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Commerce Commission  
PO Box 2351  
WELLINGTON

**SUBMISSIONS ON COMMERCE COMMISSION'S DRAFT DETERMINATION  
RELATING TO POHOKURA JOINT SALES AUTHORISATION APPLICATION**

**Introduction**

- 1 In the course of considering the application by the Pohokura joint venture parties, OMV New Zealand Limited, Shell Exploration New Zealand Limited and Todd (Petroleum Mining Company) Limited (together "the Applicant") for authorisation of proposed joint selling arrangements in respect of the Pohokura gas field, the Commission has published a draft determination dated 16 May 2003 (the "Draft Determination"). In the Draft Determination (at paragraph 32) the Commission has sought submissions from interested parties in respect of the preliminary conclusions reached.
- 2 Unless otherwise stated, any capitalised terms shall have the same meaning as that set out in the Draft Determination.
- 3 The Applicant intends filing a detailed submission setting out the joint venture parties' collective view regarding matters of mutual concern. Shell

- contributed to the preparation of, and wholly endorses, the Applicant's submission. These further submissions are intended to supplement, and in no way supplant, the Applicant's submission.
- 4 That said, however, some of the Commission's preliminary findings in the draft determination have potential implications for our client, Shell, which clearly go beyond simply Shell's involvement in the Pohokura joint venture. In particular:
- 4.1 The nature of the Shell/Todd relationship;
  - 4.2 The consequences for other joint ventures where Shell is a major or the majority partner;
  - 4.3 Shell's ongoing relationship with the Commission (and in particular, the perception that Shell may have wilfully misled the Commission during its investigation of Shell's applications for clearance to acquire Fletcher Challenge Energy); and
  - 4.4 Shell's position as the most substantial player in the up-stream gas market.
- 5 In all of those matters, the interests of Shell may diverge – currently or in the future – from those of its joint venture partners in Pohokura. Thus, the Applicant's submission on behalf of *all* Pohokura joint venture partners cannot be expected to canvas those issues adequately from Shell's perspective.
- 6 Further, Shell's comments in relation to some of those matters of necessity must come from the particular perspective of Shell's own involvement and conduct. For example, Shell's view of the intended and/or achieved effect of the replacement last year of the Shell/Todd 1955 Joint Venture with the AMIA of necessity will differ from Todd's view of that same exercise. That outcome was achieved only after prolonged negotiation between those two parties – and to some extent, represents a compromise from each party's initial position.
- 7 The writers acted as counsel for Shell throughout both those previous applications for clearance and the replacement of the 1955 Joint Venture. Accordingly, we have been instructed now to prepare these submissions for Shell based on that experience, on the matters described below.

**Outline of our submission**

- 8 These submissions focus on the following matters:
- 8.1 statements in the draft determination relating to the impact in relevant markets of the Shell/Todd commercial relationship;
  - 8.2 statements made in the Draft Determination in relation to perceived inconsistencies between statements made by the Applicants in the Application and statements made in 2000 by Shell in the context of its applications for clearance of the FCE acquisition; and
  - 8.3 the Australian context cited by the Commission has been indicative of the practicality of joint sales in the New Zealand context.

9 We consider each of these in turn below.

**The Shell/Todd relationship**

10 At the time the Commission was considering Shell's applications for clearance of the FCE acquisition, considerable efforts were made to demonstrate to the Commission that Shell and Todd are independent from each other and operate effectively as competitors at all relevant levels in the market. Despite this, in Decisions 408 and 411, the Commission effectively "discounted" the competitive constraint exerted on Shell by Todd. For example, in Decision 411 it was found (at paragraph 112) that:

*the 1955 JV does have an impact on the intensity of the competition between Shell and Todd.*

11 Further, it was found (at paragraphs 114 and 115) that:

*To some extent, the incentive on Todd and Shell to maintain a healthy relationship with each other also applies to partners in most joint ventures. Each partner in a joint venture may avoid actions against other partners if they could put the success of the joint venture at risk. **However it is the scope and scale of the relationships between Shell and Todd which makes it unusual.** The mutual dependence on each other in these circumstances, particularly Todd on Shell, may mean that Todd is less of a competitive force on Shell than would otherwise be the case.*

*The Commission considers that Todd may place some competitive constraint on Shell, but in its analysis it has not relied on it to be a fully effective competitor post-acquisition.*

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## **Perceived inconsistencies**

- 24 Shell's letter of 30 March 2003, in response to your letter of 18 March 2003, addresses various specific questions regarding what the Commission view as an inconsistency of approach taken in the context of the FCE acquisition clearance application as compared with that taken in the Application.
- 25 In that 30 March letter, Shell clarified that, during the FCE acquisition clearance application, its position was that:
- 25.1 Joint sales were the mechanism most likely to be used for marketing Pohokura gas;
  - 25.2 "Separate sales" were contemplated only "at the margin" in the context of that portion of gas not jointly committed to a "cornerstone" purchaser necessary to "underwrite" the development of the Pohokura field; and
  - 25.3 The prospect of separate sales being able to be made, rather than the likelihood that they would be made, was cited as the most significant competitive constraint for the purposes of the Commission's analysis.
- 26 In the 30 March letter Shell also:
- 26.1 Clarified that, in the considerable further time available, further work has since been undertaken to establish the practical difficulties associated with separate selling – overall, it is fair to say that these difficulties were underestimated to a degree at the time of the FCE acquisition clearance application; and
  - 26.2 Noted that certain issues related to terminology have increased the confusion in this area – references to "separate sales" and "equity gas" are often used inappropriately when in fact the arrangements contemplated constitute "joint sales" back to individual JV parties. This was, in fact, the type of arrangement contemplated by Shell at the time of the FCE acquisition clearance application whereby from time to time gas is purchased from the joint venture by an individual co-venturer for on-sale to its customers.
- 27 Nevertheless, in the Draft Determination, the Commission finds (at paragraphs 284 and 285) that:

*... while the Applicants have argued there is no feasible means of marketing gas sourced from the Pohokura field other than by joint marketing, the Commission notes that two years ago Shell and Todd advised the Commission that separate marketing of gas from the Pohokura field was possible, practical and likely to happen.*

*While the Commission has sought and obtained explanations from Shell and Todd with regard to why their views have changed, the Commission has some difficulty in reconciling the current view argued by the Applicants.*

28 In Shell's view, the Commission's comments are not justified. Shell's 30 March letter (summarised at paragraphs 25 and 26 above) effectively reconciles what the Commission had initially perceived to be a fundamental inconsistency. Most particularly, we request on Shell's behalf that the Commission acknowledge the context in which "separate sales" (probably in some hybrid form) were contemplated – i.e. at the margin beyond that gas contractually committed jointly to a cornerstone purchaser.

29 Joint sales were always considered an essential component of the Pohokura gas marketing strategy. This was made plain at the time of the FCE acquisition application. For example, as Shell pointed out at paragraph 9 of its 30 March letter, during the course of the FCE acquisition clearance application Shell expressly acknowledged that joint sales were the preferred and most likely mechanism to be adopted for marketing Pohokura gas:

*"... a probable outcome is that the other JV parties would agree to a single JV sales plan ...*

(para 7 – Letter to Commission from Chapman Tripp dated 11 October 2000)

*... we would expect joint sales to be the preferred form of Pohokura gas sales. Further, gas sales to a single customer, such as Methanex, are likely to be necessary to make early gas production from Pohokura viable. As a result, when all parties have an interest in procuring early development, there are likely to be efficiency gains from a single JV sales agreement ... we concur with Millard's view that joint sales are probable.*

(para 8 – Letter to Commission from Chapman Tripp dated 11 October 2000)

30 By citing the extracts set out in paragraphs 101 of the Draft Determination in isolation from statements such as those set out above, the Draft



Determination is misleading and casts inappropriate aspersions on Shell's dealings in these matters. Accordingly, we request that the comments made at paragraphs 13 and 285 of the Draft Determination be appropriately amended to recognise the relevant circumstances drawn to the Commission's attention by Shell.

### **The Australian context**

- 31 Shell's related companies have first-hand experience in the matters canvassed in the Commission's description of the Australian Experience at paragraphs 163 to 187 of the Draft Determination. We are therefore having detailed discussions with Shell's Australian lawyers on that description, based on their experiences as counsel for Shell in relevant matters. In particular, we are having on-going discussions with Professor Bob Baxt and his colleagues from Allens Arthur Robinson in Melbourne.
- 32 We do not propose to comment specifically on the Australian Experience at this stage, but will be asking Professor Baxt to comment on Shell's behalf on any particular issues that appear to take on significance at the conference.

### **General**

- 33 We will be happy to meet with you and discuss any aspect of these submissions if that would be of assistance.

Yours faithfully

Grant David  
Partner

**APPENDIX 1**