



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

CS Energy & Ors

in respect of

joint negotiations with Anglo Coal
in relation to the terms and
conditions of the supply of coal

Date: 12 September 2013

Authorisation number: A91378

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Walker

Summary

The ACCC proposes to grant authorisation for five years to enable CS Energy Limited, Callide Energy Pty Ltd, IG Power (Callide) Limited, and Callide Power Management Pty Limited to jointly negotiate with Anglo Coal the terms and conditions (including price) of coal to be supplied to the Callide B and Callide C power stations in Queensland.

The ACCC now seeks further submissions in relation to this draft determination before making its final decision.

On 20 June 2013 Queensland power generators CS Energy Limited, Callide Energy Pty Ltd, IG Power (Callide) Limited and Callide Power Management Pty Limited (**the Applicants**) lodged an application for authorisation (A91378) with the ACCC. The Applicants are seeking authorisation to jointly renegotiate existing coal supply arrangements with Anglo Coal.

The proposed arrangements relate to coal supplied to the Callide B and Callide C power stations in central Queensland from the nearby mine owned by Anglo Coal. The applicants were previously granted authorisation by the ACCC in 2006 to jointly negotiate a price review with Anglo Coal under their existing separate long term coal supply agreements.

The Applicants submit that the proposed joint negotiations will result in public benefits through savings on legal, accounting, consulting and administrative costs, and through reducing the length of the negotiations. The Applicants submit that they cannot identify any detriment to competition arising from the proposed joint negotiations.

The ACCC accepts that the proposed joint negotiations are likely to result in public benefits through reduced transactions costs, and considers that detriment is unlikely to result from joint negotiations due to the constraining influence of the coal export market and other generators providing energy through the National Electricity Market. The ACCC notes that Anglo Coal advises that it does not object to the application.

As part of their application for authorisation, the Applicant sought interim authorisation to begin joint negotiations with Anglo Coal prior to the ACCC making its final decision. The ACCC granted interim authorisation on 17 July 2013 to enable joint negotiations to commence.

The ACCC is satisfied that the likely public benefits will outweigh the likely detriments from the proposed arrangements, and therefore proposes to grant authorisation for five years, but is open to the possibility of granting authorisation for a longer period should this be of benefit to the parties. The ACCC is interested to receive submissions from the Applicant and interested parties on this issue following the draft determination.

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The application for authorisation

1. On 20 June 2013 Queensland power generators CS Energy Limited, Callide Energy Pty Ltd, IG Power (Callide) Limited and Callide Power Management Pty Limited (CPM) (**the Applicants**) lodged an application for authorisation (A91378) with the ACCC. The Applicants also requested interim authorisation to enable them to engage in the proposed conduct while the ACCC is considering the substantive application.¹

The conduct

2. The Applicants seek authorisation to jointly negotiate with Anglo Coal in relation to the terms and conditions (including price) of coal to be supplied to the Callide B and Callide C power stations.
3. The Applicants advise the new supply arrangements may take the form of a variation to existing agreements or new agreements. The negotiations may extend to both price terms and supply conditions, and may result in differing or the same price, quality and delivery terms for each of CS Energy and CPM. Any concluded new supply arrangements will be reflected in separate agreements between Anglo Coal and CS Energy and between Anglo Coal and CPM.
4. The Applicants seek authorisation for a five year period.

Background

The Parties

The Applicants

5. The application for authorisation has been lodged by:
 - CS Energy Limited (CS Energy)
 - Callide Energy Pty Ltd (a wholly-owned subsidiary of CS Energy)
 - IG Power (Callide) Limited (InterGen) and
 - Callide Power Management Pty Limited (CPM) (a joint venture company owned by the subsidiaries of CS Energy and InterGen).
6. CS Energy is a Queensland government-owned electricity generator which, amongst other activities, now owns and operates Callide Power Station including the Callide Power Station known as Callide B.

¹ Detailed information about the authorisation process is contained in the ACCC's Authorisation Guidelines 2013 available on the ACCC's website www.accc.gov.au

7. Callide C is owned and operated by a 50/50 joint venture of subsidiaries of CS Energy and InterGen. A separate joint venture company of the subsidiaries of the two parties acts as the joint venture manager and as agent in the acquisition of coal for the station, and a third joint venture company trades the electricity generated by the station on the basis of bids submitted by each owner.
8. CS Energy has day-to-day management of the coal receipt and operation of both Callide Power Stations.
9. CS Energy and CPM each have separate existing long term coal supply agreements with Anglo Coal, which is situated adjacent to the Callide power stations. These agreements were executed concurrently in 1998 and provide a base price for coal supplied to the Callide B and C Stations respectively.
10. The Applicants applied for, and were granted, authorisation by the ACCC in 2006 to engage in joint negotiations with Anglo Coal in relation to a price review under the agreements.

Anglo Coal

11. Anglo Coal is an Australian coal producer with six mines operating within Queensland and New South Wales. Anglo Coal owns and operates the open cut Callide Mine. The mine produces low sulphur-sub-bituminous thermal coal.
12. Anglo Coal advises it supplies all of the coal from the Southern areas of the Callide Mine to the Applicants for the operation of the Callide Stations, and that coal from the Boundary Hill area of the Callide Mine is supplied to customers in Gladstone and a small amount is exported. Anglo Coal advises that it exports approximately 1,000,000 tonnes of coal annually from the Callide Mine.

Callide Power Stations

13. Callide B (generation capacity 700MW) and Callide C (generation capacity 860MW) (Callide power stations) are coal-fired power stations in central Queensland.
14. Coal is delivered from the Callide Mine to the Callide Power Stations by means of a single conveyor belt; however, Anglo Coal submits that coal can be, and at times has been, delivered to the two stations separately. The Callide Power Stations also share other infrastructure including a single coal stockpile, stamler (coal feeder) and water tanks.
15. The Applicants submit that the minimum and target coal specifications under the respective coal supply agreements for Callide B and Callide C power Stations are the same and this is likely to remain the case under any new supply arrangement. Anglo Coal notes that the coal supply arrangements have different ash rejection limits. Anglo Coal submits this means it could potentially deliver coal to the different ash rejection limits.
16. The Callide Power Stations are connected to the national electricity grid and operate within the National Electricity Market (NEM). The stations operate as base load stations supplying electricity into the NEM.

Submissions received by the ACCC

17. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
18. The ACCC sought submissions from 22 interested parties potentially affected by this application, including industry bodies, state government departments, coal mines, electricity generation, distribution and retail companies as well as Anglo Coal. A summary of the public submissions received from the applicants and Anglo Coal follows.

The Applicants

19. Broadly, the Applicants submit that the proposed conduct will aid the efficiency of negotiations by reducing the length of time needed and achieving savings on legal, accounting, consulting and administrative costs. The Applicants submit they cannot identify any public detriment from the proposed conduct.

Interested parties

20. Anglo Coal advises it does not object to the application. Anglo Coal noted a number of factual points on which it disagreed with the Applicants' submission (for example, see paragraph 34).
21. No other submissions were received from interested parties.
22. The submissions of the Applicants and Anglo Coal are considered in the evaluation chapter of this draft determination. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

23. The ACCC's evaluation of the proposed joint negotiations is in accordance with the relevant net public benefit tests² contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
24. In order to assess the effect of the proposed joint negotiations and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future without the conduct.

² Subsections 90(5A), 90(5B), 90(6) and 90(7). The relevant tests are set out in Attachment A.

The relevant area of competition

25. The Applicants submit the relevant area of competition is the global market for the supply of coal, given the extent to which Australian thermal coal is exported and the fact that Australian miners compete with coal miners operating in various other countries.
26. Anglo Coal did not express a view as to the area of competition likely to be affected by the proposed conduct.
27. The ACCC considers that the area of competition likely to be affected by the proposed joint negotiations is the supply of black coal in central Queensland, but is of the view that it is not necessary to precisely define the geographic market in this instance.

The future with and without

28. To assist in its assessment of the conduct against the authorisation tests, the ACCC compares the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
29. The Applicants submit, and the ACCC agrees that, if authorisation is not granted, the Applicants are likely to conduct separate negotiations with Anglo Coal.

Public benefit

30. 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.³
31. The Applicants submit the joint negotiations will deliver public benefits, specifically:
- By reducing the length of the negotiations, and otherwise aiding the efficiency of the negotiations, particularly where the relevant terms affect practical supply issues, given the fact that CS Energy operates both Callide Stations and coal is supplied using a single conveyer
 - savings on legal, accounting, consulting and administrative costs. The Applicants submit the savings are likely to be greater than in the 2006 negotiations previously authorised because it is proposed to jointly negotiate beyond price terms. The Applicants estimate that joint negotiations will result in a saving of between \$750,000 and \$1.2m in legal and consultancy fees.

³ *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.

32. The Applicants submit the savings and efficiencies resulting from the joint negotiations are significant given increased operational and maintenance costs currently impacting electricity generators.
33. Anglo Coal, while not disputing the Applicants' claimed public benefits, questions a number of the facts which may in turn impact the extent of the transaction cost savings resulting from the proposed conduct. Specifically, Anglo Coal notes that coal may be delivered separately to both mines, and that some specifications under the current coal supply agreements differ.
34. The ACCC accepts that joint negotiations will reduce transaction costs associated with the negotiations, including in legal, accounting, consulting and administrative costs. However the ACCC notes that potential differences in specifications for the coal delivered to the two Callide power stations under the agreements may to some extent reduce the benefits resulting from the proposed arrangements,. The benefits to be gained may be greater than in the previous authorisation given the negotiations are proposed to extend beyond price terms as previously authorised.

Public detriment

35. 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.⁴

36. The Applicants submit that they have not been able to identify any detriment resulting from the proposed joint negotiations, and note:
- the global nature of the market for the supply of coal
 - that any negotiated outcome from the proposed joint negotiations is unlikely to be materially different from what might otherwise be negotiated separately
 - that Anglo Coal is free to negotiate different supply terms with other customers, and
 - that the joint negotiations would not impact on the prices and terms of supply of other coal miners.
37. The Applicants submit they are not likely to accrue market power as a result of proceeding with joint negotiations, and submit that Anglo Coal supports the proposed joint negotiations.
38. Anglo Coal does not object to the application for authorisation.
39. The ACCC notes the proposed joint negotiations relate to a wider range of issues than those covered by the previous 2006 authorisation, and that this could potentially increase the detriment resulting from the proposed joint negotiations.

⁴ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

40. However, the ACCC accepts it is unlikely that the proposed conduct would result in significant public detriment, particularly due to the constraining influence of the coal export market, the number of other generators supplying electricity into the NEM, participation is voluntary and the fact that Anglo Coal has not objected to the application for authorisation.

Balance of public benefit and detriment

41. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed joint negotiations are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
42. Based on the information before it, for the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.
43. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

Length of authorisation

44. The Act allows the ACCC to grant authorisation for a limited period of time.⁵ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
45. In this instance, the Applicants seek authorisation for five years.
46. The ACCC proposes to grant authorisation for the period requested, but is open to the possibility of granting authorisation for a longer period should this be of benefit to the parties. The ACCC is interested to receive submissions from the Applicant and interested parties on this issue following the draft determination.

Draft determination

The application

47. On 20 June 2013, CS Energy, Callide Energy, InterGen and Callide Power Management lodged application for authorisation A91378 with the ACCC. Application A91378 was made using Form B, Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88(1) and 88(1A) of the Act to jointly negotiate with Anglo Coal the terms and conditions (including price) of coal to be supplied to the Callide B and Callide C power stations.

⁵ Subsection 91(1).

48. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

49. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed 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 conduct.

Conduct for which the ACCC proposes to grant authorisation

50. The ACCC proposes to grant authorisation to CS Energy Limited, Callide Energy Pty Ltd, IG Power (Callide) Limited and Callide Power Management Pty Ltd to jointly negotiate with Anglo Coal the terms and conditions (including price) of coal to be supplied to the Callide B and Callide C power stations for five years.
51. This draft determination is made on 12 September 2013

Interim authorisation

52. At the time of lodging the application, the Applicants requested interim authorisation to commence joint negotiations with Anglo Coal. The ACCC granted interim authorisation under subsection 91(2) of the Act on 17 July 2013.
53. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

54. The ACCC seeks submissions from interested parties in response to this draft determination
55. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) 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 were made or given effect to, or in the case of subsection 90(5B) 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.

Subsections 90(6) and 90(7) state 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 in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) 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 was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.