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PUBLIC VERSION

COMMERCE COMMISSION

DRAFT DETERMINATION

Note: This is a draft determination issued for the purpose of advancing the Commission's decisions on this matter. The conclusions reached are preliminary and take into account only the information provided to the Commission to date.

PROPOSED REVOCATION OF AUTHORISATION OF ARRANGEMENTS TO JOINTLY MARKET AND SELL POHOKURA GAS

Draft determination pursuant to the Commerce Act 1986 (the "Act") in the matter of the proposed revocation, by the Commerce Commission, of an authorisation of arrangements whereby OMV New Zealand Limited ("OMV"); Shell Exploration New Zealand Limited and Shell (Petroleum Mining) Company Limited ("Shell"); Todd (Petroleum Mining Company) Limited ("Todd") would jointly market and sell gas produced from the Pohokura natural gas field.

The Commission: P R Rebstock (Chair)
D R Bates QC
S W Stevens

Draft Determination: On 1 September 2003, in its Decision 505, the Commerce Commission determined, pursuant to s 61(1)(a) of the Act, to grant authorisation, subject to a number of conditions, for OMV, Shell, Todd and any person who becomes a party to the Pohokura Joint Venture to enter into arrangements to jointly market and sell gas produced from the Pohokura natural gas field.

The Commission determines, on the basis of the information provided to it to date that, it would be likely to revoke that authorisation pursuant to s 65 of the Act.

Date: 23 February 2005

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EXECUTIVE SUMMARY[1]

Introduction

On 1 September 2003 the Commerce Commission in its Decision 505 authorised an arrangement between Shell, OMV and Todd, the three parties to the Pohokura Joint Venture. The arrangement, authorised under sections 58 and 61(1)(a) of the Commerce Act, allowed the three companies to jointly (rather than individually) market and sell gas produced from the Pohokura field.

In April 2004, the Pohokura Joint Venture advised the Commission that because they had been unable to agree on issues associated with the joint marketing and sale of Pohokura gas, it would be necessary to market and sell the gas separately. They advised this course of action was necessary to avoid placing at risk early production from the field. Subsequently, each of the JV Parties announced that they had separately entered into contracts for the sale of Pohokura gas.

The Commission decided to consider whether or not it should revoke its authorisation of the joint marketing and sale arrangement. Section 65 of the Commerce Act sets out the circumstances in which the Commission may alter, revoke, or substitute authorisations. If the Commission is satisfied that the authorisation was granted on information that was false or misleading in a material particular, or that there has been a material change in circumstances since the authorisation was granted, the Commission may amend or revoke the authorisation or substitute a new authorisation to replace the original.

Commission Processes

On 30 September 2004, by press release, and on 2 October 2004, by public notice, the Commission announced that it was considering revoking Decision 505. The Commission also wrote to OMV, Shell and Todd and other potentially affected parties, advising of its intention to consider revoking Decision 505. In preparing this draft determination, the Commission has sought and given weight to the initial submissions on the matter that it has received.

The Commission's Reasons for Authorising Joint Sale and Marketing

In their application for authorisation of the joint marketing and sale arrangement, dated 20 December 2002, the Pohokura Joint Venture stated at paragraph 16:

> …..the practical problems the Pohokura JV parties would face in separately marketing gas would be difficult if not impossible to overcome. Substantial welfare losses will occur if joint marketing is not authorised. Absent joint marketing, a substantial delay in the development of the field is expected, at a time of scarcity of resource. In addition, separate marketing would result in significant

[1] The Executive Summary is provided for the assistance of readers of the Commission's draft determination. It does not purport to completely encompass all the details in the draft determination. Readers are referred to the body of the draft determination for a complete picture of the issues.

> extra transaction and production costs, and sub-optimal field depletion. This would impact significantly on the value of the field, and that effect would have the potential of significantly reducing exploration incentives in New Zealand.

and

> In attempting to separately sell gas produced jointly, pursuant to contracts negotiated individually, the Pohokura JV parties would face a number of insurmountable problems.

In its submissions to the Commission, at the time of its application for authorisation, the Pohokura Joint Venture adopted what it said was a conservative position that separate marketing would, at best, result in a three year delay in production. The Pohokura Joint Venture attributed the delay to the additional time it would take before the individual parties could achieve the final investment decision from their respective Boards.

Having regard to these and other submissions from interested parties, the Commission concluded in Decision 505 that separate marketing would delay production by one year.

The Commission decided that joint marketing and sale of the gas would result in a lessening of competition in the gas production market, with fewer competitors and higher gas prices. This would lead to detriments from a lessening in allocative, productive and dynamic efficiencies.

On the other hand, the Commission considered that there would be potential benefits that would arise from joint marketing. The majority of those benefits would arise from the earlier development by one year of the Pohokura field (with benefits in the order of $47.8m to $81.9m arising). There were also other more minor benefits.

After weighing the detriments and benefits, the Commission decided that there would be a net benefit to the public from joint marketing under the arrangement and that it would authorise the joint marketing and sale arrangement. However, as it noted in Decision 505, without the early production which joint marketing and sale was considered to bring, the arrangement would not have been authorised, notwithstanding the other benefits accepted by the Commission.

In the event, the Pohokura Joint Venture chose to adopt a separate marketing and sale approach in mid-April 2004, and reached the final investment decision at the end of June 2004. The Commission has concluded from this that the separate marketing and sale approach has not led to a delay in the final investment decision. Any minor delays that have occurred may be attributable to the seven and a half months spent by the Pohokura Joint Venture attempting (and failing) to reach an agreement amongst themselves on joint marketing and sale arrangements.

Jurisdiction to Vary or Revoke the Authorisation Granted in Decision 505

The Commission authorised joint marketing and sale, despite its detrimental impact on competition, principally because it was persuaded (by information now known to

be incorrect) that joint marketing and sale was necessary in order to realise the benefits associated with early gas production from the Pohokura field. The material relevant change is that the nexus between joint marketing and sale and early production no longer exists. Without that the public benefit analysis alters substantially in a way which was discussed by the Commission when it gave the authorisation. The Commission in Decision No.505 indicated that without that nexus, the authorisation would not have been given.

In summary, on the basis of information currently available to the Commission, the Commission considers that either:

- the information provided at the time of the original application for authorisation was false or misleading in a material particular so far as it indicated the final investment decision could only be achieved by 2004 with joint marketing and sale; or

- a material change in circumstances since authorisation has had the effect that joint marketing has not been necessary to achieve the final investment decision by 2004.

Based on the evidence before it, the Commission considers that it has proved not to be the case that joint marketing and sale was essential to bring the final investment date forward, as was indicated in submissions. Hence, the Commission considers that information was either incorrect at the time it was provided or circumstances in the industry have subsequently changed to render that information incorrect. If the former, then the Commission considers the material information regarding the necessity of joint marketing and sale to bring the final investment decision forward was "false or misleading in a material particular." If the latter, then the Commission considers that the change in the relevant circumstances was a "material change of circumstances." In either case, the Commission has jurisdiction under s 65(1) to revoke or amend the authorisation or to grant a further authorisation in substitution.

Exercise of the Commission's Discretion to Vary or Revoke

In Decision 505 the Commission considered that the main potential benefit to the public from the proposal arose from the early development of the Pohokura field, conservatively assessed as being worth in the order of $47.8 million to $81.9 million. Subject to the imposition of conditions aimed at creating more certainty around the early production date, the Commission determined, on the balance of probabilities, that the substantial overall benefit of earlier production would outweigh the significant detriment to the New Zealand public caused by the loss in competition resulting from joint marketing.

The Commission concludes that the primary material factor it took into account when granting the original authorisation, namely that joint marketing and sale were necessary to achieve early production by one year is not correct. The evidence indicates that the parties did not need to engage in the authorised behavior to achieve the early final investment date and hence production at an early date.

If the authorisation were to remain in place, the benefits found to accrue in Decision 505 would be substantially smaller but the parties to the authorisation would be able

to sell remaining gas jointly, which the Commission considers would cause anti-competitive harm.

The Commission considers that had it known at the time of determining the original application that separate marketing and sale would still make the final investment decision achievable by June 2004, the Commission would not have authorised the proposed arrangement.

Taking these factors into account, the Commission considers that having established that OMV, Shell and Todd are now marketing and selling gas separately and that this, in itself, will not cause a delay to production, it is appropriate to revoke the authorisation.

Furthermore, the Commission also considers that there is insufficient evidence of grounds for it to amend the authorisation granted in, or to grant an authorisation in substitution for, Decision 505. The basis upon which Decision 505 was granted, that joint marketing and sale was necessary to bring forward the final investment decision and as a result achieve early production from the Pohokura field, has changed to such a significant degree that the Commission considers that it would be inappropriate for the Commission to amend the present authorisation or to substitute a revised authorisation.

Preliminary Conclusions

The Commission's preliminary conclusions, on the information available to it at this time, are that:

- the authorisation in Decision 505 was granted on information that was false or misleading in a material particular, or that there has been a material change in circumstances since the authorisation was granted;
- as a result, the Commission has jurisdiction to consider whether to revoke, amend, or grant a further authorisation in substitution for Decision 505;
- after considering whether to revoke, amend or grant a further authorisation in substitution for, Decision 505, the Commission should exercise its discretion to revoke the authorisation given in Decision 505; and
- the Commission does not consider it should amend, or grant a further authorisation in substitution for, Decision 505.

Draft Determination

If the Commission's preliminary conclusions are confirmed after its consideration of submissions on this draft determination, the Commission proposes to revoke the authorisation granted in Decision 505, pursuant to s 65(1) of the Act.

Next Steps

The Commission is now seeking written submissions from interested parties in respect of the preliminary conclusions it has reached in this draft determination. The deadline for written submissions to be received by the Commission is 23 March 2005.

Interested parties may advise the Commission by 23 March 2005 as to whether they consider it necessary for the Commission to hold a conference to discuss the issues raised by this draft determination. Although at present, the Commission does not consider a conference is necessary, the Commission will consider such advice and finally decide whether to hold a conference. Interested parties will be advised of the Commission's decision and will be provided with details, if a conference is to be held.

INTRODUCTION

1. On 20 December 2002, Preussag Energie Gmbh ("Preussag"), Shell Exploration New Zealand Limited and Shell (Petroleum Mining) Company Limited ("Shell"); and Todd (Petroleum Mining Company) Limited ("Todd"), applied to the Commerce Commission ("the Commission") under s 58(2) of the Commerce Act 1986 ("the Act") for authorisation to enter into arrangements to jointly market and sell gas produced from the Pohokura field ("the Arrangement"). On 14 May 2003, the Commission was notified that OMV New Zealand Limited ("OMV") had purchased Preussag's participating interest in the Pohokura Joint Venture.

2. OMV, Shell and Todd are the parties to a Joint Venture Operating Agreement dated 15 July 1999 relating to Petroleum Mining Permit number 38154 issued by the Minister of Energy on 8 October 2004. PMP 38154 applies to an area of seabed immediately off the coastline north east of New Plymouth. Petroleum reserves which exist in the concession are known as the Pohokura natural gas field ("the Pohokura field"). The Pohokura field is owned in the following proportions:

   - OMV 26%
   - Shell 48%
   - Todd 26%

3. In this draft determination, these parties, when acting together under the Joint Venture Operating Agreement, are referred to as the Pohokura Joint Venture.

4. Although the Pohokura Joint Venture considered that neither s 27 nor s 30 of the Act applied to the Arrangement, they recognised that opinions to the contrary were possible and wished to ensure that their acts of joint marketing, joint negotiation with purchasers, and entering jointly into contracts for the sale of natural gas from the field were immune from challenge, under the Act. They, therefore, applied for authorisation of the Arrangement.

5. On 1 September 2003 the Commission determined, in Decision 505, to authorise the Arrangement, subject to certain conditions. The full text of the determination is provided at paragraph 20 of this draft determination.

6. On 13 April 2004, the Pohokura Joint Venture advised the Commission that they had been unable to reach agreement on critical issues associated with the joint marketing and sale of Pohokura gas. As a result, they had decided that it would be necessary to market and sell the gas separately so that sufficient contracts would be in place to ensure each party was able to make a final investment decision in time for Pohokura gas to be produced at full production capability, by mid-2006.

7. During May 2004, the Commission noted press releases informing the public that OMV, Shell and Todd had individually, rather than jointly, marketed and sold tranches of gas from the Pohokura field to various purchasers.

8. The Commission decided to consider whether s 65(1)of the Act applied and if so whether it should revoke its authorisation of the Arrangement.

COMMISSION PROCEDURES

9. On 30 September 2004, by press release, and on 2 October 2004, by public notice, the Commission announced that it was considering revoking Decision 505. The Commission also wrote to OMV, Shell and Todd and other potentially affected parties, advising of its intention to consider revoking Decision 505.

10. Initial submissions were requested by 18 October 2004, from OMV, Shell, Todd and any other person who was likely to have an interest in the matter, to assist the Commission in its preparation of a draft determination. A written submission was received from the Pohokura Joint Venture. Other written submissions were received from Wanganui Gas Ltd and Ballance Ltd.

Submissions and Conference

11. The Commission is now seeking written submissions from interested parties in respect of the preliminary conclusions it has reached in this draft determination. The deadline for written submissions to be received by the Commission is 23 March 2005.

12. Interested parties may advise the Commission by 23 March 2005 as to whether they consider it necessary for the Commission to hold a conference to discuss the issues raised by this draft determination. Although at present, the Commission does not consider a conference is necessary, the Commission will consider such advice and finally decide whether to hold a conference. Interested parties will be advised of the Commission's decision and will be provided with details, if a conference is to be held.

THE PARTIES

OMV

13. The OMV group is an Austrian-based energy company, historically with government roots, but now with diversified ownership. The OMV Group's core business is exploring for, and producing, oil and natural gas.

14. OMV's interests in New Zealand include:

- 10% ownership of the Maui field;
- 69% ownership of the Maari oil field; and
- joint interests in a number of petroleum exploration permits with other exploration companies, including Shell and Todd.

Shell

15. Shell is part of the Royal Dutch Shell Group of Companies. The Shell Group companies are involved in activities relating to oil and natural gas, chemicals, electricity generation, and renewable resources in more than 135 countries.

16. The primary activities of Shell in New Zealand include:

- the exploration for, and production of oil and gas, including significant shareholdings in the Maui, Kapuni and Pohokura natural gas fields;
- the operation of Shell brand service stations;
- the production and distribution of marine and aviation fuels, lubricants, petrochemicals and detergents; and
- various equity investments including the New Zealand Refining Company and 50% of the shares in Shell Todd Oil Services Limited ("STOS"), the operator of the Maui, Kapuni and Pohokura fields.

Todd

17. Todd is part of the Todd family's group of companies. Todd Energy is a diversified energy business whose activities include:

- the exploration for, and production of oil and gas. It has significant shareholdings in the Maui, Kapuni, Pohokura, Mangahewa and McKee natural gas fields and in several exploration joint ventures holding petroleum exploration permits;
- 50% of the shares in STOS;
- natural gas retailing through it subsidiary Nova Gas Ltd ("Nova");
- electricity generation;
- electricity retailing through its subsidiaries Bay of Plenty Electricity Ltd and King Country Energy Ltd;
- coal mining; and
- LPG wholesaling.

18. Todd has a strategic agreement concerning exploration activities with Shell.

THE AUTHORISED ARRANGEMENT

The Text

19. In Decision 505, the Commission authorised the joint gas marketing and sale from the Pohokura field. It determined as follows:

> Pursuant to s 61(1)(a) of the Act, the Commission grants authorisation for:
>
> - OMV New Zealand Limited;
> - Shell Exploration New Zealand Limited and Shell (Petroleum Mining) Company Limited;
> - Todd (Petroleum Mining Company) Limited; and
> - any person who becomes a party to the Pohokura joint venture,
>
> to enter into arrangements to jointly market and sell gas produced from the Pohokura field.
>
> The authorisation is subject to the following conditions:
>
> 1) The Arrangement, as it applies to the carrying out of additional joint marketing and sale of gas for the period after 30 June 2006, is authorised only if the Pohokura field and its associated off-shore, and on-shore, gas production equipment is fully operational before 30 June 2006.

For the purposes of Condition One:

- the Arrangement to jointly market and sell gas includes the following:
  - the Pohokura Joint Venture discussing and agreeing on all relevant terms and conditions, including price, quantity, rate, specification and liability of the joint sale of gas from the Pohokura field; and
  - the Pohokura Joint Venture negotiating and entering into contracts for the sale of Pohokura gas jointly;
- fully operational means that the Pohokura field and its associated off-shore, and on-shore, gas production equipment is installed, commissioned and is capable of producing at least 60 petajoules of gas per annum; and
- the date of 30 June 2006 may be extended by the Commission on application by the Applicants for the period of any delay which the Commission considers was caused by events beyond the Applicants' reasonable control.

For the avoidance of doubt, the Arrangement to jointly market and sell gas from the Pohokura field is authorised until 30 June 2006. The marketing and sale of gas by way of contracts agreed before 30 June 2006 but which extend beyond that date, remains authorised notwithstanding that the Pohokura field and its associated off-shore, and on-shore, equipment is not fully operational before 30 June 2006.

2) Any assignment by the Applicants or any other party acquiring an interest in the Pohokura JV of any part of their rights or interests in the Pohokura field, must be made conditional on the purchaser(s) obtaining from the Commission a clearance pursuant to section 66, or an authorisation pursuant to section 67 of the Commerce Act 1986.

3) The Applicants or any other party acquiring an interest in the Pohokura Joint Venture must not enter into any contract for the sale of gas from the Pohokura field which contains terms or conditions which limit or restrict the resale of the gas to third parties.

The Commission's Reasons for Authorisation

The Factual and Counterfactual

20. The factual, with the Arrangement authorised and in place, involves the Pohokura Joint Venture jointly marketing and selling gas from the Pohokura field. The first production of gas from the field would occur during February 2006 and the full production capability of the field would be reached by the end of the second quarter of 2006.

21. The counterfactual, in the absence of the Arrangement, would have the following characteristics:

- the Pohokura Joint Venture would negotiate and agree on the development profile and gas output of the field;
- OMV, Shell and Todd would then separately sell a proportion of the gas output of the Pohokura field, corresponding to their individual equity ownerships of the field;
- OMV, Shell and Todd would negotiate and agree on measures to address the contractual implications of separate marketing; and

- production from the Pohokura field would be delayed by one year as a result of the time needed to cement such measures in place.

The Relevant Market

22. The relevant market for consideration of the competition effects of the Arrangement was the national natural gas production (and first point of sale) market;

Lessening of Competition in the Factual

23. The characteristics of joint marketing in the factual in comparison to the counterfactual would be:

    - a lesser number of competitors in the market;

    - higher prices and an enhanced potential for price discrimination;

    - a more limited range of terms and conditions being offered to gas purchasers by the joint venture; and

    - a slowed or inhibited development of a more efficient and competitive wholesale gas market in the future.

24. The Commission concluded that joint marketing in the factual, with the Arrangement, would result in a lessening of competition in comparison to separate marketing in the counterfactual without the Arrangement.

Detriments

25. The Commission considered that the following additional detriments would arise in the factual in comparison to the counterfactual:

    - a significant, but moderate detriment from a lessening in allocative efficiency;

    - a small detriment from a lessening in productive efficiency; and

    - a more significant detriment from a loss of dynamic efficiency.

Benefits

26. The Commission considered that there would be potential benefits that would arise in the factual but not in the counterfactual as a result of:

    - earlier development of the Pohokura field (with benefits in the order of $47.8m to $81.9m arising);

    - limited lower production and transaction costs; and

- possibly some improvement in operational efficiency; limited savings in field facilities, appraisal and design costs; and an increase in incentives for oil companies to explore for gas in New Zealand.

Weighing the Detriments and Benefits

27. After weighing the detriments and benefits, the Commission decided that it appeared that there would be a net benefit to the public from joint marketing under the Arrangement. However, the Commission decided that for it to be satisfied about this net effect it was necessary to impose conditions stated in paragraph 20 to lock in the benefits.

The Commission's Determination

28. In summary, in Decision No. 505 the Commission stated that joint marketing would:

    - restrict the number of competitors in the market;

    - result in higher prices and enhance the potential for price discrimination;

    - result in a more limited range of terms and conditions being offered to gas purchasers; and

    - slow or inhibit the rate at which a more efficient and competitive market may evolve in the future.

29. On the other hand, the Commission accepted that in the counterfactual there would also be a high level of co-ordination between the parties on such matters as field development and determining output parameters.

30. Overall, the Commission concluded that the Arrangement would lessen competition in the gas production and first point of sale market, and that this would lead to detriments from a lessening in allocative, productive and dynamic efficiencies.

31. The Commission considered that benefits to the public could arise from joint marketing in the form of lower production and transaction costs and, possibly, some improvements in operational efficiency, a saving in field facilities, appraisal and design costs, and an increase in the exploration incentive.

The Critical Factor in the Commission's Reasoning

32. The benefit which was critical to the Commission's decision was that arising from the early development of the Pohokura field. After considering numerous submissions on the matter, the Commission concluded that with separate marketing, rather than joint marketing, production from the Pohokura field would be delayed by one year from February 2006 commencement date, to February 2007 for first gas, and the end of June 2007 for full production capacity.

33. The Commission noted in paragraph 516 of the Decision that, on the balance of probabilities, the benefits excluding the benefit from early production were likely to be less than the detriments from the loss of competition. To ensure that joint marketing achieved early production, the Commission imposed a condition which stated that joint marketing, as it applies to the carrying out of additional joint marketing of sale of gas for the period after 30 June 2006, is authorised only if the Pohokura field and its associated off-shore and on-shore, gas production equipment is fully operational before 30 June 2006. Gas marketing and sales of gas prior to that date were not affected by this condition.

34. As a result of these considerations, the Commission authorised joint marketing with conditions.

35. In reaching its decision, the Commission took account of submissions by the Pohokura Joint Venture. Discussed below are the statements and claims, about such early production and marketing, made by the Pohokura Joint Venture to the Commission, in their application for authorisation, during the Commission's investigation of the matter and at the Commission's conference.

Submissions by the Pohokura Joint Venture During their Application for Authorisation

36. In their application for authorisation of the joint marketing and sale arrangement, dated 20 December 2002, the Pohokura Joint Venture stated at paragraph 16:

> The immaturity of the New Zealand gas market means that the practical problems the Pohokura JV parties would face in separately marketing gas would be difficult if not impossible to overcome. Substantial welfare losses will occur if joint marketing is not authorised. Absent joint marketing, a substantial delay in the development of the field is expected, at a time of scarcity of resource. In addition, separate marketing would result in significant extra transaction and production costs, and sub-optimal field depletion. This would impact significantly on the value of the field, and that effect would have the potential of significantly reducing exploration incentives in New Zealand.

37. The difficulties of separate marketing were discussed at paragraph 26 in the application.

> In attempting to separately sell gas produced jointly, pursuant to contracts negotiated individually, the Pohokura JV parties would face a number of insurmountable problems. Contracts negotiated without co-ordination will consequently contain different extraction rates, quantity, term, etc. The practical problems faced by the Pohokura JV parties include determining how they would:
>
> - apportion the costs of appraisal, development and operation;
> - apportion facilities access;
> - appropriately allocate risk, in particular reserves risk;
> - apportion uplift rights;
> - apportion field deliverability;

- apportion all products recovered; and
- appropriately adjust overlift and underlift.

38. Paragraph 45 of the application states:

> The Pohokura JV parties do not consider that separate marketing is feasible in the foreseeable future or for the expected life of Pohokura. Accordingly, no development is a counterfactual in the event that authorisation is not granted.

39. The Pohokura Joint Venture further stated in their application that if the Commission did not accept such a "no development" counterfactual, there were two other theoretical options. One of these was adopted by the Commission as the most likely counterfactual[2] (which was subsequently accepted by the Pohokura Joint Venture). This was given the title "scenario 1". Scenario 1 was described in Decision No. 505 as follows:

> "Scenario 1" is where the parties separately sell their proportion of gas after agreeing on parameters for the development of the field. This included an optimal depletion path which may be described in terms of maximum daily, average daily and annual quantities. Within these constraints each Pohokura JV party is able to separately sell its proportionate share of gas to the buyer(s) on the basis of independently negotiated terms and conditions, including price.

40. The Pohokura Joint Venture argued in their application for authorisation that in a "Scenario 1" type situation, even if an optimistic view were taken, the development of the field would be delayed by three years beyond the time required for development under the factual with the joint marketing arrangement in place, and the welfare losses from separate marketing would be very large.

41. Subsequent to their submission on the draft determination, the Pohokura Joint Venture provided additional information claiming that the production and marketing delay which would result, if separate marketing was forced on them, would in fact be six years, although they stated that three years was the appropriate, albeit conservative, timeframe to use for the purpose of the analysis.[3]

42. The Commission's reasons for Decision 505 set out the timetable provided by the Pohokura Joint Venture in which they estimated times for joint and separate marketing:

> The Applicants' joint marketing scenario estimated there would be 43 individual tasks to be completed taking 483 days under the following timetable:
>
> - authorisation approved on 8 August 2003;
> - Phase 1 – gas marketing completed in 483 days on 21 March 2004;
> - Phase 2 – bank approvals and project financing completed in parallel with Phase 1 by 21 March 2004; and
> - earliest FID to be made on 21 March 2004.

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[2] See, for instance, Dr Berry for the Pohokura Joint Venture, Conference transcript of 1 July 2003, p7.
[3] Pohokura Joint Ventures' Reply, Conference transcript, 3 July 2003, p393.

In contrast, the Applicants' Scenario 1 separate marketing timetable estimated there would be 138 individual tasks to be completed taking approximately 2200 days under the following timetable:

- appeal of joint marketing decision would take 730 days to 8 August 2005 with no other work taking place during this period;
- Phase 1 – preparation for selling gas completed in 120 days;
- Phase 2 – seeking bank approval / project financing completed in 50 days;
- Phase 3 – joint venture agreements completed in 838 days;
- Phase 4 – gas marketing completed in 479 days;
- Phase 5 – renegotiation of JV joint agreements based on gas marketing outcomes completed in 260 days;
- Phase 6 – project redesign completed in 390 days; and
- earliest FID to be made on 24 August 2010.

Separate Marketing Developments Post-Authorisation

43. On 13 April 2004, OMV and Shell advised the Commission that the Pohokura Joint Venture had been unable to reach agreement on critical issues associated with the joint marketing of Pohokura gas. They advised they decided that it would be necessary to market and sell the gas separately so that sufficient contracts were in place to ensure each party was able to make a final investment decision in time for Pohokura gas to come on stream by mid-2006.

44. In May 2004, Shell announced in two separate media releases:

> …the contracted sales of foundation volumes of its 48% share of Pohokura gas.
>
> …the sale of parcels of gas to Contact Energy, Ltd, Genesis Power Ltd, and Multi Gas (NZ) Ltd, was one of the key milestones to be achieved to further confirm that the Pohokura project is firmly on track to produce gas from mid 2006.
>
> Shell's Pohokura entitlement is now largely contracted until 2012 with some of the contracts extending even further out into the future.
>
> …it had sold two further parcel[s]….to NGC Holdings Ltd. ….With this further sale of Pohokura gas to NGC, Shell….. has now essentially concluded our marketing campaign targeting foundation customers in the lead up to the investment decision for the Pohokura development stated for mid-2004,…

45. Also in May, Contact Energy Ltd announced in a press release:

> In early April, OMV … offered an initial tranche of gas from the Pohokura field to prospective buyers. The volume of gas offered was up to OMV's… share of production from the … field for a period of five years commencing from the field's first production date. This is expected to be around 30 June 2006.
>
> Under the terms of the arrangements …..Contact will purchase the entire initial tranche of gas from OMV.
>
> The volume of gas covered by the arrangement is broadly equivalent to the fuel requirement of our Otahuhu B power station….

46. In May 2004, Genesis Energy announced in a media statement:

> Genesis has entered into agreements with Todd Energy to purchase gas from the ……Pohokura oil and gas fields.
>
> It has ….purchased Todd Energy's entitlements from Pohokura, with delivery starting 1 January 2006 through to the end of December 2011

47. On 30 June, 2004 Shell announced in a media release:

> Shell New Zealand has formally given the green light to the development of the Pohokura gas field, when it signed off the Final Investment Decision (FID) today.
>
> Shell New Zealand Exploration and Production Commercial Manager Ajit Bansal said taking FID signalled the formal start of the development of the Pohokura field.
>
> It is now all systems go for Pohokura. With the taking of FID today the Joint Venture has instructed the operator, Shell Todd Oil Services to lodge a Mining Permit with Crown Minerals.

48. In their statements quoted in paragraphs 37 to 39 above, the Pohokura Joint Venture said that separate marketing and sale of gas either had practical problems that "would be difficult if not impossible to overcome" or is not "feasible in the foreseeable future or for the expected life of Pohokura". Within nine months of the Commission's authorisation of joint marketing and sale of gas from the Pohokura field the Shell, OMV and Todd acted contrary to these statements. Presumably, in that short length of time, the "difficult or impossible practical problems" have been overcome and it has become "feasible" to separately market and sell Pohokura gas. Moreover, again contradicting the Pohokura Joint Venture's statements to the Commission during its consideration of the authorisation application (one of which is quoted in paragraph 43 above), separate marketing has not resulted in a delay to the date of the final investment decision or to the development and production timetable for Pohokura gas.

VIEWS OF INTERESTED PARTIES ON REVOCATION

49. The Commission has written to interested parties stating that it is considering revoking Decision No. 505. The Commission noted in the letters that, on the face of it, the decision by OMV, Shell and Todd to separately market gas from the Pohokura field is evidence of a material change in circumstances in terms of s 65(1)(b) of the Commerce Act. The Commission sought initial submissions on whether it would be appropriate to revoke the Decision.

50. The Commission received written submissions from Wanganui Gas Ltd, Ballance Agri-Nutrients (Kapuni) Ltd. Wanganui Gas was neutral, but Balance favoured revocation of Decision 505 on the basis that the subsequent behaviour has demonstrated the false premise on which the Decision was based and that the detriments of joint marketing now outweighed the benefits.

51. The Commission also received a submission on behalf of the Pohokura Joint Venture. Commission staff also met individually with each of OMV, Shell

and Todd. The principal submissions made by the Pohokura Joint Venture are:

- market circumstances have not changed since the authorisation;

- joint marketing and sale is still the best option to deal with commissioning gas, peaking gas, and the sale of subsequent tranches of gas;

- the Pohokura joint venture might still have to revert to joint marketing if gas balancing arrangements cannot be negotiated, if separate marketing results in significant unutilised capacity or other inefficiencies, and when further investment becomes necessary to recover residual gas;

- absence of the ability to jointly market and sell might still cause a delay in the commencement of production;

- if there has been a relevant material change in circumstances, then s 65 of the Act requires the Commission to reassess the net benefit of joint marketing; and

- if revocation is considered to be warranted, the Commission must also consider whether a substitute authorisation is appropriate. Following initial separate marketing of the field, there would in the present case be strong grounds upon which that net benefits would be likely to attach to future joint marketing.

REVOCATION CONSIDERATIONS

Facts Relevant to a Revocation Decision

52. In Decision No. 505 the Commission concluded that joint marketing and sale, as opposed to separate marketing and sale, would result in a lessening of competition. Further, it concluded that this would result in a loss of allocative, productive and dynamic efficiencies. These effects would result in a detrimental impact on gas users and the economy as a whole.

53. The Pohokura Joint Venture submitted that there were a wide-range of public benefits which they claimed would be likely to arise from joint marketing and sale. The Commission considered them all and concluded that benefit to the public would arise from lower production and transaction costs and possibly from more operationally efficient depletion of the field, a savings in facilities and in appraisal and design costs and an increase in the incentive to explore for additional gas. However, the largest benefit arose from the early production from the field (by one year). The Commission assessed the value of this benefit as being in the order of $47.8m to $81.9m.

54. The Commission concluded that, on the balance of probabilities, the detriments from the loss of competition outweighed the benefits, excluding the benefit from early production. To put it another way, without the early production, which joint marketing and sale was considered to bring, the

Arrangement would not have been authorised notwithstanding the other benefits accepted by the Commission.

55. The Joint Venture submitted that the date that production commences critically depended on the date of the final investment decision, as the date which determines when the physical construction and development of the field can commence. The Pohokura Joint Venture informed the Commission that the final investment date would be significantly delayed if they were required to market and sell Pohokura gas separately. The construction and development steps after the final investment decision were expected to take about the same time, irrespective of whether the gas is to be marketed and sold jointly or separately.

56. As discussed above, the Pohokura Joint Venture submitted that with joint marketing and sale, the final investment decision date would be 21 March 2004 and the field would be in full operation by 30 June 2006, whereas under separate marketing and sale the final investment decision date would be 24 October 2010. The Commission concluded that the likely delay with separate marketing and sale would be one year.

57. In the event, the Pohokura Joint Venture chose to adopt a separate marketing and sale approach in mid-April 2004, and reached the final investment decision at the end of June 2004. The Commission has concluded from this that the separate marketing and sale approach has not led to a delay in the final investment decision. The delay between 21 March 2004 (the original final investment decision target date) and the end of June 2004 may be attributable to the seven and a half months[4] spent by the Pohokura Joint Venture attempting (and failing) to reach an agreement amongst themselves on joint marketing and sale arrangements.

58. The Pohokura Joint Venture have stated that they may still need to revert to joint marketing and sale of Pohokura gas:

- if gas balancing arrangements cannot be negotiated or require some form of joint arrangement;
- if separate marketing results in significant unutilised capacities or other inefficiencies; and
- when further investment becomes necessary to recover residual gas.[5]

59. Whether or not this is correct, these matters were not at the heart of the Commission's decision to authorise joint marketing and sale. The Commission authorised joint marketing and sale, despite its detrimental impact on competition, principally because it was persuaded (by information now known to be incorrect) that joint marketing and sale was necessary in order to realise the benefits associated with early gas production from the

[4] That is, the seven and a half month period between 1 September 2003, the date of the authorisation. and mid April 2004, the date the Pohokura Joint Venture decided to proceed with separate marketing.
[5] In their letter to the Commission of 18 October 2004.

Pohokura field. Parties have submitted that the continued retention of the authorisation may provide the Pohokura Joint Venture with a useful back-up if separate marketing and sale proves difficult. However, it would also mean that if joint marketing and sale was chosen at some time in the future (if the authorisation remained in place), gas consumers would face detriments from the loss of competition.

60. It is possible that the Pohokura Joint Venture parties have now found benefits from joint marketing and sale which are different from those submitted to the Commission during the course of its consideration of the original application for authorisation. Equally, it is possible that there are different detriments. However, the material relevant change is that the nexus between joint marketing and sale and early production no longer exists. Without that the public benefit analysis alters substantially in a way which was discussed by the Commission when it gave the authorisation. The Commission in Decision No.505 indicated that without that nexus, the authorisation would not have been given.

Section 65 of the Commerce Act

61. Section 65 of the Act sets out the circumstances in which the Commission may alter, revoke, or substitute authorisations made under s 58 of the Act. Section 65 of the Act provides:

> **65. Commission may vary or revoke authorisations**
>
> (1) Subject to subsection (2) of this section, if at any time after the Commission has granted an authorisation under section 58 of this Act the Commission is satisfied that—
>
> (a) The authorisation was granted on information that was false or misleading in a material particular; or
>
> (b) There has been a material change of circumstances since the authorisation was granted; or
>
> (c) A condition upon which the authorisation was granted has not been complied with—
>
> the Commission may revoke or amend the authorisation or revoke the authorisation and grant a further authorisation in substitution for it.
>
> (2) The Commission shall not revoke or amend an authorisation or revoke an authorisation and substitute a further authorisation pursuant to subsection (1) of this section unless the person to whom the authorisation was granted and any other person who in the opinion of the Commission is likely to have an interest in the matter is given a reasonable opportunity to make submissions to the Commission and the Commission has regard to those submissions

62. Under the scheme of s 65, the Commission must first consider whether it has jurisdiction to vary or revoke an authorisation. If it considers it does have jurisdiction, it must then go on to consider whether to exercise its discretion to vary or revoke an authorisation or grant a substitute authorisation.

Previous Discussions on Possible Grounds for Revocation

63. The issue of possible revocation of the authorisation was discussed briefly at the Commission's conference on the application, by counsel for the Pohokura Joint Venture, Dr Mark Berry. Dr Berry stated at the conference:

> Section 65 has this ability to reopen matters where there is a material change in the market at a later point in time. But to follow that through logically thinking about the competition concerns the Commission has, a revocation would only seem to be on the table potentially if the market moved to such a position that separate marketing was going to be happening.
>
> So in other words the market would have had to have moved to such a point of maturity that separate marketing was feasible and achievable.[6]

64. The Commission is of the view that the scenario outlined by Dr Berry as to when s 65 of the Act could be used to revoke an authorisation, currently exists. It transpires that separate marketing is feasible, achievable and is happening.

Jurisdiction to Vary or Revoke the Authorisation Granted in Decision 505

65. Under s 65, the Commission has the jurisdiction to revoke or amend an authorisation; or to substitute a new authorisation, if it is satisfied that any of the criteria under s65 (1) (a)-(c) are fulfilled. In summary, on the basis of information currently available to the Commission, the Commission considers that either:

- the information provided at the time of the original application for authorisation was false or misleading in a material particular (s65(1)(a)) so far as it indicated the final investment decision could only be achieved by 2004 with joint marketing and sale; or

- that a material change in circumstances (s65(1)(b)) since authorisation has had the effect that joint marketing has not been necessary to achieve the final investment decision by 2004.

66. Based on the evidence before it, the Commission considers that it has proved not to be the case that joint marketing and sale was essential to bring the final investment date forward, as was indicated in submissions. Hence, the Commission considers that information was either incorrect at the time it was provided or circumstances in the industry have subsequently changed to render that information incorrect. If the former, then the Commission considers the material information regarding the necessity of joint marketing and sale to bring the final investment decision forward was "false or misleading in a material particular." If the latter, then the Commission considers that the change in the relevant circumstances was a "material change of circumstances." In either case, the Commission has jurisdiction under s 65(1)

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[6] Transcript of Commerce Commission Conference on Pohokura, Applicant's Reply, p400.

to revoke or amend the authorisation or to grant a further authorisation in substitution.

These grounds are considered in turn.

False or misleading information

67. Subsection 65(1)(a) of the Commerce Act allows the Commission to reconsider the authorisation if it was granted on information that was false or misleading in a material particular. The Commission must therefore address two questions. First, whether intentionally or otherwise, was false or misleading information provided to the Commission; and secondly, whether that information was material to the Commission's decision.

68. In Decision 505 the Commission wrote:

> The Commission concludes, on the balance of probabilities, that the benefits, excluding the benefit from early production, are likely to be less than the detriments from the loss of competition. The inclusion of the benefit from early development would mean the benefits are likely to outweigh the detriments. [7]

69. The Commission thus emphasised that the benefits would not have outweighed the detriments arising from the Arrangement, and the Commission would not have granted an authorisation, but for the significant benefit arising from early production.

70. In their application the Pohokura Joint Venture submitted that the parties would face "insurmountable" problems if required to market separately[8]. They did not consider separate marketing feasible in the foreseeable future or for the expected life of the Pohokura field. They suggested, as one counterfactual, that there would be no development of the Pohokura field in the event that the authorisation was not granted. As a second alternative counterfactual, they suggested that development of the field would be delayed by three years, absent an authorisation. In considering the application, the Commission did not accept that there would be no development in the counterfactual. Instead it considered and relied on the information provided by the joint venture parties and concluded that without the authorisation the full production from the field would be delayed by one year.

71. Despite the problems the Pohokura Joint Venture Parties submitted would arise from separate marketing, in April 2004 OMV, Shell and Todd chose not to jointly market and sell gas and embarked on marketing and sale separately. They achieved their final investment decision by the end of June 2004, three months later than the original target, 21 March 2004. This delay can be attributed to difficulties encountered by parties to the joint venture in reaching agreement on critical issues associated with the joint marketing and sale of Pohokura gas. There is no present evidence that the Pohokura Joint Venture will not meet their production target of 30 June 2006. However, the

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[7] At paragraph 516.

[8] See quote in paragraph 38 of this Draft Determination.

Commission notes that it is possible that factors other than separate selling may yet result in delays.

72. The Commission concludes that joint marketing and sale was not necessary to meet the early production target. The reason the Commission previously formed the view in Decision 505, that joint marketing and sale was required to make the final investment decision by 21 March 2004 and that this in turn was necessary to achieve the early operation of the field by the end of June 2006, was because it was provided with false information. Having established that false information was provided to the Commission it is not necessary to show that it was also misleading for the purposes of s65(1)(a). Nevertheless, the Commission relied on the information provided by the parties and was misled to the extent that it found joint marketing and sale was required for early production from the field, notwithstanding that the Commission found that production would only be delayed by one year. The Commission considers that the information was also misleading.

73. The Commission further concludes that the information was false or misleading in a "material particular", as the Commission would not have granted the authorisation if early production remained possible in the absence of joint marketing and sale. The information was therefore false or misleading in a particular material to the Commission's decision to authorise the anticompetitive arrangement.

Material change of circumstances

74. The Commission may reconsider an authorisation if there has been a "material change of circumstances" since the granting of the authorisation. In this case, the Commission must determine whether the behaviour of OMV, Shell and Todd to separately market and sell Pohokura gas amounts to, or occurred in the context of, a "material change of circumstances."

75. In identifying the material change the Commission has adopted an approach similar to that used by the courts in Australia in considering s 91B of the Trade Practices Act. In Australia the existence, or otherwise, of a material change is determined firstly, by examining the circumstances as they existed at the time the authorisation was granted; and secondly, by considering the circumstances as they exist at the time the revocation is being considered.[9]

76. The Pohokura Joint Venture submitted to the Commission that separate (rather than joint) marketing and sale of gas from the Pohokura field would lead to delays in production of the gas. When considering whether or not to authorise, the Commission partially accepted that submission. It considered that separate marketing and sale would be likely to result in a delay of one year from 30 June 2006 to 30 June 2007.

77. The Commission was led to believe that separate marketing and sales would delay by one year the date of the final investment decision. In fact, in the absence of joint marketing and sales, the Pohokura Joint Venture has been

[9] *Re Media Council of Australia & Ors* (1996) ATPR 41-497 at 42,241.

able to reach a final investment decision only three months after the proposed final investment decision it had suggested would be possible with joint marketing and sale. The Commission recognises that it is possible that production could still be delayed for a number of reasons not related to marketing and sales of gas.[10] Again, at present the Commission has no evidence of any likely delays.

78. The Commission considers that the period of time from the final investment decision to the production of gas will be the same under either the joint or separate marketing and sale regimes. That is, the time required to put in place the necessary infrastructure will be unaffected by the form of marketing chosen. Thus, joint marketing and sale after the final investment decision would not have accelerated progress towards the early operation of the field.

79. As the situation stands today, joint marketing has proved not to be necessary to early production of gas from the Pohokura field. The information provided by the Pohokura Joint Venture indicated that the final investment decision could not be achieved by 2004 except if the parties marketed gas jointly. In fact, the final investment decision was achieved by the end of June 2004 despite the parties actually marketing gas separately. The fact that joint marketing has proved not to be essential to the final investment decision by June 2004 is consistent with a change having occurred in market conditions or other relevant circumstances. The Commission considers that such a change would constitute a "material change in circumstances" for the purposes of s65 (1)(b).

Condition has not been complied with

80. The Commission does not consider it necessary to examine whether s65(1)(c) applies in the present case.

Conclusion on Jurisdiction

81. The Commission concludes that one of the following situations must have taken place:

- either the Commission was provided with incorrect information regarding the necessity of joint marketing and sale to bring the final investment decision forward and as a result achieve early production from the Pohokura field; or

- there has been a material change in circumstances such that it is no longer the case that the particular relied on the Decision 505, that joint marketing and sale was necessary to bring the final investment decision forward.

82. The Commission therefore concludes that it has jurisdiction, under either ss 65(1)(a) or 65(1)(b), to vary or revoke the authorisation granted in Decision 505 or grant a further authorisation in substitution for it.

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[10] Such reasons could be engineering or climatic, although currently the Commission has not received any information to that effect.

Exercise of the Commission's Discretion to Vary or Revoke the Authorisation Granted in Decision 505

83. If the Commission is satisfied one or more of the three criteria set out in s65(1) are met, it must then give consideration to whether it is appropriate to use its discretion to revoke, amend, or revoke and grant a further authorisation in substitution.

84. Unlike the Australian Trade Practices Act, which requires the Australian Competition and Consumer Commission (the ACCC) to conduct a new benefit and detriment analysis before making a determination to revoke an authorisation, the Commerce Act provides no direction on how the Commission should exercise its discretion[11].

85. A useful analysis of the approach adopted pursuant to the Australian Trade Practices Act is to be found in *Re Media Council of Australia & Ors*[12]. In that case Lockhart J set out the appropriate test to be applied when considering whether to revoke an authorisation. His Honour held that once the ACCC is satisfied that one of the three qualifying criteria, which are in very similar terms to those in s 65(1), have been met it then has to determine, in the exercise of its discretion, whether or not such change of circumstances was of a kind or of such magnitude or significance to warrant the ACCC revoking the previous authorisation granted. The determination of public benefit and detriment is relevant to both determining whether there has been a material change of circumstances and, if so, whether such change warranted the ACCC's revocation of the authorisation.

86. The Commission notes that in *Re Media Council,* the ACCC had argued for a "straight conduct test" in some cases:

> It was the [Australian Competition and Consumer] Commission's submission that it will sometimes be the case that no elaborate analysis is required when the very conduct that was originally authorized is currently not being undertaken. ….It was the Commission's submission that a straight conduct test is then sufficient not only to establish "material change in circumstances" but also to warrant revocation. …It could be that the conduct was never in fact undertaken;…[13]

The Court accepted the ACCC's submission in principle.[14]

87. The Commission considered a purposive approach to the interpretation of s 65. The Commission considers that the purpose of s 65 is to enable the Commission to reconsider an authorisation where the Commission considers that the circumstances or information it took into account in granting the authorization have altered in a material way or have proved to be false. In such circumstances, or falsity of information, the Commission must then determine whether, given the altered circumstances, it should exercise its discretion to revoke, amend, or revoke and grant a further authorisation.

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[11] Australian, Trade Practices Act 1974, s 91B.
[12] *Re Media Council of Australia & Ors* (1996) ATPR 41-497 at 42,241.
[13] *Ibid,* at 42,261.
[14] *Ibid.*

88. In some cases it may be necessary to carry out a fresh analysis of the benefits and detriments pertaining to the changed factual circumstances in order to be able to determine whether to the Commission should exercise its discretion. In other cases it may be unnecessary to carry out any elaborate analysis and an approach analogous to the "straight conduct test" described in *Re Media Council* might be appropriate.

89. In each case, the Commission must exercise its discretion based on the facts of the particular situation before it.

90. In Decision 505 the Commission considered that the main potential benefit to the public from the proposal arose from the early development of the Pohokura field, conservatively assessed as being worth in the order of $47.8 million to $81.9 million. Subject to the imposition of conditions aimed at creating more certainty around the early production date, the Commission determined, on the balance of probabilities, that the substantial overall benefit of earlier production would outweigh and mitigate the significant detriment to the New Zealand public caused by the loss in competition resulting from joint marketing.

91. The Commission concludes that the primary material factor it took into account when granting the original authorisation, namely that joint marketing and sale were necessary to achieve early production is not correct. The evidence indicates that the parties did not need to engage in the authorised behavior to achieve the early final investment date and hence their June 2006 production target.

92. If the authorisation were to remain in place, the benefits found to accrue in Decision 505 would be substantially smaller but the parties to the authorisation could still jointly market and sell any uncommitted gas. This would, for the reasons set out in Decision 505, create anticompetitive harm and lead to a substantial detriment.

93. The Commission considers that had it known at the time of determining the original application that separate marketing and sale would still make the final investment decision achievable by June 2004, the Commission would not have authorised the proposed arrangement.

94. Taking these factors into account, the Commission considers that having established that OMV, Shell and Todd are now marketing and selling gas separately to a timetable largely consistent with the timetable the Commission found would only be achievable if the Parties marketed and sold gas jointly, it is appropriate to revoke the authorisation.

95. Furthermore, the Commission also considers that there is insufficient evidence of grounds for it to amend the authorisation granted in, or to grant an authorisation in substitution for, Decision 505. The basis upon which Decision 505 was granted, that joint marketing and sale was necessary to bring forward the final investment decision and as a result achieve early production from the Pohokura field, has changed to such a significant degree that the Commission considers that it would be inappropriate for the Commission to

amend the present authorisation or to substitute a revised authorisation. This is because under the separate marketing and sale scenario now prevailing, the factual and counterfactual, competition analysis, and public benefits and detriments, under that circumstance, are now untested by the Commission's formal authorisation procedures.

PRELIMINARY CONCLUSIONS

96. The Commission's preliminary conclusions, on the information available to it at this time, are that:

- the authorisation in Decision 505 was granted on information that was false or misleading in a material particular, or that there has been a material change in circumstances since the authorisation was granted;
- as a result, the Commission has jurisdiction to consider whether to revoke, amend, or grant a further authorisation in substitution for Decision 505;
- after considering whether to revoke, amend or grant a further authorisation in substitution for, Decision 505, the Commission should exercise its discretion to revoke the authorisation given in Decision 505; and
- the Commission does not consider it should amend, or grant a further authorisation in substitution for, Decision 505.

DRAFT DETERMINATION

97. If the Commission's preliminary conclusions are confirmed after its consideration of submissions on this draft determination, the Commission proposes to revoke the authorisation granted in Decision 505, pursuant to s 65(1) of the Act.