PROGRESS IN RAIL REFORM FOR COAL TRANSPORT IN NSW

A submission to the

Productivity Commission Inquiry

into

Progress In Rail Reform

OCTOBER 1998

NSW Minerals Council

CONTENTS

1. SUMMARY

The NSW export coal industry has long been handicapped by excessive rail freight rates and has been advocating reform of the rail industry for many years. Rail freight charges for most coal hauls in NSW imposed by the state-owned monopoly rail freight service include a significant monopoly rent component. This monopoly rent has been charged even when the NSW coal industry as a whole was operating at a loss.

The industry therefore welcomed the developments in competition policy, which culminated in the signing of the Competition Principles Agreement in April 1995 and establishment of the Competition Policy Reform Act in June 1995. It expected this reform would bring immediate benefits in the form of a phase-out of the monopoly rent, non-discriminatory rail access charges based on efficient costs and healthy competition between rail haulage operators for the transport of coal to port. The reality has been different.

Some reforms have been implemented in NSW. These are

- the former State Rail Authority, which was fully vertically integrated, was divided into four separate entities
- a NSW Rail Access Regime (the Regime) was established
- a timetable was developed for phase-out of the explicit monopoly rent paid by the coal industry

The outcomes of these reforms have been disappointing

- the Regime was developed with no public consultation and the NSW Government has not been prepared to enter into meaningful negotiations with the coal industry on aspects of the NSW Rail Access Regime that apply solely to coal traffic
- the Regime that was established does not comply with the Competition Principles Agreement
- the NSW Premier did not accept recommendations from the National Competition Council (NCC) that he declare the Sydney-Broken Hill Rail Service and the Hunter Railway Line Service, thereby forcing the applicants for declaration to seek that declaration through an appeal to the Australian Competition Tribunal
- the NSW Government shows no sense of urgency in establishing a rail access regime that is "effective" within the terms of the Trade Practices Act
- Rail Access Corporation, the monopoly rail infrastructure owner, was directed by the Minister for Transport to suspend a program for contestability of its infrastructure maintenance in favour of having its maintenance carried out by the State-owned Railway Services Authority (now Railway Services Australia)

The result is a hiatus in the reform process after an encouraging beginning.

The export coal mining industry in particular has therefore not received the full benefit of rail reform in NSW. Implementing reform in the NSW rail industry consistent with the Competition Principles Agreement will help remove unnecessary barriers to improving the international competitiveness of the NSW coal industry.

The NSW Minerals Council believes that its frustrations during the past several years in seeking efficient rail charges for coal in NSW, and especially on the Hunter railway line, have a number of implications which the Commission should pursue in this Inquiry.

First, viewing the NSW coal industry's experience as a case study in the application of Part IIIA of the Trade Practices Act, the NSW Minerals Council believes that it illustrates some aspects of the Act which the Commonwealth and State/Territory Governments should change. A particular instance, as we have said in an earlier submission to another Inquiry, is the provision which allows the designated Minister to ignore a declaration recommendation from the NCC without giving any reasons. A more direct process than this is required if the transparency and general interest objectives of National Competition Policy are to be honoured. Another area in need of improvement is the absence of insistence on the practical enforcement of regimes. The Commission may encounter other desirable design changes of this nature in the course of this Inquiry.

Second, in relation to rail itself, the experience we relate in this submission suggests a number of policy initiatives which individual jurisdictions should aim to take if they are to achieve more competitive railway services. These relate to tendering, the regulation/arbitration mix, separation versus ringfencing, transparency and so on. These are issues to which the Commission's Issues Paper for this Inquiry seems mainly pitched.

Third, our experience indicates a number of imperatives for management at the State/Territory eco-political level which may need to be addressed to achieve meaningful transport policy reform. In particular, we can see lessons in our involvement on the need for Transport Ministries and GBEs to be contained and disciplined by "general interest" Ministries (for example, Premier and Cabinet in the case of NSW) if genuine and lasting reform is to be achieved.

We urge the Commission to pay attention to matters at each of these levels during its Inquiry.

2. INTRODUCTION

Black coal is Australia's largest commodity export. NSW coal exports in 1996/97 were valued at $3.4 billion, or around 40% of the Australian total. Over 80% of NSW coal exports were from the region served by the Hunter Railway Line. Hunter Region coal mines, producing principally thermal coals, have in recent years contributed the lion's share of the annual turnover of the NSW coal industry of more than $4 billion, which itself represents nearly half of the annual turnover of the Australian black coal industry. The direct contribution of the Hunter Region coal industry to national GDP approaches 0.5 percent. Counting ancillary activities, the Hunter Region coal industry's national contribution would be much more.

The coal export industry relies heavily on rail to transport the coal to port for export. Rail freight charges comprise 15% to 30% of the f.o.b. cost of NSW coal exports. Some coal for domestic consumption is also carried by rail. For the quantities and distances involved, rail is often the preferred mode of transport. In most cases however mines are required under the terms of their mining leases or development consents to use rail transport regardless of whether or not it is the most economic form of transport.

Until July 1996 the NSW rail industry comprised a single vertically integrated body – the State Rail Authority. Several reports[1, 2] had established that its performance was well short of world's best standard. In addition it charged monopoly rent to large sections of the coal industry, even though coal industry profitability was poor. The coal industry therefore welcomed the developments in competition policy in 1995. It expected that implementation of National Competition Policy should and would bring immediate benefits in the form of a phase-out of monopoly rent, non-discriminatory rail access charges based on efficient costs and a reduction in haulage rates through healthy competition between rail haulage operators for the transport of coal to port.

The reality has been different. This submission gives details of the NSW Minerals Council's experience in the implementation of National Competition Policy reforms to the NSW rail industry, as it affects the coal industry. Most of the information provided in this submission is contained in, or can be inferred from, many submissions and reports produced by the Council in the past few years. These include

- Application for Declaration of the Hunter Railway Line Service, April 1997
- Submission to the NCC on the Issues Paper on the Application for Declaration of the Sydney - Broken Hill Rail Service, April 1997
- Submission to the NCC on the Issues Paper on the Application for Declaration of the Hunter Railway Line Service, June 1997

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1 Bureau of Industry Economics *Rail Freight 1995 International Benchmarking* Report 95/22, December 1995

2 Industry Commission *Rail Transport* Report No 13, 21 August 1991

- Submission to the NCC on Rail Access Corporation's submission on the Issues Paper on the Application for Declaration of the Hunter Railway Line Service, August 1997

- Submission to the NCC on the Issues Paper on the Application for Certification of the NSW Rail Access Regime, September 1997

- Submission to the NCC on the NCC's Draft Recommendation on the Application for Certification of the NSW Rail Access Regime, May 1998

- Letter to the NCC commenting on the KPMG Report on Pricing Principles in the NSW Rail Access Regime, October 1997

- Submissions to the Industry Commission Inquiry into the Australian Black Coal Industry, October 1997, February 1998

- Submissions to the House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform Inquiry into the Role of Rail in the National Transport Network, October 1997, March 1998

- Submission to the Independent Pricing and Regulatory Tribunal of NSW on the proposed terms of reference for a review of the NSW Rail Access Regime, September 1998

- Submission to the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy, October 1998

The events, experiences and arguments embodied in these documents are summarised in this submission as they relate to the terms of reference. Copies of the various documents are however available upon request. Responses in this submission generally follow the outline of the Commission's Issues Paper.

3. INDUSTRY STRUCTURE AND COMPETITION

What structural changes have affected the rail industry in each State and at the Commonwealth level? What is the rationale for each of the reform initiatives? What has been the impact of these structural changes?

At the State level in NSW, the following structural changes have been made

- the former State Rail Authority, which was a vertically integrated rail freight and passenger carrier, was split into four separate entities as from 1st July 1996

  - Rail Access Corporation (RAC), which owns or has vested in it all essential rail infrastructure

  - the "new" State Rail Authority (SRA), a rail passenger carrier

  - Freight Rail Corporation (FreightCorp), a freight carrier

  - Railway Services Authority (RSA), a rail infrastructure and rolling stock maintenance contractor

  Of these four entities, RAC is the only structural monopoly. Because of the nature of its operations and of the Sydney rail network, SRA has an effective monopoly of Sydney urban and suburban passenger services

- National Rail Corporation (NRC), a freight carrier which is jointly owned by the Commonwealth, New South Wales and Victorian Governments, had been established to conduct only interstate rail freight operations. It was not permitted to compete with FreightCorp (or, prior to the establishment of FreightCorp, with SRA). We understand that in around February 1998 this restriction was lifted and NRC is now permitted to compete freely for intrastate freight haulage

- Railway Services Authority was corporatised and its name changed to Railway Services Australia in around May 1998

Other developments in New South Wales, not strictly of a structural nature, that have occurred have had a significant impact on the progress of rail reform in NSW.

Establishment of an effective NSW third party rail access regime

The NSW Government on 21st August 1996 established the NSW Rail Access Regime (the Regime). The purpose of the Regime was to regulate aspects of third party access by rail users to the monopoly rail infrastructure owned by or vested in RAC. The Regime was developed with no public consultation whatsoever. The Regime does not comply with the Competition Principles Agreement. Consequently in February 1997 Specialized Container Transport (SCT), a road/rail transport operator, sought declaration of the Sydney-Broken Hill rail service under the terms of section 44F of the *Trade Practices Act 1974* (Cth) (the TPA). This was

followed in April 1997 by an application from the NSW Minerals Council that the Hunter Railway Line Service be declared.

The National Competition Council (NCC) recommended to the NSW Premier that he declare both services for which declaration was sought. The Premier did not respond to the recommendations and is deemed to have not declared the services. It is inherent in the recommendation of the NCC that the Regime was considered by the NCC to not be "effective" under the terms of the TPA. That is, it was considered not to comply with the Competition Principles Agreement. The Premier's non-decision did not challenge this conclusion.

The mechanism under which the Premier can ignore the recommendation of the NCC is one which needs to be reconsidered. Indeed, the August 1998 Report of the House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform has recommended that it be changed such that if the designated Minister does not respond to a recommendation for declaration, he be deemed to have declared the relevant service.

On 12th June 1997 (four days before it was due to make its recommendation on the SCT declaration application) the NCC received an application from the NSW Government to recommend to the Commonwealth Treasurer that he certify the Regime as "effective" under the terms of sections 44M and 44N of the TPA. The Issues Paper on the application published by the NCC stated that the NCC aimed to forward its recommendation to the Commonwealth Treasurer by 25th August 1997. As at October 1998 there has been no recommendation to the Commonwealth Treasurer, because the NCC is not yet satisfied that the Regime, after incorporating many amendments proposed by the NSW Government, is effective.

Extensive fundamental amendments are required before the Regime could be certified. The NCC issued a Draft Recommendation in April 1998 but this still did not clearly define a regime that could be recommended for certification. The process of certification has been further delayed by the referral to the Independent Pricing and Regulatory Tribunal of NSW of issues in the Regime that have not been adequately addressed by NSW in their discussions with the NCC.

In the meantime, the Hunter coal industry is having to seek application of the Competition Principles Agreement to the Hunter Railway Line Service through an appeal to the Australian Competition Tribunal against the deemed decision by the NSW Premier not to declare that service. The appeal is being contested by RAC.

The appeal has been further delayed by an application by RAC to the Federal Court to have the appeal struck out through the application of section 78 of the *Competition Policy Reform Act 1995* (Cth) (the CPRA). Section 78 imposes a moratorium on government coal carrying services from the application of the CPRA until 22nd November 2000. Both the NSW Minerals Council and the NCC have legal advice that the moratorium does not apply to access to NSW rail infrastructure used to carry coal. RAC is claiming that use of the infrastructure owned or controlled by RAC is a government coal carrying service and that a declaration for the purpose of carrying coal cannot therefore be sought until November 2000. The matter was heard by a full bench of the Court on 8th September 1998 and the parties are waiting upon a decision.

In summary, the NSW Government has implemented a regime for third party access to rail infrastructure which does not comply with the Competition Principles Agreement. It shows no sense of urgency in devising a regime which does comply and is actively resisting attempts by the coal industry which would allow it access to arbitration by the Australian Competition and Consumer Commission (ACCC) based on section 44X of the TPA, which is developed from principles in the Competition Principles Agreement. This absence of any appearance of urgency has been highlighted by recent reports by the House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform[3] and by the Industry Commission[4] which have been critical of the slow rate of progress in implementing rail reform.

Suspension of RAC maintenance contestability

When RAC was established, all its rail infrastructure maintenance was contracted to RSA without being put to public tender. It was stated at the time that it was intended that this arrangement would change. It was claimed that the work being carried out by RSA would be progressively put to open tender so that after four years all RAC's infrastructure maintenance would be subject to public tender. The State was to be separated into about 12 regions and a new region was to be put to public tender each three months. Work under the first such contract started in January 1998 and in February 1998 the NSW Government announced that the RAC's contestability program would be suspended. We believe that one or two further contracts had been let and work on drawing up tenders for or awarding one or two more (including for the Hunter region) was under way.

The NSW Minerals Council pointed out to the NSW Premier, the NCC and the Productivity Commission that this suspension would penalise the Hunter coal industry. The NSW Cabinet Office, in separate submissions to the NCC and the Productivity Commission, has claimed that

> *"The proposed arrangements during the suspension of the contestability program is [sic] for benchmarking of maintenance costs by the Independent Pricing and Regulatory Tribunal over all bundles [of proposed maintenance contracts] simultaneously."*[5]

and

> *"Benchmarking, supervised by the Independent Pricing and Regulatory Tribunal, will be introduced to ensure that maintenance costs are, at most, equal to levels which would be achieved by competitive tendering."*[6]

We understand from IPART that to date they have not been asked to benchmark any RAC maintenance costs. RAC and RSA are understood to have entered into a private agreement relating to benchmarking, details of which are not public.

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3 House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform, *The Role of Rail in the National Transport Network* 12th August 1998

4 Industry Commission *Draft Report on the Australian Black Coal Industry* April 1998

5 Attachment to letter from Mr R B Wilkins to Mr G Samuel, National Competition Council, 13 May 1998

6 Attachment to letter from Mr R B Wilkins to Mr J Coulter, Productivity Commission, 1 June 1998, p10

Ministerial portfolios

The Minister for Transport is the portfolio Minister for all four new rail organisations in NSW. The portfolio Minister has significant powers in relation to the operation of RAC and FreightCorp. Inter alia

- under section 19B of the *Transport Administration Act 1988* (NSW) (TA Act)
  - the portfolio Minister, with the approval of the Premier, will establish the [rail access] Regime from time to time
  - the portfolio Minister may direct that specified facilities be treated as rail infrastructure facilities for the purposes of the Regime
- under section 19J of the TA Act, the portfolio Minister may direct that specified assets, rights and liabilities of the SRA or of any SRA subsidiary be transferred to RAC and FreightCorp
- under section 20P of the *State Owned Corporations Act 1989* (NSW) (SOC Act) the portfolio Minister with the approval of the Treasurer may give the board of a statutory State Owned Corporation a written direction. The board must ensure that the direction is carried out

The Minister's power over the board of RAC was demonstrated by his direction to it on 22nd May 1998 to suspend maintenance contestability. This direction was given under section 20P of the SOC Act.

The portfolio Minister also has certain responsibilities for the new SRA which is a Statutory body reporting through a Board to the Minister, and for Railway Services Australia (RSA) which is a Statutory Corporation formed by the corporatisation of Railway Services Authority in May 1998.

The Minister's Second Reading speech for the Transportation Administration Amendment (Rail Corporatisation and Restructuring) Bill 1996 stated that the Government intends that RAC should contract infrastructure maintenance management (for up to four years) and capital project management to RSA (for some period) and permanently contract train control to SRA, apparently on an uncontested basis, rather than perform these functions itself or contract them on a contestable basis.

The NSW Minerals Council notes that with a common portfolio Minister, there is an obvious possibility that serious conflicts of interest could arise in relation to access arrangements, considering that

- FreightCorp and SRA are seeking access to rail infrastructure from RAC
- third party operators will be seeking access from RAC in competition with FreightCorp and SRA

- third party operators may seek that certain FreightCorp, SRA and RSA facilities be treated as rail infrastructure facilities for the purposes of the Regime

- third party operators may wish to enter into various commercial arrangements, with FreightCorp, RSA or SRA, for example for the use of rolling stock or maintenance services or various facilities

Further, with a common portfolio Ministerthere is the likelihood that serious potential conflicts of interest will arise in relation to the contractual arrangements for infrastructure management and maintenance and train control, considering that, by Government mandate

- infrastructure maintenance management and capital project management is contracted by RAC to RSA for some period, irrespective of RSA performance or competitiveness

- infrastructure maintenance is contracted to RSA irrespective of RSA performance or competitiveness until progressively contracted out on a competitive basis over a period which was originally stated to be four years, but has now been extended

- RSA is able to tender for the infrastructure maintenance and capital project work when it is contracted out, even though it is responsible for managing those infrastructure maintenance and capital projects

- RSA is also performing maintenance of rolling stock for both SRA and FreightCorp

- train control has been contracted by RAC to the SRA indefinitely, irrespective of SRA performance or competitiveness

There is also potential for discrimination between parties accessing the network in the train control and infrastructure maintenance arrangements, especially in light of the personal and cultural relationships that will remain between the employees of the four new organisations. The NSW Minerals Council believes that Ministerial responsibility for RAC should be separated from that for the other three new rail organisations. There is also a strong case for RSA to have a different portfolio Minister from the other three rail organisations.

Impact of structural changes

There has been little apparent impact of these structural changes on rail freight of coal. There has been a 50% reduction in the monopoly rent component of access charges that is acknowledged by the Government to have applied in 1996/97. There has been some reduction in haulage rates, but because of a lack of transparency in pricing it is difficult to quantify the contribution of structural change to this reduction. The response to the question “What has been the effect on overall rail prices” on p24 of this submission has more detailed discussion on this point. Other than that, there is little or no discernible change to coal exporters. There are no new rail operators hauling coal and none is likely to start operations for a considerable time.

What are the advantages and disadvantages of vertically separating rail authorities into various agencies? If rail authorities are to be separated, what is the appropriate level of separation? Do specific characteristics of the rail industry in each jurisdiction affect the relative merits of structural separation or vertical integration?

Advantages of vertical separation of rail authorities into various agencies are

- it potentially provides for greater transparency in the affairs of monopoly enterprises
- it should reduce the potential for conflict of interest in implementing competition reforms (providing the reforms are properly applied)
- it should lead to more genuine competition and hence greater efficiency in the provision of rail services
- it allows each of the enterprises into which the formerly vertically integrated body was split to concentrate on its core activity
- it requires each of the new enterprises to more closely examine the costs of each component of its business
- "Chinese walls" may not be effective in adequately isolating different components of the business

Disadvantages of vertical separation of rail authorities into various agencies are

- possible loss in efficiency through fragmentation of operations
- possible splitting into sub-economic sizes of activities which have economies of scale when combined

The NSW Minerals Council believes that the structural separation of the old SRA in NSW was an appropriate degree of separation. An examination of the 1996/97 Annual Reports of the SRA, RAC, FreightCorp and RSA reveals those entities claim to have derived many benefits from that separation. Prominent among them is a realisation that before separation their management systems were inadequate and much of the information needed to run the operations as efficient businesses was not available. Transparency is claimed to have improved significantly and costs are now known. Costs are now lower than before separation or there are plans to significantly reduce costs and eliminate inefficiencies that seem not to have been apparent prior to separation.

It is to be hoped that the reforms currently being undertaken will reduce the differences in specific characteristics between different jurisdictions. This would both improve the efficiency of the Australian rail industry as whole and lower the barriers between jurisdictions, so removing impediments to rationalisation between jurisdictions where this has economic and commercial merit.

The obvious barriers to integration between jurisdictions are

- the difference in rail gauges
- reluctance of State governments to reduce or relinquish their control of rail
- reluctance of government and private enterprise to assume more responsibility for loss-making rail operations

These should not represent insurmountable barriers to management integration of railways.

What evidence is there of economies of scale and scope in the provision of rail services? Has the presence or absence of economies of scale and scope affected decisions to separate rail authorities?

There are economies of scale in the provision of rail services. There may have been some narrow economic justification for the original development of State rail systems in a way that happened to result in systems that are not compatible. More recent decisions to keep rail authorities separate would appear to have been driven more by efforts to defend the status quo and to maintain State control over railways for political purposes than to capture or maintain economies of scale.

What components of the rail industry can be subject to increased competition (for example, track, terminals, services etc)? What are the best methods of introducing competition into the provision of rail transport? Are there gains from increasing competition? If yes, how can these gains be measured? Who are advantaged or disadvantaged by increased competition? Please provide examples.

All components except any natural monopoly element can be subject to increased competition. The rail industry as a whole is subject to competition from other forms of transport, such as road and sea. There are some exceptions, such as the Hunter Valley coal industry, most of which is constrained by the conditions of mining development consents or mining leases to use rail transport.

Methods of introducing competition into the provision of rail transport are to

- introduce competitive neutrality into the Australian transport industry between road, rail and sea
- provide sufficient funds to improve Australia's rail infrastructure to a standard equivalent to its major interstate road network
- dismantle vertical integration where this is inhibiting competition
- implement National Competition Policy on the rail system, ensuring that

- monopoly elements ie rail infrastructure providers are adequately regulated
- competition policy is enforced
- State-owned participants in the industry are not unfairly advantaged or disadvantaged by virtue of their ownership
- mergers and buyouts of industry participants occur on a commercial basis, not a narrow parochial basis
- harmonisation of the industry across State borders is encouraged to occur where this has commercial and economic benefits

The major natural monopoly element is rail infrastructure ie the rail tracks. All other elements should be open to competition. The NCC should more closely consider whether major rail terminals are natural monopolies and in any case whether they should fall under Part IIIA of the TPA.

There are gains to be obtained from increasing competition. One way of measuring these is through monitoring reductions in rail freight rates towards world best practice levels. Another is through comparison of key performance indicators through international benchmarking.

Those who would be advantaged by increased competition include the NSW coal industry, which would benefit from rail freight rates at world best practice levels, through a stronger industry which would be better able to compete in international coal markets. This in turn would strengthen the communities in which mining is carried out.

Operations Protocols

One reason for the delay in entry of new rail operators to compete on the Hunter rail network is the lack of publicly available Operations Protocols. These are the protocols for ordering and controlling the operations of trains on the network. Amongst other matters they would set out the priorities for access to trainpaths where there is disruption in the timetable or where there is conflict between, for example

- passenger trains and freight trains
- coal freight and other types of freight (grain, general)
- freight trains carrying the same type of freight but owned by different rail operators
- trains running late and trains running on time
- trains carrying the same freight that may be paying different access charges for the same line section

The resolution of such conflicts in a fair and equitable manner is a vital issue to prospective rail operators. Without a clear statement of how such issues will be resolved on a day-to-day or

minute-by-minute basis, new operators have no assurance that they will be able to utilise their assets in an efficient manner. Capital cost of a single 84-wagon train could be $15M or more. The efficient operation of this asset is at the core of a prospective operator being confident that it can compete with the incumbent operator. It has to surrender control of this asset to the train controllers. Without written guidelines on how this valuable asset will be utilised relative to those of its competitors, prospective rail operators are understandably reluctant to commit the large capital amounts involved. This represents a significant barrier to entry of new operators on the Hunter rail network.

The NSW Minerals Council was advised by Rail Access (then a division of the State Rail Authority) in May 1996 that Operations Protocols would be available on 1st September of that year. Throughout the process of attempting to have an effective rail access regime established in NSW, the Council has maintained that a regime could not be considered complete without acceptable Operations Protocols. A later timetable indicated that RAC would issue Hunter Valley Operations Protocols by 30 June 1998.

There are still no publicly available Operations Protocols for the NSW rail network, over 2¼ years after the establishment of RAC and over two years after the original announced date for issue.

4. CORPORATISATION AND COMMERCIALISATION

What corporatisation models have been adopted by the rail authorities in each jurisdiction? What are the advantages and disadvantages of the approaches adopted? Are these arrangements similar to those for other corporatised government business enterprises? If not, how do they differ and what is the rationale for the different treatment of railways?

The corporatisation model adopted for RAC, FreightCorp and RSA is a statutory State owned corporation under the *State Owned Corporations Act 1989* (NSW) (SOC Act). There is an obvious weakness in this arrangement, as discussed in the next item.

What are the governance arrangements under which the corporatised entities operate? For example, what freedom and autonomy do managers have to make decisions that affect the performance of the authority? How are they held accountable for the outcomes achieved? If systems differ between jurisdictions, what is the rationale for the differences? What role, if any, do shareholder ministers have in the corporatised entities?

The governance arrangements under which the State-owned rail entities in NSW, including RAC, operate are prescribed in the TA Act and the SOC Act. These governance arrangements are flawed, as they appear to allow RAC to flout the TA Act without penalty.

The NSW Rail Access Regime was established pursuant to Section 19B of the TA Act, while RAC was established by Section 19C(1) of the TA Act. Section 19E(5) of the TA Act says

> *In exercising its functions, Rail Access Corporation must act in accordance with the NSW Rail Access Regime.*

RAC's 1997 Annual Report and Corporate Plan said on p13 that "the Corporation [RAC] did not comply with the Rail Access Regime during the year.". There has been no report or other evidence of any remedial action to compensate customers penalised by the contravention, or to discipline RAC, or to ensure that RAC complies with the Regime in the future. There is obviously a lack of adequate corporate governance if RAC can choose not to comply with the Regime and thereby contravene the provisions of the TA Act, without correction or penalty.

The potential conflict of interest of the single portfolio Minister for the four NSW State-owned rail entities was discussed on p10-11 of this submission.

5. COMMUNITY SERVICE OBLIGATIONS

What is the nature of CSOs provided through railways? How is the requirement to provide particular CSOs specified, for example, through legislation or ministerial direction? How has the CSO requirement changed with the increasing commercialisation of rail authorities?

The NSW Minerals Council understands that the NSW government claims that CSOs for rail freight in NSW are provided through two mechanisms – "line CSOs" and "commodity CSOs". A further source of funding of CSOs is through cross-subsidisation by monopoly rents from coal access charges. A line CSO is a payment by the Government to RAC to cover the costs to RAC of providing access to traffic that is deemed to be unable to pay what RAC considers an appropriate access charge. Commodity CSOs are paid to FreightCorp to enable it to carry freight in circumstances where, even when line CSOs are paid to RAC to enable it to reduce the price of rail access to a relevant traffic, further assistance is required for that traffic.

Additional CSO funding is provided by monopoly rent from coal access charges. This is described as an "adjustment component" of access charges under clause v(e) of Schedule 3 of the Regime. It has been claimed by representatives of RAC that

> *RAC is merely a collection agency for the adjustment component*.[7]

RAC's 1997 Annual Report and Corporate Plan (Annual Report) would appear to contradict this however.

An analysis of the accounts suggests that the adjustment component is being used to cross-subsidise RAC's operations. It can be imputed from the Annual Report that the adjustment component paid by the Hunter coal industry to RAC in 1996/97 amounted to around $50M. Payments made by RAC to the Government were a dividend of $19.627M and a tax-equivalent payment of $11.373M, a total of $31.000M. Operating profit before tax was $33.115M and $21.194M after tax. These are well below the amount of adjustment component, which does not appear from the Annual Report to have been otherwise paid to the Government.

[7] Evidence to the Industry Commission Inquiry into the Australian Black Coal industry 18.11.97 p151

6. ACCESS REGIMES AND REGULATION

What are the advantages and disadvantages of rail specific access regimes compared with general regimes?

Advantages of rail-specific access regimes

- allow clear specification of a regime as it applies to a particular industry
  - issues specific to a particular industry can be fully addressed
- avoid over-generalisation of regimes

Disadvantages of rail-specific access regimes

- there is a greater danger of regulatory capture with regimes of narrow scope
- a rail-specific regime may deter dissenting, small, inexperienced or new interests from seeking to challenge the regulatory agency
- the narrower the scope of a regime, the fewer the consumers that are affected by it and the weaker their collective voice. This enhances the power of the monopolist, especially when combined with the scope for regulatory capture. For example, it may
  - provide an opportunity to implement a regime that allows excessive latitude or power to one of the interests in the regime, where resistance to such interests may be weak eg rail freight in NSW, where established Rail Operators were all Government-owned and not inclined to rock the boat
  - encourage establishment of regimes which are not "effective", and thereby
  - allow monopoly rent to be prolonged
  - allow a non-effective regime to be prolonged

Under what conditions do these regimes permit access to rail infrastructure?

In NSW, under the Regime

- an access seeker must be a Rail Operator, or seeking to become a Rail Operator, accredited as such under the *Rail Safety Act 1993* (NSW)
- an amendment to the TA Act passed in June 1998 provides that a NSW rail access regime *may* provide for access to be provided to access purchasers who need not be accredited Rail Operators, provided that rail operations are contracted to an

accredited Rail Operator. The Regime has not been amended to permit such access to non-accredited access purchasers

- RAC has considerable discretion as to whom it will consider for access in that an existing or prospective Rail Operator must demonstrate to RAC a sound financial and managerial capacity adequate to sustain its proposed rail operation before RAC will enter into negotiations with it

- access is provided under the terms of

  - the Regime
  - the TA Act
  - the IPART Act
  - the *Commercial Arbitration Act 1984* (NSW)
  - the *Rail Safety Act 1993* (NSW)
  - the *State Owned Corporations Act 1989* (NSW)
  - Operations Protocols for the operation of trains on the NSW rail network
  - RAC's Access Pricing Policy developed in accordance with s19E(3)(a) of the TA Act

  In addition, an access seeker must enter into an access agreement with RAC before it can obtain access.

How do these requirements to obtain access vary between states?

- the "rail" regime submitted by Queensland appears to virtually duplicate Part IIIA of the Trade Practices Act, with the Queensland Competition Authority taking the place of the ACCC in the TPA, and a simple statement that this regime applies to rail access

How time consuming and costly are access applications to prepare and satisfy the requirements of the access regulators?

The NSW Minerals Council would like to have the opportunity to find out. It has however cost the Hunter coal industry through the Hunter Rail Access Task Force over $1.5M since September 1995 seeking to have an effective rail access regime established in NSW. Included in this activity are

- seeking unsuccessfully to have some input into the development of the Regime

- seeking unsuccessfully to have the TA Act require that adequate transparency and efficient pricing be included in a regime established pursuant to the TA Act

- engaging in discussions with the NSW Government on monopoly rent

- lodging with the NCC an application for declaration of the Hunter Railway Line Service

- lodging with the Australian Competition Tribunal an appeal against the deemed decision of the NSW Premier not to declare the Hunter Railway Line Service

- responding to an application by RAC in the Federal Court for an order prohibiting the Australian Competition Tribunal from continuing with the hearing and determination of the application for a review of the deemed decision of the Premier of NSW not to declare the Hunter Railway Line Service

- responding to an application by the NSW Government to the NCC for certification of the NSW Rail Access Regime

- responding to the Draft Recommendation of the NCC on the Application for Certification of the NSW Rail Access Regime

- making submissions to the Industry Commission Inquiry into the Australian Black Coal Industry, the House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform Inquiry into the Role of Rail in the National Transport Network and to this Inquiry

- responding to the Independent Pricing and Regulatory Tribunal of NSW on the proposed terms of reference for a Review of the NSW Rail Access Regime and for a Review of Rail Safety Accreditation Costs for Rail Operators

The appeal to the Australian Competition Tribunal will not resume until the verdict of the Federal Court is known. Once that is known, and assuming it is in favour of the NSW Minerals Council, it could be six months or more before the appeal is finalised. Assuming again that the result is a declaration, around two years will have elapsed since the original declaration application was lodged.

A declaration would still only entitle persons seeking access to the Hunter Railway Line Service to seek arbitration from the ACCC in the event of a dispute over access. A dispute would be not unlikely, as RAC is obliged under the terms of the TA Act to apply the Regime (although as has been pointed out elsewhere in this submission it seems that RAC does not appear to feel obliged to comply with that requirement), and the Regime is not effective. Arbitration by the ACCC could well take a further six months.

A feature of the Regime that sets it apart from other regimes in Australia is that RAC is, by default, the *de facto* regulator of the Regime itself. RAC itself has effective control over its total revenue, price paths and distribution of revenue from its various customers. This is subject only to recourse to arbitration by individual customers. There is no overall control exercised over RAC's activities by anyone other than RAC itself.

There does appear to be difficulty with overlapping of regulatory activity by the Transport Safety Bureau of the NSW Department of Transport and by RAC in obtaining accreditation, and in being subject to audit once accredited.

Are there any other problems with the access regimes, for example, in complex urban networks?

There is a problem in the Hunter Valley, where the operation of the network is complex because of the "just-in-time" operation of the Port Waratah coal loading facility. Ship cargoes are railed from the mine to the port on a campaign basis. Efficient operation of the shiploading facility requires integration of rail operations with mine, port receival and shiploading activities. This technique is necessary because the Port Waratah Coal Services (PWCS) terminals have a limited site area compared to the very large number of coal specifications shipped (over 100).

Because of this complexity, appropriate train scheduling is of vital importance to the efficient operation of the whole coal transport chain from mine to ship dispatch. RAC has prime responsibility under the TA Act for the compilation of the master timetable for the allocation of train paths, the establishment of systems to ensure that train paths are allocated in an efficient and impartial manner and the preparation and application of standards for allocation of train priorities and resolution of conflicts. This scheduling is currently carried out by SRA, under contract to RAC. PWCS and FreightCorp play significant roles in drawing up the train schedule for the Hunter Valley because of their key roles in the coal transport operations.

The control exercised by FreightCorp and PWCS over train scheduling tends to entrench the monopoly power these organisations have in their respective fields and represents a significant barrier to entry of new Rail Operators. To reduce this control it is essential that RAC carries out its responsibility under the TA Act and develops and makes widely available a set of Operations Protocols which would set out rules for train scheduling and priorities. The lack of public availability of such Protocols, over 2¼ years since RAC's establishment, raises the barrier to entry of new Rail Operators.

How are access prices determined?

In NSW, access prices are determined by what RAC calls "commercial negotiation" between the monopoly infrastructure owner and Rail Operators. Issues relating to "commercial negotiation with a monopoly" were explored during public evidence by RAC to the Inquiry into the Australian Black Coal Industry[8]. There is no provision in the Regime for major rail users, such as coal exporters, to negotiate with RAC unless they are Rail Operators.[9] Meanwhile, the Regime specifies that for coal, prices will be "established" by RAC, ie there is to be no negotiation, and "prices will be on an origin-destination specific haul basis, irrespective of the operator, and irrespective of the route of the haul" (Schedule 3(v)(b)).

The Regime specifies that a floor test and a ceiling test will be applied to prices with the actual outcome being determined by "commercial negotiation". Determination of the floor and

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8 Industry Commission Black Coal Industry Inquiry Public Hearings 18.11.97 p152-154

9 An amendment to the TA Act was passed by the NSW Parliament in June 1998 which provides that a rail access regime established under the TA Act *may* provide for persons who are not Rail Operators, such as coal companies, to enter into negotiations with RAC over access. The Regime itself has not been amended to implement this provision.

ceiling limits, if carried out strictly in accordance with the Regime, is a highly complex engineering and mathematical process, and does not have a unique solution. There is no objective specified in the Regime to guide RAC or access seekers in these "commercial negotiations". RAC says it establishes access prices in accordance with its perception of capacity to pay of the various traffics using the infrastructure. Yet RAC has also conceded "There is no rule to apply in determining capacity to pay. It is something that becomes apparent in the negotiation process."[10] But remarkably rail users, such as coal exporters, whose capacity to pay is being evaluated during negotiations, are not entitled under the Regime to negotiate with RAC!

In a narrow textbook sense economic efficiency is maximised by pricing at marginal cost. But in a broader sense, since commercial enterprises need revenue to cover fixed costs if they are to remain solvent, they need to charge at a level higher than marginal cost. Charging at the higher level results in losses in economic efficiency viewed in the narrow. The question is "how can an enterprise charge at a level above marginal cost in order to remain solvent, but cause minimum efficiency losses?"

In theory, Ramsey pricing will result in such minimum (static) efficiency losses. The principles of Ramsey pricing developed as a theory of optimal taxation, where the objective is to minimise efficiency losses arising from taxation. Ramsey pricing seeks to impose a price on a product such that the markup over marginal cost is inversely proportional to the elasticity of demand of the product.

A disadvantage of Ramsey pricing applied unrestrained to a monopoly service is that it could result in the monopolist obtaining monopoly rents, or some purchasers subsidising others. Professor William Baumol and associates developed an approach to pricing regulation called constrained market pricing which seeks to constrain Ramsey prices under a monopoly so that no more revenue is collected than would be necessary to meet the efficient costs of supplying the service. It is this theory that the Regime seems to be seeking to apply.

The objections of the NSW Minerals Council to the pricing principles in the Regime are that

- while supporting statements say that it is intended that Baumol principles will apply to rail access pricing, the Regime itself does not mention the words Ramsey or Baumol, does not mention any guidelines for applying the discrimination allowed to RAC under the Regime, and does not mention the objective of maximising efficiency in the broad sense of the term (or indeed any objective of pricing)

- Ramsey pricing only minimises efficiency losses in a static sense. It may lead to higher dynamic efficiency losses because it reduces the incentive for producers to improve operational efficiency as they know any efficiency gains will be taken from them

- the engineering, informational and calculational demands of faithfully implementing Baumol constrained Ramsey pricing are enormous

[10] Industry Commission Black Coal Industry Inquiry Public Hearings 18.11.97 p146

- the penalty for getting the Ramsey/Baumol sums wrong can be very large. Research carried out by ACIL Consulting for the NSW Minerals Council has showed that the improvement in efficiency of perfectly executed Ramsey pricing over pricing based on activity based costing was small compared to the potential loss in efficiency through imperfectly executed Ramsey pricing

- the NSW Minerals Council has demonstrated in several submissions to the NCC on the Regime that, on the Hunter rail network at least, because of the enormous informational demands and the complexity of the calculations required, it is impossible for RAC to faithfully implement the Baumol pricing approach. The process is so inherently non-transparent and non-auditable that it must degenerate into unchecked discretionary pricing. This is accentuated by the fact that RAC is itself the *de facto* regulator of the Regime

Coal users of the NSW rail network obtain no relief from these pricing arrangements through arbitration. The ability of an arbitrator to have any influence on prices between the ceiling and floor is unclear. The Regime requires that pricing be based on actual costs, not on efficient costs. Further, in the regime proposed by the NSW Government for certification, until 1st July 2000 coal prices are subject to arbitration only to establish whether they fall within the range between floor and ceiling. After that date there are no provisions at all applying to the pricing of coal in the proposed regime. The NCC's Draft Recommendation contains no proposal to change this.

An example of the power of RAC under the Regime to impose excessive access prices is the magnitude and method of application of capital-related charges. RAC can charge a rate of return on the depreciated replacement value of assets of up to 14% nominal after tax. This is equivalent to 21.9% before tax. At the time this rate was published (August 1996), the average increase of the Consumer Price Index (CPI) over the preceding 12 months had been 4.2%. It is currently 0.0%. Consequently the real before-tax return on (non-optimal) replacement asset values allowed under the Regime is currently 21.9%.

This may be compared to the value of 7% real, before tax on depreciated optimised replacement value recommended by the Australian Competition and Consumer Commission and the Office of the Regulator General in Victoria for Victorian Gas Pipelines in their draft decision of 28th May 1998. As another comparison the Independent Pricing and Regulatory Tribunal of NSW on 29th September 1998 issued a draft recommendation on gas distribution pricing in Southern NSW. It proposed a real before tax rate of return of 7½% on asset values which are lower than depreciated optimised replacement cost.

How are the often competing interests of infrastructure owners and potential entrants reconciled?

It is presumed that the potential entrants referred to in this question are entrants to the non-monopoly parts of the industry, such as freight haulage, passenger services and track and rolling stock maintenance, and not to the monopoly sector of the industry ie infrastructure ownership.

There is little evidence that the competing interests have been reconciled in NSW. The infrastructure owner's and other incumbents' interests appear to be always paramount

- since establishment of the Regime in August 1996 only two new commercial rail operators have entered into access contracts in NSW – Austrac and Specialized Container Transport. Their operations are relatively small

- RAC was directed by the Minister for Transport to suspend its maintenance contestability program under which it was progressively opening up its maintenance for public tender

- RAC is the *de facto* regulator of the Regime, with wide discretion on access pricing

How transparent is the determination process and the outcome?

The process of determination of access prices for rail haulage of coal is not at all transparent to coal exporters. The Regime provides for no transparency whatsoever of access prices or of the cost to RAC of providing access. There are no objectives or guidelines in the Regime to indicate to RAC how its wide power of discrimination should be exercised.

The NSW Department of Transport appears to think that because coal prices are set, rather than "negotiated", the pricing process is transparent.[11] Coal exporters, who collectively pay around $200M each year in rail access fees, do not even have a right to know what the access charge is. RAC has offered to advise coal exporters directly of their access charges, but only if they sign a strict confidentiality agreement. Many have declined to sign the agreement. FreightCorp advises its coal customers of the access component as distinct from the haulage component in their rail freight invoices.

What has been the effect on overall rail prices?

The effect of rail reform on overall rail prices is difficult to estimate. Because of the total absence of transparency, referred to in the previous paragraph, it is difficult, if not impossible, to distinguish between changes that arise from rail reform and those which arise from other influences. The results are that coal exporters

- do not know what was the breakdown of their total rail charge into the access, monopoly rent and haulage components before 1996/97

- do not know the basis upon which monopoly rent for 1996/97 was calculated

- have never been advised formally of the monopoly rent component of their access charges, although it is possible to calculate that component from access charge

[11] Attachment to the letter from Mr R B Wilkins, NSW Cabinet Office to Mr J Coulter, Productivity Commission of 1 June 1998, p12.

forecasts that RAC advised to FreightCorp in 1997

- do not know the effect of variations in tonnage on RAC's costs

- are not permitted to disclose rail access charges or haulage charges because of the confidentiality provisions of their contracts with RAC and FreightCorp

- do not know the full basis of variations in their charges, so cannot attribute such variations to any particular cause (other than the reduction in monopoly rent and, to a limited extent, some tonnage variations)

There has been a reduction in the explicit monopoly rent paid for access for coal haulage as it is phased out in four equal steps (in $/tonne terms) to zero on 1 July 2000. There is no indication that all monopoly rent is being phased out, as the calculation of monopoly rent was not transparent. Not is there any indication that the benefit of lower costs is being passed on to users. Hunter coal traffic has increased by over 30% since establishment of the Regime. There is no certainty that access charges fully reflect the price reductions that should be occurring as a result of the significantly increased coal traffic over the past two years, and no way under the Regime for coal exporters to find out if they do.

Under the terms of the Regime RAC should be passing on to coal rail users the benefit of cost reductions and tonnage increases. But RAC has admitted in its 1997 Annual Report and Corporate Plan that it did not comply with the Regime[12]. The NSW Minerals Council is relying on declaration of the Hunter Railway Line Service or establishment of an effective regime to bring about the necessary transparency and associated appropriate changes in access prices.

There may have been some reduction in haulage charges, but like access charges it is hard to quantify the effect of competition reform because of the lack of transparency and the effect of increasing coal tonnages railed.

Have the access regimes facilitated entry into the provision of rail services? If so, to what extent? Has entry occurred in freight transport, passenger services or both?

There are now two private commercial rail operators operating on the NSW rail network where there were none before, Austrac and SCT, but these are relatively small operations. There are still significant barriers to entry of new Rail Operators for the carriage of coal in the Hunter Valley. These include

- lack of publicly available Operations Protocols (see p14 of this submission for a discussion of this point)

- uncertainty over the Regime. All potential new operators know that the Regime will change. They do not know to what extent, nor when, this will occur

- the excessive time and cost of obtaining accreditation as a Rail Operator

[12] See Rail Access Corporation 19997 Annual Report and Corporate Plan, CE O's Report, p13

Accreditation procedures are governed by the *Rail Safety Act 1993* (NSW) (RS Act). Both existing and prospective new Rail Operators complain of the excessively prescriptive nature of accreditation procedures under the RS Act administered by the Transport Safety Bureau of the NSW Department of Transport. A review of the RS Act is currently under way. The Minister for Transport has to report to the NSW Parliament by September 1999.

The review of the RS Act has also to be considered in the wider context of Australia-wide accreditation. State Transport Ministers have indicated their intention that accreditation of a Rail Operator in one State should automatically qualify that operator to carry out rail operations in other States. In practice however operators accredited in one State have to undergo a lengthy accreditation process to gain accreditation in other States. This arises because of the lack of uniform standards and procedures in the various States and the continuing reluctance of some States to move towards such national standards. It is to be hoped that the formation of the Australian Rail Track Corporation will act as a catalyst in bringing about an appropriate amount of standardisation and rationalisation of accreditation procedures.

In NSW private companies have entered the field of provision of maintenance services to the infrastructure owner, in competition with RSA. The NSW Government suspended this practice soon after its practical implementation. It stated at the time that no customer would be penalised by this action. It undertook to the Productivity Commission[13] and the NCC[14] that IPART would benchmark infrastructure maintenance costs to ensure this occurred. The Government has not honoured this undertaking to have rail maintenance costs benchmarked by IPART. This is discussed in more detail on p9 of this submission.

To which components of the rail industry has access been sought, for example track, terminals or other facilities? If entry has occurred, what impact did it have on service quality, freight rates, passenger charges and other performance indicators?

On 2nd April 1997 the NSW Minerals Council sought access to the Hunter Railway Line Service through an application for declaration of the Service. The Service was defined in the application as use of the railway line, incorporating its associated infrastructure facilities, in the Hunter Region of NSW. This railway line is bounded by Gunnedah, Ulan, Eraring Power Station and the Port of Newcastle. The NSW Minerals Council does not yet have access as the Premier of NSW did not declare the service as recommended by the NCC. An appeal to the Australian Competition Tribunal is in progress.

What difficulties are encountered if access is sought to facilities which cross state boundaries? Is there a need for a national access regime for interstate networks? What are the advantages or disadvantages of a national access regime for the interstate rail network? Alternatively, is there potential for State governments to coordinate their approaches to access?

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13 NSW Cabinet Office Letter to Mr John Cosgrove 1 June 1998 Attachment p10

14 NSW Cabinet Office Letter to Mr Graeme Samuel 13 may 1998 Attachment "Rail Track Maintenance Contestability and the Rail Access Regime"

Difficulties could arise from having an interstate and intrastate regime applying to the same track, such as the Hunter Railway Line. This does not have to be the case if the States and Commonwealth have a genuine desire to make such an arrangement work. The ideal would be for the same regime to apply to the whole interconnected standard gauge rail network in Australia, if not to all Australian railways. If it can be done in the electricity and gas industries, why not in the rail industry?

Are passenger or freight rail charges regulated? If there is pricing regulation, which agency, or agencies, are responsible for its administration? What changes, if any, have occurred in pricing regulation since 1991? What has been the rationale for any changes which have occurred?

RAC is the *de facto* regulator of the NSW Rail Access Regime, as it can impose any price it wishes within an excessively wide range. RAC effectively sets its own revenue limit[15], its price path and the allocation of revenue from its customers within wide limits. There is no provision for enforcement of the Regime, except by RAC itself. RAC does not appear to consider it has to comply with the Rail Access Regime anyway – as indicated on p13 of its 1997 Annual Report and Corporate Plan. The only protection available to Rail Operators or access seekers is recourse to arbitration on individual access agreements. The arbitrator has to apply the ineffective Regime in its arbitrations.

When the *Government Pricing Tribunal Act 1992* (NSW) was introduced the Government Pricing Tribunal had a standing reference for "government monopoly services" supplied by the State Rail Authority, which at that time had responsibility for all NSW rail operations, including freight. When the Act was changed in 1995 to the*Independent Pricing and Regulatory Tribunal Act 1992* (IPART Act) the SRA retained this standing reference. In practice, the only rail services defined as government monopoly services for the purposes of reference to IPART were for passenger services and not freight.

When the State Rail Authority was split into RAC, FreightCorp, RSA and a remanent SRA by the *Transport Administration Amendment (Rail Corporatisation and Restructuring) Act 1996*, the only monopoly service provider was RAC. Instead of changing the IPART Act to reflect this change in identity of monopoly service supplier, the IPART Act has remained unchanged. Consequently, as a result of the reforms to the structure of NSW rail services, there is now no framework in place for regulatory oversight of the monopoly element of rail services, where previously there was such a framework under the IPART Act. RAC is the only major State monopoly infrastructure provider for which there is no standing reference under the IPART Act.

The rationale advanced by the NSW Government for allowing RAC to regulate itself is that the Regime is a "negotiate and arbitrate regime". It has never been explained why this removes the need for competent independent oversight of the Regime, especially when

[15] The theoretical maximum revenue that RAC can derive under the Regime is of the order of $2,000M. Its actual revenue from access charges, excluding CSOs, in 1996/97 was $535.9M.

- RAC can discriminate under the Regime

- there are no guidelines or objectives specified for application of this discrimination, and

- RAC can apparently elect not to comply with the Regime anyway.

What are the implications for rail transport and the economy generally of regulations, charges and arrangements affecting competing and complementary modes of transport?

Rail transport suffers under the current arrangements because its regulatory structure is much more strict and fragmented than that for road. This is to a large extent the fault of the rail industry caused by trying to keep separate the respective State-based regulations and regulatory organisations.

Rail transport is disadvantaged by the pricing structure for road and rail transport, whereby

- road transport has the advantage of large amounts of Commonwealth capital and maintenance expenditure on roads every year which provides an excellent infrastructure for the road industry, at no direct cost to it

- rail transport has insufficient funds available in some cases for even necessary maintenance, resulting in speed and other restrictions and a competitive disadvantage compared to road. If an amount had been expended on capital improvements to rail comparable to the amount spent on road, the rail industry today would be much more competitive, even with its self-imposed regulatory handicaps

- rail pays a diesel fuel excise which, being in excess of Commonwealth Government outlays for rail, is in effect used in part to fund its competitor, road

The result of this uneven playing field is that in some cases road is preferred for commercial reasons when rail would actually be the most efficient mode of transport. This results in unnecessary costs to the economy, or is the logical result of expenditure (road construction) which is not the most productive (rail maintenance or improvement)

7. OWNERSHIP

What role is there, if any, for Commonwealth or State government ownership of railways? In what ways has technological change altered the role of government?

If State-owned rail entities were allowed by Governments to operate without unnecessary Government interference, it should not make any difference whether railways are owned by Government or private enterprise. The reality is that Governments do interfere with the operation of Government-owned railways, often to the detriment of their economic and operational efficiency.

What aspects of rail infrastructure and operations are open to private ownership? Does ownership have any effect on the level of competition in the provision of rail services? What are the expected benefits, if any, of greater private sector involvement in the rail industry?

Ownership would appear to have an effect on the level of competition in the provision of monopoly services in NSW. This may be illustrated by comparing the relative progress in certification under the TPA of the Regime and the Third Party Access Code for Natural Gas Distribution Networks in NSW (Gas Code). The table below shows that enabling legislation was passed and the regimes established within a few days of each other. An optimistic forecast of the date of certification of the Regime puts it over two years later than certification of the Gas Code.

Activity	**Gas Code**	**Rail Access Regime**
Enabling legislation passed	25/06/96	28/06/96
Regime established	26/08/96	23/08/96
Application for certification lodged	9/10/96	12/06/97
Draft recommendation released by NCC	19/02/97	8/04/98
Final recommendation to Treasurer	19/05/97	*30/6/99* ?
Treasurer certifies regime	18/08/97	*30/9/99* ?

The Gas Code was introduced to regulate the activities of non-government companies, while the Regime regulates the activities of a government-owned corporation.

8. INVESTMENT ISSUES

Is there a need for additional investment in rail infrastructure? If yes, in what areas and how much is required?

In NSW there is a need for more customer input and better avenues for customers to contribute to or initiate investment. The Regime does not provide for any access where new investment is required to make additional capacity available.

Is there a role for private sector investment in rail infrastructure? Who should provide leadership in identifying the need, if any, for new investment?

There should be a role for private sector investment in rail infrastructure where a government-owned rail infrastructure owner is unable or unwilling to proceed with what a potential rail user considers to be necessary investment. Identification of the need for new investment should come about through willingness of the infrastructure owner to make transparent such issues as infrastructure capacity and its plans for new investment.

A cooperative approach is needed, not a secretive one. Addressing this question in the Regime (where it is not currently mentioned) would be a necessary component of resolving the issue.

Are existing guidelines for private involvement in the provision of public infrastructure appropriate? Are there problems in relation to the allocation of risk? In what ways can the private sector become involved in providing rail infrastructure? Give examples where possible.

The NSW Minerals Council is not aware of any existing guidelines for private involvement in the provision of public infrastructure related to investment in the NSW rail network.

Is private capital readily available for investment in rail projects? Do existing taxation arrangements, including the infrastructure rebate, affect the availability of private capital for rail projects? Are there any impediments to increased private sector investment in railways? If yes, please give examples.

The lack of an effective rail access regime in NSW, the lack of publicly available Operations Protocols, and uncertainty caused by the excessive complexity and potential for delay in applying Part IIIA of the TPA are considerable impediments to private sector investment in railways in NSW.