

**Parliament of Australia**

**Senate Economics Committee**

**INQUIRY INTO THE JOINT  
MARKETING ARRANGEMENTS ON  
THE NORTH WEST SHELF**

**Submission  
by**

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**PROMOTING AN EFFICIENT MARKET FOR THE SUPPLY OF GAS TO  
WESTERN AUSTRALIAN MARKET:  
THE ROLE OF THE *TRADE PRACTICES ACT* AND COMPETITION  
PRINCIPLES TO MAXIMISE  
THE WELFARE OF BUSINESSES AND CONSUMERS**

This Submission is concerned entirely with promoting an efficient market for the supply of gas to the Western Australian market. It is drafted by an independent commentator with nearly 20 years of experience in relation to Australian competition law and policy as a consultant; researcher; regular expert media commentator; as an occasional adviser to members of Federal and State Parliaments; Federal and State Governments and Departments; and the ACCC.

This Inquiry raises the following two key issues;

- (i) Given that the North West Shelf joint venture arrangements are no longer covered by authorisations under the *Trade Practices Act*, it would be submitted that the joint marketing activities and various other restrictive aspects of the joint venture arrangements are in breach of the competition provisions of the *Trade Practices Act*, and
- (ii) Given that the liberalisation of markets can generate substantial benefits to businesses and consumers and that a process of liberalisation remains incomplete unless there is competition between suppliers/producers, the North West Shelf joint venturers should cease their joint marketing activities and instead be required to undertake separate marketing of their individual entitlements from the project.

## **THE NORTH WEST SHELF JOINT VENTURE ARRANGEMENTS ARE IN BREACH OF THE COMPETITION PROVISIONS OF THE *TRADE PRACTICES ACT***

Given that the North West Shelf joint venture arrangements no longer have the benefit of the immunity afforded by an authorisation under the *Trade Practices Act*, it would be submitted that the arrangements are in breach of the Act. In particular, it would be submitted that the North West Shelf joint venture arrangements either individually or collectively give rise to various possible breaches of the competition provisions of the *Trade Practices Act*. It is further submitted that the joint venture is unable to rely on the so-called “joint venture” defences found in s 76C and 76D of the *Trade Practices Act*.

While for present purposes the submission will focus on breaches of s 45 of the *Trade Practices Act* involving the joint venture, it should be noted that in view of the substantial market power possessed by the joint venture, there may well also be possible breaches of s 46 of the *Trade Practices Act*.

### **Breaches of s 45 of the *Trade Practices Act***

The joint marketing activities and various other restrictive aspects of the North West Shelf joint venture arrangements give rise to various possible breaches of s 45 of the *Trade Practices Act*. These breaches relate to price fixing and provisions of the joint venture arrangements that either individually or collectively substantially lessen competition in breach of s 45.

In short, while individual provisions of the joint venture arrangements may separately constitute a breach of s 45, it is clear that as a result of the operation of s 45(4) the various restrictive provisions of the joint venture arrangements, as well as other aspects of the project (such as control of over gas reserves), can be grouped together and assessed collectively for their impact on competition. Section 45(4) states:

(4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and

(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;

together have or are likely to have that effect.

Thus, as a result of the operation of s 45(4) a provision in a particular joint venture arrangement will be deemed to substantially lessen competition where that provision; and other provisions in that particular arrangement, or provisions in other arrangements involving the joint venturers, collectively have the effect or likely effect of substantially lessening competition. This is significant as s 45(4) allows all aspects of the arrangements relating to the North West Shelf project to be considered together for the purposes of determining whether there are breaches of s 45 of the *Trade Practices Act*.

Turning to specific breaches of s 45 of the *Trade Practices Act*, it is clear that the joint venture through its joint marketing activities engages in conduct that is prohibited under s 45. This not only relates to expressly prohibited specific activities such as price fixing, but also extends to making and giving effect to a contract, arrangement, or understanding containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessens competition in breach of s 45.

A finding that a provision of a contract, arrangement, or understanding has the purpose, or has or is likely to have the effect, of substantially lessens competition is particularly significant as such a finding would mean that the joint venture would not have the benefit of the so-called "joint venture" defences found in sections 76C and 76D of the *Trade Practices Act*.

The defences are central to the present inquiry on the basis that if such defences are not satisfied, then the joint venture would be open to prosecution under s 45 of the *Trade Practices Act*. The defences in s 76C and 76D are in the following terms:

### **TRADE PRACTICES ACT 1974 - SECT 76C**

#### **Defence to proceedings relating to exclusionary provisions**

##### **Defence**

(1) In proceedings against a person in relation to a contravention of subparagraph 45(2)(a)(i) or (b)(i) in relation to an exclusionary provision, it is a defence if the person establishes that the provision:

- (a) is for the purposes of a joint venture; and
- (b) does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.

##### **Application of subsections 45(3) and (4)**

(2) Subsections 45(3) and (4) apply for the purposes of subsection (1) in the same way as they apply for the purposes of section 45.

### **TRADE PRACTICES ACT 1974 - SECT 76D**

#### **Defence to proceedings relating to price fixing provisions**

## Defence

(1) In proceedings against a person in relation to a contravention of subparagraph 45(2)(a)(ii) or (b)(ii) in relation to a provision of the kind referred to in subsection 45A(1), it is a defence, despite subsection 45A(1), if the person establishes that the provision:

- (a) is for the purposes of a joint venture; and
- (b) does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.

## Application of subsections 45(3) and (4)

(2) Subsections 45(3) and (4) apply for the purposes of this section in the same way as they apply for the purposes of section 45.

## Joint Venture defences not satisfied

Under sections 76C and 76D of the *Trade Practices Act*, the joint venturers would need to establish that the provision allegedly in breach of s 45 'does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.' At its simplest, this requires proof that the provision does not, for example, have the purpose of raising prices above competitive levels or have the effect of raising prices above competitive levels. The joint venturers would fail to satisfy this defence where it can be shown that the provision does have the purpose, and does have and is likely to have the effect, of substantially lessening competition.

From the outset, it is important to note that in accordance with s 45(3) of the *Trade Practices Act* the lessening of competition is to be considered by reference to *any* market in which the joint venturers supply or acquire goods or services or would supply or acquire goods or services but for the provision allegedly in breach of s 45. Section 45(3) states:

(3) For the purposes of this section and section 45A, *competition*, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

Thus, the lessening of competition is to be considered by reference to the Western Australian gas market as this is a market supplied by the joint venturers.

In relation to purpose, it would be submitted that the substantial purpose of the joint marketing activities and various other restrictive aspects of the joint venture arrangements is to enable the joint venturers to raise or maintain prices above competitive levels. Ultimately, the substantial purpose of or the end sought to be achieved by the price fixing and other restrictive aspects of the joint venture can only be to raise or maintain prices above competitive levels in a manner facilitated by the market power flowing from the joint marketing activities and other restrictive aspects of the joint venture arrangements. The joint marketing activities and other restricted activities of the joint venture are clearly intended to restrict competition between the joint venturers and, within this context, the restriction of competition can only be for the purpose of financially benefiting the joint venturers through their ability to raise or maintain of prices above competitive levels.

In relation to whether the joint marketing activities and various other restrictive aspects of the joint venture arrangements have the effect or likely effect of substantially lessening competition, it would be submitted that as a result of the following factors the joint marketing activities and various other restrictive aspects would have the effect, or be likely to have the effect, of substantially lessening competition in the Western Australian gas market:

- (a) the lack of import competition in the Western Australian gas market;
- (b) the very high barriers to entry to the Western Australian gas market;
- (c) the very high levels of concentration in the Western Australian gas market;
- (d) the lack of countervailing power of gas buyers in the Western Australian gas market; and
- (e) the joint venturers' control over proven gas reserves.

In the circumstances, it would be submitted that the joint venturers would not be able to rely on the joint venture defences under sections 76C and 76D of the *Trade Practices Act* and, accordingly, it would be further submitted that the joint marketing activities and various other restrictive aspects of the joint venture arrangements are in breach of s 45 of the *Trade Practices Act*.

In turn, this raises the issue of the need for the ACCC to investigate and possibly institute proceedings for breaches of the *Trade Practices Act*. Within this context, the European experience provides two excellent examples of how the competition agency can deliver considerable benefits to businesses and consumers as a result of pursuing legal action against joint marketing activities in gas markets. These cases involved the European Commission settling cases whereby the joint marketing of gas in the Norwegian<sup>1</sup> and

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<sup>1</sup> See

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/1084&format=HTML&aged=0&language=EN&guiLanguage=en>

Danish<sup>2</sup> gas markets was discontinued to the benefit of businesses and consumers.

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<sup>2</sup> See

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/566&format=HTML&aged=0&language=EN&guiLanguage=en>

## **THE PROMOTION OF COMPETITION IN THE UPSTREAM GAS MARKET IS AN ESSENTIAL PRECONDITION TO A COMPETITIVE GAS MARKET**

Irrespective of the outcome of any prosecution for breaches of the *Trade Practices Act* arising from the joint marketing activities and various other restrictive aspects of the joint venture arrangements, it is clear that such joint marketing activities are preventing the move to a fully liberalised and truly competitive Western Australian gas market.

In this regard, it is generally accepted that full liberalisation of a gas market is dependent on satisfying three preconditions:

- First, consumers must be given the freedom to choose their own gas supplier;
- Second, there must be a variety of gas producers or suppliers in the market who are able to independently determine their own marketing strategies; and
- Third, access to gas pipelines must be transparent and non-discriminatory.

While in Western Australian considerable progress has been made in relation to the first and third preconditions, it is clear that the second precondition has not been satisfied. This failure to satisfy the second precondition is a significant impediment to the achievement of a fully liberalised gas market and unless joint marketing activities cease and the joint venturers are free to individually and independently market their gas entitlement, a truly competitive market will not develop. This will continue to deny businesses and consumers the considerable benefits that flow from having a fully liberalised and truly competitive gas market where a diversity of suppliers/producers actively compete for business and have an incentive to expand the supply of gas where market conditions justify such an expansion.

While joint marketing activities undoubtedly remove any incentive for the joint venturers to compete with one another, it is clear that requiring the joint venturers to separately market their gas entitlements would considerably maximise the chances of an “outbreak” of competition between the joint venturers and rapidly expedite the development of all the features of a truly competitive market previously identified by the ACCC such as:

- additional transportation options;
- storage facilities;
- the entry of brokers or aggregators;
- gas-related financial markets; and
- substantial short term and spot markets.

While at the moment these features may not be present at the required levels, they will never develop or reach the required level in a market heavily dominated by a joint marketing arrangement amongst large and powerful joint venturers with a stranglehold over the Western Australian gas market. In short, the full liberalisation of the Western Australian gas market through a



requirement that the joint venturers separately market their gas entitlement remains a necessary precondition for the emergence of a truly competitive gas market for the benefit of businesses and consumers.

## List of Recommendations

- (1) That the Committee affirm the principle that full liberalisation of gas markets requires that there be a variety of producers/suppliers in the market that are individually free to determine their own marketing strategies. Competition on the supply side through a diversity of suppliers/producers is an essential precondition to having a truly competitive gas market and unless joint marketing by the North West Shelf joint venturers ceases the Western Australian gas market will not be truly competitive with businesses and consumers being denied the full benefits of liberalisation;
- (2) Pursuant to s 29(3) of the *Trade Practices Act*, and subject to one proviso, the Committee to request the ACCC to furnish to the Committee within 3 months of the request a report addressing (i) whether or not the joint marketing activities of the North West Shelf joint venture; or (ii) whether or not any other restrictive aspects of the joint venture arrangements (such as control over gas reserves) either separately or collectively may constitute possible breaches of the *Trade Practices Act*. The proviso being that if the ACCC institutes, or proposes to institute, proceedings against the joint marketing activities; or any other aspect of the joint venture arrangements, then the ACCC, on notifying the Committee, be excused from furnishing the information;
- (3) That the Productivity Commission be required to investigate and report on the possible benefits and costs to businesses and consumers from requiring the North West Project joint venturers to separately market gas to the Western Australian market;
- (4) That the Productivity Commission be required to investigate and report on an appropriate timeframe (with clear timelines) for the North West Project joint venturers to cease their joint marketing activities and move to separate marketing of their gas entitlements to the Western Australian market.