

Form B

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would 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 FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of Applicant:
(Refer to direction 2)

- A91378
- CS Energy Limited ACN 078 848 745 (**CS Energy**)
 - Callide Energy Pty Ltd ACN 082 468 746 (a wholly owned subsidiary of CS Energy)
 - IG Power (Callide) Limited ACN 082 413 885 (**InterGen**)
 - Callide Power Management Pty Limited ACN 082 468 700 (**CPM**)

(b) Short description of business carried on by applicant:
(Refer to direction 3)

The Applicants generate and transmit electricity for sale in the National Energy Market.

(c) Address in Australia for service of documents on the applicant:

c/- Eddie Scuderi
Corrs Chambers Westgarth
Level 34, Waterfront Place
1 Eagle Street
Brisbane QLD 4000

2. Contract, arrangement or understanding

**(a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:
(Refer to direction 4)**

Refer to the attached Submission.

**(b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:
(Refer to direction 4)**

Refer to the attached Submission.

(c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

Refer to the attached Submission.

(d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

Refer to the attached Submission.

3. Parties to the proposed arrangement

(a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

- Anglo Coal (Callide) Pty Ltd ACN 081 022 228
201 Charlotte Street
BRISBANE QLD 4000
- Anglo Coal (Callide) No. 2 Pty Ltd ACN 004 784 454
201 Charlotte Street
BRISBANE QLD 4000
- Callide Coalfields (Sales) Pty Ltd ACN 082 543 986
201 Charlotte Street
BRISBANE QLD 4000

Anglo Coal is an Australian coal producer which owns and operates the open cut Callide Mine. The majority of coal from the Callide mine is supplied to CS Energy, InterGen and CPM for operation of the Callide Stations.

Anglo Coal supports this application for interim and final authorisations.

- (b) **Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:**
(Refer to direction 5)

Not applicable.

4. Public benefit claims

- (a) **Arguments in support of authorisation:**
(Refer to direction 6)

Refer to the attached Submission.

- (b) **Facts and evidence relied upon in support of these claims:**

Refer to the attached Submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 7)

Refer to the attached Submission.

6. Public detriments

- (a) **Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:**
(Refer to direction 8)

Refer to the attached Submission.

- (b) **Facts and evidence relevant to these detriments:**

Refer to the attached Submission.

7. Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?**

No.

- (b) If so, the following information is to be furnished:**

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:
(Refer to direction 9)**

Not applicable.

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:**

Not applicable.

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:**

Not applicable.

8. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?**

Yes.

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

No.

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

Not applicable.

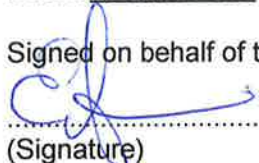
9. Further information

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:**

Eddie Scuderi
Corrs Chambers Westgarth
Level 34, Waterfront Place
1 Eagle Street
Brisbane QLD 4000

Dated 20 June 2013

Signed on behalf of the applicant:



.....
(Signature)

Eddie Scuderi

(Full Name)

Partner, Corrs Chambers Westgarth

(Position in Organisation)

DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing the application for authorisation.

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. 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. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions. Provide details of those provisions of the contract, arrangement or understanding that do, or would or might, substantially lessen competition.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
 8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.
 9. 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, arrangements or understanding referred to in item 2.

Applications for Interim and Final Authorisations

Applicants:

- 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**)

Nature of Application:

The Applicants are seeking an interim and a final authorisation.

Conduct for Authorisation:

Authorisation is sought for the joint re-negotiation of existing coal supply arrangements with Anglo Coal.

1 Background to the Application

The Applicants

- 1.1 On 1 July 2011 a restructure of Queensland's government-owned electricity generator companies resulted in the merger of CS Energy and Stanwell Corporation. The merged entity trades as CS Energy Limited.
- 1.2 CS Energy remains a Queensland government-owned electricity generator which, amongst other activities, now owns and operates:
 - (a) Callide Power Station (1,630MW)¹;
 - (b) Kogan Creek Power Station (750MW); and
 - (c) Wivenhoe Power Station (500MW).
- 1.3 Relevantly, CS Energy owns and operates the Callide Power Station known as Callide B.
- 1.4 CS Energy (through its wholly owned subsidiary Callide Energy Pty Ltd) and InterGen Australia (through its wholly owned subsidiary IG Power (Callide) Ltd) are 50/50 participants in an unincorporated joint venture – 'Callide Power Project Joint Venture' which owns and operates the Callide Power Station known as Callide C.
- 1.5 CPM is a 50/50 joint venture company owned by the subsidiaries of CS Energy and InterGen Australia, which acts as the joint venture manager for the Callide Power Project Joint Venture and as agent for the joint venture parties in the acquisition of coal for the station.

¹ CS Energy (through its wholly owned subsidiary Callide Energy Pty Ltd) is a 50 percent participant in the unincorporated joint venture which owns the 860MW Callide C.

- 1.6 Callide Power Trading Pty Ltd (another 50/50 joint venture company owned by the subsidiaries of CS Energy and InterGen Australia) trades the electricity generated from the Callide C Power Station on the basis of bids submitted by each owner.
- 1.7 CPM has contracted the operation and maintenance of the Callide C Power Station along with the provision of station services to CS Energy.
- 1.8 Both Callide B and Callide C are coal-fired power stations. Both power stations are supplied under long term coal supply agreements with coal by Anglo Coal from its Callide Mine which is adjacent to the Callide Power Stations.
- 1.9 Coal is delivered from the Callide Mine to the Callide Power Stations by means of a single conveyer belt. The Callide Power Stations also share other infrastructure including a single coal stockpile, stamler and water tanks.
- 1.10 Callide B and Callide C power stations (**Callide Stations**) are connected to the national electricity grid and operate within the National Electricity Market (**NEM**).
- 1.11 The Callide Power Stations operate as base load stations supplying electricity into the NEM.

The Other Party – Anglo Coal

- 1.12 Anglo Coal is an Australian coal producer with six mines operating within Queensland and New South Wales. It is a related body corporate of Anglo American Plc which has mining operations in Australia, South America and South Africa.
- 1.13 Anglo Coal owns and operates the open cut Callide Mine. The mine produces low sulphur-sub-bituminous thermal coal.
- 1.14 The majority of coal from the Callide Mine is supplied to CS Energy and CPM for operation of the Callide Stations. The balance of the coal from the Callide Mine is exported.

The Coal Supply Agreements

- 1.15 CS Energy and CPM each have two separate existing coal supply agreements with Anglo Coal. These agreements were executed concurrently in 1998 and provide for a base price for coal supplied to the Callide B and C Stations respectively.
- 1.16 The proposed joint negotiations may result in either a variation to the existing coal supply agreements or a termination and replacement of them.

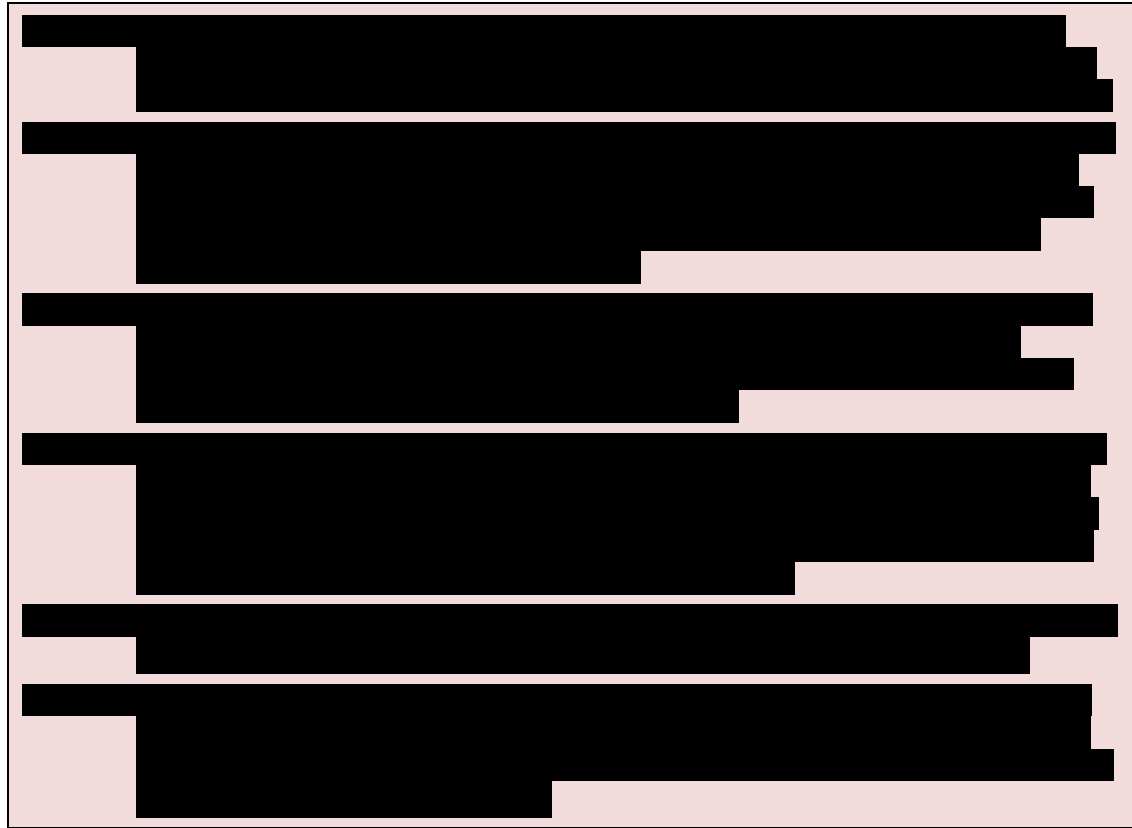
Previous Authorisation

- 1.17 In November 2006 the Australian Competition and Consumer Commission (**Commission**) authorised CS Energy and CPM to jointly negotiate a price review of their respective coal supply agreements with Anglo Coal.² Those negotiations occurred and a price review was implemented.

² Authorisation No. A50027.

THE FOLLOWING PARAGRAPHS ARE CONFIDENTIAL

EXCLUDED FROM
PUBLIC REGISTER



END OF CONFIDENTIAL PARAGRAPHS

This Application

1.24 Against that background and recognising that:

- (a) CS Energy, as operator of both Callide B and Callide C power stations, has day-to-day management of the coal receipt and operation of the coal-fired Callide Stations;
- (b) coal from the Callide Mine is delivered to both Callide B and Callide C power stations via a single conveyer belt; and
- (c) the minimum and target coal specifications under the respective coal supply agreements for Callide B and Callide C Power Stations are the same and that this is likely to remain the case under any new supply arrangement,

CS Energy and CPM (acting as agent on behalf of CS Energy and InterGen) wish to jointly negotiate with Anglo Coal potentially revised supply arrangements which could involve a change to existing pricing and supply conditions.³

³ Representatives of IG Power (Callide) Ltd as the owner of the 50 percent joint venturer in the Callide Power Project Joint Venturer will be present at the proposed joint negotiations. However, any concluded new supply arrangements will be reflected in separate agreements between Anglo Coal and CS Energy and between Anglo Coal and CPM.

- 1.25 The new supply arrangements may take the form of a variation to existing agreements or new agreements.
- 1.26 CS Energy and CPM do not consider themselves to be in competition for the acquisition of coal from Anglo Coal – the required annual quantities do not represent the annual production of the Callide Mine⁴ and the supply volumes are likely to be set within specified parameters, as is currently the case. [e1]
- 1.27 Also, having regard to:
- (a) the fact that CS Energy operates both the Callide B and Callide C stations, including the management of the receipt of coal from Anglo Coal;
 - (b) the fact that coal required by both Callide B and Callide C Stations will need to meet the same minimum standards;
 - (c) the history of supply under existing arrangements and the other characteristics of the likely supply arrangements going forward,
- CS Energy and CPM are of the view that the proposed acquisition of coal under any new arrangements will constitute a collective acquisition within the meaning of section 44ZZRV of the *Competition and Consumer Act, 2010* (Cth) (**CCA**). However, the Applicants acknowledge that the concept of “collective acquisition” is largely untested and there remains some doubt as to its meaning.
- 1.28 Despite the lack of competition between CS Energy and CPM for the relevant coal and the collective nature of the acquisition being proposed, CS Energy and CPM have determined to apply for an authorisation from the Commission to secure greater compliance certainty. The authorisation granted by the Commission in 2006 was a factor in the decision to proceed with this application.
- 1.29 The applicants submit that there is no detriment to competition (substantial or otherwise) by allowing them to negotiate collectively for new terms of supply to the Callide B and Callide C Stations.
- 1.30 The applicants also submit that there is public benefit in allowing them to negotiate and to implement any revised coal supply agreement. Those public benefits are detailed in this application.
- 1.31 The joint negotiations may result in different price, quality and delivery terms for each of CS Energy and CPM, although the same or similar terms may also result.
- 1.32 Anglo Coal supports the applications for interim and final authorisations.
- 1.33 The Applicants are seeking a final authorisation to protect the joint negotiations for a 5 year period.⁵

Interim Authorisation

- 1.34 Given the ongoing significant financial impact of shortfalls in supply and coal quality issues for both CS Energy and CPM, the Applicants see an urgent need

⁴ Anglo Coal exports up to 1,000,000 tonnes of annual production from the Callide Mine.

⁵ The current supply agreements, with extensions, each have a term ending in 2031. It is possible that the revised arrangements will have a similar or potentially longer term. Both agreements will reflect the current provisions which allow for individual (non-linked) rights of termination.

to commence negotiations and are seeking an interim authorisation for that purpose.

- 1.35 Any negotiations with Anglo Coal during the period of the interim authorisation will be on the express basis that no concluded bargain can be reached or implemented without final authorisation.

2 Market definition

- 2.1 The Applicants note the Commission's comments on market definition in the previous authorisation granted by the Commission to the Applicants in November 2006 (Authorisation No. A50027). In particular, the observation made by the Commission that the relevant market was arguably wider than the market which the Applicants contended for in that application. There has been no material change to market dynamics or the way in which coal is marketed and sold between 2006 and now.
- 2.2 The Applicants submit that the relevant market is the global market for the supply of coal. This is the case having regard to the extent to which Australian thermal coal is exported and to the fact that Australian miners (many of whom, including Anglo Coal, are part of global organisations) compete with coal miners operating in various other countries⁶.
- 2.3 The Applicants note that Anglo Coal participates in the export market with coal mined from its Australian operations, including with coal mined at its Callide Mine.

3 Counter-factual

- 3.1 The Applicants recognise that the Commission's practice is to assess proposed conduct on the 'future with-and-without test' (commonly referred to as the counter-factual).
- 3.2 If authorisation is not granted for the proposed joint negotiations the counter-factual result will be that the Applicants will be forced to negotiate with Anglo Coal separately. For the reasons articulated in this submission, the Applicants submit that the counter-factual is inefficient, fails to take into account the practicalities of the supply arrangements and will not deliver the public benefits associated with the proposed joint negotiations.

4 Public detriment

- 4.1 The Applicants cannot identify any public detriment from the proposed arrangements.
- 4.2 In particular, the Applicants note that:
- (a) given the global nature of the market for the supply of coal, nothing they might jointly negotiate with Anglo Coal in relation to the supply of coal to the Callide Power Stations will impact on price or other terms of supply in that global market;

⁶ Australia produces approximately 340 million tonnes of coal per annum of which approximately 160 million tonnes is exported – Bureau of Resources and Energy Economics – Resources and Energy Quarterly September 2012 edition.

- (b) any negotiated outcome from the proposed joint negotiations is unlikely to be materially different from what might otherwise be negotiated separately given the similarity in demand profile, the fact that the Callide Mine is adjacent to both Callide Power Stations and that coal from the Callide Mine is delivered to both Callide Power Stations by means of a single conveyor belt;
- (c) nothing Anglo Coal might agree with the Applicants in the joint negotiations would prevent Anglo Coal from obtaining different prices or negotiating different supply terms with other customers for its coal produced from the Callide Mine or from any of its other five mines in Australia;
- (d) nothing agreed as a result of the collective negotiations would impact on the prices and terms of supply achieved by other Australian coal miners and that this would also be true if the negotiations were undertaken separately.

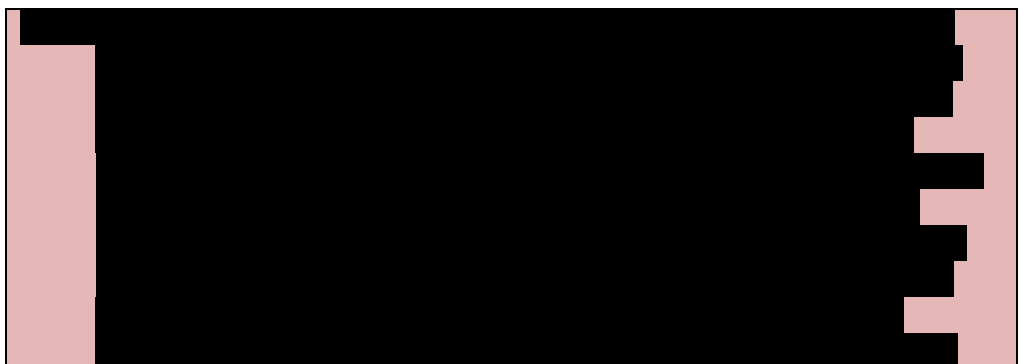
4.3 The Applicants agree with the Commission in the 2006 authorisation where it concluded that:

“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”⁷.

4.4 As was the case in the 2006 authorisation, it is also relevant here that the party most likely affected by the proposed conduct, Anglo Coal, supports the proposed joint negotiation process. It is also aware of and supportive of the fact that once the results of the joint negotiation are agreed, the agreed terms will be given effect by means of varied or new supply agreements.

5 Public benefit

5.1 The Applicants submit that there are a number of public benefits flowing from the proposal to allow joint negotiations and for the giving of effect to any jointly agreed terms. These include:



⁷ Paragraph 5.17.





- (b) Joint negotiations recognise the realities that CS Energy operates both Callide Stations and the fact that coal is supplied using a single conveyer. Allowing joint negotiations will therefore aid the efficiency of the negotiations, particularly where the relevant terms affect practical supply issues. In practice, the joint negotiations will reduce the length of the negotiations (as compared to the counter-factual) because practical issues flowing from proposed supply terms can be assessed by all of the parties impacted at the same time in the negotiation timeline, and with the benefit of knowing, first hand, the reasons articulated in support of the proposed contractual terms.
- (c) As with the negotiations that were authorised by the Commission in 2006, the joint negotiations now being proposed will achieve savings on legal, accounting, consulting and administrative costs. However, in the currently proposed negotiations the savings are likely to be significantly greater than in the 2006 negotiations because the currently proposed negotiations will extend beyond price terms; they will also address complex quantity and quality issues which by their nature, will involve more detailed negotiation and a greater range of specialist and consultancy services. The range of specialists likely to be required to assist include mining engineers, environmental specialists, project schedulers and financial analysts as well as lawyers. Based on experience, the Applicants estimate that joint negotiations, as compared to individual negotiations, will result in a total saving of between \$750,000 and \$1.2m on legal and consultancy fees.
- (d) The Applicants note that in its 2006 authorisation Determination the Commission concluded that while there would be savings and efficiencies from the joint negotiations, and that those savings and efficiencies would constitute public benefits, those benefits would be “small” and were “*unlikely to be substantial relative to the size of the business involved*”¹⁰

As noted in paragraph (c) above, the savings are likely to be significantly greater in these proposed negotiations because of the increased number and the complexity of the matters requiring resolution. Moreover, as the Commission would be aware, electricity generators are facing significantly increased operational and maintenance costs which are having substantial impacts on financial performance and upward pressure on prices to consumers. In that economic environment, the benefits of achieving cost savings (for the benefit of consumers), wherever possible, should not be underestimated. The State of

¹⁰ Paragraphs 5.22 and 5.24.

Queensland is the owner of CS Energy and as such has a vested interest in the outcome of the negotiations.

6 Conclusion

- 6.1 The Applicants are not convinced that an authorisation is necessary in relation to the proposed joint negotiations as they do not consider themselves to be in competition with one another for the acquisition of coal to be supplied by Anglo Coal, and because what they propose would appear to involve a collective acquisition.
- 6.2 They have applied for authorisation to achieve regulatory and compliance certainty. They took the same approach in 2006 when they successfully applied for authorisation to protect a jointly negotiated price review.
- 6.3 The Applicants cannot identify any detriment to competition arising from the proposed joint negotiations.
- 6.4 The Applicants have identified a number of genuine, meaningful public benefits associated with the proposed conduct, most of which are over and above those that applied in 2006 because of the difference in the matters to be negotiated and the different financial and contextual circumstances now applying as compared to 2006.