



Anglo American Services (UK) Ltd
and
Jellinbah Group Pty Ltd

Supporting Submission for Application for Authorisation
Anglo and Jellinbah Inter-Company Agreement

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1 Background

1.1 Overview of Applicants and Applicants' Operations

Anglo American Metallurgical Coal Pty Ltd (**Anglo American**) and Jellinbah Group Pty Ltd (**Jellinbah**) are coal mining companies that operate and export (through related bodies corporate) coal from various coal mines across Queensland and New South Wales for export to international customers for use in steel making and power generation.

The Anglo American group produce thermal coal and metallurgical coal for domestic consumption and export. Anglo American currently operates five coal mines in Queensland (Moranbah North, Capcoal, Dawson, Foxleigh and Callide) and one in New South Wales (Drayton mine), and has the Dartbrook mine (in New South Wales) currently under care and maintenance. Anglo American also have a variety of planned projects in Australia in various phase of study or development including Drayton South and Dartbrook in New South Wales and two metallurgical coal underground projects, Moranbah South and Grosvenor in Queensland. Anglo American currently produces approximately 30 million tonnes of coal per annum (**Mtpa**) for steelmaking customers and power producers throughout the world.

Anglo American Services (UK) Ltd (**Anglo Services UK**), an Anglo American group company, performs a procurement function of obtaining goods and services on behalf of numerous companies within the broader Anglo American group, including Anglo American.

Jellinbah is a Queensland based coal mining company focused primarily on metallurgical coal with two mines in Queensland (Jellinbah and Lake Vermont). Jellinbah is a relatively small coal producer, producing just under 10Mtpa of coal production in the 2012/13 financial year. Anglo American owns a minority interest (33%) in Jellinbah, such that Jellinbah is not a related body corporate of Anglo American group companies.

1.2 Overview of Proposed Transaction Structure

Anglo Services UK has entered into a range of contracts concerning the purchase of earthmover tyres by companies within the broader Anglo American group (**Contracts**). This includes a Framework Agreement that took effect on 1 January 2014 (**Framework Agreement**) with Transityre B.V., a company organised under the laws of Netherlands and acting through its registered French branch office (the **Supplier**).

The Framework Agreement sets out the key terms and conditions that will apply to the purchase of tyres by companies within the Anglo American group, including Anglo American from the Supplier or its affiliates.

The Framework Agreement further provides a process for the conclusion of various local agreements whereby the most appropriate affiliate of the Supplier will enter into a local agreements with the relevant company within the Anglo American group for the supply of tyres in furtherance of the supply arrangements under the Framework Agreement.

The Framework Agreement sets out all of the key terms for the acquisition of the tyres including:

- (a) the volume commitments for the relevant year, including any adjustments to volume;
- (b) the process for determining the schedule for delivery;
- (c) the methodology for calculating the price for the acquisition of tyres;
- (d) the allocation of risk between the parties; and
- (e) dispute resolution procedures and termination rights.

Further the Framework Agreement provides that, in relation to any local agreement:

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- (a) the failure to execute a local agreement will not negate or suspend any party's obligations under the Framework Agreement;
- (b) no party shall have any liability to each other arising from a local agreement; and
- (c) any local agreement must be substantially in the form set out in the schedule to the Framework Agreement, except any change required by law or that does not contradict the Framework Agreement.

Jellinbah procures tyres from Bridgestone, Goodyear and Michelin. Each arrangement is negotiated on separate terms with each of the suppliers. In recent times Jellinbah has not renewed contracts with each of these suppliers and has instead decided to use existing inventory until a more cost effective solution can be found for procuring large earthmoving tyres.

Anglo Services UK is considering extending its procurement services in relation to the acquisition of tyres for mining vehicles to also cover Jellinbah. To do so Anglo Services UK will need to amend the Framework Agreement to include Jellinbah as a participating buyer group company and will require Jellinbah to enter into an Inter-Company Agreement (**ICA**) with Anglo Services UK.

2 Authorisation Required

2.1 Proposed Conduct

Anglo Services UK and Jellinbah (the **Applicants**) seek authorisation under section 88(1A) and section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to:

- (a) collectively discuss and negotiate terms and conditions for the purchase of tyres from the Supplier or its affiliates;
- (b) include Jellinbah as a participating buyer group company to the Framework Agreement and enter into an ICA with Jellinbah so that Jellinbah can participate in the purchase of tyres on the same terms as if it was an Anglo American group company;
- (c) enter into and give effect to the Contracts and such other contracts, arrangements or understandings with the Supplier (and their representatives) as required; and
- (d) discuss related matters amongst themselves (together the **Proposed Conduct**).

2.2 Scope of immunity

To ensure proper statutory immunity for the Proposed Conduct, the Applicants request that any authorisation granted pursuant to this application for authorisation include each of the Applicants' respective successors, assigns, related bodies corporate and any future joint venture participants into one of Jellinbah's mining operations.

2.3 Voluntary negotiations

Entry into the Proposed Conduct is voluntary for the following reasons:

- (a) Even after authorisation, there is no requirement for Jellinbah to participate in collective negotiations;
- (b) Each party is free to determine whether they wish to enter into the Proposed Conduct; and
- (c) Following collective negotiations, each Party is free to determine whether they wish to be bound by the negotiated terms.

Accordingly, the Proposed Conduct does not constitute a collective boycott and authorisation will merely provide the opportunity for the parties to enter into the Proposed Conduct on a voluntary basis.

2.4 Rationale for the Proposed Conduct

The mining sector throughout Australia (and particularly the Queensland and New South Wales coal industries) has seen a significant cyclical change resulting in extreme cost pressures on miners. In particular (without being an exhaustive list):

- (a) There has been a major slowdown in the global economy (particularly Asia, Europe and the U.S.) thereby dramatically decreasing demand for steel (including coking coal products);
- (b) Miners are locked into 'take or pay' rail and port contracts which were struck at the top of the market, creating significant cost pressures (with many marginal producers making losses by producing, but the losses are lower than would be incurred by not producing and paying the take or pay charges);
- (c) The high Australian dollar has created cost pressures for Australian producers (who have costs denominated in Australian dollars, but revenues generally denominated in US dollars); and
- (d) Government policies have imposed additional costs (such as coal royalty rate increases in Queensland and to a lesser degree the previous federal government's emissions trading scheme and mineral resource rent tax).

Accordingly, there is currently very significant cost pressures on miners to reduce operating expenditure and deliver products at a reduced price.

The current significant cost pressures are probably best evidenced by:

- (a) The closure of several coal mines due to unprofitability such as Blair Athol, Wilkie Creek and Gregory in Queensland; and
- (b) Several high profile expansion plans or new mines (such as Wandoan) and new port developments that were dependent on new mines being developed (such as Dudgeon Point and various Abbot Point developments) having been shelved due to the costs pressures facing the coal industry.

Procurement of tyres for mining vehicles represent a substantial operating cost for coal mines and consequently is an area in which Anglo American and Jellinbah are keen to make their operations as efficient as possible.

The Proposed Conduct will allow the Applicants to decrease operating costs by seeking to purchase tyres in a larger predetermined quantity and therefore being able to negotiate a lower price for the goods.

In particular, Jellinbah is a smaller miner and therefore is very dependent on running a low cost operation in order to achieve a return on its investment. The Applicants note that Jellinbah, in particular, will see significant benefit in purchasing tyres under the terms that Anglo Services UK will be able to negotiate with the Supplier. As a part-owner (holding approximately 33% of Jellinbah) Anglo American will in turn see benefit in reducing Jellinbah's costs of operations in its return from its investment in Jellinbah.

2.5 Term

The Applicants seek authorisation for a period of 5 years. The framework agreement expires on 31 December 2017 and includes automatic extension for rolling 1 year periods unless one of the

parties terminate the arrangements. The Applicants submit that the term is appropriate given the length of the proposed Contracts and is conservative in comparison to previous authorisations granted by the ACCC to coal producers for collective bargaining (as described in further detail in paragraph 2.6 below).

2.6 Previous authorisations for collective bargaining arrangements for coal producers

The Applicants note that the ACCC have previously provided consent to a range of collective bargaining arrangements by coal producers, including most relevantly for this application:

- (a) Endocoal Ltd & Ors - Authorisations - A91350 & A91351: where the ACCC authorised two groups of central Queensland coal miners to enter into a collective bargaining arrangement for port and below rail services to Dudgeon Point for a period of 15 years;
- (b) Abbot Point Coal Export Terminal Producers - Authorisation - A91275: where the ACCC authorised several coal miners to enter into a collective bargaining arrangement for below rail infrastructure to Abbot Point Coal Terminal for a period of 15 years;
- (c) Cockatoo Coal Limited & Stanmore Coal Limited - Authorisation - A91311: where the ACCC authorised the collective bargaining by two coal miners of below rail infrastructure to WICET at the Port of Gladstone for a period of 22 years; and
- (d) Nathan Dam Project with SunWater - Authorisation – A91338: where the ACCC authorised 6 coal miners to enter into collective bargaining arrangements for the development of, and water supply from, the Nathan Dam project for a term of 23 years.

The Applicants submit that the Proposed Conduct for which authorisation is being sought in this instance, whilst providing many of the same public benefits, is likely to cause less public detriment because this application is confined to the activities of only two miners and therefore much less likely to be able to adversely impact on competition.

3 Weighing public benefits and detriments

The ACCC will not authorise a provision of a proposed contract, arrangement or understanding that is (or may be) a cartel provision, unless it is satisfied that:¹

- (a) the cartel conduct has, or is likely to, result in a benefit to the public; and
- (b) that benefit would outweigh the detriment to the public that may arise from any lessening of competition resulting from the conduct.

The Applicants submit that the Proposed Conduct is likely to result in significant public benefits that outweigh any public detriment for the reasons identified at paragraphs 6 and 7 below.

3.2 Public benefit test

The term '*public benefit*' is not defined in the CCA. The ACCC and the Australian Competition Tribunal (*Tribunal*) have held that:²

'...public benefit should be given its widest possible conception....[including] anything of value to the community generally, any contribution to the aims pursued by society including The achievement of the economic goals of efficiency and progress...'

¹ See the test in sections 90(5A) and 90(5B) of the CCA in relation to cartel conduct and s90(6) in relation to substantially lessening competition

² *Re Queensland Cooperative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

3.3 Public detriment test

Similarly, the term '*public detriment*' is not defined in the CCA. The Tribunal has also applied a wide meaning to the concept of public detriment stating:³

'detriment to the public constituted by any lessening of competition that would result, or be likely to result... 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.'

3.4 The counterfactual test

In weighing the public benefits and detriments, the ACCC applies the 'future with and without' test (the counterfactual test). The ACCC will compare the benefits/detriments that would be likely to exist in the market in the future if the authorisation were granted (factual) against the benefits / detriments that would be likely to apply if the conduct was not granted (counterfactual).

In the Authorisation Guidelines the ACCC identifies that the test will be applied on a case by case basis.⁴

4 The counterfactual

Where the Proposed Conduct is not authorised by the ACCC, the following is likely to be the direct outcome of such refusal (and therefore the counterfactual):

- (a) The Applicants would negotiate with the Supplier on separate terms, which especially in the situation of Jellinbah would result in a worse bargaining position (due to a substantially reduced volume, lesser certainty of volumes to be acquired and lesser credit rating); and
- (b) Jellinbah would be likely to receive higher costs for the tyres due to the reduced bargaining position and volume (or at least volume that could be guaranteed upfront under the proposed arrangement).

In this scenario, Anglo Services UK would continue to procure tyres for related bodies corporate within the Anglo American group as normal, such that the incremental difference between the Proposed Conduct and the counterfactual is the addition of the Jellinbah volumes to the tyres Anglo Services UK is responsible for procuring.

5 Relevant markets

The Proposed Conduct will be assessed by the ACCC in the context of the competitive environment in which the proposed conduct will occur.

The Applicants submit that, given the scope of the Proposed Conduct is limited to the acquisition of large earthmover tyres for use in mining operations, the relevant market should be the global market for acquisition of large earthmover tyres from manufacturers. While the Applicants consider this is a global market, the competition assessment will remain unchanged if a narrower Australian market was adopted for the purposes of assessing this application.

There are only two major suppliers of first tier quality large earthmover tyres to the mining sector in Australia. These are Michelin and Bridgestone. Other suppliers such as Firestone, Marathon Tyres, Goodyear and Belshina provide second tier (lower quality) earthmover tyres. Products from these second tier manufacturers are not considered a comparable product due to higher safety risks and lower performance.

³ *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 140357 at 42, 683.

⁴ ACCC, Authorisation Guidelines, 2013 p.53

6 Significant public benefit

The Applicants submit that the Proposed Conduct will result in significant public benefit including:

- (a) Reduced transaction costs associated with negotiations (by removing the duplication of negotiation time, legal costs and other costs which would be incurred by the Applicants and the Supplier if the Applicants were to negotiate separately);
- (b) Increased economic efficiency of the coal mines for which the tyres are being acquired;
- (c) Strengthening the competitiveness and viability of the coal mines for which the tyres are being acquired in an otherwise challenging economic environment for those coal mines (with the resulting flow-on benefits of preserving or enhancing export volumes and revenue, employment – particularly in regional areas, government royalty revenues and related economic activity); and
- (d) Providing benefits for the Supplier through increased certainty of volumes (which in turn may allow for more efficient investment in and operation of production and logistics facilities).

6.2 Reduced transaction costs

By bargaining collectively the parties will be able to pool resources and therefore reduce transaction costs associated with negotiations such as staff hours involved in negotiation and expenditure on legal advisers and other costs related to supporting such negotiations.

If authorisation was not provided and the counterfactual (as assessed earlier in this submission) was to eventuate, Anglo Services UK and Jellinbah would instead duplicate a lot of the resources and costs involved in separate negotiations for procurement of tyres.

6.3 Increased economic efficiencies

By bargaining collectively, rather than on an individual basis, parties are able to generate public benefits by improving the economic efficiency of the negotiated arrangements with the Supplier (including by reducing some of the information asymmetries around anticipated volumes of tyres to be acquired).

6.4 Strengthened competitiveness and viability

By reducing the anticipated costs of tyres (and thereby overall mine operating costs), the competitiveness and economic viability of the mines for which the tyres are being acquired will be improved. Enhancing a mine's position on the industry cost curve in this manner is critical in the current challenging economic environment for Australian coal mines.

Enhancing or preserving the viability of the mines involves has numerous resulting flow-on benefits, principally including:

- (a) Preserving or enhancing Australia's export volumes and revenue;
- (b) Preserving or enhancing employment – particularly in regional areas which have been impacted by the downturn in the coal industry; and
- (c) Continuing royalty revenue streams for the Queensland and New South Wales State governments (with the resulting improvement in each State's ability to provide for other community needs).

6.5 Benefit for supplier

Permitting parties to collectively negotiate can also provide benefits to suppliers. As is the case here, collective negotiations will increase the certainty the Supplier has about the volume of sales

which it will achieve to the Applicants. It would be anticipated that this may allow for more efficient investment in and operation of production and logistics facilities by the Supplier.

7 Minimal (if any) public detriment

The Applicants submit that the Proposed Conduct is likely to cause minimal (if any) public detriment because:

- (a) The collective bargaining negotiations being entered voluntarily with no collective boycott activity;
- (b) There is likely to be no or minimal effect on competition within the relevant market(s) – principally due to the limited scope of the Proposed Conduct (both in terms of the participating parties and the goods to be acquired); and
- (c) There is likely to be minimal long term or irreversible effects on any relevant market.

7.2 Negotiations are voluntary with no collective boycott activity

An authorisation would permit, but not compel, Jellinbah to engage in the Proposed Conduct and the Supplier to negotiate with the Applicants on the basis of the collective bargaining proposed.

As the parties are entering into these negotiations on a voluntary basis, there is no collective boycott activity that could restrict the activities of the parties in dealing with other competitors.

7.3 Minimal effect on competition

The Applicants submit that there is minimal risk (if any) of the Proposed Conduct having an effect on the competitive landscape in the relevant market. This is because:

- (a) The relevant market is dominated by two major suppliers (Bridgestone and Michelin) and therefore the incremental quantity of tyres being acquired at better rates (i.e. Jellinbah's tyres) is unlikely to have any effect on the competitive environment of the relevant market;
- (b) While the Applicants are both coal mining companies in Queensland they do not necessarily 'compete' for the acquisition of inputs like tyres;
- (c) Anglo American and Jellinbah make up a small proportion of the mining companies that would be acquiring tyres (being something that is required for mining projects for numerous other types of resources, not just coal). Each year Anglo American and Jellinbah separately acquire a total of approximately 250 large earthmoving tyres in Australia and approximately 3,300 large earthmoving tyres on a global basis. Anglo American estimates that at present the percentage of market share held by Anglo American and Jellinbah in the acquisition of large earthmoving tyres in Australia and globally is less than 10%;
- (d) The vast majority of this market share (identified above) is held by Anglo American, with Jellinbah making up a smaller percentage of the total market share. The incremental change from the counterfactual (described earlier in this submission) of Jellinbah's tyre volumes being included in the Anglo Services UK procurement volume is minimal and therefore unlikely to increase the parties' market share by a significant amount;
- (e) The Supplier sells its products on a global scale and is not limited to mining operations generally or mining operations in Australia, Queensland or New South Wales; and
- (f) There are no restrictions on the Supplier supplying tyres to other mining companies.

In relation to potential secondary markets:

- (g) Any wider mining goods and services market would be even broader in terms of customers and suppliers, and the Proposed Conduct would have even less impact on such a market as the collective bargaining is restriction to acquisition of tyres for mining vehicles; and
- (h) In respect of the metallurgical and thermal coal markets, the arrangement is, if anything, procompetitive, by enhancing the efficiency of mines that may otherwise become less competitive in the current challenging economic environment for the coal industry.

Therefore the Applicants consider that, given the very confined scope of the Proposed Conduct, the Proposed Conduct would not have any adverse effect on competition in the primary market or any relevant secondary market.

7.4 No significant or irreversible effect on relevant market

The Proposed Conduct does not involve uncompetitive arrangements. Further due to the limited scope of the activity there is almost no possibility of a change to the relevant market. In the very unlikely instance of a change to the relevant market any such change is very unlikely to be permanent.

8 Interim authorisation

8.1 No risk pending final approval

The Applicants are seeking interim authorisation to allow the Applicants to commence negotiations as soon as possible in order reduce costs at the earliest opportunity.

The Applicants consider that, for the reasons identified above, the public benefit significantly outweighs the public detriment resulting, or likely to result, from the Proposed Conduct.

The Applicants understand the ACCC's concern that providing interim authorisation permits the conduct prior to the ACCC having a proper opportunity to assess the Proposed Conduct. The Applicants have taken all opportunities to mitigate any public detriment (if any) and respectfully request that interim authorisation be permitted for the following reasons:

- (a) The conduct does not involve uncompetitive arrangements;
- (b) For the reason identified at paragraph 4 above there is very little risk of a change to the relevant market if interim authorisation is granted;
- (c) Further in the very unlikely instance of a change to market, that change is very unlikely to be permanent and it is almost impossible to consider that the market would be unable to return to its pre-interim state should ACCC refuse to grant authorisation; and
- (d) The negotiations provide both cost benefit to the Applicants and certainty of supply to the Supplier and therefore interim relief will not result in harm to any party to the transaction.

If interim relief is not granted the Applicants will continue to be subject to higher operating costs at a critical time in the coal mining industry (which will be particularly detrimental to Jellinbah as a junior miner).

9 Conclusion

The Applicants seek authorisation under section 88(1A) and section 88(1) of the CCA (and interim authorisation) to undertake the Proposed Conduct.

Authorisation is sought for the Term.

The Applicants submit that the substantial public benefits anticipated to arise from the Proposed Conduct outweigh the minimal (if any) likely public detriments.

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Further, the Applicants submit that the Proposed Conduct is consistent with previous authorisations provided by the ACCC and is likely to result in significantly less public detriment due to the confined number of parties (and limited incremental change compared to the counterfactual of separate negotiations).

Accordingly, the Applicants request that authorisation be granted for the Proposed Conduct for the Term, and interim authorisation be granted pending a final decision from the ACCC on authorisation.