

**ORIGINAL****Form B**

AUST. COMPETITION &  
CONSUMER COMMISSION  
PERTH

29 AUG 2002

*Regulation 7*

**COMMONWEALTH OF AUSTRALIA**

*Trade Practices Act 1974 --- Sub-section 88(1)*

**AGREEMENTS AFFECTING COMPETITION:****APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section :

- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act; and
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

1. **(a) Name of Applicant**

OMG Kokkola Chemicals Holding B.V.

**(b) Short description of business carried on by applicant**

OMG Kokkola Chemicals Holding B.V's Australian business activities involve the exploration, mining, processing and exporting of nickel ore. Its business activities outside of Australia include producing, developing and marketing value added nickel based speciality metals and chemicals.

**(c) Address in Australia for service of documents on the applicant**

c/- Philip Edmands  
Blake Dawson Waldron  
PO Box 7438  
Cloisters Square  
PERTH WA 6850

2. (a) **Brief description of contract, arrangement or understanding and, where already made, its date**

Please see Attachment A.

- (b) **Names and addresses of other parties or proposed parties to contract, arrangement or understanding**

MPI Mines Ltd (ABN 30 054 584 191) and MPI Nickel Pty Ltd (ABN 80 088 127 379).

3. **Name and address of parties and other persons on whose behalf application is made**

MPI Mines Ltd (ABN 30 054 584 191) and MPI Nickel Pty Ltd (ABN 80 088 127 379).

4. (a) **Grounds for grant of authorisation**

Please see Attachment A.

- (b) **Facts and contentions relied upon in support of those grounds**

Please see Attachment A.

5. **This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.**

- (a) **Is this application to be so expressed?**

No.

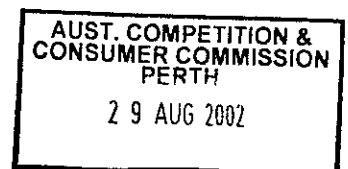
- (b) **If so, the following information is to be furnished:**

- (i) **the names of the parties to each other contract, arrangement or understanding.**

Not applicable.

- (ii) **the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application.**

Not applicable.



6. (a) Does this application deal with a matter relating to a joint venture (see section 4J of the Trade Practices Act 1974)?

Yes, details of which are described in Attachment A.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Yes.

- (c) If so, by whom or on whose behalf are those other applications being made?

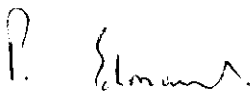
OMG Kokkola Chemicals Holding B.V. on its own behalf and on behalf of MPI Mines Ltd (ABN 30 054 584 191) and MPI Nickel Pty Ltd (ABN 80 088 127 379).

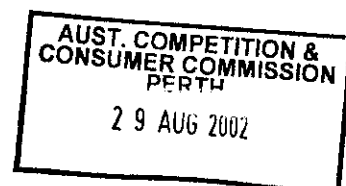
7. Name and address of person authorised by the applicant to provide additional information in relation to this application.

Philip Edmands  
Blake Dawson Waldron  
PO Box 7438, Cloisters Square  
PERTH WA 6850  
Ph: (08) 9366 8091  
Fax: (08) 9366 8111  
Email: philip.edmands@bdw.com.au

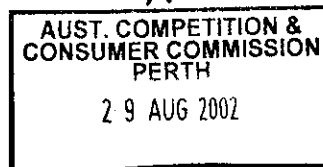
Dated this 29<sup>th</sup> day of August 2002

Signed on behalf of the applicant

  
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ATTACHMENT A

TO APPLICATIONS FOR A GRANT OF AUTHORISATION BY OMG KOKKOLA  
CHEMICALS HOLDING B.V. FOR AUTHORISATION UNDER SECTION 88(1) OF  
THE *TRADE PRACTICES ACT 1974*

1. **BACKGROUND TO THE APPLICATIONS**

On 15 August 2002, OMG Kokkola Chemicals Holding B.V. ("**OMGK BV**"), MPI Mines Ltd ABN 30 054 584 191 ("**MPI**") and MPI Nickel Pty Ltd ABN 80 088 127 379 ("**MPIN**") entered into an alliance ("**Alliance**") for the purpose of developing nickel tenements, mining nickel and concentrating/processing nickel in Australia. The terms of the Alliance were recorded in an Alliance Agreement dated 15 August 2002 ("**Agreement**"), a copy of which is attached.

In clause 2.4 of the Agreement OMGK BV, MPI and MPIN ("**Parties**") acknowledge that the Agreement may contain one or more provisions ("**Relevant Provisions**") to which section 88(1) of the *Trade Practices Act 1974* (Cth) ("**TPA**") applies. The acknowledgment is based on advice provided to OMGK BV to the effect that there may be a risk, albeit technical, that one or more of the provisions of the Agreement might be construed as constituting exclusionary provisions contrary to section 45 of the TPA.

Having considered that advice and having consulted Senior Counsel, the Parties are strongly of the view that the Relevant Provisions do not contravene the provisions of the TPA. They are in the process of seeking advice from Senior Counsel to confirm that view. In the interim, the Parties have determined that it is prudent to apply for a grant of authorisation under the TPA. To that end, clause 2.6 provides that the Relevant Provisions do not come into force unless and until the parties are granted an authorisation under the TPA by the Australian Competition and Consumer Commission ("**ACCC**"). Clause 2.5 addresses the making of an application for authorisation and particularly obligates OMGK BV to make such an application.

The Parties believe that the Alliance will deliver significant public benefits in relation to the Australian nickel industry and markets in Australia. The public benefits significantly outweigh any possible detriment that may be associated with the Relevant Provisions and are such that authorisation ought be granted.

2. **PROVISIONS IN RESPECT OF WHICH AUTHORISATION IS SOUGHT**

The terms of the Alliance are reflected in the Agreement.

The particular provisions of the Agreement in respect of which a grant of authorisation is sought are clauses 3.8, 4.8(a), 6.2 and 6.3. These are the Relevant Provisions for the purposes of this Attachment.

3. **TERMS OF AUTHORISATION SOUGHT**

Application is made under section 88(1) of the TPA for an authorisation:

- (a) to make a contract or arrangement or arrive at an understanding, being the Agreement, where a provision of it (being each of the provisions of the Agreement identified above) would be, or might be, an exclusionary provision or would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA; and
- (b) to give effect to a provision of a contract, arrangement or understanding (being each of the provisions of the Agreement identified above) where the provision is, or may be, an exclusionary provision or has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

Authorisation is sought for the term of the Agreement.

In specifying the terms of the authorisation sought, the Parties stress that they are strongly of the view that the Relevant Provisions do not contravene the provisions of the TPA. Authorisation is sought as a prudent measure to ensure that the parties are afforded the full immunity available under the TPA in relation to a grant of authorisation. Further, the making of the applications for authorisation and information presented in this Attachment should not be taken as indicating that the Parties concede in any respect that any of the Relevant Provisions contravene the TPA.

4. **GROUNDINGS FOR GRANT OF AUTHORISATION**

OMGK BV submits that an authorisation ought be granted under section 88(1) of the TPA in relation to each of the Relevant Provisions on the grounds that in all the circumstances:

- (a) to the extent that the Relevant Provision is or may be an exclusionary provision, the provision and the giving effect to the provision will result, or be likely to result, in such a benefit to the public that it should be allowed to be made or be given effect to, as the case may be; and
- (b) to the extent that the Relevant Provision is not or may not be an exclusionary provision, the provision and giving effect to the provision will result, or be likely to result, in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition (which the Parties deny will occur – rather they believe the Agreement will promote competition).

5. **FACTS AND CONTENTIONS RELIED UPON IN SUPPORT OF THE APPLICATION FOR AUTHORISATION**

5.1 **General comments**

The primary facts and contentions upon which the Parties rely in making the applications for a grant of authorisation are set out below.

- (a) The Australian nickel industry has an important export focus through sales of nickel concentrates and refined nickel products.

- (b) The Parties, acting together under the terms of the Alliance, are relatively minor participants in the Australian nickel industry.
- (c) It is highly unlikely that the Relevant Provisions will have the effect or likely effect of substantially lessening competition; rather, the Agreement is likely to promote competition and opportunities for others.
- (d) The Alliance between the Parties gives rise to public benefits in connection with the nickel industry and Australian markets that would be unlikely to accrue in the absence of the Relevant Provisions.

The Parties are keen to assist the Commission in its process of assessment. If the Commission believes it necessary, the parties will supplement the primary facts and contentions, and provide additional supporting evidence.

## 5.2 Competitive effect of proposed conduct

The Parties believe that the Relevant Provisions will have no real effect on competition in a market in Australia. Indeed, the Parties are strongly of the view that the Relevant Provisions may, when viewed as an ancillary but essential part of the Alliance, promote competition in markets in Australia.

The Parties also assure the Commission that they do not possess any anti-competitive purpose.

## 5.3 Public benefits

The Parties believe that the Alliance will directly give rise to significant and real public benefits in connection with the Australian nickel industry and markets in Australia. The public benefits include, but are not limited to:

- (a) introducing new participants into the Australian nickel industry – an industry which is currently highly concentrated;
- (b) the exploitation of nickel resources which have to date not been feasible to develop by other parties;
- (c) significant capital investment in Australian industry with flow on benefits for the Australian economy;
- (d) increased export income for Australia;
- (e) the availability of OMGK BV's advanced patented nickel processing to an Australian company and within the Australian nickel industry generally;
- (f) lower production costs, higher yields and increased economies of scale and scope at both Silver Swan mine and Cawse mine in Western Australia;
- (g) improving and expanding plant at the Cawse site so as to ensure the survival of the Cawse operations and the continuing availability to both the Parties and other industry participants of the processing facilities at Cawse;

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- (h) extending the life of the Black Swan Project (including Silver Swan) which has already been demonstrated through resource increases;
- (i) combining the complementary assets, intellectual property and know-how of MPI (an Australian company) with the assets of OMGK BV (a Dutch company but part of a multinational group); and
- (j) royalties and taxation revenue for State and Commonwealth governments.

The Parties submit that the public benefits are highly unlikely to arise in the absence of the Alliance. If a comparison is made between the public benefits and public detriments (if any) resulting from the position which would be likely to exist in the future if the authorisation is granted, with the position if the authorisation is not granted, the Parties submit that the public interest is best served by the authorisation being granted.

The Relevant Provisions are ancillary, but important, components of the Alliance and Agreement. The Parties view them as an essential part of the Alliance.

In making this submission, the Parties note that they have restricted the extent of any restraints imposed by the Relevant Provisions as much as possible. This is self-evident, for example, in the terms of clause 3.8.

#### 5.4 Concluding comments

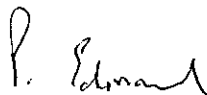
Neither OMGK BV nor MPI would have risked the significant investment of their financial, industrial and technological capital in the Alliance without the reasonable contractual restraints contained in the Agreement and the subject of these applications. In particular, OMGK BV would not have acquired an interest in either the Black Swan Project or Honeymoon Well Project without being assured that:

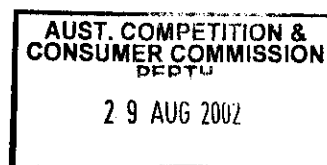
- (a) it could process the nickel produced by those mines at its Cawse operation; and
- (b) it could export all of the product produced by those mines to HNO in Harjavalta, Finland.

Without those assurances, OMGK BV is unlikely to continue to further invest in the Australian nickel industry and would have to consider whether its Australian investments to date fit with its wider strategy.

Dated this 29<sup>th</sup> day of August 2002.

Signed on behalf of the Applicant





Philip Edmands, Partner, Blake Dawson Waldron

**Confidentiality has been granted for the Alliance Agreement. This document is not available for public access**