Submission in Response to the Competition Policy Review Final Report (National Access Regime)

May 2015

Rio Tinto Submission responding to the Competition Policy Review Final Report (National Access Regime)

1 Introduction

1 Rio Tinto welcomes the opportunity to provide a submission commenting on the recommendations made in the Competition Policy Review Final Report. This submission focusses on one issue in particular, namely the Review Panel's recommendation about the role of the Australian Competition Tribunal (the ***Tribunal***) under the National Access Regime.

2 In summary, Rio Tinto submits:

(a) ***the Tribunal should be able to undertake a full merits review of Ministerial decisions regarding declaration, including receiving new evidence:*** Rio Tinto strongly agrees with the Review Panel's recommendation that '*The Australian Competition Tribunal should be empowered to undertake a merits review of access decisions, while maintaining suitable statutory time limits for the review process*'.

(b) ***legislation is required to override limitations on the Tribunal's ability to review Ministerial decisions on criterion (f):*** in conducting any merits review the Tribunal should be able to consider ***all of the declaration criteria*** afresh. The limitations imposed by the High Court on the Tribunal's ability to consider afresh Ministerial decisions regarding criterion (f) (the public interest criterion) should be expressly overridden. If the High Court's limitation on the Tribunal's ability to review the Minister's decision under criterion (f) is not removed, the only way to ensure an unfettered cost benefit analysis by the Tribunal is to revert to a net social benefit test rather than private profitability test under criterion (b).

2 The Tribunal should be empowered to undertake a full merits review of Ministerial decisions regarding declaration, including receiving new evidence

3 The Panel summarised its views on this issue as follows:

> **The Panel's view**
>
> The Australian Competition Tribunal fulfils an important role in both the development and the administration of Australia's competition laws.
>
> Decisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of making a wrong decision are likely to be high.
>
> The Panel favours empowering the Tribunal to undertake a merits review of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for the review process.

4 Rio Tinto strongly agrees. The Tribunal is uniquely placed to make decisions about declaration applications that are rigorous, transparent and, above all, most likely to be correct, for three key reasons.

5 First, as the Review Panel observes, one particular strength of the Tribunal is its composition. Any sitting Tribunal consists of a presidential member (who is a Federal Court Judge) and two other members who have qualifications in industry, commerce, economics, law or public administration. The experts' skills available on the Tribunal mean it is well able to assess the myriad factual, commercial, economic and legal issues that arise in applying the declaration criteria.

6 Secondly, as Rio Tinto pointed out in its submission to the Review Panel, another great strength of the Tribunal, at least prior to the 2010 amendments to the declaration regime, was that primary evidence in the form of affidavits from lay and expert witnesses was filed and that evidence was tested through cross-examination and, in the case of experts, joint expert evidence, or 'hot tubs'. In contrast, the process before the NCC and Minister involves written submissions that make assertions, not primary evidence that can be tested through cross-examination. This means that the Tribunal can conduct a much more rigorous examination of the facts than is possible before the NCC or Minister and is therefore much more likely to arrive at the correct result.

7 Thirdly, whilst sitting the three members of the Tribunal are able to focus exclusively on the declaration issues before them. This is in stark contrast to the position of the designated Minister in particular who, not only has 60 days to make a decision, but has numerous other matters to deal with.

8 As a result of these factors, allowing merits review by the Tribunal is most likely to lead to a decision making process that reaches the correct result. As the Review Panel pointed out, the benefits of a thorough Tribunal review must be considered in a context in which access declarations are likely to be rare and the costs of a wrong decision for the companies concerned and the Australian economy are likely to be very high.

9 In order to enable thorough decision making by the Tribunal, not only must the Tribunal's current merits review role be retained, but the 2010 amendments which limited parties' ability to put primary evidence before the Tribunal should be removed. As discussed above, one of the Tribunal's key strengths is the process whereby it receives primary evidence and tests that evidence, including through cross-examination. There is really no substitute for these processes, which are not available to either the NCC or the Minister.

10 It has been suggested that as a result of the 2010 amendments, parties in declaration matters will be encouraged to provide primary evidence in the form of affidavits from lay and expert witnesses to the NCC, in order to avoid the risk they may be precluded from producing evidence in relation to a particular issue at the Tribunal stage. This, however, is not what has occurred in practice, possibly because the tight timelines within which the NCC and the Minister must make decisions make it impossible for a party to put forward all of the primary evidence necessary for a thorough review of the facts. Furthermore, neither the NCC nor the Minister has the necessary processes to test lay and expert evidence put before them (eg, in the form of cross-examination of witnesses). Although the Tribunal may request additional material, the Tribunal will not be aware of what relevant material is available or might assist it in its tasks.

11 In Rio Tinto's view restricting the ability of parties to put evidence to the Tribunal is likely to lead to more decisions being made based on untested assertions contained in submissions and decision maker intuitions, rather than a detailed examination of the facts from the bottom up. This greatly increases the risk of incorrect decisions being made, potentially to the great detriment of Australia's economic performance.

12 Like the Review Panel, Rio Tinto accepts that there is a need to ensure that decisions are reached in a timely manner and that statutory time limits are appropriate. The Tribunal has demonstrated in a number of contexts that the Tribunal can meet statutory timelines ***and*** also receive and analyse complex primary evidence. For example, the Tribunal recently dealt with an application for authorisation made by AGL Energy Limited (***AGL***) in relation to its proposed acquisition of Macquarie Generation within three months.[1] The Tribunal received 'voluminous material' prior to the hearing and received documentary and affidavit evidence from AGL and the

[1] In *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 (***AGL Authorisation Application***).

ACCC. Counsel for AGL and the ACCC were permitted to test relevant evidence by cross-examination. The Tribunal described this process as 'efficient, focused and helpful'.[2]

13 In summary, Rio Tinto submits that the Tribunal should continue to have power to conduct a full merits review of declaration decisions and the restrictions on the ability of parties to put evidence before the Tribunal should be removed. It is possible to do this whilst continuing to impose appropriate statutory time limits within which the Tribunal must make decisions.

3 Legislation is required to override limitations on the Tribunal's ability to review Ministerial decisions on criterion (f)

14 In the Pilbara railways case, the High Court expressed the view that where the Tribunal is reviewing a Ministerial decision on declaration, the Tribunal should not 'lightly depart' from a Ministerial conclusion about whether access would not be in the public interest (criterion (f)).[3] In particular, the High Court considered that if the Minister had found that criterion (f) was satisfied, 'the Tribunal should ordinarily be slow to find to the contrary'.[4]

15 Rio Tinto submits that there is no reason to impose this limitation on the Tribunal. All of the declaration criteria are inter-related and ultimately directed to the single question of whether or not declaration is in the public interest. Crucially, assessing whether or not declaration would be in the public interest requires an assessment of the likely consequences of declaration compared to the likely consequences of non-declaration and a weighing-up of the likely costs and benefits of declaration. This requires what is essentially a detailed factual assessment to be made; it is not a matter of political judgment. In the Pilbara railways case, for example, the decision maker was required to understand, amongst many things, the effect that access would have on the operation of Rio Tinto's rail lines, on future expansions of the rail lines and on the future introduction of new technologies. These were matters that required the decision maker to have a deep factual understanding of the operations of the Pilbara rail lines and likely future developments affecting them; they were not matters that required the exercise of political judgment.

16 In summary, applying the public interest criterion requires an enquiry into what are essentially factual questions not political judgments. For the reasons discussed above, the Tribunal is extremely well placed to make those factual assessments. There is no reason why the Tribunal should be required to take a different approach in relation to the public interest criterion than it applies in considering any other criterion.

17 In order to achieve the Review Panel's objective of '*facilitating a thorough examination of the costs and benefits of [a declaration decision]*', the High Court's suggested limitation on the Tribunal's ability to review a decision under criterion (f) must be expressly removed. Although this is implicit in the Review Panel's recommendation that there be a right to a full merits review by the Tribunal entailing a weighing of costs and benefits, in our view this needs to be stated expressly in any legislation so that a future Tribunal does not feel constrained by the High Court's suggested limitation.

18 In Rio Tinto's submission, an unfettered right for the Tribunal to weigh the costs and benefits of access is paramount. Criterion (f) is the only criterion under which such an assessment could occur if, as recommended by the Review Panel, the private profitability test is retained under criterion (b). If the High Court's limitation on the Tribunal's ability to review the Minister's decision under criterion (f) were not removed, it would be preferable to revert to a net social benefit test

---

[2] *AGL Authorisation Application* at [138].

[3] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 423 [112].

[4] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 423 [112].

under criterion (b) (which requires an assessment of all costs associated with meeting market demand using one facility be taken into account and balancing those against the benefits). Otherwise there would be no scope for the Tribunal to undertake such an analysis on an unfettered basis. With the greatest respect to any Minister, for reasons including the limitation on the period of time in which a decision must be made, it is unrealistic to think that his or her decision can take into account all relevant matters for the purposes of undertaking a thorough examination of the costs and benefits of the declaration decision.

4 Conclusion

19 In order to give full effect to the Review Panel's recommendation, any legislation should provide that:

(a) the Tribunal is empowered to undertake a full *de novo* review of Ministerial decisions on whether a service is declared;

(b) the Tribunal is not limited to the material before the Minister, and may receive new evidence; and

(c) the Tribunal is to consider afresh each of the criteria that must be satisfied before a service is declared including, specifically, whether the public interest test under criterion (f) has been met.