

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

28th September 2004

Dear Mr. Feil

The NCC has requested that interested parties should respond to the issue of whether the service that was the subject of FMG's application to the NCC, namely the use of BHPB's railway lines, should be considered a service within the meaning of s44B of the Trade Practice Act or whether the use of these railway lines should be exempted because they formed part of a production process.

Governments recognise that competition is not always feasible in markets for bottleneck infrastructure, such as railway lines, and yet parties may need to use such infrastructure to make competition feasible in markets located both upstream and downstream from the market for the bottleneck infrastructure in question.

The rationale for access regulation is that major infrastructure facilities often confer substantial market power on their owners. This market power can be exploited to the detriment of the public interest particularly where the facility has natural monopoly characteristics and businesses operating upstream and downstream need access to this natural monopoly facility. The scope for abuse of market power increases in those cases where the infrastructure operator is vertically integrated with a commercial arm in related markets. The operator may seek to deny access to external parties in order to exclude them from competing in those related markets.

FMG's application to have declared the service provided by the use of BHPB's railway facilities is clearly a case where an external party is seeking access to the service provided by an essential bottleneck facility and the operator of that service, being a vertically integrated company with interests in related markets both upstream and downstream, is seeking to deny such access in order to prevent itself from suffering the forces of competition in those related markets. Allowing BHPB to exempt its railway line because as a vertically integrated producer it was able to organise its production in a manner that ensured that the final stage of the process by which it produced export grade iron ore took place at the port after use of the railway line to transport the product would be to defeat the intention of Part IIIA of the Trade Practices Act. It would open the door for any vertically integrated producer to exempt any reticulation infrastructure facility from coverage by organizing the various production processes into a single process with the final product only being marketable after the reticulation facility had been utilised.

Consideration of public interest should not be confined merely to the question of how the price of sea-borne iron ore as traded on the global markets would be impacted; public interest in this case should also encompass issues such as employment, regional development, resource development, the efficient allocation of resources, and revenues to both State and Commonwealth.

Allowing FMG to utilise BHPB's railway line to export iron ore from its joint venture mine at Mindy Mindy will create additional employment in the Pilbara. More importantly by opening the transport infrastructure facility to all third parties it will encourage other development projects in the vicinity of BHPB's railway line, that would not otherwise happen because the resources are currently considered to be stranded as a result of the inability to access suitable transport facilities. This could create further employment and more generally encourage regional development in the exploitation of mineral resources in the Pilbara. It will allow third parties to utilise the available surplus capacity that BHPB could allocate to third parties, but refuses to do so because it wishes to retain control in the related markets, and so result in a more efficient utilisation of resources and the avoidance of wasteful investment in duplicate facilities. It will also result in greater export of iron ores and other mineral ores with a corresponding increase in royalty revenues.

All these benefits will be lost if BHPB is allowed to avoid being forced to negotiate access terms as the result of an exemption that was clearly never intended to apply to railway lines. I hope that the NCC will not allow Part IIIA of the Trade Practices Act to become redundant by granting this exemption.

Finally I would like to add that the standard gauge railways of the Pilbara are best world practise in heavy haulage, they represent vital regional transport infrastructure which indirectly, the region has helped to create along with the companies involved. It follows that the practical access regimes must be fair to all involved, but must be provided for, especially in the twenty first century and particularly given the dynamic of the Trade Practices Act.

Yours sincerely

Signed Tim Fischer (Rail Author)

The Hon. Tim Fischer