



125 St Georges Terrace
Perth, Western Australia 6000
Australia

T +61 8 6321 0000
bhp.com

07 May 2024

Naomi Menon
Director, Competition Exemptions
Australian Competition and Consumer Commission
Level 27, 135 King Street
Sydney NSW 2000

Dear Ms Menon

Pilbara ISOCO Ltd - application for authorisation AA1000666

I refer to the ACCC's letter dated 9 April 2024 in relation to an application for authorisation made by Pilbara ISOCO Ltd (**Pilbara ISOCO**) dated 28 March 2024 (**Application**) and BHP's subsequent correspondence with the ACCC in which an extension of time was granted to BHP until 7 May 2024 to make submissions on the Application.

Thank you for providing BHP with the opportunity to make a submission on the Application and for granting the extension of time requested. BHP's position in relation to the Application is addressed below. Unless otherwise indicated, any defined terms used in this submission have the same meaning as used in the Application.

Summary of BHP's views of the Application

The North-West Interconnected System (**NWIS**) is a critical piece of infrastructure which facilitates the supply of electricity that is essential to the operational viability of a number of significant commodity producers, other businesses and residents in the Pilbara region of Western Australia, including BHP's Western Australian iron ore business.

BHP recognises that ensuring the safety, security and stability of the NWIS is of paramount importance to all relevant stakeholders and understands that in order to do so, certain technical and operational restrictions may need to be placed on market participants from time-to-time which may require certain co-ordination to occur between Pilbara ISO and/or Network Service Providers (**NSPs**). With this in mind, subject to the matters raised below, BHP is generally supportive of the Proposed Conduct that is the subject of the Application being authorised and considers there are significant benefits to the public that are likely to result from the Proposed Conduct being authorised.

Notwithstanding this, in circumstances where the Proposed Conduct involves:

- the disclosure and use of competitively sensitive information of consumers of electricity in the Pilbara region by Pilbara ISOCO and/or NSPs (which includes Rio Tinto, a direct competitor of BHP in various commodity markets);
- the ability of Pilbara ISOCO and/or NSPs to make decisions regarding (and restricting) the consumption of electricity by BHP, or limiting the amount of electricity which may be injected into, transferred through or withdrawn from an electricity network in the NWIS, including decisions which may have significant commercial consequences for BHP; and
- conduct that would, absent authorisation, involve potential contraventions of serious prohibitions of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (including the civil and criminal prohibitions on cartel conduct),

it is critical that appropriate controls are embedded as conditions of authorisation to minimise the risk of anti-competitive conduct resulting from or being facilitated by the Proposed Conduct. BHP considers that the absence of those controls means that the ACCC ought not be satisfied that the legal test for authorisation is established unless the ACCC elects to impose suitable additional conditions (as it is empowered to do so under section 88(3) of the CCA) in granting the authorisation.

Relevantly, BHP considers that the controls proposed in the Application are both deficient in a number of respects to address the competition law concerns which would arise from authorisation of the Proposed Conduct and may also be practically unworkable. This is in at least the following material respects:

- the existing ringfencing requirements of the PNR are deficient as they only apply to certain Registered NSPs (APA and Horizon Power) and do not therefore adequately address the risks which arise from the disclosure and use of competitively sensitive information by Participants in the course of engaging in the Proposed Conduct, including the potential impacts on competition in the iron ore market;
- the transparency measures in the PNR that are relied upon as a condition of authorisation are inadequate and do not appropriately 'cover the field' of the scope of Proposed Conduct. In particular, the relevant rules in the PNR that are relied upon in the Application would not require Pilbara ISO to prepare and provide records of any arrangements in respect of the Proposed Conduct to affected Participants or maintain records of information discussed or disclosed in the course of making those arrangements, which is an appropriate measure to ensure both transparency and accountability in relation to the Proposed Conduct;
- the proposal in the Application to require compliance with certain requirements in the PNR and PNAC relating to transparency, confidentiality and ring-fencing as a condition of engaging in the Proposed Conduct gives rise to significant uncertainty as to the ongoing basis upon which authorisation is proposed to be granted given the PNR and PNAC are liable to change, and is likely to create practical difficulties both for Participants and the ACCC in ensuring compliance with the terms of authorisation; and
- the conditions of authorisation ought to not require the ACCC to assume an active ongoing monitoring role in relation to the extensive and complex Pilbara regulatory regime, which is overseen by another regulator. This extends to determining the impact of, and Participant's compliance with, any rule change proposals to the PNR or PNAC, by reason of the proposal in the Application requiring Pilbara ISO to notify the ACCC of those changes. This is not consistent with the ACCC's role or functions in relation to authorisation applications.

Accordingly, BHP considers that the conditions of authorisation should be:

- first, self-contained in the Application;
- second, capable of being independently understood and scrutinised without requiring a detailed understanding of the underlying State-based Pilbara regime; and
- third, sufficiently certain and not subject to change (without appropriate opportunity to review and consider any impacts to the markets affected by the conduct) to provide the ACCC with a clear basis for making a determination on the Application and to enable the Participants to comply with its terms.

In the sections below, BHP provides further context to the commercial landscape in which BHP operates in the Pilbara region and is a consumer of electricity from the NWIS, addresses each of its primary concerns in greater detail and outlines its proposals for addressing those concerns.

Background

BHP's operations in the Pilbara

BHP operates a significant iron ore production business in the Pilbara region of Western Australia through a number of unincorporated and incorporated production joint ventures. BHP's interest in each of the main joint ventures is 85 per cent. BHP Iron Ore Pty Ltd (**BHPIO**) is the Manager of each of the joint ventures and

manages those joint ventures under a single integrated system known as Western Australian Iron Ore (**WAIO**). In broad terms, WAIO comprises four processing hubs and five open-cut operational mines in the Pilbara region, connected by over 1,000 kilometres of rail infrastructure and port facilities. WAIO is a commercially significant operation which achieved production of 253 million tonnes of iron ore in FY23.

Some of BHP's primary competitors in the production of iron ore who have operations in the Pilbara region include Rio Tinto (which is also a Registered NSP), Fortescue Metals Group (**Fortescue**) and Hancock Prospecting/Roy Hill (**Roy Hill**).

WAIO has two separate port facilities at the Port Hedland port that consume electricity supplied through the NWIS (Nelson Point and Finucane Island). In addition, WAIO also consumes electricity supplied through the NWIS at the Port Haven accommodation camp in Port Hedland, the Mooka Rail Maintenance Yard, south of Port Hedland and the Warehouse Hub facility in Port Hedland.

For the purposes of this electricity consumption in the Pilbara region:

- BHP presently purchases electricity from APA DEWAP Pty Ltd (a subsidiary of APA) under a Power Purchase Agreement dated 1996, which was most recently amended on 14 September 2022; and
- BHP also presently purchases electricity from Horizon Power under an Energy Supply Agreement entered into in 2023.

Pursuant to these agreements, electricity is delivered to BHP by both NSPs to various delivery points located throughout the Pilbara. The commercial terms of these agreements are confidential.

WAIO also owns three transmission lines in Port Hedland, as well as distribution infrastructure on WAIO's side of the APA and Horizon delivery points. The first of these lines comprises two sections connecting the Boodarie Delivery Point to the Nelson Point Delivery Point (via the Finucane Island substation), and the second line connects the Wedgefield substation to the Finucane Island substation. The third transmission line (currently out of operation) connects the Yarrie mine site to the Goldsworthy Delivery Point. These lines are shown in the diagrams at **Annexure A** to this submission.

The Pilbara regime

BHP generally agrees with the broad description of the role of Pilbara ISO and the NWIS set out at [1] – [12] of the Application.

BHP further considers the following features of the Pilbara regime are relevant to the issues raised by the Application:

- the Pilbara regime features some electricity markets which are highly concentrated and subject to low levels of competition, including the supply and acquisition of network services, the generation and wholesale supply of electricity and the retail sale of electricity. In relation each of these markets, in particular the generation and wholesale supply of electricity to third parties, there are presently only three suppliers, APA, Horizon Power and TransAlta. Further, there are only a small number of major wholesale customers in the region, including BHP. These market dynamics increase the sensitivity of all relevant competitively sensitive information in relation to the supply and acquisition of electricity in the region, including pricing, costs, margins, and quantities of electricity consumed, purchased or planned for consumption by wholesale customers and highlight the need for the conditions of authorisation to ensure there is transparency regarding the use and disclosure of such information.
- the critical instruments which comprise the Pilbara regime, in particular the *Pilbara Network Rules (PNRs)*, are dynamic instruments which are subject to regular changes over time. In particular, there is regular consultation between Pilbara ISO and stakeholders of the Pilbara regime, including BHP, regarding the effectiveness of the PNRs. Following implementation on 1 July 2021, the PNRs have been amended four times, with the most recent version being in place from 1 July 2023. By way of recent example, in the course of engaging with BHP on its draft application for authorisation, in response to concerns raised by BHP regarding the disclosure of confidential information, Pilbara ISO offered to address BHP's concerns by conferring further with BHP for the purpose of considering whether the PNR provided an appropriate level of protection.

BHP's Concerns

The scope of the Proposed Conduct is extremely broad. It includes the potential for Pilbara ISO and any or all NSPs “to exchange information regarding, or planning or implementing, a requirement... That a facility increase or reduce its electricity production, that a facility reduce its electricity consumption... [or] ... limiting the amount of electricity which may be injected into, transferred through or withdrawn from an electricity network.”

The Proposed Conduct consequentially enables NSPs to disclose competitively sensitive information of their customers in relation to quantities of electricity consumed, purchased or planned for consumption, or actual or planned outages for particular customers of NSPs. This information is likely to be competitively sensitive for a number of reasons. In the case of large mining companies operating in the Pilbara region, those reasons include the fact that information of this kind can be used to signal or infer production levels, production plans, maintenance planning and mine shutdowns. The Application does not include any obligation on NSPs to ensure this information is appropriately aggregated across customers or anonymised or include any additional conditions in relation to confidentiality, ringfencing or transparency regarding this information exchange that are not already an existing requirement of the Pilbara regime, which does not cover the field in applying to all information potentially exchanged when Participants' engage in the Proposed Conduct.

Rather, the conditions which are proposed in relation to the authorisation of the Proposed Conduct, are limited to the following:

- Condition 1 – which prevents participants from sharing information or giving effect to any contracts, arrangements or understandings related to prices, bids, costs or margins;
- Condition 2 – which requires participants to comply with certain requirements of the Pilbara regime regarding information sharing; and
- Condition 3 – which requires Pilbara ISO to provide the ACCC with notice of all actual and proposed changes to the instruments comprising the Pilbara regime.

In relation to Condition 2, the Application submits that “the PNR and PNAC include detailed confidentiality, ringfencing and transparency regimes, which are picked up by proposed Condition 2 (paragraph 125).”

Condition 2 as set out at [125] is as follows:

Condition 2 – Comply with Pilbara regime requirements regarding information sharing: In undertaking the Proposed Conduct, a Participant must comply with all Pilbara regime requirements regarding:

- (a) **(Transparency)** the publication or other dissemination of information (see description of how the Pilbara regime deals with these matters from paragraph 264);
- (b) **(Ringfencing)** the management of information flows and decision-making within vertically-integrated businesses or corporate groups (see from paragraph 294);
- (c) **(Confidential Information)** the protection of, and limitations on use and sharing of, confidential and commercially sensitive information (see from paragraph 296).

For the reasons outlined below, there are various deficiencies with these regimes in the PNR that are adopted in the Application through Condition 2, in so far as they operate to mitigate competition law risk and potential anti-competitive conduct which might arise from the Proposed Conduct.

Ringfencing

BHP's primary concern with Condition 2 relates to the deficiencies of the ringfencing rules contained in the PNAC. The Application states at [294] that:

“the PNAC contains rules regarding ringfencing with the primary objective of ensuring that the vertical integration of an NSP (for example, the vertical integration of the network and retail business) does not lead to a reduction of competition in a market in which a related business of an NSP participates. A related business of an NSP means the business of generating, purchasing or

selling electricity except to the extent necessary for the safe and reliable operation of the network, to enable the NSP to provide balancing and ancillary services or comply with an additional obligation under the PNR. Vertically-integrated NSPs are required to publish ringfencing rules which contain measures to ensure confidentially sensitive information received by the NSP in performance of a function under the PNR is only used within the network business, that costs of the network business are appropriately attributed and that measures are included to ameliorate the potential for discriminatory treatment in favour of other businesses of the NSP. Ringfencing rules are required to be approved by the ERA. The approved ringfencing rules for each of Horizon and APA are available on the ERA's website."

The ringfencing rules in the PNAC only apply to certain NSPs (APA and Horizon Power). Further, it is clear from the above that the ringfencing rules contained in the PNAC are directed at a limited purpose of ensuring that the disclosure and use of competitively sensitive information which is accessed by a vertically-integrated NSP does not impact competition in related markets.

Despite this, the Application seeks authorisation be granted in respect of all Participants, namely Pilbara ISO, all Registered NSPs (including Rio Tinto), Registered Controllers and Connection Applications from time to time (as those terms are defined in the PNR). It is also plausible that other Registered Controllers and Connection Application might become Registered NSPs in the future, during the period of proposed authorisation. This includes other companies involved in the production of iron ore including Fortescue, Roy Hill and BHP.

The ringfencing requirements contained in the PNAC do not therefore adequately address:

- the risks which arise from the disclosure and use of competitively sensitive information in the course of engaging in the Proposed Conduct by Participants, in particular Rio Tinto as a non-covered NSP; and
- any potential impacts on competition in other markets in which Participants partake, which are not addressed in the Application, including, in the case of BHP, the iron ore market.

Whilst the PNR does include a confidentiality regime, this regime only limits the *use* of Confidential Information (as defined in the PNR) for purposes other than certain proscribed purposes (see PNR 297), but does not place limits on the *disclosure* of Confidential Information, other than to third parties (see PNR 298). Accordingly, BHP considers that a key gap in relying on the protection afforded by the existing PNR confidentiality regime is that it does not place any restrictions on the internal *disclosure* of Confidential Information by a Participant.

Pilbara ISO also places reliance in the Application on PNR 176, which places restrictions on the disclosure, use and storage of any Confidential Information obtained in the course of participation in meetings or discussions undertaken pursuant to subchapter 7.3 or 7.4 of the PNR. This includes obligations for any person who participates in a meeting or discussion under subchapter 7.3 or 7.4 to ensure that Confidential Information obtained in the course of the meeting or discussion "*is not disclosed or accessible beyond the person's operational staff (except to the extent reasonably necessary for audit, compliance and governance purposes)*". BHP accepts that this rule does ensure a certain level of additional protection which addresses the potential for any competitively sensitive information disclosed by Participants in the course of engaging in the Proposed Conduct to be made available or used by personnel in unrelated businesses or functions, meetings or discussions undertaken pursuant to subchapter 7.3 or 7.4 of the PNR. However, BHP remains concerned that not all information proposed to be exchanged as part of the Proposed Conduct will be information obtained in the course of meetings or discussions under subchapter 7.3 or 7.4 of the PNR. Accordingly, there is a risk that the rule does not 'cover the field' of the Proposed Conduct. There are no similar protections for meetings or discussions for purposes other than pursuant to subchapter 7.3 or 7.4. Further, as is addressed below, the requirements of the PNR are liable to be amended from time-to-time, which may affect the scope of these protections.

BHP considers that an additional condition should be imposed which restricts any confidential or commercially sensitive information that is disclosed to Participants pursuant to the Proposed Conduct:

- being only made available to employees, contractors or external advisors of any Participants whose access to the information is reasonably necessary for undertaking the Proposed Conduct for the authorised purpose;

- not being internally accessible by any personnel in an unrelated business or function, including any personnel who have day-to-day responsibility for making decisions on pricing, marketing or production volumes relating to any mining business conducted in the Pilbara region.

BHP considers that such a condition will minimise the risk that any confidential or commercially sensitive information exchanged pursuant to the Proposed Conduct will be used for any purposes other than the authorised purpose, including any anti-competitive purposes.

Such a condition is also reasonable and appropriate in circumstances where:

- it practically reflects the intent of similar existing ringfencing requirements already in place for vertically-integrated NSPs (APA and Horizon);
- there is no reason why any personnel in unrelated businesses or functions ought to need or be able to access any competitively sensitive information of Participants that is disclosed or exchanged by Pilbara ISO and/or NSPs for the purposes of undertaking the Proposed Conduct, and placing restrictions on this access would significantly reduce the potential for the authorisation of the Proposed Conduct to facilitate any anti-competitive behaviour in any relevant markets.

Disclosure and Transparency

BHP is also concerned that the transparency measures in the PNR that are relied upon in relation to Condition 2 are deficient and do not appropriately 'cover the field' of the scope of Proposed Conduct that is the subject of the Application.

The Application sets out at [264] – [265]:

“The PNR contain various transparency measures. Many of these will make information regarding the instances and nature the Proposed Conduct publicly accessible when or after it occurs. For example, procedures and protocols are all required to be published and so the outcomes of any contracts, arrangements or understandings on these subjects will be publicly available. For Proposed Conduct that does not result in the publication of the outcomes, transparency measures include reporting to a broad group of affected parties as described below.

In other circumstances, the PNR will ensure that confidential and sensitive information relating to instances of the Proposed Conduct are subject to confidentiality requirements or are appropriately quarantined to operational employees.”

Whilst BHP accepts that the PNR do contain certain transparency measures, some of which will cover aspects of the Proposed Conduct, there are significant gaps, meaning much of the Proposed Conduct is not likely to be covered or consequently subject to any disclosure requirements. BHP also disagrees with the second paragraph above, which is inaccurate for the reasons addressed above in relation to ring-fencing.

Firstly, the Application highlights at [267] to [275] that under the PNR there are obligations to publish certain information in relation to protocol frameworks and constraint rules (being rules directed at limiting or controlling the transmission of electricity in certain circumstances). Whilst those obligations ensure some transparency in relation to certain arrangements made under the Pilbara regime, they do not cover the field of the Proposed Conduct that is the subject of the application. The Proposed Conduct extends to the exchange of information regarding, or planning or implementing, requirements that a facility increase or reduce its electricity production or consumption, or limiting the amount of electricity injected into or transferred through the network, which may well be agreed as short-term measures rather than the subject of formal frameworks or determined as 'constraint rules' and therefore not subject to any disclosure requirements under the PNRs. Further, the obligations in relation to the publication of 'constraint rules' apply only to Pilbara ISO in respect of constraint rules that are formally determined and do not apply to any other less formal or short-term arrangements that are made between NSPs, where Pilbara ISO is not involved or present in those discussions.

Secondly, the Application notes at [276] to [285] that some other conduct, directed at implementing system security measures (for example, actions taken in emergencies, issuing of system operations, directions, ISO interventions regarding equipment and system black start arrangements) 'can' be the subject of post-incident investigations. As is acknowledged in the Application at [278], such investigations operate as grievance mechanisms and are only initiated where either Pilbara ISO elects to do so on its own initiative or where a

request is made by an aggrieved Participant, in which case Pilbara ISO must comply with such a request unless it determines the request is frivolous, vexatious or not made in good faith. These investigations and any consequential disclosures do not happen as a matter of course. Given the Proposed Conduct extends to the exchange of information and electricity production or consumption planning agreed as short-term measures between Pilbara ISO and NSPs in private meetings without a general obligation to make a record of the information exchanged or arrangements made, it is questionable whether Participants will ordinarily be privy to sufficient information to determine whether seeking to initiate an investigation by Pilbara ISO is warranted.

Thirdly, in relation to proposed outage coordination, reference is made in the Application at [286] – [288] to a number of rules in Subchapters 7.3 and 7.4 of the PNR which contain information sharing obligations and requirements to discuss information regarding ‘Notifiable Events’ affecting facilities outage coordination under the PNR, both at scheduled fortnightly system coordination meetings and at discussions in between meetings. However, none of these rules require arrangements agreed in the course of these exchanges to be documented or disclosed to Registered Controllers (including BHP), but instead only to Registered NSPs and ESS providers.

Fourthly, in relation to technical connection standards, the Application acknowledges at [289] that the PNR does not contain any significant transparency requirements in respect of the content of network access contracts (as they are confidential) and otherwise points to limited specific exceptions where this is not the case.

In effect, Condition 2 requires compliance with the PNR rather than the authorisation being subject to any specific conditions aimed at ensuring transparency of the Proposed Conduct and that information shared in the course of the Proposed Conduct cannot be used or disclosed for an anti-competitive purpose.

For the reasons set out above, BHP considers there is a clear need for the authorisation to be subject to additional conditions in the form of transparency obligations (relating to information shared when engaging in authorised conduct and restrictions on the use and disclosure of that information for anti-competitive purposes) which operate to cover the complete scope of the Proposed Conduct that provide protection in circumstances where the Pilbara regime information sharing and ring-fencing requirements do not apply.

Instead of relying upon the piecemeal disclosure requirements in the PNR, BHP considers that a condition of authorisation should be imposed which:

- requires Pilbara ISO to make and keep a record of any discussions, contracts, arrangements or understandings made between Participants in respect of the Proposed Conduct or, where Pilbara ISO is not present, requires Participants to make and keep those records and provide those records to Pilbara ISO as soon as reasonably practicable (and not less than ten business days thereafter);
- requires Pilbara ISO to provide records of any contracts, arrangements or understandings made between Participants in respect of the Proposed Conduct to any affected Participants as soon as reasonably practicable (and not less than ten business days thereafter) after making or receiving the relevant record;
- requires Pilbara ISO to maintain records of any discussions made between Participants in respect of the Proposed Conduct and provide these to any Participant on request,

save that all of the above obligations should be subject to the requirements of the PNR (including the restrictions of the disclosure and use of Confidential Information).

Uncertainty

Aside from the specific concerns outlined above, BHP is also concerned that the operation of Condition 2 of the Application gives rise to significant uncertainty and may be practically unworkable, which is in part demonstrated by the fact that Condition 3, which requires Pilbara ISO to provide the ACCC with notice of all actual and proposed changes to the instruments comprising the Pilbara regime, is needed at all.

As noted above, the instruments which comprise the Pilbara regime, including the PNR and the PNAC are complex and dynamic instruments which are liable to change and, in the case of the PNR, have been amended a number of times since commencement in July 2021. The fact that the relevant provisions related to transparency, ringfencing and confidential information can be amended during the 5-year period of proposed authorisation gives rise to the following issues:

- current rules and requirements relating to transparency, ringfencing and confidential information may be amended in the PNR or the PNAC, meaning, in the event the ACCC determines to grant authorisation, the basis upon which the ACCC has determined to grant authorisation may materially change. This issue is further compounded by the variety of ways in which changes may affect the current information sharing requirements under the Pilbara regime. As the Application itself identifies, the Coordinator of Energy and the Minister have very broad rule-making powers under the EI Act in relation to the PNAC and PNR, and any person can also propose a rule or procedure/protocol change. Furthermore, significant changes could be proposed or made that stop short of being rule or procedural changes but nonetheless have a significant impact on Participants' information sharing obligations under the Pilbara regime. For example, changes to Horizon's or APA's ring-fencing obligations are approved by the Economic Regulation Authority (**ERA**) (and out of the ACCC's control);
- if the event changes are made as described above, any relevant amendments to the information sharing obligations under the PNR or PNAC effectively appear to put the onus on the ACCC to consider whether it would need to initiate the revocation of an authorisation process pursuant to s 91B of the CCA or to initiate a review of the authorisation if it appears that the rule changes have resulted in a material change of circumstances since the authorisation was granted (pursuant to s 91C of the CCA);
- in the event any Participant proposes to or does undertake the Proposed Conduct, Participants will need to carefully trace through the various requirements relating to transparency, ringfencing and confidential information contained in the PNR and the PNAC in order to ensure that any Proposed Conduct is authorised and is not otherwise liable to contravene the relevant provisions of Part IV of the CCA. In circumstances where these requirements were not clearly and separately set out in the terms of authorisation, there would be an inherent risk that certain conditions might be overlooked, misunderstood or not followed. This would give rise to an undesirable level of uncertainty as to whether any conduct was authorised or otherwise liable to contravene the relevant provisions of Part IV of the CCA. Here, the description of the Proposed Conduct could also benefit from an express reference to 'contract, arrangement or understanding' (mirroring the language featured in the cartel provisions under the CCA) to ensure there is no mismatch between the potential scope of the conduct being authorised and the protection afforded by the authorisation;
- related to the above issues, Pilbara ISO's proposal to include Condition 3 as a condition of authorisation, which requires Pilbara ISO to provide the ACCC with notice of all proposed and actual changes to the instruments comprising the Pilbara regime, suggests that during the period of proposed authorisation, the ACCC will perform an ongoing monitoring and review function to assess the materiality of any changes to those instruments (and effectively assume a supervisory role in respect of the Participants' compliance with the Pilbara regime). In addition to being inconsistent with the ACCC's functions, such a role has the potential to cut across existing regulatory functions performed by State regulators like the ERA. Naturally, if the ACCC declines to take on this role, the regime proposed by Pilbara ISO will be left with a number of potential gaps which could then be exploited for anti-competitive purposes. This issue highlights the complications caused by having conditions of authorisation incorporate requirements contained in other statutory regimes which are liable to change;
- the 5-year term (from expiry of the regulated authorisation on November 2024) for which authorisation is sought intends to provide sufficient time for the ERA's required statutory review under the EI Act to occur (i.e., as soon as practicable after 7 April 2025) and for its recommendations to be implemented. While the Application suggests that such changes would be reflected in any future, further authorisation, it is possible that changes may be required prior to the expiry of the 5-year term. It is therefore unclear how the proposed authorisation might be amended to reflect changes emerging from the ERA's review.

BHP considers it is more appropriate that conditions in relation to ringfencing, conduct disclosure and the disclosure and use of confidential information are expressed as stand-alone conditions of authorisation so that there is transparency and certainty for both Participants and the ACCC as to what those requirements are for the period of authorisation.

Please let us know if the ACCC has any queries arising from the above submission.

Should it be of assistance for the ACCC, BHP is also willing to meet with the ACCC to address any queries which the ACCC might have in relation to BHP's submission or in relation to the issues arising from the Application and Proposed Conduct more generally.

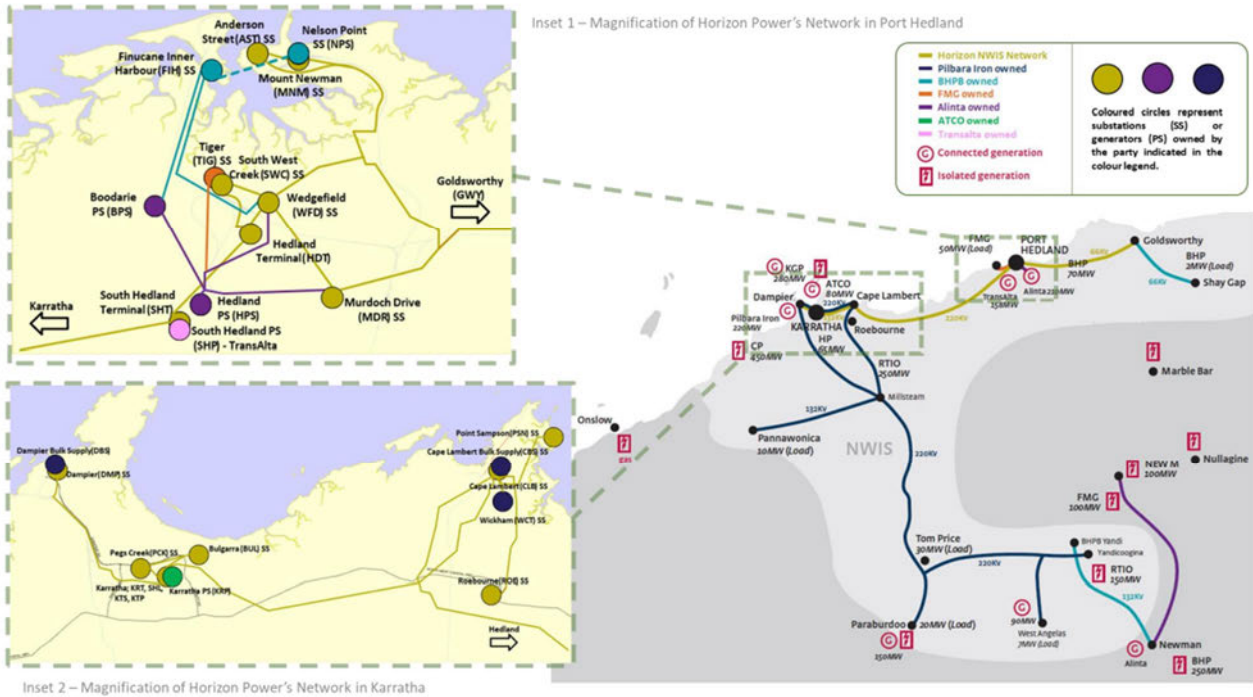
Yours sincerely



Kate Holling
General Manager, Infrastructure and Services – Iron Ore
BHP



ANNEXURE A



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