



NORTH WEST SHELF GAS JOINT SELLING ARRANGEMENTS

**SUBMISSION TO THE INQUIRY BY THE SENATE
STANDING COMMITTEE ON ECONOMICS**

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EXECUTIVE SUMMARY

Background

- The North West Shelf Joint Venture (NWSJV) comprises six participants: Woodside, Shell, BP, Chevron, BHP Petroleum and MIMI (Mitsui and Mitsubishi).
- Each NWSJV participant has the right and obligation to own, take and separately dispose of its production entitlement.
- The six NWSJV participants market gas to WA domestic customers through a joint selling arrangement – North West Shelf Gas Pty Ltd. – which is staffed mainly by secondees from the joint venture participants.
- 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.

The NWSJV participants exercise significant market power

- The NWSJV participants have and exercise significant market power as a direct consequence of the joint selling arrangement.
- The NWSJV controls close to 70% of the WA gas market and over 92% of gas resources in developed fields.
- Two supplier groups – the NWSJV and Apache-led JVs – control close to 100% of the WA gas market and gas resources in developed fields.
- This market power is further exacerbated by the fact that:
 - There are significant commercial and economic barriers to the entry of new suppliers to the domestic gas market;
 - The NWSJV participants include some of the world's largest oil and gas companies, each of which already possess significant commercial and negotiating power;
 - Local consumers have no reasonable alternatives to gas supply from existing gas producers;
 - The current market is experiencing a serious shortage in gas supply which has led to a tripling of gas 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, Apache, or in conjunction.

The joint selling arrangement substantially lessens competition

- The joint selling arrangement substantially lessens competition in the domestic gas market:
 - It creates a significant concentration in market power whereby the NWSJV controls 70% of the domestic gas market and over 90% of developed gas reserves, and two major producer groups control close to 100% of the domestic market and 100% of developed reserves.
 - It dramatically reduces the number of independent producers selling gas into the domestic market.
 - It significantly limits the ability of consumers to secure competitive terms, including price and long term supply terms.
 - It operates to withhold supply from the domestic market with NWSJV focusing on a small number of large customers and not supplying smaller customers.
 - It constrains the entry of *competitive* new suppliers with the majority of prospective new gas supply developments being controlled by the same NWSJV participants.
 - It constrains the development of other elements of a competitive marketplace.
 - It creates a significant disparity in information which significantly undermines bargaining power of consumers.
 - It effectively provides for the maintenance of a minimum (and rising) floor price for domestic gas.
 - It encourages the potential abuse of market power.
- The joint selling arrangement has the purpose or likely effect of fixing, controlling or maintaining prices for gas supplied by the individual NWSJV participants.
- But for the arrangement, each of the NWSJV participants would be offering gas for sale at a price and on terms individually determined by that participant.

- The fact that authorisations from the application of the Trade Practices Act were seen to be necessary by the NWSJV participants for their joint selling activities in 1977 and 1998 clearly reinforces concerns about the anti-competitive nature of the arrangement.

Joint selling arrangements have been found to be anti-competitive in other countries.

- Joint selling arrangements for domestic gas supply have been found in other international jurisdictions to be anticompetitive.
- Shell and Chevron (which are both NWSJV participants) were parties to joint selling arrangements found to be anticompetitive by the European Commission.
- New Zealand competition authorities have also found joint selling of domestic gas to be anti-competitive in revoking an authorisation granted to a joint venture involving Shell.

There is no justification for maintaining the joint selling arrangement

- The West Australian domestic gas market has undergone significant transformation from one dominated by a vertically-integrated monopoly buyer to one of 25-30 individual customers.
- Joint selling by the NWSJV participants is no longer required to balance market power of consumers or to support investment and development in the North West Shelf project.
- Producers in other joint venture gas developments are already selling separately into the WA domestic market.
- With the growth of Woodside and the North West Shelf Project into a world class, highly profitable producer, there is no longer any need for joint selling to underpin the initial development of the NWSJV.
- NWSJV participants, including Shell and Chevron, have been required to independently market gas produced under a JV project in other jurisdictions.
- There is also no basis to claims by producers that:
 - The West Australian domestic market is not sufficiently mature to make separate selling feasible;

- Removing joint selling will lead to an adverse outcome for consumers by discouraging gas field development and domestic supply by the NWSJV participants; or that
- The current domestic gas supply shortage and price escalation was due to historical long term contracts.

Broader policy issues

- Joint selling is inconsistent with the object and spirit of the Trade Practices Act which is to promote competition and consumer welfare.
- The NWSJV joint selling arrangement is impacting consumers through supply shortages and escalating gas and electricity prices.
- Not removing joint selling would have significant consequences for future competition in the market.
- Not removing joint selling would send a strong message to producers sanctioning cartel selling as a matter of practice.
- The ACCC has taken a strong stance against gas market concentration in the Eastern States.
- Concerns about the possible consequences of removing joint selling are outweighed by the benefits of a competitive market.
- It is unreasonable to expect consumers to act individually to ensure the NWSJV participants comply with the Trade Practices Act.

Conclusion

- The NWSJV joint selling arrangement substantially lessens competition in the Western Australian domestic gas market.
- The arrangement results in a significant concentration in market power and has shifted bargaining power unfairly to the hands of gas producers.
- It has operated to limit supply, and has impacted domestic gas prices and the ability of consumers to secure competitive terms.
- Removing the joint selling arrangement will promote competition and supply by forcing the individual NWSJV participants to compete in the market place.

1. BACKGROUND

1.1 The North West Shelf Joint Venture

1. The North West Shelf Joint Venture (**the NWSJV**) explores for and extracts hydrocarbons from offshore production fields in the Carnarvon Basin which are then transmitted via pipeline to onshore processing facilities on the Burrup Peninsula near Dampier.
2. The NWSJV currently operates three offshore facilities which together comprise the North West Shelf Project: North Rankin A gas Platform; Goodwyn A Gas Platform; and Cossack Pioneer floating production, storage and offtake (FPSO) facility.
3. The NWSJV comprises six participants (**the NWSJV participants**) – each holding an equal 1/6th share in future gas sales (subject to various joint venture arrangements).
4. The participants are:
 - 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
5. Woodside, a NWSJV participant, is the operator of the North West Shelf Project.¹
6. From the processing facilities, the hydrocarbons are supplied as: pipeline quality natural gas for sale in WA; LNG (liquefied natural gas) for export to Japan, Korea, Taiwan and China; liquid condensate for sale on the world market; and LPG (liquid petroleum gas) for sale in Australia and overseas.
7. The NWSJV consists of five production joint ventures:
 - the Domestic Gas Joint Venture (**the Domgas Venture**) – created to produce 5064 PJ of sales gas for supply in WA

¹ North West Shelf Gas, <http://www.nwsg.com.au/sp-frameset.html?about/nwsg.html>, accessed 26 August 2008.

- LNG Joint Venture – created to produce 6 million tonnes of LNG per year to satisfy 20 supply contracts for eight Japanese electricity and gas companies; the original three train plant which was expected to produce 6mtpa has a production capacity of 7.5 mtpa; Train 4 and Train 5 each have a capacity of 4.4 mtpa;
 - LPG Joint Venture – created to store LPG produced by the other ventures in excess of LPG required to be retained in the gas produced by those other ventures to meet specifications under contracts;
 - Gas Recycling Joint Venture – created to obtain early production of condensate by bringing gas to the surface, stripping it of condensate and recycling the gas back into the reservoir; and
 - Incremental Venture – created to produce natural gas for supply into WA in excess of the scope of the Domgas Venture.²
8. Gas for the domestic market is produced by the Domgas Venture (and the Incremental Venture). At the time the Domgas Venture was established, the participants were:
- Woodside Energy Limited (50%)
 - Shell Development (Australia) Pty Ltd (8 $\frac{1}{3}$ %)
 - BHP Billiton Petroleum (North West Shelf) Pty Ltd (8 $\frac{1}{3}$ %)
 - BP Developments Australia Pty Ltd (16 $\frac{2}{3}$ %); and
 - Chevron Australia Pty Ltd (16 $\frac{2}{3}$ %)³
9. In 1977, the participants to the Domgas Venture received authorisation from the Trade Practices Commission (TPC) for joint marketing arrangements. The 1977 authorisation (A18492) states:
- “The Commission considers that for the Joint Venturers to ‘discuss and agree together the common terms and conditions (including price) upon which natural gas produced pursuant to their programme(s) ... will be offered for sale to potential customers to discuss and agree a method(s) for marketing such gas’ (which is what they seek authorisation to do) is likely to result in substantial benefit to the public being a benefit that would not otherwise be available and in all the circumstances that likely result justifies the granting of authorisation.”⁴
10. The 1977 authorisation had no end-date and remained in force until revoked by the ACCC.

² ACCC, 1998 Authorisation Determination, *supra.*, p.7.

³ ACCC Determination, Revocation of Authorisation A18492 – North West Shelf Gas Pty Ltd, 5 March 2008, Public Register no. C2008/55.

⁴ Authorisation A18492, 15 February 1977, para. 27.

11. The 1977 authorisation did not cover the marketing activities of the parties to the **Incremental Venture** owing to the inclusion of an additional party, Japan Australia LNG (MIMI) Pty Ltd, which was not a party to the 1977 authorisation.⁵
12. In 1997, the NWSJV participants sought authorisation for the Incremental Venture to enter into joint marketing arrangements. The applicants were at the time facing significant new investment and sought the authorisation in order to underpin that investment.
13. An important component of the new investment program was a proposal to double the domestic production capacity of the NWS Project from 550 TJ/d to 1100 TJ/d.
14. The NWSJV participants sought authorisation to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.⁶
15. In particular, the participants sought authorisation to discuss and agree together the common terms and conditions, including price, at which gas produced together by them under the NWS Project will be offered for sale to customers and to discuss and agree on methods for marketing and selling such gas (co-ordinated marketing).⁷
16. In 1998, the ACCC granted authorisation (A90624) to the participants:
 - A. to enter into or give effect to contracts, arrangements and understandings between them relating to common terms and conditions (including price) upon which gas produced by the Incremental Venture will be offered for sale and sold by them to customers; and
 - B. to discuss and agree on a method for the marketing and selling of such gas by them, pursuant to contracts, arrangements and understandings relating to the Incremental Venture only.⁸
17. The 1998 authorisation was granted for a period of seven years from the date of the ACCC's final determination.⁹ This authorisation lapsed in 2005 and the NWSJV participants never sought to have it renewed.

⁵ Ibid.

⁶ ACCC Determination, Application for Authorisation – North West Shelf Project, Authorisation No. A90624, 29 July 1998, File No. CA97/19, p.iii.

⁷ Ibid.

⁸ Ibid., p.viii.

18. In December 2007, North West Shelf Gas Pty Ltd requested that the ACCC revoke the 1977 authorisation A18492. In March 2008, the ACCC revoked the 1977 authorisation.¹⁰
19. No other authorisations remain in force with respect to the NWSJV joint selling arrangement.
20. The NWSJV continue to market gas jointly through its marketing agency **North West Shelf Gas Pty Ltd**.

1.2 Production and joint selling arrangements

21. Each JV participant has the right and obligation to own, take and separately dispose of its production entitlement.¹¹
22. In the case of the Domgas Venture, the representatives from each of the JV participants form a small group to conduct marketing and sale negotiations on behalf of the participants.¹²
23. These representatives are seconded to North West Shelf Gas Pty Ltd and act in accordance with instructions given by the participants.¹³
24. Sales contracts are entered into in the name of each participant and North West Shelf Gas Pty Ltd acts as its representative for administrative purposes only under these sales contracts.¹⁴
25. The North West Shelf Gas website states:

“North West Shelf Gas Pty Ltd (NWSG) is the domestic gas marketing representative established by the North West Shelf Venture to market gas and administer contracts with domestic customers in Western Australia.”

“Within that function, NWSG continues to market domestic gas to new and existing customers on behalf of the Incremental Pipeline Gas Joint Venture (IPGJV) participants.”

“The IPGJV participants (each with a 1/6th interest) are: Woodside Energy Ltd., BP Developments Australia Pty Ltd; Chevron Australia Pty Ltd;

⁹ *Ibid.*, p.ix.

¹⁰ ACCC Determination, Revocation of Authorisation A18492 – North West Shelf Gas Pty Ltd, 5 March 2008, Public Register no. C2008/55.

¹¹ ACCC 1998 Authorisation Determination, *supra.*, p.8.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

BHP Billiton (North West Shelf) Pty Ltd; Shell Development (Australia) Proprietary Limited and Japan Australia LNG (MIMI) Pty Ltd.”¹⁵

26. The North West Shelf Gas website further states that the owners of North West Shelf Gas are the domestic gas sellers, each having 1/6 interest.¹⁶
27. The DomGas Alliance understands that North West Shelf Gas markets gas on behalf of the NWSJV participants with respect to both the original Domgas Venture and the Incremental Venture.

¹⁵ North West Shelf Gas, <http://www.nwsg.com.au/sp-frameset.html?products/domestic-gas.html>, accessed 26 August 2008.

¹⁶ North West Shelf Gas, <http://www.nwsg.com.au/sp-frameset.html?products/domestic-gas.html>, accessed 26 August 2008.

2. THE WEST AUSTRALIAN GAS MARKET

2.1 The WA domestic gas market

28. Western Australian gas users are highly dependent on domestic gas supply, with demand for gas expected to grow for the future.
29. 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 giant North West Shelf project in 1984.
30. Today, Western Australia is heavily dependent on domestic gas to supply energy, support essential services, fuel industry and supply households.
31. The State is the single largest natural gas consumer in Australia. Natural gas supplies 51% of the State's primary energy and 60% of electricity generation. By comparison, natural gas currently accounts for less than 20% of Australia's energy source.
32. Western Australian 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 Shelf¹⁷. The average rate of increase over the 23 years from 1984 has been 8.5% per annum.
33. Manufacturing, electricity generation and mining account for up to 90% of annual domestic gas consumption:
 - manufacturing (up to 40%) including alumina, other non-ferrous metals, iron and steel, chemicals, glass, ceramics, cement and concrete; electricity generation;
 - electricity generation (around 30%);
 - mining (20-25%); and
 - other uses (10%) including commercial services, transport and storage, and residential gas for cooking and heating.
34. Demand for gas will continue to grow. A 2007 study by Economics Consulting Services (ECS) concluded that Western Australia alone will require around 900 TJ/day of gas in the next 6 years to meet new and

¹⁷ ABARE: Natural gas consumption by State, 2008

replacement demand, including 650 TJ/d of new gas. This is equivalent to the total size of the existing market for gas.

35. Since 2007, expectations of future gas demand have further increased, including in relation to potential development in the State's Mid-west.
36. A revised 2008 study by ECS concluded the State could require over 1100 TJ/day of additional gas by 2014-15 to meet new and replacement demand.

2.2 The downstream market has undergone major transformation – which significantly increased competition on the demand side

37. At the time the NWSJV was established in the 1970s, the domestic gas supply market was characterised by a small number of suppliers and dominated by a single vertically integrated State monopoly buyer (SECWA).
38. However, since the 1977 authorisation, and when the ACCC last reviewed the domestic gas market in 1998, there has been a fundamental transformation in the downstream market.
39. This has seen a significant expansion in:
 - the size of the domestic market and domestic demand;
 - the number of direct buyers; and
 - the number of parties currently buying through an aggregator many of whom could elect to purchase directly.
40. In 1995, the original SECWA contract was disaggregated leading to the emergence of six independent buyers:
 - the Electricity Corporation (South West)
 - the Electricity Corporation (Pilbara)
 - the Gas Corporation
 - Alcoa of Australia Limited
 - Hamersley Iron Pty Limited
 - Robe River Mining Co. Pty Ltd
41. Other key reforms implemented in the 1990s and 2000s to increase competition in the downstream market included:
 - 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 within the downstream domestic gas market;
 - the privatisation and sale of AlintaGas in 2000; and
 - the disaggregation of Western Power to establish three entities (Verve, Synergy and Horizon Power) with existing gas supply contracts or the ability to contract with gas suppliers.
42. As a result of these reforms, the downstream market is today highly competitive with around 25-30 customers buying gas directly from producers.
43. 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 (eg Burrup Fertilisers; Verve; Alinta; and Alcoa) down to approximately 1 TJ/d.
44. In addition, aggregators such as Alinta and Synergy supply a large number of customers ranging from large industrial customers, light industrial and commercial customers, as well households.
45. Many of these aggregator customers can purchase directly from a producer and arrange their own transmission but for reasons of convenience prefer to purchase a delivered service through an aggregator. Perth Energy is also building a presence in the domestic market as an aggregator.

2.3 Gas producers have significant market power

46. The joint selling arrangement creates a significant concentration in market power whereby:
- the NWSJV controls close to 70% of the WA gas market and over 92% of gas resources in developed fields; and

- two supplier groups – the NWSJV and Apache-led JVs - control close to 100% of the WA gas market and resources in developed fields;

47. This market power is further exacerbated by the fact that:

- there are significant barriers to the entry of new suppliers to the domestic gas market;
- the NWSJV participants include some of the world's largest oil and gas companies, each of which already possess significant 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 – which has led to a tripling of gas 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.

48. This submission will address these factors in detail.

2.3.1 The NWSJV controls close to 70% of the market and 92% of developed resources; two supplier groups control close to 100% of the market

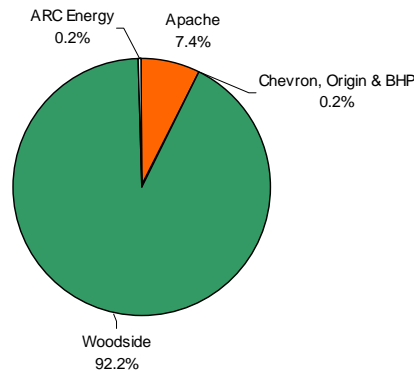
49. While the downstream market has undergone significant transformation to increase competition, the supply side of the market retains the same high level of concentration which existed in 1995. This has created a significant disparity in the market power of sellers vis-à-vis consumers.

50. Through its joint selling arrangement, the NWSJV controls close to 70% of the domestic gas market. As a consequence, it has significant ability to influence prices or withhold supplies.

51. Given that Apache-led JVs supply around 30% of the market, the joint selling arrangement also results in a situation where the market is controlled by two supply groups. Together the NWSJV and the Apache-led JVs control almost 100% of the market.

52. This concentration in supply is reinforced by the fact that the two groups together control close to 100% of gas reserves in developed fields that supply the domestic market.¹⁸
53. 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.¹⁹ Another 7.4% is located in the John Brookes field operated by Apache.²⁰
54. The fact that two groups control 100% of developed reserves has a significant impact on competition and 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 Operator²¹



2.3.2 There are significant barriers to the entry of new suppliers

55. The domestic gas market is characterised by significant barriers to the entry of new suppliers.
56. New supply is dependent on a developer identifying and securing potential gas resources. These involve significant exploration costs and time delays.
57. 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 Apache-led JVs.

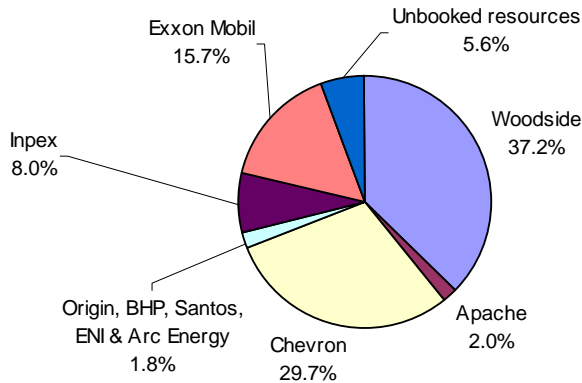
¹⁸ Synergies Economic Consulting, *WA Gas Supply & Demand*, July 2007, p.88.

¹⁹ Synergies Economic Consulting, *WA Gas Supply & Demand*, July 2007, p.35.

²⁰ Synergies Economic Consulting, *WA Gas Supply & Demand*, July 2007, p.88.

²¹ Synergies Economic Consulting, *WA Gas Supply & Demand*, July 2007, p.88.

WA Total Gas Reserves by Operator ²²



58. 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.
59. These entry barriers operate to “entrench” existing suppliers and their dominant market position, with existing suppliers already controlling close to 100% of existing developed reserves.
60. As a result, existing suppliers have significant market power. This places individual consumers at a significant disadvantage when seeking to negotiate price and terms for gas supply.

2.3.3 The NWSJV participants include some of the world’s largest oil and gas companies, each of which have significant commercial and negotiating power

61. The NWSJV participants include some of the world’s largest oil and gas companies, including Shell, BP, Chevron, Woodside and BHP Billiton.
62. Individually, these companies possess significant commercial and negotiating power compared to local gas consumers.
63. They have highly sophisticated businesses, with the operational and resource backing of multi-billion dollar global operations.
64. By comparison, many of the 25-30 companies that purchase gas direct from producers are smaller to medium sized companies, including emerging resource processing and energy generation companies.

²² Synergies Economic Consulting, *WA Gas Supply & Demand*, July 2007, p.91.

65. These companies are already at a commercial disadvantage in negotiating gas supply contracts, even without the operation of a joint selling arrangement whereby the six NWSJV participants combine to negotiate prices and contract terms as a single entity.

2.3.4 Local consumers have no reasonable alternatives to gas supply

66. The disparity in market power between suppliers and consumers is emphasised by the fact that local consumers have no reasonable alternatives 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
 - there are significant practical and economic constraints on the ability of existing users to switch from gas to other fuels such as coal. This was demonstrated by the recent Varanus Island outage which resulted in the loss of 30% of the State's gas supply.
67. As a result, local gas users are highly dependent on existing suppliers for current and future gas supply.
68. By comparison, sellers have an alternative market in the form of overseas exports.

2.3.5 The current market is experiencing a significant shortage in supply

69. The market power of suppliers is emphasised by the very tight domestic gas supply market.
70. Since at least 2004, Western Australia is experiencing a serious shortage in domestic gas supply.
71. Current and prospective users have been unable to secure long term supplies of gas in substantial quantity. This has resulted in escalating gas prices for local consumers.
72. Evidence of this gas shortage include:
- the recent State Government's electricity generation tender was forced to select coal as the only feasible option;

- 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 tripled compared to historical prices;
 - on a delivered basis, WA gas prices are more than triple that of 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 historical prices.
73. 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.
74. The serious shortage of gas is unlikely to be resolved by 2014 at the earliest.
75. Given the very tight domestic gas supply market, existing gas producers enjoy significant market power vis-à-vis gas consumers.

2.3.6 The majority of potential new domestic gas developments are owned or controlled by one or more of the NWSJV participants, Apache or in conjunction

76. 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, Apache, or in conjunction.
77. These include:
- Pluto – Woodside 100% (a NWSJV participant)
 - Macedon – BHP Billiton (a NWSJV participant) and Apache

- Wheatstone – Chevron (a NWSJV participant)
 - Gorgon – Chevron, Shell (NWSJV participants) and Exxon Mobil
 - Reindeer – Apache, Santos
 - Julimar – Apache, Kufpec
78. This provides for a very tight grouping of producers with significant market power from existing operations, and control over future developments that could supply the domestic market.

3. IMPACT ON COMPETITION

3.1 Overview

79. The NWSJV joint selling arrangement substantially lessens competition in the West Australian domestic gas market by:
- creating a significant concentration in market power whereby the NWSJV controls 70% of the domestic gas market and over 90% of developed gas reserves, and two major producer groups control close to 100% of the domestic market and 100% of developed reserves;
 - dramatically reducing the number of independent producers selling gas into the domestic market;
 - significantly limiting the ability of consumers to secure competitive terms, including price and long term supply terms;
 - operating to withhold supply from the domestic market with NWSJV focusing on a small number of large customers and not supplying smaller customers;
 - constraining the entry of *competitive* new suppliers with the majority of prospective new gas supply developments being controlled by the same NWSJV participants;
 - constraining the development of some of the features identified by the ACCC in its 1998 Determination as indicating a more mature WA gas market;
 - creating a significant disparity in information which significantly undermines bargaining power of consumers;
 - effectively providing for the maintenance of a minimum (and rising) floor price for domestic gas; and
 - encouraging the potential abuse of market power.
80. Furthermore, the joint selling arrangement has the purpose or likely effect of fixing, controlling or maintaining prices for gas supplied by the individual NWSJV participants.
81. The fact that authorisations from the application of the Trade Practices Act were sought by the NWSJV participants for joint selling and granted in

1977 and 1998 raises serious concerns about the anti-competitive nature of the arrangement.

3.2 The joint selling arrangement dramatically reduces the number of independent sellers into the domestic market

82. Each NWSJV participant has the right and obligation to own, take and separately dispose of its production entitlement.²³
83. With six participants in the NWSJV, this would equate to six individual sellers each owning a share production that could be sold to local consumers.
84. The joint selling arrangement substantially lessens competition by:
 - dramatically reducing the number of independent sellers to the domestic market from six to one;
 - forcing individual consumers to negotiate with North West Shelf Gas which sets a common price and conditions for six producers, and
 - preventing consumers from dealing with individual NWSJV participants.
85. But for the arrangement, there would be six individual sellers each competing and negotiating in the market. The joint selling arrangement substantially interferes with competitive trading in the market.
86. The arrangement has or is likely to have the effect of lessening competition by suppressing “rivalrous market behaviour” and the “independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.”²⁴
87. The 2002 COAG Energy Market Review Report (“the Parer Report”) identified joint selling as a key barrier to a more competitive gas market: “In the Australian economy there is a general presumption that competition between firms achieves the most sustainably efficient market place.”

“Overall, the Panel finds that separate marketing, where it can be practically implemented, will encourage a more competitive natural gas market. Given the significant evolution in the Australian gas market in the last decade, the first steps should now be taken toward encouraging

²³ ACCC 1998 Authorisation Determination, *supra.*, p.8.

²⁴ Re QCMA (1976) 25 FLR 169, at 188-189.

greater competition through separate marketing where this can be achieved.”²⁵

88. In its 1998 Determination on NWSJV’s application for joint selling authorisation, 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.”

“The Commission believes that separate marketing of gas by joint venture producers, wherever feasible, will be more competitive than coordinated marketing and likely to provide a wider variety of supplier options that would better meet market demands.”²⁶

89. The lessening of competition by the joint selling arrangement is substantial given the nature of the market.

90. As discussed earlier, the WA domestic gas supply market is characterised by:

- significant concentration in market power by the NWSJV – the NWSJV’s control of 70% of the WA gas market and over 92% of gas resources in developed fields gives it significant ability to influence prices or withhold supply;
- significant concentration in market power by suppliers - two supplier groups (the NWSJV and Apache-led JVs) control close to 100% of the WA gas market and resources in developed fields;
- significant barriers to the entry of new suppliers to the domestic gas market which serve to entrench the market dominance of existing suppliers;
- significant commercial power on the part of the individual NWSJV participants which include some of the world’s largest oil and gas companies;
- local consumers being dependent on existing suppliers given they have no reasonable alternatives to gas supply;

²⁵ 2002 COAG Energy Market Review Report (“the Parer Report”), pp.203-204.

²⁶ ACCC, Determination on the Application for Authorisation – North West Shelf Project, 29 July 1998, pp.32 and 47.

- a serious shortage in gas supply – which has led to a tripling of gas prices.
91. Given the nature of the WA domestic gas market, any reduction in the number of independent suppliers into this market has a substantial impact on competition.

3.3 The joint selling arrangement limits the ability of consumers to secure competitive terms

92. The joint selling arrangement limits the ability of consumers to secure competitive terms, including on price and supply.
93. This has a significant impact on consumers who are dependent on competitively priced gas and long term contracts to underpin capital intensive developments in resource and minerals processing developments, new power stations and gas transmission facilities.
94. Recent years has seen a dramatic escalation in gas prices payable by local consumers. The price of domestic gas has tripled compared to historical WA prices.
95. On a delivered basis, WA gas prices are now more than triple that of the Eastern States – where the market is characterised by greater competition in supply.
96. Suppliers are also shortening terms on a “take it or leave it basis”. Given investment decisions are frequently based on 15-20 year timeframes, the inability of consumers to secure long term energy contracts is impacting major project developments.
97. 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, which forces WA gas producers to compete with other international suppliers on price and contract terms.
98. Removing joint selling in the WA domestic market will increase the number of potential NWSJV sellers from one to six. This will result promote greater competition and diversity in contract terms for consumers by:
- allowing natural competition between six independent suppliers to occur. NWSJV participants would actively compete against each other and third parties. Consumers will have the opportunity to deal

with a wider range of suppliers, which will allow competition on price, supply and contract terms;

- creating a situation where each of the six NWSJV participants would have a significant quantity of gas to supply to the domestic market. Individual NWSJV participants will also be able to access supply from outside the North West Shelf Project to back contracts;
- encouraging individual NWSJV participants to monetise their proportion of reserves and supply the domestic market;
- encouraging a significant increase in the number of gas 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;
- removing the current situation where decisions by the NWSJV on the marketing or supply of domestic gas are made on the basis of the “lowest common denominator” whereby any one of the six NWSJV participants can act to block supply;
- making substitution between individual suppliers easier. Consumers would also have greater opportunity to deal with different sellers (maintain a portfolio of suppliers) to meet a required quantity as opposed to only sourcing from a single supplier;
- encouraging a greater diversity of supplier risk – preferences; each of the NWSJV participants would have their own supplier risk – return preferences which can then translate to individual negotiations with potential consumers;
- by enabling “deals” to be done between individual NWSJV participants to trade reserves, production capacity and processing capacity. This might allow one or more NWSJV participants to take a more aggressive position in supplying the domestic market; and
- resulting in a situation where **all six NWSJV participants would have to collude** on price and contract terms to arrive at the current situation that consumers currently face under the joint selling arrangement.

3.4 The joint selling arrangement operates to withhold supply from the domestic market

99. The DomGas Alliance believes the joint selling arrangement operates to withhold supply into the domestic market.

100. The NWSJV has focused on a small number of large customers and appears to have deliberately taken a view not to supply customers of less than around 15 TJ/d demand. As far as the Alliance is aware, the NWSJV has not accepted any new customers since the BHP DRI contract in 1995.
101. The NWSJV has also not offered any significant new volumes of gas into the domestic market for several years, notwithstanding the severe gas market shortfall.
102. In seeking the 1998 joint selling authorisation from the ACCC, the NWSJV claimed that authorisation was necessary to underpin a doubling of the capacity of the domestic gas processing plant from 550 TJ/d to 1100 TJ/d through the construction of an additional domestic gas processing train.
103. This commitment was never met and the promised expansion in domestic gas supply never took place.
104. In contrast, the NWSJV continues to announce significant extensions to long term LNG contracts, has expanded LNG export capacity via LNG Trains 4 and 5, and has foreshadowed a sixth LNG Train.
105. Given the NWSJV's dominant market position with almost 70% of the market and over 90% of developed reserves, the actions by the NWSJV to withhold supply have had a significant impact on competition supply.
106. The refusal to supply smaller customers effectively forces them to deal with a single monopoly supplier for that segment of the market – the Apache-led joint ventures – or an aggregator.
107. Removing joint selling would therefore encourage one or more of the NWSJV participants to become active in the domestic market - down to small sales - in the same way that Apache has done.
108. This will promote greater competition, including on:
 - prices
 - volumes
 - length of contract
 - take-or-pay provisions
 - reliability of supply
 - peaking provisions,
 - options for renewal; and
 - reserve back-up

109. Any one of the NWSJV parties could also provide delivered service in competition with existing aggregators.
110. In addition, the NWSJV is currently limited to only dealing with gas reserves held within its JV structure. It is resource limited which reduces flexibility to contract and supply.
111. Removing joint selling would allow individual NWSJV participants to draw on reserves outside the JV to back larger and longer term contracts – in the same way that Apache Energy has done with its various JV operations.

3.5 The joint selling arrangement significantly limits the entry of competitive new suppliers

112. The joint selling arrangement significantly limits the entry of *competitive* new suppliers into the market.
113. As discussed in section 2.3 of the submission, the NWSJV and the Apache-led joint ventures together control close to 100% of the domestic gas market and 100% of WA's developed reserves of natural gas, with the NWSJV alone controlling almost 70% of the market and 92% of developed reserves.
114. This market power will be further entrenched by the fact that the majority of prospective new gas developments in Western Australia are controlled by the same NWSJV participants or Apache and its partners. These projects include:
 - Pluto – Woodside 100% (a NWSJV participant)
 - Macedon – BHP Billiton (a NWSJV participant) and Apache
 - Wheatstone – Chevron (a NWSJV participant)
 - Gorgon – Chevron, Shell (NWSJV participants) and Exxon Mobil
 - Reindeer – Apache, Santos
 - Julimar – Apache, Kufpec
115. This therefore provides for a very narrow grouping of existing and prospective suppliers, all of whom have access to detailed knowledge of the commercial terms and timing of all domestic gas sales arrangements.

116. These suppliers also participate in common marketing decisions in existing and new JVs including on price, supply and contract terms.
117. In the absence of effective ring-fencing commitments enforced by the ACCC, the risk of collusion and market exploitation is high.
118. Producers that are participants in the NWSJV are unlikely to undercut pricing arrangements negotiated by the NWSJV. Nor are they likely to support NWSJV pricing decisions that would in any way undercut prices in their non-NWSJV projects.
119. Given the participation of existing NWSJV participants in prospective JVs involving Apache, and their access to commercial information on domestic gas sales contracts, the effect on competition is to create a single monopoly selling block for domestic gas.

3.6 The joint selling arrangement constrains the development of a more mature and competitive market

120. The joint selling arrangement constrains the development of a more mature and competitive market.
121. In its 1998 Determination on the NWJSV joint selling authorisation, the ACCC identified features as indicating a more mature market. These include the development of a short term trading or spot market, the entry of brokers and the development of financial markets.
122. The DomGas Alliance believes these elements can only arise in a competitive and dynamic market characterised by a multiplicity of sellers and individual contracting arrangements.
123. The NWSJV joint selling arrangement constrains this by dramatically reducing the number of independent sellers in the market and by creating a significant market concentration.
124. 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.”²⁷

125. The New Zealand Commerce Commission adopted a similar view in its authorisation determination on joint selling for the Pohokura gas field. 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 was dependent on a number of sellers in the market, including a number selling from each field.²⁸

3.7 The joint selling arrangement provides suppliers significant bargaining and market power through access to information.

126. The joint selling arrangement provides suppliers significant bargaining and market power vis-à-vis consumers through access to sensitive commercial information.
127. Gas producers through the NWSJV and Apache-led JVs have access to detailed knowledge of the commercial terms and timing of all domestic gas sales arrangements including on:
- price;
 - supply volumes;
 - contract term and expiry;
 - the identity and supply demand of potential customers seeking gas.
128. The sharing of what would otherwise be confidential commercial and market information confers on producers significant advantage in negotiations with potential consumers. This can only serve to limit competition in the market place between producers.
129. In contrast, potential consumers have no access to commercial information on other gas contract negotiations, including what other consumers have paid in recent contracts. This severely limits their ability to bargain on a level playing field with producers.

²⁷ 2002 COAG Energy Market Review Report (“the Parer Report”), pp.199-200.

²⁸ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.392.

3.8 The joint selling arrangement effectively provides for a minimum floor price for domestic gas

130. The joint selling arrangement effectively provides for a minimum floor price for domestic gas. Gas producers through the NWSJV and Apache-led JVs have access to detailed knowledge of the commercial terms and timing of all domestic gas sales arrangements. These same producers control the majority of prospective new gas developments in Western Australia.
131. In the absence of effective ring-fencing commitments enforced by the ACCC, the risk of collusion and market exploitation is high. Producers that are participants in the NWSJV are unlikely to undercut pricing arrangements negotiated by the NWSJV.
132. Nor are they likely to support NWSJV pricing decisions that would in any way undercut prices in their non-NWSJV projects.
133. The NWSJV joint selling arrangement, the significant concentration in market power, and producers' access to common information, therefore operates to establish a minimum (and rising) floor price for domestic gas. This is the price established by the NWSJV in its supply contracts.

3.9 The joint selling arrangement encourages the abuse of market power

134. The NWSJV joint selling arrangement and the concentration in supply encourage the abuse of market power.
135. This is evident in the public threats made by the NWSJV operator, Woodside (Managing Director and CEO, Don Voelte), to pass on the removal of the Federal Government condensate excise exemption in the form of higher gas prices to domestic consumers.²⁹ The *West Australian* has for example 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.”³⁰

²⁹ ‘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.

³⁰ *The West Australian*, ‘Woodside warns on forcing Shelf split’, 17 September 2008.

136. There is no justification for domestic gas consumers being forced to pay higher gas prices as a result of the Federal condensate excise:
- the condensate excise exemption was a historical concession that was provided to the North West Shelf Project to help support its initial development;
 - since then, the North West Shelf Project has grown to become a highly profitable, world-class producer comprising some of the world's largest oil and gas companies;
 - the profitability of the North West Shelf Project was underlined by Woodside's announcement of a \$1.016 billion net profit after tax for the first half of 2008, up 67% from the previous year;³¹ and
 - the excise is to be applied on the production of condensate, not natural gas.
137. It is relevant that NWSJV has not threatened to pass on the cost of the removal of the condensate excise exemption to overseas LNG customers, or local or overseas condensate customers, but only local gas consumers.
138. This clearly demonstrates the lack of competition in the domestic gas market, and the significant concentration in supply as a result of the joint selling arrangement.

3.10 The joint selling arrangement fixes, controls or maintains prices

139. The joint selling arrangement has the purpose or likely effect of fixing, controlling or maintaining prices for gas supplied by the individual NWSJV participants.
140. But for the arrangement, each of the NWSJV participants would be offering gas for sale at a price individually determined by that participant.
141. They would also be doing so in competition with each other given:
- Each of the NWSJV participants has the right and obligation to own, take and separately dispose of its production entitlement to domestic gas;

³¹ Woodside ASX Announcement; 'Record 1H Net Profit of A\$1.016 Billion Supports LNG Growth', 27 August 2008.

- A number of NWSJV participants already supply gas to the domestic market from other projects;
- A number of NWSJV participants continue to sell gas separately in other jurisdictions, where they have been required to do so by European competition authorities; and
- The WA domestic gas market presents significant commercial opportunities for suppliers.

3.11 The fact that authorisations from the Trade Practices Act were sought and provided raises serious concerns

142. The fact that authorisations were seen to be necessary by the NWSJV participants for their joint selling activities in 1977 and 1998 clearly reinforces serious concerns about the anti-competitive nature of the arrangement.

143. This is further supported by the ACCC's comments in granting the authorisation in 1998 that:

"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."

"The Commission believes that separate marketing of gas by joint venture producers, wherever feasible, will be more competitive than coordinated marketing and likely to provide a wider variety of supplier options that would better meet market demands."³²

³² ACCC, Determination on the Application for Authorisation – North West Shelf Project, 29 July 1998, pp.32 and 47.

4. PRACTICE IN OTHER JURISDICTIONS

4.1 Overview

144. Joint selling arrangements for domestic gas as practiced by the NWSJV have been found to be anti-competitive in other major economies, including the European Union and New Zealand.
145. Two of the current NWSJV participants – Shell and Chevron – were the subject of the European Commission action in Denmark, with Shell the subject of action in both Denmark and Norway.
146. Shell and Chevron therefore continue in the WA domestic gas market to engage in the same anti-competitive conduct that has been prohibited since 2002 by the European Commission in relation to their operations in Europe.
147. The New Zealand Commerce Commission has also revoked authorisation for Shell to sell jointly in New Zealand in relation to the Pohokura gas field.

4.2 The European Union

148. In 2001, the European Commission issued a formal warning to Norwegian gas producers about the joint sale of gas by the Gas Negotiation Committee (GFU).
149. The GFU case concerned joint sales of natural gas through a single seller, the GFU, from Norway to the EU. 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.”³³

³³ 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&aged=0&language=EN&guiLanguage=en>

150. The case was successfully settled in 2002 with Norwegian gas producers confirming they will market their gas individually.³⁴ These included six groups 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.
151. In 2003, the Danish and European Commission competition authorities also successfully settled an antitrust investigation in Denmark involving the Danish gas supplier DONG and the country's main gas producers Shell, A.P Moller and Chevron Texaco.
152. The EC 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, A.P Moller and ChevronTexaco.
153. As a result of the settlement, the gas producers committed to market their production individually.³⁵ 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.
154. In accepting this commitment, the European Commission noted that a significant number of customers inside and outside Denmark have actively looked at alternative sources of supply in the past and continued to do so at the time of the investigation.
155. The DomGas Alliance believes this commitment was in recognition that the effect of joint selling in Denmark was to limit gas supply and competition. The NWSJV joint selling arrangement has similarly operated to limit supply and competition, for example by:
- focusing on a small number of large customers;
 - appearing to have taken a deliberate view not to supply customers of less than around 15 TJ/d demand; and

³⁴ European Commission, 'Commission successfully settles GFU case with Norwegian gas producers', IP/02/1084, Brussels, 17 July 2002; available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/1084&format=HTML&aged=0&language=EN&guiLanguage=en>

³⁵ 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&aged=0&language=EN&guiLanguage=en>

- as far as the Alliance is aware, by not accepting any new customers since the BHP DRI contract in 1995.
156. The removal of joint selling arrangements in Norway for example has promoted competition and supply for local consumers. The DomGas Alliance engaged international energy consulting firm Wood McKenzie to assess the potential benefits of common-use mid-stream gas gathering and processing infrastructure to gas suppliers and end users.
 157. The report examined the Norwegian market and concluded the gas supply market to be highly competitive with individual joint venture partners competing with others to market gas to consumers.³⁶ The requirement for joint venture partners to market independently has therefore resulted in a highly competitive market.
 158. It is relevant that two of the current NWSJV participants – Shell and Chevron – were the subject of the EC action in Denmark, with Shell the subject of EC action in both Denmark and Norway.
 159. Shell and Chevron therefore continue in the WA domestic gas market to engage in the same anti-competitive conduct that has been prohibited since 2002 by the European Commission in relation to their operations in Europe.

4.3 New Zealand

160. New Zealand competition authorities have also found joint selling for domestic gas to be anti-competitive in revoking an authorisation granted to a joint venture involving Shell.
161. In 2003, the New Zealand Commerce Commission granted authorisation to Shell, Todd and OMV which were joint venture partners to the Pohokura field to jointly sell gas from the field.
162. 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.³⁷
163. The Commission concluded the owners of the Pohokura field would not face an effective competitive constraint from other gas producers before the end of the decade because of:

³⁶ Wood McKenzie, *WA Midstream Gathering and Processing Review with Global Analogues*, March 2008, p.7 and 15.

³⁷ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.340.

- 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.³⁸
164. The Commission found that joint selling would have a significant impact on competition and “substantially lessen competition in a market”³⁹:
- 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.⁴⁰
 - 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 relative bargaining strength of buyers and sellers in favour of the seller and because it would facilitate price discrimination.⁴¹
 - The range of terms and conditions on offer would be more limited with joint selling.⁴²
165. 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 was dependent on a number of sellers in the market, including a number selling from each field.⁴³
166. 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.⁴⁴

³⁸ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.358.

³⁹ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.390.

⁴⁰ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.372.

⁴¹ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.377.

⁴² New Zealand Commerce Commission Determination, Decision 505, September 2003, para.383.

⁴³ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.392.

⁴⁴ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.390-391.

167. 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.
168. In June 2006 however, the Commission revoked the joint selling authorisation. This was because each of the JV participants were unable to agree to joint selling arrangements and instead separately sold their share of production with no delays in production.⁴⁵

⁴⁵ New Zealand Commerce Commission Determination, Decision 581, June 2006.

5. THERE IS NO JUSTIFICATION FOR MAINTAINING JOINT SELLING

5.1 Overview

169. The Western Australian domestic gas market has undergone significant transformation from one dominated by a vertically-integrated monopoly buyer to one of 25-30 individual customers.
170. Joint selling by the NWSJV participants is no longer required to balance market power of consumers or to support investment and development in the North West Shelf project.
171. Producers in other joint venture gas developments are already selling separately into the WA domestic market.
172. With the growth of Woodside and the North West Shelf Project into a world class, highly profitable producer, there is no longer any need for joint selling to underpin the initial development of the NWSJV.
173. NWSJV participants, including Shell and Chevron, have been required to independently market gas produced under a JV project in other jurisdictions.
174. There is no basis to claims by producers that:
 - The Western Australian domestic market is not sufficiently mature to make separate selling feasible;
 - Removing joint selling will lead to an adverse outcome for consumers by discouraging gas field development and domestic supply by the NWSJV participants; or that
 - The current domestic gas supply shortage and price escalation was due to historical long term contracts.

5.2 The domestic market has undergone significant transformation

175. As discussed section 2.2 of the submission above, the domestic market has undergone significant transformation which has significantly increased the level of competition in the downstream market.
176. 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 25-30 individual customers.

177. Joint selling and price fixing by the NWSJV participants is no longer required to balance market power of consumers or to support investment and development in the North West Shelf project.

5.3 Claims by producers that separate selling is not feasible, or that it will discourage development and supply, are unfounded

178. The NWSJV participants are expected to claim that joint selling is not feasible or practical in what they would describe as the current “immature” Western Australian domestic market.

179. Producers have claimed that joint selling is necessary to underpin ongoing investment and development of gas fields, and that removing joint selling will lead to an adverse outcome for consumers by discouraging domestic gas development and supply.

180. *The West Australian* for example reports public comments by Woodside:

“Mr Voelte said yesterday Woodside and its partners had been effectively selling gas into the domestic market at almost no profit for many years.

He said there were far bigger profits to be made by turning the gas into LNG for export and with the project having already met its obligations for the supply of domestic gas, the international joint venture companies such as Shell and Chevron might give up selling into the WA market.”

181. Any concerns that the DomGas Alliance members might have on the possible adverse consequences of removing joint selling are more than outweighed by the benefits which would accrue from the creation of a truly competitive upstream market.

182. The claims by producers are not supported on the evidence:

- Separate selling has not in practice operated as a disincentive to supply;
- The WA domestic gas market has been and continues to be an attractive market for suppliers; and
- Each of the NWSJV participants has the right and obligation to own, take and separately dispose of domestic gas production, and have the commercial incentive to supply gas domestically.

5.3.1 *Separate selling has not in practice operated as a disincentive to supply*

183. The DomGas Alliance questions the extent to which separate selling represents an administrative challenge or disincentive to supply.
184. Participants in other JV gas developments in WA are selling separately into the WA domestic market, including NWSJV participant Woodside. These include:
 - Woodside is independently marketing gas from the Browse and Pluto fields; and
 - the DomGas Alliance understands that separate marketing of domestic gas is already taking place from the Apache-led John Brooks development, and possibly from other Apache-led JVs.
185. Further, the requirement by the European Commission that Shell and Chevron cease joint selling did not appear to have prevented these companies from continuing to participate in the Danish and Norwegian gas markets.
186. Separate selling also took place in New Zealand in relation to the Pohokura field, which includes Shell as a joint venturer.
187. It is relevant that the New Zealand Commerce Commission rejected claims that preventing joint selling would have an impact on the level of new gas exploration in New Zealand. The Commission also considered that preventing joint selling was unlikely to make an otherwise viable field non-viable.⁴⁶

5.3.2 *Each of the NWSJV participants has the right and obligation to own, take and separately dispose of domestic gas production, and will have the commercial incentive to supply domestically*

188. As part of the North West Shelf Project, each of the NWSJV participants has the right and obligation to own, take and separately dispose of its production entitlement.⁴⁷
189. This includes domestic gas produced by the Domgas Venture and the Incremental Joint Venture.

⁴⁶ New Zealand Commerce Commission Determination, Decision 505, September 2003, para.390-391.

⁴⁷ ACCC 1998 Authorisation Determination, *supra.*, p.8.

190. Given gas produced by the NWSJV has commercial value, individual NWSJV participants will continue to have a commercial incentive to supply their share of production to the domestic market.
191. Removal of the joint selling arrangement will not remove this incentive to supply to the domestic market.

5.3.3 *The WA domestic gas market has been and continues to be an attractive market for suppliers*

192. Contrary to Woodside's assertions, the WA domestic gas market has been, and continues to be a profitable market.
193. The original North West Shelf domestic gas contract was not a "low priced" contract. Two-thirds of the gas was priced against high-priced Collie coal, with one-third priced against imported oil.
194. This high pricing structure continued until the contract was disaggregated in 1995, when new supply competition from Apache helped put downward pressure on prices.
195. Domestic customers have been instrumental in underpinning expansion of the North West Shelf project, and the subsequent LNG export joint venture. The domestic customers provided stable, long term revenue, at low sovereign risk, and at a highly attractive price.
196. The domestic market continues to provide significant opportunities for producers:
 - There continues to be a serious shortage of gas which has led to a very tight market and escalating gas prices;
 - Demand for gas will continue to grow as shown by the Economics Consulting Services Report; and
 - The domestic market continues to offer the advantages of low sovereign risk, no currency risk, geographic proximity without the need for vast shipping distances to China or Japan; and access to long term contracts.
197. The DomGas Alliance also rejects the notion of the domestic market being a "low price" market.
198. Local customers would welcome the opportunity to access the same price and terms as the recent LNG contract with China which was negotiated by Woodside.

199. The Alliance understands the long term contract pegs prices at the equivalent of \$US 25 a barrel for oil – which is less than a quarter of the current world oil price.
200. This compares to the high prices that WA domestic customers have been required to pay in recent contracts.
201. There are also indications that some producers are seeking more than “LNG-netback” prices, i.e. a premium return from domestic customers well in excess of that which could be derived from LNG exports.

5.4 Any justification for joint selling has diminished over the maturity of the North West Shelf project

202. Any justification for joint selling or price fixing has diminished over the life cycle of the NWSJV project. In the initial stages of the North West Shelf development, Woodside had no operating experience or revenues, but was required to underwrite 50% of the initial domestic gas investment.
203. This led to close financial scrutiny and extremely stringent funding constraints on the part of Woodside’s banking consortium. The joint selling arrangements were put in place in that context.
204. This imperative no longer exists. The North West Shelf Project has grown to become a highly profitable, world-class producer comprising some of the world’s largest oil and gas companies.
205. Woodside has also grown into one of Australia’s largest companies with a market capitalisation of \$35 billion, and a reported first half 2008 net profit of \$1.016 billion.⁴⁸

5.5 The West Australian market can support joint selling

206. The NWSJV participants are expected to draw on the findings by the ACCC in its 1998 Determination on the NWSJV’s application for joint selling authorisation.
207. The ACCC found that separate marketing was not at that time feasible in the WA market. The ACCC identified a number of market features which it considered needed to develop before separate marketing will become viable in WA:
 - a significant increase in the number of customers

⁴⁸ Woodside ASX Announcement; ‘Record 1H Net Profit of A\$1.016 Billion Supports LNG Growth’, 27 August 2008.

- the entry of new competitive suppliers
 - additional transportation options
 - storage
 - the entry of brokers/aggregators
 - the creation of gas-related financial markets
 - the development of substantial short term and spot markets
208. Whether separate marketing is “practicable” or whether there are public benefits in permitting the NWSJV participants to sell jointly, is not relevant to whether the arrangement substantially lessens competition.
209. These considerations instead go towards an application for authorisation under s 88(1) of the Trade Practices Act to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition.
210. Given no authorisation currently exists for the NWSJV joint selling arrangement, the NWSJV participants cannot rely on the conclusions of an authorisation granted 10 years ago and no longer in force.
211. In any event, the joint selling arrangement in fact constrains the development of some of the market features identified by the Commission in its 1998 Determination as indicating a more mature market.
212. These features can only arise in a competitive and dynamic market characterised by a multiplicity of sellers and individual contracting arrangements.
213. The NWSJV joint selling arrangement constrains this by dramatically reducing the number of independent sellers in the market and by creating a significant market concentration.
214. As previously discussed by the submission, both the 2002 Parer Report and the New Zealand Commerce Commission rejected the notion that separate selling could only arise after a mature market has evolved.
215. The Parer Report and the New Zealand Commerce Commission considered that the continuation of joint selling could instead operate to prevent the development of a competitive market in the future.⁴⁹

⁴⁹ 2002 COAG Energy Market Review Report (“the Parer Report”), pp.199-200; New Zealand Commerce Commission Determination, Decision 505, September 2003, para.392.

216. Notwithstanding the above, the DomGas Alliance's submission will discuss the market features identified in the ACCC's 1998 Determination for completeness.
217. It will be shown the WA gas market has undergone significant developments since the ACCC last examined the market and made its Determination in 1998. These further support the conclusion that separate marketing is feasible and practical in the WA domestic gas market.

5.5.1 The entry of brokers / aggregators; creation of additional transport options; creation of gas-related financial markets; development of substantial short term and spot markets

218. As discussed in section 2.2 of the submission, since the 1990s, Western Australia has undertaken an extensive reform process to improve competition in the downstream gas supply market.
219. Downstream reforms commenced in 1995 with the disaggregation of the original SECWA contract and gathered momentum with the subsequent deregulation of the gas and electricity markets.
220. Aggregators such as Alinta and Synergy now supply a large number of customers ranging from large industrial customers, light industrial and commercial customers, as well as households.
221. Many of these customers can purchase directly from a producer and arrange their own transmission but for commercial reasons prefer to purchase a delivered service through an aggregator.
222. Perth Energy is also building a presence – in addition to Alinta and Synergy - in the domestic market.
223. Trades in gas transmission capacity and physical gas are regularly being conducted on a short and long term basis. 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. There is a high level of sophistication in arrangements. The Dampier to Bunbury Natural Gas Pipeline (DBNGP) posts spot capacity when this is available, which has been useful for the current Apache outage.
224. Since 2007 – with the completion of the DBNGP / Goldfields Gas Pipeline interconnect - there has been complete interconnectivity between pipelines in Western Australia. Customers have the ability either physically or with swaps to trade gas to most of the market. Gas from

North West Shelf can therefore be traded - either physically or commercially - in any part of the system.

225. The market reforms that have taken place in the downstream market have not been mirrored in the supply market, which retains the same high level of concentration which existed in 1995. This has created a significant disparity between the market power of buyers versus sellers.
226. Furthermore as pointed out by the Parer Review and the New Zealand Commerce Commission, the continuation of joint selling constrains the development of a more competitive market, including many of the features identified by the ACCC in its 1998 Determination.

5.5.2 The entry of new competitive suppliers

227. In its 1998 Determination, the ACCC identified the entry of new competitive suppliers as one of the features of a more mature market that could support joint selling.
228. The DomGas Alliance considers the joint selling arrangement in fact significantly limits the entry of *competitive* new suppliers into the market.
229. The NWSJV and the Apache-led joint ventures together control close to 100% of the domestic gas market and 100% of WA's developed reserves of natural gas, with the NWSJV alone controlling almost 70% of the market and 92% of developed reserves.
230. This market power will be further entrenched by the fact that the majority of prospective new gas developments in Western Australia are controlled by the same NWSJV participants or Apache and its partners.
231. This provides for a very narrow grouping of existing and prospective suppliers, all of whom have access to detailed knowledge of the commercial terms and timing of all domestic gas sales arrangements.
232. These suppliers also participate in common marketing decisions in existing and new JVs including on price, supply and contract terms.
233. In the absence of effective ring-fencing commitments enforced by the ACCC, the risk of collusion and market exploitation is high.
234. Producers that are participants in the NWSJV are unlikely to undercut pricing arrangements negotiated by the NWSJV. Nor are they likely to support NWSJV pricing decisions that would in any way undercut prices in their non-NWSJV projects.

- 235. Given the participation of existing NWSJV participants in prospective JVs involving Apache, and their access to commercial information on domestic gas sales contracts, the effect on competition is substantial.
- 236. Retaining joint selling entrenches the situation of a market controlled by two closely related selling blocks, instead of a potential 8-10 individually competing sellers.

5.6 NWSJV participants have been required to sell separately in other countries

- 237. As previously discussed, NWSJV participants have been required in other jurisdictions to independently market gas produced under a JV project. This demonstrates that independent marketing by participants in JV projects is practical and feasible.
- 238. The European Commission required Shell and Chevron to separately market gas produced by a JV in Denmark; and Shell to separately market gas produced by a JV in Norway.
- 239. The New Zealand Commerce Commission has also revoked authorisation for Shell to sell jointly to the New Zealand market in relation to the Pohokura joint venture gas field.
- 240. It should be questioned how these same companies could claim independent selling is not feasible for the NWSJV when they have been required to do so by competition authorities in other jurisdictions for a number of years.

5.7 Claims the current domestic gas supply shortage and price escalation are due to historical long term contracts are unsupported

- 241. Finally, there is no basis to claims by oil and gas companies that current domestic gas supply shortages and price escalation was due in part to historical long term contracts coming to an end, or that long term contracts have suppressed supply or discouraged domestic gas development. Such claims are not supported on the evidence.
- 242. There has in fact been a stable and continuous contracting of supply to the domestic market prior to 2007, on competitive and long term contracts.
- 243. A summary of past domestic gas supply contracts is provided (**Attachment**). This provides a selection of information available in the public arena and does not in any way cover the full extent of transactions that have taken place.

244. LNG exports from the North West Shelf have also been characterised by long term contracts. In 2003 for example, the North West Shelf JV entered into a 25 year agreement to supply 3.3 million tonnes of LNG a year to a Chinese customer.
245. Long term LNG contracts have not discouraged the NWSJV from significantly expanding production from the original three LNG processing trains to five LNG trains, with a sixth train foreshadowed by Woodside.
246. Long term contracts for domestic gas are necessary to underpin capital intensive developments such as offshore developments, resource and minerals processing developments, new power stations, and gas transmission facilities. Recently, suppliers are shortening terms on a “take it or leave it” basis which is having an impact on consumers seeking long-term certainty.
247. Removing joint selling will increase the number of sellers from one to six – which will promote greater competition and diversity in contract terms.

6. POLICY CONSIDERATIONS

6.1 Overview

248. The DomGas Alliance's submission will address a number of broader policy issues relating to the NWSJV joint selling arrangement. These are:

- Joint selling is inconsistent with the objects and spirit of the Trade Practices Act;
- The NWSJV joint selling arrangement is impacting consumers through supply shortages and escalating gas and electricity prices;
- Not removing joint selling would have significant consequences for future competition in the market;
- Not removing joint selling would send a strong message to producers sanctioning cartel selling as a matter of practice;
- The ACCC has taken a strong stance against gas market concentration in the Eastern States;
- Concerns about the possible consequences of removing joint selling are outweighed by the benefits of a competitive market; and
- It is unreasonable to expect consumers to act individually to ensure the NWSJV participants comply with the Trade Practices Act.

6.2 Joint selling is inconsistent with the object and spirit of the Trade Practices Act

249. The objects of the Trade Practices Act include: "to enforce the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

250. As ACCC Chairman Graeme Samuel recently emphasised:

"Competition is a very useful means to an end. What we know from decades of experience both domestically and internationally is that pursuing and promoting vigorous competition delivers the benefits we wish to provide to the public. It encourages and rewards innovation, leads to lower prices, improves choices and services that consumers want. It does

this partly by weeding inefficiency out of our economy, allowing the best performers to rise to the top.”⁵⁰

251. In another forum, Mr Samuel said:

“One thing that does not change however, is the grounding philosophy of the Australian Competition and Consumer Commission (the ACCC) - to promote vigorous and effective competition for the benefit of all Australians.”⁵¹

252. Joint selling is inconsistent with the object and spirit of the Trade Practices Act by substantially lessening competition, entrenching market concentration, and shifting bargaining power unfairly to the hands of gas producers.

6.3 The joint selling arrangement is impacting consumers through supply shortages and rising gas and electricity prices

253. The joint selling arrangement is having a significant impact on consumers through rising gas prices. This is impacting industrial users, as well as small businesses and households.

254. As the submission has discussed:

- members of the DomGas Alliance continue to experience difficulties in securing long term contract for substantial quantities of gas;
- a number of potential customers have been forced to switch from gas to coal, despite gas being the preferred fuel source;
- the price of domestic gas has tripled compared to historical prices;
- on a delivered basis, WA gas prices are more than triple that of 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 historical prices; and
- Dampier Bunbury Pipeline was required in 2006 to significantly downsize an expansion of the Dampier to Bunbury Natural Gas

⁵⁰ Graeme Samuel, *Promoting competition or protecting consumers – the role of competition policy and its implications for Australian businesses*, 12 October 2007, p2.

⁵¹ Graeme Samuel, *Regulating media and broadcasting networks in a changing media environment*, 5 March 2007 p1.

Pipeline as a number of prospective projects were unable to secure gas supplies;

255. Given natural gas fuels 60% of the State's electricity generation, escalating gas prices have directly translated to higher electricity prices for businesses and households.
256. In April 2008, the State Government announced domestic electricity charges will rise by 10 per cent in 2009-10 with further annual increases to be phased in over a six to eight-year period.⁵² The increase in electricity charges for consumers was the result of significant increases in the cost of supplying electricity, particularly domestic gas prices.
257. Consumers will continue to face sharply rising gas and electricity prices unless the joint selling arrangement is removed.

6.4 The consequences of not removing joint selling are significant

258. The DomGas Alliance urges the Committee to consider the consequences of not removing joint selling. These consequences include:
 - Preserving the existing anti-competitive duopoly situation whereby two suppliers control almost 100% of the domestic market;
 - Continuing the existing restrictive supply practices by NWSJV, by which NWSJV appear to have deliberately taken a view not to supply smaller customers of under 15 TJ/d demand; and
 - Preventing any future competition arising from new development projects given the bulk of these are controlled by parties to the NWSJV, Apache Energy, or Apache and NWSJV parties in joint venture.
259. Retaining it will significantly restrict new competition in the future – from the existing NWSJV and from new gas developments.

6.5 Not removing joint selling would be seen to be a sanctioning of cartel selling as a matter of practice

260. Not removing joint selling would be seen to be a sanctioning of cartel selling as a matter of practice. This is particularly given the current arrangement involves some of the world's largest oil and gas companies, controlling 70% of the domestic market.

⁵² Premier of Western Australia, "State Government to phase in electricity price increases", Friday 4 April 2008, <http://www.mediastatements.wa.gov.au/Pages/Results.aspx?ItemId=129961>

261. This will have significant implications for the competition objectives of the Trade Practices Act and entrench cartel selling as an accepted practice in gas and other developments.
262. The anti-competitive effect of joint selling has been demonstrated in other developments. The Alliance understands that in the recent Reindeer tender, the two joint venturers Apache and Santos conducted a joint tender which included a formula that priced gas against international TAPIS oil prices. This took place in a market experiencing serious gas shortages and was aimed at achieving prices upwards of \$14 per GJ – which would amount to a 600% increase to historical gas prices.
263. Permitting the NWSJV joint selling arrangement will also discourage independent selling by gas producers. As shown previously, a number of producers in other JVs are selling independently to consumers.
264. Requiring participants in future gas projects to sell independently will clearly promote competition. These projects include, for example, Macedon (Apache and the NWSJV party BHP as JV partners) and Julimar (Apache and Kufpec as JV partners).

6.6 The ACCC has taken a strong stance on market concentration in the Eastern States gas market

265. The ACCC has taken a strong stance on market concentration in the Eastern States, including by opposing arrangements that would undermine competition in the Queensland gas market.
266. In 2007, the ACCC acted to oppose Santos' takeover for Queensland Gas Company on the grounds it would inhibit competition among domestic suppliers.
267. More recently, the ACCC has expressed concerns for BG Group's proposed takeover of Origin Energy. The DomGas Alliance understands that if successful, the takeover will concentrate most of Queensland's coal seam methane reserves in two aligned operators.
268. The current WA gas market is characterised by an even higher level of market concentration than the Queensland market, with the NWSJV controlling 70% of the market and 92% of developed reserves.

6.7 Concerns about the possible consequences of removing joint selling are outweighed by the benefits of a competitive market

269. Any concerns that the Alliance members might have about possible adverse consequences on consumers from removing joint selling are

more than outweighed by the benefits which would accrue from the creation of a truly competitive upstream market.

- 270. The DomGas Alliance members represent the bulk of consumer demand in Western Australia.
- 271. The Alliance also reflects the views of a broad range consumers – including large industrial customers, aggregators (which supply industry, small businesses and households), to smaller energy and resource companies.
- 272. The Alliance urges the Committee to be guided by the strong views expressed by consumers on the importance of facilitating competition, rather than that promoted by the NWSJV sellers.

6.8 It is unreasonable to expect consumers to act individually

- 273. Finally, given the significant market concentration and market power enjoyed by the NWSJV suppliers, it is unreasonable to expect consumers to act individually to ensure suppliers comply with the Trade Practices Act.
- 274. Notwithstanding the apparent buying power of some of the Alliance members, there is a very real fear of retribution on the part of the large oil producers given the critical dependence of customers on ongoing gas supply. This retribution might include producers continuing to withhold supply.
- 275. The actions of the NWSJV participants in joint selling have also had a significant impact on small businesses and households, through rising gas and electricity prices. It is unreasonable to expect individuals to take civil action against some of the world's largest oil and gas companies.
- 276. The ACCC therefore has a critical role to play as the regulator responsible for administering and enforcing the Trade Practices Act on behalf of all businesses and households.

7. CONCLUSION

277. The NWSJV joint selling arrangement substantially lessens competition in the Western Australian domestic gas market.
278. The arrangement results in a significant concentration in market power and has shifted bargaining power unfairly to the hands of gas producers.
279. It has operated to limit supply, and has impacted domestic gas prices and the ability of consumers to secure competitive terms.
280. Removing the joint selling arrangement will promote competition and supply by forcing the individual NWSJV participants to compete in the market place.