Committee of review - ACCC and Trade Practices Act

Submission re. the regulation of the mining industry.

I submit that the ACCC should widen its role to scrutinise all industry regulators for signs of regulatory capture starting with the mining industry. My reasons are given below but may be summarised as a compelling amount of evidence of non-enforcement of law and a reluctance to prosecute.As a result of this . company liabilities are being understated.Whilst there has been some admission of non-enforcement it apparently has not been communicated to the stock-exchange.

Over the last 15 years I have been exposed to an ugly side of Corporate Australia that is not well known. I am talking about our largest mining companies where there is a lack of firm regulation and enforcement of the law applying to environment protection. It is not inadvertant but has been contrived. Legal and professional responsibilities are negotiated downwards (conditions are watered down and diluted) or avoided altogether, and considerable costs are thereby saved.

I have the credentials and experience to say this and refer to my cv. in Attachment 1.

The "greed, incompetence and fraud" and the "cooking of books, shading the truth " (all words coming now from the White House) are all haulmarks of the Australian Mining Industry. The mining industry has been shown to be untrustworthy. There is no other way but to prosecute in order to achieve some protection of the environment. The trial of alternative friendly methods of persuasion has been an expensive failure.

I am not just jumping on the bandwagon of recent news. Since 1991 I have continued to throw down a challenge (in the form of specific allegations) to the industry, which it has not answered. I have listed in Attachment 2 the main formal challenges that I have made. It is not appropriate that these accusations are still around and the industry (including the regulators) should be forced to respond properly ie. verify its compliance or concede the breaches.

It is anti-competitive to not comply with environmental laws and regulations, and to capture regulators; and as a consequence of both to leave taxpayers with an expensive clean up.Share-holders too will be in for some nasty surprises. Laws are designed to avoid all that happening, but are not being enforced.

There is very clear evidence of intense lobbying of politicians by the mining industry which is not healthy. We know now how difficult it was for the Olympics organisers to separate lobbying from corrupt actions.

Let us ask

. what is the level of political donations made (directly or indirectly) by the mining industry?
. what largesse has been handed out to regulators in recent years?
. Let us ask regulators how many shares, directly or indirectly(in superannuation), they own in mining and what largesse have they received?
. what is the national annual clean-up bill on mine sites, for taxpayers?
. what hard data exists to verify the plans and claims for the future closure of existing mines? If the industry and the regulators will not answer then ACCC will need to go and find out.

Despite all the rhetoric there is still a "catch-me-if-you-can" culture in mining; and governments in Australia have been lulled into a false sense of security by a "trust-me"offer (from industry) for reducing the costs of regulation.There has even been talk of privatising regulation, ie.self regulation!.

IN 1993 I alerted the Australian Securities Commission to this problem. In 1998 the Industry Commission, investigating the competitiveness of the Black Coal Industry did not even bother with my submission regarding environmental costs. Not relevant it seems and yet in most cases required by law to be met.The mining industry will not, and often can not, verify its environmental performance. It is not accountable. Best practice can not be audited.

JAMES LEGGATE
23 Church St.
GOODNA 4300
Tel - 38180786.

18.07.02

Attachment 1.

JAMES LEGGATE - CURRICULUM VITAE IN BRIEF

BORN: South Rhodesia - 10th July, 1937

UNIVERSITY EDUCATION: BSC (Capetown), MA Forestry (Oxford)

AUSTRALIAN CITIZEN: 1980

EMPLOYMENT RECORD

Approximately 14 years as a professional Forester before leaving Queensland Forestry Service to join Comalco in 1973 as Regeneration Officer. Since then have held positions of Agronomist, Environmental Manager and Divisional Manager in AMC, Thiess-CSR Energy Division, and Ranger Uranium respectively. I have served on the Environment Committees of Australian Coal Association, Australian Mining Industry Council, and as Chairman on the Queensland Chamber of Mines committee.

I have reason to believe I was well respected at Ranger Uranium by the Commonwealth Government and their Supervising Scientist, and I have been placed on a Central Register of Potential Appointees in the Department of the Special Minister for State in Canberra.

I left Ranger to take up a very junior position of Ecologist in the Queensland Department of Mines in 1986, mainly for family reasons.

I have published various authoritative papers on the subject of mine rehabilitation.

ATTACHMENT 2 CHALLENGE TO MINING INDUSTRY

1.I compiled an official list of alleged breaches of legislation for 44 mine sites in Queensland and presented it to the Director-General of Mines.Feb. 1991

2.I made a lengthy submission to Queensland Public Sector Management Commission, describing the capture of the Mines department. 1991

3.I made a complaint to the Ombudsman about maladministration in the department of mines. 1991.

4.I wrote a paper "Mining according to the rules" for an environmental conference but was prevented from presenting it.March 1993.

5.Provided sworn evidence to the Matthews Inquiry into mining,for the CJC .1994.

6.I complained to Australasian Institution of Mining (copied to ASC and ATPC) about unlawful and unprofessional mining practice, and copied to ASC the article in Attachment 3. 1993.

7.Prepared and presented a submission on regulatory capture to the Senate in 1995.

8.I alerted the Federal Attorney General. 1995.

9.Compiled a substantial legal submission to the Connolly/Ryan Inquiry alleging a conspiracy to obstruct the mining statutes and presented it under oath.1997.

10.Made a formal submission to Industry Commission Inquiry into Black Coal industry. 1998.

* I would be happy to provide copies of the above if requested and to answer any questions.

When honesty doesn't pay

One whistleblower's story

Honest public officials are the major potential source of the information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced.

Fitzgerald Report

In 1989, Tony Fitzgerald Q.C. presented the report of his Commission of Inquiry into police corruption to the Queensland Parliament. The report's findings were damning: a culture of corruption permeated virtually the entire force. A number of recommendations were made to change this, including the establishment of legislation to protect "whistleblowers," honest public officials who wish to expose corruption.

The Fitzgerald Report was the catalyst for enormous changes in public administration in Queensland, ushering in an era of reassessment and reform. The Criminal Justice Commission, the Electoral and Administrative Review Commission and a number of other bodies were established by the Goss Government, and interim whistleblower protection legislation was passed.

It was this mood of reform and change which encouraged Jim Leggate, an environmental officer with the Department of Resource Industries (now the Department of Minerals and Energy), to draft two reports in 1991 detailing what he alleged were widespread breaches of mineral lease conditions by mining companies.

Jim Leggate worked for nearly twenty years as an environmental scientist in mining. In that time, he was responsible for environmental management at some of Australia's largest mines, including Comalco's bauxite mine at Weipa and the Ranger uranium mine at Kakadu, before joining the Department.

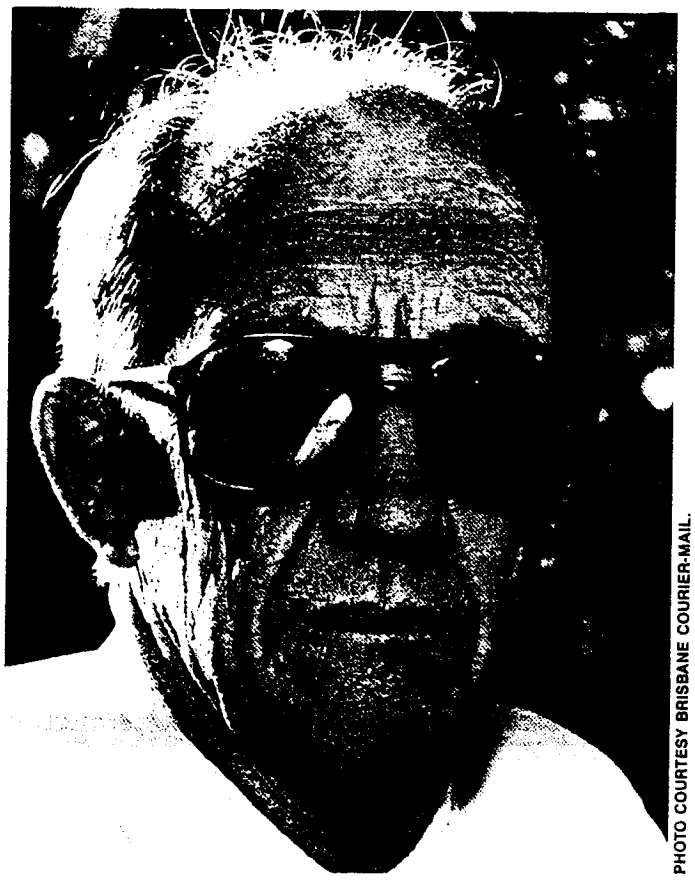

PHOTO COURTESY BRISBANE COURIER-MAIL.

Jim Leggate: alleges the mining industry is legally "off the rails".

Mr Leggate says he supports the industry in which he has worked so long. "Queensland has one of the largest and most significant mining industries in the world. We have huge mines, some of the biggest mines in the world are in Queensland. That industry can and should get even bigger, but I'm alleging that it has got itself off the rails legally speaking, and has left itself wide open. Huge public clean-up costs could arise to avoid serious pollution."

Mining leases are not granted unconditionally; they carry legally enforceable obligations relating to land regeneration and environment protection. But Mr Leggate says these obligations are widely ignored. "Until quite recently — and I have experienced this and observed this over a period of nearly twenty years — the mining industry, including some of the largest corporations in Australia, has often treated the conditions attached to the title with contempt."

One example is Comalco's bauxite mine at Weipa. The *Commonwealth Aluminium Agreement Act* 1957, under which the mine operates, lays down constraints, including that regeneration be carried out progressively so that not more than one square mile of land is disturbed at any one time. "That condition had been in breach for years," Mr Leggate says. "The scale of mining has increased beyond the constraints of the title. My endeavours to have this dealt with were just suppressed by the department."

Another example is the BHP coal mine at Moura. The agreement governing its operations requires the company to lodge an annual report to the Minister outlining the method of rehabilitation to be undertaken. Mr Leggate alleges that between the mine's establishment in the late '60s and 1990, this was not done. "That condition was in breach from day one. For about thirty years the requirements of that title have not been met, with the result that there is a huge legacy of neglect. I am talking 30 or 40 million dollars of rehabilitation."

In addition, Mr Leggate identified breaches of legislation at 44 other Queensland mines in his report. "I had the statutory responsibility as an authorised environmental officer to report on these matters, which I did. Part of the report that got me into trouble outlined that in Queensland there is probably $1 billion of rehabilitation that will have to occur at some stage or other if the legal obligations are to be met. That is a lot of money to be found, a lot of work that is outstanding. I pointed out that it is increasing at a rate of $1 million a week. And nothing much was done about it."

The relevant legislation contains provisions for the Department to issue a notice to show cause, if the Department

believes a breach has taken place. Mr Leggate recommended that such action be taken against BHP. "The provision allows for the Minister to ask the lessee to show cause why their lease not be terminated, or a fine imposed. My recommendations were dismissed as being politically naive. I was told you don't threaten to close down BHP's coal mines unless you are prepared to go through with it. I said 'that is not the point, all I am suggesting is that the provisions of the legislation be followed to the point that some authority is exerted. It may be that all [that the courts] end up doing is fining them ten dollars.'"

Mr Leggate says that after his report was apparently ignored, he exhausted all the available channels to make his concerns known. "I went to the Ombudsman. The Ombudsman sat on it for several months and then declared that I didn't have sufficient personal interest, I wasn't an aggrieved person suffering as a consequence of the [alleged] breaches. The Ombudsman said I was talking more about a systemic issue.

"I thought that was fair enough, and I went to the Electoral and Administrative Review Commission. At the time it was headed by Tom Sherman. From his correspondence, he seemed receptive to my suggestion that there was a systemic problem in the Department of Resource Industries, not altogether different from the police culture that the Fitzgerald Inquiry identified. But unfortunately he referred it to the Public Sector Management Commission, which was conducting a review of each government department. He moved on to the National Crime Authority before that was completed, and it was never followed up."

Matters came to a head when one of Mr Leggate's reports was leaked to the media in 1992. Mr Leggate says he does not know who was responsible for the leak, but as a result he was transferred to the Forestry Department. "The Resources Minister then issued a public statement which declared that the report was never officially presented and had all been dealt with . . . [I]t so outraged me that I reported it to the Criminal Justice Commission. They took evidence from me, but after many weeks' deliberation they wrote and informed me that my allegations couldn't be investigated, and that probably it would be more appropriately dealt with by the Ombudsman! I was just being tossed between government authorities who could not agree whether it was a personal or substantive matter."

In April this year, Mr Leggate testified before a Criminal Justice Commission inquiry into toxic waste management. There he repeated his allegations of illegality in the industry and complicity in the Department. The story became front-page news in Queensland, though the long-term repercussions were unclear at time of writing.

However, both the mining industry and the Government have conceded that breaches of mining lease conditions took place.

A spokesman for the Queensland Minister for Resource Industries, Tony McGrady, accepted that abuses had occurred. "There is no denying that some of the problems Jim is talking about were real. Some mines had a pretty abysmal record in environmental management. But things are being done about it: we introduced a new policy to address these problems in 1992."

The Environmental Management Overview Strategy (EMOS), as it is known, requires mining companies to draw up a plan of operations which has to be approved by the Department. "We are taking a more co-operative approach, negotiating with the companies to arrive at new guidelines. Once that is done, we are making sure the guidelines are followed."

The spokesman said the reports which Mr Leggate claims were suppressed were internal departmental reports, and handled by departmental personnel. "I doubt that they ever came to the Minister," he said.

The public relations manager for BHP, Ian Dymock, said that the problems identified in Mr Leggate's reports had been remedied. "While there may have been grounds for criticism in the past, there has been a lot happening since 1991. Under EMOS, we have drawn up a plan of operations at all our mines, and they have all been approved by the Department. We spend $20,000 a hectare on rehabilitation, and I think we can claim to be a leader in the field."

A spokesman for Comalco said that the company did not agree with Mr Leggate's interpretation of the regeneration provision of the *Commonwealth Aluminium Corporation Agreement Act* 1957, and did not accept that the company was in breach of the Act's provisions.

"Comalco has devoted very significant resources and effort to progressively rehabilitating mined areas over the past 27 years," the spokesman said, and pointed out that in October last year the company won the inaugural Queensland Government Premier's Award for Environmental Excellence in the Metalliferous Sector of the mining industry.

The spokesman said that Queensland's *Mineral Resources Act* 1989 required mining companies to implement a comprehensive environmental management strategy, and that Comalco had done that. "Comalco's Environmental Management Overview Strategy, which deals with regeneration, has been approved by the Department, and Comalco is complying with its provisions."

Although he was eventually able to have his concerns heard in the Criminal Justice Commission inquiry, Mr Leggate says he is bitterly disappointed at the way he was treated. "I was aware of the draft Bill [on whistleblower protection] that EARC was working on, and that was what encouraged me to continue to expose this. I felt very confident that the Goss Government would act on it, particularly as this was all in the aftermath of Fitzgerald. Fitzgerald declared that it was unlikely that the police department was the only department to be suffering these problems. I was encouraged by all that to stick my neck out. It hasn't done me any good, but I remain very firm in my resolve to expose it."□

RICHARD EVANS

And what about Mabo?

An interesting question raised by Mr Leggate's claims is whether a mining company which has breached the conditions of its lease will have that lease validated by the State Government in the wake of the Federal Government's native title legislation.

"Mabo has raised the issue of validation of title," Mr Leggate says. "Title is not just the right to mine, it is conditional upon other things being done. The minerals belong to the State, and ultimately to the public. The conditions are there to protect the public interest.

"It is important that the sorts of breaches I have been talking about are considered before any validation of title occurs. To just rubber-stamp these titles as they are is to validate a breach, and will lead to serious shortfalls in the state of the land after mining.

"If validation of mining title is to occur, the State Government should at least review the status of these big mines. Quite possibly they will have to be renegotiated because some of the breaches cannot be redressed; the matter has gone beyond the point of return. For example, if in order to rehabilitate the land you needed to save the topsoil, and if you don't do that for twenty years, you can't go back and recover it, it's gone.

"You have to accept that the past cannot be corrected. You have to change the agreement to fit the reality of what has happened.

"In many cases, the mining has evolved from quite small scale to a big scale. In the past twenty or thirty years there have been major developments in technology, there are bigger machines, sometimes different equipment and machines. In the coal area they have got bigger draglines. They are bigger and better and they can operate deeper, and they have gone beyond the limits of operation originally set down, but renegotiation of the lease never took place."□

Attachment 3.

New Accountant

June 24, 1993

The push for mandatory audit committees in major corporations raises the interesting issue of responsibility and enforcement.

The Institute of Chartered Accountants wants the Australian Stock Exchange to flex its muscles and ask all companies to establish audit committees. The ASX believes it should simply encourage its listed companies to do so.

In fact, corporate governance is neither the domain of the ICA or the ASX. It is the domain of the Australian Securities Commission.

There appears little doubt about the merits of audit committees as an important check and balance on management for investors and directors alike.

One worrying aspect of the legal wrangles which have followed some of our more public corporate collapses has been the naivety of directors about the financial management of the companies they oversee. Frightening claims, such as directors not understanding balance sheets, means the elected officials of shareholders must be enticed into taking a closer interest.

Audit committees are a way of ensuring this.

Gone are the days when a director can simply turn up for board meetings once a month and make decisions. The changing legal and social requirements on directors demand greater commitment.

But the issue goes deeper than simply legislating for audit committees. It means establishing guidelines on how an audit committee must operate and its reporting responsibilities.

But while the profession can campaign for audit committees, its role is establishing the framework under which they must operate.

The Australian Securities Commission must be charged with enforcing it. No-one else.

How green is our accounting?

Have Australian mining companies made adequate provisions for mine rehabilitation? A recent report in Queensland's *Sun-Herald* (May 9, 1993) suggested that they haven't. It claimed that up to $1 billion may have to be spent on legally enforceable land rehabilitaion throughout the state, and that the projected cost of completing that work substantially exceeded the security deposits lodged with the Queensland government.

This *Sun-Herald* story exposed considerable sensitivities within the industry, including at the offices of the Big Australian BHP

In any event, Schedule 5 of the Corporations Law requires companies to make supplementary disclosures of "commitments" which have not been included in their balance sheets. That would seem to cover legal commitments which management did not expect to be enforced.

I later learned that the *Sun-Herald* story did not contain any of this material. Maybe Orr just wanted it for background. Maybe it was too technical. However, a few days later I received a phone call from ABC Radio in Rockhampton, and from the Rockhampton Morning

nies complied with corporate law, and that "a number of mines had failed to make provisions for mining rehabilitation in their accounting documents".

Flew took umbrage at what he saw as suggestions that the ASC should "investigate mining companies' compliance with law regarding rehabilitaion obligations". "Given your position", he wrote, "you should know that accounting standards require all future liabilities to be recognised in the accounts."

Flew explained that if security deposits paid by

dard of rehabilitation to be undertaken (e.g. returning mine sites to grazing land);

- the feasibility of those standards (e.g. where insufficient topsoil had been retained to produce grazing land);
- the inadequacy of security deposits;
- the failure of miners to undertake rehabilitation work on a progressive basis, or even to prepare detailed plans for that work; and
- the damage – particularly to waterways and the marine environment – likely to flow from run-off and uncontrolled leaching of

as a "specific accounting principle, basis or method".

A closer look at the accounts of BHP Australia Coal Limited as at May 31, 1992, revealed that while there were extensive disclosures about the valuation methods used for assets, nothing was said about the provision for restoration and rehabilitation. The accounts showed that $5.7 million had been transferred to the provision for the year, bringing the provision to a total of $28.1 million. No mention was made about mining rehabilitation under the heading of "commitments".

tivities within the industry, including at the offices of the Big Australian, BHP.

But first, some background. Before publication of this story, Brisbane journalist John Orr telephoned me to ask what I knew about the accounting rules relating to reporting liabilities for mine rehabilitation. He told me that he had reason to believe that environmental and mining laws in Queensland were not being rigorously enforced.

I explained that there were legally-enforceable requirements for both the accounting and for disclosures of this projected expenditure. In the course of this discussion I noted some curious variations between the text of the Australian Accounting Standard AAS 7 (1977) and the subsequently "approved" accounting standard, SRB 1022 (1989).

AAS 7 requires provisions to be made where there is

On Balance with Bob Walker

an obligation or intention to restore an area of interest. On the other hand, the legally-enforceable accounting standard AASB 1022 only requires that provision should be made for mine rehabilitation where there is "an expectation that an area of interest will be restored".

On the face of it, AAS 7 is more demanding. If companies are legally obliged to undertake mine restoration, but government policy is lax, then management might not expect to spend large sums on mine restoration, and hence (in terms of ASB 1022) would not be required to establish a full provision.

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few days later I received a phone call from ABC Radio in Rockhampton, and from the *Rockhampton Morning Bulletin*. The people of Rockhampton, it seems, are highly interested in mine rehabilitation.

In response to enquiries, my comments were:

- I had not systematically surveyed mining company accounts;
- some major corporations engaged in mining have a reputation for complying with both the letter and the spirit of accounting standards and the Corporations Law – so that I would be very surprised to learn that they were in breach of either legal requirements or the profession's accounting standard AAS 7;
- if a corporation did not establish an appropriate provision for mine restoration, even though it faced legal obligations to undertake that work, then it would be obliged by Schedule 5 to make supplementary disclosures of commitments;
- if there was evidence that some mining corporations had not set aside funds or created provisions for mine rehabilitation, or had not disclosed commitments for such work, then *prima facie* there were breaches of the Corporations Law.

After that, I forgot about the whole thing. That is, until receiving a rather strong letter from a Mr. R.J. Flew, group general manager, of BHP Australia Coal Limited. Attached was a press clipping from the *Rockhampton Morning Bulletin*. According to this press report, I had suggested that the ASC should ensure that mining companies disclose the accounts."

Flew explained if security deposits paid by miners to government are *less* than the provision a company may have made, no further reporting was required. Continuing, he said that "if the security deposit is *greater* than the provision, but the mine and its auditors are satisfed as to the level of the provision, then the difference may appear in contingent liabilities." That seemed back to front to me, but then again, I'm not a mining specialist.

Finally, Flew expressed disappointment that someone in my "situation" could have made such uninformed comment on such a matter. Under his signature was a note that a copy of his letter had been forwarded to the vice-chancellor of my university.

I felt compelled to reply. After outlining my understanding of accounting standards, I discussed the accuracy of the press report. I then invited him to extend me the courtesy of replying in a particular fashion.

Well, at least he accepted that I had been misquoted (again, copy to the vice-chancellor).

Now this experience aroused my interest in whether there was any substance in the *Sun-Herald* report. Discreet enquiries produced a sheaf of documents which confirmed that a number of senior Queensland public servants have expressed concerns about the adequacy of some arrangements for mine rehabilitation in Queensland. These concerns related to:

- the ambiguity of statements regarding the standard marine environment – likely to flow from run-off and uncontrolled leaching of waste from mining operations.

The documents also confirmed that some public servants had recommended that at least one mining company should be required to show cause why its lease should not be cancelled – with the aim of encouraging immediate rectification of breaches to environmental legislation.

Now plainly the task of estimating the cost of mine rehabilitation is difficult. As one former mining executive explained, "sometimes you have a big hole and a big pile of waste. It's going to cost a lot to fill the hole in. But a few years later you might dig another hole, and use the waste from that hole to fill in the first one. One could get quite different numbers, depending on how you made your projections."

Existing accounting standards for the extractive industries don't deal with such problems. Nor (it seems) are extensive disclosures made voluntarily by the industry.

For example, a quick look at a recent BHP annual report located an item in the statement of accounting policies: "Provision is made in the accounts for restoration and rehabilitation of areas from which natural resources are extracted".

The amounts involved were disclosed, but there was no indication of how these figures were arrived at. Readers can decide for themselves whether such matters should be disclosed under AASB 1001, which defines an accounting policy was made about mining rehabilitation under the heading of "commitments".

The original *Sun-Herald* article alleged that "BHP had the biggest and most embarrassing rehabilitation problems in its 150 kilometres of coal mines in the Bowen Basin".

Citing an internal memorandum, it claimed that "topsoil had never been retained by BHP in many of its coal mines and many spoil piles – heaps of dirt left after mining – were too steep to revegetate".

Flew has observed that this original article was "biased, misleading and sensational". Perhaps so. But it is within the power of miners like BHP Australia Coal Limited to dispell such impressions by publishing:

- a list of their major mine sites;
- a summary of the requirements for mine rehabilitation specified by relevant legislation;
- details of the standard of rehabilitation work to be carried out on those sites;
- details of the rehabilitation work already undertaken on those sites, the work remaining, and the likely timetable; and
- an explanation of how costs of rehabilitation were estimated.

This information would enable readers to have a better understanding of the distinction between "provisions" and "commitments" for mining rehabilitation expenditure.

I'm sending a copy of this article to Mr. Flew.

** Copy to Mr. J.B. Prescott, managing director and chief executive officer of BHP.*