



Gorgon Gas Project: Application for Joint Selling Authorisation

Submission to the ACCC by the DomGas Alliance

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EXECUTIVE SUMMARY

Market structure

1. Ensuring competition in the domestic gas market is an issue of vital importance for consumers in Western Australia.
2. Natural gas underpins the State's mining and resource processing industries, fuels power generation, and supplies small businesses and households.
3. There has been fundamental transformation in the market since the mid-1990s. The downstream level of the market has undergone significant reforms to increase competition between customers.
4. This has led to a significant increase in:
 - the breadth of the domestic market and the size of domestic demand;
 - the number of direct gas customers;
 - the number of parties buying through an aggregator, many of whom could also elect to purchase directly from gas producers;
 - the entry of brokers providing gas trading services to gas users;
 - short and long-term trading in gas transmission capacity and physical gas;
 - additional transportation and storage options;
 - the flexibility within the Dampier to Bunbury Natural Gas Pipeline system to deal with supply and demand imbalances; and
 - connectivity between gas pipelines in Western Australia – gas can now be traded either physically or commercially in any part of the system.
5. The upstream market however remains highly concentrated with two suppliers controlling almost 100% of the domestic gas market.
6. Shell and Chevron continue to exercise significant market power through the unauthorised NWSJV cartel selling arrangements, and through their control of prospective new developments, particularly Gorgon.

Separate selling is commercially and practically feasible

7. Separate selling of domgas by the Gorgon Project is commercially and practically feasible:
 - the WA domestic gas market has undergone significant transformation over the past 10 years;
 - Shell and its partners sell separately from the major Pohokura gas field in New Zealand *despite originally claiming it was impossible to do so* because of supposed market features, and that “no development” would occur in the absence of authorisation;
 - long term contracts have not prevented major producers from supplying international customers and expanding LNG supply;
 - major producers already enjoy complete transparency over domestic demand and contract pricing, whereas domestic consumers have no access to this information;
 - there is no commercial imperative for joint selling to offset the market power of customers;
 - the operational measures necessary to enable separate selling are well-known and practical;
 - marketing decisions for domestic gas are already being made separately by Shell and Chevron in regard to the NWSJV;
 - gas balancing and nomination arrangements are already in place in the WA market;
 - producers in other joint venture gas developments sell separately into the WA domestic gas market; and
 - marketing decisions are already being made separately by Shell, Chevron and ExxonMobil with respect to LNG and condensate;
 - Shell, Chevron and ExxonMobil have been compelled by competition authorities to sell separately in other countries – including in Norway, Denmark and New Zealand; and
 - joint selling is not necessary to support investment and development of the Gorgon Project.
8. In the absence of an authorisation, Chevron, Shell and ExxonMobil would be able to separately sell gas into the domestic market.

Public benefits

9. Given that separate selling of domgas is commercially and practically feasible, the benefits associated with the Gorgon Project would therefore arise even in the absence of joint selling.
10. To the extent there are any additional “public” benefits from joint selling, these are illusory and accrue exclusively to the applicants.
11. These include the significant windfall gains expected from the suppression of competition and the concentration in market power with joint selling.

Significant anti-competitive detriment

12. Joint selling by the Gorgon participants would result in significant anti-competitive detriment by:
 - significantly reducing the number of independent sellers from three to one;
 - reducing customer choice over terms and conditions on offer;
 - entrenching the already dominant market power exercised by Shell Chevron and ExxonMobil, with consumers lacking countervailing power;
 - enabling the coordinated exercise of market power;
 - extending that market power to other projects in which Shell, Chevron and ExxonMobil participate; and
 - entrenching an effective minimum price for domestic gas.
13. In the absence of joint selling:
 - Shell, Chevron and ExxonMobil would compete against each other for WA domestic gas customers;
 - consumers would have greater customer choice over terms and conditions on offer;
 - Shell, Chevron and ExxonMobil would not be able to co-ordinate market power in setting price or non-price terms; and
 - there would be greater competitive pressure asserted on existing suppliers.

14. The significant anti-competitive detriments far outweigh any benefits that might be derived from joint selling.
15. Interim and final authorisation should not be granted to the applicants for joint selling.
16. The WA market can be distinguished from that in the PNG Gas Project Determination. In that case, the project participants possessed a lack of bargaining power and consumers possessed countervailing power.

Interim authorisation

17. A decision not to grant interim authorisation would not prevent Chevron, Shell and ExxonMobil from:
 - separately marketing and selling gas into the domestic market;
 - meeting their obligation under the State Agreement to diligently market gas to WA customers;
 - separately obtaining “a firm understanding of the likely level and timing of demand for domgas from the Project prior to a Final Investment Decision”; and
 - undertaking the required investment decisions for developing the Gorgon Project.
18. Interim authorisation would give rise to significant harm to consumers by suppressing competition and concentrating market power.
19. Given separate selling of domgas is commercially and practically feasible, any benefits associated with the Gorgon Project would arise even in the absence of an interim authorisation.
20. To the extent there are any additional “public” benefits from joint selling, these accrue exclusively to the applicants from the suppression of competition and the concentration of market power.
21. There are no grounds for the urgency claimed by the applicants. Separate selling is commercially and practically feasible. The applicants have also had considerable opportunity since at least 2003 if not earlier to seek authorisation.
22. The significant impacts that interim authorisation would have on the market and consumers cannot be unwound if final authorisation was later denied and the Gorgon participants required to sell separately.
23. For these reasons, interim authorisation should not be granted to the applicants for joint selling.

1. THE DOMGAS ALLIANCE

24. The DomGas Alliance represents natural gas users, infrastructure investors and prospective domestic gas producers in Western Australia. The Alliance aims to promote security, affordability and diversity of gas supply for industry and households.
25. The Alliance was formed in 2006 in response to a serious shortage of gas supply for new developments in WA.
26. Alliance members represent around 80 percent of Western Australia's domestic gas consumption and gas transmission capacity, including smaller industrial and household users of gas.
27. The Alliance also includes companies working to develop domestic gas fields.
28. The Alliance works closely with State and Federal Government and other industry stakeholders to promote initiatives and debate on domestic gas supply.

2. MARKET STRUCTURE

2.1 Summary

29. Ensuring competition in the domestic gas market is an issue of vital importance for consumers in Western Australia.
30. Natural gas underpins the State's mining and resource processing industries, fuels power generation, and supplies small businesses and households.
31. There has been fundamental transformation in the market since the mid-1990s. The downstream level of the market has undergone significant reforms to increase competition between customers.
32. This has led to a significant increase in:
 - the breadth of the domestic market and size of domestic demand;
 - the number of direct gas customers;
 - the number of parties buying through an aggregator, many of whom could also elect to purchase directly from gas producers;
 - the entry of brokers providing gas trading services to gas users;
 - short and long-term trading in gas transmission capacity and physical gas;
 - additional transportation and storage options;
 - the flexibility within the Dampier to Bunbury Natural Gas Pipeline system to deal with supply and demand imbalances; and
 - connectivity between gas pipelines in Western Australia – gas can now be traded either physically or commercially in any part of the system.
33. The upstream market however remains highly concentrated with two suppliers controlling almost 100% of the domestic gas market.
34. Shell and Chevron continue to exercise significant market power through the unauthorised NWSJV cartel selling arrangements, and through their control of prospective new developments, particularly Gorgon.

2.2 Western Australia's dependence on competitive gas supply

35. Competition in domestic gas supply is an issue of vital importance for Western Australia. Access to secure and affordable natural gas underpins the State's mining and resource processing industries, fuels power generation, and supplies small businesses and households.
36. Natural gas first flowed into markets in Western Australia with the completion of a pipeline from the Dongara gas fields to Perth in 1971. This supply was supplemented with a second pipeline from the North West Shelf project in 1984.
37. Today, Western Australia is the most energy and gas-dependent economy in Australia. Natural gas supplies half of the State's primary energy requirements and fuels 60% of the State's electricity generation. In contrast, natural gas supplies 19% of the primary energy needs of Australia as a whole.
38. Given the State's dependence on gas-fired electricity, the absence of competition in the domestic gas market has major direct impact on households and small businesses through electricity prices, as well as gas prices.

Table: Domestic gas consumption in Western Australia ¹

| Domestic gas consumption | |
|---|------------|
| Manufacturing - including alumina, other non-ferrous metals, iron and steel, chemicals, glass, ceramics, cement and concrete | up to 40% |
| Electricity generation | around 30% |
| Mining | 20-25% |
| Other uses – including commercial services, transport and storage, residential gas for cooking and heating | 10% |

39. Western Australia's natural gas consumption averaged an estimated 1,194 TJ/day in 2006-07 – seven times the volume used in 1983 prior to deliveries from the North West Shelf.² Since 1984, domestic demand for gas has been growing at around 8.5% per year.
40. Demand for gas will continue to grow. Western Australia will require around 1100 TJ/day of gas by 2014-15 to meet new and replacement

¹ Chamber of Commerce and Industry of Western Australia, *Meeting the Future Gas Needs of Western Australia*, May 2007, pp.38 onwards.

² ABARE: Natural gas consumption by State, 2008

demand. This demand is equivalent to the total size of the existing market for gas.³

41. Importantly, around 274 TJ/day of replacement gas will be needed to replace existing gas contracts as they expire. These include large contracts for gas used to underpin existing electricity generation, industrial processing and manufacturing.⁴

2.3 The downstream market has undergone significant transformation

42. At the time the North West Shelf Joint Venture (NWSJV) commenced production in 1984, domestic gas supply in WA was characterised by the NWSJV and a single vertically integrated State monopoly buyer (SECWA).
43. Since the mid-1990s, however, the downstream market has undergone significant transformation. This has seen a significant expansion in:
 - the breadth of the domestic market and the size of domestic demand;
 - the number of direct gas customers;
 - the number of parties buying through an aggregator, many of whom could also elect to purchase directly from gas producers;
 - the entry of brokers providing gas trading services to gas users;
 - short and long-term trading in gas transmission capacity and physical gas;
 - additional transportation and storage options;
 - the flexibility within the Dampier to Bunbury Natural Gas Pipeline system to deal with supply and demand imbalances; and
 - connectivity between gas pipelines in Western Australia which means that gas can now be traded either physically or commercially in any part of the system.

2.3.1 Significant increase in the number of customers

44. In 1995, the original SECWA contract was disaggregated which led to the emergence of six independent buyers:

³ Economics Consulting Services, *Natural Gas Demand Outlook for Western Australia and Economic Impact*, 2008.

⁴ Economics Consulting Services, *Natural Gas Demand Outlook for Western Australia and Economic Impact*, 2008.

- the Electricity Corporation (South West);
 - the Electricity Corporation (Pilbara);
 - the Gas Corporation;
 - Alcoa of Australia Limited;
 - Hamersley Iron Pty Limited; and
 - Robe River Mining Co. Pty Ltd.
45. Other key reforms implemented in the 1990s and 2000s to increase downstream competition in the market include:
- the separation of the supply and transmission components of the SECWA domestic gas supply contract as part of the disaggregation;
 - the introduction of an open access regime for the Dampier to Bunbury Natural Gas Pipeline;
 - the establishment of AlintaGas and Western Power as separate corporatised businesses;
 - the privatisation of the Dampier to Bunbury Natural Gas Pipeline in 1998;
 - the staged removal of barriers to competition downstream in the domestic gas market;
 - the privatisation and sale of AlintaGas in 2000; and
 - the disaggregation of Western Power to establish four entities (Verve, Synergy, Horizon Power and Western Power) with existing gas supply contracts (the ability to contract with gas suppliers).⁵
46. As a result of these reforms, the downstream segment of the market today is highly competitive. Around 25-30 customers now buy gas directly from producers. This compares to the previous market situation which was characterised by a single vertically-integrated monopoly buyer.
47. The Apache-led joint ventures supply the majority of these parties, including most of the NWSJV's customers. These contract sizes range from >80 TJ/d (such as with Burrup Fertilisers, Verve, Alinta and Alcoa) down to approximately 1 TJ/d.

⁵ Western Power (Networks) was created without the ability to purchase power or gas.

2.3.2 Entry of aggregators

48. In addition to customers directly buying from producers, a large number of customers purchase through aggregators such as Alinta and Synergy. These customers range from light industrial and commercial customers, as well as small businesses and households.
49. Many of these customers can purchase directly from a producer and arrange their own transmission. However for reasons of convenience, customers prefer to purchase a delivered service through an aggregator.
50. Perth Energy is also building a presence in the domestic market as an aggregator supplying to gas users.

2.3.3 Entry of brokers

51. There has been a significant increase in the number of independent brokers providing gas trading services to gas users.
52. Gas users engaging brokers range from large industrial customers to smaller industrial customers.
53. The Alliance has previously provided advice to the ACCC on the entry and activity of brokers into the WA gas market.

2.3.4 Short and long-term trading; additional transport options

54. Trades in gas transmission capacity and physical gas are regularly being conducted on a short and long term basis.
55. While no formal market has been established, given the relatively small number of major players, large gas consumers and pipeline shippers commonly trade amongst themselves either independently, or with the assistance of brokers.
56. Smaller industrial gas consumers also trade either independently or with the assistance of brokers.
57. There is a high level of sophistication in trading arrangements between gas users.
58. DBP, the owners of the Dampier to Bunbury Natural Gas Pipeline (DBNGP), also posts spot transmission capacity, subject to availability.
59. Since 2007 – with the completion of the DBNGP / Goldfields Gas Pipeline interconnect - there has been complete interconnectivity between pipelines in Western Australia.

60. Customers now have the ability either physically or with swaps to trade gas to most of the market. Gas from the North West Shelf can therefore be traded - either physically or commercially - in any part of the system.

2.4 The upstream market remains highly concentrated – major producers enjoy significant market power

61. While the market has undergone significant transformation to increase competition downstream, the supply side of the market retains the same high level of concentration and absence of competition which existed in the mid-1990s.

62. Major gas producers such as Shell and Chevron enjoy significant market power as a result of unauthorised cartel selling arrangements:

- the NWSJV participants – which includes Gorgon participants Shell and Chevron – control 70% of the domestic gas sold in WA and over 92% of the gas resources in developed fields; and
- two supplier groups – the NWSJV participants and Apache-led joint ventures - control close to 100% of the gas supplied into the WA domestic gas market and the resources in developed fields;

63. This market power is further reinforced by the fact that:

- there are significant barriers to the entry of *competitive* new suppliers to the domestic gas market;
- producers include the world's largest oil companies with immense commercial and negotiating power
- local consumers have no reasonable alternatives to gas supply other than existing suppliers;
- the current market is experiencing a serious shortage in gas supply;
- WA gas prices have risen dramatically to be four to five times prices in the Eastern States;
- despite WA's "abundance" of gas reserves, current domestic gas prices are significantly higher than in overseas markets (such as Henry Hub or LNG netback prices);
- the majority of potential new field developments which could increase gas supplies to the domestic market are owned or controlled by one or more of the NWSJV participants; and

- two of the three participants in the Gorgon field – Shell and Chevron – already exercise significant market power through the unauthorised cartel selling arrangements of the NWSJV.

2.4.1 the North West Shelf Joint Venture participants, including Shell and Chevron, exercise significant market power through unauthorised cartel selling arrangements

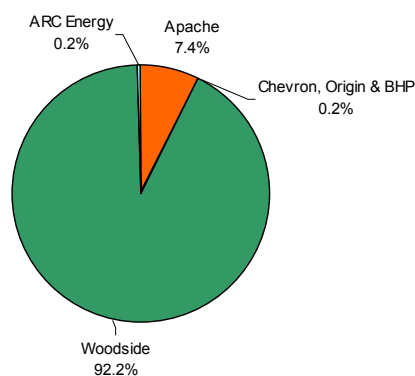
64. While the downstream segment of the market has undergone significant transformation to increase competition, the upstream level of the market retains the same high level of concentration which existed in 1995. This has created a significant disparity in the market power of sellers vis-à-vis customers.
65. Shell and Chevron are participants of the NWSJV which also includes Woodside, BP, BHP Petroleum and MIMI (Mitsui and Mitsubishi).
66. Each NWSJV participant has the right and obligation to own, take and separately dispose of its production entitlement.
67. The six NWSJV participants combine as a cartel to market gas to WA domestic customers through joint selling arrangements implemented through North West Shelf Gas Pty Ltd, a vehicle staffed mainly by secondees from the joint venture participants.
68. North West Shelf Gas acts in accordance with instructions given by the NWSJV participants and markets on common terms and conditions, including price, to domestic customers.
69. These cartel selling arrangements are unauthorised.
70. Through these arrangements, the NWSJV controls close to 70% of the domestic gas market. Projects that include one or more of the NWSJV participants in fact supply 73% of the WA market.
71. Given that Apache-led joint ventures supply around 30% of the market, the unauthorised cartel selling arrangements also results in a situation where the market is controlled by two supply groups.
72. Together the NWSJV and the Apache-led joint ventures control almost 100% of the market.
73. This concentration is reinforced by the fact that Apache is itself a participant in the Macedon new gas development joint venture that includes the NWSJV participant BHP Billiton.
74. As such, projects that include one or more of the NWSJV participant companies, or a company (i.e. Apache) that is in joint venture with a NWSJV participant, supply almost 98% of the WA market.

Table: WA Domestic Gas Production by Project 2007 ⁶

| Project | Operator | Tenement Owner/s | M cubic metres | % of Total |
|---------|----------|--|----------------|------------|
| NWSJV | Woodside | Woodside, BP, BHPB, Chevron, Shell, MIMI | 6,725,083 | 73.4 |
| Various | Apache | Apache, Santos | 2,229,814 | 24.3 |
| Other | Various | Various | 214,209 | 2.3 |
| TOTAL | | | 9,169,106 | 100.0% |

75. Furthermore, the two groups together control close to 100% of gas reserves in developed fields that supply the domestic market.⁷
76. From the current fields providing gas that is marketed as part of domestic gas projects, over 92% of the remaining gas resource is contained in fields held by the NWSJV.⁸ Another 7.4% is located in the John Brookes field operated by Apache.⁹
77. The fact that two groups control 100% of developed reserves has a significant impact on supply. Supply cannot be increased at short notice to meet market demand unless one or both of the groups decide to act. They can essentially withhold supply and drive up prices.

WA Developed Gas Reserves by Operator ¹⁰



78. The consequence of the current market arrangement is that Shell and Chevron exercise significant market power – as participants in the unauthorised NWSJV cartel selling arrangement, and as suppliers in a market controlled by just two supply groups.

⁶ Sources used: WA Department of Industry and Resources, *Petroleum in Western Australia September 2008*, pp.36 and 38.

⁷ Synergies Economic Consulting, *WA Gas Supply & Demand*, July 2007, p.88.

⁸ Synergies Economic Consulting, *WA Gas Supply & Demand*, July 2007, p.35.

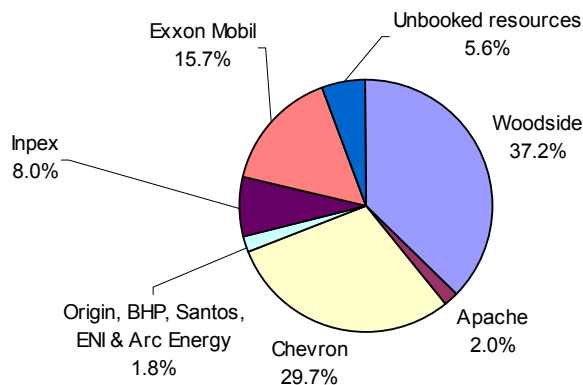
⁹ Synergies Economic Consulting, *WA Gas Supply & Demand*, July 2007, p.88.

¹⁰ Synergies Economic Consulting, *WA Gas Supply & Demand*, July 2007, p.88.

2.4.2 There are significant barriers to the entry of *competitive* new suppliers

79. The domestic gas market is characterised by significant barriers to the entry of *competitive* new suppliers.
80. New supply is dependent on a developer identifying and securing potential gas resources. These involve significant exploration costs and time delays.
81. Further, the bulk of identified gas reserves in Western Australia are held by existing gas suppliers through Retention Leases. Of these suppliers, a substantial majority are participants in either the NWSJV or the Apache-led joint ventures.

WA Total Gas Reserves by Operator ¹¹



82. This concentration in supply is demonstrated by producer market shares in gas reserves in the Carnarvon Basin, which supplies the bulk of Western Australia's domestic gas.
83. Almost 90% of proved and probable (2P) reserves of gas are held by the same NWSJV participants, including Shell and Chevron.¹²

| | |
|---------------------------------|--------------|
| Woodside | 26.1% |
| BHP Billiton | 12.6% |
| BP | 12.8% |
| Chevron | 12.8% |
| Mitsubishi-Mitsui MIMI | 12.4% |
| Shell | 12.6% |
| TOTAL NWSJV Participants | 89.3% |

¹¹ Synergies Economic Consulting, *WA Gas Supply & Demand*, July 2007, p.91.

¹² AER / ACCC, *State of the Energy Market* (2008) ch 8.

| | |
|--------------------|--------------|
| Santos | 2.4% |
| CNOOC | 3.4% |
| Kansai Electric | 0.7% |
| Tokyo Gas | 0.7% |
| Apache Energy | 3.3% |
| TOTAL OTHER | 10.5% |

84. Gas developments also involve large infrastructure investments requiring significant capital expenditures. These include the cost of field development, as well as associated pipelines to link fields to existing gas transport and delivery infrastructure.
85. These entry barriers operate to “entrench” existing suppliers – including Shell and Chevron - and their dominant market position. Existing suppliers already control close to 100% of existing developed reserves.
86. Furthermore, the majority of prospective new gas developments in Western Australia are controlled by the same NWSJV participants, Apache, or in conjunction.

Table: Prospective new developments and participants

| Development | Participants |
|--|----------------------------------|
| Pluto | Woodside* |
| Macedon | BHP Billiton* and Apache |
| Wheatstone | Chevron* |
| Gorgon | Chevron*, Shell* and Exxon Mobil |
| Reindeer | Apache, Santos |
| Julimar | Apache, Kufpec |
| * denotes a North West Shelf Joint Venture participant | |

87. This provides for a very tight grouping of producers with significant market power from existing operations. Shell and Chevron have significant market power both as participants in the unauthorised NWSJV cartel selling arrangements, and as participants in future developments such as Gorgon.
88. This places individual customers at a significant disadvantage when seeking to negotiate price and terms for gas supply.

2.4.3 Major producers include the world's largest oil companies with immense economic and commercial power

89. The major producers in Western Australia include the world's largest oil companies with immense economic and commercial power.
90. ExxonMobil is the world's largest oil company. Reported 2008 profit was over \$US 45 billion - believed to be the largest ever delivered by a US company in a single year.¹³
91. Shell is the biggest company by market capitalisation on the FTSE, with a market capitalisation of over £106 billion as at January 2009. The company has global reach and operates in more than 100 countries and territories.
92. Shell reported the biggest annual profit in UK corporate history of \$US 31.4 billion or almost £22 billion in January 2009 – equivalent to £2.5 million per hour.¹⁴
93. Chevron, the second largest US oil company by market capitalisation, reported record profits in 2008 of almost \$US 24 billion.¹⁵
94. Individually, each of these companies possess immense commercial and negotiating power compared to local gas customers, and indeed sovereign governments.
95. They have highly sophisticated businesses, with the operational and resource backing of multi-billion dollar global operations.
96. In contrast, the bulk of the 25-30 companies that purchase gas direct from producers are smaller to medium sized companies, including emerging resource processing and power generation companies.
97. These companies are at a significant disadvantage in negotiating gas supply contracts, even without the operation of unauthorised cartel selling arrangements.
98. Furthermore, a fact often ignored by major producers is that the WA gas retail market includes almost 580,000 residential and non-residential customers, including households.¹⁶
99. There are almost 300,000 small businesses in WA reliant on gas and electricity supply.¹⁷

¹³ Available at: <http://www.telegraph.co.uk/finance/newsbysector/energy/4400803/Exxon-Mobil-and-Chevron-pumped-12.7bn-of-profits-last-quarter.html>

¹⁴ Available at: <http://www.guardian.co.uk/business/2009/jan/29/shell-profits-oil>

¹⁵ Available at: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/31/BUS215KHIN.DTL>

¹⁶ Economic Regulation Authority of WA.

¹⁷ Small Business Development Corporation of WA, *Small Business Stats*, 2006.

100. Electricity generator and retailer Synergy for example supplies electricity to 980,000 customers. The company also competes in the sale of gas industrial, commercial and small to medium enterprises.
101. Each one of these small consumers is entirely dependent on energy retailers being able to negotiate on a level playing field with major producers like Shell, Chevron and ExxonMobil.

2.4.4 Local consumers have no reasonable alternative to domestic gas supply

102. The disparity in market power between major producers and customers is accentuated by the fact that local customers have no reasonable alternative to domestic gas supply:
- in the absence of gas pipelines linking Western Australia with South Australia or the Northern Territory, there is no competition from interstate sources;
 - in the absence of an LNG receiving terminal in Western Australia, there is no competition from imports and, from a practical and economic perspective, no receiving terminal is likely to be constructed; and
 - there are significant practical and economic constraints on the ability of existing users to switch from gas to other fuels such as coal.
103. The dependence of local consumers on existing producers for current and future supply was underlined by the Varanus Island outage. This resulted in the loss of 30% of the State's gas supply and caused immense economic damage to a multitude of gas users.
104. The loss of supply resulted in severe disruption to operations as well as higher costs as companies were forced – to the extent they were able – to switch to alternative gas supplies or energy fuels.
105. The outage had a compounding impact on industry by disrupting the local production and supply of other essential inputs, such as fertilisers, reagents for the mineral processing industry and industrial gases such as carbon dioxide.
106. The incident had far-reaching economic, employment and investment impacts, and also resulted in significant inconvenience to households.
107. While consumers are dependent on existing producers, sellers have an alternative market in the form of overseas exports.

2.4.5 The current market is experiencing a significant shortage in supply and dramatic price increases

108. The market power of suppliers is reinforced by the very tight domestic gas supply market.
109. Since at least 2004, Western Australia has been experiencing a serious shortage in domestic gas supply. Current and prospective users have been unable to secure long term supplies of gas in substantial quantity.
110. Evidence of this gas shortage includes:
 - the recent State Government's electricity generation tender did not include a baseload gas option, resulting in a baseload coal proposal being the only viable solution;
 - the Karara iron ore project has had to rely solely on long term contracts with coal fired generation;
 - Newmont Asia Pacific chose coal-fired power for the Boddington gold project;
 - Dampier Bunbury Pipeline was required in 2006 to significantly downsize an expansion of the Dampier to Bunbury Natural Gas Pipeline as a number of prospective projects were unable to secure gas supplies;
 - members of the DomGas Alliance continue to experience difficulties in securing long term contracts for substantial quantities of gas;
 - the price of domestic gas has risen fivefold compared to historical prices;
 - on a delivered basis, WA gas prices are around five times those in the Eastern States, where there is greater competition in supply;
 - in the recent Reindeer gas field tender, the two joint venturers Apache and Santos conducted a joint tender that was aimed at pricing gas at more than six times the historical prices; and
 - in October 2008, Santos announced a contract to supply gas to Moly Mines. The contract was stated to be for 33 petajoules of gas over six years with projected revenue of \$US 380 million (\$A 527 million). The gas price was linked to international oil prices. At the contract's assumed oil price of \$US 90 a barrel, this would have equated to up to \$16 per gigajoule for gas before transmission costs.

111. In the short to medium term, there are no new gas developments which would provide additional domestic gas to underpin new projects or to replace existing long term contracts as they expire.
112. The serious shortage of gas is unlikely to be improved until 2014 at the earliest.
113. These matters are further discussed in the DomGas Alliance report *Western Australia's Domestic Gas Security 2009*.
114. Given the very tight domestic gas supply market, Shell, Chevron and ExxonMobil are able to exercise substantial market power over domestic gas customers, both as existing participants in the NWSJV, and as prospective suppliers in the Gorgon Project.

2.4.6 Prices have risen dramatically - producers are seeking a premium return from domestic customers well in excess of that from LNG exports

115. The gas shortage and absence of competition between suppliers has led to a dramatic increase in prices.
116. WA wholesale gas prices have risen four to five-fold over the past 18-24 months, to be priced at up to \$14-16 per gigajoule before transport costs.
117. Prices are four to five times gas prices in the Eastern States on a delivered basis – despite WA's "abundance" of gas resources.
118. At recent price levels, WA gas prices are significantly higher than prices in most gas producing or exporting countries. Current US domestic gas prices ("Henry Hub") for example are around \$US 4 per gigajoule.
119. Major producers have also been seeking a premium return from domestic customers well in excess of that which could be derived from LNG exports.
120. The up to \$14-16 prices envisaged by recent domestic gas contracts are well in excess of delivered LNG prices, let alone LNG-netback prices.

2.4.7 The majority of potential new domestic gas developments are owned or controlled by existing suppliers

121. As discussed in section 2.4.2 above, the majority of potential new field developments which could increase gas supplies to the domestic market in WA are owned or controlled by existing producers.
122. These include Shell and Chevron which are participants in joint selling arrangements which already control 70% of the domestic market.

123. The control that this very tight grouping of producers have over future developments confers significant market power in relation to their existing operations.
124. As the most important domestic gas development since the original North West Shelf project, the Gorgon development could supply a minimum 300 TJ/d of additional gas to the domestic market. This is equivalent to a third of size of the existing domestic market.
125. Extending joint selling arrangements to Gorgon would therefore result in Shell and Chevron being participants in supply groups that control close to 80% of the WA market.

2.5 Conclusion

126. Ensuring competition in the domestic gas market is an issue of vital importance for consumers in Western Australia.
127. Natural gas underpins the State's mining and resource processing industries, fuels power generation, and supplies small businesses and households.
128. Since the mid-1990s, the downstream level of the market has undergone significant reforms to increase competition between customers. This has led to a significant increase in:
 - the breadth of the domestic market and the size of domestic demand;
 - the number of direct gas customers;
 - the number of parties buying through an aggregator, many of whom could also elect to purchase directly from gas producers;
 - the entry of brokers providing gas trading services to gas users;
 - short and long-term trading in gas transmission capacity and physical gas;
 - additional transportation and storage options;
 - the flexibility within the Dampier to Bunbury Natural Gas Pipeline system to deal with supply and demand imbalances; and
 - connectivity between gas pipelines in Western Australia – gas can now be traded either physically or commercially in any part of the system.

129. The upstream market however remains highly concentrated with two suppliers controlling almost 100% of the domestic gas market.
130. Shell and Chevron continue to exercise significant market power through the unauthorised NWSJV cartel selling arrangements, and through their control of prospective new developments, particularly Gorgon.

3. OVERVIEW

131. Sections 88 of the *Trade Practices Act* empowers the ACCC to grant authorisations for proposed conduct that would or might constitute exclusionary conduct, or substantially lessen competition.
132. Section 90 of the TPA provides that authorisation shall not be granted unless:
- it is likely to result in a benefit to the public; and
 - that benefit outweighs the detriment to the public constituted by any lessening of competition that is likely to result if the proposed conduct was engaged in.
133. In applying section 90, the ACCC is required to apply a “future with-and-without” test to identify and measure the public benefit and anti-competitive detriment generated by the arrangements for which authorisation is sought.
134. In *Re Media Council of Australia & Ors*, the Australian Competition Tribunal stated:
- “... in the course of determining relevant public benefit and detriment the Tribunal must compare the position which would or would be likely to exist in the future, on the one hand if the authorisation were to continue, and on the other hand if it were absent.”¹⁸
135. In the present case, the factual (**Joint Selling Factual**) is the future scenario where authorisation for joint selling is granted.
136. The counterfactual is the situation that would be most likely to occur if authorisation for joint selling was not granted. This is: Chevron, Shell and ExxonMobil separately sell gas into the domestic market (**Separate Selling Counterfactual**).
137. It will be demonstrated that:
- separate selling is commercially and practically feasible;
 - in the absence of an authorisation, Chevron, Shell and ExxonMobil would separately sell gas into the domestic market;
 - the granting of an authorisation is not likely to result in a benefit to the public;

¹⁸ (1996) ATPR 41-497 at 42,241.

- even if any benefit were to result, this would be far outweighed by the significant detriment to competition and consumers from joint selling; and
138. Furthermore, a decision not to grant interim authorisation would not prevent Chevron, Shell and ExxonMobil from:
- separately marketing and selling gas into the domestic market;
 - meeting their obligation under the State Agreement to diligently market gas to WA customers;
 - separately obtaining “a firm understanding of the likely level and timing of demand for domgas from the Project prior to a Final Investment Decision”; and
 - undertaking the required investment decisions for developing the Gorgon Project.
139. Interim authorisation would give rise to significant harm to consumers by suppressing competition and concentrating market power.
140. Given separate selling of domgas is commercially and practically feasible, any benefits associated with the Gorgon Project would arise even in the absence of an interim authorisation.
141. To the extent there are any additional “public” benefits from joint selling, these accrue exclusively to the applicants from the suppression of competition and the concentration of market power.
142. There are no grounds for the urgency claimed by the applicants. Separate selling is commercially and practically feasible. The applicants have also had considerable opportunity since at least 2003 if not earlier to seek authorisation.
143. The significant impacts that interim authorisation would have on the market and consumers cannot be unwound if final authorisation was later denied and the Gorgon participants required to sell separately.
144. Accordingly, the ACCC should not grant interim or final authorisation for joint selling to the applicants.

4. THE COUNTERFACTUAL

4.1 Summary

145. Separate selling of domgas by the Gorgon Project is commercially and practically feasible:

- the WA domestic gas market has undergone significant transformation over the past 10 years;
- Shell and its partners sell separately from the major Pohokura gas field in New Zealand *despite originally claiming it was impossible to do so* because of supposed market features, and that “no development” would occur in the absence of authorisation;
- long term contracts have not prevented major producers from supplying international customers and expanding LNG supply;
- major producers already enjoy complete transparency over domestic demand and contract pricing, whereas domestic consumers have no access to this information;
- there is no commercial imperative for joint selling to offset the market power of customers;
- the operational measures necessary to enable separate selling are well-known and practical;
- marketing decisions for domestic gas are already being made separately by Shell and Chevron in regard to the NWSJV;
- gas balancing and nomination arrangements are already in place in the WA market;
- producers in other joint venture gas developments sell separately into the WA domestic gas market; and
- marketing decisions are already being made separately by Shell, Chevron and ExxonMobil with respect to LNG and condensate;
- Shell, Chevron and ExxonMobil have been compelled by competition authorities to sell separately in other countries – including in Norway, Denmark and New Zealand; and
- joint selling is not necessary to support investment and development of the Gorgon Project.

146. In the absence of an authorisation, Chevron, Shell and ExxonMobil would be able to separately sell gas into the domestic market.

4.2 Separate selling is commercially and practically feasible

147. The applicants claim that it is not commercially or practically feasible to separately market domgas in WA. They argue in particular that:

- the structural market features identified by the ACCC in the 1998 NWSJV joint selling arrangements as barriers to separate marketing have not changed in any significant way;
- gas balancing arrangements cannot be put in place in relation to domgas sales;
- the Gorgon Project is a greenfields joint venture that requires joint selling until markets are substantially developed.¹⁹

148. These claims are not supported by the evidence.

4.2.1 The downstream market has undergone significant transformation

Downstream market transformation

149. As outlined in section 2.3 above, the domestic gas market has undergone significant transformation which has significantly increased competition between customers in the downstream market.

150. Since the 1990s, Western Australia has undertaken extensive reform of the downstream structure and characteristics of the market.

151. The disaggregation of the SECWA contract transformed the domestic gas market from one characterised by a vertically-integrated monopoly buyer to one where there are now 25-30 individual customers.

152. Downstream reforms gathered momentum with the subsequent deregulation of the gas and electricity markets.

153. As a result of these reforms, the WA domestic gas market has fundamentally changed – at least with respect to the downstream market – from when the ACCC last assessed the market in the mid-1990s. There has been a significant increase in:

- the breadth of the domestic market and the size of domestic demand;
- the number of direct gas customers;

¹⁹ Applicants' submission, para.1.10.

- the number of parties buying through an aggregator, many of whom could also elect to purchase directly from gas producers;
 - the entry of brokers providing gas trading services to gas users;
 - short and long-term trading in gas transmission capacity and physical gas;
 - additional transportation and storage options;
 - the flexibility within the Dampier to Bunbury Natural Gas Pipeline system to deal with supply and demand imbalances; and
 - connectivity between gas pipelines in Western Australia – gas can now be traded either physically or commercially in any part of the system.
154. In contrast, the upstream market retains the same high level concentration and lack of competition between suppliers as was the case in the mid-1990s.
155. Through unauthorised cartel-selling arrangements, two producer groups continue to control almost 100% of the domestic gas market.
156. Shell and Chevron continue to exercise significant market power through the unauthorised NWSJV cartel selling arrangements, and through their control of prospective new developments, in particular Gorgon. There remains a significant disparity between the market power of producers and that of consumers.

Cartel selling arrangements have constrained the development of a more competitive market

157. In their submission, the applicants argue that the fact that two producer groups account for around 96% of the total supply of domgas is a structural deficiency in the WA market that prevents separate selling.²⁰
158. In both its 1998 Determination on the NWSJV joint selling and the 2006 Determination on the PNG Gas Project, the ACCC considered that not all of these features needed to be evident for separate marketing to be feasible.²¹
159. To the extent current market structure and arrangements have constrained the development of a more competitive market, these relate to the unauthorised cartel selling arrangements maintained by producers.

²⁰ Applicants' submission, para.7.19-7.21.

²¹ ACCC, PNG Gas Project, Determination, 3 May 2006, p.29.

160. The 2002 COAG Energy Market Review Report (“the Parer Report”) rejected the notion that separate marketing could only arise after a mature market characterised by these elements has been established:

“The Panel has concluded that not all the features of a mature market need to be present for separate marketing from joint facilities to be feasible. If they were, separate marketing itself would probably only be of academic interest, as a high degree of competition would already be achieved. The existence of secondary markets with associated financial products are outcomes of a mature market, rather than prerequisites for separate marketing. For each gas producing joint venture, some market features will be more important than others in considering the feasibility of separate marketing.”

“Moving toward separate marketing would be considered as part of the overall package to improve the competitive nature of the natural gas market. *Separate marketing itself should be regarded as one of the ingredients that in the appropriate circumstances helps create competition and thereby a more mature market.*”²²

161. The view expressed in the Parer Report was accepted by the ACCC in the PNG Gas Project Determination (2006):

“The conclusions of the ... Parer Review that separate marketing could aid in the development of a more mature and competitive gas market and assist in the evolution of the factors listed earlier in this Determination are noted. It would be a concern if adherence to joint marketing, when separate marketing became feasible, hindered the continued development of a competitive and mature gas industry.”

162. The New Zealand Commerce Commission also considered in its Decision on joint selling of the Pohokura gas field that:

“[T]he Commission accepts that the development of new gas fields is the primary prerequisite for enhanced competition in the future. However also of importance to the future competitive environment is the number of sellers in the market, including the number selling from each field. By reducing the number of sellers from the Pohokura field the Arrangement could have a material impact on the prospects of competitive market conditions developing at an early date.”²³

163. The applicants are therefore disingenuous in claiming that the existing duopoly market structure presents a barrier to separate selling.

164. This structure only exists because of the actions of Shell, Chevron and the other NWSJV participants to continue to sell to local consumers as a cartel to control 70% of the domestic market.

²² 2002 COAG Energy Market Review Report (“the Parer Report”), pp.199-200.

²³ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.392.

165. Indeed, the applicants' argument is breathtaking in its circularity. According to their argument, the participants of a monopoly cartel need never be required to sell separately so long as the impact of the cartel arrangement is to limit the number of sellers.

Conclusion

166. To conclude, the domestic gas market has undergone significant transformation which has significantly increased competition between customers in the downstream market.
167. The market has fundamentally changed from when the ACCC last assessed the market in the mid-1990s
168. To the extent that current market structure and arrangements have constrained the development of a more competitive market, these relate to unauthorised cartel selling arrangements maintained by producers.

4.2.2 Shell and its partners sell separately in New Zealand *despite originally claiming it was impossible to do so*

169. There is compelling evidence that separate selling is practical and feasible even in the absence of the market structure elements asserted by the applicants.
170. Indeed, it is surprising that Shell has not alerted the ACCC to its own practice in relation to the Pohokura gas development in New Zealand – a major greenfield project which also involved three joint venture parties.
171. In the Pohokura case, Shell and its partners sought and obtained authorisation from the New Zealand Commerce Commission to sell domestic gas jointly.
172. The arguments made by Shell and its partners in the Pohokura case bear a striking resemblance to those asserted by Shell, Chevron and ExxonMobil, with respect to the Gorgon Project:
- “The Pohokura JV parties do not consider that separate marketing is feasible in the foreseeable future or for the expected life of Pohokura. Accordingly, **no development** is a counterfactual in the event that authorisation is not granted.”
 - “Authorisation is sought for joint marketing **as there is no other feasible means of marketing gas sourced from Pohokura.**”
 - “The **immaturity** of the New Zealand gas market means that the practical problems of the Pohokura JV parties would face in

separately marketing gas would be difficult if not impossible to overcome.”

- “**Substantial welfare losses** will occur if joint marketing is not authorised.”
- “Absent joint marketing, a **substantial delay** in the development of the field is expected, at a time of scarcity of resource.”
- “In addition, separate marketing would result in **significant extra transaction and production costs, and sub-optimal field depletion.**”
- “This would impact significantly on the value of the field, and that effect would have the potential **of significantly reducing exploration incentives** in New Zealand.”
- “The application is seeking authorisation for what is a **standard industry approach to the marketing and sale of gas.** There has been co-ordinated marketing of gas in all jointly owned New Zealand and Australian gas fields.”
- “there are only a **small number of participants** in the gas production market ...”
- “the demand side of the New Zealand gas production market is **very thin ...**”
- “there are **no storage facilities** for natural gas in New Zealand ...”
- “there are no firms in New Zealand performing a **gas broking or aggregating role ...**”
- “there is **no gas related financial market** in New Zealand which could offer futures and options contracts ...”
- “there is **no spot market** of any significance in New Zealand. The limited depth of the New Zealand market, in terms of the small number of both suppliers and purchasers make it unlikely that a gas related financial market or a spot market (of the requisite depth) will develop.”
- “In the absence of the market developments identified above, the Pohokura JV parties are **unable to overcome the essential problems** faced when gas is separately marketed.”²⁴

173. Shell and its partners made specific reference to the ACCC’s 1998 Determination on joint selling by the NWSJV:

²⁴ Applicants’ submission in the Pohokura case, para.15-29 and 46.

- “The ACCC in the *Northwest Shelf Project Determination* identified the market features necessary to support separate marketing:
 - a large number of competitive suppliers;
 - a large number of customers;
 - a range of storage facilities close to demand;
 - gas brokers and aggregators;
 - gas related financial markets; and
 - significant short term and spot markets.”
- “None of these features are present in the New Zealand gas production industry. Nor are these developments likely to occur by the date of commencement of production from Pohokura, and probably for the expected life of the field.”

174. To support their arguments, Shell and its partners submitted a detailed consultants’ report by CRA further elaborating these concerns. Key findings of the consultants’ report include:

- “In New Zealand, there are **no storage facilities for gas, and there is no spot market.**”
- “Because the discovery and production of hydrocarbons entails greater uncertainty and a high level of sunk capital investment in all stages, the ability to efficiently market the gas **materially affects decisions relating to both exploration and production.**”
- “Furthermore, typical downstream gas users – such as electricity generators – own large specific assets that require contractual certainty if investment is to proceed.”
- “[The] coordination problem is exacerbated by the fact that New Zealand **does not have a spot market** for gas and is almost certainly not going to have one of the requisite depth in the foreseeable future.”
- “Particularly in this environment, we consider that separate marketing of gas is **virtually infeasible.**”
- “At a minimum, a regulatory prohibition on the coordination necessary for joint marketing **would lead to, perhaps indefinite, delay in the Pohokura field’s production.**”
- “Furthermore, it will reduce competition because of the later availability and production of Pohokura gas and the signal it impacts for other exploration ventures that, if gas is found, marketing the gas will be a long, costly and problematic exercise.”

- In the **thin New Zealand gas production market**, a delay in production from Pohokura would result in significant welfare losses, similar in nature to those arising from a missing market.”
 - “[T]ransactions costs would be **extremely large, even prohibitively high**, if coordination of marketing is not allowed.”²⁵
175. While the Alliance has not had the opportunity to undertake a detailed review of the Concept Economics consultants’ report submitted by Shell, Chevron and ExxonMobil on the Gorgon application, there would appear to be some similarity in the “insurmountable barriers” to separate selling claimed by the applicants in both the Gorgon and Pohokura cases.
176. It was on the basis of these claims that the New Zealand Commerce Commission granted authorisation to Shell and its partners to sell jointly.
177. The subsequent actions of Shell and its partners in New Zealand however provided the clearest possible rebuttal of these claims, and indeed the applicants’ claims in the Gorgon case.
178. Despite claiming separate selling to be “difficult if not impossible”, “virtually infeasible” and with “no feasible means of marketing gas”, separate selling subsequently took place *with no delays to production* when the three partners were *unable to agree to joint selling arrangements*.
179. Accordingly, Shell and its partners sell separately *despite originally claiming it was impossible to do so* and that there would be *no development* in the absence of authorisation for joint selling.
180. While the applicants in the present case might claim the Australian market to be somehow fundamentally different to the New Zealand market, this is refuted by Shell and its partners’ own evidence in the Pohokura case:
- “The Australian gas markets are described in contrast as ‘contract’ or ‘project’ markets where gas is only produced to meet specific contractual obligations. **Like Australia, gas in New Zealand is only produced to meet specific contractual obligations.**”²⁶
 - “Our conclusion is implied by the peculiar nature of the industry and the state of the New Zealand gas market. It is also the position on

²⁵ CRA, *Coordinated Marketing of Pohokura Gas – An Economic Analysis*, December 2002, pp.1-3.

²⁶ Applicants’ submission in the Pohokura case, para.20.

joint marketing of gas in Australia, **where the market characteristics are similar to those in New Zealand.**"²⁷

4.2.3 There is significant competition between customers

181. The applicants contend that separate selling is not feasible because of a small number of customers and a lack of competition.
182. As outlined above, the domestic gas market has undergone significant transformation which has significantly increased competition between customers in the downstream market.
183. The downstream segment of the market today is highly competitive with around 25-30 customers buying gas directly from producers.
184. In addition, many potential customers could purchase directly from a producer and arrange their own transmission but, for reasons of convenience, prefer to purchase a delivered service through an aggregator.
185. The current market structure contrasts to the market that existed when authorisation for joint selling was first provided to the NWSJV in 1977, and when the ACCC assessed the market in the 1990s in regard to the 1998 authorisation for joint selling.
186. Furthermore, to the extent that there is any degree of customer concentration, this is far outweighed by the market power and concentration exercised by Shell, Chevron and ExxonMobil:
 - as a consequence of the unauthorised NWSJV cartel selling arrangements, just two producer groups control almost 100% of the WA gas market;
 - there are significant barriers to the entry of *competitive* new suppliers to the domestic gas market;
 - major producers include the world's largest oil and gas companies with immense commercial and negotiating power
 - local consumers have no reasonable alternatives to gas supply from existing suppliers;
 - the current market is experiencing a serious shortage in gas supply – a shortage that has resulted in increased competition between customers for available demand and an up to fivefold increase in gas prices;

²⁷ CRA, *Coordinated Marketing of Pohokura Gas – An Economic Analysis*, December 2002, p.3.

- the majority of potential new field developments which could increase gas supplies to the domestic market are owned or controlled by one or more of the NWSJV participant; and
- two of the three participants in the Gorgon field – Shell and Chevron – already exercise significant market power as participants of the unauthorised NWSJV cartel arrangement.

187. There is therefore no commercial imperative for joint selling to offset the market power of customers

4.2.4 Long term contracts have not prevented major producers from supplying international customers and expanding LNG supply

188. The applicants contend that separate selling of domgas is not feasible because of a small number of large contracts, “lumpy” project demand, long term contracts and the absence of a spot market.

189. At the same time, the applicants advise they will be separately marketing LNG and condensate produced by the Gorgon Project because the global LNG market is “fundamentally different to the WA domgas market”.²⁸

190. The applicants argue these differences include the large and diverse mix of suppliers and customers around the world, the large number of short term and spot sales which provide transparency both for demand and pricing.²⁹

191. These arguments have no merit.

The LNG export industry in WA is characterised by large, long term contracts

192. The applicants’ claims that long term domestic gas contracts should somehow operate as a barrier to separate selling are surprising given the LNG export industry in WA is itself characterised by the pursuit of long term contracts with overseas customers.

193. These involve very large contracts, significant amounts of gas, delivered over decades, to a very small number of customers. Recent examples include:

- In 2003, the NWSJV entered into a 25 year agreement to supply 3.3 million tonnes of LNG a year to a Chinese customer.
- In 2004, the NWSJV entered into a 25 year contract to supply 1.6 million tonnes a year of LNG to Tokyo Gas in Japan.

²⁸ Applicants’ submission, para.7.16.

²⁹ Applicants’ submission, para.7.16.

- In 2007, Woodside entered into agreements, including price, with PetroChina and CPC Corporation, Taiwan, each for the supply of 2-3 million tonnes of LNG over 15 to 20 years from Browse.
 - In March 2008, the NWSJV entered into a further 8 year contract with Tokyo Gas to supply 530,000 tonnes per year of LNG.
194. This experience is shared by the Gorgon Project. In fact, Shell and Chevron have been *selling separately* and entering into *large, long term contracts* with a small number of overseas customers since as early as 2005:
- In 2005, Chevron entered into a 25 year contract to supply 1.5 million tonnes of LNG a year from its share of Gorgon production to Osaka Gas in Japan.
 - In 2007, Shell entered into a 20 year contract to supply 1 million tonnes of LNG a year from its share of Gorgon production to PetroChina in China.
 - Recently, in May 2009, ExxonMobil reportedly agreed on an “intent to supply” 1.5 million tones of LNG a year from its share of Gorgon production to Petronet in India.
195. The 2004 LNG contract negotiated by Woodside with China is understood to peg prices at the equivalent of \$US 25 a barrel for oil. The contract is to supply the state-owned China National Offshore Oil Corp with 3.5 million tonnes of LNG a year for 25 years.
196. Oil prices rose to over \$US 140 a barrel. At current oil prices of almost \$70 a barrel, oil prices are around three times that at which the 25 year China LNG contract was pegged.
197. The applicants note in their submission that they “will be separately marketing LNG and condensate” produced by the Gorgon Project. They have been doing so since as early as 2005 and have been entering into large, long term contracts with overseas customers.
198. There is no evidence to support claims that long term domestic gas contracts have operated to discourage domestic gas supply. Prior to 2007, there has in fact been a stable and continuous contracting of supply to the domestic market on competitive prices and long term contracts.
199. Long term contracts have also not prevented gas producers from supplying international customers and from expanding the LNG export market.

200. In fact, the North West Shelf Joint Venture has significantly expanded production from the original three LNG processing trains to five LNG trains. These investments were only possible with the certainty that long term contracts provided to the NWSJV participants.
201. Woodside has recently flagged the potential for extra six LNG processing trains and a potential 77 million tonnes of additional LNG capacity within the next 15 years.

Long term contracts underpin gas field development

202. It is curious that the applicants have pointed to long term, take-or-pay conditions for pipeline transmission as a barrier to separate marketing and domgas investment.³⁰ It was long term, take-or-pay domestic gas contracts that provided the certainty and returns that enabled the original development and subsequent expansion of the North West Shelf project.
203. Without SECWA and Alcoa's initial commitment to purchase domestic gas, there would have been no North West Shelf development and no LNG industry in WA. The domestic market provided the low-risk returns to producers like Shell and Chevron for over 20 years that underpinned the initial North West Shelf project and its subsequent expansion to LNG sales.
204. Nor was the original North West Shelf domestic gas contract a "low priced" contract. Two-thirds of the gas was priced against high-priced Collie coal, with one-third priced against imported oil. This high pricing structure continued until the contract was disaggregated in 1995, when new supply competition from Apache helped put downward pressure on prices.
205. Long term domestic gas contracts enable capital intensive developments such as resource and minerals processing developments and new power stations. Such investments involve significant capital investment with rates of return assessed on a 20-25 year timeframe. Like major gas producers, energy users require the certainty that long term contracts provide to underpin significant, capital-intensive investments.
206. Long term contracts also underpin ongoing investment and operation of the State's vital gas supply infrastructure. Regulated infrastructure such as the Dampier to Bunbury Natural Gas Pipeline functions in a regulatory environment involving write-off periods of 60 years or more without regard to resource availability.
207. Recently however, major gas producers have been shortening contract terms on a "take it or leave it" basis. The Economic Regulation

³⁰ Applicants' submission, para. 7.34-7.37.

Authority of Western Australia reported in 2007 that producers were only offering contracts with a maximum term of 5 years with volumes restricted to about 10 terajoules a day.³¹

208. This is having an impact on customers seeking the long term certainty over energy supply necessary to underpin new investment.

The limited role of spot sales

209. The applicants argue that the lack of spot sales in the domestic market is a barrier to separate selling of domgas. They further contend that a large number of short term and spot sales provide transparency for demand and pricing in the international LNG market.³²

210. As past experience of the LNG export industry and the Gorgon Project demonstrates, access to spot markets have a marginal if any impact on operations, development and investment by major producers.

211. The bulk of all gas sold overseas by LNG exporters has been on long term contracts. This was recently confirmed by Woodside, which also operates the NWSJV. *The Australian* reports:

“Energy giant Woodside Petroleum Ltd has sold some cargoes of liquefied natural gas (LNG) into the spot market after demand from Asian markets dipped. Almost all of the company’s output was sold through long-term contracts but ‘a very small per cent’ of LNG had recently been sold on the spot market, chief executive Don Voelte said on Friday.

‘There is some flexibility for some of our long term contractors to adjust (how much they take) because they have different situations going on,’ Mr Voelte said.

‘It’s actually a very small quantity when you take a look at the overall annual amount.

‘We’ve had no long-term cargoes refused and I haven’t heard of any in the industry being refused, so it’s still a preferred, premier fuel.

‘People want to sign up for contracts on long terms.’³³

212. Spot prices – such as US Henry Hub prices – also exhibit extreme volatility both from a year-on-year basis, and on a monthly and even weekly basis. This volatility is evident below.³⁴

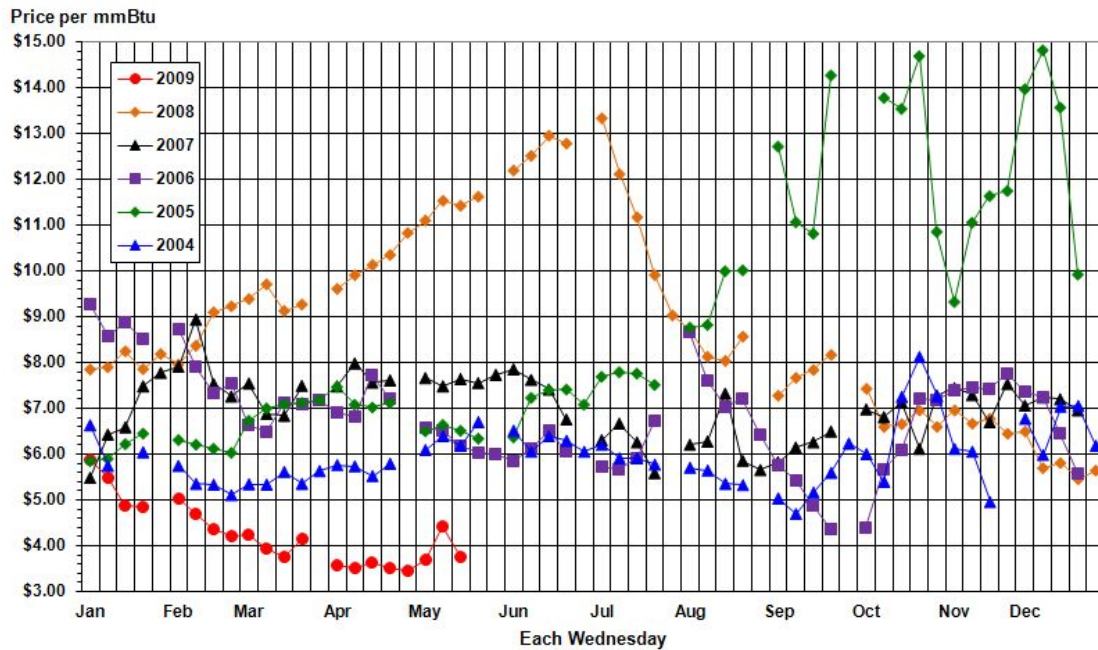
³¹ ERA, Gas Issues in Western Australia, Discussion Paper, 2007.

³² Applicants’ submission, para.7.16.

³³ ‘Woodside unfazed by dip in LNG demand’, *The Australian*, 1 May 2009.

³⁴ Government of Nebraska website, available at: <http://www.neo.ne.gov/statshtml/124.htm>

Natural Gas Spot Prices at the Henry Hub 2004 - 2009



213. It is highly unlikely that major gas field investment decisions, involving multi-billion dollar capital investments of 60 year project life, are taken purely on the basis of spot pricing. It is in fact long term contracts and expectations of long term pricing that underpin major decisions to invest and supply gas.
214. The lack of spot sales in the domestic market is therefore no barrier to domgas investment or to separate selling.

Shell and its partners sell separately in New Zealand – despite claiming it was impossible to do so

215. As outlined above, Shell and its partners claimed separate selling was “difficult if not impossible” and “virtually infeasible” in the New Zealand market, and that “no development” would occur in the absence of joint selling.
216. The market features claimed by Shell and its partners included:
- “The **immaturity** of the New Zealand gas market means that the practical problems of the Pohokura JV parties would face in separately marketing gas would be difficult if not impossible to overcome.”
 - “there are only a **small number of participants** in the gas production market ...”
 - “the demand side of the New Zealand gas production market is **very thin** ...”

- “there are **no storage facilities** for natural gas in New Zealand ...”
- “there are no firms in New Zealand performing a **gas broking or aggregating role** ...”
- “there is **no gas related financial market** in New Zealand which could offer futures and options contracts ...”
- “there is **no spot market** of any significance in New Zealand. The limited depth of the New Zealand market, in terms of the small number of both suppliers and purchasers make it unlikely that a gas related financial market or a spot market (of the requisite depth) will develop.”
- “In New Zealand, there are **no storage facilities for gas, and there is no spot market.**”
- “Furthermore, typical downstream gas users – such as electricity generators – own large specific assets that require contractual certainty if investment is to proceed.”
- “[The] coordination problem is exacerbated by the fact that New Zealand **does not have a spot market** for gas and is almost certainly not going to have one of the requisite depth in the foreseeable future.”
- “Particularly in this environment, we consider that separate marketing of gas is **virtually infeasible.**”
- “At a minimum, a regulatory prohibition on the coordination necessary for joint marketing **would lead to, perhaps indefinite, delay in the Pohokura field’s production.**”
- “In the absence of the market developments identified above, the Pohokura JV parties are **unable to overcome the essential problems** faced when gas is separately marketed.”
- “Furthermore, it will reduce competition because of the later availability and production of Pohokura gas and the signal it impacts for other exploration ventures that, if gas is found, marketing the gas will be a long, costly and problematic exercise.”
- In the **thin New Zealand gas production market**, a delay in production from Pohokura would result in significant welfare losses, similar in nature to those arising from a missing market.”

- “[T]ransactions costs would be **extremely large, even prohibitively high**, if coordination of marketing is not allowed.”³⁵

217. Despite these claims by Shell and its partners, separate selling subsequently took place *with no delays to production* when the three partners were *unable to agree to joint selling arrangements*.

To the extent there is any lack of transparency, the impact falls entirely on consumers

218. The applicants contend that a large number of short term and spot sales provide transparency for demand and pricing in the international LNG market - the lack of which in the domestic market prevents separate selling.³⁶ The applicants further argue that domgas sales take place under “individually negotiated, bilateral and confidential agreements”.³⁷

219. The reality, however, is that the impact of any lack of transparency on demand or pricing falls entirely upon consumers.

220. Shell and Chevron, as participants in the unauthorised NWSJV cartel selling arrangement, have significant bargaining and market power vis-à-vis consumers through access to sensitive commercial information. To the extent that the NWSJV’s domgas sales to individual customers take place under “individually negotiated, bilateral and confidential agreements”, the terms and conditions of these contracts fully known by Shell and Chevron.

221. Through this arrangement, Shell and Chevron have access to detailed knowledge of the commercial terms and timing of all domestic gas sales arrangements entered into by the NWSJV including on:

- price;
- supply volumes;
- contract term and expiry; and
- the identity and supply demand of potential customers seeking gas.

222. This sharing of what would otherwise be confidential commercial and market sensitive information confers Shell, Chevron – and by extension Gorgon joint venture partner ExxonMobil – significant advantage in negotiations with individual consumers. This can only serve to limit competition in the market place between producers, particularly given the NWSJV already controls 70% of the domestic market.

³⁵ Applicants’ submission in the New Zealand Pohokura case and CRA report.

³⁶ Applicants’ submission, para.7.16.

³⁷ Applicants’ submission, para.7.38.

223. In contrast, potential consumers have no access to commercial information on other gas contract sales or negotiations, including what other consumers have paid in recent contracts. This severely limits their ability to bargain on a level playing field with major producers.
224. The Alliance recalls Chevron’s assertion that “relevant staff with experience of sales in WA and the facilities they use are firewalled from the Project because of the involvement in the NWS Venture”.³⁸ In the absence of legally enforceable undertakings by the ACCC, there is nothing to prevent Shell and Chevron using this information in negotiating on the price or non-price terms of gas sold by the Gorgon Project.
225. Assertions by Chevron that staff are “firewalled” from the NWSJV therefore have no consequence in the absence of ring-fencing commitments enforceable by the ACCC.
226. Claims by the applicants that they are unable to separately sell because of a lack of transparency of demand and pricing are therefore disingenuous.
227. Shell, Chevron – and by extension ExxonMobil – already enjoy complete transparency in demand and pricing by virtue of their access to information, while consumers on the other hand remain completely in the dark.

Conclusion

228. To conclude, long term contracts do not operate as a barrier to gas development and supply. This is demonstrated by:
- the history of the original North West Shelf project development which was underpinned by long term domestic contracts;
 - the strong preference for major gas producers (including NWSJV participants Shell and Chevron) to enter into long term LNG contracts;
 - the fact that spot sales account for only a marginal proportion of LNG exports - almost all of the LNG exported by major producers in WA is through long term contracts; and
 - Shell, Chevron and ExxonMobil’s *own practice* in separately selling LNG from the Gorgon Project on 20-25 year terms;
 - Shell and Chevron have directly benefitted – and continue to benefit - from long term contracts for over 20 years.

³⁸ Applicants’ submission, para.6.14.

229. Shell and Chevron already enjoy complete transparency in demand and pricing by virtue of their access to information. To the extent there is any lack of transparency, the impact falls entirely on consumers.
230. Shell and its partners sell separately in New Zealand *despite claiming it was impossible to do so* because of supposed market features.

4.2.5 Operational measures necessary to enable separate selling are well-known and practical

231. Contrary to the applicants' assertions, the operational measures to enable separate selling are well-known and practical.
232. In fact, they are already maintained by Shell and its partners for the Pohokura field in New Zealand. As outlined above, Shell and its partners sell domestic gas separately in New Zealand despite claiming it was "difficult if not impossible" and "virtually infeasible" to do so.
233. Operational measures that would enable separate selling are also in place for the far more complex NWSJV which Shell and Chevron are both party to.
234. The NWSJV maintains mechanisms to manage supply from two separate domestic gas JVs, with two different ownership structures. Both JVs currently operate contemporaneously to supply the WA domestic gas market. These two JVs comprise:
- the original five party Domestic Gas Joint Venture (**the Domgas Venture**) created to supply 5064 PJ of sales gas to the WA domestic market. This JV was the subject of the 1977 TPA authorisation; and
 - the subsequent six party **Incremental Venture** created to produce natural gas for supply into WA in excess of the scope of the Domgas Venture. This JV was the subject of the 1998 authorisation.³⁹
235. The two JVs have different ownership structures and different entitlements to reserves and production/processing facilities. At the time the original Domgas Venture was established, the participants and ownerships were:
- Woodside Energy Limited (50%)
 - Shell Development (Australia) Pty Ltd (81/3%)
 - BHP Billiton Petroleum (North West Shelf) Pty Ltd (81/3%)
 - BP Developments Australia Pty Ltd (162/3%); and

³⁹ ACCC, North West Shelf Project, Determination, 29 July 1998, p.7.

- Chevron Australia Pty Ltd (162/3%)⁴⁰
236. The Incremental JV comprises six participants – each holding an equal 1/6th share:
- BP Developments Australia Ltd;
 - Chevron Australia Pty Ltd;
 - Japan Australia LNG (MIMI) Pty Ltd – an investment vehicle of Mitsui and Mitsubishi;
 - Shell Development (Australia) Ltd;
 - BHP Petroleum (North West Shelf) Pty Ltd; and
 - Woodside Energy Ltd
237. Gas for supply to the domestic market is processed through the Goodwyn and North Rankin production platforms on behalf of both joint ventures.
238. Production from these platforms comes together in two production trunk lines which deliver the gas to processing facilities on the Burrup Peninsula. There is therefore a fully blended stream of product that is owned by two *separate JVs with different ownership structures*.
239. This product is being sold to the domestic market on the basis of different shares reflecting the different ownership structure of the two JVs.
240. There are therefore two separate sellers with the participants internally managing production and sales nominations between the original Domgas and the Incremental JVs.
241. North West Shelf Gas (NWSG) has been selling jointly on behalf of Shell and Chevron which are participants of both the original Domgas JV and the Incremental JV. There are clearly practical and effective arrangements in place to allocate gas for:
- Shell and Chevron's production shares between the two different JVs; and
 - within each JV, Shell and Chevron's production shares vis-à-vis other participants.
242. Further, the joint venture accounting arrangements are currently sophisticated enough to separately account for individual JV participant entitlement to four different product streams – the domestic gas stream

⁴⁰ ACCC Determination, Revocation of Authorisation A18492 – North West Shelf Gas Pty Ltd, 5 March 2008, Public Register no. C2008/55.

(comprising the Domgas Venture and the Incremental JV), the LNG stream, LPG's and the liquids / condensate stream.

243. The Alliance understands that LPG's, liquids and condensate are already being sold separately by the NWSJV participants in relation to their respective shares of production.
244. Given Shell and Chevron already participate in arrangements for the far more complex NWSJV – involving two different JVs with two different ownership structures – such arrangements would be even more practical for the single Gorgon JV comprising just three parties.
245. Shell, Chevron and ExxonMobil have also been separately selling LNG from their respective production shares from the Gorgon Project from since 2005. They will continue to do so. Separate selling arrangements are therefore already in place for the Gorgon Project and have been effective since 2005.

4.2.6 Marketing decisions for domestic gas are already being made separately by Shell and Chevron in regard to the NWSJV

246. As outlined above, marketing decisions for LNG are already being made separately by Shell, Chevron and ExxonMobil in regard to the Gorgon Project.
247. They are also being made separately by Shell and Chevron for domestic gas in regard to the NWSJV.
248. All of the NWSJV participants – including Shell and Chevron - retain substantial marketing capability within their respective organizations to support the marketing of NWSJV Domgas Venture and Incremental Venture production.
249. All contracts for supply of gas to domestic customers from the NWSJV involve all six (for the Incremental JV) counterparties contracting severally.
250. While North West Shelf Gas Pty Ltd negotiates with a purchaser on behalf of the JV participants, it has to communicate with and seek approval from all six JV participants on contract terms and price.
251. North West Shelf Gas Pty Ltd has no authority to agree terms – it is a clearing house or postbox by which all six parties come together to set contract prices and terms.
252. DBP's Operating Balancing Agreement (explained below) is with all six JV participants severally.

253. In the event of an emergency which has any bearing on contractual obligations of the NWSJV, North West Shelf Gas refers every action to all six JV participants for responses.
254. The fact that Shell and Chevron already retain substantial marketing capacity within their respective organisations for domestic gas is confirmed by the applicants' own admission.
255. According to the applicants, Shell already has "relevant staff with experience of sales in WA and the facilities they use [which] are firewalled from the [Gorgon] Project *because of their involvement in the NWS Venture*".⁴¹
256. Shell staff with experience with WA domgas sales, and their dedicated facilities, clearly perform a function that is more than as a mere postbox for rubber stamping decisions by North West Shelf Gas.
257. Similarly, Chevron "has developed the knowledge, expertise and resources to enable it to fulfil the marketing role on behalf of the Participants".⁴² To the extent that this knowledge, expertise and resources relates to the marketing of domestic gas to the WA market, they could only have arisen from active participation in domgas marketing in WA.
258. While the applicants' submission asserts that ExxonMobil has not supplied pipeline specification gas into the domestic market, it footnotes that gas has been supplied from the Griffin Project.⁴³
259. It also fails to disclose that as recently as May 2009, ExxonMobil has reportedly agreed on an "intent to supply" 1.5 million tonnes of LNG a year from its share of Gorgon production to Petronet in India. It could be inferred that negotiations on a complex international sales agreement of this magnitude are continuing, and would involve substantial marketing expertise and capacity on the part of ExxonMobil.
260. To conclude, marketing decisions for domestic gas are already being made separately by Shell and Chevron in regard to the NWSJV.
261. Shell, Chevron and ExxonMobil already possess substantial marketing expertise and capacity within their individual organisations – both within WA, and as part of their global operations.

4.2.7 Gas balancing and nomination arrangements

262. The applicants' contend that gas balancing agreements which would enable separate selling are not feasible in the WA domgas market given what they assert to be WA's illiquid market for large domgas

⁴¹ Applicants' submission, 6.14.

⁴² Applicants' submission, 6.14.

⁴³ Applicants' submission, para.6.14 and footnote 22.

projects. Even if gas balancing agreements could be implemented, the applicants claim they are practically and commercially unfeasible and present an unacceptable level of risk due to the market features in WA.⁴⁴

263. These arguments have no merit. Nominations systems and mechanisms are well-known in the gas industry and already used by Shell in New Zealand and in WA.
264. Shell and its partners sell domestic gas separately in New Zealand despite previously claiming that implementing gas balancing and nomination arrangements would present “insurmountable problems”.
265. Gas balancing and nomination arrangements are already in place in the WA market:
 - as part of the NWSJV involving domestic gas sales from two separate domgas joint ventures with two separate ownership structures, and
 - with Shell, Chevron and ExxonMobil selling LNG separately from the Gorgon Project;
 - to manage the supply of gas from the Io field, including BP’s share, to the Gorgon Project.

Shell and its partners’ “insurmountable barriers” in New Zealand

266. In the New Zealand Pohokura case, Shell and its partners claimed that implementing gas balancing and nomination arrangements would present “insurmountable problems” that would prevent separate selling:
 - “In attempting to separately sell gas produced jointly, pursuant to contracts negotiated individually, the Pohokura JV parties would face a number of **insurmountable problems**. Contracts negotiated without co-ordination will consequently contain different extraction rates, quantity, term, etc. The practical problems faced by the Pohokura JV parties include determining how they would:
 - apportion the costs of appraisal, development and operation;
 - apportion facilities access;
 - appropriately allocate risk, in particular reserves risk;
 - apportion uplift rights;
 - apportion field deliverability;
 - apportion all products recovered; and
 - appropriately adjust overlift and underlift.”

⁴⁴ Applicants’ submission, para.7.76.

- “In commodity or developed gas markets the divergence between entitlement and sales (the “overs” and “unders”) can be mitigated by a **gas balancing arrangement**. Other mitigating circumstances include **storage facilities** and the ability of **brokers** to aggregate parcels of gas from different sources. A gas balancing arrangement can also assist in resolving conflicting interests caused by different gas sales contracts and hence the incentive to over extract.”
- “Conceptually, there are three gas balancing arrangements which can correct this divergence: [1] gas storage; [2] cash balancing; and [3] in kind balancing.”
- “The problems with these options are set out in ... the CRA report. **These problems are unlikely to be resolvable in New Zealand in the foreseeable future.**”⁴⁵

267. The CRA consultants’ report presented by Shell and its partners in that case also contained extensive arguments as to why gas balancing arrangements would present “insurmountable problems”, for instance:

- “If there is uncertainty about the quantities of gas available on a spot market, and concomitantly the volatility of price, the joint venture parties would be reluctant to design a balancing arrangement on the basis of their ability to make-up deficits from it, nor would they be happy to risk huge sunk investments on it.”⁴⁶
(p.31)

268. These claims bear a striking resemblance to those made by Shell, Chevron and ExxonMobil in the present case, and by their commissioned consultants’ report.

269. It is surprising that in citing the CRA and Lateral Economics Reports in the present case, the applicants appear to have neglected the very similar claims made in Shell and its partners’ application in the Pohokura case and in the CRA report. Both these documents are included by attachment to the DomGas Alliance’s submission.

270. The actual practice of Shell and its partners in New Zealand provide the clearest rebuttal of the claims made by the applicants in the present case.

271. Despite claiming that separate selling was “difficult if not impossible” and “virtually infeasible”, separate selling subsequently took place *with no delays to production* when the three partners were *unable to agree to joint selling arrangements*.

⁴⁵ Applicants’ submission in the New Zealand Pohokura case, para.26-29.

⁴⁶ CRA report, p.31.

Gas balancing and nomination arrangements are already in place in the WA market

272. It is astounding that the applicants would assert that “so far as the Participants are aware, no major project in WA has implemented such arrangements in the past”.⁴⁷
273. Gas balancing and nomination arrangements are already in place in the WA market to the benefit of Shell and Chevron:
- as part of the NWSJV involving domestic gas sales from two separate domgas joint ventures with two separate ownership structures;
 - with the flexibility within the Dampier to Bunbury Natural Gas Pipeline system to manage “overs and unders”;
 - with Shell, Chevron and ExxonMobil selling LNG separately from the Gorgon Project;
 - to manage the sourcing of gas from the Io gas field outside the Gorgon Project.

NWSJV project and the DBNGP

274. Nominations are already taking place in relation to the two separate Domgas and Incremental JVs of the NWSJV due to their different ownership structures, and in relation to sales of liquids and condensate by the NWSJV.
275. Under the nominations system, each of the JV participant sellers – including Shell and Chevron - would collect nominations from their respective buyers for the quantities of gas required for a certain date.
276. Each seller would then nominate to the operator of the production and processing facilities (Woodside) what their production requirements were for each day. The operator would then aggregate these quantities and deliver this total quantity of gas for that day at the delivery point.
277. Currently, domestic gas buyers are required to inform the sellers’ representative (North West Shelf Gas) of nominations three days in advance. North West Shelf Gas then informs the operator to ensure this amount is delivered on the required day.

Flexibility within the DBNGP to manage “overs and unders”

⁴⁷ Applicants’ submission, para.7.73.

278. To the extent that there is a difference between actual offtakes and nominations, an “Operating Balancing Agreement” can be implemented between the joint venturers and the pipeline operator for any excess or shortfall in demand.
279. DBP operates the Dampier to Bunbury Natural Gas Pipeline under an “Operating Balancing Arrangement” agreed with sellers under which NWSG delivers gas into the pipeline against pressure and not to specific nominations. This essentially operates as a “park and loan service”.
280. This provides for any excess production to be parked in the pipeline or a gas supply shortfall drawn from pipeline linepack within a range of +/- 300 TJ a day. This is equivalent to half a day’s gas production from the NWSJV, or a full day’s production of 600 TJ/day in terms of the total “swing capacity”.
281. The pipeline therefore already provides the buffer to cover variations between nominations (ie production) and actual market demand.
282. The pipeline has *individual shipper agreements* with more than 20 gas purchasers (shippers) that provide for an imbalance range at any one time of +/- 8% of their contracted capacity. This provides for shippers to add to “linepack” (gas in the pipeline) or draw from it within this range.
283. This means that shippers who cannot control their physical usage to meet their nominated daily intake have a latitude of +/- 8%. The benchmark for other pipelines in the world is +/- 2%.
284. To the extent that shippers look like breaching these limits, they have the ability to – and in fact do - trade imbalances between themselves.
285. The total flexibility between inlets (production) and outlets (demand) which could be managed on the Dampier to Bunbury Natural Gas Pipeline under these various arrangements is therefore approximately +/- 470TJ or in excess of 1 day’s production from the NWSG plant.
286. The terms on which Woodside provides operating services to the NWS Project and the detailed joint venture arrangements themselves are governed by detailed contracts. These contracts would already – or could readily - provide for:
- the nature of delivery obligations to individual JV participants;
 - dispossession of product whether liquids, LPG, LNG or domestic gas;
 - physical delivery arrangements;

- nomination arrangements that each of the individual parties of the two separate JVs would have for their own offtake;
- some form of balancing arrangement amongst the joint venturers

Balancing arrangements are in place to enable separate selling of LNG

287. Balancing arrangements would already be in place to allow separate selling of LNG for the Gorgon Project.
288. Shell, Chevron and ExxonMobil have been separately selling LNG from as early as 2005.

Sourcing of gas from outside the Gorgon Project – Io field

289. The Gorgon participants and BP have entered into an agreement with Shell to enable unitisation of BP's Io gas field with the Gorgon Project's Jansz gas field.
290. Shell has also separately entered into an agreement with BP under which BP will sell petroleum to Shell and purchase it as LNG cargoes after it has been processed through Gorgon LNG infrastructure.⁴⁸
291. The arrangement means that the Gorgon Project will be sourcing gas from a field outside the Project, with a different ownership structure.

Table: Equity shares of the Io and Jansz fields, and the Gorgon Project

| | Io Licences WA-25-R WA – 26-R | Jansz licence WA-18-R | Gorgon LNG Project |
|------------|--|----------------------------------|-------------------------------|
| BP | 12.5% | - | - |
| Chevron | 50% | 50% | 50% |
| ExxonMobil | 50% | 25% | 25% |
| Shell | 12.5% | 25% | 25% |

292. This demonstrates that the Gorgon participants are able to access supply from outside the Gorgon Project – whether for LNG sales, or for domgas.
293. It also demonstrates that gas balancing arrangements are practical and feasible given the Gorgon participants will be managing:
- the supply of gas from outside the Gorgon Project;

⁴⁸ BP, 'Significant milestone for Io and Jansz gas fields', 29 May 2009, available at: <http://www.bp.com/genericarticle.do?categoryId=9008681&contentId=7053385>.

- the ownership structure of the Io field both in regard to BP as a non-Gorgon participant, and in the different ownership shares of Gorgon participants Shell, Chevron and ExxonMobil; and
- Shell's separate sales, processing and re-purchase agreement with BP.

Conclusion

294. A gas balancing and nomination arrangement can therefore be implemented on a practical and commercial basis for the Gorgon Project given:
- gas balancing and nominations are already taking place in the far more complex NWSJV – which involves two separate domestic gas JVs with two different ownership structures;
 - there is significant flexibility provided by the Dampier to Bunbury Natural Gas Pipeline to cover variations between nominations and actual market demand;
 - balancing arrangements would already be in place to permit the separate selling of LNG for the Gorgon Project; and
 - the Gorgon participants have entered into an agreement with BP to source gas from the Io field, outside the Gorgon Project.

4.2.8 Producers in other joint venture gas developments already sell separately in WA and the Eastern States

295. That separate selling is practical and feasible is demonstrated by the fact it is already taking place in practice – both in WA and in the Eastern States.
296. Separate selling by joint venture participants is taking place in WA, mainly by participants in the Apache-led joint ventures through the Varanus Island domestic gas processing facility. This facility supplies 30% of the WA domestic gas market.
297. Separate selling is taking place by Apache and Santos from the John Brookes field joint venture. While Apache (55% share, operator) and Santos (45%) initially sold their gas jointly, during later marketing efforts, the JV participants could not agree on remaining available reserves. Santos took a more aggressive view in respect of available reserves than Apache and decided to market additional gas from John Brookes separately, with Apache not marketing any further John Brookes gas.
298. Separate selling of natural gas is also happening in the Otway Basin in Eastern Australia. Santos has separately marketed gas from its

interest in the Casino field. Woodside has separately marketed gas from its interest in the Geographe/Thylacine field.

299. It should be noted that consumers have held the belief that Shell, Chevron and ExxonMobil would separately sell domestic gas from the Gorgon Project. This belief was underlined by the three companies separately selling LNG since 2005.
300. Shell, Chevron and ExxonMobil's 11th hour disclosure that they now intend to sell jointly – and the stated urgency which they are now seeking authorisation - comes as considerable surprise to consumers.

4.2.9 Shell, Chevron and ExxonMobil have been required by competition authorities to sell separately in other countries – including Denmark, Norway and New Zealand

301. In their submission, the applicants make extensive reference to the United States and United Kingdom domestic gas markets to support their claims that separate selling is not practical or feasible in WA.
302. In focusing on two of the world's biggest economies for natural gas, the applicants neglect to mention other countries where they have been compelled by competition authorities to sell separately.
303. For example, Shell and Chevron have been compelled by the European Commission to sell separately in Denmark.
304. Shell and ExxonMobil have been compelled by the European Commission to sell separately in Norway.
305. Shell has been compelled by the New Zealand Commerce Commission to sell separately in New Zealand from the new greenfield Pohokura development.

Denmark – Shell and Chevron

306. In 2003, the Danish and European Commission competition authorities settled an antitrust investigation in Denmark involving the Danish gas supplier DONG and the country's main gas producers Shell, Chevron Texaco and A.P Moller.
307. The investigation related to the joint selling of North Sea gas by the parties to the Danish Underground Consortium (DUC). DUC, which accounted for 90% of Danish gas production, was composed of Shell, Chevron and A.P Moller.

308. As a result of the settlement, the gas producers committed to market their production individually.⁴⁹ Producers also undertook to offer an additional 7 billion cubic metres of gas for sale to new customers over a period of 5 years when new gas volumes are available. This corresponded to around 17% of the total production of the DUC parties.
309. In accepting this commitment, the European Commission noted that a significant number of customers inside and outside Denmark had actively looked at alternative sources of supply in the past and had continued to do so at the time of the investigation.
310. This commitment clearly recognised that the effect of joint selling in Denmark had been to limit gas supply and competition. Unauthorised joint selling arrangements in WA have similarly operated to limit supply and competition, and increase prices.

Norway – Shell and ExxonMobil

311. In 2001, the European Commission issued a formal warning to Norwegian gas producers – including Shell and ExxonMobil - about the joint sale of gas by the Gas Negotiation Committee (GFU).
312. The case concerned joint sales of natural gas through a single seller, the GFU, from Norway to the European Union. The GFU negotiated natural gas sales contracts with buyers on behalf of all the other natural gas producers in Norway and thus fixed the selling price, volumes and all other trading conditions:
- “The European Commission has warned Norwegian gas producers that the joint sale of Norwegian gas carried out through the Gas Negotiation Committee (GFU) is in breach of the European Union competition rules as it fixes, among other things, the price and the quantities sold.”
- “As the European gas market is progressively being liberalized, it is of paramount importance that producers sell their gas individually so that those customers that can already choose their supplier benefit from real choice and competitive prices.”⁵⁰
313. The case was settled in 2002 with Norwegian gas producers confirming that they will market their gas individually.⁵¹ These included six groups

⁴⁹ European Commission, ‘Commission and Danish competition authorities jointly open up Danish gas market’, 24 April 2003, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/566&format=HTML&age d=0&language=EN&guiLanguage=en>

⁵⁰ European Commission, ‘Commission objects to GFU joint gas sales in Norway’, IP/01/830, Brussels, 13 June 2001; available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/830&format=HTML&age d=0&language=EN&guiLanguage=en>

⁵¹ European Commission, ‘Commission successfully settles GFU case with Norwegian gas producers’, IP/02/1084, Brussels, 17 July 2002; available at

of gas companies which were sellers to Norwegian gas negotiated under the GFU scheme – Shell, ExxonMobil, TotalFinaElf, Conoco, Fortum and Agip. The companies provided written commitments to discontinue all joint marketing and sales activities.

New Zealand - Shell

314. In 2003, the Commerce Commission granted authorisation to Shell, Todd and OMV. Shell, Todd and OMV were joint venture partners for the greenfield Pohokura gas development. The authorisation allowed the partners jointly to sell gas from the field.
315. Shell and Todd were the two dominant producers in New Zealand's highly concentrated gas market. Collectively, the three Pohokura joint venture partners accounted for 88% of natural gas production.⁵²
316. The Commission found that the owners of the Pohokura field would not face an effective competitive constraint from other gas producers before the end of the decade given:
- the concentrated ownership of current production fields;
 - the current supply and demand situation; and
 - the very limited potential for significant new gas fields to be brought into production in the short-term.⁵³
317. The Commission also found that joint selling would have a significant impact on competition and “substantially lessen competition in a market”.⁵⁴
- Separate selling would offer different dynamics to negotiations between the buyer and the seller. Within limits, buyers would have choices not available to them under joint selling.⁵⁵
 - Joint selling would, on the balance of probabilities, result in gas prices being higher on average than they would be under separate selling. This would result because joint selling would shift the

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

⁵² New Zealand Commerce Commission Determination, Decision 505, September 2003, para.340.

⁵³ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.358.

⁵⁴ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.390.

⁵⁵ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.372.

relative bargaining strength of buyers and sellers in favour of the seller and because it would facilitate price discrimination.⁵⁶

- The range of terms and conditions on offer would be more limited with joint selling.⁵⁷
318. Importantly, the Commission considered that joint selling could have a material impact on development of a competitive market in the future. This was because a future competitive environment depended on having a number of sellers in the market, including a number selling from each field.⁵⁸
319. The Commission rejected claims that preventing joint selling would have an impact on the level of new gas exploration in New Zealand. Preventing joint selling was also unlikely to make an otherwise viable field non-viable.⁵⁹
320. The Commission nevertheless considered that authorisation permitting joint selling would avoid a one year delay in using the gas, because owners would not need to negotiate contractual arrangements for separate sale. The Commission authorised joint selling on the basis that avoiding a one year delay was a substantial benefit to the public, which outweighed the anti-competitive nature of joint selling.
321. However, in June 2006, the Commission revoked the joint selling authorisation. This was because the JV participants had been unable to agree upon joint selling arrangements and instead had separately sold their share of production with no delays in production.⁶⁰
322. In revoking the authorisation, the New Zealand Commerce Commission considered whether the original authorisation was granted on information that was “false or misleading in a material particular”.
323. The Commission noted that the information in question “involved predictions as to a future state of affairs in an area of accepted uncertainty”. The Commission considered that if “there was not an objective foundation for the information at issue at the time, the information can be properly regarded as ‘false or misleading’” in terms of the New Zealand statutory provisions.⁶¹

⁵⁶ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.377.

⁵⁷ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.383.

⁵⁸ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.392.

⁵⁹ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.390-391.

⁶⁰ New Zealand Commerce Commission Determination, Decision 581, June 2006.

⁶¹ New Zealand Commerce Commission Determination, Decision 581, June 2006, para.51.

324. In the present Gorgon case, the applicants' claims that separate selling is "not commercially or practically feasible" should be closely scrutinised by the ACCC given:
- the strikingly similar claims made by Shell and its partners in the New Zealand Pohokura field;
 - Shell and its partners' assertion in the New Zealand case that "the market characteristics [in Australia] are similar to those in New Zealand";⁶²
 - the experience in New Zealand is recent with Shell continuing to sell separately;
 - the fact the applicants have made little if any mention of Shell's own activities in New Zealand, despite making extensive reference to the US and UK market in support of their claims; and
325. The applicants in the Gorgon case continue to claim that separate selling is not "commercially or practically feasible" because of supposed market features despite Shell's actual experience to the contrary in New Zealand.

Conclusion

326. The fact that Shell, Chevron and ExxonMobil have been compelled to sell separately in Denmark, Norway and New Zealand – *and have been able to do so successfully* – demonstrates that separate selling is practical and feasible in WA.
327. The New Zealand Pohokura gas field example is especially pertinent. It involved a major greenfield with three parties. The arguments made by Shell and its partners in that case bear a striking resemblance to those asserted by the applicants with respect to the Gorgon Project.
328. Despite Shell and its other partners' claim that "there is no feasible means of marketing gas sourced from Pohokura", separate marketing in fact took place *with no delays to production* when the partners were unable to agree upon joint selling arrangements.
329. Far from being a necessary enabler for domestic gas supply, joint selling arrangements in the New Zealand case in fact operated as a potential barrier to timely domestic gas supply when Shell and its partners were unable to reach agreement on joint selling arrangements.

⁶² CRA, *Coordinated Marketing of Pohokura Gas – An Economic Analysis*, December 2002, p.3.

4.2.10 Joint selling is not necessary to support investment and development of the Gorgon Project.

330. The applicants claim that as a major greenfields gas development, joint selling is necessary “to minimise risks and ensure security of cashflows in order for participating parties to undertake the venture”.⁶³
331. The applicants further assert that the structural market barriers to joint selling – the supposed lack of maturity of the Australian market and the very limited number of buyers and sellers – is particularly the case in relation to greenfield projects “which face large lead times and require the expenditure of very large amounts of capital well in advance of gas becoming available for consumption”.⁶⁴
332. There is no merit to these claims. Joint selling is not necessary to support development of the Gorgon Project:
- the WA domestic gas market has undergone significant transformation over the past 10 years – the market structure barriers asserted by the applicants’ no longer apply;
 - Shell and its partners sell separately from the Pohokura gas field – a major greenfields project - despite originally claiming it was impossible to do so;
 - Shell, Chevron and ExxonMobil already enjoy immense market power in the WA domestic gas market vis-à-vis consumers;
 - Shell, Chevron and ExxonMobil are already selling Gorgon LNG separately through large, long term contracts;
 - domgas investment and supply represents only a small component of the overall Gorgon Project - LNG will account for the bulk of project investment and expected revenues; and
 - it is proposed that there will be a significant delay between LNG and first domgas supply.

The WA domestic gas market has undergone significant transformation

333. As previously outlined, the WA domestic gas market has undergone significant transformation over the past 10 years. This has seen a significant expansion in:
- the breadth of the domestic market and the size of domestic demand;

⁶³ Applicants’ submission, para.7.46.

⁶⁴ Applicants’ submission, para.7.47.

- the number of direct gas customers;
- the number of parties buying through an aggregator, many of whom could also elect to purchase directly from gas producers;
- the entry of brokers providing gas trading services to gas users;
- short and long-term trading in gas transmission capacity and physical gas;
- additional transportation and storage options;
- the flexibility within the Dampier to Bunbury Natural Gas Pipeline system to deal with supply and demand imbalances; and
- connectivity between gas pipelines in Western Australia which means that gas can now be traded either physically or commercially in any part of the system.

334. As such, the market structure features asserted by the applicants' no longer apply. Separate selling of domestic gas is practical and feasible – whether from existing projects like the NWSJV, or from greenfield projects like Gorgon.

335. Furthermore, separate selling alone is not likely to make an otherwise viable field non-viable. The New Zealand Commerce Commission considered in the *Pohokura* case that:

“While it is axiomatic that any additional cost faced by new entrants act as a disincentive to entry, the Commission considers that the scale of these additional costs, in comparison with the potential rewards, would not be likely to be sufficient to make a viable field non-viable.”⁶⁵

Shell and its partners sell separately from the Pohokura gas field – a major greenfields project

336. As outlined above, the Pohokura case involved a major greenfield joint venture development involving three parties. In seeking authorisation for joint selling, Shell and its partners claimed joint selling was necessary to underpin a major new gas field investment. Separate selling would on the other hand lead to significant if not indefinite delay in domestic gas development and supply:

- “The immaturity of the New Zealand market means that the practical problems the Pohokura JV parties would face in separately marketing gas would be **difficult if not impossible to overcome.**”

⁶⁵ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.391.

- “**Substantial welfare losses** will occur if joint marketing is not authorised.”
- “Absent joint marketing, a **substantial delay** in the development of the field is expected, at a time of scarcity of resource.”
- “In addition, separate marketing would result in **significant extra transaction and production costs, and sub-optimal field depletion**. This would impact significantly on the value of the field, and that effect would have the potential of significantly reducing exploration in New Zealand.”⁶⁶

337. Failure to provide authorisation would lead to “no development”, “significant delay” or the project being “delayed indefinitely”:

- “At the very least, [separate] marketing would involve **significant delay** as the Pohokura JV parties attempt to address the problems associated with separate marketing, such as the need for a gas balancing arrangement and the need to co-ordinate development and operation (in the absence of the market developments necessary to support separate marketing).”
- “The Pohokura JV parties do not consider that separate marketing is feasible in the foreseeable future or for the expected life of Pohokura. Accordingly, **no development** is a counterfactual in the event that authorisation is not granted.”
- “Joint marketing clearly has a pro-competitive effect on competition when compared with the counterfactual of no development. If commencement of production from Pohokura is **delayed indefinitely**, the gas production market would not receive the competitive benefit of a new source of gas supply.”
- “[I]t is a very real prospect that the Pohokura JV parties would never reach agreement on feasible arrangements. Therefore the first counterfactual of **no development** may well be the outcome of an attempt at [separate selling].”
- “Authorisation of joint marketing will enable **earlier development of, and production** from Pohokura. The public benefits have been modelled on a conservative estimate that the delay in commencing production will be three years, under [separate selling].”⁶⁷

338. Despite Shell and its partners’ claim that “there is no feasible means of marketing gas sourced from Pohokura”, separate marketing in fact took place *with no delays to production* when the partners were unable to agree upon joint selling arrangements.

⁶⁶ Applicants’ submission in the Pohokura case, para.16.

⁶⁷ Applicants’ submission in the Pohokura case, para.46, 52, 66, 72.

339. Separate selling had marginal if any impact on either viability of the Pohokura project or first supply of domgas.
340. Far from being a necessary enabler for domestic gas supply, joint selling arrangements in the New Zealand case in fact operated as a potential barrier to timely domestic gas supply when Shell and its partners were unable to reach agreement on joint selling arrangements.

Shell, Chevron and ExxonMobil already enjoy immense market power

341. Market power and the competitive structure of the market are relevant not only in assessing the competitive impact on joint selling, but also the ability of producers to negotiate attractive prices that would facilitate Gorgon investment.
342. As outlined in section 2.4 above, Shell, Chevron and ExxonMobil already exercise immense market power:
- the NWSJV participants – which includes Shell and Chevron – control 70% of the domestic gas sold in WA and over 92% of the gas resources in developed fields; and
 - two supplier groups control close to 100% of the gas supplied into the WA domestic gas market and the resources in developed fields;
 - there are significant barriers to the entry of *competitive* new suppliers to the domestic gas market;
 - producers include the world’s largest oil companies with immense commercial and negotiating power
 - local consumers have no reasonable alternatives to gas supply other than existing suppliers;
 - the current market is experiencing a serious shortage in gas supply;
 - WA gas prices have risen dramatically to be four to five times prices in the Eastern States;
 - despite WA’s “abundance” of gas reserves, current domestic gas prices are significantly higher than in overseas markets (such as Henry Hub or LNG netback prices); and
 - the majority of potential new field developments which could increase gas supplies to the domestic market are owned or controlled by one or more of the NWSJV participants.

343. An assessment of whether joint selling arrangements are necessary to underpin the Gorgon Project should focus on the overall competitive market structure not the size or greenfield nature of the project.
344. In the current market, any investment risks that joint selling arrangements purport to manage are more than offset by the immense market power enjoyed by Shell, Chevron and ExxonMobil. The applicants have significant ability to determine supply and price – and to secure commercial returns that would facilitate Gorgon development without needing to combine together to sell.
345. Furthermore, the State’s serious gas shortage is not expected to improve before 2015 at the earliest.
346. It is revealing that the applicants have sought authorisation until agreements have been reached for the sale of 2000 PJ of domgas or 6 years from the date of first gas. This period would not only coincide with the continuing very tight market conditions for domestic gas, it is likely to long exceed it.
347. It should also be remembered that while the proposed Gorgon Project represents a significant capital investment, the Project involves very, very large companies – indeed the world’s largest oil companies.
348. To place the size of the Project in perspective, media reports refer to a \$A 40 billion Gorgon Project. ExxonMobil, the world’s largest oil company, reported 2008 profits of over \$US 45 billion.
349. As such, ExxonMobil *alone* would be able to fund the entire Gorgon development from a single year’s profits. Shell, Chevron and ExxonMobil’s combined 2008 profits would, in \$A terms, more than fund *three* Gorgon Projects let alone a single project constructed over a period of years.
350. Individually, each these companies possess immense commercial and negotiating power compared to local gas customers, and indeed sovereign governments. They have highly sophisticated businesses, with the operational and resource backing of multi-billion dollar global operations.
351. In contrast, the bulk of the 25-30 companies that purchase gas direct from producers are smaller to medium sized companies, including emerging resource processing and power generation companies. These companies have limited bargaining power. There is no commercial imperative for joint selling to offset the market power of customers to underpin gas field investment.
352. The current situation can therefore be contrasted to the original NWSJV project. Authorisation in that case enabled the NWSJV partners to offset the market power of the single vertically integrated

monopoly buyer (SECWA), and thereby negotiate the commercial returns that would facilitate investment.

Shell, Chevron and ExxonMobil are already selling LNG separately

353. The applicants argue that the Gorgon Project is a greenfield gas project involving “substantial upfront investment and an imperative to minimise risks and ensure security of cashflows in order for participating parties to undertake the venture”.⁶⁸
354. Despite this “imperative to minimise risks” to enable investment, Shell, Chevron and ExxonMobil have been competing with each other and selling LNG to overseas customers separately.
- In 2005, Chevron entered into a 25 year contract to supply 1.5 million tonnes of LNG a year from its share of Gorgon production to Osaka Gas in Japan.
 - In 2007, Shell entered into a 20 year contract to supply 1 million tonnes of LNG a year from its share of Gorgon production to PetroChina in China.
 - As recently as in May 2009, ExxonMobil reportedly agreed on an “intent to supply” 1.5 million tones of LNG a year from its share of Gorgon production to Petronet in India.
355. The applicants have therefore been competing with each other for international sales since as early as 2005 with no apparent detriment to the viability of the Gorgon Project.
356. Furthermore, LNG will account for the bulk of capital investment and revenues associated with the Gorgon Project. Domestic gas will, in comparison, account for only a modest proportion of the overall Gorgon development:
- the 15 million tonnes per year capacity of the three LNG trains equates to around 2200 TJ/day;⁶⁹
 - the initial *up* to 150 TJ/day domgas supply would only be equivalent to just over 6% of expected LNG exports;
 - even at 300 TJ/day, domgas supply would only be equivalent to around 13% of expected LNG exports;
 - this 300 TJ/day is not expected to be attained until 2021 – some 12 years after an expected final investment decision.

⁶⁸ Applicants’ submission, para.7.46.

⁶⁹ Conversion values provided by www.santos.com/conversion-calculator.aspx

357. To the extent that joint selling was considered necessary to reduce supply competition between participants and to mitigate the risks of a major greenfield investment, the applicants have not done so for LNG - the product that accounts for the bulk of the Gorgon Project investment and the bulk of expected revenues.
358. It is also relevant that the international LNG market is highly competitive, with the Gorgon participants competing not only with each other but other LNG suppliers in Australia and the rest of the world. International customers have a multiplicity of choice and significant negotiating power vis-à-vis suppliers.
359. LNG exporters face a very challenging international LNG market. The *Australian Financial Review* reports on falling LNG demand in Japan and Korea, the world's two largest LNG importers:
- “Imports of LNG in Japan dropped 8.4 per cent in March to 5.79 million tonnes from a year earlier as industries and power plants cut gas use. Imports of spot cargoes from the Atlantic Ocean area, including Egypt, Nigeria and Equatorial Guinea fell about 45 per cent to 354,995 tonnes in March from a year earlier. Prices of spot transactions dropped about 19 per cent to \$US 716 a tonne on delivered terms ...”⁷⁰
360. Similarly, *The Times* reports that gas demand and prices are tumbling from falling demand and a build-up in new LNG supplies:
- “Gas prices, already tumbling as a result of the recession, are suffering a triple whammy, according to Cambridge Energy Research Associates (Cera): from recession in the Far East; a long-awaited build-up in new supplies of liquefied natural gas (LNG); and unexpected discoveries of new gas reserves in the United States.
- “The emerging gas glut could even displace coal in the supply of fuel to power stations in Europe, Michael Stoppard, managing director of Cera, said.
- “In the teeth of a recession, the LNG industry is about to take a big upward step, Mr Stoppard said. “Over the next 18 to 24 months, LNG capacity will increase by 30 per cent,” he said. “Where is the stuff going to go? The answer will be in the Atlantic basin.”
- “Natural gas prices have tumbled in recent months, falling in the United States from an average of \$US12.61 (\$19.18) in 2008 to \$US4.54 in February. In Britain, the fall has also been precipitous, from \$US13.46 to \$US6.79.”⁷¹

⁷⁰ ‘Gas prices slide in Japan as demand peters out’, *Australian Financial Review*, 5 May 2009.

⁷¹ ‘Plunging gas prices threaten coal pits’, *The Times*, 16 March 2009.

361. WA gas producers have not been immune to the challenging international environment. *The Australian* reports that “energy giant Woodside Petroleum Ltd has sold some cargoes of liquefied natural gas (LNG) into the spot market after demand from Asian markets dipped”.⁷²
362. The very challenging international LNG market stands in sharp contrast to the domestic gas market. The WA gas market remains very tight, there is a serious shortage of gas, prices have risen dramatically and Shell, Chevron and ExxonMobil exercise significant market power.
363. Logically therefore, to the extent there is any “imperative to minimise risks” to enable greenfield investment, this relates to:
- the product (LNG) comprising the bulk of the capital investment and expected revenues associated with the Gorgon Project;
 - the market (the international LNG market) where the greatest commercial detriment and risks would arise from Project participants competing with each other.
364. It does not relate to domestic gas. The fact that Shell, Chevron and ExxonMobil have been – and will continue to – market LNG separately confirms that any investment risk associated with separate selling is illusory.

There is a significant delay between LNG and first domgas supply

365. The applicants argue that “during the developmental phase of a gas project joint marketing is essential”. This will be until “extensive infrastructure [is] in place, and the supply of new demand through incremental development of fields”.⁷³
366. The applicants claim that both the domgas and LNG components are being developed “at the same time”, making both components – and the overall project – greenfield.⁷⁴
367. The greenfield nature of the Gorgon Project, and the fact that extensive infrastructure is not yet in place, has not prevented Shell, Chevron and ExxonMobil from separately negotiating agreements or “intent to supply” totalling 4 million tonnes per year of LNG.
368. Furthermore, the applicants’ submission states that First Gas is not expected until 2015, some six years after a final investment decision is expected.⁷⁵

⁷² ‘Woodside unfazed by dip in LNG demand’, *The Australian*, 1 May 2009.

⁷³ Applicants’ submission, para.7.54.

⁷⁴ Applicants’ submission, para.7.46.

⁷⁵ Applicants’ submission, para.7.51.

369. Even with first domgas, supply will initially be for *up to 150 TJ/day* and “it may take *six years after First Gas in 2015 to reach the 300 TJ/day* target under the State Agreement”.⁷⁶
370. To place this in perspective, the up to 300 TJ/day volume represents a very modest quantity of supply compared to the expected domestic demand for gas, and to the overall scale of the Gorgon Project. It is only equivalent to around 13% of the LNG exports that might be expected from the three LNG trains.⁷⁷
371. This very modest quantity would not be reached until 2021 at the earliest – some 12 years after an expected final investment decision on the Gorgon Project.
372. It is also revealing that in public comments late last year, Chevron stated that first domestic gas delivery would not be until start-up of the *third LNG train*. The October 2008 “Gorgon Project Update” states:
- “Greater Gorgon Area General Manager Colin Beckett said a proposal on domestic gas supply will now be submitted at the same time as the Project’s overall development proposals.
- The solution proposed by the Gorgon Joint Venture participants will provide the progressive supply of up to 300 terajoules per day of domestic gas with *delivery starting at or around ready-for-start up of the Project’s third LNG train*.”⁷⁸
373. The impression conveyed by the applicants’ submission that the LNG and domgas components are being developed “at the same time” is therefore less than accurate.
374. The participants would already have engineered, financed, built and commenced operating two LNG trains, totalling 10 million tonnes per year in LNG capacity.
375. These two LNG trains would be providing substantial security of cashflows. First domgas would not begin until around start-up of the Project’s third LNG train, with the up to 300 TJ/day target not expected to be reached until 2021 – some 12 years after an expected final investment decision for the overall Project.
376. Given the original Gorgon Project was for two LNG trains totalling 10 million tonnes, the applicants would have engineered, financed, built and commenced operating the equivalent of the original Gorgon Project before first domgas supply.

⁷⁶ Applicants’ submission, para.7.51.

⁷⁷ Conversion values provided by www.santos.com/conversion-calculator.aspx

⁷⁸ ‘Gorgon Project Update’, October 2008.

377. LNG is moreover expected to account for the bulk of capital investment and revenues associated with the Gorgon Project. Domestic gas will only account for a modest proportion of Project investment and revenues. In fact, even at the 300 TJ/d volume, domgas would only be equivalent to around 13% of the LNG exports that might be expected from the three LNG trains.⁷⁹
378. To conclude, the applicants' claim that separate selling of domgas is necessary to underpin the overall greenfield Gorgon Project should be rejected:
- domgas only accounts for modest proportion of the overall Project with LNG accounting for the bulk of capital investment and expected revenues;
 - there is significant delay between the LNG and domgas components of the Project, with domgas delivery only starting at or around start-up of the third LNG train;
 - the Project would have security of cashflows from two LNG trains totalling 10 million tonnes of LNG per year - the equivalent of the original Gorgon project – before first domgas supply;
 - the 150 TJ/d domgas supply volume is very modest compared to the overall scale of the Gorgon Project; and
 - even the very modest 300 TJ/d supply volume would not be reached until 2021 at the earliest – some 12 years after an expected final investment decision.

4.3 Conclusion

379. Separate selling of domgas by the Gorgon Project is commercially and practically feasible:
- the WA domestic gas market has undergone significant transformation over the past 10 years;
 - Shell and its partners sell separately from the major Pohokura gas field in New Zealand *despite originally claiming it was impossible to do so* because of supposed market features;
 - long term contracts have not prevented major producers from supplying international customers and expanding LNG supply;
 - major producers already enjoy complete transparency over domestic demand and contract pricing, whereas domestic consumers have no access to this information;

⁷⁹ Conversion values provided by www.santos.com/conversion-calculator.aspx

- there is no commercial imperative for joint selling to offset the market power of customers;
- the operational measures necessary to enable separate selling are well-known and practical;
- marketing decisions for domestic gas are already being made separately by Shell and Chevron in regard to the NWSJV;
- gas balancing and nomination arrangements are already in place in the WA market;
- producers in other joint venture gas developments sell separately into the WA domestic gas market; and
- marketing decisions are already being made separately by Shell, Chevron and ExxonMobil with respect to LNG and condensate;
- Shell, Chevron and ExxonMobil have been compelled by competition authorities to sell separately in other countries – including in Norway, Denmark and New Zealand; and
- joint selling is not necessary to support investment and development of the Gorgon Project.

380. In the absence of an authorisation, Chevron, Shell and ExxonMobil would be able to separately sell gas into the domestic market.

5. PUBLIC BENEFITS

5.1 Summary

381. Separate selling of domgas is commercially and practically feasible.
382. The benefits associated with the Gorgon Project would therefore arise even in the absence of joint selling.
383. To the extent there are any additional “public” benefits from joint selling, these are illusory and accrue exclusively to the applicants.
384. These include the significant windfall gains expected from the suppression of competition and the concentration in market power with joint selling.

5.2 The public benefits would arise with or without joint selling

385. The applicants claim that separate selling of domgas is not commercially or practically feasible in WA and that “the benefits of the Project and the benefits that will arise from joint marketing are therefore inseparable”.⁸⁰
386. As outlined in section 4, separate selling is commercially and practically feasible. The benefits arising from the Project would therefore arise even in the absence of joint selling.
387. As the ACCC in the PNG Determination stated:

“If it were feasible for the Project to proceed under separate marketing arrangements the benefits arising from the Project could not be attributed to the joint marketing conduct. They would arise under both the future with and without joint marketing arrangements.”⁸¹

5.3 The additional benefits claimed are illusory

388. The applicants further assert that even if separate selling is feasible, joint selling would still bring significant and long term public benefits including:
- less marketing and transaction costs, and less risk, which is likely to lead to prices that are lower, or at least no higher, than prices under separate marketing;
 - strong inter-project competition, enabling the Gorgon Project to exert competitive pressure on current supplier prices;

⁸⁰ Applicants’ submission, para.1.10.

⁸¹ ACCC, PNG Gas Project, Determination, 3 May 2006, p.45.

- more domgas available in the market; and
- avoiding creating a disincentive for future investment.⁸²

389. These claims have no merit. To the extent there are any additional “public” benefits from joint selling, these are illusory and accrue exclusively to the applicants.

5.3.1 Marketing and transactions cost and risk

390. The applicants assert that separate selling would entail higher costs and risks which they would invariably seek to pass on to domgas consumers. The “costs and risks” claimed by the applicants include:

- the need to access domgas from other joint venturers to make up for any shortfall;
- the greater costs associated with negotiations with customers;
- transaction costs from the number of separate marketers;
- the need for storage of fixed entitlements;
- gas balancing arrangements are “impractical and infeasible in illiquid markets”; and
- the costs associated with a “clearing house” to manage “overs and unders” in demand.

The domestic gas market has undergone significant transformation

391. As outlined in sections 2 and 4 above, the WA domestic gas market has undergone major transformation which has led to a significant expansion in:

- the role of brokers providing gas trading services to gas users;
- short and long-term trading in gas transmission capacity and physical gas;
- additional transportation and storage options;
- the flexibility within the Dampier to Bunbury Natural Gas Pipeline system to deal with supply and demand imbalances; and

⁸² Applicants’ submission, para.1.12.

- connectivity between gas pipelines in Western Australia – gas can now be traded either physically or commercially in any part of the system.

392. The “costs and risks” claimed by the applicants as relating to an “immature” market are therefore no longer applicable in the WA domestic gas market.

Gas balancing and nomination arrangements are already in place

393. The applicants claim that gas balancing arrangements are “impractical and infeasible in illiquid markets”. They further assert that to the extent that imbalances could be addressed by gas balancing arrangements, these would result in higher costs due to associated risks being passed on to customers.⁸³

394. As outlined in section 4, gas balancing and nomination arrangements are already in place in the WA market:

- as part of the NWSJV involving domestic gas sales from two separate domgas joint ventures with two separate ownership structures;
- with Shell, Chevron and ExxonMobil selling LNG separately from the Gorgon Project;
- to manage the supply of lo gas into the Gorgon Project – a field outside the Project, with a different ownership structure (see 5.2.3);
- to manage the separate agreement between Shell and BP by which BP will sell petroleum to Shell and purchase it as LNG cargoes after it has been processed through the Gorgon LNG infrastructure (see 5.2.3).

395. Shell and its partners also sell domestic gas separately in New Zealand despite previously claiming that gas balancing and nomination arrangements would present “insurmountable problems”.

Transaction costs and risks

396. Marketing / transaction costs and risks have not prevented Shell, Chevron and ExxonMobil from selling LNG separately. This is despite international LNG contract negotiations being significantly more complex undertakings requiring sellers to manage:

- sovereign risk issues;
- exchange rate risk issues;

⁸³ Applicants’ submission, para.7.88.

- jurisdictional and governing law issues;
 - potential language barriers;
 - negotiations with sovereign government entities or foreign corporations;
 - commodity price risks where LNG contracts are linked to international oil prices.
397. In contrast, these costs and risks are minimal if not non-existent in domestic gas negotiations.
398. To the extent there is a “higher risk environment” from separate marketing as claimed by the applicants,⁸⁴ this therefore relates to the international LNG market and not the domgas market.
399. The applicants further claim that separate selling would require each participant to hire or relocate marketing staff, engage in separate negotiations and increase costs through duplication of overheads which need to be recouped from domgas customers.
400. As outlined above, Shell, Chevron and ExxonMobil already possess substantial marketing expertise and capacity within their individual organisations – both within WA, and as part of their global operations.
401. Shell, Chevron and ExxonMobil are already separately negotiating complex and significant international LNG sales agreements since as early as 2005.
402. Separate marketing decisions are also being made by Shell and Chevron in regard to domgas sales from the NWSJV:
- All of the NWSJV participants – including Shell and Chevron - retain substantial marketing capability within their respective organizations to support the marketing of NWSJV Domgas Venture and Incremental Venture production.
 - All contracts for supply of gas to domestic customers from the NWSJV involve all six (for the Incremental JV) counterparties – including Shell and Chevron - contracting severally.
 - While North West Shelf Gas Pty Ltd negotiates with a purchaser on behalf of the JV participants, it has to communicate with and seek approval from all six JV participants – including Shell and Chevron - on contract terms and price.

⁸⁴ Applicants’ submission, para.7.86.

- North West Shelf Gas Pty Ltd has no authority to agree terms – it is a clearing house or postbox by which all six parties – including Shell and Chevron - come together to set contract prices and terms.
 - DBP’s Operating Balancing Agreement is with all six JV participants severally – including Shell and Chevron.
 - In the event of an emergency which has any bearing on contractual obligations of the NWSJV, North West Shelf Gas refers every action to all six JV participants – including Shell and Chevron - for responses.
403. According to the applicants, Shell already has “relevant staff with experience of sales in WA and the facilities they use” from the NWSJV which they claim to be “firewalled” from the Gorgon Project.⁸⁵ Shell staff with experience with WA domgas sales, and their dedicated facilities, clearly perform a function that is more than providing a mere postbox for rubber stamping decisions by North West Shelf Gas.
404. Similarly, Chevron “has developed the knowledge, expertise and resources to enable it to fulfil the marketing role on behalf of the Participants”.⁸⁶ To the extent that this knowledge, expertise and resources relates to the marketing of domestic gas to the WA market, they could only have arisen from active participation in domgas marketing in WA.
405. While the applicants’ submission asserts that ExxonMobil has not supplied pipeline specification gas into the domestic market, it footnotes that gas has been supplied from the Griffin Project.⁸⁷
406. It also fails to disclose that as recently as May 2009, ExxonMobil has reportedly agreed on an “intent to supply” 1.5 million tonnes of LNG a year from its share of Gorgon production to Petronet in India. It could be inferred that negotiations on a complex international sales agreement of this magnitude are continuing, and would involve substantial marketing expertise and capacity on the part of ExxonMobil.
407. Finally, it is appears beyond belief that the world’s biggest oil companies - with their immense commercial and negotiating power, highly sophisticated businesses and the operational and resource backing of multi-billion dollar global operations - could claim a lack of knowledge, expertise and resources that prevents them separately marketing gas.
408. To conclude, the transaction risks and costs claimed in regard to separate selling for domgas are marginal compared to the substantial

⁸⁵ Applicants’ submission, 6.14.

⁸⁶ Applicants’ submission, 6.14.

⁸⁷ Applicants’ submission, para.6.14 and footnote 22.

marketing expertise and capacity already possessed by the applications within their organisations.

409. The applicants have also been separately negotiating major international LNG contracts – undertakings that require far greater complexity, risks and costs than domgas sales.

Any increase in prices to consumers is the result of coordinated exercise of market power

410. The applicants claim that in the absence of joint selling arrangements, higher transaction costs from separate selling would lead to higher prices for consumers.⁸⁸
411. The experience in Western Australia demonstrates that higher prices for consumers has been the direct result of the coordinated exercise of market power through joint selling arrangements, rather than any costs associated with separate selling.
412. The NWSJV participants – which include Shell and Chevron - have publicly threatened to pass on the removal of the Federal Government condensate excise exemption in the form of higher gas prices to domestic consumers.⁸⁹ The *West Australian* reported that:

“Woodside chief executive Don Voelte said there could be a big backlash from some of the multinationals if the Australian Competition and Consumer Commission forced the partners to compete against each other for customers.

He also said his company would not feel guilty about passing on to its gas customers a proposed increase in oil excise, saying he had to look after Woodside shareholders.”⁹⁰

413. The co-ordination of market power under joint selling means participants can force domestic consumers to pay higher gas prices despite therefore being no justification to do so.
414. It is telling that the excise is applied on the production of condensate, not natural gas. It is also telling that the NWSJV participants – which include Shell and Chevron – have not threatened to pass on the cost of the removal of the condensate excise exemption to overseas LNG customers, or to local or overseas condensate customers.

⁸⁸ Applicants’ submission, para.7.87.

⁸⁹ ‘Gas market faces ACCC shake-up’, *The West Australian*, 29 August 2008; ‘Households winners in NW Shelf gas shake-up’, *The West Australian*, 30 August 2008; ‘Gas price “inflated”, watchdog called in’, *The Weekend Australian*, 30-31 August 2008.

⁹⁰ *The West Australian*, ‘Woodside warns on forcing Shelf split’, 17 September 2008.

415. Far from mitigating price increases to consumers, joint selling arrangements in fact provide a mechanism to pass on costs, otherwise borne by overseas customers, on to WA consumers.
416. The result is to force domestic consumers to subsidise the international customers of Shell, Chevron and the other NWSJV participants.

5.3.2 Inter-project competition

417. The applicants claim that joint selling would promote inter-project competition, enabling the Gorgon Project to exert competitive pressure on current supplier prices.

418. In the PNG Determination, the ACCC stated:

“[P]otentially anti-competitive detriments may arise where cross-ownership among PNG gas producers and producers in other gas basins exists. These detriments ... are associated with the potential misuse of confidential information and exercise of market power. These detriments should not arise under separate marketing arrangements.”

“Under joint marketing arrangements each of the participants in the Process would have access to commercially sensitive information about the Project’s customers, such as pricing, volumes and delivery points. The potential exists for such information to be inappropriately disclosed and used in an anti-competitive manner by parties who have other gas interests in eastern Australia ... a Project participant could use this information as leverage in negotiations in respect of its other interests in gas basins in Australia.”⁹¹

419. The concentration in supply in the WA market and cross-ownership in supply operate as significant barriers to inter-project competition. As previously outlined, Shell and Chevron are participants in the NWSJV. Through unauthorised cartel selling arrangements, the NWSJV control 70% of the WA domestic gas market.

420. Furthermore, Shell and Chevron have access to detailed knowledge of the commercial terms and timing of all domestic gas sales arrangements entered into by the NWSJV including on:

- price;
- supply volumes;
- contract term and expiry; and
- the identity and supply demand of potential customers seeking gas.

⁹¹ ACCC, PNG Gas Project, Determination, 3 May 2006, pp.36 and 63.

421. This sharing of what would otherwise be confidential commercial and market sensitive information confers Shell, Chevron – and by extension Gorgon joint venture partner ExxonMobil – significant advantage in negotiations with individual consumers. This can only serve to eliminate any competitive pressure that the Gorgon Project might otherwise assert on the domestic market.
422. In contrast, potential consumers have no access to commercial information on other gas contract sales or negotiations, including what other consumers have paid in recent contracts. This severely limits their ability to bargain on a level playing field with major producers.
423. Chevron’s assertion that “relevant staff with experience of sales in WA and the facilities they use are firewalled from the Project because of the involvement in the NWS Venture” should be discounted.⁹² In the absence of ACCC-enforceable ring fencing undertakings, there is nothing to prevent Shell and Chevron misusing this information in negotiating on the price or non-price terms of gas sold by the Gorgon Project.
424. Far from promoting inter-project competition, joint selling arrangements would enable coordination of the already dominant market power of Shell and Chevron through the NWSJV:
- Shell, Chevron and ExxonMobil are unlikely to sell Gorgon gas at prices lower than those agreed to by Shell and Chevron in the sale of NWSJV gas;
 - Shell and Chevron are unlikely to agree to sales of NWSJV gas at prices lower than that attained by Shell, Chevron and ExxonMobil in regard to Gorgon gas; and
 - the other NWSJV participants are unlikely to sell gas in their other developments at prices lower than NWSJV and Gorgon gas.
425. The effect of joint selling would be to entrench and extend the current minimum pricing for domestic gas.

5.3.3 More domgas in the domestic market

Market structure “barriers”

426. The applicants claim that joint selling will lead to more domgas available in the market because of the infeasibility of gas balancing arrangements, the inflexibility of a “project” market with lumpy demand, and the higher costs of separately marketing domgas.

⁹² Applicants’ submission, para.6.14.

427. As outlined in sections 2 and 4, the applicants' claims regarding the domestic gas market have no merit. The WA domestic gas market has undergone significant transformation over the past 10 years.
428. Strikingly similar claims were also made by Shell and its partners in the New Zealand Pohokura case. These perceived market structure factors did not prevent the parties selling domestic gas separately, despite previously claiming it was impossible or infeasible to do so.

Any inter-project competition is illusory

429. The applicants claim that without joint selling, the Project would be "unable to effectively compete for major domgas contracts against other projects"⁹³.
430. As previously discussed, any competitive pressure that Gorgon gas supply might have on the domestic market is negated by:
- Shell and Chevron's participation in the unauthorised cartel selling arrangements of the NWSJV;
 - their access to commercially sensitive information about the NWSJV's customers such as pricing, volumes and delivery points; and
 - any extension of joint selling arrangements to the Gorgon Project;

Higher costs and less efficient marketing of domgas

431. The applicants assert that "higher costs and less efficient marketing of domgas" is likely to reduce the incentive to supply domgas above the minimum domgas reservation volumes.⁹⁴
432. As outlined above, separate selling does not appear to have reduced the applicants' incentive to supply LNG into the international market. This is despite international LNG contracts involving significantly greater risks and significantly more complex negotiating undertakings than domestic gas contracts.
433. In addition, Shell and Chevron already retain significant marketing capacity for domestic gas as participants in the NWSJV. This is confirmed in their submission.
434. Any additional costs associated with the separate marketing of domgas are therefore marginal compared to:
- the overall scale of the Gorgon Project;

⁹³ Applicants' submission, para.7.92.

⁹⁴ Applicants' submission, para.7.93.

- the fact that participants already retain significant domestic marketing capacity; and
 - the significantly greater risks and complexity relating to international LNG contracts – which the applicants are already marketing separately.
435. In contrast, the applicants would be expected to derive significant economic benefit from the suppression of competition and the concentration in market power that would flow from joint selling.

Producers have commercial incentive to supply the domestic market

436. Each of the applicants would have strong commercial incentives to sell gas separately in the WA market even in the absence of joint selling arrangements.
437. Each of the applicants would have the right to own, take and separately dispose of its production entitlement. They have been exercising this right and have been separate selling of LNG since as early as 2005.
438. Given that gas reserves and production have commercial value, each of the applicants would have strong commercial incentive to monetise their share of reserves.
439. Further, the WA domestic market provides significant opportunities to producers. As previously outlined:
- there continues to be a serious shortage of gas which has led to a very tight market and escalating gas prices;
 - producers have been seeking more than “LNG-netback” prices from domestic customers – i.e. a premium return from domestic customers well in excess of that which could be derived from LNG exports;
 - recently reported WA gas prices have been up to \$14-16 per gigajoule before transmission costs;
 - at these price levels, WA gas prices are around four to five times Eastern States prices on a delivered basis – gas prices in the Eastern States are around \$3-4 per gigajoule;
 - local customers would welcome the opportunity to access the same price and terms as the 2004 LNG contract with China which pegs prices at the equivalent of \$US 25 a barrel for oil; and

- demand for gas will continue to grow – WA will require 1,100 TJ/day of additional gas by 2014-15 to meet new and replacement demand – this is equivalent to the total size of the existing market for gas;
- the domestic market continues to offer the advantages of minimal or no sovereign risk or currency risk, geographic proximity without the need for vast shipping distances to China or Japan, and access to long term contracts; and
- the domestic market provides stable returns to producers and does not suffer from the volatility of international oil prices (and increasingly LNG prices).

Producers will have greater flexibility to source additional supply from outside the JV

440. The applicants claim that separate selling would result in each participant contracting less than their equity share of the available domgas production capacity, thereby reducing the volume of domgas available at any point in time.
441. This argument has no merit. As outlined above, individual Gorgon participants have commercial incentive to monetise their proportion of reserves and supply the domestic gas market.
442. Separate selling would also provide individual participants with greater flexibility to access supply from outside the Gorgon joint venture arrangement to back contracts.
443. The Gorgon participants and BP have entered into an agreement with Shell to enable unitisation of BP's Io gas field with the Gorgon Project's Jansz gas field.
444. Shell has also separately entered into an agreement with BP under which BP will sell petroleum to Shell and purchase it as LNG cargoes after it has been processed through Gorgon LNG infrastructure.⁹⁵
445. The arrangement means that the Gorgon Project will be sourcing gas from a field outside the Project, with a different ownership structure.

⁹⁵ BP, 'Significant milestone for Io and Jansz gas fields', 29 May 2009, available at: <http://www.bp.com/genericarticle.do?categoryId=9008681&contentId=7053385>.

Table: Equity shares of the Io and Jansz fields, and the Gorgon Project

| | Io Licences WA-25-R WA – 26-R | Jansz licence WA-18-R | Gorgon LNG Project |
|------------|--|----------------------------------|-------------------------------|
| BP | 12.5% | - | - |
| Chevron | 50% | 50% | 50% |
| ExxonMobil | 50% | 25% | 25% |
| Shell | 12.5% | 25% | 25% |

446. This demonstrates that the Gorgon participants are able to access supply from outside the Gorgon Project – whether for LNG sales, or for domgas.

447. It also demonstrates that gas balancing arrangements are practical and feasible given the Gorgon participants will be managing:

- the supply of gas from outside the Gorgon Project;
- the ownership structure of the Io field both in regard to BP as a non-Gorgon participant, and in the different ownership shares of Gorgon participants Shell, Chevron and ExxonMobil; and
- Shell’s separate sales, processing and re-purchase agreement with BP.

Joint selling by Shell and Chevron has not delivered additional gas supply to WA consumers

448. The Commission would recall that Shell, Chevron and their partners have previously claimed that authorisation for joint selling would deliver more domgas supply to the WA market. This commitment was never met.

449. In 1998, Shell, Chevron and their partners claimed - as part of their justification for seeking authorisation to extend NWSJV joint selling – that they intended to increase the capacity of the domestic gas processing plant to 1,100 TJ/d through the construction of an additional domestic gas processing train.

450. Shell, Chevron and the other NWSJV participants’ submission reads in relevant part:

“As discussed with Dr John Tamblyn, a representative of the Australian Competition and Consumer Commission (the ACCC) on 27 November 1995, the Joint Venture Participants are contemplating expanding the capacity of the Project. **The proposed expansion will increase the production of gas for sale in Western Australia.** This will result in the current capacity of the Domestic Gas Joint Venture (the Domgas

Venture) being exceeded. The Joint Venture Participants, for reasons of certainty, have decided to seek additional authorisation to that issued on 15 February 1977 (the 1977 Authorisation) by the Trade Practices Commission (the TPC) to the then participants of the Project.”⁹⁶

“To be able to compete for the supply to industrial projects forecast to be undertaken in the short to medium term, and in some cases to render a project, the Joint Venture Participants are contemplating an **expansion of capacity of 550 TJ/day to enable them to accept obligations for the supply on a firm basis of approximately 1,100 TJ/day**. Sellers are currently negotiating with existing and prospective customers for supply to various new and expanded facilities and projects. The industrial tranches of gas necessary to meet these customers’ demand is in excess of what any individual participants would be able to meet from their respective shares. **Therefore these discussions must involve all the Joint Venture Participants.**”⁹⁷

“The proposed expansion by the Joint Venture Participants therefore extends to creating additional capacity for existing customers, as well as capacity for new customers and projects. The national importance of these developments in terms of increased exports and import replacement, as well as the direct benefits enjoyed by the businesses and communities concerned, are likely to be significant. However, such an expansion decision must necessarily involve all the Joint Venture Participants, including MIMI, because it will result in supply of natural gas by the Incremental Venture ... **It must also be predicated on the ability of the Joint Venture Participants to co-ordinate the marketing of any expanded capacity.**”⁹⁸

“The proposed expansion which also includes potential investment in LNG expansion entails the construction of:

- (a) a second pipeline from North Rankin A platform to the onshore processing facilities on the Burrup Peninsula; and
- (b) a third pipeline gas processing train and additional fractionation and stabiliser facilities (which would be installed alongside the existing processing facilities on the Burrup Peninsula).”⁹⁹

451. This commitment to expand domestic gas capacity and to construct a third domgas processing train was never met despite:

⁹⁶ North West Shelf Project, *Submission to the ACCC in Support of an Application for Authorisation*, 5 September 1997, para. 1.2.

⁹⁷ North West Shelf Project, *Submission to the ACCC in Support of an Application for Authorisation*, 5 September 1997, para. 9.7.

⁹⁸ North West Shelf Project, *Submission to the ACCC in Support of an Application for Authorisation*, 5 September 1997, para. 9.8.

⁹⁹ North West Shelf Project, *Submission to the ACCC in Support of an Application for Authorisation*, 5 September 1997, para. 9.9.

- clear demand for domestic gas; and
 - Shell, Chevron and their NWSJV partners continuing to sell jointly.
452. Since the granting of the 1998 authorisation, there has however been a significant expansion in LNG exports. LNG Train 4 was completed in 2005 and LNG Train 5 completed in 2008. LNG Train 5 is producing 4.4 million tonnes of LNG annually, bringing total LNG export production to 16.3 million tonnes per year.¹⁰⁰
453. Woodside has flagged construction of a further six LNG Trains, with the ambition of an additional 77 million tones of LNG capacity within the next 15 years.¹⁰¹
454. In contrast, supply to the domestic market by the NWSJV has increased only marginally from the 1980s. The NWJSV has not contracted any significant new volumes of gas into the domestic market since the mid-1990s.
455. This is notwithstanding the severe gas market shortfall, and their earlier commitment to double the size of the domestic gas processing plant as part of their justification for seeking the 1998 authorisation for joint selling.
456. Shell, Chevron and their NWSJV partners also appear to have taken a deliberate view to not typically supply customers of less than around 15 TJ/d demand. Smaller customers are effectively forced to purchase from Apache - the 'effective' monopoly seller for that section of the market.
457. Claims by the applicants that joint selling is necessary to deliver more domgas to the WA market should therefore be rejected given the past practice of Shell, Chevron and their NWSJV partners.

5.3.4 Delays in domgas supply

458. The applicants claim that that separate selling is “likely to result in delays in bringing domgas to market, and further delays in ramping up domgas production”.¹⁰² There is no basis for these claims given:
- Shell, Chevron and ExxonMobil already possess substantial marketing expertise and capacity within their individual organisations – both within WA, and as part of their global operations;

¹⁰⁰ Woodside Petroleum, ‘North West Shelf Venture Produces First LNG From Train 5 Production Facility’, ASX Announcement, 1 September 2008.

¹⁰¹ ABC News online, ‘Outlook remains strong: Woodside’, 1 May 2009,

<http://www.abc.net.au/news/stories/2009/05/01/2558367.htm>

¹⁰² Applicants’ submission, para.7.102.

- Shell, Chevron and ExxonMobil are already separately negotiating complex and significant international LNG sales agreements since as early as 2005; and
 - Separate marketing decisions are already being made by Shell and Chevron in regard to domgas sales from the NWSJV:
459. Furthermore, LNG is expected to account for the bulk of capital investment and revenues associated with the Gorgon Project. Domestic gas will only account for a modest proportion of Project investment and revenues, with first domestic gas not expected until start-up of the *third LNG train*.
460. Strikingly similar claims were made by Shell and its partners in the New Zealand Pohokura case:
- “The Pohokura JV parties do not consider that separate marketing is feasible in the foreseeable future or for the expected life of Pohokura. Accordingly, **no development** is a counterfactual in the event that authorisation is not granted.”
 - “[M]arketing would involve **significant delay** as the Pohokura JV parties attempt to address the problems associated with separate marketing, such as the need for a gas balancing arrangement and the need to co-ordinate development and operation (in the absence of the market developments necessary to support separate marketing).”
 - “If commencement of production from Pohokura is **delayed indefinitely**, the gas production market would not receive the competitive benefit of a new source of gas supply.”
 - “[I]t is a very real prospect that the Pohokura JV parties would never reach agreement on feasible arrangements. Therefore the first counterfactual of **no development** may well be the outcome of an attempt at scenario 2 marketing.”
 - “Authorisation of joint marketing will enable earlier development of and production from Pohokura. The public benefits have been modelled on a conservative estimate that the delay in commencing production will be three years ...”
 - “Absent joint marketing, the delay is expected to be at least in the order of **three years**. Accordingly, if joint marketing was not authorised, Pohokura would not be expected to commence production until 2007. This quantification is **conservative**. The **delay may well be longer and possibly indefinite.**”¹⁰³

¹⁰³ Applicants’ submission in the Pohokura case, para.46, 52, 66, 72, 81 and 85.

461. Development of the Pohokura project took place, and the partners sold separately, *with no delay in production*, despite Shell and its partners claiming that separate selling would result in:
- “no development”
 - “significant delay”
 - production being “delayed indefinitely”; or
 - production being delayed for at least “three years” on a conservative estimate.
462. To the extent there has been any delay in domgas supply, this cannot be attributed to any future selling arrangements that the Gorgon partners might or might not implement in respect to domestic gas.
463. The original Gorgon project involved the proposed development of two 5 million tonne per annum LNG processing trains, and a domgas train. The State Agreement committed the Gorgon partners to establish a domgas project by end 2012 and progressive expansion to deliver at least 300 TJ per day.
464. Since the original State Agreement was concluded however, the Gorgon partners have proposed a significant expansion in the project to add a third 5 million tonne per annum LNG processing train.
465. According to their submission, they have secured approval from the State Government to delay establishment of the domgas project by three years until end 2015.¹⁰⁴
466. Even then, initial supply will only be *up to* 150 TJ/day. The applicants indicate that it may take a further six years after first gas to reach even the very modest 300 TJ/day target under the State Agreement – i.e. 2021.¹⁰⁵
467. Chevron has also publicly stated as early as October 2008 that domgas delivery would not be until “at or around ready-for-start-up of the Project’s *third LNG train*”.
468. Given the original Gorgon Project was for two LNG trains totalling 10 million tonnes, the applicants would have engineered, financed, built and commenced operating the equivalent of the original Gorgon Project before first domgas supply.
469. To the extent there has been any delay in domestic gas supply, this cannot be attributed the future selling arrangements that the applicants might or might not implement for domestic gas.

¹⁰⁴ Applicants’ submission, para.2.17.

¹⁰⁵ Applicants submission, para.7.51.

5.3.5 Disincentive for future investment

470. The applicants' claim that separate selling would dissuade future investment in domgas production should be rejected. As outlined above, the WA domestic market provides significant opportunities to producers.
471. Furthermore, the *up to* 150-300 TJ/day domestic supply volume identified by the applicants represents a very modest volume of supply compared to:
- the current and expected size of the domestic market;
 - the level of unfilled demand; and
 - the overall scale of the Gorgon Project.
472. In the Pohokura case, Shell and its partners claimed that preventing joint selling would discourage new exploration. These arguments were rejected by the New Zealand Commerce Commission.
473. The New Zealand Commerce Commission considered that gas producers would be fully aware of that New Zealand competition law prohibited joint selling arrangements that substantially lessened competition. The potential costs would in any event outweighed by the potential rewards:

“The Commission does not accept that a decision to decline the current application would have more than a minimal impact on the level of new gas exploration. The current level of exploration is described by Crown Minerals as high, and this has occurred presumably in the knowledge that New Zealand competition law prohibits arrangements, including joint marketing arrangements, which substantially lessen competition in a market, unless they have been authorised by the Commission ...

While it is axiomatic that any additional cost faced by new entrants act as a disincentive to entry, the Commission considers that the scale of these additional costs, in comparison with the potential rewards, would not be likely to be sufficient to make a viable field non-viable.”¹⁰⁶

5.4 Conclusion

474. Separate selling of domgas is commercially and practically feasible.
475. The benefits associated with the Gorgon Project would therefore arise even in the absence of joint selling.

¹⁰⁶ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.390-391.

476. To the extent there are any additional “public” benefits from joint selling, these are illusory and accrue exclusively to the applicants.
477. These include the significant windfall gains expected from the suppression of competition and the concentration in market power with joint selling.

6. SIGNIFICANT ANTI-COMPETITIVE DETRIMENT

6.1 Summary

478. Joint selling by the Gorgon participants would result in significant anti-competitive detriment by:
- significantly reducing the number of independent sellers from three to one;
 - reducing customer choice over terms and conditions on offer;
 - entrenching the already dominant market power exercised by Shell Chevron and ExxonMobil, with consumers lacking countervailing power;
 - enabling the coordinated exercise of market power;
 - extending that market power to other projects in which Shell, Chevron and ExxonMobil participate; and
 - entrenching an effective minimum price for domestic gas.
479. In the absence of joint selling:
- Shell, Chevron and ExxonMobil would compete against each other for WA domestic gas customers;
 - consumers would have greater customer choice over terms and conditions on offer;
 - Shell, Chevron and ExxonMobil would not be able to co-ordinate market power in setting price or non-price terms; and
 - there would be greater competitive pressure asserted on existing suppliers.
480. The significant anti-competitive detriments far outweigh any benefits that might be derived from joint selling.
481. Interim and final authorisation should not be granted to the applicants for joint selling.
482. The WA market can be distinguished from that in the PNG Gas Project Determination. In that case, the project participants possessed a lack of bargaining power and consumers possessed countervailing power.

6.2 Separate selling is significantly more competitive

483. The ACCC has long emphasised the importance of separate selling. In the 1998 NWSJV Determination, the ACCC stated:

“It is the Commission’s view that, where possible, separate marketing is to be preferred to joint marketing. By creating price competition between as many suppliers of gas as possible, separate marketing should generate a number of benefits for consumers and users of gas.”¹⁰⁷

484. The 2002 Parer Report also concluded that:

“Moving toward separate marketing should be considered as part of the overall package to improve the competitive nature of the natural gas market. Separate marketing itself should be regarded as one of the ingredients that in the appropriate circumstances helps to create competition and thereby a more mature market.”¹⁰⁸

485. In the present case, joint selling by the Gorgon participants would result in significant anti-competitive detriment by:

- significantly reducing the number of independent sellers from three to one;
- reducing customer choice over terms and conditions on offer;
- entrenching the already dominant market power exercised by Shell Chevron and ExxonMobil, with consumers lacking countervailing power;
- enabling the coordinated exercise of market power;
- extending that market power to other projects in which Shell, Chevron and ExxonMobil participate; and
- entrenching an effective minimum price for domestic gas.

486. In the absence of joint selling:

- Shell, Chevron and ExxonMobil would compete against each other for WA domestic gas customers;
- consumers would have greater customer choice over terms and conditions on offer;

¹⁰⁷ ACCC, North West Shelf Project, Determination, 29 July 1998, pp.32 and 47.

¹⁰⁸ Parer Report, p.200.

- Shell, Chevron and ExxonMobil would not be able to co-ordinate market power in setting price or non-price terms; and
- there would be greater competitive pressure asserted on existing suppliers.

6.2.1 Reduction in the number of independent sellers

487. Each of the Gorgon participants would have the right and obligation to own, take and separately dispose of their production entitlements.
488. With three participants, this would equate to three individual sellers each owning a share in production that could be sold to local consumers.
489. Joint selling reduces the number of independent sellers competing with each other from three to one. Consumers are forced to negotiate with a combined entity and are prevented from dealing separately with the individual Gorgon participants. This difference in the number of competitors constitutes in itself significant detriment to competition.
490. The effect is to suppress “rivalrous market behaviour” and the “independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers”.¹⁰⁹
491. The impact of any reduction in the number of potential suppliers from the Gorgon Project is reinforced by the structure of the WA domestic gas market – where just two suppliers already control close to 100% of the market.

6.2.2 Reduction in customer choice over terms and conditions

492. By setting a common price and conditions, joint selling arrangements limit customer choice over terms and conditions. In the 1998 NWSJV Determination, the ACCC stated:

“The Commission believes that separate marketing of gas by joint venture producers, where feasible, will be more competitive than coordinated marketing and likely to provide a wider variety of supplier options that would better meet market demands.”¹¹⁰

493. In the 2006 PNG Determination, the ACCC stated:

“The ACCC considers that separate marketing can add value and lead to enhanced dynamic efficiency ... users could negotiate more flexible terms and conditions with individual producers. This in turn would

¹⁰⁹ *Re QCMA(1976)* 25 FLR 169, at 188-189.

¹¹⁰ ACCC, North West Shelf Project, Determination, 29 July 1998, pp.32 and 47.

allow users to tailor their supply contracts to match the needs of their own customers.”¹¹¹

494. Joint selling will limit the ability of customers to secure competitive terms, including on price and supply. Given the current WA market structure and environment, this lack of choice will have a significant impact on customers. Consumers are dependent on competitively priced gas and diversity over contract terms to underpin capital intensive developments in resource and minerals processing developments, new power stations and gas transmission facilities.
495. Recent years have seen a dramatic escalation in gas prices payable by local consumers. The price of domestic gas has risen four to fivefold. On a delivered basis, WA gas prices are now four to five times those of the Eastern States – where the market is characterised by greater competition in supply.
496. Suppliers are also shortening terms on a “take it or leave it basis”. Given that investment decisions are frequently based on 15-20 year time-frames, the inability of consumers to secure long term energy contracts adversely impacts major project developments.
497. By contrast, overseas gas customers continue to benefit from greater competition and long term contracts for LNG sales. Overseas customers can negotiate with a diversity of potential suppliers. This forces WA gas producers to compete with other intentional suppliers to provide diversity on price and contract terms.
498. Given that WA customers are now paying more than “LNG-netback” prices or even LNG prices, local consumers are effectively being forced to cross-subsidise overseas customers through higher prices.
499. Joint selling arrangements for the NWSJV have operated to limit consumer choice and supply. Shell, Chevron and their NWSJV partners appear to have taken a deliberate view to not typically supply customers of less than around 15 TJ/d demand. Smaller customers are effectively forced to purchase from Apache; the 'effective' monopoly seller for that section of the market.
500. The NWJSV has also not offered any significant new volumes of gas into the domestic market for many years, notwithstanding the severe gas market shortfall.
501. Separate selling for Gorgon domestic gas would therefore promote competition, choice and diversity for consumers:

¹¹¹ ACCC, PNG Gas Project, Determination, 3 May 2006, p.36.

- **Natural competition** between three independent sellers would be allowed to occur. The Gorgon participants would actively compete against each other and third parties.
- Customers would have the opportunity to deal with a **wider range of suppliers**, which would allow competition on price and other contract terms.
- There would be **greater diversity of contract terms** offered to consumers including on: price, volume, length of contract, take-or-pay provisions, reliability of supply, peaking provisions, options for renewal and reserve back-up.
- Any one of the Gorgon participants could provide a delivered service to end consumers, in competition with existing aggregators.
- Separate selling would encourage supply to a **greater number of customers**, and opportunities to supply **smaller consumers** – in the same way that the entry of a new supplier Apache has promoted competition and supply in recent years.
- Decisions on supply and contract terms would be made on the basis of the individual Gorgon participants with **greater flexibility**. Under joint selling, decisions are made on the “lowest common denominator” which means any one of the three Gorgon participants can act to block supply or contract terms.
- **Substitution** between individual customers would be easier. Customers would have greater opportunity to deal with different sellers and maintain a portfolio of suppliers to meet a required quantity. This provides greater flexibility, competition and risk management than would have been the case if customers were forced to source their requirements from a single supplier.
- **Greater diversity of supplier risk-preferences** would ensure a greater range of options for consumers. Each of the Gorgon participants would have their own supplier risk-return preferences which could then be translated to individual negotiations with potential customers. This was demonstrated by Apache and Santos separately marketing production from the John Brookes field when they were unable to agree on resource availability.
- Individual Gorgon participants would **not be limited** to dealing with gas reserves held within the Project. Separate selling would allow participants to draw on reserves outside the Project to back larger and longer term contracts – in the same way that Apache Energy has done with its various joint venture operations.

- **Deals could be done** between individual Gorgon participants between themselves to trade reserves, production capacity and processing capacity. This might allow one or more of the participants to take a more favourable position in supplying the domestic gas market and on the terms and conditions of such supply.

6.2.3 Entrenching of the already dominant market power of Shell, Chevron and ExxonMobil

502. As previously outlined, the Gorgon participants already exercise immense market power in the WA domestic gas market:

- the NWSJV participants – including Shell and Chevron – control 70% of the domestic gas sold in WA and over 92% of the gas resources in developed fields; and
- two supplier control close to 100% of the gas supplied into the WA domestic gas market and the resources in developed fields;
- there are significant barriers to the entry of *competitive* new suppliers to the domestic gas market;
- producers include the world’s largest oil companies with immense commercial and negotiating power
- local consumers have no reasonable alternatives to gas supply other than existing suppliers;
- the current market is experiencing a serious shortage in gas supply;
- WA gas prices have risen dramatically to be four to five times prices in the Eastern States;
- despite WA’s “abundance” of gas reserves, current domestic gas prices are significantly higher than in overseas markets (such as Henry Hub or LNG netback prices); and

503. Joint selling of Gorgon gas will further entrench and extend the market already enjoyed by Shell and Chevron, and prospective supplier ExxonMobil, to the detriment of consumers.

6.2.4 Extending an effective minimum floor price for domestic gas

504. In the PNG Determination, the ACCC considered:

“[P]otentially anti-competitive detriments may arise where cross-ownership among PNG gas producers and producers in other gas basins exists. These detriments ... are associated with the potential misuse of confidential information and exercise of market power.

These detriments should not arise under separate marketing arrangements.”

“Under joint marketing arrangements each of the participants in the Process would have access to commercially sensitive information about the Project’s customers, such as pricing, volumes and delivery points. The potential exists for such information to be inappropriately disclosed and used in an anti-competitive manner by parties who have other gas interests in eastern Australia ... a Project participant could use this information as leverage in negotiations in respect of its other interests in gas basins in Australia.”¹¹²

505. As previously outlined, the WA gas market is characterised by significant concentration in supply and cross-ownership of gas reserves. Shell and Chevron are participants in the NWSJV. Through unauthorised cartel selling arrangements, the NWSJV controls 70% of the WA domestic gas market.
506. Furthermore, Shell and Chevron have access to detailed knowledge of the commercial terms and timing of all domestic gas sales arrangements entered into by the NWSJV including on:
- price;
 - supply volumes;
 - contract term and expiry; and
 - the identity and supply demand of potential customers seeking gas.
507. This sharing of what would otherwise be confidential commercial and market sensitive information confers Shell, Chevron – and by extension Gorgon joint venture partner ExxonMobil – significant advantage in negotiations with individual consumers. This could only serve to eliminate any competitive pressure that the Gorgon Project might otherwise assert on the domestic market.
508. As the ACCC noted in the PNG Gas Project Determination:
- “This issue would not be of such concern under separate marketing arrangements, as potential customers would have a choice of suppliers within the joint venture with whom to negotiate. Under separate marketing arrangements commercially sensitive information would not be shared in the same manner as under joint marketing arrangements.”
- “The exercise of market power in an anti-competitive manner is another potential detriment associated with joint marketing arrangements ... The extent of cross-ownership may heighten market power concerns. If a firm in other gas interests ... had the ability to influence the

¹¹² ACCC, PNG Gas Project, Determination, 3 May 2006, pp.36 and 63.

decisions of the Project, it could use this ability in an anti-competitive manner and restrict competition between gas basins.”¹¹³

509. In contrast to major producers, potential consumers have no access to commercial information on other gas contract sales or negotiations, including what other consumers have paid in recent contracts. This severely limits their ability to bargain on a level playing field with major producers.
510. In the absence of separate selling and effective ring-fencing commitments enforced by the ACCC, the risk of collusion and price co-ordination by different joint venture projects is high:
- Shell, Chevron and ExxonMobil are unlikely to sell Gorgon gas at prices lower than those agreed to by Shell and Chevron in the sale of NWSJV gas;
 - Shell and Chevron are unlikely to agree to sales of NWSJV gas at prices lower than that attained by Shell, Chevron and ExxonMobil in regard to Gorgon gas; and
 - the NWSJV participants are unlikely to sell gas in their other developments at prices lower than NWSJV and Gorgon gas.
511. The effect of joint selling would be to entrench and extend the current minimum pricing for domestic gas.

6.2.5 Joint selling enables the coordinated abuse of market power.

512. Joint selling would enable the Gorgon participants to act in a united way in the market and thereby to co-ordinate the exercise of their market power.
513. This has already been demonstrated in relation to the NWSJV, which Shell and Chevron are participants to.
514. As previously outlined, the NWSJV participants – including Shell and Chevron - have sought to exercise their market power under joint selling arrangements to force domestic consumers to pay higher gas prices as a result of the Federal condensate excise.
515. This is despite there being no justification for doing so. The excise is applied on the production of condensate, not natural gas.
516. It is also telling that the NWSJV participants have not threatened to pass on the cost of the removal of the condensate excise exemption to overseas LNG customers, or to local or overseas condensate customers.

¹¹³ ACCC, PNG Gas Project, Determination, 3 May 2006, p.63.

517. Joint selling arrangements therefore enable the coordinated abuse of market power – in the condensate excise case to force domestic consumers to subsidise the international customers of the NWSJV participants like Shell and Chevron.

6.3 The market in the PNG joint selling authorisation can be distinguished

518. In the 2006 PNG Gas Project Determination, the ACCC concluded that joint selling in that case would have little to no anti-competitive detriment.¹¹⁴

519. The ACCC also concluded that the applicants possessed a lack of bargaining power. Consumers possessed countervailing bargaining power which limited the capacity of the project to impose monopoly prices and terms.

520. The market structure and conditions in the PNG Determination can however be distinguished from the present case. These differences include:

- Western Australia's dependence on domestic gas supply;
- the Gorgon participants possess significant market power, WA consumers have little countervailing power;
- Queensland consumers have access to competitive coal seam methane, whereas WA consumers have no currently available alternative gas sources.

6.3.1 WA's dependence on domestic gas supply

521. Western Australia is the most gas-dependent economy in Australia. Natural gas supplies half of the State's primary energy requirements and fuels 60% of the State's electricity generation.

522. In contrast, natural gas supplies 19% of the primary energy needs of Australia as a whole.

523. The Queensland Government's has a target requiring electricity retailers to source 13% of electricity from gas-fired generation, rising to 15% by 2010. This target contrasts to the 60% gas-fired electricity generation currently in Western Australia.

524. Given WA's critical dependence on gas supply, current and prospective gas suppliers possess far greater market power than would have been

¹¹⁴ ACCC, PNG Gas Project, Determination, 3 May 2006, p.63.

the case if gas accounted for a smaller proportion of the State's fuel mix.

6.3.2 The Gorgon participants enjoy significant market power

525. As previously outlined, the Gorgon participants enjoy significant market power in Western Australia. This market power is not offset by any countervailing power on the part of consumers.

526. This contrasts to the PNG Gas Project case where the ACCC found a lack of bargaining power on the part of the PNG Project participants:

“The ACCC agrees with the applicants that potential customers of Project gas currently possess countervailing bargaining power and thus the capacity of the Project to impose monopoly prices and terms is limited. The difficulties the Project has encountered to date in securing sales attests to the lack of market power the Project possesses in any market at this time.”

527. The difficulties of the participants in the PNG case to secure sales stand in sharp contrast to the WA domestic gas market. Since at least 2004, Western Australia has been experiencing a serious shortage in domestic gas supply.

528. Current and prospective users have been unable to secure long term supplies of gas in substantial quantity. WA domestic gas prices have risen dramatically - to be around four to five times Eastern States prices on a delivered basis.

529. In the current market, WA consumers have little if any countervailing power compared to the dominant market power of Shell, Chevron and ExxonMobil.

6.3.3 WA consumers have no alternative gas sources currently available such as coal seam methane in Queensland

530. A key factor in the ACCC's examination on market power in the PNG Gas Project Determination was that local consumers had competitive alternative sources of gas in the form of coal seam methane.

531. The ACCC considered:

“Coal seam methane has experienced significant growth in recent years. It has developed from supplying around 2 PJ of Queensland's demand for gas in 1998 to 11 PJ in 2001, 25 PJ in 2002 and around 30 PJ of Queensland's total demand for gas of 100 PJ per annum in 2004. The loss of potential customers to coal seam methane producers demonstrates that coal seam methane is currently a competitive constraint on the Project ...”

“While it is clear that coal seam methane has been competing with the Project for foundation customers it is difficult to predict the future of the coal seam methane industry in Queensland. Nevertheless, given the growing market for gas in Queensland, the advantages of coal seam methane production enjoys over conventional gas and the ongoing research into extraction techniques, the ACCC considers it is likely that coal seam methane will remain competitive for the foreseeable future and that the establishment of PNG gas will not foreclose this development.”

“Although coal seam methane production in Queensland is likely to face greater competitive pressure from the Project, the ACCC expects it will continue to compete against the Project. While the Project will possess some bargaining power, the ACCC expects that other energy sources will constrain the Project from exercising market power and imposing monopoly prices, at least in the foreseeable future. Among these sources will be gas from the Cooper Basin, which will constrain the Project at least in the first few years of operation.”¹¹⁵

532. According to the Queensland Department of Mines and Energy, coal seam gas supplied around 75% of the State’s gas in 2008.¹¹⁶

533. In contrast, there are no alternative sources of gas that are *currently* available for supply to WA consumers. While significant effort is being made to develop the State’s “tight gas” resources, no tight gas field is yet operating to supply gas to consumers. Tight gas development presents additional technical challenges compared to a conventional gas field.¹¹⁷

6.4 Conclusion

534. Joint selling by the Gorgon participants would result in significant anti-competitive detriment by:

- significantly reducing the number of independent sellers from three to one;
- reducing customer choice over terms and conditions on offer;
- entrenching the already dominant market power exercised by Shell Chevron and ExxonMobil, with consumers lacking countervailing power;

¹¹⁵ ACCC, PNG Gas Project, Determination, 3 May 2006, pp.60, 62-63.

¹¹⁶ Queensland Government, Department of Mines and Energy – Gas in Queensland, website.

¹¹⁷ In 2008, Alcoa and Latent Petroleum formed a joint venture to appraise and develop the Warro tight gas field. If proven to be commercially viable, the Warro project will be the first commercially viable tight gas field in Western Australia.

- enabling the coordinated exercise of market power;
- extending that market power to other projects in which Shell, Chevron and ExxonMobil participate; and
- entrenching an effective minimum price for domestic gas.

535. In the absence of joint selling:

- Shell, Chevron and ExxonMobil would compete against each other for WA domestic gas customers;
- consumers would have greater customer choice over terms and conditions on offer;
- Shell, Chevron and ExxonMobil would not be able to co-ordinate market power in setting price or non-price terms; and
- there would be greater competitive pressure asserted on existing suppliers.

536. The significant anti-competitive detriments far outweigh any benefits that might be derived from joint selling.

537. Interim and final authorisation should not be granted to the applicants for joint selling.

538. The WA market can be distinguished from that in the PNG Gas Project Determination. In that case, the project participants possessed a lack of bargaining power and consumers possessed countervailing power.

7. INTERIM AUTHORISATION

7.1 Summary

539. A decision not to grant interim authorisation would not prevent Chevron, Shell and ExxonMobil from:
- separately marketing and selling gas into the domestic market;
 - meeting their obligation under the State Agreement to diligently market gas to WA customers;
 - separately obtaining “a firm understanding of the likely level and timing of demand for domgas from the Project prior to a Final Investment Decision”; and
 - undertaking the required investment decisions for developing the Gorgon Project.
540. Interim authorisation would give rise to significant harm to consumers by suppressing competition and concentrating market power.
541. Given separate selling of domgas is commercially and practically feasible, any benefits associated with the Gorgon Project would arise even in the absence of an interim authorisation.
542. To the extent there are any additional “public” benefits from joint selling, these accrue exclusively to the applicants from the suppression of competition and the concentration of market power.
543. There are no grounds for the urgency claimed by the applicants. Separate selling is commercially and practically feasible. The applicants have also had considerable opportunity since at least 2003 if not earlier to seek authorisation.
544. The significant impacts that interim authorisation would have on the market and consumers cannot be unwound if final authorisation was later denied and the Gorgon participants required to sell separately.
545. For these reasons, interim authorisation should not be granted to the applicants for joint selling.

7.2 Harm to applicants and consumers

7.1.1 Impact on the applicants

546. The applicants claim that interim authorisation will enable the immediate marketing of domgas as separate marketing is “not commercially or practically feasible at the current time, nor do the

Participants anticipate that it will become feasible in the foreseeable future”.¹¹⁸

547. As previously outlined, separate selling of domgas by the Gorgon Project is commercially and practically feasible:
- the WA domestic gas market has undergone significant transformation over the past 10 years;
 - Shell and its partners sell separately from the major Pohokura gas field in New Zealand *despite originally claiming it was impossible to do so* because of supposed market features, and that “no development” would occur in the absence of authorisation;
 - long term contracts have not prevented major producers from supplying international customers and expanding LNG supply;
 - major producers already enjoy complete transparency over domestic demand and contract pricing, whereas domestic consumers have no access to this information;
 - there is no commercial imperative for joint selling to offset the market power of customers;
 - the operational measures necessary to enable separate selling are well-known and practical;
 - marketing decisions for domestic gas are already being made separately by Shell and Chevron in regard to the NWSJV;
 - gas balancing and nomination arrangements are already in place in the WA market;
 - producers in other joint venture gas developments sell separately into the WA domestic gas market; and
 - marketing decisions are already being made separately by Shell, Chevron and ExxonMobil with respect to LNG and condensate;
 - Shell, Chevron and ExxonMobil have been compelled by competition authorities to sell separately in other countries – including in Norway, Denmark and New Zealand; and
 - joint selling is not necessary to support investment and development of the Gorgon Project.
548. Furthermore, LNG will account for the bulk of capital investment and revenues associated with the Gorgon Project. Domestic gas will, in

¹¹⁸ Applicants’ submission, para.6.12-6.13.

comparison, account for only a modest proportion of the overall Gorgon development.

549. The domestic gas market is also well understood given the serious shortage of supply, the very tight market conditions and significant unfilled demand.
550. The 2007 and 2008 Economics Consultants Reports also outlined that significant supply of gas will be required by 2014-2015 alone to meet new and replacement demand. The reports identify real opportunities for supply and represent “a firm understanding of the likely level and timing of demand for domgas”. They are publicly available documents.
551. The domestic gas market stands in contrast to the international LNG market which has exhibited significant volatility in pricing and demand. To the extent there are important market risks, these relate to LNG supply. The applicants have however elected to separately market LNG since as early as 2005, and will continue to do so.
552. The refusal to grant interim authorisation would therefore not prevent Chevron, Shell and ExxonMobil from:
 - separately marketing and selling gas into the domestic market;
 - meeting their obligation under the state Agreement to diligently market gas to WA customers;
 - separately obtaining “a firm understanding of the likely level and timing of demand for domgas from the Project prior to a Final Investment Decision”; and
 - undertaking the required investment decisions for developing the Gorgon Project.

7.2.2 Interim authorisation would create significant harm to consumers

553. As outlined in section 5, any joint selling by the Gorgon participants will give rise to significant anti-competitive detriment to consumers by:
 - significantly reducing the number of independent sellers from three to one;
 - reducing customer choice over terms and conditions on offer;
 - entrenching the already dominant market power exercised by Shell Chevron and ExxonMobil, with consumers lacking countervailing power;
 - enabling the coordinated exercise of market power;

- extending that market power to other projects in which Shell, Chevron and ExxonMobil participate; and
 - entrenching an effective minimum price for domestic gas.
554. Furthermore, interim authorisation would give rise to additional harm to consumers by:
- creating expectations as to price and other terms that might not otherwise be achieved if the applicants were independently competing with each other;
 - creating a high risk of collusion over price-sensitive information, even if the Gorgon participants were subsequently required to sell separately;
 - locking consumers into an invidious situation of having to *support* the Gorgon participants' claim for final authorisation; and
 - creating significant uncertainty and delay for consumers given that any agreements entered into might be voided if final authorisation was not granted.

Price expectations

555. By permitting the Gorgon participants to combine as a cartel, interim authorisation entrenches and extends the market power already enjoyed by Shell, Chevron and ExxonMobil.
556. The coordination of this market power would create expectations of pricing and other conditions that might not otherwise be achieved if all three Gorgon participants were separately marketing and competing with each other.
557. Consumers would then be subject to these producer price expectations even if the Gorgon participants were subsequently required to sell separately.
558. These producer price expectations would also flow through to other domestic gas sales in WA involving other gas projects and producers.
559. The impact of interim authorisation – and the expectations of pricing that might arise from joint selling by the Gorgon participants – could therefore extend well beyond the Gorgon Project, and well beyond the time period of any interim authorisation.

Unavoidable risk of collusion

560. As previously outlined, joint selling would enable Shell, Chevron and ExxonMobil to share sensitive market sensitive information. This

includes information as to price, demand, contract terms being sought by individual customers. It also includes the price expectations that each might have in respect to individual contracts and the market.

561. The sharing of otherwise confidential commercial and market sensitive information confers Shell, Chevron and ExxonMobil significant advantage in negotiations with individual consumers.
562. Even if final authorisation was refused, these same Gorgon participants would, individually, now have full knowledge of the price expectations of the other participants. This creates a high risk of collusion even if the applicants were subsequently forced to sell separately.
563. Furthermore, Shell and Chevron are participants in the NWSJV joint selling arrangement, with the NWSJV controlling 70% of the domestic gas market.
564. Through the sharing of information between the Gorgon and NWSJV projects, the participants can coordinate the exercise of market power. This would also eliminate any competitive pressure that the Gorgon Project might otherwise on existing suppliers.
565. In the absence of separate selling and effective ring-fencing commitments enforced by the ACCC, the risk of collusion and price co-ordination by different joint venture projects is high:
 - Shell, Chevron and ExxonMobil are unlikely to sell Gorgon gas at prices lower than those agreed to by Shell and Chevron in the sale of NWSJV gas;
 - Shell and Chevron are unlikely to agree to sales of NWSJV gas at prices lower than that attained by Shell, Chevron and ExxonMobil in regard to Gorgon gas; and
 - the NWSJV participants are unlikely to sell gas in their other developments at prices lower than NWSJV and Gorgon gas.
566. The effect of joint selling from any interim authorisation would be to entrench and extend the current minimum pricing for domestic gas.

Consumers would be forced to support final authorisation

567. The applicants state that any domgas sales agreements entered into would include “conditions precedent” that agreements “will not be fulfilled unless and until final authorisation is granted”.
568. An interim authorisation would therefore place consumers in an invidious situation of having to *support* the Gorgon participants’ claim for final authorisation, notwithstanding the significant detriment that would arise from joint selling.

569. Given the very tight market situation and serious shortage of gas, consumers have no choice but to enter into discussions and agreements with the Gorgon participants to secure future gas supply.
570. They would therefore be held hostage to having these agreements rendered void unless final authorisation was granted. This severely limits the ability of consumers to engage in the process and present their views to the ACCC, notwithstanding the significant detriment that would arise under joint selling.

Significant uncertainty and delay for consumers

571. The fact that any agreements negotiated could be voided in the event final authorisation is not granted creates significant uncertainty for consumers.
572. Consumers negotiating to secure vital gas supply contracts require long term certainty that contracts would be fulfilled in order to plan new capital investments and make long term operational decisions.
573. Should agreements be subsequently voided, consumers would be forced to negotiate new contracts with either the Gorgon participants individually – who now have knowledge of the price expectations of customers and of the other Gorgon participants - or with alternative suppliers. This would create significant delay and uncertainty.
574. Furthermore, consumers would be precluded from actively sourcing alternative supply sources during the period in which they agreements in force with the Gorgon participants – even if those agreements might subsequently be voided.
575. Far from enabling the timely marketing of domgas, interim authorisation would create significant delays and uncertainty for consumers in the purchase and supply of domgas.

7.3 Any public “benefits” are illusory and accrue exclusively to the applicants

576. As previously outlined, separate selling of domgas is commercially and practically feasible.
577. Any benefits associated with the Gorgon Project would therefore arise even in the absence of joint selling or an interim authorisation.
578. Furthermore as outlined in section 5, any additional “public” benefits from joint selling of domgas are illusory and accrue solely to the applicants. By suppressing competition and allowing the coordination of market power, interim authorisation will allow the applicants to:

- Create market expectations as to gas pricing and other terms that they might not otherwise be able to achieve if they were required to compete with each other;
- Collude over price-sensitive information both in regard to the NWSJV, and in regard to their future marketing activities in the event they were subsequently required to sell separately; and
- Lock consumers into an invidious situation of having to *support* their claim for final authorisation.

7.4 The urgency claimed by the applicants is unwarranted

579. The applicants claim that interim authorisation is “urgently needed to enable the Participants to obtain a firm understanding of the likely level and timing of demand for domgas from the Project prior to a Final Investment Decision (FID).” They also assert that it is necessary to enable them to continue to meet their domgas obligations under the State Agreement.¹¹⁹
580. As outlined earlier, a decision not to grant interim authorisation would not prevent Shell, Chevron and ExxonMobil from:
- separately marketing and selling gas into the domestic market;
 - meeting their obligation under the State Agreement to diligently market gas to WA customers;
 - separately obtaining “a firm understanding of the likely level and timing of demand for domgas from the Project prior to a Final Investment Decision”; and
 - undertaking the required investment decisions for developing the Gorgon Project.
581. The urgent basis on which interim authorisation is claimed is therefore unwarranted.
582. Furthermore, the urgency claimed by the applicants does not appear to align with their past behaviour given the history of the Gorgon Project.
583. The Gorgon State Agreement was concluded in 2003, although the Gorgon Project has been under contemplation since the 1990s.
584. Unlike the original North West Shelf State Agreement contained in the *North West Shelf Gas Development (Woodside) Act 1977*, which Shell and Chevron are party to, the Gorgon State Agreement did not contain provisions for the joint selling of domestic gas. The applicants would

¹¹⁹ Applicants’ submission, para.

therefore have been aware of the need to seek authorisation for any joint selling arrangement.

585. Environmental approval for the original Gorgon Project, comprising two LNG trains and a domestic gas processing plant, was obtained from the State Government in 2007.
586. The applicants subsequently provided a revised proposal for the construction of a third LNG train, with the expanded Gorgon Project resubmitted for environmental assessment.
587. In progressing each of these matters, the applicants would have been fully aware of their obligations under the *Trade Practices Act*, including the prohibition against price fixing, exclusionary conduct and arrangements that substantially lessen competition.
588. The applicants have had considerable opportunity since at least 2003 if not earlier to seek authorisation for joint selling but never did so. That they should now assert the urgency of interim authorisation raises serious questions as to the credibility of their claims.
589. The applicants had, until now, provided no indication that they intended to sell jointly. Indeed, consumers were under the strong belief that the Gorgon participants would sell separately. An Alliance submission to the ACCC, dated 7 January 2008, on joint selling states for example:

“That the joint marketing arrangements are redundant is also confirmed by the fact that several of the North West Shelf joint venturers are marketing gas from new projects separately, or in joint venture with other participants.

For example, Woodside is marketing Browse and Pluto gas. *Shell, ExxonMobil and Chevron are independently marketing gas from the Gorgon field.*”
590. This belief was reinforced by the positive actions of the Gorgon participants, including by their separate marketing of LNG since as early as 2005.
591. The applicants’ 11th hour disclosure that they had always intended to market jointly since the Project’s inception, and that authorisation was urgently needed, therefore comes as a considerable surprise to consumers.
592. The urgency with which interim authorisation is sought also does not appear to reflect the actual domgas volumes and delivery time-frames being considered.

593. As the applicants have indicated, first domestic gas is not expected until the end of 2015, and even then, only an initial volume of *up to* 150 TJ/day.
594. The applicants expect it may take a further six years to reach even the very modest 300 TJ/day target – i.e. 2021, some 12 years after an expected final investment decision. Even at 300 TJ/day, domgas supply would only be equivalent to around 13% of the LNG production.
595. Domgas supply therefore represents a very modest undertaking compared to the overall scale of the Gorgon Project, the timeframes for LNG development, the breadth of the domestic market and the size of domestic demand.
596. That interim authorisation is urgently needed to enable a final investment decision on the Gorgon Project is therefore open to challenge.

7.5 It would be impossible to substantially return the market to its pre-interim state

597. The applicants assert that: “Interim authorisation will not lead to any irreversible change in market outcomes as it is proposed that a condition precedent would be included in executive domgas sales agreements which will not be fulfilled unless and until final authorisation is granted.”¹²⁰
598. The applicants further assert that “there will be no change to the market structure or competitive dynamics and it is highly unlikely that any harm will be sustained by potential customers or competitors to the Project.”¹²¹
599. As outlined above, interim authorisation would significantly impact the WA domestic gas market and consumers by:
- significantly reducing the number of independent sellers from three to one;
 - reducing customer choice over terms and conditions on offer;
 - entrenching the already dominant market power exercised by Shell Chevron and ExxonMobil, with consumers lacking countervailing power;
 - enabling the coordinated exercise of market power;

¹²⁰ ACCC letter to Interested Parties on the Gorgon Gas Project application for authorisation, 21 May 2009, p.2.

¹²¹ Applicants’ submission, para.6.11.

- extending that market power to other projects in which the Gorgon participants operate, such as the NWSJV;
 - entrenching an effective minimum price for domestic gas;
 - creating expectations as to price and other terms that might not otherwise be achieved if the applicants were independently competing with each other;
 - creating a high risk of collusion over price-sensitive information, even if the Gorgon participants were subsequently required to sell separately;
 - locking consumers into an invidious situation of having to *support* the Gorgon participants' claim for final authorisation; and
 - creating significant uncertainty and delay for consumers given that any agreements entered into might be voided if final authorisation was not granted.
600. These impacts cannot be unwound and the market returned to its pre-interim state if final authorisation was later denied.
601. For example, interim authorisation would enable Shell, Chevron and ExxonMobil to share sensitive market information on: (1) the price, demand and contract terms being sought by individual customers; and (2) the price expectations that each Gorgon participant might have in respect to individual customers and the overall market.
602. Even if final authorisation was refused, these same Gorgon participants would, individually, retain full knowledge of the price expectations of customers and the other Gorgon participants. This creates a high risk of collusion even if the applicants were subsequently forced to sell separately.

7.6 Conclusion

603. A decision not to grant interim authorisation would not prevent Chevron, Shell and ExxonMobil from:
- separately marketing and selling gas into the domestic market;
 - meeting their obligation under the State Agreement to diligently market gas to WA customers;
 - separately obtaining “a firm understanding of the likely level and timing of demand for domgas from the Project prior to a Final Investment Decision”; and

- undertaking the required investment decisions for developing the Gorgon Project.
604. Interim authorisation would give rise to significant harm to consumers by suppressing competition and concentrating market power.
 605. Given separate selling of domgas is commercially and practically feasible, any benefits associated with the Gorgon Project would arise even in the absence of an interim authorisation.
 606. To the extent there are any additional “public” benefits from joint selling, these accrue exclusively to the applicants from the suppression of competition and the concentration of market power.
 607. There are no grounds for the urgency claimed by the applicants. Separate selling is commercially and practically feasible. The applicants have also had considerable opportunity since at least 2003 if not earlier to seek authorisation.
 608. The significant impacts that interim authorisation would have on the market and consumers cannot be unwound if final authorisation was later denied and the Gorgon participants required to sell separately.
 609. For these reasons, interim authorisation should not be granted to the applicants for joint selling.

8. CONCLUSION

8.1 Market structure

610. Ensuring competition in the domestic gas market is an issue of vital importance for consumers in Western Australia.
611. Natural gas underpins the State's mining and resource processing industries, fuels power generation, and supplies small businesses and households.
612. There has been fundamental transformation in the market since the mid-1990s. The downstream level of the market has undergone significant reforms to increase competition between customers. This has led to a significant increase in:
- the breadth of the domestic market and the size of domestic demand;
 - the number of direct gas customers;
 - the number of parties buying through an aggregator, many of whom could also elect to purchase directly from gas producers;
 - the entry of brokers providing gas trading services to gas users;
 - short and long-term trading in gas transmission capacity and physical gas;
 - additional transportation and storage options;
 - the flexibility within the Dampier to Bunbury Natural Gas Pipeline system to deal with supply and demand imbalances; and
 - connectivity between gas pipelines in Western Australia – gas can now be traded either physically or commercially in any part of the system.
613. The upstream market however remains highly concentrated with two suppliers controlling almost 100% of the domestic gas market.
614. Shell and Chevron continue to exercise significant market power through the unauthorised NWSJV cartel selling arrangements, and through their control of prospective new developments, particularly Gorgon.

8.2 Separate selling is commercially and practically feasible

615. Separate selling of domgas by the Gorgon Project is commercially and practically feasible:

- the WA domestic gas market has undergone significant transformation over the past 10 years;
- Shell and its partners sell separately from the major Pohokura gas field in New Zealand *despite originally claiming it was impossible to do so* because of supposed market features, and that “no development” would occur in the absence of authorisation;
- long term contracts have not prevented major producers from supplying international customers and expanding LNG supply;
- major producers already enjoy complete transparency over domestic demand and contract pricing, whereas domestic consumers have no access to this information;
- there is no commercial imperative for joint selling to offset the market power of customers;
- the operational measures necessary to enable separate selling are well-known and practical;
- marketing decisions for domestic gas are already being made separately by Shell and Chevron in regard to the NWSJV;
- gas balancing and nomination arrangements are already in place in the WA market;
- producers in other joint venture gas developments sell separately into the WA domestic gas market; and
- marketing decisions are already being made separately by Shell, Chevron and ExxonMobil with respect to LNG and condensate;
- Shell, Chevron and ExxonMobil have been compelled by competition authorities to sell separately in other countries – including in Norway, Denmark and New Zealand; and
- joint selling is not necessary to support investment and development of the Gorgon Project.

616. In the absence of an authorisation, Chevron, Shell and ExxonMobil would be able to separately sell gas into the domestic market.

8.3 Public benefits

617. Given that separate selling of domgas is commercially and practically feasible, the benefits associated with the Gorgon Project would therefore arise even in the absence of joint selling.
618. To the extent there are any additional “public” benefits from joint selling, these are illusory and accrue exclusively to the applicants.
619. These include the significant windfall gains expected from the suppression of competition and the concentration in market power with joint selling.

8.4 Significant anti-competitive detriment

620. Joint selling by the Gorgon participants would result in significant anti-competitive detriment by:
- significantly reducing the number of independent sellers from three to one;
 - reducing customer choice over terms and conditions on offer;
 - entrenching the already dominant market power exercised by Shell Chevron and ExxonMobil, with consumers lacking countervailing power;
 - enabling the coordinated exercise of market power;
 - extending that market power to other projects in which Shell, Chevron and ExxonMobil participate; and
 - entrenching an effective minimum price for domestic gas.
621. In the absence of joint selling:
- Shell, Chevron and ExxonMobil would compete against each other for WA domestic gas customers;
 - consumers would have greater customer choice over terms and conditions on offer;
 - Shell, Chevron and ExxonMobil would not be able to co-ordinate market power in setting price or non-price terms; and
 - there would be greater competitive pressure asserted on existing suppliers.

622. The significant anti-competitive detriments far outweigh any benefits that might be derived from joint selling.
623. Interim and final authorisation should not be granted to the applicants for joint selling.
624. The WA market can be distinguished from that in the PNG Gas Project Determination. In that case, the project participants possessed a lack of bargaining power and consumers possessed countervailing power.

8.5 Interim authorisation

625. A decision not to grant interim authorisation would not prevent Chevron, Shell and ExxonMobil from:
- separately marketing and selling gas into the domestic market;
 - meeting their obligation under the State Agreement to diligently market gas to WA customers;
 - separately obtaining “a firm understanding of the likely level and timing of demand for domgas from the Project prior to a Final Investment Decision”; and
 - undertaking the required investment decisions for developing the Gorgon Project.
626. Interim authorisation would give rise to significant harm to consumers by suppressing competition and concentrating market power.
627. Given separate selling of domgas is commercially and practically feasible, any benefits associated with the Gorgon Project would arise even in the absence of an interim authorisation.
628. To the extent there are any additional “public” benefits from joint selling, these accrue exclusively to the applicants from the suppression of competition and the concentration of market power.
629. There are no grounds for the urgency claimed by the applicants. Separate selling is commercially and practically feasible. The applicants have also had considerable opportunity since at least 2003 if not earlier to seek authorisation.
630. The significant impacts that interim authorisation would have on the market and consumers cannot be unwound if final authorisation was later denied and the Gorgon participants required to sell separately.
631. For these reasons, interim authorisation should not be granted to the applicants for joint selling.

ATTACHMENTS

1. DomGas Alliance, *Western Australia's Domestic Gas Security*, 2009
2. Application by Shell and its partners seeking authorization for joint selling for the Pohokura gas development, December 2002.
3. CRA Report, *Coordinated Marketing of Pohokura Gas: An Economic Analysis*, December 2002.
4. New Zealand Commerce Commission, Decision 581, revoking authorization to Shell and its partners for joint selling of Pohokura gas, June 2006.
5. Economics Consulting Services, *Natural Gas Demand Forecast for Western Australia and Economic Impact of Supply Shortages*, 2007.
6. Economics Consulting Services, *Natural Gas Demand Outlook for Western Australia and Economic Impact*, 2008.