

RIO TINTO

IRON ORE

National Access Regime Review –
Rio Tinto Iron Ore Further Submission Regarding the
Productivity Commission Draft Report
31 July 2013

1. Introduction

- 1 On 5 July 2013 Rio Tinto Iron Ore (**RTIO**) made a submission in response to the Productivity Commission's Draft Report of May 2013 (***the Draft Report***). Following further consultations and public hearings as part of the Productivity Commission's review process, RTIO now wishes to make a further submission to address two matters:
- (1) an alternative amendment to the production process exception; and
- (2) a suggested clarification of the costs to be taken into account under the Productivity Commission's proposed test for criterion (b) and consequential amendments to criterion (f).

2. The production process exception

- 2 RTIO previously expressed concerns with the effectiveness of the production process exception contained in s 44B of the *Competition and Consumer Act 2010* (Cth) (**CCA**) following the High Court's interpretation of the exception in 2008.¹
- 3 RTIO continues to believe that it is important to ensure that the production process exception is able to operate as intended to effectively filter out inappropriate declaration applications. In order to achieve this objective, it is necessary to amend the exception to make it clear in the definition of 'service' that it excludes the use of a facility that is '*used as an integral part of a production process by the facility owner or access provider.*'
- 4 RTIO considers this amendment would provide an appropriate filter. If, however, the Productivity Commission is of the view that this may preclude access to some facilities where access would not affect the relevant production process, a further refinement could be added as suggested in the following paragraph.
- 5 The definition of 'service' in section 44B could be further amended as follows:
- 'but does not include:*
- ...(f) a service provided by means of a facility which is used as an integral part of a provider's production process, unless it can be demonstrated that use of such facility by any third party would not have any material impact on such production process.'*
- 6 The proviso in the 'service' definition – '*except to the extent that it is an integral but subsidiary part of the service*' – would not apply to this sub-paragraph (f).

3. The costs to be taken into account under criterion (b)

- 7 RTIO previously submitted that if the Productivity Commission's draft recommendation for a new natural monopoly type test for criterion (b) is to be adopted, it needs to take into account *all* of the costs associated with meeting market demand through the sharing of the facility.
- 8 In its Draft Report, the Productivity Commission suggested the insertion of an 'inclusive' list of types of costs that would be taken into account under criterion (b). RTIO understands that this inclusive approach is not intended to wholly describe the types of costs that can be taken into account under criterion (b), but is instead intended to ensure that *at least* these costs are considered in the criterion (b) analysis. However, RTIO considers there is a significant risk that this approach is open to misinterpretation by subsequent decision-makers and may have the

¹ *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 (**BHPBIO v NCC**).

unintended consequence of an inappropriately narrow approach being taken to the types of costs that are assessed under criterion (b) in the future.

- 9 RTIO believes it would be preferable to avoid any attempt to identify particular categories of cost that should be taken into account under criterion (b). However, if the Productivity Commission considers that an inclusive list is of benefit, then RTIO believes it is necessary for the Productivity Commission to clarify that some types of investment-related costs (as well as others) in relation to the facility and the operations it services be taken into account under criterion (b).
- 10 RTIO urges the Productivity Commission to clarify that all costs in relation to the facility and the operations it services (including investment-related costs) which may arise from sharing the particular infrastructure (for example, delays to expansions and delays to the implementation of new technology) are not excluded from consideration under criterion (b).
- 11 If the proposed test for criterion (b) in the Draft Report is to be retained, RTIO suggests that draft recommendation 8.1 be amended as follows:

'DRAFT RECOMMENDATION 8.1

The Australian Government should amend paragraphs 44G(2)(b) and 44H(4)(b) of the Competition and Consumer Act 2010 (Cwlth) such that criterion (b) is met where total market demand could be met at least cost by the facility. Total market demand should include the demand for the service under application as well as the demand for any substitute services provided by facilities serving that market. The assessment of costs under criterion (b) should include *all costs arising from multiple usage of the facility, including the costs associated with additional maintenance, reduced operational flexibility and efficiency, impediments to expansion and the adoption of new technology, and loss of throughput and productivity.*'

- 12 If the Productivity Commission is of the view that non-quantifiable costs that are unrelated to the relevant facility or operations it services should be expressly specified in criterion (f), then criterion (b) could provide that the costs considered under that criterion should not include any costs that arise in connection with the matters expressly prescribed in criterion (f).
- 13 In light of the above, RTIO suggests that criterion (b) be amended as follows:

(b) that total market demand for the service and for any substitute services provided by facilities serving the market for the service could be met at least cost by the facility, having regard to all costs arising from multiple usage of the facility including any costs associated with:

(i) additional maintenance;

(ii) reduced operational flexibility and efficiency;

(iii) impediments to expansion and adoption of new technology; and

(iv) loss of throughput and productivity,

[but not including:

(i) any costs that arise in connection with matters expressly prescribed in section 44G(2)(f)/44H(4)(f).]²

- 14 If the Productivity Commission decides to recommend that criterion (f) specifies that under that criterion account must be taken of certain unquantifiable costs that do not relate to the facility or the operations it services, the 'having regard to' list proposed by the Productivity Commission

² The bracketed words to be included if certain costs are to be specified as falling within criterion (f) and not criterion (b).

for criterion (f) could then be amended to include the factors that ought not be addressed under criterion (b). For example:

DRAFT RECOMMENDATION 8.4

...As part of their assessment of the public interest, decision makers should be required to have regard to:

- *the effect of declaration on incentives to invest (excluding effects on incentives to invest in the facility or the operations it services, which costs are to be considered under section 44G(2)(b/44H(4)(b));*
- *the environmental consequences likely to result from declaration or no declaration;*
- *the social consequences likely to result from declaration or no declaration;*
- *the national security consequences likely to result from declaration or no declaration.*