

Our Ref:  
Your Ref:  
Contact Officer: Margaret Arblaster  
Contact Phone: 03 9290 1862

9 August 2005

Mr John Feil  
Executive Director  
National Competition Council  
GPO Box 250B  
MELBOURNE VIC 3001

Dear Mr Feil

I refer to an email and attachment from Mr Stephen Dillon to Mr David Salisbury on 22 July 2005. Thank you for giving the Australian Competition and Consumer Commission (ACCC) the opportunity to respond to several questions regarding the conduct of arbitrations pursuant to Part IIIA of the *Trade Practices Act 1974* (TPA).

I understand that the NCC's interest in these questions stems from its consideration of an application by Fortescue Metals Group Ltd (FMG) for the declaration of services provided by facilities owned by BHP Billiton Iron Ore Pty Ltd (BHPBIO). I also understand that BHPBIO has raised a number of concerns regarding the cost, risk and incentive effects of having matters being subject to arbitration by the ACCC should the services be declared.

As I understand it, the questions you raise are not directly related to the NCC's consideration of the criteria under s.44G (Limits on the Council recommending declaration of a service). The ACCC is nevertheless pleased to provide the NCC with some guidance as to how it would approach such matters should they be brought to the ACCC for arbitration.

As a general point, the declaration and arbitration approach to mandated access under Part IIIA is such that until specific matters are brought before the ACCC, the ACCC can only provide limited guidance as to its view on the likely outcome. Indeed the ACCC is under an obligation to consider the views of all parties that can reasonably be regarded as having an interest in the arbitration in reaching a decision under the arbitration provisions. As such, it would be inappropriate for the ACCC to provide definitive views on these matters without a thorough process. For operators of facilities that perceive risks associated with declaration,

Part IIIA provides a means – through an access undertaking – to limit uncertainty by proposing terms and conditions of access and having them assessed and accepted by the ACCC.

Finally, the ACCC is considering publishing a guide to conducting arbitrations under Part IIIA. In addition, the ACCC has published a number of guides that provide advice on the ACCC's approach to regulatory issues. They include *Resolution of Telecommunications Access Disputes – A Guide*; *Statement of principles for the regulation of transmission revenues*; and *Greenfields guidelines for natural gas transmission pipelines (Draft)*.

Should you wish to discuss these matters further I would be pleased to arrange a meeting. Alternatively, NCC staff may contact Margaret Arblaster, General Manager – Transport and Prices Oversight, on (03) 9290 1862.

Yours sincerely

Joe Dimasi  
A/g Chief Executive Officer