



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

CS Energy Limited and Callide Power Management Pty Limited

in respect of

a joint negotiation for the purchase of black coal with Anglo Coal.

Date: 12 October 2006

Authorisation no.: A50027

Public Register no. C2006/1627

Commissioners:

Samuel
Sylvan
King
Martin
McNeill
Smith
Willett

Summary

The ACCC proposes to grant authorisation to CS Energy and CPM to jointly negotiate a price review with Anglo Coal. The ACCC proposes to grant authorisation for a period of 5 years.

The authorisation process

Authorisation is a process under which the Australian Competition and Consumer Commission (ACCC), in response to an application, can grant immunity on public benefit grounds against action under the competition provisions of the *Trade Practices Act 1974* (the Act).

Generally, the ACCC can grant immunity from the application of the competitive provisions of the Act if it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC runs a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

The application for authorisation

CS Energy and CPM (the Applicants) are seeking authorisation for 5 years to negotiate jointly with Anglo Coal in relation to price review mechanisms under existing agreements. 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. Both Applicants have existing agreements with Anglo Coal which contain provisions for a price review mechanism to be conducted on a 5 yearly basis.

Background

CS Energy and CPM operate electricity stations, Callide B and C respectively, and have requested authorisation for a period of 5 years to jointly negotiate price reviews with coal producer Anglo Coal, owner of the Callide Mine. The price reviews are stipulated under existing coal supply agreements between each of the Applicants and Anglo Coal. In seeking authorisation, CS Energy and CPM submit that there are public benefits through increased efficiency, particularly by minimising duplication in legal, accounting and consulting costs, as well as streamlining the negotiation process with Anglo Coal.

Public detriment

The ACCC accepts the view advanced by CS Energy and CPM that demand within the market will not be significantly impacted. The ACCC considers it unlikely that either CS Energy or CPM will accrue market power as a result of proceeding with a joint negotiation. In addition, the ACCC recognises that Anglo Coal, the party most likely affected by the proposed conduct, is not opposed to the joint review process.

Public benefit

The ACCC is satisfied that public benefits will result from the proposed joint price negotiations with Anglo Coal. While the ACCC considers that efficiency savings that avoid duplication are a public benefit, the public benefits claimed by CS Energy and CPM are unlikely to be substantial relative to the size of the business involved.

Furthermore, despite Anglo Coal not opposing the joint negotiation process, Anglo's submission, lodged on 21 September 2006, raised some issues/clarifications that suggest that the

savings through avoiding duplication in the negotiation process may not be as extensive as the Applicants suggested.

Balance of public benefit and detriment

Overall, the ACCC considers that there are public benefits likely to arise from the proposed conduct. Although these public benefits are not extensive relative to the size of the business involved, the ACCC considers that there is little if any public detriment to the proposed conduct. Accordingly, the ACCC is satisfied that the benefits outweigh any detriments.

Length of authorisation

The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

In this instance, the ACCC proposes to authorise the joint negotiation for 5 years. Should CS Energy and CPM wish to enter into fresh price review joint negotiations at the conclusion of the authorised period, the ACCC would expect a further application for authorisation before that time.

Conclusion

The ACCC proposes to grant authorisation to CS Energy and CPM to jointly negotiate the price review with Anglo Coal. Authorisation is granted for 5 years.

Interim authorisation

CS Energy and CPM also requested interim authorisation to jointly negotiate with Anglo Coal. The ACCC granted interim authorisation on 13 September 2006, for the parties to commence negotiations.

1. INTRODUCTION	1
AUTHORISATION.....	1
THE APPLICATION FOR AUTHORISATION.....	1
INTERIM AUTHORISATION	2
CHRONOLOGY	2
2. BACKGROUND TO THE APPLICATION.....	3
THE APPLICANTS	3
THE OTHER PARTY – ANGLO COAL	3
THE AGREEMENTS	4
THE ELECTRICITY INDUSTRY.....	5
THE COAL INDUSTRY IN QUEENSLAND	6
3. THE APPLICATION AND THE ACT	7
4. THE NET PUBLIC BENEFIT TEST	9
5. ACCC EVALUATION.....	11
SUBMISSIONS RECEIVED BY THE ACCC	11
THE MARKET	11
THE COUNTERFACTUAL.....	12
PUBLIC DETRIMENT	12
PUBLIC BENEFIT.....	12
BALANCE OF PUBLIC BENEFIT AND DETRIMENT.....	13
LENGTH OF AUTHORISATION	14
6. DRAFT DETERMINATION	15
THE APPLICATION	15
THE NET PUBLIC BENEFIT TEST	15
CONDUCT FOR WHICH THE ACCC PROPOSES TO GRANT AUTHORISATION	15
CONDUCT NOT PROPOSED TO BE AUTHORISED.....	15
INTERIM AUTHORISATION.....	16
FURTHER SUBMISSIONS.....	16

1. Introduction

Authorisation

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2. The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.
- 1.3. The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4. The ACCC runs a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5. After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6. Once a draft determination is released, the Applicants or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the Applicants and interested parties to lodge written submissions on the draft.
- 1.7. The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

The application for authorisation

- 1.8. On 18 August 2006, CS Energy and CPM lodged application A50027 with the ACCC.
- 1.9. CS Energy and CPM are seeking authorisation to negotiate jointly with Anglo Coal in relation to price review mechanisms under existing agreements. 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. Both of the existing agreements contain provisions for a price review mechanism to be conducted on a 5 yearly basis.
- 1.10. CS Energy and CPM seek authorisation for a period of 5 years.

Interim Authorisation

1.11. CS Energy and CPM also applied for interim authorisation. The ACCC granted interim authorisation on 13 September 2006 for the parties to commence the joint negotiations with Anglo Coal. The interim authorisation does not extend to the parties concluding an arrangement with Anglo Coal.

Chronology

1.12. Table 1.1 provides a chronology of significant dates in the consideration of this application.

Table 1.1: Chronology of application for authorisation A50027

DATE	ACTION
18 August 2006	CS Energy and CPM lodged applications for authorisation with the ACCC, including an application for interim authorisation.
01 September 2006	Closing date for submissions from interested parties in relation to the request for interim authorisation.
13 September 2006	The ACCC granted interim authorisation to allow CS Energy and CPM to commence joint negotiation with Anglo Coal.
22 September 2006	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
11 October 2006	Draft Determination Issued

2. Background to the application

The Applicants

- 2.1. CS Energy is a Queensland Government-owned electricity generator, incorporated on 1 July 1997 when the Queensland electricity supply industry was restructured. CS Energy uses a range 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.
- 2.2. CS Energy operates in three geographically dispersed communities across Queensland:
 - Swanbank Power Station in south east Queensland;
 - Callide Power Station in central Queensland; and
 - Mica Creek Power Station at Mt Isa north west Queensland;
- 2.3. CS Energy owns and operates Callide Station (stations A and B). Station A is not operating at present.
- 2.4. CPM manages the Callide C power station. 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). 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.
- 2.5. The Callide B and Callide C electricity stations (the Callide stations) are connected to the national electricity grid at Biloela in central Queensland and operate within the National Electricity Market. The Callide stations currently generate around 11 000 GWh/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.

The other party – Anglo Coal

- 2.6. Anglo Coal is an Australian coal producer. Anglo Coal has extensive coal mining interests and prospects in Queensland and New South Wales. Anglo Coal is a related body corporate of Anglo American plc, a global mining company with coal operations in Australia, South America and South Africa.
- 2.7. Anglo Coal is the owner of the Callide Mine. The Callide Mine produces low sulphur, sub-bituminous thermal coal, primarily for domestic power generation. The Callide Mine is located adjacent to the Callide Stations. The Callide Coal Mine operates as an open cut operation, utilising both dragline and truck and shovel methods of overburden removal. Its annual production averages 9.8 Mt of saleable coal.
- 2.8. The majority of the contracted coal from the Callide Mine is supplied to CS Energy and CPM.

The Agreements

- 2.9. CS Energy and CPM each has an existing coal supply agreement with Anglo Coal for the acquisition of coal to be used in the production of electricity at the Callide stations. These agreements were executed concurrently in 1998 and provide for a base price for coal supplied to the Callide stations.¹ The price determined in 1998 was the same for the Callide B and Callide C stations.
- 2.10. Anglo Coal has to date been delivering coal to Callide B and Callide C power stations jointly. However, Anglo Coal does have the option of delivering coal to the power stations separately.
- 2.11. The coal supply agreement with Callide C contains a different coal specification from the agreement with Callide B. Anglo Coal has submitted that the ash specification in the Callide B agreement is 23% and the C agreement is 24.5%. To date, Anglo Coal has targeted deliveries to the power stations to not exceed the lower Callide B rejection specification. However, Anglo Coal submits that it would be possible to separately deliver to the two different ash rejection limits.
- 2.12. Each agreement contains provisions for a 5 yearly price review mechanism. The agreements stipulate that the review must commence within 30 days of the fifth anniversary of the Commercial Load Date for Unit 1 of the Callide C station, which was 14 August 2001.
- 2.13. When the Agreements were drafted in 1998, it was anticipated that two separate reviews would be undertaken.
- 2.14. 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.
- 2.15. The joint negotiations under the review mechanisms may result in a separate and different price, quality and delivery outcome for each agreement.

¹ At the time the coal supply 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. InterGen (through its subsidiary IG Power (Callide) Pty Ltd) has subsequently taken an assignment of these interests.

The electricity industry

- 2.16. Australia's electricity industry has been significantly restructured since the early 1990s. Commonwealth, State and Territory Governments have all undertaken reforms to establish competitive wholesale and retail electricity markets.
- 2.17. The reforms included breaking up State and Territory-owned energy authorities and separating the potentially competitive upstream supply and downstream retailing assets from the non-contestable transmission and distribution facilities. In some jurisdictions electricity generation utilities and electricity retail assets were further separated into competing businesses. Ownership and management structures have also been reformed. In some cases this has involved privatisation; in others, greater commercialisation has been introduced within public ownership.
- 2.18. A major objective of the reforms was to create a national electricity market (NEM) through the interconnection of State and Territory electricity transmission grids. The NEM commenced operation in December 1998 and now supplies electricity to over 7.7 million Australian customers through an interconnected national grid that runs through Queensland, New South Wales, the Australian Capital Territory, Victoria, South Australia and, most recently, Tasmania.²
- 2.19. The NEM is governed by the national Electricity Law and Rules and the day to day operation of the market is managed by the National Electricity Market Management Company Limited (NEMMCO).
- 2.20. The NEM pools output from all significant generators, such as CS Energy, into a single wholesale market. Generators bid to supply given quantities of electricity into the grid. Based on these bids, and subject to any physical constraints on the transmission system, NEMMCO schedules which generators will operate for each five-minute period.
- 2.21. Customers can purchase at the average half-hour (spot) market price, and/or under long or short term contracts. Contracts can also be made directly with generators.
- 2.22. To protect against the financial risks associated with the spot market electricity retailers and generators enter into financial hedge contracts which operate outside the NEM. The contracts vary in term, but generally the parties agree a fixed price for electricity and depending where the spot price falls either below or above the fixed price then one party pays the difference to the other.
- 2.23. NEMMCO, along with various governments and the recently established Australian Energy Market Commission, all work at ensuring long term electricity reliability and supply security. One factor involved in this planning process is ensuring that there is sufficient generating capacity and reserved generating capacity within the system to meet current and future demand projections.

² Western Australia and the Northern Territory are not part of the NEM.

- 2.24. Electricity retailers purchase electricity out of the NEM and on-sell to end users. Electricity is transported from generators to end users through the transmission and distribution system.³

The coal industry in Queensland

- 2.25. In 2004-05 sales of coal from Queensland totalled 172.43 million tonnes, of which 145.47 million tonnes was sold for export and 26.96 million tonnes was sold in domestic markets. The main domestic use for coal is electricity generation, with 89.6% of the domestic sales being used for this purpose. Generally, lower grade thermal coal is used domestically while better quality thermal coal and coking coal are exported.
- 2.26. There are a large number of coal producers in Queensland which compete in the domestic and export markets. These include Anglo Coal Australia, Peabody, Rio Tinto Coal Australia, Xstrata Coal Queensland Pty Ltd, Ensham Resources Pty Ltd, BHP Billiton Mitsubishi Alliance and Macarthur Coal. In 2004-05 coal from Queensland was shipped to 31 countries. Japan is the largest importer of Queensland coal.⁴

³ In Queensland the high voltage transmission system which transports electricity from the generators is owned by Powerlink Queensland, a government owned corporation.

⁴ "Queensland's World Class Coals: Mine Production and Developments", QLD Government, Department of Natural Resources and Mines, December 2005 (Annexure E)

3. The application and the Act

- 3.1. CS Energy and CPM seek authorisation to jointly negotiate price reviews each has with Anglo Coal in existing agreements.
- 3.2. The joint negotiation of the price review potentially raises concerns under the Act. Specifically, section 45A of the Act which effectively declares prices fixing arrangements between competitors as illegal per se.
- 3.3. Section 45A provides that a provision of a contract, arrangement or understanding will be regarded as a price fixing provision if it has the purpose or likely effect of either:
 - Fixing, controlling or maintaining the price of goods or services or providing for that to occur; or
 - Fixing, controlling or maintaining any discount, allowance, rebate or credit in relation to goods or services, or providing for that to occur.
- 3.4. On this basis, CS Energy and CPM have lodged the applications for authorisation with the ACCC.
- 3.5. The ACCC notes that CS Energy and CPM argue the proposed joint negotiation should be exempt from the operation of section 45A of the Act on the basis that it is a collective acquisition within the meaning of section 45A(4)(a) of the Act. This claim is made on the basis that there is commonality of production, delivery and administration of coal supplies for the Callide stations.
- 3.6. Under section 45A(4)(a) of the Act, the price fixing provisions do not apply to a provision of a (proposed) contract, arrangement or understanding being a provision in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by (proposed) parties to the contract, arrangement or understanding. The Act does not define 'collectively acquired'.
- 3.7. The Applicants note the legal uncertainty regarding section 45A(4)(a) and advise that they have lodged the applications for authorisation to ensure legal protection for the arrangements'

4. The net public benefit test

- 4.1. The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

The Application

- 4.2 CS Energy and CPM lodged application A50027 under section 88(1) of the Act to make and give effect to 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 the Act. The relevant tests for this application are found in section 90(6) of the Act.
- 4.3 In respect of the making of and giving effect to the arrangements, section 90(6) of the Act states that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- The provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - This benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Definition of public benefit and public detriment

- 4.2. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁵

- 4.3. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁶

Future with-and-without test

- 4.4. The ACCC applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.⁷

⁵ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.5. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the 'counterfactual'.

⁷ Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

5. ACCC evaluation

Submissions received by the ACCC

- 5.1. CS Energy and CPM provided a supporting submission with its application for authorisation (A50027)
- 5.2. The ACCC also sought submissions from 22 interested parties potentially affected by the application, all of whom are participants in the Queensland electricity or coal industries. The ACCC sought submissions from AGL Electricity Pty Ltd, Alinta Sales Pty Ltd, AMCI, Anglo Coal, BHP Billiton Mitsubishi Alliance, Delta Electricity, ENERGEX Limited, EnergyAustralia, Enertrade, Eraring Energy, Ergon Energy Pty Ltd, Excel Coal (Millenium), Integral Energy Australia, Macarthur Coal, Macquarie Generation, Origin Energy Electricity Limited, Powerlink Queensland, Qld Department of Natural Resources and Mines, Rio Tinto Coal Australia, Stanwell Corporation Limited, Tarong Energy Corporation Pty Ltd and Xstrata Coal Qld.
- 5.3. The ACCC received 1 submission in relation to this application, from Anglo Coal. Anglo Coal submitted an application wishing to correct what it claimed were relevant factual errors in CS Energy and CPM's authorisation application.
- 5.4. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

The market

- 5.5. The first step in assessing the effect on competition of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 5.6. CS Energy and CPM submit that the relevant market in which they operate, for the purposes of the application, is the market for the acquisition of black coal from the Callide Mine for use in the production of electricity.
- 5.7. On this matter of the relevant market, no interested parties have submitted a view supporting/opposing CS Energy and CPM's submission.
- 5.8. CS Energy and CPM claim not to 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.
- 5.9. The ACCC notes that Anglo Coal sells some of its coal for export. On this basis, there is arguably a wider market for coal supply.
- 5.10. Under the wider market, the price of coal is largely determined by international commodity prices. In relation to the proposed joint price negotiations, CS Energy and CPM do not have the ability to significantly affect the price of the coal purchased.
- 5.11. This said, the ACCC notes that the cost savings that result from the collocation of the Callide mine and power stations would impact upon another coal company's ability to compete to supply Callide B and C.

5.12. The ACCC is of the view that it is not necessary to comprehensively define the relevant market in this instance. In this respect, it is the ACCC's view that its assessment will not be overly affected by the possible variations in precise market definition.

The counterfactual

5.13. As noted in Chapter 5 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the 'future with-and-without test'.

5.14. The applicants submit and the ACCC agree that, if CS Energy and CPM are not granted authorisation to negotiate jointly, then they will negotiate separately.

Public detriment

Submissions

5.15. CS Energy and CPM submit that:

There is no public detriment likely to arise from the existing or proposed arrangements. 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 specified.

ACCC's view

5.16. The ACCC accepts the view advanced by CS Energy and CPM that demand within the market will not be significantly impacted. The ACCC is of the view that, while the Applicants may get different outcomes (in price and/or quality of coal), whether the parties negotiate jointly or separately will not be a critical factor in the final outcomes arrived at with Anglo Coal. Furthermore, in light of the constraining influence of export opportunities, it is not likely that either CS Energy or CPM will accrue market power as a result of proceeding with a joint negotiation. In addition, the ACCC recognises that Anglo Coal, the party most likely affected by the proposed conduct, is not opposed to the joint review process. In this context, it seems that Anglo Coal would only choose to enter joint negotiations if it offered some benefits

Public benefit

Submissions

5.17. CS Energy and CPM submit that jointly negotiating the price review with Anglo Coal will deliver a number of public benefits, including:

- Increased efficiency by minimising duplication of legal, accounting and consulting costs and expenses for each of CS Energy and CPM;
- Increased efficiency by minimising duplication of administrative costs and expenses for CS Energy and CPM in conducting the joint negotiations with Anglo Coal;

- Practicality, efficiency and resource savings through not having to ring-fence personnel in relation to the negotiations; and
- Increased efficiency and streamlining in the process of negotiation

ACCC's view

- 5.18. The ACCC notes that there is little difference between some of these claimed public benefits.
- 5.19. Anglo Coal lodged a submission on 21 September 2006. Anglo's submission indicated that it was not opposed to the joint price negotiation. However, Anglo's submission raised some issues/clarifications that suggest that the savings through avoiding duplication in the negotiation process may not be as extensive as the Applicantss suggested.
- 5.20. Increased efficiency by minimising duplication of legal, accounting and consulting costs and expenses for each of CS Energy and CPM.
- The ACCC accepts that these costs, essentially transaction costs, will be minimised through the joint negotiation process and believes it can expedite the price review. However, the public benefit resulting is likely to be small.
- 5.21. Increased efficiency by minimising duplication of administrative costs and expenses for CS Energy and CPM in conducting the joint negotiations with Anglo Coal;
- Similarly, the ACCC accepts that by minimising administrative costs, a public benefit can follow. Again, the public benefit resulting is likely to be small.
- 5.22. The parties have not sought to quantify the public benefits. The ACCC considers that efficiency savings that avoid duplication are a public benefit. However, in this instance, these public benefits claimed are unlikely to be substantial relative to the size of the business involved.

Balance of public benefit and detriment

- 5.23. The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the joint negotiations with Anglo Coal are likely to result in a public benefit that will outweigh any public detriment.
- 5.24. The ACCC accepts that there is little if any public detriment likely to arise from the proposed conduct. The ACCC considers that the quantities of coal purchased will not be altered and that demand within the market will not be significantly impacted. The ACCC agrees that it is not likely that either CS Energy or CPM will accrue market power as a result of proceeding with a joint negotiation. Furthermore, the ACCC places particular weight on the fact that Anglo Coal, the party most likely affected by the proposed conduct, is not opposed to the joint review process.
- 5.25. The ACCC considers that some of the public benefits claimed by CS Energy and CPM are quite similar and any public benefit is likely to be small. However, in general, the ACCC accepts the public benefits put forward by CS Energy and CPM.

Length of authorisation

- 5.26. The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 5.27. In this instance, CS Energy and CPM seek authorisation for a period of 5 years.
- 5.28. The ACCC proposes grant authorisation for 5 years. Should CS Energy and CPM wish to enter into fresh price review joint negotiations at the conclusion of the authorised period, the ACCC would expect a further application for authorisation before that time.

6. Draft determination

The application

- 6.1. On 18 August, CS Energy and CPM lodged application for authorisation A50027 with the Australian Competition and Consumer Commission (the ACCC).
- 6.2. Application A50027 was made using Form B Schedule 1, of the Trade Practices Regulations 1974. The application was made by CS Energy and CPM under subsection 88 (1) of the Act to:
 - Make and give effect to 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 the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 6.3. In particular, CS Energy and CPM seek authorisation to jointly negotiate with Anglo Coal with respect to price review negotiations under existing coal supply agreements each Applicant has with Anglo Coal.

The net public benefit test

- 6.4. For the reasons outlined in Chapter 6 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

Conduct for which the ACCC proposes to grant authorisation

- 6.5. The ACCC proposes to grant authorisation for CS Energy and CSM to jointly negotiate with Anglo Coal with respect to price review negotiations under existing coal supply agreements each Applicant has with Anglo Coal. The ACCC proposes to grant authorisation for a period of 5 years.
- 6.6. This draft determination is made on 11 October 2006

Conduct not proposed to be authorised

- 6.7. The proposed authorisation does not extend to and should not be interpreted as the ACCC granting authorisation to the pre-existing 1998 coal supply agreements CS Energy and CPM have with Anglo Coal.

Interim authorisation

- 6.8. At the time of lodging the application, CS Energy and CPM requested interim authorisation. CS Energy and CPM requested interim authorisation to jointly negotiate with Anglo Coal with respect to price review negotiations under existing coal supply agreements each Applicants has with Anglo Coal. On 13 September 2006, the ACCC granted interim authorisation for the parties to commence negotiations.
- 6.9. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect.

Further submissions

- 6.10. The ACCC will now seek further submissions from interested parties. In addition, the Applicants or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act. Any request for a conference or further submission should be made by 26 October 2006.