13 February 2004

Professor Mike Woods
Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks
Productivity Commission
Belconnen ACT 2617

Sent via email: wcohs@pc.gov.au

Dear Professor Woods,

Please find attached a further submission by this union to your inquiry.

With respect to occupational health and safety frameworks, the move towards national consistency in mining is already occurring via reform of State laws and requires no further intervention from the Federal Government.

With respect to workers' compensation frameworks, CFMEU Mining and Energy opposes the interim recommendations of the Commission that would enable mining industry employers to self-insure to a greater extent than is currently the case.

Any move to towards a more national workers compensation scheme and greater employer self-insurance should only take place with the consent and involvement of State Governments and major stakeholders including unions.

The use of the corporations power or other options under the Australian Constitution to impose national OHS and workers' compensation systems on the States and on major stakeholders is unwarranted and is opposed.

Yours sincerely,

Tony Maher
General President

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Submission to the

Productivity Commission

regarding the

Interim Report:
National Workers' Compensation and Occupational Health and Safety Frameworks

10 February 2003

Introduction

The CFMEU Mining and Energy Division welcomes this opportunity to make a further submission to the Productivity Commission; this time in response to its Interim Report.

The Construction, Forestry, Mining and Energy Union is a national union of employees registered under the Workplace Relations Act 1996. The Mining and Energy Division has as its members people employed in mining, power generation, oil refining, coke processing and coal ports. Membership is approximately 15,000 people, of whom the majority are employed in the coal industry of NSW and Queensland.

In its Interim Report the Productivity Commission has reached conclusions and made recommendations that will have, if implemented by governments, major impacts on CFMEU members and on the operations of the mining industry in general. There will be major adverse impacts on:

- Occupational health and safety regulation and practice across the mining industry, with industry-specific State legislation overridden by generalist Commonwealth OHS legislation that was never developed to regulate the mining industry and is incapable of safely doing so.

- Workers' compensation systems prevailing in all or most State jurisdictions, with State-based schemes being financially undermined by enabling the opting-out of major multi-State employers.

- In particular, coal mining employees in New South Wales who face having their fully-funded industry scheme being rendered non-viable and having their benefits/entitlements reduced under any alternative scheme. Many employees may be rendered unemployed directly as a result of mine closures arising from the loss of specialised insurance provided through the NSW Coal Mines Insurance scheme

Occupational health and safety frameworks

The CFMEU Mining and Energy Divisions considers that there has been considerable progress towards a nationally consistent framework that balances an appropriate move towards a common approach with the particular and specific needs of the mining industry. With respect to specific mine safety legislation, there has been considerable integration with mainstream safety legislation in all of the jurisdictions. The degree to which there needs to be national regulatory consistency has been achieved, and considerable evolution of the mine safety legislation has occurred without the need for any further federal government intervention.

There is an acceptance across all of the jurisdictions of a duty of care approach along with considerable integration of performance-based outcomes. Where necessary, there has been the retention of specific prescriptive regulation that has been the outcome of considerable consultation with and support from the majority of mining industry stakeholders.

Surprisingly, The Productivity Commission Interim Report does not acknowledge the existence of separate, complementary mine safety legislation and separate departmental responsibility for metalliferous and coal mining in NSW, Queensland and Western Australia. Nor does it acknowledgement the progress towards a general duty of care approach within mining specific legislation. This lack of acknowledgment by the Commission in their Interim Report also suggests a lack of appreciation of the reasons for this approach and the widespread acceptance of it among the key stakeholders.

The continuation of complementary mine safety legislation in these states is a reflection of:

- the unique and specific safety and health hazards that exist in the mining industry and in particular, in the coal industry;
- the need for a specialist enforcement body with the requisite technical skills base and expertise;
- the work environment and conditions of the underground mining sector that create a unique set of challenges for workers, managers and government inspectors.

These factors have led to the retention of separate mine safety legislation that reflects the continuing special requirements of these conditions. At the same time, in each state which continues to have separate legislation, there has been an adoption of Roben's style legislation and, in NSW in particular, a mirroring of many if not most of the key provisions in the NSW Occupational Health and Safety Act. In addition, the various departments in each of the jurisdictions have been recently working towards a National Mine Safety Framework providing an consistent umbrella approach for each of the jurisdictions that is highly likely to be adopted.

It is understood that the Productivity Commission does not see current Commonwealth OHS legislation as adequate for mining regulation and envisages some mechanism by which the federal law could integrate or refer to the more-developed State law in this area.

While CFMEU Mining and Energy admits that this is theoretically possible, we do not know of a mechanism by which that can be readily achieved and we doubt that it can be done in the near future in a manner that does not result in a degradation of mine safety.

The union notes the submission of the NSW Minerals Council of January 2004 on this issue and considers the one paragraph description of how State to Commonwealth transition of mine OHS legislation could be achieved to be grossly ill-considered.

The reform process that has been undergone at State level with respect to mining OHS legislation and regulation has involved all parties/stakeholders and has been exhaustive and exhausting. A similar process to achieve transition to federal law would be even more gruelling considering the multiple jurisdictions involved.

It is not warranted at this time.

In summary, the move towards national consistency is already occurring via reform of State laws and requires no further intervention from the Federal Government.

Workers' compensation frameworks

In this section a number of observations will be made with respect to:

- The Commission's own findings and recommendations;
- References/ citations by the Commission of certain submissions; and
- Verbal testimony to the Commission

The Commission has recommended that there be a three-stage process to a national workers' compensation scheme, with the apparent primary goal of facilitating larger employers to self-insure (pages xxxii to xxxiv).

Stage 1 would only apply to employers already able to be licenced under the Comcare scheme. This would not appear to affect the mining industry. Stages 2 and 3 of this recommendation will, however, impact substantially on the mining industry.

The Australian mining industry is increasingly dominated by a small number of international/global mining companies who would be eligible to avail themselves of self-insurance under a new federal scheme.

Submissions by BHP Billiton and the NSW Minerals Council indicate significant company support for the national self-insurance model being put forward by the Commission.

There is a high probability that most employers in the mining industry would avail themselves of the opportunity to self-insure under a national scheme if it were implemented by governments.

CFMEU Mining and Energy presents the following concerns and observations:

Prudential requirements for self-insurance and government capacity to regulate self-insurance

The Commission appears to downplay the possibility that there is a significant risk of default by large employers who are self-insurers. CFMEU Mining and Energy has substantial experience of companies becoming insolvent leaving substantial unfunded

liabilities to their employees. The case of the Oakdale mine[1] is perhaps the most prominent in the coal industry, but there have been many other examples. Were it not for the existence of an industry long service leave scheme, which was extended as a result of union campaigning to cover such unfunded worker entitlements, hundreds of mineworkers would have been permanently denied their legal entitlements.

Major companies do fail, often spectacularly. Former "blue-chip" mining company Pasminco collapsed with more than $3 billion in liabilities, while the cases of Ansett and HIH in other industries demonstrate that supposedly safe, iconic companies can collapse with major adverse impacts for employees and the public.

The Commission appears blasé about these risks, assuming that bank guarantees, re-insurance and perhaps post-event levies can deal with any possible problems. The history of major bank errors in risk management, crises in re-insurance and major insolvencies do not justify such nonchalance. Further, a future characterised increasingly by tough competitive markets, continual corporate restructuring, short-tenure senior executives and a regime of continual cost-cutting suggest that major corporate collapses will become more, rather than less, common.

The Commission also fails to adequately appreciate that it may be beyond the capacity of governments as regulators to properly police the prudential practices of some major corporations, especially those headquartered in other countries (which is now the norm in mining). Current major operators in the Australian mining industry in some cases barely existed 5 years ago, are now major public companies, and in 5 years may no longer exist.

Xstrata plc, now one of the world's largest coal producers, was the smallish subsidiary of a private Swiss company only a matter of years ago. Today it is a Top 100 publicly-listed company on the London Stock Exchange but still managed from Switzerland.

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[1] On 9 June 1999 the owner of the Oakdale mine announced the closure of the mine and retrenchment of the workforce of 150 people. Collectively the workers were owed $6.3 million in annual leave, sick leave, and severance and retrenchment pay (at 3 weeks per year of service)

Whilst Advance Coal Pty. Ltd. had become insolvent, the major shareholders in the company continue to trade elsewhere in the coal industry and in other businesses. The owners effectively quarantined their losses with respect to the mine.

The cases of massive insolvency at Enron, Worldcom and now Parmalat (all of which had or have Australian operations) demonstrate that assets and liabilities may be acquired, disposed of, reported and not-reported in a rapidly moving manner that is frequently beyond the capacity of regulators to monitor.

For large foreign-based corporations the self-insurance model for workers' compensation may represent a convenient way in which liabilities can be shifted to employees and the public sector in the event of significant financial problems elsewhere.

The failure to involve State Governments

At page xxxii of the Interim Report the Commissions acknowledges that it has no evidence of support from the States and Territories for a uniform national workers' compensation scheme. In the absence of such evidence, the value of the Commission's work in this area is called into question. The fault here perhaps lies in the political process surrounding the Terms of Reference of the Inquiry rather than the Commission itself. It was unwise of the Federal Government to commission an inquiry of the type being undertaken by the Commission – one that treads heavily on matters largely the subject of State jurisdiction – without seeking the support of the States in advance.

Assessment of costs and benefits of national frameworks

The principal purpose of much of the interim recommendation appears to be reducing compliance costs for multi-state employers – which the Commission acknowledges account for less than 30% of all employment. While the Commission provides anecdotal evidence that multi-state employers face higher compliance costs as a result of multiple jurisdictions (eg at pages xxiv and 17-19), there is no attempt to quantify those costs for multi-state employers as a whole. Nor is there an attempt to estimate their magnitude relative to other costs in the workers' compensation system, nor indeed to other business costs. Finally, there does not appear to be any estimate of the costs to Governments and employers arising from the complexities of the multi-stage reform process proposed by the Commission.

Before it is possible to conclude that the higher compliance costs faced by multi-state employers are a sufficient reason for change, this comparison of overall costs and benefits should be done.

The case of Coal Mines Insurance in NSW

The Interim Report deals briefly with CMI at pages 250 to 252, concluding that there is little justification for NSW coal mine workers to be the subject of a separate scheme.

The brevity with which the Commission has examined the scheme can only leave a reader with the conclusion that the Commission's views are ill-considered.

Relevant facts and issues are:

Impact of CMI premiums on investment and production

CFMEU Mining and Energy is not aware that any company / employer has presented evidence that the allegedly high levels of CMI premiums have altered their business investment decisions. This matters goes to the question of whether or not CMI premiums are a significant problem in that they are adversely affecting investment decisions.

The evidence of investment in NSW coal mining suggests that CMI premiums are not a significant issue. BHP Billiton is currently developing a new underground coal mine on the south coast of NSW at a cost of US$117 million. While there have been other investments in the area (notably by Austral Coal) BHP Billiton's investment is easily the largest.

BHP Billiton is also developing the open-cut Mt Arthur North coal mine in the Hunter Valley area. It will be one of the largest mines of its type in Australia (12 million tonnes of saleable coal per annum) and is being developed as a cost of US$411 million.

Xstrata is another major NSW producer. Its former parent, the Swiss-based Glencore, purchased a series of mines from multiple vendors over a short few years leading to 2002. In March 2002 Xstrata was floated on the London Stock Exchange with South African and NSW coal mines as its major assets. The float was heavily oversubscribed.

Rio Tinto is the other major producer in NSW. It has acquired and/or expanded a series of mines in NSW over the last decade. Mostly recently it acquired all the Australian coal assets (mostly in NSW) of Peabody (USA) for US$555 million in 2001.

Rio Tinto and BHP Billiton have recently sold their major Indonesian coal investments while expanding their NSW coal assets, despite Indonesia having much lower labour costs and that nation being a major competitor in the international coal market.

The International Energy Agency in its publication *Coal Information 2003* at pages I.215 to I.220 lists coal production expansion by nation. Of 305 million tonnes of coal production expansion that is "on the books", 143.7mt is shown as being based in Australia. Roughly half of that is shown as being in NSW. This means that in the order of one quarter of global future production expansion for the internationally-traded coal market is forecast to be based in NSW.

In the face of this recent and forecast investment activity in NSW it is extremely difficult to conclude that CMI premiums are a significant impediment to investment.

The complaints of BHP Billiton re level of CMI premiums

BHP Billiton has complained in its submission that it pays $16,000 in premiums per employee in NSW coal mines, but only $3,000 per employee in its self-insured Queensland operations. The relevant facts here are:

- That according to CMI, BHP Billiton's premiums at the time the claim of $16,000 per employee was made were actually $11,269 per person. Furthermore, for the calendar year 2003 the amount paid by BHP was $8,834 per person.

- The reason why premiums are lower in Queensland is, *inter alia*:
  - That the first 5 days of any claim in Queensland is covered by the employer rather than the insurer in Queensland, so claims against insurance are fewer and smaller; and

- That insurers in Queensland are not liable for claims that are over 5 years old. The liability for long-tail claims is effectively passed to the public sector.

The level of CMI premiums compared to similar industries

The average scheme rate for CMI for NSW coal industry employees is 9.8% of wages.

Underground metalliferous mining is covered by the NSW Workcover scheme. The average scheme rate for employers in that sector is 9.9% of wages.

The complaints of BHP Billiton and Xstrata that premiums have increased despite reduced injury rates.

CMI premium rates are currently falling, which is not reflected in the BHP Billiton and Xstrata comments. Further, it seems to have escaped the two companies that premiums are a reflection of *where the company has been, not where it is now*. Premiums are based on the experience of the company over a number of years. The premiums paid by BHP Billiton and Xstrata reflect their history of claims, not their current injury rates.

A further particular issue is that these employers, along with most of the NSW industry, engaged in a major round of retrenchments from the end of 1997 through to 2001 with the workforce decreasing by over 30%. It was inevitable that a large number of workers who had been carrying unreported injuries and illnesses (acknowledged as a major issue by the Commission at pages 39-40) would, as a result of being thrown on the scrapheap, report such injuries and illnesses.

There are many reasons why workers fail to report workplace injuries and illnesses. They include, *inter alia*;

- Loyalty to the company and/or the industry;
- Performance appraisal systems that penalise workers for reporting injuries and illnesses; and
- Cash bonus schemes which reward workers collectively for the numbers of days that pass without a lost-time injury.

All these “carrots and sticks” cease when the worker is retrenched. This has resulted in a bubble of claims, lagging the period of retrenchments, that is now leaving the system.

Employers were warned of the likelihood of this problem at the time they undertook major retrenchments. It should be seen as a consequence of industry downsizing and one that the perpetrators of the downsizing should expect to live with.

Prevention of prompt return to work

The Commission cites a complaint by Xstrata that the CMI scheme does not engender a positive attitude to return to work and rehabilitation (page 251). The clear implication is that it is injured workers who are not encouraged to have a positive attitude.

The experience of CFMEU Mining and Energy is that, as a result of cost-cutting and downsizing at minesites, and the lengthening of shifts and total working hours, mining companies are increasingly reluctant to provide suitable opportunities for workers to return to work on light or amended duties. The employers want a worker back at work if they are 100% fit for work, or not at all.

Xstrata is a case in point. There have been numerous cases of the company refusing to accept the return to work of injured employees.

One such case study could be a Mr Chillingworth, who was an operator employed at Bulga mine and was fit for suitable duties on 20 December 2000; his only restriction being that time each hour be provided for him to stretch so as to avoid further injury. This WorkCover Medical Certificate was modified on 27 December 2002 in which it was indicated he was fit for pre-injury duties with the same requirement.

The employer refused to permit him to commence employment, and ultimately Coal Mines Insurance had to commence paying workers compensation at the full rate. Mr Chillingworth attended a Coal Services Special Medical that indicated he was fit for duty. The Company would not accept the Workcover Medical Certificate or the Special Medical from Coal Services, and relied upon a different medical report to base their decision.

Ultimately the Company terminated Mr Chillingworth - in breach of Section 99 of the New South Wales Act, that prohibits termination within 78 weeks for a reason related to a work related injury. This termination is being opposed by Mr Chillingworth and the Union.

A further example of this is a Mr Stephen Childs, who was declared fit to return to work on 9 May 2003. His Workcover Medical Certificate provided that he was fit to return on normal duties. He attended a Special Medical of Coal Services that indicated he was fit to return to work, with the diagnosis that he had a "fully resolved soft tissue strain of the right glutea muscle" or "fully recovered strain of the lower back with mild irritation of the right sciatic nerve". The injury management consultant advised that, to prevent simular incidents, Mr Childs:

- *"Arrange correct seating position to avoid stretching right leg;*
- *Avoid prolonged fixed posture by frequent moving about in the cabin or various items of plant;*
- *Stretch various muscle groups at normal rest breaks;*
- *Maintain a level of fitness which seems quite good; and*
- *Seek medical attention promptly should symptoms return*……"

Because of this advice, the Company was not satisfied that he was fit for full duties and required him to attend for a further medical. The advice that was provided was no more than reflective of general advice that should be given to all persons that are required to sit in a static position ie. plant operators or persons working in an office.

The practice of Xstrata in these cases seems to be a willingness to accept higher workers' compensation costs rather than participate in early rehabilitation and return to work of injured employees. It is highly inappropriate of the company to be making submissions critical of worker attitudes to return to work when they regularly advise the insurer that no suitable duties exist for people to return to work.

The problem of the industry providing less opportunities for return to work was stated by the Ernst and Young Review of CMI to be a significant reason for problems in the CMI scheme and one over which CMI had no control. This problem would remain under any alternative insurance scheme unless employer practices change.

The verbal testimony of Mr John Tucker, Executive Director of the NSW Minerals Council

In verbal testimony on 4 December Mr Tucker made many generalised comments that should not be taken at face value. Commissioner Professor Woods himself was critical of Mr Tucker for claiming that the Commission had said something when in fact it was the Commission citing Mr Tucker's own claims.

Mr Tucker complains of a "rampant common law culture" (p1164). The CFMEU is informed that Coal Mines Insurance has approximately 2,500 claims on hand, of which around 300 involve litigation. This does not seem a *prima facie* case of rampant common law actions or a culture producing that.

The Ernst and Young Review of the CMI scheme to which Mr Tucker sometimes refers in fact states:

> *"We are not convinced that common law has been a significant cause of the deterioration in the scheme's claims experience. While common law claims experience has deteriorated, it is our view the reduction in return to work rates by claimants has probably been the main cause of increased common law activity. If common law was to be excluded from the scheme with no other changes than it is possible there may not be any significant savings."*

The NSW coal industry continues to have a high rate of injury and illness, and claims arising therefrom. It is *not* comparable to other industries. Before the employers in the industry can mount claims that entitlement to common law action should be curtailed in the same manner as in other industries, there should be an onus on them to demonstrate that they are able to reduce injury and illness rates to levels similar to other industries.

Mr Tucker also makes vague reference to the problems of the Australian dollar and its contribution to cost problems in the coal industry.

These comments must be placed in context. For the period that the Australian dollar fell to historic laws of around 50 US cents most Australian mining companies enjoyed phenomenal profits. They were receiving more Australian dollars per unit of production sold in US dollars than they had ever thought possible.

According to ABARE[2] export earnings from coal increased from A$10.8 billion in 2000-01 to A$13.2 billion in 2001-02 before dropping back to A$11.9 billion in 2002-03.

The A$ has now increased in value from around US$0.58 in January 2003 to around US$0.76 today – about a 30% increase. Other things being equal, this would represent a huge downturn in A$ earnings from coal sales in US$. However, the Newcastle port spot price for thermal coal has risen from around US$25 per tonne in January 2003 to around US$43 per tonne in January 2004. That is, a 70% increase in US$ price that has more than offset the problem caused by the appreciating A$. There are many factors at work in this, but a key reason is that Australia has the largest share of the internationally traded coal market, other countries are unable to supply increased production, demand has been strong and Australian producers – of which there are now fewer than ever and therefore possessing more bargaining power – have made it clear that they will only supply coal that is profitable to produce.

Australian coal producers have gone through a belt-tightening experience during 2002-03 but the last several months have produced coal prices strongly favouring producers. While the A$ is unduly volatile and this creates uncertainty for exporters in general, the position of Australia as the dominant coal producer for export means that A$ production costs have a substantial influence on the world price. This provides Australian coal producers with a degree of protection not enjoyed by other exporters who are small in global markets.

The impact of the Commission's recommendations

With respect to OHS frameworks, the releasing of employers from regulation under OHS legislation and regulations specifically designed for the mining industry would be, quite literally, dangerous. Until the Commission actually examines mine safety legislation in the various States and determines how safety outcomes would be maintained under any transfer to generalist federal OHS legislation, it would be failing in its own duty of care to the community. Any minister acting on a Commission

[2] Data from the Australian Commodities journal published by the Australian Bureau of Agricultural and Resource Economics.

recommendation that has not been based on such research would also be failing in their duty of care.

In respect of workers' compensation, implementation of Stage 2 of the Commissions three-stage process would result almost immediately in major employers representing around 80% of premium income for NSW Coal Mines Insurance leaving the scheme. The consequences are:

- That NSW coal industry employees of those companies would experience an immediate decline in their level of benefits.
- CMI would be rendered non-viable due to loss of scale. It is perhaps ironic that one of the few fully-funded schemes in Australia would be among the first rendered non-viable by the implementation of the Commission's recommendations.
- The remaining coal industry employers would need to find alternative scheme coverage. It is not immediately apparent that such cover would be either cheaper or even available. Mine closures and job losses are probable. Not because such mines were losing cross-subsidies under CMI (as each company's premium is based on its claims record) but because of the loss of a specialist industry scheme providing an essential service that is not readily replaceable.

Allowing some employers to self-insure under a federal scheme while other employers remained under a State scheme would mean that workers doing the same job in similar businesses in the same industry and in the same region could be subject to different workers compensation regimes.

While this may be beneficial for a small number of large companies, it is hard to see how it benefits employees or reduces the complexity of the overall workers' compensation system.

CFMEU Mining and Energy therefore opposes the interim recommendations of the Commission that would enable mining industry employers to self-insure to a greater extent than is currently the case.

Any move to towards a more national workers compensation scheme and greater employer self-insurance should only take place with the consent and involvement of State Governments and major stakeholders including unions.

The use of the corporations power or other options under the Australian Constitution to impose national OHS and workers' compensation systems on the States and on major stakeholders is unwarranted and is opposed.

*** END ***