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Date: 08 July 2011

cc: see below

Dear Jo

## **CONSULTATION: MODIFICATIONS TO NIW LICENCE**

You wrote formally to Malcolm McKibbin on 13 June about the consultation on modifications to NIW's licence and invited comments. Prior to this our colleagues met and exchanged correspondence on the licence modifications. I wrote to you on 10 March 2011 outlining some of the Departments issues with the licence. You replied on 13 May accepting some of the points made by the Department, specifically in relation to removing all of the material in Condition B relating to the first three 'SBP years'.

In general your reason for undertaking this modification of the Licence was limited to reflecting what was strictly required to reflect the MoU agreed between DRD and NIAUR. Our view is that it should deal with the reality that NIW is being treated as a NDPB and that this imposes constraints upon the company that the Licence currently does not envisage. The MoU recognises that the PE process imposes these constraints upon the Licensee in respect of its funding. The present Licence requires amendment in respect of these as it, not the MoU, is a legally binding document. I think the narrow approach also leaves a document that is still far from transparent. Perhaps simplification is something that could be looked at in the future.

On specifics, paragraph 5A could have a simpler formulation to link the end of the period when PE has primacy directly to the time specified in Article 213(4) of the 2006 Order. This would require no amendment to Condition B should the initial period be subsequently amended and would contain no specific date which could be confusing in the event of a change.

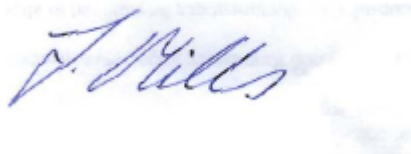
We previously wrote to you about the date included in paragraph 5.5. Our view is that it would be better to amend this date. I understand that this paragraph deals with the calculation of the subsidy factor relating to the low income protection subsidy following the end of the initial period. The provision relating to the date, in effect, ensures that there is no subsidy factor carried forward from the initial period (because the calculation for a given year is based on information relating to the previous two years). The extension of the initial period would suggest that for this mechanism to remain in force, the dates should change. Again, I think you should consider a formulation that did not state a specific date but linked to the initial period specified in Article 213(4) of the 2006 Order.

The most significant point relates to the references to the Competition Commission. In order to reflect the public expenditure spending requirements in the Licence the Competition Commission's role in arbitrating NIW's funding needs to be suspended. Put simply, during the time when the Executive sets the bulk of the budget for NIW the Competition Commission can have no realistic appeal role and the Licence should say so (as it did in the past).

In your letter of 15 May you state that the purpose of the current licence changes is to reflect the MoU (although as I have indicated above it should be, more fundamentally, about reflecting the NDPB treatment of NIW) and that the MoU does not mention the Competition Commission. It is correct that no mention is made of the Competition Commission in the MoU but the reason is because it is irrelevant during the PE budget period. I should add that there is no indication from the Competition Commission that it would have any issues with a suspension of its role in current circumstances.

We cannot overlook the public expenditure implications of a potentially pointless referral and, if you are unwilling to address this in the Licence or through other means, we will have to consider wider options for addressing the point.

I am happy to discuss any of these points with you.

A handwritten signature in blue ink, appearing to read 'J. Mills', is shown on a light blue background.

**JOHN MILLS**

CC    Malcolm McKibbin  
      Stuart Wightman  
      Andrew Grieve  
      Orla Gray  
      Barbara Faloona  
      Alan Craig - NIAUR