INDUSTRY COMMISSION

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY, NEW SOUTH WALES

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Black Coal Industry Inquiry

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PRESIDING COMMISSIONER: Good morning, lady, and gentlemen. We are resuming today the public hearings on the Commission's draft report on the Australian Black Coal Industry. Our intention is always to keep these hearings as informal as we can but we do ask participants to be accurate in the information which they provide to the Commission.

The hearings as you can see, are recorded and transcripts are recorded and transcripts of them will be publicly available. Bruce Gooday, who I think is known to you, seated at the back of the room, will be able to tell you how to obtain a copy if you wish to do so.

Our first participant today is the New South Wales Mineral Council. I would be grateful if you would each, for the purposes of our transcript, identify yourselves and the capacity in which you are with us today.

MS PENSON: Barbara Penson, I am employee relations assistant director.

MR PORTER: Denis porter, deputy executive director.

MR STILLER: Laurie Stiller, occupational health and safety manager.

MR CLACKER: Ken Clacker, I'm a consultant working on implementation of the competition policy reforms to the Hunter Rail System.

PRESIDING COMMISSIONER: Thank you. I would also like to express our thanks to you, Denis, for this very helpful further submission that you have provided to the inquiry. We will certainly be taking steps to pick up any of these factual inaccuracies that may have been in the draft report and more generally, picking up a number of the broader observations that are in the main body of submission.

I do not know whether you wish to make any remarks at this stage?

MR PORTER: Perhaps just one brief matter, which is I guess, touched on in our summary. I recall that the initial round of public hearings, I think with Mr Horton-Stephens, asked us about whether we felt there was a sense of urgency in the industry about the need for change and we attempted to grapple with that issue and I think that by saying that yes, there is a sense of urgency there, whether it is as great as is needed is a debatable point. I guess the one point I had in relation to your draft report which I think has almost universally received a very good reception in the industry, is that it probably could do a little more to convey that sense of urgency to all the stakeholders and I say that in particular because of the way the market has changed even in recent months And we touch on that in the submission with the massive changes to the benchmark pricing system, the very major move by the major customers overseas to buy an increasing proportion of their coal on the spot market and so on.

So there is a change out there in the market, I think, which is making the need for change here even more urgent. And of course, we also touch on the fact that the Japanese are taking a fundamental re-look at their whole energy needs in the future and that's something else you might like to take account of. But if - we are happy to try and answer any of your questions on any of the points we have raised here.

PRESIDING COMMISSIONER: There are a number that I would like to discuss with you. On that point you have just referred to, we have taken, as you may know, our view of the future, essentially on the basis of what we regarded as the most expert advice that was available to us, a combination of work done by ABAIR and some other private sector bodies who are looking at market prospects for black coal. I think in the light of what you have said we will be keen to get back to them and see if they too have been re-assessing the situation in the light of more recent developments. The material which we have used I think, goes back to, at least in Abair's case, to their updated projections provided to their annual outlook conference which I think was held back in February, so that is already three months ago and circumstances can change.

We otherwise, I think, have questions mainly related to the policy oriented parts of the draft report, Denis, but I might just mention that in connection with the industry performance area of the report we intend as we indicated in the draft report, to convene a workshop, a further workshop, perhaps, since we held one earlier in the year, at which we intend to expose to interested parties and experts, the result of the bench marking study which is being done for us as you know by Tasman Asia Pacific. That is likely to be held in early June and we would be very glad to have some involvement from you and possibly some of your members. We think it is an important event, one in which we are hoping to get a good deal of interaction between the consultants and the people in the industry.

I might also say as you have raised the matter in a relevant part of your latest submission, that we too are seized with the difficulties associated with this work and in particular, the danger of drawing faulty conclusions on the basis of partial indicators of one kind or another. We again, had some general observations on those sorts of difficulties in the draft report and I am sure we will be keeping them in our mind as we work towards the final report.

Just one point of detail on the market situation though, Denis, you have mentioned in the early part of your submission that there is a strengthening trend for use of the spot market by some of our major buyers in fact, and you have cited some reported shifts of that kind on the part of Kepco and the Japanese power utilities. I have seen some reports of that kind myself in the press. Do you have any harder evidence of what is actually going on? It is easy or difficult to obtain that type of information?

MR PORTER: The numbers I think we quoted in the submission came from, for example, Barlaiyonka, who as you know are consultants who track the industry very closely.

PRESIDING COMMISSIONER: Yes.

MR PORTER: We don't have any special expertise in the market so we do tend to look to those consultants or industry marketing people. Probably the best thing I can do is send you copies of the source for those and if I can find any more information I'll do that. But I mean, yes, there is a lot happening out there in the market and it is reflected in those dramatic shifts in the proportion of sales on spot.

PRESIDING COMMISSIONER: Yes, well, if you have any more in the way of factual sources that would be helpful to us, I am sure.

Let me now turn to what you had to say about work arrangements. I am just going to take issues more or less in the order addressed in your submission. The first one I was interested in was what you have to say about bonus payments as an award matter. I have the impression that you would prefer that these were excluded as a possible allowable matter under simplified awards. Is that a correct inference that I have drawn?

MR PORTER: I will ask Barbara to address that.

MS PENSON: I think it would be the general view of the industry that it is something more appropriately addressed at the enterprise. Whilst it isn't a matter currently addressed in detail in the industry award it is certainly a matter that the AIRC sees as an appropriate matter to deal with as allowable.

PRESIDING COMMISSIONER: Is that picked up - I am sorry to interrupt - under the Customer Practice Provisions under the awards? Is that where that comes in?

MS PENSON: Assumedly it could be picked up there but it's certainly a part of agreements at the workplace and it is an allowable matter under the current Act but I think that there would be a diversity of views as to what is the definition of bonus and you would appreciate that it varies significantly between industries. In this industry it has always had a history of being linked to gross production which as you would appreciate is a very poor indicator of perhaps the labour component in terms of bonus.

What we are seeing now is with the significant reduction of labour at most mines where you have a simple formula of production divided by a number of employees, a significant unintended consequence of that where the labour costs are increasing instead of decreasing in that area and many mines are endeavouring to negotiate a productivity, and I emphasise the differential

there, bonus so that it reflects the contribution of labour to that production outcome. And that is proving somewhat resistant as the Commission perhaps takes a different view of how the production bonus should be handled. And we have had a few significant cases which have addressed the matter and companies may wish to make submissions separately as to their views of the outcome. Certainly I think the MIM case would demonstrate their dissatisfaction with the way they have handled that outcome and certainly BHP have been endeavouring to turn around that concept of the production bonus as well.

So yes, they need to be able to approach it far more flexibly at the enterprise.

PRESIDING COMMISSIONER: Yes. So as I say, you would really prefer a situation in which that was not permitted to be an allowable matter?

MS PENSON: That's correct, yes.

PRESIDING COMMISSIONER: On training, I am not - well, I am interested to hear what you might have in the way of views on the advantages of a kind of a centralised approach to industry training as distinct from essentially and in-house or on the job approach to training. I might say we have heard from some mining companies that they have a pretty strong preference for the latter. My reading of your submission tends to suggest that you would still see some role for a more centralised institution based approach but I may be misinterpreting you there?

MS PENSON: I'm sorry, I'm not quite clear on what areas you are suggesting I centralised. Do you mean in terms of the management training?

PRESIDING COMMISSIONER: That could come into it but I am thinking more of traineeship. If you look at section 4.4 there on - mine's a fax so I am not quite sure what page number it is - -
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MS PENSON: Right. No - yes, as in terms of the traineeship - - -

PRESIDING COMMISSIONER: You clearly favour a situation in which you have a consistent approach to traineeship across metalliferous and coal mining. That is as I read that part. You say "A consistent model would facilitate more opportunities for entrants to both sectors of the industry." What was not coming through clearly, I guess, is whether you see that approach being one which operates under some sort of mining industry training advisory board or how you would see it coming about, I guess is the source of my question.

MS PENSON: Very strongly I could say that training is certainly an enterprise issue. The role of the industry training advisory bodies is to

facilitate the linkage between the State Government and the Federal Government and what industry might like to see as outcomes delivered by those processes but in terms of how an enterprise accesses its training is entirely up to the company and should strongly remain that way. A traineeship is I guess, a product for want of a more effective word, that is available for companies that might wish to make use of that product and that is being developed by a company in concert with the ITAB.

The current traineeship that is being developed for the coal industry no doubt will be accessed by a number of companies and can be varied to suit their needs. There's no requirement that they access it or use it and in the current environment perhaps they won't have a capacity to. I guess, in theory there is no reason why the traineeship for both industries can't be the same and that would facilitate a flexibility for people to move between the industries. So that would be the reason for encouraging that route.

PRESIDING COMMISSIONER: So if you look at it from the point of view of a coal mining company, what you are suggesting is sort of a horses for courses approach. If a company wanted to do all of its training at the mine using its own facilities and experience that would be okay, if on the other hand it wanted to send some of its employees off to a training institute to learn something about coal mining, that would be okay too?

MS PENSON: Certainly, and that's the way it occurs now, the ITAB just ensures or facilitates the competencies that are available and what the industry wants and in terms of a traineeship it could be a base model and of course each company put on a module on top of that where it reflects their particular enterprise arrangements. But there's no element of compulsion in it at all.

PRESIDING COMMISSIONER: Thank you. We had as you know, raised in the draft a question for participants as to any possible amendments to the Workplace Relations Act that they might have seen as being helpful to better productivity in the industry. The one that you seem to have focused on mainly, I think, in your further submission is the use of contractors, you have in fact said that you would like to see an amendment which prohibited the utilisation of contractors being an industrial issue. How would you see that being put in place?

MS PENSON: If we are to utilise the facilities of the Workplace Relations Act, I guess again, it could be a non allowable matter for resolution by the AIRC. There is, again, as you infer, the Customer Practice clause and a number of the agreements at work site are influenced in the number of contractors that are utilised, where they can be used and indeed, which companies are preferred. And that does inhibit the flexible use of contractors on site and for what they might be used for, and as you would appreciate in the current economic environment, it is critical that companies have the

greatest amount of flexibility that they do have and we would encourage that this should be a management prerogative and not an issue that is seen as resolvable through the AIRC.

PRESIDING COMMISSIONER: Some companies have been able under existing legislation to bring about use of contractors at mines, indeed, I think we have cited the case of Burton as being one where a contractor operates the mine entirely.

MS PENSON: Yes.

PRESIDING COMMISSIONER: Is the essence of your point that even though that can be done it involves a lot of difficulty and expense to do it or is it more a question of management not being prepared to take advantage of what is possible under existing legislation?

MS PENSON: Perhaps in Queensland the environment is different given that most mines are newer and their long history is not an impediment to their changing their ways. I think in New South Wales one of the burdens we carry is a very long history, a very long period in which work has been organised in a particular way for a whole range of reasons that don’t meet our current competitive environment and therefore we are facing a difficult paradigm shift from what the past environment was into what the future, which is coming upon us more rapidly than was anticipated, requires for survival.

So therefore that shift between how the world was in the past and what we need now to survive is probably a bigger leap in terms of people’s view of the world and certainly perhaps management’s capacity to also adapt to that environment. So we do need a radical shift very quickly and we need all the help we can get and issues such as changing the Workplace Relations Act, I think, helps to send very loud messages to all parties that management needs to be able to deploy their labour in the best means fit to have a productive outcome.

MR PORTER: If I could just have - - -

PRESIDING COMMISSIONER: Would this necessary - I am sorry, if I can just follow up that point that Barbara was making, Denis, I guess it’s still not clear to me what in the legislation you would change. I have understood this to be more a matter of a decision by the Commission possible under existing legislation rather than a matter which requires an actual Parliamentary amendment to the legislation. Am I missing something?

MS PENSON: No, I think you’re alluding to the correct view, however, I think a change to the Act would help to encourage that paradigm shift that it is part of agreements at workplaces now and as those agreements come up for renewal of course the view of the parties are that past arrangements should

continue and I think a message through the Workplace Relations Act amendments would help the negotiating parties focus a little more clearly on those productive elements of their agreements.

MR PORTER: Just to add to what Barbara has said. Also there are examples in New South Wales, of course, where contractors operate lines, particularly Greenfields Operations and I think there are some good case studies there. The problems here, as Barbara said, are more historical and more related to the established mines in many cases. It does get back to management, competence and strength and so on, I think we acknowledge that, but such a change to the Act would, as Barbara said, certainly send
some very helpful signals and perhaps strengthen management resolve.

PRESIDING COMMISSIONER: Are there any other areas of the WR Act that you would have in mind being amended to facilitate the efficiency of the industry?

MS PENSON: I think you certainly touched on some of the major issues. It is more a matter, I guess, of the parties at the work place taking what is their appropriate role in negotiating these issues and anything that can be seen to encourage that process
is helpful.

PRESIDING COMMISSIONER: Right. Let me now move on to the transport area.
I should say in passing though that I am grateful for the attachment, or appendix as you call it, that has been provided by Drayton Coal was of some interest to us, an area we need to explore in a little more detail, I think.

Now, rail transport. I have a series of questions here. One of them picks up the main point that you have covered in this part of your submission but before I get to that, let me discuss a few others. I'd be interested if you have any view on the role of negotiation between the Rail Access Corporation and FreightCorp and individual users in the setting of access prices. An example of what I'm looking for is the issue of whether individual users who have similar requirements should be able to obtain different rail freight or access charges on the basis of their negotiating skills.

MR CLACKER: At the moment, of course, users, coal companies, don't have
any right at all to participate formally in the negotiations on access prices. The Hunter Valley mining industry has taken the view that they would like to have prices set on a fully distributed cost basis. There is lots of scope for negotiation - also of course they'd like to be able to negotiate direct with the access provider but because the rail operator has no direct interest in what the access charge is as long as it's passed on fully to all of the users. So they don't care what it is if they're passing it on in full.

Yes, the users think that the best way to do this, or to have prices set, is on a

fully distributed cost basis and that, of course, leaves lots of room for negotiation about what assets are you going to pay capital charge on and what should be the rate of return, what costs are being imposed on the infrastructure by the users, how should overheads be distributed. All those types of things leave room for negotiation.

The problem we have with the regime at the moment is that it just says, "Well, you won't pay more than that" or "You won't pay any less than that" and it leaves a big void with no guidance as to what should guide the negotiation. There's nothing in the regime that says you can negotiate so that the use of the infrastructure is as efficient as possible. There's just nothing at all to say how you go about negotiating where you should be in that range and with the monopolists, the monopolist has the last say.

PRESIDING COMMISSIONER: Yes. But if you had a set of appropriate and transparent pricing principles established by an independent body, say, in the New South Wales case, IPART, would that go a long way towards clarifying the basis of access prices without a process of individual negotiation? I'm trying to understand what the role of negotiation by individual users achieves if - and I know you don't have this at the moment, but if you had a situation in which you had these independently established and transparent pricing principles.

MR CLACKER: Right. I think it's likely that there could perhaps be one or two test cases which would come out with the principles, after which users would be able to see how these principles are applied and that - as long as the results of arbitration or of negotiation were transparent, then people would pretty much know where they stand. There should always be room for individual users to go to the infrastructure provider or to the arbitrator and say, "We have a different view from RAC on just what costs we're imposing on the system, or how we might be able to improve efficiency and how that should be taken into account in access charges."

PRESIDING COMMISSIONER: I gather from what you've been saying, Ken, that you don't really see at present a lot of operational efficiency in the negotiations, the price negotiation process that presently exists with FreightCorp and RAC?

MR CLACKER: When you say operational - yes, I agree.

PRESIDING COMMISSIONER: You seem to be saying you've got this big margin within which identification of proper pricing and charging is difficult.

MR CLACKER: Yes. We don't see that under the current pricing negotiation arrangements that there's much scope for price signals to be incorporated in the pricing arrangements which will encourage the industry to move to more efficient transport arrangements over all. You're probably

aware that the whole transport system from the mine for rail, to the port for ship loading, is a very complicated business and it all needs to be highly integrated. At the moment, there could be improvements in the integration and everything that the pricing systems - the proper pricing signals in there, in the right application of (indistinct) of access prices could greatly help to improve efficiency in that area.

PRESIDING COMMISSIONER: What information about RAC's operations do you think should be available publicly, including to users of course, to create those - if I could repeat. What information about RAC's operations do you think should be publicly available to establish the transparency about access pricing arrangements? For example, would you like to see material publicly available on evaluation of RAC's assets, (indistinct) rate of return?

MR CLACKER: Yes, yes.

PRESIDING COMMISSIONER: Any other matters of that kind that occur to you?

MR CLACKER: Yes. We think that the RAC's prices on a section by section - sorry, RAC's costs on a section by section basis should be publicly available.

PRESIDING COMMISSIONER: If I could come more particularly to a point you raised in the submission about the role of the regulator. You think there should be one but that the regulator should be independent of the arbitrator. I'm not quite sure what you see is the value of an arbitrator, independent of the regulator and how such a system would work and who the arbitrator might be.

MR CLACKER: The Rail Access regime is different from some or all of the other regimes around. These other regimes do seem to have a regulator who sets prices and if people are unhappy about the way these prices are being implemented, they can go to an arbitrator to arbitrate on a particular price.

Now, the Rail Access regime doesn't have a regulator in that sense. All it has is an arbitrator so that the sorts of problems that can arise were demonstrated by the statement in the RAC's annual report that said, "We didn't comply with the regime this year."

PRESIDING COMMISSIONER: Sorry, what was that? They didn't?

MR CLACKER: There was a statement in RAC's annual report in 1997 that said, "The RAC did not comply with the regime."

PRESIDING COMMISSIONER: Yes. I think I noticed that.

MR CLACKER: Right. Now, we don't quite see the point in having a regime if RAC can say "we didn't comply" and there's been nothing that has happened as a result of that disclosure of non-compliance.

Now, as we see it, there needs to be someone who has oversight over RAC, as there is in gas and electricity regimes.

PRESIDING COMMISSIONER: But you wouldn't call RAC a regulator, would you?

MR CLACKER: No, no.

PRESIDING COMMISSIONER: RAC is a supplier.

MR CLACKER: That's right, yes. So what we're saying is there needs to be someone who looks at RAC's operations and knows that, yes, RAC is not complying with the regime and has some sort of redress, some power to say to RAC, "Well, you've got to change what you're doing so that you do comply with the regime."

PRESIDING COMMISSIONER: But why then do you need an independent arbitrator? Isn't the regulator the agency to which a user with a complaint could reasonably go?

MR CLACKER: I think we see that there could be conflict of interest between the two roles and this was again pointed out in the New South Wales Gas regime when it was certified. There was a question there which arose in submissions to the NCC about possible conflict of interest between IPART's regulation and the arbitration role and there were some changes made to - although IPART finished up having both roles but there was some distinction made between those two roles and some steps made to help resolve possible conflict of interest problems.

MR PORTER: Also, John, I think if the two parties, if RAC and the other party, agreed on an arbitrator, why not use that other person or organisation. It doesn't - apart from Ken's points, if there is an agreement, fine, whoever that person may be, or organisation may be.

PRESIDING COMMISSIONER: So I'm looking at one of our recommendations here, Dennis, which is number four. You may not have it with you but let me just read it. In connection with both New South Wales and Queensland it said, "Pricing principles and asset valuations involved in determining prices for access to rail infrastructure should be established," I think that's common ground among us, "and published with freight customers having a right of appeal," by the agencies which would have published and possibly established those principles, IPART in the case of New South Wales, "regarding the application of the principles."

Now, you are regarding that as not necessarily sufficient, I take it, are you? Are you also seeing it as inadequate? You'd like to have a situation in which the parties could voluntarily agree on the use of an independent arbitrator.

MR PORTER: Yes.

PRESIDING COMMISSIONER: Do you see this as not enabling that to occur or, indeed, as possibly being open to a situation in which some sort of conflict of interest as regards the role of the regulator, IPART, could occur?

MR PORTER: I think there's always that potential for conflict of interest. I mean, what you've recommended I think would be a major step forward.

MR CLACKER: Yes. I think it sounds to me that's more like the regulatory role that we had in mind.

PRESIDING COMMISSIONER: Yes, that's how we were seeing it.

MR CLACKER: But I think that there would be occasions where the parties may wish to arbitrate a particular dispute which mightn't come under that umbrella.

PRESIDING COMMISSIONER: I see. So it's an either/or situation?

MR CLACKER: Yes, yes.

PRESIDING COMMISSIONER: This could in some cases be an adequate model but you could also envisage a different situation in which the parties might want to have somebody else sorting out an issue. Would you see any other way in which an arbitrator could be selected, other than by voluntary agreement of the parties concerned?

MR CLACKER: Well, under the regime at the moment, the regime service, IPART, is the arbitrator. That's obviously an alternative but it's not one that we - - -

PRESIDING COMMISSIONER: You prefer the - - -

MR CLACKER: It's not consistent with the competition principles agreement, which says that the parties must be able to appoint an arbitrator rather than have one imposed on them.

MR PORTER: John, I should also add that we're about - probably late next week we're about to go back to the NCC with a detailed submission on its draft certification paper and we'll supply you with a copy straight away.

PRESIDING COMMISSIONER: Good.

MR PORTER: It addresses - it's a very detailed submission and it will address maybe in a little bit more detail some of the things we've covered or we've touched on here.

PRESIDING COMMISSIONER: Do you think experience in New South Wales as regards an independent access provider, RAC, and a freight provider, FreightCorp, has been beneficial?

MR PORTER: Perhaps if I can make a comment and then Ken can come in. I think it has. We supported the break up of the old SRA into those components. We've still got some concerns, clearly, about the Rail Access regime and they're mainly concerns that relate to RAC and, I guess, government policy on pricing and so on. FreightCorp, I think established itself as a fairly efficient operator. We don't have any competition in the system yet but I think, from what I can understand, FreightCorp is acting more and more in the way of taking - it's taking into account what the industry is saying and taking into account that competition may come very quickly.
So I think it's moving in the right direction, certainly.

PRESIDING COMMISSIONER: That, I take, might be in the nature of further improvements that you'd like to see, more competition?

MR PORTER: I think so. The Hunter Valley, for example, can support - we think it certainly can support more than one operator. It's a very lucrative business, I think, for RAC and FreightCorp but when you're talking about a 50 million tonne a year coal business, we think there's room for other operators to come in there. But I think at least the threat of competition has been important to date.

PRESIDING COMMISSIONER: I wanted to ask a few questions about an issue which I don't think is mentioned in your submission and that's the ports. We raised a question in the draft report as to reasons why waterfront charges should differ between ports, allowing for the fact that for the most part these ports are provided by a single owner, typically a government. Do you have any thoughts on that?

MR PORTER: Yes, I do. I didn't address the ports in here. I sought some feedback from the two terminal operations here and unfortunately we were unable to do that but I will follow up with them. If you look at New South Wales, you've got two operations which are both managed by the - operated by the industry and, in the case of Newcastle, owned and operated by the industry and, in the case of Port Kembla, largely owned - well, in a sense owned by the industry although some of the facilities are leased from the government, but you've got a massive difference in through-put.

In Port Kembla, you're probably talking currently a through-put of something in the order of 10 to 12 million tonnes. PWUCS's through-put is probably

annualised at something like 65 million tonnes at the moment. That's having a big impact on charges clearly. Queensland, I can't speak with any authority on but I think there are differences there depending on which port you're talking about and which port has or is in the process of investing in (indistinct) capacity and how that's charged out. So certainly in terms of Newcastle and Wollongong there is a major gap in the charges and I think the major factor there is simply this report and the scale. If I could also add to that?

PRESIDING COMMISSIONER: Yes.

MR PORTER: Another fact in Wollongong/Port Kembla, which the industry is trying to address with the state government is the conditions of the lease, what the charges are for the lease and there is still a significant charge being paid back to the government and we are trying, given the state of the industry in the south and the west, we are trying to get that re-negotiated down, without much success to date.

PRESIDING COMMISSIONER: Do you think sufficient use is made of prices in terms of improving the efficiency, provision of coal waterfront services. Could more be done in that area?

MR PORTER: I believe it can. Again, a personal view here and I think the industry is grappling with this, particularly up in Newcastle, but I have a personal view that the common loader charge and everything that goes with it is the wrong way to go. I think again, we need better price signals at rail system, we need better price signals at the ports.

PRESIDING COMMISSIONER: Including services like blending?

MR PORTER: Yes, indeed, yes. For example, the Japanese we believe sometimes complain about the number of coal brands or blends there are, particularly out of a port like Newcastle. And that's true there are dozens and dozens of them, over a hundred of them now. A lot of those are probably very similar coals. But I think if you had a pricing system which took into account blending requirements, stockpile space, time of coal sitting on the stockpile, industry practices and attitudes would change.

PRESIDING COMMISSIONER: Talking about Newcastle, the information you have given us in one of the appendices - it is encouraging to hear actually that the problems of last year seem to be being sorted out at Newcastle. There's a statement though that on the demand side a capacity allocation system has been established. Do you understand the nature of that system, is it a non-price system, or a price system?

MR PORTER: I am trying to recall the details now.

MR CLACKER: Yes, it is a non-price system, mechanical capacity type arrangement.

PRESIDING COMMISSIONER: Did they, do you know, consider the use of the price mechanism to allocate use of the waterfront?

MR PORTER: Not that I'm aware of.

PRESIDING COMMISSIONER: No.

MR CLACKER: That system hasn't been implemented. I think it was approved by the ACCC, but by the time it was approved the queue had gone down and so it has not been implemented.

MR PORTER: It's in the top drawer to be pulled out if necessary. Also the ACCC put some quite stringent conditions on the system, you could only operate up until September this year when the new capacity is in place. I think the queue had to be so many ships - was it 25 ships for seven days at least. The industry I think generally doesn't expect the systemto be needed or used, but it is there if necessary.

PRESIDING COMMISSIONER: Thank you. I think we can now move on to the important area of Occupational Health and Safety. Perhaps you could help us first on the factual front, Dennis, as regards this issue of regulation of open cut and underground mines. What in your view has been transferred in the way of inappropriate regulation from underground mines to open cut, could you give us any examples on that front?

MR STILLER: I think the management structure for a start is a reflection of the underground, so again, given the different level of hazard involved in being managed, I mean you would have to argue whether or not that was essential and needed to be prescribed. I guess that is the strongest example.

PRESIDING COMMISSIONER: Too many positions specified, is that what you're - - -

MR STILLER: The specification of positions, I mean, is it ultimately necessary.

PRESIDING COMMISSIONER: I see. It may not be necessary at open cut at all?

MR STILLER: That's correct. I am just trying to think off the top of my head whether there were any others. Nothing else leaps out at me, but that is sort of a key example. The representative structure I guess, has also been transferred across, so the check/inspector situation that applies in underground mines applies to open cut mines, another good example.

MR PORTER: Plus, if I could just chip in there another example may be I think the attitude and practices of the inspectorate which came out of the underground sector, I think also reflected in the way the individual inspectors go about equipment approvals and in the Hunter Valley for example, a lot of companies will complain about the cost of modifying machinery, major items of machinery which might be used all over the world or in other sectors in Australia. But to be operated in the New South Wales coal industry, in the open cut sector it might require $100,000 of modifications. So again, there is a link there, I think.

PRESIDING COMMISSIONER: Yes, we noticed that point raised earlier in our inquiry. Are there though, any residual safety issues that might apply in the case of mining environments in this country, more particularly in your case in New South Wales, which might justify some additional checks, rather than a simple approval of a foreign authorisation as being sufficient in itself.

MR PORTER: Are we talking of the open cut sector here?

PRESIDING COMMISSIONER: Both.

MR STILLER: I think it is reasonable to always - and most of the mines, as a matter of course, would risk assess any new item of equipment that comes on side and in fact there has been some positive change back through the manufacturers to - changes to equipment that then get spread world-wide. But I guess often it is the case that this ties up equipment - the arrangements that are in place for approvals and like, will tie up the use of the equipment for extended periods of time and there is not a lot of flexibility in that. But I would agree that most mines would and should go through a process of risk assessing new equipment that is brought on site.

PRESIDING COMMISSIONER: One area which has been mentioned to us in our travels around mines, is the danger of use of aluminium underground in particular, of course. I gather that restriction on the use of aluminium is related to a case in the UK, I can't remember exactly when the case occurred, but some have said to us it was never really clearly established that the use of aluminium in that situation had in fact been the source of the safety problem. Is that an area in which countries other than the United Kingdom specify avoidance of the use of aluminium, as apparently we do?

MR STILLER: No, I'm not aware - certainly the US does not.

PRESIDING COMMISSIONER: Does not?

MR STILLER: No. In fact there was a project that was funded through the ACARB research program, specifically looking at that issue, so there is quite a deal of documentation, which if you wish we can make available to you. But as far as I am aware, UK and Australia are the only ones that have those blanket bans.

PRESIDING COMMISSIONER: We had suggested in our draft report that regulations - existing regulations, have been inappropriately applied from the underground context to the open cut. I am not quite sure what you have in mind when you refer to separation. There may well be something to be said for having separate rules for the two types of mine, is that really what you have in mind?

MR STILLER: It is more going through a process of looking at those - as a separate process. At the moment both come under the one, both are dealt with under the Coal Mines Regulation Act with their own sets of regulations and it would seem to us that if the process resulted in a separate consideration of the two that may well lead to a more rapid perhaps, and a more performance based regulatory regime for the open cuts than would be the case if we attempted to do both together, if you like. Then that possibility, that option of simply mainstreaming the open cut, for example under the OHS Act and it's regulations, is one option. That could be considered and yet would probably be inappropriate for the underground sector.

PRESIDING COMMISSIONER: When you refer to mainstreaming, you have that in mind essentially for open cut but not for underground, is that the way I should interpret it?

MR STILLER: Yes, I guess mainstreaming in this sense is meant to mean that you simply move open cut out from under the CMA Act and its regulations and apply the OHS Act and its regulations. We have - the view would be that the inspectorate - the coal inspector would remain the authority to undertake the inspections under the Act. We are simply suggesting it should be considered as an option, there is by no means uniform support for that.

PRESIDING COMMISSIONER: Are there strong reasons why you would not want to see underground mine safety arrangements also mainstream?

MR STILLER: I think to the extent that they can be, I think that is a positive, but I think there is a recognition that there are particular hazards with underground coal mining that need special attention. So I think we should maintain a consistency with the mainstream Health and Safety Act and regulations and where the regulations are appropriate for underground mines they should be applied to underground mines. But I think there is a recognition that there are some special needs of the underground sector that need to be considered.

PRESIDING COMMISSIONER: I think you indicated that you felt that what we had proposed without - a need to recommending in the draft report a

general OH&S duty of care approach, but supported by a continuation of legislative regulation for core hazards. Is that what you see as - I think you have indicated you thought that was broadly supported.

MR STILLER: Broadly supported.

PRESIDING COMMISSIONER: Broadly supported, yes.

MR STILLER: It really depends, and I think central to this whole thing is the mine safety management plan issue and it comes down - it depends what you mean by mine safety management plan and how the mine safety management plan fits within the whole regulatory regime. If you follow the type of mine safety management plan that is outlined in that Systek document, in effect it would contain a lot of the prescription that currently occurs in underground mining. It would include things like management structure, it would include specific rule and requirements relating to the control or risk, it would form the basis for the inspectorates inspection process. I think if you use that model at the end of the day there wouldn’t be an enormous amount left to prescribe in regulation.

But I think that option needs to be left open, I would I guess in moving towards regulatory reforms, start from the basis of what is a mine safety management plan, how can we develop those to really replace an existing regime, that is, it doesn’t take account of the differences that occur between mines, the different levels of risk, the different issues that are being managed. I think that concept is a poor one and perhaps needs to be fleshed out a little bit in the commission document for it to make sense.

PRESIDING COMMISSIONER: Yes. I think you are right, and that was why we didn’t make a recommendation.

MR PORTER: One of the problems in trying to communicate this concept I think is, once you start talking about mainstreaming and less prescriptive systems and so on, individuals and organisations in the industry, some of them, take this as deregulation and letting the bastards loose, and so on. To try and get the message across that a duty of care system in safety is in fact, or should in fact be more onerous in its requirements on management. It is very difficult. So if you could address that in some way in your report I think that would be useful. We try to do that, but often it is not accepted or people often don’t want to accept that reasoning.

PRESIDING COMMISSIONER: I guess in our draft report stage we found ourselves in a situation where the commission itself had previously in one of its reports suggested that a duty of care approach was one that should be essentially universal across all Australian industry, yet we had nagging reservations in the context of this particular inquiry, that there may be some sufficiently substantial hazards that might require some variation on that broad duty of care scene.

Of course the existing approach of heavy prescription has been criticised on a number of grounds, creating apathy and compliance mentality, insufficient attention to identification and management of some safety - potential safety problems. If one were to continue with some element of prescription, you know, essential, serious core hazards, would you see those deficiencies as identified in the present system of high prescription as being likely to continue. In other words would that constitute some sort of reason for going towards the duty of care with a carefully specified safety management plan approach and no prescription?

MR STILLER: We do operate under a duty of care regime, I mean, let's not ignore the fact that we do operate under the OHS Act, the duty of care is there, it is simply the more prescription you add in the next level or next layers of regulation the more it dilutes the duty of care, because it in fact describes how you will meet your duty of care. So it provides guidance, it makes it very simple, it provides guidance. But also provides - it perhaps means that there are gaps in there that people can hide behind. I think people are less accountable under that arrangement than under a broader duty of care, a model where there is less prescription. But recognising that, maybe at the end of the day there are some areas that do need to be prescribed. I am yet personally to be convinced of that.

I think if you started from the basis that the mine safety management plan is a means by which the company demonstrates that it (a) has identified all its core hazards, and (b) has in place a system of control of those hazards, then I can't see where the prescription is required. Certainly there would be standards and codes that could be used to judge the response of the company in terms of its adequacy. But at the end of the day they are required under their duty of care to control these hazards, it is contained in the plan and they are held accountable for implementing that plan. It is exactly the regime that operates in the off-shore petroleum industry extremely effectively and there are some major risks there to be managed and controlled.

PRESIDING COMMISSIONER: Are there any reasons why you might - perhaps this is a difference from the off-shore petroleum industry, you might have some concerns about the capacity of some smaller mining companies to operate under the approach you were just outlining? Thereby, perhaps requiring some further prescription?

MR STILLER: Certainly I guess that would be the reason why you would have a significant amount of guidance and if you take the code of practice as being a statement of a reasonable approach to meeting the management of a hazard, then small mines are more likely to simply adopt the approach laid down in the code of practice. A larger more resource rich mine may well deviate from the code of practice, because it can set up a more - a different

regime, it has more resources to enable it to do that. So I think at the end of the day a small mine has to control the hazards no less well, particularly where there is potential for a high level of catastrophic outcome. They have to do that as much as a large mine.

PRESIDING COMMISSIONER: You have indicated that you think these plans, the mine safety management plans, should be accepted but not approved by the inspectorate. Could you tell me what you really mean by that?

MR STILLER: It is a fairly subtle distinction. I think the more he inspectorate gets involved I guess in these plans and putting their stamp of approval, the more you are shifting the onus of responsibility from the employer to government. So you are moving towards more of a shared responsibility, which really under the current system with all the approvals, that rarely occurs. So there has to be a balance in there, on government to - it's appropriate for an inspector to make an assessment about whether or not the management plan provides a level of control that is reasonable and acceptable against standards and guidelines, but at the end of the day, it's the mine management that's responsible.

PRESIDING COMMISSIONER: But what about a situation where a mine inspector has been given a plan by a company, he accepts that plan, but he identifies a fault in the plan, what would you envisage him doing then? He or she.

MR STILLER: I think a company who had that information provided to them and never responded to that fault in some way, satisfied itself and hopefully also satisfied the inspector that he had something in place to address that fault, then they would be - not be very prudent.

PRESIDING COMMISSIONER: Yes, I guess I'm still struggling, Laurie, with the distinction between the two terms. I have understood acceptance to mean that the inspector would not adjudicate on the adequacy of the plan at the time he received it, otherwise he would in effect be approving it or disapproving of it.

MR STILLER: It comes to a level of detail. For an inspector to approve one of these things, they would have to be as immersed in the plan and know as much about how the mine operates as the mine operated. Now it's physically impossible for them to do that. I mean, there is a real distinction in the amount of information, knowledge and expertise that an inspector has to be able to give that stamp of approval. I think we're just going beyond the inspector's ability when you move from an acceptance, yes, this, on the face of it, appears to be an acceptable and adequate response to the hazards that are at the time, to, yes, you've got it right, we approve it. And I think there's a real - - -

PRESIDING COMMISSIONER: Let me move to the next stage then. You've got a plan, it's a good plan, how does an inspector in auditing the implementation of that plan perform his duties if, as you were saying, he can't be really immersed in every integral detail of a mine's operation and its management of safety.

MR STILLER: Again, it's taking the systems as defined in the plan and checking to see that they are in fact on the ground. If you've said this is in place, show me. So it's that kind of (indistinct.)

PRESIDING COMMISSIONER: So you really are in favour of accountability being entirely with the company.

MR STILLER: Certainly. That's where the bulk of the accountability should and must lie, and that's the, in essence, what the duty of care is about.

PRESIDING COMMISSIONER: And the inspectors are - it's a process inspection.

MR STILLER: Yes.

PRESIDING COMMISSIONER: All right.

MR PORTER: Also in terms of the transition if you like to the system, we could see a very quick move in terms of the open cut sector, but we're not suggesting that something change overnight with the underground sector. There's a process of probably a few years to bring everyone along, and that needs to be understood.

PRESIDING COMMISSIONER: That leads into one of my next questions, Dennis. We have quoted in our report - it's at page 230 - a statement by your counterpart in Queensland, the Queensland Mining Council, which saw main streaming as a long term goal. Now, as I look at this quotation, they're not distinguishing open cut and underground, so that's something that needs to be noted, but in the short to medium term, they thought the industry needs to keep it's own separate legislation and inspectorate for three reasons, to stage the process of major change for the participants involved, in a sense I suppose, an advocacy of a gradualist approach, to prove a level of continuing prescription in regard to of - here I see, catastrophic accident risks unique to underground mining. And, thirdly, to build and preserve a skilled coal mining inspectorate. Would you take a different view form that in terms of the pace of change here? Perhaps you might again want to distinguish, as I'm sure you would, between the open cut and underground; but could you see for example, the system you were just describing to me, Laurie, coming in pretty quickly in open cut circumstances?

MR STILLER: I guess one distinction between New South Wales and Queensland legislation is that in Queensland the coal industry has never come under the OHS Act up there, so it's not had that general duty of care applied to it as has been the case here. So that's one of the differences. But yes, I think it's got to be a gradated change particularly for the underground sector.

Now we've had I think some good experience in terms of controlling some - hazards through this process. So the out-bursting problem to a large extent, has been addressed through non prescriptive plans for controlling that hazard developed by the site. So that if you like, that experience is gradually being built up within the industry and certainly moving completely to that regime is simply a continuation of the drift that's already occurring, but it will take some time.

We have, through the mine safety review process, there's been a general agreement that 3 to 4 years is a reasonable time frame. Now whether or not we can get the open cut sector moved more quickly than that, remains to be seen. It should be possible, but the vagaries of the consultative process might cast some doubts upon that.

PRESIDING COMMISSIONER: Yes; I think my only other question in this particular area concerned what you had to say about the - in the joint coal board context, where you suggest that the Coal Mines Insurance monopoly which, as you will have seen, we advocated should be dispensed with, should be progressively dismantled.

What do you have in mind? How could that occur?

MR PORTER: The industry has still to come to grips with a lot of the detail of how we would move from the current situation of CMI having a complete monopoly to a different system.

In fact, we have suggested to the joint Coal Board and to the New South Wales minister responsible that a first step that they should consider and hopefully implement very quickly, would be to give companies a choice of an insurer in relation to new employees. That's only a minor step really.

But if CMI is to be corporatised, if the whole system is to change, you get into a very complex debate about who owns, if you like the assets, it's a fully funded scheme, a couple of hundred million dollars invested. There would be various parties claiming part or so ownership of funds; and there are all sorts of options in the long term as: Would you privatise it? Would you keep it as a government statutory corporation and so on.

But I think our major objective is to provide companies with a choice of insurer and some may qualify to self-insure as they do in other industries, at

the moment there is absolutely no choice in New South Wales and although we respect CMI as an efficient service provider, it does a good job, it provides competitive rates, we think it's part of the industry regulatory blanket, if you like, that needs to be dismantled.

But as I say, we still are to explore the full detail of how we would move.

PRESIDING COMMISSIONER: But you see some potential difficulty in a shift from a monopoly provider to a corporatised competitor occurring on one day?

MR PORTER: I think there's a lot of detail to go through, but I think the major difficulties will be political.

PRESIDING COMMISSIONER: No doubt that would be the case.

MR PORTER: But, no, we don't underestimate the debate that we'll need to have with Government and within the industry about what's the best model, but we don't see any reason why CMI couldn't stand on it's own feet as a general insurer.

PRESIDING COMMISSIONER: I thought you were implying a few moments ago, Denis, some potential financial problems that would be associated with an immediate move to competition with CMI as a corporatised competitor.

MR PORTER: Unless it's financial problems it's a matter of - for example, if someone was to say, "Look, CMI should be privatised", well, who would get the proceeds of that? I mean, there would be people in the industry who would say, "Look, we have been contributing in terms of premiums to CMI for many years, it is a fully funded scheme, we really believe we have a share of the assets of that body." You know, so there are going to be different agendas and different arguments there.

PRESIDING COMMISSIONER: But companies, I may be misunderstanding here, they would have been users of CMI's services for which they have received a benefit, a coverage against the risks which this particular institution has been insuring against, you would not - I mean, it is not a mutual body, you would not have a claim of right, I would have thought, to free shares in the way that life insurance mutual operators have recently been providing to their insured members.

MR PORTER: I guess the key issue or one of the key issues here is that the fully funded nature of the scheme means that there are many employees out there in the industry and many injuries and we need to make sure that they are catered for in the system so yes, I mean, you could argue whether or not companies have a right to a share but that's the sort of debate you could envisage but as I say, we believe we need to get political acceptance initially

of the fact that the monopoly should not continue to exist and we need to move progressively to unwind - - -

PRESIDING COMMISSIONER: Sort out how to do it.

MR PORTER: Yes.

PRESIDING COMMISSIONER: I think the last area I wanted to go through a little with you is the royalties area. It seems to us, if we thinking about the New South Wales system, that the present royalty system where they are charged on the basis of the volume of production results in a big difference really between the coking coal and the thermal coal producers because of the significant gap in the prices which those two types of producers receive. So that was the basis on which we thought as a minimum, a movement by the New South Wales government to an ad valorem system of royalty charging would be an improvement so far as the producers were concerned. But I'm not quite sure that you are agreeing with that in these brief remarks.

MR PORTER: It is a difficult one for us. We did refer - we did touch on the debate that we had back in the early '90s late '80s on resource rent royalty and some of the sensitivities there which - and I guess it's a bit like Laurie said, to delve in the detail, I mean, I don't know that the industry would necessarily be against in principle, a move to say an ad valorem royalty but until individual companies saw what it meant for them, they would be reluctant to make a commitment and the nature of the coal business is that individual companies here very much compete between themselves for the local market or the export market. It's not like the gold industry where the gold just goes into almost an amorphous market out there and there is a world price, I mean, we compete between each other and with other countries. So there are great sensitivities here.

The industry would be clearly prepared to look at it. We'd need a signal from the State Government as to whether they wanted to move that way but I can imagine the debate - - -

PRESIDING COMMISSIONER: Yes. What do you envisage as the main concerns of companies? I guess thermal coal producers would see this as essentially a good thing, would they?

MR PORTER: Yes, sure. I mean, I think the companies' basic starting point would be, if we individually end up paying less in royalties, that's fine." But the State Government's starting point would be that we want the same dollar revenue flow and the two are not necessarily compatible.

PRESIDING COMMISSIONER: No. It is not clear that the State Government would be on solid ground I think, in that particular argument. But leaving that particular issue aside, on the RRR, as we've called it, we

were looking for views of people in the industry as to the extent and nature of administrative compliance problems that could arise with such apparently theoretically desirable construct. Do you have any wisdom to offer to us in that area?

MR PORTER: No, I don't. I guess some of our companies would be experienced with RRR, or in different parts of their business - - -

PRESIDING COMMISSIONER: Yes, BHP for one - - -

MR PORTER: Yes, BHP or Shell.

PRESIDING COMMISSIONER: Yes, Shell.

MR PORTER: So yes, there may be some wisdom there to gather, I can't throw any light on that but - - -

PRESIDING COMMISSIONER: All right, I am very grateful for the time and the detail that you have helped me with in some of these answers. I do not have anything further on your submission. Is there anything you wish to say before - - -

MR PORTER: No, I don't think so. I think there are one or two things that we can try and follow up for you.

PRESIDING COMMISSIONER: If you would be good enough to follow up some of that additional information, yes, that would be helpful to us in the next couple of weeks as we get down towards the very final part of our time table. Meanwhile, thank you all for coming along and helping the inquiry once again. Thank you. My understanding is that there are no other formal participants in today's hearing, is that the case? Then I think this is the conclusion of our public hearings on this inquiry and we will now adjourn. Thank you.