BACKGROUND

The New South Wales Minerals Council (NSWMC) is the industry association representing mineral exploration companies and the producers of coal, minerals and extractive materials in the State of NSW. The NSWMC is a major stakeholder in many of the environmental, social and economic aspects of New South Wales.

The NSW mining industry has an annual production value of around $7 billion, employs over 15,000 people, mainly in rural areas, and contributes over $900 million per year to government revenues. Coal continues to be the State's largest export earner and the industry now earns around $4 billion per year.

The mining industry also provides indirect employment, estimated to be in the order of a further 45,000 people, in a large number of support industries, ranging from heavy engineering and equipment manufacturing to the provision of mine supplies and consumable items and specialised advisory, design and management services. The export of Australian mining equipment, technology and services is also significant and is valued at nearly $2 billion per year nationally.

THE NSWMC SUBMISSION ON WORKERS COMPENSATION

After a decade of effort, metalliferous and coal occupational health and safety legislation is beginning to bear fruit in NSW with two new pieces of legislation clearly aligned to the NSW OH&S Act 2000 on the table. Given this time of substantial reform, this submission is silent on the issue of a national occupational health and safety framework. This submission will concentrate on NSW coal workers compensation arrangements from an Industry-specific perspective as a case study. The NSWMC notes that there are three main types of workers' compensation schemes. That is, a "National Framework", a "State Scheme" and an "Industry-specific Scheme". The NSWMC is fundamentally supportive of a National Framework for workers compensation. The NSWMC's decision to support a National Framework is an informed decision. The NSWMC has genuine experience with operating in an Industry-specific workers compensation scheme. The following submission will highlight many of the inherent problems with an Industry-specific Scheme and detail desirable characteristics of a National Framework. The NSWMC argues that the NSW coal industry provides a perfect example of the inherent disadvantages of an Industry-specific Scheme.

PART 1: INTRODUCTION

The workers' compensation situation in the NSW coal industry has reached such a dire and costly state that companies have funded and supported various reviews through Coal Services Pty Ltd to attempt to salvage the situation. The two primary reports are the Ernst & Young Report and the Wallace Report. Both reports will be referred to throughout this submission.

COAL MINES INSURANCE

Coal Services Pty Ltd (CSPL) administers workers compensation for coalminers in NSW through its insurance arm Coal Mines Insurance (CMI). It covers approximately 10,500 employees in the coal industry. The scheme is funded by industry in the order of $100m per annum and holds an estimated $20m in unfunded liabilities.

Unlike WorkCover NSW, CMI is a monopoly specialist insurer established under corporations law, owned by and controlled by equal representation of the NSWMC and the Construction, Forestry, Mining and Energy Union (CFMEU). The CSPL Board is comprised of seven Directors, two of whom are jointly nominated independent directors.

The coal industry scheme has been exempted from reforms to the NSW mainstream legislation by successive NSW Governments over the past two decades.

This case study will show the inherent defects associated with such an industry-specific scheme and the political interface that such schemes generate and shows the structural problems that are then created as a result of this context.

SNAP SHOT OF THE COAL INDUSTRY SITUATION[1]

- Premium rates are at their highest level for the past 25 years;
- Claims inflation is at 10 to 14% pa over the past ten years;
- Claim frequency has reduced significantly from 32.8% per half year to 12.9% per half year (i.e. a reduction of 4.2% pa over 21.5 years); and

[1] Ernst & Young Actuarial Business Consultants, 4 June 2003

- Despite premiums doubling in the past four years the CMI scheme is in deficit for the first time in 25 years.

COMPANY STATISTICS

According to the BHP Billiton Limited submission[2] to the Productivity Commission, BHP Billiton pays in the vicinity of $16,000,000 per annum in insurance premiums to cover approximately 1,000 coals miners, that is, approximately $16,000[*] per year per employee. BHP Billiton submits that it pays approximately $3,000 per employee in its self-insured Queensland operations. In other words, BHP Billiton asserts that the cost is in the vicinity of 14% of wages for NSW employees compared to 3% in its Queensland operations.

Centennial Coal estimates[3] "that for the year 2003/2004 the company will be paying approximately $25,000,000 in workers compensation insurance premiums for its NSW operations. This equates to approximately $16,000 per employee. At one of Centennial's sites, the figure is close to $35,000 per employee for the year".

Clearly there are significant differences between States in terms of company premiums and workers' compensation costs. Among other imbalances, the NSWMC asserts that there are two major equity issues:

a. As a national competitor there are major differences between State arrangements; and

b. There are major inequities regarding the statutory benefits and access to common law amongst employees. That is, employees within the same company are compensated vastly differently depending on which State they are employed.

[2] BHP Billiton Limited Submission, pg 6.
[*] The CSPL Board asserts that BHP Billiton pays in the vicinity of $11,000 per year per employee.
[3] Centennial Coal Limited Submission, page 4

PART 2: GENERAL WORKERS COMPENSATION MATTERS

THE ERNST & YOUNG REPORT

The NSW Government agreed to an independent review of CMI one year after the commencement of the *Coal Industry Act 2001*. Ernst & Young were contracted to undertake the review. Among other things, the terms of reference included:

- An actuarial valuation of the outstanding claims liabilities and assets of Coal Services as at 31 December 2002;
- An assessment of the likely future trends in claims liabilities;
- An assessment of the current initiatives to reduce claims costs and improve outcomes for injured works;
- A review the scheme compliance; and
- Identifying any further initiatives or areas to enhance the scheme performance for the benefit of the industry stakeholders.

KEY FINDINGS

Amongst other findings, the Ernst & Young Report found that:

- The high premium rates are putting employers under significant financial pressure, at a time when coal prices are falling and the appreciating Australian dollar[4], is having an adverse affect on export returns.
- The experience in all states of Australia in personal accident compensation schemes over many decades indicates that schemes with claims inflation rates at the level experienced by the CMI scheme, are **not viable in the long term** (e.g. around 5 years or more depending on the level of claims inflation), and eventually the benefits levels and/or design are subject to legislative reform[5].

[4] 1.55 Ernst & Young Actuarial Business Consultants, 4 June 2003
[5] 1.56 Ernst & Young Actuarial Business Consultants, 4 June 2003

OUTCOMES

Despite the findings in the Ernst and Young report that was commissioned by Coal Services Pty Ltd for the NSW State Government, there has been inadequate action and no legislative reform to date taken to rectify the structural problems of the coal industry scheme. This remains the case notwithstanding the fact that these problems are similar in nature to the problems that were experienced in the NSW WorkCover scheme. This scheme has been subsequently subject to extensive legislative change.

NATIONAL WORKERS COMPENSATION FRAMEWORK

Several of the NSWMC members have mining operations in more than one jurisdiction. In fact, there are members who operate in up to nine different jurisdictions. The NSWMC contends that its members should not have to operate in such varied jurisdictions when dealing with workers' compensation. A National Framework that deals with one system of legislation would reduce the jurisdictional burden and cost imposed on companies whilst promoting a fair and equitable system. One National Framework would also promote and support fair company competition. With global competitiveness of an utmost importance, it is clear that there are significant business costs associated with establishing a coalmine in NSW rather than Queensland.

Understandably, there are significant costs associated with operating a business in up to nine different jurisdictions. Personnel required to administer and interpret the different jurisdiction aspects of workers compensation legislation, incur major cost.

Of equal importance, a National Framework would reduce the inequities amongst the benefits that employees in different States receive.

INDUSTRY SPECIFIC SCHEME

The NSWMC experience of industry arrangements is a primary example where industry arrangements have hindered employers significantly. A monopoly arrangement, as is in place in the NSW coal sector, prohibits competition.

With regard to the CMI monopoly arrangements, the Ernst & Young Report[6] asserts the following:

[6] 1.6.3 Ernst & Young Actuarial Business Consultants, 4 June 2003

a. The capital position of the scheme is poor with CMI being exposed to greater risks than a private sector insurer by virtue of it being a monopoly insure for a specific industry having no access to outside capital since its policyholders are its shareholders;

b. Employers are also exposed to greater financial risk than those in the WorkCover scheme. Any deterioration in the scheme's financial position can only be funded from premiums on coal industry employers unlike the wider WorkCover scheme;

c. In the event of a reduction in the size of the industry a heavier burden falls on the remaining employers unlike the wider WorkCover scheme.

With the consolidation of the NSW coal industry, it results in four major companies contributing to approximately 80% of the premium. In addition, the NSW coal industry's workforce has halved in the past decade.

The NSW coal industry does not have the option to self-insure. As indicated in the BHP Billiton submission that the cost of workers compensation premiums is in the vicinity of 14% of wages for NSW employees compared to 3% in its self-insured Queensland operations.

CLAIMS AND INJURY MANAGEMENT

The Ernst & Young Report assessed over 50 claims to determine the standard of claims and injury management. It emphasises:

- That CMI's standard of claims and injury management was **below average Australian insurance standard levels**. The Ernst & Young Report regard average Australian industry standards of claims and injury management to be below a desirable standard. In Ernst & Young's view, "best practice" is a goal to be worked towards. However, realistically a desirable standard is below "best practice"[7]; and

- The urgency of the current situation and that taking small corrective actions is not a viable option[8].

[7] 1.22 Ernst & Young Actuarial Business Consultants, 4 June 2003
[8] 11.4 Ernst & Young Actuarial Business Consultants, 4 June 2003

POOR RETURN TO WORK RATES IN THE COAL INDUSTRY SCHEME

With respect to the NSW coal industry's significantly higher workers' compensation payments, the operation of section 11(1) and 11(2) of the NSW Workers Compensation Act 1926 allows for **partial incapacity** deemed **total incapacity**.

Modern legislation is geared to have the worker back into the work force as soon as possible. Section 11 was removed from the NSW mainstream legislation in 1987 to ensure that there was an incentive for the worker to engage in rehabilitation. However, the coal industry was exempted from this 1987 legislative change. The effect of this is that whilst Section 11 remains in force in the coal industry, it is a fundamental deterrent for workers to return to productive working lives and to sincerely engage in rehabilitation efforts.

When designing a National Framework we encourage the Productivity Commission to consider incorporating features that will encourage prompt return to work rather than well-recognised barriers associated with return to work (such as the partial incapacity deemed total incapacity provision).

ACCESS, COVERAGE AND COMMON LAW

The NSWMC contends that there must be an alignment across Australia to tort law reform. We also submit that there must be objective impairment assessment guidelines.

BENEFIT STRUCTURES

Statutory benefits

The NSWMC's primary contention is that the underlying principle of workers compensation legislation should be based on the principle of "no fault". Therefore, compensation levels for impairment should be adequately assessed in a National Framework and not be at the mercy of the courts in an adversarial arena.

When designing a National Framework the NSWMC encourages the Productivity Commission to consider appropriate statutory benefits. Statutory benefits should be fair, reasonable and appropriate in response to the level of impairment.

Common law

In our experience we have found that access to common law, and entrenching a system and culture that encourages courts to resolve workers compensation matters, discourages early return to work of injured employees.

However, should the Productivity Commission recommend access to common law, then the NSWMC submits that there should be a common law threshold, access should be restricted to those employees who are seriously injured. It is therefore important to reiterate the need to have fair and reasonable statutory benefits so that employees are appropriately compensated.

PREMIUM RATING SYSTEM

The Ernst & Young report submitted that the CMI premium rating system should provide greater incentives to employers to improve injury prevention and claims experience. There should be direct incentives on employers to reduce the incidence of claims and improve return to work rates of claimants[9].

The NSWMC contends that a National Framework premium rating system should be fair and equitable. In general, the following principles[10] recently adopted by CMI could be used as a guide when considering a premium rating system. A National Framework should:

- Have a premium rating system that is based on the policyholder's claims experience;
- Be able to account for year to year fluctuations as part of the insurance process;
- Allow the claims experience of large policyholders to have greater influence on their premium than that of small policyholders (as the claims experience of large policyholders are less likely to be subject to variation due to the large number of claims);
- Minimise cross subsidisation. That is, avoid systematic under and over statement of premiums for individual policyholders or groups of policyholders;
- Minimise manipulation by policyholders; and

[9] 1.28 Ernst & Young Actuarial Business Consultants, 4 June 2003
[10] Adapted from David G Hart Consulting

- Include a discount or loading where policyholders achieved or failed to achieve certain risk and claims management practices.

DEFINITIONS

The NSWMC contends that:

- There must be a clear and consistent federal definition of "employment", "work", "employee", "employer" and "contractor"; and

- There must be a requirement to demonstrate that the employment was a substantial contributing factor on the injury;

- There must be a national and transparent model for assessing medical impairment;

- Journey coverage: The NSWMC contends that journeys to and from the workplace have no causal connection with the workplace and should not be included in any revised National Framework.

A further difficulty with having an industry-specific scheme operating alongside a State Scheme is that at times it is unclear where the boundaries are between the two schemes. The Ernst & Young Report identified that there were boundary issues relating to the coal scheme in NSW and asserted that CMI needs to work with WorkCover NSW to clarify jurisdiction and boundary issues between the CMI scheme and the NSW WorkCover scheme[11].

PART 3: DISPUTE RESOLUTION

DISPUTE PREVENTION AND RESOLUTION- THE WALLACE REPORT

In 2002 Coal Services Pty Ltd commissioned *Transformation Management Services* (The Wallace Report) to conduct a review and write a report on dispute resolution systems in CMI. The Wallace Report examines dispute mechanisms, the causes or 'drivers' of disputes in workers compensation matters and provides options and strategies for taking action to reverse the negative impact the system is currently facing.

Where disputes arise, most schemes process such matters through administrative means. The coal industry scheme relies on lawyers and court processes to resolve disputes. Impairment claims, common law claims and redemptions of weekly benefits are mostly dealt with as 'disputes' together with more traditional disputes over initial liability for weekly benefits, termination of benefits and medical expense liability. Coal-mining disputes are processed through the Workers Compensation Court, the District Court and the Supreme Court of NSW. Others are mediated without litigation by claims officers negotiating directly with solicitors or union advocates representing the worker[12].

With the closure of the Workers Compensation Court on 31 December 2003 all NSW coal workers compensation matters will have the capacity to proceed to the District Court while the NSW WorkCover scheme cases will go to the newly established Workers Compensation Commission. Clearly this variation between schemes is an unsatisfactory result of having an industry scheme divorced from mainstream reform.

KEY FINDINGS

Three major recommendations of the Wallace Report address putting in place control mechanisms that CMI will need to use to manage expenses and claim costs. In summary, and in order of importance they are:

- **For common law**- CMI must ensure that all strategies for the prosecution of its cases are optimal, both in terms of legal outcome and cost containment.

- **For redemptions**- CMI must standardise prevention and early settlement strategies. It should centre on compulsory mediation or conciliation and occur at the earliest possible time. Early intervention and information exchange is paramount.

- **For permanent impairment claims**- CMI's strategy must be to finalise all permanent impairment cases at the earliest possible time.

[11] 1.66 Ernst & Young Actuarial Business Consultants, 4 June 2003
[12] Wallace Report pg 9

PREVENTING DISPUTES

The NSWMC contends that disputes should be resolved through means other than courts. According to the Wallace Report, 87% of CMI cases are resolved at the court door[13]. The NSWMC contends that there must be non-judicial dispute resolution incorporated into a National Framework.

This poor resolution rate in the coal industry scheme is very costly and again systemic of a scheme that has not had the benefit of design improvements. In addition, it spells out a great deal of frustration to injured workers in terms of delays to settlements of claims.

According to the Wallace Report, CMI does not provide reasons for decisions on claims in written form. This is a major factor in the number of disputes. In CMI, an undocumented policy states that reasons should be limited – a few lines or paragraphs – in a defensive positioning for later court activity[14]. The NSWMC contends that a National Framework should ensure that written reasons for any adverse decisions would reduce the number of disputes. In addition, employers should be involved as early as possible in case management. Should an insurer consider providing an adverse decision it is paramount that the employer is advised in order to manage the situation appropriately.

Drawing from the Wallace Report[15], the NSWMC contends that a dispute resolution system should include features such as:

- Intensive work at the beginning of the dispute, if not before, to assess the workers needs;
- High quality communication with all the parties;
- Early deadlines to collect and exchange all information and evidence;
- Early conferencing;
- Fixed offers from the insurer once liability and quantum has been established based on fact; and

[13] Wallace Report pg 15
[14] Wallace Report pg 41
[15] Wallace Report pg 30

- Clear timetables where each case has a plan and deadlines are communicated to all parties from the beginning of the series of transactions.

Good file management relies on the case manager retaining control of the file. Costs increase when doctors, investigators and lawyers are involved particularly when the control of the situation is shifted away from the case manager.

There have been many attempts at establishing workers' compensation dispute resolution systems. In NSW alone, there have been four significant changes in the past 10 years. These include the Workers Compensation Court Commissioners, the WorkCover Conciliation Service, Workers Compensation Resolution Service and, most recently, the Workers Compensation Commission. There are similar examples in other jurisdictions. Employers incur significant costs each time there are changes to the workers' compensation systems in each jurisdiction.

PART 4: CONCLUSION

As demonstrated above, the NSWMC submission provides a real-life case study of "industry arrangements" as opposed to a National Framework. The submission demonstrates how the industry scheme has hindered employers significantly in efforts at proper case management and has also been frustrating to injured workers especially in terms of delays to the settlement of claims.

The implications of this unnecessary industry based workers compensation scheme, coupled with the industry's monopoly arrangements, is that the industry cannot continue to afford this scheme. The coal industry scheme is increasingly out of kilter with:

- The workers compensation scheme in NSW;
- Workers compensation schemes in Australia;
- Community standards for NSW citizens seeking damages under tort law (eg motor accidents; public liability; medical negligence; professional negligence); and
- International workers compensation schemes (with comparable economies).

A national framework that selects best practice would eliminate the vast differences and significant costs outlined above.

The NSWMC notes that the Productivity Commission's current review is a significant opportunity to address the cross-state and inherent problems in the coal industry workers compensation scheme.