SUBMISSION TO THE

INDUSTRY COMMISSION

on its

DRAFT REPORT ON THE

AUSTRALIAN BLACK COAL INDUSTRY

NSW Minerals Council

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1. SUMMARY

The NSW Minerals Council has welcomed the Commission's Draft Report. It is a professional and timely contribution which provides a comprehensive framework of analysis and recommendations and which should guide the restructuring of the industry in the years ahead.

The Council also believes that one of the Report's strengths is the fact that it quantifies the potential benefits for the industry and the national economy if the necessary reforms are implemented.

This submission provides our comments and views on a number of the issues raised in the draft report. If there is one overall comment about the Final Report, it is that we would recommend that it convey a greater sense of urgency about the need for change.

As we discuss in this submission, 1998 has seen a significant reduction in export contract prices (for example, the steaming coal "reference" price is down 8.4% from 1 April and the semi-soft coking coal price is down by about 10% and there is a strengthening in the trend for customers to buy more coal on the spot market, where prices are currently significantly below the reference rate).

While the reduction in prices could be reversed to a greater or lesser extent in due course, particularly if the Asian region's economic growth rate recovers, it is possible that the breakdown of the benchmark pricing system and other changes in the market are heralding a new era in relation to coal pricing.

In any event, the industry is experiencing increased price and competitive pressures and stakeholders need to accept that, unless the rate of change is increased quickly and substantially, jobs and export earnings will suffer.

2. THE MARKET

Chapter 2 of the Draft Report presents a very useful overview of trends in the domestic and international markets.

One major issue which the Commission may wish to consider in its final report is the likelihood that Japan will downgrade its forecasts of coal demand as part of a fundamental reassessment of energy demand in the context of its Kyoto target. The Japanese forecasts are expected to be available in the next couple of months.

In relation to real export price forecasts, the projection on page 13 has steaming coal prices trending down on a fairly smooth basis. Given the following factors, however, there is an argument that 1998 will see a significant shift downwards in prices:

- contract export prices for the Japanese steaming coal market fell by 8.4% from 1 April.

- this 8.4% fall is no longer a benchmark but a "ceiling" or "reference" price, with the Japan Power Utilities seeking significant tonnages at prices below this level.

- the Korean and Japanese markets are likely to purchase increasing tonnages on the spot market.

  KEPCO (the Korean power utility) is reported as planning to buy 35% of its 1998 requirements on spot. The Japanese power utilities are reported as buying 19.5% of their 1998 requirements on spot (vs 15.7% in 1997).

New South Wales is also a major producer of semi-soft coking coals for the export market. Contract prices for these coals are down about 10% from 1 April 1998 and the downturn in Asian economies is seeing an absolute reduction in the level of demand.

The value of the Australian dollar, of course, will be critical in determining the A$ returns to exporters.

3. INDUSTRY PERFORMANCE

The Commission will be aware of claims (for example, by the CFMEU) that the coal industry in Australia is highly efficient and has similar average productivity levels to the United States industry which is generally regarded as having the highest levels in the world.

We recognise that the benchmarking project being undertaken by Tasman Asia Pacific will be a significant element of the Commission's final report. However, in the final report we recommend that the Commission also addresses the argument of the CFMEU to ensure that the appropriate recognition will be given by readers of the report to the potential for efficiency improvement which we expect the Tasman work to show.

We believe that issues to be considered in addressing the CFMEU argument could include:

- the relevance of labour productivity measures (tonnes per employee being only one measure of efficiency).

- the extent to which comparisons between average labour productivity levels in different countries are meaningful (such comparisons are affected by geology, size, distribution of mines, statistical differences, market orientation, etc.).

- the value of information about best practice operations (for example, which can provide a guide to the potential for improvement in Australian mines).

- implications for cost competitiveness (this is linked to the dot point above; while benchmarking Australian mines against, for example, United States mines has no direct relevance in terms of Australian mines' competitiveness against, say, Indonesia, such benchmarking can assist an Australian mine to evaluate how much more competitive it could be if it could achieve best operational practice).

4. WORK ARRANGEMENTS

The Council commends the Commission for its analysis of issues relating to work arrangements and industrial relations in its Draft Report.

4.1 Management

The industry is rapidly developing the capacity to move beyond prescription of mine manager qualifications. The regulatory regime has been superseded by events in other fields, for example those facilitated by the National Training Reform Agenda. Industry competency standards have been developed by industry to enable recognition of skills. There exists strong evidence across better practice mines that they are building effective assessment criteria into their selection processes.

If a Competence Assurance Scheme was in place, the industry would have a skills base which could be accessed for guidance on the assessment of relevant skills and competencies. The Coal Mining Qualifications Board could therefore be phased out as demand reduces.

4.2 Allowable Award Matters

The NSW Minerals Council notes the comments with regard to the award review and agrees that these are issues which inhibit flexibility at the workplace. Under the terms of the Workplace Relations Act, these aspects of the industry awards are being reviewed under Section 89A and should be removed under the provisions for non-allowable matters or the simplification process.

4.3 Bonus as an Award Matter

The nature of the bonus in the coal industry, which has been linked historically to production rather than productivity, is more appropriately negotiated at the enterprise level. With changing work organisation and the reduction in many workforces, greater flexibility is required to negotiate formulae which reflect the particular operating environment of the mine. Indeed, in the current economic environment, this may be necessary to ensure the survival of particular mines and hence ongoing employment for many employees.

4.4 Traineeship

As competencies are developed for metalliferous mining, it would be appropriate to make a comparison of those developed for the coal mining industry traineeship. A consistent model would facilitate more opportunities for entrants to both sectors of the industry.

4.5 Workplace Relations Act

a) Use of Contractors

The flexible utilisation of contractors at coal mines for all work has been referred to by a number of contributors to the Commission. The matter is frequently the subject of dispute at coal mines and can result in the reduced access to contractors or the proscription of particular providers. Such contractors also include labour deployment contractors such as United Mining Support Services.

An amendment to the Workplace Relations Act which prohibited the utilisation of contractors as an industrial issue would assist in ensuring the flexible deployment of labour as required during fluctuations in demand.

Utilisation of contractors may also assist in avoiding dislocation to a permanent workforce where a rapid increase or decrease in labour is required.

b) Representational Rights

The NSW Minerals Council notes the comments of the Industry Commission with regard to the 'more conveniently belong' provisions of the Workplace Relations Act. There is no doubt that these provisions have caused considerable disputation and in fact, costly litigation within this industry.

A broadening of the scope for all mines however may create instability at current mine sites where operating arrangements have been negotiated. Multiple representation may destabilise current arrangements which are operating satisfactorily.

New mine sites however may be in a position to develop appropriate relationships which provide the required flexibility to make an endeavour viable.

It is suggested that further research would be required prior to recommending any change to the current arrangements.

4.6 Demarcation

The Industry Commission Draft Report identifies four types of demarcation:

1. between staff and production by virtue of the separate awards
2. between production and maintenance/engineering, and
3. wage rate clauses which define classifications through occupational definitions and equipment capacity, and
4. legislative - through statutory roles

The NSW Minerals Council has not been aware of significant impediments created by the distinction between administrative and production work, however it is evident that the other criteria have impeded more productive work organisation at mine sites.

It is the employers' contention through the award review process that the award work model prohibits the establishment at the enterprise of more flexible work arrangements. It is the view of many within the industry that the work models should be replaced with a generic classification structure which would facilitate a wider range of work arrangements, tied to the appropriate enterprise assessed employee capacity. This has been discussed with the industry unions through the conciliation phase of the award simplification process and may be the subject of arbitration as the matter proceeds.

The legislative requirement for the role of Deputies inhibits the development of a role within the range of supervisory skills evidenced in other industries. A review of this aspect of the legislation would be welcome during the review of Coal Industry Safety Legislation.

4.7 Adjustment Issues

The Council recognises that the significant process of change currently affecting companies throughout the industry (and which has been foreshadowed by the Commission for the years ahead) has major implications for employees (particularly those retrenched), management, governments and local communities.

In relation to retrenchments, different companies adopt different policies and processes in terms of, for example, outplacement services. One of the Council's members (Drayton Coal - a member of the Shell Coal group and which has significantly reduced its workforce in recent months) has provided a brief summary of its program of assistance to displaced employees. A copy of this summary is attached as Appendix A.

5. COAL RAIL TRANSPORT

The Industry Commission has highlighted a number of shortcomings in the implementation by NSW of national competition policy to rail access, particularly for coal. The Commission has expressed clearly and succinctly many of the points the Council has been endeavouring to make on rail access for coal in NSW.

The Commission's Draft Report makes a number of points on the New South Wales rail access regime which are consistent with and support the Council's many submissions to the New South Wales Government, the Commonwealth Government, the National Competition Council and the Commission. In Appendix B we detail and comment on the key sections of the Draft Report in relation to rail reform.

The Draft Report (page 151) notes that "NSW has been slow to develop a rail access regime acceptable to the National Competition Council and users. This has delayed the entry of new firms in the coal freight market". The Council strongly endorses this statement.

The Draft Report (page 151) also recommends the adoption of transparent and economically sound pricing systems developed by existing independent State pricing tribunals (IPART and QCA) together with a right of appeal to these tribunals regarding particular access pricing decisions on a case-by-case basis. We agree that issues in the pricing of rail access, such as asset valuation, rates of return and price discrimination are important. However, we also contend that:

- there should be a regulator, such as suggested here, but that regulator should be independent of the arbitrator

- the parties to a dispute should be able to appoint an arbitrator of their own choosing in accordance with the CPA and not have a predetermined arbitrator imposed on them by the access regime

6. GOVERNMENT REGULATION AND SAFETY

6.1 Occupational Health and Safety

a. Coal Mining Hazards

The Commission's report states that "coal mining is a dangerous activity" (page 215). The NSW Minerals Council believes that while coal mining, particularly underground mining, has particular and high potential consequence hazards, that there is no need for coal mining to be a dangerous activity and that fatalities and serious injuries are not an inevitable outcome of coal mining. The fact that individual coal mines can, and do, operate for many years without serious incidents, demonstrates that a fatality free industry is achievable. Promotion and acceptance of the industry as "inherently dangerous" could provide the "excuse" for accepting lower standards than are necessary to achieve the objective of an industry free of fatalities, injuries and workplace related diseases.

We would hope that the Final Report will reflect the above comments and the objective of an industry free of fatalities, injuries and workplace related diseases be acknowledged.

b. Open Cut Sector

The NSW Minerals Council also believes that it is important that the open cut sector is viewed separately to the underground sector. The evidence is that the open cut sector, while it can improve its performance, performs at or above the standards of other major industries such as construction.

The open cut sector has been significantly and negatively affected by its close association with underground coal mining. Much of the prescription in open cut regulations "flows on" from the underground. Separation is seen as a critical step in achieving rapid improvements in open cut mine safety.

The Mine Safety Review implementation process has identified this issue and has recommended that open cut mining is considered separately from underground and that the issue of mainstreaming (that is, adoption of the mainstream OHS Act and all of its regulations, Codes, etc.) can be considered as an option. The CFMEU has indicated its opposition to this mainstreaming, however, the review process will address this option.

As a direct result of the Mine Safety Review Implementation process the Government has made a commitment to develop and resource an implementation plan (including a consultative process) to introduce a new regulatory model within three to four years. This is a very positive and important step. The SYSTEC document (developed with NSW Minerals Council funding and previously provided to the Industry Commission) provides a number of options for regulatory reform based on best practice regulation (in particular the "safety case" approach of the petroleum industry) and forms a useful basis for further reform.

The Council suggests that the Final Report should

- note the significant difference between open cut and underground coal mining in terms of lower levels of risk being managed and the better performance of the former.

- recommend that open cut mining regulation be considered separately from underground regulation and that the option of mainstreaming be considered by the industry

- note and support initiatives to introduce a new regulatory model in New South Wales within three to four years.

c. Industry Commission Recommendations

The package of measures proposed by the Commission is broadly supported by the NSW Minerals Council. The following points should be considered in finalising recommendations on these measures.

- the duty of care in the OHS Act does currently apply to New South Wales coal mines. The problem is that the prescriptive Coal Mines Regulation Act, in effect, prescribes "how to" meet that broad duty. Also, it is clear that all companies in the industry have not yet fully embraced the OHS Act and duties. With a reduction in prescription the general duties should receive greater focus

- the proposal for "Mine Safety Management Plans" is supported. An understanding of the nature of the plans and how they would form part of the regulatory process, while a matter of "detail" is vital to the recommendation. The model outlined in the SYSTEC document is informative. Mine Safety Management Plans should address the core risks at the site and demonstrate that the company is effectively managing those risks. It should be "accepted" and not "approved" by Government inspectors and should form the basis of the mines inspection process. Companies should be held accountable by the Inspectorate on the basis of their implementation of the plan. The plans will and should contain much of the prescription currently in regulation except that the specifying could be based on the particular risks and needs of the mine sites.

- the Industry Commission proposes that the Inspectorate operate on a full fee for service basis and that companies should not be immune from prosecution if they follow that advice. However, the Inspectorate should be held accountable for the quality of the advice it provides and be liable if it is negligent in providing that advice

- The NSW Minerals Council is also of the view that currently there is significant expenditure on mine safety through the Department of Minerals Resources, Joint Coal Board and Mines Rescue (much higher per person than in any other State) and that until the Government provides a better co-ordinated, targeted range of services and uses its current resource base more effectively, it should not be seeking additional funds from the companies on a user pays or any other basis.

- enforcement of safety legislation is a critical issue. The development of an enforcement policy in consultation with industry is an important step if deterrence and prosecution are to play a greater role than is currently the case

6.2 Joint Coal Board

The NSW Minerals Council supports the Commission's recommendation that the Joint Coal Board should be abolished and its functions taken over by other organisations.

However, the Council also recognises that the current New South Wales Government wishes to retain the Joint Coal Board. We are, therefore, recommending to the New South Wales Government that:

- the Board of the Joint Coal Board should be restructured along the lines of other statutory authorities (that is, the Board should comprise an independent chairperson, employer and employee representatives and one or two other directors with expertise in workers' compensation, occupational health, etc).

- the Coal Mines Insurance monopoly should be progressively dismantled.

6.3 Local Government

The NSW Minerals Council has argued for many years against the ability of local councils to levy differential rates on mines (that is, to strike a mining rate which is different to the general business rate). While we recognise that in many local government areas, mine rating does not cause conflict between the

council and the mining companies, the current system does provide councils with the ability to impose excessive rates on mines.

Several years ago the Council's predecessors (the NSW Coal Association and NSW Chamber of Mines) were successful in having the output method of valuation removed as a method of valuing mining land for rating purposes. However, the industry still has to contend with the differential mining rating provisions of the Act which can, and do, lead to discriminatory rates being assessed against some mines.

7. ROYALTIES

At this stage, members of the NSW Minerals Council have not formed a view on the Commission's recommendations regarding alternative royalty arrangements for coal.

In relation to a resource rent royalty (RRR) system, however, we query how practicable this would be in the case of the New South Wales coal industry. RRR can be readily applied to new projects and it is designed to cater for the different phases of a project (that is, initial development phase involving major capital expenditure and the ongoing operational phase).

The greater the time elapsed since a project's initial development the more difficult it would seem to be to ensure that accurate records exist of the timing and value of the various revenue and expenditure flows of an operation. Many New South Wales mines have been operating for long periods of time.

Should a system of RRR be imposed on existing mines, that would raise the issue of sovereign risk (unless, of course, the outcome was more favourable to the mines concerned).

As the Commission's Draft Report notes, the Council was involved in a consideration of RRR several years ago. At that stage, the New South Wales Government view was that it would only consider a RRR system for new mines. Faced with the prospect of a dual royalty system (that is, old mines paying the specified royalty per tonne and new mines possibly not paying royalties for a number of years) many companies were concerned about competitive advantage or disadvantage arising from such a system.

These issues of competitive advantage and sovereign risk could also apply in the case of a change to an ad valorem royalty system.

Appendix B

DETAILED COMMENTS ON COAL RAIL TRANSPORT

1. Key Observations in Draft Report

The following extracts from the Draft Report highlight additional areas of significant agreement between the Commission's Draft Report and the views of the NSW Minerals Council.

a. Operating Costs And Productivity

- .... (the) moratorium on competitive tendering for RAC maintenance work ..... will reduce significantly the short-term cost savings available to the RAC and commensurately increase charges for rail access (p161)

- .... delaying the impact of competitive forces by restricting competitive tendering and by failing to develop acceptable rail access regimes ... will be expensive for rail users (p161)

b. Removing implicit royalties and monopoly rent

- .... the scope for price discrimination [by RAC] by such a high ceiling rate [of return on assets] gives some cause for concern. To the extent the ceiling rate is considered excessive, monopoly rents will still be earned even after 2000 on those contracts paying ceiling or close to ceiling prices (p168, 169)

- The NSW Minerals Council (sub. 52) observed that under current access pricing arrangements, delaying the introduction of competitive tendering for maintenance work would mean that the coal industry would continue to pay for such inefficient costs [for RSA maintenance] (p169)

- The policies of the NSW and Queensland Governments for ongoing removal of monopoly rents and de facto royalties from rail freights have improved the efficiency of rail pricing and encouraged improved performance by rail authorities. However, the pace of change has been slow, delaying the benefits from more efficient pricing of coal freight. (P170)

c. Introducing competition to rail freight

- .... the detail of the proposed access arrangements raises questions concerning the extent of the [NSW] Government's commitment to seeking the full benefits offered by competition in rail freight (p174)

- The introduction of access to rail infrastructure for coal freight services in NSW has been hampered by the lack of an effective access regime against which new freight carriers can confidently invest. (p174)

- It is important that governments set appropriate charters and performance objectives for rail infrastructure providers and monitor their achievement carefully. (p175)

d. Price Setting for Rail Access

- ..... in particular an appropriate administrative framework for determining access pricing is recommended (p179)

i) Asset Valuation

Whichever asset valuation method is chosen, the most important requirement to avoid systematic over- or under-pricing is to implement the matching rate of return concept. (p181)

ii) Rate of return

.... replacement cost and deprival value .... make allowance for inflation and hence a real rate of return is appropriate when determining the amount of profit that should be aimed for in the long run (p182)

The application of nominal rates of return to current valued assets in setting prices for access to rail infrastructure will lead to excessive prices. (p182)

iii) Differential pricing and cross-subsidisation

If appropriately applied on the basis of relative demand elasticities, price discrimination ...would be likely to benefit the coal industry as a whole. However, the information requirements of such an approach are high. .... price discrimination between viable mines will be largely arbitrary because those setting access prices will not be able to assess (p 184-185).

..... the complex issues surrounding price discrimination make transparency and genuinely independent regulation of price setting particularly desirable for a monopoly service. ..... These concerns

are given more credence when governments do not appear to be wholeheartedly facilitating the introduction of access to rail infrastructure. (p185)

The pricing of coal rail freight by government enterprises in NSW and Queensland is not transparent. A set of principles and practices should be developed in each State which will generate efficient prices and provide the private rail freight and coal industries with confidence in the fairness of pricing (p185).

iv) Other

It is crucial that details of the recommendations and decisions of [IPART] regarding access pricing for coal (and other freight) be publicly available. (p186).

..... granting passenger services preference to freight services in use of track implies their access charge should be higher in such instances. (p186)

2. Other Comments

There are a few instances where the Commission's report is not quite accurate or has been overtaken by events. These are:

- Page 171 of the draft report is the statement

  The NSW Government has not sought at this stage to use s.78 to thwart the NCC proceedings. Indeed, it had previously indicated (sub 26) its intention to allow third party access to rail lines for coal freight.

  The NSW Government has at all stages of application to the NCC for declarations and certification sought to utilise s78 to impose on the NSW coal industry terms for access that are inconsistent with the Competition Principles Agreement. In most cases it has been RAC that has taken up the argument, as the NSW Government has not made submissions to the NCC on the NSW Minerals Council's declaration application, nor is it a party to nor intervener in the appeal in the Australian Competition Tribunal against the decision on the declaration.

  In a document filed on behalf of Rail Access Corporation in the Australian Competition Tribunal on 6th March 1998, Corrs Chambers Westgarth stated at paragraph 15

  Section 78 is to be interpreted so that access to the rail track used to carry coal is not to be regarded as a service for the purposes of Part IIIA for a period of 5 years.

RAC is currently preparing to commence proceedings in the Federal Court under section 163 of the Trade Practices Act to determine whether the Hunter Railway Line Service is covered under Part IIIA of the Trade Practices Act, that is, whether s78 applies to access to infrastructure. We can only assume that the Rail Access Corporation's action reflects Government policy.

- Page 173 of the draft report is the statement

  No such appeals [to IPART for arbitration on access conditions] have yet been made.

  No appeals have been made to IPART on access conditions for coal haulage but around August 1996 RAC applied to IPART for arbitration on an access dispute with National Rail Corporation relating to interstate freight traffic. That dispute was resolved by agreement between the parties in March 1997 after some days of hearings by IPART.

- Page 173 of the draft report is the statement

  ... the NCC found that the existing NSW rail access regime is not an effective regime, largely because of the uncertainty and lack of transparency in its pricing arrangements.

  In making its recommendation on the Hunter declaration application the NCC referred to its earlier recommendation on Specialised Container Transport's declaration application. In that recommendation it considered only the first four of the 16 criteria for effectiveness in section 6(4) of the Competition Principles Agreement. It found that the regime did not comply with any of these four criteria examined. As failure of a regime to comply with only one criterion is sufficient to make it ineffective the NCC did not consider any of the other 12 criteria.

- Page 173 of the draft report is the statement

  The NSW Government also has not given the necessary permission for the National Rail Corporation (NRC) to compete in the NSW freight market.

  The NSW Minerals Council understands that NRC is now able to compete freely for intrastate traffic, including coal, in NSW.