

Minority report

Senator Nick Xenophon

The Joint venture reduces competition

The bulk of the evidence before the committee is that the joint marketing arrangements of the North West Shelf Joint Venture are anti-competitive. In the absence of an authorisation from the ACCC, they would appear to be a breach of the *Trade Practices Act*. The committee was not told of any practical or logistical reasons for maintaining joint selling.

An independent legal opinion was offered by Associate Professor Zumbo:

In my opinion, there is a breach of section 45 of the Trade Practices Act. It can be through price fixing—and we know there is price-fixing conduct. Also there is conduct that is likely to have the effect of substantially lessening competition.¹

The Venture clearly has the *effect* of substantially lessening competition in the Western Australian gas market because of the lack of import competition, the very high barriers to entry of the market, high levels of market concentration and the lack of countervailing power of gas buyers.² The Joint Venture reduces the number of significant sellers from seven to two.³ In terms of whether its *purpose* is to substantially lessen competition:

...you have to ask: what is the goal they are seeking to achieve by engaging in joint marketing? I would submit that there is only one goal, and that is to maintain or raise prices above competitive levels. If that is the case, then they would have the purpose of substantially lessening competition.⁴

Once it is established that the purpose and effect of the joint selling is to substantially lessen competition, there is a basis to 'investigate and possibly institute proceedings' for breaches of the TPA. Associate Professor Zumbo cites two European precedents in which the European Commission settled cases involving the joint marketing of gas in the Norwegian and Danish gas markets.

It is arguable that the joint venture was justified when first introduced as the producers were effectively facing the government as a vertically integrated monopsony buyer. But the subsequent deregulation and privatisation of the domestic gas market means this justification no longer holds.

1 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 11 November 2008, p. 31.

2 Associate Professor Frank Zumbo, *Submission 4*, p. 6.

3 It increases the Herfindahl-Hirschman concentration index (which can vary from 0 representing perfect competition to 1 representing monopoly) from around 0.16 to 0.52.

4 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 11 November 2008, p. 31.

The individual companies in the Joint Venture are all large and profitable. The profitability of the joint venture project itself was not disclosed. At one point, the Joint Venture's CEO said 'the joint venture is not an incorporated entity. It does not have profits per se', which seemed inconsistent with her later claim that 'through what I call "the lean years" of the nineties this project was far from highly profitable'.⁵

There was no convincing evidence presented that the viability of the North West Shelf gas project would be compromised if the joint activities in the local gas market were restricted to exploration and development.

There is some irony in the Venture's argument that their joint marketing arrangement must continue because the Western Australian gas market is 'immature'. It is a vicious circle as the joint marketing arrangements are themselves an impediment to the maturing of the market. It is a bit like the classic economic argument about protecting 'infant industries' who then never grow up. If the Venture's partners were able to market their products independently to consumers, the various factors cited by the Venture as signs of the market's immaturity would be overcome.

This point was made by Associate Professor Zumbo:

...you will never get the market to develop to a fully mature status until you remove the joint marketing arrangements, because the joint marketing arrangements are an impediment to the development of all the factors you pointed out. Until you have separate marketing, all these additional facilities will not develop. There is no incentive to develop them because you essentially have a very dominant player, it being the North West Shelf project.⁶

The puzzle of the lifting of the authorisation

Chapter 1 of the majority report notes that in December last year, the Venture applied to the ACCC to have its authorisation for joint selling revoked. Ms Howell claimed the authorisation was no longer necessary and may not have been needed at all (see paragraph 2.7). Associate Professor Zumbo questioned this strategy:

My advice to any person in the position of the joint venture—given the considerable risk, given the size of the venture—is: if you have an authorisation you keep it, and if you do not have an authorisation you get one. It is just far too risky. The penalties under the Trade Practices Act could be 10 per cent of turnover or 10 million [dollars, if greater] per offence. They are very significant penalties. There is a real question as to why they sought to revoke that authorisation. If it is there, you keep it. Why give it up?... what I still cannot understand is: if the benefits that the joint venture believe they are contributing outweigh the cost—that is, the

5 Ms Eva Howell, *Proof Committee Hansard*, 11 November 2008, pp 13, 16.

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

reduction in competition—why don't they seek an authorisation? That would put the issue beyond doubt.⁷

Associate Professor Zumbo speculated before the committee that the ACCC may have given the joint venturers 'a level of comfort' that the arrangements are not in breach of the Act and that no action would be taken. He stressed that if an understanding along these lines had been reached, it is important for that to be made public.⁸

Conclusion

The North West Shelf Joint Venture's arguments for maintaining joint selling arrangements are flimsy and unconvincing. All of the arguments put to the committee in defence of joint selling were soundly rebutted. Further, the arguments that the arrangements stunted the competitive development of the Western Australian gas market are cogent and well founded. Having had its authorisation for joint selling revoked, the Venture seems to be in breach of section 45 of the Trade Practices Act. Whatever the legal ramifications of current practices, there is no reason why joint selling arrangements should be allowed to continue.

If there has been an understanding between the Venture and the ACCC that the joint selling arrangement is protected *on the basis of matters other than the provisions of the Act*, then these details must be made public. If the ACCC decides as an outcome of its investigation that the Venture is complying with section 45, the basis of this finding must be made public.

Ending the North West Shelf Joint Venture is a crucial requisite for deregulating the upstream gas market in the State and ensuring that the welfare of domestic gas consumers is maximised.

Recommendation

The ACCC should either abolish the joint marketing arrangements on the North West Shelf or provide clear, publicly stated reasons as to why the current arrangements should be permitted within the provisions of sections 45 and 76C and 76D of the Trade Practices Act.

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7 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 11 November 2008, pp 32–4.

8 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 11 November 2008, p. 36.