13th May 1999

Ms Helen Owens
Commissioner, Productivity Commission
Progress in Rail Reform Inquiry
LB2, Collins Street East Post Office
MELBOURNE VIC 8003

Dear Ms Owens

<u>INQUIRY INTO PROGRESS IN RAIL REFORM</u>

The NSW Minerals Council commends the Productivity Commission on its Draft Report on Progress in Rail Reform. Generally we consider it is a balanced and well-considered document. We do have some comments on the Draft Report as it applies to the particular circumstances of Hunter Valley and other NSW coal shippers. These comments are attached.

Yours sincerely

Denis Porter
<u>Executive Director</u>

NSW MINERALS COUNCIL
COMMENTS ON
DRAFT REPORT ON
PROGRESS IN RAIL REFORM

The Draft Report of the Productivity Commission on Progress in Rail Reform ("**Draft Report**") is a balanced document that clearly describes the progress, and in some cases lack of progress, in Rail Reform in Australia since the Industry Commission inquiry into rail transport in 1991.

In its original submission to the current inquiry, the NSW Minerals Council pointed out the vital role of rail transport in coal exports, and the vital role of coal exports in Australia's foreign trade. We appreciate that the Commission's Report on the Australian Black Coal Industry contained a considerable amount of discussion on the place of rail in the industry. Nevertheless there are some places where we think more comment is warranted in the Commission's Report on Progress in Rail Reform as it applies to transport of coal on rail.

Structure of Classes of Railways

The Draft Report identifies four different classes of rail networks and discusses the appropriate structure for each[1]. The railways used for coal transport in NSW are possibly unique in Australia in that they have the characteristics of all four types.

The Hunter rail network could be defined as that part of the NSW network bounded by Ulan, Gunnedah, Stratford (Craven) and Eraring. There is no doubt that the part of the network bounded by Muswellbrook and Newcastle would qualify as a high volume regional network. Yet it also serves low volume regional railways and some urban and inter-urban passenger traffic. In hauling coal from Gunnedah or Ulan to Newcastle, the coal is first hauled on a low volume regional network, then on a high volume regional network, then on track that is used by and influenced by interstate freight and urban passenger traffic. Coal from south of Newcastle shares the track with urban passenger traffic and interstate freight traffic.

Coal railed from the Western and Southern coalfields also shares the track with urban passenger and interstate freight traffic, and traffic sourced from low volume regional networks.

There is discussion in the Draft Report (pp98-105) on the preferred structure for the various classes of network. The comment is made that high volume regional networks should be horizontally separated from other regional railways. The Draft Report also seeks views on the appropriateness of vertical separation for high volume regional railways.

Horizontal separation

It is difficult to interpret the implications for the Hunter rail network of the comment in the Draft Report that "***High volume regional networks should be horizontally separated from other regional railways.***". On pXXXIV of the overview, the Commission indicates that by

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1 pages XXXIII & XXXIV and Table 2.6, p21. See also pp98-105.

horizontal separation, it also has in mind separation of regional services *from other freight and passenger services*. The Hunter is the only rail network in NSW that makes a profit. The Hunter network is clearly regional, but

- some of it is high volume, some is not
- some services on it are profitable, some are not
- some services on it ‘depend’ on other parts of the NSW and interstate railway systems, some do not, and
- some traffic is given priority over other traffic

Consequently, parts of the Hunter network have characteristics of all four categories of network identified by the Draft Report. It is difficult to see how in practice the various types of traffic could be horizontally separated on this network. Horizontal separation from adjacent networks, with or without vertical separation, would mean that traffic on the Hunter network that has its origin or destination beyond the Hunter network would have to deal with separate entities. This might entail higher administrative costs both for some users and for rail service providers as a group.

The NSW Minerals Council still has concerns about the scope for cross-subsidisation in access pricing on the NSW rail network, even under the amended NSW Rail Access Regime Gazetted in February 1999 and modified by the IPART report. If horizontal separation of the Hunter rail network could be implemented it *might* bring some useful discipline to the charging of coal traffic, but it would involve some important judgements about cost sharing and pricing and a range of other detailed management issues. In principle, coal freight users would endorse such a move because of its potential to provide the necessary transparency in costs and to obviate any concerns about cross-subsidisation by Hunter coal traffic of other traffic. But before supporting it, the NSW Minerals Council would need be satisfied that appropriate judgements about those details had been made.

It would seem, however, that there are better ways of eliminating cross-subsidies from the Hunter network than resorting to separation that could introduce as many practical problems as it solves. Adoption of an access regime that provides the necessary transparency would achieve the same result and at much lower cost. This would have the added benefit of improving the distribution of charges within the Hunter network.

A factor which would undermine the potential of horizontal separation to deliver improvements would be continuation of discriminatory pricing and other forms of discriminatory treatment of users *within* the Hunter rail network. The provisions allowing discriminatory pricing without transparency of objectives or method have probably been the main bone of contention in the toing-and-froing between the NSW Government and coal industry users of the Hunter rail network over the past few years.

The problem presented by such pricing, particularly in the imprecisely-defined floors and ceilings form included in the NSW Rail Access Regime[2], is that it is a recipe for non-transparency and thus arbitrary charging and revenue collection. Price discrimination means all charges remain commercial-in-confidence. Thus, whilever the NSW track owner (the Rail Access Corporation, or RAC) is permitted to price access with such freedom, it will be impossible for users to verify that any revenue ceiling is being observed, or that over-charging or under-charging of particular users or groups of users is not occurring. Even for an arbitrator or regulator with the power to subpoena cost and revenue information, the process of discovery will be impaired because, in the absence of transparent pricing, there will be few if any users in possession of sufficient information to mount a credible challenge in arbitration. The environment is one which breeds cost padding and provides room for unchecked cross subsidisation by the track owner between regional lines, between classes of traffic and between sub-regions.

The compromises to the potential benefits of horizontal separation created by the discriminatory pricing provisions in the NSW Rail Access Regime are not significantly offset by the type of horizontal separation which has been instituted within the Hunter railway for the separate treatment of access for coal traffic. First, the separation is illusory – unequal treatment coal vis-a-vis other traffic is institutionalised through the *Transport Administration Act 1988* (NSW) which grants passenger traffic priority over freight traffic on the NSW rail network, even though passenger trains generally pay much lower access charges. Second, since coal freight is by far the dominant traffic on the Hunter line, separating it from the rest does little if anything to combat the general non-transparency caused by allowing RAC to price discriminatorily in the first place. Transparency is reduced to such an extent that the risk of unchecked cross-subsidisation between coal and other traffic or between the Hunter and other networks is considerably increased. .

The lesson is that if horizontal separation it is to have its desired effect, the access regime applying to regions such as the Hunter rail network needs to be strong and provide a high degree of transparency. The NSW Rail Access Regime, in the form in which it was Gazetted on 19th February 1999, is or does neither of these. There is no independent regulator to ensure that the Regime is enforced – effectively, this role falls upon the rail users. Transparency is currently not adequate for this task, with essential information, such as the basis for price discrimination, not required to be disclosed. Undertakings from the NSW Cabinet Office on transparency, upon which the NCC relied in issuing its Draft Recommendation on certification of the Regime, were not adhered to in the amended Regime finally Gazetted in February 1999.

Operations on the Hunter rail network have been claimed to be the most complicated of any major freight rail operation in the world, because of the status of Newcastle as the world's largest coal port and the large number of coal types exported from the port. An ownership structure for the Hunter rail network similar to that of the Hamersley iron ore operation, with the coal industry owning the rail infrastructure, would have its advantages, notably in

[2] The NSW Minerals Council understands the theoretical reasons for considering demand-side pricing, including price discrimination, to fund the non-attributable (ie non use-based) portion of total costs. The Council is concerned, however, with the practical aspects, and particularly with how price discrimination by a monopoly supplier of railway track could be effectively policed. In the NSW context, as the Council has said in many submissions to official bodies, there is the added concern that the track owner is given no overall objective to guide such discrimination.

coordination of coal trains with mine and port operation. The Hunter Valley coal industry did investigate such a structure with the NSW Government for some years, but when National Competition Policy was introduced, this concept (and the idea of NSW relinquishing control of these assets) was shelved by the NSW Government. One of the main obstacles to the freedom of the coal industry to schedule trains appropriately is legislated priority for passenger trains. The lack of publicly available written Operations Protocols and of a capacity transfer policy also hamper such optimisation.

Vertical separation

In the NSW Minerals Council's view it is highly appropriate for high volume regional networks such as the Hunter Railway line to be vertically separated, and especially where the infrastructure owner is a state-owned monopoly.

The Draft Report identified the need for a 'strong' access regime for high volume regional and interstate freight traffic. For coal which uses track with the characteristics of all categories of networks, it is essential that there be a 'strong' access regime. This is even more so when coal is required by legislation or regulation to use rail for transport to port.

If it is assumed that the rail infrastructure is not owned by the coal industry, then for the Hunter rail network vertical separation has advantages that outweigh the disadvantages. Advantages are

- transparency of the infrastructure owner
- greater scope for competition amongst haulage operators

The main disadvantage could be considered to be the loss of opportunity for optimising rail operations. In this respect the Hunter, with around 25 different producers providing coal to the network, is somewhat different from Hamersley which has only one producer. In some ways the vertical separation encourages the various mines to give more attention to planning the transport network, from mine to Port, to a greater degree than if there is only a single vertically integrated rail operator.

Recommendations to encourage faster reform

The Draft Report makes the finding that

> **Reform to improve access to rail infrastructure has been slow. Current access arrangements are complex due to the multiplicity of regimes and the intricacies associated with each.**

but it offers no answer to the problem. Measures that the Commission should consider recommending that might greatly improve the situation include

- a single national rail access regime for all lines connected to the interstate rail network

- the distribution of Competition Payments to the States and Territories be made expressly conditional upon progress in rail reform

The Draft Report lists 'characteristics of well designed access regimes' (p145). *The final report should recommend that these be adopted in the rail access regime (or regimes) to be established in Australia.* This applies particularly to the requirement for transparency.

Coal freight cost reductions

In discussing regulating access in rail markets, the Draft Report (p142) says that the NCC's 1997/98 Annual Report attributed to competitive pressures on coal rail freight in the Hunter Valley reductions in rail freight rates of around 25 per cent between 1995/96 and 1997/98. While rail freights may have fallen by this amount over the period quoted, a significant proportion of the reduction can be attributed to an increase of over 35% in the amount of coal carried in the Hunter and the commencement of the phaseout of acknowledged monopoly rent in 1997/98.

The cost of developing an effective access regime

Box 7.4**, 'The cost of developing an effective access regime'** mentions that the NSW Minerals Council had spent over $1.5 million since 1995 in seeking to have an effective access regime established in New South Wales. The cost as at April 1999 has risen to $1.9 million. As well as the activities mentioned in the Box, the Council has made several submissions to the IPART Review of Aspects of the NSW Rail Access Regime and responded to the invitation by the NSW Government to comment on proposed amendments to the NSW Rail Access Regime. Much more than this has gone into developing an effective access regime so far, however. Besides our costs have been the costs of the NSW Government and others. That said, we maintain that if the NSW Government had approached the development of an access regime in an open and co-operative fashion at the outset, the cost of developing an effective regime would have been much less to all parties.

DRAFT RECOMMENDATION 7.1

The pricing and allocation of train schedules should reflect the value that users place on the track.

In relation to Draft Recommendation 7.1, the NSW Minerals Council understands that the Productivity Commission mainly has in mind the use of bidding systems and other demand-based allocation aids as means of resolving congestion problems and the determination of priorities for trains on the interstate lines which also carry home state traffic. This particular matter is already an issue on the Hunter rail network and particularly in relation to rail transport of coal from the Southern and Western coalfields through Sydney. We have also been exposed to many similar issues and would offer the following qualified support for the Commission's proposed approach.

The Council is particularly keen to see something done about passenger trains. Currently, throughout NSW, passenger trains are given automatic priority over freight and at times this creates commercial inconveniences to coal freight out of all proportion to the passenger service benefits. A more flexible system to allow priorities to be better related to the value of access to each client would be an improvement. One approach would be to give the train controller greater flexibility to convert standing priorities, for a 'rescheduling fee'. Market-driven capacity trading, discussed further below, could be another element in such a policy. The Council sees considerable scope for capacity trading and the ultimate development of secondary markets involving 'derivatives,' to aid price discovery and transparency and serve as a competitive discipline on the monopoly seller of rail access.

In other contexts also, the Council supports the use of demand-based elements in rail service management. The NSW Minerals Council and individual coal companies themselves have encouraged the rail bodies in NSW to make greater use of penalty clauses and other performance incentives to improve rail services and to resolve congestion problems on the Hunter Valley rail network. The omission of such clauses in coal freight contracts on the Hunter rail network is one of many managerial defects which the Council would expect to see eliminated when genuinely competitive conditions are established in the coal freight industry.

Having said this, the NSW Minerals Council does *not* support State governments using the powerful arguments for supplementing cost reflectivity with demand based pricing elements as an excuse for introducing regulatory frameworks which permit their monopoly track owners to pursue price discrimination as a matter of course. For reasons outlined above, from the very start the Council has opposed provisions in the NSW Rail Access Regime which allow RAC to price discriminate between users on the basis of obscure and unworkable floor and ceiling rules. In the Council's view, the Regime's rules in this regard amount to a recipe for non transparency. Moreover, the Council has commissioned a detailed analysis of the Hunter rail network which has shown that the proposed approach, even if perfectly applied (and RAC simply does not have the computational capacity to do so), would have little if any efficiency advantage over, and none of the transparency benefits of, a pre-announced access pricing formula which assigned fixed costs to rail freight users in proportion to variable costs.

Thus, when the rail owner is a monopolist and regulation is required to guard against exploitative behaviour, workability and enforcement problems are important practical reasons for not permitting some forms of demand-based pricing in rail path pricing and allocation.

Best use of the track

The Commission seeks comment on current techniques used by access providers to determine the value and best use of the track and the potential to apply auctioning techniques in the future.

The NSW Minerals Council has for some time been advocating the establishment of a capacity transfer mechanism for rail access with no apparent result. In the Draft Recommendation of the National Competition Council on the application for certification of the NSW Rail Access Regime, the NCC quoted from a letter of November 1997 from the NSW Cabinet Office[3] thus

> *The NSW Government proposes that it confers with the NCC, RAC and IPART over a period of three months to develop a capacity transfer Policy which would take into account the following guidelines:*

[3] NSW Cabinet Office letter 10 November 1997 quoted in National Competition Council Application for Certification of the NSW Rail Access Regime Draft Recommendation April 1998

(a) *that the aim of such a policy is the optimum efficient utilisation of the NSW Rail Network by rail operators*
(b) *that RAC have the power, where appropriate, to ensure that a rail customer does not retain the right to use timepaths that are not being utilised in circumstances when they can be allocated to another rail operator*
(c) *where a rail operator is not utilising capacity and surrenders the unutilised capacity, and the access fees payable to RAC are not based on usage of the NSW Rail Network, it may be necessary to adjust the access fees; and*
(d) *where a rail operator seeks access to capacity that is already utilised by another rail operator, RAC will approach the other rail operator to seek to negotiate an amendment to its agreement so as to facilitate the rail operations of the prospective rail operator.*

As at mid-May 1999 there has still been no discussion with the NCC or IPART to develop a capacity transfer policy.

In responding to the NCC's Draft Recommendation, the NSW Minerals Council welcomed the NSW Government's stated intent to develop a capacity transfer policy, but pointed out some shortcomings in the Cabinet Office's proposal. The NSW Minerals Council recommended modifications to the principles proposed, in order to create a freer market in train timepaths. The Council also recommended wider consultation in developing a capacity transfer policy. The full text of the NSW Minerals Council's proposals to the NCC[4] are appended as Attachment 1.

There was no apparent action on development of a capacity transfer policy until the issue by the NCC on 2nd November 1998 of a circular in which the NCC stated

> *Effective mechanism to trade timepaths – RAC has developed a draft policy which it will provide to the Council, major access seekers* ***(including coal miners)*** [our emphasis] *and rail operators for comment. It is envisaged that following amendment to incorporate comments relevant to the development of an effective mechanism, the policy will be finalised and adopted by the Regime. IPART will assist in this finalisation process and thereafter arbitrate disputes. Notice of the final policy will be published in newspapers and the Government Gazette. This final policy will then be publicly available.*

In *NCC Update No 14,* which has just been published, the NCC stated

> *On 1 November the NSW Government finalised the changes it would make to the Regime to meet the Council's concerns. The Council outlined these principal changes in a circular dated 2 November. ... The changes included ... a commitment to develop an effective timepath trading mechanism in consultation with the [National Competition] Council and major RAC customers.*

Neither the NSW Minerals Council nor any coal mining company of which it is aware has had any discussions with RAC or the NSW Government on a capacity transfer policy. We believe

4 NSW Minerals Council letter to the National Competition Council 22nd May 1998 Annex pp14-17

that neither IPART nor Freight Rail Corporation has had discussions with RAC on capacity transfer policy. We also note that the NSW Rail Access Regime Gazetted on 19th February ("Regime") says (clause 7.2) that "The Corporation [RAC] must provide Public Notice of its capacity transfer policy" but there is no obligation to confer with anyone on the policy nor any time limit imposed on this disclosure. No capacity transfer policy has been publicly disclosed by RAC.

Valuation of assets

There is some discussion in the draft report (p156, 157) which includes mention of depreciated optimised replacement cost (DORC) proposed by the Independent Pricing and Regulatory Tribunal of New South Wales (IPART) for the NSW Rail Access Regime. The theoretical appeal of the DORC approach is undeniable. However its practical application can present problems on some occasions. We would point out that in IPART's case, a DORC asset valuation methodology was being proposed in the context of a particular access regime that features a Baumol-style floors and ceilings pricing approach, with, nominally at least, an exhaustive and computationally unwieldy 'optimisation' process to establish the appropriate railway configuration for each user or group of users. Both IPART and its consultant, Professor Stephen King, expressed the opinion that there are more appropriate asset valuation methods. The NSW Minerals Council agrees with that as far as the Gazetted NSW Rail Access Regime is concerned and has repeatedly urged that a more workable and transparent approach be adopted. IPART's recently issued Final Report is ambiguous on this issue.

Appendix 1

PROPOSAL BY THE NSW MINERALS COUNCIL TO THE NATIONAL COMPETITION COUNCIL ON RAIL CAPACITY TRADING

[an extract from the NSW Minerals Council submission
to the National Competition Council, May 1998]

The NSW Minerals Council welcomes the NSW Government's intent to develop a capacity transfer policy and applauds, in particular, the sentiment in (a) that the aim is to achieve optimum efficient utilisation of the network. The Council is concerned however at

- the conditionality of the proposal and
- the retrograde content of the proposed guidelines

Regrettably, paragraphs (b) and (c) of the proposed guidelines reveal a tendency towards central planning control by RAC rather than indicating any confidence that permitting commercial incentives to operate will ensure the market determines this optimum. The propositions implicit in those two paragraphs (central re-allocation and surrender of unutilised capacity to the monopoly service provider) are out of step with modern approaches to network pricing and competition. Modern approaches, in Australia and elsewhere, emphasise the role of the unrestricted right of resale of capacity in discovering the most valuable uses of capacity and in constraining the ability of the service provider to exercise deterministic control over supply.

To genuinely pursue a capacity transfer policy, and to reap its potential pro-competition benefits, paragraph (b) of the proposed guidelines should, the NSW Minerals Council submits, be replaced by the following paragraphs:

- when the rights to use timepaths allocated to a rail operator are not being fully utilised, or are in prospect of not being fully utilised, RAC will facilitate opportunities for the rail operator, or other holders of timepaths, to offer unused timepaths to others, on private commercial terms, and will register the transfer of those rights expeditiously when requested to do so;
- there is no reason why the registered holder of a timepath need be a rail operator — compliance with the Regime only requiring that timepaths actually be utilised by accredited Rail Operators;
- there is also no reason why a registered holder of a timepath need be obliged to utilise, sell or surrender the right to use it — provided that refusal to sell or surrender is not an abuse of market power (a matter for the trade practices jurisdiction) and that RAC is not precluded from offering 'interruptible' timepaths[5] to prospective access seekers

[5] Interruptible timepaths might be available if the holder of the 'firm' timepath has not nominated a train, say, 24 hours before the scheduled time or, perhaps preferably, committed to utilising the timepath in a master timetable revised, say, every month.

By way of explanation of this proposal, railway users will naturally be concerned to ensure that holders of timepaths not abuse any dominant market position, for example by refusing to sell or surrender unused timepaths. There are two powerful deterrents to this kind of behaviour:

- the commercial deterrent of the RAC's ability to offer cheap interruptible timepaths
- any such abuse of market power would expose the timepath holder to prosecution under the TPA

The NSW Government's understanding of the NCC's position on unutilised capacity is reported in the box in the draft recommendation dealing with the possible definition of a 'Rail Operator'. The text asserts that:

> *Providing access to persons other than accredited operators creates the potential for inefficiencies, which may arise from, for example, administrative costs incurred by RAC, effective monopolisation of access by "customers" not subject to the Regime, or misuse of access rights, for example, to reduce the transport capacity of the rail infrastructure. It is understood that the Council would support the inclusion of "use for rail transport or lose" provisions within the Regime and/or access contracts ....*[6]

Leaving aside questions as to the significance of any such administrative burdens the NSW Minerals Council would be surprised if the NCC were indeed to be satisfied with a "use it or lose it" policy — implicitly surrendering paid for, but unused, capacity to the monopolist. That is an nth-best approach to freeing-up capacity and making it available to users at its real (and contemporary) value, and it fundamentally entrenches the position of the service provider as the sole source of capacity.

The proposed guidelines imply that timepaths would be "allocated" (or, anyway, re-allocated) by the RAC. The means by which this would occur is obviously a central matter of interest to rail users. To date it has been assumed that initial "allocation" would occur, as now, through the medium of contract negotiation between the RAC and rail operators and/or between the RAC and rail users capable of contracting accredited rail operators to undertake their haulage task. The terms of the contracts would explicitly define the timepaths allocated.

The NSW Minerals Council accepts that this would be the practical way to proceed, provided that access to this negotiation process is open and even-handed. This is absolutely critical to the integrity of the whole Regime and, being so, it would be anomalous if a statement of policy intent of this kind were not incorporated in the guidelines.

Paragraph (d) of the NSW Government's proposed guidelines also warrants development. The NSW Minerals Council notes the RAC's proposed role in facilitating an agreement between rail operators in respect of currently utilised capacity. Arguably, it needs to be able to do more than that if the policy aim is to be attained. Its main instrument for this purpose could be as the sole provider of 'interruptible' timepaths (as mentioned earlier and in footnote 7).

6 Draft recommendation p24

There is good reason to be confident about the efficacy of sales of interruptible access rights — which would not command a price much above marginal cost except when the system is congested — and no real concern about service providers being the only source of non-firm capacity[7].

The NSW Minerals Council notes that there are proposals being considered for trains to share the same timepath, in order to improve capacity on the Hunter Railway Line. Where a timepath is shared by more than one train, the right of each train to a share of the timepath should be tradeable as if it were a right to the timepath.

But none of this is of any consequence if the NSW Government confers, as it proposes, with the NCC, the RAC and IPART, and determines to take the matter no further. The proposal put forward contains no obligation to implement a capacity transfer policy now or in the future. Furthermore, the NSW Minerals Council notes that the conference group nominated contains no representatives of rail service consumers, whether Rail Operators or their customers such as the coal industry[8]. As such, and notwithstanding the integrity and judgement of the regulatory parties, the group is clearly unrepresentative of the interests at stake. Restricting this group as proposed would depart markedly from the consultative path taken on similar access issues in other network industries, and seems at odds with the recommendations of IPART.

The NSW Minerals Council also notes that the proposal to confer, over a period of 3 months, was contained in a letter from the NSW Cabinet Office dated 10 November 1997, some 6 months ago.

The NSW Minerals Council does not agree with the assessment in the NCC's draft recommendation that the NSW Government's proposal in respect of trading timepaths is "a reasonable step" — though the NSW Minerals Council acknowledges the proposal as a step forward. However, it is certainly not a sufficient step to ensure open access to the infrastructure on competitive, efficient terms.

> The NSW Minerals Council submits that the NCC should require the NSW Government, as a condition precedent to certification, to commit to:
>
> - developing a capacity transfer policy, in consultation with Rail Operators and rail users including the coal industry, as well as with the NCC, RAC and IPART, and giving effect to the policy, including by legislation as necessary, before the end of 1998;
>
> - incorporating the amendments to paragraphs (b) and (d) of the NSW Government's proposed guidelines as outlined above;

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7 There are questions, of course, about the treatment of revenue from interruptible and secondary sales inside or outside the revenue cap. It is important, clearly, that adequate incentives exist to induce the service provider to be a ready seller of interruptible capacity whenever it appears likely to be available.

8 Coal companies would certainly have the capacity to secure and properly manage the services of an accredited rail operator and thereby the claim to be treated within the meaning of 'Rail Operator' as indicatively defined in the option reproduced in the draft recommendation (p24).

- incorporating a statement in the guidelines asserting the policy intent that "allocation" of access rights (timepaths) must involve a process that is open and even-handed; and

- in the event that the parties involved in that consultation are unable to agree in time to meet that deadline, referring the issue to the Regime's regulator and undertaking to accept and promptly implement the regulator's recommendations.

The NSW Minerals Council considers that a capacity transfer policy should be implemented via a set of Operations Protocols, and submits that these must be in place before the NCC recommends to the Commonwealth Treasurer that the Regime be certified.