

Certified 52/84

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

COURT OF APPEAL

IN PROCEEDINGS NO. 2749 of 1982

B E T W E E N :

THE GRIFFIN COAL MINING
COMPANY LIMITED

Appellant
(Defendant)

- and -

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Respondent
(Plaintiff)

R E C O R D

Lawrence Jones & Co.,
16 Eastcheap,
London EC3M 1JL

Payne Hicks Beach,
10 New Square,
Lincoln's Inn,
London, WC2A 3QG

Tel. 01-242 6041

Ref. RJM

SOLICITORS FOR THE APPELLANT

SOLICITORS FOR THE RESPONDENT

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

COURT OF APPEAL

IN PROCEEDINGS NO. 2749 of 1982

B E T W E E N :

THE GRIFFIN COAL MINING
COMPANY LIMITED

Appellant
(Defendant)

- and -

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Respondent
(Plaintiff)

R E C O R D

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

COURT OF APPEAL

IN PROCEEDINGS NO. 2749 of 1982

B E T W E E N :

THE GRIFFIN COAL MINING
COMPANY LIMITED

Appellant
(Defendant)

- and -

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Respondent
(Plaintiff)

INDEX OF RECORD

<u>No.</u>	<u>Description</u>	<u>Page Number</u>
1.	Originating Summons dated 12th November 1982.	1 - 9
2.	Affidavit of Douglas Ralph Chatfield sworn 4th November 1982 and exhibits thereto being:-	10 - 118
	Exhibit DRC 1 - true copy of agreement between the parties dated 29th March 1979.	26-96
	Exhibit DRC 2 - copy of variation agreement between the parties dated 23rd August 1982.	97-115
	Exhibit DRC 3 - copy of minute of items agreed between the parties dated 23rd August 1982.	116-118
3.	Affidavit of Peter Vernon Jones sworn 18th November 1982.	119 - 120
4.	Affidavit of George Michael Strmotich sworn 15th December 1982 and exhibits thereto being:-	121 - 166

Exhibit A1	- photograph of Muja Open Cut Mine looking west.	144 - 145
Exhibit A2	- photograph of North West main face of Muja Open cut mine.	146 - 147
Exhibit AA	- copy of Summary of RTZ Study.	148 - 154
Exhibit AA1	- copy of letter from Continental Illinois National Bank and Trust Co of Chicago to the parties dated 20th December 1978.	155 - 159
Exhibit B	- Notice of Defendant's Further Questions dated 15th December 1982.	160 - 163
Exhibit C	- Memorandum portraying Defendant's analysis of alternative methods of calculating Pre-tax Cash Surplus.	164 - 166
5.	Defendant's Notice of Further Questions dated 15th December 1982.	167 - 169
6.	Plaintiff's objections and exceptions dated 20th December 1982 to the Affidavit of George Michael Strmotich dated 15th December 1982.	170 - 171
7.	Reasons for Judgment of the Honourable the Chief Justice dated the 19th January 1983.	172 - 190
8.	Plaintiff's proposed new Question 7 dated 22nd April 1983.	191 - 192
9.	Order of the Honourable the Chief Justice made 22nd April 1983.	193 - 198
10.	Reasons for Judgment of the Honourable Mr Justice Rowland dated the 30th day of August 1983.	199 - 206
11.	Reasons for Judgment of the Full Court dated the 1st day of February 1983 granting conditional leave to appeal to Her Majesty in Council.	207 - 233
12.	Order of the Full Court granting the Appellant (Defendant) final leave to appeal to Her Majesty in Council made the 3rd May 1984.	

Documents not Reproduced

1. Affidavit of Robert Frederick Stowe sworn the 17th December 1982.
2. Notice of Motion for Leave of Appeal to Her Majesty in Council dated 13th May 1983.
3. Affidavit of Nicholas Paul Hasluck sworn the 13th May 1983 and Exhibit A thereto being Notice of Intended Application for Leave to Appeal.
4. Order of the Honourable Mr Justice Rowland made the 30th August 1983.
5. Notice of Appeal dated the 16th September 1983.
6. Order of the Full Court granting Conditional Leave to Appeal made the 1st February 1984.

THIS INDEX was prepared by Keall Brinsden, Solicitors for the Appellant (Defendant) whose address for service is 9th Floor, 150 St Georges Terrace, Perth WA 6000
Tel: 321 8531 Ref: 3:SW:23761
CP:T303:EFG-D

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. *2749* of 1982

B E T W E E N:

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

and

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

Let THE GRIFFIN COAL MINING COMPANY LIMITED of 44 Kings 10
Park Road, West Perth within ten days after service of this
summons on it exclusive of the day of such service cause an
appearance to be entered for it to this summons and thereafter
attend before the Judge sitting to hear such summons at such
time and place as shall hereafter be fixed for such hearing.

This summons is issued upon the application of THE STATE
ENERGY COMMISSION OF WESTERN AUSTRALIA of 365 Wellington
Street, Perth which claims the declarations of right set out
in the Schedule hereto pursuant to Order 58 Rule 10 in respect 20
of a contract in writing dated 29th March 1979 between the
parties and all such further orders and declarations as may be
necessary or appropriate.

DATED the *12th* day of *NOVEMBER*, 1982

This Summons was taken out by Jackson, McDonald & Co., solicitors
for the said plaintiff whose address for service is 6 Sherwood
Court, Perth.

Note:

If the defendant does not enter an appearance at the Central
Office, Supreme Court, Barrack Street, Perth within the time
above mentioned, and thereafter attend before the Judge sitting 30
to hear such summons as such time and place as shall hereafter
be fixed for such hearing, such order will be made and proceedings
taken as the Judge may think just and expedient.

Plaintiff's Questions for Determination
Arising out of Long Term Coal Supply Contract
Pursuant to Originating Summons

1. Whether on a proper construction of Clauses 3, 5 and otherwise of the Contract the Plaintiff ("the Commission") is obliged to pay for at the end of each quarter at the "Base price as adjusted" calculated in accordance with the Contract the whole of the applicable quantity of Annual Base Tonnage coal (calculated by reference to Schedule A of the Contract) ordered by the Commission for that quarter if the Defendant ("Griffin"):- 10

- (a) does not have the whole of that tonnage available for delivery; or
- (b) is not physically able to deliver the whole of that tonnage in that quarter for reasons not excused by Clause 24 of the Contract; or
- (c) does not tender for acceptance by the Commission the whole of that tonnage ordered.

2. Whether on a proper construction of Clause 24 and otherwise of the Contract the Commission is obliged to pay for 20 at the end of each quarter at the "Base price as adjusted" calculated in accordance with the Contract the whole of the applicable quantity of Annual Base Tonnage coal (calculated by reference to Schedule A of the Contract) ordered by the Commission for that quarter if -

- (a) by reason of a force majeure situation properly declared by the Commission only, the Commission is unable to accept delivery of the full quantity of coal ordered that quarter;
- (b) by reason of a force majeure situation properly declared by Griffin only, Griffin is unable to deliver the full quantity of coal ordered that quarter by the Commission;
- (c) by reason of one or more force majeure situations concurrently affecting both the Commission and Griffin either or both the following situations occur, scil. 10
 - (i) the Commission is unable to accept; or
 - (ii) Griffin is unable to deliver the full quantity of coal ordered that quarter by the Commission.

3. Whether when a force majeure situation applies to the Commission only, so that it is unable to take delivery in any quarter of the quantity of coal ordered, it may at its sole election decide to treat the whole tonnage of coal of which it cannot take delivery in that quarter as falling to be dealt with under Clause 24 only; or whether the Commission is 20 required to pay for all the coal ordered that quarter pursuant to either Clause 5 or Clause 10 of the Contract.

4. Whether in circumstances when Clause 24 applies and:-
- (a) (i) Griffin is unable in any quarter to deliver the full quantity of Annual Base Tonnage coal ordered by the Commission that quarter; or

- (ii) the Commission is unable to take delivery of the full quantity of Annual Base Tonneage coal ordered by it in that quarter; and

the Commission makes payments to the Banks pursuant to Clause 24 -

is the Commission obliged to pay the balance of the price of coal ordered for that quarter to Griffin under Clause 5 of the Contract or otherwise notwithstanding that the coal ordered has not been supplied in case of sub-paragraph (a)(i) or delivery 10 has not been accepted in case of sub-paragraph (a)(ii)?

5. For the purposes of Clause 5, in cases -

(1) where Griffin does not actually deliver the full quantity of Annual Base Tonneage Coal ordered ("the coal ordered"); or

(2) where Griffin does not tender delivery of the full quantity of the coal ordered:

(a) does Griffin bear the onus of proof of demonstrating the Commission failed to take delivery whilst it was ready and willing to 20 deliver; or

(b) does the Commission bear the onus of proof of demonstrating either or both:-

(i) Griffin was not ready and willing to delivery; or

(ii) it did not fail to take delivery?

6.(1) Upon a proper construction of the Contract where it is necessary to apply Clause 8(3) and Schedule F to determine the "Pre Tax Cash Surplus" of Griffin in a financial year when Griffin does not deliver the Annual Base Tonnage of coal required to be supplied is the "GROSS REVENUE" for the purposes of the calculation in Schedule F:-

- (a) the actual tonnage of coal delivered multiplied by the base price paid; or
- (b) the tonnage specified in Schedule A regardless of how much has been actually delivered multiplied by the Base Price as adjusted or the Average Base Price as adjusted; or
- (c) some other formula and if so what formula.

(2) Does the expression "any additional quantities of coal" in the definition "gross revenue" include all or any of:-

- (i) extra coal supplied under Clause 3(2);
- (ii) extra coal supplied under Clause 3(3);
- (iii) extra coal delivered to make good deliveries postponed pursuant to Clause 10;
- (iv) extra coal delivered to make up shortfalls in prior years to which Clause 24 has applied;
- (v) extra coal delivered to make up shortfalls in Annual Base Tonnage not falling within Clauses 10 and 24.



- (3) If coal deliveries postponed by the Commission in a previous year under Clause 10 are included in making the calculation of "gross revenue" under Clause 8(3) and Schedule F is the amount to be taken as part of the "gross revenue" -
- (a) only the balance amount paid in the year of delivery pursuant to Clause 10(3); or
 - (b) both the amounts paid under Clause 10(1) and 10(3); or
 - (c) some other amount and if so how is to be calculated. 10
- (4) If coal delivered to make up shortfalls in base tonnage of previous years to which tonnage Clause 24 has applied is included in making the calculation of "gross revenue" aforesaid are either or both:-
- (a) the amounts paid by the Commission to the Banks in previous years under the proviso to Clause 24; or
 - (b) the amount paid by the Commission to Griffin in the current year
- included in the amount of "gross revenue" for the current year under Schedule F. 20
- (5) If extra coal delivered to make up shortfalls in base tonnage from previous years and which shortfall tonnage has not fallen within either Clause 10 or Clause 24 is included in making the calculation of "gross revenue" aforesaid, is the amount paid by the Commission for such

extra coal in the current year included in the amount of gross revenue for the current year under Schedule F.

(6) If coal referred to in all or any of sub-questions (3), (4) and (5) does not fall to be included as "gross revenue" for the year of delivery, is it otherwise taken into account in determining Griffin's pre-tax cash surplus under Clause 8(3) and if yes, in what fashion in each case?

7. Upon a proper construction of the Contract, where for any reason Griffin does not deliver all the Annual Base Tonnage for any one financial year, is the Commission obliged to pay for all coal ordered (whether or not the full tonnage was delivered in the applicable financial year) and make adjustments in respect of defaults by Griffin only upon an application of Clause 8(3) and Schedule F at the end of that financial year. (Refer also to Question 9(1), (2) and (3).) 10

8. (1) If where Clause 5(2) applies and the Commission is of opinion that a deficiency could not be made up by Griffin within a reasonable time without affecting Griffin's subsequent delivery obligations may the Commission without the concurrence of Griffin cancel and neither take delivery of nor pay for such tonnage of coal. 20

(2) If the Commission is entitled to cancel and not take delivery of undelivered coal falling within Clause 5(2), how is the pre-tax cash surplus of Griffin to be determined especially insofar as the

"Gross Revenue" is to be calculated. For example, is Griffin to be treated as if it had delivered the full Annual Base Tonnage at the average or weighted Base Price? Or is it to be determined otherwise?

- (3) If the Commission pursuant to Clause 5(2)(b) allows Griffin to make up deliveries in a year subsequent to the year in which they were delivered:-
- (a) Is any allowance to be made in respect that tonnage when calculating gross revenue or pre-tax cash surplus under Clause 8(3) in either year? 10
- (b) If yes to (a) in whole or part:-
how is that tonnage to be dealt with for the purpose of calculating gross revenue and pre-tax cash surplus aforesaid in the year in which it was supposed to be delivered?
- (c) If yes to (a) in whole or part:-
how is that tonnage to be dealt with for the purpose of calculating gross revenue and pre-tax cash surplus aforesaid in the year in which the tonnage is actually delivered? 20
- 9.(1) Is "gross revenue" for the purposes of Clause 8(3) and Schedule F calculated on the basis only of cash received for coal actually delivered in the relevant year if (i) Griffin has not delivered the full tonnage prescribed in Schedule A for that year and (ii) the Commission is not required to pay for the amount of that shortfall

pursuant to Clause 5(4) or by reason of the operation of Clause 24.

(2) If the whole base tonnage for the current year has not been delivered by Griffin but it has during that year delivered coal on account of:-

(a) deliveries postponed under Clause 19; or

(b) deliveries from a previous year allowed to be made-up in the subsequent year under Clause 5(2)(b); or

(c) deliveries postponed or delayed from a previous year by reason of Clause 24 - 10

is either:-

(i) the tonnage of; or

(ii) the cash paid attributable to deliveries falling within items (a), (b) or (c) to be taken into account in calculating gross revenue or pre-tax cash surplus under Clause 8(3)?

(3) If either the tonnage of or cash paid for coal deliveries falling under items (a), (b) or (c) of sub-question (2) is to be taken into account as 20
aforesaid how is the tonnage or cash paid to be dealt with in making the appropriate calculations under Clause 8(3) to arrive at Griffin's pre-tax cash surplus?

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. *2749* of 1982

B E T W E E N:

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

and

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

I, DOUGLAS RALPH CHATFIELD of 365 Wellington Street, Perth in 10
the State of Western Australia being duly sworn make oath and
say as follows:-

1. I am the Acting Assistant Commissioner Operations of the
Plaintiff. At all material times in conjunction with
designated officers of the Plaintiff drawn from its other
branches I have had the general administration control and
carriage of negotiations and dealings with the Defendant the
subject of this originating summons. I am generally familiar
with all aspects of the disputes between Plaintiff and
Defendant either of my own personal knowledge or from 20
information available to me from the Plaintiff's records and
its officers.
2. I am authorised by the Plaintiff to make this
affidavit. Now produced and shown to me and marked "DRC-1" is
a true copy of the agreement dated 29th March 1979 between
Plaintiff and Defendant the subject of this originating summons
(hereafter called "the Contract").

John Gillies

L. K. H. H. H.

The 1981 Disputes

3. In the second half of 1981 disputes arose between Plaintiff and Defendant centred chiefly around:-

- (1) shortfalls (for whatever reason) of deliveries of current coal orders by the Defendant;
- (2) the non-delivery of the outstanding balance tonnage of base tonnage coal the delivery of which had been deferred by the Plaintiff pursuant to Clause 10 of the Contract in 1979 ("1979 Clause 10 Coal") for which the Defendant had been paid in advance and the inability or 10 refusal of the Defendant to give undertakings as to when or at what rate the undelivered coal would be supplied;
- (3) the size of coal delivered and the occurrence of extraneous materials therein such as steel roof bolts from old workings in the HEBE seam, old mine timbers, pieces of scrap metal and of cables, and other extraneous materials including clay and earth and (on one occasion) the delivery of a large steel excavator tooth about 2 feet long which temporarily disabled one of the Plaintiff's coal crushing plants; 20
- (4) related to (3) - the contentions by the Defendant that the Plaintiff's coal receival facilities, conveyor systems and crushing plants were inadequate, unsuitable or not efficient;
- (5) a proposed departure from the Mining Plan suggested by the Defendant in about July 1981 and the proposal by the Defendant associated with or part of that proposal that

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

A0019e MJS/27.10.82

- it be allowed to supply some of its coal deliveries from deposits on coal mining leases not the subject of the Contract and which are generally called "Chicken Creek";
- (6) claims by the Plaintiff that the Defendant had not conformed to the mining plan set forth in a report by consultants and referred to in the Contract and which is commonly called "the RTZ Study";
- (7) claims by the Defendant that the RTZ Study and its mining plan were inadequate or that the figures set out therein were proving incorrect in practice or by the actual course of mining and that as a result additional equipment was required;
- (8) claims over various items of expenditure by the Defendant about which the parties could not agree whether they were recoverable at all by the Defendant or, if recoverable, how they should be dealt with under the Contract;
- (9) the fact that by reason of the Defendant not giving any assurance as to when the balance 1979 Clause 10 coal would be delivered, the Plaintiff had deducted by way of set-off from the proceeds of current coal sales the amount pre-paid for undelivered coal pending delivery of that coal;
- (10) the terms and conditions under which the Defendant was entitled to make private coal sales from the Muja pit.

Previous Proceedings

4. As a result the Defendant issued writ of summons No. 2761/1981 against the Plaintiff. The hearing of the trial of A0019e MJS/27.10.82

those proceedings was expedited and listed for hearing before Kennedy J. commencing on 18th February 1982. Because of the complexity and dimensions of the disputes it had been agreed that certain issues only would be dealt with initially.

5. On the opening day of the trial the parties reached an interim settlement which is recorded in a minute of agreement dated 18th February, 1982. Generally that minute is not relevant to the questions for determination in this originating summons.

Default Notice by Plaintiff

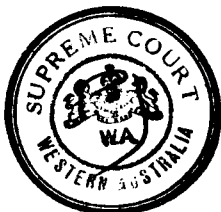
10

6. The Plaintiff in December 1981 issued a default notice under Clause 23 of the contract based upon the non delivery of contract tonneages of coal by the Defendant. That default notice was eventually withdrawn as a result of the agreements reached on 23rd August, 1982.

Flooding: Force Majeure

7. Further, the operation of that default notice was affected by the fact that following unseasonal heavy rains over the Christmas-New Year period in 1981-82 (when the Defendant's main work staff were on leave) there was substantial flooding 20 in the Defendant's main pit at Muja. The Defendant claimed the occurrence of a force majeure situation under Clause 24 of the Contract as a result of that flooding.

8. The Plaintiff accepted that this was a bona fide claim of force majeure but has not agreed the extent, if any, by which:-



A0019e MJS/27.10.82

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

John Buller

Douglas Ralph Chatfield

- (a) the physical extraction and delivery of coal by the Defendant may have been delayed or prevented; or
- (b) whether there were any additional costs of working to the Defendant; or
- (c) any combination of (a) and (b).

Further the Plaintiff is unable at present to assess whether the impact of the force majeure event would have had an immediate effect on coal deliveries or whether the effect, if any, would have been postponed in manifesting itself.

9. The Defendant has indicated it claims coal deliveries 10 have been affected to the extent of causing a shortfall of about 120,000 tonnes in coal deliveries in the first half of 1982. The validity of this claim will fall for determination in other proceedings if not settled.

Prior Negotiations

10. After the interim settlement of 18th February 1982 there were many long and exhaustive disputes between the representatives of the Plaintiffs and Defendants and their respective legal advisers. I believe I was present at all such negotiations. 20

11. For the financial year ended 30/6/1982 the Plaintiff ordered 2.0 million tonnes of base tonnage coal in accordance with the Contract. The Defendant delivered 1,739,705.93 tonnes only leaving a shortfall for that year (for whatever reason including the force majeure claim in respect of 120,000 tonnes) of 260,294.07 tonnes. This represents about \$6.5

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

A0019e MJS/27.10.82

John Liddle

D. Chatfield
20

millions in value and is indirectly reflected in the figure of about \$6.9 millions referred to in paragraph 21 below.

Supplementary Agreements

12. Eventually on 23rd August, 1982 the parties reached or formalised two ad hoc agreements to ensure the continuance of coal supplies to the Plaintiff and the continued administration of the Contract pending resolution of the many differences between them.

13. Both these agreements are in writing dated 23rd August, 1982. The first is commonly called "the Chicken Creek Variation Agreement" and a copy thereof is now produced and shown to me and marked "DRC-2". The second is commonly called "the Minute of 23/8/82" and a copy of that is now produced and shown to me and marked "DRC-3".

14. The two documents are largely self explanatory but I refer to item 3 in the Minute of 23/8/82 Exhibit "DRC-3".

15. Prior to those agreements being finalised there were many exhaustive discussions between the parties to attempt to reach consensus as to what the contract meant and how its various provisions operated. On two of these discussions using blackboards various examples and contingencies were set out by both sides attempting to cover all reasonable and likely contingencies and the financial results thereof.

16. After one of these discussions in August 1982 it was apparent that the contentions of Plaintiff and Defendant were irreconcilable and the Minute of 23/8/82 was the result.

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

A0019e MJS/27.10.82

John Guller.

Contract Provisions

17. Subject to what may be contended by counsel at trial, the Contract contains four major provisions or cases for payment viz:-

- (1) for current coal orders of base tonnage coal under Clauses 4, 5 and 9;
- (2) for coal deliveries deferred by the Plaintiff - under Clause 10;
- (3) in the case of force majeure situations - under Clause 24;
- (4) by way of make-up to the Defendant of what is called "the Pre-tax Cash Surplus" - under Clause 8(3)(c).

10

(There is also provision for refund to the Plaintiff in the event of an excessive profit being made by the Defendant - vide Clause 8(3)(c)(ii)).

There are also special provisions for payment as for a "Defined Event" under Clause 8(1), but these are not material to the present originating summons.

18. Pursuant to Clause 3(1) and Schedule A of the Contract, the Plaintiff in the year ending 30/6/82 has prima facie to purchase 2.0 million tonnes of base tonnage coal. In the year ending 30/6/83 and thereafter the annual base tonnage will be 2.1 million tonnes. The price of coal for the 1982 Financial Year will be about \$27. per tonne and for the 1983 Financial Year, in accordance with the Contract formulae is likely to be in excess of \$30 per tonne. Thus, leaving aside extraordinary items which the Plaintiff may also have to pay

20

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

A0019e MJS/27.10.82

John Buller
16

W. J. ...
62

under Clause 8(1) as upon a "Defined Event" or otherwise of the Contract the Plaintiff will currently be required to pay in excess of \$55 millions for the 1982 Financial Year and in excess of \$60 millions in the 1983 Financial Year with the annual pay-out likely to continue increasing by reason of inflation and general cost rises in the economy. I also refer to the lump sum required to be paid shortly pursuant to Schedule F and Clause 8(3) referred to in paragraph 20 below.

Parties' Contentions

19. The rival contentions of the parties as to the construction interpretation and effect of the Contract which have lead to this originating summons by way of illustration only and in an over simplified form and without prejudice to the arguments of Counsel at trial can be summarised thus:- 10

(1) The Defendant contends:-

- (a) basically the plaintiff must pay initially for all coal ordered (which must be the base tonneages in Schedule A) at the ruling contract prices in accordance with its fortnightly orders placed under Clause 4(1) 20 regardless of any shortfall in current deliveries;
- (b) the plaintiff normally can only obtain redress in respect of any defaults in delivery by the defendant via the mechanism in Clause 8(3) (d);

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

John Buller

John Buller

(c) in utilising "gross revenue" as the basis for ascertaining the Pre-tax Cash Surplus under Clause 8(3), subject only to Clause 8(3)(d) dealing with default, inefficiency etc of the defendant, it is the amount actually paid for tonnage delivered only which must be used as the base from which deductions are made under Schedule F to compare with the appropriate annual percentages at the foot of the annual tables 10 in Schedule F.

(2) The Plaintiff contends:-

- (i) that pursuant to Clause 5(4) and 5(2)(b) it is not obliged to make payment for coal ordered by it but not delivered by the Defendant unless it has "failed" to take delivery or the non-delivery or non acceptance is otherwise due to its fault;
- (ii) that it is not obliged to pay for tonnage not delivered or not accepted due to force majeure except in the way set out in 20 Clause 24;
- (iii) that in calculating the Pre-tax Cash Surplus the "gross revenue" figure is to be based on the notional base tonnage of coal for the year set out in Schedule A where the actual tonnage delivered is less than the

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

John Buller

Schedule A tonnage due to default by the defendant or application of force majeure circumstances.

20. As has been pointed out to the plaintiff by its solicitors, there are a number of other consequential or collateral questions to be answered flowing from the view this Court takes of the Contract and which are set out in the list of questions annexed to the original Summons herein.

Difference in Pre-Tax Cash Surplus

21. Determination of the questions raised in the originating 10 Summons is now a matter of great importance and urgency to both parties. This primarily arises by reason of the defendant having produced draft accounts for the purposes of Schedule F which are in the process of settling between the parties prior to being referred to auditors for certification. On the present drafts for the 1982 Financial Year the plaintiff's officers estimate that on a "worst case" result so far as the plaintiff is concerned, on the auditors passing the accounts, at the expiration of 30 days from the date of that certification, the plaintiff would be required to pay by way of 20 make up of the defendant's Pre-Tax Cash Surplus an amount of about \$6.9 millions as against about \$2.3 millions if the plaintiff's contentions are found to be substantially correct. These figures are calculations from the accounts and financial statements recently submitted by the defendant to the plaintiff and the agreed auditors, Price Waterhouse & Co. Having to pay an amount as large as \$4.3 millions from public moneys

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

A0019e MJS/27.10.82

John Lister

h. Lister

unnecessarily even if the amount is subsequently repaid would be most undesirable and inconvenient for the plaintiff. It will further have to put in train immediately steps to re-organise long term finance and appropriations to meet the additional substantial and recurring annual shortfalls in the defendant's Pre-Tax Cash Surplus which will inevitably follow each year if the Defendant's contentions are correct.

Evidence etc to be Adduced

22. For this reason the plaintiff seeks an expedited hearing of his originating Statement of Claim to the earliest possible 10 dates. The solicitors for the plaintiff estimate that argument should be completed within two days of hearing. It would not be proposed to call viva voce evidence or cross examined deponents. The only materials before the Court would be:

- (a) the Contract (Exhibit "DRC-1")
- (b) possibly material portions of the RTZ study necessary to allow the parties to expound the Contract provisions;
- (c) possibly the Exhibits "DRC-2" and "DRC-3";
- (d) any statement of agreed facts; 20
- (e) this affidavit (subject to all just exceptions);
- (f) probably an affidavit to be filed by the defendant (subject to all just exceptions as to admissibility etc);
- (g) possibly additional questions for determination submitted by the defendant.

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield sworn 4.11.82.

23. It has been agreed between the parties that determination of questions of construction in this originating Summons shall be without prejudice to any claims by either party for subsequent rectification of the Contract. In view of the many disputes or differences between the parties as to the construction, interpretation and operation of the Contract, however, it is essential that there be a binding determination as to what is the prima facie meaning and construction of a number of its provisions before any decision is made by either party as to whether rectification is necessary. 10

24. None of the questions set out annexed to the originating Summons are merely hypothetical. All relate either to current differences and situations which may well occur over the next few years or the life of the contract and in respect of which the Plaintiff and to a considerable extent the Defendant also wishes to know how it stands or will stand in foreseeable contingencies. In some instances the answers will or may affect the approach taken by the plaintiff at least to other outstanding disputes which (if not settled) will need to be determined in other proceedings and go to reducing the cost of 20 and time involved in those proceedings.

25. As to the list of questions for determination annexed to the originating summons, I say specifically:-

Question 1: The answers to this goes to the basis of determination of the major area of dispute between the parties over non-delivery of coal in circumstances such as applied in the 1981-82

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

A0019e MJS/27.10.82

John Gullett
21



[Handwritten signature]

Financial Year. Already a similar problem threatens to develop in the present financial year as the Defendant's coal deliveries are presently running somewhat behind projected schedules.

Question 2: Unless the primary contention of the Defendant as to the construction of the Contract is almost entirely upheld, this question must be determined to allow proper administration of the Contract in the future by the Plaintiff.

Question 3: On the Defendant's contentions, Clauses 10 and 24 10 would have only minimal practical application. If the parties had not reached agreement, this very question would have come up for determination in 1979 at the time there was the deferment of 1979 Clause 10 coal.

Question 4: This question is seen by the Plaintiff as essential for resolution for the proper administration and financial planning under the Contract. As mentioned above, there is a force majeure situation currently requiring decision and 20 the Defendant is also seeking to assign its interest under the Contract by way of second mortgage to an additional lender for a loan of about \$25 millions for purposes unrelated to the performance of the Contract.

Question 5: The Plaintiff desires to know, so as to assess its own position from time to time if and when

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
SWORN 4.11.82.

N0019e MJS/28.10.82

John L. L. L.

L. L. L.

shortfalls occur, whether prima facie it must pay for coal ordered but not delivered. Also the answer to this question will materially assist the determination of any factual disputes upon an arbitration involving shortfalls. On at least one occasion the representatives of Griffin have suggested, in substance, that whether it is expressed in the Contract or not, the intent of the Contract or what really should have been the intent of the Contract was that interim payments 10 on account of anticipated Pre-tax Cash Surplus ought in fairness to Griffin be made by quarterly instalments to keep pace with the cost of coal.

Question 6: Sub-question (1) goes to the whole basis of the disputes between the parties and an answer is essential to the proper working of the Contract so far as the Plaintiff is concerned.

Sub-question (2) raises complications in the calculations of the Pre-tax Cash Surplus.

Instances of Cases (2)(iii), (iv) and (v) have 20 already occurred. These have either been agreed by the parties or have been stood over. However, there is no guarantee that these matters will always be capable of resolution by agreement.

Question 7: This also goes to the main basis of the disputes between the parties. Possibly it may be answered by the answers to prior questions.

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

N0019e MJS/28.10.82

Dr. Guller

L. J. Guller
/ 2.5

Question 8: The two parts of this question are most material. I refer to the shortfall of 260,294.07 tonnes of 1982 coal referred to in paragraph 11 above. On present indication and with its present equipment fleet that shortfall cannot be made up by the Defendant over the next 12 months. I refer to the Chicken Creek variation agreement Exhibit "DRC-2". The Plaintiff would very much have liked to have had that coal in 1982, but by judging its power production operations it has managed to avoid major disruption. In the present economic climate and having in mind its power production facilities becoming available it will not require that 260,294.07 tonnes in 2 - 3 years time, when it is likely to be available for delivery by the Defendant. (The Plaintiff will of course continue to take 2.1 million tonnes of coal as contracted).

The second part of the question goes to the consequential effect under Clause 8(3) which will follow.

26. As the difference in cash which the plaintiff would be required to pay within 30 days on the conflicting arguments as to construction could be about \$4.3 millions, the plaintiff

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

N0019e MJS/28.10.82

John Gilbert

requests the earliest possible dates be appointed for hearing
this matter.

SWORN by the said)
DOUGLAS RALPH CHATFIELD)
at Perth this ^{4th} day)
of NOVEMBER 1982)
Before me:)

K. Gillett

JOHN GILLETT.

~~A Commissioner of the Supreme Court
for taking Affidavits/
A Justice of the Peace~~

THIS AFFIDAVIT is filed by Messrs. Jackson McDonald & Co of 6
Sherwood Court, Perth. Solicitors for the Plaintiff.
TEL: 325.0291 REF: MJS:

N0019e MJS/28.10.82

DOCUMENT 2* - Affidavit of Douglas Ralph Chatfield
sworn 4.11.82.

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. DRC-1 of 1982

B E T W E E N:

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

and

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

This is the Exhibit marked "DRC-1 " referred
to in the Affidavit of DOUGLAS RALPH CHATFIELD
Sworn the 4 day of November 1982
and produced and shown to him at the time of
swearing such Affidavit

10

Before me:-

JOHN GILLET

A Commissioner for Affidavits/
~~Justice of the Peace~~

DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

AGREEMENT - THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA - THE GRIFFIN COAL
MINING COMPANY LIMITED

INDEX

<u>Clause</u>		<u>Page</u>
1.	Definitions: (Interpretation provisions)	2 - 6 6 - 7
2.	Period of Agreement	7
3.	Base Price: Base Tonneages (Tonneage variations)	7 - 8
4.	Orders (and delivery rate)	8 - 9
5.	Quarterly Computation of Deliveries	9
5.(2)	Adjustment and Excessive and Deficient Deliveries)	10 - 11 10
6.	Lease Payment and Company Funded Purchases - adjustment in respect of Financial Agreements (Schedules C, D and E)	12 - 14
7.	(Formula for Base Price - Adjustments Schedules G, H, I, J and K)	14 - 18
8.	Price Revision - Events Beyond Control of Company ("Defined Events")	18 - 22
8.(3)	Price Revision - Financial Performance (Pre-tax Cash Surplus - Schedule F)	23 - 24
9.	(Accounts: Invoices)	24 - 25
10.	(Suspension of Delivery by SECWA)	25 20
11.	(Coal to be Mined from CML's and Coal Seams only)	25
12.	(Adherence to RTZ Mining Plan - Reference to Consultant)	26 - 27
13.	Company's Obligations (Mining)	27
14.	Quality of Coal	27 - 28
15.	Inspection (and Rejection of Coal)	28
16.	Sampling and Analysis	28 - 29
17.	Right of Entry (by Commission to Griffin's Mine etc.)	29 30
18.	Delivery - Size of Coal	29 - 30
19.	Reserves of Coal: Sales to Third Parties	30 - 31
20.	Weighing	31 - 32
21.	Five Year Engineering Review	32 - 33
22.	Assignment	33
23.	Default (Entry by Receiver Appointed by Bank)	33 - 35

DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

24.	Force Majeure	35 - 36
25.	Notice	36
26.	Arbitration (and Experts)	36 - 37
27.	Compliance with Laws	37 - 38
28.	Stamp Duty	38
29.	Severability	38
30.	Consent by Commission to Financial etc. Agreements	38 - 39 ¹⁰
	Schedule A - Base Tonneages (Clause 3)	(40)
	Schedule B - Base Price and Price Components (Clause 3)	(41)
	Schedule C - Equipment (Clause 6)	(42 - 45)
	Schedule D - Purchase Price of Leased Equipment (Clause 6)	(46 - 49)
	Schedule E - Company Funded Equipment (Clause 6)	(50 - 53)
	Schedule F - Pre-tax cash surplus as Percentage of Revenue (Clause 8(3))	(54 - 55B)
	Schedule G - Derivation of Labour Cost Index (Clause 7(5))	(56 - 59)
	Schedule H - Detail of Employee Categories (Clause 7(5))	(60 - 62)
	Schedule I - Basis of Percentage Allowances and Overtime Loading (Clause 7(5))	(63) ²⁰
	Schedule J - Calculation of Materials Cost Related Index (Clause 7(6))	(64 - 66)
	Schedule K - Base Indices to be used in the Adjustment Formula (Clause 7(2))	(67)

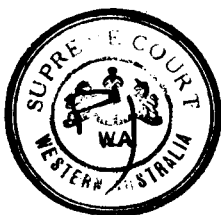
1 9 7 9

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

COAL SALES AGREEMENT



DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

[29th] [March]

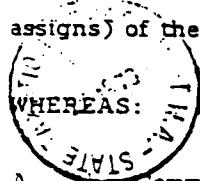
THIS AGREEMENT is made the _____ day of _____ 1979

BETWEEN:

THE STATE ENERGY COMMISSION of WESTERN AUSTRALIA, a body corporate constituted pursuant to the provisions of the State Energy Commission Act, 1975-1978 whose office and principal place of business is at 365 Wellington Street, Perth in the State of Western Australia (hereinafter called "the Commission" in which term shall be included the Commission and its successors and permitted assigns) of the one part and

THE GRIFFIN COAL MINING COMPANY LIMITED, a Company duly incorporated in the said State under the Companies Act, 1961-1975 whose registered office is situate at 24 Kings Park Road, West Perth in the said State (hereinafter called "the Company" in which term shall be included the Company and its successors and permitted assigns) of the other part.

10



A. the Commission and the Company are desirous of entering into an agreement for the sale and delivery by the Company to the Commission and the purchase by the Commission during a twenty-five year period of run of mine coal for use in the Commission's power stations;

20

B. the Company, having regard to the term of the agreement and the need to substantially increase its capacity for production, has -

(1) with the agreement of the Commission, retained R.T.Z. Consultants Ltd. to advise on the development of operating

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

strategies for the best method of expansion of the production of coal from the Company's Coal Mining leases for the purposes of this Agreement;

- (2) arranged with the Commonwealth Trading Bank of Australia, of Martin Place Sydney New South Wales, Rural and Industries Bank of Western Australia of Barrack Street Perth Western Australia, and Continental Illinois National Bank and Trust Company of Chicago of 231 South La Salle Street Chicago Illinois in the United States of America (hereinafter collectively called "the Banks") for the provision of finance for the leasing and/or purchase of mining equipment for the purposes of this agreement.

10

- C. the Company has made available to the Commission the results of the RTZ Study and details of the financial agreements.

Now this agreement witnesseth that in consideration of the premises and mutual covenants herein contained, the parties hereto covenant and agree as follows:

1. (1) In this agreement, subject to the context -

"adjustment formula" means the adjustment formula referred to in clause 7;

20

"advise", "approval", "consent", "notice", "request" or "require" means advise, approval, consent, notice, request or require in writing as the case may be;

"arithmetic verification" means verification conducted by the Commission to check the accuracy of calculations performed by the Company when seeking payment pursuant to the provisions of this Agreement;

"Backup Data" means the financial assumptions, data, computations, and schedules from which the Lease Payments

Schedule was prepared;

"Base Price" means the base price per tonne of coal for the relevant financial year referred to in Schedule B;

"Base Price as adjusted" means the relevant Base Price as adjusted pursuant to clause 7;

"base tonnage" means the relevant base tonnage of coal to be supplied by the Company to the Commission in any financial year as provided in Schedule A and which the Commission must accept or pay for as hereinafter provided; base tonnage in any quarter means the base tonnage for the relevant financial year divided by four;

10

"Central Coal Processing Plant" means the coal processing plant to be constructed and operated by the Commission situated approximately midway between Western No. 2 mine and the Muja power station;

"clause" means a clause of this agreement and a reference to a subclause refers to the relevant subclause of the clause in which the reference appears;

"coal" means run of mine coal as defined herein;

"Coal Inspector" means the person designated by the Commission for the time being to be Coal Inspector for the purposes of clause 15;

20

"Coal Mining Leases" means the Coal Mining Leases registered in the name of the Company as Lessee pursuant to the provisions of the Mining Act and numbered 449, 450, 453, 454, 532 and 537 respectively;

"coal seams" means the seams of coal within the Coal Mining Leases known as ATE, BELLONA, CERES, DIANA, EOS,

FLORA, GALATEA, HEBE and HEBE SPLIT referred to in the RTZ Study;

"Defined Event" means any event beyond the control of the Company or the Commission described in clause 8(1);

"financial agreements" means and includes the financial, security, lease or purchase agreements or instruments or any one or more of them entered into or to be entered into by the Company with the Banks or any of them or such other financial institutions or other companies or firms from time to time for the purpose of further financing of plant and equipment for the purposes of this Agreement or for the securing of such financing. Such financial agreements shall be initialled by the parties hereto for the purposes of identification.

10

"financial covenants" means those provisions of the financial agreements which require the Company to achieve and maintain certain standards of performance as a condition of advancing funds, and includes the covenants contained in clause 7 of the Deed of Debenture with the Banks.

"Financial Deficiency payment" means a payment by the Commission to the Company made pursuant to clause 8(3)(b);

20

"financial year" means the 12 month period commencing on 1st July in each year and terminating on 30th June in the year next following;

"financial year 1" means the financial year commencing on 1st July, 1978 and "financial year" followed immediately by any other numeral has a corresponding meaning;

"Five-Year Engineering Review" means the review conducted pursuant to clause 21(1);

30

"gross revenue" means the base tonnage as specified in Schedule A for the applicable year plus any additional quantities of coal delivered multiplied by the base price as adjusted ;

"Lease Payments Schedule" means the Lease Payments Schedule and Backup Data each respectively initialled by the parties hereto for the purposes of identification;

"materials cost" means the cost of all operating and maintenance materials used in the mining operations applicable to this Agreement and envisaged in the RTZ Study including but not limited to fuels oils greases explosives all equipment spares and replacement parts back up items of equipment tyres and off site plant and equipment repairs ;

10

"Mining Act" means the Mining Act, 1904-1973 of the State of Western Australia;

"Mining Plan" means the Mining Plan referred to in clause 12(1) as may be amended by agreement between the parties pursuant to clause 12(1) or by the Five-Year Engineering Review pursuant to Clause 21 or otherwise as provided by this Agreement;

20

"pre-tax cash surplus" means the pre-tax cash surplus which the Company derives from its operations under this Agreement determined on an annual basis at the end of each financial year in accordance with Schedule F;

"quarter" means a calendar quarter with the first such quarter commencing with the quarter ending March 31st, 1979;

"RTZ Study" means the results of studies carried out by RTZ Consultants Limited and supplemental consultant

30

studies initialled by the parties hereto for the purposes of identification;

"gross specific energy" means the gross specific energy of run of mine coal of not less than 18.6 MJ/Kg (8,000 BTU/lb);

"run of mine coal" means the untreated coal as mined by open cut methods from the Coal Mining Leases;

"Schedule" means a schedule to this Agreement as amended from time to time pursuant to this Agreement;

"Senior Inspector of Coal Mines" means the person for the time being holding the office of Senior Inspector of Coal Mines appointed under the provisions of the Mining Act;

10

"this Agreement" "hereof" and "hereunder" refer to this Agreement whether in its original form or as from time to time added to, varied or amended;

"tonne" means 1,000 kilogrammes in the S.I. system of units.

- (2) Marginal references shall not affect the construction of this Agreement.
- (3) References herein to any agreement (other than this Agreement) or other instrument shall be deemed to include references to such agreement or instrument as amended or replaced from time to time.
- (4) Reference to any Act includes, subject to the context amendments to that Act for the time being in force and also any Act passed in substitution therefor or in lieu thereof and the regulations for the time being in force thereunder.

20

- (5) Words denoting the singular number only shall include the plural number and vice versa.
- (6) Words denoting natural persons shall include corporations and vice versa.

Period of Agreement

2. This Agreement shall be deemed to have commenced on 1st July, 1978 and subject to the provisions of clause 22 shall terminate on 30th June, 2003.

Base price and base tonneages

3. (1) Subject to the provisions of this Agreement the Company shall deliver to the Commission and the Commission shall accept, the aggregate of the base tonneages of coal to be supplied in each of the financial years as provided in Schedule A at the Base Price as adjusted. 10
- (2) The Commission may give to the Company not less than 14 days notice prior to the commencement of any financial year that it requires the base tonnage relevant to such financial year to be increased by any percentage not exceeding 5 per centum and the Company shall supply such increased tonnage at the Base Price as adjusted. 20
- (3) The Commission may, during any financial year give to the Company not less than 14 days notice that it requires the undelivered balance of the base tonnage for such financial year to be increased by any percentage not exceeding 5 per centum and the price payable by the Commission for such increased tonnage shall be the Base Price as adjusted.
- (4) Where notice has been given to the Company pursuant to

subclause (2) the provisions of subclause (3) shall not apply in respect of the financial year to which such notice refers.

- (5) The Company acknowledges that the Commission may from time to time desire an increase in any base tonnage up to 50% above the base tonnage for any financial year. If the Commission desires any increase in any base tonnage other than as provided for in subclauses (2), (3) and (4) the Commission and the Company shall confer with a view to determining whether a separate agreement can be entered into for the sale and purchase of additional coal having regard to the coal reserves contained in the Coal Mining Leases and the Company's supply obligations (both to the Commission and otherwise) for the balance of the term hereof. If the Company agrees to the supply of such additional coal, the parties shall agree upon the price for such coal and such price shall have regard inter alia to the actual increased cost incurred by the Company in the production of such increased tonnages PROVIDED HOWEVER that the provisions of clause 26 shall not apply if the parties do not enter into any agreement as aforesaid.

10

20

Orders

4. (1) Subject to the provisions of subclause (2) and (3), the Commission shall order coal to be delivered by the Company pursuant to clause 3, at fortnightly intervals stating the relevant delivery point or points as provided in clause 18. In determining the quantity of such fortnightly orders the Commission shall ensure that the Company is enabled to maintain an average daily rate of delivery of coal to the Commission determined by dividing the relevant base tonnage of coal by the number of working days in the relevant financial year. For the purposes of this subclause

30



DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

a working day means any day in any financial year not being a holiday as referred to in subclause 2(a).

- (2) (a) The Company shall not be required to deliver coal during any period when the mine workers employed by the Company are on holidays being the holidays prescribed from time to time under the industrial award governing the conditions of employment of such mine workers.
- (b) The Commission shall not later than one month before the commencement of each financial year provide the Company with a delivery schedule setting out the estimated quantity of fortnightly orders throughout the relevant financial year. 10
- (3) Having regard to the provisions of subclause (2) the Company shall, in respect of each fortnightly order, use its best endeavours to deliver coal to the Commission at the average daily rate of delivery referred to in subclause (1).

Quarterly computation of deliveries

- (1) The Commission shall at the end of year quarter commencing with the quarter ending on the 31st March, 1979 compute the difference, if any, between the tonnage ordered by the Commission and that delivered by the Company during the preceding quarter and if the magnitude of the difference exceeds 0.5 per centum, shall notify the Company of such computation. The Company shall be deemed to have agreed with such computation unless within 7 days of the receiving of such notice the Company notifies the Commission that it disputes such computation. 20 30

Excessive and deficient deliveries

(2) If the computations made pursuant to subclause (1) indicate that the quantity of coal delivered by the Company during the preceding quarter exceeds the quantity ordered by 0.5 per centum or is less than the quantity ordered by 0.5 per centum then -

(a) in respect of any excess the Commission may -

(i) accept such excess as additional to the relevant base tonnage at the Base Price as adjusted applicable at the time of delivery, or

10

(ii) accept such excess as provided in sub-paragraph (i) of this paragraph and require the Company to reduce the quantum of subsequent deliveries until such time as such excess has been extinguished;

(b) in respect of any deficiency caused by the inefficiency of the Company in carrying out its operations or by default in the performance of its obligations hereunder and if in the opinion of the Commission such deficiency could be made up within a reasonable time without affecting the Company's subsequent delivery obligations, the Commission may allow the Company a reasonable time to make up such deficiency and the price payable by the Commission in respect of those parts of any subsequent deliveries as relate to such deficiency shall be the prices payable by the Commission during the period of such deficiency.

20

(3) If after the expiry of any quarter, payments by the Commission for coal delivered during such quarter are by

reason of the exercise by the Commission of its rights under clause 10, less than those that would have been made to the Company had such right not been exercised, the Commission shall, within 30 days of the expiry of such quarter pay to the Company the amount of any shortfall. For the purposes hereof the amount of shortfall in any quarter shall be determined by dividing the base tonnage as specified in Schedule A for the applicable year by the number of working days for that year and multiplying by the number of working days for that quarter less the actual tonnage delivered multiplied by the Base Price(s) as adjusted applicable at the time the shortfall tonnages should have been delivered.

10

- (4) If during any quarter in any financial year the Company is ready and willing to deliver and the Commission shall fail to accept delivery of the whole or any part of the base tonnage of coal to be delivered/sold in that financial year as provided in Schedule A in quantities ordered by the Commission up to but not in excess of the base tonnages set out herein, the Commission shall within 30 days of the expiry of such quarter pay the Company for the shortfall as defined above.

20

- (5) Where the Commission pays for undelivered coal pursuant to this clause the Company shall reserve an equivalent quantity of coal in its future planning that would have been delivered to the Commission but for the provisions of this clause. The Company acknowledges that the Commission has the right to take delivery of such equivalent quantity of coal at a future date. The Commission acknowledges that coal reserved by the Company hereunder shall remain the property of the Company until delivery. The provisions of subclauses (2) and (3) of clause 10 shall mutatis mutandis apply in respect of the delivery of such coal and the payment therefor.

30

Lease Payments and Company Funded Expenses: A continuation in
respect of the financial agreements

6. (1) The items of plant and equipment referred to in the Mining Plan to be leased or purchased by the Company (as the case may be) are listed in Schedule C. Such of those items to be leased by the Company are set out in Schedule D and such of those items to be purchased by the Company are set out in Schedule E.

The lease payments due to the Banks under such of the financial agreements as relate to the plant and equipment set out in Schedule D (as amended from time to time under this Agreement) are set out in the Lease Payments Schedule and Backup Data. The quarterly payments due under such of the financial agreements as relate to plant and equipment set out in Schedule E (as amended from time to time in accordance with this Agreement) are set out in that schedule. The Company shall be entitled to the benefit of the value of any trade-ins of any plant and equipment (whether now owned or leased by it or not).

10

20

- (2) If the aggregate of the amounts paid by the Company pursuant to the financial agreements in any quarter differs from an amount determined by multiplying the components "LP" and "CF", both as adjusted by the base tonneages in Schedule A divided by the number of working days in the relevant year and multiplied by the number of working days in the relevant quarter, the Company shall notify the Commission of the difference within 14 days of the last day of the relevant quarter and subject to arithmetic verification the Commission shall pay the difference to the Company or the Company shall pay the difference to the Commission as the case may be within 21 days of the last day of the relevant quarter.

30

(3) Nothing in this clause shall require the Commission to reimburse the Company for any extra amounts including but not limited to penalty interest payments paid by the Company under the financial agreements which result from the Company's failure to perform any obligation thereunder.

(4) (a) If at any time prior to the acquisition of any items of plant or equipment listed in Schedule C (as may be amended pursuant to the Five-Year Engineering Review conducted in accordance with clause 21) the Company, in its management of mining operations on the Coal Mining Leases, desires to acquire items of plant or equipment in substitution for such listed items and such substitution is consistent with the Mining Plan as may be amended by such Five-Year Engineering Review or otherwise in accordance with this Agreement -

10

(i) if at the time of substitution the aggregate of the purchase prices of the remaining listed items and such substituted items at such time, if any, for the relevant financial year does not exceed the aggregate of the purchase prices priced at the date of substitution of all such originally listed items, the Company shall give to the Commission notice thereof and may proceed with such substitution;

20

(ii) if at the time of such proposed substitution the aggregate of the purchase prices of the remaining listed items and such substituted items, if any, for the relevant financial year exceeds the aggregate of the purchase prices of all such originally listed items priced at the date of substitution, the Company shall give notice to the Commission describing such proposed substitution and the Commission shall be deemed to have agreed to such substitution unless the Commission

30

notifies the Company within 14 days after receiving such notice that the Commission disputes such substitution. In the event of a dispute the parties shall confer and endeavour to agree upon such substituted plant and equipment which shall be consistent with the Mining Plan and Schedule C as may be amended pursuant to the Five-Year Engineering Review. If agreement is not reached within 45 days of such notice, the Company may either acquire the equipment listed in Schedule C as may be amended in accordance with Schedules D and E both as may be amended or request the appointment of an independent consultant acceptable to the Commission and whose recommendations concerning the proposed substitution will be binding on both parties. If the consultant is not selected by agreement within 50 days of such notice the parties hereby agree to accept the appointment of an independent consultant by the Chairman for the time being of the Australian Institution of Mining and Metallurgy and such consultant's recommendations concerning the proposed substitution will be binding on both parties.

10

20

(b) Where any substitution is made pursuant to this subclause Schedules C, D and E and the Lease Payments Schedule shall be amended accordingly.

(c) Nothing in this subclause shall be deemed to confer on the Company any right to transfer any item or substituted item from Schedule D to Schedule E or vice versa.

30

7. (1) For the purposes of the adjustment formula the Base Price shall be deemed to be comprised of the following components

which are set out in Schedule B and are expressed in dollars per tonne for each financial year -

- (a) labour and labour related costs including leave and workers compensation (L);
- (b) materials cost (M);
- (c) other costs including overheads and other capital expenditure (O);
- (d) lease payments in respect of the financial agreements (LP);
- (e) Company funded capital payments in respect of the financial agreements (CF).

10

- (2) The adjustment formula by which the Base Price shall be adjusted is as follows :-

$$P_n = L_n \frac{I_{Ln}}{I_{Lo}} + M_n \frac{I_{Mn}}{I_{Mo}} + O_n \frac{I_{On}}{I_{Oo}} + LP + CF$$

WHERE P_n = Base Price as adjusted as at quarter n

L = Labour related cost component

I_L = Labour related cost index (as determined pursuant to this clause)

M = Materials cost component

I_M = Materials related cost index (as determined pursuant to this clause)

20

O = Other cost component (including overheads and other capital expenditures)

I_O = Other cost index (being the Consumer Price Index, All Groups Index Number, Perth, Catalogue Number 6401.0 for the quarter preceding the quarter in which adjustment is made)

LP = Lease payments component for the relevant financial year as set out in Schedule B.

CF = Company funded payment component for the relevant financial year as set out in Schedule B.

10

Subscript n denotes quarter n

Subscript o denotes quarter o

I_{Lo} , I_{Mo} , I_{Oo} are the labour related cost base index, the materials related cost base index and the other cost base index respectively as at 1st July, 1978. The derivation of I_{Lo} appears in Schedule G. The base indices I_{Mo} and I_{Oo} are set out in Schedule K.

(3) The Base Price shall be adjusted as follows:-

20

(a) by adjustment of I_L from time to time as at the dates upon which the Coal Industry Tribunal or any other legally constituted authority gives any decision affecting the wage level and associated costs payable to any employee group of the Company as set out in subclause (4), and which results in an alteration to the labour related cost index (I_L);



DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

(b) by adjustment of all other indices on 1st September, 1st December, 1st March and 1st June in each financial year for the purposes of any alteration to any index in the adjustment formula other than the Labour related cost index;

(c) if the aggregate of the amounts paid by the Company during any quarter pursuant to the financial agreements differs from the amount specified in the Lease Payments Schedule for that quarter, then the LP component of the Base Price applicable to the next succeeding quarter pursuant to Schedule B will be increased or decreased as the case may be by multiplying it by the ratio of such amounts paid to the amount for that quarter specified in the Lease Payments Schedule.

10

(d) if the aggregate of the amounts paid by the Company during any quarter pursuant to ^{Schedule E} ~~the~~ Financial Agreements differs from the amounts specified in Schedule E for that quarter, then the CF component of the Base Price applicable to the next succeeding quarter pursuant to Schedule B will be increased or decreased as the case may be by multiplying it by the ratio of such amounts paid to the amount for that quarter specified in Schedule E.

KKB
B.S.

20

(4) Notwithstanding the adjustments in subclauses (c) and (d) of subclause (3) above, the Base Price as adjusted for the base tonnage will be the sum of the adjusted Labour related cost component, adjusted Materials related cost component, adjusted Other related cost component, adjusted Lease Payment component and adjusted Company Funded component.

30

The Base Price as adjusted when multiplied by the base tonnage plus any incremental tonneages equals the gross revenue.

- (5) In the application of the adjustment formula I_L and I_{Lo} shall be calculated in accordance with the provisions of Schedules G, H and I.
- (6) In the application of the adjustment formula, I_M shall be calculated in accordance with the provisions of Schedule J.
- (7) The Company shall provide, and if required by the Commission verify, such information as the Commission may require as to any component or constituent part of any of the various formulae referred to in this clause.

10

Price Revision - Events beyond Control of the Company

8. (1) If after the date of commencement of this Agreement -
 - (a) the Government of the State of Western Australia or any State agency or instrumentality or any other local authority or statutory body in the State -
 - (i) pursuant to the provisions of the Mining Act or any agreement between the State and the Company ratified by Act of Parliament alters the rates of rent in respect of the Coal Mining Leases or on land leased to the Company, or of royalty, above the respective rates current at the date at the commencement of this Agreement; or
 - (ii) imposes any new levy tax or impost on the Company or changes the rate of levy or tax on coal production or other taxes, rates or charges of any nature whatsoever; or

20

- (iii) requires any change in mining practices or mine safety measures involving the Company in expenditure in respect of which no allowance was made in the RTZ Study; or
 - (iv) requires any change in the methods of rehabilitation used to restore land mined by the Company involving the Company in expenditure in respect of which no allowance was made in the RTZ Study; or
- (b) the Government of the Commonwealth of Australia or any Commonwealth agency or instrumentality or any other authority or statutory body of the Commonwealth - 10
- (i) pursuant to the provisions of the Income Tax Assessment Act of the Commonwealth of Australia alters the rate of income tax payable by the Company or changes the deductibility of expenditure or assessability of revenue from those existing at the date of commencement of this Agreement; or 20
 - (ii) changes the rate of levy or tax on coal production or imposes any new form of levy tax, or impost; or
 - (iii) changes the rate of duty of excise on coal under the Excise Tariff Act, 1921 above the rate current at the date hereof; or
 - (iv) requires any change in the methods of rehabilitation used to restore land mined by the Company involving the Company in expenditure in respect of which no allowance was made in the RTZ Study; or 30

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

- (c) (i) the Company (after having taken all reasonable actions consistent with its financial position necessary to facilitate the obtaining of the same during the period up to 31st December 1978 and agreeing to take such actions as may be necessary to facilitate the obtaining of the same during the period up to 30th June 1979) is unable to obtain an Investment Allowance under the Income Tax Assessment Act of the Commonwealth of Australia of 40% on the whole or any part of the plant and equipment ordered prior to 30th June 1978 and listed in Schedule C hereof (being the plant and equipment lists for financial years 1 and 2) at the commencement of this Agreement; or 10
- (ii) the Company is unable to obtain an Investment Allowance under the Income Tax Assessment Act of the Commonwealth of Australia of at least 20% in each of financial years 3 to 7 inclusive on the whole or any part of the plant and equipment to be ordered in each such financial year as listed in Schedule G; or 20
- (iii) the Company obtains an Investment Allowance under the Income Tax Assessment Act of the Commonwealth of Australia in excess of 20% in any of the financial years referred to in subparagraph (ii) above on the whole or any part of the relevant plant and equipment; or
- (d) the minimum number of hours per week to be worked by the Company's employees for normal wage rates is reduced from those required at the commencement of this Agreement (apart from those or any other changes in which are the subject of adjustment in clause 7) by the Coal Industry Tribunal; or 30

(e) the Company encounters sub-surface conditions which could not reasonably have been anticipated by a prudent mine operator after making the necessary geological investigations, and such conditions differ significantly from those documented and costed in the RTZ Study;

(f) the exercise by the Commission of its rights pursuant to clause 10 results in increased costs to the Company;

and in any financial year the consequence of any such Defined Event or combination of such Defined Events (whether occurring in such financial year or in any earlier financial year) is or is anticipated to be a change of more than 2% in the after tax cash surplus of the Company in the first mentioned financial year, then in such case, the Commission will pay to the Company or the Company will pay to the Commission as the case may be a Defined Event payment of such amount as shall be required to compensate the Company or the Commission as the case may be in consequence of the occurrence of any such Defined Event and in the case of the Company having regard to the intent of the parties that the Defined Event payment shall be such as to place the Company in the same after tax financial position in terms of after tax cash surplus in the first mentioned financial year as a result of performance of this Agreement as if such Defined Event or Defined Events had not occurred. A Defined Event payment shall be made subject to arithmetic verification within 21 days of receipt of notice in writing specifying the amount of such payment and the basis upon which the same is calculated. A Defined Event payment to the Company shall not form a part of gross revenue for the purposes of this Agreement.

10

20

30

(2) (a) If -

DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

- (i) any index in the adjustment formula ceases to exist on a quarterly basis; or
- (ii) the method of computing indices I_L and I_M becomes inappropriate because of the actions of an appropriate recognised authority;

then, if there is no substitute or equivalent index or method of computing indices (as the case may be), the parties shall agree upon such quarterly index or method of computation (as the case may be) as will as far as practicable achieve such adjustment to the Base Price as would have occurred had such index continued to be published or methods of computation continued to be appropriate. In the event that the parties fail to agree on such substitute index or adjustment within 30 days of the occurrence of the events defined in (i) and (ii) above, then the Commission and the Company shall agree on an independent expert within 60 days of the occurrence of such events and the decision of such independent expert on such substitute index or adjustment shall be binding on both parties. If the parties cannot agree on the choice of an independent expert within 60 days of the occurrence of these events, then the parties hereby agree to accept the appointment of an independent expert by the Chairman of the Australian Institution of Mining and Metallurgy within 30 days of being required to do by either party and such consultant's decision shall be binding on both parties. If the independent expert does not submit his decision within 60 days after his appointment or informs the parties that he is unable to make a decision then the parties will again confer and endeavour to agree on such substituted index or adjustment.

10

20

30

price Revision - Financial Performance

(3) (a) The Company shall during the currency of this Agreement supply to the Commission within 90 days of the completion of each financial year, a statement detailing the pre tax cash surplus and the after tax cash surplus which the Company derives from this Agreement. The Company will, if requested by the Commission, have such a statement audited by an independent auditor agreed between the parties and the cost of such audit shall be shared equally.

10

(b) If notwithstanding good mining and management practices, the Banks serve notice on the Company for any of financial years 1, 2 and 3 that the Company fails to comply with the financial covenants contained in the financial agreements for the relevant financial year, the Commission within 15 days of the receipt of notice from the Company to that effect will pay to the Company a Financial Deficiency payment sufficient to enable the Company to comply with such financial covenants. Such Financial Deficiency payments shall not form a part of gross revenue for the purposes of this Agreement.

20

(c) If at any time after the expiration of financial year 3 -

(i) notwithstanding good mining and management practices, in the immediately preceding financial year the pre tax cash surplus of the Company expressed as a percentage of gross revenue falls below the the pre tax cash surplus expressed as a percentage of gross revenue estimated pursuant to the RTZ Study computed for that financial year in Schedule F, by more than one per centum then the Company shall notify the Commission and the Commission within 30 days of receipt of such

30

notice will pay to the Company such amount as is required to restore the pre-tax cash surplus to that estimated pursuant to the RTZ Study for such financial year;

(ii) the pre tax cash surplus of the Company expressed as a percentage of gross revenue in the immediately preceding financial year exceeds the pre tax cash surplus expressed as a percentage of gross revenue estimated pursuant to the RTZ Study computed for the relevant financial year in Schedule F, by more than 5 per centum, then the Company shall notify the Commission and the Company within 30 days of receipt of notice of demand from the Commission shall pay to the Commission such amount as is required to restore the pre tax cash surplus to that estimated pursuant to the RTZ Study for such financial year plus 2 per centum.

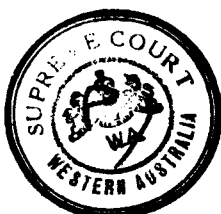
10

(d) Notwithstanding anything contained in this subclause, the Commission shall not be liable for any increase in the price of coal where any insufficiency of pre tax cash surplus referred to in paragraphs (b) and (c) of this subclause is the result of improper management by the Company, the effect of activities of the Company unrelated to the mining of coal for the purposes of this Agreement, any departure by the Company from the Mining Plan as may be adjusted or the failure by the Company to observe the best modern practice in mining methods.

20

9. (1) The Company shall submit accounts to the Commission accompanied by detailed invoices and supported by full details of coal delivered and any adjustments required.

30



DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

(2) Subject to arithmetic verification, payment shall be made not later than 5 working days after receipt by the Commission of such accounts and relevant accompanying documents.

10. (1) The Commission may require the Company to suspend any delivery of coal ordered by the Commission or in any financial year order less than the base tonnage subject to the Commission paying to the Company such amount as would have been payable by the Commission had the Commission ordered and taken delivery of such coal pursuant to clause 4 and the Company shall reserve an equivalent quantity of coal in its future planning that would have been delivered but for the provisions of this clause. The Company acknowledges that the Commission has the right to take delivery of such equivalent quantity of coal at a future date. The Commission acknowledges that coal reserved by the Company hereunder shall remain the property of the Company until delivery.

10

(2) Where the Commission requires the Company to deliver coal reserved pursuant to subclause (1) the Commission shall have regard to the capability of the Company's existing plant and equipment to make such delivery without undue interference with the Company's other delivery obligations hereunder and the rate of such delivery will be determined by agreement between the parties.

20

(3) The Commission shall pay to the Company for coal delivered pursuant to this clause such additional amount as when added to any amount paid for the equivalent quantity of coal reserved pursuant to subclause (1) will equal the Base Price as adjusted at the time of such delivery.

11. All coal to be supplied to the Commission hereunder shall be mined from the coal seams in the Coal Mining Leases and the Company shall not supply coal to the Commission from any other seam without the prior approval of the Commission.

30

DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

12. (1) The Company shall substantially adhere to the Mining Plan (incorporating plant and equipment and manning requirements) referred to in the RTZ Study provided however subject to any recommendations which may have been made in the Five-Year Engineering Review that where the Company desires to depart from the Mining Plan to any significant extent which would result in any increased cost to the Commission the Company shall first consult with and agree with the Commission on such departure including any revision of plant and equipment and manning requirements thereby required.

10

If within 15 days of the initial consultation, the Commission has not agreed to the Company's departure from the Mining Plan, the Commission and Company shall agree upon and appoint a qualified mining consultant independent of both the Commission and Company within 30 days of the initial consultation whose recommendation on the Company's request shall be made within 60 days and shall be binding on both parties. If the Commission and the Company fail to agree on such independent consultant within such period, then the parties hereby agree to accept the appointment of such independent consultant by the Chairman of the Australian Institute of Mining and Metallurgy within 30 days of receipt of a request by either party and such consultant shall be required to make his recommendations within a further 60 days and whose recommendations shall be binding on both parties.

20

- (2) On 1st July, 1979 and thereafter at 6 monthly intervals the Company shall report to the Commission on the Company's progress in mining pursuant to the Mining Plan including details of current and planned equipment usage and manpower, and obligations under the financial agreements denominated in foreign currencies; and

30

- (3) The Company shall not use or permit to be used any plant or equipment listed in Schedule C as may be amended other than for the purposes of this Agreement and clause 19, or remove or permit to be removed from the Coal Mining Leases the said plant or equipment, other than for repair, maintenance or replacement without the consent of the Commission, but such consent shall not be unreasonably withheld if the Company is able to demonstrate that the Commission's rights hereunder are not prejudiced.

Company's obligations (mining)

10

13. (1) The Company -

- (a) shall adequately drain areas from which coal is mined or loaded to prevent increase in moisture content due to inclusion of water; and
- (b) when mining outcrop sections of coal seams, shall mine with additional care to ensure that weathered coal which does not meet the quality standards referred to in clause 14 is neither offered nor delivered to the Commission.

- (2) The Company may make water available pursuant to the operations described in 13(1)(a) above, to the Commission for use at the Commission's Power Stations. The terms and conditions of such supply shall be embodied in a separate agreement between the parties.

20

Quality of coal

14. All coal which the Company shall deliver to the Commission shall -

- (a) conform to the requirements of this Agreement;

- (b) be reasonably free from impurities;
- (c) be reasonably free from extraneous impurities materials such as shale, clay, timber, iron or other tramp metal, explosives, detonators and wire; and
- (d) have a gross specific energy as defined.

Inspection

15. The Coal Inspector may reject any truckload of coal which in his opinion does not comply with the provisions of clause 14. However, any rejection of coal because of low specific energy must be as a result of tests conducted in the pit prior to mining. Should a dispute occur in respect to any coal rejected, the matter shall be referred to the Senior Inspector of Mines at the Mines Department for the time being at Collie whose decision shall be final and binding on both parties.

10

Sampling and analysis

16. (1) The Commission may from time to time obtain coal prior to delivery for sampling and analysis.
- (2) The Commission shall follow the methods set out in Australian Standard Specifications 152 and 153 (as varied from time to time) in conducting such sampling and analysis and shall, if requested by the Company, provide the Company with a copy of the results thereof.
- (3) In the absence of fraud, mistake or manifest error, the Company shall accept the results of such sampling and analysis provided such sampling and analysis complies with the obligations under sub-clause (2).

20

(4) If the Company so requires it may appoint an observer to attend any sampling and analysis conducted by the Commission pursuant to this clause.

(5) Any rejection by reason of low specific energy content shall be based upon daily sampling and analysis conducted over any fortnight in accordance with this clause and clause 15.

Right of entry

17. The Commission, its servants or agents shall during mine working hours have the right on giving to the Company's mine Superintendent or Manager reasonable notice, to enter upon any part of a mine or mines the subject of the Coal Mining Leases or into any buildings of the Company thereon in which coal is handled and stored for the purpose of sampling, examining or inspecting such coal in accordance with this Agreement.

10

Delivery - Size of Coal

18. (1) Subject to subclause (2) and (3) the Company shall deliver run of mine coal ordered by the Commission for the Muja Power Station to the coal receiving hoppers servicing the said power station between the hours of 6.30 A.M. and 10.00 P.M. or between such other hours as the parties shall agree. The size of such coal shall be such that the largest dimension shall not exceed 500 millimetres.

20

(2) The Company and the Commission acknowledge that some coal may be delivered from time to time on behalf of both parties to the Commission's Central Coal Processing Plant as may be agreed between them. Such deliveries and any subsequent crushing and loading shall be the subject of a separate agreement between the parties.

30

(3) A Coal Crushing Plant will be installed adjacent to the Muja Power Station early in the period of this Agreement and

subject to subclause (2), delivery of all coal will be required to this plant at no additional cost to the Company. The parties agree to consult on the design, construction, financing and operation of the plant and any arrangement consequent thereon shall be embodied in a separate agreement.

- (4) The provisions of clause 26 shall not apply if the parties do not enter into any agreement pursuant to subclauses (2) and (3).

Reserves of Coal and Sales to Third Parties

10

19. (1) The Company shall at all times ensure that it has reserved in the coal seams 105% of the coal required to enable it to meet its remaining obligations under this Agreement.

RWB
[Signature]
(1) (2)

(2) The Company shall not, during the term of this Agreement, supply coal at a rate exceeding 100,000 tonnes a year in the aggregate to any purchaser or purchasers other than the Commission from the coal seams without the consent of the Commission which shall not be unreasonably withheld if -

20

(a) the Company demonstrates that the proposed transaction or transactions shall not prejudice the Commission's rights hereunder; and

(b) (i) the price per tonne of coal for the time being payable by the Commission is equal to or less than the price to be paid by the proposed purchaser or purchasers; or

(ii) the price per tonne of coal for the time being payable by the Commission is greater than the price to be paid by the proposed purchaser or purchasers and the Company has agreed with the Commission to reduce such price payable by the Commission to an amount not more than the amount payable by such purchaser or purchasers.

30

- (3) Notwithstanding subclause (2) where the Company proposes to enter into any agreement for the supply of coal from the coal seams at a rate exceeding 100,000 tonnes per annum in the aggregate to any purchaser or purchasers other than the Commission, the Company shall notify the Commission of the quantity of coal to be so supplied.

40

the duration of the proposed contract and the price to be paid for such coal by the proposed purchaser.

- (4) In addition to the reserves of coal which the Company is obliged to maintain pursuant to subclause (1), the Company shall maintain a reserve of 8 million tonnes of coal (in this subclause called "the reserved tonnage for the possible purchase by the Commission pursuant to the provisions of clause 3(5) PROVIDED that if after the expiration of financial year 17 the whole of the said reserved tonnage has not been purchased by the Commission pursuant to clause 3(5) or by third parties the Company may in respect of such reserve tonnage or the balance thereof reduce such reserve tonnage or the balance thereof for each financial year commencing with financial year 18 by one eighth of such balance. If the Company desires to enter into a contract for the supply of coal with a third party which would reduce the reserved tonnage, the Company shall apply to the Commission for its consent to such proposed sale. Upon receipt of such application the Commission may request the Company to enter into negotiations with the Commission for the purchase by the Commission of such coal. If within 3 months of the date of such application a separate agreement is entered into between the Commission and the Company pursuant to such negotiations such application shall be deemed to be withdrawn. If at the expiration of the said period of 3 months no such separate agreement is entered into, the Commission shall not unreasonably withhold its consent to such proposed sale by the Company to the third party if such proposed sale will not prejudice the rights of the Commission under the provisions of this Agreement with the exception of this sub-clause.

10

20

30

Weighing

20. (1) Coal supplied to the Commission hereunder shall be weighed on a Commission weighbridge at the point of delivery pursuant to clause 18 or in such other manner as is agreed between the parties.
- (2) The Commission shall ensure that the weighing device is properly calibrated and if the Company shall have any doubts as to the correctness of any weighing device of the Commission, the Commission shall at the request of the Company have such weighing device tested in the presence of a duly authorised representative of the Company and produce to the Company a copy of the certificate issued in connection with such test. In the event of such testing proving such weighing device to be inaccurate or defective to a greater extent than

40

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

0.5 per centum, the cost of testing shall be borne
[0.5 per centum, the cost of testing shall be borne
by the Commission but otherwise shall be borne by
the Company.]
the Company.

21. Five-Year Engineering Review

(1) Six months prior to the end of financial years 5, 10, 15 and 20 the Company and the Commission will appoint a consulting mining engineer or engineering company independent of both the Company and the Commission to:

(a) review the Company's adherence to the Mining Plan and determine whether the Company has mined coal efficiently and at as low a cost as would any prudent coal mine operator; and

(b) review the list of Leased Equipment designations as outlined in Schedule D and the Company Funded Equipment list as outlined in Schedule E to take account of technological advances in equipment design and capabilities applicable to the Mining Plan (and to ensure efficient, low-cost production of coal from the coal seams; and

10

(c) compare the performance of the cost indexes in Schedules G, H, I, J, and K with the actual costs incurred by the Company in the period since the last Five-Year Engineering Review except that the first such engineering review will be based on the actual costs incurred since January 1st, 1979;

20

(d) (if the comparison prepared pursuant to subclause (c) shows that, during the relevant five year period, between the end of the second quarter of the third year and the end of the second quarter of the fourth year, any index ceases to be relevant or the actual costs incurred by the Company attributable to the component exceeds the cost of the indexed component derived from Schedules G, H, I, J and K by more than 2 per centum of the indexed cost,) recommend replacing such index with one more appropriate; and

30

(e) in making recommendations pursuant to subclause (d), the independent consultant shall not make changes to the cost indices to compensate the Company for any inefficiencies in the mining operations when compared with the mining operations under the Mining Plan.

(2) In the Five-Year Engineering Review, the indexes will be kept on a common 1st July 1973 basis with the exception



DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

the Labour related cost index which shall be on a 30th June 1978 basis.

(3) The Commission and the Company hereby agree to be bound by the recommendations of such independent consultant and agree to any change that may be required to give effect to such recommendations to the Mining Plan, Lease Equipment Schedule, Company Funded Equipment Schedule, revisions to the Base Price as adjusted, replacement of cost indexes, or adjustment of the components in Schedule B as the case may be.

10

(4) If the Commission and the Company cannot agree on the selection of the independent consultant within 15 days after the dates referred to in subclause (1) above, the Commission and the Company hereby agree to accept the appointment of an independent consultant by the Chairman for the time being of the Australian Institute of Mining and Metallurgy within 30 days of being requested by either party to do so.

Assignment

22. Neither party shall assign or sublet any part of its rights or obligations under this Agreement without the prior consent of the other party and in the case of an assignment by the Company by way of security, such consent shall not unreasonably be withheld.

20

Default

23. That in the event of :

(a) any default by the Company or the Commission in the due observance or performance of any of the terms, conditions, covenants or stipulations on their respective parts herein contained and such default continuing for fourteen days

after receipt of notice from the other party requiring such default to be remedied or such other period as is specified in such notice which ever is the longer; or

- (b) an order being made for the winding up of the Company or a resolution being passed for the winding up of the Company (other than for the purpose of reconstruction or amalgamation)

then in any such case the Commission or the Company as the case may be shall be entitled forthwith by notice to the other party of which a copy is given to the Banks to cancel or rescind this Agreement and upon such notice being given to the other party and the Banks this Agreement shall be terminated without prejudice to any right of action or remedy of either party in respect of the breach of any term, condition covenant or stipulation on the part of the other party herein contained.

10

PROVIDED THAT if within the period of the notice referred to in paragraph (a) of this clause or prior to an order being made or resolution being passed under paragraph (b) of this clause as the case may be Continental Illinois National Bank and Trust Company of Chicago (hereinafter called "Continental Bank") exercises its rights to appoint a receiver or reciver and manager of the whole or any part of the property of the Company or enter into possession of the same pursuant to the financial agreements or any of them and gives notice to the Commission of such exercise and by such notice declares that its purpose is to enable payment of monies payable to it or to the Banks while ensuring that the obligations of the Company under this Agreement are performed then, without prejudice to the right of the Commission to cancel or rescind this Agreement on account of any default under paragraph (a) of this clause after the date of such appointment or entry into possession as the case may be, the Commission shall not be entitled to cancel or rescind this Agreement :

20

30

- (i) on account of any default by the Company under paragraph (a) of this clause prior to such appointment or entry into possession as the case may be unless such default remains unremedied for a period of thirty days after the date of such appointment or entry into possession as the case may be; or
- (ii) on account of an order being made for the winding up of the Company or a resolution being passed for the winding up of the Company (other than for the purpose of reconstruction or amalgamation), as the case may be.

10

Force Majeure

14. This Agreement shall be subject to any delay in the performance of obligations and to the temporary suspension of the continuing obligations hereunder caused by circumstances beyond the power and control of the party responsible for such performance including delays caused by or arising from acts of God earthquakes floods storms tempests washaways fire (unless caused by the actual fault or privity of the party responsible for such performance) act of war or public enemies riots or civil commotions strikes lockouts stoppages restraint of labour or other similar acts provided that the party whose performances of obligations is affected by any of these causes shall promptly give notice to the other party of the event and shall minimise the effect of the causes as soon as possible after their occurrence.

20

During the period of such delays the obligations of the party responsible shall be suspended only to the extent made necessary by the delay. Deliveries that otherwise would have been made during any period in which the performance of either party is delayed shall be made at such time or times as the Company and the Commission agree unless such deliveries are cancelled by agreement.

30

PROVIDED THAT in the event of any delay occurring in the performance of obligations or the temporary suspension of the continuing obligations of either party hereunder being caused as aforesaid which results in any delay in or suspension of payment by the Commission to the Company of any payment which would otherwise fall due hereunder then notwithstanding any other provision herein contained the Commission shall pay to the Banks on behalf of the Company on their respective due dates for payment all such amounts as may become due and payable by the Company under the financial agreements during the period of such delay or suspension as the case may be/ ^{in the} such payments shall be credited by the Company to the Commission against future deliveries of coal.

10

Notice

25. Any notice consent or other writing required by this Agreement to be given or sent shall be deemed to have been duly given or sent by the Commission if signed by the Commissioner or Secretary of the Commission and forwarded by prepaid post to the Company, 24 Kings Park Road, West Perth, Western Australia or delivered by hand to that place and by the Company if signed by the Managing Director or Secretary of the Company and forwarded by prepaid post to the Commissioner of the State Energy Commission of Western Australia at 365 Wellington Street Perth Western Australia or properly delivered to a responsible Commission Officer at the above address AND any such notice consent or writing shall be deemed to have been duly given or sent (unless the contrary be shown) on the day on which it would be delivered by hand and addressed to the party concerned at its respective address herein contained

20

30

Arbitration

26. (a) Except as expressly provided herein if any dispute or difference shall arise between the Commission and the Company touching any clause matter or thing whatsoever herein contained or the operation or construction thereof or

any matter or thing in any way connected with this Agreement or the rights duties or liabilities of either party under or in connection with this Agreement or as to any matter to be agreed upon between the parties under this Agreement and providing that there be no express provision herein for resolution of the same then and in every such case the dispute or difference shall be referred to the arbitration of two arbitrators one to be appointed by each party. The arbitrators to appoint a third arbitrator before proceeding in the reference and every such arbitration shall be conducted in accordance with and subject to the provisions of the Arbitration Act 1895 or any statutory modification thereof for the time being in force.

10

(b) During the course of any said arbitration, the rights and obligations of the parties hereunder shall be modified only to the extent made necessary by such arbitration.

(c) Where provision is made in this Agreement for the appointment of an independent expert or consultant to decide or make recommendations on any matter for the purposes of this Agreement, such expert or consultant shall be taken to act as an expert and not as an arbitrator. The costs and expenses of any such expert or consultant shall be borne and paid equally by the parties hereto.

20

Compliance with Laws

(1) The Company shall comply in all respects with the provisions of the Mining Act, 1904, the Fuel Energy and Power Resources Act, 1971-1974, the Mines Regulation Act, 1946, the Coal Mines Regulation Act, 1946, the Coal Miners Welfare Act, 1947, the Coal Mine Workers (Pensions) Act, 1943, the Coal Industry Long Service Leave Act, 1950, the Mine Workers Relief Act, 1932 the Inspection of Machinery Act, 1921, the Machinery Safety Act, 1974 and any other law of the State of Western Australia for the time being in

30

force relating to the holders of coal mining leases or persons carrying on coal mining operations; and

- (2) the Company shall observe and comply with all statutes not specifically mentioned herein, now or hereafter enforced in the State of Western Australia and all ordinances, regulations and by-laws thereunder and all requirements and orders of any competent authority, statutory or otherwise, in all cases in which the non-observance or non-compliance therewith would impose some charge or liability or disability upon the coal reserves or otherwise impair the ability of the Company to perform its obligations under this Agreement.

10

Stamp Duty

28. Any stamp duty hereon shall be paid by the Commission.

Severability

29. If any provision of this Agreement is found by any Court of competent jurisdiction to be in contravention of any Act or law then such provision shall be severable from this Agreement and the validity and enforceability of the provisions of this Agreement, other than such severable provision, shall not be affected.
30. (1) In the event that the Company desires, to enter into any financial, security, lease or purchase agreement or instrument with any financial institution or other company or firm other than the Banks, and have such agreement initialled as a financial agreement in accordance with the terms of this Agreement, the Company shall obtain the Commission's prior consent and such consent shall not unreasonably be withheld having regard to the acceptability to the Commission of :-

20

30

- (a) the currency exchange risk;
- (b) the identity and credit rating of the lender;
- (c) the interest rates fees and charges applicable in respect of the proposed agreement;
- (d) the degree of similarity of the terms and conditions of the proposed agreement to the financial agreements as entered into with the Banks.

- (2) In the event that the Commission does not consent to a proposed agreement under subclause (1) and the Company at its election proceeds to enter into such agreement then the Commission and the Company shall confer and agree upon any essential consequential changes to this Agreement and the Schedules but the rights of the Commission under this Agreement shall not be prejudiced thereby.

10

IN WITNESS WHEREOF this Agreement has been executed by or on behalf of the parties hereto the day and year first hereinbefore mentioned.



Schedule A

Base tonnages of coal to be supplied

in each financial year

		Base tonnage to be supplied in each financial year
Financial year 1	1978-79.	1,200,000
Financial year 2	85	1,350,000
Financial year 3	89	1,600,000
Financial year 4	80	2,000,000
Financial years 5 - 25 inclusive	83	2,100,000

[40]



DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

Schedule B

Base Price and Price Components for each year of the Agreement

(\$A per tonne - 1st July 1978 Terms)

Financial Year	Price Components					Base Price	
	Labour	Materials	Other	Lease Payments	Company Funded Equipment		
1979 78/79	4.20	2.91	5.77	0.16	0.26	13.30	
1980 79/80	3.98	3.19	6.00	0.98	0.25	14.40	10
1981 80/81	3.63	3.12	5.69	1.89	0.07	14.40	
1982 81/82	3.08	2.72	5.91	1.87	0.12	13.70	
1983 82/83	2.95	2.62	5.52	1.90	0.11	13.10	
1984 83/84	2.95	2.62	5.29	2.18	0.06	13.10	
1985 84/85	2.95	2.62	5.60	1.85	0.08	13.10	
1986 85/86	2.95	2.62	5.07	2.15	0.31	13.10	
1987 86/87	2.95	2.62	5.09	2.28	0.16	13.10	
1988 87/88	2.95	2.62	4.58	2.86	0.09	13.10	
1989 88/89	2.95	2.62	5.23	2.25	0.05	13.10	
1990 89/90	2.95	2.62	5.17	2.27	0.09	13.10	20
1991 90/91	2.95	2.62	5.14	2.29	0.10	13.10	
1992 91/92	2.95	2.62	4.86	2.58	0.09	13.10	
1993 92/93	2.95	2.62	4.55	2.68	0.30	13.10	
1994 93/94	3.08	2.77	4.95	2.48	0.12	13.40	
1995 94/95	3.08	2.77	4.59	2.84	0.12	13.40	
1996 95/96	3.08	2.77	4.91	2.58	0.06	13.40	
1997 96/97	3.08	2.77	4.69	2.79	0.07	13.40	
1998 97/98	3.08	2.77	4.57	2.88	0.10	13.40	
1999 98/99	3.08	2.77	4.83	2.62	0.10	13.40	
2000 99/2000	3.08	2.77	4.62	2.60	0.33	13.40	30
2001 00/2001	3.08	2.77	4.63	2.83	0.09	13.40	
2002 01/2002	3.08	2.77	4.92	2.55	0.08	13.40	
2003 02/2003	3.08	2.77	4.49	2.95	0.11	13.40	

[41]

DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

Schedule C

Schedule of Equipment

(Thousands of \$A - 1st July 1978 Terms)

Item	Unit Cost	1984 - 1985		1985 - 1986		1986 - 1987		1987 - 1988		1988 - 1989		1989 - 1990		1990 - 1991	
		Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost
Rotary Drills	200	-	-	-	-	-	-	1	200	1	200	1	200	1	200
O/B EQUIPMENT															
33.6m ³ Scrapers	503	2	1006	-	-	2	1006	-	-	-	-	-	-	2	1006
7.6m ³ Hyd Shovels	936	-	-	-	-	-	-	2	1872	-	-	-	-	-	-
14 m ³ Hyd Shovels	1388	-	-	-	-	-	-	-	-	-	-	1	1388	-	-
11.6m ³ FELs	439	1	439	-	-	-	-	-	-	1	439	1	439	-	-
109 t Trucks	534	-	-	-	-	1	534	8	4272	1	534	3	1602	-	-
77 t Trucks	386	-	-	6	2317	-	-	-	-	-	-	-	-	-	-
COAL EQUIPMENT															
7.6m ³ Hyd Shovels	936	-	-	-	-	-	-	-	-	1	936	-	-	-	-
11.6m ³ FELs	439	-	-	-	-	-	-	-	-	1	439	-	-	-	-
77 t Trucks	444	-	-	2	888	3	1332	1	444	-	-	-	-	1	444
ANCILLARY EQUIPMENT															
Graders	183	1	183	1	183	1	183	1	183	-	-	1	183	1	183
Tracked Dozers	277	1	277	1	277	2	554	-	-	-	-	-	-	1	277
R T Dozers	330	1	330	1	330	-	-	-	-	1	330	1	330	1	330
Explosive Trucks	15	1	15	1	15	-	-	-	-	-	-	1	15	-	-
AW/FO Trucks	55	1	55	-	-	-	-	-	-	-	-	1	55	-	-
Lube Trucks	33	-	-	-	-	1	33	-	-	-	-	-	-	1	33
Fuel Trucks	85	-	-	-	-	1	85	-	-	-	-	-	-	1	85
Backhoes	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Cranes	185	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Misc Haul Trucks	45	-	-	1	45	-	-	1	45	-	-	-	-	-	-
Water Carts (Convsn)	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-
O/B - Coal (convsn)	20	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Truck Rebuilds	-	-	-	6	480	1	80	-	-	-	-	-	-	-	-
Pumper Trucks	20	-	-	1	20	-	-	-	-	-	-	1	20	-	-
Stores Trucks	11	-	-	1	11	-	-	1	11	-	-	1	11	-	-
Engineering Trucks	11	-	-	-	-	-	-	1	11	-	-	-	-	-	-
O/C Supervision Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Engineering Jeeps	6	3	18	3	18	3	18	3	18	3	18	3	18	3	18
O/C Transport Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Survey Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
O/C Supervision Sdms	9	1	9	1	9	1	9	1	9	1	9	1	9	1	9
Admin Sedans	9	3	25	3	25	3	25	3	25	3	25	3	25	3	25
Engineering Sedans	9	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Forklift	31	-	-	1	31	1	31	1	31	-	-	1	31	-	-
Portable Pumps	5	5	25	5	25	5	25	5	25	5	25	5	25	5	25
TOTAL			2397		4655		3036		7159		2984		4811		4035

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

(Schedule C)

Schedule C
Schedule of Equipment

(Thousands of \$ - 1st July 1978 Terms)

Item	Unit Cost	1st Half 1978 - 1979		2nd Half 1978 - 1979		1979 - 1980		1980 - 1981		1981 - 1982		1982 - 1983		1983 - 1984	
		Units	6 mth Cost	Units	6 mth Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost
Rotary Drills	200	1	200	1	200	1	200	1	200	-	-	-	-	-	-
O/V EQUIPMENT															
33.6m ³ Scrapers	503	2	1006	-	-	-	-	2	1006	-	-	-	-	-	-
7.6m ³ Hyd Shovels	936	1	936	-	-	-	-	-	-	-	-	-	-	-	-
14 m ³ Hyd Shovels	1388	1	1388	-	-	-	-	1	1388	1	1388	-	-	-	-
11.6m ³ FELs	439	1	439	1	439	1	439	1	439	3	1602	-	-	1	439
109 t Trucks	534	1	534	1	534	8	4272	1	534	-	-	-	-	-	-
77 t Trucks	386	1	386	1	386	-	-	-	-	-	-	-	-	-	-
COAL EQUIPMENT															
7.6m ³ Hyd Shovels	936	1	936	-	-	-	-	-	-	-	-	-	-	-	-
11.6m ³ FELs	439	1	439	-	-	-	-	-	-	-	-	-	-	1	439
77 t Trucks	444	-	-	-	-	-	-	-	-	-	-	1	444	-	-
ANCILLARY EQUIPMENT															
Graders	183	1	183	1	183	1	183	1	183	1	183	-	-	1	183
Tracked Dozers	277	1	277	1	277	1	277	2	554	-	-	-	-	1	277
R T Dozers	330	1	330	1	330	1	330	1	330	1	330	-	-	1	330
Explosive Trucks	15	-	-	-	-	-	-	-	-	1	15	-	-	-	-
AN/FO Trucks	55	1	55	-	-	-	-	-	-	-	-	-	-	-	-
Lube Trucks	33	1	33	1	33	-	-	-	-	-	-	-	-	-	-
Fuel Trucks	85	1	85	1	85	-	-	-	-	-	-	1	85	-	-
Backhoes	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Cranes	185	-	-	1	185	-	-	-	-	-	-	-	-	-	-
Misc Haul Trucks	45	-	-	1	45	-	-	-	-	1	45	-	-	-	-
Water Carts (Convsn)	30	1	30	1	30	-	-	-	-	-	-	-	-	-	-
O/B - Coal (Convsn)	20	-	-	-	-	5	100	-	-	1	20	-	-	-	-
Truck Rebuilds	80	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Pumper Trucks	20	1	20	1	20	-	-	-	-	1	20	-	-	-	-
Stores Trucks	11	-	-	1	11	-	-	-	-	1	11	-	-	1	11
Engineering Trucks	11	-	-	1	11	-	-	1	11	-	-	-	-	1	11
O/C Supervision Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Engineering Jeeps	6	3	18	3	18	3	18	3	18	3	18	3	18	3	18
O/C Transport Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Survey Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
O/C Supervision Sdns	9	1	9	1	9	1	9	1	9	1	9	1	9	1	9
Admin Sedans	9	6	54	3	27	3	27	3	27	3	27	3	27	3	27
Engineering Sedans	9	1	9	1	9	1	9	1	9	1	9	1	9	1	9
Forklift	31	1	31	1	31	-	-	-	-	1	31	-	-	1	31
Portable Pumps	5	5	25	5	25	5	25	5	25	5	25	5	25	5	25
TOTAL			5716		6228		4310		3405		682		1511		

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

(Schedule C)

Schedule C

Schedule of Equipment

(Thousands of \$A - 1st July 1978 Terms)

Item	Unit Cost	1991 - 1992		1992 - 1993		1993 - 1994		1994 - 1995		1995 - 1996		1996 - 1997		1997 - 1998	
		Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost
Rotary Drills	200	1	200	-	-	-	-	-	-	-	-	-	-	1	200
O/B EQUIPMENT															
33.6m ³ Scrapers	503	-	-	2	1006	-	-	-	-	-	-	2	1006	-	-
7.6m ³ Hyd Shovels	936	-	-	-	-	1	936	-	-	-	-	-	-	2	1872
14m ³ Hyd Shovels	1388	1	1388	-	-	-	-	-	-	-	-	-	-	-	-
11.6m ³ FELs	439	-	-	-	-	1	439	1	439	-	-	-	-	-	-
109 t Trucks	534	-	-	-	-	1	534	1	534	8	4272	1	534	3	1602
77 t Trucks	386	-	-	-	-	8	3088	-	-	-	-	-	-	-	-
COAL EQUIPMENT															
7.6m ³ Hyd Shovels	936	-	-	-	-	1	936	-	-	-	-	-	-	-	-
11.6m ³ FELs	439	-	-	-	-	2	878	3	1317	1	444	-	-	-	-
77 t Trucks	444	-	-	-	-	-	-	-	-	-	-	-	-	-	-
ANCILLARY EQUIPMENT															
Graders	183	1	183	1	183	1	183	-	-	1	183	1	183	1	183
Tracked Dozers	277	1	277	2	554	-	-	-	-	-	-	-	-	1	277
R T Dozers	330	-	-	-	-	1	330	1	330	1	330	-	-	-	-
Explosive Trucks	15	-	-	-	-	1	15	1	15	-	-	-	-	1	15
AN/FO Trucks	55	-	-	-	-	-	-	1	55	-	-	-	-	-	-
Lube Trucks	33	-	-	-	-	-	-	1	33	-	-	-	-	-	-
Fuel Trucks	85	-	-	-	-	-	-	1	85	-	-	-	-	-	-
Backhoes	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Cranes	185	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Misc Haul Trucks	45	1	45	-	-	-	-	-	-	-	-	-	-	1	45
Water Carts (convsn)	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-
O/B - Coal (convsn)	20	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Truck Rebuilds	80	-	-	6	480	1	80	-	-	-	-	-	-	1	80
Pumper Trucks	20	-	-	-	-	1	20	-	-	-	-	-	-	1	20
Stores Trucks	11	1	11	-	-	1	11	-	-	1	11	1	11	1	11
Engineering Trucks	11	1	11	1	11	1	11	1	11	1	11	1	11	1	11
O/C Supervision Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Engineering Jeeps	6	3	18	3	18	3	18	3	18	3	18	3	18	3	18
O/C Transport Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Survey Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
O/C Supervision Sdms	9	1	9	1	9	1	9	1	9	1	9	1	9	1	9
Admin Sedans	9	3	25	3	25	3	25	3	25	3	25	3	25	3	25
Engineering Sedans	9	1	9	1	9	1	9	1	9	1	9	1	9	1	9
Forklift	32	1	32	1	32	1	32	1	32	1	32	1	32	1	32
Portable Pumps	5	.5	25	5	25	5	25	5	25	5	25	5	25	5	25
TOTAL			2236		2370		7000		2897		5349		2138		4346

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

(Schedule C)

Schedule C

Schedule of Equipment

(Thousands of \$A - 1st July 1978 Terms)

Item	1998 - 1999		1999 - 2000		2000 - 2001		2001 - 2002		2002 - 2003	
	Unit Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	
Rotary Drills	200	1	200	1	200	1	200	-	-	
O/B EQUIPMENT										
33.6m ³ Scrapers	503	2	1006	-	-	-	-	2	1006	
7.6m ³ Hyd Shovels	936	-	-	-	-	-	-	-	-	
14m ³ Hyd Shovels	1388	-	1388	1	1388	-	1388	-	-	
11.6m ³ FELs	439	1	439	-	-	-	534	1	534	
109 t Trucks	534	-	-	-	-	-	3089	8	3089	
77 t Trucks	386	-	-	-	-	-	-	-	-	
COAL EQUIPMENT										
7.6m ³ Hyd Shovels	936	1	936	-	-	-	-	-	-	
11.6m ³ FELs	439	1	439	-	-	-	-	-	-	
77 t Trucks	444	1	444	-	-	-	888	2	888	
ANCILLARY EQUIPMENT										
Graders	183	1	183	-	-	-	183	1	183	
Tracked Dozers	277	2	554	-	-	-	-	-	277	
R T Dozers	330	1	330	1	330	1	15	-	-	
Explosive Trucks	15	-	-	-	-	-	-	-	-	
AN/FO Trucks	55	-	55	1	55	-	-	-	33	
Lube Trucks	33	1	33	-	-	-	-	-	85	
Fuel Trucks	85	1	85	-	-	-	-	-	-	
Backhoes	-	-	-	-	-	-	-	-	-	
Cranes	185	-	-	-	-	-	-	-	-	
Misc Haul Trucks	45	-	45	1	45	-	-	-	-	
Water Cart (convsn)	30	-	-	-	-	-	-	-	-	
D/B - Coal (convsn)	20	-	-	-	-	-	-	-	-	
Truck Rebuilds	80	-	480	6	480	1	20	-	-	
Pumper Trucks	20	-	-	-	-	-	11	-	-	
Stores Trucks	11	-	11	1	11	1	6	1	6	
Engineering Trucks	11	-	11	1	11	1	18	3	18	
O/C Supervision Jeeps	6	1	6	1	6	1	6	1	6	
Engineering Jeeps	6	3	18	3	18	3	9	3	9	
O/C Transport Jeeps	6	1	6	1	6	1	9	1	9	
Survey Jeeps	6	1	6	1	6	1	25	3	25	
O/C Supervision Sdns	9	1	9	1	9	1	31	1	31	
Admin Sedans	9	3	25	3	25	3	25	3	25	
Engineering Sedans	9	1	9	-	-	-	31	1	31	
Forklift	31	-	-	-	-	-	25	-	-	
Portable Pumps	5	5	25	5	25	5	25	5	25	
TOTAL			4746		3231		2705		6457	3571

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

Purchase Price of Leased Equipment

(Thousands of \$A - 1st July 1978 Terms)

Schedule D

Item	Unit Cost	1st Half 1978 - 1979		2nd Half 1978 - 1979		1979 - 1980		1980 - 1981		1981 - 1982		1982 - 1983		1983 - 1984	
		Units	6 mth Cost	Units	6 mth Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost
Drills	200	1	200	1	200	1	200	1	200	-	-	-	-	-	-
EQUIPMENT															
3 Scrapers	503	2	1006	-	-	-	-	2	1006	-	-	-	-	-	-
3 Hyd Shovels	936	1	936	-	-	-	-	-	-	-	-	-	-	-	-
3 Hyd Shovels	1388	1	1388	-	-	-	-	1	1388	1	1388	-	-	-	-
3 FELS	439	-	-	1	439	-	-	-	-	-	-	-	-	1	439
3 Trucks	534	1	534	8	4272	-	-	1	534	3	1602	-	-	-	-
3 Trucks	386	1	386	-	-	-	-	-	-	-	-	-	-	-	-
VEHICLE EQUIPMENT															
3 Hyd Shovels	936	-	-	-	-	-	-	-	-	-	-	-	-	-	-
3 FELS	439	1	439	-	-	-	-	-	-	-	-	-	-	1	439
3 Trucks	444	-	-	-	-	-	-	-	-	-	-	1	444	-	-
MARINE EQUIPMENT															
3 Bidders	183	1	183	1	183	1	183	1	183	1	183	-	-	1	183
3 Dozers	277	-	-	1	277	1	277	2	554	-	-	-	-	-	-
3 Dozers	330	1	330	1	330	1	330	1	330	-	-	-	-	1	330
3 Bidders	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
3 Bidders	185	-	-	1	185	-	-	-	-	-	-	-	-	-	-
		5402		5886		4195		3173		444		1391			

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

Purchase Price of Leased Equipment

(Thousands of \$A - 1st July 1978 Terms)

Schedule D (Cont'd.)

Item	Unit Cost	1984 - 1985		1985 - 1986		1986 - 1987		1987 - 1988		1988 - 1989		1989 - 1990		1990 - 1991	
		Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost
Drills	200	-	-	-	-	-	-	1	200	1	200	1	200	1	200
CONCRETE EQUIPMENT															
1.6m ³ Scrapers	503	2	1006	-	-	2	1006	-	-	-	-	-	-	2	1006
1.6m ³ Hyd Shovels	936	-	-	-	-	-	-	2	1872	-	-	-	-	-	-
1.6m ³ Hyd Shovels	1388	-	-	-	-	-	-	-	-	-	-	1	1388	1	1388
1.6m ³ FELs	439	1	439	-	-	-	-	-	-	1	439	1	439	-	-
1.6m ³ FELs	534	-	-	-	-	1	534	-	4272	1	534	3	1602	-	-
1.6m ³ Trucks	386	-	-	6	2317	-	-	-	-	-	-	-	-	-	-
COAL EQUIPMENT															
1.6m ³ Hyd Shovels	936	-	-	-	-	-	-	-	-	1	936	-	-	-	-
1.6m ³ FELs	439	-	-	-	-	-	-	-	-	1	439	-	-	-	-
1.6m ³ Trucks	444	-	-	2	888	3	1332	1	444	-	-	-	-	1	444
HEAVY EQUIPMENT															
Loaders	183	1	183	1	183	1	183	1	183	-	-	1	183	1	183
Backed Dozers	277	1	277	1	277	2	554	-	-	-	-	-	-	1	277
Dozers	330	1	330	1	330	-	-	-	-	1	330	1	330	1	330
Excavators	-	-	-	-	-	-	-	-	-	-	-	1	470	-	-
Graders	185	-	-	-	-	-	-	-	-	-	-	-	-	-	-
		2235		3995		3609		6971		2878		4612		3828	

Purchase Price of Leased Equipment

(Thousands of \$A - 1st July 1978 Terms)

Schedule D (Cont'd)

Item	Unit Cost	1991 - 1992		1992 - 1993		1993 - 1994		1994 - 1995		1995 - 1996		1996 - 1997		1997 - 1998	
		Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost
Drills	200	1	200	-	-	-	-	-	-	-	-	-	-	1	200
EQUIPMENT															
3 Scrapers	503	-	-	2	1006	-	-	-	-	-	-	2	1006	-	-
3 Hyd Shovels	936	-	-	-	-	1	936	-	-	-	-	-	-	2	1872
3 Hyd Shovels	1388	1	1388	-	-	-	-	-	-	-	-	-	-	-	-
6 FELLS	439	-	-	-	-	1	439	1	439	-	-	-	-	-	-
1 Trucks	534	-	-	-	-	1	534	1	534	8	4272	1	534	3	1602
1 Trucks	386	-	-	-	-	8	3089	-	-	-	-	-	-	-	-
COAL															
EQUIPMENT															
3 Hyd Shovels	936	-	-	-	-	-	-	-	-	-	-	-	-	-	-
6 FELLS	439	-	-	-	-	1	439	-	-	-	-	-	-	-	-
1 Trucks	444	-	-	-	-	2	888	3	1332	1	444	-	-	-	-
MINING EQUIPMENT															
1 Dozer	183	1	183	1	183	1	183	-	-	1	183	1	183	1	183
1 Dozer	277	1	277	2	554	-	-	-	-	-	-	1	277	1	277
1 Dozer	330	-	-	-	-	1	330	1	330	1	330	-	-	-	-
1 Dozer	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
1 Dozer	185	-	-	-	-	-	-	-	-	-	-	-	-	-	-
		2048		1743		6838		2635		5229		2000		4134	



DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

Purchase Price of Leased Equipment

(Thousands of \$A - 1st July 1978 Terms)

Schedule D (Cont'd)

Item	Unit Cost	1998 - 1999		1999 - 2000		2000 - 2001		2001 - 2002		2002 - 2003	
		Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost
Drills	200	1	200	1	200	1	200	1	200	-	-
COAL EQUIPMENT											
3.6m ³ Scrapers	503	2	1006	-	-	-	-	-	-	2	1006
3.6m ³ Hyd Shovels	936	-	-	-	-	-	-	-	-	-	-
3.6m ³ Hyd Shovels	1388	-	-	1	1388	1	1388	1	1388	-	-
3.6m ³ FELs	439	1	439	1	439	-	-	1	534	1	534
19 t Trucks	534	-	-	-	-	-	-	8	3089	-	-
19 t Trucks	386	-	-	-	-	-	-	-	-	-	-
COAL EQUIPMENT											
3.6m ³ Hyd Shovels	936	1	936	-	-	-	-	-	-	-	-
3.6m ³ FELs	439	1	439	-	-	-	-	-	-	-	-
19 t Trucks	444	1	444	-	-	-	-	2	888	3	1332
AUXILIARY EQUIPMENT											
Loaders	183	1	183	1	183	-	-	1	183	1	183
Backed Dozers	277	2	554	-	-	-	-	-	-	1	277
Dozers	330	1	330	1	330	1	330	-	-	-	-
Excavators	-	-	-	-	-	-	-	-	-	-	-
Trucks	185	-	-	-	-	-	-	-	-	-	-
			4531		2540		1918		6282		3332

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

Schedule of company funded equipment

(Thousands of \$A - 1st July 1978 Terms)

Schedule E

Item	Unit Cost	1978 - 1979		1979 - 1980		1980 - 1981		1981 - 1982		1982 - 1983		1983 - 1984	
		1st Half Units	6 mth Cost	1978 - 1979 Units	Annual Cost	1980 - 1981 Units	Annual Cost	1981 - 1982 Units	Annual Cost	1982 - 1983 Units	Annual Cost	1983 - 1984 Units	Annual Cost
5ive Trucks	15	-	-	-	-	-	-	1	15	-	-	-	-
Trucks	55	-	-	1	55	-	-	-	-	-	-	-	-
Trucks	33	-	33	-	-	-	-	-	-	1	33	-	-
Trucks	85	-	85	-	-	-	-	-	-	1	85	-	-
Trucks	45	-	-	1	45	-	-	1	45	-	-	-	-
Trucks	30	-	30	1	30	-	-	-	-	-	-	-	-
Carts (Convsn)	20	-	-	5	100	-	-	1	20	-	-	-	-
Coal (Convsn)	80	-	-	-	-	-	-	-	-	-	-	-	-
Rebuilds	20	-	20	-	-	-	-	1	20	-	-	-	-
Trucks	11	-	-	1	11	-	-	1	11	-	-	-	11
Trucks	11	-	-	1	11	-	-	1	11	-	-	-	11
Trucks	6	-	6	1	6	1	11	1	6	1	6	1	6
Trucks	6	-	6	3	19	3	18	3	18	3	18	3	18
Trucks	6	-	6	1	6	1	6	1	6	1	6	1	6
Trucks	6	-	6	-	-	1	6	-	-	-	-	-	-
Trucks	9	-	9	1	9	1	9	1	9	1	9	1	9
Trucks	9	-	9	3	25	3	25	3	25	3	25	3	25
Trucks	9	-	9	-	-	1	9	-	-	-	-	-	-
Trucks	31	-	31	-	-	1	31	1	31	1	31	1	31
Trucks	5	-	5	5	25	5	25	5	25	5	25	5	25
			314		342		115		232		238		120

DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

Schedule of company funded equipment

(Thousands of \$A - 1st July 1978 Terms)

Schedule E (Cont'd)

Item	Unit Cost	1984 - 1985		1985 - 1986		1986 - 1987		1987 - 1988		1988 - 1989		1989 - 1990		1990 - 1991	
		Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost
ive Trucks	15	-	15	-	-	-	-	-	-	-	-	1	15	-	-
Trucks	55	1	-	-	-	-	-	-	-	-	-	1	55	-	-
Trucks	33	-	-	1	33	-	-	-	-	-	-	-	-	1	33
Trucks	85	-	-	1	85	-	-	-	-	-	-	-	-	1	85
Haul Trucks	45	-	45	-	-	1	45	-	-	-	-	-	-	-	-
Cart (Convsn)	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Coal (Convsn)	20	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Rebuilds	-	-	-	1	480	1	-	-	-	-	-	-	-	-	-
Trucks	20	-	20	-	-	-	-	-	-	-	-	1	20	-	-
Trucks	11	-	11	-	-	-	-	-	-	-	-	1	11	-	-
Trucking Trucks	11	1	-	-	-	1	11	1	11	1	11	-	-	-	-
Supervision Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Trucking Jeeps	6	3	18	3	18	3	18	3	18	3	18	3	18	3	18
Transport Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Jeeps	6	1	6	-	-	-	-	-	-	-	-	-	-	-	-
Supervision Sdns	9	1	9	1	9	1	9	1	9	1	9	1	9	1	9
Sedans	9	3	25	3	25	3	25	3	25	3	25	3	25	3	25
Trucking Sedans	9	-	-	1	9	-	-	-	-	-	-	1	9	-	-
Trucking Sedans	31	-	-	1	31	-	-	-	-	-	-	-	-	-	-
Lift	5	5	25	5	25	5	25	5	25	5	25	5	25	5	25
Portable Pumps	5	-	-	-	-	-	-	-	-	-	-	-	-	-	-
			660		327		188		106		199		207		

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

Schedule of company funded equipment

(Thousands of \$A - 1st July 1978 Terms)

Schedule E (Cont'd)

Item	Unit Cost	1991 - 1992		1992 - 1993		1993 - 1994		1994 - 1995		1995 - 1996		1996 - 1997		1997 - 1998	
		Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost
ive Trucks	15	-	-	1	15	1	15	-	-	-	-	-	-	1	15
Trucks	55	-	-	-	-	-	-	1	55	-	-	-	-	-	-
Trucks	33	-	-	-	-	-	-	1	33	-	-	-	-	-	-
Trucks	85	-	-	-	-	-	-	1	85	-	-	-	-	-	-
Haul Trucks	45	1	45	1	45	-	-	-	-	-	-	-	-	1	45
Carts (convsn)	30	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Coal (convsn)	20	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Rebuilds	80	-	480	-	-	-	-	-	-	-	-	-	-	-	-
Trucks	20	-	-	6	20	1	20	-	-	-	-	-	-	1	20
Trucks	11	1	11	-	-	1	11	-	-	1	11	-	-	1	11
Trucks	11	1	11	1	11	-	-	-	-	1	11	-	-	-	-
Trucks	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Supervision Jeeps	6	3	18	3	18	3	18	3	18	3	18	3	18	3	18
Supervision Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Transport Jeeps	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6
Jeeps	6	-	-	1	6	-	-	-	-	-	-	-	-	-	-
Supervision Sdns	9	1	9	1	9	1	9	1	9	1	9	1	9	1	9
Sedans	9	3	25	3	25	3	25	3	25	3	25	3	25	3	25
Supervision Sdns	9	-	-	1	9	-	-	-	-	1	9	-	-	-	-
Supervision Sedans	32	1	32	1	32	-	-	-	-	-	-	-	-	1	32
Lift	5	5	25	5	25	5	25	5	25	5	25	5	25	5	25
able Pumps	5	-	-	-	-	-	-	-	-	-	-	-	-	-	-
			188		627		260		262		120		138		212

Schedule of company funded equipment

(Thousands of \$A - 1st July 1978 Terms)

Schedule E (Cont'd)

Item	Unit Cost	1998 - 1999		1999 - 2000		2000 - 2001		2001 - 2002		2002 - 2003	
		Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost	Units	Annual Cost
Trucks	15	-	-	-	-	-	-	1	15	-	-
Trucks	55	-	33	1	55	-	-	-	-	-	-
Trucks	33	1	85	-	-	-	-	-	-	1	33
Trucks	85	1	-	-	-	-	-	-	-	1	85
Haul Trucks	45	-	-	1	45	-	-	-	-	-	-
Cart (convsn)	30	-	-	-	-	-	-	-	-	-	-
Coal (convsn)	20	-	-	-	-	-	-	-	-	-	-
Rebuilds	80	-	-	6	480	1	80	-	-	-	-
Trucks	20	-	-	-	-	-	-	1	20	-	-
Trucks	11	-	-	1	11	-	-	1	11	-	-
Trucks	11	-	-	1	11	-	-	-	-	-	-
Trucks	6	1	6	1	6	1	6	1	6	1	6
Supervision Jeeps	6	3	18	3	18	3	18	3	18	3	18
Jeeps	6	1	6	1	6	1	6	1	6	1	6
Jeeps	6	-	-	-	-	1	6	-	-	-	-
Jeeps	9	1	8	1	9	1	9	1	9	1	9
Supervision Sdms	9	3	25	3	25	3	26	3	25	3	25
Sedans	9	1	9	-	-	-	-	1	9	-	-
Jeeps	31	-	-	-	-	-	-	1	31	-	-
Lift	5	5	25	5	25	5	25	5	25	5	25
Pumps											
			215		691		187		175		239

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

Schedule F

SCHEDULE OF PRE TAX CASH SURPLUS AS A PERCENTAGE
OF REVENUE AS CALCULATED

Definition of Pre Tax Cash Surplus

Any of the components in the pre tax cash surplus shall apply to the performance by the Company and its obligations under this Agreement. The deductions from Gross Revenue to determine Pre Tax Cash Surplus are those envisaged in the RTZ Study. For any other expenditures which were not provided for in the RTZ Study shall be a deduction under this Schedule F by mutual agreement.

10

Gross Revenue Less:

Labour and Related Costs
Consumables, including Operating Materials and Maintenance Materials & Supplies
Royalties & Levies
Dewatering, as provided in the RTZ Study
Perth Office Costs, consistent with the RTZ Study
Existing Loan Repayments
Existing Loan Interest Charges (excluding Deutschemark revaluation)
Existing Lease Rentals
Other Capital Expenditure as detailed in the RTZ Study excl. Add'l Capital
Repayment of New Capital Borrowings)
Payment of Interest on New Capital) Detailed in the Financial
 Borrowings) Agreements and Embraced by
Lease Rentals) The Commission in this
Company Funded Equipment) Agreement.

20

Pre Tax Cash Surplus

Schedule F (Cont'd)

	78/79	79/80	80/81	81/82	82/83	83/84	84/85	85/86	86/87	87/88	88/89	89/90
Gross Revenue	15,960	19,440	23,040	27,400	27,510	27,510	27,510	27,510	27,510	27,510	27,510	27,510
Labour	5,040	5,373	5,802	6,155	6,205	6,205	6,205	6,205	6,205	6,205	6,205	6,205
Consumables	3,488	4,312	4,989	5,441	5,497	5,497	5,497	5,497	5,497	5,497	5,497	5,497
Royalties, Levies	90	101	120	150	157	157	157	157	157	157	157	157
Watering	184	15	115	230	115	195	195					
Birth Office	949	994	994	994	994	994	994	994	994	994	994	994
Exist Loan Repay	229	253	140									
Exist Loan Int	60	35	5									
Exist Loan Principal		1,037										
Exist Loan Int	190	75										
Criga Loan	82	109	110	109	110	147	68	85				
Criga Int	52	70	69	70	69	52	46	12				
Exist Leases	968	1,032	1,040	1,036	1,029	1,058	793	106	25	24	51	
Other Capital Expend	1,019	1,475	687	169	76	74	98	149	138	234	117	167
Lease Rentals	194	1,319	3,025	3,746	3,995	4,587	3,878	4,514	4,786	5,999	4,732	4,773
Unfunded Equip	314	342	115	232	238	120	162	660	327	188	106	199
Pre Tax Cash Surplus	3,101	2,898	5,829	9,068	9,025	8,424	9,417	9,131	9,381	8,212	9,651	9,518
Percentage	19.43%	14.99%	25.30%	33.09%	32.81%	30.62%	34.23%	33.19%	34.10%	29.85%	35.08%	34.60%

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79



	91/92	92/93	93/94	94/95	95/96	96/97	97/98	98/99	99/00	00/01	01/02	02/03
27,510	27,510	27,510	28,140	28,140	28,140	28,140	28,140	28,140	28,140	28,140	28,140	28,140
6,205	6,205	6,205	6,469	6,469	6,469	6,469	6,469	6,469	6,469	6,469	6,469	6,469
5,497	5,497	5,497	5,808	5,808	5,808	5,808	5,808	5,808	5,808	5,808	5,808	5,808
157	157	157	157	157	157	157	157	157	157	157	157	157
994	994	994	994	994	994	994	994	994	994	994	994	994
144	93	84	231	110	184	91	153	164	107	89	215	130
4,816	5,419	5,629	5,214	5,962	5,420	5,849	6,051	5,505	5,458	5,945	5,352	6,205
207	188	627	260	262	120	138	212	215	691	187	175	239
9,490	8,957	8,317	9,007	8,378	8,988	8,634	8,296	8,828	8,456	8,491	8,970	8,138
34.59%	32.56%	30.23%	32.01%	29.77%	31.94%	30.68%	29.48%	31.37%	30.05%	30.17%	31.88%	28.92%

DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

Schedule G

Derivation of labour related cost index I_L

(Including the derivation of the labour related cost base index I_{Lo} as at
1st July 1978)

Weekly award wage rates have been extracted from the Coal Industry Tribunal Determination dated 28th June 1978 and operative from 1st July 1978 for the purpose of this contract.

$$\begin{aligned} I_L &= 0.162 (A1 + B1 + C1 + D1 + E1 + F1 + G1) + \\ & 0.295 (A2 + B2 + C2 + D2 + E2 + F2 + G2) + \\ & 0.270 (A3 + B3 + C3 + D3 + E3 + F3 + G3) + \\ & 0.070 (A4 + B4 + C4 + D4 + E4 + F4 + G4) + \\ & 0.203 (A5 + B5 + C5 + D5 + E5 + F5 + G5) \end{aligned} \quad 10$$

In the application of the above formula:

- AJ = Annual base award wages
= 52 weeks x base weekly award rate
- BJ = Annual gross loading plus overtime loading
(52 weeks - number of weeks annual leave - number of
weeks annual sick leave) x base weekly award rate x
allowances and overtime loading)
- CJ = Annual leave loading 20
= Number of weeks annual leave x annual leave loading x
base weekly award rate
- DJ = Annual sick leave loading
= Number of weeks annual sick leave x sick leave loading
x base weekly award rate
- EJ = Annual workers compensation payments

For the purpose of calculating the base index I_{Lo} ,

$$\begin{aligned} EJ &= \$50 \times 47 \text{ weeks} \times \text{workers compensation premium rate} \\ & \quad \times (1 - \text{discount allowed}) \times (1 + \text{rate of stamp duty}) \end{aligned}$$

If J = 1, EJ = \$50 x 47 x 0.0084 x 1 x 1.03 = \$20.33 30
If J = 2 to 5, EJ = \$50 x 47 x 0.75 x (1 - 0.35) x 1.03 = \$1180.00

For all subsequent calculations of annual workers compensation payments

$$EJ = (AJ + BJ) \times \text{workers compensation premium rate} \times (1 - \text{discount allowed}) \times (1 + \text{rate of stamp duty})$$

Schedule G (Cont'd)

- FJ = Annual payroll tax
 (AJ + BJ + CJ + DJ) x rate of payroll tax
- GJ = Annual pensions contribution
 = 26 fortnights x fortnightly pension contribution

where for each employee category in the formula J takes a unique integer value from 1 to 5

Thus applying the formula in order to calculate the labour related cost base index I_{Lo} , we have:

A Division Chief Clerk (J = 1)

A1	= 52 x 303.68	=	15,791.36	
B1	= 43.6 weeks x 303.68 x 0.27306	=	<u>3,615.44</u>	
	A1 + B1	=	19,406.80	
C1	= 6 weeks x 0.35 x 303.68	=	637.73	
D1	= 2.4 weeks x 0.175 x 303.68	=	<u>127.55</u>	
	A1 + B1 + C1 + D1	=	20,172.08	
E1	=	=	20.33	
F1	= 0.05 x 20,172.08	=	1,008.60	
G1	= 26 fortnights x 31.65	=	<u>822.90</u>	
			<u>22,023.91</u>	10

50 - 100 ton Truck Driver (J = 2)

A2	= 52 x 243.74	=	12,674.48	
B2	= 43.6 weeks x 243.74 x 0.27306	=	<u>2,901.83</u>	
	A2 + B2	=	15,576.31	
C2	= 6 weeks x 0.35 x 243.74	=	511.85	
D2	= 2.4 weeks x 0.175 x 243.74	=	<u>102.37</u>	
	A2 + B2 + C2 + D2	=	16,190.53	
E2	=	=	1,180.00	
F2	= 0.05 x 16,190.53	=	809.53	
G2	= 26 fortnights x 31.65	=	<u>822.90</u>	
			<u>19,002.96</u>	30

[57]



Schedule G (Cont'd)

Experienced Tradesman (J = 3)

A3	= 52 x 241.32	=	12,548.64
B3	= 43.6 weeks x 241.32 x 0.27306	=	<u>2,873.02</u>
	A3 + B3	=	15,421.66
C3	= 6 weeks x 0.35 x 241.32	=	506.77
D3	= 2.4 weeks x 0.175 x 241.32	=	<u>101.35</u>
	A3 + B3 + C3 + D3	=	16,029.78
E3	=	=	1,180.00
F3	= 0.05 x 16,029.78	=	801.49
G3	= 26 fortnights x 31.65	=	<u>822.90</u>
			<u>18,834.17</u>

10

Navvy Driver (J = 4)

A4	= 52 x 243.74	=	12,674.48
B4	= 43.6 weeks x 243.74 x 0.27306	=	<u>2,901.83</u>
	A4 + B4	=	15,576.31
C4	= 6 weeks x 0.35 x 243.74	=	511.85
D4	= 2.4 weeks x 0.175 x 243.74	=	<u>102.37</u>
	A4 + B4 + C4 + D4	=	16,190.53
E4	=	=	1,180.00
F4	= 0.05 x 16,190.53	=	809.53
G4	= 26 fortnights x 31.65	=	<u>822.90</u>
			<u>19,002.96</u>

20

Borer/Shotfirer (J = 5)

A5	= 52 x 220.85	=	11,484.20
B5	= 43.6 weeks x 220.85 x 0.27306	=	<u>2,629.31</u>
	A5 + B5	=	14,113.51
C5	= 6 weeks x 0.35 x 220.85	=	463.79
D5	= 2.4 weeks x 0.175 x 220.85	=	<u>92.76</u>
	A5 + B5 + C5 + D5	=	14,670.06
E5	=	=	1,180.00
F5	= 0.05 x 14,670.06	=	733.50
G5	= 26 fortnights x 31.65	=	<u>822.90</u>
			<u>17,406.46</u>

30

1557

DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

Schedule G (Cont'd)

$$\begin{aligned} I_{Lo} = & 0.162 \times 22,023.91 + \\ & 0.295 \times 19,002.96 + \\ & 0.270 \times 18,834.17 + \\ & 0.070 \times 19,002.96 + \\ & 0.203 \times 17,406.46 \end{aligned}$$

$$\underline{I_{Lo} = \$19,122.69}$$



Schedule H

Details of Employee Categories

Summary

Selected Employee Classification	No of Employees Represented	Percentage	
A Division Chief Clerk	44	16.24%	
Experienced Tradesman	73	26.94%	
50 - 100 ton Truck Driver	80	29.52%	
Navy Driver	19	7.00%	
Borer/Shotfirer	55	20.30%	
TOTAL	<u>271</u>	<u>100.00%</u>	10

A Division Chief Clerk

Represents the following employees:

	Number
Wages staff Perth office	9
Engineers	7
Undermanagers	1
Deputies	5
Clerical	21
Screen overseer	1
TOTAL	<u>44</u>

Experienced Tradesmen

Represents the following employees:

	Number
Fitters	47
Electricians	6
Welders	14
Millwrights	6
TOTAL	<u>73</u>

50 - 100 Ton Truck Driver

10

Represents the following employees:

	Number
Wabco scraper drivers	4
Dozer drivers	10
O/B truck drivers	34
Grader drivers	5
Coal truck drivers	17
Borers	4
Stores truck drivers	2
Front end loader drivers	4
TOTAL	<u>80</u>

20

Navy Driver

Represents the following employees:

	Number
Excavator drivers	17
Crane drivers	2
TOTAL	<u>19</u>

Schedule H (Cont'd)

Borer/Shotfirer

Represents the following employees:

	Number
Borers	24
Pumpmen	3
Lubricators	6
Bin attendant	1
Screenmen	5
Bathroom attendants	3
Labourers	13
TOTAL	<u>55</u>



Schedule I

Basis of Percentage Allowances and Overtime Loading

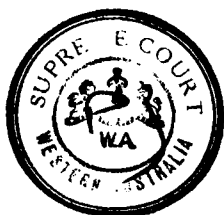
(Calculated for the period 6.7.75 to 1.7.78)

OF TOTAL :

	\$	%	
Base wage	7,251,443	66.544	
Overtime	1,183,160	10.858	
Allowances	796,955	7.313	
Sick Pay	347,573	3.190	
Holiday Pay	1,318,011	12.095	
TOTAL	<u>10,897,142</u>	<u>100.00</u>	10

OF BASE WAGE:

Allowances	796,955	10.990
Overtime	1,183,160	16.316
		<u>27.306</u>



DOCUMENT 2* - Ex DRC 1 - True copy of agreement between the parties: 29.3.79

Schedule J

CALCULATION OF MATERIALS RELATED COST INDEX

The materials related cost index shall be calculated on 1st September 1978 and quarterly thereafter. The method of calculation shall be as follows -

Cost increases to fuels, oils, greases and explosives shall be represented by increases in the unit cost of selected items of fuels, oils, greases and explosives.

The following list shows the selected items to be used, their average base unit costs as at 1.7.78 and the items of fuels, oils, greases and explosives which they represent:

10

1. Distillate - \$0.0812 per litre (C₀₁)
- represents all diesel fuels, super and standard grade petrols

2. Shell HPD 30 Oil - \$0.3534 per litre (C₀₂)
- represents all oils and greases

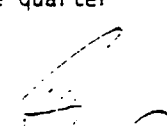
3. ICI Nitropril - \$225.00 per tonne (C₀₃)
- represents Nitropril, Amex sausages and other ammonium nitrate based explosives

4. ICI Molanite - \$37.08 per 25 kg case (C₀₄)
- represents Molanite, Gelignite and other nitro-glycerine based explosives

5. ICI Cordtex - \$165.85 per 1000 metres (C₀₅)
- represents cordtex, detonators, boosters and other accessories

20

Cost increases to all other materials consumed shall be represented by the index applicable to Materials used in the Manufacturing Industry, Perth Catalogue Number 6411.0 Table 2, Mining (Home Produced) for the quarter preceding the quarter in which the adjustment is made.



DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

Schedule J (Cont'd)

The following list shows the percentage of the materials related cost component of price represented by each of the selected items and all other materials consumed for the first year of the contract.

ITEM	PERCENTAGE OF MATERIALS RELATED COST COMPONENT OF PRICE	
1. Distillate	20.55 (P ₁)	
2. Shell HPD 30 Oil	4.33 (P ₂)	
3. ICI Nitropri1	3.09 (P ₃)	
4. ICI Molanite	9.61 (P ₄)	10
5. ICI Cordtex	5.82 (P ₅)	
6. Other Materials	56.60 (P ₆)	

On 1st September 1978 and quarterly thereafter the percentage variations to the base numbers as at 1st July 1978 of each of the selected items and the index applicable to Materials used in the Manufacturing Industry as described above shall be calculated by dividing the actual unit cost of the selected item or the index number applicable at the time of calculation by the base unit cost of each of the selected items or the materials base index as shown in Schedule K.

Schedule J (Cont'd)

The new materials related cost index shall then be calculated as follows on a quarterly basis:

$$I_M = 1 + \sum_{J=1}^{J=6} \left(\frac{C_J}{C_{0J}} - 1 \right) \times P_J$$

100

Where

C_{0J} = base unit cost of each of the selected items for J = 1 to 5

and

C_{0J} = base index applicable to Materials used in the Manufacturing Industry as defined in Schedule K, for J = 6

10

C_J = Average unit cost of each of the selected items on the first day of each quarter when the price adjustment is made, for J = 1 to 5

and

C_J = index applicable to the Materials used in the Manufacturing Industry, as defined in Schedule K expressed as an average for the previous quarter, for J = 6

P_J = percentage of materials related cost component of price of each of the selected items and all other materials consumed, for J = 1 to 6

Schedule K

Base indices to be used in the adjustment formula

1. Labour related cost base index (I_{LO})
 $I_{LO} = \$19,122.69$
(See Schedule G for derivation)

2. Materials related cost base index (I_{MO})
 $I_{MO} = 1$

3. Index applicable to Materials used in Manufacturing Industry,
Perth Catalogue Number 6411.0 Table 2, Mining (Home Produced)
(C_{06})
 $C_{06} = 214.1$

4. Other cost base index (I_{00})
 $I_{00} = 245.3$


(being the average consumer price index, all groups index
number, Perth catalogue number 6401.0 for the quarter
ending 31st March 1978)

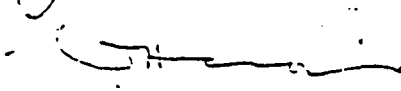
10

DOCUMENT 2* - Ex DRC 1 - True copy of agreement
between the parties: 29.3.79

IN WITNESS WHEREOF the Common Seals of the Commission and
the Company the day and year hereinbefore mentioned.

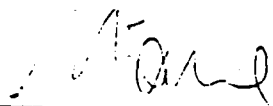
THE COMMON SEAL of THE)
STATE ENERGY COMMISSION)
OF WESTERN AUSTRALIA was)
affixed hereto in the)
presence of:)

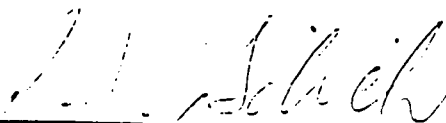


COMMISSIONER


SECRETARY

THE COMMON SEAL of THE)
GRIFFIN COAL MINING .)
COMPANY LIMITED was aff-)
ixed by authority of)
the Board of Directors .)
in the presence of:)



DIRECTOR


SECRETARY

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2747 of 1982

B E T W E E N:

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

and

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

This is the Exhibit marked "DRC-2 " referred
to in the Affidavit of DOUGLAS RALPH CHATFIELD
Sworn the 4th day of November 1982
and produced and shown to him at the time of
swearing such Affidavit

10

Before me:-

JOHN GILLET

A Commissioner for Affidavits/
~~Justice of the Peace~~

DOCUMENT 2* - Ex DRC 2 - copy of variation
agreement between the parties: 23.8.82

THIS AGREEMENT is made the _____ day of _____ 1982
B E T W E E N : THE STATE ENERGY COMMISSION OF WESTERN
AUSTRALIA a body corporate originally constituted pursuant to
the provisions of the State Energy Commission Act, 1945 and
thereafter by the State Energy Commission Act, 1979 whose
office and principal place of business is at 365 Wellington
Street Perth in the State of Western Australia (hereinafter
called "the Commission" in which term shall be included the
Commission and its successors and permitted assigns) of the
one part and THE GRIFFIN COAL MINING COMPANY LIMITED a 10
company duly incorporated in the said State under the
Companies Act 1961 whose registered office is situated at 24
Kings Park Road West Perth in the said State (hereinafter
called "the Company" in which term shall be included the
Company and its successors and permitted assigns) of the
other part.

R E C I T A L S :

A. By an Agreement dated the 29th day of March 1979
(hereinafter called "the Main Agreement") the Company agreed
to supply coal to the Commission for a period of twenty five 20
(25) years at a price calculated as therein mentioned and
upon and subject to the terms and conditions therein set
forth.

DOCUMENT 2* - Ex DRC 2 - copy of variation
agreement between the parties: 23.8.82

B. The parties have agreed certain matters with
respect to the Main Agreement directed to ensuring insofar as

possible that the Commission's requirements for coal deliveries from the Company during the financial year ending 30th June 1983 (hereinafter called "the 1983 financial year") are met.

O P E R A T I V E P A R T :

1. Except as otherwise herein provided or required by the context terms and expressions defined in clause 1 of the Main Agreement shall carry the same meaning where used herein and -

(a) the expression "the Chicken Creek Leases" means 10
Coal Mining Leases Nos 451, 452 and 514 located at Collie in the said State;

(b) the expression "Contract Equipment" means -

(i) all items of equipment leased by the Company the lease payments in respect of which are or have been made pursuant to agreements initialled by the Commission as financial agreements pursuant to the Main Agreement;

(ii) all items of equipment purchased by the Company the payments in respect of which are or 20
have been brought to account as company funded payments for the purpose of determining the base price under the provisions of the Main Agreement;

(c) the expression "the February 1982 Agreement" means the agreement in writing dated 18th February 1982 whereby the parties inter alia agreed terms of settlement of Supreme Court Action No. 2761 of 1981;

(d) the expression "the 23rd August Agreement" means the Minute of Agreement signed on behalf of the parties

DOCUMENT 2* - Ex DRC 3 - copy of minute of items agreed between the parties: 23.8.82



hereto dated 23rd August 1982 and headed "Long Term coal Supply Agreement - Minute of Agreed Items";

(e) the expression "the Independent Consultant" shall mean Coleman & Associates, Mining Consultants of 33rd Floor Northpoint 100 Miller Street North Sydney 2060;

(f) the expression "the Independent Consultant's Report" means the report dated the 25th April 1982 produced by the Independent Consultant and the supporting documents subsequently produced by the Independent Consultant amplifying that report;

10

(g) the expression "base tonnage coal" means coal delivered to the Commission in or towards satisfaction of the Company's obligation under the Main Agreement to supply a base tonnage of 2,100,000 tonnes of coal during the 1983 financial year;

(h) the expression "the 30,130.32 tonnes of clause 10 coal" shall mean the 30,130.32 tonnes of 1982 clause 10 coal referred to in the February 1982 Agreement;

(i) the expression "the estimated Chicken Creek mobilisation and establishment costs" means the sum of THREE HUNDRED AND TWENTY ONE THOUSAND DOLLARS (\$321,000.00) which the Company has estimated as the mobilisation and establishment costs which have been or will be incurred by it subsequent to the 1st May 1982 in the development of the short term pit reserve at the Chicken Creek Leases as referred to in clause 4 hereof;

20

(j) the expression "the Chicken Creek establishment advance" means the sum of THREE HUNDRED AND TWENTY ONE THOUSAND DOLLARS (\$321,000.00) which the Commission has

advanced to the Company against future coal payments to be applied by the Company in or towards meeting or recouping the mobilisation and establishment costs incurred in the development of the short term pit reserve at the Chicken Creek Leases as referred to in clause 4 hereof.

2. The Company will during the 1983 financial year -

(a) subject to any lawful excuse under the Main Agreement deliver to the Commission a base tonnage of 2,100,000 tonnes of coal in accordance with the requirements of the Main Agreement and in particular will use its best endeavours to deliver 1,110,000 tonnes of such coal by the 31st day of December 1982;

(b) deliver to the Commission the 30,130.32 tonnes of clause 10 coal.

3. (1) The Company will undertake and carry out negotiations with the relevant industrial unions and endeavour to reach agreement with such unions on terms for the introduction of a three shift mining operation on the Coal Mining Leases and will keep the Commission fully informed as to the progress of such negotiations and of all demands made by the unions in the course of such negotiations.

(2) Subject to agreement with the unions being reached the Company will introduce the three shift mining operation as soon as possible.

(3) Pending the outcome of such negotiations the Company will not proceed with the purchase of one (1) Demag H 241 Hydraulic Excavator and three (3) 109 tonne rear dump

trucks referred to in the Independent Consultant's Report as being necessary if a two shift mining operation is retained.

(4) The Company will give the Commission notice forthwith of any move to refer negotiations between the Company and the unions to the Coal Industry Tribunal or any other industrial tribunal or commission.

4. The Company will relocate its scraper fleet and support equipment as determined by it from pre-stripping operations on the Coal Mining Leases to the Chicken Creek Leases and will develop at the Chicken Creek Leases a short term pit reserve designed for the production of approximately 300,000 tonnes of coal during the 1983 financial year. 10

5. (1) The Commission will during the 1983 financial year subject always to the criteria of size standard and quality specified in the Main Agreement being complied with accept coal mined from the Chicken Creek Leases in satisfaction of the Company's obligations to deliver coal under the Main Agreement to the intent that the projected base tonnage of 2,100,000 referred to in clause 2 hereof will be supplied as nearly as practicable as to 1,800,000 tonnes from the Coal Mining Leases and as to 300,000 tonnes from the Chicken Creek Leases subject however to reasonable variation to such proportions dependent upon the availability of coal from the Coal Mining Leases and the Chicken Creek Leases as mining proceeds and provided always that the Commission shall be entitled to receive 300,000 tonnes of base tonnage coal from the Chicken Creek Leases at the price mentioned in clause 7(3) hereof. 20

DOCUMENT 2* - Ex DRC 2 - copy of variation agreement between the parties: 23.8.82

(2) The first 30,130.32 tonnes of coal supplied to the Commission from the Chicken Creek Leases will be in

satisfaction of the Company's obligation under clause 2(b) hereof to deliver the 30,130.32 tonnes of clause 10 coal and will not be base tonnage coal.

6. (1) Subject as hereinafter in this clause provided the Company shall use its best endeavours during the 1983 financial year to adhere as closely as possible to the Base Tonnage Production Schedule set forth as the First Schedule hereto Provided That the Commission recognises that such Schedule assumes the immediate introduction of a three shift mining operation and it may not be possible to adhere thereto 10 by reason of delay in or non-introduction of such three shift mining operation or for other unforeseen circumstances which may arise.

(2) If the Company reaches agreement with the unions pursuant to clause 3 hereof on terms for the introduction of a three shift mining operation it shall within sixty (60) days thereafter submit to the Commission a detailed production plan based on the abovementioned Base Tonnage Production Schedule. Such detailed plan shall show the proposed areas of and sequence of mining, schedules of 20 delivery on a monthly basis, estimates of progressive monthly tonneages of coal to be uncovered from the Coal Mining Leases and the Chicken Creek Leases and shall unless there is good reason for not doing so contain provision for mining that area of the Coal Mining Leases known as and referred to in the Independent Consultant's Report as the Modified Northern Extension. Such detailed production plan shall be subject to the approval of the Commission which approval shall not be unreasonably withheld and upon such approval shall be

substituted for and stand in place of the abovementioned Base Tonneage Production Schedule.

(3) If the detailed plan referred to in sub-clause (2) of this clause does not contain provision for mining the Modified Northern Extension the Company shall give to the Commission a written statement of its reason for not including such provision in such detailed plan and any dispute as to whether such reason constitutes good reason for the purposes of sub-clause (2) of this clause shall be determined by the Independent Consultant or some other independent consultant appointed in accordance with the procedure set forth in clause 12(1) of the Main Agreement. 10

(4) If the Company is unable to reach agreement with the unions pursuant to clause 3 hereof by 30th September 1982 on terms for the introduction of a three shift mining operation then it will inform the Commission accordingly and will as a matter of urgency submit to the Commission an alternative production proposal or proposals directed towards enabling 2,100,000 tonnes of base tonnage coal and the 30,130.32 tonnes of clause 10 coal to be delivered in the 1983 financial year to be met and any such proposal or proposals shall be binding on the parties unless within seven (7) days after submission of the same to the Commission the Commission shall notify the Company that such proposal or proposals are not acceptable to it in which event the steps to be taken to achieve the abovementioned production targets in the 1983 financial year shall be determined by an independent consultant appointed by mutual agreement of the parties within a further period of two days. If the 20

Commission and the Company fail to agree on such independent consultant within such period then they will accept the appointment of an independent consultant to be immediately appointed by the Chairman of the Australian Institute of Mining and Metalurgy.

7. (1) The price for coal supplied from the Coal Mining Leases during the 1983 financial year shall be \$27.00 per tonne (being the base price as at July 1 1982 comprised of the components and calculated in the manner set forth in the Second Schedule hereto) which price shall be subject to 10 periodic adjustment after that date in accordance with the provisions of clause 7 of the Main Agreement (and as so adjusted from time to time shall be hereinafter called "the Muja Price").

(2) The price for the 30,130.32 tonnes of clause 10 coal supplied from the Chicken Creek Leases shall be the Muja Price.

(3) The price for the first 300,000 tonnes of base tonnage coal supplied from the Chicken Creek Leases during the 1983 financial year shall be a base price as at the 1st 20 July 1982 of \$9.00 per tonne which price shall be subject to periodic adjustment at the times and in the manner provided in the Third Schedule hereto.

(4) The price for any base tonnage coal in excess of 300,000 tonnes supplied from the Chicken Creek Leases during the 1983 financial year shall be the Muja Price.

(5) The parties hereto acknowledge that the company funded payments and lease payments incurred by the Company in the purchase or leasing as the case may be of those items of

plant and equipment listed in the Fourth Schedule hereto have been brought to account for the purpose of calculation of the Muja Price and shall continue to be brought to account for the purpose of future adjustment from time to time of the Muja Price as if such items of plant and equipment had at all times been included in Schedule C and in Schedules D or E as the case may be of the Main Agreement.

8. For the purpose of calculation pursuant to Schedule F of the Main Agreement of the Company's pre-tax cash surplus for the 1983 financial year -

10

(a) all mobilisation and establishment costs incurred by the Company after the 1st day of May 1982 in or in relation to the development of the short term pit reserve at the Chicken Creek Leases (estimated to be approximately THREE HUNDRED AND TWENTY ONE THOUSAND DOLLARS (\$321,000.00) as hereinbefore mentioned) and all costs of producing coal from the Chicken Creek Leases for the purposes of this Agreement shall be brought to account as deductions from gross revenue;

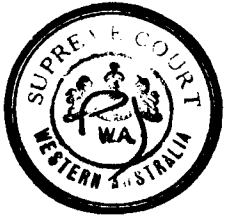
(b) the expression "gross revenue" (without prejudice to any different interpretation which either of the parties hereto may contend to be attributable to such expression under the Main Agreement in respect of other financial years or in respect of coal delivered other than against the Company's obligation to deliver base tonnage coal) shall mean -

20

(i) in respect of coal supplied from the Coal Mining Leases against the Company's obligation to deliver base tonnage coal the price thereof as

mentioned in clause 7(1) multiplied by the actual tonnage thereof delivered;

(ii) in respect of coal supplied from the Chicken Creek Leases against the Company's obligation to deliver base tonnage coal the price thereof as mentioned in clause 7(3) or 7(4) as shall be applicable multiplied by the actual tonnage thereof delivered



AND the method of calculation outlined in the example set forth in the Fifth Schedule hereto shall be followed. 10

9. (1) The Company if it has not already done so will as soon as practicable following execution of this Agreement furnish to the Commission a detailed statement of the estimated Chicken Creek mobilisation and establishment costs.

(2) The Chicken Creek establishment advance will be recouped by the Commission through a reduction in the price of coal supplied to the Commission from the Chicken Creek Leases such reduction to be calculated and given effect in the manner set forth in the Third Schedule hereto. 20

10. (1) As from the 1st day of July 1983 the Company will move all its mining operations for the production of coal for sales to third parties away from the Coal Mining Leases and withdraw from operation on the Coal Mining Leases all those items of plant and equipment which have been purchased or leased by it and utilised in production of coal under the Main Agreement not being Contract Equipment and will also exclude from charge to the Commission the labour and

personnel used in operating the withdrawn plant and equipment.

(2) As from the 1st day of July 1983 the Company will not utilise for the purpose of producing coal for any party other than the Commission any Contract Equipment.

(3) Notwithstanding the foregoing sub-clauses of this clause the Company will remain entitled after the 1st day of July 1983 to use the administrative facilities and other infrastructure on the Coal Mining Leases (including workshops and mechanical services) for the production of coal for the purpose of sale to parties other than the Commission free from any claim by the Commission that the costs or expenses of such administrative facilities and other infrastructure should be apportioned or reduced when the price of coal under the Main Agreement or the pre-tax cash surplus of the Company is being calculated provided that - 10

(a) such utilisation does not interfere with or hinder the due performance by the Company of its obligations under the Main Agreement; and

(b) such use does not result in any increase in the price of coal to the Commission. 20

11. Except as expressly varied by or insofar as they are inconsistent with the express terms of this Agreement or the 23rd August Agreement the terms conditions and warranties express or implied contained in the Main Agreement shall apply mutatis mutandis to the rights and obligations of the parties under this Agreement.

12. The parties hereto acknowledge that this Agreement is entered into without prejudice to any rights entitlements or

causes of action which may have arisen under the Main Agreement and the 23rd August Agreement and save to the extent expressly settled varied or affected by this Agreement those rights entitlements and causes of action shall continue to be available to the parties.

13. The parties hereto acknowledge that due to difficulties encountered between them in reaching agreement on the terms hereof execution of this Agreement has been delayed until the expiration of seventy one (71) days after the commencement of the 1983 financial year to which it relates and to the extent that the Company can demonstrate that it has actually been prejudiced thereby this fact will be recognised and brought to account with all other relevant circumstances in the event that the due performance by the Company of its obligations hereunder is at any time called into question. 10

THE FIRST SCHEDULE

1982-83 BASE TONNEAGE PRODUCTION SCHEDULE

ASSUMPTIONS AND COMMENTS

1. Production at Chicken Creek commences in Period #1 concurrently with the Night Shift and the North Extension development.
2. A total of 300,000 tonnes of Chicken Creek coal is mined in 1982/83.

1982/83 PRODUCTION SCHEDULE ('000t)

	MUJA		CHICKEN CREEK		TOTAL		
	End of Period Reserve	Prod ⁿ	End of Period Reserve	Prod ⁿ	End of Period Reserve	Prod ⁿ	
1	119	170	92	15	211	185	10
2	62	105	91	80	153	185	
3	8	105	72	80	80	185	
4	7	105	40	80	47	185	
5	0	140	40	45	45	185	
6	12	185	84	-	96	185	
7	166	185	84	-	250	185	
8	278	185	84	-	362	185	
9	175	185	84	-	259	185	
10	103	185	84	-	187	185	20
11	44	185	84	-	128	185	
12	19	165	84	-	103	165	
	-----	-----	-----	-----	-----	-----	
TOTAL	19	1900	84	300	103	2200	
						<u>100</u>	
						<u>2100</u>	

DOCUMENT 2* - Ex DRC 2 - copy of variation agreement between the parties: 23.8.82

THE SECOND SCHEDULE

BASE PRICE AND PRICE COMPONENTS FOR 1982-1983
FOR COAL SUPPLIED FROM THE COAL MINING LEASES

Financial Year 1982/83

A\$ per tonne

	July 1 1978 Terms	July 1 1982 Terms	
Labour	4.49	7.33	
Materials	3.30	7.82	
Others	5.52	7.91	
Lease Payments	3.18	3.69	10
Company Funded Equipment	0.24	0.25	
<hr/>			
Base Price	16.73	27.00	
		(as adjusted)	
<hr/>			

DOCUMENT 2* - Ex DRC 2 - copy of variation
agreement between the parties: 23.8.82

THE THIRD SCHEDULE

VARIATION FORMULA FOR COAL SUPPLIED
FROM THE CHICKEN CREEK LEASES

The Chicken Creek Base Price at 1st July 1982 is \$9.00 per tonne as provided by clause 7(3) of the within Agreement.

The Chicken Creek Base Price is to be varied in accordance with the percentage variation from time to time to the various components of the Muja Price.

The Chicken Creek Base Price as adjusted will be reduced by the amount of the Chicken Creek establishment advance. Such reduction shall be determined on a per tonne basis by dividing the amount of the said advance, expressed in dollars, by 300,000, in the manner described below. 10

The Chicken Creek Base Price will be adjusted from time to time at precisely the same times as the Muja Price is adjusted. The formula for varying the Chicken Creek Base Price is as follows:

Chicken Creek Base price as adjusted =

$$\left(2.86 \frac{I_{Ln}}{I_{LN}} + 3.05 \frac{I_{Mn}}{I_{MN}} + 3.09 \frac{I_{On}}{I_{ON}} \right) - \frac{\$321,000}{300,000} \quad 20$$

Where: I_{Ln} , I_{Mn} , and I_{On} are described under the Main Agreement.

I_{LN} = Labour related cost index at 1st July 1982

I_{MN} = Materials related cost index at 1st June 1982

I_{ON} = Other Cost index (being the Consumer Price Index, All Groups Number, Perth, Catalogue Number 6401.0 for the quarter ended 31st March 1982)

THE FOURTH SCHEDULE

	<u>Equipment Item</u>	<u>Number</u>	
A.	<u>Leased Equipment</u>		
	Demag H241 Excavator	1	
	Front End loader D600	1	
	Wabco CM120 - 109 tonne trucks	6	
	Terex 33-11 - 77 tonne trucks	2	
	Caterpillar D9 Tracked Dozer	2	
	Michigan 380 Rubber Tyred Dozer	1	
	Scraper (Elevating)	1	10
	Grader	1	
	Drill	1	
	Water Trucks	4	
	Compactor	1	
	Miscellaneous Trucks	2	
B.	<u>Company Funded Equipment</u>		
	Light Vehicles	4	
	Terex 33-11 Truck Tailgates	8	

DOCUMENT 2* - Ex DRC 2 - copy of variation
agreement between the parties: 23.8.82

THE FIFTH SCHEDULE

PROJECTED SCHEDULE F 1982/1983

(Example Only)

Production (Thousands of tonnes):

- Muja Pit	1,800	
- Chicken Creek Pit	<u>300</u>	
Total	2,100	

Actual Revenue (Thousands of dollars):

- Production	<u>\$51,300</u>	
	51,300	10

Costs

- Muja	44,000	
- Chicken Creek	<u>2,700</u>	
	46,700	

Pretax Cash Surplus:

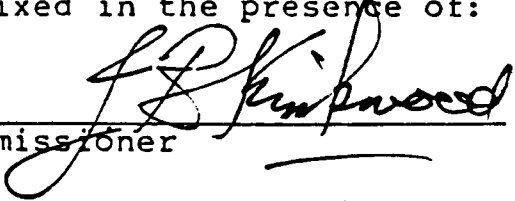
- Projected	4,600	
- <u>Allowable</u>	<u>16,832</u>	
- Deficiency	12,232	

Adjusted Revenue 63,532

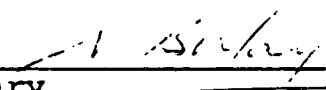
Notes: No provisions for make up of 1981/82 shortfalls. 20
Actual revenue excludes private sales revenue.
Costs exclude 1982/1983 escalation.
Production Revenue Muja \$27.00 per tonne
base 1st July 1982.
Production Revenue Chicken Creek \$ 9.00 per tonne
base 1st July 1982.
Allowable Pretax Cash Surplus 32.81% of revenue.

EXECUTED by the parties:

THE COMMON SEAL of THE STATE)
ENERGY COMMISSION OF WESTERN)
AUSTRALIA was hereunto)
affixed in the presence of:)

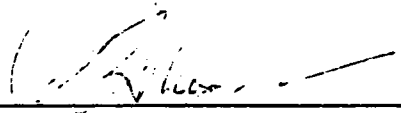


Commissioner

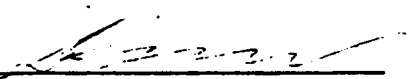


Secretary

THE COMMON SEAL of THE GRIFFIN)
COAL MINING COMPANY LIMITED)
was hereunto affixed by)
authority of the directors in)
the presence of:)

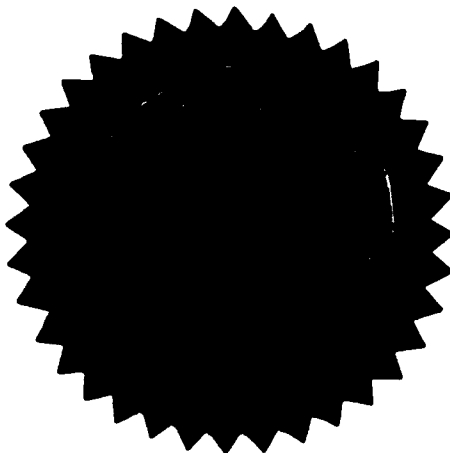


Director



Secretary

AJC/T-171-DEF-K
(3.9.82)



DOCUMENT 2* - Ex DRC 2 - copy of variation
agreement between the parties: 23.8.82

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N:

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

and

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

This is the Exhibit marked "DRC-3 " referred
to in the Affidavit of DOUGLAS RALPH CHATFIELD
Sworn the 4th day of November 1982
and produced and shown to him at the time of
swearing such Affidavit

10

Before me:-

JOHN GILLET

A Commissioner for Affidavits/
~~Justice of the Peace~~

LONG TERM COAL SUPPLY AGREEMENT -
MINUTE OF AGREED ITEMS

It is agreed between the Commission and the Company as follows:

1. Pursuant to principles finalised between the parties on 15 July 1982 the Commission and the Company are prepared to execute a Supplementary Agreement forthwith.

2. The sum of \$1 555 666.31 as offered by the Commission in its letter of 30 June 1982, is accepted by the Company as full and final settlement of all outstanding financial claims referred to in Item 1 of the Company's invoice dated 14 June 1982. 10

3. (a) As an interim measure and subject to the subsequent sub-clauses of this clause the parties agree that for the purpose of Schedule "F" calculations for the 1981/82 financial year "Gross Revenue" will be determined by multiplying the actual base tonnage delivered by the base price as adjusted.

(b) The parties will forthwith refer to a mutually agreed arbitrator or to the Supreme Court of Western Australia for the determination of the proper basis for calculation of "Gross Revenue" under the Main Agreement and the determination of related problems concerning shortfalls in coal deliveries for the purposes of Schedule "F" calculations under the Main Agreement and for the determination of various other matters upon which the parties cannot agree and known between them as - 20

- (i) the infrastructure dispute;
- (ii) the materials index dispute;
- (iii) the Jacia fees dispute.

(c) (i) Should the determination under sub-clause (b) above be available prior to the time the Company is due for a "make up payment" pursuant to its 1981/82 Schedule "F" submission the Commission will make such payments calculated in accordance with such determination. 30

(ii) Should the determination under sub-clause (b) above not be available by the time the Company is due for a "make up payment" pursuant to its 1981/82 Schedule "F" submission the Commission will make such payment calculation on the basis outlined in sub-clause (a) above and within seven (7) days after the subsequent receipt of such determination a cash adjustment in accordance with the determination shall be made between the parties.

4. The Commission will forgo it's claim to apportionment of any costs 10 to private sales in the years to 30 June 1982. The Company agrees to apportion the cost of labour and consumables with respect to private sales in the financial year 1982/83 in accordance with the principles for apportionment contained in the Price Waterhouse Audit Report on Pre and After Tax Cash Surplus for the year ended 30 June 1981.

5. The Commission will pay the Company the sum of \$2.5 million in full settlement of Item 2 of the Company's invoice of 14 June 1982. The \$2.5 million shall be included as revenue for the purpose of Schedule "F" calculations in the financial year 1981/82.

DATED the *23rd* day of *August* 1982.

D R Chatfield

State Energy Commission of
Western Australia
per D R Chatfield A/Assistant
Commissioner Operations

G M Strmotich

The Griffin Coal Mining
Company Limited
per G M Strmotich

DOCUMENT 2* - Ex DRC 3 - copy of minute of
items agreed between the parties: 23.8.82

E E T W E E N:

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

and

THE GRIFFIN COAL MINING COMPANY
LIMITED

Defendant

I the Honourable PETER VERNON JONES of 77 St. George's 10
Terrace Perth being duly sworn make oath and say as follows:-

1. I am the Minister for Resources Development Mines, Fuel
and Energy for the State of Western Australia and
Minister charged with administration of the State Energy
Commission Act, 1979.
2. I am aware of the long running disputes between the
Plaintiff and Defendant in respect of the long term
coal supply contract between them dated 29th March,
1979. I have read a copy of the affidavit of DOUGLAS
RALPH CHATFIELD sworn in these proceedings the 4th 20
day of November, 1982.
3. The magnitude of the monetary shortfall to be made
by the Plaintiff as part of the Defendant's Pre-Tax
Cash Surplus which could emerge as a result of the
different contentions of the parties to the effect
of the contract is a matter of great concern to
the Government of Western Australia, both in the
short and long term. I am informed that on the
latest figures available according to the Plaintiff's

interpretation about \$2.3 millions would be payable but on the Defendant's interpretation about \$6.9 millions would be claimed as payable for the 1982 financial year.

4. I am satisfied that further negotiation between the parties would be pointless. I believe it most desirable in the public interest that a definitive decision be given as to the construction of the contract between Plaintiff and Defendant as soon as possible so that both parties can arrange their financial affairs with some degree of certainty. 10
5. I respectfully request that the earliest possible date be fixed for the hearing of this originating summons so that if possible the situation does not arise whereby the Plaintiff is required to pay out a very large sum of public money to the Defendant which the Plaintiff may subsequently have to demand be repaid. If at all possible the Government of Western Australia would like this matter heard before the Christmas vacation. 20

SWORN by the said)
PETER VERNON JONES)
at PERTH the 18th) P.V. JONES
day of NOVEMBER)
1982. Before me:)

IAN G MEDCALF

A Commissioner of the Supreme Court
of Western Australia for taking
affidavits.

THIS AFFIDAVIT is filed on behalf of the Plaintiff by
Messrs Jackson, McDonald & Co. of 6 Sherwood Court, Perth.
Tel. 325 0291 Ref: MJS

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N:

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

AFFIDAVIT

10

I, GEORGE MICHAEL STRMOTICH of 28 Eucalypt Court, Duncraig in the State of Western Australia, Mining Engineer being duly sworn make oath and say as follows:

1. I am presently Assistant Managing Director of Jacia Mine Management and Consulting Services and have held that position since March 1981.

2. Pursuant to a management agreement Jacia manages and supervises the mining operations being conducted by the Defendant, Griffin Coal Mining Company Limited, at Collie. I am therefore effectively in charge of the Defendant's mining operations and am generally familiar with all aspects of the disputes between the Plaintiff and the Defendant either of my own personal knowledge or from information available to me from the Defendant's records and its officers. I am authorised by the Defendant to make this Affidavit setting out information and matters relevant to an understanding of the Defendant's point of view. 20

3. I have read the Affidavit of DOUGLAS RALPH CHATFIELD sworn the 4th day of November 1982 and have a number of observations to make upon it.

4. I agree that "DRC-1" is a true copy of the Agreement dated 29th March 1979 made between the parties. The structure of the Agreement and the circumstances giving rise to the 1981 disputes detailed in paragraph 3 of the Chatfield Affidavit can be more readily understood by reference to the history of the relationship between the Plaintiff and the Defendant.

10

5. The Defendant has mined coal in the Collie region for more than 50 years. An open cut mine was commenced at Muja in 1953 followed by a deep mine to exploit coal from what is known as the Hebe Seam in 1954. The deep mine ceased operating in 1965 after a drill hole from the surface had penetrated the workings and resulted in a large inflow of water which flooded the mine. Subsequently the open cut was expanded and the operations are now mining through the area formerly worked by deep mine methods with the result that extraneous materials (referred to in paragraph 3(3) of the Chatfield Affidavit) such as steel roof bolts, old mine timbers, pieces of scrap metal and of cables are inevitably mixed in with the "run of mine" coal excavated from that portion of the open cut operation notwithstanding that the Defendant utilises good mining practices and takes all reasonable steps in the circumstances to keep the extraneous material to a minimum.

20

6. The Defendant has been the major supplier of coal to the Muja Power Station controlled by the Defendant which power

DOCUMENT 4* - Affidavit of George Michael Strmotich
sworn 15.12.82

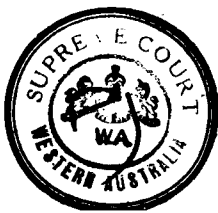
station is located in close proximity to the open cut mine. Exhibited hereto and marked with the letters "A1" and "A2" are photographs showing the Muja open cut mine and its relationship to the Muja Power Station.

7. During the course of the 1970's it became apparent that the volume of coal to be supplied to the power station would have to be increased and that the Defendant would require additional equipment in order to achieve the necessary results. It also became apparent that in order to obtain finance with which to acquire the equipment required to 10 increase production from the mine it would be necessary to engage internationally respected consultants to prepare a thorough study of the project so that financiers would be prepared to make advances.

8. RTZ Consultants Limited were engaged to undertake the study and a draft copy of the RTZ study was available by June 1978.

9. As at 1978, Griffin was the registered lessee of a block of 23 coal mining leases, known as the Muja leases, which included the Muja open cut mine and its surrounding area and 20 amounted in total to an area of approximately 2,685 hectares. With four exceptions, these leases are valid until 31st December 1992. Two of the exceptions expire on 31st December 1993 and the other two on 31st December 1982. These last two leases do not contain any coal considered in the reserve.

10. The RTZ study indicates that the total estimated coal reserves as at 1st January 1978 amounted to 67.9lm tonnes. The greater part of the coal reserves are located in the Hebe



seam and the Hebe split that is to say the seams situated at the lowest level of the nine seams comprising the Muja Mine.

11. The RTZ study notes (at page 6) that allowing for a phased build up to an output of 2.1m tonnes of coal per year and having regard to the requirements of the Plaintiff as a consequence of increasing the capacity of the Muja Power Station, the reserves would be adequate for approximately 30 years. The RTZ study noted (at page 6) that the Defendant had additional reserves in the vicinity (being the Chicken 10 Creek Reserves the subject of the agreement comprising "DRC-2") which reserves were not then considered by the RTZ study.

12. The RTZ study noted (at page 10) that the expansion of production at Muja according to the strategy proposed in the report was technically and economically feasible subject to the negotiation of an appropriate sales contract. That strategy presumed expansion of the existing fleet of 20 equipment.

13. Negotiations were commenced between Griffin and SEC with a view to bringing about a new and more permanent contractual relationship which to this time had been on a purely short term basis. Those negotiations proceeded upon the basis that:

(a) the mining methods and financing of the operation contemplated by the RTZ study would be carried into effect;

(b) there would therefore be a new and extended fleet 30 of equipment;

(c) there would be regular schedules of delivery and at a price sufficient to finance the operation and give Griffin a reasonable return;

(d) overburden would be removed at a prescribed rate and that work (and working hours) would be conducted in the manner contemplated by the RTZ Study.

13A. Exhibited hereto and marked with letters "AA" is a photocopy of pages 5 to 10 of the RTZ Study comprising a summary of the RTZ Study. The Defendant envisages that the full text of the RTZ Study will be submitted to the Court at the hearing by consent. The relationship between the RTZ Study and the Contract is demonstrated, inter alia, by the fact that the list of equipment set out in Schedule C of the Contract was prepared from and in essence corresponds to the list of equipment detailed in the RTZ Study at Appendix III tables 5 and 6. Schedule F provides that "the deductions from Gross Revenue to determine pre-tax cash surplus are those envisaged in the RTZ Study".

14. The parties to the negotiations, being conversant with the findings detailed in the RTZ Study, recognised that the Plaintiff was seeking to obtain an assured supply of coal for a guaranteed 25 year period at what was basically a "cost plus" price (that is to say the price was not to be necessarily related to the general economics of the energy supply situation) and the Defendant was seeking to obtain a permanent customer with special provisions in the contract ensuring the economic viability of the project from the Defendant's point of view during the life of the contract.

14A. I am informed by the Managing Director of the Defendant Mr R.F. Stowe who represented the Defendant and I verily believe that during the course of the negotiations CHARLES RICHARD TINSLEY (being a representative of the Continental Illinois National Bank and Trust Company of Chicago hereinafter mentioned) prepared a letter dated the 20th December 1978 which was to serve as a record of the areas of agreement which had been reached as at that date. The broad principles of agreement reflected in the letter remained constant. Exhibited hereto and marked with the letter "AAl" is a copy 10 of the said letter which was initialled by both parties.

14B. The respective requirements of the parties found expression in a number of the provisions of the Contract including:

(a) The notion that if the Defendant could deliver coal up to a certain minimum amount, the Commission was obliged to pay for it (which concept can be succinctly stated in the phrase "take or pay").

(b) The Contract provided that if coal was unable to be delivered because of a happening of a force majeure 20 event, the leasing payments due in respect of the expanded fleet of equipment would nevertheless continue to be made by the Commission.

(c) The notion that a percentage return for the company calculated by reference to revenue and expenditure should not exceed or fall below agreed limits.

(d) Having regard to the length of the Contract, provision was made for review of the mining plan and for

DOCUMENT 4* - Affidavit of George Michael Strmotich
sworn 15.12.82

variation of the plan in accordance with guidelines prescribed in clauses 12 and 21 of the Contract.

14C. It appears from the matters hereinbefore referred to that the parties entered into the Contract as a result of paying close attention to the economic realities of the situation. The RTZ Study represents a detailed appraisal of the factors relevant to the respective requirements of the parties. The RTZ Study contains the Mining Plan and in Schedule F is adopted as a point of reference in regard to measuring the pre-tax cash surplus. The Defendant contends that the Contract should be interpreted in a manner which has regard to the economic realities of the situation and to the respective requirements of the parties. 10

15. As appears from the recital to the Contract the Defendant arranged with the Commonwealth Trading Bank of Australia, the Rural and Industries Bank of Western Australia and the Continental Illinois National Bank and Trust Company of Chicago for the provision of finance for the leasing and/or purchase of mining equipment for the purposes of the Contract. The total amount of finance required and obtained in relation to the equipment in Schedule D and in relation to the equipment in Schedule E amounts to approximately \$30,000,000. The original borrowing facility negotiated with the Continental Bank was the sum of \$28,000,000. The parties advancing the finance have an interest in the continuance of the Contract and compliance with the terms of the Contract by both parties because the Contract provides the Defendant with an assured revenue and, prima facie, so long as the company exercises good management, a financial return sufficient to 20

provide the company with a surplus after making its financial commitments.

16. Against this general background, I will now deal with the contents of the Chatfield Affidavit in more detail.

17. As to paragraph 3, the Defendant agrees that in the second half of 1981 disputes arose between the Plaintiff and the Defendant of the kind described. However, I would make the following additional observations:

(a) Many of the disputes touched on in paragraph 3 in the Defendant's contention arose from the need for 10 revisions to the mining plan and a need to review the mining operation in the light of events transpiring subsequent to the making of the Contract.

(b) It is true that the presence of extraneous materials in coal supplied to the Plaintiff was frequently a source of friction between the parties but it must be remembered that the Contract is essentially for the supply of "run of mine coal" in respect of an open cut mining operation which from the outset was known would proceed through former deep mine workings. 20 As indicated above the company was obliged to and has in fact utilised good mining practice in the course of performing its obligations under the Contract and in coping with the extraneous materials.

18. There is no need to further explore these differences of opinion in the present proceedings save and except to make the general comment that the complexity of the mining operation and the multiplicity of safeguards introduced into the Contract with a view to protecting the position of each

party in respect of the relationship which is presumed will continue for 25 years makes it almost inevitable that factual situations will occur which will give rise to difficulties of interpretation of the kind brought into issue in these proceedings.

19. As to paragraphs 4 and 5, I confirm that the outcome of the proceedings was as described in the Chatfield Affidavit save and except that the settlement referred to was effected on the second day of the hearing.

20. As to paragraph 6, I agree that a default notice was issued and subsequently withdrawn but say that there was no default on the part of the Defendant. 10

20A. As to paragraph 7, the unseasonal heavy rains referred to occurred on or about the 19th and 20th January when the Defendant's work force was at full strength having resumed work after the Christmas break.

21. As to paragraphs 8 and 9 I agree the position is as described in the Chatfield Affidavit save and except that:

(a) the impact of the force majeure event had both an immediate and deferred impact on coal deliveries and overburden waste removal; 20

(b) the effect of force majeure to the 30th June 1982 resulted in a deficiency of coal deliveries of 104,000 tonnes a portion of which comprising one day's delivery (approximately 8,850 tonnes) can be attributed to an event of force majeure declared by the Plaintiff in respect of strike action on the 3rd February 1982, 120,000 tonnes represents the total deficiency by reason of force majeure to the 22nd July 1982 at which date the

effect of the force majeure was declared by the Defendant to be no longer operative.

22. As to paragraphs 10, I say that:

(a) there were frequent discussions but many of these are more accurately portrayed as being directed to matters which had not previously been addressed or resolved;

(b) the matters in issue pre-dated the Court settlement and had been present since the inception of the Contract being in the nature of "teething problems"; 10

(c) the shortfall referred to does not arise as a result of any default on the part of the Defendant and nor does it arise as a consequence of a lack of good mining and management practices;

(d) I was present at the various negotiations referred to and at no time during any such negotiations did the Defendant concede any default on its part or lack of good mining and management practices.

22A. As to paragraph 11, I agree that the position is as described save and except that: 20

(a) I do not understand what is meant by the statement that the value of the undelivered coal is "indirectly reflected in the figure of about \$6.9m." If the coal had been delivered and paid for then the gross revenue for the purpose of the pre-tax cash surplus calculation would have been increased by the amount paid and this would be reflected in a substantial reduction of the top up payment;

(b) as hereinbefore appears, the deficiency in deliveries to the end of June 1982 amounted to 104,000 tonnes a portion of which comprising one day's delivery (approximately 8,000 tonnes) can be attributed to an event of force majeure declared by the Plaintiff in respect of strike action on the 3rd February 1982.

23. As to paragraphs 12, 13, 14, 15 and 16 I agree that the position is as described in the Chatfield Affidavit.

24. As to paragraphs 17 and 18 I agree that the position is as described in the Chatfield Affidavit but would make the following additional comments: 10

(a) it is consistent with the concept referred to above in paragraph 14 (which finds expression in clause 8(3)(c)(i)) that the Defendant should obtain a reasonable return. The Contract also contains the related notion in clause 8(3)(c)(ii)) that there shall be a refund to the Plaintiff if the pre-tax cash surplus exceeds a prescribed percentage. The concept of "excessive profit" is not referred to in the Contract and those words should therefore be disregarded. 20

(b) the Defendant does not necessarily accept the figures presented in paragraph 18 but says that the figures in themselves are meaningless because they are not related to the quantity of coal supplied and cost of production. As indicated above, the contract is essentially a "cost plus" Contract and an increase in the price being paid for the commodity as the Contract proceeds is not surprising.

DOCUMENT 4* - Affidavit of George Michael Strmotich
sworn 15.12.82



25. As to paragraphs 19 and 20, I do not accept that these paragraphs represent a fair summary of the Defendant's contentions but as they are apparently included in the Affidavit for the purpose of exposition only I will not comment further but will leave it to Counsel for the Defendant to define the Defendant's position at the hearing more accurately.

26. As to paragraph 21, I agree that the Defendant has produced draft accounts for the purposes of Schedule F which are in the process of being settled between the parties. I 10 deal with the monetary implications of those accounts as far as the relationship between the parties is concerned in more detail below. I agree that resolution of difficult points of interpretation by court ruling pursuant to the Originating Summons may go some way towards resolving differences of opinion between the parties and for that reason the Defendant has not opposed the application for an expedited hearing. However, the Defendant is obliged to say that notwithstanding the resolution of adequately framed question of contract construction, underlying questions of factual dispute might 20 require to be resolved between the parties before the amount of the adjustment payment for the year ended the 30th day of June 1982 can be finally determined.

27. As to paragraph 22 the Defendant would agree that the hearing can proceed upon the basis of the materials referred to save and except that the Defendant wishes to adduce a copy of the RTZ Study, this affidavit and further evidence by affidavit as to the circumstances giving rise to the Contract and as to the meaning of "gross revenue".

DOCUMENT 4* - Affidavit of George Michael Strmotich
sworn 15.12.82

28. As to paragraphs 23 and 24, I agree that the position is as described in the Chatfield affidavit.

29. As to paragraph 25 and the list of questions for determination annexed to the Originating Summons, I say that in the view of the Defendant and its advisors the questions posed by the Plaintiff do not necessarily bring out the matters in issue in the most satisfactory manner. Some of the terminology in the questions does not correspond with terminology in the contract. Some of the matters which the questions touch on are not controversial. Some of the questions do not define the issues succinctly. 10

29A. The questions for determination submitted by the Commission appear to fall into two broad categories:-

(a) Take or pay questions - questions directed to ascertaining the circumstances in which the Commission is bound to pay on a quarterly basis for coal not delivered for some reason during the relevant quarter - such questions are concerned essentially with the interpretation of clause 5(4) of the Contract.

(b) Schedule F questions - questions directed to 20 ascertaining the basis upon which the annual Schedule F adjustment payment contemplated by clause 8(3)(c) of the Contract should properly be calculated particularly in circumstances where -

(i) the scheduled quantity of coal for the relevant year as set forth in Schedule A of the Contract is for some reason not delivered; and

(ii) in the relevant year quantities of coal are delivered to make up shortfalls in deliveries from previous years.

29B. Exhibited hereto and marked with the letter "B" is a memorandum setting out an alternative series of questions which in the submission of the Defendant more suitably raise the real matters in issue between the parties.

30. However, as to the questions formulated by the Plaintiff, my specific comments are as follows:

Question 1:

10

This is a take or pay question. It is directed to whether the Commission is obliged to pay at the end of each quarter for coal ordered by it for that quarter if for certain specified reasons there is a delivery deficiency for such quarter. Griffin does not contend that it is entitled to be paid at the end of each quarter for coal not delivered during that quarter unless it was ready and willing to deliver and the Commission failed to accept delivery. If for any reason whatsoever Griffin was not ready and willing to deliver then Griffin would concede that it would not be entitled to claim 20 payment under clause 5(4).

Question 1(c) requires special comment. It raises the issue of whether the Plaintiff is obliged to pay if the Defendant "does not tender for acceptance for the Commission the whole of that tonnage ordered." The Defendant says there are practical difficulties in giving effect to a concept of "tender" in the administration of the Contract. The RTZ Study prescribes and the Contract has been administered on the basis that coal will be mined in shifts and that coal

extracted from the work face of the open-cut mine will be transported to weighbridges and receiving hoppers manned by the Plaintiff in massive dump trucks operated by the Defendant. If for any reason there is any delay at the weighbridge and receiving hoppers then a queue of trucks will inevitably form at the delivery point.

It will merely create confusion and will be incompatible with good mining practice if in order to effect a "tender" the Defendant is obliged to demonstrate its capability to deliver by some formal process on those occasions when delivery cannot be physically effected owing to the presence of a queue of trucks at the point of delivery. The only manner in which capacity to deliver could be convincingly demonstrated in such circumstances would be by immediate stockpiling at the delivery point or by trucks being immediately and formally "turned away" from the weighbridge. Such steps would be impractical and in any event, have not been proposed by the Plaintiff.

In the event of delay, the practice has been to re-schedule the trucking operation. The Defendant therefore submits that the proper test of its capacity to deliver is whether it is ready and willing to deliver as measured by an examination of its operations at the work face and of its trucking capacity and method of operation rather than of a process of formal tender which would be futile for the reasons set out above. The Defendant says that the answer to the question as formulated should therefore be: Yes, if Griffin is otherwise ready and willing to deliver.

The question could perhaps be re-formulated as follows: For the purpose of clause 5(4) of the Contract, would the fact that Griffin did not actually tender coal for acceptance conclusively determine that Griffin was not ready and willing to deliver such coal?

Question 2:

This is again a take or pay question directed to whether the Commission is obliged to pay at the end of each quarter for coal not delivered during the quarter - in this case in the specific circumstance where the non-delivery is due to force majeure. As Griffin would see the position clause 24 operates to suspend the obligations of the parties under the contract in a force majeure situation - including (subject only to the specific exception of the payment to the Banks contemplated by the clause) the obligation of the Commission to pay for coal on a take or pay basis under clause 5(4). That being so Griffin would concede that the answer to (a), (b) and (c) of this question would in each case be "No" Griffin has not in any situation which has arisen contended to the contrary.

Question 3:

My comment on the immediately preceding question applies and again Griffin would concede that the answer to the question posed should be "No".

Question 4:

Once again Griffin would concede that the answer to each aspect of this question would be "No".

Question 5:

This question appears to be misconceived and will be dealt with by Counsel for the Defendant in argument.

Question 6:

This question is central to the dispute between the parties and will be dealt with by Counsel. The Defendant contends that the issue is more exactly defined in Exhibit "B" hereto.

Question 7:

We think that this question in that it does not address itself to the reason for the contemplated deficiencies in delivery does not really permit a proper answer.

Question 8:

10

This question will be dealt with by Counsel in argument.

Question 9:

This question will be dealt with by Counsel in argument.

31. I now return to paragraph 21 of the Chatfield affidavit and the key issue between the parties, that is to say the determination of the pre-tax cash surplus. The Defendant says that:

- (a) the payment referred to falls due within thirty (30) days of receipt of the notice mentioned in clause 8(3)(c)(i) notwithstanding that any audit required by 20 the Commission has not yet been received;
- (b) the Defendant does not know how the figure of \$2.3m is calculated. The Defendant considers that the difference between the parties is best illustrated by the figures set out in Exhibit "C" to this affidavit;
- (c) the Defendant queries the description "public moneys" in this context. The Plaintiff is a quasi

autonomous State instrumentality which derives revenue from various sources including revenue from the sale of services to consumers. The statement that it would be undesirable and inconvenient for the Plaintiff to make the top up payment must be considered in the context of its undertaking to do so pursuant to clause 3 of Exhibit "DRC3" to the Chatfield affidavit;

(d) as to the last sentence of paragraph 21, the Defendant says that although a shortfall in the Defendant's pre-tax cash surplus will arise in the current financial year (which shortfall has been previously forecast and notified to the Plaintiff) there is nothing to support the statement that "substantial recurring annual shortfalls in the Defendant's pre-tax cash surplus will inevitably follow each year" whether or not the Defendant's contentions are correct. 10

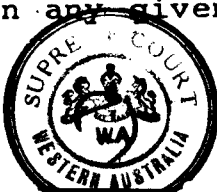
32. The dispute concerning the interpretation and application of clause 8 and Schedule F has arisen as a result of the deficiency in deliveries in the latter part of 1981. The Defendant says that the deficiency in deliveries arose from the Plaintiff's inability to accept delivery. The position has been further complicated by the unusually heavy rainstorm in January 1982 which substantially flooded the mine thereby giving rise to a force majeure situation under clause 24. There is a dispute between the parties as to the scope and financial implications of that situation. 20

33. The parties do not propose that the precise cause of the shortfall be determined in these proceedings. However, the Plaintiff apparently asserts that the term "gross revenue"

referred to in clause 8 is to be taken as the total base tonnage for the relevant year referred to in Schedule A of the Contract rather than the lesser quantity of actual base tonnage delivered. The consequence of this assertion is that "gross revenue" would be a purely notional figure which would not reflect the actual moneys paid by the Plaintiff to the Defendant. It would follow that the amount payable to the Defendant pursuant to the pre-tax cash surplus calculation pursuant to clause 8(3)(c) in order "to restore the pre-tax cash surplus to that estimate pursuant to the R.T.Z. study" 10 for the financial year ended 30th June 1982 (hereinafter referred to for convenience as "the top up" payment) would be very substantially reduced.

34. The Defendant on the other hand asserts that the only sensible basis for the calculation under the Schedule is on the basis of actual revenue received by the Defendant. Otherwise, the protection afforded to the Defendant by clause 8 and Schedule F would be illusory. The Defendant says that the clear intention of clause 8(3)(c) is that the Defendant will obtain the minimum acceptable rate of return as agreed 20 at the inception of the Contract but will not be permitted to exceed the maximum acceptable return as also agreed. It therefore follows, in the Defendants' submission, that the calculation must basically be made having regard to actual rather than to notional revenue.

35. The Defendant is obliged to maintain the infra-structure, equipment and manpower capable of producing the contracted quantities of coal from the Muja Open Cut Mine in any given contract year. The basic cost of maintaining



that establishment does not vary significantly with the amount of coal actually produced. The Plaintiff's interpretation of "gross revenue" for the purposes of the definition of pre-tax cash surplus in clause 8 and Schedule F would in the circumstances pertaining in the 1981/82 financial year, produce the result that the top up payment would be calculated on the basis of the Defendant having received a notional revenue which substantially exceeds (by approximately five million dollars as shown on Exhibit "C" to this affidavit) the actual revenue which the Defendant in 10 fact received. However, as just mentioned, the Defendant's expenditure has been much the same as would have been required if total base tonnage had in fact been delivered. A consequence would be that the Defendant's return for the year would be substantially below the minimum return agreed at the time of execution of the Contract.

36. The Plaintiff appears to argue that "gross revenue" should be defined as being in broad terms the revenue which would have been received in any year if the full quantities specified in Schedule A had been paid for notwithstanding 20 that for some reason the full quantities were not in fact paid for.

37. The Plaintiff would further seem to argue that if actual revenue is used for the purpose of the Schedule F calculation, there would be no commercial incentive upon the Defendant to achieve its delivery obligations because its minimum return would be guaranteed in any event. In that circumstance, the Plaintiff, it is said, would be forced to pay a high unit price for coal.

38. The Defendant would respond to this argument by saying that clause 8(3)(d) of the Contract protects the Plaintiff in this regard. This clause provides for an adjustment to the top up payment in the event of such payment being higher than otherwise would be the case due to any of the default factors specified in the clause.

39. I now wish to translate the general approach to the matter in issue adopted by the Defendant into actual figures. Exhibited hereto and marked with the letter "C" is a memorandum setting out the alternative viewpoints by 10 reference to the draft accounts referred to in paragraph 21 of the Chatfield affidavit.

40. In summary, the Defendant contends that:

(a) the relevant Base Tonnage figure for the purposes of calculating Gross Revenue is that quantity of coal the Commission was obliged to accept or pay for in the relevant financial year;

(b) in the event that deliveries fall short of the quantities specified in Schedule A of the contract the relevant quantity will be the quantity which the 20 Commission was bound to take or pay for under the provisions of the contract.

(c) any part of the deficiency being coal which Griffin was ready and willing to deliver but which the Commission failed to take (for any reason other than a properly declared event of force majeure) must be paid for by the Commission and will form part of the Base Tonnage figure for the purposes of the calculation of Gross Revenue;

DOCUMENT 4* - Affidavit of George Michael Strmotich
sworn 15.12.82

(d) any part of the deficiency being coal which Griffin was ready and willing to deliver but which the Commission failed to accept by reason of a properly declared event of force majeure is not coal which the Commission must accept or pay for within the definition of Base Tonneage and accordingly will not form part of the Base Tonneage figure for the purposes of the calculation of Gross Revenue;

(e) any part of the deficiency not properly described as coal which Griffin was ready and willing to deliver 10 and which the Commission failed to accept, is not coal which the Commission "must accept or pay for" within the definition of Base Tonneage, and accordingly will not form part of the Base Tonneage figure for the purposes of the calculation of Gross Revenue;

(f) where coal has been paid for by the Commission but not delivered and in a subsequent contract year such coal is delivered and in accordance with the provisions of the contract an additional payment is made by the Commission in respect thereof only the amount of the 20 additional payment is to be brought to account in such subsequent year for the purpose of the calculation of Gross Revenue in that year.

(g) if by reason of a reduction in the quantity of coal which the Commission must take or pay for in any year the pre-tax cash surplus percentage figure calculated pursuant to Clause 8(3)(c) is lower than it would otherwise have been then the Commission will be obliged to make any top up payment under such clause unless the

reason for the reduction in the quantity of coal taken or paid for is due to any of the reasons specified in clause 8(3)(d), that is to say -

- (i) the result of improper management by Griffin, or
- (ii) the effect of activities of Griffin unrelated to the mining of coal for the purposes of the Agreement, or
- (iii) any departure by Griffin from the Mining Plan as adjusted, or
- (iv) the failure of Griffin to observe the best modern practice in mining methods.

10

SWORN by the Deponent at Perth)
in the State of Western Australia)
the 15th day of December 1982)
before me:)

G. M. STIMOTICH

T. LONDON. J.P

This AFFIDAVIT was filed by Keall, Brinsden & Co., Solicitors for the Defendant of 9th Floor, 150 St George's Terrace, Perth WA 6000 Tel. 321 8531 Ref. NH:23761 MAC.T-256-ABC-G

DOCUMENT 4* - Affidavit of George Michael Stimotich
sworn 15.12.82

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N :

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Plaintiff

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

10

EXHIBIT "A1"

This is the exhibit marked with the letter "A1" referred to
in the Affidavit of GEORGE MICHAEL STRMOTICH sworn the
15th day of *December* 1982 before me:

T. Loudon J.P

KEALL, BRINSDEN & CO.,
Barristers & Solicitors,
150 St. George's Terrace,
PERTH W.A. 6000

Tel: 321 8531
Ref: NH:23761

DOCUMENT 4* - Ex A1 - photograph of Muja
Open Cut Mine looking west



LOOKING WEST

NORTHWEST PIT EXTENSION IN RIGHT FOREGROUND

MAIN PIT IN TOP LEFT QUARTER OF PICTURE

MUJA POWER STATION & COAL RECEIVING FACILITIES IN RIGHT BACKGROUND

12 FEBRUARY 1982

DOCUMENT 4* - Ex A1 - photograph of Muja
Open Cut Mine looking west

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N :

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Plaintiff

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

10

EXHIBIT "A2"

This is the exhibit marked with the letter "A2" referred to
in the Affidavit of GEORGE MICHAEL STRMOTICH sworn the
15th day of *December* 1982 before me:

T. LOUDON J.P

KEALL, BRINSDEN & CO.,
Barristers & Solicitors,
150 St. George's Terrace,
PERTH W.A. 6000

Tel: 321 8531
Ref: NH:23761

DOCUMENT 4* - Ex A2 - photograph of North West
main face of Muja Open cut mine



ATE
 BELLONA
 CERES
 DIANA (missing)
 EOS
 FLORA
 GALATEA
 HEBE
 IONA (not visible)

LOOKING NORTHWEST AT MAIN FACE
 COAL SEAMS NOTED AT RIGHT OF PHOTOGRAPH
 IONA (HEBE SPLIT) IS BELOW PIT FLOOR

12 FEBRUARY 1982



DOCUMENT 4* - Ex A2 - photograph of North West main face of Muja Open cut mine

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N :

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Plaintiff

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

10

EXHIBIT "AA"

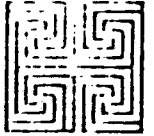
This is the exhibit marked with the letter "AA" referred to
in the Affidavit of GEORGE MICHAEL STRMOTICH sworn the
15th day of *December* 1982 before me:

T LOUDON J.P

KEALL, BRINSDEN & CO.,
Barristers & Solicitors,
150 St. George's Terrace,
PERTH W.A. 6000

Tel: 321 8531
Ref: NH:23761

DOCUMENT 4* - Ex AA - copy of summary of
RTZ study



SECTION 3. SUMMARY AND CONCLUSIONS

Griffin owns and operates the Muja Open Cut coal mine, situated near the town of Collie, Western Australia. This report sets out the overall strategy for an expansion of production from the Cut and evaluates the economics of the project.

3.1 BACKGROUND

Coal is mined from nine seams of the Muja Series. The seams occur in a saucer shaped basin, and vary from 1 to 13 metres in thickness. Former deep mine workings underly part of the area to be mined.

The bulk of the fuel supply for the adjacent Muja Power Station, owned 10 and operated by the SEC, is currently (1977-1978) being produced by the Cut. Deliveries amount to approximately 1 million tonnes of coal per year, while in addition approximately 50,000 tonnes per year is sold to private customers.

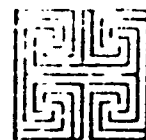
3.2 COAL DELIVERIES

The SEC is increasing the capacity of the Muja Power Station, and requires additional coal deliveries from the Cut. These will rise to approximately 2 million tonnes per year by 1982. Griffin forecasts that private sales will rise to approximately 100,000 tonnes per year by this date.

20

The study assumes the following overall production requirements:

	Millions of Tonnes of Coal
1978-1979	1.3
1979-1980	1.4
1980-1981	1.6
1981-1982	2.0
Remaining Years	2.1



COAL RESERVES AND MINE LIFE

Mineable coal reserves at Muja were 61 million tonnes at January 1st 1978. Allowing for a phased build up to an output of 2.1 million tonnes of coal per year, these reserves are adequate for approximately 30 years. Griffin has additional reserves in the vicinity which have not been considered in the present study.

ACCEPTABILITY OF MUJA COAL

Muja Coal has been a proven source of fuel for the Muja Power Station for more than 10 years. Coal quality is not expected to vary significantly from that prevailing in recent years providing that current mining standards are maintained.

10

FUTURE MINING OPERATIONS

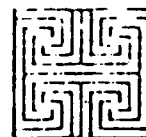
Case studies indicate that a development strategy, which employs mine design and mining methods similar to those currently in use, is the preferred approach for the expanded operation. In reaching this conclusion it has been assumed that coal supplied to the SEC will continue to be crushed outside the Cut rim.

Future operations will:

- Develop the Cut by mining a sequence of cross basin blocks aligned perpendicular to the main axis of the basin
- Employ a fleet of scrapers to remove unconsolidated surface overburden
- Employ shovels and trucks to mine overburden and coal, after it has been loosened by drilling and blasting.

20

The sequence of development is shown on Plates 11-23 accompanying this report.



3.6 OVERBURDEN REMOVAL

Overburden must be removed at the following rates to ensure that coal output requirements are met:

	Millions of m ³ /Year	
1978-1979	5.2	
1979-1980	7.0	
1980-1981	8.0	
1981-1982	8.6	
1982-1993	8.8	
Remaining Years	9.7	10

3.7 EQUIPMENT

Standard production equipment for the three types of mining will be as follows:

Unconsolidated Overburden	-	33.6 m ³ twin powered bowl scrapers	
Other Overburden	-	14 m ³ bucket capacity hydraulic shovels and 109 t trucks and 7.6 m ³ bucket capacity hydraulic shovels and 77 t trucks	20
Coal	-	7.6 m ³ bucket capacity hydraulic shovels and 77 t trucks	

Additional loading capacity will be provided by 11.6 m³ bucket capacity front end loaders.

Currently there are no hydraulic shovels in operation in the world larger than the 7.6 m³ machines operating at Muja. Demag has developed a prototype 14 m³ machine. It is proposed to carry out trials at Muja with a machine of this type (and a single 109 t truck) over a 12-18 month period to ascertain the practicality and economic viability of these units. If the trials are successful additional units will be purchased, if unsuccessful the overburden fleet will be enlarged on the basis of existing models of trucks and shovels. 30



Predictions in this study are based on the assumption that the trials will be a success. However, since the actual performance of the large hydraulic shovels is entirely unknown, only conservative estimates of their productivity have been used.

Some of the existing equipment is relatively new and will be retained. Older, non standard, equipment will be scrapped during the next two years.

3.8 MAINTENANCE AND SERVICE FACILITIES

The mobile equipment workshop and stores facilities will be extended to meet the requirements of the larger production fleet.

10

Additional fueling and tyre repair facilities will be built. Extensions will be made to the explosive store and the administration building.

3.9 DEWATERING PROGRAMME

A dewatering programme to drain the overburden ahead of mining will be an essential part of the operation, since it is very important to improve operating conditions in the lower areas of the pit. The programme includes measures to:

- drain more water into the old deep mine
- pump water directly from well points to be located north-west of the deep mine area
- relieve pressure from artesian water below the floor of the Cut.

20

A significant quantity of the water which is extracted will be supplied to the SEC for use at the power station.



3.10 ORGANISATION AND STAFFING

The expanded operation will require a strengthened management team. Griffin has already taken steps to increase the supervisory staff at Muja.

The labour force is very stable, and there has been no serious work stoppage for many years. Manpower requirements will increase from approximately 280 to approximately 320 in the period from 1978 to 1983.

3.11 OPERATING COST ESTIMATES

Overall unit operating costs, excluding the costs of Griffin's small crushing and screening plant are estimated to be:

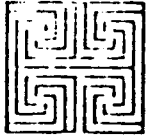
	\$A/tonne of Coal July 1978 Terms	10
1978-1979	8.99	
1979-1980	8.04	
1980-1981	7.48	
1981-1982	6.47	
1982-1983	6.16	
1983-1985	6.20	
1985-1993	6.10	
Remaining Years	6.38	

3.12 CAPITAL COST ESTIMATES

20

Capital requirements for the period 1978 to 1984 are estimated to be:

	Thousands of \$A July 1978 Terms
1978-1979	10844
1979-1980	8781
1980-1981	5767
1981-1982	4325
1982-1983	1012
1983-1984	1927



3.13 CONCLUSION

RTZC considers that the expansion of production at Muja, as described in this report, is technically and economically feasible, subject to the negotiation of an appropriate sales contract.

All facets of the expansion must be considered carefully and planned in detail to ensure its success. However, two areas - the trials of large hydraulic shovels and the dewatering programme - should be singled out for special attention. The success or failure of the large shovels will determine future operating procedure, and the effectiveness of dewatering will have a direct influence on overall operating efficiency. 10

DOCUMENT 4* - Ex AAl-copy of letter from
Continental Illinois National Bank and Trust
Co. of Chicago to the parties: 20.12.78

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N :

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Plaintiff

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

10

EXHIBIT "AAl"

This is the exhibit marked with the letter "AAl" referred to
in the Affidavit of GEORGE MICHAEL STRMOTICH sworn the
15th day of December 1982 before me:

T. LONDON J.P.

KEALL, BRINSDEN & CO.,
Barristers & Solicitors,
150 St. George's Terrace,
PERTH W.A. 6000

Tel: 321 8531
Ref: NH:23761



DOCUMENT 4* - Ex AAl-copy of letter from
Continental Illinois National Bank and Trust
Co. of Chicago to the parties: 20.12.78

20 December 1978

The Griffin Coal Mining Company Limited
24 King's Park Road
W1ST PLRTH WA 6005

The State Energy Commission of WA
365 Wellington Street
PLRTH WA 6000

Gentlemen:

The accompanying document represents a draft prepared by us which includes many of the clauses and principles discussed between you. This is being presented to each of you as a bankable document under our financial agreements.

The intention of the parties in initialling this draft would be to record the areas of agreement which have been reached between you as at the 20 December 1978 while recognising that the following matters have yet to be resolved before an agreement can be entered into.

10

These matters are:

- (a) Schedule B
Schedule C in part (Contingency and First 6 months equipment)
Schedule D in part (Contingency and First 6 months equipment)
Schedule E in part (First 6 months equipment)
Schedule F
Schedule G in part (Workers Compensation)
Schedule K in part (Workers Compensation component of labour index)
- (b) Clause 7 as to application of formula in regard to labour on a quarterly basis as against immediate application. 20
- (c) Resolution of any trade practice difficulties.

Both parties recognise that:

Return of \$275,000 advance stripping allowance
Share RTZ Study Cost
Investment Allowance (equipment)
Shortfall, if any

are beyond the scope of the contract to be agreed and shall be calculated and paid under a separate agreement so that the long-term contract can operate unimpeded as of 1 January 1979. Any payment arising under such separate agreement will be made on or before the 31 January 1979.

30

In formulating this draft we took into account the following broad statements of principle:

- That the SEC and Griffin wish to enter into a 25 year sales contract to deliver coal from the Muja pit to the SEC's power stations.
- That Griffin would need additional equipment to expand its production to 2.1 million tonnes per year.
- That such a development of the State's indigenous energy sources is important to the reduction of fuel oil imports by the State.

DOCUMENT 4* - Ex AAI - copy of letter from
Continental Illinois National Bank and Trust
Co. of Chicago to the parties: 20.12.78

- That the expansion of the Muja pit is a benefit to the Collic area and to the State of Western Australia as a whole.
- That the SEC has obtained Executive Council approval to sign a contract with Griffin based on the principles discussed in August.
- That any contract will show a minimum acceptable rate of return to Griffin.
- That the SEC wishes to ensure that Griffin does not realise "excess profits" from the long-term sales contract.
- That the financial agreements with the Bank (commencing from 1 January 1979) must be acceptable to both the Company and the Commission before a contract can be entered into. 10
- That Griffin wishes to supply the SEC at as low a price as could an efficient and prudent coal mine operator.
- That the SEC and Griffin agree that the Company should follow the mining plan in the RTZ Study or any agreed variation.
- That, subject to a contract being agreed, the Base Price discussed in August superceded all prior price discussions.
- That the SEC will "take or pay" for coal up to the base tonnage (Schedule A) so long as Griffin can deliver coal.
- That, in the event of force majeure affecting Griffin's ability to deliver coal, the SEC is willing to cover the payments by Griffin required under the financing agreements. 20
- That the SEC will ensure that Griffin can meet the Bank's financial covenants during the first three years of mine expansion/mine lay-back.
- That variations in the payments by Griffin under the financing agreements and for other equipment financed by Griffin will be regarded as a pass through and the price components adjusted accordingly as from and including 1 January 1979.
- That the application of indexation or escalation will not penalise Griffin because Griffin is an efficient mine operator.
- That this indexation will run for five years uninterrupted until reset, if necessary, by a Five-Year Engineering Review, except where indexes cease to exist or are affected by the action of a recognised authority. 30
- That a Five-Year Engineering Review would be conducted by an expert consultant (not an arbitrator) independent of both the SEC and Griffin to:
 - (i) Assure compliance by Griffin with the RTZ Mining Plan; and
 - (ii) Amend the equipment list (Schedule C) to take into account any technological advances; and
 - (iii) Evaluate the performance of the indexation and make binding recommendations for adjustment.
- That the SEC has an option on a further 5% above the base tonnages at any time. 40
- That the price for such incremental tonnage is at Base Price as adjusted.
- That events beyond Griffin's control which result in a change in the Company's financial performance above a certain level (here 2% of after-tax cash surplus) will be treated as a pass through outside of the pricing formulae. (This has to be an after-tax measure since tax is defined as outside Griffin's control).
- That Griffin's pre-tax cash surplus as a percentage of gross revenue each year relates to the RTZ Study.

DOCUMENT 4* - Ex AAl-copy of letter from
Continental Illinois National Bank and Trust
Co. of Chicago to the parties: 20.12.78

That Griffin's pre-tax cash surplus percentage has a ceiling which is 5% above a percentage to be agreed. If the surplus is greater than 5%, Griffin will make an adjustment to bring it down to 2% above the percentage to be agreed.

- That Griffin's pre-tax cash surplus percentage does not fall below a floor which is 1% below the percentage to be agreed. If the pre-tax cash surplus is more than 1% below the percentage to be agreed, then the SEC will make an adjustment to restore the pre-tax cash surplus.
- That the gross revenue will not include:
 - (i) Pass through of any amount defined as outside Griffin's control. 10
 - (ii) Any amount paid to Griffin to ensure it complies with its financial covenants during the first three years.
- That if any substitutions are made of any agreed plant and equipment (Schedule then Griffin is free to do so provided that the aggregate cost of the listed and substituted items at the time of substitution does not exceed the aggregate costs of the original agreed and listed items priced at the time of substitution (consistent with the Mining Plan).
- That Griffin's sales of Muja coal to other parties will be a maximum of 100,000 tonnes per year unless with the consent of the Commission. 20
- That, to the maximum extent possible a consultant (not an arbitrator) independent of both Griffin and the SEC would make recommendations binding on both parties on technical questions. The costs of these consultants will be shared equally.
- That, if the SEC asks for a reduction in deliveries below the base tonneages (Schedule A), Griffin will reserve that amount of coal for future delivery to the SEC.
- That the SEC may allow Griffin to make up deficient deliveries caused by Griffin.
- That any contract cannot be cancelled by the SEC if Continental Bank appoints a receiver and commits to continue coal deliveries under the agreement 30
- That in formulating the Schedules, the principles to be followed are:
 - (i) That the Schedules are internally consistent.
 - (ii) That the estimates and indices are based as at 1 July 1978 except for workers compensation.
 - (iii) That the assumptions and premises of the RTZ Study will be incorporated into the Schedules.

It is on the above general premises that the draft was prepared. It is reiterated that the financial agreements with the Bank must be acceptable to both the SEC and Griffin. Continental Bank hereby removes the lease payments from the current ratio in our Debenture delete Rent in Clause 7.2 (a) (vi) given a contract on 40 the lines outlined above. This deletion should ensure the Company's compliance with our financial covenants throughout the agreement under normal circumstances. Continental Bank recognises that appropriate amendments should be made to its Debenture to protect Griffin's position in relation to compliance with its financial covenants when the Bank is satisfied that Griffin's inability to comply is due solely to a force majeure event under Clause 24 of the draft.

DOCUMENT 4* - Ex AAL-copy of letter from
Continental Illinois National Bank and Trust
Co. of Chicago to the parties: 20.12.78

However, the Bank makes this proposal draft without representation as to the commercial advisability of either party entering into such an agreement as such a determination must be made by the party concerned. This draft was prepared from information made available to us by Griffin and the Commission and the Bank does not make any representations or warranties on the legality, accuracy, validity, or applicability of such information or the conclusions derived therefrom.

Your initialling of this letter will recognise the general principles described above and the Bank's deletion.

Yours truly

10

C Richard Tinsley
Mining Division
Continental Illinois National Bank and Trust Co of Chicago
231 South La Salle Street
Chicago
Illinois 60693

Initialled

F.D.K. KKB
State Energy Commission of WA

Date

21/12/78

Initialled

A/MO MO
Griffin Coal Mining Co Ltd

Date

20. 12. 1978

Subject To:

- (a) The initialisation by both parties of each page of the final contract and Schedules by 1st January, 1979.
- (b) The signing and sealing of the full contract by 10th January, 1979.
- (c) Minor drafting changes necessary for clarity and correctness.

DOCUMENT 4* - Ex AA1 - copy of letter from
Continental Illinois National Bank and Trust
Co. of Chicago to the parties: 20.12.78

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N :

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Plaintiff

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

±0

EXHIBIT "B"

This is the exhibit marked with the letter "B" referred to in
the Affidavit of GEORGE MICHAEL STRMOTICH sworn the
15th day of *December* 1982 before me:

T. Loudon J.P

KEALL, BRINSDEN & CO.,
Barristers & Solicitors,
150 St. George's Terrace,
PERTH W.A. 6000

Tel: 321 8531
Ref: NH:23761

DOCUMENT 4* - Ex B - Notice of Defendants
Further Questions: 15.12.82

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N :

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Plaintiff

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

10

NOTICE OF FURTHER QUESTIONS

TAKE NOTICE that pursuant to an Order made by the Master in Chambers the 25th day of November 1982 the Defendant will upon the date appointed for the hearing of the Originating Summons herein submit the following additional questions to the Court for determination:

10. If during a financial year the Commission is under the terms of the Contract for any reason bound to accept or pay for a quantity of base tonnage coal being less than the quantity for such year specified in Schedule A of the 20 Contract is the quantity of coal which constitutes base tonnage for such year to be brought to account in determining the gross revenue of Griffin for the purposes of clause 8(3)(c) of the Contract such lesser quantity?

11. If the answer to question 10 is "No" might the answer be different depending upon the reason for the reduction in the quantity of coal which the Commission was required to accept or pay for and in particular would the answer be different if such reason was due to any one or more of the following reasons -

- (a) inefficiency of Griffin carrying out its operations (clause 5(2)(b));
- (b) improper management by Griffin (clause 8(3)(d));
- (c) the effect of activities of Griffin unrelated to the mining of coal for the purposes of the Contract (clause 8(3)(d));
- (d) departure by Griffin from the Mining Plan (clause 8(3)(d));
- (e) failure by Griffin to observe the best modern practice in mining methods (clause 8(3)(d));
- (f) failure to amend the Mining Plan due to default by the Commission (clause 12);
- (g) force majeure affecting Griffin and or the Commission or both of them (clause 24);
- (h) a defined event within the meaning of clause 8(1) of the Contract;
- (i) subterranean or other mining conditions not anticipated by the RTZ Study but not coming within a defined event under clause 8(1) of the Contract.

12. If in any quarter of any financial year Griffin is ready and willing to deliver and the Commission fails to accept delivery of any part of the applicable quantity of base tonnage coal deliverable to the Commission for such quarter for any reason other than a properly declared event of force majeure under clause 24 of the Contract, is the Commission upon the proper construction of clause 5(4) bound to pay Griffin for the coal which the Commission fails to accept? 20

DATED the

day of

1982

.....
Keall, Brinsden & Co.
Solicitors for the Defendant

TO : The Plaintiff

AND TO : Its Solicitors,
Messrs Jackson McDonald & Co.,
6 Sherwood Court,
PERTH WA 6000

This NOTICE OF FURTHER QUESTIONS was filed by Keall, Brinsden & Co., Solicitors for the Defendant whose address for service is 9th Floor, 150 St. George's Terrace, Perth W.A. 6000
Tel: 321 8531 Ref: NH:23761 MAC.T-266-CDE-B



DOCUMENT 4* - Ex B - Notice of Defendants
Further Questions: 15.12.82

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N :

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Plaintiff

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

10

EXHIBIT "C"

This is the exhibit marked with the letter "C" referred to in
the Affidavit of GEORGE MICHAEL STRMOTICH sworn the
15th day of *December* 1982 before me:

T. LONDON J.P.

KEALL, BRINSDEN & CO.,
Barristers & Solicitors,
150 St. George's Terrace,
PERTH W.A. 6000

Tel: 321 8531
Ref: NH:23761

DOCUMENT 4* - Ex C - Memorandum portraying Defendants
analysis of alternative methods of calculating pre-tax
surplus.

EXHIBIT "C"

The Griffin Coal Mining Company Limited

Pre-tax Cash Surplus Statement for 12 months ended 30th June 1982 - (simplified version - Griffin's interpretation).

GROSS REVENUE

Base tonnage coal delivered and paid for	\$38,161,478.00		
Clause 10 coal paid for but not delivered	\$680,727.00		
Specially agreed clause 12 payment	<u>\$2,500,000.00</u>	\$41,342,205.00	10
<u>DEDUCTIONS FROM GROSS REVENUE AUTHORISED BY CONTRACT</u>		\$34,483,768.00	
<u>PRE-TAX CASH SURPLUS</u>		\$6,858,437.00	
<u>PERCENTAGE</u>	16.59%		
<u>RTZ ESTIMATED PRE-TAX CASH SURPLUS PERCENTAGE</u>	33.09%	\$13,680,135.00	
<u>ACTUAL PRE-TAX CASH SURPLUS PERCENTAGE AS ABOVE</u>	16.59%	\$6,858,437.00	
<u>TOP-UP PAYMENT</u>		\$6,821,698.00	20
<u>TOTAL ACTUAL REVENUE</u>		\$48,163,903.00	

DOCUMENT 4* - Ex C - Memorandum portraying Defendants analysis of alternative methods of calculating pre-tax surplus.

The Griffin Coal Mining Company Limited

Pre-tax Cash Surplus Statement for 12 months ended 30th June 1982 - (simplified version - Commission's interpretation).

GROSS REVENUE

Base tonnage coal delivered and paid for	\$38,161,478.00	
Clause 10 coal paid for but not delivered	\$680,727.00	
Specially agreed clause 12 addition	\$2,500,000.00	10
Notional adjustment for force majeure coal not delivered	\$2,288,000.00	
Notional adjustment for further undelivered coal	<u>\$2,794,000.00</u>	\$46,424,205.00
<u>DEDUCTIONS FROM GROSS REVENUE AUTHORIZED BY CONTRACT</u>		\$34,483,768.00
<u>PRE-TAX CASH SURPLUS</u>		\$11,940,437.00
<u>PERCENTAGE</u>	25.72%	
<u>RTZ ESTIMATED PRE-TAX CASH SURPLUS PERCENTAGE</u>	33.09%	\$15,361,769.00
		20
<u>NOTIONAL PRE-TAX CASH SURPLUS PERCENTAGE AS ABOVE</u>	25.72%	\$11,940,437.00
<u>TOP-UP PAYMENT</u>		\$3,421,332.00
<u>TOTAL ACTUAL REVENUE</u>		\$44,763,537.00

SJ.T-182-KLM-B

DOCUMENT 4* - Ex C - Memorandum portraying Defendants analysis of alternative methods of calculating pre-tax surplus.

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N :

THE STATE ENERGY
COMMISSION OF WESTERN
AUSTRALIA

Plaintiff

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

10

NOTICE OF FURTHER QUESTIONS

TAKE NOTICE that pursuant to an Order made by the Master in Chambers the 25th day of November 1982 the Defendant will upon the date appointed for the hearing of the Originating Summons herein submit the following additional questions to the Court for determination:

10. If during a financial year the Commission is under the terms of the Contract for any reason bound to accept or pay for a quantity of base tonnage coal being less than the quantity for such year specified in Schedule A of the Contract is the quantity of coal which constitutes base tonnage for such year to be brought to account in determining the gross revenue of Griffin for the purposes of clause 8(3)(c) of the Contract such lesser quantity? 20

11. If the answer to question 10 is "No" might the answer be different depending upon the reason for the reduction in the quantity of coal which the Commission was required to accept or pay for and in particular would the answer be different if such reason was due to any one or more of the following reasons - 30

- (a) inefficiency of Griffin carrying out its operations (clause 5(2)(b));
- (b) improper management by Griffin (clause 8(3)(d));
- (c) the effect of activities of Griffin unrelated to the mining of coal for the purposes of the Contract (clause 8(3)(d));
- (d) departure by Griffin from the Mining Plan (clause 8(3)(d));
- (e) failure by Griffin to observe the best modern practice in mining methods (clause 8(3)(d));
- (f) failure to amend the Mining Plan due to default by the Commission (clause 12);
- (g) force majeure affecting Griffin and or the Commission or both of them (clause 24);
- (h) a defined event within the meaning of clause 8(1) of the Contract;
- (i) subterranean or other mining conditions not anticipated by the RTZ Study but not coming within a defined event under clause 8(1) of the Contract.

10

12. If in any quarter of any financial year Griffin is ready and willing to deliver and the Commission fails to accept delivery of any part of the applicable quantity of base tonnage coal deliverable to the Commission for such quarter for any reason other than a properly declared event of force majeure under clause 24 of the Contract, is the Commission upon the proper construction of clause 5(4) bound to pay Griffin for the coal which the Commission fails to accept? 20

DATED the *15th* day of *December* 1982

Keall Brinsden & Co.
.....
Keall, Brinsden & Co.
Solicitors for the Defendant

TO : The Plaintiff
AND TO : Its Solicitors,
Messrs Jackson McDonald & Co.,
6 Sherwood Court,
PERTH WA 6000

This NOTICE OF FURTHER QUESTIONS was filed by Keall, Brinsden & Co., Solicitors for the Defendant whose address for service is 9th Floor, 150 St. George's Terrace, Perth W.A. 6000
Tel: 321 8531 Ref: NH:23761 MAC.T-266-CDE-B

DOCUMENT 5* - Defendants Notice of Further Questions
15.12.82

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N:

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

-and-

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

10

PLAINTIFF'S OBJECTIONS AND EXCEPTIONS TO THE
AFFIDAVIT OF GEORGE MICHAEL STRMOTICH SWORN
THE 15TH DAY OF DECEMBER, 1982.

Paragraph 5 - Last four lines.

The Plaintiff does not admit that the Defendant has
always utilised good mining practices and taken all
reasonable steps in the past.

Paragraph 14 A. - Lines 8 and 9.

The Plaintiff does not admit, or does not admit uncondition-
ally that "the broad principles of agreement reflected in 20
the letter remain constant".

Paragraph 15 - line 11 onwards.

The Plaintiff says the sentence commencing "The parties
advancing the finance..." is irrelevant.

Paragraph 17.

The Plaintiff does not admit the matters set out in
sub-paragraph (a) or sub-paragraph (b).

Paragraph 20

The Plaintiff maintains there was a default on the part

of the Defendant. DOCUMENT 6* - Plaintiffs objections and exceptions
dated 20.12.82 to the Affidavit of George Michael
Strmotich dated 15.12.82

Paragraph 21.

As to sub-paragraph (b), the Plaintiff does not admit the deficiency was 104,000 tonnes only to 30th June, 1982 or that 120,000 tonnes was the total deficiency by reason of force majeure and in due course will maintain that the total deficiency was in excess of 200,000 tonnes and that the force majeure deficiency was less than 120,000 tonnes.

Paragraph 22A.

The Plaintiff does not admit that the total deficiency in deliveries to 30th June, 1982 was only 104,000 tonnes

Paragraph 29A.

The Plaintiff does not concede the questions for determination fall only into those two categories.

Paragraph 30. - Question 1 (c) - Lines 16 to 18 on Page 15.

The Plaintiff says that at all material times it offered the Defendant the opportunity of depositing coal in a "run-of-mine" stockpile at the Plaintiff's power station if there was any delay in unloading trucks, and will adduce evidence to that effect in appropriate proceedings.

Paragraph 32.

The Plaintiff denies that the deficiency in deliveries arose from its inability to accept delivery.

DATED the 17th day of DECEMBER, 1982.



Michael McDonald
Solicitors for the Plaintiff

DOCUMENT 6* - Plaintiffs objections and exceptions dated 20.12.82 to the Affidavit of George Michael Strmotich dated 15.12.82

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)

Heard: 20, 21 & 22 December, 1982
Delivered: 19 January, 1983

IN CHAMBERS

CORAM: BURT C.J.

No. 2749 of 1982

B E T W E E N:

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

-and-

THE GRIFFIN COAL MINING
COMPANY LIMITED

10

Defendant

Mr. M.J. Stevenson, instructed by Messrs. Jackson,
McDonald & Co., appeared for the plaintiff.

Mr. D. K. Malcolm, Q.C., with him Mr. N.P. Hasluck,
instructed by Messrs. Keall Brinsden & Co., appeared
for the defendant.

BURT C.J.

For many years prior to 1978, the Griffin Coal Mining Company Limited, in these reasons called "the Company", had carried on business as a coal miner at Collie. The plaintiff - the Commission - operates a power station at Collie known as the Muja Power Station. For some years prior to 1978 the Company had supplied coal to the Commission for use at that power station. This had been done, it seems, pursuant to a number of short term or ad.hoc contracts.

10

In the early 1970's it became apparent that the tonnage of coal to be supplied to the power station was to be significantly increased and this led the Company to engage R.T.Z. Consultants Limited to advise it upon the way in which its production could be increased so as to meet the Commission's anticipated requirements. The advice was in due course given in a document which became known as the R.T.Z. Study. This Study is based upon estimated coal reserves within the Company's leases of 67.91 million tonnes and upon that estimate the study examines the commercial feasibility of the Company supplying the Commission with coal over a period of twentyfive years at an annual rate of 1.2 million tonnes in the first financial year, of 1.35 million tonnes in the second financial year, of 1.6 million tonnes in the third financial year, of 2 million tonnes in the fourth financial year and of 2.1 million tonnes in each of the financial years 5 to 25 inclusive. The report contains a "mining plan" which prescribes the way in which the coal is to be won and it also sets out in some detail the plant and equipment which the Company would require so as to achieve the stipulated annual production and it indicates the manner in

20

which the acquisition of that plant and equipment by the Company could be financed.

Based upon that report the parties entered into an agreement which is dated 29th March 1979, and which is expressed to operate for a period of twentyfive years commencing on 1st July 1978, whereby the Company would supply the Commission with coal at the annual tonnage rates as set out above. Those rates are set out in Schedule A to the agreement and they are there described as "base tonnages of coal to be supplied in each financial year". It is that agreement which has given rise to 10 the questions which are before me on this originating summons.

In very general terms the philosophy of the agreement is clear enough. By it - cl. 3(1) of the agreement - the company agrees to deliver to the Commission and the Commission agrees to accept "the aggregate of the base tonnages of coal to be delivered in each of the financial years as provided in Schedule A at the Base Price as adjusted". That covenant as to each party is made "subject to the provisions of this Agreement".

The provisions which condition the central agreement, which is to continue for a period of twentyfive years, are necessarily many in number and they seem to cover all the eventualities 20 which the parties could reasonably anticipate.

The agreement, subject to context, defines a number of expressions which are to be found within it, as follows:

"'Base Price' means the base price per tonne of coal for the relevant financial year referred to in Schedule B. "

In passing, it could be noted that a reference to cl. 7 and to Schedule B of the agreement shows that the "Base Price" has five components, they being labour, materials, other costs 30 including overheads and other capital expenditure, lease payments and company funded equipment.

"'Base Price as adjusted' means the relevant Base Price as adjusted pursuant to clause 7;

'base tonnage' means the relevant base tonnage of coal to be supplied by the Company to the Commission in any financial year as provided in Schedule A and which the Commission must accept or pay for as herein-after provided; base tonnage in any quarter means the base tonnage for the relevant financial year divided by four;

'Defined Event' means any event beyond the control of the Company or the Commission described in clause 8(1); 10

'financial agreements' means and includes the financial, security, lease or purchase agreements or instruments or any one or more of them entered into or to be entered into by the Company with the Banks or any of them or such other financial institutions or other companies or firms from time to time for the purpose of further financing of plant and equipment for the purposes of this Agreement or for the securing of such financing. Such financial agreements shall be initialled by the parties hereto for the purposes of identification. 20

'Financial Deficiency payment' means a payment by the Commission to the Company made pursuant to clause 8(3) (b);

'gross revenue' means the base tonnage as specified in Schedule A for the applicable year plus any additional quantities of coal, delivered multiplied by the base price as adjusted;

'pre-tax cash surplus' means the pre-tax cash surplus which the Company derives from its operations under this Agreement determined on an annual basis at the end of each financial year in accordance with Schedule F; 30

'RTZ Study' means the results of studies carried out by RTZ Consultants Limited and supplemental consultant studies initialled by the parties hereto for the purposes of identification. "

Relevantly to the questions which have arisen, the following provisions of the agreement should be specifically noted.

By cl. 3(2) of the agreement, the Commission may give to the Company not less than fourteen days notice prior to the commencement of any financial year that it requires the base tonnage relevant to such financial year to be increased by any percentage not exceeding 5 per centum and the Company shall supply such 40

increased tonnage at the Base Price as adjusted.

By sub-cl. (3) of that clause and provided a notice has not been given under sub-cl. (2), "the Commission may, during any financial year give to the Company not less than 14 days notice that it requires the undelivered balance of the base tonnage for such financial year to be increased by any percentage not exceeding 5 per centum and the price payable by the Commission for such increased tonnage shall be the base price as adjusted". If any further increase in the base tonnage is required by the Commission up to 50 per cent above the base tonnage for any 10 financial year, then the additional coal and its price is to be subject to a further agreement - cl. 3(5).

By cl. 4 of the agreement the Commission is to order coal to be delivered at fortnightly intervals and when doing so it is to nominate the point or points of delivery. In determining the quantity of coal to be delivered the Commission is to ensure that the Company is able to maintain an average daily rate of delivery by dividing the relevant base tonnage by the number of working days in the financial year. The Commission may require the Company to suspend the delivery of coal ordered by it or in any 20 financial year it may order less than the relevant base tonnage, but should it do so then it must pay to the Company such amount as would have been payable had the base tonnage been ordered and delivered pursuant to cl. (4). This is provided for by cl. 10 of the agreement and such coal can be described as "Clause 10 shortfall coal". The Company is to reserve coal to make up this shortfall in its future planning and the Commission may accept delivery of such shortfall coal at a future date. Should it do so it is to pay such an additional amount as might be necessary to bring its price up to the Base Price as adjusted at the time of delivery.

If there should be a shortfall, apparently within any quarter, in the amount of coal delivered by the Company and caused by the default - expressing it in general terms - of the Company, then the Commission may allow the Company a reasonable time to make that shortfall good and if made good the coal which makes up the deficiency is to be paid for at the Base Price ruling when the deficiency occurred - cl. 5(2)(b).

If in any quarter the Company is ready and willing to deliver coal as ordered and the Commission fails to accept delivery, the Commission within thirty days of the expiry of the quarter shall pay the Company for the shortfall. If that shortfall is 10 subsequently made good, the Commission shall make such additional payment as may be necessary so as to make up the price to the Base Price as adjusted at the time of the delivery. Clause 5(4).

The agreement contains a force majeure clause. It is cl. 24. When it operates the obligations of the party affected by it are suspended and if the delay so caused "results in any delay in or suspension of payment by the Commission to the Company of any payment which would otherwise fall due hereunder then notwithstanding any other provision herein contained the Commission shall pay to the Banks on behalf of the Company on their 20 respective due dates for payment all such amounts as may become due and payable by the Company under the financial agreements during the period of such delay or suspension as the case may be and any such payment shall be credited by the Company to the Commission against future deliveries of coal". Force majeure shortfalls are to be made up "at such time or times as the Company and the Commission agree unless such deliveries are cancelled by agreement". A failure to agree as to a force majeure shortfall is to be resolved by arbitration - cl. 26(a).

Those provisions appear to me to be the provisions in the agreement directly bearing upon the delivery of coal and upon the obligations of the Commission to pay for it.

The agreement contains detailed provisions for the adjustment of the Base Price. The details of the formula are not relevant to any question arising out of this originating summons, it being enough to say that the Base Price is to be adjusted as to its labour component from time to time as changes in labour costs occur and otherwise it is to be adjusted on the 1st September, the 1st December, the 1st March and the 1st June in each year. 10

The agreement contains a provision - again an elaborate and detailed provision - which is cl. 8, dealing with the financial consequences of the happening of any one or more of "the defined events". In short, it provides that if in any financial year and as a consequence of the happening of a "defined event" there is or is anticipated to be a change of more than 2 per cent in the after-tax cash surplus of the Company in the first financial year, then a payment is to be made by one party to the other, called a "Defined Event Payment", of such an amount as will "place the Company in the same after tax financial position in terms of after tax cash surplus in the first mentioned financial year as 20 a result of performance of the Agreement as if such Defined Event or Defined Events had not occurred". A defined event payment shall not form part of gross revenue for the purposes of the agreement.

And the agreement contains yet a further provision - cl. 8(3)(a) - which requires the Company to supply to the Commission within ninety days of the completion of each financial year, a statement detailing the pre tax cash surplus and the after tax cash surplus, then it goes on to provide in para. (c) that:

DOCUMENT 7* - Reasons for Judgment of the Honourable
Chief Justice: 19.1.83

" If at any time after the expiration of financial year 3 -

(i) notwithstanding good mining and management practices, in the immediately preceding financial year the pre tax cash surplus of the Company expressed as a percentage of gross revenue falls below the pre tax cash surplus expressed as a percentage of gross revenue estimated pursuant to the RTZ Study computed for that financial year in Schedule F, by more than one per centum then the Company shall notify the Commission and the Commission within 30 days of receipt of such notice will pay to the Company such amount as is required to restore the pre-tax cash surplus to that estimated pursuant to the RTZ Study for such financial year;

10

(ii) the pre tax cash surplus of the Company expressed as a percentage of gross revenue in the immediately preceding financial year exceeds the pre tax cash surplus expressed as a percentage of gross revenue estimated pursuant to the RTZ Study computed for the relevant financial year in Schedule F, by more than 5 per centum, then the Company shall notify the Commission and the Company within 30 days of receipt of notice of demand from the Commission shall pay to the Commission such amount as is required to restore the pre tax cash surplus to that estimated pursuant to the RTZ Study for such financial year plus 2 per centum. "

20

And by para. (d) of that sub-clause:

" Notwithstanding anything contained in this subclause, the Commission shall not be liable for any increase in the price of coal where any insufficiency of pre tax cash surplus referred to in paragraphs (b) and (c) of this subclause is the result of improper management by the Company, the effect of activities of the Company unrelated to the mining of coal for the purposes of this Agreement, any departure by the Company from the Mining Plan as may be adjusted or the failure by the Company to observe the best modern practice in mining methods. "

30

The manner in which that percentage is to be calculated appears from Schedule F.

40

The questions asked arising out of those provisions and out of the agreement generally and within which as formulated the Company is referred to as "Griffin", are as follows:

" 1. Whether on a proper construction of Clauses 3, 5 and otherwise of the Contract the Plaintiff ('the Commission') is obliged to pay for at the end of each quarter at the 'Base price as adjusted' calculated in accordance with the Contract the whole of the applicable quantity of Annual Base Tonnage coal (calculated by reference to Schedule A of the Contract) ordered by the Commission for that quarter if the Defendant ("Griffin"):-

50

DOCUMENT 7* - Reasons for Judgment of the Honourable Chief Justice: 19.1.83



- (a) does not have the whole of that tonnage available for delivery; or
- (b) is not physically able to deliver the whole of that tonnage in that quarter for reasons not excused either by Clause 24 of the Contract or by reason of default by the Commission; or
- (c) does not tender for acceptance by the Commission the whole of that tonnage ordered. "

The parties agree that each question (a) and (b) within that question should be answered "No". Question (c) arises in a slightly different way under a question - it is question 12 - put forward by the Company. The point of it seems to be that the Commission is seeking a declaration that upon the proper construction of the contract the Company can never be heard to say that the Commission has failed to accept delivery of coal unless the Company physically tenders the coal at the Commission's power station. As to that I can only say that there is nothing in the contract which would lead one to that conclusion. A failure to accept delivery as well as the ability of the Company to make delivery is each a question of fact and as to each it may be established in many ways, depending upon the circumstances. No further answer to question 1(c) is required.

Question 2 is in these terms:

- " 2. Whether on a proper construction of Clause 24 and otherwise of the Contract the Commission is obliged to pay for at the end of each quarter at the 'Base price as adjusted' calculated in accordance with the Contract the whole of the applicable quantity of Annual Base Tonnage coal (calculated by reference to Schedule A of the Contract) ordered by the Commission for that quarter if -
- (a) by reason of a force majeure situation properly declared by the Commission only, the Commission is unable to accept delivery of the full quantity of coal ordered that quarter;
 - (b) by reason of a force majeure situation properly declared by Griffin only, Griffin is unable to deliver the full quantity of coal ordered that quarter by the Commission;
 - (c) by reason of one or more force majeure situations concurrently affecting both the Commission and Griffin either or both the following situations occur. scil. DOCUMENT 7* - Reasons for Judgment of the Honourable

- (i) the Commission is unable to accept; or
 - (ii) Griffin is unable to deliver
- the full quantity of coal ordered that quarter by the Commission. "

The parties agree that each of those questions should be answered in the negative. In other words the Commission is not obliged to pay for force majeure shortfall unless and to the extent that the shortfall is pursuant to agreement made good. The Commission may be required to pay the Banks pursuant to the proviso to cl.24 and those payments if made are credited by the Company to the 10 Commission against future deliveries of coal - not future deliveries of shortfall force majeure coal but against future deliveries of coal generally.

Question 3:

" Whether when a force majeure situation applies to the Commission only, so that it is unable to take delivery in any quarter of the quantity of coal ordered, it may at its sole election decide to treat the whole tonnage of coal of which it cannot take delivery due to force majeure in that quarter as falling to be dealt with under Clause 24 only; or whether the Commission is required to pay for all the coal ordered in that quarter pursuant to either Clause 5 or Clause 10 of the Contract. "

It is agreed that the first question within that question should be answered in the affirmative and the second question in each of its limbs in the negative.

Question 4:

" Whether in circumstances when Clause 24 applies and:-

- (a) (i) Griffin is unable in any quarter to deliver the full quantity of Annual Base Tonnage coal ordered by the Commission that quarter; or
- (ii) the Commission is unable to take delivery of the full quantity of Annual Base Tonnage coal ordered by it in that quarter; and

the Commission makes payments to the Banks pursuant to Clause 24 - is the Commission obliged to pay the balance of the price of coal ordered for that quarter to Griffin under Clause 5 of the Contract or otherwise notwithstanding that the coal ordered has not been supplied in case of sub-paragraph (a) (i) or delivery has not been accepted in case of sub-paragraph (a) (ii)?"

The answer to each question within that question is agreed to be "No".

Question 5:

" For the purposes of Clause 5, in cases -

(1) where Griffin does not actually deliver the full quantity of Annual Base Tonneage Coal ordered ('the coal ordered'); or

(2) where Griffin does not tender delivery of the full quantity of the coal ordered:

(a) does Griffin bear the onus of proof of demonstrating the Commission failed to take delivery whilst it was ready and willing to deliver; or 10

(b) does the Commission bear the onus of proof of demonstrating either or both:-

(i) Griffin was not ready and willing to deliver; or

(ii) it did not fail to take delivery? "

This question I decline to answer. It is not a question of construction. It is a question which can only be answered in the context of proceedings in which the question arises. 20

Question 6(1):

" Upon a proper construction of the Contract where it is necessary to apply Clause 8(3) and Schedule F to determine the 'Pre Tax Cash Surplus' of Griffin in a financial year when Griffin does not deliver the Annual Base Tonneage of coal required to be supplied is the 'GROSS REVENUE' for the purposes of the calculation in Schedule F:-

(a) the actual tonnage of coal delivered multiplied by the base price paid; or 30

(b) the tonnage specified in Schedule A regardless of how much has been actually delivered multiplied by the Base Price as adjusted or the Average Base Price as adjusted; or

(c) some other formula and if so what formula. "

The parties agree that question (a) should be answered "No".

There is a real difference between the parties as to the answer to questions (b) and (c). The Commission would answer question (b) in the affirmative. The Company, on the other hand, says

that at the end of each financial year one must look back on the events as they have happened and ascertain the tonnage of coal which the Commission was obliged to accept and pay for during that year. That tonnage so ascertained, multiplied by the Base Price as adjusted, applicable at various times within the year and applied to the tonnages delivered at those times, establishes the gross revenue which is then used so as to calculate the "top-up" payment (if any) calculated in accordance with Schedule F.

The Company's argument starts with the definition of "base¹⁰ tonnage" to be found within cl. 1(1) of the agreement. That definition should be repeated. The expression "base tonnage" is there defined to mean: "The relevant base tonnage of coal to be supplied by the Company to the Commission in any financial year as provided in Schedule A and which the Commission must accept or pay for as hereinafter provided; base tonnage in any quarter means the base tonnage for the relevant financial year divided by four". The Company would construe that definition, in effect, as being so much of the base tonnage for the relevant year as it appears in Appendix A as the Commission must accept and pay for. Hence if within the year, for one reason or another, the Company is unable to supply ordered coal up to the then Appendix A 20 tonnage the Commission is not obliged to pay for the shortfall and the "base tonnage" in the sense of the definition is to that extent reduced below the Appendix A figure. Having taken that step, then the definition of "base tonnage" so understood is imported into the expression of "gross revenue" so that the definition reads, in effect, "so much of the base tonnage specified in Schedule A for the applicable year as the Commission must accept and pay for plus any additional quantities of coal delivered multiplied by the Base Price as adjusted". That is a

DOCUMENT 7* - Reasons for Judgment of the Honourable Chief Justice: 19.1.83

step which I am unable to take. The definition of "gross revenue" seems to me to be perfectly clear. The tonnage to be multiplied by the Base Price as adjusted to produce "gross revenue" is "the base tonnage as specified in Schedule A for the applicable year plus any additional" - cl. 3(2) or (3) - "quantities of coal delivered". Nor can I take the first step within the argument which is centred on the definition of "base tonnage". That is a tonnage to be supplied. It is, subject to any increase pursuant to cl. 3(3) of the agreement, a tonnage which is known at the beginning of the financial year and, again subject to cl. 3(3), 10 it remains constant. As defined and when used within the definition of "gross revenue" it remains constant in the scheduled tonnage and one adds to that cl. 3(2) or (3) coal, if any.

The construction contended for by the Company when applied to cl. 7(4) of the agreement would create an inconsistency within it. By that clause: "The Base Price as adjusted when multiplied by the base tonnage plus any incremental tonnages equals the gross revenue". If "base tonnage" as it there appears is construed in the sense of the definition of that expression 20 contended for by the Company, it could be less than "the base tonnage as specified in Appendix A" and hence the product of the arithmetic would not be "gross revenue" as defined and would not equal "gross revenue" as defined. If, on the other hand, one accepts the meaning which I would give to the expression "base tonnage" as defined, that inconsistency disappears.

It cannot be that the definition of "gross revenue" must give way to the context in which it is used because it is only used within the agreement for one purpose, that being to do the calculation which is required to be done by cl. 8(c) as 30 illustrated by Schedule F.

DOCUMENT 7* - Reasons for Judgment of the Honourable
Chief Justice: 19.1.83

This question is of particular importance in its application to what may be described as shortfall force majeure coal, by which I mean ordered coal and hence coal within the year's base tonnage which has not been delivered within that year because of a delay caused by one or other of the events set out in the first paragraph of cl. 24. It is a question the answer to which is not of such importance, at least from the Company's point of view, when there has been a cl. 10 shortfall because that coal, although not delivered is paid for in the year of the shortfall at the Base Price adjusted as at the date when it would otherwise have been delivered. Hence as to cl. 10 shortfall coal the Company suffers no loss by the construction which I have placed upon the contract in my answer to this question. Nor is that construction of any importance in its application to a shortfall caused by the Commission's failure to accept delivery for some reason outside cl. 24 because that shortfall must also be paid for in the quarter in which it occurs. Clause 5(4). But it is agreed that there is no obligation upon the Commission to pay for a force majeure shortfall unless that shortfall is subsequently made good. This being so, it can be seen that upon the construction which I have placed upon the contract the Company will, in effect, carry the loss caused by a force majeure shortfall and will not be able to make good that loss by a "top-up" payment under cl. 8(3) in 20 Schedule F. If, on the other hand, a force majeure shortfall - it being coal which the Commission is not required to "accept or pay for" - reduces the base tonnage in the sense in which that expression is used within the definition of "gross revenue" then in effect the loss caused by a force majeure shortfall will fall upon the Commission as it will increase the "top-up" payment under cl. 8(3) and Schedule F.

And that that should be the end result is, the Company submits, consistent with the overall philosophy of the agreement, it being that subject to para. (b) of cl. 8(3) of it "the pre tax cash surplus of the Company expressed as a percentage of gross revenue" is not to fall by more than one per cent below the pre tax cash surplus estimated in the RTZ Study. That general idea is also reflected in the contract's "defined events" provision. Furthermore, although contracting parties may for the purposes of their agreement make their own dictionary and call things what they like and measure them how they like, one would be reluctant to hold unless the dictionary of the agreement requires it that the parties would agree upon a formula to measure a "pre tax cash surplus" which is a percentage of something which is not and which cannot be said to be the equivalent of cash.

I recognise the force of those considerations and no doubt it is for that reason that it has been agreed that the questions within the originating summons should be answered "without prejudice to any claim by either party for subsequent rectification of the contract" - para. 23 of Mr. Chatfield's affidavit.

However, I am unable to accept the Company's central submission. I cannot do so without in effect rectifying the definition of "gross revenue". And as a court of construction this is something which I am unable to do. For the purposes of that definition the base tonnage cannot be less than the "base tonnage as specified in Schedule A".

For those reasons I would answer Question 6(1)(a) "No", and Question 6(1)(b) as formulated, "No".

The tonnage to be multiplied by the Base Price as adjusted to calculate "gross revenue" is the relevant tonnage as in Appendix A plus cl. 3(2) or cl. 3(3) coal, if any. That tonnage is multiplied by the Base Price as adjusted ruling at the time of delivery as ordered.

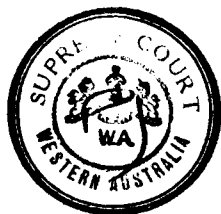
Question 6(2) is in these terms:

" Does the expression 'any additional quantities of coal' in the definition 'gross revenue' include all or any of:-

- (i) extra coal supplied under Clause 3(2);
- (ii) extra coal supplied under Clause 3(3);
- (iii) extra coal delivered to make good deliveries postponed pursuant to Clause 10;
- (iv) extra coal delivered to make up shortfalls in prior years to which Clause 24 has applied;
- (v) extra coal delivered to make up shortfalls in Annual Base Tonnage not falling within Clauses 10 and 24. " 10

Those questions should be answered:

- (i) Yes;
- (ii) Yes;
- (iii) No. Coal delivered to make up cl. 10 shortfall has been paid for up to the Base Price as adjusted ruling at the date when the coal, had the Commission not required the Company to suspend delivery, would have been delivered and for reasons which I have given it 20 is within and it forms part of the base tonnage for the purpose of calculating "gross revenue" in the year in which it would otherwise have been delivered. It is not to be brought in again for that purpose. It is not "additional" coal for the purpose of calculating "gross revenue" and it is not "incremental" coal for the purposes of cl. 7(4). In passing, it may be noted that this may give rise to a "defined event payment". See cl. 8(1)(f).
- (iv) No. The "extra coal" so called for the purposes of 30 calculating "gross revenue" is within the "base tonnage" as specified in Schedule A" in the year in which delivery would have been made had the force majeure event not happened. It is not to be brought into



calculation again. It is not "additional" nor is it "incremental" coal.

(v) This coal may be cl. 5(2)(b) coal. So understood,

I would answer the question in the negative.

Questions 6(3), (4), (5) and (6) are in these terms:

- " (3) If coal deliveries postponed by the Commission in a previous year under Clause 10 are included in making the calculation of 'gross revenue' under Clause 8(3) and Schedule F is the amount to be taken as part of the 'gross revenue' - 10
- (a) only the balance amount paid in the year of delivery pursuant to Clause 10(3); or
 - (b) both the amounts paid under Clause 10(1) and 10(3); or
 - (c) some other amount and if so how is it to be calculated.
- (4) If coal delivered to make up shortfalls in base tonnage of previous years to which tonnage Clause 24 has applied is included in making the calculation of 'gross revenue' aforesaid are either or both:-
- (a) the amounts paid by the Commission to the Banks in previous years under the proviso to Clause 24; or 20
 - (b) the amount paid by the Commission to Griffin in the current year
- included in the amount of 'gross revenue' for the current year under Schedule F.
- (5) If extra coal delivered to make up shortfalls in base tonnage from previous years and which shortfall tonnage has not fallen within either Clause 10 or Clause 24 is included in making the calculation of 'gross revenue' aforesaid, is the amount paid by the Commission for such extra coal in the current year included in the amount of gross revenue for the current year under Schedule F. 30
- (6) If coal referred to in all or any of sub-questions (3), (4) and (5) does not fall to be included as 'gross revenue' for the year of delivery, is it otherwise taken into account in determining Griffin's pre-tax cash surplus under Clause 8(3) and if yes, in what fashion in each case?"

Questions (3), (4) and (5) do not fall to be answered and it would seem that Question (6) is sufficiently answered by saying that all shortfall coal has in effect been taken into consideration in the calculation of "gross revenue" in the year in which the shortfall occurred.

I am not as at present advised prepared to answer Question 7 as it is drafted. If the parties press me to do so, I will hear further argument upon it.

Question 8(1) is in these terms:

" If where Clause 5(2) applies and the Commission is of opinion that a deficiency could not be made up by Griffin within a reasonable time without affecting Griffin's subsequent delivery obligations may the Commission without the concurrency of Griffin cancel and neither take delivery of nor pay for such tonnage of coal. "

The parties agree that that question be answered in the affirmative.

Questions 8(2) and (3) and the whole of Question 9 have, in effect, been answered by what has already been written and unless I am persuaded to do so, I do not propose to say anything more about them.

Questions 10 and 11, which are questions put forward by the Company, are in these terms:

" 10. If during a financial year the Commission is under the terms of the Contract for any reason bound to accept or pay for a quantity of base tonnage coal being less than the quantity for such year specified in Schedule A of the Contract is the quantity of coal which constitutes base tonnage for such year to be brought to account in determining the gross revenue of Griffin for the purposes of clause 8(3)(c) of the Contract such lesser quantity? "

11. If the answer to question 10 is 'No' might the answer be different depending upon the reason for the reduction in the quantity of coal which the Commission was required to accept or pay for and in particular would the answer be different if such reason was due to any one or more of the following reasons -

- (a) inefficiency of Griffin carrying out its operations (clause 5(2)(b));
- (b) improper management by Griffin (clause 8(3)(d));
- (c) the effect of activities of Griffin unrelated to the mining of coal for the purposes of the Contract (clause 8(3)(d));
- (d) departure by Griffin from the Mining Plan (clause 8(3)(d));
- (e) failure by Griffin to observe the best modern practice in mining methods (clause 8(3)(d)); 10
- (f) failure to amend the Mining Plan due to default by the Commission;
- (g) force majeure affecting Griffin and or the Commission or both of them (clause 24);
- (h) a defined event within the meaning of clause (l) of the Contract;
- (i) subterranean or other mining conditions not anticipated by the RTZ Study but not coming within a defined event under clause 8(1) of the Contract. "

It follows from my reasons generally that each of these questions should be answered in the negative. 20

Question 12 is in these terms:

" If in any quarter of any financial year Griffin is ready and willing to deliver and the Commission fails to accept delivery of any part of the applicable quantity of base tonnage coal deliverable to the Commission for such quarter for any reason other than a properly declared event of force majeure under clause 24 of the Contract, is the Commission upon the proper construction of clause 5(4) bound to pay Griffin for the coal which the Commission fails to accept? " 30

As I understand it, the parties agree that this question should be answered "Yes". The contract itself seems to give the answer to it in cl. 5(4).

I publish these reasons as minutes and I will hear further argument or submissions at some time suitable to counsel.

B E T W E E N:

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

and

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

PROPOSED NEW QUESTION 7

- 7.(1) In a financial year in which for reasons not 10
excused by Clause 24 or not due to default
by the Commission in failing to accept delivery
Griffin does not deliver the full base tonnage
of coal set out in Schedule A that year - does
Clause 8 (3) (c) operate in that year so as to
either --
- (a) entitle Griffin to claim a payment pursuant
to Clause 8 (3)(c)(i); or
- (b) entitle the Commission to claim a payment 20
under Clause 8 (3)(c)(ii)
- if prima facie on the figures set forth in a
statement provided pursuant to Clause 8 (3)(a)
either Griffin or the Commission (as the case
may be) would be entitled to such a payment.
- (2) If for reasons -
- (a) on the part of Griffin - non delivery of all
shortfall of annual base tonnage is excused
by Clause 24; or

(b) on the part of the Commission - failure to take delivery of all the annual base tonnage coal not delivered is excused by Clause 24 then in each case (assuming delivery of a statement under Clause 8 (3)(a)) --

(i) is Griffin entitled to claim a payment under Clause 8 (3)(c)(i); and

(ii) is the Commission entitled to claim a payment under Clause 8 (3)(c)(ii)

if prima facie on the statement either party would have been entitled to claim such a payment.

DATED the *22nd* day of April, 1983.

Jackson McDonald & Co.
Solicitors for the Plaintiff

THIS MINUTE OF PROPOSED NEW QUESTION is filed the day of April, 1983 by Jackson, McDonald & Co. Solicitors for the Plaintiff. Tel. 325 0291 Ref: MJS.

DOCUMENT 8* - Plaintiffs proposed new Question
7 dated 22.4.83

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

B E T W E E N :

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Plaintiff

- and -

THE GRIFFIN COAL MINING
COMPANY LIMITED

Defendant

BEFORE THE HONOURABLE THE CHIEF JUSTICE
IN CHAMBERS THE 22ND DAY OF APRIL 1983

10

UPON the application of the Plaintiff by Originating Summons dated the 12th day of November 1982 AND UPON HEARING Mr M.J. STEVENSON of Counsel for the Plaintiff and Mr D.K. MALCOLM one of Her Majesty's Counsel with him Mr N. HASLUCK of Counsel for the Defendant and pursuant to Order 58 Rule 10 in answer to the questions set forth in the Schedule to the said Originating Summons IT IS DECLARED AND ORDERED THAT:

1. As to Question 1

The Commission does not have to pay at the end of each quarter for the whole of the applicable quantity of annual 20 base tonnage coal (calculated by reference to Schedule A) ordered by the Commission if Griffin -

(a) does not have the whole of that tonnage available for delivery; or

(b) is not physically able to deliver the whole of that tonnage in that quarter for reasons not excused either by clause 24 of the Contract or by reason of default by the Commission.

2. As to Question 2

The Commission is not obliged to pay at the end of each quarter for the whole of the applicable quantity of annual base tonnage coal (calculated by reference to Schedule A of the Contract) ordered by the Commission for that quarter if -

(a) by reason of a force majeure situation properly declared by the Commission only, the Commission is unable to accept delivery of the full quantity of coal ordered that quarter; or

10

(b) by reason of a force majeure situation properly declared by Griffin only, Griffin is unable to deliver the full quantity of coal ordered that quarter by the Commission; or

(c) by reason of one or more force majeure situations concurrently affecting both the Commission and Griffin either or both the following situations occur, that is to say -

(i) the Commission is unable to accept; or

(ii) Griffin is unable to deliver the full quantity of coal ordered that quarter by the Commission.

20

3. As to Question 3

When a force majeure situation applies to the Commission only, so that it is unable to take delivery in any quarter of the quantity of coal ordered, it may at its sole election decided to treat the whole tonnage of coal of which it cannot take delivery due to force majeure in that quarter as coal falling to be dealt with under clause 24 only and the Commission is not required to pay for all the coal ordered

within that quarter pursuant to either clause 5 or clause 10 of the Contract.

4. As to Question 4

In circumstances when clause 24 applies and -

(1) Griffin is unable in any quarter to deliver the full quantity of annual base tonnage coal ordered by the Commission that quarter; or

(2) the Commission is unable to take delivery of the full quantity of annual base tonnage coal ordered by it in that quarter;

10

and the Commission makes payment to the Banks pursuant to clause 24, the Commission is not obliged to pay the balance of the price of coal ordered for that quarter to Griffin under clause 5 of the Contract or otherwise if the coal ordered has not been supplied in a case where sub-paragraph (1) applies or delivery has not been accepted in a case where sub-paragraph (2) applies.

5. As to Question 5

This question is not a question of construction and is not appropriate for determination on this Originating Summons 20 because it is a question which can only be answered in the context of proceedings in which it arises.

6. As to Question 6

(1) Where it is necessary to apply clause 8(3) and Schedule F to determine the "Pre Tax Cash Surplus" of Griffin in a financial year when Griffin does not deliver the Annual Base Tonnage of coal required to be supplied in that year the "Gross Revenue" for the purpose of calculation in Schedule F is the tonnage specified in Schedule A for that

DOCUMENT 9* - Order of the Honourable Chief
Justice made 22.4.83



year multiplied by the Base Price as adjusted ruling at the time of delivery as ordered.

(2) The expression "any additional quantities of coal" in the definition "gross revenue" includes -

(a) extra coal supplied under clause 3(2); and

(b) extra coal supplied under clause 3(3) but does not include -

(i) extra coal delivered to make good deliveries postponed pursuant to clause 10; or

(ii) extra coal delivered to make up shortfalls in previous years to which clause 24 has applied; or

(iii) extra coal delivered to make up shortfalls in Annual Base Tonneage- falling within clauses 5(2)(b).

It is not necessary to answer sub-questions (3), (4) (5) and (6) of question 6.

7. As to Question 7

This question as formulated does not require to be answered on the said Originating Summons.

8. As to Question 8

20

(1) Where clause 5(2) applies and the Commission is of opinion that a deficiency could not be made up by Griffin within a reasonable time without affecting Griffin's subsequent delivery obligations the Commission may without the concurrence of Griffin cancel and neither take delivery of nor pay for such tonnage of coal.

It is not necessary to answer sub-questions (2) and (3) of question 8.

9. As to Question 9

It is not necessary to answer this question.

10. As to Question 10 (Defendant's question)

If during a financial year the Commission is under the terms of the Contract bound to accept or pay for a quantity of base tonnage coal being less than the quantity specified in Schedule A the base tonnage for such year to be brought to account in determining the gross revenue of Griffin for the purposes of clause 8(3)(c) of the Contract is not such lesser quantity.

10

11. As to Question 11 (Defendant's question)

The answer to question 10 would not be different depending on the reason for the reduction in the quantity of coal which the Commission was required to accept and pay for and in particular the answer would not be different if such reason was due to any one or more of the following reasons -

(a) inefficiency of Griffin carrying out its operations (clause 5(2)(b));

(b) improper management by Griffin (clause 8(3)(d));

(c) the effect of activities of Griffin unrelated to the mining of coal for the purposes of the Contract (clause 8(3)(d));

20

(d) departure by Griffin from the Mining Plan (clause 8(3)(d));

(e) failure by Griffin to observe the best modern practice in mining methods (clause 8(3)(d));

(f) failure to amend the Mining Plan due to default by the Commission;

DOCUMENT 9* - Order of the Honourable Chief Justice made 22.4.83

(g) force majeure affecting Griffin and or the Commission or both of them (clause 24);

30

(h) a defined event within the meaning of clause (1) of the Contract;

(i) subterranean or other mining conditions not anticipated by the RTZ Study but not coming within a defined event under clause 8(1) of the Contract.

12. As to Question 12 (Defendant's question)

If in any quarter of any financial year Griffin is ready and willing to deliver and the Commission fails to accept delivery of any part of the applicable quantity of base tonnage coal deliverable to the Commission for such quarter 10 for any reason other than a properly declared event of force majeure under clause 24 of the Contract the Commission is upon the proper construction of clause 5(4) bound to pay Griffin for the coal which the Commission fails to accept.

13. There be no order as to costs.

BY THE COURT



DEPUTY REGISTRAR

This ORDER was filed by Keall, Brinsden & Co. of 9th Floor, 150 St George's Terrace, Perth, W.A. 6000. Solicitors for the Defendant Tel. 321 8531 Ref. NH:23761
SC.T-259-FGH-C

DOCUMENT 9* - Order of the Honourable Chief Justice made 22.4.83

Delivered: 30.8.83

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

IN CHAMBERS

No. 2749 of 1982

B E T W E E N :

THE GRIFFIN COAL MINING
COMPANY LIMITED

Appellant
(Defendant)

and

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Respondent
(Plaintiff)

Mr. D.K. Malcolm Q.C. and Mr. N.P. Hasluck
(instructed by Keall Brinsden & Co.) appeared
for the appellant.

10

Mr. M.J. McCusker Q.C. and Mr. M.J. Stevenson
(instructed by Jackson McDonald & Co.) appeared
for the respondent.

ROWLAND J.

The appellant is the defendant to an originating summons issued by the respondent as plaintiff. The plaintiff sought the answers to several questions in such originating summons which arise principally as a matter of construction of an agreement dated 29th March 1979 whereby the appellant is to supply coal to the respondent for 25 years commencing 1st July 1978.

20

The plaintiff asked some ten questions and the defendant asked two questions and in his reasons the Chief Justice indicated that the answers to several were agreed. He refused to answer one question because it was not only a question of construction.

It appears that it was agreed that all the questions are answered "without prejudice to any claims by either party for the subsequent rectification of the contract".

The appellant seeks leave to appeal the declaratory orders made by the Chief Justice to the Privy Council. The application for leave to appeal seems to envisage an appeal against all of the answers including, it seems the ones, the answers to which have been agreed.

The application is made pursuant to Order in Council dated the 28th June 1909 Rules 2(a) and (b):

10

"2. Subject to the provisions of these Rules, an Appeal shall lie -

(a) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and

20

(b) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court the question involved in the Appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision. "

The application for leave has had a rather chequered history. Initially the respondent wished to reserve its right to argue the competence of the appeal before the Judicial Committee. I queried whether the judgment was a final judgment and eventually after argument by senior counsel for both appellant and respondent the stage has been reached where both agreed that the judgment was a final judgment for the purposes of the Rule but the respondent submitted that the appellant could not bring itself within the balance of Rule 2(a) with respect to the value of £500 or upwards. The respondent also

30

argued that the facts that condition the exercise of a discretion under Rule 2(b) do not exist.

The first matter to resolve is whether the appellant can bring itself within Rule 2(a). This has often proved to be a troublesome matter.

It is said that the judgment is final, based on the decision of the Privy Council itself in Becker v. City of Marion Corporation (1977) A.C. 271. The Court held that the negative answer to a question in an originating summons seeking a declaration that the appellant could appeal to the City Council for subdivision of its lands finally resolved that question and accordingly the appellant could never get before the City Council to enable her to subdivide her land. The Judicial Committee said that that was a final judgment within the meaning of the Rule and accepted the argument of Hogarth J. a member of the Supreme Court of South Australia who granted leave that "the negative answer to the question raised by the prayer for the first declaration produced a state of finality ..." the answer "finally determined the question whether or not the plaintiff was entitled to have her plan considered by the council ... that was the lis". 10 20

There has sometimes been a slightly different approach to that taken by some members of the High Court of which Hall v. Nominal Defendant (1966) 117 C.L.R. 423 is an example. In that case three of the Judges held that a refusal to extend time to make an application to sue the nominal defendant under the Traffic Act was not a final judgment because circumstances could arise which would enable a further application to be made for the same purpose.

It seemed to me that the declarations made by his Honour the Chief Justice in this originating summons may not in fact

resolve the matters that could be in issue between the parties because the matters of construction have been resolved expressly on a without prejudice basis so as to enable either party if it wishes to seek rectification of the agreement that is being construed to give effect to what each says is the proper construction of the agreement.

I accept that the declaratory orders made are binding on the parties and that they finally determined the matter of construction on the lis of those proceedings, but I am not convinced that those declarations will eventually resolve the issue that is implicit in the orders made which are without prejudice to future rights to apply to rectify the contract. It was for that reason that I had doubts as to whether the judgment could be called final as that term is understood for the purpose of the rule. 10

In the light however of the concession made by counsel for the respondent I feel that I should not seek to force my views on unwilling parties and I am also fortified by the fact that the appellate court chosen by the appellant has in Becker's case apparently favoured the view that it is the end result of the particular litigation that gives the status of finality. 20 Accordingly I will not pursue what might be thought to be a different approach of the High Court. I am prepared to find that for the purposes of this application the judgment is a final judgment.

That finding however still does not resolve the issue as to whether the appellant is entitled to leave to appeal as of right. It still has to establish that the matter in dispute in the appeal is of the value of £500 or more or alternatively that the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting 30

to or of the value of £500 sterling or upwards.

The parties are at odds on this.

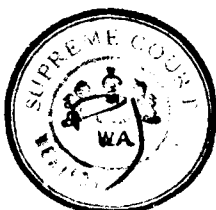
Again this is not easily resolved and many cases were cited by both counsel.

The respondent submits that there is no matter respecting property in dispute and although the parties were in dispute as to a particular item that involved a matter of construction, by agreement they decided to resolve general questions of construction of the agreement by way of originating summons and this in the main involved matters that were not then in dispute 10 in the sense that no dispute had arisen at that time. They simply had differing views as to what the agreement meant. There was really nothing in the sense of a live issue between the parties which would result in a final judgment for a sum of money or a judgment from which a sum of money could be calculated by way of assessment of any value.

It is true of course that if a live issue did arise then depending upon the construction applied the amount in issue between the parties would amount to some millions of dollars. That state of affairs has not been reached. 20

The matter in issue was how one construed the document and each wished a construction that would ultimately, if the relevant facts arose, give rise to either a larger or a smaller contractual payment than the other considered would be due under the agreement. There is no present relevant dispute in the matter that is the central issue between the parties.

It is submitted by the respondent that the question of construction of this document does not involve property or civil rights. On this compare, for example, Rossignoli v. State of Victoria (1983) 46 A.L.R. 273 where the right to fill land was 30 the subject of the litigation and there the value of the



property was held to be the relevant value. Again this was respecting property being the land to be filled which is not the situation in this case. Here it is said there is no property and no civil right in dispute. The rights are not in issue. All that is in issue is a question of construction which would apply in the event of certain events occurring. I accept the arguments submitted by the respondent in this regard. The matter of construction simply resolves what the agreement means. It does not affect rights - they already exist - they have simply been given a declared meaning. There is no property 10 involved. The matter of construction is one step removed from anything that can have a value. It follows that the appellant is not entitled to leave to appeal as of right.

I now turn to the application under Rule 2(b) which grants to the court a discretion to grant leave if the court is of opinion that the question involved in the appeal is one which by reason of its great general or public importance or otherwise ought to be submitted to Her Majesty in Council for decision. Here again there are two questions, firstly, whether the matter is of great general or public importance and, 20 secondly, whether if so or for any other reason the matter ought to be submitted.

It is the appellant's argument that the matter is of general or public importance because it involves a contract for the supply of coal which will provide a great portion of the State's energy requirements over the next 25 years involving huge amounts of revenue expenditure.

I cannot see any merit in that argument. It seems to me that the argument is simply a matter of construction of the document. It may well be difficult to answer but it has not 30 been suggested that it involves any law or rules that are not

well settled.

Counsel for the appellant submitted that the respondent had originally sought early resolution of the matters of construction and on that premise the appellant said that it was likely that the matter would be resolved more quickly by appealing direct to the Privy Council than either applying for special leave to the High Court or adopting the more orthodox approach of appealing to the Full Court of this Court and thence to the High Court. Whatever may have been the plaintiff's desire when this matter was first commenced it is clearly no longer of the view that there is great urgency about this matter or alternatively it is not of the view that an appeal to the Privy Council is likely to lead to an earlier resolution than any other methods available. I must confess that since the matter first came before me on the 22nd July I have been responsible for any delay thereafter in that I required further argument to establish the grounds for the application but prior to that there does not seem to have been any great sense of urgency about the matter. Apart from those considerations it seems to me that I should be satisfied that this is a matter that ought to go to the Privy Council and I am not at all convinced that that is the desired forum.

I accept that for the purposes of leave to appeal under Rule 2(a) that the choice is that of the proposed appellant and whilst the choice exists if leave to appeal can be given as of right the appellant's choice should not be interfered with.

In my view similar considerations do not apply to an application that depends for its life on Rule 2(b). As counsel for the appellant correctly submitted the High Court is becoming increasingly diffident in granting leave to appeal to the High

Court where leave is required on matters that are domestic to a State unless they involve question of national interest or otherwise have a wider implication. This means that in many cases State courts of appeal will become the final arbiter for all practical purposes. Although the matter may well be debated it seems to me that we are fast moving in Australia towards the time when all appeals to the Privy Council will be abolished. Accordingly one should be looking for resolution of disputes to the High Court which court has already indicated that it is free to disregard decisions of the Privy Council. This in my view will apply especially in commercial disputes wherein the courts of Australia are free from any commercial implications arising from the entry of England into the Common Market. The cases of Harrison v. Law Society of South Australia (1981) 27 S.A.S.R. 387 and Harrison v. Magarey & ors. (1983) 46 A.L.R. 362 contain statements by members of the South Australian Supreme Court which would seem in my view to lend support to my views. The resolution of this dispute involves a matter of construction that is not said to involve matters of doubtful law - that question does not in my view involve matters of great general or public importance. I am not aware of any other reason why the resolution of such a matter ought to go to Her Majesty in Council.

It follows that leave to appeal should be refused.

DOCUMENT 11* - Reasons for Judgment of the
Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council
Delivered: 1st February 1984

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

THE FULL COURT

CORAM: BRINDSEN, KENNEDY & OLNEY JJ.

Appeal No. 310 of 1983

B E T W E E N :

THE GRIFFIN COAL MINING
CO. LIMITED

Appellant
(Defendant)

and

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Respondent
(Plaintiff)

10

Mr. D.K. Malcolm Q.C. and Mr. N.P. Hasluck
(instructed by Keall Brinsden & Co.) appeared
for the appellant.

Mr. M.J. McCusker Q.C. and Mr. M.J. Stevenson
(instructed by Jackson McDonald & Co.) appeared
for the respondent.

Cases referred to in judgment:

- Rossignoli v. State of Victoria (1983) 46 A.L.R. 273. 20
- Judiciary Act 1903 S.35(1)(a).
- Cole v. The Commonwealth of Australia (1961) 106 C.L.R. 653.
- De Bortoli v. Kenny 76 C.L.R. 453.
- Clyne v. New South Wales Bar Association 104 C.L.R. 186.
- Australian Government Workers' Association v. Armstrong
(1980) Vol.25 S.A.S.R. 441.
- Kidney v. Melbourne Tramway and Omnibus Co. Ltd. (1902)
8 A.L.R. (C.N.) 29.
- Oertel v. Crocker 75 C.L.R. 261.
- New Zealand Insurance Co. v. Commissioner of Stamp Duties
(1954) N.Z.L.R. 1011. 30
- Ballas v. Theophilos 97 C.L.R. 186.
- Lipshitz v. Valero (1948) A.C.1.
- Meghji Lakhamshi and Bros. v. Furniture Workshop (1954) A.C.80.
- Ebert v. The Union Trustee Co. of Aust. Ltd. 98 C.L.R. 172.
- Tampion v. Anderson (1973) 48 A.L.J.R. 11.
- Haron v. Central Securities (1982) 2 All E.R. 481.
- Re Page (1910) 1 Ch.489.
- Hall v. Nominal Defendant (1966) 117 C.L.R. 423.
- Becker v. City of Marion Corporation (1977) A.C.271.
- Attorney General (Qld) v. Andrews (1979) 25 A.L.R. 297. 40

Cases also cited:

- Supreme Court Act, 1935-1982 s.61(1)(f).
- The Commercial Bank of Australia Ltd. v. McCaskill (1897)
23 V.L.R.343.

DOCUMENT 11* - Reasons for Judgment of the
Full Court dated 1.2.83 granting conditional
leave to appeal to Her Majesty in Council

Pedler v. Hunter's Hill Municipal Council (1976) 2 N.S.W.L.R. 411.
Harrison v. Law Society of S.A. (1981) 27 S.A.S.R. 387.
Harrison v. Magarey (1983) 46 A.L.R. 362.
Morris v. Eaton (1981) 37 A.L.R. 389.
Sanofi v. Parke Davis (1982) 39 A.L.R. 405.
Halsbury 4th Edn. Vol.10 784.

BRINSDEN J.

In these reasons the appellant will be called "the company" and the respondent "the Commission". This matter is 10
an appeal from the order of Rowland J. made the 30th August 1983 refusing leave to appeal as of right to Her Majesty in Council pursuant to Rule 2(a) of Order in Council dated the 28th June 1909 on the basis that the final judgment made by Burt C.J. on the originating summons in this action of the 21st April 1983 did not meet any of the requirements of that subparagraph and also refusing to exercise the discretion of the court to grant leave to appeal pursuant to Rule 2(b) of the said Order. The grounds of appeal are set out hereunder:

"(a) The Honourable Mr Justice Rowland was wrong in 20
law in holding that:

- (i) There was no property or civil right in dispute between the parties within the meaning of Rule 2(a) of the Order of Council made the 28th June 1909.
- (ii) The matter of construction is one step removed from anything that can have a value.
- (iii) The final judgment of the Chief Justice on the Originating Summons did not relate to a matter in dispute to the value of 500 pounds sterling or upwards or directly or indirectly involve some claim or question to or respecting property or some civil right amounting to or of the value of 500 pounds sterling or upwards. 30
- (iv) The Court's discretion under Rule 2(b) of the Order in Council of the 28th June 1909 should not be exercised as the questions involved were not of general or public importance or of the type which should otherwise be submitted to Her Majesty in Council.

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

2. His Honour should have held that:

(a) Notwithstanding that the questions asked in the Originating Summons required the Court to decide on matters of construction, a value could be placed on the matters in dispute.

(b) Matters of construction do involve questions of property value in that the way in which the document is construed determines the amounts which are to be paid pursuant to the contract between the Appellant (Defendant) and the Respondent (Plaintiff). 10

(c) The amount in dispute is valued at greater than 500 pounds sterling.

(d) The Court is entitled to exercise and should have exercised its discretion under Rule 2(b) so as to allow the Appellant (Defendant) leave to appeal on the basis that the matter is of general or public importance because it involves a contract for the supply of coal which will provide a substantial proportion of the State of Western Australia's energy requirements over the next 25 years and involves a considerable outlay of revenue by a State instrumentality in respect of which the public has an interest. " 20

There are a number of preliminary matters which ought to be disposed of first. In case this Court should hold that the order of Rowland J. comprised an interlocutory order in respect of which leave to appeal would be required within the meaning of s.60(1)(f) of the Supreme Court Act 1935 and amendments, a motion for leave to appeal was also before us. The Commission 30 objected to the competency of the appeal on the ground that the order made by Rowland J. was indeed an interlocutory order but offered no resistance to the granting of leave to appeal. Without deciding whether the order of Rowland J. was final or interlocutory this Court granted leave to appeal. Both before Rowland J. and this Court another question was argued, namely, whether the order of Burt C.J. was a final or interlocutory judgment within the meaning of Rule 2 of the Order. Both before Rowland J. and this Court the Commission did not seek to argue to the contrary and we therefore have dealt with this 40 appeal on the basis that the order was a final judgment within

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

the meaning of the term in the Order.

Fortunately for the purpose of answering the question raised by this appeal it is not necessary for me to go into the facts of the case in any detail but I think it is necessary to briefly outline sufficient so that these reasons can be understood in the correct context. In doing so I am indebted to Burt C.J's reasons for judgment which I propose paraphrasing in this regard. For many years prior to 1978 the company carried on business as a coal miner at Collie and the Commission operated a power station at Collie known as the Muja Power Station. For some years prior to 1978 the company had supplied coal to the Commission for use at that power station. In the early 1970's it became apparent that the tonnage of coal to be supplied to the power station was to be significantly increased and this led the company to engage R.T.Z. Consultants Limited to advise it upon the way in which its production could be increased so as to meet the Commission's requirements. The R.T.Z. Study was accordingly prepared and presented to the company. It estimated the coal reserves and suggested how they should be mined by prescribing a "mining plan". Based upon that report the parties entered into an agreement dated the 29th March 1977 (the agreement) which is expressed to operate for a period of 25 years commencing on 1st July 1978 whereby the company would supply the Commission with coal at the annual tonnage rates set out in Schedule A to the agreement and they are there described as "base tonneages of coal to be supplied in each financial year". By cl.3(1) the company agrees to deliver to the Commission and the Commission agrees to accept "the aggregate of the base tonneages of coal to be delivered in each of the financial years as provided in Schedule A at the Base Price as adjusted".

Disputes arose between the parties and as a result it

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

was decided to submit to the Supreme Court a number of questions most of which sought the Court's opinion as to the construction of certain clauses of the agreement. The Commission commenced the proceedings by way of originating summons which sought the Court's opinion in relation to nine questions and the company also put forward three questions for answer. No evidence was called but the parties submitted affidavits. By the time the hearing came on, the parties had agreed as to what answer they wanted to some of the questions but apparently argued over the answers to others. Burt C.J. answered most of the questions though he declined to answer one or two of them. It is his answer to part of question 6 which has caused the company to seek conditional leave to appeal to the Privy Council. That question involves cl.8(3)(a) which requires the company to supply to the Commission within 90 days of the completion of each financial year a statement detailing the pre-tax cash surplus and the after tax cash surplus. It then goes on to provide in paragraphs (c) and (d) as follows:

"(c) If at any time after the expiration of financial year 3 -

- (i) notwithstanding good mining and management practices, in the immediately preceding financial year the pre tax cash surplus of the Company expressed as a percentage of gross revenue falls below the pre tax cash surplus expressed as a percentage of gross revenue estimated pursuant to the RTZ Study computed for that financial year in Schedule F, by more than one per centum then the Company shall notify the Commission and the Commission within 30 days of receipt of such notice will pay to the Company such amount as is required to restore the pre tax cash surplus to that estimated pursuant to the RTZ Study for such financial year.
- (ii) the pre tax cash surplus of the Company expressed as a percentage of gross revenue in the immediately preceding financial year exceeds the pre tax cash surplus expressed as a percentage of gross revenue estimated pursuant to the RTZ Study computed for the relevant financial year in Schedule F, by



DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

more than 5 per centum, then the Company shall notify the Commission and the Company within 30 days of receipt of notice of demand from the Commission shall pay to the Commission such amount as is required to restore the pre tax cash surplus to that estimated pursuant to the RTZ Study for such financial year plus 2 per centum.

- (d) Notwithstanding anything contained in this subclause, the Commission shall not be liable for any increase in the price of coal where any insufficiency of pre tax cash surplus referred to in paragraphs (b) and (c) of this subclause is the result of improper management by the Company, the effect of activities of the Company unrelated to the mining of coal for the purposes of this Agreement, any departure by the Company from the Mining Plan as may be adjusted or the failure by the Company to observe the best modern practice in mining methods. " 10

It is to be noted that cl.8(3)(c)(i) only operated in respect of financial years after the third, and the first year of operation was the financial year 1981-82. The questions asked in cl.6(1) of the originating summons was in respect of cl.8(3)(1) and read as follows: 20

- "6. (1) Upon a proper construction of the Contract where it is necessary to apply Clause 8(3) and Schedule F to determine the 'Pre Tax Cash Surplus' of Griffin in a financial year when Griffin does not deliver the Annual Base Tonnage of coal required to be supplied is the 'GROSS REVENUE' for the purposes of the calculation in Schedule F:- 30

- (a) the actual tonnage of coal delivered multiplied by the base price paid; or
- (b) the tonnage specified in Schedule A regardless of how much has been actually delivered multiplied by the Base Price as adjusted or the Average Base Price as adjusted; or
- (c) some other formula and if so what formula. " 40

The parties agreed that question 6(1)(a) should be answered "No", but the real difference between them was as to the answer to questions (b) and (c). In an affidavit by Douglas Ralph Chatfield the Acting Assistant Commissioner of operations of the Commission the significance of this dispute so far as the Commission is concerned, is set out. This affidavit was filed

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

in respect of the proceedings commenced by the originating summons before Burt C.J. It appears that the company had produced draft accounts for the purpose of Schedule F which at the time of the affidavit were in the process of being settled prior to being referred to auditors for certification. The deponent then goes on to state that on the then drafts for the 1982 financial year the Commission's officers estimated that on a "worst case" result it would be required to pay by way of makeup (hereinafter called top-up payment) of the company's pre-tax cash surplus an amount of \$6.9 million as against about 10 \$2.3 million if its contentions were found to be substantially correct. In the same affidavit the deponent said that question 6 went to the whole basis of the disputes between the parties and that an answer was essential to the proper working of the agreement so far as the Commission was concerned. An affidavit was also filed on behalf of the Commission by the then Minister of the Crown charged with the administration of the Commission and he confirms the seriousness of the dispute and the figures deposed to by Chatfield. The company filed an affidavit from one Strmotich, the assistant managing director of a firm which managed and supervised the mining operations of the company. He referred to the dispute concerning the interpretation of cl.8 and 20 Schedule F which had arisen as a result of the deficiency in deliveries in the latter part of 1981. He set out the various contentions of the parties, the Commission apparently asserting that the term "Gross Revenue" referred to in cl.8 is to be taken as the total base tonnage for the relevant year referred to in Schedule A of the agreement rather than the lesser quantity of actual base tonnage delivered. The consequence of that assertion is that "Gross Revenue" would be a purely notional figure which would not reflect the actual moneys paid by the 30

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

Commission to the company. It would therefore follow, according to this deponent, that the amount payable to the company pursuant to the pre-tax surplus calculation pursuant to cl.8(3)(c) in order "to restore the pre-tax cash surplus to that estimate pursuant to the R.T.Z. Study" for the financial year ended the 30th June 1982 would be substantially reduced. The company on the other hand asserted that the only sensible basis for the calculation is upon actual revenue received by it for otherwise protection, so it was said, afforded to it by the clause would be illusory. 10

It appears that on the 23rd August 1982 in anticipation of the proceedings to be commenced by originating summons the parties entered into a stopgap agreement. In summary this provided that as an interim measure, subject to the subsequent subclauses, they agreed that for the purpose of Schedule F calculations for the 1981-82 financial year "Gross Revenue" would be determined by multiplying the actual base tonnage delivered by the Base Prices adjusted. The clause then went on to state the parties would refer to a mutually agreed arbitrator or the Supreme Court for determination, the proper basis for calculation 20 of "Gross Revenue" and the determination of certain other related problems. Should the determination by the arbitrator or the Supreme Court be available prior to the time the company was due for the top-up payment pursuant to its 1981-82 Schedule F submission, the Commission would make such payments calculated in accordance with such determination. If on the other hand the determination of either of those bodies was not available by the time the company was due for its top-up payment the Commission would make such payment in accordance with the basis previously outlined in the stopgap agreement, and after receipt 30 of the subsequent determination a cash adjustment in accordance

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

with a determination would be made between the parties. The determination was not made by the Supreme Court prior to the time the company became due for the top-up payment. As time went on since Chatfield swore his affidavit, it became possible to clarify the calculations in respect of the top-up payment based on the various contentions as to the interpretation of "Gross Revenue", more precisely. Payment of \$4.2 million was made to the company by the Commission pursuant to the stopgap agreement on the 22nd December 1982 the last date of the hearing before Burt C.J., but before the delivery of his judgment. In 10 answering question 6(b) and (c) his Honour accepted the argument submitted on behalf of the Commission. The actual answer was "Where it is necessary to apply clause 8(3) and Schedule F to determine that the 'Pre-tax Cash Surplus' of Griffin in a financial year when Griffin does not deliver the Annual Base Tonnage of coal required to be supplied in that year the 'Gross Revenue' for the purpose of calculation in Schedule F is the tonnage specified in Schedule A for that year multiplied by the Base Price as adjusted ruling at the time of delivery as ordered". As a consequence of that answer the company repaid to the 20 Commission a sum in excess of \$2,500,000.

Order 2(a) provides as follows:

" 2. Subject to the provisions of these Rules, an Appeal shall lie -

(a) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; "

The reasons why Rowland J. would not accept that the company had an appeal as of right pursuant to this subclause were as follows:

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

" It is submitted by the respondent that the question of construction of this document does not involve property or civil rights. On this compare, for example, Rossignoli v. State of Victoria (1983) 46 A.L.R. 273 where the right to fill land was the subject of the litigation and there the value of the property was held to be the relevant value. Again this was respecting property being the land to be filled which is not the situation in this case. Here it is said there is no property and no civil right in dispute. The rights are not in issue. All that is in issue is a question of construction which would apply in the event of certain events occurring. I accept the arguments submitted by the respondent in this regard. The matter of construction simply resolves what the agreement means. It does not affect rights - they already exist - they have simply been given a declared meaning. There is no property involved. The matter of construction is one step removed from anything that can have a value. It follows that the appellant is not entitled to leave to appeal as of right. "

There have been many decided cases on Order 2 (a) and also similar words in s.35(1)(a) of the Judiciary Act 1903 and amendments and it is not easy to reconcile some of the cases. In this case the company contends the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of the required sum. The words "civil right" are wide words and indeed "their ambit is not easily defined" per Dixon C.J., Windeyer and Owen JJ. in Cole v. The Commonwealth of Australia 106 C.L.R. 653 at p.656.30 In that case it was held that the words were wide enough to include a claim to a new trial to establish a money sum by way of damages. A right to deposit fill upon land was held to be a civil right within the meaning of the Order in Rossignoli & ors. v. State of Victoria. In this particular case cl.8(3)(a)(i) confers a right on the company to a top-up payment in certain circumstances and likewise, if I can use the expression, "a top-down payment" to the Commission in other circumstances. The agreement in my view confers a civil right on the company within the meaning of those words in Order 2. The order of Burt C.J. as to question 6 is an order in respect of a civil right since it

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

construes the right given by cl.8. A number of cases were pressed upon us by counsel for the Commission based upon the proposition that all the order of the Chief Justice did was to construe the clause and that it did not in itself directly or indirectly relate to any claim or question respecting property or a civil right. He cited for example, De Bortoli v. Kenny 76 C.L.R. 453 and particularly the passage in the joint judgment of Rich, Dixon and Williams JJ. at p.461 which reads as follows:

"It is the curial order of the court from which the appeal must be brought, not the decision of points of law in the course of reaching the judgment embodied in the order. There must be a question directly or indirectly respecting a civil right of the required value and that question must be involved not in what the court holds to be the law but in what the court does by its order. Here what the orders of the Supreme Court do is to affirm convictions for offences. The legal points lying behind those orders are another matter. The convictions themselves do not involve any civil right of the required amount. "

This case establishes that the civil right must be involved in what the Court does by its order. In that case the order merely affirmed the convictions. In the instant case the order construes the meaning of cl.8 in a material particular. The civil right conferred by the clause is thus affected by the order, and not only by the reasons in law for the making of it. In De Bortoli's case the civil right claimed was that of being able to sell without the restriction of a notice given by the Prices Commissioner fixing prices for the appellant's products. In confirming the convictions for selling at prices above the fixed prices the Supreme Court held the notice was a valid notice. It can be easily seen that on De Bortoli's case the civil right was in no way involved in the order confirming the convictions. This case is entirely different since the order of Burt C.J. directly involves some civil right.

Reference was also made to a number of other cases, Clyne

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

v. New South Wales Bar Association 104 C.L.R. 186 at p.205,
Australian Government Workers' Association v. Armstrong (1980)
Vol.25 S.A.S.R. 441. Kidney v. Melbourne Tramway and Omnibus
Co. Ltd. (1902) 8 A.L.R. (C.N.) 29 apparently cannot now be
relied upon as an authority on the meaning of s.35(1)(a) of the
Judiciary Act: see De Bortoli's case at p.461 though the former
case was cited with approval by Latham C.J. in Oertel v. Crocker
75 C.L.R. 261 at p.267. I am not able to find in any of these
cases anything which causes me to revise my view that this
appeal involves indirectly, and also directly, a question 10
respecting some civil right. It is difficult to think of words
more appropriate to cover this precise situation. The matter
might also be put on the basis that the appeal involves indirectly
a claim respecting some civil right since it is clear on the
facts that a claim had been made prior to the order of Burt C.J.
for a top-up payment for the relevant financial year and that a
dispute had arisen as to the quantum of that payment. I reach
that view appreciating what was said by Dixon J., as he then was,
in Oertel at p.271, namely that the word "respecting" is used to
require a connection between the claim, demand, or question, and 20
the valuable property or civil right, and that the connection
must be "close, immediate, or proximate". I am also conscious
of what F.B. Adams J. said in New Zealand Insurance Co. v.
Commissioner of Stamp Duties (1954) N.Z.L.R. 1011 at p.1024
concerning the word "indirectly" that it must be understood
reasonably and that there must be a limit to the distance one
may travel from the actual point of controversy in search of
something which may be described as "property", or for that
matter as a civil right. In my view the question of construction
which arose before Burt C.J., and is involved in the Appeal, has 30
a close, immediate, and proximate, connection with the civil right

DOCUMENT 11* - Reasons for Judgment of the
Full Court dated 1.2.83 granting conditional
leave to appeal to Her Majesty in Council

involved in the very clause the subject of the construction, and the civil right which was the subject of the demand made by the company upon the Commission.

It is now necessary to consider whether the civil right amounts to or is of the value of £500 sterling or upwards. In order to decide what matter or property is to be valued "you consider from the appellant's point of view what is the property to or respecting which a claim, demand or question is involved in the judgment": per Kitto J. in Ballas v. Theophilos 97 C.L.R. 186 at p.197. That is the approach the Privy Council has taken 10 in Lipshitz v. Valero (1948) A.C.1 and Meghji Lakhamshi and Bros. v. Furniture Workshop (1954) A.C.80. To the same effect are Oertel v. Crocker and New Zealand Insurance Co. v. Commissioner of Stamp Duties per F.B. Adams J. at p.1023. In Cole's case at p.655 what was said in Ebert v. The Union Trustee Co. of Aust. Ltd. 98 C.L.R. 172 at p.175 was approved. "It still remains generally true that the plaintiff must show prejudice through the order made which sounds in the required sum of money". There is no difficulty in deciding this question in favour of the company because it is clear that the order sought to be appealed 20 from has had the immediate impact of denying to it over \$2,500,000 Thus the company is by that figure worse off by reason of the making of the order.

In my view this appeal should succeed and that there should be an order made granting leave to appeal to Her Majesty in Council in accordance with the usual terms being those set out in the notice of appeal.



DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

THE FULL COURT

CORAM: BRINSDEN, KENNEDY & OLNEY JJ.
Appeal No. 310 of 1983

B E T W E E N :

THE GRIFFIN COAL MINING
CO. LIMITED

Appellant
(Defendant)

10

and

THE STATE ENERGY COMMISSION
OF WESTERN AUSTRALIA

Respondent
(Plaintiff)

Mr. D.K. Malcolm Q.C. and Mr. N.P. Hasluck
(instructed by Messrs. Keall Brinsden & Co.)
appeared for the appellant.

Mr. M.J. McCusker Q.C. and Mr. M.J. Stevenson
(instructed by Messrs. Jackson McDonald & Co.)
appeared for the respondent.

20

KENNEDY J.

The question which has been raised in the present appeal is whether the appeal against the judgment of the Chief Justice involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards. The relevant facts are fully set out in the judgment of Brinsden J. and I need not repeat them.

As such, the question of whether the judgment is a final judgment has not been raised in this appeal, both parties accepting that it is. However, this was a matter which was of concern to the Judge below and it is, I think,

SW

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

necessary that this Court should be satisfied on the point.

The originating summons was issued pursuant to the provisions of Order 58 Rule 10 of the Rules of the Supreme Court, which permit any person claiming to be interested under any written instrument to apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested. In terms, the originating summons sought declarations of right in respect of a contract in writing dated the 29th March 1979 between the parties. 10

The Chief Justice answered nine of the twelve questions which were before him. He declined to answer the fifth question on the grounds that it was not one of construction and further that it was not appropriate for determination on the originating summons because it was a question which could only be answered in the context of the proceedings in which it arose. He found that the seventh question did not need to be answered and that it was unnecessary to answer the ninth question. The appellant seeks to challenge the constructions adopted by the Chief Justice.

It is unnecessary, I think, to refer at length to the 20 many authorities in which the question of whether an order is final or interlocutory has been considered. It is generally conceded that many of the decisions are difficult to reconcile. The position was well expressed by Lord Kilbrandon in Tampion v. Anderson (1973) 48 A.L.J.R. 11 at p.12.

"It was submitted, and their Lordships would be inclined to agree, that the authorities are not in an altogether satisfactory state. There is a continuing controversy whether the broad test of finality in a judgment depends on the effect of the order made, as decided in Bozson v. Altrincham U.D.C. (1903) 1 K.B. 547 (per Lord Alverstone C.J.) at p. 548, or on the application being of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute - Salaman v. Warner (1891) 1 Q.B. 734. But the difficulty seems to arise out of attempts to frame a definition 30

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

of 'final' (or of 'interlocutory') which will enable a judgment to be recognised for what it is by appealing to some formula universally applicable in any contingency in which the classification falls to be made. "

That passage was cited by Sir William Douglas, speaking for the Privy Council, in what appears to be the most recent authority on this subject, Haron v. Central Securities (1982) 2 All E.R. 481.

By reference only to the originating summons and 10
the order made, there could have been no question but that the judgment was a final judgment. However, the affidavit in support of the originating summons contains the following paragraph:-

"23. It has been agreed between the parties that determination of questions of construction in this originating summons shall be without prejudice to any claims by either party for subsequent rectification of the contract. In view of the many 20
disputes or differences between the parties as to the construction, interpretation and operation of the contract, however, it is essential that there be a binding determination as to what is the prima facie meaning and construction of a number of its provisions before any decision is made by either party as to whether rectification is necessary. "

The desirability of proceeding in this manner may be open to debate; but it does not appear to me that it affects 30
the finality of the present judgment, which finally determines the construction of the existing written contract between the parties. That construction, the judgment standing, cannot be questioned in any other proceedings between the parties and it finally disposes of the rights of the parties in this regard - see Re Page (1910) 1 Ch. 489. It is the final order of the Court in the cause - see Hall v. Nominal Defendant (1966) 117 C.L.R. 423 per Windeyer J. at pp.442-5. It does not appear to me that the fact that one party might, in the future, seek

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

rectification of the contract can affect this conclusion. No application may in fact be made and, if made, it may be refused. It must further be appreciated that the present question arises, not in the abstract, but in the context of whether the judgment is final in contradistinction to its being interlocutory. In my opinion, the judgment is a final judgment.

I turn now to the critical question of whether the appeal involves, directly or indirectly, some question respecting some civil right amounting to or of the value of £500 sterling or upwards. 10

In my opinion, the appeal involves a question respecting a civil right (or rights), "right" being a word of wide import. The right was created by the contract between the parties, and its construction must, and it did, involve questions respecting the right. Can it then be said that the civil right amounts to or is of a value of £500 sterling or upwards?

It is the value of the right itself and not the value of the claim or question which is the determining factor - see Becker v. City of Marion Corporation (1977) A.C. 271 at pp.283-4 and see also Attorney General (Qld) v. Andrews (1979) 20 25 A.L.R. 297 per Gibbs J. at p.301. Nevertheless, the purpose of the rule cannot be overlooked. Having considered a number of the earlier authorities on the equivalent provisions to be found in the Judiciary Act, Dixon C.J., Windeyer and Owen JJ said in Cole v. The Commonwealth of Australia (1961) 106 C.L.R. 653 at p.655:-

"We have not, of course, in any of these cases deserted the literal words of the two paragraphs but the principle upon which the paragraphs proceed has been explained by the court as being that the appellant must by the order of which he complains have been prejudiced, with respect to the rights he asserts or the liabilities he denies, to an extent which amounts to or may be estimated as involving £1,500. "

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council 30

It is irrelevant that the judgment itself does not quantify the right. As it was expressed by Wilson, Brennan and Deane JJ. in Rossignoli v. State of Victoria (1983) 46 A.L.R. 273 at pp.273-4:-

"What then is the value of the alleged right in those circumstances. Precision is impossible, for the events which affect the continuation of the right to fill are uncertain of occurrence and the profits or savings which might be made in exercise of the right have not been clearly established. However, it is sufficient if, in all the circumstances, the value of the alleged civil right to the appellant is \$20,000 or upwards, though it is not possible to specify the extent to which the value of the alleged civil right exceeds \$20,000. The ascertainment of value is a matter for this Court to determine upon the material available either in the appeal papers or in supplementary affidavits. "

That case involved the value of a right to deposit fill upon land. As to the determination of a value, see also Hall v. Nominal Defendant (1966) 117 C.L.R. 423 per Barwick C.J. at p.431.

At the time at which Mr. Chatfield swore his affidavit on behalf of the respondent on the 4th November 1982, on the basis of the draft accounts for the 1982 financial year, the respondent's officers estimated that, on a worst case result, it would be required to pay, on the auditors passing the accounts, by way of make-up of the appellant's pre-tax cash surplus, an amount of about \$6.9 millions, as against about \$2.3 millions if its contentions as to the construction of the contract were found to be substantially correct.

In the affidavit of the then Minister for Resources Development Mines Fuel and Energy sworn on the 18th November 1982 it was said that the magnitude of the monetary shortfall to be made up by the respondent as part of the appellant's pre-tax cash surplus which could emerge as a result of the different contentions of the parties as to the effect of the contract was

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

a matter of great concern to the Government of Western Australia both in the short and long term. He said that he was informed that, on the latest figures available, according to the respondent's interpretation, about \$2.3 millions would be payable but on the appellant's interpretation about \$6.9 millions would be claimed as payable for the 1982 financial year. An early hearing was sought upon the basis that the situation where the respondent was required to pay out a very large sum of public money to the appellant which the respondent might subsequently have to demand be repaid was to 10 be avoided.

By the time that Mr. Strmotich came to swear his affidavit on behalf of the appellant on the 15th December 1982, it was said that the amount due to the appellant based upon the construction of the contract for which it contended was \$6,821,698, as against \$3,421,332 upon the construction contended for by the respondent. Furthermore, it was said from the Bar Table, and not challenged, that the consequence of the decision of the Chief Justice was that the appellant was required to repay to the respondent a sum in excess of \$3.4 20 millions paid to it in accordance with a Minute of Agreement dated the 22nd August 1982.

It was argued for the respondent that the determination of the question of construction merely has the potential to affect the parties' financially, being one step removed, on the basis, it would seem, that upon the order being made by the Chief Justice, the appellant did not become, ipso facto, entitled to or liable for payment of an amount in excess of £500 sterling. Counsel for the respondent conceded that the appellant, by reason of the 30 construction placed upon the contract, might suffer to the extent of more than \$4 millions, for the determination of the

questions of construction govern not only the amount payable to the appellant for the financial year ended the 30th June 1982, but also for future years. The respondent's argument, in my view, gives inadequate weight to the words "involved" and "indirectly" in the Rules, the critical question being whether the judgment involved directly or indirectly some question to or respecting some civil right amounting to or of the value of £500 sterling or upwards.

It appears to me that, on the material before us, to adopt the words used in Cole's case, the appellant has 10 sufficiently shown that, by the order against which it seeks to appeal, it has been prejudiced with respect to the right it asserts to an extent which may be estimated as involving upwards of £500 sterling. I would allow the appeal.

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

Heard: 1st November, 1983
Delivered: 1 FEB 1984

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

THE FULL COURT

CORAM: BRINSDEN, KENNEDY, OLNEY JJ

APPEAL NO: 310 of 1983

B E T W E E N :

THE GRIFFIN COAL MINING CO. LIMITED

Appellant 10
(Defendant)

and

THE STATE ENERGY COMMISSION OF
WESTERN AUSTRALIA

Respondent
(Plaintiff)

Mr. D.K. Malcolm Q.C. with him Mr. N.P. Hasluck
(instructed by Keall Brinsden and Co) appeared
for the appellant.

Mr. M.J. McCusker with him Mr. M.J. Stevenson 20
(instructed by Jackson McDonald and Co) appeared
for the respondent.

OLNEY J.

The background to the litigation which has led to this appeal has been outlined in detail in the reasons delivered by Brinsden J. and I do not need to repeat same. However, as his Honour has not quoted the full text of Rule 2 of the "Order in Council as to Appeals from the Supreme Court of Western Australia to His Majesty in Council" made the 28th day of June 1909 (the Order in Council) same is set out in full: DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council 30

" 2. Subject to the provisions of these Rules, an Appeal shall lie -

(a) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and

(b) at the discretion of the Court, from any other judgment of the Court, whether final or



interlocutory, if in the opinion of the Court the question involved in the Appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision. "

The originating summons issued by the respondent (the Commission) claimed:

" The declarations of right set out in the Schedule hereto pursuant to Order 58 Rule 10 in respect of a contract in writing dated 29th March 1979 between 10 the parties and all such further orders and declarations as may be necessary or appropriate. "

The originating summons had attached to it several pages not specifically entitled as a schedule but headed "Plaintiff's questions for determination arising out of long-term coal supply contract pursuant to originating summons". The heading is followed by a series of numbered paragraphs most of which have several sub-paragraphs and all of which are couched in the form of a question, in several cases prefaced with the words "whether on a proper construction" of a particular clause 20 or clauses of the contract. The Commission originally posed nine questions for the Court's consideration to which three further questions were added at the appellant's (the Company's) request. By the time the matter came before the Chief Justice for hearing the parties had agreed to the answers to be given to many of the questions and as to some others the Chief Justice declined to give an answer. The particular question which appears to be central to the appeal proceedings and indeed which seems to be the matter about which the parties were most hotly in contest before the Chief Justice is question 6 which contains six sub- 30 questions as to which the Chief Justice found it necessary to answer only the first two. Brinsden J. has set out the first sub-question of question 6 and the relevant contractual provisions (Clause 8(3)(c)(d)) the construction of which is raised by that question.

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

Although the originating summons is couched in terms of a claim for declarations of right, the only declarations sought and indeed the only declarations made were declarations as to the construction of the contract. There is nothing in the Chief Justice's order which finally determines any right as between the interested parties and whilst it may probably be true that in any later proceedings between the same parties they would be bound by the construction placed upon the contract by the Chief Justice (and I expressly exclude from this those matters 10 determined by consent of the parties), it is not the construction of the contract which determines the rights of the parties but the application of that construction to a proven set of facts. The determinations made by the Chief Justice were in no way dependent upon the facts of the case and whilst the facts may properly have been referred to in order to understand the context in which the contract operates no particular finding of fact nor any agreed state of affairs had any bearing upon the conclusions reached.

I have some sympathy for the view expressed by 20 Rowland J. in the decision appealed from questioning whether the Chief Justice's order amounts to a final judgment or order. Were it necessary to do so I would not hesitate to go behind the apparent concession made by the parties that Burt C.J.'s order is a final judgment. The jurisdiction of the Judicial Committee of the Privy Council to hear appeals from the Supreme Court of Western Australia and the right of a party to proceedings to invoke that jurisdiction is strictly controlled by the Order in Council and it is not for the parties to determine in any particular case whether the criteria giving rise to that 30 jurisdiction and those rights have been satisfied. That is a matter for the Court and the Court cannot be bound by any agreement made between the parties. As it is, I find it unnecessary to delve into the question of whether the order of the Chief Justice is a

final judgment in terms of the Order in Council and for present purposes I am prepared to accept that so far as it represents a determination made by the Chief Justice and not by the consent of the parties, it is within the definition of that term.

The first question before this Court is whether the other criteria of Rule 2(a) of the Order in Council have been met. In my opinion they have not.

Whatever may have been the historical background, there is now a clear statutory recognition that the Supreme Court of Western Australia may make a binding declaration of right without granting consequential relief (Supreme Court Act s.25(6)). Order 58 Rule 10 of the Rules of the Supreme Court is designed to facilitate the exercise of the Court's jurisdiction to make a declaration of right. Such a declaration may be sought and obtained in proceedings commenced by writ but in a limited number of cases, that is, those requiring the determination of a question of construction arising under a deed, will or other written instrument, a person claiming to be interested therein may proceed by way of originating summons for a declaration of the rights of the persons interested. Order 58 Rule 10 does not confer jurisdiction on the Supreme Court but rather facilitates the exercise of one aspect of the jurisdiction conferred by the Supreme Court Act. And that jurisdiction is the jurisdiction to make a binding declaration of right without necessarily granting consequential relief.

Accepting for present purposes that the Chief Justice's determinations and his declarations consequential thereon finally determine the construction of the contract as between the parties, it still cannot be said that the matter in dispute on the appeal "amounts to or is of the value of 500 pounds sterling or upwards" or that the appeal "involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of 500 pounds

sterling or upwards". Those conditions can only be satisfied when they arise in the context of the facts of a particular case to which the terms of the contract are relevant. The declarations as appearing in the order sought to be appealed from are all expressed to be conditional upon hypothetical facts which in many cases are expressed to be in the alternative. The answer to question 6(1) probably comes closest of all of the answers to a positive declaration of right but even so the Commission is by the terms of the contract in question under no liability to the Company under paragraph 8(3)(c) if the circumstance giving rise to the claim is the result of improper management by the Company, the effect of activities of the Company unrelated to the mining of coal for purposes of the agreement, any departure by the Company from the mining plan or the failure by the Company to observe the most modern practices in mining methods (paragraph 8(3)(d)). In any particular case the construction of paragraph 8(3)(c) determined by the Chief Justice will not necessarily result in the Company having a greater or lesser claim against the Commission. In my opinion the position was accurately and appropriately expressed by Rowland J. when he said:

20

" The matter of construction is one step removed from anything that can have a value. "

Whilst it can be conceded that this statement may not be universally true in every case, in the context of the present case it is, in my opinion, correct and accordingly I agree with Rowland J. that the Company is not entitled to appeal as of right to Her Majesty in Council.

Before leaving this aspect of the appeal I wish to comment briefly on the "stop-gap agreement" referred to by Brinsden J. With respect, I cannot agree that this has any relevance to the question in issue. The stop-gap agreement was entirely separate from the instrument the subject of the proceedings and any declaration of right made by the Chief

30

Justice resulting from his determination of the construction of that agreement and the declaration of the rights of the parties thereto was a resolution of those rights qua that agreement and not the stop-gap agreement. Any arrangements the parties may have made between themselves outside of the agreement subject to determination in the proceedings cannot give the order made in determination of those proceedings a quality which it would not otherwise have.

The second question that falls to this Court for 10 determination is whether Rowland J. erred in failing to exercise his discretion to grant leave to appeal pursuant to Rule 2(b) of the Order in Council. In my opinion this question admits of the simplest of answers. Rule 2(b) is based upon the premise that the general or public importance of some matters will be so great that notwithstanding there is no appeal as of right those matters ought to be subject to appeal to the Judicial Committee of the Privy Council. This rule no doubt represented the thinking of governments and legislators at the time the Order in Council was made and may well have been appropriate in the case of an 20 Australian State which had recently emerged from colonial status. As to that I am unable to make any comment. I am however able to express the opinion that by reason of the emergence of Australia as an independent sovereign nation the premise upon which Rule 2(b) was formulated is no longer valid and in fact the contrary is so. It is my view that matters of considerable general or public importance ought to be finally determined within the Australian judicial system and not by Judges of another independent sovereign nation. It follows therefore that the facts of contemporary history have overtaken Rule 2(b) of the 30 Order in Council and that there is no longer any scope for its operation. For this reason I am of the view that Rowland J. correctly refused to grant leave to appeal.

In view of the foregoing it is my view that the present appeal should be dismissed.

DOCUMENT 11* - Reasons for Judgment of the Full Court dated 1.2.83 granting conditional leave to appeal to Her Majesty in Council

DOCUMENT 12* - Order of the Full Court granting the Appellant (Defendant) final leave to appeal to Her Majesty in Council made the 3.5.84

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2749 of 1982

THE FULL COURT)

ON APPEAL TO HER MAJESTY
IN COUNCIL

B E T W E E N :

THE GRIFFIN COAL MINING COMPANY
LIMITED

Appellant
(Defendant)

- and -

THE STATE ENERGY COMMISSION OF
WESTERN AUSTRALIA

10

Respondent
(Plaintiff)

BEFORE THE HONOURABLE THE CHIEF JUSTICE THE HONOURABLE MR
JUSTICE WALLACE AND THE HONOURABLE MR JUSTICE OLNEY
THE 3RD DAY OF MAY 1984

UPON THE APPLICATION of the Appellant (Defendant) by Motion dated the 19th day of April 1984 AND UPON HEARING Mr M Cooke of Counsel for the Appellant (Defendant) and Mr M J Stevenson of Counsel for the Respondent (Plaintiff) AND WHEREAS on the 1st day of February 1984 the Appellant (Defendant) was granted conditional leave to appeal herein And the Court being satisfied that the conditions imposed therein have been complied with And the Court being of the opinion that the matter in dispute in this appeal exceeds the sum of 500 pounds sterling THIS COURT DOTH ORDER THAT the Appellant (Defendant) have final leave to appeal to Her Majesty in Council from the judgment of the Honourable the Chief Justice given herein the 22nd day of April 1983.

20

BY THE COURT

DEPUTY REGISTRAR

DOCUMENT 12* - Order of the Full Court granting the Appellant (Defendant) final leave to appeal to Her Majesty in Council made the 3.5.84