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The Secretary
Senate Standing Committee on Economics
PO Box 6100
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Dear Secretary

The Trade Practices Amendment (Infrastructure Access) Bill 2009 (*the Bill*)

Thank you for the opportunity to make a submission to the Committee on the proposed Bill.

Background

As the Committee is no doubt aware, Rio Tinto has been deeply involved in access issues under Part IIIA of the Trade Practices Act 1974 (***the Act***) over the last decade. The focus of Rio Tinto's involvement has been its railway facilities, which form part of Rio Tinto's iron ore production system in the Pilbara in Western Australia.

The revenue generated in 2008 by exports from the Pilbara mines operated by Rio Tinto totalled $16.4 billion and the royalties paid to Western Australia on these sales totalled $772 million. The income taxes paid to the Australian Government on income generated by Rio Tinto's share of these sales amounted to $1.8 billion.

Rio Tinto's current Pilbara iron ore production rate is 220 mtpa, having been expanded from approximately 100mtpa in 2002, when the surge in demand generated by China's industrialization and urbanization program became apparent. Further expansions are now underway and it is planned to increase capacity to 330mtpa by 2015. As a result of Rio Tinto's expansions, and investment by other Australian integrated producers in new iron ore capacity, Australia has maintained it share of seaborne iron ore sales.

By contrast, in coal, where the same demand surge occurred and the same opportunity presented itself, the necessary expansion projects did not occur and Australia's share of seaborne coal sales slipped from approximately 35% in 2002/3 to 29% in 2007/8. The only apparent reason for the difference is the fact that the coal industry is dependent on multi-user infrastructure, whereas the iron ore industry almost exclusively utilizes integrated production systems in which the operator is the sole user of the infrastructure and has an unfettered ability to optimize and expand its operations rapidly to capture opportunities as they present themselves.

The fact that coal has failed to capture opportunities while iron ore has succeeded has been the subject of comment by several bodies, including the Reserve Bank of Australia in its Statement on Monetary Policy in February 2005 and The Prime Minister's Export and Infrastructure Taskforce in its report in May 2005. As the Taskforce report observed,

in multi-user systems, interested parties "focus more on shifting slices of the pie than on ensuring that the pie expands"[1].

Given the value of the operations at stake and the obvious constraints that will be imposed if any part of Rio Tinto's Pilbara iron ore system is changed from an integrated single user facility to a multi-user facility, we are strongly of the view that it is contrary to Australia's interest for the Pilbara railways to be subject to enforced third party access. Rio Tinto has previously submitted that there should be scope to exempt from Part IIIA privately owned vertically integrated export infrastructure. This notion was advanced by the Infrastructure Taskforce which recommended a mechanism similar to the authorization process found elsewhere in the Act to provide an "efficiency override" in respect of export related facilities[2].

Rio Tinto notes that the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson, was reported as saying that he was considering exempting privately owned facilities from Part IIIA because of the disincentives to investment provided by the current provisions[3]. Rio Tinto welcomes the prospect of such an exemption, which would be consistent with the recommendation of the Taskforce.

However, as matters now stand there is no such exemption and, therefore, Rio Tinto wishes to comment on the Bill. In particular Rio Tinto thinks that the proposal to truncate the review process will substantially increase the risks posed by Part IIIA and the inefficiencies and disincentives that are recognized as problems with Part IIIA will be significantly exacerbated if the Bill is enacted.

The Current Part IIIA Applications

On 16 November 2007, a subsidiary of Fortescue Metals Group (***FMG***) applied under Part IIIA for declaration of most of Rio Tinto's Hamersley rail system and a further application for the Robe railway (also operated by Rio Tinto) followed in January 2008. A similar application was made in respect of BHP Billiton's Goldsworthy railway. The interested parties made submissions to the National Competition Council (***the Council***) in the first half of 2008 and the Council made a recommendation to declare the facilities on 29 August 2008. The facilities were then declared by the Federal Treasurer by decision published on 27 October 2008. In November 2008 Rio Tinto and BHPB both applied to the Australian Competition Tribunal (***the Tribunal***) for review of the decisions.

Prior to these applications, in 2004 FMG had applied for declaration of BHPB's Mt Newman railway, but this was subject to a jurisdictional challenge in the courts, which was not resolved until the High Court handed down its judgment in September 2008. The challenge was based on the "production process" exception in Part IIIA, which Hamersley Iron had successfully invoked in the Federal Court in 1999 in response to an application by Robe River Iron Associates. The High Court decision effectively negated the exception. Meanwhile, in January 2006 the Council had recommended declaration of the Mt Newman railway, but the then Federal Treasurer had declined to make a decision and the declaration was deemed to be refused. FMG applied to the Tribunal for review, but progress of this review was intentionally delayed until the outcome of the High Court appeal was known.

In December 2008 all four applications for review by Rio Tinto, BHPB and FMG were consolidated into the one hearing before the Tribunal in the interests of speed and efficiency. The Tribunal, headed by the President, Justice Finkelstein, pressed the parties to accept a very tight timetable for the filing of evidence and hearing of the applications. Extensive evidence was filed by lay and expert witnesses between March and September 2009 and the hearing commenced on 28 September 2009. Final addresses are now

[1] Taskforce report p 2

[2] Taskforce report p 39

[3] Australian Financial Review 10 Nov 2009, p 10

being delivered, but the Tribunal has sought extra rail modelling evidence and this is due to be presented in the last week of February 2010. A Tribunal decision will follow some time after that.

Rio Tinto's Most Significant Concern about the Bill

Rio Tinto's most significant concern about the Bill is the limitation on the review process that can be undertaken by the Tribunal. The requirement that the Tribunal is limited to considering only the information that the Council took into account in making its recommendation or the Minister took into account in making his decision (proposed section 44ZZOA) will be a very serious impediment in achieving a properly considered and balanced outcome.

Given the significance of the assets involved and the impact of access on proprietary rights and the Australian economy, to so limit the review process is probably as significant a step as the introduction of Part IIIA in 1995. The explanatory memorandum that accompanied the introduction of the Bill stated at paragraph 1.3 that the Bill was being introduced "to address potential adverse effects on infrastructure investment". It is difficult to see how limiting the right of review, where assertions are tested by an independent body, which receives evidence under oath, can have anything but a very adverse effect on investment. It is crucial that Part IIIA decisions be assessed from a legal, economic and business perspective. The specialist Tribunal, constituted by a judge, an economist and an experienced business person, is able to make this assessment in a way that the Council and the Minister simply cannot. Recourse to the Tribunal is the one saving grace in Part IIIA, which is otherwise severely flawed and highly politicized.

Rio Tinto strongly urges the Committee to seek the views of the President of the Tribunal as to whether he believes the limitation on the role of the Tribunal is likely to achieve a more satisfactory outcome than the current Part IIIA provisions.

It is Rio Tinto's view that the credibility of the Part IIIA process will be severely undermined if the proposed Bill is enacted. Restricting the right of review by an independent body, so that a declaration with such far reaching consequences can be made without any effective means of testing whether the basis for declaration has been made out, will diminish, rather than enhance, the investment in infrastructure that Australia so desperately needs.

Rio Tinto's concerns are more fully set out below:

1. The Tribunal is a specialist tribunal and conducts its proceedings in a similar manner to a court. Evidence must be given under oath and each witness is subject to cross examination. By contrast the process before the Council involves unsubstantiated assertions by interested parties that are not (and cannot be) tested as to their veracity.

2. If material before the Tribunal is limited to that considered by the Council or the Minister, how will this work in practice? Does the Council or the Minister simply supply to the Tribunal all the unsubstantiated material received from interested parties? Is this required to be verified under oath? Will there be a public hearing? Will the proponents be subject to cross examination? If not, how can the Tribunal separate fact from fiction? If there is a hearing, what is the status of further (or different) information obtained in that hearing (either through evidence in chief or cross examination)? How is information to be updated (eg by the time the Tribunal proceeding is underway, there may be substantial changes in plans for use of the facility by the incumbent or potential users, that could bear upon the declaration criteria)?

3. An important feature of the Tribunal is that it has the power to seek further information to ensure a proper consideration of the issues. Indeed, in the Pilbara railway proceedings, the Tribunal has of its own volition sought further

information from rail modellers and from the parties about their operations. This is not information to "*clarify*" evidence; it is additional information the Tribunal considers important to enable it to make the correct decision. The Tribunal's inquiries may even require information from persons who have not previously been involved in the applications. The process therefore goes well beyond the provisions of the proposed section 44ZZOA, which restricts the Tribunal's requests to clarifying information from parties who have already supplied information. Such a restriction is harmful and ill-conceived and severely undermines the benefits of the Tribunal's role as set out in section 103 of the Act.

4. With the greatest respect to the Council, it does not have the resources, the powers or the processes available to it to test the veracity of the various submissions put to it. The Tribunal has similar powers to those of the Federal Court and proceedings are conducted in a similar manner to court proceedings. As a result there is considerably greater confidence that the true facts will be derived through the Tribunal than through the Council. Further, as the Tribunal is presided over by a judge, it is much more likely to be seen as an independent body than the Council, which is an administrative body reporting to Treasury. If the Government is determined to reduce the steps involved in the declaration process, it would be more appropriate to eliminate the role of the Council rather curtailing the Tribunal's role.

The above observations are not made in a "vacuum". Having participated in a Tribunal hearing for three months, Rio Tinto is convinced that the true issues involved in declaring its Pilbara rail facilities are understood by the Tribunal to a much greater extent than they were by the Council. The information extracted through the evidentiary process has provided much greater insight into the relevant issues. If the Tribunal had been limited to a review of the material relied upon by the Council in making its recommendation, or the Minister in making his decision, this confidence would not be there and the outcome might well be different.

In short, given that probably the most significant Part IIIA access applications since the inception of Part IIIA are currently before the Tribunal, it is at least premature to limit the role of the Tribunal prior to seeing the outcome of the applications for review. Further, irrespective of what the Tribunal's final decision may be, there is likely to be much greater acceptance of it, given the rigour and transparency of the process.

Other Concerns

Other concerns about the Bill are set out below:

Binding Time Limits

The timetable that has been applied to the FMG applications for the Hamersley and Robe railways has been as speedy as anyone could reasonably expect given the magnitude of the issues involved. We would expect FMG and the Council would agree with this. Nevertheless the time taken between application to the Council and the Council's recommendation was approximately 9 months and the time taken in the Tribunal has been about 12 months so far and is likely to be 18 months before a decision is issued. Any mandated truncation would undermine confidence in the process and would inhibit a fair and well-considered outcome.

It is noted that there is some scope for the Council and the Tribunal to extend the binding time limits, although there are burdensome processes to go through to do so. We have no doubt that if fair and proper process is to be applied an extension will inevitably be required and we therefore question why such unrealistic time limits are imposed. Even a desire to try to satisfy such time limits rather than seek an extension runs the risk of accelerating an unsatisfactory result.

The time limit imposed on the Australian Competition and Consumer Commission (***the Commission***), is an even more serious matter. There appears to be no means for the Commission to extend the 180 days imposed upon it other than to apply the limited "clock-stoppers". If Rio Tinto's Pilbara facilities are declared it is almost certain that agreement on terms of access will not be reached with any access seeker and the complex issues now before the Tribunal (such as the capacity of the railway lines, the anticipated requirements of Rio Tinto, the impact of the access seeker, the costs and lost production that Rio Tinto may suffer etc etc) will need to be determined by the Commission. It is inconceivable that such complex issues, as well as compensation terms, could be satisfactorily determined within 6 months of the application to the Commission. There is then the question as to the consequences of there not being a decision in the prescribed time. This is addressed below. However, the existence of such an unrealistic timetable that cannot be extended might drive the Commission to try to reach a decision in an unacceptably short time and thus undermine confidence in the process and the quality of the decision.

Any view that confidence (and investment) are adversely affected by the time taken to undertake the Part IIIA process is overwhelmingly countered by the adverse consequences that would flow from an unduly hasty decision. Assets worth many billions of dollars are at stake and the financial consequences of a wrong decision can also amount to billions of dollars.

Deemed Decisions

It is noted that the proposed new section 44XA(6) provides that if the Commission has not published a decision on access disputes within the expected period (180 days plus clock-stoppers) the Commission is deemed to have made a determination that does not impose or alter any obligations that are on the parties at that time. In the case of an access dispute over the terms of an initial access agreement, there are no such obligations on the parties as there will be no existing agreement. One might conclude that from the perspective of the incumbent this leaves it protected, but as mentioned above, if the Commission realizes this is the result it may be driven to prematurely decide highly complex issues in less than optimal time.

Conclusion

Thus, in summary, Rio Tinto strongly opposes Schedule 1 of the Bill and believes that it will further dampen enthusiasm to invest in facilities, beyond the disincentives provided by the current provisions of Part IIIA. This will apply whether the investment is in a new facility or in the expansion of an existing facility.

Rio Tinto has no comment on Schedule 2 other than to endorse the concept of declaring a new facility to be ineligible for declaration for a period. However as the criteria for granting this exemption are the same as those applied for declaration (ie driven by theoretical competition issues rather than giving precedence to the incentive to invest) it is questionable whether it will be successfully employed.

If the Committee would like to meet with representatives from Rio Tinto or to follow up on any matters raised in this letter please do not hesitate to contact me.

Yours sincerely

David Peever