

14 April 2010

Our reference  
ASUT.MDEA.10024545

By email: [richard.chadwick@accg.gov.au](mailto:richard.chadwick@accg.gov.au)

Dr Richard Chadwick  
General Manager, Adjudication Branch  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

Dear Dr Chadwick

**North West Iron Ore Alliance (NWIOA) - application for authorisation A91212**

In our letter to you dated 23 March 2010, we expressed concern that the current drafting of the third condition (C3) in the ACCC's Draft Determination is too broad in its scope.

In our teleconference with the ACCC on 8 April 2101, we were informed that the ACCC's principal rationale in imposing the third condition in the Draft Determination (C3) is to ensure that the ACCC is able to properly assess prospective shareholders and non-shareholder members of NWIOA and target companies which may be notified to the ACCC from time to time. In order to undertake this assessment, the ACCC may need access to certain information about these entities which may not always be readily available in the public domain, for example, information regarding the non-visible assets owned by a publicly visible corporate structure.

NWIOA believes that the third condition (C3) should be redrafted in order to clarify the nature of the information which the condition is intended to capture. In this way, the ACCC can ensure that it will have access to sufficient information to complete its assessment, while providing NWIOA's shareholders and non-shareholder members with sufficient security so as not to feel inhibited from passing information to NWIOA for the purpose of collective bargaining.

NWIOA's paramount concern with any revised condition is that it will be adequately protected against any breach of confidence claims to which it could be exposed in complying with the condition. A waiver of confidence may often be justified in circumstances where the entity in question is complying with a legal obligation. However, faced with a request for information from the ACCC under the proposed condition, NWIOA is not confident that the condition imposes a sufficient legal compulsion to permit NWIOA's disclosure of information to the ACCC in circumstances where that information was acquired by NWIOA on a confidential basis from a shareholder or another third party. In order to guard against the risk of being exposed to a breach of confidence suit, NWIOA submits that the condition should expressly require that information only be disclosed with the consent of the relevant shareholder, non-shareholder member or target that provided the information to NWIOA. In this way, NWIOA will also be well

Locked Bag 1  
Royal Exchange NSW 1225  
DX 170 Sydney  
[www.middletons.com](http://www.middletons.com)

Level 26  
52 Martin Place  
Sydney NSW 2000  
Australia  
telephone: +61 2 9513 2300  
facsimile: +61 2 9513 2399

Partner  
Murray Deakin  
telephone: +61 2 9513 2335  
[murray.deakin@middletons.com](mailto:murray.deakin@middletons.com)

Contact  
Adele Sutton  
telephone: +61 2 9513 2390  
[adele.sutton@middletons.com](mailto:adele.sutton@middletons.com)

syddocs 2155474v1 ASUT

placed to verify the accuracy of the information from the relevant third party prior to any disclosure by NWIOA.

We set out below a suggested C3 condition which we hope better encapsulates a position satisfactory to both NWIOA and the ACCC.

"In the event that NWIOA notifies the ACCC pursuant to C1 or C2, the ACCC may request in writing that NWIOA furnish to the ACCC any information, documents or materials within NWIOA's custody, power or control which relate to:

- o the notified prospective NWIOA shareholder;
- o the notified prospective non-shareholder member of the collective bargaining group; or
- o the notified prospective target of the collective bargaining group.

To the extent that NWIOA has the consent of the relevant prospective NWIOA shareholder, non-shareholder member or target, NWIOA must provide the information, documents and materials requested by the ACCC.


Nothing in this condition requires the provision of information, documents or materials in respect of which NWIOA is bound by a duty of confidentiality or has a claim of legal professional privilege.

The power of the ACCC in this condition may be exercised by an employee of the ACCC"

Please advise whether this revised condition is acceptable to the Commission.

Please do not hesitate to contact us should you wish to discuss any aspect of this matter.

Yours sincerely

  
**Murray Deakin**  
Partner