastructure, to date, no third party has been successful at securing access to BHPB and Rio Tinto's railway lines in the Pilbara. The ACCC notes that the Australian Competition Tribunal is currently considering applications made by FMG and its subsidiary for declaration of BHBP and Rio Tinto's railway lines as a service under Part IIIA of the Act. The ACCC considers that such declaration, if made, would apply to both the factual and counterfactual.

4.30. The ACCC considers that without authorisation, the likely counterfactual is a continuation of the status quo, where the NWIOA's shareholders seek to negotiate access individually with BHPB, Rio Tinto and FMG.

Public benefit

4.31. Public benefit is not defined in the Act. 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.[10]

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[8] Final Recommendation by NCC dated 23 March 2006 in respect of application for declaration of a service provided by Mount Newman railway line under section 44F(1) of the *Trade Practices Act 1974*, p. 123.

[9] *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; Re *Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

[10] *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

4.32. The NWIOA submits that the proposed collective bargaining arrangements will deliver a number of public benefits, including:

- the fostering of business efficiency, especially where this results in improved international competitiveness
- meaningful improvement in commercial outcomes
- growth in export markets
- less transaction costs and less risk, which is likely to lead to lower prices
- more iron ore available on the market and
- allowing additional investment in Australia and avoiding the creation of a disincentive for future investment.

4.33. A number of the public benefits claimed depend on the NWIOA successfully negotiating access to the relevant rail infrastructure. The ACCC notes that:

- BHPB's submission indicates that unless it is required to do so, it would be unlikely to participate in any market for iron ore transportation services or any narrower market
- it appears that no third party has been granted access to BHPB and Rio Tinto's Pilbara railways for 40 years.

4.34. In this context, the ACCC recognises that collective bargaining may not occur with all or any of the targets.

4.35. The ACCC's role in applying the statutory test is to assess what benefits and detriments flow from the conduct if it were to take place. The ACCC does not discount the public benefits that accrue from collective negotiations because there is uncertainty about whether the conduct will actually be engaged in.

4.36. The primary public benefits identified by the NWIOA in their supporting submission are discussed below.

Meaningful improvement in commercial outcomes

4.37. The NWIOA submits that in any commercial negotiation, a firm with market power offering a contract will seek to secure the most favourable deal for itself. Such contracts would generally be offered on a "take it or leave it" basis with limited, if any, scope by the acquirer to have input into the terms of the contract.

4.38. The NWIOA does not consider that its collective bargaining arrangements will represent a substantial level of countervailing market power. With collective bargaining, the ability for the applicants to improve their bargaining position can be increased. The NWIOA suggests that, for example, the scope for a service provider to provide differing information to individual participants is reduced. Analysis and

opinions over price and service offering can be exchanged among the participants, with the potential for a more focused response to the service providers.

4.39. The NWIOA considers that its collective bargaining arrangements are capable of generating a meaningful but not necessarily substantial (i.e. a competitive market outcome) improvement in commercial outcomes.

ACCC view

4.40. The ACCC considers that collective bargaining arrangements can result in benefits to the public by facilitating improvements in the level of input a party has in their contractual negotiations. The ACCC accepts that in this case, current shareholders of the NWIOA would have little bargaining power in negotiating the terms of access with infrastructure owners such as BHBP, Rio Tinto or FMG. In this regard, the ACCC notes the NWIOA's submission that for over 40 years it would appear that BHBP or Rio Tinto have not provided rail services to other iron ore producers.

4.41. The ACCC also notes BHBP's submission that unless required to do so, it would be unlikely to participate in any market for iron ore transportation services or any narrower market. BHPB further submits that there are rail haulage obligations that are currently applicable to BHPB's Pilbara rail system operations and there are other regulatory regimes for the provision of rail haulage or other iron ore transportation services which may be applicable in the future.

4.42. In circumstances where the service providers propose or are required to provide above rail haulage services and below rail track access, the collective bargaining arrangements may allow the parties to have greater input into contractual terms and conditions compared to a situation where the parties engaged in individual negotiations. The ACCC therefore accepts that in these circumstances, the proposed collective bargaining arrangements may deliver public benefits by facilitating more meaningful commercial outcomes.

Transaction cost savings

4.43. Generally, there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiating process is employed, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. The ACCC considers that to the extent these transaction cost savings do arise they are likely to constitute a public benefit.

4.44. The NWIOA submits that the proposed collective bargaining arrangements enable the applicants to participate in negotiations for services in the Pilbara region at significantly lower cost than if negotiations took place on an individual basis. In particular, the NWIOA suggests that these transaction cost savings take the form of savings of management time and the need to engage lawyers and consultants.

4.45. The NWIOA considers that absent collective negotiations, these costs would feed through into each participant's cost base and would ultimately result in higher charges to customers.

ACCC view

4.46. The ACCC considers that some transaction cost savings are likely to result from the proposed collective bargaining arrangements compared to a situation under which each iron ore producer attempts to negotiate individually with the service providers. The ACCC accepts that the proposed collective bargaining arrangements would therefore be likely to deliver a public benefit in the form of transaction cost savings that are likely to be passed on to customers.

More efficient infrastructure investment

4.47. The NWIOA submits that if the service providers were required to deal with each iron ore producer individually expectations about prices, services and contractual terms would vary. The NWIOA submits that its proposed collective bargaining arrangement would give each service provider the ability to respond to the aggregate or consolidated view of the applicants.

4.48. The NWIOA submits that collective bargaining would therefore facilitate the development of infrastructure plans that satisfy the needs of all the applicants, thereby giving service providers more certainty regarding potential infrastructure investment.

ACCC view

4.49. The ACCC considers that there are likely to be a number of factors that impact efficient infrastructure investment. The ACCC considers that collective negotiations may assist in identifying proposals that seek to satisfy the needs of the relevant parties more fully. To the extent that the proposed collective bargaining arrangements facilitate such an outcome, the ACCC considers that the proposed arrangements may contribute to more efficient infrastructure investment, compared to a situation where negotiations are engaged in on an individual basis, and that this delivers a public benefit.

ACCC conclusion on public benefits

4.50. The ACCC considers that the proposed arrangements would be likely to deliver the following public benefits:

- transaction cost savings compared to a situation where iron ore producers attempt to negotiate with the service providers individually
- improvements in the level of input a party has in their contractual negotiations, in circumstances where the service providers propose or are required to provide above rail haulage services and below rail track access
- a small benefit by contributing to more efficient infrastructure investment.

Public detriment

4.51. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

> …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.[11]

4.52. The NWIOA submits that the proposed collective negotiations will not have any identifiable negative impacts on competitive outcomes in the primary markets.

4.53. The ACCC considers that the following factors are relevant to an assessment of the anti-competitive effects, if any, of the collective bargaining arrangements:

- voluntary participation in the collective bargaining arrangement; and
- restrictions on the coverage and composition of the bargaining group.

Voluntary participation in the collective bargaining arrangements

4.54. The NWIOA advises that participation in the proposed collective bargaining arrangements is voluntary. In particular:

- service providers are not required to negotiate with NWIOA and
- the bargaining group is not compelled to adopt the terms and conditions negotiated by NWIOA.

4.55. The NWIOA considers that this means the real benefits of collective negotiation will only flow if this will yield a better result – typically lower costs and more efficient outcomes for both the service providers and the bargaining group – than if the group and the service providers engaged in individual negotiations.

4.56. The ACCC notes that members of the bargaining group remain free to negotiate individually with the targets at any time. The service providers are under no obligation to participate in negotiations and should negotiations commence, they are able to opt out at any time.

4.57. The ACCC notes that no submissions were received objecting to the proposed arrangements.

Coverage or composition of the group

4.58. The ACCC considers that where the size of the bargaining group is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade affected and the competition provided by those suppliers outside the group.

4.59. In some circumstances the ACCC considers it appropriate to impose conditions that set clear limits on the coverage, composition and representation of the bargaining group. Such conditions are designed to mitigate any potential detriment that may arise if the bargaining group has the potential to significantly increase in size.

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[11] *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

4.60. The NWIOA's shareholders currently comprise FerrAus Limited, Atlas Iron Limited, and Brockman Resource.

4.61. The NWIOA has sought authorisation on behalf of NWIOA's current shareholders, other shareholders from time to time and others (who do not own or operate rail infrastructure) who approach NWIOA in relation to the supply of available services.

4.62. The NWIOA's authorisation application also does not limit the targets of the collective negotiations, and is framed to include BHBP, Rio Tinto, TPI/FMG and any other similar provider in future.

4.63. The possibility of changes to the NWIOA participants and target service providers may affect the competitive impact of the proposed collective negotiation arrangement, particularly in circumstances where a 15 year authorisation term is proposed.

4.64. Accordingly, the ACCC proposes to grant authorisation subject to conditions that ensure the ACCC is kept informed of changes to the parties involved in the proposed collective negotiation arrangements, and can obtain further information about such changes (if any), to assist with assessment on the ongoing competitive impact of the proposal. The proposed conditions are set out at paragraph 5.6 below.

4.65. While the ACCC is proposing to grant authorisation to include future parties, it may be that a change to the parties as described above produces a material change in circumstances since the authorisation was granted. In those circumstances, the ACCC may consider invoking the process to revoke the authorisation under section 91B.

ACCC conclusion on public detriments

4.66. The ACCC considers that the voluntary nature of the proposed arrangements and the imposition of conditions relating to the coverage or composition of the parties involved in the proposed negotiations would limit any potential detriment that may arise.

Balance of public benefit and detriment

4.67. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangement for collective negotiations is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

4.68. In the context of applying the net public benefit test in section 90(8)[12] of the Act, the Tribunal commented that:

> … something more than a negligible benefit is required before the power to grant authorisation can be exercised.[13]

4.69. For the reasons outlined in this chapter the ACCC is satisfied that the proposed arrangements are likely to generate public benefits in the form of potential transaction

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[12] The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

[13] *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

cost savings. Additionally, the proposed arrangements may facilitate improvements in the level of input the NWIOA has in their contractual negotiations for the provision of the services and a small benefit by contributing to more efficient infrastructure investment.

4.70. The ACCC considers that the proposed conduct is likely to result in limited public detriments.

4.71. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) are met.

Length of authorisation

4.72. The Act allows the ACCC to grant authorisation for a limited period of time.[14] The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

4.73. In this instance, the NWIOA seeks authorisation for a period of 15 years because:

- of the long lead times, extensive capital investment and the need to deliver greater certainty to both the applicants and service providers
- it is contemplated that some contracts for the services will be required for the life of a mine, which could mean that contracts or arrangements will be in effect for at least 15 years
- the effect of this period of authorisation on competition is expected to be minimal and therefore there will be no negative impact on the global iron ore market.

4.74. Given the long term nature of the investments and to allow the parties to collectively negotiate any changes that may be required to the collectively negotiated contract(s), the ACCC considers that a 15 year period of authorisation is appropriate in this instance. The ACCC is of the view that this would deliver greater certainty to iron ore producers and the service providers.

4.75. As such, the ACCC proposes to grant authorisation to the NWIOA for 15 years.

[14] Section 91(1).

5. Draft determination

The application

5.1. On 4 February 2010 the NWIOA lodged application for authorisation A91212 with the Australian Competition and Consumer Commission (the ACCC).

5.2. Application A91212 was made using Form B, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsections 88(1A) and (1) of the Act to:

- make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act)

- make and give effect to a contract, arrangement or 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 the Act.

5.3. In particular, the NWIOA seeks authorisation to collectively negotiate, on behalf of its shareholders, with BHP Billiton, Rio Tinto, Fortescue Metals Group (the service providers) and any similar provider in future in relation to the terms and conditions, including price, under which above rail haulage services and/or below rail access will be acquired in the Pilbara region in Western Australia.

5.4. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

5.5. For the reasons outlined in Chapter 4 of this draft determination, and subject to the conditions below, the ACCC considers that in all the circumstances the conduct for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

Conditions

5.6. The ACCC therefore **proposes to grant** authorisation to application A91212 **on condition that:**

C1

- the NWIOA must,within 5 business days, provide the ACCC with the following information in writing:

  (a) any change in the current shareholders of NWIOA

  (b) any change in the non-shareholder members of the collective bargaining group and

C2

- the NWIOA must provide the ACCC with the name of any target, not being a target identified by NWIOA in its application for authorisation,approached by the collective bargaining group within 5 business days of that approach.

C3

- The ACCC may, at any time during the term of this authorisation, direct in writing NWIOA to, and NWIOA must:

  (a) Furnish information, documents and materials to the ACCC in the time and in the form requested by the ACCC; and/or

  (b) Produce information, documents and materials to the ACCC within NWIOA's custody, power or control in the time and in the form requested by the ACCC.

- Nothing in this condition requires the provision of information or documents in respect of which NWIOA has a claim of legal professional privilege.

- The power of the ACCC in this condition may be exercised by an employee of the ACCC.

Conduct for which the ACCC proposes to grant authorisation

5.7. Subject to the conditions set out at 5.6 above, the ACCC proposes to grant authorisation, for a period of 15 years, to the NWIOA to collectively negotiate with the service providers in relation to the terms and conditions under which above rail haulage services and below rail access will be acquired in the Pilbara region in Western Australia.

5.8. This draft determination is made on 4 March 2010.

5.9. The attachments to this determination are part of the draft determination.

Conduct not proposed to be authorised

5.10. The proposed authorisation does not extend to any collective boycott activity by the participants. Accordingly, any such activity, should it occur, is not protected from legal action under the Act.

Interim authorisation

5.11. At the time of lodging the application the NWIOA requested interim authorisation to engage in collective negotiations with the service providers.

5.12. On 4 March 2010 the ACCC granted interim authorisation to enable the NWIOA to collectively negotiate with the service providers in respect of the services described in this draft determination.

5.13. This interim authorisation does not extend, however, to the making or giving effect to any subsequent contract between the NWIOA or members of the collective bargaining group and a service provider.

5.14. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

5.15. 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 conference to discuss the draft determination, pursuant to section 90A of the Act.

Attachment A — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

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

Attachment B — chronology of ACCC assessment for application A91212

The following table provides a chronology of significant dates in the consideration of the application by the North West Iron Ore Alliance.

DATE	ACTION
4 February 2010	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
12 February 2010	Closing date for submissions from interested parties in relation to the request for interim authorisation.
12 February 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
19 February 2010	Submission received from NWIOA in response to interested party submissions.
4 March 2010	The ACCC granted interim authorisation.
4 March 2010	Draft determination issued.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

(1) The Commission shall, in respect of an application for an authorization:

(a) make a determination in writing granting such authorization as it considers appropriate; or

(b) make a determination in writing dismissing the application.

(2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(4) The Commission shall state in writing its reasons for a determination made by it.

(5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:

(a) that the provision would result, or be likely to result, in a benefit to the public; and

(b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and

(ii) the provision were given effect to.

(5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:

(a) that the provision has resulted, or is likely to result, in a benefit to the public; and

(b) that the 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.

(6) The Commission shall not make a determination granting an authorization under subsection 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 (other than conduct to which subsection 47(6) or (7) applies), 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 authorization under subsection 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.

(8) The Commission shall not:

(a) make a determination granting:

(i) an authorization under subsection 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 authorization under subsection 88(7) or (7A) in respect of proposed conduct; or

(iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or

(iv) an authorisation under subsection 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 authorization under subsection 88(1) 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.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;

(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.[15]

However, the Tribunal has previously stated that regarding 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.[16]

Consequently, when applying either test, the ACCC can take most, if not all, public detriments 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.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.[17]

Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future[18]

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[15] *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] AcompT9 at paragraph 67.

[16] *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.

[17] Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.[19]

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation[20]. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.[21] The Act limits applications for minor variation to applications for:

> … a single variation that does not involve a material change in the effect of the authorisation.[22]

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.[23] The ACCC may also review an authorisation with a view to revoking it in certain circumstances.[24]

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.[25] The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.[26]

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[18] Section 88(10).
[19] Section 88(6).
[20] Section 90(10A)
[21] Subsection 91A(1)
[22] Subsection 87ZD(1).
[23] Subsection 91B(1)
[24] Subsection 91B(3)
[25] Subsection 91C(1)
[26] Subsection 91C(3)