

Chapter 3

The case for ending the joint marketing arrangements

3.1 The DomGas Alliance represents the majority of Western Australia's gas consumption and gas transmission capacity. In its submission and verbal evidence to this inquiry, the Alliance described the North West Shelf Venture as a 'cartel' which substantially lessens competition in the domestic market.¹ It argued that the joint selling arrangement 'has the purpose or likely effect of fixing controlling or maintaining prices for gas supplied by the individual...participants'.² Were it not for the joint marketing arrangements, each company would be offering gas for sale at a price and on terms individually determined by that participant.

3.2 The DomGas Alliance notes that the six participants in the North West Shelf Venture currently enjoy substantial market power and are all highly profitable producers.³ It claims that this market power is a direct consequence of the joint selling arrangements which have shifted bargaining power 'unfairly' to gas producers. Specifically, the current arrangements:

- constrain the entry of new suppliers;
- reduce the number of independent producers selling gas to the domestic market;
- create a significant disparity in information which undermines the power of consumers;
- effectively maintain a minimum price floor; and
- operate to withhold supply from the domestic market with the Venture focussing on a small number of larger customers.⁴

Is the Western Australian gas market 'immature'?

3.3 The DomGas Alliance contests the claim that the current gas market in Western Australia is 'immature' (see chapter 2). The Chairman of the Alliance told the committee that since the mid-1990s, there had been a 'transformation' in the downstream gas market. There are now 25 to 30 individual customers and gas purchase and transmission have been separated. There is also third party access to pipelines and deregulation of energy utility and markets generally.

1 Mr Stuart Hohnen, *Proof Committee Hansard*, 11 November 2008, p. 18.

2 DomGas, *Submission 1*, p. 5.

3 Woodside alone recorded a half-yearly net profit this year of over \$1 billion.

4 DomGas, *Submission 1*, p. 6.

3.4 The DomGas Alliance argued that the deregulation of the downstream market gas market means that joint selling by the joint venture participants is no longer required to balance the market power of a single buyer.⁵ The 'immaturity' of the Western Australian gas market, therefore, is principally a product of the joint selling arrangement itself. The Venture argues that it cannot end joint selling without a more mature market but DomGas say the main obstacle to a more mature market is the Venture's joint selling arrangement.

Does the Venture need to sell jointly?

3.5 Recall from chapter 2 that one of the Venture's key arguments was that they needed to explore and develop gas collectively to meet common infrastructure costs that would be too large for a single company to cover. Having made this investment jointly, they argued, joint selling is necessary to ensure that their product is sold and the risks are shared equally across the whole chain. The other submitters found these arguments less than convincing.

3.6 On the high cost of common infrastructure, the Chairman of the Alliance told the committee:

Ms Howell talked about the difficulty of aggregating sufficient volumes to underpin investment. That is something that we in the pipeline business do every day. We have mounted three very large expansion projects in the last four years. We have committed \$1.8 billion to the Western Australian market. We have aggregated a series of diverse customer loads and engineered and financed those expansions. That is not all that difficult.⁶

3.7 On the need for joint arrangements 'across the whole chain', the Alliance's Executive Office, Mr Gavin Goh, gave the following response:

...when you are looking at these joint ventures, you have production infrastructure and exploration and operations going on. What we are talking about is the disposal of the product at the end point. Being required to sell independently and compete, in our mind, does not impact on the production of that resource. It is probably relevant to note that the argument was raised with the New Zealand authorities that joint selling was necessary to underpin investments. New Zealand found as a matter of conclusion that separate selling was not going to make an otherwise viable field nonviable. What I am trying to say is that it is not going to impact the viability or otherwise of a field.⁷

5 Mr Stuart Hohnen, *Proof Committee Hansard*, 11 November 2008, p. 19.

6 Mr Stuart Hohnen, *Proof Committee Hansard*, 11 November 2008, p. 26.

7 Mr Gavin Goh, *Proof Committee Hansard*, 11 November 2008, p. 25.

Anti-competitive practices

3.8 In putting the case that the Venture's activities are anti-competitive, the DomGas Alliance emphasised that the six Venture companies share knowledge on contract terms, prices, timing and all the provisions of a commercial gas contract.⁸ This cooperation among major industry players allowed the Venture to set a minimum price for gas. There is no incentive for participants in prospective joint ventures to undercut the Ventures prices.⁹ Only in a competitive market with 'a sufficient number of competing players' will gas prices be set appropriately.¹⁰

3.9 This active price setting is only one manifestation of the Venture's market dominance. DomGas alleged that the Venture also withholds the supply of gas to the local market which is 'at least as powerful an action as putting up prices'.¹¹ However, the committee has no evidence to corroborate this claim.

3.10 The DomGas Alliance also claimed that the Venture's dominance in the domestic market is reflected in their recent attitude to cost increases for local consumers. It cited Woodside's recent threat to pass on to domestic consumers the cost of the condensate excise exemption removal as evidence that the Venture has substantial market power. The Alliance noted that Woodside had not threatened to pass on the excise to customers in Japan or China where competitive markets exist.¹² In response, the Venture replied:

Any impost or fixed cost has to go into consideration when we look at our business and when we look at the prices we charge.¹³

3.11 Indeed, the DomGas Alliance put to the committee that the joint selling arrangement for the local market was creating a price premium for producers which they are not getting from the international market.¹⁴ Associate Professor Zumbo also noted:

...the possibility that there is cross-subsidisation—that the domestic consumers to some degree are cross-subsidising the need for the joint venturers to cut their prices on global markets, because those global markets are more competitive, and hence make those up somehow with domestic consumers.¹⁵

8 Mr Stuart Hohnen, *Proof Committee Hansard*, 11 November 2008, p. 28.

9 Mr Gavin Goh, *Proof Committee Hansard*, 11 November 2008, p. 25.

10 Mr Stuart Hohnen, *Proof Committee Hansard*, 11 November 2008, p. 25.

11 Mr Stuart Hohnen, *Proof Committee Hansard*, 11 November 2008, p. 28.

12 Mr Stuart Hohnen, *Proof Committee Hansard*, 11 November 2008, p. 19.

13 Ms Eva Howell, *Proof Committee Hansard*, 11 November 2008, p. 13.

14 Mr Gavin Goh, *Proof Committee Hansard*, 11 November 2008, p. 25.

15 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 11 November 2008, p. 35.

The Trade Practices Act

3.12 The question of whether the Joint Venture's activities are legal under the *Trade Practices Act* is only relevant because it no longer has an authorisation.

3.13 Section 45 of the *Trade Practices Act* prohibits a contract, arrangement or understanding which has the purpose, or would be likely to have the effect, of substantially lessening competition'.¹⁶ Both the DomGas Alliance and Associate Professor Zumbo argued that the Venture's joint selling arrangement was clearly a breach of this section.

3.14 Mr Hohnen told the committee:

...the requirement of the Trade Practices Act is that their behaviour—the way in which they organise their marketing—is not substantially lessening of competition. Quite frankly, we cannot believe that an amalgamation of six companies like that, with 70 per cent market share, cannot lessen competition in the marketplace.¹⁷

3.15 Associate Professor Zumbo explained to the committee that while section 76 of the Act refers to joint ventures, there is an onus on the joint venturers to prove that they do not have the purpose, the effect or the likely effect of substantially lessening competition. On all three grounds, he argued, the joint venturers 'would fail to satisfy this defence'¹⁸.

3.16 If it could be established that the purpose, effect and likely effect of the joint selling is to substantially lessen competition, there may be some basis to 'investigate and possibly institute proceedings' for breaches of the TPA.

16 *Trade Practices Act 1974*, Section 45(2)(a)(ii)

17 Mr Stuart Hohnen, *Proof Committee Hansard*, 11 November 2008, p. 23.

18 Associate Professor Frank Zumbo, *Submission 4*, p. 5.