

**Australian Competition
&
Consumer Commission**

PRE-DECISION CONFERENCE

Minutes

**Authorisations A91009 and A91010
lodged by Tarong Energy Corporation Limited, New Hope Corporation Limited
and New Acland Coal Pty Ltd**

27 November 2006

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-determination conference but a summary of the matters raised. A copy of this document will be placed on the ACCC's public register.

Pre-Decision Conference: Authorisations A91009 and A91010 lodged by Tarong Energy Corporation Limited, New Hope Corporation Limited and New Acland Coal Pty Ltd

27 November 2006
500 Queen Street
Brisbane

Attendees:

Australian Competition & Consumer Commission	Ed Willett (Chair) Commissioner David Hatfield Director – Adjudication Sarah Chubb Project Officer – Adjudication
International Gold Mining Limited	Alan Phillips (Spokesperson) Director John Saunders Partner Shand Taylor Lawyers
Metallica Minerals Limited	John Haley (Spokesperson) Director/Company Secretary Michael Hansel Hopgood Ganim Lawyers
New Hope Corporation Limited	Dennis Brown-Kenyon (Spokesperson) General Manager Corporate Development & Government Relations Chris Hopkins General Manager Marketing Kevin Standish Legal Advisor Campbell Standish Partners Solicitors Karen Standish Legal Advisor Campbell Standish Partners Solicitors

<p>Tarong Energy Corporation Limited</p>	<p>John Crosisca (Spokesperson) Corporate Solicitor</p> <p>Grahame Shann Integration Manager, Fuel Strategy</p> <p>John Powell Partner Clayton Utz</p>
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Conference commenced: 9:00am

Introduction

Commissioner Willett welcomed attendees, made some introductory remarks outlining the purpose of the conference, declared the pre-decision conference open and invited Mr Alan Phillips on behalf of International Gold Mining Limited (IGML), who called the conference, to make an opening statement.

Statement by Mr Alan Phillips, Director, IGML

Opening remarks

Mr Phillips indicated that IGML had lodged a submission with the ACCC on Friday 24 November 2006 in relation to authorisations A91009 and A91010. Commissioner Willett indicated that he had received and read the submission.

Mr Phillips stated that Tarong Energy Corporation Limited (Tarong) has not disclosed all relevant facts and business dealings to the ACCC in relation to authorisations A91009 and A91010. In particular, Mr Phillips indicated that Tarong has not provided the ACCC with important information regarding Tarong's coal procurement strategies, and he expressed concern about the ability of the ACCC to make a determination pursuant to section 88 of the *Trade Practices Act* without full disclosure from the applicants for authorisation.

Mr Phillips noted that IGML has instituted proceedings in the Federal Court against Tarong. IGML is claiming \$30 million damages from Tarong for breach of section 46 of the *Trade Practices Act*. IGML is also considering adding a claim for damages for breach of section 52 of the *Trade Practices Act*. The Federal Court proceedings are in an advanced state, and IGML is concerned that the ACCC's determination in respect of authorisations A91009 and A91010 may prejudice the court proceedings.

IGML's submission to the ACCC dated 24 November 2006

Mr Phillips read IGML's submission dated 24 November 2006 to the conference attendees. The submission contains information which IGML believes was not clearly

identified or included in Tarong's application to the ACCC, including information regarding:

- The current litigation pending in the Federal Court between IGML and Tarong.
- The coal supply options being considered by Tarong, and the issues associated with pursuing each of these options.
- The implications of the Queensland State Government Purchasing Policy for Tarong's acquisition of coal.
- The economic efficiencies associated with Mine Mouth Coal Supply.
- The reasons why the Taabinga Coal Deposit should be considered as a supplemental coal supply option by Tarong.
- The anti-competitive effects that will arise if Tarong and New Acland Coal Pty Ltd (New Acland) enter into a 25 year coal supply agreement.

The IGML submission also contains a discussion of the public benefits and detriments associated with the agreement between Tarong and New Acland. IGML argues that if Tarong chooses to obtain its coal from New Acland, then taxpayer money will be used in order to fund transport infrastructure and mine development. IGML also believes that without a public tender process, there is no way of knowing whether the contract between Tarong and New Acland will provide coal to Tarong at the lowest possible price.

IGML's submission dated 24 November 2006 can be found at Attachment 1 to this minute.

Commissioner Willett asked Mr John Crosisca, on behalf of Tarong, if he wished to address the conference.

Statement by Mr John Crosisca, Corporate Solicitor, Tarong

IGML's submission

Mr Crosisca asked Commissioner Willett whether Tarong would receive a copy of IGML's submission, indicating that this would enable Tarong to provide a comprehensive written response in relation to the points raised by IGML. Commissioner Willett confirmed that IGML's submission would be sent to Tarong.

Section 46

Mr Crosisca indicated that the Federal Court proceedings between Tarong and IGML in relation to section 46 of the *Trade Practices Act* are a matter for the Federal Court, and are not relevant to the pre-decision conference. Mr Crosisca indicated that the conference should focus upon the restrictive provisions for which Tarong has sought authorisation, and that Tarong's submissions to the ACCC address all relevant issues regarding the authorisation applications.

Tarong's coal supply

Mr Crosisca indicated that the cost of coal is a significant operational cost for Tarong, which supplies one quarter of Queensland's electricity. The cost of coal forms a significant part of the price that consumers pay for their electricity.

Mr Crosisca stated that Tarong should be free to make a decision as to which coal supplier provides the best value for money. He also noted that the State Government Purchasing Policy does not require Tarong to conduct a tender process, and that the Policy is concerned with value for money.

Mr Crosisca noted that in deciding which coal supply option provides the best value for money, the cost of the coal is an important factor, but security of supply is also significant. Tarong has identified several coal supply options that it considers appropriate.

Mr Crosisca indicated that Tarong is operating in a very competitive energy market, and it will make its fuel supply decisions so that it is best able to compete in that market.

Mr Crosisca reiterated that Tarong needs to be free to choose what it considers to be the best coal supply option.

Mr Crosisca noted that Tarong was a previous owner of the Taabinga Coal Deposit. Tarong assessed the Taabinga coal, concluded that it is not suitable, and decided not to pursue this option any further.

Mr Crosisca concluded by saying that Tarong would be very concerned if the progress of the authorisations was stalled due to the section 46 proceedings. Tarong will suffer significant loss if the authorisations are held up, and this loss will be difficult to compensate.

Mr John Powell of Clayton Utz added that the section 46 proceedings are going to be dealt with in another forum at another time, and that it is difficult to see how the authorisations will impact upon the section 46 case.

Commissioner Willett asked Mr Dennis Brown-Kenyon, on behalf of New Hope Corporation Limited (New Hope), if he wished to address the conference.

Statement by Mr Dennis Brown-Kenyon, General Manager, Corporate Development & Government Relations, New Hope

Mr Brown-Kenyon indicated that New Hope is satisfied with the ACCC's draft determination.

Commissioner Willett asked Mr John Haley of Metallica Minerals Limited (MML) if he wished to address the conference.

Statement by Mr John Haley, Director/Company Secretary, MML

Mr John Haley indicated that MML is concerned about Tarong's behaviour, and considers it to be anti-competitive. However, Mr Haley indicated that MML is not

involved in the litigation between Tarong and IGML in relation to section 46 of the *Trade Practices Act*.

Tarong sent a letter to MML dated 5 December 2005 in relation to the possibility of Tarong obtaining coal from the Taabinga mine. Mr Haley indicated that this letter had only been sent due to the persistence of MML. In the letter, Tarong asked MML to provide a non-binding indicative coal supply offer by 17 February 2006. Mr Haley questioned why MML was given this 10-week deadline when Tarong is continuing to investigate other coal supply options at the present time. MML is very concerned that Tarong excluded MML from consideration before it could properly assess the Taabinga coal.

MML's mine is located close to the Tarong power stations, and MML believes that it should have been considered as a coal supply option by Tarong. Mr Haley expressed agreement with IGML in relation to the economic efficiencies associated with mine mouth coal supply.

Mr Daley stated that if Tarong does not purchase the cheapest coal possible, then Queensland taxpayers and/or electricity consumers will suffer as a consequence.

Discussion

Commissioner Willett opened the conference for discussion, and asked IGML and MML if they had any reason to believe that Tarong would not choose the cheapest coal supply option (taking security of supply into account). In response, **Mr Phillips** discussed three points. First, **Mr Phillips** indicated that Tarong's previous coal supply agreement was for 10 years. By contrast, the proposed contract with New Acland is for 25 years. **Mr Phillips** indicated that there are many uncertainties associated with producing coal and electricity (eg. the availability of water, motor vehicle fuel and tyres), and that these uncertainties make such long-term contracts problematic. Second, **Mr Phillips** questioned who would pay for the 70-90 km railway between the Tarong power stations and the New Acland mine, indicating that the cost of this railway will be approximately \$150 million. **Mr Phillips** stated that Tarong's authorisation applications were premature, and that Tarong should have secured funding for infrastructure development before seeking authorisation. Third, **Mr Phillips** discussed the State Government Purchasing Policy, and indicated that Tarong may not need to comply with this Policy if the Glen Wilga coal deposit is developed. **Mr Phillips** stated that since there are several coal supply options available to Tarong, it should be required to comply with the Policy.

Mr Crosisca stated that Tarong has complied with all its legal obligations in relation to purchasing, and reiterated that Tarong should be free to choose its coal supplier. Taabinga coal has been assessed by Tarong, and Tarong does not wish to pursue this coal supply option any further. **Mr Crosisca** also noted that the commercial interests of Tarong are a matter for Tarong's Board.

Commissioner Willett asked Mr Crosisca if Tarong complies with the State Government Purchasing Policy. **Mr Crosisca** indicated that the State Government Purchasing Policy is a guideline which focuses on value for money. Tarong believes that it does comply with the Policy.

Mr Haley noted that it has been 10 years since Tarong owned the Taabinga Coal Deposit, and that the market has changed significantly in that time. **Mr Haley** also stated that MML has not been given sufficient opportunity to put a coal supply proposal to Tarong, so it is impossible for Tarong to be sure that it will be obtaining its coal for the best possible price.

Commissioner Willett asked Mr Haley how the situation would change if the ACCC refused to grant authorisation to Tarong. **Mr Haley** stated that if the ACCC refuses to grant authorisation to Tarong, then Tarong may be forced to properly consider all of its coal supply options. **Mr Haley** stated that this would be in the public interest, and it would give MML the opportunity to put a proposal to Tarong.

Commissioner Willett stated that, presumably, it is in Tarong's best interests to seek the lowest possible price for coal. **Mr Phillips** stated that it may not necessarily be in Tarong's best interests to seek the lowest possible coal price. Tarong has purchased a wind farm in South Australia, and may start producing coal itself (eg. if Tarong chooses to develop Glen Wilga, or decides to exercise its option over Meandu and Kunioon). Therefore, Tarong may be looking to expand into different areas, and may be making its coal purchasing decisions accordingly.

Mr Phillips reiterated the uncertainties associated with producing coal and electricity, and queried why Tarong and New Acland would want to commit to a 25-year contract in light of these uncertainties.

Commissioner Willett briefly summarised IGML's concerns. In response, **Mr Phillips** reiterated that unless Tarong conducts a tender process, Tarong cannot be sure that it will obtain its coal for the cheapest possible price.

Commissioner Willett stated that it would be difficult for the ACCC to deny authorisation on the basis that Tarong is not acting in its best interests.

Conclusion

Commissioner Willett called for any further comments. No further comments were made. **Commissioner Willett** closed the conference by noting that the ACCC would be providing a further opportunity for parties to make written submissions in respect of its draft determination and that the ACCC would be writing to those who attended the conference to provide participants with a record of the conference, which would also be placed on the ACCC's public register.

Conference closed: 10:00am

ATTACHMENT 1 TO MINUTE



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4 Page(s)

Attention: Scott Gregson / Sharon Clancy

Associate
Ben Warren

APPLICATION FOR AUTHORISATION A91009 AND A91010 LODGED BY TARONG ENERGY CORPORATION LIMITED, NEW HOPE CORPORATION LIMITED AND NEW AC LAND COAL PTY LTD

Consultant
John D Taylor

As previously advised we act for Intercoal limited recently renamed International Gold Mining Limited. Our client is the applicant in proceedings number WAD 359 of 2005 currently pending in the Federal Court of Australia. In these proceedings, our client is claiming damages of \$30m against Tarong Energy Corporation Limited ("Tarong Energy") arising from an alleged breach by Tarong Energy of section 46 of the *Trade Practises Act of 1974 (Cth)* ("TPA"), namely misuse of market power.

Further, we have, on behalf of our client, lodged a complaint with the ACCC about the conduct of Tarong Energy, since the commencement of the Federal Court proceedings, in relation to its coal procurement strategies to source a supply of coal for the Tarong power stations after December 2010.

However, please note our client is presently considering amending its statement of claim in the Federal Court proceedings to add a claim for damages for misleading and deceptive conduct under section 52 of the TPA.

Our client has requested and been granted the opportunity to put forward their case at a pre decision conference which will be held on the 27th of November 2006.

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Our client further recommends that the ACCC should take all or part of the following information into consideration prior to making any final decision under S88 (1) of the TPA. It is our client's opinion that by Tarong Energy entering into the option agreement with New Acland for a period of 25 years this conduct would **substantially lessen competition**, restrict entry into the market by competitors and potentially provide a significant benefit to one single ASX listed public company, New Hope Corporation Limited.

Information to be considered some of which wasn't clearly identified or included in Tarong's submission to the ACCC

- The failure to mention (even in passing) the current litigation pending in the Federal Court between our client and Tarong Energy in which a serious allegation of misuse of market power against Tarong Energy is made. It would appear Tarong Energy believe that a \$30 million claim

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The General Manager
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 Australian Competition & Consumer Commission

- 2 -

24 November 2006

in respect of an alleged breach by it of one of the competition provisions of the TPA (the very same provisions being the subject of its authorisation application) is not material or relevant.

- The failure to mention the fact that Tarong Energy has entered into an option agreement with Rio Tinto Coal Australia, the owner of the Meandu Mine, for the purchase of the rights to a coal deposit located at Kunioon, just north of the Tarong Power Stations. This option is exercisable on or before the 30/06/07.
- The failure to mention the fact that coal from the Kunioon deposit is presently being bulk tested by Tarong Energy to determine the quality of the coal.
- The failure to mention the fact that Tarong Energy owns a coal resource at Glen Wilga. It has been in the public domain for some considerable time that one of the options available to Tarong Energy has been the development of a mine at Glen Wilga and associated transport infrastructure (a 150km railway line).
- New Hope Corporation Limited (ASX Code NHC) is an ASX listed public company with a market capitalisation of \$1billion.
- NHC is profitable. Results to 31/7/06 record a profit after tax of \$68.7m from production of 3.7 million tonnes of coal with 72% or 2.7 million tonnes from New Acland Coal mine.
- NHC's major shareholder is Washington H Soul Patterson with a 62% interest.
- Washington H. Soul Patterson is ASX Listed (ASX Code SOL) public company with a market capitalisation of over \$2billion.
- From NHC's financial statements as at 31/7/06, a basic analysis of profit from coal sales and tonnes of coal produced indicate a profit of over \$20 per tonne of coal produced.
- The Tarong Power Stations are fuelled by low-grade energy output. Higher grade coal is usually sold to the more lucrative export market.
- Tarong purchases up to 7.5 million tonnes per year of its coal form Rio Tinto Coal Australia Pty Ltd's Meandu mine. This current contract is due to expire 31/12/2010.
- Meandu Mine is nearing the end of its economic productive life (but not of its mine life). Presumably the Meandu Mine could produce further coal at an incrementally higher cost than the current cost. Consequently Tarong requires a new source of Coal once the current contract expires in 2010.
- The Kunioon Thermal Coal deposit:
 - Is completely surrounded by EPC 882 (Taabinga Deposit owned by Metallica Minerals Limited)
 - Is adjacent to the Taabinga Coal Deposit
 - Shares some common coal seams with the Taabinga Coal Deposit
- Tarong have been supplied with thermal coal by Rio Tinto Coal Australia from the Tarong Basin for the past 22 years.
- This thermal coal is supplied from the Meandu Mine, located only 1.5km from the Power Station.
- In economic terms, supply of Coal from a Thermal Coal resource that is in close proximity to a power station is generally considered to be the most cost effective (Mine Mouth Coal Supply)

The General Manager
 Adjudication Branch
 Australian Competition & Consumer Commission

- 3 -

24 November 2006

- CS Energy's KOGAN Creek is a new \$1Billion Government Owned Power Station and is a current example of the economics of Mine Mouth Coal Supply.
- Callide Power Stations are supplied by the adjacent Callide Thermal Coal Deposit. This is a further example of the economics of Mine Mouth Coal Supply.
- Tarong's stated reason for the 30/7/07 deadline to make a decision appears to be based on an estimated 3 year lead time for construction of the 70-90 km transport infrastructure and for Mine development for the New Acland Mine.
- Tarong's stated reason for a 25 year contract term is to cover amortisation of the capital cost of the transport infrastructure and Mine development at New Acland Coal Mine.
- Tarong submit that a long term stable supply of coal of a consistent quality at a competitive price will enable Tarong to operate competitively in the national electricity market.
- Before a competitive rate for the supply of coal was determined, Tarong would need to undertake feasibility studies on all coal supply options before it could conclusively determine which coal supply provides the most economical and competitive price.
- Tarong has stated that it has several options:
 - Glen Wilga
 - New Acland
 - |◦ Meandu
 - |◦ Kunioon

Each of these options have a substantial number of different conditions to satisfy,

- Glen Wilga requires substantial capital for Transport Infrastructure and for mine development. This will require State Government approval and funding.
- New Acland requires substantial capital for Transport Infrastructure and mine development. This will require State Government approval and funding.
- The exercise of the option with Rio Tinto Coal Australia over Meandu and Kunioon will require substantial capital for the acquisition and mine development. This will require State Government approval and funding.
- Tarong have rejected Metallica's Taabinga Thermal Coal Resource, however if it is taken into consideration that Taabinga is in the Tarong Basin and is in close proximity to the Power Station and is adjacent to the Kunioon Deposit, then it should be included as a option for a supplemental supply of coal from a different supplier (i.e Metallica). Taabinga has a measured and indicated thermal coal resource of 196 million tonnes.
- Tarong have been exempted from complying with the State Government's Purchasing Policy on the Basis that for the past 22 year the Meandu Mine owned and operated by Rio Tinto Coal Australia and has been the sole supplier.
- Tarong's circumstances have now changed and Tarong now has a number of separate options to consider from a number of separate suppliers.
- If Tarong entered into the 25 year agreement with New Acland to supply 5.7 million tonnes a year it would prevent the development of coal deposits in the Tarong Basin and it would be anti-competitive in that it would lock out all other competitors.

The General Manager
 Adjudication Branch
 Australian Competition & Consumer Commission

- 4 -

24 November 2006

Public Benefit and or Detriment from the Agreement

- Meandu Mine would be closed and the Kunioon and Taabinga Thermal Coal Resources would remain undeveloped. This would mean a loss of jobs and benefits to Kingaroy and a migration of jobs and benefits for the New Acland area. This appears to be a zero net gain.
- Tarong have offered to fund the Transport Infrastructure and Mine Development under the terms of the New Acland Agreement presumably this will require Queensland Government approval and funding which in effect is the use of tax payers money.
- The Queensland Coordinator-General has given Tarong Energy approval to undertake certain works to evaluate potential corridors for transporting coal between the coal deposits at the Kunioon and New Acland mines and the Tarong power stations. If the New Acland option proceeds, this will necessarily result in the resumption of land which will require both government approval and government funding.
- The 25 year contract will have an estimated gross value of \$8.5 billion and could potentially deliver an estimated profit of \$2.85 billion to NHC
- Without a competitive public tender it would be impossible to determine if the cost of coal to be provided to the power station would be the lowest cost available.
- Tarong Energy's Annual Report 05/06 indicates that fuel consumption represents 32% of revenue which is by far the greatest cost item. Consequently the cost of coal is material to the cost of production of electricity.

Whilst these and other matters will be raised by our client with the ACCC at the pre-decision conference on 27 November 2006, our client felt it was important that these matters be brought to your attention.

Finally, please note that each of the factual matters mentioned above are matters of the public record.

Yours faithfully
SHAND TAYLOR LAWYERS



John Saunders
 Partner