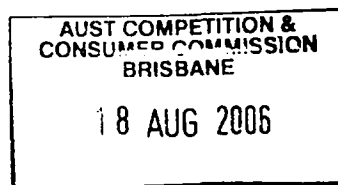
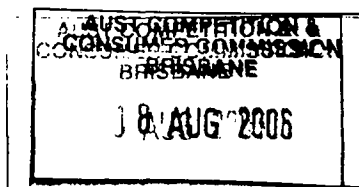


# Deacons



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Singapore  
Taiwan  
Thailand  
Vietnam

18 August 2006

**By Delivery**

Mr David Hatfield  
Australian Competition and Consumer Commission (ACCC)  
3rd Floor  
AAMI Building  
500 Queen Street  
BRISBANE QLD 4000

Our Ref: 2599294

Dear Mr Hatfield

**Application for Authorisation by CS Energy Limited and Callide Power Management Pty Limited**

We act for CS Energy Limited (**CS Energy**) and Callide Power Management Pty Limited (**CPM**).

CS Energy and CPM each has existing coal supply agreements with Anglo Coal (Callide) Pty Ltd and Anglo Coal (Callide) No. 2 Pty Ltd (together, **Anglo Coal**) for the acquisition of coal to be used in the production of electricity at electricity stations, Callide B and Callide C, respectively.

Each of these agreements contains provisions for a price review mechanism. The price review mechanism is set out in clause 12 of both coal supply agreements. This clause provides that a 5 yearly review will be conducted between the parties and that this review must involve a review of the consistency of the operation of the agreement against the principles set out in clause 12.1 of both agreements.

CS Energy and CPM propose that each party agree to jointly negotiate the review under their respective agreements with Anglo Coal. The parties propose to agree to use the same data as the basis for the review, to engage joint experts and consultants (where necessary) and to conduct the negotiation process with Anglo Coal jointly.

We and our clients are of the view that:

KMH/1428613\_1

18/08/2006

- CS Energy and CPM are not in competition with one another for the purposes of sections 45 and 45A of the *Trade Practices Act 1974* (Cth) (TPA);
- even if CS Energy and CPM are in competition with one another, the acquisition of coal under the respective coal supply agreements falls within the section 45A(4)(a) exemption to the application of section 45A of the TPA.

However, this statutory exemption has not yet been subject of relevant judicial interpretation. Accordingly, its scope is unclear.

Therefore, CS Energy and CPM/Callide C Station Owners are seeking authorisation from the ACCC for a period of 5 years to:

- give effect to the existing coal supply agreements which were entered into in 1998 between CPM, for the Callide C Station Owners, (50% owned subsidiary of Shell at the time and subsequently assigned to InterGen), CS Energy and a further subsidiary of Shell (subsequently assigned to Anglo Coal); and
- engage in joint negotiations with Anglo Coal in relation to the price review negotiations under the existing agreements, and any further negotiations,

for the reasons explained in the submission.

We are instructed that Anglo Coal does not object to the joint negotiation process, subject to ACCC interim authorisation being granted and provided that obtaining authorisation from the ACCC does not delay the negotiating process.

Please note CS Energy and CPM also seek interim authorisation.

In this regard, we **enclose**:

1. Form B Application for Authorisation by CSE and CPM made under sub-section 88(1) of the TPA;
2. CSE and CPM's Submission in support of the Form B Application; and
3. our trust account cheque for the lodgement fee of \$7,500.

The supporting submission contains some commercially sensitive and confidential information. Pursuant to section 89(5) of the TPA, our clients request that the Commission exercise its power under section 89(5A) to exclude this information from the register kept by the Commission pursuant to section 89(3).

Accordingly, for the Commission's convenience, we are preparing duplicate copies of the submission. The confidential parts of the enclosed copy have been highlighted within the document, and we will send to you as soon as possible another copy with the confidential parts removed. We propose that the copy with the confidential parts removed be used for the purposes of disclosure on the public register.

If you wish to discuss any aspect of our clients' Application, please call us.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Andrew Rankin', is written over the typed name. To the left of the signature, the initials 'KOR' are written vertically.

Andrew Rankin  
Partner  
Deacons

Contact: Karen Hauff  
Direct line: +61 (0)7 3309 0655  
Email: karen.hauff@deacons.com.au

AUST COMPETITION &  
CONSUMER COMMISSION  
BRISBANE  
18 AUG 2006

Regulation 7

FORM B

COMMONWEALTH OF AUSTRALIA

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

A50027

AGREEMENTS AFFECTING COMPETITION:

APPLICATION FOR AUTHORISATION

To the Australian Competition & 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.

\*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.

\*(Strike out whichever is not applicable)

(PLEASE READ DIRECTIONS AND NOTICES AT END OF FORM)

1. (a) Name of applicant .....  
CS Energy Limited ACN 078 848 745  
(See Direction 2 below)
- (b) Short description of business carried on by applicant .....  
Production of electricity for sale in the National Electricity Market
- (c) Address in Australia for service of documents on the applicant .....  
c/- Deacons  
Level 17  
175 Eagle Street  
Brisbane Queensland 4000
2. (a) Brief description of contract, arrangement or understanding and, where already made, its date  
See Attached Submission and Annexures
- (b) Names and addresses of other parties or proposed parties to contract, arrangement or understanding .....  
Callide Power Management Pty Limited ACN 082 468 700  
Level 11  
61 Mary Street  
Brisbane Queensland 4000

.....  
(See Direction 4 below)

3. Names and addresses (where known) of parties and other persons on whose behalf application is made.....  
Callide Power Management Pty Limited ACN 082 468 700  
Level 3  
10 Felix Street  
Brisbane Queensland 4000  
.....

4. (a) Grounds for grant of authorisation

See attached Submission.....  
.....  
.....

- (b) Facts and contentions relied upon in support of those grounds.....  
See attached Submission  
.....

.....  
(See Notice 1 below)

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 above-mentioned 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 .....

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

.....  
(See Direction 5 and Notice 2 below)

6. (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)? No.....

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

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

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

Andrew Rankin  
Partner  
Deacons

Level 17  
175 Eagle Street  
Brisbane Queensland 4000

---

---

Dated 15th August 2006

Signed by/on behalf of the applicant

*aw Rankin*

.....  
(Signature)

*ANDREW WILLIAM RANKIN*

.....  
(Full name)

*Solicitor*

.....  
(Description)

### DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1(b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished -
  - (a) in so far as the particulars or any of them have been reduced to writing - by lodging a true copy of the writing; and
  - (b) in so far as the particulars or any of them have not been reduced to writing - by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced to writing.
5. Where the application is made also in respect of other contracts, arrangements or understandings which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangement or understanding referred to in item 2.

### NOTICES

1. In relation to item 4, your attention is drawn to sub-sections 90(6) and (7) of the *Trade Practices Act 1974* which provide as follows:-
  - "(6) The Commission shall not make a determination granting an authorisation under sub-sections 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct, unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if
    - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;

(b) the proposed covenant were given, and were complied with; or

(c) the proposed conduct were engaged in,

as the case may be.

(7) The Commission shall not make a determination granting an authorisation under sub-section 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding, or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant."

2. If an authorisation is granted in respect of a proposed contract, arrangement or understanding the names of the parties which are not known at the date of this application, the authorisation shall, by sub-section 88(14) of the *Trade Practices Act 1974*, be deemed to be expressed to be subject to a condition that any party to the contract, arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.



# Submission Supporting Form B Application for Authorisation

## 1. Introduction

- 1.1 This Submission supports the Application for Authorisation under Division 1 of Part VII of the TPA in relation to:
- (1) giving effect to the existing coal supply contracts and arrangements identified and described in sections 6 and 10 of this Submission; and
  - (2) making the arrangements identified and described in section 11 of this Submission
- 1.2 The Application and this Submission are made on behalf of, and for the benefit of, each of the Applicants.
- 1.3 Parts of the information contained in this Submission and the copies of the agreements set out in the annexures to this Submission are confidential and may not be disclosed to any person without the prior written consent of the Applicants and the other parties to the agreements.
- 1.4 The Applicants claim that this information is exempt from disclosure under the *Freedom of Information Act 1982 (Cth)*. Furthermore, pursuant to section 89(5) of the TPA, the Applicants request that the Commission exercise its power under section 89(5A) to exclude this information from the register kept by the Commission pursuant to section 89(3).
- 1.5 Where such information or documents are confidential, these parts have been highlighted within this document. A duplicate copy of this Submission with the confidential parts removed has been provided to the ACCC for the purposes of disclosure on the public register.

## 2. Procedural formalities

- 2.1 The fact that the Applicants purchase coal from a wholly owned subsidiary of Anglo Coal from the Callide Mine for use at the Callide Power Plant is known to the public, but the terms of the agreements are commercial in confidence. The Applicants confirm that the ACCC is free to undertake market enquiries necessary to evaluate the Application, provided that confidential information is not disclosed as part of that enquiry.

## 3. Background

- 3.1 The Callide Power Stations have an installed capacity totalling 1,660 MW (nameplate rating). They are comprised of Callide A (4x 30MW), Callide B (2x350MW) and Callide C (2x420MW).
- 3.2 The Callide Power Stations are connected to the national electricity grid at Biloela in central Queensland and operate within the National Electricity Market. Callide Power Stations presently generate some 11,000GWh/year, which is sufficient to provide power to about 2 million homes. In the national electricity market, Callide B and

Callide C operate as base load stations, providing a reliable and consistent source of energy. 'Base load' operation requires energy output around the clock.

- 3.3 Callide A station, owned and operated by CS Energy Limited (**CS Energy**), was commissioned in 1965 and refurbished in 1998. It is not operating at present but is intended to be used in future for development and research purposes.
- 3.4 Callide B station, owned and operated by CS Energy, was commissioned in 1988.
- 3.5 Callide C station is managed by Callide Power Management Pty Limited (**CPM**), which is a joint venture company owned by CS Energy (through its wholly owned subsidiary Callide Energy Pty Ltd) and InterGen Australia Group through IG Power (Callide) Pty Ltd. Each of the joint venture parties owns 50% of CPM and Callide C.
- 3.6 All three Callide stations burn black coal delivered by a common conveyor belt from the Callide Mine adjacent to the Callide Power Stations.

#### 4. The Callide Mine

- 4.1 The Callide Mine is owned by Anglo Coal (Callide) Pty Ltd and Anglo Coal (Callide) No. 2 Pty Ltd in joint venture in the interests of 66.67% and 33.33% respectively (together, **Anglo Coal**). The joint venture participants have appointed Callide Coalfield (Sales) Pty Ltd as their agent for the sale of coal from the Callide Mine. The Callide Mine produces low sulphur, sub-bituminous thermal coal, primarily for domestic power generation. The Callide Mine is located in the Callide Basin of central Queensland and is adjacent to the rural community of Biloela.
- 4.2 Based upon publicly available information, the Callide Mine operates as an integrated open cut operation, utilising both dragline and truck and shovel methods of overburden removal. Its annual production averages 9.8 Mt of saleable coal. This annual production is based on 10.7 Mt ROM with 9.5444 Mt saleable. The Callide Mine has reserves of 253.13 Mt (current to 30.06.05) coal<sup>1</sup>
- 4.3 The Callide Mine is 120 kilometres by rail from the port of Gladstone.

#### 5. General Information on the Callide plants

Site capacity	1,660 MW		
Fuel supply	Black coal	~ 6 million tonnes pa	Conveyed from the adjacent Callide Mine
	<b>Callide A (in storage)</b>	<b>Callide B</b>	<b>Callide Power Plant (Callide C)</b>
<b>GENERAL</b>			
Commissioned	(Recommissioned) 1998	1988	2001
Capacity	120 MW	700 MW	840MW
Units	4x30 MW	2x350 MW	2x420 MW
Transmission	132 kv	275 kv	275kv
Fuel	Black coal	Black coal	Black coal
<b>TURBINE</b>			
Type	Steam	Steam	Steam
Manufacturer	Parsons	Hitachi	Toshiba
<b>BOILER</b>			

<sup>1</sup> <http://www.anglocoal.com.au/wps/wcm/connect/AngloCoal/Our+Business/Our+Operations/Callide>

Manufacturer	Mitchell Engineering	Babcock Hitachi	IHI
Height	30 m	42 m	42 m
Furnace temperature	1400 °C	1400 °C	1400 °C
Steam pressure	4300 kPa	17700 kPa	25100 kPa
Steam temperature	460 °C	539 °C	566 °C
<b>CHIMNEYS</b>			
Height	76 m	210 m	230 m
Flue gas temp	144 °C	135 °C	135 °C

## 6. The Operations and interaction between CSE and CPM

- 6.1 Coal is supplied under separate coal supply agreements for Callide B (CS Energy as customer) and Callide C (CPM as customer) that were executed concurrently in 1998. Copies of these confidential contracts, together with amending agreements, are annexed to this submission as Annexure A and Annexure B.
- 6.2 At the time that these agreements were entered into, Shell Coal (Callide) Pty Ltd and AMP Life Limited, as participants in the Callide Joint Venture, were the owners of the Callide Mine. When the Shell Group disposed of its worldwide coal assets in 2000, Anglo Coal acquired Shell's 66.67% interest in the joint venture. A short time later, Anglo Coal subsequently acquired AMP's 33.33% interest. Further, a separate subsidiary of Shell had a 50% ownership of CPM and Callide C. IG Power (Callide) Pty Ltd has subsequently taken an assignment of these interests.
- 6.3 Callide C was established as an incremental development of Callide B, and progressed with Callide C using the services and personnel of CS Energy. The Callide B coal delivery facility is connected to the Callide Mine by a single conveyor belt that is used for both stations B and C.
- 6.4 The establishment of Callide C was advanced by using as much of the existing Callide B infrastructure and manning capability as possible. The main reasons for this were to create economic efficiencies, avoid unnecessary and costly duplication, and to increase production efficiency.
- 6.5 The base price for coal supplied to Callide B and Callide C for electricity generation was determined by the respective agreements which were executed in 1998 during the common negotiation in 1998. This common negotiated price was provided for in the respective executed coal supply agreements. The price determined at this time was the same for Callide B and Callide C stations to simplify administration.
- 6.6 The Applicants believe that the circumstances surrounding those initial negotiations, including the fact that Shell held interests in the Seller and the Buyer, do not give rise to any TPA breaches. However, given the passage of time since the agreements were negotiated, the Applicants are seeking authorisation to give effect to the existing price arrangements in those agreements. Both of these coal supply agreements provide for a price review mechanism, under which a review of prices is to be undertaken 5 years from the date of practical completion for Unit 1 of Callide C.
- 6.7 As a consequence of the method of operation of the Callide stations, the coal purchased under each of the agreements with Anglo Coal is currently mixed at the Delivery Points so that there is no way to distinguish between the coal purchased under the CS Energy agreement or the coal purchased under the CPM agreement.

- 6.8 Coal for the stations is mined, beneficiated, delivered, bunkered and stockpiled using common equipment. The quality of the coal is the same regardless of which power station is supplied, and the quality is determined from a common sample.
- 6.9 There is only one weigher on the single conveyor belt from the Callide Mine that determines the total mass of coal delivered to the two stations.
- 6.10 The allocation of total deliveries and stockpile levels between each station for each month is the same book figure determination, and there is no physical differentiation.
- 6.11 From this book determination, Anglo Coal prepares the invoices for each of the stations. It is important from an operational perspective that the stations run on direct feed from the Callide Mine to avoid double handling.
- 6.12 Drawing from stockpiles is only done when mine deliveries are interrupted.
- 6.13 Direct feed from the Callide Mine or feed from the power stations' stockpile is into a common slot bunker located at the end of the mine conveyor belt adjacent to the power stations' common stockpile area.
- 6.14 Each station draws coal for its boilers from this single slot bunker at a rate that depends on the generating regime for each station.
- 6.15 The generating regime is determined by CS Energy (for Callide B) and CPM (for Callide C).
- 6.16 CS Energy personnel carry out the operation of both stations under two agreements with CPM (Station Services Agreement and Operation & Maintenance Agreement). In summary, there is commonality of production, delivery and administration of coal supplies for the two stations. These confidential agreements are annexed to this submission as Annexure C and Annexure D.

## **7. About CS Energy**

- 7.1 CS Energy is a Queensland Government-owned electricity generator, and one of the fastest growing electricity companies in Australia.
- 7.2 CS Energy uses a diverse mix of fuels to operate almost 2,500 megawatts of electricity generating plant in order to supply the national electricity market and Queensland's North West Minerals Province.
- 7.3 CS Energy employs more than 400 people across Queensland, in four geographically dispersed communities:
  - (1) Swanbank Power Station in south east Queensland;
  - (2) Callide Power Station in central Queensland;
  - (3) Mica Creek Power Station at Mt Isa north west Queensland; and
  - (4) the corporate office in Brisbane.
- 7.4 CS Energy was incorporated on 1 July 1997 when the Queensland electricity supply industry was restructured.

7.5 CS Energy's shareholding is held by five State Government Ministers. The interests of the people of Queensland are represented by two voting shareholders:

- (1) Deputy Premier; Minister for State Development and Trade and Minister for Finance, The Hon Anna Bligh MP; and
- (2) The Minister for Energy and Aboriginal and Torres Strait Islander Policy, The Hon John Mickel MP.

## **8. About CPM**

8.1 CPM is owned through a 50/50 joint venture between CS Energy and InterGen Australia Group. InterGen Australia Group is owned equally by InterGen and China Huaneng Group (CHG). CPM entered into the 1998 coal supply agreement for and on behalf of the then joint venturers, in the Callide C project, namely CS Energy and Shell Coal.

8.2 InterGen is a global power generation firm. InterGen is operating or building a total of 17 power stations representing over 15,000 megawatts (MW). InterGen has projects operating, under construction or in active development in the United States, the United Kingdom, the Philippines, Colombia, Mexico, China, Turkey, Australia, the Netherlands, Spain, Germany, and Singapore.

8.3 CHG is a leading power generation company in China and is wholly-owned by the Chinese government. Its main business is the development, construction, operation and management of thermal and hydropower projects. The company owns over 33,000MW in generation assets predominantly in coal.

8.4 Site operations for CPM are administered by CS Energy through a series of agreements, including the agreements that are Annexures C and D.

## **9. About Anglo Coal**

9.1 Anglo Coal is one of Australia's leading coal producers. Anglo Coal has extensive coal mining interests and prospects in Queensland and New South Wales.

9.2 Anglo Coal is a related body corporate of Anglo American plc, a global leader in mining and having coal operations in Australia, South America and South Africa.

9.3 The majority of the contracted coal from the Callide Mine is supplied to CS Energy and CPM.

## **10. The Coal Supply Agreements**

10.1 Each of CS Energy and CPM has existing coal supply agreements with Anglo Coal for the acquisition of coal to be used in the production of electricity at Callide B and Callide C respectively – refer to Annexure A and Annexure B. Each of these agreements contains provisions for a price review mechanism.

10.2 **Confidential paragraph removed**

10.3 Necessarily, these negotiations will involve the price of the coal being acquired, and whether the current price under each agreement is consistent with the principles set

out in the agreements. ~~Confidential paragraph removed~~ This will also require data collection and analysis, and the input of experts and consultants.

- 10.4 This process will involve significant time commitment and expenditure for CS Energy, CPM, and the Callide C Station Owners under their respective agreements.

## **11. The Proposed Agreement for Price Review**

- 11.1 CS Energy, CPM and the Callide C Station Owners propose that they will agree to jointly undertake the review of their respective agreements with Anglo Coal. The parties propose to agree to use the same data as the basis for the review, to engage joint experts and consultants (where necessary) and to conduct the negotiation process with Anglo Coal jointly.
- 11.2 Anglo Coal wishes to conduct and complete negotiations with CS Energy and CPM/Callide C Station Owners as soon as possible and does not oppose the joint negotiation process, subject to ACCC authorisation, as it believes this will expedite the process, provided that obtaining authorisation from the ACCC does not delay the negotiating process. However, even if authorisation is granted Anglo reserves its right to negotiate a separate outcome with each of CS Energy and CPM.
- 11.3 Under the agreements the review must take place within 30 days of the date which is the fifth anniversary of the Commercial Load Date of unit 1 of the Callide C power station which was August 14 2001. It is Anglo Coal's intention to proceed with negotiations with CS Energy and CPM separately in the event ACCC authorisation has not been granted within this time period.

## **12. The Applicants' Submission to the ACCC**

- 12.1 CS Energy and CPM submit to the ACCC that the acquisition of coal under the respective coal supply agreements falls within the section 45A(4)(a) exception to the application of section 45A of the TPA. Among other things section 45A(4) of the TPA expressly exempts 'collective acquisitions', from the scope of the price fixing prohibition. In particular, it exempts arrangements or understandings:
- (1) *In relation to the price of goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding...*
- 12.2 This statutory exemption has not yet been subject of relevant judicial interpretation. Accordingly, its scope is unclear. For example, it is not clear whether to satisfy the 'collective' element of the exemption it is necessary for parties to:
- (1) Collectively contract for the purchase of goods or services;
- (2) Collectively negotiate, but separately contract, for the purchase of the goods or services (as suggested by the ACCC, below); or
- (3) Collectively acquire the goods or services, in the sense of receiving or taking possession of the goods or services in a collective manner (e.g. collective coal storage and mixing).

In this case, the arrangements proposed by the parties would involve collective negotiation but separate contracting (with the possibility of a separate pricing outcome) within paragraph (3) above.

- 12.3 Further, even if CS Energy and CPM/Callide C Station Owners are to be regarded as being in competition with one another for the acquisition of coal, the Applicants submit to the ACCC that the acquisition of coal under the respective coal supply agreements falls within the section 45A(4)(a) exception to the application of section 45A of the *Trade Practices Act 1974* (Cth).
- 12.4 The basis for this assertion is that the coal being used by CS Energy and CPM to generate power at the Callide B and Callide C sites is acquired collectively, since all essential provisions of the respective agreements are the same, and the coal is mixed once it is acquired. On this basis, the existing pricing arrangements and the proposed joint negotiation by CS Energy and CPM with Anglo Coal in relation to the price reviews under the agreements for the acquisition of coal should not be considered to be a contravention of the *Trade Practices Act*.
- 12.5 This submission that the section 45A(4)(a) exemption should apply is based on the following facts and circumstances:
- (1) currently the quality of the coal acquired under the existing coal supply agreements is the same regardless of which power station is supplied, and this is determined from a common sample.
  - (2) coal for the stations is mined, beneficiated and delivered by Anglo using its equipment and bunkered and stockpiled by CSE and CPM.
  - (3) each contract utilises the same weigher.
  - (4) the allocation of total deliveries and stockpile levels each month between each station is a book figure determined by CS Energy as the operators of Callide Power Station (there is presently no physical differentiation). From this book determination, the mine prepares the invoices for the two stations.
  - (5) at present direct feed from the mine or feed from the power stations' stockpile is into a common slot bunker located at the end of the mine conveyor belt adjacent to the power stations' common stockpile area. Each station draws coal for its boilers from this single slot bunker at a rate that depends on the generating regime for each station.
- 12.6 Accordingly, CS Energy and CPM/Callide C Station Owners are seeking authorisation for a period of 5 years from the ACCC to:
- (1) give effect to the existing coal supply agreements which were entered into in 1998 between CPM, for the Callide C Station Owners, (50% owned subsidiary of Shell at the time and subsequently assigned to InterGen), CS Energy and a further subsidiary of Shell (subsequently assigned to Anglo Coal); and
  - (2) engage in joint negotiations with Anglo Coal in relation to the price review negotiations under the existing agreements.
- 12.7 Anglo Coal does not oppose the joint negotiation process, subject to ACCC authorisation, as it believes this will expedite the process, provided that obtaining authorisation from the ACCC does not delay the negotiating process. However, even

if authorisation is granted Anglo reserves its right to negotiate a separate outcome with each of CS Energy and CPM.

- 12.8 CS Energy and CPM/Callide C Station Owners submit to the ACCC that Anglo Coal is most likely to be the only interested party to be affected by the joint negotiation, and that the conduct of the joint negotiation will not have the effect or likely effect of substantially lessening competition in any market.

### **13. The reasons for the Application**

- 13.1 CS Energy and CPM/Callide C Station Owners are due to renegotiate the terms of their respective coal supply agreements with Anglo Coal as detailed above. CS Energy and CPM/Callide C Station Owners wish to jointly undertake this negotiation with Anglo Coal.
- 13.2 The Application is made on the basis that the proposed agreement between CS Energy and CPM/Callide C Station Owners to jointly negotiate with Anglo Coal may have the potential to contravene provisions of Part IV of the TPA on a technical basis. This is discussed further in section 14 of this Submission.
- 13.3 Section 88(1) of the TPA gives the ACCC the power to grant authorisation for the making of a contract, arrangement or understanding containing a provision which would have or might have the effect or likely effect of substantially lessening competition in a market within the meaning of section 45 of the TPA, and applies similar language in reference to the giving effect to such a contract, arrangement or understanding.
- 13.4 Given that the respective coal supply agreements are already in existence between each of CS Energy and CPM/Callide C Station Owners and Anglo Coal, it is submitted that CS Energy and CPM/Callide C Station Owners are not "in competition with each other" for the purposes of section 45 and 45A of the TPA. Further, it is argued that CS Energy and CPM/Callide C Station Owners do not compete with each other in the acquisition of coal due to the fact that the Callide B and Callide C stations are adjacent to each other, draw coal from the same power station stockpile and are jointly managed.
- 13.5 The fact that the Applicants are making this Application does not mean, and should not be taken to mean, that the making or giving effect to the existing pricing agreements or the proposed agreement to jointly negotiate with Anglo Coal in relation to price under the existing coal supply agreements, will or has the potential to contravene any of the provisions in Part IV of the TPA.

### **14. The Technical Nature of the Competition Issues**

- 14.1 The technical nature of the potential competition issues is further emphasised by the fact that, in a practical sense, physical possession of the coal by each of CS Energy and CPM/Callide C Station Owners is indistinguishable from the moment that the coal is extracted from the Callide Mine to the moment that it is delivered to the respective plants. This may be considered as further support for the assertion that the acquisition of coal under the respective agreements is a collective acquisition within the meaning in section 45A(4)(a) of the TPA. On this basis, the joint negotiation in relation to price under the existing coal supply agreements should be considered to be exempt from the operation of section 45A of the TPA.



- 14.2 Additionally, the proposed joint price review arrangement differs only slightly from the existing arrangements between CS Energy, CPM/Callide C Station Owners and Anglo Coal with respect to the acquisition and pricing structure under the respective coal supply agreements. That is, the only change to the respective arrangements under the coal supply agreements is that the negotiation of the price under the coal supply agreements will be conducted jointly rather than separately. As the pricing mechanism under each agreement is currently the same, this will not alter the status quo in relation to the market identified in paragraph 15 of this Submission.
- 14.3 Further, the joint negotiation, when considered in a practical sense, will not have the purpose or effect of substantially lessening competition in the market; rather it is the deeming effect of section 45A of the TPA which creates the possibility of a contravention.

## **15. Market Definition**

- 15.1 For the purposes of Part IV of the TPA the relevant market in which CS Energy and CPM/ Callide C Station Owners operate for the purposes of this Application is the market for the acquisition of black coal from the Callide Mine for use in the production of electricity.
- 15.2 CS Energy's and CPM's installed plant of 1,540MW (700 MW for Callide B and 840 MW for Callide C) represents 18% of the installed capacity in Queensland per year, and represents 4.44% of the installed capacity in the National Electricity Market.

15.3 Confidential paragraph removed

## **16. Market participants and relative market shares**

- 16.1 CS Energy and CPM/Callide C Station Owners are the main consumers of the coal mined at the Callide Mine. Other customers of the Callide Mine are Queensland Alumina Limited (**QAL**) and a joint venture comprising Comalco, three of its Japanese partners in Boyne Smelters Limited, and NRG (a US-based energy provider), which runs Gladstone Power Station (Comalco). Each of these companies purchases the coal and then transports it to Gladstone for use in the Gladstone Power Station and Queensland Alumina Refinery.
- 16.2 Confidential paragraph removed
- 16.3 As outlined in paragraph 13.4 CS Energy and CPM/Callide C Station Owners may not be "in competition" with each other within this market, as the quantity of coal to be acquired by each entity under its coal supply agreement is set within a specified range.

## **17. The Underlying reason for the Joint Negotiation**

- 17.1 CS Energy and CPM/Callide C Station Owners have already entered into their respective agreements with Anglo Coal for the acquisition of coal from the Callide Mine. The primary difference between the current arrangements under those agreements and the proposed joint negotiation is that the process will be a streamlined one where all parties will be involved in the same negotiation, rather than each of the Applicants negotiating separately. The mechanism for negotiation will not

differ from the mechanism which would be used if the negotiations were conducted separately.

17.2 The Applicants have identified many advantages in conducting these negotiations jointly, which are detailed in paragraph 20, including:

- (1) elimination of duplication;
- (2) lower costs;
- (3) time efficiencies;
- (4) economies of scale; and
- (5) lower administration costs.

## **18. The Authorisation Test**

18.1 Section 90(6) of the TPA provides that the ACCC must be satisfied in all of the circumstances that the provision in the **proposed** contract, arrangement or understanding would result, or would be likely to result, in a benefit to the public, and that the benefit would outweigh the likely detriment to the public constituted by any potential of competition in the market.

## **19. Public Benefits and public detriments**

19.1 In considering the public benefits and the public detriments associated with any conduct, the following principles should be considered and applied:

- (1) the assessment of efficiency and progress must be from the perspective of society as a whole. This efficiency extends to production efficiency, allocative efficiency and dynamic efficiency;
- (2) the making of an application for authorisation does not create a presumption that the conduct to be authorised is likely to contravene Part IV of the TPA; and
- (3) the analysis under section 90(6) is different from that under section 45.

## **20. Public Benefit**

20.1 The public benefits that arise from the existing jointly negotiated coal supply agreements include:

- (1) increased economies of scale and efficiency levels;
- (2) sharing of resources between CSE and CPM/Callide C Station Owners, such as the use of one expert mining consultant for both parties;
- (3) developing a common system for monitoring the quality of the coal acquired by each of CS Energy and CPM/Callide C Station Owners;

- (4) sharing by both CS Energy and CPM/Callide C Station Owners of equipment, such as the sampler; and
- (5) mitigation of loss of electricity generation (supply) risk through inconsistent coal delivery and quality mechanisms.

20.2 The public benefits that arise from the proposed joint negotiations for review of the coal supply agreements include:

- (1) increased efficiency by minimising duplication of legal, accounting and consulting costs and expenses for each of CS Energy and CPM;
- (2) increased efficiency by minimising duplication of administrative costs and expenses for CS Energy and CPM in conducting the joint negotiations with Anglo Coal;
- (3) practicality, efficiency and resource savings through not having to ring-fence personnel in relation to the negotiations; and
- (4) increased efficiency and streamlining in the process of negotiation.

#### **Transaction Cost Savings**

The ability for CS Energy and CPM/Callide C Station Owners to negotiate jointly the price under their respective coal supply agreements with Anglo Coal will result in efficiency. This is because:

- (1) only one negotiation will need to occur;
- (2) each of CS Energy and CPM/Callide C Station Owners will have the benefit of using shared experience and data in preparing for the review;
- (3) there will be no duplication of data, cost analysis, determination of relevant considerations and the basis for review; and
- (4) CS Energy and CPM/Callide C Station Owners will not have to establish and maintain a ring-fencing regime to ensure that negotiations are kept entirely independent.

#### **Economies of Scale**

The ability for CS Energy and CPM/Callide C Station Owners to jointly negotiate price under their respective coal supply agreements with Anglo is expected to result in increased economies of scale to each of CSE and CPM, and to Anglo Coal, with regard to mine and power station quality, delivery, stockholding and administrative processes.

#### **Administrative Savings**

If CS Energy and CPM/Callide C Station Owners jointly negotiate the review of their respective agreements with Anglo Coal, this will result in lower administrative costs, as the process will be streamlined and there will not be the necessity to complete every step in the review process twice. This is expected to result in financial savings. The result will be increased efficiency at lower cost.

### **No Ring-Fencing Requirement**

The joint negotiation will eliminate the need to implement a “ring-fencing” arrangement between CS Energy and CPM/Callide C Station Owners of their respective negotiating teams. This would be a highly involved and costly exercise given the high level of integration between CSE and CPM.

There is a risk to electricity generation from inappropriate coordination of coal supply activities whilst organisations are ring-fenced. Further, the cost saving involved in this would assist in passing on lower prices to consumers (or maintaining the existing prices in the event of a price rise)

Additionally, there is a need for CS Energy involvement (for guidance, assistance, approval and funding) in the CPM/Callide C Station Owners negotiation by virtue of its 50% ownership and of CPM).

### **Lack of Duplication**

As discussed above, the agreement or arrangement between CS Energy and CPM/Callide C Station Owners will result in only one data collection, and will ensure that there is no unnecessary duplication as it relates to the negotiation process. Consistent data will result in benefits for CS Energy and CPM. This free flow of information will be conducive to competitive negotiations.

## **21. No Public Detriment**

- 21.1 The Applicants submit that there is no public detriment likely to arise from the existing or proposed arrangements.
- 21.2 The quantities of coal under the respective coal supply agreements are currently set within specified parameters such that, irrespective of whether the negotiations are pursued individually (as originally contemplated by the respective coal supply agreements) or jointly, there can be no significant impact on the demand within the market as defined.
- 21.3 On this basis, the Applicants will not accrue any market power as a result of proceeding with a joint negotiation.

## **22. The Future With and Without Test**

- 22.1 If authorisation is granted, the joint negotiation arrangement will not allow for a collective boycott.
- 22.2 Each agreement contains essentially the same terms (as they relate to price review). There is also a high level of integration between CS Energy and CPM/Callide C Station Owners in their operations of the Callide Plant. Consequently, not to permit CS Energy and CPM to jointly negotiate would probably increase costs by way of duplication of processes, procedures, and would foster inefficiency without altering the competitive environment of the market as a result of negotiations proceeding separately.
- 22.3 If CS Energy and CPM/Callide C Station Owners are not permitted to jointly negotiate then this will result in:

- (1) creating unnecessary duplication of processes and procedures;
- (2) fostering inefficiencies;
- (3) increasing costs unnecessarily; and
- (4) denying the public benefits described in paragraph 20 above.

22.4 Conversely, if CS Energy and CPM/Callide C Station Owners are permitted to jointly negotiate with Anglo Coal in relation to the respective agreements, this will result in increased efficiencies, decreased costs.

### **23. Adverse Consequences**

23.1 If CS Energy and CPM/Callide C Station Owners are authorised to jointly negotiate with Anglo Coal, there will be no adverse consequences to the consumer or to competitors of CS Energy and CPM/Callide C Station Owners.

23.2 In fact, consumers may ultimately benefit because the cost savings on the negotiation process, and any savings in the price obtained in the acquisition of the coal, may ultimately flow on to consumers.

23.3 Competitors will not be affected by this arrangement, as CS Energy and CPM/Callide C Station Owners acquire quantities within a set range from the Callide mine under their respective agreements.

### **24. Interim Authorisation**

24.1 Confidential paragraph removed.

24.2 In the absence of interim authorisation from the ACCC, CS Energy and CPM/Callide C Station Owners will lose the opportunity to jointly negotiate. This will result in inefficient processes, unnecessary duplication, and increased costs to all parties concerned. The Applicants understand that Anglo Coal will not extend the review date, and if interim authorisation is not granted the opportunity to take advantage of increased efficiencies and lower costs will not be possible.

24.3 If interim authorisation is granted, the review process will most likely be completed before a final determination as to the Application is made by the ACCC.

24.4 However, for the reasons set out above, there would be no adverse consequences of any kind to consumers or other competitors in the market, if interim authorisation is granted but final authorisation is not granted.

### **25. Conclusion**

25.1 In summary, there is no appreciable anti-competitive (or other) detriment associated with the existing coal supply agreements or the proposed joint negotiations. Furthermore, a joint negotiation would result in public benefits achieved through increased efficiencies, elimination of unnecessary duplication, and cost savings.

25.2 The joint negotiation will not result in any competition impact within the market, rather, it will in fact benefit CS Energy, CPM/Callide C Station Owners.

- 25.3 In discussions between the Applicants and Anglo Coal, Anglo Coal has indicated that it is not opposed to the joint negotiation (subject to CS Energy and CPM obtaining interim authorisation from the ACCC and the process not causing delays to the negotiating process), which, in the Applicant's submission, is further justification for authorisation being granted.

## **Glossary**

**ACCC** means the Australian Competition and Consumer Commission;

**Applicants** means CS Energy and CPM;

**Callide C Station Owners** means Callide Energy Pty Ltd and IG Power (Callide) Pty Ltd;

**Callide Power Station** means the Callide A, Callide B and Callide C plants;

**Callide Mine** means the mine owned by Anglo Coal located at Biloela; and

**TPA** means the *Trade Practices Act 1974* (Cth) as amended.

**Annexure A – Confidential Agreement removed**



**Annexure B – Confidential Agreement removed**

**Annexure C – Confidential Agreement removed**

**Annexure D – Confidential Agreement removed**