



AusCID

**Australian Council for
Infrastructure Development
Limited** ACN 061 241 638

Suite 901, Level 9, 60 Pitt Street
SYDNEY NSW 2000

Australia

PO Box R1295

Royal Exchange NSW 1225

Telephone: (02) 9247 2022

Facsimile: (02) 9247 3477

www.auscid.org.au

E-mail: admin@auscid.org.au

25 August 2005

The Secretary
Senate Economics Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Sir

Trade Practices Amendment (National Access Regime) Bill 2005.

The Committee will recall that in both our verbal and written submissions we raised the issue of price monitoring as an alternative regulatory framework to the arbitration provisions contained with Part IIIA. In particular, we drew attention to the situation of "regulatory double jeopardy" faced by airports which are subject to Part IIIA and a monitoring regime. We would also like to draw to the Committee's attention that the Senior Officials Group supporting the Ministerial Council for Energy is currently undertaking consultations which, in part, canvass the use of monitoring as part of the Gas Code. It would seem to us unusual that an industry specific code would provide for this option but the primary legislative structure, Part IIIA, would not.

We would therefore suggest that in dealing with both the question of price monitoring and the definition of production process (discussed below) the Committee recommend to the Government that the Productivity Commission undertake a limited review on these specific matters plus any others arising from this inquiry that the Committee considers may warrant further attention. This will ensure both transparency and consistency and should enable the Government to bring forward any necessary additional legislation next year.

As you will recall, at the hearings of the Committee on evening of 11 August 2005 Senator Murray invited AusCID to review the submission made to the Committee by Fortescue Metals Group with a view to providing comment on the issue of the exclusion from coverage by Part IIIA of "production processes"

While AusCID is not close to this matter (in not generally representing interests of parties in what is primarily a commercial dispute), Fortescue's submission appears to be a reasonable representation of the "production process" issue. AusCID would generally support the view that rail track (as opposed to rolling stock and locomotives), may not have been intended to be defined as "production processes"

within what is generally accepted as the intention of Part IIIA although it is necessary to examine the facts in each case.

If it is the case that certain Western Australian statutes were drafted in such a way that does not give effect to their intention to provide carriage of freight owned by persons other than the rail operator then the appropriate response is for the Western Australian Government to attend to them. However, we would not consider it appropriate for the wording of Part IIIA to be affected by deficiencies in laws of Western Australia.

We do not support Fortescue's suggestion to redefine the definition of "production process" at this time for a number of reasons:

- the outcome of the current matter in the Federal Court will clarify Justice Kenny's ruling in the Hamersley Iron Case and may render legislative change unnecessary. As a general proposition, AusCID does not support legislative change while there is court action afoot as this may create a perception of sovereign risk.
- AusCID strongly supports the processes that the Commonwealth has embarked upon in managing reform of Part IIIA (and other regulatory regimes) by having the Productivity Commission conduct a public review and make recommendations to Government before the Government brings legislation, such as the Bill currently before the Committee, to the Parliament; and
- Such a process as describe above will ensure that proper consideration is given to any impacts a change may have on other sectors where the "production process" issue may be a consideration.

Please convey our thanks the Committee for the opportunity to discuss this important Bill. I trust that our evidence was of assistance. If you wish to discuss these issues any further, please do not hesitate to contact me on 02 9247 2022 or Dr Warren Mundy on 0409 911 554.

Yours faithfully



Dennis O'Neill
Chief Executive Officer