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CHANGE IN THE NSW COAL INDUSTRY

"Too Little, Too Slow and Too Costly"

A submission to

the Industry Commission Inquiry into the

Australian Black Coal Industry

October 1997

NSW Minerals Council

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1. Summary

In the context of its own historical standards, the New South Wales coal industry has undergone significant change in recent years . However, change in the coal industry must be considered in the much broader context of change in other Australian industries and change internationally.

When considered in the broader context, the pace of change in the New South Wales coal industry in recent years has been totally inadequate. Change, particularly in the area of work practices, has tended to involve a very high cost, often resulting in little or no overall gain for the viability of the enterprise.

The industry is facing ever increasing competitive pressures both in the domestic and international markets. Profitability is generally poor, productivity is inadequate in comparison with best practice operations overseas and the industry's safety performance is unacceptable.

Major contributing factors to the industry's current position include:

- the coal industry "culture" which tends to be resistant to change and inward-looking and which tends to seek to blame others (particularly management and customers) for the pressures arising from the market

- in the area of safety, a highly prescriptive legislative regime which has tended to foster a compliance mentality rather than a best practice mentality

- the industry's history and the web of special regulation which has tended to reinforce the culture

- the development of major overseas competitors

- the lack of operational flexibility which stems from work practices, regulatory constraints and high labour cost arrangements.

Over the next decade, coal prices are expected to continue to decline in real terms and competition is expected to intensify. Domestic and international customers will demand more flexible supply arrangements. Responses to greenhouse emission targets may also impact severely on the industry.

The industry is currently poorly equipped to meet the challenges in this environment. If it is to become more viable, a major effort will be necessary at the minesite level. This effort must also be accompanied by an acceptance of the need for change on the part of unions, governments, politicians and the community.

2. Introduction

This submission covers a range of issues relating to the New South Wales coal industry. It has not attempted to duplicate the detail of issues covered in a number of reports and submissions which have been made available separately to the Commission.

These reports and submissions include:

- NSW Minerals Council submission to Review into Mine Safety (February 1997) plus related research papers commissioned by the Council

- NSW Minerals Council submission to the (Grellman) Inquiry into the Workers' Compensation System in New South Wales (April 1997)

- Submission to (Taylor) Study of the Australian Black Coal Industry prepared by ACIL Economics and Policy Pty Ltd for the Australian Coal Association (September 1994)

- Report by Barlow Jonker Pty Ltd - "International Market Prospects for Australian Coal" (October 1997) commissioned by NSW Minerals Council and Queensland Mining Council

- Report by ACIL Economics and Policy Pty Ltd - "Black Coal in the Australian Energy Market" (October 1997) commissioned by NSW Minerals Council and Queensland Mining Council

- Application by the NSW Minerals Council to the National Competition Council in relation to the New South Wales Rail Access Regime (April 1997)

3. The Market

To assist in the understanding of the domestic and international market environment in which the coal industry will be operating in the period to 2010, the NSW Minerals Council commissioned two consultant reports which have been provided to the Industry Commission. Barlow Jonker Pty Ltd analysed the likely trends in the international coal market. ACIL Economics and Policy Pty Ltd looked at the implications of domestic energy market trends and reforms for the coal industry.

3.1 Domestic

The ACIL report analyses the outlook for both steaming and coking coal. Its key conclusions are as follows:

The formation of the National Electricity Market (NEM) is about to have far reaching impact on commercial arrangements in domestic markets for black coal:

- the structure of the electricity market in south-eastern Australia is in the process of changing from several closed State markets dominated by a single seller of electricity with largely tied coal suppliers whose costs, in effect, were underwritten, to a market where competition for 'dispatch' and for contract customers is fierce;

- these competitive pressures will oblige electricity generators to request their coal suppliers to enter into more flexible, shorter term contracts with structured prices designed to incorporate a sharing of electricity price risk between the generators and their coal suppliers; and

- low (variable) cost brown coal-fired generation is displacing black coal fired-generation during periods of lower power demand (essentially at night and on weekends), forcing some black coal fired-generators to operate at low capacity factors (and to consume commensurately less coal). The incremental cash cost advantage for brown coal is exacerbated by State Government royalties which are significant in New South Wales and Queensland, but negligible in Victoria.

The implications for coal demand for electricity depend on the time period - since it seems unlikely that new brown coal-fired plant will be installed:

- the immediate outlook is for low utilisation of a number of existing black coal-fired power stations, particularly in New South Wales, with consequent flat demand for coal; and

- in the longer term, increasing utilisation of black coal-fired electricity generation will lift demand for coal; however, black coal is likely to lose significant market share to gas-fired generation which can be installed in smaller increments of capacity and brought on line more quickly. This is

allowing gas to take advantage of emerging opportunities in the more rapidly moving new electricity market.

The tough competition emerging in the electricity market will inevitably be reflected in the fuel supply market, and will be particularly severe on high cost and inefficient coal producers.

ACIL has used its NEM model to assess the likely range of outcomes for black coal-fired electricity generation. The model confirms that a number of black coal-fired generators will continue to be denied market share in off-peak periods unless black coal producers are prepared to enter into innovative arrangements with generators that, by influencing generators' bidding performance in the electricity pool, share the price risks of participation in the NEM. Such new arrangements are already evident in New South Wales and benefit coal suppliers by reducing their volume risk. They will become more commonplace there and elsewhere even after the excess generating capacity which currently exists is absorbed by market growth - likely sometime in the middle of the next decade.

Adding to the competitive pressure is the apparent limited ability of black coal-fired power generation to capture new markets. Despite the fact that, on a strict cost of operation basis, new coal-fired generation capacity can be delivered for less than gas-fired capacity, ACIL's experience is that new entrants are preferring gas-fired. ACIL has found that there is at least a $6/GWh negative externality being applied to new coal-fired electricity.

In the iron, steel and other metals industries, the prospects for black coal are driven by the international competitiveness of these industries. BHP's recent decision to close its Newcastle works and the possibility of substantial quantities of natural gas entering the Townsville and Gladstone regions mean that black coal is not only likely to lose market share, but will most probably face an absolute decline in demand.

In summary, on all domestic market fronts the black coal industry is being exposed to greater competition. Its choices are stark - either improve productivity in order to allow entry into more flexible marketing arrangements so that coal can compete with other fuels, or rely even more heavily on the equally tough export market.[(1)]

3.2 International

The Barlow Jonker Report predicts continuing fierce competition in the export steaming coal market as a result of plentiful supply from the major exporting countries and further erosion of benchmark pricing. Its key conclusions are as follows:

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(1) The NSW Minerals Council notes that some domestic mines may be unable to turn to the export market; for these mines the alternative to greater flexibility would be closure.

Oversupply of thermal coal will continue to threaten the export industry . The international coal industry operates on a large resource base and the theoretical capacity to supply the seaborne market will be in excess of demand

for the foreseeable future. Whether actual oversupply conditions will occur will depend entirely upon how fast the mining companies around the world expand export capacity and whether the Independent Power Projects (IPP) planned in Asia, particularly in India and the Philippines, are built on schedule. The recent financial upheavals in South East Asia indicate that IPP construction is likely to be deferred. Even out to the year 2050 on a world basis available coal reserves are more than double forecast cumulative consumption.

Thermal coal import demand will continue to grow rapidly.
For the next decade world thermal coal imports are exported to grow at a rate of 6% p.a., with higher growth rates in Asian markets. Demand for IPP coal consumption may, however, be slower than forecast due to delays in approvals, financing, construction and commissioning of the plants.

Australia and its competitors will fight for their share of market growth .
The Australian, Indonesian, Colombian and Venezuelan industries all have the resources to expand exports significantly and based on current plans will continue to compete vigorously.

Import demand for metallurgical coal market will grow slowly at 1% p.a.
Over the next 14 years the demand for imported metallurgical coal (PCI and coking blend coal) is expected to increase by an average of 1% per annum with the faster growth occurring in the period to 2000. The import demand for coal going into the coke oven is expected to grow at 0.6% p.a. to 2010. Australian exporters will mainly compete amongst themselves and against Canadian exporters.

PCI import demand will continue to grow at 6% p.a.
Asian and European steel makers are continuing to increase the application of PCI in blast furnace operation. Levels of 200 kgs of coal per tonne hot metal will be the target. PCI coals can be wide ranging in Volatile Matter content, but Ash, Sulphur and Phosphorous levels will be important parameters.

The USA will remain the swing supplier in both thermal and coking coal markets.
The USA is permanently present as a large swing supplier with approximately 160 Mtpa of coal export capacity (versus 1996 exports of 81 Mtpa). US thermal coal will enter the market progressively once prices exceed US$40 per tonne FOB. The June 1997 signing by President Clinton of the more restrictive SO_x standards for power stations to apply from 2005 will mean that all power stations have to be equipped with de SO_x units. This will permit high sulphur coal, which currently has been excluded from the US utility market, to re-enter the market from 2005 thereby freeing up low sulphur coal for the export market. In the metallurgical market the USA will be ever present as a swing supplier if prices escalate towards the US$55 to US$60 per tonne FOB level.

Productivity improvements will have to match cost inflation.

The Australian industry faces market conditions which will demand that productivity improvements are achieved at a rate necessary to absorb cost inflation in order to maintain its cost competitiveness.

Coal specifications will continue to tighten.
In Asian markets there has been a continuing tightening of coal quality specifications with particular emphasis on sulphur and ash specifications. This trend will continue and will place cost pressures on exports.

The thermal coal market will have multi-tiered pricing
The erosion of the benchmark price concept in Japan, which became official in 1996 with the public tenders by Tohoku, Chubu and EPDC, will continue. We expect that with current three tiered pricing system of baseload benchmark tonnages, followed by discounted benchmark optional tonnage and spot priced tender tonnage will continue and become entrenched among all the Asian utilities.

Metallurgical coal prices will become more quality related.
Prices in the metallurgical coal market will differentiate further with coals having good fluidity and coke strength properties achieving the higher prices.

There will not be an upward trend in export prices.
New thermal coal export capacity will come on stream with cash operating costs competitive with existing exporters. This new supply coupled with US swing capacity will hold prices back despite the growth in import demand.
The outlook for thermal coal prices in the seaborne market is expected to be in the range of US$30 to US$40 per tonne FOB (in nominal dollars), with actual achieved prices depending upon the economic cycle and the timing of the expansion of supply. PCI and semi-soft coking coal prices are expected to parallel the thermal coal prices adjusted for their higher energy content.
In the hard coking coal market we expect that nominal dollar prices will range from US$47 to US$55 per tonne FOB (in nominal dollars).

3.3 Greenhouse

The Barlow Jonker and ACIL reports have been prepared under what can generally be described as “business as usual” conditions.

The international response to potential climate change can only tend to increase the competitive pressures on the coal industry, particularly in the steaming coal market.

ABARE’s analysis (Research Report 97.4) shows that under its “less stringent scenario”[(1),] Australia’s coal output is projected to decline by 20% below business as usual levels by 2010. This occurs largely as a result of coal exports to other Annex 1 countries (particularly Japan) falling due to emission abatement policies.

Although the coal sector is not disaggregated in the ABARE analysis, it is possible that the impact on steaming coal (and therefore on New South Wales) would be greater than the 20% figure.

The reason for the greater impact on steaming coal would be the fact that Japan would cut back significantly on coal use for electricity (as compared with business as usual). While Australia's exports of coking coal to Japan would also suffer due to the reduction in Japan's steel industry, coking coal exports to countries such as Korea would be expected to increase as a result of a shift in steel production to those countries.

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(1) Annex 1 countries stabilised CO_2 emissions at 1990 levels by 2010

4. Occupational Health and Safety

Occupational safety and health remains a major problem for the industry in terms of the human cost, the impact on the employer/employee relationship and the economic cost to the industry. Particularly since the Moura disaster in Queensland, the issue is also impacting on the standing of the industry in the eyes of the public.

Fatalities continue to occur in the industry and while indicators such as lost time injury frequency rates continue to show an improvement, they remain at unacceptably high levels.

Traditional industry-related diseases such as pneumoconiosis are now quite rare and recent studies conducted by the Joint Coal Board have indicated no elevated cancer rates in the coal industry. However, general employee health and fitness for work remain a concern, particularly at some mines where the average age of the workforce is high and increasing.

The NSW Minerals Council made a major submission to the Review into Mine Safety in February 1997. A copy of this submission, together with copies of the following commissioned research papers have been provided to the Industry Commission.

- Towards OHS Best Practice in the NSW Minerals Industry (Shaw Idea Pty Ltd)
- Issues and Options - The Regulation of Occupational Health and Safety in Mines (Luminico Pty Ltd)
- Literature Review - Compliance and Enforcement in Occupational Health and Safety (Luminico Pty Ltd).
- Legislation Review - Comparison of Occupational Health and Safety Legislation for Mines (Luminico Pty Ltd).
- The Impact of Current Regulation on Effective Risk Management (R Davis and J Joy).
- An Investigation into Safety Culture in the New South Wales Coal Mining Sector (C.J. Pitzer).

The Council's submission acknowledged that a major improvement in the industry's safety performance is required. It also recognised that mining in New South Wales is an industry of great diversity with underground and opencut operations which vary on the basis of scale, techniques and processes employed and hazards faced. Underground mining, and in particular underground coal mining, have unique hazards with potentially catastrophic consequences if uncontrolled. However, the challenge of reliably managing risks of this magnitude is also shared with other high risk industries.

The Submission highlights the fact that most companies recognise and are addressing many of the issues identified as having an impact on occupational health and safety (OHS) at sites, but significant common concerns exist with:

- low levels of trust between employees and management, which are having a significant negative impact on companies' abilities to effectively manage safety. Attempts to address this issue are frustrated by a long term adversarial relationship between management and unions.

- the ability to develop and maintain quality-based management systems (particularly for core risks) which perform effectively and which take into account the way people are required to manage and operate them; and

- legislation in the coal sector, which neither encourages (and may in fact impede) the efficient introduction of best practice approaches to health and safety management (including the management of core risks), nor recognises the differing capabilities of companies to meet best practice standards.

While there has been a gradual and continued improvement in these areas overall, reform in the metalliferous sector has been more rapid than in coal due to differences in legislation, inspectorate relationships and industrial relations climate.

A significant stepwise change is now required if the industry is to meet the demands of the community and its own requirements for a safe and economically viable industry capable of competing on world markets.

The Review into Mine Safety reported to the New South Wales Government in April 1997 and made over forty recommendations. The NSW Minerals Council welcomed the report and is actively working with other stakeholders to implement the recommendations.

5. Profitability

The New South Wales coal industry has a recent history of poor overall profitability both in relation to the Australian minerals industry and Australian industry generally.

In the ten years to 1995/96, the New South Wales coal industry's average return on shareholders' funds has been less than 5% compared with 8.8% for all Australian mining.

These figures incorporate negative returns for coal in 1986/87 and 1987/88. Excluding these two years, the New South Wales coal return was an average of 7.1%, still well below the mining industry average of 10.7%.

On a per tonne basis, New South Wales coal profitability has averaged $2.13 over the last seven years, well below the $3.33 paid on average in royalties and company taxes (a figure which would be significantly higher if de facto taxes such as the monopoly profit element of rail freight rates were included).

The results for the 1996/97 financial year are not yet available, but profitability is expected to show a significant reduction on 1995/96, mainly as a result of lower export prices.

RETURN ON SHAREHOLDERS' FUNDS
NSW COAL VS AUSTRALIAN MINERALS INDUSTRY (%)

	AUST.MINING INDUSTRY [1]	NSW COAL [2]	NSW COAL [3]
1987	6.4	(7.1)	(0.7)
1988	15.6	(11.2)	(8.5)
1989	18.3	5.8	3.8
1990	23.4	17.0	9.5
1991	11.8	5.6	6.1
1992	8.1	2.8	4.7
1993	10.2	6.9	9.2
1994	10.2	9.9	9.7
1995	5.3	0.1	4.7
1996	8.8	6.2	8.8
Ten year average	**11.8**	**3.6**	**4.7**
Eight year average (1989-1996)	**10.7**	**6.8**	**7.1**

1. Including abnormals and extraordinary items.
2. Including abnormal and extraordinary items
3. To 1988/89 excludes extraordinary items;
from 1988/89 excludes abnormal and extraordinary items

Source: Coopers & Lybrand surveys for Minerals Council of Australia and NSW Minerals Council

NSW COAL INDUSTRY

COOPERS & LYBRAND FINANCIAL SURVEY

	1989/90	1990/1	1991/2	1992/3	1993/4	1994/5	1995/6
Operating Profit *(1)*							
- $ per tonne	2.11	1.45	1.24	2.87	3.18	1.45	2.61
- % return on shareholders' funds	9.5	6.1	4.7	9.2	9.7	4.7	8.8
Government revenue ($ per tonne)							
- total $ per tonne	12.88	12.88	13.46	12.80	12.14	12.43	12.05
- excl. PAYE tax $ per tonne	8.71	8.45	8.84	8.66	8.31	8.31	7.81
- royalties, company taxes	2.98	3.37	3.73	2.93	2.92	3.69	3.59

(1) After tax but excluding abnormal and extraordinary items.

6. Human Resource Management

6.1 Introduction

'Best practice' industry in Australia has accepted that good human resource management practices provide rewarding working environments for employees and, most importantly, secure on-going employment through strengthening the productivity of the enterprise.

The New South Wales black coal mining industry has a fascinating history stretching back to the early days of European settlement. The immigration of skilled miners in the early years also saw the importation of patterns of work practices which have been insulated from the changes occurring in the rest of industry.

Many of the barriers to reform within the coal mining industry have been institutionalised in legislation which applies singularly to coal mining. These include prescriptive occupational health and safety legislation, specialised workers' compensation legislation, and long service leave legislation.

A long history of industrial relations conducted through the specialised Coal Industry Tribunal sidelined the coal mining industry from mainstream industrial relations. Recent transition to the Australian Industrial Relations Commission has seen some movement, however several AIRC decisions appear to limit the industry's need for reform. These decisions are analysed in Section 6.6 below.

Many companies are working hard to establish modern human resource management practices, however, many barriers still remain to the introduction of best practice human resource management.

Due to the importance of the industry to the national and state economies and the challenge of an aggressive global market, it is essential that barriers to improved productivity are removed rapidly to ensure the continued viability of the industry.

6.2 Competitive Labour Market

As is clear from the following sections, the coal industry operates in a labour market which is far removed from the competitive model which other Australian industries enjoy.

In a modern industry such as coal which sells its products to highly competitive domestic and export markets, a competitive labour market is essential. Coal producers need to be able to recruit the most appropriate staff, allocate work in the most safe and cost effective manner, structure rosters and other work arrangements efficiently, employ specialist contractors according to the needs of the business and generally operate to maximise their efficiency and long term viability.

At present, New South Wales coal industry employees enjoy average wages which are over twice the all industries Australian average. If the industry is to continue to offer such wage rates, the only way in which it will prosper in future will be for significant improvements in the productivity of labour and capital to occur. These improvements in productivity will require a major overhaul in the way in which companies are able to manage their businesses.

6.3. Recruitment

To ensure an organisation has available to it the skills and experience required not only to perform existing tasks, but also to adapt and innovate, companies must select the best staff available.

Impediments to best practice recruitment include:

a. The Coal Mining Industry (Production & Engineering) Interim Consent Award provides:

   Clause 27 - Increase in hands: New South Wales

   "When in any District of New South Wales an increase in hands is decided upon by the employer former employees who were retrenched and who apply shall be re-engaged in order of their seniority in the respective class of work according to length of service at the mine.

   Provided that if with regard to any mine an agreement is arrived at between the employer and the appropriate union in respect of an increase in hands, such agreement shall be binding upon the employer and the employees, notwithstanding that it may be inconsistent with the foregoing."

b. District union officials maintain lists of union members available for mine work.

   Although the Workplace Relations Act prohibits preference of employment based on union membership, employers continue to be confronted with the retrenchment list when a decision is made to recruit.

   The degree to which employers are impeded varies from mine to mine. Some employers have reached agreement to partly circumvent recruitment from the list, whilst others are placed under pressure to recruit from the list, particularly where mines which have retrenched employees, seek to recruit.

c. Security of Employment - Decision of the Coal Industry Tribunal (1994)

   Whilst this decision did represent a step forward, it does outline prescriptive arrangements as to how mines may recruit labour.

d. Whilst several mines have been able to negotiate alternative arrangements, the CFMEU have withheld agreement for others mines to institute recruitment processes which would introduce recruitment on merit.

6.4 Retrenchment

A number of occasions arise where mines are required to reduce labour. This may be due to the removal of certain sections of work, geological barriers to work advancement or loss of markets. To secure the viability of the ongoing enterprise, it is essential that skills and experience required to maintain the enterprise are retained and those no longer required, are redeployed.

Barriers to retention of needed skills include:

a. Coal Mining Industry (Production and Engineering) Interim Consent Award Clause 24 - Reduction in hands

"When a reduction of hands is decided upon by the employer it shall be regulated by the principle 'the last to come the first to go' in the respective classes of work according to the length of service at the mine. Provided that if with regard to any mine an agreement is arrived at between the employer and the appropriate union, such agreement will bind such members notwithstanding that it may be inconsistent with the foregoing provisions of this clause."

b. Some companies have been able to secure agreement with the union to limited variations of this clause. Others have pursued the matter before the AIRC and endured industrial action and stoppages in an endeavour to achieve change in this area. Many companies are still facing delays and financial loss in an endeavour to retain the required skills and experience.

Several companies have endeavoured to use the Workplace Relations Act to remove Clause 24 without success. Impediments include the existence of bargaining periods being in place which restrict the capacity of the AIRC to arbitrate. Applications have been made to the Federal Court to test the standing of this clause.

The decision of Justice Moore in the CFMEU/Rio Tinto (Mt Thorley) case was handed down on October 30. Justice Moore confirmed in his interpretation of clause 24, that in a true reading of the clause's intent, if an employee is forced to retrench and, in the absence of agreement between the parties, the principle of "last on first off" is to be applied to identify those employees to be retrenched.

While Justice Moore provided an interpretation of Clause 24 on its current drafting in the P&E Award, his interpretation did not comment on the legitimacy or legal status of the clause's operation. The question of discrimination relating to the application of Clause 24 remains unresolved.

6.5 Retirement

Performance management practices instituted by many companies outside the coal mining industry require the development of job descriptions, person specifications and performance management, which assist in identifying the 'inherent requirements' of a position as required by anti-discrimination legislation.

Barriers to this practice include:

a. The emphasis on union imposed seniority principles and compulsory age-based retirement

b. The Coal and Oil Shale Mine Workers (Superannuation) Act requires that employers do not continue to employ, and that employees do not remain in employment, beyond the age of 60. (Regulations provide for staff and administrative employees to work until 65).

   A Bill has been introduced into the New South Wales Parliament to remove this provision for compulsory retirement.

6.6 Work Organisation

Productive enterprises assess the needs of customers, the resources at hand, and the needs of the employees, and organise work in a manner which will provide the most productive and competitive outcome.

Barriers to effective work organisation include:

a. Union restrictions on multi skilling

   Despite membership of the same union (CFMEU - Mining and Energy), employees frequently restrict their work to rigid streams, i.e. either maintenance or production.

> *A $5-8 million shovel, servicing up to 6 trucks costing $2 million each. When the shovel driver goes for lunch another appropriate qualified person can't operate the shovel because he may be considered a maintenance stream employee as opposed to production stream. This leaves $20 million worth of capital sitting idle over lunch time.*

b. Casual and Part-Time Employment

   There is not award provision for such a work arrangement. Whilst this issue has been discussed at length during the award review process, no agreement has been forthcoming from the CFMEU to alter this situation.

c. Contractors

The CFMEU - Mining and Energy Division restrict the use of contractors on site.

One mine can't bring on a contractor to mow lawns, so engage a production worker to mow lawns on overtime at $40 per hour.

CFMEU requires use of United Mine Support Services - which is 51% owned by CFMEU. Hourly rate is $55 plus on costs, and $60 on overtime.

d. Seniority

Custom and practice within the coal mining industry entrenches rigidities in the deployment of labour by requiring that access to training, overtime, shift selection, etc, is determined by the length of service at the mine.

Coal Mining Industry (Production & Engineering) Interim Consent Award

Clause 31 - Conditions not dealt with by the award

(a) This award is to be read as not interfering with existing customs and practices except insofar as it expressly interferes with them. These customs and practices being in substance agreements between the parties it is directed that any discontinuance of them which alters existing conditions shall entitle any of the parties to apply to have the award varied to fit the altered conditions.

(b) Except insofar as it expressly interferes with them, this award is to be read as not interfering with any award, order or determination made or given by competent authority and in force prior to the date of operation of this award.

e. Other restrictions

The CFMEU also imposes other restrictions on employers, for example, in terms of machinery manning and roster arrangements.

The 'five panel roster' is most favoured by the CFMEU based on 'custom and practice' Five day workers present for work of 8.5 hours, 2210 hours per year. Seven day workers doing 8.5 hour shift length, will present for work 1856hours per year, representing 84% of normal five day work and receive 20% more pay for working 20% less hours. At one mine this costs $86,050 per worker before overtime.

6.7 AIRC Decisions

While the introduction of the Workplace Relations Act has been welcomed by coal industry employers, a number of decisions by the Australian Industrial Relations Commission have been of concern. These decisions and their implications are summarised below.

a. Woodside Heating and Air Conditioning and Ors - v - CEPU (Print P2244)

In this matter, the Commission determined that it could certify an agreement containing a preference provision, even though the Act itself renders void, to the extent that it requires or permits, or has the effect of requiring or permitting, amongst other things, preference of employment to union members.

It is anomalous that a provision can be outlawed pursuant to one section of the Act, but be totally legitimate by virtue of another. This decision is detrimental to employer's endeavour to remove preference provisions from industry awards as required by the Act.

The application was originally brought to the Commission by consent application pursuant to Division 3 of part VIB of the Workplace Relations Act ("the Act") to certify a number of agreements made between the union and a number of companies. Each of the agreements contained the following provision:

"Absolute preference of employment shall be given to financial members of the Union"

Pursuant to intervention by the Federal Government, the applications were referred to a Full Bench. This decision is the Full Bench decision.

The matter is of considerable importance to the operation of the Act. On the one hand, the Act provides as an object that the primary responsibility for determining matters rests with the employer and employees at the enterprise[1]. On the other hand the objects ensure freedom of association. In this matter, there is obvious conflict between the two objects.

Critical to the Full Bench determining that it could certify an agreement were sections 170LT and 170LU. These sections say 'that the Commission must certify an agreement if, and must not certify an agreement unless, it is satisfied that the requirements of the section are met.' 'Section 170LU sets out a number of circumstances in which, despite s170LT, the Commission must refuse to certify an agreement.' Notwithstanding section 298, neither sections 170LT or 170LU limit the Commission's jurisdiction to certify an agreement, even though the

[1] Section 3(b) of the Workplace Relations Act

agreement may contain provisions that are rendered void by other sections of the Act.

b. MECA Restructuring Decision (Print P4026)

In this matter the Commission determined that training is incidental to the effective operation of the provisions which give effect to skill based career paths.

This decision concludes a long process of award restructuring in respect of the National Metal and Engineering On-Site Construction Industry Award (MECA), and various other awards, arising from applications to give effect to the new classification structures pursuant to the Commission's National Wage Case principles and, in particular, the August 1989 Structural Efficiency Principle (Print H9100).

A number of decisions were handed down in respect of the proceedings. Arising out of those decisions the National Building and Construction Industry Award (NBCA) was varied. The parties to the other building industry awards, including the MECA sought, and were afforded, the opportunity to confer with a view to finalising orders to give effect to structural efficiency principle based classification structures consistent with that determined in relation to the NBCA.

Following extensive negotiations, the issues were narrowed to five. One of those issues is the necessity for a training provision associated with the new skill based classification structure.

The MTIA, as party principle to the dispute, submitted that the draft order should be amended to remove the training clause in light of s89A of the Act. It was argued that training is not an allowable matter and is not incidental to allowable matters for the necessary and effective operation of the award. Training is therefore not a provision the Commission can include in an award.

In defence of the training provision being inserted into the award, the AMWU argued that training was an allowable matter in its own right, and if the Commission determined otherwise, is incidental to "s89A(2)(a) - classifications of employees and skill-based career paths".

The Commission determined that training is an allowable matter as prescribed by s89A. In particular, training is a matter incidental and necessary for the operation of the provisions which give effect to skill based career paths as envisaged by the Structural Efficiency Principle.

c. CPSU - v - Telstra Corporation Limited (Print P3756)

In this case, Telstra successfully appealed a decision of a single Commissioner by effectively confining the meaning of s89A(2)(m) - Redundancy Pay, and s89A(2)(n) - Notice of Termination. The number

and identity of persons to be terminated or made redundant is not an allowable matter, nor is it incidental to an allowable matter.

That the matter was only finally determined by appeal illustrates the hurdles employers confront when attempting to implement the Act

The matter was an appeal by Telstra Corporation Limited ("Telstra") against an order by Commissioner Blair forcing Telstra to withdraw redundancy notices.

Telstra intended to close its National Information and Resource Centre ("NIRC") and had issued redundancy notices to effect the closure. The Community and Public Sector Union ("CPSU") first notified the Commission of a dispute seeking the Commission's assistance in maintaining the status quo pursuant to the Telstra Enterprise Agreement. The status quo being that no employees be terminated until the matter could be resolved. At that hearing, Telstra submitted that the claims being pursued by the CPSU were not allowable matters as defined by the Workplace Relations Act ("Act"). In establishing dates for jurisdictional argument to be heard, the Commissioner directed that the status quo remain, and that Telstra withdraw its redundancy notices.

Upon appeal, the Full Bench concluded that the effect of the Commissioner's orders were to require Telstra to withdraw redundancy notices to staff, that is, preventing Telstra from determining who it wished to make redundant. To prevent an employer from determining the number or identity of persons it wished to make redundant would not be an allowable matter, nor would it be incidental to an allowable matter. The appeal was upheld and the orders quashed.

d. Finance Sector Union of Australia - v - Commonwealth Bank of Australia (Print P1297)

The case provides another example of the broad interpretation of award allowable matters the Commission has taken since the Workplace Relations Act became operative.

In this matter the Commission was asked to determine whether or not accident pay and medical expenses are matters incidental to allowable award matters. That accident pay specifically, and medical expenses were not included in the final list of allowable matters at section 89A of the Act, did not deter the Commission from ruling both provisions to be allowable.

The case provides further evidence of broad discretionary interpretation the Commission is exercising when confronting the allowable matters issue.

This matter was brought to the Commission by virtue of an application by the Finance Sector Union of Australia ("the Union") to vary the Commonwealth Bank of Australia Officers Award ("the Award") by

inserting a provision creating a duty on the Commonwealth Bank ("CBA") to pay accident pay. Accident pay is not one of the allowable matters listed at section 89A of the Act. The Union also claimed paid insurance against permanent impairment and medical expenses for related work injuries.

The matter was referred to a Full Bench where the CBA made application under section 111(1)(g) of the Act for the Commission to refrain from further hearing the matter. The grounds upon which the CBA relied include accident pay and the related provisions were not allowable, nor were they incidental to allowable matters. It was also strongly refuted that accident pay was an allowance within the meaning of section 89A.

The Full Bench determined that accident pay and medical expenses were forms of allowance and are therefore allowable award matters. It was determined that disability insurance was not an allowable matter.

e. Curragh Queensland Mining Limited - v - CFMEU (Print P0859)

Curragh made application to remove the "last on first off" provision from the Production and Engineering Award on grounds including discrimination and contravention of the Act. The Commission determined to refrain from further hearing the matter because of the existence of a bargaining period.

Furthermore, the decision insinuates that reduction of hands is an allowable matter. By virtue of this decision, the Commission potentially expands the scope of what may be allowable.

Although the Commission's comments in relation to discrimination were "preliminary comments" only, the decision clearly identifies the Commission's interpretation of "discrimination" referring only to direct discrimination. This clearly contradicts the various Anti-Discrimination Acts, which outlaw both direct and indirect forms of discrimination.

Curragh Queensland Mining Limited ("Curragh") made application to the Australian Industrial Relations Commission ("AIRC") for variation to the Coal Mining Industry (Production and Engineering) Interim Consent Award, by seeking exclusion from the operation of 'Clause 24 - Reduction in Hands'.

The company is in the process of restructuring its mining operations. A consequence of the restructuring will be a reduction in the workforce of approximately 200 employees to be achieved by voluntary redundancy and forced retrenchment. In support of its application the company argued:

- that the clause is prohibited by section 289Y of the Workplace Relations Act 1996 ("the Act") which states: "*A provision is an industrial instrument or an agreement (whether written or*

unwritten) is void to the extent that it requires or permits or has the effect of requiring or permitting any conduct that would contravene this Part".

- Section 170CK of the Act prohibits the termination of employment for a number of reasons, in particular for non-membership of a trade union and for reasons including race, colour, age, sex etc.

The Full Bench handed down its decision on 12 May 1997 where it held:

- that the Commission could not arbitrate the matter during a bargaining period

- the Reduction of Hands provision does not constitute direct discrimination on the grounds of union membership, age or sex. Further, the Bench questioned whether the clause could give effect to indirect discrimination, and even if it could it was a discretionary factor that the Commission would only consider in making a decision.

- that the Reduction of Hands provision is not prohibited by section 298Y.

Implications for the industry are as follows:

Section 170N

The CFMEU relied upon section 170N of the Act in opposing the application. It argued that because a bargaining period existed between the parties, and that one of the issues listed in the notice of bargaining period was reduction of hands, the Commission could not arbitrate.

The company argued that what was before the Commission was whether the Act operates in such a way as to make clause 24 void, or whether 170CK works in such a way to make action under the provision unlawful.

The Full Bench however held that:

"The matter of a reduction in hands is one about which, in the absence of section 170N, there would ordinarily be jurisdiction to arbitrate. Undoubtedly, in a proper case the Commission has a power to arbitrate about the issue of a reduction in the workforce and the terms upon which that may occur and would be able to make an award. For this reason we are not inclined to accept Mr. Martin's proposition that the parties could not be entitled to put in issue a matter that is void. The matter actually in issue is not contrary to any provision of the Act.

For the above reasons we are of the view that section 170N operates to cause us to be unable to proceed by way of arbitration to hear the application to vary the award."

In effect what the Commission is saying is that if it were not for 170N, it could arbitrate. To arbitrate, the Commission would have to satisfy itself that the matter was firstly an allowable matter. The Commission appears to satisfy itself that this is the case by saying that it has the power to arbitrate about issues dealing with the reduction of the workforce and the terms upon which the reduction shall occur.

Further, it would appear that the decision will limit employers' ability to be party to award variation applications by virtue of the existence of bargaining periods. Effectively, the decision could mean that any company subject to a bargaining period may not be able to make application to remove what it or the industry perceive as discriminatory or non-allowable matters.

Section 170CK and section 298Y

The Commission stated that "*it was not necessary ..... to deal with arguments relating to s170CK and s298Y"* because of its finding in relation s170N. For reasons unknown, it decided that "*it was desirable to indicate [its] general view..."*

Both parties acknowledged that the Production and Engineering Award is a members only award. The outcome of matters dealing with discrimination in the coal mining awards will hinge upon the awards being member only awards.

The company argued that section 298Y had the effect of making clause 24 void. It was submitted that the award being a members only award requires the employer to apply the last on first off principle to CFMEU members, and in so doing taking union membership into account. The provision therefore allows the employer to disregard clause 24 in so far as non-CFMEU members are concerned, and in so doing permits the employer to commit an offence under the Act.

The Commission rejected this argument on the grounds that "*it was unable to see how the application of clause 24 to a CFMEU member vis-a-vis another CFMEU member involves conduct for a prohibited reason"*.

Regardless of the Commission's reasoning, no coal mining company is bound by the award to apply the last on first off principle to all of its workforce if some employees are non-union members. Companies are only bound to do so in relation to union members because the award is members only.

The Company also argued that clause 24 contravened section 170CK(2)(b) which states that employers cannot discriminate on grounds of union membership or non-membership and section 170CK(2)(f) which includes age, race, sex, etc.

The Commission determined that termination of employees does not invalidate clause 24. It states *"We cannot see that when it decides to terminate an employee's employment, it is motivated by reason of the employee's membership of the trade union. Nor is it motivated by reason of the employee's age or sex."* The Commission concluded that the mere existence of clause 24 did not of itself give rise to terminations that will occur contrary to section 170CK.

While the Commission stated that Clause 24 did not bring about direct discrimination, if it had the effect of some employees being treated differently by virtue of their age, sex or union membership, then it would do so indirectly.

The Commission then established that even if it did find that discrimination was indirect, it would be a discretionary factor only, which it would take into account in deciding whether to vary the award.

This finding distinguishes between direct and indirect discrimination. That section 93 of the Act compels the Commission to take account of the Discrimination Acts, we would argue that the application of s170CK should not be limited by the lack of distinction between the two in the Act.

f. Australian Colliery Staff Association - v - Newlands Coal Pty Ltd (Print P1188)

The ACSA made application to insert into the Staff Award a new provision concerning bonus arrangements at Newlands Coal Mine. The company opposed the application and raised a number of jurisdictional arguments. The main argument was that production bonus, as it existed at Newlands, and in coal generally, was not an allowable matter pursuant to the Act.

The Commission determined that production bonus was an allowable matter within the meaning of the Act.

This matter came before the Commission by virtue of an application by the Australian Colliery Staff Association ("ACSA") to insert the following provision into the Coal Mining Industry (Administration and Supervision) Interim Consent Award, Queensland:

Clause 10(h) Production Bonus (Newlands Coal Pty Ltd)
Employees shall be paid the production bonus applicable to the site to which they provide services.

Newlands opposed the application, and raised a number of threshold jurisdictional issues. The matter was referred to a Full Bench pursuant to section 107 of the Act.

The background to the application is that ACSA covers Newlands "service" employees who work generally on ancillary or administrative

roles related to the Newlands mine site. Evidence submitted by the ACSA indicates that a 1985 agreement compels the company "to apply to all staff the same bonus amount and same payment conditions as apply to the wages of employees of the company".

In February 1997, the company served notice of discontinuance of the practice on the understanding that the arrangement represented an over-award privilege .

Although "bonus" is identified in Section 89A as an allowable matter, the company argued that because "bonus" read along side "piece rates and tallies" in section 89A, then bonus is related to achievement of 'performance targets by the relevant production unit or individual employee.' Given that ACSA members subject to the dispute in question 'were not performing work or production tasks reasonably related to any production targets', then for that reason "bonus" is not allowable, and therefore the Commission lacked jurisdiction to hear the matter.

The Full bench determined that "it is not necessary to establish that the performance or results be those of the individual employees subject to the claims, provided there is sufficient collective linkage to production or performance". It may be a question on the merits of the case whether there is a linkage at Newlands. Bonus therefore includes coal production bonus for the purposes of the Act. A report has been prepared by Commissioner Hodder and presented to the Full bench. A decision is yet to be handed down.

g. Australian Public Service, General Employment Conditions Award 1995 (Print P4693)

The Commission refused to remove preference of employment provisions from the award, a provision made void by the Act, on the grounds that a bargaining period was in existence.

Together with the Curragh decision, the Commission is again prevented from implementing important aspects of the Act dealing with freedom of association.

The Minister for Workplace Relations and Small Business made application to have the Right of Entry and Preference provisions in the award removed. While the application to remove right of entry from the award was successful, the Commission failed to remove the preference provision on the grounds that a bargaining period was in place and preference of employment was an issue that may be subject to negotiations. In accordance with the Curragh decision, Print P0859, the Commission refused to arbitrate pursuant to s.170N.

This decision clearly demonstrates the difficulties employers are confronted with when endeavouring to implement the Workplace Relations Act. Section 298Y specifically voids provisions within awards and agreements that contravene section 298. Preference of employment

to union members is one such ground that the Act aims to make void, however, it is not able to be removed on the grounds of a legal quirk relating to bargaining periods, which deals with agreement making, not awards.

6.8 Barriers to Change - A NSW Minerals Council member company view

BARRIERS TO CHANGE - A COMPANY VIEW

- **Contractors:**

The need to focus on core activities within a mine site provides a logical reason for using contractors to carry out specialised tasks, non-core tasks or to supplement mine site labour during shortages or major maintenance activities.

At many sites, the requirement to use contractors requires extensive consultation and agreement. If there is a stoppage of work by CFMEU members, then the Union expectation is that any contractors on the site will also cease work, even if they are members of other Unions or non-union employees, and irrespective of the cost implications.

- **Overtime:**

The CFMEU, through its Divisions, imposes district overtime limits which are zealously maintained. At many sites, the Union has "Roster Keepers" who manage the allocation and sharing of overtime. This can lead to difficulties in achieving sufficient people to work overtime to suit business needs.

- **Shifts and Rosters:**

The CFMEU's intransigence on rosters and shifts and roster changes means that many sites are unable to implement alternate rosters and shifts that will better serve their business needs, and may provide additional opportunities for the employees.

- **Casual/Part Time:**

The changing needs of the industry would be better served by the ability to employ casual and/or part time employees, as many other industries do.

- **General**

The view held by the CFMEU officials and strongly supported through their formal and informal communications is that all employers are callous and uncaring, and that anything the employer seeks is to be resisted and fought. This adversarial win-lose philosophy is deeply ingrained and provides explicit and implicit barriers to the development of constructive and supportive relationships at many mine sites.

This adversarial approach continues in the delivery and commitment to agreements once they are reached, and the strong resistance and reluctance to negotiate forward thinking arrangements for the long-term benefit of the industry and future employees.

7. Coal Industry Culture

One of the major impediments to change in the coal industry is the "culture" of the industry or the set of attitudes which pervade the industry as a result of its history and the institutional and other arrangements which have existed.

This culture, certainly as it applies to many employees in the industry, tends to be characterised by attitudes such as the following:

- coal is unique, special, different - therefore requiring special legislative, regulatory and other arrangements (typically on an industry wide basis).

- the employee sees himself/herself as working for the "industry" (rather than the particular company or mine) and identifies very strongly with the union.

- many of the problems in the industry are due to incompetent management, lack of controls on the industry's production and marketing and damaging investment and purchasing practices by importing countries - these tend to form the rationale for resistance to change.

The culture has, of course, been continually reinforced by a union which sees one of its major roles as attacking management and by politicians from coal electorates.

In recent years there has been some change in attitudes within the industry, with some employers more successful than others in achieving change and in breaking down some of the resistance to change.

Nevertheless the old industry culture as outlined above is still strong and presents a major challenge for management if it is to continue and speed up the process of lifting minesite performance. This process is being facilitated by key institutional changes such as the integration of the Coal Industry Tribunal into the AIRC. However, a number of other institutional and other barriers still exist which are continuing to inhibit change in the industry and which need to be addressed by management and governments.

The following tabulation summarises a number of the key factors influencing attitudes in terms of the position in the mid 1980's and in 1997 and the impact which these factors have on culture.

BARRIERS TO CULTURAL CHANGE

	Mid 1980's	1997	Impact on Culture
Mine safety regulation - Coal Mines Regulation Act	Highly prescriptive regulation of open cut and underground mines	Essentially unchanged (although some rationalisation of regulations achieved in 1997)	Has tended to foster a compliance mentality
Recruitment	Strictly from union lists	Some companies now recruiting on merit; others presumed to recruit off lists	Reinforces allegiance of employee to union; discriminates against employment of women
Retrenchment	Last on/first off provision in industry award	Still an award provision; ARCO challenging in court	Seniority more important than expertise; entrenches old attitudes
Casual/part time employment	Virtually non-existent - no award provision	No change	Entrenches male dominance in workforce; discriminates against women; reduces enterprise flexibility
Use of contractors	Union power of veto; specialised contractors in some areas	More common (eg greenfield sites) but at most mines only for specialised tasks	Inhibits introduction of new ideas, people, expertise
Union Membership	Minesites 100% unionised (except eg mine managers)	Production workforce still 100% unionised at most mines	Entrenches union policies and attitudes
Seniority	Determined allocation of shifts, training, overtime, etc	Some EAs have removed seniority as an issue but still a major factor at many sites	As for Retrenchment above; also seniority relates to length of service in the industry as opposed to the company
Industrial disputation	Disputes commonly settled by LCAs or CIT rather than by enterprise CIT operated outside IR main-stream perpetuated old work practices, etc. by giving great weight to "customs and practice" in its decisions JCB at times involved as "honest broker".	Now largely settled at minesites; if not, AIRC conciliates or arbitrates	Abolition of CIT plus new Workplace Relations Act give companies opportunity to effect change
Management/supervisory structure	CMRA specified key positions	No change	Reinforces compliance mentality

	and structures		
Qualifications	System required significant coal industry experience for key positions	No change	Restricts ability to recruit talented people from other industries; encourages promotion from within the industry
Enterprise Agreements	Non-existent; wages negotiated on industry basis	EAs now common but many are based on the award and deliver limited flexibility; few compare favourably with EAs in general industry	Starting to impact on attitudes
Training	JCB (Order 34) required each mine to develop an approved training scheme	Order now defunct. Training now largely an enterprise issue	
Long service leave	Portable between NSW, Qld, WA and Tasmania, funded by industry wide levy of 20c per tonne; significant unfunded liability	Minister for IR has announced inquiry into the scheme; now funded on payroll basis; significant unfunded liability remans	Entrenches commitment to the industry rather than the employer
Workers' Compensation	Joint Coal Board the monopoly insurer; coal industry had special benefit provisions; also no requirement on injured worker to undergo rehabilitation	JCB still monopoly; 1997 exemptions further differentiate coal from mainstream industry, including wider definition of injury to mainstream industry	Reinforces view that coal is different; combined with high rate of accident pay, reduces incentive to return to work
Export contracts	Commonwealth approval required for coal sales. Details also supplied to JCB.	Export controls abolished in 1997	System of controls tended to reinforce CFMEU rhetoric that coal companies not able to negotiate appropriate prices.

8. Cost Structures

8.1 New South Wales vs Competitors

The following data illustrate the competitive position of New South Wales steaming coal export producers vis a vis our major competitors, Indonesia and South Africa. The data, drawn from the International Energy Agency's Coal Information 1996 publication, are indicative only, but do assist us to understand the pressure New South Wales producers are facing in the international market.

Indonesian producers have the lowest cost structure, with the major mines at the lower end of the cost range.

Indicative Costs - Export Steam Coal
(1996 US$/tonne)

	Mine Operating	FOB[(1)]	CIF[(2)] Japan
NSW-Open Cut	20-30	34.2-45.3	40.7-51.8
-Underground	16-29	30.0-43.8	36.5-50.3
Indonesia	10-25	28.0-44.3	32.2-48.5
South Africa	15-22	28.1-36.0	34.6-42.5

Source: IEA. Coal Information 1996
Note: Data excludes allowance for net return on investment at the lower end of the cost range

(1) cost at port of export
(2) landed cost

The benchmark price for Australian steaming coal to the Japanese power utilities for the current year to March 1998 is US$37.65 FOB. Some New South Wales producers' costs are above this level.

The competitive pressures in the market are being exacerbated by the increasing trend to purchases by Asian customers, including Japanese utilities, on a tender basis (as opposed to longer term contracts). Prices in the tender market are currently well below the Japanese benchmark level.

8.2 Labour Costs

Average weekly earnings in the New South Wales coal industry have risen by 34% over the last seven years. This compares with an increase of 23.5% for average male earnings for all Australian industries (see below)

Part of the reason for the significantly higher increase in coal earnings has been the increase in the average hours worked per week and the high pay rates which those additional hours have attracted.

Increases in production bonus payments have also been a significant factor, with the average weekly bonus rising from $217.80 in calender year 1990 to $310.9 in 1996.

Average Weekly Earnings
NSW Coal vs All Australian Industries

NSW Coal (1)		All Industries (2)	
	$		$
Sept Qtr 1990	1080.7	May 1990	555.8
June Qtr 1991	1156.5	May 1991	569.9
June Qtr 1992	1206.5	May 1992	597.4
June Qtr 1993	1268.4	May 1993	614.1
June Qtr 1994	1291.7	May 1994	628.2
June Qtr 1995	1335.2	May 1995	653.1
June Qtr 1996	1414.4	May 1996	671.5
June Qtr 1997	1450.2	May 1997	686.3

(1) *Source: Joint Coal Board - all employees*
(2) *Source: Australian Bureau of Statistics - all male earnings*

8.3 Rail Freight Rates

Rail freight rates are the largest off-site cost item for coal producers.

In New South Wales, freight rates represent around 12-15% of the f.o.b. price of coal for Upper Hunter producers and over 20% for Western producers.

The NSW Minerals Council has been campaigning for many years for reforms to rail freight pricing and in recent years for the restructuring of rail operations to provide private competition to the Government-owned haulier.

The industry therefore welcomed the implementation of the National Competition Policy reforms. It expected that this would lead the way to more transparent, more competitive, more efficient and thus lower cost rail haulage for coal. It was also expected to lead to the phasing-out of monopoly rent.

To its credit, the New South Wales Government has committed to phasing-out the monopoly rent component of Hunter Valley rail access charges, with a 25% reduction in that component applying from July 1997, and the full phase-out complete by July 2000. A rail access regime was Gazetted by the NSW Government in August 1996, but the National Competition Council (NCC) has found that it is not effective in terms of the Competition Principles Agreement. On 3rd September 1997 the NCC recommended that the NSW Premier declare the Hunter Railway Line Service. The Premier has declined to declare the service. Declaration would have entitled users of the Hunter railway line to seek access to that line on principles laid down in the Trade Practices Act.

Some of the NSW Minerals Council's major concerns with the regime are as follows:

- there is no regulator
- Rail Access Corporation (RAC) can charge a price for access between a floor and ceiling, without guidance on where in that range prices might be struck
- commercial negotiation is not possible because of a lack of transparency
- coal producers cannot negotiate access prices directly with RAC unless they become accredited rail operators
- access prices are based on actual rather than efficient costs access prices are based on achieving a rate of return on assets of up to 14% nominal after tax
- there are no price signals on how efficiency might be improved by coal miners, rail operators, RAC or the port.

These features mean that in practical terms and apart from the issue monopoly rent, there is little difference between pricing before introduction of the rail access regime, and access pricing now.

It is also difficult for new operators to challenge the monopoly of FreightCorp, the Government-owned haulage operator, because of a lack of Operations Protocols and other information from RAC which they need to compete effectively with FreighCorp.

The NSW Minerals Council is seeking amendments to the regime which include the following

- reference prices, established and published by a regulator
- negotiation of prices, with reference prices as a ceiling
- transparency of RAC's costs and pricing methods
- prices based on fully distributed efficient costs, ie efficient operating costs, realistic asset values, and a rate of return based on the capital asset pricing model, properly applied
- rail users to be entitled to negotiate directly with RAC without having to become accredited operators
- arbitration in accordance with Competition Principles Agreement by an arbitrator independent of the regulator

These amendments are necessary to provide the certainty and non-discrimination in pricing that will encourage new investment. They are necessary to provide the pricing signals to all participants in the coal supply chain, including mines, rail transport and port, to determine the most efficient configuration of assets to accomplish the coal transport task, and to determine how to operate these assets n the most efficient manner.

The rail access regime in its current form prevents these efficiencies from becoming apparent. Any action, or lack of action, which prevents or defers correction of the rail access regime harms the NSW coal industry.

It is evident that the regime requires significant improvement from the following comparison between New South Wales third party access regimes for electricity, gas and rail.

The New South Wales Rail Access Regime in its current form represents a significant barrier to optimising the performance of the mine-to-port coal transport task.

COMPARISON OF NSW ACCESS REGIMES

FEATURE	ELECTRICITY	GAS	RAIL
• Regulator	ACCC	IPART	None
• Transparency	Pricing model available	Comprehensive detail provided	None
• Public consultation on regime	Extensive	Extensive	None
• Price setting	User pays*	User pays*	RAC discretion
• Price bases	Efficient costs	Efficient costs	Actual costs
• Rate of return basis	market rate (CAPM)	market rate (CAPM)	Not revealed
• Asset value	Optimised	Optimised	Actual
• Eligibility of customers to negotiate with service provider (1 July 1997)	>$75,000	>$660,000	None

*** fully distributed costs**

9. The Regulatory Framework

9.1 Joint Coal Board

a. JCB Functions

Under the current Coal Industry Acts, the Board's functions include the following:

- provision of occupational health and rehabilitation services
- accident and related statistics
- workers' compensation
- international training programs
- advice to government on health and welfare
- promotion of welfare of workers and their communities
- training standards relating to health and safety
- monitoring of dust
- industry statistics

The functions relating to training, dust monitoring and industry statistics are "temporary" (i.e. to be performed by the Board until such time as the Commonwealth and State Ministers decide otherwise).

b. Need for Commonwealth Involvement

The Council understands that the Commonwealth's intention is to withdraw from the joint Commonwealth/State arrangements and so leave the New South Wales Government with sole responsibility for the JCB.

Of the JCB's functions, it is clear that the only one which arguably requires or benefits from Commonwealth involvement is the international training program. This program is highly regarded, however, the Council believes that it could be conducted under the auspices of another organisation if necessary.

We do not believe that any of the other functions of the Board require Commonwealth involvement as they relate purely to the New South Wales coal industry.

c. Rationale for JCB

The JCB was established, together with the Coal Industry Tribunal, in the late 1940s at a time of turmoil in the New South Wales coal industry. Conditions in the industry today are, of course, dramatically different. The industry is a modern, high technology industry, competing in global and domestic markets. Two thirds of New South Wales coal production is exported. The coal industry has experienced major restructuring at the minesite level and at the industry level in terms of its legislative and regulatory framework.

The JCB remains a unique organisation. The Council is not aware of any comparable inter-governmental arrangement in Australia whereby an organisation with powers and functions in relation to one State only operates under parallel statutes at State and Commonwealth level.

We also note the Queensland Coal Board, which historically had a far more limited role than the JCB, has now effectively benn absorbed into the Queensland Department of Minerals and Energy.

Following years of campaigning, and a period during which the then NSW Coal Association declined to nominate an employer representative to the Board, in 1990 the two Governments appointed Mr Bryan Kelman to review the powers, functions and activities of the Board. The NSW Coal Association made a detailed submission to Mr Kelman, arguing that

- the Board had made many positive contributions to the industry
- a number of the functions carried out by the Board were valuable
- there was significant overlap in responsibilities with the NSW Department of Mineral Resources
- some of the Board's powers were no longer appropriate
- there was no longer any rationale for the Board as a separate body.

Following the review, the Coal Industry Acts were amended and the powers and functions of the Board were reduced. Employers, through the NSW Coal Association and the NSW Minerals Council, have co-operated with the restructured Board and believe that it is a more focussed and less intrusive body than the pre-Kelman body. Nevertheless we still hold the view that it is not necessary for the Board's current functions to be carried out by a separate body.

d. JCB Retention

Should the New South Wales Government decide to retain the Board, employers will, of course, continue to co-operate in its operation.

There are, however, a number of issues which should be the subject of discussions between the parties or of an independent review.

- The Structure of the Board

  The current legislation provides for Board Members to either full-time or part-time and for the Chairman to be a full-time Executive position

  This structure - particularly the full or part-time Member (i.e. Director) option - appears to be unique in Australia and is certainly inconsistent with modern thinking and practice in relation to corporate governance.

The Council strongly believes that should the Board continue to operate, its Board/Senior Management structure should be aligned with that of other statutory bodies. A restructured Board of Directors could still include employer and employee representatives, but could also bring in independent expertise, which could add to the organisation's efficiency and effectiveness.

- Review of JCB Functions

  The Council believes it would also be timely to review the various functions of the JCB.

  For example, the JCB provides medical services for workers engaged in the coal industry. These presently include pre-employment medicals and rehabilitation services. These services are readily available throughout the State from private providers.

  Key questions to be considered could include the rationale for the JCB itself to provide ongoing medical services (as distinct from setting broad standards against which private providers can be assessed or accredited).

- Workers Compensation.

  The NSW Minerals Council believes that Coal Mines Insurance should be separated from the JCB (ie corporatised). Coal Mines Insurance is regarded as a competitive insurer which offers an efficient service to clients. It should, therefore, be well equipped to offer workers' compensation insurance to non-coal employers. However, the Council also believes that it is also appropriate to end the Coal Mines Insurance monopoly on New South Wales coal industry workers' compensation by providing coal companies with the option to self insure or to insure through another insurer.

9.2 Coal Mines Regulation Act

a. Less Prescriptive Model

The operations of New South Wales coal mines are regulated under both the OHS Act and the Coal Mines Regulation Act (CMRA).

The CMRA and its regulations are highly prescriptive. The NSW Minerals Council believes that the Act and regulations:

- waste resources and are illogical and outdated
- have been built on worst case scenarios and applied equally to all mines regardless of risk and performance (ie lowest common denominator regulation)
- work as a disincentive to improve and stifle innovation and best practice

- support the predominant culture of compliance rather than continuous improvement eg approvals system shifts responsibility from the minesite to the Government

The Review into Mine Safety made a total of 44 recommendations, one of which was "There be an immediate tripartite re-examination of legislative options for the coal sector, particularly as regards the practicality and likely impact of a two-tiered regulatory approach".

The implementation of the Review's recommendations is being managed through several tripartite task forces, one of which is responsible for the above recommendation. The NSW Minerals Council believes that the movement to a less prescriptive regulatory regime would be a positive step. As an input into the relevant task force's consideration, the Council has commissioned a report by SYSTEC on options for a new regulatory model.

b. Mining Approvals

Not only is the Coal Mines Regulation Act a highly prescriptive piece of legislation, its impacts are amplified by the requirements for the Department of Mineral Resources to give a range of approvals for both the open cut and underground sectors. There is generally no set of principles applied to these approvals other than an interpretation of the legislation and its regulations.

While the industry recognises the need for equipment to be of a sufficient standard in relation to safety, there is a concern that the regulatory requirements place significant costs on companies in terms of compliance costs, delays and equipment performance while, in some cases, being of little or no benefit in terms of improved safety. The function is also very demanding in terms of the Department's resources.

The following examples illustrate the impact of equipment approvals in New South Wales:

- open cut sector

  Before equipment is used in the New South Wales open cut coal sector, it must be approved by the Inspectorate. This adds considerably to the cost and commissioning time for new equipment.

  As an example, changes required to standard Caterpillar equipment used throughout the world to gain approval in New South Wales involve:

  - re-routing hydraulic lines away from any electrical wiring
  - additional insulation and clamping on electrical wiring
  - double pole isolation switches
  - 3 emergency stops

- additional lighting requiring larger alternators
- labelling of electrical circuit breakers
- widening of ladders and stairways

Under the current system, it is also not possible, for example, for a contracting company to transfer one of its large rear dump trucks from a Western Australian metalliferous mine to a New South Wales open cut coal mine because the electrical wiring system may not comply with the Coal Mines Regulation Act electrical regulations (which are based on underground mining).

The cost varies from $40,000 to $60,000 per machine depending on the quality of the component used.

- underground sector

In the New South Wales underground sector all mining machines have to be an approved type and comply with New South Wales Department of Mineral Resources - Design Guidelines. There are currently 32 guidelines. This process requires extensive changes to the machine design, its electrics, stop devices and multiple electronic protection devices.

Typically the cost impact is 14% greater than the USA designed and manufactured machine which complied with the Federal Mine Safety and Health Administration (MSHA) approval process. Apart from costs, delays of six months or more can be experienced whilst trying to introduce innovative safe and highly productive equipment.

The NSW Minerals Council is planning to study this issue in detail in the next few months with a view to identifying possible improvements in the regulatory process which would reduce the demands on the Department's resources and which would be beneficial for the industry without detracting from safety.

9.3 Project Development

The further development of coal industry projects is primarily affected in three ways , which are sometimes inter-related:

- Land use planning constraints governing access to new resources
- Complex and lengthy project approvals arrangements
- Procedures and uncertainties stemming from Native Title legislation (this topic will not be addressed in this submission)

a. Land Use Constraints

A report prepared by the Coal Resources Development Committee in February 1994 entitled "Effects of Land Use on Coal Resources" outlined the history of the New South Wales coalfields and the continuing emergence of constraints to further coal development. This Committee was an advisory committee comprising a range of senior New South Wales Government representatives from various agencies together with industry representatives.

These constraints included land uses which sterilise coal resources by way of mining prohibition, such as national parks, and those which effectively limit new development or expansion due to possible land use incompatibilities. The latter case usually relates to the nature of surface development, such as urban development, sensitive major infrastructure, and prime agricultural lands. However, limited access to railways and other support infrastructure can also be cited as effectively constraining other coal development opportunities.

The report highlighted that the common perception of NSW having sufficient coal resources to meet any long term demand is clearly a fallacy. Approximately half of NSW coal resources lie mainly beneath national parks and prime agricultural land and much of the remaining coal is of less than economic quality.

The study found that if no new constraints were placed on mining of coal resources, production in each of the coalfields would trend as follows during the next 30 years (based on the then 1994 production conditions):

- Newcastle Coalfield down to half the current (i.e. 1994) levels;
- Hunter/Gunnedah Coalfields to almost double current levels;
- Southern and Western Coalfields to remain similar to current production.

Superimposed on the recent decline in economic viability of many current and proposed coal operations are the following land use constraints for each coalfield:

- **Newcastle** - urban development and the need to protect lake foreshores and flood-prone land from the effects of subsidence.

- **Hunter** - community concerns over the intensity of mine developments close to population centres like Muswellbrook; also prime agricultural land overlying coal resources.

- **Gunnedah** - prime agricultural land

- **Southern** - considerable coal resources occur under stored waters, while urban expansion in the Camden-Campbelltown area might compete with development of premium hard coking coal resources;

- **Western** - 75 percent of the resources in this coalfield occur within existing National Parks, and an additional proposed National Park would seriously affect the life of the existing collieries, as well as the exploitation of hitherto undeveloped resources.

The CDRC concluded that the greatest problems in protecting areas for future coal development would come from declaration of new conservation areas and from the expanding surface utilisation (land subdivision and urban development) of Eastern New South Wales. However, it also concluded that mining in areas where it has traditionally been excluded could take place without detriment to other land uses, e.g. under railway lines or stored bodies of water.

In this context, it is noteworthy that during an 18 month period to October 1996, the NSW Government gazetted 35 new National Parks and related conservation areas, as well as a large number of new wilderness areas and additions thereto. This sometimes occurred with minimal effective consultation with the minerals industry. There is no statutory requirement for interagency or public consultation in the development of new conservation reserves in NSW.

The minerals industry's need for initial proving up of resources by way of exploration drilling activity, enabled by Exploration Lease titles in NSW, can confront similar significant land use constraints. The coal industry, as opposed to the metalliferous mining sector, has no clear equivalent land use and conservation evaluation process such as RACAC to consider its long term resource security needs. Even so, the RACAC process is driven by conservation value assessment and any resource security evaluation mainly focuses on the forestry industry.

Resource access issues have given rise to the concept of multiple land use reserves, which has been elaborated on in a report by the Minerals Council of Australia report titled "Multiple Land Use Reserves - A Regulatory Framework" (October 1997).

b. Project Approvals

Many of the concerns held the minerals industry, and coal industry in particular, involve the complex and lengthy project approvals system. This process is dominated by the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act), but also includes a raft of other legislation such as:

- Pollution Control Act 1970
- Clean Waters Act 1970
- Noise Control Act 1975
- Clean Air Act 1961
- Mining Act 1992
- Soil Conservation Act 1948
- National Parks and Wildlife Act 1975

- Heritage Act 1977
- Threatened Species Conservation Act 1995

These and other statutes and their Regulations combine to form a complex hierarchy of consents, leases, licences and approvals. Numerous different authorities administer these various statutes, and significant time and cost burdens upon coal mines can be attributable to the mosaic of overlapping administrative requirements such as reporting and dealing with inflexible but now outdated consent or operating conditions.

The minerals industry regarded the EP&A Act as a fundamentally good law when introduced but which is now in need of significant revision to better meet both industry and community expectations. The Department of Urban Affairs and Planning which administers the EP&A Act has recently been drafting a Bill to significantly amend the approval arrangements set out in the Act. That Bill is currently before the NSW Parliament. Submission on the White Paper and Exposure Draft Bill were made to the Department of Urban Affairs and Planning earlier in 1997 and accompany this submission.

The submissions are self-explanatory, but focus on the key proposed improvements for project approvals which relate to "integrated development assessment and approvals" and "State significant developments" and their allied decision-making procedures and appeal provisions. The Bill represents an opportunity to greatly improve the decision-making process by reducing time delays, exchanging sequential steps in approvals for more efficient concurrent assessments, establishing better interagency co-ordination and accountability, and enabling a greater degree of developer certainty from the period of initial development consent and throughout later "secondary" approvals processes.

The degree to which these opportunities will be met depends on the extent and nature of amendments made during its passage through Parliament, expected to be by the end of 1997.

Other initiatives by NSW Government have been attempting to establish improvements in natural resource planning and management, such as outlined in the recent "Native Vegetation Conservation Model White Paper" released by Department of Land and Water Conservation. The NSW Minerals Council's submission on that proposal accompanies this submission, and welcomes the model's exemption for the minerals industry and exploration activity from any unnecessary duplication or subsidiary environmental planning approvals .

9.4 Environmental Management

Within NSW, the environmental legislation and regulatory policies under the administration of various authorities are undergoing significant change and revision. These include:

- Protection of the Environment Operations Bill 1997 ("Stage II pollution control legislation") - Environment Protection Authority (EPA)
- Load Based Licensing and Noise Policy revisions - EPA
- Environmental Planning and Assessment Act Amendment Bill 1997 - Department of Urban Affairs and Planning
- Contaminated Lands Bill 1997 - EPA
- Native Vegetation Conservation Model - Department of Land and Water Conservation
- Rehabilitation Security Bond policy/procedures - Department of Mineral Resources (DMR)
- Mining exploration environmental assessment procedures (DMR)
- Mining Operation Plans; Annual Environmental Management Reports (DMR)
- Aboriginal cultural heritage policies - National Parks & Wildlife Service

In addition, current Commonwealth initiatives that will have a bearing on the coal industry's environmental regulatory and reporting regime include National Environmental Protection Measures (specifically National Pollutant Inventory and Air Quality).

Other relevant initiatives that have a bearing on mine environmental management include the Greenhouse Challenge (for those companies that are signatories to Greenhouse Challenge Agreements with the Commonwealth) and the Minerals Council of Australia Code for Environmental Practice.

While many of these matters are still being formulated, some Bills are currently before NSW Parliament. While some opportunities exist for major improvements to be made to project approvals and environmental management requirements by these initiatives, their success will depend on their smooth Parliamentary passage and the satisfactory finalisation of Regulations and policy details.

Copies of the NSW Minerals Council's submissions to relevant authorities on the above matters accompany this submission. These outline the concerns that the Council has and also include recommendations for improvement in these regulatory and policy proposals. The Council consistently seeks improved environmental outcomes while ensuring regulatory efficiency, clarity, transparency and cost-effectiveness. The Council specifically aims to ensure that the regulatory framework avoids:

- onerous and ineffective environmental requirements
- costly *de facto* "taxes" and charges which do not directly relate to environmental management improvement
- unnecessary delays during processing of applications/permits
- regulatory duplication and conflict of conditions within the approvals hierarchy (by clarification of jurisdictional areas and accountabilities of

authorities), particularly in relation to monitoring, regulatory standards/limits and reporting.

The following attachments are not included on diskette.