

*Opening Remarks by Chair*

1                   **COMMERCE COMMISSION CONFERENCE**  
2                   **ON THE APPLICATION FOR AUTHORISATION BY THE POHOKURA JOINT**  
3                   **VENTURE PARTNERS TO JOINTLY MARKET AND SELL GAS FROM**  
4                   **THE POHOKURA FIELD**

7   **Day Two: 2 July 2003**

8 **[9.00 am]**

10 **CHAIR:**    Good morning, I'd like to welcome you back to the  
11                proceedings on the Pohokura Gas Authorisation.

12                I just want to cover off a few procedural matters before  
13                we begin.    Commissioner Bates will be here shortly, her  
14                plane was delayed, but I propose to carry on until she  
15                arrives.

16                I just wanted to mention that an electronic version of  
17                the transcript is now available.  If you provide Rachel with  
18                your e-mail address she can arrange to have that posted to  
19                you.  We can make copies, but it's probably going to be more  
20                timely for you if we do it the other way.

21                With respect to the order for the rest of the session, I  
22                intend this morning to start with the applicant and  
23                hopefully we can complete that by approximately 11 o'clock,  
24                we'll see how it goes.  When the applicant is finished I  
25                propose to take the Contact presentation after that.  That  
26                will be followed by the lunch break and after the lunch  
27                break at 1.30 we will have a closed session on the late  
28                submission that was put in by the Ministry of Economic  
29                Development.  That session can be attended by all parties to  
30                those negotiations and any other advisors or legal counsel

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1 who have signed the appropriate undertakings.

2 Now, I would like an indication at this time whether all  
3 those parties involved in the negotiations around that  
4 matter will be available for that hearing and able to answer  
5 questions, and the purpose of the question is to determine  
6 whether the Commission needs to issue 98 notices in order to  
7 achieve representation at that session.

8 So, I would like an indication now from parties if they  
9 have any difficulty in attendance at that session and  
10 willingness to answer questions. It will be at 1.30.

11 **MR DELLOW:** For Contact, we can be here but our client can't be  
12 represented at 1.30, I don't think. We'll have to get...

13 **CHAIR:** But legal counsel can be available?

14 **MR DELLOW:** Yes, but we won't be in a position to answer  
15 questions.

16 **CHAIR:** You will be or you won't?

17 **MR DELLOW:** We won't have any knowledge, we need to have David  
18 Thomas here with us.

19 **CHAIR:** What time would you be able to attend?

20 **MR DELLOW:** We were actually just talking to Rachel a little  
21 while ago, you've said that immediately after the applicants  
22 we would make our submission, we would actually prefer to  
23 have heard from the Ministry before we make our submission  
24 if possible.

25 **CHAIR:** The Ministry is not -- the purpose of the session is not  
26 to hear from the Ministry, it is to direct questions to  
27 parties, the other parties.

28 One thing that could be done is, we could take the  
29 closed session this morning before the lunch hour, but then  
30 my understanding is Contact's not available after the lunch  
31 hour.

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1 **MR DELLOW:** That's right.

2 **CHAIR:** For the whole of the afternoon, that is correct?

3 **MR DELLOW:** That's correct.

4 **CHAIR:** Which does not work because it's my intention to finish  
5 everything except for the reply today. So, I don't know  
6 what the situation is at Contact, but I wonder if we do need  
7 to issue 98 notices. I am a little surprised that no one in  
8 Contact is available.

9 **MR DELLOW:** Perhaps we could go away and get an indication from  
10 Contact. We'll do that now.

11 **CHAIR:** Can I take it then that in principle no-one has a  
12 difficulty with -- who is intended to attend the closed  
13 session, has a difficulty with attending and answering  
14 questions on the matter that is to be considered.

15 **MR DAVID:** Grant David, counsel for Shell. We have difficulty -  
16 - I have difficulty as counsel. I have seen the confidential  
17 material but have got no way of getting instruction from my  
18 clients, of course they haven't seen the material. Whilst I  
19 would be in a position to attend I don't know if I would be  
20 terribly helpful in relation to the matters to be dealt  
21 with.

22 **CHAIR:** My understanding is, there's no problem with your  
23 client, Shell, seeing that, because Shell has participated  
24 in all the discussions, is that not correct? Peter, is that  
25 the correct position? [**Peter Taylor (legal advisor to**  
26 **Commission) nods**].

27 We clarified that last night with the submitter that it  
28 was fine for the parties who have attended the negotiations  
29 to have access to the confidential material. It's only the  
30 parties outside those negotiations that can only have access  
31 to external legal counsel.

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1 **MR DAVID:** My apologies, I wasn't aware of that clarification.

2 **MR BIELBY:** Can I indicate, first of all, I understand what  
3 you're talking about, negotiations around the Maui contract,  
4 I have to raise that question because I also have not seen  
5 confidential version of the letter.

6 **CHAIR:** Yes.

7 **MR BIELBY:** Secondly, NGC is party to those negotiations, we  
8 would be available during the day at the time. Can we have  
9 a copy of that?

10 **CHAIR:** Yes, you can. My understanding, and I would -- if this  
11 is not correct I think you should let me know by the lunch  
12 hour, but my understanding is, what is in that note is  
13 something you will be familiar with. There's nothing more -  
14 - there's far less in there than what has actually occurred  
15 in the negotiations, and so, if that's not correct and we  
16 need to delay the confidential session until tomorrow to  
17 give you time, then you need to let me know, but I don't  
18 believe you will find that is the case.

19 **MR BIELBY:** I'm very happy to look at the letter today and  
20 proceed on that basis, I don't want to delay.

21 **CHAIR:** Thank you very much. I will assume Contact will come  
22 back to me if there's any difficulty; the sooner the better.  
23 Thank you very much.

24 After we have the closed session, which I intend to  
25 finish -- I intend it to take place between 1.30 and 2.30,  
26 following that the order will be NGC, Shell and balance.  
27 So, that is the proposed order for the day.

28 Any questions on that, or further comment from any  
29 party? [**No comments**]. If not, then Dr Berry we'll return  
30 to the applicants.

1           **PRESENTATION BY POHOKURA JOINT VENTURE PARTNERS (continued)**

2

3 **DR BERRY:** Well, we finished off last time with Professor Evans  
4 coming close to his conclusions relating to the competition  
5 principles, and he was moving at this point into detriments.  
6 So, if I can just ask Professor Evans to recap and lead back  
7 into his conclusions.

8 **PROF EVANS:** Yesterday I presented arguments and explanations  
9 with respect to the propositions that gas contracts must  
10 precede extraction, that joint marketing without conditions  
11 is essential for security of contracts, that really related  
12 to the negotiation cost, including time of alternative  
13 possibilities, and the possibility of having a portfolio of  
14 contracts as a result of this marketing of Pohokura.

15           Thirdly, I looked at the secure contracts and argued  
16 that they were actually pro-competitive, and finally just  
17 before we closed we discussed the issue of whether  
18 competition was not lessened, and that discussion concluded  
19 that this is not a monopoly versus oligopoly versus perfect  
20 competition world when we're comparing separate market and  
21 joint marketing.

22           In both circumstances there is a great deal of co-  
23 ordination that takes place in the management of the field  
24 and in the defining of contracts that would be sold in any  
25 event, and so the textbook models of monopoly and oligopoly  
26 are simply not an issue.

27           Now, I want to proceed from there, that was the  
28 background, to ask the question whether there are detriments  
29 to joint marketing. Having established that joint marketing  
30 would not lessen competition, the most reasonable  
31 presumption is that the annual field off-take would be the

*Pohokura JVPS (cont)*

1 same or less under separate marketing, that should read, I  
2 consider whether any detriment of joint marketing can arise  
3 from the level or structure of contract prices.

4 First, we note that -- I would note that, as mentioned a  
5 couple of times yesterday, the Joint Venture Parties have  
6 very different actual and potential business interests.  
7 They come together essentially for the special purpose of  
8 producing hydrocarbons from Pohokura and this imparts  
9 attention that's not present in single owner firms. Joint  
10 marketing creates a new entity in the market.

11 Under joint marketing gas sales contracts with the joint  
12 venture, and I emphasise that with the joint venture per se,  
13 whereas under separate marketing they would be with  
14 individual Joint Venture Parties. Again as mentioned it is  
15 more likely there will be aggregations of existing market  
16 positions in Pohokura Gas under separate marketing.

17 I have already described the process of separate  
18 marketing supposing that this form of marketing can  
19 eventually be arranged. The only degree of latitude that  
20 separate marketing provides individual JV parties is the  
21 pricing of contracts; all other terms, e.g. Timing, must be  
22 agreed among the parties. However, freedom to price  
23 independently even is illusory because the parties most  
24 certainly have to agree on a transfer price. It's very  
25 difficult to envisage how agreeing on a transfer price, let  
26 alone the iterative process for agreement on the forms of  
27 the contracts, would not reveal the contract prices and  
28 result in commonality of prices across contracts under  
29 separate marketing.

30 Also, it's difficult to imagine how the transfer price  
31 would differ much from the contract price, because, if it

*Pohokura JVPS (cont)*

1 did, it would set up perverse incentives for delivery under  
2 separate marketing, and earlier yesterday I gave it through  
3 the example of a JV party having a different contract price  
4 than the transfer price and the implications of that, it  
5 would lead to potential opportunism concerns that might  
6 concern purchasers from the contract as well as within the  
7 JV party.

8 Now, ultimately the contract prices will depend upon the  
9 characteristics of demand as well as supply. While I've not  
10 presumed whether the contracts will be tendered or  
11 negotiated, the process of tendering depending on the form  
12 of tender would reveal demand no matter whether it was  
13 carried out separately or jointly.

14 The only other point to make is with respect to prices  
15 in general is that there would be a narrower range of  
16 contracts available under separate marketing for all the  
17 reasons described yesterday and that this would have some  
18 effect on prices, but generally it would reflect the  
19 services offered by the contract per se.

20 So, to sum up this aspect, separate marketing cannot be  
21 expected to improve competition among JV parties in the  
22 market over that of joint marketing, prices are likely to be  
23 similar, and off-take of the field very similar providing  
24 separate marketing contracts can be established.

25 Now let's turn to the issue of price discrimination.  
26 Price discrimination occurs when sales of a homogeneous  
27 commodity occur at different prices. It can occur in  
28 competitive markets and it can occur in monopoly markets,  
29 and it can be revenue and it can be welfare enhancing in  
30 each of those markets. Often commodities, even quantities  
31 of gas, are in fact not homogeneous because of the terms and

*Pohokura JVPS (cont)*

1 conditions of contracts under which they are supplied. Gas  
2 supplied in New Plymouth is a different product from gas  
3 supplied in Auckland.

4 In relation to Pohokura, Pohokura price discrimination  
5 at least as likely under separate as joint marketing. Under  
6 joint marketing, contracts are with the joint venture which  
7 has the participant tensions we've just described. Whereas,  
8 under separate marketing there is a much higher likelihood  
9 of any party entering a special deal, i.e. With their own  
10 downstream interest which, when we look at the field, the  
11 output of the field, is price discrimination.

12 Given that the field output produced and consumed is as  
13 invariant between separate and joint marketing the prices we  
14 see will clear the market whether or not there's price  
15 discrimination, in which case the static economic efficiency  
16 of the two forms of marketing will be the same. In this  
17 circumstance if joint marketing yielded higher revenue its  
18 only implication would be to yield scarcity rents that are  
19 likely to engender dynamic efficiency via the search for  
20 substitutes and including prospectively new discoveries.

21 In the case where we're facing here we have -- the  
22 factual and the counterfactual are very close, and as we  
23 discussed yesterday the way in which the field will operate  
24 and the output of the field will be chosen will be exactly  
25 the same under both forms of marketing.

26 Thus, the real effect in terms of the level of output of  
27 the field will not be affected by the choice between  
28 separate marketing or joint marketing, indeed, it may be  
29 that the total output is less under separate marketing than  
30 it is under joint marketing. In such a circumstance the  
31 efficiency implications of the two forms of organisation, in



*Pohokura JVPS (cont)*

1 terms of our usual consumer and producer surplus, or the  
2 total of the two, are exactly the same.

3 What would happen here with price discrimination would  
4 be that price discrimination might yield different levels of  
5 revenue, but it would not affect the efficiency of the  
6 market.

7 The third point is, because terms of contract would be  
8 restricted under separate marketing it is likely that  
9 revenue would be somewhat different under the two forms.  
10 However, for the reasons previously given there is no reason  
11 to suggest that the more restrictive set of contracts will  
12 enhance welfare. For example, price discrimination is  
13 limited by resale rights in contracts, and these may be more  
14 likely under joint marketing than they would be under  
15 separate marketing, as we discussed yesterday.

16 So, it's my conclusion that price discrimination may  
17 occur under each form of marketing but there's no basis for  
18 suggesting there would be any economic efficiency reduction,  
19 i.e. Detriment from joint marketing.

20 The Commission has not quantified any detriments to  
21 joint marketing but it has suggested that this he may exist.

22 The only submission to the Commission that attempted to  
23 quantify detriments was that of NZIER. I mentioned  
24 yesterday that that was the entity that had sought to  
25 quantify detriments and it did so by arguing that joint  
26 marketing was monopoly and that separate marketing was  
27 either perfect competition or oligopoly.

28 Now, that is simply incorrect. All decisions that are  
29 taken in the context of joint marketing will have to be  
30 taken under separate marketing. The only degree of freedom  
31 that's left under separate marketing is a minor degree of

*Pohokura JVPS (cont)*

1 freedom with respect to particular prices of particular  
2 contracts, and as we have discussed, that is vastly  
3 constrained.

4 The whole calculation of NZIER depends on there being a  
5 significantly different output under joint marketing than  
6 separate marketing and that simply is not tenable as in the  
7 case we were comparing the factual and the counterfactual.

8 There are some other aspects of NZIER's report which are  
9 worth mentioning. First, NZIER does not produce any  
10 benefits to joint marketing for it has no delay in its  
11 calculations associated with separate marketing.

12 Secondly, they apply their methodology to far higher  
13 reserves than Pohokura has. In fact, they seem to apply  
14 their methodology to almost all the gas market, and they end  
15 up as a consequence of this of a level of detriments which,  
16 on most assumptions, is at least equal to the entire value  
17 of the Pohokura Field, which is an extraordinary conclusion  
18 to reach and one which suggests that their methodology is  
19 not sensible in the context of the factual and the  
20 counterfactual.

21 So, I conclude from this that there's no aspect of this  
22 work that is relevant for assessing detriments of joint  
23 marketing. I'm led to the conclusion that there is no  
24 argument for, or evidence of detriments to joint marketing.  
25 Thank you, that's that section.

26 **CHAIR:** I'll see if there's any questions at this time. [No  
27 **comments**].

28 Anthony, did you have any questions at this time?

29 **MR CASEY:** Sure, just on price discrimination, for example, I'm  
30 not quite clear what the argument is. It seems to say that  
31 price discrimination will be limited under joint marketing,

*Pohokura JVPS (cont)*

1 but also that it is welfare enhancing.

2 **PROF EVANS:** Yeah. The output is basically the same no matter  
3 which we have. So, the prices that we will see in the  
4 market, be they be obtained by tendering the contracts or  
5 whatever, should clear the market, so there will be high  
6 enough so demand so equals supply. Whether it's joint  
7 marketing or separate marketing, the amount of gas in the  
8 market from Pohokura will not -- will be negligibly  
9 affected.

10 However, it could be possible that different tranches of  
11 gas have different prices attached to them under either  
12 joint marketing or separate marketing, and that this is  
13 typically where there's no output effects of this kind, this  
14 is inhibiting the welfare attached to that market.

15 In fact, price discrimination, the literature said, is  
16 often welfare enhancing because it allows for larger outputs  
17 to be produced than would be produced under monopoly for  
18 example, and in that circumstance it's welfare enhancing;  
19 I'm not claiming that. I'm just saying that it is just, the  
20 price discrimination associated with joint marketing is not  
21 at all deleterious relative to any price discriminations  
22 associated with separate marketing.

23 The issues are the same for joint and separate marketing  
24 because each firm that would go out to market would have a  
25 fixed amount to sell, so it's the same issue. I could  
26 discriminate, you know, within those bundles as well, but  
27 under separate marketing it would seem more likely, although  
28 it could occur under joint marketing as well, that a  
29 particular party could, as was raised yesterday, sell to  
30 their own downstream interests at a different price than the  
31 general price that would be achieved from the Pohokura

*Pohokura JVPS (cont)*

1 Field, and that would only take place under separate  
2 marketing rather than joint marketing. And so, that is a  
3 difference but it does not lead to a detriment attached to  
4 joint marketing.

5 **MR CASEY:** So, is dead weight loss then going to be the same  
6 under joint marketing, or separate marketing?

7 **PROF EVANS:** Yes. I think it's going to be -- under joint  
8 marketing it's going to be at least that under separate  
9 marketing.

10 **MR AINSWORTH:** Professor Evans, would it be possible for a joint  
11 venture with downstream interests that wanted a special  
12 deal, would to be possible for that person to withhold  
13 agreement on other aspects of the project, to inveigle its  
14 other two joint ventures to agree to that special deal?

15 **PROF EVANS:** Within any joint venture there's always that  
16 tension, yeah, so that is a possibility. It's much less a  
17 possibility -- that's just one example of what the problem  
18 is with separate marketing.

19 The way in which those separate contracts have to be  
20 negotiated and decided reflects those interacting tensions.

21 **MR AINSWORTH:** So that would be possible under joint marketing?  
22 That would be a scenario that could occur?

23 **PROF EVANS:** It could occur.

24 **MR SALISBURY:** David, I'd make the point in response to that,  
25 though, that I would think it's no more nor less likely  
26 under joint than it is with Scenario 1 because for  
27 Scenario 1 to work we have to sit down and agree all the  
28 parameters anyway. So, if that influence is there in the  
29 joint decision it is certainly also there when we're trying  
30 to put in place the mechanisms for Scenario 1. I don't see  
31 that there's any difference.

*Pohokura JVPS (cont)*

1 **PROF EVANS:** That was really my second point on that, that it  
2 was a possibility that it is alive and well under separate  
3 marketing.

4 **DR BERRY:** Okay, well that brings to an end the first of our key  
5 lines of legal outline I outlined in the introduction and it  
6 outlines there are no detriments, and accordingly  
7 jurisdiction ought to be declined.

8 We now move into our second key line of argument  
9 relating to, if however there is some finding of minimum  
10 detriment, that there is public benefit that is overwhelming  
11 compared with detriments, and we begin this dialogue with a  
12 discussion about the time delay which forms the basis for  
13 the public benefit. So, Chris Hall is speaking to the  
14 question of delay.

15 **MR HALL:** Thank you. As Mark has said, in the event, if the  
16 Commission contrary to the applicant's submission determines  
17 that it has jurisdiction, then in our submission the  
18 authorisation should be granted because the public benefits  
19 from the proposed activity substantially outweigh the  
20 detriments of any.

21 Principal amongst the benefits is the avoidance of time  
22 delay. There are other benefits, for example the avoidance  
23 of the substantial transaction costs that would be incurred  
24 in implementing Scenario 1 marketing, but key amongst the  
25 issues surrounding benefit is the issue of delay.

26 I have five key messages in relation to that subject  
27 which are on the first PowerPoint. First, requiring  
28 Scenario 1 marketing will cause delay in development of the  
29 field, and in my submission that proposition is uncontested.  
30 It is not contested -- it has been accepted by the  
31 Commission and it has been accepted by other parties to the

*Pohokura JVPS (cont)*

1 Conference. Clearly there is argument and dispute about the  
2 extent of delay. But my first point is that the proposition  
3 that there will be delay is uncontested.

4 In the applicant's submission, and this is my second  
5 point, a three year delay is conservative. There is on the  
6 whiteboard at the side of the room a chart outlining a  
7 programme of tasks that would be required to be completed if  
8 Scenario 1 marketing was to be implemented; a copy of that  
9 chart was provided to Commission staff in a meeting on the  
10 11th of April and an updated and refined version of the  
11 chart provided to the Commission last week.

12 As the Commissioners will no doubt have seen, that both  
13 identifies the tasks required to be undertaken and the  
14 issues to be addressed, allocates a time period to each of  
15 them and charts the calendar of events and working through  
16 those issues. The chart in fact suggests, or shows that  
17 there could be a delay substantially in excess of  
18 three years and that is consistent with the position the  
19 applicants have taken at the outset of this matter, that  
20 their estimate of a three year delay is conservative.

21 My third point is that the delay causes substantial  
22 welfare losses. Again, I submit that that proposition is  
23 uncontested; it is accepted that to the extent that there is  
24 delay, welfare losses will arise from that. There is  
25 obviously a difference in view about quantification of those  
26 losses, but I submit that the proposition that there will be  
27 losses arising from delay is not contested.

28 My fourth key message is that the period of delay also  
29 represents a loss of competition for the period of delay  
30 insofar as -- for the period of delay Pohokura would not be  
31 participating in the market and competing with other

*Pohokura JVPS (cont)*

1 existing fields. In my submission that's an important  
2 consideration for the Commission in this matter.

3 My fifth proposition or key message which flows from the  
4 first four is that, for the reasons outlined, the  
5 application should be granted so that those net welfare  
6 losses can be avoided.

7 In the Draft Determination, as I say, the Commission has  
8 accepted that a period of delay would be occasioned if the  
9 applicants were required to implement Scenario 1 marketing.  
10 In my submission the Draft Determination, that period of  
11 delay would be 12 months, is erroneous. The Draft does  
12 canvass to a limited extent the factors that would  
13 contribute to the delay and allocates best case and worse  
14 case timeframes to the tasks that are addressed, although  
15 the tasks that are addressed are a subset of those which are  
16 outlined in the chart on the whiteboard.

17 In my submission it's not clear from the Draft  
18 Determination why the preliminary view is reached that 12  
19 months is the period of delay that would be associated with  
20 implementing Scenario 1 marketing. The applicants have  
21 given a detailed and comprehensive analysis in support of  
22 their view of the period of delay, and in my submission that  
23 has not been matched by any submission by any other party.

24 As I'll come to later in this section, the submissions  
25 of the other parties in my view are assertion without  
26 analysis; they do not replicate the detailed analysis and  
27 quantification that has been put forward by the applicants  
28 and, therefore, in my submission that the evidence from  
29 those parties should be accorded proportionately less  
30 weight. In fact, the only detailed analytical evidence  
31 provided in relation to the period of delay is that from the

1 applicants.

2 Before I address the key sets of tasks that the  
3 applicants -- tasks and issues the applicants say would need  
4 to be undertaken, I have five preliminary comments. The  
5 first I've already touched on is that the chart on the  
6 whiteboard is a slightly updated version of that which was  
7 provided to the Commission staff on the 11th of April. I  
8 mention that only because there is a suggestion in the Draft  
9 Determination that the applicants had not previously  
10 quantified the period of delay, or provided an analysis or a  
11 breakdown of that time period, so I mention that first point  
12 because if that is the implication in the Draft  
13 Determination, it is not correct.

14 The second preliminary point, and one which I urge the  
15 Commission to consider, this will be a matter touched on  
16 also by David Agostini, is that there is no New Zealand  
17 experience, and in my submission no relevant Australian  
18 experience, to draw on.

19 It is easy for other parties to say, well, these sorts  
20 of arrangements have been implemented in other  
21 jurisdictions, for example the United States. For the  
22 reasons that have previously been outlined in relation to  
23 the state of markets and which will be also discussed in a  
24 more detailed way in relation to the Australian market,  
25 those precedents are not helpful in the New Zealand context,  
26 and we submit that the extent of the learning curve that  
27 would be required to implement this form of marketing in  
28 New Zealand market conditions should not be underestimated.

29 **CHAIR:** Can I interrupt you for a minute, please, with respect  
30 to your comment about the relative weight to be given to  
31 different submissions. I just want to be clear; if I recall



*Pohokura JVPs (cont)*

1 correctly your own note indicated that estimating the  
2 duration of different activities was highly speculative and  
3 uncertain, and I'll finish the question and then I will give  
4 you an opportunity to respond, and what you have just  
5 indicated supports that view, that it is -- that you've just  
6 stated to us again that there's not a lot to base this --  
7 base any view on given lack of experience here or elsewhere  
8 that is relevant.

9 So, I wonder about your comment about the relative  
10 weight and whether it's correct to say you've provided us  
11 with anything more substantive than anyone else, and I would  
12 go on to put to you that other parties have suggested that  
13 your own dates are based on difficulties you may or may not  
14 be having within your own joint venture; difficulties which  
15 are, to some extent, under your control and that you  
16 shouldn't gain a benefit from not being able to resolve  
17 those difficulties.

18 So, I think you have to substantiate a claim to greater  
19 weight being put on your evidence than others in a more  
20 definite way than you have, because it seems to me you  
21 yourself have called into question how much weight we can  
22 put on your own evidence.

23 **MR HALL:** Thank you. I think there are probably three parts to  
24 the answer to that question. The first is that I don't  
25 believe that the applicants have used the word "speculative"  
26 in their written submissions. We have acknowledged that the  
27 allocation of timeframes to tasks is a subjective exercise  
28 and will always be open to debate, and we have said that  
29 without apology.

30 The second point is that, notwithstanding the first  
31 point, the three Joint Venture Parties have drawn on their

*Pohokura JVPS (cont)*

1 collective experience of negotiating complex commercial  
2 arrangements in the oil and gas sector in New Zealand in  
3 formulating time periods to allocate to the tasks which they  
4 foresee they would have to undertake to implement Scenario 1  
5 marketing. So, although the exercise is subjective, it is  
6 not speculative, it is not a question of drawing numbers out  
7 of a hat, it is a question of allocating -- of the parties  
8 allocating based on their experience in New Zealand what  
9 they consider to be realistic timeframes for completing  
10 these tasks.

11 The point that I was seeking to make in relation to the  
12 evidence submitted by other parties is that they have not  
13 even provided a subjective analysis to support their  
14 assertions that the task could be completed more quickly  
15 than the applicants, say.

16 We have provided, based on our experience, a breakdown  
17 of the time period, we have identified the tasks, we have  
18 allocated time periods, we have indicated where the task can  
19 be completed in parallel and where they would need to be  
20 undertaken sequentially.

21 My simple proposition is that other parties to this  
22 Conference have not even attempted in any way to  
23 substantiate their assertions that the task could be  
24 completed more quickly, and that's a relevant factor, in my  
25 submission, for the Commission to have in mind when it is  
26 considering those other submissions.

27 **CHAIR:** I understand the submission that you have just made, but  
28 I will, as a matter of record, read out what you wrote in  
29 your memo to us under point 4(b):

30 "Estimating the duration of activities of which there is  
31 no precedent available anywhere is highly speculative and

1 uncertain."

2 So, I do believe you did say that in your notes, so I do  
3 accept your submission as you presented it, but I believe it  
4 was correct to say that that's the terminology you used.

5 **MR HALL:** Thank you, I stand corrected. That would not be the  
6 word I would use to describe the process. My view would be  
7 to use the word "subjective", that the time periods  
8 allocated by the Joint Venture Parties are subjective, but  
9 nevertheless based on their collective commercial  
10 experience.

11 **CHAIR:** I understand the difference and, you know, I can well  
12 accept that that might be a preferable term to use to  
13 describe it.

14 **MR HALL:** There's another important element --

15 **MR STEVENS:** Just before you move on, I wonder if you could  
16 provide any examples of the experience amongst the parties  
17 in this area in New Zealand. You mentioned that the three  
18 Joint Venture Parties have drawn on their collective  
19 experience in New Zealand in these matters. Are there some  
20 examples that you can give us, some indication elsewhere on  
21 the time issues of this and drawing on that experience?

22 **MR HALL:** The first part of the answer to that is that we  
23 obviously do not have any experience of implementing  
24 Scenario 1 type marketing in New Zealand because it's never  
25 been done before and obviously it's an important part of our  
26 case that separate marketing of any kind has not been  
27 implemented in New Zealand before so we have no direct  
28 experience to draw on.

29 Each of the Joint Venture Parties has, or individuals  
30 amongst the Joint Venture Parties have substantial  
31 experience in the upstream sector in New Zealand and can

*Pohokura JVPs (cont)*

1 speak to the sorts of issues that they have dealt with.

2 But an example might be, for example, all the parties  
3 have experience in negotiating gas sales contracts, they all  
4 have experience in negotiating joint venture Agreements and  
5 complex Joint Venture Agreements. They all have experience  
6 in negotiating arrangements between joint ventures on the  
7 one hand and field operators on the other. They have  
8 experience in negotiating other commercial arrangements as  
9 between themselves and as between joint ventures; for  
10 example, for the sharing of resources.

11 Would it be helpful for the parties to indicate on their  
12 experience the sorts of timeframes that can be required for  
13 implementing those sorts of things?

14 **MR STEVENS:** It would be helpful and I guess, how it would be  
15 relevant to this situation. I guess we are also in a unique  
16 situation here in that there's a significant benefit for  
17 being able to bring this on-line for the parties given that  
18 you have already sunk significant amount of capital invested  
19 in the project to date and there is going to be, hopefully,  
20 a good return once it's on-stream, which as some of the  
21 submitters yesterday were saying, which was highly  
22 incentivising you to bring it on stream quicker. If you  
23 have got examples where you've negotiated Joint Venture  
24 Agreements and others under those sort of pressures, it  
25 would certainly be helpful.

26 **MR JACKSON:** Just one example that might come to mind about the  
27 biggest gas negotiation that occurred in New Zealand; Maui  
28 was discovered in 1969 and almost immediately there was a  
29 desire to bring that field into production as quickly as  
30 possible. The Maui gas contract was not signed until  
31 October 1973, and I think the public record on the intensity

*Pohokura JVPS (cont)*

1 and complexity of those negotiations is freely available.  
2 It was a very difficult and drawn out negotiation. So, that  
3 is the one that is available to everybody to see how complex  
4 it was.

5 **MR STEVENS:** From Shell's perspective, have you examples  
6 overseas of separate marketing experience and how long it  
7 takes to negotiate these things? Are you able to provide to  
8 the Commission?

9 **MR JACKSON:** Well, we have experience of separate marketing but  
10 no experience in markets like New Zealand, so we don't think  
11 that the comparison is useful. However, the information  
12 would be available.

13 **MR STEVENS:** What is the key difference between the separate  
14 market agreements that you have overseas and the situation  
15 that arises in New Zealand which would bring in some more  
16 complexity to those negotiations?

17 **MR JACKSON:** Lack of commodity market here. We simply cannot --  
18 the key agreement, and there are a number of other  
19 agreements, but it all stems from the lack of a commodity  
20 market here. The presence of a commodity market makes crude  
21 oil processing, separate crude oil marketing very easy and  
22 the lack of it makes separate gas marketing extremely  
23 difficult.

24 **MR STEVENS:** Is that in terms of the marketing itself or in  
25 terms of arriving at an agreement as to how that actually  
26 eventuates?

27 **MR JACKSON:** I think we've tried to portray and show to you that  
28 setting up the platform for getting gas to market is  
29 extremely difficult, without a commodity market, to support  
30 those arrangements.

31 **CHAIR:** How is the gas at Kapuni marketed?

*Pohokura JVPS (cont)*

1 **MR JACKSON:** It is marketed -- all of it is marketed on a joint  
2 marketing basis.

3 **MR HALL:** NGC has submitted that Kapuni is a precedent for  
4 separate marketing in New Zealand, as we have said in our  
5 written material we reject that proposition entirely.  
6 Kapuni is not separately marketed, Kapuni gas is not  
7 separately marketed. All gas from Kapuni is sold by the  
8 Joint Venture Parties jointly, including gas to NGC.

9 NGC then on-sells the gas, but it is not a field owner,  
10 it is not a party to the Joint Venture Agreement, it is not  
11 a party to the operating agreement, it is not a party to the  
12 obligations to the Crown which follow from field ownership,  
13 and it does not separately sell gas from Kapuni.

14 **CHAIR:** We'll receive submissions on that from NGC, but I wanted  
15 to hear what your view on it was, but I'd like to ask our  
16 adviser to follow that up.

17 **MR BAY:** That's true in the strictest legal sense, that NGC has  
18 to participate in the upstream side of it, but in a very  
19 practical sense, since they are allocated half the reserve  
20 to sell, would this not be in fact an example of separate  
21 marketing as would occur post these agreements being in  
22 place that you have identified, and if that is the case, how  
23 did you arrange the gas balancing arrangements between  
24 yourselves as field owners and NGC as entitlement rights to  
25 half the reserves?

26 **MR TWEEDIE:** Could I add a few comments on this? I mean, what  
27 Mr Hall said is entirely correct, NGC shares none of the  
28 risk or reward of the upstream side of the business. It's  
29 got none of the risk of things going wrong with regard to  
30 the sub-surface activity, with the field operations, with  
31 the obligations, on the safety health, environmental, oil

1 spill whatever basis.

2 There is no -- all they are entitled to for us is to  
3 sell to them as a joint venture half of the reserves that we  
4 have available from the field from time to time, and there's  
5 nothing more complicated than that. There's no balancing  
6 arrangements with them, they purely get the gas that we can  
7 deliver to them. It is not a precedent in any form with the  
8 joint marketing -- with the separate marketing proposal  
9 that's being discussed with regard to Pohokura.

10 I mean, this isn't a contestable issue, this is the  
11 fact; NGC cannot allege anything other than this, though  
12 they've tried to, because the facts and the legal position  
13 are beyond doubt.

14 **MR BAY:** Can I ask how you ensure that each of the parties  
15 receive their half of the reserves and whether there are any  
16 arrangements in place to deal with any over-lifts or under-  
17 lifts?

18 **MR TWEEDIE:** There are no -- if NGC -- the split is 50/50 on the  
19 reserves. When NGC have taken their -- when they have --  
20 when we have delivered the gas to them and they have taken  
21 their 50%, that's the end of the story, they don't get any  
22 more. They have taken more than their 50% over time because  
23 this all stemmed from the High Court finding NGC, who were  
24 then totally dominant in the wholesale market, had abused  
25 their market power, and though they had the rights to all  
26 the gas from the Kapuni field that the joint venture could  
27 sell to them, the High Court split that entitlement to take  
28 half the reserves between the Kapuni mining companies and  
29 NGC, because there was a breach of s.27 of the Commerce Act.

30 **CHAIR:** Excuse me, I don't think that's the matter before us.  
31 What I think is being asked is how do you determine when

*Pohokura JVPS (cont)*

1 someone has their share, whether it's 50% or 100, it doesn't  
2 matter; I mean, if it's 100 the question doesn't arise.

3 **MR TWEEDIE:** So the agreement -- the settlement agreement  
4 between us actually says that both of us are entitled to  
5 half the maximum daily quantity.

6 **CHAIR:** And how do you determine when you've received your half?

7 **MR TWEEDIE:** Well, that is actually, actually a dispute right  
8 now between NGC and the KMCs. NGC allege that the KMCs are  
9 in fact -- because you can't actually turn taps off, the gas  
10 goes through across to the treatment plant, it goes out into  
11 the pipelines and they are alleging that the KMC's customers  
12 are in fact taking more than 50% of the MDQ on a day by day  
13 basis, and there are complaints flying at this -- well,  
14 yesterday. They maintain in fact that the KMCs -- they're  
15 the KMC's customers, are taking all the capacity that NGC  
16 have available in the treatment plant.

17 So right now there's a dispute between the KMCs and NGC  
18 over who's getting what amount of gas relative to the  
19 settlement agreement that was originally entered into.

20 **CHAIR:** Can I ask staff to follow-up, please.

21 **MS BHAMJI:** Just one question. Is there a balancing agreement  
22 in place for that 50% or is the dispute without a balancing  
23 agreement at all?

24 **MR TWEEDIE:** There's no balancing agreement, there's just a  
25 provision in the settlement agreement that says each party  
26 is entitled to 50% of MDQ on each day, each day.

27 **CHAIR:** I think we should proceed with the presentation, thank  
28 you for that.

29 **MR LAUNDER:** Could I just add one thing for the record. Up  
30 there it says that a presentation was made to the  
31 Commerce Commission on the 11th of April which identified



*Pohokura JVPS (cont)*

1 the key workstreams. Just for the record, I think it needs  
2 to be said that the workstream that was presented to the  
3 Commission was obviously a preliminary one with a notation  
4 across it which read, "this list is only indicative of  
5 issues to be resolved, timeline has not been developed,  
6 sequencing has not been determined, sequencing may not be  
7 series but parallel and iterative".

8 I just think that needs to be presented, and in fact the  
9 worksheet that you refer to up there wasn't provided to the  
10 Commission until the 24th of June, which just obviously  
11 leaves a difficulty of how the Commission perhaps could have  
12 tested the initial information when it had that notation  
13 over it, and as I say, that the timeline hasn't been  
14 developed.

15 Have you got any comments on that?

16 **MR HALL:** Yes, I accept that that statement did appear on the  
17 chart that was presented to the Commission staff in April.  
18 In summary, the effect of that notation was to say that that  
19 was a draft work plan that obviously needed to be updated  
20 and finalised, and you're correct insofar as you say that  
21 the updated and finalised product was provided to the  
22 Commission in June.

23 Nevertheless, it would be relevant or correct to say in  
24 my view that from the 11th of April onwards the draft work  
25 plan was in front of Commission staff and it was open to the  
26 parties to engage in a dialogue about it from that point.

27 I don't think this is an issue that -- I certainly don't  
28 think there's great value in debating, I simply wanted to  
29 record that if it was implicit in the Draft Determination  
30 that there had not been any attempt by the applicants to  
31 quantify the period of delay, that would not be correct.

*Pohokura JVPS (cont)*

1 **CHAIR:** I think the point that is being made is not that. The  
2 point that I think our staff are making is that, you  
3 yourself have said that taking a view on this is highly  
4 subjective at least, if not speculative, and providing the  
5 Commission with information on the 24th of June leaves us in  
6 a situation where we have to decide how much weight we can  
7 put on it if we cannot find a means to test that  
8 information, and you yourself have told us today that we  
9 will find it hard to test that information.

10 So, I think the point that is being made is that, this  
11 presents the Commission with some difficulty and we will do  
12 our best to test that information through those proceedings,  
13 but it has been presented in a way that does present some  
14 difficulties.

15 **DR BERRY:** Perhaps if I could make a comment on that because I  
16 was present at that meeting on the 11th of April, and I too  
17 would like to address the suggestion in the Draft  
18 Determination that no time limit was put forward by the  
19 applicant.

20 In the original application itself a three year time  
21 limit was indicated and my recollection of the 11 April  
22 presentation was to say, here's all the issues as to why we  
23 say three years is out there, and we put the presentation up  
24 on the basis that three years was a conservative assessment,  
25 and so, it has been on the record with Commission staff  
26 since 11 April that there are that indicative list of tasks  
27 which then support the conclusion that that three year time  
28 is a conservative one, and my recollection is that it was in  
29 that context that that material was first put to the  
30 Commission.

31 **CHAIR:** I understand the submission, and I also think the record

*Pohokura JVPs (cont)*

1 stands in terms of what that submission says on it, but we  
2 will do our best to endeavour to test this information. But  
3 if you have any suggestions on how we can test it given the  
4 subjective nature of it and the timing of some of the  
5 submissions, that might be helpful. But, I suggest we  
6 proceed with the presentation and I think if we have the  
7 opportunity to ask some more questions, we might advance the  
8 matter.

9 **MR HALL:** Thank you. Before I move on with the presentation it  
10 might be helpful in I made one further point in response to  
11 Commissioner Stevens' questions about experience in such  
12 matters.

13 In fact, the best available experience I submit for the  
14 Commission to have consideration to is the time chart which  
15 we have provided in relation to joint marketing, because  
16 that is a process that we have already commenced and are  
17 currently engaged in; so that gives a current and actual  
18 example of a commercial contracting exercise that the  
19 parties have actually already commenced.

20 There's another point which I think arises out of  
21 Commissioner Rebstock's question, which is the suggestion  
22 that this delay only arises -- in effect the submission is,  
23 look, this delay just results from the bad behaviour of the  
24 Joint Venture Parties and if anyone should be punished for  
25 that, they should. We reject that. This is not an exercise  
26 of the Joint Venture Parties seeking to cause delay. In  
27 fact, we have accepted that we have an incentive to achieve  
28 a return on the investment that we have made and continue to  
29 make in the field.

30 And, it is not a question of the Joint Venture Parties  
31 behaving badly and seeking to off-lay responsibility for

*Pohokura JVPs (cont)*

1 that on to somebody else. Rather, this is a set of 94, so  
2 far as we can predict, 94 complicated and contemporaneous  
3 tasks that have never been undertaken in New Zealand before  
4 and which these applicants would have to undertake.

5 As has been explained, those tasks necessarily give rise  
6 to intra-joint venture tension. The opportunities and the  
7 incentives for gaming and for maximising individual interest  
8 are substantial, and it is rational and predictable that the  
9 Joint Venture Parties should, at least to some extent, take  
10 up the opportunities to achieve those maximised returns.

11 And so, the point is that we reject the assertion that  
12 this is just the Joint Venture Parties behaving badly.  
13 Instead we say, no, it's a complex set of tasks, it gives  
14 rise to perverse incentives and is rational behaviour for  
15 those to play out.

16 **MR SALISBURY:** Perhaps it's not necessary, but I want to endorse  
17 that statement and make it clear that that is a joint  
18 statement by all of the applicants. It is certainly the  
19 case within a joint venture that tensions will rise, these  
20 are complex matters, we are negotiating for months on end,  
21 we do this as a regular course, and at times even tempers  
22 will flare, but nevertheless every party at this table is a  
23 rational business person and is interested in their best  
24 value for the company, and I would expect that that would  
25 prevail at all times. So, I would reject the notion that it  
26 is simply bad behaviour by any Joint Venture Partner.

27 **MR JACKSON:** Shell endorses that as well.

28 **CHAIR:** I would like to ask you; your company has probably  
29 hundreds of joint venture arrangements that it participates  
30 in. Would you say this is a typical one in terms of the  
31 dynamics of the joint venture Arrangement, in terms of how

1 the parties are interacting?

2 **MR JACKSON:** I cannot answer that, I'm afraid, I haven't had  
3 international experience to make that judgment. We  
4 certainly are in a very wide range of -- a large number of  
5 joint ventures, but I haven't got that particular  
6 experience.

7 But I think, even if we had joint ventures exactly like  
8 Shell on the other side of the table, we would still come  
9 up -- if each one were looking after their best interest,  
10 these complex issues would take considerable time to  
11 resolve, and I think that shouldn't be underestimated.

12 **MR HALL:** It might be worth just observing in relation to that  
13 question, that so far as today is concerned this joint  
14 venture amongst the three applicants is a healthy and  
15 constructive joint venture relationship. The difficulties  
16 that we say would arise from undertaking these tasks are not  
17 a reflection on the relationship that we have with Shell and  
18 OMV, rather they are a reflection of the fact that we each  
19 have different drivers and incentives and that the tasks  
20 required to be completed for separate marketing bring those  
21 drivers and incentives into conflict.

22 **MR TAYLOR:** Just for the moment let's assume we accept the  
23 proposition you're making with regard to the progression of  
24 the negotiations between the partners.

25 Why was it then that in April when you submitted the  
26 indicative timing that it was three years was the best guess  
27 at that time from all the knowledge that is available to  
28 you, and when you get down to the detailed 94 actions, its  
29 best estimate now is seven years. That seems to be quite a  
30 blow out.

31 **MR HALL:** I think it's correct to say that when the application

*Pohokura JVPS (cont)*

1 was filed and subsequently we have always described the  
2 three year period as a conservative one and we have said  
3 that, if Scenario 1 marketing could be implemented, which is  
4 an assumption -- we have not accepted that it could be  
5 successfully implemented -- but if it could be implemented,  
6 then it would take conservatively three years. I think it's  
7 made clear in the initial CRA report that the period of  
8 delay could be substantially greater than that, but for the  
9 purposes of quantification of welfare losses a three year  
10 period was taken as being a useful one.

11 So, I don't see that the position we're advocating, or  
12 the schedule of tasks is in any way inconsistent with the  
13 position that we've previously taken.

14 **MR TAYLOR:** Thank you.

15 **MS BATES QC:** Really it's just a question to Mr Tweedie. When  
16 you were talking yesterday about the joint venture structure  
17 and how the companies are all bound to act in the interests  
18 of the joint venture, and I know we discussed that might be,  
19 you say, easier to achieve with joint marketing rather than  
20 separate. But, now we're hearing the -- what I'm hearing is  
21 that the companies have all put self-interest before the  
22 interests of joint venture if we have separate marketing;  
23 and then I'm wondering, in that scenario where does the  
24 obligation for the parties to act in the best interests of  
25 the joint venture really sit?

26 **MR TWEEDIE:** Well, I think the difference is that a third party,  
27 namely the Commerce Commission, if it did go down the track  
28 of its Draft Determination, is imposing a change on the  
29 joint venture, the joint venture would have to consider the  
30 terms of its contractual relationships to each other. And  
31 I'm quite sure there would be a consensus that this

*Pohokura JVPS (cont)*

1 intervention would inevitably result in a variation to the  
2 Joint Venture Agreement.

3 When the Joint Venture Agreement was first constructed  
4 it was pretty standard, as was explained yesterday, a pretty  
5 standard sort of form agreement in the industry. There's  
6 maybe the few changes here and there, but they all have a  
7 similar raft of clauses and key features, and no-one in  
8 New Zealand has contemplated in that contracting nexus the  
9 concept of separate marketing.

10 If separate marketing is forced on us, it is so  
11 fundamental in such a significant intervention into the  
12 relationship, that the parties would have to consider the  
13 basis of their relationship going forward because of the  
14 outcomes that are going to probably eventuate as a result of  
15 separate marketing. So, I said to you yesterday I believe  
16 that would force a variation of the agreement to be  
17 considered, and I stand by that.

18 **MS BATES QC:** Can you just be a little bit more specific?  
19 You're saying that the general term that the companies  
20 should all act in the best interests of the joint venture  
21 would be varied?

22 **MR TWEEDIE:** It would have -- the position would have to be  
23 reconsidered in my view.

24 **MS BATES QC:** No, I'm asking you, do you think that contractual  
25 term would be varied?

26 **MR TWEEDIE:** We'd have to discuss it. I can honestly say we  
27 haven't considered that position in-depth, but it's a matter  
28 that would have to be scrutinised and discussed by  
29 individual parties separately and then together between  
30 them.

31 **MS BATES QC:** Well, it has been on the table for a while, it's a

*Pohokura JVPs (cont)*

1 possibility that there's separate marketing, so you're  
2 saying you haven't even discussed it?

3 **MR TWEEDIE:** We haven't discussed it in detail, no. The fact  
4 is, we believe joint marketing is the appropriate course and  
5 we're still maintaining that.

6 **MS BATES QC:** I would have thought, correct me if I'm wrong,  
7 that what you would do if there was separate marketing is,  
8 you would look to see if it was still economically viable to  
9 develop the field as speedily as possible and that would be  
10 your top priority. Am I wrong in that?

11 **MR TWEEDIE:** You're quite right to say that it's still a  
12 priority, but the fact of, there's such a significant  
13 portion of the value of the field in the gas, we don't get  
14 the liquids until we've got the gas; we've got a  
15 significant -- this is a billion dollar investment; that is  
16 substantial for all parties, particularly ourselves, and we  
17 will not embark on the project without being very very sure  
18 of what we're getting into. And separate marketing throws  
19 unquestionably a stick of dynamite into the whole  
20 relationship, and unquestionably, I say without any shadow  
21 of doubt, will significantly delay the project.

22 **MS BATES QC:** Well, if there are very strong incentives for the  
23 companies to get their investments starting to pay, why  
24 would the companies not all pull together as much as  
25 possible to make sure that happened?

26 **MR TWEEDIE:** The parties will still be incentivised to get the  
27 project -- I mean, there's unquestionably a financial  
28 incentive to do it, but there's a series of trade-offs. I  
29 mean, we know it will get into production eventually, no-one  
30 has ever argued it won't; it's a question of when, and that  
31 will take longer, unquestionably longer under separate



1 marketing than joint marketing.

2 It may have a negative effect on ultimate value, I don't  
3 question that at all; a number of things associated with  
4 separate marketing are going to detract from value, but that  
5 is a factor that will have to be taken into account and  
6 managed appropriately. But it's not to say we're not gonna  
7 get this going, we will, but it will take longer.

8 **MS BATES QC:** Well, if the parties are incentivised to agree,  
9 would you not agree with me that the time delay is at least  
10 affected by how those parties -- whether those parties have  
11 a co-operative attitude towards the project and each other  
12 or not? For example, if they put the project first and they  
13 all have a will to co-operate, the time might be shortened?

14 **MR TWEEDIE:** It may, it may, but our collective experience, and  
15 a lot of work has gone in into looking at what is involved,  
16 what will be required to be undertaken in getting to the  
17 separate marketing position, and there are charts here, all  
18 of us have separately and collectively put our experience in  
19 individually negotiating joint venture agreements, cash  
20 sales contracts, and that gets through to the three year  
21 timeline.

22 That profile, I understand the Commission's got it, it  
23 is going to be presented again shortly, clearly step-by-  
24 step, every step along the way has been quantified, and that  
25 ends up at our best estimate today of three years.

26 Now, that requires co-operation to get there, we've co-  
27 operated to come up with that timeline; it is our best  
28 estimate based on our collective experience of what will be  
29 involved. We will take the Commission through that and it  
30 gets to three years. That is the best wisdom we have got at  
31 this stage and that is based on us working co-operatively to

1 get those outcomes.

2 **MR HALL:** There are a couple of points in relation to that.  
3 We've accepted that there is an incentive to achieve a  
4 return on the investment, but we have equally made clear  
5 that the parties will want to ensure that the risks  
6 associated with the project are appropriately managed.

7 In a context of the Joint Venture Parties collectively  
8 spending up to \$1 billion, they will want to make sure that  
9 appropriate risk mitigation strategies are in place. As  
10 Charles River Associates have made clear in their reports,  
11 the risks are increased under Scenario 1 marketing and,  
12 therefore, further measures will be required to mitigate  
13 those risks.

14 And the related point is that the timeframe that we have  
15 presented to the Commission is based on those facts. It is  
16 based on the assumption that we will work co-operatively  
17 where possible because of that common incentive.

18 The answer to your question, could the degree of co-  
19 operation or lack of co-operation affect the timeframe; in  
20 my view the answer to that is yes, and a lack of co-  
21 operation, a lack of that common incentive could cause the  
22 timeframe to expand.

23 **MS BATES QC:** Yes. If you balanced risk against gain, or  
24 potential gain, I wonder whether the applicants have  
25 actually calculated how much value would be lost by the  
26 Joint Venture Partners for each year of the delay. Have you  
27 done that? Have you made an assessment of how much of the  
28 delay would actually cost you?

29 **MR SALISBURY:** We have had an ongoing assessment of that type  
30 because in fact we have been driven to get this project  
31 underway as a matter of urgency for some time, and our

*Pohokura JVPs (cont)*

1 operator has been driving us to make hurried decisions on  
2 the sub-surface analysis and the surface facilities as well  
3 as marketing, and we know that every month that goes by  
4 destroys value. On the other side, we can't agree to go  
5 forward until we've appropriately addressed the risks.

6 **CHAIR:** How much have you estimated the value loss at?

7 **MR SALISBURY:** Oh, it's a very rough calculation, it's in the  
8 few million of dollars a month. That was the last figure I  
9 saw, but it really didn't put too much weight on it, we know  
10 it's a fairly big number, but it's a little bit of a  
11 nonsensical number until you've got the parameters better  
12 defined.

13 **CHAIR:** So, what is the few million? One or two, or one  
14 hundred, or...?

15 **MR SALISBURY:** Well, there was a few; I've seen numbers between  
16 a couple of million and 5 million, but I mean, I don't  
17 particularly believe any of them. They were just suggesting  
18 that there was a lot of value to be made by getting this up  
19 and running in a hurry.

20 On the other side, we haven't acted to make, what I  
21 would consider irresponsible decisions and ignore the risks.

22 **CHAIR:** Is that for you or is that for all parties?

23 **MR SALISBURY:** Well, it's certainly true for the companies that  
24 I've worked for.

25 **MR LAUNDER:** Just further to what Mr Tweedie was talking about,  
26 the three year part. I'm just a little bit confused as to  
27 whether the three year is the best estimate now of the  
28 delay, or is it still a conservative figure and you actually  
29 think it will be a seven year delay, because the recent  
30 information suggests a seven year. What is your actual best  
31 estimate now as to what would either actually be the delay

1 or -- can you just tell us where you are between the three  
2 and the seven?

3 **MR HALL:** The three year figure that we have included in our  
4 application and which we've talked about since then has  
5 been, as I explained a few minutes ago, a shorthand for the  
6 proposition that the period of delay will be a minimum of  
7 three years and that in fact the Joint Venture Parties  
8 consider it likely that the period of delay will be greater.

9 To answer your question directly, our current best  
10 estimate of the period of delay is captured in the chart on  
11 the wall, which is including appeal periods, six years.

12 **CHAIR:** I think we should proceed with the presentation, please.

13 **MR HALL:** If I could just turn to the key sets of tasks which  
14 are described in that chart; I don't propose to talk to each  
15 individual task and issue because we would be here all day,  
16 although we're obviously very happy to respond to questions  
17 in relation to particular matters.

18 The PowerPoint slide currently shows the key sets of  
19 issues which in combination give rise to the period of  
20 delay. The first is relating to appeal periods, and this  
21 has been a matter -- the question of appeal periods has been  
22 addressed in the Draft Determination.

23 The Commission offers the view that any appeal would  
24 likely be conducted in parallel to what is described as  
25 "field development preparation". We're not entirely clear  
26 what that phrase means, but in any event the position of the  
27 applicants is clear and where we tried to state it very  
28 clearly in our submission in reply to the draft, that in the  
29 event of a Determination which required the parties to  
30 separately market, in other words, either a declinature of  
31 the application or a granting of the application on terms

*Pohokura JVPS (cont)*

1 that the Joint Venture Parties could not live with, they are  
2 likely to appeal that decision.

3 I say that not by way of threat, but simply by way of  
4 indicating that this is a part of the make up of the time  
5 delay and that there will not be any further development  
6 expenditure until risks surrounding gas marketing are  
7 resolved and certainly so far as the Todd position is  
8 concerned, that means resolution of appeals.

9 One might say, well, given the incentive to achieve  
10 return, wouldn't it be rational to keep working on field  
11 surface and sub-surface development and keep working with  
12 your development plan while those appeals were running? Our  
13 position is, we do not consider that would be an appropriate  
14 strategy. Rather, as I said, yesterday, we consider that  
15 the overwhelming weight of legal and economic evidence on  
16 this matter is that the application should be granted and  
17 any appeal would be launched in that same context.

18 Given the transaction costs, the management time, the  
19 expense and the delay associated with implementing  
20 Scenario 1 marketing, we do not consider it would be a  
21 rational course of action for us to undertake that exercise  
22 until that appeal, which as I say would be brought in the  
23 context of our belief that it had strong prospects of  
24 success, had been resolved.

25 So, work would resume once those issues were resolved  
26 and we were confident that there was a secure marketing  
27 platform on which to achieve gas production.

28 **MS BATES QC:** I just want to follow-up on that, and perhaps  
29 Mr Tweedie might like to come in on this one too, because  
30 what I understood Mr Tweedie to be saying was, that field's  
31 going to be developed whether there's joint marketing or

*Pohokura JVPs (cont)*

1 separate marketing, it's just a question of timing because  
2 obviously you want to get your money out.

3 Now, I don't see that there's any rational reason for  
4 delaying development of the field if it's going to be  
5 developed; you might as well get on with it, considering  
6 what it's costing you.

7 **MR TWEEDIE:** Look, I don't want to give you a lecture on the  
8 economics of oil and gas field development...

9 **MS BATES QC:** I might need it, of course.

10 **MR TWEEDIE:** Sometimes I might agree with that, but the --  
11 [pause for laughter]

12 **MS BATES QC:** I did give you the opportunity.

13 **MR TWEEDIE:** No, you did, and I took it, stupidly.

14 **MS BATES QC:** Black mark.

15 **MR TWEEDIE:** But it is a real issue of risk and reward, and  
16 philosophically it's very hard for any business person to  
17 embark on a project of this sort unless you know precisely  
18 what the outcomes are likely to be, and getting the basis of  
19 a sound working relationship with your Joint Venture  
20 Partners on the separate marketing model is just good  
21 business.

22 If we don't do it we are going to end up in ultimately  
23 value destructive dysfunctional behaviour. So it's just  
24 good business, good practice, good relationships. A joint  
25 venture hasn't got too many dissimilarities from a  
26 marriage -- plenty of marriages end up in divorce.

27 **MS BATES QC:** Are you going to give me a lecture on that too,  
28 Mr Tweedie?

29 **MR TWEEDIE:** Should I -- I don't know whether I should or not.  
30 But if a marriage is dysfunctional you end up separated, and  
31 if you put the spade work in before -- and sometimes we need

*Pohokura JVPS (cont)*

1 mediators and input -- so, getting that right is ultimately  
2 going to be the best outcome for the parties, and ultimately  
3 the nation, because we're not going to have the sorts of  
4 problems that may eventuate if we get it wrong.

5 **CHAIR:** I'd like to ask the applicants to proceed through the  
6 rest of their presentation and at this point we'll hold  
7 further questions I think until the end. Thank you.

8 **MR HALL:** Thank you. I think there is just one other element in  
9 relation to Commissioner Bates' question which is that, as  
10 will be seen from the time chart, actually if we had an  
11 adverse outcome here we would get to a resolution of that,  
12 on our view of things, actually quicker by the appeal  
13 process than we would by implementing Scenario 1 marketing,  
14 and that's another reason why it would be rational for us to  
15 go down that route instead of implementing the Scenario 1  
16 marketing.

17 If I come back then to the slide, the first key  
18 workstream there is resolution of appeals. The second is  
19 preparation for separate selling, and that has a number of  
20 tasks allocated to it which you will see from the chart.  
21 You will also see that of course preparation for selling is  
22 a set of tasks which appears in relation to joint marketing,  
23 so there is a degree of commonality between the two.

24 Project financing is the next set of tasks. One of the  
25 key points to be made in relation to this is that we  
26 consider the project financing under a Scenario 1 marketing  
27 proposition would be substantially more complex and  
28 iterative than it would be under joint marketing because of  
29 the factors.

30 We heard from Westpac yesterday the due diligence  
31 exercise that they require to undertake includes a scrutiny

*Pohokura JVPs (cont)*

1 of all the relevant contractual material, and of course  
2 we're not going to have that contractual material available  
3 for the financiers to scrutinise until we have resolved all  
4 of the issues internally.

5 The fourth key workstream of course goes to the  
6 resolution of issues amongst the Joint Venture Parties, and  
7 we have set out there the principal agreements and issues  
8 which would require to be addressed, and of course they are  
9 replicated in some more detail in the chart.

10 Gas marketing is the fifth set of tasks. That of course  
11 is duplicated in the joint marketing chart and also involves  
12 several sub-tasks. One of the key points to be made in  
13 relation to gas marketing under Scenario 1 is that we  
14 consider that there will actually be a circularity to the  
15 process insofar as we will -- and this goes back to the  
16 fourth workstream, the Joint Venture Agreements. The  
17 schedule contemplates that we will reach a set of agreements  
18 amongst the joint venture and then go to market.

19 Issues will arise when we go to market and we each are  
20 negotiating and dealing with our individual purchasers, what  
21 if we find out that the agreements that we've made  
22 internally are not compatible with the requirements of  
23 buyers and erode value in terms of the contracts we would  
24 seek to put in place with those buyers?

25 Because of the likelihood of those sorts of issues  
26 arising, we consider that in fact the Joint Venture  
27 Agreements addressed under the fourth workstream would only  
28 be taken to the stage of final draft -- they're unlikely to  
29 be executed until after the parties have individually  
30 canvassed their buyers and ascertained whether the buyer  
31 requirements are consistent with the proposed internal



*Pohokura JVPS (cont)*

1 arrangements and that's why I say there's a circularity to  
2 the exercise because of the potential for inconsistency  
3 between the internal and external arrangements.

4 That's why you will see the sixth workstream there is  
5 re-negotiation of Joint Venture Agreements. Re-negotiation  
6 in light of the experience that the parties have gathered  
7 from the fifth workstream. The understanding that they have  
8 achieved in relation to buyer requirements, in our view, is  
9 likely to require re-negotiation of at least some of those  
10 internal arrangements.

11 Seventhly, project redesign to incorporate both the  
12 internal and external arrangements will be undertaken, and  
13 finally, a funding investment decision will be made.

14 In the Draft Determination the Commission did address a  
15 number of matters which had been previously the subject of  
16 submissions by the applicants and in one respect a piece of  
17 independent work by the Commission through its advisor, and  
18 I would just like to address each of those matters briefly  
19 if I may.

20 As we have said in our submission in response to the  
21 Draft Determination, we consider that the AIPN survey for  
22 various reasons should receive no weight, and the principal  
23 reasons are outlined in the slide on the overhead.

24 In our submission in reply at paragraph 5.3.7 we  
25 outlined the legal principles that apply, and they are  
26 established and well settled legal principles that apply to  
27 the receipt and giving of weight to survey evidence, and we  
28 submit that on a number of grounds this particular survey  
29 falls well below accepted minimum legal standard.

30 Secondly, we note that only 17 responses have been  
31 provided to the applicants. We understand, or it has been

*Pohokura JVPS (cont)*

1 said that something in the order of 50 responses were  
2 received; we have had the opportunity to see and consider  
3 only 17 of those.

4 Thirdly, as is acknowledged in the Draft Determination,  
5 no New Zealand specific information was provided to the  
6 parties who responded to the survey, and because of the very  
7 significant differences between the New Zealand markets and  
8 other markets, we consider that to be a very significant  
9 flaw, particularly in the context of the fact that most of  
10 the responses appear to emanate from the United States  
11 which, as has been discussed, has very different market  
12 characteristics.

13 Fourthly, we submit that even if the survey didn't  
14 suffer from those flaws, it would be very difficult to draw  
15 any particular conclusions from it because the responses  
16 varied so widely. For example, in response to a question as  
17 to the respondent's estimate of how long it should or would  
18 take to implement a gas balancing agreement, the responses  
19 varied from two weeks to two years.

20 Fifthly, as I've indicated, most of the responses appear  
21 to have come from the United States, which has very  
22 different market conditions.

23 The question of appeals I have already addressed.

24 The Commission in its Draft gave some consideration to  
25 the submissions that we had previously made about  
26 operatorship issues, and we have addressed that in some  
27 detail in the submission in reply. I don't want to restate  
28 all of those points other than to emphasise the point that  
29 has been made throughout this application, which is that in  
30 our view Scenario 1 marketing introduces significant  
31 different internal drivers and incentives. It introduces,

*Pohokura JVPS (cont)*

1 if not actual then the potential for misalignment, and the  
2 culmination of those factors make it untenable for three  
3 parties negotiating with each other to rely entirely on the  
4 services of a common adviser.

5 In my submission it's no different from any situation  
6 where three parties are negotiating with each other and  
7 seeking to achieve commercial outcomes with different  
8 incentives; it's no different -- this question of  
9 operatorship -- than the issue of relying on a common  
10 adviser anywhere.

11 If we were negotiating with Shell and OMV in relation to  
12 a Joint Venture Agreement for example, it would not be  
13 content for the three of us to employ the services of a  
14 common lawyer or a common consultant of any other kind, and  
15 I honestly don't understand the proposition that the  
16 situation of operatorship should be any different. It's  
17 effectively the situation of the three parties with  
18 different incentives being asked to rely on the services of  
19 a common consultant, and our position is, that would not be  
20 tenable.

21 It gives rise to two particular issues so far as the  
22 period of delay is concerned. One is, as Charles Rivers  
23 Associates have emphasised in their initial report, the need  
24 to employ extra risk mitigation strategies in the Scenario 1  
25 context. It means that the parties will seek to have a much  
26 deeper and broader understanding of the sub-surface issues  
27 which they would obtain from an independent source of  
28 advice.

29 The second and very significant set of issues arises  
30 from day-to-day operations. We've outlined some of those  
31 issues in paragraph 5.3.17 of the submission in reply.

**2 July 2003**

*Pohokura JVPS (cont)*

1           To take a simple example; if there is spare capacity on  
2 a particular day and each of the three Joint Venture Parties  
3 wants to utilise that capacity, how is a common operator to  
4 decide which of the parties should get the benefit of that  
5 capacity? I'm not suggesting that that's an issue that's  
6 impossible to solve, rather it is an issue that has to be  
7 solved and will take some time to resolve, it's an example  
8 of the sort of issue that would arise from operation that  
9 would have to be addressed if Scenario 1 marketing was to be  
10 implemented.

11           Related points would be, if a party is to have access to  
12 that spare capacity, on what basis should it be given that  
13 access? Who should have to -- on what basis, for example,  
14 should it have to pay operating expenses in relation to that  
15 capacity? Should there be some mechanism for adjusting  
16 contributions to capital cost-based on parties' access to  
17 spare capacity on particular days? Those are the sorts of  
18 issues that would have to be addressed in terms of day-to-  
19 day operation.

20           I think there's been considerable discussion already on  
21 the maximising of revenues incentive. The position, to  
22 briefly restate it, of the Joint Venture Parties, is that  
23 they do have an incentive to achieve a return from their  
24 investment, but in the context of the fact that they are  
25 facing the prospect of a further very substantial  
26 investment, they will make that investment only on the basis  
27 of sound commercial judgment as to risk rate of return and  
28 they are not going to succumb to that incentive at all  
29 costs. The point that I've made there is that, even if they  
30 wanted to, they wouldn't get external or internal funding  
31 approval to do so.

*2 July 2003*

*Pohokura JVPS (cont)*

1           The question of gas balancing has been accepted by the  
2 Commission as one which will require some time to resolve; I  
3 don't think there's any argument about that from any of the  
4 other parties.

5           My first point there is that, it appears from the Draft  
6 Determination that it is assumed that this will be achieved  
7 within a shorter rather than a longer time because of the  
8 revenue incentive. And so my first point there is that the  
9 flaws underlying that assumption therefore permeate the  
10 analysis on the time period required to implement a gas  
11 balancing agreement.

12           As we've outlined in some detail in the submission in  
13 reply, external balancing is not practicable in New Zealand.  
14 There are very difficult issues surrounding the proposition  
15 of internal balancing. Unless the parties are going to  
16 deliberately produce the field at a sub-optimal level there  
17 won't be any gas available for internal balancing, and as we  
18 have outlined in the reply, cash balancing, which is the  
19 most likely mechanism, gives rise to a set of difficult  
20 issues first as to determination of the market price and  
21 secondly, as to the Commerce Act implications of agreeing  
22 that price amongst the three parties.

23           I do note and refer again to the fact that, insofar as  
24 the Commission's AIPN survey is concerned, at least one of  
25 the responses to it indicated that achieving a gas balancing  
26 agreement could take up to two years.

27           In this slide I simply observe that there are a number  
28 of other issues and sets of issues which had previously been  
29 canvassed by the applicants which don't appear to have  
30 received any treatment in the Draft Determination. We have  
31 addressed those matters in some detail in paragraphs 5.3.27

*Pohokura JVPS (cont)*

1 of the submission in reply and following, and I don't  
2 intend, unless the Commissioners require it, to go through  
3 those in any particular detail, other than to commend to you  
4 a consideration of that part of the submission in reply.

5 There are significant issues arising from production,  
6 treatment and abandonment costs, use of joint venture  
7 assets, an example of which I gave in relation to plant  
8 capacity a moment ago. The period for completion of the  
9 tasks, of course, is in the context of a number of  
10 stakeholders being involved in the process and, therefore,  
11 time will be required for each of them to achieve comfort on  
12 the relevant issues.

13 So far as the other submissions are concerned, and this  
14 is my final slide, I come back to the point that I made at  
15 the outset; in contrast to the detailed analysis provided by  
16 the applicants, there is a complete paucity of such analysis  
17 from the submissions filed by other parties. I would go so  
18 far as to suggest there has been no real attempt to rebut  
19 the time delay -- the period of time delay indicated by the  
20 applicants or the analysis underlying and giving rise to  
21 that time delay.

22 Rather, the submissions consist of their assertion that  
23 it should be possible to achieve outcomes more quickly than  
24 the applicants have said they will be achieved. Because of  
25 that paucity of analysis it's my submission that those --  
26 the submissions of those other parties are of no real  
27 assistance to the Commission.

28 Unless the Commissioners have any questions, that is the  
29 end of the section on time delay.

30 **MS BHAMJI:** This is just a question in relation to the AIPN  
31 survey. It might be best for you, Mark. You would agree,

*Pohokura JVPS (cont)*

1 would you not, that the Commission is not bound by Rules of  
2 Evidence in considering information when it makes its  
3 decision?

4 **DR BERRY:** My recollection is, and I'd a need to look at s.99  
5 again, but that pertains to admissibility, does it not?

6 **MS BHAMJI:** It's to take evidence, but in considering  
7 information, it's...

8 **DR BERRY:** Can I perhaps come back to that in closing  
9 submissions, but I would just make the point that the  
10 reference to the caselaw in the submission pertains to the  
11 weight that ought to be attached to the evidence, and the  
12 standard principles in the High Court judgments which we  
13 cite are, in my view, sensible principles which ought to be  
14 taken into account with or without strict legal  
15 requirements, but I would like to come back to that.

16 **MS BATES QC:** Come back to it, I understand that. I have some  
17 evidence with survey evidence. Basically the rules do get  
18 back to the question of admissibility actually, but it then,  
19 I think, becomes a question of weight, but we'll...

20 **DR BERRY:** My recollection of the starting point case is often  
21 the Custom Glass Boat(?), Justice Mahon(?), and that  
22 pertains not just to admissibility but clearly is pertaining  
23 to weight as well. I'll come back to that.

24 **MS BATES QC:** It's technical, we will come back to it.

25 **DR BERRY:** Okay, well, at this stage the rest of the  
26 presentation as to public benefit now moves to Professor  
27 Evans to lead off to take us through the CRA report findings  
28 as to the quantum of benefit.

29 **PROF EVANS:** Thank you. This is s.6 in the material which I  
30 circulated yesterday. Without any detriments, any level of  
31 positive benefits from joint marketing must be sufficient to

*Pohokura JVPS (cont)*

1 justify the authorisation of joint marketing on economic  
2 welfare grounds. I agree with the Commission that the  
3 benefit calculation should not be influenced by foreign or  
4 domestic ownership, although I reach this conclusion from a  
5 different route. I would argue that my route is in accord  
6 with the High Court's view in the *AMPS A* case.

7 For the calculation of benefits and the purposes  
8 measuring the benefits, the quantification, I assume that  
9 there are no conditions placed on the authorisation. There  
10 is a very great range of possible delay, demand and supply  
11 scenarios that might be considered in a benefit evaluation  
12 as there are many credible sources of uncertainty in demand  
13 and supply in particular.

14 While the extent of delay is a matter for judgment for  
15 the reasons given the literature on the subject and the  
16 information provided by the Joint Venture Parties, I see no  
17 reason to resile from the position taken by CRA in both its  
18 reports that separate marketing implies at least a three  
19 year delay in bringing Pohokura gas to market.  
20 Nevertheless, CRA provides estimates of benefits from delays  
21 of one and three years.

22 I note that the CRA calculations show substantial  
23 welfare costs from delayed production of LPG and condensates  
24 alone of the order of \$192 million for a three year delay  
25 and \$70.4 million from a one year delay. Thus, there are  
26 welfare gains to be expected from delaying bringing Pohokura  
27 gas to market.

28 These positive benefits indicate that the authorisation  
29 of joint marketing satisfies the benefit test and is  
30 economically efficient. In other words, unless there are  
31 welfare gains on the gas side from delaying bringing



*Pohokura JVPs (cont)*

1 Pohokura gas to market, these benefits on the liquids alone  
2 suggest that we should bring it forward.

3       Apropos an earlier question; if you want to see what  
4 it's costing the Joint Venture Parties from delay, then you  
5 can use those figures on the LPG and condensates to give an  
6 idea as to what the cost is on a yearly basis or a monthly  
7 basis.

8       The sources of uncertainty supply a great range of  
9 scenarios that we can consider when calculating the benefits  
10 of this marketing arrangement, and these scenarios --  
11 there's a vast number of them that could be considered for  
12 gas, condensate and LPG. Given that LPG and condensate are  
13 tradable in international commodity markets, it's reasonable  
14 to estimate joint marketing benefits at current price  
15 levels, just as the Commission did for condensate.  
16 Although, if much depended upon accuracy, a deeper  
17 investigation would be warranted.

18       I note that LPG and condensate price rises or falls  
19 would increase or decrease the benefits of streams of  
20 product under both forms of marketing, and as a consequence  
21 they would increase, decrease the benefits of joint  
22 marketing. Nevertheless the expected benefit from joint  
23 marketing would remain positive across all these price  
24 changes even allowing for the option to delay.

25       The demand for gas is a demand derived from its uses in  
26 New Zealand. While it may seem that scenarios for gas  
27 demand and supply are more readily definable and known with  
28 more certainty, I think this position is hard to justify.  
29 In addition to the risks of discoveries and evolving  
30 competing supply there are large players in the New Zealand  
31 gas and electricity markets whose individual production and

*Pohokura JVPS (cont)*

1 fuel contract decisions materially affect the state of these  
2 markets and this imparts considerably upside and downside  
3 risk potentialities.

4 If the level of benefit were critical to the  
5 authorisation decision, a very extensive investigation of  
6 alternative scenarios might sharpen the precision of the  
7 benefit estimate somewhat. However, what accuracy can be  
8 achieved is limited by the considerable intrinsic  
9 uncertainty which is such that the outcome of variance  
10 extensive investigation is not likely to justify its cost.

11 Further, given the robust estimates of the benefits  
12 relating to condensate and LPG all that is required to  
13 justify authorisation of joint marketing on economic  
14 efficiency grounds is comfort that there is no benefit from  
15 delaying the option to extract gas from Pohokura.

16 Now, we have presented here on a slide a rough summary  
17 of different figures that have been obtained under different  
18 scenarios. The range of estimated benefits on a three year  
19 basis, they range between \$400 million roughly and \$1  
20 billion. The \$1 billion one crops up in a very adverse  
21 situation in which we have included in the delay period a  
22 very dry year and where the price of alternative supplies of  
23 gas limit price against diesel at 11.70 and there's  
24 inelasticity of demand of minus 2.

25 Now, all one can do here, I think, is give a broad range  
26 of benefits in order to sort of cover the various range of  
27 scenarios that are possible. In a deeper more accurate and  
28 sophisticated study one could spend an awful lot of time,  
29 even up to three years, finding probabilities for all these  
30 scenarios, attaching it to the scenarios and coming up with  
31 a better estimate. But I think that the information that's

*Pohokura JVPS (cont)*

1 provided through this report and the various scenarios that  
2 have been considered, whether you take the one year delay or  
3 whether you take the three year delay, suggests that there  
4 are significant benefits to joint marketing.

5 On the basis of the benefit estimates of CRA and of the  
6 Commission itself, I conclude that it is economically  
7 efficient for joint marketing of Pohokura gas to be  
8 authorised. Thank you.

9 **CHAIR:** I'd just like to follow-up the comment I think you made,  
10 which was that -- something to the effect that all that is  
11 required is some comfort that there is no benefit from  
12 delay, and I really wonder if that is what the Act requires.  
13 In that the Act doesn't rather require a higher degree of  
14 confidence that any benefits claimed will be achievable?

15 **PROF EVANS:** Well, while it's referring to gas, there are --  
16 obviously benefits to be gained from the liquids, are  
17 reasonably substantial. So that comment was explicitly  
18 related to gas to say that even if there was little benefit  
19 attached to having gas coming on earlier, that would still  
20 be a reasonable authorisation.

21 **CHAIR:** I --

22 **PROF EVANS:** The second aspect to this is the one which I think  
23 you were suggesting, that whether this should be implying  
24 whether or not these benefits would be realisable. Is that  
25 correct?

26 **CHAIR:** The benefits from avoiding delay. It isn't some  
27 comfort, it's a high degree of comfort that we actually will  
28 avoid delay. I think the Act requires a fairly high degree  
29 of confidence that the benefits can be achieved.

30 **DR BERRY:** A point we've made in our submission in reply to the  
31 Draft Determination is to remind the Commission that the

*Pohokura JVPs (cont)*

1 civil standard of proof applies. There is an inference in a  
2 few parts of the Draft Determination that some standard of  
3 certainty to the achievement of benefits is required. That,  
4 in our submission, is not the appropriate legal standard of  
5 proof.

6 **CHAIR:** We might want to come back to that point later.

7 **PROF EVANS:** I just would comment that, on the basis of the  
8 analysis, and the way in which we approached it was just to  
9 study the market itself, to study the way joint ventures  
10 operate, to study the way contractual arrangements are  
11 entered into, and to look for references in the literature  
12 about the interaction of these things in the gas and  
13 petroleum markets; by studying the markets per se and not  
14 thinking about which members -- which companies are actually  
15 members of this joint venture for example, but just the  
16 intrinsic characteristics of the market.

17 Given New Zealand's situation, it would be our  
18 submission that the ability to contract certainly with  
19 surety, as is provide under joint marketing, would  
20 facilitate the earlier -- early as possible bring on  
21 benefits associated with a field that is privately owned.

22 **CHAIR:** I just would like to suggest we take a 10 minute break.  
23 I want to keep it very brief because I'd like to continue  
24 with the applicant's presentation and I'm still hopeful we  
25 can finish it by 11.30, but we'll take as much time as we  
26 need, so I would like you to be back from the break at  
27 11 o'clock sharp, we'll start again then. Thank you.

28

29 **Adjournment taken from 10.50 am to 11.05 am**

30

31 **CHAIR:** I'd like to reconvene the meeting if we can, please.

*Pohokura JVPS (cont)*

1 Before we start again I'd just like to say that we will need  
2 to adjust the schedule again and that requirement is due to  
3 the Commission's questions, and I want to assure the  
4 applicants that we will take what time is necessary in order  
5 to hear the case, and time is available. So, I don't want  
6 people to feel rushed.

7 The other thing I would say is -- and I'm sure everyone  
8 knows this -- is the Commission won't hesitate to ask the  
9 questions it feels need to be asked. So, while I have been  
10 attempting to make up some time, we do have time to take so  
11 I don't want you to feel rushed and I want you to present  
12 your case.

13 The purpose of these proceedings is to allow the  
14 Commission to engage with you and ensure that it has the  
15 opportunity to understand your submissions, so if it takes  
16 more time it simply takes more time. So, I would like to  
17 thank the other parties for being flexible in the timing.  
18 At this stage I think we'll proceed with the applicants.  
19 I'm assuming we'll carry on through to the lunch break and  
20 then we'll do the confidential session after the lunch  
21 break. So, on that basis, Mr Berry, please proceed.

22 **DR BERRY:** Thank you. The conclusion of Professor Evans'  
23 presentation reached the end of our second key line of legal  
24 argument that there are benefits resulting from earlier  
25 development that would clearly outweigh any detriments, so  
26 that's the end of the second key point of our legal  
27 submissions which then brings us to our submissions relating  
28 to the Commission's proposed conditions as well as those  
29 conditions suggested by other submitters.

30 The way that we propose to present this is that I will  
31 go first and go through all of the legal issues in their

*Pohokura JVPS (cont)*

1 entirety for all of these conditions. Following me will be  
2 Professor Evans who will link in with the economic  
3 perspectives, and then finally the industry participants  
4 will talk to each of the condition's proposed conditions  
5 one-by-one, and there will be the company perspective plus a  
6 linkage to the Westpac presentation in the course of that,  
7 and then finally we'll wrap-up with the other submitters'  
8 proposed conditions.

9 So, bearing in mind it is an evolving line of argument,  
10 the three different disciplines coming to it, there may be  
11 benefits waiting for questions at the end of the complete  
12 submission, if that's possible.

13 **CHAIR:** I can make no guarantee of that, but we'll see how it  
14 goes.

15 **DR BERRY:** The starting point is s.61(6) and I just begin with  
16 some general principles relating to conditions. S.61(6)  
17 states:

18 "The Commission shall not grant authorisation unless it  
19 is satisfied that the application will -- in all the  
20 circumstances etc -- result in benefits which would outweigh  
21 the lessening of competition."

22 And so, that's the prevailing legal test. Following on  
23 from that the other key legislative provision is s.61(2)  
24 pertaining as to conditions, and this provides that:

25 "Any authorisation may be granted subject to such  
26 conditions not inconsistent with this Act or for such period  
27 as the Commission thinks fit."

28 So, the beginning point is that the Commission needs to  
29 address this test of satisfaction on the balance of  
30 probabilities that the benefits outweigh the detriments.  
31 That's the s.61(6) test. There is the overlay in the

*Pohokura JVPs (cont)*

1 present situation where the Commission proposes conditions,  
2 and we acknowledge that this is a wide discretionary power  
3 but it is a power that is not unfettered.

4 There is a legislative restriction on the discretionary  
5 power, the conditions must not be inconsistent with the Act,  
6 and there is also a substantial body of administrative law  
7 principles to similar effect, and just very broadly the  
8 Commission will be aware of these general heads of  
9 administrative law.

10 But the ones I highlight are that the conditions must  
11 not be disproportionate to the objectives to be achieved or  
12 the reasons for which the discretion was conferred. And so,  
13 the conditions must only be designed to give effect to the  
14 objectives of this test of public benefit that we have under  
15 inquiry.

16 Other relevant administrative law principles are that  
17 the conditions must not pursue objectives other than ones  
18 for which the discretion was conferred. The discretion must  
19 not take into account irrelevant considerations. The  
20 conditions must not be unreasonable, onerous, oppressive and  
21 so on -- I see Commissioner Bates nodding, so I assume you  
22 are familiar with all these headings?

23 **MS BATES QC:** Are you actually looking at any caselaw when you  
24 are putting these forward?

25 **DR BERRY:** This is largely through standard text which cite all  
26 of the relevant collections of cases, most of which turn on  
27 their facts, and that's as useful a starting point as any on  
28 this.

29 **MS BATES QC:** Okay.

30 **DR BERRY:** So it brings us to consider what are the relevant  
31 benefits and detriments in the present case which must then

1       come through this legal framework.

2               Now, in the Draft Determination the detriments have only  
3       been broadly set out, they have not been quantified and so  
4       we have no opportunity to respond to any quantification by  
5       the Commission as to what the detriments may be. In  
6       contrast we have put before the Commission, through CRA's  
7       report, quantification of benefits which we say are  
8       significant, and on our analysis of the case are  
9       overwhelmingly greater than the detriments which we say are  
10      none.

11             And so, in these circumstances what conditions are  
12      appropriate? It is our submission that it is only those  
13      conditions which would aim to achieve the benefit of early  
14      start-up which would be consistent with the Act. Conditions  
15      with other goals would be inconsistent for the purposes of  
16      the legislative restriction under s.61(2); the question  
17      there of consistency, and the administrative law principles  
18      about pursuit of objectives which are inconsistent with the  
19      proper exercise of the discretion.

20             There is an adjunct to that principle relating to  
21      whether conditions may be used to minimise detriments, and  
22      our submission is that there are limits on the ability to  
23      exercise that discretionary power where, in the  
24      circumstances of this case the benefits are so overwhelming  
25      in relation to the detriments. This is not a tipping of the  
26      balance case in our submission.

27             So, therefore, on our reading of s.61(6) on the plain  
28      and ordinary meaning of the words, because the benefits so  
29      clearly outweigh the detriments it would be inappropriate to  
30      fashion any conditions which would purport to minimise  
31      detriments.



*Pohokura JVPs (cont)*

1 **MS BATES QC:** Which wording are you exactly referring to in  
2 s.61(6)?

3 **DR BERRY:** Correct. In combination with s.61 --

4 **MS BATES QC:** Which wording in s.61(6) are you referring to  
5 specifically?

6 **DR BERRY:** It's the basic test that the Commission -- the  
7 Commission's inquiry is to be satisfied whether or not the  
8 benefits outweigh the detriments.

9 **MS BATES QC:** Yes, and...?

10 **DR BERRY:** And the submission is that the power to impose  
11 conditions to be consistent with that must strike the  
12 appropriate balance. Where, if, for example, the benefits  
13 equal 8 and detriments equal 0, or for arguments' sake say 1  
14 on a scale of 10, then the appropriate approach would be for  
15 the Commission to authorise the application because the  
16 benefits outweigh the detriments.

17 **MS BATES QC:** Yes, I understand.

18 **DR BERRY:** Moving on from that, it perhaps is self-evident, but  
19 there is also a cause or connection argument there for any  
20 condition to be imposed there needs to be a cause or  
21 connection between the proposed condition, and the  
22 achievement of the benefit, it's another way of saying the  
23 same thing that I outlined at the start of the submission.

24 Those are the general submissions relating to the scheme  
25 of s.61(6) and the relevant condition power, and I now turn  
26 to comments specifically on each of the proposed conditions.

27 First of all, the proposed five year term which, upon  
28 clarification we understand to be five years from the date  
29 of first production. Again, conditions must be fashioned to  
30 help ensure the achievement of benefits, and there will be  
31 industry perspectives on this, but the imposition of this

*Pohokura JVPS (cont)*

1 condition will mean that the field won't be developed in a  
2 timely fashion to achieve the benefits.

3 Indeed, contrary to one of the Commission's stated  
4 reasons for this condition, and again, there will be  
5 industry perspectives that will come to bear on that.

6 The further submission relating to this is that, the  
7 Commission's reasons for this condition are largely  
8 speculative and not linked to any known detriment about what  
9 the market will be at the expiry of this time period, and it  
10 is our submission that it is inappropriate within the  
11 context of the legislation to limit the authorisation time  
12 period simply because you can't make that particular  
13 prediction, and there's a crucial link to that platform  
14 because there are other expressed legislative powers which  
15 the Commission has to address those particular concerns. I  
16 refer in particular to s.65 where the Commission has power  
17 to reassess markets and to move to revoke authorisations  
18 where there is a material change in circumstances.

19 And so, our submission is that, the concern the  
20 Commission has is one where the legislation dictates that  
21 the matter be looked at on a retrospective basis rather than  
22 a prospective basis.

23 Moving to the Commission's second proposed condition  
24 that first start-up commence in February 2006: The legal  
25 position is that the Commission has power to revoke  
26 authorisations where conditions are not met -- again, s.65  
27 is the governing provision.

28 Now, for the Commission to impose this condition in the  
29 current setting it would be tantamount to the Commission  
30 revoking the authorisation should the joint venture miss  
31 this magic February 2006 date. In my view it is -- if the

*Pohokura JVPS (cont)*

1 Commission does not intend to revoke the authorisation if  
2 development date is not met, then this condition should not  
3 be imposed.

4 Again, the effect of this condition is that timely  
5 development of the field will be frustrated. Again, you  
6 will hear industry talking on this.

7 **MS BATES QC:** Can I just clarify this, so I'm just making sure  
8 that I understand it, or we understand it properly. You are  
9 saying, because there's power to revoke, that a condition  
10 imposing a time limit should not be imposed -- is legally  
11 not able to be imposed?

12 **DR BERRY:** It would dovetail with the industry view. The  
13 position is that, if you put that condition on there, you've  
14 got the ability to unilaterally revoke -- if first  
15 production date is missed, you know, by a couple of weeks or  
16 by six months or whatever; for you to have imposed the  
17 condition gives you the ability to unilaterally revoke the  
18 authorisation for breach of that condition. And you will  
19 hear what uncertainty that creates going forward.

20 **MS BATES QC:** Yes, but I'm trying to get to what you are saying  
21 in a legal context. Are you saying that there is no ability  
22 to impose a time limitation on the authorisation? And  
23 that's what I'm really interested in.

24 **DR BERRY:** The argument comes down to the adverse effect it will  
25 have on the achievement of benefits. You will hear from the  
26 industry that faced with this potential condition, that  
27 there is not the ability to go forward and achieve early  
28 development.

29 **MS BATES QC:** I can understand the arguments on the merits, I'm  
30 really concerned with the argument on the statutory  
31 interpretation. I want you to tell me whether you think

1       that there's a limitation on our power to impose a condition  
2       as to time?

3 **DR BERRY:** There is in the context of this particular condition  
4       because it is inconsistent with the scheme of s.61(2) in  
5       that it will have the effect of adversely impacting on the  
6       potential achievement of the benefits, which is the  
7       objective of the Act.

8 **MS BATES QC:** So that gets down to an argument of fact, right,  
9       not...?

10 **DR BERRY:** There is a significant question of fact that feeds  
11       into that question.

12 **MS BATES QC:** I mean, you'd have to come to that conclusion on  
13       the facts really, not on the law.

14 **DR BERRY:** That is a fair assumption; you will need to reach the  
15       conclusion, and you will hear evidence from the industry as  
16       to what they -- faced with that problem, what does it mean  
17       in terms of how they could do the project; would they go  
18       ahead in the knowledge that they would lose the benefit of  
19       the authorisation.

20 **MS BATES QC:** Yes, I'm not saying that we would not make that  
21       assessment on the facts, Dr Berry, I'm just saying I'm  
22       trying to clarify the actual legal position if we're talking  
23       about our actual jurisdiction.

24       I want to take you back. I'm sorry to do this, I should  
25       have done it when you were addressing it, but your argument  
26       on the ability to impose conditions to limit detriment; is  
27       it basically that our discretion under s.61(2) is fettered  
28       by an inability to impose conditions where the benefits so  
29       far outweigh the detriments that it's a meaningless  
30       exercise? Is that really what you're saying?

31 **DR BERRY:** I think it's fair to talk about it that way. Earlier

*Pohokura JVPS (cont)*

1 decisions of the Commission have spoken about it in terms of  
2 a tipping of the balance issue, but it needs to be read in  
3 conjunction with s.61(6), it comes back to that basic test  
4 of the balancing exercise, what's the quantum of the  
5 benefits against the quantum of the detriments.

6 **MS BATES QC:** Yes, and where you think that they're so out of  
7 balance, there might be some detriment, but there's so much  
8 benefits, what's the point?

9 **DR BERRY:** Correct.

10 **MS BATES QC:** And just before we leave it with you Dr Berry, it  
11 would be quite helpful if we had your written submissions.

12 **DR BERRY:** Before I move on from the required development date,  
13 there is that first issue that we've just gone through  
14 there, that the imposition of this condition will impact  
15 adversely on the achievement of the benefits.

16 There's also an additional administrative law argument  
17 that, in the event that there's only a minor breach, and  
18 particularly if there are circumstances beyond the control  
19 of the applicants; adverse weather, whatever, it would be  
20 unreasonable or oppressive to have these kind of imposition  
21 of time limits where the events would deprive the joint  
22 ventures of the authorisation.

23 **MS BATES QC:** Is that on the unreasonable limb of the  
24 administrative law test?

25 **DR BERRY:** Yep.

26 **MS BATES QC:** A quite high threshold, isn't it?

27 **DR BERRY:** It is a high threshold, but again, the facts of these  
28 cases speak for themselves, and --

29 **MS BATES QC:** Well, that's why you have to --

30 **DR BERRY:** In the context of this industry, if there's adverse  
31 weather and suddenly there's only a minor delay past a

*Pohokura JVPs (cont)*

1 certain date, it may well be a case that it could meet the  
2 standard of requirement for unreasonableness.

3 **MS BATES QC:** Okay.

4 **DR BERRY:** The third of the Commission's proposed conditions  
5 relates to the assignment of the authorisation to  
6 successors. If authorisation is not extended to include  
7 successors then the authorisation will cease to have effect  
8 from the date that one of the Joint Venture Parties sells  
9 its participating interest to a participant unrelated to the  
10 joint venture, and it can't be anticipated or presumed that  
11 pre-emptive rights would always see the participating  
12 interests going to potentially only the joint ventures.

13 Again, I think Commissioner Stevens yesterday extolled  
14 the virtues of new entrants and this may be one way that new  
15 entry may be occasioned within the industry.

16 It follows that, if successors unrelated to JV do not  
17 have the benefit of the authorisation, then this is going to  
18 impose real problems for writing contracts. Any contracts  
19 entered into without the benefit of authorisation going to  
20 successors will need to be made conditional and have the  
21 ability to result in the cessation of supply under the  
22 contracts in the event that a participating interest is sold  
23 to an unrelated new entrant party.

24 The Commission has a discretion under s.58(b)(ii) --  
25 this is where this issue in fact comes in perhaps rather  
26 than in the context of talking about conditions. The form  
27 of our application is requesting that the Commission  
28 exercise a discretionary power to extend the authorisation  
29 to successors.

30 I think a key issue is, when we go back and see what was  
31 the Commission's concern for proposing this condition, it's

*Pohokura JVPS (cont)*

1 to protect against the risk of common ownership and  
2 information flows, and I just refer you to s.47, the merger  
3 provision: Any acquisition of a participating interest will  
4 be subject to analysis under s.47 -- and this, in my  
5 submission, would in fact meet all of the Commission's  
6 stated reasons for the condition.

7 So, potentially for the Commission to exercise this  
8 discretion it does have a benefit in that it permits the  
9 writing of contracts with a certainty that the status of the  
10 authorisation may not be in jeopardy in the future, and it  
11 has the ability to extend the benefit of this authorisation  
12 to a new entrant member of the joint venture.

13 Is turning to the --

14 **MS BATES QC:** I just want to clarify as we go. Are you arguing  
15 that s.47 precludes us from imposing this condition, or are  
16 you arguing that because we have this power under s.47 that  
17 it is unnecessary to impose this condition?

18 **DR BERRY:** The starting point is, I'm -- I don't necessarily  
19 accept it is the proper territory of a condition. As I  
20 stated at the outset, this is an exercise of a discretionary  
21 power issue under s.58(b)(ii) as to whether or not you  
22 extend the benefit of the authorisation to successors; that  
23 matter is expressly covered in the legislation in that  
24 provision.

25 **MS BATES QC:** In s.47?

26 **DR BERRY:** No, no, s.58(b)(ii). And so, if we go back to our  
27 actual form of application, at the very start of our  
28 application we --

29 **MS BATES QC:** Can you just slow down a bit. S.58(b)(ii), which  
30 subsection?

31 **DR BERRY:** It's 58(b)(ii)(a), it talks about any authorisation

1 granted may be expressed or implied to --

2 **MS BATES QC:** 58(b)(ii)(a)?

3 **DR BERRY:** Yep. [Pause].

4 **MS BATES QC:** So, successors under that become parties  
5 automatically, yes? Okay.

6 **DR BERRY:** But it requires the Commission to exercise a  
7 discretionary power to give the applicants the benefit of  
8 that successor. It was in that context that when we lodge--

9 **MS BATES QC:** It says "it may be expressed to apply".

10 **DR BERRY:** Correct, it is a discretionary power.

11 **MS BATES QC:** So, it can do it if it wants to, right?

12 **DR BERRY:** In our form of application right at the start, there  
13 was a separate paragraph on page 1 of the application which  
14 invites the Commission to exercise this discretionary power.

15 **MS BATES QC:** Okay.

16 **DR BERRY:** And so, it's in that context that this argument is  
17 run.

18 So far as s.47 is concerned what I'm saying is that in  
19 any event that entitles, or it ought to urge the Commission  
20 to exercise this discretionary power affirmatively because  
21 it provides a safeguard to meet the Commission's concern,  
22 albeit that it's expressed in relation to a condition.

23 **MS BATES QC:** Just let me have a quick look. [Pause]. We're  
24 just thinking through the practicalities of this. Under  
25 s.47 as you know, we don't automatically become aware of  
26 these developments unless there's an application to the  
27 Commission once it's done. I mean, it is actually -- it is  
28 actually quite difficult to monitor.

29 **DR BERRY:** This is a concentrated industry and I think it is --  
30 you don't have to have an application to assess compliance  
31 with s.47; it is a voluntary regime.



*Pohokura JVPS (cont)*

1 **MS BATES QC:** Yes, it is, but we're talk -- what you're saying  
2 is, because it's there and it enables us to do what we want  
3 to do, that we shouldn't impose a condition?

4 **DR BERRY:** It's a reason to support the exercise of the  
5 discretion of s.58(b)(ii).

6 **MS BATES QC:** And I'm just exploring the practicality of the  
7 Commission relying on s.47 to do this. I don't mean  
8 legally; I mean practically.

9 **DR BERRY:** Again, I would just raise a question; how many  
10 situations have there been where there has been an inability  
11 to appropriately apply or enforce s.47?

12 **MS BHAMJI:** On that point, the Preussag OMV issue, I don't think  
13 we would have been aware of it.

14 **CHAIR:** I think we'll leave that matter.

15 **DR BERRY:** I was walking around there, but do you want to talk  
16 to that?

17 **CHAIR:** Unless the parties want to speak to it, I think the  
18 Commission may leave that matter. [Pause].

19 **MS BATES QC:** We don't want to talk about that specific matter,  
20 but I think we just need to be certain that s.47 actually  
21 does enable us to do what we want to do if we consider  
22 that's the right path to go down.

23 **DR BERRY:** Sure. I guess one way to partly answer your question  
24 is to look at how many mergers over the last X number of  
25 years have not been properly met by the voluntary merger  
26 regime and the circumstances where the Commission has had a  
27 concern has resulted in a relative address of the issues and  
28 I would have thought that s.47 is a provision of some safety  
29 to the Commission to rely upon.

30 **MR HALL:** I think the only point that can be added to that in  
31 terms of the practical point is that, as the Commissioners

*Pohokura JVPs (cont)*

1 will be aware, in relation to Todd's acquisition of a  
2 further interest in Pohokura, so that's a recent and  
3 relevant example of how the Commission did become aware in  
4 this concentrated industry of a proposed transaction  
5 substantially in advance of the transaction even being  
6 finalised let alone consummated.

7 **MS BATES QC:** We'll leave that topic there then.

8 **DR BERRY:** Another reason for the affirmative action of the  
9 discretion, as I've already mentioned is, it is actually  
10 pro-competitive, because the beneficiary is going to be  
11 somebody other than a person who is entitled to a preemptive  
12 right, and so, who is the beneficiary of this discretion?  
13 It is a new entrant who requires a participating interest,  
14 so that's who we are asking you to give the benefit of this  
15 authorisation.

16 Okay, I'll move on to the last of the Commission's  
17 proposed conditions relating to ringfencing. The Commission  
18 floated this in a non-specific way in the Draft  
19 Determination, and we responded in our submissions  
20 addressing essentially from a legal perspective the company  
21 law issues relating to directors' duties, and it's all set  
22 out in our submission so I won't repeat that.

23 The further submission that's been received on this  
24 issue is that put forward by NGC relating to its proposed  
25 condition, and the one that they recommend as applying to  
26 this situation is for an agent to step into the shoes of the  
27 joint venture. The agent would be given guidelines of  
28 standard terms and conditions of contract, apparently  
29 acceptable to the joint venture, then they go on to suggest  
30 that these guidelines would include a base price which is  
31 based upon some minimum revenue requirement for project

*Pohokura JVPS (cont)*

1 economics rather than market prices.

2 And so, with those directives and I'll come back to the  
3 nature of those, armed with those this agent then goes forth  
4 and enters into binding legal contracts to sell all of the  
5 gas out of Pohokura on behalf of the joint venture.

6 Now, just looking through this particular clause, the  
7 first issue is this one relating to the price dimension of  
8 what the minimum price is that the agent is given. It is a  
9 matter of some uncertainty to me as to how this condition  
10 would be fashioned. It would seem to me to be putting the  
11 Commission in essence in a regulatory role providing some  
12 kind of building blocks for the assessment of minimum prices  
13 for the gas for sale out of Pohokura, and to estimate the  
14 legitimate costs of an oil and gas field would inevitably be  
15 complex.

16 For this condition to be imposed there would need to be  
17 some workable formula to establish this minimum price. This  
18 is walking, in my submission, into something which is  
19 inconsistent with the Act because the Commission does not  
20 have power to so set prices. The powers relating to  
21 regulation pertaining to gas production would be required to  
22 be exercised under s.53 because that is what this would be  
23 doing, setting a minimum price. And so, there is enormous  
24 uncertainty as to the nature of what this condition would  
25 look like, plus also questions about the Commission's powers  
26 to in fact fashion a condition to this effect.

27 Further, the directors' duties issues simply don't go  
28 away either. If anything the position is worse in relation  
29 to company director duty issues.

30 The proposal, as I've already mentioned, requires that  
31 the joint venture provides standard terms and conditions to

*Pohokura JVPS (cont)*

1 the agent. Now, what are those conditions? Again, how  
2 would the Commission fashion a condition that was not going  
3 to end up being a matter of some degree of significant  
4 dispute about the extent of the terms, what they may be and  
5 so on.

6 But putting that to one side let's assume that the agent  
7 goes out there possessed with all this information, the  
8 price and also the relevant terms and conditions. There is  
9 an immediate agency problem under the Companies Act because  
10 that agent is deemed to be a director.

11 S.126(1)(c) of the Companies Act provides that a  
12 director includes a person to whom a power of the board has  
13 been directly delegated. And so the agent's walking  
14 straight into the frame here, and so here's an agent with  
15 power supposedly to enter into binding contracts knowing  
16 very much less than even ringfenced directors, which is  
17 something that we say could not happen in any event.

18 Stepping back from the Companies Act there are still  
19 also general principles of agency applying here, so you  
20 would end up in the situation having this agent being  
21 appointed to represent the interests of three different  
22 parties, and so you've got further issues relating to  
23 compliance with fiduciary duties owed by a principal to  
24 three potential agents.

25 Finally, there is a Companies Act problem of  
26 supervision. Under s.128 of the Companies Act there is a  
27 provision to state that the business and affairs of a  
28 company must be managed by or under the direction or  
29 supervision of the board. It is clear that the directors  
30 cannot delegate the management function itself. What the  
31 management function requires is that directors supervise and

*Pohokura JVPS (cont)*

1 scrutinise the company's activities, and in that context I  
2 refer the Commission to the decision of *Dairy Containers v*  
3 *NZI Bank*.

4 **MS BATES QC:** Can we just go back over this, because I just want  
5 to start with -- I'm really having difficulty in following  
6 it, I don't know about the rest of the Commission -- the  
7 Commission is, so I think it's important that we take this  
8 one really slowly.

9 So you start with us imposing some sort of ringfencing  
10 condition, right. On one possible scenario it's that an  
11 independent body is appointed by all three to carry out the  
12 marketing function; right? It's not -- on one scenario it's  
13 not the directors being directly responsible for the  
14 marketing function, they appoint an independent body to do  
15 so?

16 **DR BERRY:** Yes, I mean it would be helpful if NGC -- I mean, we  
17 were only responding to what's sitting there -- the problem  
18 is we have this loose suggestion in the Draft Determination,  
19 we have something that's very loose from NGC with no bones,  
20 so we're trying to respond constructively to what --

21 **MS BATES QC:** Can you give me two minutes? [Pause].

22 We'll just theoretically take Scenario 1 -- no we won't  
23 call it that, take scenario A, that there's an independent  
24 body appointed to do the marketing.

25 **DR BERRY:** On behalf of the joint venture or each of the  
26 individual parties to the joint venture?

27 **MS BATES QC:** Well, on behalf of the joint venture.

28 **DR BERRY:** I just wonder whether it isn't an idea to invite NGC  
29 to articulate clearly what their ringfencing is when they do  
30 their presentation and we can respond to it.

31 **MS BATES QC:** No, please let's go through this legal point of

*Pohokura JVPS (cont)*

1 view first. We've got an opportunity to go through it with  
2 the NGC, but just say it's the sort of body that I'm talking  
3 about, it's appointed under the terms of the joint venture.

4 **DR BERRY:** Okay, so we've got an agent who's appointed on behalf  
5 of the joint venture.

6 **MS BATES QC:** Yes, to act pursuant to a requirement which is  
7 legally imposed by the Commission.

8 **DR BERRY:** Yep.

9 **MS BATES QC:** Okay. Now, what's the problem with that?

10 **DR BERRY:** The problem is that each of the joint ventures will  
11 have to go back to their board for approval as to the  
12 decision on final investment decision, on decisions relating  
13 to entering into gas contracts, and in so doing they would  
14 have to act in the best interests of the company having  
15 regard to all relevant information.

16 **MS BATES QC:** Yeah, but you've told us they have to act in the  
17 best interests of the joint venture, the joint venture has  
18 legally imposed on it a condition. Why is it that that  
19 requirement takes second place to any other duties?

20 **DR BERRY:** That is a different fiduciary duty owed between the  
21 joint venturers to the joint venture. That cannot and does  
22 not eliminate the basic Companies Act directors' duties.

23 **MS BATES QC:** No, but the directors' duties under the Companies  
24 Act is subject to what the law is, and if there's a validly  
25 imposed condition I can't for the life of me see why they  
26 wouldn't need to acknowledge that. That's what I'm having  
27 difficulty with.

28 **DR BERRY:** I can't see how directors' duties can be simply  
29 waived, which is what you are suggesting ought to be done.

30 **MS BATES QC:** No, they're not waived, it's a requirement validly  
31 imposed at law and they need to comply with it.

*Pohokura JVPs (cont)*

1 **MR HALL:** I think the answer to that is that there isn't an  
2 ability to impose conditions which would conflict with the  
3 existing statute law.

4 **MS BATES QC:** Well, I don't see how they necessarily conflict  
5 with the existing statute law, and that's another argument.

6 **MR HALL:** Well, they conflict insofar as ringfencing insofar as  
7 we understand the proposition, would put directors in the  
8 position of not being able to be satisfied that they were  
9 acting in the best interests of the company and, therefore,  
10 in breach of their obligations under the Companies Act.

11 **MS BATES QC:** Well, if it was in the best interests of the  
12 company for the whole thing to proceed, and they do proceed  
13 with the development, I don't see why it wouldn't be.

14 **MR HALL:** The simple answer to that is that the directors  
15 cannot, in our submission, comply with their Companies Act  
16 obligations by either A ringfencing and compartmentalising  
17 their knowledge of the business field by field, or  
18 alternatively B, delegating board responsibility in respect  
19 of contracting from a field to an external agent.

20 **MS BATES QC:** Well, there doesn't seem to be a difficulty from  
21 the directors from each of the parties agreeing to put the  
22 interests of the joint venture first.

23 **MR HALL:** That's a different proposition. When you're talking  
24 about joint marketing one assumes the incentives of the  
25 parties individually are aligned with their interests under  
26 the joint venture. As we've tried to explain in some  
27 detail, the incentives are not so aligned under Scenario 1.

28 **MS BATES QC:** No, I'm not talking about an individual situation,  
29 I'm talking about a general proposition which was put by  
30 Mr Tweedie that joint ventures owe their first loyalties to  
31 the joint venture, and that their loyalties to each to each

*Pohokura JVPS (cont)*

1 of their separate companies are subject in a joint venture  
2 situation to the interests of the joint venture.

3 **MR TWEEDIE:** But I did say, Commissioner Bates, that if this is  
4 where it all ended up, the joint ventures would have to go  
5 back and review the relationship and it would be forcing us  
6 into a variation of the joint venture rights and obligations  
7 to each other.

8 **MS BATES QC:** That doesn't really answer my point.

9 **MR TWEEDIE:** I can assure you, whether you like it or not,  
10 that's what will happen because this is such a gross and  
11 massive intervention into the existing relationship that it  
12 would have to be reviewed.

13 **CHAIR:** I don't think the point was whether she liked it, it was  
14 whether the question she put had been addressed. Now, I  
15 just --

16 **MR HALL:** There is the important related point, if I may just  
17 touch on, which is that, insofar as that issue is concerned  
18 what you have -- a theoretical potential for, I think the  
19 situation you are describing, is the conflict between a  
20 statutory obligation of a director and a contractual  
21 obligation entered into by the company. Aside from the  
22 important point that I've talked about in terms of alignment  
23 of interests under the two alternatives of joint and  
24 separate marketing, I think as a matter of law the  
25 contractual obligation would be subjugated to the statutory  
26 obligation.

27 **MS BATES QC:** That's right.

28 **CHAIR:** Can I just -- do you want to pursue that?

29 **DR BERRY:** I think the essence of the point is that you would be  
30 fashioning a condition which would be in breach of the  
31 Companies Act.



*Pohokura JVPS (cont)*

1 **MS BATES QC:** You see, I have great difficulty in accepting that  
2 and I think perhaps -- and maybe it's just a lack of  
3 understanding on my part, but I don't see how it could be.

4 **DR BERRY:** But you're asking directors to make decisions without  
5 knowing the relevant information, and then you go to assign  
6 it to an agent who is deemed to be a director, and that  
7 person is not possessed of any relevant information  
8 pertaining to the company who it is entering into a binding  
9 contract on behalf of. And so, in those circumstances it  
10 seems to me very clear that that agent who, being a deemed  
11 director, could not be, on any construction, acting in the  
12 best interests of the company.

13 **MS BATES QC:** Just -- I'll come back. [Pause].

14 **CHAIR:** I think we understand your submission, we will  
15 undoubtedly come back to this matter with others, and I just  
16 would like to reinforce the request to have your written  
17 notes on these legal arguments, I think it would be helpful  
18 to the Commission.

19 **MS BATES QC:** Can I say, I might be adopting a slightly  
20 adversarial style, I'm really just trying to understand what  
21 your argument is, and I'm sure that the rest of the  
22 Commissioners are too so that we can properly address it.

23 **MR HALL:** I think in a nutshell it is that, whether it's the  
24 director who is compartmentalised or the external agent;  
25 they might be satisfied that in contracting the gas for  
26 Pohokura they were making the best decision, but in either  
27 scenario they do not have the information about the  
28 company's other activities and interests and, therefore,  
29 it's impossible for that person to know that he or she is  
30 acting in the best interests of the company, they simply do  
31 not have the information on which to make that judgment.

*Pohokura JVPS (cont)*

1 **MS BATES QC:** But they'll know if they were acting in the best  
2 interests of the joint venture?

3 **MR TWEEDIE:** They wouldn't.

4 **MR HALL:** It's an interesting question, what is the joint  
5 venture and what are the interests of the joint venture as  
6 an unincorporated body without real legal standing or  
7 status.

8 They might be satisfied that the agent was acting, for  
9 example, in the interest of Todd so far as its Pohokura  
10 interest was concerned. It would not be in a position to  
11 make a judgment about whether the agent was acting in the  
12 overall best interest of Todd, and that's the issue that  
13 falls squarely foul, we say, of the Companies Act  
14 obligation.

15 **CHAIR:** I think we understand that submission. I just want to  
16 check and see if our staff or advisors have a follow-up?

17 **MR BAY:** Yeah, I just had one question on appointment of an  
18 independent marketing agent to represent the joint venture.  
19 If you could differentiate to me how that is substantially  
20 different than the appointment of an independent operator as  
21 Pohokura has now who acts in the best interests of the joint  
22 venture as a whole, and yet the ultimate decision rides with  
23 the individual boards as it would do with a marketing  
24 contract, you just wouldn't have access to the information  
25 available throughout the course of the negotiations, which  
26 is the concern of the Commission.

27 **MR SALISBURY:** John, the operator operates under the ongoing  
28 instruction of the operating committee, so therefore we have  
29 ongoing oversight and ongoing opportunity to review all of  
30 the information available to the operator, and they come to  
31 us on a very frequent, if not daily basis for decision-

*Pohokura JVPS (cont)*

1 making. So they do day-to-day work but we haven't delegated  
2 all of the duties and all of the functions and all of the  
3 decision-making to them.

4 **MR HALL:** I don't think that's a relevant parallel at all, in  
5 fact it's not an independent operator, it's simply somebody  
6 who's employed under a contract who undertakes certain  
7 tasks, and the principal retains all overriding discretion  
8 and access to all relevant information; it's in complete  
9 distinction to the proposition for ringfencing that we're  
10 talking about here.

11 **CHAIR:** Thank you for that. Dr Berry?

12 **DR BERRY:** Okay, I'll finish off the legal submissions by  
13 briefly going through the other new conditions suggested by  
14 other submitters, and we'll come back to this with a  
15 checklist when we go through the rest of the presentation on  
16 this.

17 But the first one is that the Pohokura geology dataset  
18 be independently set at the expense of the applicant, and  
19 our submission is that that's not a relevant consideration;  
20 it does not inform upon the achievement of benefits or  
21 detriments. Again, there will be industry talking to that  
22 particular issue when we come back to run through all these  
23 conditions.

24 The other ones I'll group into a group of three. The  
25 ones which in essence pre-empt the negotiated terms of the  
26 sales contracts being future contracts yet to be entered  
27 into, and the three issues -- the three examples that arise  
28 from the other submitters are the contracts for gas not  
29 include provisions that unreasonably prevent or indeed to  
30 preclude buyers from on-selling gas; that there be an avenue  
31 for acquirers to appeal unreasonable contract terms, and

*Pohokura JVPS (cont)*

1 that there be limits imposed upon the ability of the  
2 applicant to impose high take obligations on purchases but  
3 minimal supply obligations on themselves.

4 Again, we have two key responses to that. The first is,  
5 as I outlined at the beginning of the Conference, the issue  
6 of specific contract terms such as these is not relevant to  
7 this application. This application is simply seeking  
8 authorisation for the Joint Venture Parties to jointly sell;  
9 in other words, to stand in the market as one contracting  
10 head in the marketplace.

11 The issue that follows on from that is that, do  
12 competition issues arise in relation to these contracts to  
13 be entered into between the joint venture and each of the  
14 purchasers of gas, and the answer is, of course yes, but  
15 those contracts are going to be clearly subject to  
16 appropriate analysis under s.27 at the time that they are  
17 entered into. So, there are those distinct legal paths  
18 relating to the analysis of those terms and conditions; they  
19 will sit there in contracts to be entered into between the  
20 joint venture and purchasers and they stand to be assessed  
21 under s.27.

22 The second issue is one of definition and enforcement.  
23 If we look at each of those conditions that I've described  
24 there would be significant problems in the Commission  
25 fashioning an appropriate condition by way of definition and  
26 it also has the potential for a monitoring situation which  
27 will involve potentially dispute and enforcement issues  
28 relating to that condition as well.

29 The other two conditions that have been raised by  
30 submitters are in fact already covered in essence by  
31 parallel discussion relating to the Commission's four

*Pohokura JVPS (cont)*

1 conditions. One of the suggestions is that authorisation  
2 only extend to a limited quantity of gas, and in our  
3 analysis that issue plays out the same way as the  
4 Commission's proposed five year term limitation -- Professor  
5 Evans will talk to that.

6 The other remaining condition proposed by other  
7 submitters is that authorisation be restricted to binding  
8 gas contracts i.e. No later than 1 December 2003, and we say  
9 that the same analysis appears to apply to that as does for  
10 the Commission's first production date termination clause.

11 So, that's our lead-off in terms of, those are the legal  
12 issues arising out of all of the proposed conditions, and as  
13 I outlined at the start the scheme is now for Professor  
14 Evans to talk through the economics, particularly linking  
15 into this requirement of the need for the conditions to be  
16 linked to the achievement of benefits, and then following  
17 that there will be the industry perspective which will build  
18 on those legal submissions as well.

19 **CHAIR:** Can I just check first, Dr Berry, if there are any  
20 questions at this stage. [**Pause**]. [**No comments**].

21 **PROF EVANS:** This authorisation is all about contracting, it's  
22 first of all about the contracting in the arrangement in  
23 order to come to the table with respect to a marketing  
24 agreement that enables the Pohokura Field to go ahead, and  
25 it's about the ability to write and enforce a portfolio of  
26 contracts that go to the sale of gas from Pohokura Field  
27 and, therefore, it's timely development.

28 Now, if we have in this process of developing contracts  
29 any relevant future event that affects the surety of  
30 contracts to any extent, it will be anticipated in the  
31 contracting process and parties will attempt to figure out

*Pohokura JVPS (cont)*

1 ways in which to handle it. In other words, if there is  
2 some event that is foreseeable that changes the nature of  
3 the game in the future, that can be -- that will be really  
4 significant or even to some extent not that significant, but  
5 anything that affects the profitability of the contracts to  
6 the parties will induce an awful lot of investment and  
7 research and negotiation before any contract is signed.

8 Thus, if it is any future event that will impinge on the  
9 performance of the contract in the Pohokura arrangements,  
10 this will add to the issues and time and cost of negotiating  
11 agreements before even the extraction capital is put into  
12 place.

13 I'd just like to make a couple of comments about this  
14 general issue. First, we do have in New Zealand some  
15 experience of contracts that, or a contract that had been  
16 breached by the use of the Commerce Act. If a contract is  
17 in fact breached and the contract is found not to be in  
18 accordance with the Commerce Act, then there is the  
19 possibility of breaching without compensation, and this is a  
20 major issue for those who are parties to the contract.

21 Now, the conditions imposed by the Commission on joint  
22 marketing presumably imply that without them the  
23 authorisation would not be allowed under Competition Law,  
24 otherwise why would the Commission lay down the conditions?  
25 Consequently when conditions are such that the authorisation  
26 expires contingent upon some date, or contingent upon some  
27 event, it is entirely reasonable to assume there's a high  
28 probability that a party, perhaps without much likelihood of  
29 liability for compensation, or a non-party can utilise  
30 Competition Law precepts to undo a contract that otherwise  
31 would extend beyond this date or beyond the event. All

*Pohokura JVPS (cont)*

1 parties know this, including the Joint Venture Parties and  
2 the prospective purchasers of gas; the other side of the  
3 contract. Thus the contracts will be negotiated and written  
4 to accommodate the future contingencies implied by the  
5 conditions before extraction investment occurs.

6 Where the conditions activate separate marketing, this  
7 carries the separate marketing contractual issues directly  
8 over to joint marketing at the outset of negotiations and  
9 obviates the benefits of joint marketing. If in a situation  
10 where a particular event or a particular day invokes in the  
11 foreseeable future, or in a relevant potential event,  
12 invokes or revokes the authorisation of joint marketing this  
13 is a significant event in the negotiation of the contracts  
14 before even investment in extraction at Pohokura has taken  
15 place.

16 Now, I've argued that there is benefit from the long-  
17 term contracts that are feasible under joint marketing, thus  
18 there would seem to be no economic purpose in conditions on  
19 joint marketing. Under joint marketing contracts will be  
20 subject to Competition Law in any event. The conditions  
21 imposed on joint marketing would simply give contract  
22 parties added presumption and comfort to breach. Parties  
23 recognising this will devote extra time and resources to  
24 managing this prospect by means of redesigned contracts.

25 An agreement contract may not exist. In any event what  
26 it does is make a situation where we have joint marketing  
27 plus certain contingencies devolves it right back into the  
28 issue of separate marketing for all the reasons that we have  
29 discussed to this point in time. Many of these conditions  
30 actually imply that separate marketing might be insisted  
31 upon in the future in some shape or form. Where this is

*Pohokura JVPS (cont)*

1 related to a date or a particular event, then this suggests  
2 that separate marketing should be budgeted for now, planned  
3 for now, before the field is operational.

4 So, if we're looking at the detriments associated with  
5 conditions, one can think of them as being the detriments  
6 that are associated with separate marketing, and I'll just  
7 refer to this on the way through the different conditions  
8 that have been specified or suggested by the Commission, and  
9 at the conclusion I'll argue that there are some special  
10 detriments that are associated with the active conditions.

11 The first condition is that of the time limit, which  
12 carries the presumption that, depending on market  
13 circumstance, the Commission or Court may well undo a gas  
14 contract after the expiry of the authorisation without,  
15 perhaps, compensation.

16 The condition converts joint marketing to separate  
17 marketing today for the reasons that we've just given, that  
18 seeing that event prospect in the future, the time to plan  
19 for it is now, not in the future. The proposed period is  
20 very short in relation to the economic and physical lives of  
21 sunk investment required for extraction and for some of the  
22 joint ventures potential customers; it's very short in  
23 relation to investment in generation plant for example.

24 As Charles River noted, the period is short in relation  
25 to hold-up problems with respect to that sort of investment,  
26 and it is short with respect to covering prudent management  
27 of commodity risk. It is also shorter than that permitted  
28 by Australian competition authorities for the same  
29 greenfields situation.

30 The Commission's proposal does, however, raise the issue  
31 as to whether it would be easier to separately market gas



*Pohokura JVPS (cont)*

1 from Pohokura at a time in the future when development costs  
2 have been recovered. At the date when extraction costs have  
3 been recovered it is likely that the level of reserves  
4 uncertainty may also have been reduced, although the recent  
5 Maui experience illustrates how material this uncertainty  
6 can be even in a mature field. Separate marketing may be  
7 easier to coordinate at that point in time, but the level of  
8 uncertainty would still be very significant, transaction  
9 costs high, the common pool incentives will still exist, and  
10 it is unlikely that New Zealand will have a spot market of  
11 the requisite depth at that time.

12 Thus, I consider the prospect of separate marketing at  
13 some future point in the context of the market  
14 characteristics remaining at that time would require the  
15 joint venture Parties negotiate required intra joint venture  
16 governance arrangements, e.g. Balancing arrangements and so  
17 on, prior to the development of the field. This would  
18 undermine, even eliminate, the earlier development of  
19 advantages of joint marketing.

20 Now, the Commission so far has provided us with no  
21 rationale for the particular time limit on the authorisation  
22 and, for the reasons adduced when we looked at the benefits  
23 and the absence of detriments, one is not implied by my  
24 analysis of the Pohokura case.

25 The second condition is that Pohokura be developed by a  
26 certain date. The Commission proposes to impose a  
27 condition, a requirement that production commence by  
28 February 2006. This or any date is subject to significant  
29 and numerous risks that are well beyond the control of  
30 Pohokura Joint Venture Parties.

31 In addition it provides potential for opportunism via a

*Pohokura JVPS (cont)*

1 joint venture or non-joint venture party instituting delay  
2 by some mechanism. The Joint Venture Parties and their  
3 customers will have to plan for separate marketing now  
4 before the investment in capital to extract from the field  
5 is in place.

6 The rationale for this condition is unclear to me. It  
7 may be that the Commission is resting on an interpretation  
8 of the Government's Section 26 Statement in being interested  
9 in inducing early extraction. As I've pointed out, the  
10 condition does not have this effect because it returns the  
11 arrangement to separate marketing. However, the timing of  
12 extraction is certainly the critical issue and one that the  
13 joint venture has control over by virtue of its ownership of  
14 Pohokura.

15 Joint marketing authorisation confers the right for the  
16 joint venture to exercise its options to write contracts.  
17 Once these are agreed the option to delay is extinguished.  
18 An investment for extraction will take place. The main  
19 legal impediment to early extraction would be the right of  
20 Joint Venture Parties to offer contracts that were secured  
21 although subject to Competition Law.

22 The third condition I'll mention is the limit succession  
23 condition. The Commission proposes to restrict the  
24 authorisation to the existing Pohokura Joint Venture  
25 Parties. For the reasons similar to those I've outlined  
26 above, this restriction would have significant efficiency  
27 costs. Any assignment of a Joint Venture Party's interest  
28 in Pohokura would put the field's long-term contracts at  
29 risk of a Commerce Act attack by some party and require  
30 contractual consideration of separate marketing.

31 The constraint on transferability would reduce the value

*Pohokura JVPs (cont)*

1 of the contracts to the Pohokura Joint Venture Parties, and  
2 the reduced value would imply that, associated with a future  
3 transfer, would limit the security for lenders and security  
4 for equity investors in the field both. The outcome would  
5 be to limit the availability of funds for the development of  
6 Pohokura in conjunction with exacerbating the transaction  
7 cost issues that arise in the context of having to plan for  
8 separate marketing.

9 The fourth one is the ringfencing condition. The stated  
10 aim of the Commission's proposal is to require ringfencing  
11 of JV parties' managerial interests in Pohokura from their  
12 other business. It is to ensure that gas from the Pohokura  
13 field is marketed in competition from gas from other fields.

14 I first would note that this is exactly what joint  
15 ventures do, that in fact what we see here are entities that  
16 are otherwise competing that are coming together for the  
17 very purpose of harvesting Pohokura. They're coming  
18 together, they have competing interests in other areas, so  
19 they're attempting to align their interests to harvest  
20 Pohokura.

21 And so, what is happening there is, the joint venture  
22 itself is in a sense ringfencing their activities from their  
23 other firms. I would argue that the ringfencing would be  
24 more likely to be of use if you are concerned about  
25 interaction with other fields under separate marketing than  
26 joint marketing.

27 **MS BATES QC:** Could I just interrupt there. Just explain,  
28 because there's a bit of track to this argument you've put  
29 forward, but why is it that you say that the joint venture  
30 itself would amount to a ringfencing separate from the other  
31 interests, because it isn't actually what I've been hearing

*Pohokura JVPS (cont)*

1           previously, so could you just explain that a bit further?

2 **PROF EVANS:** Yes. I think this is a key area actually.

3 **MS BATES QC:** Yeah, I do too.

4 **PROF EVANS:** Because what we have are entities in the market  
5 that are competing in all sorts of ways. They're not  
6 necessarily in exactly the same market but they're certainly  
7 in the discovery and production market. And here they have,  
8 they have come together for this one field, and in that  
9 field we want -- we want them to continue to compete across  
10 the rest of the market, but for that particular field that  
11 we want them to be sufficiently co-ordinated so that he get  
12 that thing to market.

13           So that it is not the same thing to have Pohokura owned  
14 by one entity as it is by these three; it is a different  
15 thing, there is still tension as we can see within the Joint  
16 Venture Parties as to exactly what they want out of  
17 Pohokura, there's competing interests. Some of those  
18 competing interests relate to their interests in the other  
19 areas in the other markets.

20           So what happens here is, you have a joint venture which  
21 is ringfencing their interests away from their other  
22 interests --

23 **MS BATES QC:** And by what mechanism is it ringfencing those  
24 interests?

25 **PROF EVANS:** Well, I'll give you an example I think. Suppose  
26 one party has some downstream interests in gas. That party,  
27 if it was separately marketing, might say I'm just going to  
28 give my gas at a transfer price to my downstream interests.  
29 I mean, there are problems with that as we discussed the  
30 other day because of the transfer price and all that kind of  
31 thing. It's a lot easier said than done but nevertheless

1 that's a possibility.

2 However if that party is a member of this joint venture  
3 the contracts for the sale of the gas are with the joint  
4 venture, not with that party; and furthermore that party has  
5 the tensions within the joint venture of the other interests  
6 of the players, and so, probably what would happen -- I have  
7 no idea -- in that situation would be that, if they wanted  
8 gas for their downstream interests, then downstream  
9 interests would have to bid for it like everybody else. So  
10 in that sense the actual act of a joint venture carries out  
11 this ringfencing function.

12 **MS BATES QC:** So if we're getting down to, what is exactly  
13 constraining them from putting their other interests first?  
14 It's that they have an agreement with each other and some of  
15 the other two might be rather annoyed if one starts not  
16 playing the game? Is that the sort of thing you're saying?

17 **PROF EVANS:** Well, they all have their shares in this entity and  
18 they all have their different interests, and they have it in  
19 such a way that their interests are -- if they can be  
20 aligned -- to make Pohokura perform, right. And they're  
21 more interested in that as a joint venture than they are in  
22 the links between Pohokura and outside. And so, the very  
23 formation of a joint venture has that affect.

24 **MS BATES QC:** Can we just pursue this a little in terms of the  
25 argument that's been put forward vis-a-vis directors'  
26 duties. Because, as I understand it, it was argued that the  
27 proposed ringfencing provision or condition would constrain  
28 directors of each of the companies being able to properly  
29 carry out their fiduciary duties to the shareholders.

30 Do you think that's the case?

31 **PROF EVANS:** I think that, if they close someone to manage their

*Pohokura JVPs (cont)*

1 field, then it would be like the operator, they'd be  
2 overseeing how the field was managed and so on and they have  
3 -- all the responsibility goes back to their boards, you  
4 know, in a shared way, da-da-da. The question is, what  
5 happens if you impose such an arrangement, and I'm -- it  
6 would certainly create significant communication and  
7 principal agent problems. But, I'm not sure of the legal  
8 position of directors, I'm not strong enough in that area.

9 **MS BATES QC:** What you seem to be saying, just put simply is,  
10 decided to go into this joint venture and they have all  
11 decided that getting the gas out and marketing it the most  
12 efficient and profitable way is for the benefit of each of  
13 them and their shareholders.

14 **PROF EVANS:** That's right.

15 **MS BATES QC:** So that, that becomes the primary aim and the fact  
16 that in some situations for each of them it might be better  
17 to play for themselves rather than for the team will not  
18 happen because the team is more important than the  
19 individual players.

20 **PROF EVANS:** But it is limited to all that is necessary to get  
21 Pohokura to work. In other words, they will still be  
22 competing everywhere else, it is just that minimal set of  
23 arrangements so that they can bring Pohokura to market in a  
24 timely way.

25 **MS BATES QC:** Yes, but we're talking about ringfencing for the  
26 reason, whether you accept it or not, of making sure that  
27 the other interests have played competitively.

28 **PROF EVANS:** My argument is that the joint venture, of itself,  
29 does that. I would be more concerned about the other  
30 connections to other fields under separate marketing.

31 **MS BATES QC:** Okay, I think I've got as far as I want to go with

1 that.

2 **PROF EVANS:** Well, I'll just reiterate; under separate marketing  
3 gas tranches offered may be in conjunction with gas from  
4 other fields with common ownership; whereas joint marketing  
5 introduces a separate entity in which participants have  
6 conflicting interests and incentives. It would be much  
7 easier to make a case for ringfencing under separate  
8 marketing than joint marketing. Because separate marketing  
9 increases risk and decreases field value, it must also  
10 reduce entry incentives and, accordingly, it is actually  
11 separate marketing that would retard the development of a  
12 more competitive production market.

13 Now secondly, I've argued that gas contracts should be  
14 in place before any investment takes place. Such large  
15 investment will require the approval of the boards of the  
16 companies in all cases and they will not have the  
17 information to do this if the managers of projects are  
18 ringfenced into the joint venture.

19 At a minimum the condition will lead to potentially long  
20 delay in decision-making as boards find out what they need  
21 to find out. Once these contracts are in place the major  
22 decisions have actually been taken, and ringfencing the  
23 Joint Venture Parties, Pohokura managers would only insert  
24 unnecessary principal agent problems in ongoing management.

25 The point here I think is that, there's a very  
26 substantial investment to be made in Pohokura, and one can  
27 well imagine -- in fact one can't imagine the boards not  
28 making these decisions, but they need all the information  
29 they can to make these decisions, and so ringfencing before  
30 investing in Pohokura would seem to be a real problem in  
31 terms of getting Pohokura on stream quite quickly because of

1       these information asymmetries.

2 **MS BATES QC:** Can you be a bit more specific about the sort of  
3 information you're talking about that would be necessary?

4 **PROF EVANS:** Well, it would be all the information that a  
5 director -- if you think about it, as each director would  
6 want its own due diligence of their share of the Pohokura  
7 investment and they would need to know it in that sort of  
8 detail in order to make the final decision to commit, I  
9 think, a substantial amount of capital to Pohokura.

10 **MS BATES QC:** Hang on, we're talking about ringfencing of  
11 marketing here, aren't we?

12 **PROF EVANS:** No, that's my point -- you've got it, that's my  
13 point. The point is, if you're looking forward, these  
14 entities arrangements looking forward; so if any contingent  
15 event or arrangement happens in the future that affects the  
16 way contracts work, then that will be taken into account at  
17 the beginning. That's the first thing.

18 **MS BATES QC:** Right, so they know there's going to be  
19 ringfencing?

20 **PROF EVANS:** That's right. Then the question becomes, when does  
21 the ringfencing start? Now, you need contracts in place in  
22 order to authorise the expenditure of these sums of money --

23 **MS BATES QC:** Well possibly. That's an arguable point isn't it?

24 **PROF EVANS:** No, not for me. I can't imagine investment in  
25 Pohokura taking place without a range of contracts that  
26 would provide, as the man from Westpac said, security on  
27 revenues.

28 **MS BATES QC:** Well, there is the argument whether the liquid  
29 resource would provide enough security -- I'm just saying  
30 there is an argument there.

31 **PROF EVANS:** No, well that -- the liquids -- the revenue from



*Pohokura JVPS (cont)*

1 that is really volatile and so the issues that go to the  
2 management of risk of gas are exactly the same as those that  
3 go to the management of the risks from the revenue of the  
4 liquids. And because gas only takes half the field, or half  
5 the revenue is coming from gas, you much longer --

6 **MS BATES QC:** We did have much debate about the different  
7 volatilities, so let's carry this forward.

8 **PROF EVANS:** Right. Suppose it was to be ringfenced; at what  
9 stage is it to be ringfenced at? Well, if it was to be  
10 ringfenced before any investment takes place in Pohokura,  
11 then obviously it's going to be very difficult for any of  
12 the boards to have the information required --

13 **MS BATES QC:** And that's what I'm asking you, what bit of  
14 information do they need?

15 **PROF EVANS:** They need the contracts, the information --

16 **MS BATES QC:** The prices -- I'm just trying to be very basic  
17 here.

18 **PROF EVANS:** Absolutely, the terms and conditions of all the  
19 contracts in place that give them the surety to knowing  
20 looking forward that their investment is going to be covered  
21 off. And they need to know also the characteristics of the  
22 field to the detail that would need to be known by any  
23 investment decision-maker or the CEO of the company.

24 **MR JACKSON:** I just want to underline a very important point  
25 here, that liquids are not independent of gas. Gas has to  
26 come before any liquids. For every gigajoule of gas, to get  
27 a barrel of condensate out you need a certain quantity of  
28 gas, they're not independent. And what gas contracts do is  
29 give confidence not only on the price of the gas but give  
30 confidence on the volume of the gas, and that's the key  
31 point and it's the volume of the gas that affects directly

1 the quantity of the liquids. So --

2 **MS BATES QC:** You want to be able to know you can sell all your  
3 gas?

4 **MR JACKSON:** We need to know that because it's a very important  
5 part of the whole value equation, so you can't ignore the  
6 value contribution of gas alone. But, even if you had the  
7 luxury of the gas not being important from a price point of  
8 view, you would still need a contract to get the volume of  
9 liquids out of the ground, so you will need gas contracts in  
10 any circumstance to be assured that you can get the liquids.  
11 I just...

12 **MS BATES QC:** Okay. [Pause].

13 **CHAIR:** Okay, please proceed, thank you.

14 **PROF EVANS:** I just summarise that point, that before any  
15 investment has taken place contracts need to be in place in  
16 order to give surety over revenue into the future, and  
17 secondly, all that information about the surety, about the  
18 costs, about the state of the field will be wanted by the  
19 boards of the companies because they're making such  
20 substantial investments. So, can you not have a wedge of  
21 any kind between the boards and the investment in this  
22 respect at the outset.

23 Now, suppose we had a mature field, one in which the  
24 investment had taken place, then imposing this sort of  
25 arrangement would have very little effect, because all it  
26 would be doing is managing existing ongoing field. The  
27 critical issue, a public interest issue as well as for the  
28 Commission is about enabling these contracts to take place  
29 now before investment takes place and not putting any wedge  
30 on an information basis, or any other basis between the  
31 information that's required for this investment decision to

*Pohokura JVPS (cont)*

1 be taken on a fully informed basis, and I think ringfencing  
2 would break that really substantially.

3 So, I would sum up by saying that the ringfence proposal  
4 is not relevant to its stated purpose because joint  
5 ventures, in essence, conduct the ringfencing that is sought  
6 and that independence is implied by joint marketing.  
7 Further, it would induce some economic efficiency and  
8 delayed investment and agency costs. I notice that the more  
9 concrete proposal that the management of field be given over  
10 to some other entity -- well, we've already commented on  
11 that. [Pause].

12 Just final comments: Each of the above conditions  
13 produce detriments to conditions on joint marketing, many of  
14 which might reasonably be assessed as an order of magnitude  
15 similar to the detriments of separate marketing, and that's  
16 implied by the joint marketing benefits described by  
17 bringing Pohokura on earlier under joint marketing than  
18 separate marketing.

19 The conditions would imply some delay and sometimes some  
20 of the conditions, as I've indicated, might imply a very  
21 significant delay. However, it's also noteworthy that joint  
22 marketing, subject to some condition, may be fundamentally  
23 different than separate marketing; it has a different  
24 effect. While restriction to separate marketing is likely  
25 to lead to long delay, joint marketing plus a condition  
26 relating to a future event or date may lead to very  
27 different outcomes, some with detriments that may exceed  
28 those of separate marketing as we have calculated them or as  
29 I've suggested they might be calculated.

30 An example might be authorisation for a specific time  
31 limit for joint marketing, or it may result in the field

*Pohokura JVPS (cont)*

1 being drawn down with great rapidity and at a cost of the  
2 total output of the field and also it is an availability of  
3 long-term arrangements. I have no idea whether that's even  
4 a prospect, but the idea that contracts may be only secure  
5 for a finite period of time that's quite short in relation  
6 to the long life of the investments that are required, could  
7 induce behaviour that is quite different than that we have  
8 used to evaluate the benefits of joint marketing and  
9 separate marketing to this point.

10 If conditions are imposed on joint marketing that do not  
11 have a clear rationale under competition, the authorisation  
12 would imply much uncertainty about how any resultant  
13 Pohokura Gas Contract would be treated subsequently under  
14 Competition Law. This of itself adds uncertainty to the  
15 contracting process.

16 Finally, Competition Law will apply in the presence or  
17 absence of joint marketing, setting aside the Section 26  
18 Statement I have dealt with; by imposing conditions on joint  
19 marketing the Commission would be implying that Competition  
20 Law of itself with joint marketing is insufficient for  
21 Competition Law purposes. And so, to do that would require  
22 a solid economic rationale or solid benefit over detriment  
23 with respect to these conditions and I have -- and I don't  
24 know of any. Thank you.

25 **CHAIR:** Thank you Professor Evans, I'll just ask Commissioner  
26 Taylor if he would like to pursue a question.

27 **MR TAYLOR:** Yes, thanks. I just want to nag around a little bit  
28 longer on the point Mr Jackson was making. The issue of the  
29 need to have the revenue streams from both gas and the  
30 condensates -- the distillates or whatever the right word  
31 is -- to justify the field. Is that because in this

*Pohokura JVPS (cont)*

1 particular case the development costs are so high compared  
2 to the eventual value of the revenue flows?

3 I have in mind -- for example, you see photographs of  
4 oil fields, presumably with much lower costs of development  
5 in the Middle East flaring off the gas to get the  
6 distillates, or have I got the wrong end of the stick?

7 **MR JACKSON:** You do see that. Pohokura is not one of those.

8 **MR TAYLOR:** I accept that, that's why I'm asking the question.

9 **MR JACKSON:** Yes, our economics -- and we'd be happy to show the  
10 Commissioners those economics if they feel it necessary --  
11 will show that we'll need to combine revenues of all the  
12 liquid streams to get us over the economic threshold.

13 None of the particular components alone would cover the  
14 CapEx, the capital expenditure required, and the two go  
15 together. I mean, again, we need -- the only way we can get  
16 access to the liquids is to get the gas out.

17 **MR TAYLOR:** Hence the need for the contracts.

18 **MR JACKSON:** I think the point that's been made, and the  
19 difference between the Saudi-Arabian analogy is, this is a  
20 gas field. The driver, at least at the outset prior to  
21 CapEx, is the question of gas.

22 Now, once the capital expenditure is made, of course as  
23 we saw in Maui the short-term economic drivers are liquids,  
24 but that's having made the capital expenditure decision.  
25 But prior to the capital expenditure decision gas is all  
26 important because without getting confidence about the  
27 marketing access to gas -- market access to gas, there's  
28 nothing that's going to come from this field.

29 Well, I guess to say, with oil -- and I guess there are  
30 one or two examples of that in Taranaki -- in oil fields the  
31 economics are totally dominated by the oil, and if one were

*Pohokura JVPs (cont)*

1 allowed environmentally to flare, you could nevertheless  
2 justify the development with an oil field, but that's a  
3 liquids-driven field. They're quite different.

4 **MR TAYLOR:** Sure, I understand.

5 **CHAIR:** I think it would be useful, given the offer, to make  
6 that information available to the Commission, if you did do  
7 that, thank you.

8 Commissioner Bates has a follow-up question.

9 **MS BATES QC:** Professor Evans, what's been put forward in broad  
10 terms by you about the competition aspect is that joint  
11 ventures are the vehicle to develop gas fields. That, if  
12 you make all of that too restrictive then other joint  
13 ventures won't come into play. If you are less restrictive,  
14 then you're likely to get other joint ventures coming in  
15 which is pro-competitive. Is that the way...?

16 **PROF EVANS:** That's the way it is, yes.

17 **MS BATES QC:** When you have, say, Pohokura Joint Venture making  
18 long-term contracts, how long-term are you talking about?

19 **PROF EVANS:** I think that one would expect to see a sort of  
20 portfolio of length of contracts, you know, for particular  
21 purposes. For those contracts that go for some wholesalers,  
22 might be for some very long periods for example.

23 **MS BATES QC:** I'm asking you to give me some indication of  
24 years.

25 **PROF EVANS:** Well, it wouldn't be, for some purposes, 20 years.  
26 But, I mean, I'm not putting a limit on it.

27 **MS BATES QC:** No, no, but parameters, is --

28 **PROF EVANS:** Well, if you look at electricity generation for  
29 example, you'd want a significant period of time to be able  
30 to offer a contract. Now, I'm not an expert in that  
31 particular area, but 12, 15, 12 years, something of that

1 kind.

2 **MS BATES QC:** For how much?

3 **PROF EVANS:** 12, 15, something like that.

4 **MS BATES QC:** Is there enough gas for 12 to 20 years?

5 **PROF EVANS:** Depends on the off-take, but...

6 **MS BATES QC:** I'm just trying to get a feel for the length of  
7 time that the customers will be tied up, that's all.

8 **PROF EVANS:** Can I put it another way. If it's a long contract  
9 with a resale right, the customer's not tied up at all; the  
10 customer is actually --

11 **MS BATES QC:** Able to on-sell it, but it's not gonna do that at  
12 a lesser price than it bought it for, is it?

13 **PROF EVANS:** But it's not just that; it's not even gonna compete  
14 with the joint venture in that arrangement. So, what I'm  
15 trying to indicate is that there's a range of contractual  
16 lengths that can extend right out to the length of field.

17 **MS BATES QC:** I'm trying to get a simple --

18 **PROF EVANS:** But if the field has a certain capacity and so has  
19 a certain annual off-take, say, that is implied by that.  
20 So, suppose the field was at 70 petajoules going to last 15  
21 years or 16 years, something of that sort then there's no  
22 reason why -- that I can think of why contracts that go the  
23 length of that would not be in the interests of the market  
24 as a whole.

25 **MS BATES QC:** Okay. So, what about other people coming into the  
26 game and they are competing for the Pohokura customers, how  
27 can they do that if those customers are tied into long-term  
28 contracts?

29 **PROF EVANS:** There's first of all the question about a wholesale  
30 market and about the exchange for gas and it could well be  
31 that these long-term contracts are putting wholesale gas in

*Pohokura JVPS (cont)*

1 the market which can be used. For example, if a certain  
2 amount of the gas is sold to a wholesaler who's actually in  
3 the business of on-selling it to different parties.

4 **MS BATES QC:** I understand that.

5 **PROF EVANS:** So that's one way. The other point is that where  
6 the contracts are very specific for specific purposes  
7 there's a good reason why both parties want a secure long-  
8 term arrangement, and if we think about a generator for  
9 example, it will not be wanting to be -- it will be wanting  
10 to build a generator if it can get a gas contract that is  
11 focussing on the use of gas and would be able to do that for  
12 the life of the investment. So, there will be a mix in the  
13 market.

14 **MS BATES QC:** Can I just take you back though. You've got a  
15 range of long-term contracts. For the new joint venturer,  
16 that customer is not available to it.

17 **PROF EVANS:** Oh, for a -- if you are arguing that the entry into  
18 the New Zealand market is limited by the New Zealand demand  
19 for gas, I agree with you. Essentially what we're saying --  
20 what I'm arguing is that the ability to write secure long-  
21 term contracts means that entry into the New Zealand  
22 exploration scene is going to be encouraged because parties  
23 that --

24 **MS BATES QC:** Yes, got that.

25 **PROF EVANS:** So then the question is whether or not the gas --  
26 then your next question is, well, let's look at another  
27 joint venture coming in, right?

28 **MS BATES QC:** Yes.

29 **PROF EVANS:** Well, the question there is whether they're going  
30 to look for gas or not and that will depend on the size and  
31 the supply and demand in the New Zealand market, not just



*Pohokura JVPs (cont)*

1 the supply side. And so, in a market our size the fact that  
2 gas is not readily internationally transportable does  
3 actually limit the interest in the New Zealand market for  
4 gas, not for liquids. That's a fact of life I think.

5 **MR JACKSON:** I would like to make an additional point, just  
6 about the physical nature of the field. I think it's fair  
7 to say that the Maui Field needed a 30 year contract to  
8 satisfy the conditions that arise in circumstances about the  
9 particular nature of the investment of the field, the  
10 characteristics of that field and the nature of the gas  
11 market that was trying to be established.

12 It's a complex discussion. As I indicated before, that  
13 complex discussion took years in the case of Maui because  
14 they were having to satisfy the economic conditions between  
15 the -- determined by the characteristics of the field,  
16 coupled with the characteristics of the market. It is a  
17 complex discussion, and a phrase comes to mind for some  
18 reason "it's all a function of the conditions".

19 **CHAIR:** Can I take a follow-up question and I'll come right back  
20 to you.

21 **MR STEVENS:** It's just a question of clarification, if I may,  
22 Professor Evans. If, for example, the joint venture was  
23 wanting to write a long-term contract with a party or  
24 parties, I presume they wouldn't write -- assuming a given  
25 off-take is the optimum given off-take for cashflow  
26 purposes -- then I presume they wouldn't write that contract  
27 for the length of what the current estimatable reserves are  
28 there at the moment, otherwise if they are estimated  
29 downwards there will be a danger of selling what you haven't  
30 got?

31 **PROF EVANS:** I think they could actually incorporate that in the

*Pohokura JVPS (cont)*

1 contract if they were serious about it, I mean you can  
2 actually share the risk associated with the reserves so long  
3 as it's done ex ante, you know before the contract is signed  
4 off for example. There would be a contract that ran towards  
5 the length of end of the field, they must be able to have  
6 provisions where they're sharing the risk of the run down of  
7 the field.

8 **MR STEVENS:** Balancing that against obviously the need to meet  
9 the significant CapEx spend and the ongoing OpEx spend, what  
10 would in your experience, not necessarily here at Pohokura,  
11 but elsewhere be a sort of a reasonable timeframe for a base  
12 underline secure contract to provide you the keystone  
13 contract that you need, and do you see that as a five year  
14 period, a seven year period or some other time?

15 **PROF EVANS:** First, I'm not experienced in writing these  
16 contracts. Secondly, what it would depend on is the state  
17 of the market as well as -- I don't think you could put a  
18 mechanistic sort of number on it at all because, you know,  
19 if they're able to contract it at one gas price, they may  
20 have a different contracting arrangement, different security  
21 than they would at a different gas price.

22 Because, when you write a contract that locks in a  
23 price, which is the purpose of these contracts, you know the  
24 level of price at which you lock it in at a determined by  
25 the state of the market and all that, and all that can  
26 materially affect what the parties might regard as minimal  
27 in order to give them surety for investment.

28 **MR STEVENS:** So would it be easier to express it in terms of  
29 quantum as opposed to in terms of timing?

30 **PROF EVANS:** No, because the price problem is still there.

31 **MR HALL:** Thank you, can I make three points in relation to the

*Pohokura JVPS (cont)*

1 matter that was previously talked about by Mr Jackson  
2 arising from the discussion with Commissioner Bates about  
3 long-term contracts, and the three points are these:

4 First, one could not assume that Pohokura gas will be  
5 contracted solely on the basis of long-term contracts.

6 Secondly, in the marketplace today gas contracts range  
7 in term from one year to life of the field, and speaking  
8 from the Todd perspective, we expect that gas contracts for  
9 Pohokura will involve a mixture of terms from one of those  
10 extremes to the other.

11 Thirdly, if there is a concern about purchases being  
12 locked up, if you like, on the basis of long-term contracts,  
13 my response to that would be, don't be concerned for two  
14 significant reasons.

15 First, purchasers will sign long-term contracts if they  
16 want to and they won't if they don't want to. As Professor  
17 Evans has said, for some particular purchases, for example,  
18 electricity generators they will have a strong incentive to  
19 sign long-term contracts to give them security of supply.

20 The second important point is, I don't see any basis for  
21 suggesting that any of those purchasers, any of the likely  
22 purchasers in the New Zealand market will be exclusively  
23 supplied from Pohokura. None of them today is exclusively  
24 supplied from any field and the most unlikely if not -- or,  
25 even I put it more strongly than that, they will not be  
26 exclusively supplied from Pohokura in the future. So they  
27 will always be available to purchase gas from new entrants.

28 **CHAIR:** Thank you Dr Berry, can we proceed please.

29 **DR BERRY:** I guess with questions we might be getting into  
30 duplication here because the plan was to go through each one  
31 of these conditions one-by-one.

*Pohokura JVPs (cont)*

1 **CHAIR:** So, don't go over things you've already covered.

2 **DR BERRY:** So, I think it might be helpful to go through the  
3 discipline of speaking through each one of them nonetheless  
4 and, hopefully, there won't be much duplication.

5 **MR JACKSON:** Well, I wish to provide our perspective of the  
6 commercial implications of the imposition of conditions.  
7 From our perspective, the proposed conditions are, by their  
8 very nature, designed to create risk and I have to point out  
9 that any risk reduces commercial value, and any such  
10 reduction of commercial value may have implications relative  
11 to shareholder or financier's approval thresholds.

12 From the perspective of the JV parties any controllable  
13 risks have to be managed. We, Shell have to make doubly  
14 sure that controllable risks have got several means by which  
15 they are controlled, and they must be contained prior to any  
16 financial commitments being entered into, whether they be  
17 contractual or capital commitments.

18 As a general point, in our view the conditions could  
19 cause unintended consequences, including delay or no  
20 development. These unintended consequences caused by any  
21 applied conditions will undermine the competitive advantages  
22 of joint marketing by delaying or preventing Pohokura from  
23 entering the market.

24 In relation to the time limit, well the JV parties need  
25 clarity and certainty with respect to the marketing platform  
26 of gas. We pointed out the critical nature of understanding  
27 how our gas is getting to market both with regard to the gas  
28 revenue and the liquids revenue.

29 As the bankers indicated yesterday, if separate selling  
30 arrangements or Scenario 1 selling arrangements are not put  
31 in place at the outset then the JV parties will give no

*Pohokura JVPS (cont)*

1 credit to gas produced outside the stipulated time period  
2 because there will be no basis for selling -- because no  
3 basis for selling that gas will exist.

4 Because we don't give any credit for that gas the impact  
5 on project viability will be severe and fatal. A time  
6 period of five years is extremely short in relation to the  
7 usual economic lives for large capital intensive projects,  
8 not only for ENP projects, but also for downstream projects  
9 by the JV's customers.

10 In our view, if the customers do not have the  
11 preconditions necessary for investment that is an assured  
12 supply of gas over a long period of time then new plant  
13 investment will not be able to be justified. If the time  
14 period proposed were to apply, the joint venture could be  
15 expected, even in the unlikely event that the project were  
16 viable, the joint venture could be expected to give  
17 preference to customers who can take gas within the time  
18 period, perhaps to apply inefficient applications, that's  
19 another unintended consequence.

20 If the project is not viable within the time limit and  
21 that is the most likely case, the marketing arrangements for  
22 separate selling beyond the time limit will have to be  
23 determined before any commitment for development will take  
24 place. The necessity for putting in place those  
25 arrangements will cause the same delay as if no  
26 authorisation were given; that is, a delay greater than  
27 three years.

28 A condition of this nature places a serious hurdle in  
29 front of the joint venture which has no benefit and is  
30 likely to create sub-optimal marketing incentives.

31 I'd like to say that we've canvassed briefly the

*Pohokura JVPS (cont)*

1 reserves limit; I think there is potential for a lot of  
2 unintended consequences to arise in that as well; just, the  
3 potential -- the attraction or the benefit of developing  
4 additional reserves when there is uncertainty about how that  
5 gas can be marketed -- well, it doesn't give much of  
6 incentive for developing gas if you don't know how it's  
7 going to get to market.

8 Development by a certain date, slide 58 -- [Pause].

9 **MR TWEEDIE:** On the issue of the time of the authorisation, we  
10 heard from Westpac Bank yesterday on the criteria that they  
11 would apply to non-recourse financing of the project, and  
12 this is certainly very material to today. We will be  
13 looking to non-recourse finance our share of the venture,  
14 and the five criteria that they mentioned yesterday, if you  
15 remember the strong sponsor, certainty, petroleum reserves  
16 etc, production profile, costs, certainty of revenue and  
17 certainty over security of assets.

18 Dealing to the certainty of revenue issues, this  
19 authorisation directly in the form that is being proposed  
20 now directly strikes at that. If we are not able to  
21 adequately and appropriately finance the project from a bank  
22 we will be definitely unable to easily fund the development  
23 costs which in our case are into the tune of some  
24 \$200 million.

25 The bankers -- when we pass -- when we enter into a non-  
26 recourse financing arrangement with the bank, though the  
27 bank -- as I think somebody asked yesterday, do they take an  
28 equity interest -- well, they don't take an equity interest,  
29 but they take a significant risk on the project themselves  
30 because the only recourse in an event of default is to the  
31 project, the project cashflows, and that is their security.

*Pohokura JVPS (cont)*

1           So, they inevitably look very very closely at the  
2 project and the project alone. They will not look at a  
3 cashflow for the whole length of field; there will be a tail  
4 that they will not be seeking a security from. In other  
5 words, they will want their debt facility repaid by --  
6 before that tail occurs.

7           So, one would expect them -- our experience with them is  
8 that, for example the loan would need to be repaid from the  
9 first 75% of production. So, it's not a loan that -- you  
10 know, they're not going to wait until the last hydrocarbon  
11 comes from the field to get their principal and interest  
12 back, they're going to want to have it well before then so  
13 that they have a less risk at the end of field life.

14           So, that compacts the ability for them to get a return,  
15 get their secure return into a fairly -- a shorter period of  
16 time compared to overall field life.

17           But they have clearly stated to you and to us that on  
18 their review of the conditions attached to the  
19 authorisation, particularly the five year issue and maybe  
20 some of the other issues -- I mean, they commented on the  
21 assignability issue. The bank has to step in, and there's  
22 some issue -- in the event of default there's some issue as  
23 to the ongoing nature of the contracts, they'll just walk;  
24 they will not take that type of financing risk on.

25           And the Commission must take this into account in its  
26 ultimate conclusion, because we have always said that there  
27 is an issue of delay, but ultimately the project will get  
28 going, but if we can't fund it, if we can't fund it with  
29 adequate banking support the project will then be in a  
30 position where certainly one partner will have great  
31 difficulty proceeding with it.

*Pohokura JVPS (cont)*

1 **MR SALISBURY:** I'd just like to make one quick comment from the  
2 perspective of OMV on the period of limited authorisation.  
3 As I said, yesterday, we're a company based in Vienna,  
4 Austria. Certainly our shareholders see New Zealand gas  
5 market risk as a key issue going forward, and whether it  
6 comes to look at investment approval for this project the  
7 company is going to be looking for gas contracts that  
8 underwrite the investment.

9 **MR JACKSON:** Moving to the question about development by a  
10 certain date. Will we see that this condition is  
11 unnecessary given that we can take the FID decision; we  
12 think there are very strong commercial incentives for the  
13 joint venture to install the facilities and get gas  
14 production underway as soon as practicable.

15 The start-up date is subject to many risks beyond the  
16 control of the joint venture, and we haven't come to a final  
17 joint venture schedule yet. That probably won't be until  
18 we've properly defined the project at FID. And, even if we  
19 had a project duration available now -- that will be  
20 available at FID -- the industry experience is that actual  
21 project duration exceeds planned duration by 10%. And, we  
22 have many examples of project duration actually exceeding  
23 original estimates by a considerable margin, and these  
24 examples are quite close to home.

25 Maui A was delayed by a year as a result of weather  
26 delays and unforeseeable installation difficulties. Maui B  
27 was delayed for about four months because of unusual weather  
28 and marine conditions. In Australia Woodsides Goodwin  
29 platform was delayed by one year as a result of  
30 unforeseeable installation difficulties.

31 In our view, any authorisation condition which is linked



*Pohokura JVPS (cont)*

1 to project timing will simply increase risk without any  
2 benefit. With any such condition the joint venture would  
3 have to plan for separate marketing from the outset because  
4 the risk of transgression of the date will be perceived to  
5 be high. The condition is likely to have the opposite  
6 effect to that intended. The imposition of a condition may  
7 actually cause the delay that it is intended to prevent.

8 With regard to successor limitation: All the Joint  
9 Venture Parties generally require contingency events to be  
10 properly examined. The delineation of exit strategies is  
11 usually part of any such examination. This condition would  
12 seriously increase the perceived risk of the project.  
13 Companies must have means to exit projects without  
14 disturbing their co-venturers or their customers.

15 This condition would impose unpredictable counter-party  
16 risks on the whole project, joint ventures, financiers and  
17 customers alike, increase risk, decreases the commercial  
18 value for the joint venture and the customers alike and that  
19 increase in risk could mean that the Joint Venture Parties  
20 cannot approve development. The reduced security for  
21 lenders and equity holders caused by this condition may  
22 simply be unacceptable because it cannot be managed.

23 In the area of ringfencing: Well, the oversight of the  
24 entire business is an important part of risk management for  
25 any company and ENP companies are no exception. We disagree  
26 with any suggestion that key decision-making should be taken  
27 without proper consideration of the entire business. We  
28 think it is inconceivable that directors could reconcile the  
29 conflict between the responsibility to meet this condition  
30 and their responsibility to properly assessing the potential  
31 impact on the business they are responsible for.

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*Pohokura JVPs (cont)*

1 All the Joint Venture Parties are New Zealand based  
2 companies with directors who must conform to New Zealand's  
3 commercial governance requirements. This condition is  
4 commercially unworkable and development would be difficult  
5 while it prevailed.

6 **MR TWEEDIE:** From a practical point of view there's the legal  
7 issues we've heard about, about directors' liabilities, but  
8 there is the situation where you've got people like myself  
9 who are the Managing Director of the company and have got a  
10 foot in both camps, there's the director's responsibilities  
11 as well as the CEO of the business.

12 Now, even if there was some form of separation or  
13 ringfencing, the reality in practice would be, it would be  
14 quite ineffective because -- I mean, Commissioner Bates  
15 would probably well understand; I mean, some of us regularly  
16 complain about law firms who say they have got Chinese walls  
17 and all those sorts of firms, and some other consulting  
18 firms do, but they leak like sieves. I mean, it's the  
19 practical reality of people seeing things coming off faxes  
20 and whatever, and people talk within a business; it's just  
21 an impractical proposition. It would not work in the real  
22 world.

23 On top of that, people like myself -- I mean,  
24 ultimately, if a deal is done I'm going to know about it,  
25 I'm going to know about the deals in the business, I'm going  
26 to know where the business is going, that's my job, and to  
27 say that part of the business, a significant part of the  
28 business is somehow going to be ringfenced and I'm not going  
29 to know about it, it's just not a real world proposition.

30 **MR SALISBURY:** I'd quickly like to talk to the position of OMV  
31 in New Zealand. Apart from our interest in the Pohokura

*Pohokura JVPS (cont)*

1 Field which will be producing gas, we have only a small 10%  
2 interest in the Maui Field, which as people know is rapidly  
3 depleting and is likely to have ceased production or cease  
4 production about the time that Pohokura comes on-stream.

5 We are a new entrant to the New Zealand market, we came  
6 into the New Zealand gas market in December 2002. We  
7 operate a very small office, we're non-operating and we're a  
8 financial interest and investor in Maui and Pohokura. I  
9 would ask the Commerce Commission to give special regard to  
10 these factors and the position of OMV in New Zealand and not  
11 impose unnecessary constraints on a new competitor.

12 **MR JACKSON:** My only closing comment is to say that we need  
13 unconditional authorisation for development otherwise we  
14 fear that unintended consequences will arise.

15 **CHAIR:** Can I just, before you proceed, I think we have a  
16 question from staff to follow-up.

17 **MS BHAMJI:** Thank you. I've just got a couple of questions.  
18 First of all, looking at the Australian decisions, there are  
19 conditions of time limitations and assignments are fairly  
20 common in relation to gas marketing. I'm just wondering if  
21 there is any thoughts that you have on that, on what the  
22 Commission should think about?

23 **DR BERRY:** I think we don't have anything further to add in  
24 terms of the legal principles relating to the conditions and  
25 the exercise of discretions for example in the case of  
26 successors, but perhaps in final submissions we might just  
27 think about addressing that particular issue.

28 I'd have to say -- I mean, I would caution against the  
29 attachment of too much concentration on the Australian cases  
30 because, as I mentioned for example the other day, when you  
31 look at Northwest Shelf, it isn't simply seven years, if

*Pohokura JVPS (cont)*

1 that was the inference that was being given, that was seven  
2 years after nine years and related to a field that had been  
3 in production. So I think you have to look very carefully  
4 at whether you are comparing it with apples. We'll give  
5 that a bit of thought overnight and come back perhaps with  
6 comments on that in closing submissions.

7 **MS BHAMJI:** Thank you, that would be helpful.

8 A further issue, I'm just wondering if you could think  
9 about or answer for us. The submission was made that in  
10 terms of time limits on authorisations the Commission has  
11 the section 65 powers in materials of material change.

12 Now, I'm just wondering, this condition of material  
13 change that when you take it into account there is a greater  
14 uncertainty for the authorisation because the industry  
15 participants, the joint venture, the bankers, everybody,  
16 would at constant periods through time, would need to look  
17 at s.65 and say, well, is this authorisation still valid.  
18 This adds greater uncertainty for everyone so wouldn't a  
19 time limit give the industry as a whole greater certainty in  
20 relation to it, meaning...

21 **DR BERRY:** Again I'll come back and make further comments on  
22 that, but instinctively it's a situation where appropriate  
23 changes in the market have to happen and there's a process  
24 that has to be gone through where the Commission has to  
25 initiate processes and procedures to start raising the  
26 issue, and I wouldn't see that as a deterrent in the way you  
27 suggest, but can I come back to you on that as well?

28 **CHAIR:** Dr Berry, if you proceed please.

29 **DR BERRY:** The remaining parts of our presentation are for  
30 Mr Agostini to make his presentation, and then following  
31 that we'll talk to the Australian examples of Geographe and

1 so on, but that ought not to take long.

2 **MR AGOSTINI:** There are two things that I'd like to address to  
3 the Commission. One is with regard to the COAG process in  
4 Australia. The objectives, the process that that went  
5 through there and the outcome of that process, particularly  
6 with respect to the gas market in Australia, and the second  
7 matter is how those conclusions, how COAG's conclusions may  
8 relate to the New Zealand market as I see it in general and  
9 the New Zealand gas market and to Pohokura and Pohokura  
10 alike projects in particular.

11 So turning to the first matter, the COAG process, the  
12 Committee of Australian Governments in 2001 came to the  
13 conclusion that the reform process that had gone through  
14 during the decade of the 90s in Australia in the energy  
15 markets there had stalled. It had been effective but it had  
16 come to an end, and no further progress was being made.

17 The improvements that had occurred during the process of  
18 the 90s, during the decade of the 90s was that interstate  
19 trade had improved considerably, there were varying degrees  
20 of disaggregation and privatisation in the energy markets,  
21 that is breaking up of generators or production elements in  
22 gas from the transmission elements and the distribution  
23 elements and the retailing. And that in some places  
24 privatisation of the assets that occurred in Victoria, that  
25 occurred in South Australia, but by and large in other  
26 States they had not, so the progress there was spotty.

27 But as a consequence of the progress that had been made  
28 during the 90s, by 2001 Australia found itself in the  
29 position of having some of the lowest energy prices in the  
30 OECD, in fact the lowest electricity prices and the lowest  
31 gas price. So, there was enormous benefit that came out of

1 that process.

2 The concern was that the process had stalled and it  
3 stalled because some States were not enthusiastic to  
4 continue with further reforms. Some States were not  
5 prepared to dispose of their assets or to go into further  
6 corporatisation of their assets. Full retail contestability  
7 had occurred in some places. In other States it was put off  
8 until 2004, 2005 and Queensland in particular said that they  
9 were not going to do it at all. So implementation of that  
10 was inconsistent and spotty, and the demand side in the  
11 energy equation situation was not working effectively in the  
12 market as it should if a market is going to function  
13 properly.

14 In addition to all that there was a recognition that the  
15 parochial interests of the States and Territories was  
16 prohibiting further progress in reform. There were market  
17 rule compatibilities that made it difficult to trade across  
18 State lines. There were subsidies that certain States gave  
19 to their retailers which made it hard for the retailers from  
20 other States to trade effectively in those territories, in  
21 those jurisdictions.

22 And in the physical sense, because of the history of the  
23 way the system developed in Australia with each State having  
24 its gas field or its electrical power generation which is  
25 located near a mine mouth being connected to its main load  
26 centres and then the distribution systems, both gas and  
27 electricity radiating out towards the edge of the State  
28 boundaries, that meant that when you had interconnection  
29 between the States in either electricity or gas, the very  
30 thin, low capacity system at the end of those lines meant  
31 that the interconnection was ineffective, it limited what

*Pohokura JVPS (cont)*

1 energy could flow across the line. So, for all those  
2 reasons, the reform had stalled and was not producing as  
3 much benefit as it could.

4 So COAG appointed a review committee, a review panel  
5 with the specific intention of firstly identifying the  
6 impediments that stood in the way of ongoing reform.  
7 Secondly, to determine what strategic direction further  
8 reform should take. In addition to that, as well consider  
9 what improvements in regulation should occur, how to improve  
10 the greenhouse gas performance of the energy sector, and how  
11 to improve the penetration of natural gas in the economy.

12 Now the panel was comprised of four people, four  
13 members; ex-Senator Perot(?) was the Chairman and there were  
14 three other members and I was one of those. The process  
15 involved, in the January of -- February of 2002 the issuing  
16 of an issues paper, the receipt of submissions, of which  
17 there were over 100, the panel taking verbal submissions in  
18 each of the State capitals and Territory, and Federal  
19 capital, the issuing to consultants of certain work packages  
20 to help clarify issues that were complex.

21 **CHAIR:** Excuse me, I think you can assume we're familiar with  
22 this because we have read the report, so I think if we focus  
23 on the implications for New Zealand, that would be helpful,  
24 but I think you can assume we have each seen the report and  
25 we are familiar with the process behind it.

26 **MR AGOSTINI:** Thank you, Commissioner. Well, if I can just go  
27 to the output of the report that's pertinent to this issue.

28 There were 53 recommendations that were made of which 11  
29 were specific to the gas market, and only four of those, I  
30 would suggest, are pertinent to the issue of separate  
31 marketing, and I'll concentrate on those four.

*Pohokura JVPS (cont)*

1 I think it's important to state that the panel  
2 recognised the potential importance of separate marketing in  
3 increasing competition in Australia. The panel recognised  
4 that, where joint ventures are produced together, are  
5 marketed separately, if a way could be found for those joint  
6 venture producers to market their gas separately, it would  
7 increase the number of players in the marketplace and that  
8 would be a positive outcome. The question before the panel  
9 was, how could we make that happen in Australia; was it  
10 feasible and could it effectively...

11 The four recommendations that were made that relate  
12 specifically to this were firstly -- and the first three are  
13 not as pertinent as perhaps the last, so I'll go through  
14 these quickly; the mandatory notification of the intention  
15 of any joint venture that wished to produce jointly in  
16 Australia, and I believe here as well it's possible for a  
17 joint venture to proceed without authorisation on the  
18 assumption that it is acceptable, and for the ACCC there's  
19 the challenge that subsequently, if that they did not think  
20 it was, and this was changing those rules so that it would  
21 have to be done upfront and increasing certainty.

22 There is also a requirement to amend the Trade Practices  
23 Act and this is because there was exemption allowed to  
24 States and Territories, or provision allowed for them to  
25 exempt joint ventures from the effects of the Trade  
26 Practices Act and sometimes this led to development  
27 interests in the States overriding competition interests and  
28 so on.

29 Perhaps the one that's most important is the  
30 recommendation that the ACCC in each instance where there's  
31 a proposal for joint venture marketing to assess that



*Pohokura JVPS (cont)*

1 proposal on a case-by-case basis. That's to determine the  
2 feasibility of joint marketing and the feasibility was the  
3 important issue. The panel in its work became aware of the  
4 structural barriers in the Australian market to separate  
5 marketing. The ACCC I believe endorses, or had a similar  
6 view -- and I refer you to the ACCC 1998 provision where  
7 they said in respect of separate marketing in Western  
8 Australia that:

9 "The key issue in the context of this authorisation,  
10 however, is not necessarily whether separate marketing is  
11 superior to joint marketing, but rather whether separate  
12 marketing is feasible in Western Australia."

13 They went on to say that:

14 "Throughout the course of the public consultation  
15 process gas users continually argue that, given separate  
16 marketing is a feature of the gas industry in North America  
17 and the United Kingdom, it should therefore be possible in  
18 Western Australia as well."

19 And further at a pre-decision Conference it had been  
20 argued that the Northwest shelf venture be refused the  
21 opportunity to jointly market, and should they refuse they  
22 would find a way to market separately. They pointed out  
23 that the Northwest shelf venturers formed separate  
24 arrangements to market LPG complete with borrow and loan  
25 capabilities, and that's an example of the joint venture's  
26 ability to establish separate marketing entities to handle  
27 certain marketing situations, and accordingly they believe  
28 that the joint venturers would be fully capable of  
29 separately marketing if forced to do so by refusal of their  
30 applications.

31 The Commission then went on to request interested

*Pohokura JVPS (cont)*

1 parties to provide further information as to how this could  
2 be done and only one proponent did that, it was Western  
3 Power; they had a consultants report which suggested it  
4 could be done. The Commission then invited Western Power to  
5 a Conference to lay out how this could be done and Western  
6 Power declined to attend. So, they commissioned -- ACCC's  
7 final conclusion on this was that in summary:

8 "No-one has been able to substantively counter the  
9 applicant's proposal that separate marketing of gas in the  
10 Northwest shelf venture is currently viable in Western  
11 Australia", and so, they granted the authorisation.

12 So the ACCC I think recognise that in Western Australia  
13 the market was not in a position yet where separate  
14 marketing was, in their view, feasible.

15 The COAG panel went on to visit other markets to form a  
16 view as to where conditions were different and what  
17 contributed to the difference between Australia, in general  
18 Western Australia in particular and those markets and  
19 visited the United States, United Kingdom and Norway and met  
20 with the market players there and came to certain  
21 conclusions as a result of those meetings.

22 The basic ingredients, it was concluded by those  
23 meetings to make a separate marketing work is that the  
24 market size is large, and can I go to the first bar chart.

25 I address first market size. The market size is large,  
26 the total amount of gas sold is substantial. This graph  
27 shows the reserves of gas in Australia versus New Zealand.  
28 There's 157,000 petajoules of gas available in Australia as  
29 opposed to 2.2000 in New Zealand, so there's a wholly  
30 different sized market in terms of reserves.

31 The other issues are concerning the volume of the

*Pohokura JVPs (cont)*

1 market, the size of the market, and comparing those markets  
2 and also with the markets overseas where separate marketing  
3 occurs routinely, you will see that in the US market sales  
4 are 23,000 petajoules a year, Europe 14,000, UK 3,600. Then  
5 we step down to Australia at 1,300, the Western Australian  
6 market itself is 730, but that includes export to the  
7 domestic market, there is 320. The eastern States of  
8 Australia 600 and New Zealand 180. So New Zealand market is  
9 probably closest to the Western Australian market in that  
10 respect.

11 In terms of customers, how deep is the market? You can  
12 see there Australia on the eastern States and are in a  
13 totally different order of magnitude altogether, Western  
14 Australia and New Zealand.

15 Moving on to next slide, this is total customers as  
16 opposed to industrial customers; a very similar picture with  
17 Western Australia being about half a million, New Zealand be  
18 quarter of a million, whereas Australia is three and a  
19 half million.

20 Now, other facilities that are important as well in a  
21 market for a market to be effective and be mature are access  
22 to storage facilities and effective financial trading  
23 market. The COAG process concluded that by all those  
24 standards the Australian market can only be categorised as  
25 immature in the absence of most of these issues and it would  
26 face real difficulties if separate marketing from production  
27 joint ventures were a requirement.

28 The panel also commissioned, as I said, earlier,  
29 consultants to do a certain amount of work to determine how  
30 some of these issues would be seen by consultants and one of  
31 those was a contract to KPMG to examine the issues of

1 separate marketing.

2 Now, the Commission in its Draft Determination  
3 highlighted some of the points made by KPMG, and can I say  
4 that the COAG review panel agreed with most of what KPMG had  
5 to say, and most of those things were built into the  
6 recommendations that were made. In particular it agreed  
7 with KPMG that the high capital cost greenfield projects are  
8 hampered if separate marketing is imposed in inappropriate  
9 circumstances.

10 It agreed that separate marketing is more feasible where  
11 you can find buyers at competitive prices where the risk of  
12 doing that is small. It agreed that not all phases of  
13 competitive marketing needed to be in place before separate  
14 marketing can start. And it agreed that, if separate  
15 marketing is imposed in a greenfield project, it can have a  
16 detrimental impact on the project schedule.

17 However, there were two specific points made by KPMG  
18 which were also recognised in the Commission's Draft  
19 Determination with which the panel was not in agreement; it  
20 was not consistent with everything it had determined by  
21 other means. The first of those was the proposition that  
22 firms had used separate marketing overseas, are unable to do  
23 so should -- notwithstanding the difference in the market  
24 structure -- should be able to do that in Australia.

25 That completely ignores the size and the depth and all  
26 the other characteristics of a market which go to make a  
27 market different in some other places, and in the view of  
28 the COAG panel this recommendation neglected those important  
29 features.

30 The second proposition that was that gas can be marketed  
31 because separate marketing -- this is in Australia -- gas

*Pohokura JVPS (cont)*

1 can be marketed separately because separate marketing is  
2 carried out by the companies for oil, condensate and LPG,  
3 and if they can do that for those products then they can do  
4 it for gas. That also fails to recognise that those three  
5 products are marketed into a commodity market, a market  
6 where there is no volume risk and which is quite the  
7 opposite in a contract market where gas is sold.

8 So, the panel concluded therefore that separate  
9 marketing should only be required where on a case-by-case  
10 bases it is determined that it becomes feasible against the  
11 criteria of what makes a market sufficiently mature for that  
12 to function effectively.

13 Now turning, if I can, to the implications of all of  
14 that, in my view, because the panel of course never did  
15 address the New Zealand issue, but in my view for the  
16 New Zealand market, and perhaps projects like Pohokura.

17 On the basis of that review where we concluded that the  
18 Australian market is immature, I would have to conclude that  
19 the New Zealand market is even more immature. The  
20 New Zealand market is perhaps comparable to the Western  
21 Australian market in many features, it is much smaller than  
22 the eastern states market.

23 Now I perhaps ought to point out that those two markets  
24 in Australia are unconnected as far as gas is concerned,  
25 they operate entirely independently.

26 The New Zealand market and the Australian market are  
27 similar to the extent that they are based on long-term  
28 contracts. Given their level of immaturity that exists in  
29 the New Zealand market to date it would be my conclusion  
30 that it is difficult to see that changing in the near term.

31 For the New Zealand market to become mature it would

*Pohokura JVPS (cont)*

1 need to acquire a number of the characteristics I talked  
2 about and it would need therefore to grow. The market would  
3 need to grow. For the market to grow it's going to need  
4 access to additional volumes of gas and to do that I showed  
5 you the reserve picture there vis-a-vis Australia. To do  
6 that, in my view, it would need access to further reserves  
7 which would mean that further exploration would need to be  
8 stimulated, there would need to be reserves on the table  
9 that could be offered to potential industries that would be  
10 considering gas as a fuel.

11 I would think, therefore, that in the interest of a more  
12 competitive New Zealand market in the future you would need  
13 to consider how to go about improving the reserve picture,  
14 and I do not think -- it is my view that it is not  
15 compatible -- if the objective is to grow the market, it's  
16 not compatible with requiring separate marketing where the  
17 market does not allow this comfortably to occur at the  
18 moment because that becomes, in my view, a deterrent to  
19 exploration -- becomes a deterrent to those who would be  
20 considering investing and in entering the market.

21 Now turning specifically to a Pohokura type development,  
22 or one of their size; the point's been made already I think  
23 that investors and financiers need to have reasonable access  
24 to an income stream that pays for their investment and  
25 that's not only financiers.

26 In my experience in the industry the investors have  
27 certain economic hurdles and the boards of investing  
28 companies need to be reasonably assured that those hurdles  
29 are going to be met so in an immature gas market, one where  
30 there's high volume risk, without a contract standing behind  
31 the investment those hurdles aren't going to be reached by

1 an investing company.

2 It is therefore my conclusion that an authorisation for  
3 a venture like Pohokura of this size in New Zealand which  
4 requires them to market separately, or which gives them an  
5 authorisation to market jointly for an inappropriately short  
6 period would be detrimental to the development prospects of  
7 that project.

8 **CHAIR:** Thank you for that. Can I ask you a question: Did COAG  
9 turn its mind directly to the issue of conditions that the  
10 ACCC have applied to authorisations in Australia?

11 **MR AGOSTINI:** No, COAG was aware that the ACCC had turned its  
12 attention to the issue of feasibility of separate marketing  
13 as being the basic criteria by which it measured, whether it  
14 should be required or not, and was comfortable with the  
15 ACCC's position on that.

16 **CHAIR:** Most of the COAG work compared the option of separate  
17 marketing with joint marketing; it didn't make a comparison  
18 of the sort we're making here with the counterfactual. Is  
19 that right?

20 **MR AGOSTINI:** Well, COAG never went into a specific case to  
21 determine whether any specific case -- gas should be  
22 marketed jointly or separately. COAG recommended that the  
23 ACCC do this and was comfortable with the process that  
24 historically the ACCC has used to do that.

25 **CHAIR:** But COAG did come to a conclusion that there was  
26 significant competition issues if separate marketing was  
27 possible. In other words, there were significant  
28 competition benefits if separate marketing was feasible. Is  
29 that a correct statement?

30 **MR AGOSTINI:** Well, let me break that into two pieces. COAG was  
31 concerned that the market was not sufficiently competitive.

*Pohokura JVPs (cont)*

1       There was a fairly -- as far as the eastern States are  
2       concerned, it's fairly deep in the total number of  
3       customers, the volume of gas is building up reasonably well,  
4       the number of sellers is deficient to have a really  
5       competitive market, so that was a concern for COAG.

6       The concern in the western market was a bit different;  
7       the number of sellers there is much larger. I point out in  
8       Western Australia where COAG was much more comfortable with  
9       the market, although it's a lot smaller, there the  
10      preponderance of sellers is something like nine individual  
11      sellers operating in the market, they're all joint venture,  
12      they're not separately broken up. There you have nine  
13      individual joint ventures that are selling into the market  
14      and so the market is a lot more healthy in terms of the  
15      number of sellers.

16      In the eastern States where COAG was most concerned it  
17      recognised that if the individual sellers in the two  
18      dominant joint ventures there marketed separately, you would  
19      have an increase in the number of players on the seller  
20      side. It also recognised, however, that to require this to  
21      happen where there was not a commodity market was a problem.

22      **CHAIR:** Sure, I understand that point. Can I see if my  
23      colleagues have follow-up questions. [**Pause**].

24      **MS OWENS:** Yeah, I just had a quick question, Mr Agostini. Did  
25      you take into consideration when comparing the Australian  
26      and New Zealand markets the fact that the New Zealand market  
27      was in a state of severe under-supply and the Australian  
28      market was in a state of over-supply and if you had taken  
29      that into account, what are the implications in terms of the  
30      feasibility in terms of separate marketing in each instance?

31      **MR AGOSTINI:** Yes, and I did address that in one point I made.



*Pohokura JVPS (cont)*

1 The fundamental difference this leads to is the importance  
2 of establishing an improved potential supply situation in  
3 New Zealand which is not such a consideration in Australia.

4 So when we in the COAG review in Australia considered  
5 the potential implication of what we might do on future  
6 exploration, while it is a consideration, it is in my view  
7 not as important as taking that into account in New Zealand  
8 where the effect of that potentially on the growth of the  
9 market would be much more severe.

10 **CHAIR:** Dr Berry?

11 **DR BERRY:** The only outstanding part of the presentation is to  
12 respond to the suggestion that there are examples of  
13 separate selling in Australia, and we can deal with that  
14 briefly.

15 **MR TWEEDIE:** The Australian examples that the Commission appears  
16 to have focused on, particularly Yolla and Geographe  
17 Thylacine -- Yolla, the reason I can speak on a reasonably  
18 informed basis with regard to Yolla is that I'm currently  
19 the Chairman of the board of Q Energy which is a small oil  
20 and gas company listed on both the New Zealand and the  
21 Australian sharemarkets.

22 Q had an interest in Yolla, it held a 14% joint venture  
23 interest in Yolla, and the Q management were bringing to the  
24 board the details because we were in the project right  
25 through to the stage that contracts were being entered into  
26 for the sale of gas to Origin. So management were bringing  
27 issues and proposals to the board and as Chairman I was  
28 obviously privy to that dialogue.

29 Before any agreement had been struck with Origin we had  
30 decided to sell out of Yolla for a variety of reasons, but  
31 one particularly relevant reason that we were very concerned

*Pohokura JVPs (cont)*

1 about the economic returns from Yolla, it's a small field,  
2 it's been around a long time, and the economic and technical  
3 risks associated with that project are quite substantial.  
4 So we decided to sell our 14% stake to AWE, one of the other  
5 Joint Venture Partners who I understand subsequently sold  
6 down, kept some, and sold the balance to Origin itself.

7 But I'd like to just put in context what I understood  
8 the process in Yolla has been, because my clear view of it  
9 is, it was a very specific case of -- very specific and  
10 quite unusual circumstances and can be definitely very  
11 clearly distinguished from the situation we've got at  
12 Pohokura.

13 I'd first of all say that in practice the whole  
14 development and sale of gas was highly co-ordinated. I was  
15 under no -- I was under the impression quite clearly that --  
16 and certainly the management of Q must have been under the  
17 impression, that we were all going to get the same  
18 contractual deal with Origin who was going to be buying the  
19 gas, all the Joint Venture Partners were going to get the  
20 same deal.

21 Now, I can explain that quite logically as to why that  
22 would be the case. Origin, which was and is the operator of  
23 the field, it's also the largest Joint Venture Partner. It  
24 also has a significant downstream business in Australia, so  
25 it is vertically integrated from upstream exploration and  
26 production to downstream gas marketing and electricity  
27 generation. In fact, it is really the favoured equity pick  
28 by analysts in Australia very much for the reason of that  
29 vertical integration.

30 It wanted the gas, it clearly wanted the gas and that  
31 was very clearly made clear to the Q board by the Q

*Pohokura JVPS (cont)*

1 management that Origin wanted the gas, and that was why  
2 Yolla had not been brought into production a lot earlier,  
3 because where was the gas going to go? Where was the  
4 buyer -- for a long time there was a debate that the gas was  
5 possibly going to go to Tasmania. The advent of Origin  
6 coming into the joint venture, they specifically came in  
7 because they wanted gas for their eastern Australian  
8 business, and they offered to buy all the gas purely because  
9 of that.

10 The first cab off the rank in terms of selling gas was  
11 AWE, and I understand the Commission has spoken to AWE. I  
12 understand AWE went to an open market to get a view on the  
13 price of the gas that they -- but my clear view would be,  
14 under no circumstances did AWE intend to sell that gas to  
15 anyone other than Origin in. The reason being, AWE would  
16 have known that, if the gas was sold to somebody else there  
17 would have been a very high probability that the project  
18 wouldn't have gone ahead.

19 So, AWE wanted to get a market price and it was equally  
20 in Origin's interests that the project was bankable,  
21 therefore it needed a market price for the gas, so there was  
22 significant alignment between the two and the deal was  
23 struck -- I don't know if Origin had a first right of  
24 refusal, but certainly AWE would have known the project  
25 would be unlikely to have gone ahead if Origin hadn't have  
26 got the gas.

27 Equally, Origin knew that if it screwed the other Joint  
28 Venture Partners, namely Cal Energy(?), Q Energy etc, there  
29 would have been the sort of non-alignment that we have  
30 touched on in some circumstances here. Origin knew that it  
31 had to have the same, or a very similar deal to Cal

*Pohokura JVPS (cont)*

1 Energy(?) and Q, and by the time Q got round to negotiating  
2 with Origin, Cal(?) had already struck a deal.

3 Now, clearly there was some implicit knowledge in what  
4 was going on because I certainly had been satisfied we were  
5 getting the same deal as Cal(?) and AWE were getting, and  
6 you can ask, why would Origin not have wanted to screw the  
7 other partners? It wouldn't have because Origin knew if it  
8 was going to get the project into development there would  
9 have had to be alignment between the Joint Venture Partners  
10 on the returns from the project. If Origin had of thought  
11 well, we'll get a significant gas price discount from Q, the  
12 chances of Q being on board at the development decision  
13 would have been just that more remote.

14 So, there was a high degree of co-ordination in all of  
15 this, and in the final outcome -- and co-ordination and  
16 alignment, and in the final outcome the parties have all  
17 contracted with Origin, the project is going ahead with  
18 Origin as operator and the largest Joint Venture Partner.

19 So if we said, how is that material to Pohokura? Well,  
20 the Yolla situation is clearly not on all fours. If it was,  
21 for example, if we were going to look at a similar situation  
22 we'd say, well, who out of the three partners, Shell, OMV  
23 and Todd? Shell is effectively the operator, Shell is the  
24 major Joint Venture Partner. If Shell had a downstream  
25 business like Origin had, they were vertically integrated,  
26 the comparative position with Yolla would have been Shell  
27 would have been buying all the gas.

28 So in the New Zealand context if we apply Yolla, it  
29 would be Shell the operator, Shell the largest partner,  
30 Shell buying all the gas and that frankly in the New Zealand  
31 situation would have been the last -- would have been

1 certainly hardly pro-competitive.

2 So with that background that's how I saw Yolla firsthand  
3 at the coalface.

4 The issue with Geographe Thylacine is, I certainly can't  
5 speak with the knowledge that I have there, but I can  
6 clearly say with Geographe Thylacine, they haven't yet made  
7 a development decision and, therefore, there could be delay  
8 on Geographe Thylacine's development. The issue that they  
9 will have to face with separate marketing or separate  
10 selling is exactly what the Pohokura partners will have to  
11 face if you force it on them.

12 But, in the case of Geographe Thylacine, if there is a  
13 delay on the basis that we're saying there will be delay,  
14 that has got no detriments to the Australian economy  
15 because, as we've just heard, there's 157 Pohokuras waiting  
16 in the queue to come into development in Australia. In fact  
17 we, Todd, have been party to a discovery up in the Timor  
18 sea, it's around two TCF, two Pohokuras, but it will never  
19 come into production for a long time, if ever.

20 Some of that 157 will only ever ultimately come into  
21 production as the queue -- you get through the queue. The  
22 closer gas fields to market, the closer ones that get them  
23 to pipeline, that ultimately when there is connection  
24 between the markets from the west to the north to the east,  
25 maybe more gas will flow around. But, the key  
26 distinguishing feature, apart from all the ones we've just  
27 seen, is there's a lot of gas in the queue and if Geographe  
28 Thylacine is delayed for three years, five years, whatever  
29 the delay may be, it will not matter, whereas in New Zealand  
30 a delay in Pohokura does matter, potentially to the tune of  
31 an economic detriment of \$1 billion. Thank you.

*Pohokura JVPS (cont)*

1 **CHAIR:** Sorry to interrupt you Mr Tweedie.

2 **MR TWEEDIE:** I've finished.

3 **CHAIR:** I just need to know, Dr Berry, how much time you need  
4 because I think we'll have to break now.

5 **DR BERRY:** I think probably about five minutes away -- oh,  
6 that's it?

7 **MR TWEEDIE:** That takes two seconds. The other Australian  
8 projects that we're aware of at the moment, I mean Blacktip  
9 is actually a similar size to Pohokura, which is off-shore  
10 Darwin. Woodside are the operator in the major Joint  
11 Venture Partner in that, and they are certainly looking at  
12 joint marketing there; they have just entered into a  
13 contract with Alcan(?) on an aluminium -- I think it's an  
14 aluminium smelter, but that is definitely being viewed as  
15 joint marketing. Again, probably in market circumstances  
16 and depth of market not too dissimilar from what we've got  
17 here.

18 The sunrise project, which is the Timor sea where it's  
19 now turning into a floating LPG project; certainly they  
20 looked at bringing gas ashore into Australia on a joint  
21 marketing basis, but that project is now focussing on purely  
22 an off-shore marketing position. And, of course, I've  
23 mentioned the number of projects.

24 **CHAIR:** Thank you for that. Any last questions?

25 **MR LAUNDER:** Just one, I wasn't sure. When did Q exit out of  
26 the Yolla project, or when did you sell out of your share?

27 **MR TWEEDIE:** It exited -- I can't give you the exact -- maybe a  
28 year or so ago. It was prior to -- I can say categorically  
29 we were in negotiations with Origin on the first stage of a  
30 gas contract; there had been material exchanged, and it was  
31 after AWE and Cal(?) had entered into deals. It was about

1 that time that we exited by selling to AWE.

2 **CHAIR:** Thank you Mr Tweedie. Is there anything further?

3 **DR BERRY:** There's no further material for presentation.

4 **CHAIR:** I want to thank the applicants for their presentation  
5 and willingness to take questions, it's been very helpful to  
6 the Commission.

7 I would like to turn now to the matter of how to handle  
8 the rest of the afternoon. I would like to break now for  
9 one hour and ask that the parties that would like to  
10 participant in the closed session be here promptly at 2.30,  
11 and in attendance. That session will be restricted to  
12 parties to those negotiations plus anyone who has signed the  
13 appropriate undertakings, which is limited to external  
14 counsel and advisors. I'll give further indication at the  
15 beginning of that session how we plan to handle it.

16 I am planning to allow 45 minutes for that session and  
17 would ask that NGC be prepared to start their presentation  
18 at the end of that session, and I will give you further  
19 indication of other adjustments after the break. Once we've  
20 resumed the open session I will give that indication.

21 So, if there aren't any questions, I will adjourn the  
22 meeting for now and ask that those attending the  
23 confidential session be back in one hour's time. Thank you  
24 very much.

25

26

27

**Adjournment taken from 1.37 pm to 2.35 pm**

28

29

**[Confidential session proceeds and concludes at 3.40 pm]**

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*Discussion*

1 **CHAIR:** I'd like to reconvene the Conference at this stage.  
2 Before we start I'd just like to ask the applicants what  
3 their estimation of their time required for the final reply  
4 would be.

5 Dr Berry, do you have an estimate of that time?

6 **DR BERRY:** The reply is going to, I think, centre upon the  
7 submissions that have yet to be made, so I'm just a bit  
8 reluctant to make an offering for a potential timeframe. I  
9 just wonder whether we can take that issue up a bit later  
10 this afternoon perhaps?

11 **CHAIR:** The reason I ask is, I understand someone would like to  
12 know the start time in the morning. At this point in time  
13 I'm aiming to start at 9 o'clock, but I have considered  
14 whether we should start at 8.30 but I think at this point in  
15 time we'll plan on 9 o'clock, but we may have to vary that  
16 as the afternoon proceeds.

17 So, I just want to restate for those that weren't at the  
18 last bit of the proceedings, we will hear now from Contact  
19 followed by NGC, and in the morning we will hear from  
20 balance and Shell followed by the applicant's reply. That  
21 is the schedule at this stage, and I believe that -- I don't  
22 think I've overlooked anyone, is that right? So, that is  
23 the plan at this stage, and as I said we'll plan on  
24 9 o'clock. I would anticipate that we will be done around  
25 midday, I suspect, is what we're looking a tomorrow.

26 Okay, if there aren't any questions on that, I will ask  
27 Contact to please present.

28

29

30

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## PRESENTATION BY CONTACT ENERGY LIMITED

1

2

3 **MR DELLOW:** Thank you, we have introduced ourselves at the  
4 previous session but I'll just go through it again; I'm Tony  
5 Dellow from Buddle Findlay and with me is David Thomas who  
6 is General Manager, Fuels Trading, with Contact. I'm  
7 planning just to run through our prepared submissions.  
8 You're welcome to ask questions as we go. It shouldn't take  
9 very long, I'm envisaging about 15 minutes of material.

10 **CHAIR:** Do you have copies?

11 **MR DELLOW:** No we haven't but we will provide copies.

12 **CHAIR:** Thank you.

13 **MR DELLOW:** So, just by way of introduction, Contact has already  
14 made two written submissions on the application. Those  
15 submissions do take issue with a number of matters raised by  
16 the applicants in support of the application. However,  
17 Contact's overriding concern is that gas from Pohokura must  
18 be made available to generators by 2006 if New Zealand is  
19 not to avoid electricity shortages. Any such shortages, as  
20 the Commission has recognised, would have serious  
21 ramifications for the New Zealand economy.

22 Contact maintains that the difficulties claimed by the  
23 applicants to be associated with separate marketing are  
24 either non-existent or result from a lack of determination  
25 and common purpose amongst the applicants to bring the gas  
26 to market swiftly. However, Contact is concerned that  
27 drawn-out arguments on the application and the possibility  
28 of an appeal by the applicants against a refusal by the  
29 Commission to grant authorisation, or perhaps to grant  
30 authorisation with unacceptable conditions as far as they're  
31 concerned, will only serve to delay the availability of the

1 Pohokura gas at a critical time.

2 Contact also believes that, if an authorisation is not  
3 granted, gas production from the Pohokura field will be  
4 delayed. This is not because delay is an inevitable  
5 consequence of separate marketing, but because not all of  
6 the Joint Venture Parties are necessarily incentivised to  
7 bring the gas to market as quickly as possible.

8 The Commission obviously should only grant an  
9 authorisation of joint marketing if doing so will result in  
10 Pohokura gas becoming available within a reasonable time.  
11 That's consistent with the Draft Determination. In our view  
12 this makes the conditions on any authorisation crucial. For  
13 this reason Contact wishes to focus its submissions today  
14 solely on the appropriate conditions that should be imposed  
15 on an authorisation granted by the Commission.

16 So, looking at the conditions: As we've already said,  
17 Contact agrees that there should be limitations on any  
18 authorisation of joint marketing activities by the  
19 applicants. This is because Contact firmly believes that  
20 separate marketing is feasible and realistic, and joint  
21 marketing should only be allowed to the extent that it  
22 results in earlier gas availability.

23 Under the heading of general principles on the  
24 submission of 9 June -- that's paragraph 3.1.5 -- the  
25 applicant's state:

26 "As there are no detriments and in contrast positive  
27 benefits arising under the proposed joint marketing,  
28 authorisation should be granted unconditionally."

29 Yesterday when this point was raised orally by Dr Berry,  
30 the Chair put it to the applicants that the Commission is  
31 entitled to impose conditions to secure the benefits that

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1 form the basis of the Commission's decision to grant an  
2 authorisation. Dr Berry replied that -- and this has been  
3 gone through again today, and I haven't updated the notes --  
4 as there are no detriments the Commission should grant an  
5 authorisation without conditions.

6 In our submission that response doesn't address the  
7 point that was raised. An authorisation is granted under  
8 the Commerce Act on the basis that there is a benefit  
9 arising from the proposed conduct that outweighs any  
10 lessening of competition arising from it. In our submission  
11 the Commission is correct in suggesting that the Commission  
12 is entitled to impose conditions to secure the claimed  
13 benefit.

14 The Commission's previously considered this issue in  
15 Decision 221, which is *re New Zealand Kiwi Fruit Exporters*  
16 *Association, New Zealand Kiwi Fruit Coolstorers Association*.  
17 At paragraph 7.4 the Commission said:

18 "Conditions designed to enhance competition or to remove  
19 detriments flowing from an absence of competition could be  
20 appropriate. Further conditions designed to help ensure the  
21 continuation or effectiveness of public benefit found to  
22 exist in respect of any application could likewise be  
23 considered. Such conditions are in line with the objectives  
24 of the Act."

25 I just note that that was the first time the matter was  
26 considered. The Commission's also previously referred to  
27 that decision in the Draft Determination for the Qantas-Air  
28 New Zealand application.

29 In our view the Commission is right in the Draft  
30 Determination in finding that conditions could be imposed to  
31 ensure public benefit is realised. In our submission also

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1 this is an appropriate case for imposing conditions of that  
2 type.

3 **CHAIR:** Can I interrupt you for just a minute. The applicants  
4 have raised questions, it seems to me, that are slightly  
5 different. There's a first order issue, if there are no  
6 detriments is there a substantial lessening and, therefore,  
7 does the Commission even have jurisdiction?

8 **MR DELLOW:** Yes.

9 **CHAIR:** You don't even get to the point where you have to  
10 establish whether the benefits are achievable. So, I know  
11 that you're starting at the point where we've determined  
12 where, if we determine that we had jurisdiction it may --  
13 you take the position that we can impose conditions to  
14 ensure the benefits are achieved, but I wonder if you can  
15 address the jurisdiction issue in the first place.

16 **MR DELLOW:** The jurisdiction issue I've always had a problem  
17 with in the sense that -- I have to state that I've been  
18 involved in amending the Commerce Act to change the basis on  
19 which this jurisdictional issue was viewed, but it didn't  
20 seem to work.

21 I haven't prepared these submissions, so you'll have  
22 to -- you'll just have to forgive me for going through it,  
23 but the relevant section, I believe, gives the Commission  
24 jurisdiction to consider an application for authorisation by  
25 stating that, as a subjective test, that if the applicant  
26 considers that their conduct may or -- I think it's 'may or  
27 might', I'll just have to have a look and see what the  
28 section is. **[Pause]**. Well, anyway -- here we go. Sorry,  
29 s.58.

30 So, s.58(1):

31 "A person who wishes to enter into a contract or

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1 arrangement will arrive at an understanding to which that  
2 person considers s.27 of this Act would apply, or might  
3 apply."

4 May apply to the Commission. It seems to me -- I say  
5 once again, I haven't prepared these submissions, but I have  
6 long held the view that that is what gives the Commission  
7 jurisdiction contrary to what the Commission has found in  
8 the past.

9 And that at that point the question of whether there are  
10 detriments or benefits, you simply have to find that the  
11 benefits outweigh the detriments or they don't and the  
12 question of jurisdiction doesn't arise.

13 The original approach of the -- sorry, these are novel,  
14 I realise the Commission hasn't heard this before, but the  
15 original approach of the Commission in this regard goes back  
16 to a decision, and it relates to the Medical Association, I  
17 think, in 1987. The wording of s.58 was changed, and I  
18 can't remember exactly when it was, I think it was about  
19 1991, and the reason at the time was to address that issue.

20 It's always seemed to me, I'll have to say, as an  
21 interesting issue and something that I wouldn't be prepared  
22 to do is to bring an application on behalf of a client to  
23 the Commission looking for an authorisation and then  
24 advocate that you don't grant the authorisation because, by  
25 declining jurisdiction, the applicants are left with  
26 nothing, other than a finding by the Commission which is not  
27 binding by the courts as to the effect of the practice.

28 **CHAIR:** I think, if we leave that issue to one side about why an  
29 applicant might do so, and I think there probably are some  
30 solid reasons why they might; I just wonder about the  
31 underlying logic about why the Commission would want to

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1       assert jurisdiction if there's a finding of no detriment.

2 **MR DELLOW:** Well, with respect, I think that's starting the  
3 question around the wrong way. The issue is that the  
4 applicant comes to the Commission and gives information  
5 about what it is that they want to do and the Commission  
6 simply decides whether there are benefits that outweigh any  
7 detriments. That's the Commission's jurisdiction.

8           This has been, I suppose -- I have to say, this has been  
9 laid out in previous papers that led to the amendment of the  
10 Act.

11 **CHAIR:** So, you think it's in the public record in terms of what  
12 the Select Committee hearings on the changes to the Act?

13 **MR DELLOW:** I believe so, yes.

14 **CHAIR:** If you have those references, I think it would be useful  
15 for us to have them.

16 **MR DELLOW:** I could try to find them for you, yes. I am  
17 conscious that the Commission has worked on the basis of  
18 those earlier decisions for many years -- well, specifically  
19 for about 16 years. But I think that for today's  
20 purposes -- I mean, you asked me the question about what I  
21 thought the legal position was. For today's purposes  
22 Contact's view is that there are detriments as identified in  
23 the Draft Determination, and that on that basis whatever the  
24 answer is to the legal question you have jurisdiction. So,  
25 that's a submission just as the substantive submission.

26           I think what I've just said is that Contact therefore  
27 strongly supports the Commission's view there should be  
28 conditions on an authorisation granted that ensure that the  
29 applicants don't win both ways by being allowed to jointly  
30 market Pohokura gas with its associated detriments -- which  
31 we've just discussed -- without also delivering the

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1 benefits, the principal one of the benefits being the  
2 avoidance of delay in the availability of gas.

3 However, we are concerned that the conditions proposed  
4 in the Draft Determination are not the right conditions.  
5 This is because in our view they are unworkable and, as  
6 we'll discuss later, unenforceable. For the remainder of  
7 this submission we wish to address the problems with the  
8 conditions proposed by the Commission and then suggest  
9 alternative conditions setting out our reasons why we  
10 consider that they are more appropriate.

11 The first condition we want to look at is the limited  
12 period of authorisation. The Draft Determination is not  
13 entirely clear on this point and I notice from the -- what  
14 some of the applicants were saying this morning, that there  
15 does seem to be confusion about this and there seems to be a  
16 view that if -- that the proposed time limitation means the  
17 contracts entered into within the five year period lose the  
18 protection of the authorisation after the expiry of that  
19 period. That just seems to be implicit in what they were  
20 saying this morning.

21 If that's the case, Contact agrees with the applicants  
22 that contracts of the nature required to commence production  
23 from a field such as Pohokura need to be operated over a  
24 longer period than five years. It seems unnecessary, from a  
25 practical point of view, to require contracts entered into  
26 within the relevant period to be revisited and/or for a new  
27 authorisation to be applied for at the expiry of the period.

28 On the other hand, if the five year limitation period  
29 set out in paragraph 511 of the Draft Determination means  
30 that the parties can jointly market for a period of five  
31 years, and that any contracts entered into within this

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1 period would be protected under the authorisation, -- and  
2 I'm conscious that Dr Berry is saying the authorisation  
3 doesn't cover the contracts, but in the absence of an  
4 authorisation, if there was a restrictive trade practice,  
5 those contracts would be -- so that's what I mean by  
6 protecting the contracts. If that's the case, then this  
7 five year period of protection is too long. It effectively  
8 would give the Joint Venture Parties an unlimited ability to  
9 jointly market gas.

10 Contact anticipates that the vast majority of Pohokura  
11 gas could be subject to contracts within a five year period.

12 We'll come back to our suggestion for limiting the  
13 duration of the authorisation later in these submissions.

14 **MS BATES QC:** Could I just ask you a question here, that you  
15 would have heard the argument put that it's necessary for  
16 long-term contracts to be in place in order to provide the  
17 finance necessary, the development; do you have anything to  
18 say about that, or are you going to address that later or  
19 now?

20 **MR DELLOW:** We are, but just very briefly, what we are going to  
21 be proposing would mean that the -- notwithstanding that the  
22 authorisation had expired, it wouldn't have any effect on  
23 contracts that ran past that period. It would actually  
24 cover those contracts -- provided the contracts are not  
25 anti-competitive in themselves is, I guess, the distinction  
26 I was making earlier. But I will come back to that.

27 **MS BATES:** Just one other question; you said that you thought  
28 not all the parties were similarly incentivised to bring the  
29 gas to market as quickly as possible, or something along  
30 those lines?

31 **MR DELLOW:** In the introduction, yes.



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1 **MS BATES QC:** Could you please expand on that. Do you think  
2 different parties have different incentives to you?

3 **MR THOMAS:** I think the way to look at that, most of the -- all  
4 of the sellers have other interests; within those other  
5 interests they have higher or lower percentage interests  
6 than they do in Pohokura. They also may have fields where  
7 they have sunk costs. I would have thought it's logical  
8 that they'd want to monetise those before they see gas from  
9 the likes of Pohokura to come on the market.

10 **MS BATES QC:** Thank you.

11 **MR DELLOW:** Okay, the second condition of the Commission's  
12 conditions I want to deal with is the first gas condition.

13 Contact considers that the first gas condition creates  
14 legal uncertainty. We request whether it's appropriate for  
15 the Commission to impose such a condition. This is because  
16 a condition should only be imposed if a failure to comply  
17 with it gives the Commission sensible options for  
18 enforcement.

19 In Decision 221 that I referred to earlier the  
20 Commission also mentioned enforceability as being an  
21 important factor in formulating conditions. However, there  
22 has been no consideration that we can find of what  
23 enforceability of conditions on an authorisation involves.  
24 Section 65(1), which was mentioned earlier in the day,  
25 section 65(1) of the Commerce Act provide that if the  
26 Commission is satisfied that a condition on an authorisation  
27 has been breached the Commission may amend or revoke the  
28 authorisation.

29 Another view, which has not been tested is that, if a  
30 condition is breached the parties lose the protection of the  
31 authorisation for the conduct to which it relates.

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1           In Contact's view a first gas condition of the type  
2 proposed by the Commission would not be able to be sensibly  
3 enforced in either of these senses. In coming to this view  
4 we've considered a scene under which the Joint Venture  
5 Parties labouring under all the difficulties they've  
6 referred to in the application and their submissions succeed  
7 in entering into contracts to supply gas under joint  
8 marketing but then fail to undertake physical development of  
9 the field to the point where the gas is available by the  
10 date specified by the Commission.

11           In that case, the condition would have been breached and  
12 presumably the applicants, and possibly any party to a  
13 contract with the applicants, could be exposed to the  
14 possibility of amendment or revocation of the authorisation  
15 or lose the protection of the authorisation, or both. It  
16 seems to us that one effect of this is that the Joint  
17 Venture Parties in entering into a contract for gas under  
18 joint marketing could then have acted unlawfully, possibly  
19 looking retrospectively, although this is very unclear, and  
20 would therefore be subject to penalties and remedies in  
21 relation to the contract as if joint marketing had not been  
22 granted authorisation. If this is so, then it would  
23 obviously be unacceptable.

24           In addition, Contact thinks it doubtful that the  
25 Commission would be able to -- would feel able to take  
26 action or the Court to grant remedies on that basis. This  
27 would also apply if the Commission revoked the  
28 authorisation.

29           On the other hand, if the Commission sought to amend the  
30 authorisation, it's difficult to envisage what amendment  
31 would remedy the situation. That is to say, the benefits

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1 would have been lost to that extent. Accordingly, we submit  
2 that the Commission's first gas condition is inappropriate  
3 and later in the submission we propose alternative  
4 conditions to deal with the Commission's concern.

5 The next issue is the five year period extending from  
6 February 2006. In Contact's view the applicants should be  
7 entering into contracts for supply of gas from Pohokura as  
8 soon as possible, imposing a condition that would  
9 effectively mean marketing would be delayed until the field  
10 is actually developed doesn't seem to us to make sense.

11 In relation to assignment to successors, Contact  
12 appreciates that the Commission's concerned about changes of  
13 ownership that increase the common ownership between  
14 projects. Contact considers this is already a significant  
15 factor affecting the market for gas, and Pohokura gas in  
16 particular. Any changes in ownership could exacerbate this  
17 matter. However, Contact does consider that this issue's  
18 better dealt with under s.47 of the Commerce Act rather than  
19 a condition on an authorisation.

20 Finally, ringfence marketing: As Contact outlines in  
21 its written submission, developments, we recognise that  
22 developments such as Pohokura require such a significant  
23 investment that development's unlikely to occur unless it's  
24 considered at the highest level of the companies concerned.

25 Accordingly it's unrealistic to expect that the  
26 consideration of issues such as the marketing of Pohokura  
27 gas could be divorced from the consideration of other  
28 investments or projects by the relevant boards. You heard  
29 that from the applicants this morning, and we support that.

30 Accordingly, Contact considers that the Commission's  
31 proposed conditions are not appropriate and would not be

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1 workable. Contact has therefore suggested another approach  
2 to conditions that we'd like to elaborate on and, to some  
3 extent, modify slightly from our written submission.

4 Contact's proposed conditions seek to do a number of  
5 things. Firstly, more effectively, secure the benefits  
6 claimed by the applicants; that is, making gas available  
7 earlier than would otherwise be the case. Provide clarity  
8 to all parties in relation to their legal position, create  
9 the right incentives for the Joint Venture Parties to  
10 produce gas as soon as possible, and finally, to allow  
11 market participants through contractual provisions to ensure  
12 the benefits claimed by the applicants are realised without  
13 the need for or minimising the need for the Commission to be  
14 involved on an ongoing basis.

15 So, turning to the conditions which Contact has  
16 proposed: The first is that the authorisation would only  
17 apply to joint marketing leading to contracts for supply  
18 entered into prior to a specified date. In the applicant's  
19 submission on the Draft Determination, paragraph 10.1.4, the  
20 applicants state that OMV must make its decision --  
21 investment decision prior to the end of April 2004 and that  
22 to make an investment decision there needs to be contracts  
23 in place.

24 However, on the other hand in paragraph 5.3.20 of their  
25 submission the applicants state the contract timing will be  
26 affected by institutional arrangements, eg the possibility  
27 of joint marketing and any regulatory conditions on it, and  
28 by commercial assessments of the options to delay, which  
29 seems to us to indicate that they are signalling that they  
30 may, just from a commercial point of view, want to delay.

31 CRA in their report highlight the necessity for having

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1 contracts in place to secure the development of a gas field  
2 like Pohokura, as CRA point out, and we agree, once  
3 contractual arrangements are concluded there's no incentive  
4 to delay the production of gas. That comes from paragraph  
5 2.3 of their paper. This is also acknowledged in paragraph  
6 5.3.20 of the applicant's submission. So, it's in this  
7 context.

8 That it seems to us that it would better secure the  
9 benefits that the Commission has identified; that is, the  
10 early production of gas and to better suit the needs of the  
11 applicants that any condition imposed by the Commission  
12 should relate to a requirement to enter contracts under  
13 joint marketing rather than a requirement to produce gas by  
14 a specified date. In our written submission we've suggested  
15 that the date be 1 December 2003.

16 In relation to first gas dates, however, the Commission  
17 should be comfortable in leaving it to the purchasers to  
18 establish a suitable first gas date, having regard to the  
19 purchasers' individual needs. The advantage of this  
20 approach is that the parties may enforce their contracts  
21 without the need for further intervention by the Commission.

22 So, in other words, we'd say that the first gas date  
23 would be in the contracts -- that could be a requirement  
24 that there be a first gas date in the contracts, but once  
25 they're in the contracts they're enforced under the  
26 contracts as opposed to the need for the Commission to come  
27 back and supervise that.

28 **CHAIR:** I'm sorry, I had to be told something else that has  
29 happened, but I missed what you were saying and I do want to  
30 understand it. Can you just...?

31 **MR DELLOW:** Well, the first part of the submission under this

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1 heading was pointing out that we seem to be as one with the  
2 applicants, that once contracts are entered into, there  
3 shouldn't be any incentive to delay the production of gas,  
4 and we're suggesting that a better way to secure the  
5 benefits than have a limited period of authorisation in the  
6 way that you've suggested, is to say that joint marketing  
7 would be limited in time and we're submitting that time  
8 that's set should be quite aggressive, and in our written  
9 submission we said the 1st of December, although there's  
10 nothing magic about that date. And, to resolve the  
11 uncertainty that there seems to have been about what that  
12 period means, it would mean that there would be no action  
13 able to be taken in relation to contracts. In other words,  
14 the expiry of the authorisation wouldn't affect -- in itself  
15 affect the contracts that have been entered into.

16 **CHAIR:** Signed up until that date.

17 **MR DELLOW:** That's right.

18 **CHAIR:** I just want to follow-up on that, if I may.

19 When I read the CRA submission I thought it was a  
20 powerful argument for exactly the sort of condition, leaving  
21 aside what the date was on it, I think, as you yourself  
22 indicated, the December 2003 date's fairly aggressive, but  
23 it does highlight, it seems to me, a difficulty and that  
24 is -- and I think CRA address that in their presentations --  
25 and that is opportunism on your part in terms of -- or, on  
26 the purchaser's side in terms of knowing that they face that  
27 drop dead date. And, I wonder if you can address that  
28 because it affects this one problem, but it creates another  
29 one, and where does the balance sit here?

30 **MR DELLOW:** I think David will want to address that, but I think  
31 the thing that the Commission needs to bear in mind is that

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1       there is a competitive situation on the demand-side, and so,  
2       in the absence of any collusive practice, which of course  
3       wouldn't take place, then the -- it would be risky for any  
4       of the buyers to stand back and in the hope that their  
5       competitor didn't come in and gazump then. So, I think that  
6       is the first answer, that is simply the nature of the market  
7       and the fact that there's shortage of gas.

8   **MR THOMAS:** I'd just reinforce that. Contact this year is going  
9       to burn or sell 68 petajoules of gas; that is basically, as  
10      I understand it, the entire production of Pohokura. If we  
11      were to stand back and wait till the end date, it's likely  
12      that someone's going to come along and gazump us.

13   **CHAIR:** I wonder how many players you need, even if there is  
14      excess demand before -- I take the point you wouldn't expect  
15      people to explicitly collude on this, but tacit collusion  
16      might be an option.

17   **MR DELLOW:** It's very high stakes, very risky.

18   **CHAIR:** Can you tell us a little bit more about those risks and  
19      why it wouldn't be worth behaving opportunistically? Why it  
20      wouldn't be feasible for you to do that?

21   **MR THOMAS:** I think what would drive us away from that is that  
22      we would need to require the majority of gas, I think, that  
23      they're looking at putting on the market. If there was to  
24      be tacit collusion you would be dividing that volume up  
25      amongst the parties. It would mean that one, if not all of  
26      the parties, may be short of gas.

27   **CHAIR:** What happens at the end of that period, whatever it  
28      would be. Say it was two years; come to the end of the  
29      period at which contracts can be signed up in and the Joint  
30      Venture Partners don't have enough contracts basically to  
31      make it economical to develop the field?

1 **MR DELLOW:** I suppose what we're saying is, that the alternative  
2 is separate marketing or to come back to the Commission for  
3 another authorisation in a new context where they have got  
4 contracts signed up, we're looking at the condition that  
5 gives them the incentive to get those contracts signed up  
6 and get a first gas date in the contracts. Otherwise, you  
7 know, the simple answer to your question is, they're back to  
8 no authorisation for joint marketing and either another  
9 authorisation or a market separately.

10 **CHAIR:** Wouldn't it, in effect, mean that they would virtually  
11 have to secure contracts for all of the gas of the field?

12 **MR THOMAS:** I don't think that's necessarily true, Commissioner;  
13 I think they would need to secure sufficient contracts to  
14 make their final investment decision, and as far as -- from  
15 what I've heard, they're looking to do that in the first  
16 quarter next year, so they would had to have sold sufficient  
17 gas to do that by then anyway.

18 **MR DELLOW:** That is actually stated in the applicant's  
19 submission at 10.1.4.

20 **CHAIR:** But they still would face all of the gas balancing and  
21 all the other issues that we've heard about, for the  
22 remainder of the gas?

23 **MR DELLOW:** Well, if there is gas remaining, yes.

24 **CHAIR:** Yes, if there is.

25 **MR THOMAS:** I think it's made quite significantly simpler  
26 because they will have agreed on at least the original or  
27 the majority of the development of the field; they all have  
28 time to negotiate and put in the kinds of arrangements  
29 they're talking about; they also should have a lot more  
30 certainty about the amount of gas that's actually in the  
31 ground.



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1 **CHAIR:** It may not be efficient to -- in the first year, the  
2 first two years, commit all of the gas. For whatever reason  
3 it may be in the national interests sense better that not  
4 all the gas is committed in the first round, yet this will  
5 sort of tip the balance towards locking in contracts for the  
6 whole of the gas it seems to me.

7 That doesn't seem to be of concern to you, and yet I  
8 think there could be some real economic effects from that.

9 **MR THOMAS:** I'm not sure, Commissioner, it drives them to  
10 selling all the gas in the first round. I think it drives  
11 them into selling sufficient gas to get the development off  
12 the ground.

13 **CHAIR:** Okay.

14 **MR DELLOW:** The next issue to be covered is the idea that the  
15 authorisation only cover a limited quantity of gas.  
16 Contact's written submission suggests that the authorisation  
17 cover a limited quantity of gas. However, on reflection and  
18 in the light of thinking about the previous condition,  
19 Contact considers that if the authorisation is limited in  
20 time, as we have suggested, it shouldn't be necessary to  
21 also limit the quantity of gas. Contact considers the  
22 applicant should be given an incentive to market as much gas  
23 as possible as quickly as possible.

24 **CHAIR:** I guess that goes back to my last question; why is that  
25 necessarily a good thing? Why would we want to necessarily  
26 bring forward the profile of how this gas is contracted?

27 I mean, I can understand a fair amount of it, but why  
28 necessarily incentivise them to...?

29 **MR THOMAS:** I think the power that the sellers have is, before  
30 they've actually contracted the gas, once it is contracted,  
31 that that power is diluted and spread amongst the buyers and

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1 the sellers, essentially a lot of the control of the gas is  
2 therefore out of their hands.

3 **CHAIR:** I understand that point, and that's exactly why I say --  
4 I'm sure you heard the accusations that there were various  
5 terms used, but I'll prefer that opportunism is the way to  
6 describe it, but it does sound like that. It sounds like,  
7 just because of current supply and demand conditions the  
8 applicants have some market power and, through the means of  
9 this authorisation, the purchasers are seeking to try to  
10 shift that balance. Not necessarily because of the  
11 authorisation, but it presents an opportunity to have that  
12 balance changed, and I think it's hard here to discern how  
13 many of this is simply an opportunity for you to shift the  
14 balance of market power here as opposed to something that  
15 will really achieve the outcome that we're talking about.

16 **MR DELLOW:** Well, that's something the Commission always has to  
17 deal with when it listens to interested parties in an  
18 application.

19 Perhaps I could just say that, in analysing what we're  
20 saying, what we're -- I said earlier about the objectives,  
21 it's about addressing the detriments and addressing the  
22 benefits and in the Draft Determination, and we're saying we  
23 support the Draft Determination, what you've found is that  
24 there are significant detriments and those are balanced by  
25 benefits which are principally the avoidance of delay, and  
26 this condition -- I mean, it's recognising, and it's our  
27 submission, that separate marketing is quite possible, is  
28 quite feasible, and that the authorisation shouldn't go any  
29 further than it needs to to balance the detriments with the  
30 benefits.

31 So, in this case what we're saying is that it's quite

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1 possible once you get to a certain point for separate  
2 marketing to kick in. And that's the basis in saying that  
3 the authorisation doesn't necessarily need to be for all of  
4 the gas that comes from Pohokura, but that would be at the  
5 option of the applicants.

6 **MR STEVENS:** Can I just ask for a slight clarification on the  
7 issue of the quantity of gas: You say that's not necessary  
8 if you have the condition of time limit. Would you believe  
9 that you could swap the two and have only a condition in  
10 terms of the quantity of gas that's required to be  
11 contracted and not the time limit?

12 **MR DELLOW:** No, because that quantity of gas could be offered  
13 some time off in the future; that wouldn't secure the  
14 avoidance of delay.

15 **CHAIR:** Can I just come back to the question I raised before.  
16 In the counterfactual, if you think of Scenario 1, what I  
17 would like you to address for me is, in Scenario 1 would the  
18 fact that you had different marketing arrangements lead to a  
19 different situation vis-a-vis the market power of the Joint  
20 Venture party versus the purchasers, and how would that  
21 compare with market power as it would exist under your  
22 preferred condition?

23 The reason I ask the question is, it seems to me quite  
24 inappropriate for the Commission, no matter how desirable  
25 competitive pressure is, it seems to me inappropriate for us  
26 to impose conditions that improve the competitive  
27 environment in a way that is really about designing a market  
28 rather than addressing the issue before us. And if in the  
29 counterfactual we see a situation where that market power  
30 would be there any way, I wonder if it's the business of the  
31 Commission to unpick that through conditions.

1 Do you understand the question I'm putting to you?

2 **MR DELLOW:** No, not totally, because I mean, you have found that  
3 there are detriments compared with Scenario 1, and found  
4 that the major benefit that outweighs those detriments -- I  
5 mean, there are other transaction costs and so on, but  
6 putting those to one side, because you haven't found that  
7 those are particularly significant, that the major benefit  
8 that you're looking at is an avoidance of delay; so if you  
9 can do no more through an authorisation than achieve the  
10 avoidance of delay, then it seems to me that's as far as you  
11 need to go.

12 I don't know if that does answer the question, because  
13 I'm not sure I totally understood it.

14 **CHAIR:** I suppose your condition 1 both has the effect  
15 essentially of, if I understand you correctly, it would have  
16 the effect of ensuring the benefit of reducing the delay,  
17 but it also has the effect of reducing the detriments from  
18 the lessening of competition.

19 **MR DELLOW:** I'm not sure that's the case. We still have to  
20 bear -- in our submission we've said that we think that the  
21 price will be higher, there'll be a lower, a lesser range of  
22 terms and conditions available to buyers; those won't be  
23 avoided.

24 **CHAIR:** But if it changes the relative market power of buyers  
25 and sellers, I would have suspected that it has some effect  
26 on reducing the detriments.

27 **MR DELLOW:** I'm not sure we would agree that it does have that  
28 effect; in a sense that, as we said before, it's a  
29 competitive market on the demand-side and we will still have  
30 to -- we'll still have to be scrambling for gas with the  
31 supply situation.

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1 **MR STEVENS:** Yesterday we heard from the applicants that one of  
2 the key drivers for them wanting to get this on-stream  
3 quickly is that there is a strong commercial incentive for  
4 them to do so; in other words, they've got a large sunk  
5 investment at present and they really are incentivised to  
6 get it in early.

7 Do you believe, in your opinion, that that's not  
8 sufficient then, without us needing to apply any conditions  
9 whatsoever, that economic incentive is not sufficient to  
10 enable them to deliver the benefit of early timing then?

11 **MR DELLOW:** As I said earlier, even in the applicant's  
12 submission, and in the CRA report, they talk about  
13 commercial assessments of the options to delay. So I think  
14 what we're saying is that clearly there could be situations  
15 where they wouldn't see it in their best interests -- that  
16 comes from their own words -- they wouldn't necessarily see  
17 it in their best interests to bring the gas forward at an  
18 early stage. And then also earlier David gave an indication  
19 that not all the Joint Venturers might have the same  
20 incentives.

21 The next condition we want to talk about is obligations  
22 to supply. We consider that the Commission should impose  
23 conditions that limit the ability of the Joint Venture  
24 Parties to impose high take obligations on purchasers  
25 coupled with minimal supply obligations on the Joint Venture  
26 Parties. Any such conditions would be a blatant use of  
27 market power and could create inefficient requirements on  
28 purchasers to manage risks that the applicants are better  
29 placed to manage.

30 This is a particular concern to Contact as a participant  
31 in the electricity market. Gas in the main is used to

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1 supplement hydrogeneration. Hydrogeneration requires high  
2 takes over some periods of the year and low in others; that  
3 should be the supplementation of hydrogeneration needs.

4 **CHAIR:** Can I just ask you there: You stressed at the beginning  
5 of your presentation the issue of enforceability. It seems  
6 to me with these sorts of conditions there's also an issue  
7 about monitoring and the ongoing role of the Commission.  
8 Generally we try to avoid having an ongoing role in this  
9 manner, and I don't really understand how this could be  
10 operationalised, even if we thought it was an appropriate  
11 thing to consider. And I wish -- I think it would be  
12 helpful if you could address that.

13 **MR THOMAS:** I would agree that it is a difficult thing to be  
14 able to mandate. We are particularly concerned that we get  
15 into a position where we are faced with high prices and an  
16 inflexibility on takes which means we must take whether we  
17 want to use the gas or not. Traditionally the way that has  
18 been dealt with is dealt with in contracts where you have  
19 the ability to bank gas that you don't want to use in any  
20 particular year, or the ability to pay for certain amounts  
21 but able to swing that amount of gas that you took through  
22 the year.

23 I think probably maybe the only practical way of  
24 actually enforcing it is to essentially dictate what terms  
25 actually go into the contracts.

26 **CHAIR:** I am aware, Mr Dellow, that you've had a long  
27 association with Commerce Act proceedings, and I just would  
28 ask your opinion whether you think that is -- I mean, is  
29 that really something the Commission could proceed with,  
30 specifying the terms and conditions?

31 **MR DELLOW:** I think it could be possible for the Commission,

1 with some work with the applicants and with other parties,  
2 to set some general principles that would be good enough to  
3 allow the purchasers and the -- the sellers and the  
4 purchasers to go away and come up with conditions, but I do  
5 agree that you don't want the Commission dictating  
6 contractual terms.

7 **CHAIR:** Who's going to enforce that condition should it be used?

8 **MR DELLOW:** Well, to go back to what I said about enforcement  
9 earlier, it's not really necessary to enforce as such. The  
10 applicants, if they want the benefit of the authorisation,  
11 would have to comply, and it would be possible for the  
12 purchasers to be able to enforce their own rights under the  
13 Act. It would be possible, of course, for the Commission to  
14 come back into the picture and amend or revoke the  
15 authorisation, but in the submission earlier I said that I  
16 thought that it's arguable that that's not the only remedy.

17 **CHAIR:** I mean, even leaving aside the issue about  
18 enforceability, it seems to me that there may be quite valid  
19 commercial reasons why different parties would be quite  
20 happy to accept quite different terms and conditions of  
21 supply and off-take, and I even wonder about the  
22 desirability of setting down broad principles. I'm not sure  
23 at all that the Commission has the expertise to be doing  
24 that.

25 **MR DELLOW:** I'm sure that the parties involved would be able to  
26 give some assistance, but I think the issue here is that we  
27 are saying, and we have said, and I think that the  
28 Commission has already recognised in the Draft  
29 Determination, that by giving this authorisation you are  
30 actually creating a situation where the sellers are able to  
31 dictate in a way they might not be able to if they were

1 required to separately market. So, --

2 **CHAIR:** You don't think that the situation now of excess demand  
3 would lead to a similar situation where they could set the  
4 conditions of supply and also set the high take obligations;  
5 you think that would be different under the counterfactual  
6 and the factual given current market circumstances?

7 **MR THOMAS:** I think you would expect, though not necessarily see  
8 different terms and conditions offered by the three parties  
9 that are selling gas. I would accept that they are  
10 constrained somewhat by the arrangements they have between  
11 themselves, but it doesn't necessarily mean that the prices  
12 need to be the same. It doesn't necessarily mean that the  
13 swing or the amount of swing factors and the like needs to  
14 be the same.

15 **CHAIR:** Is it your experience in other negotiations that those  
16 terms and conditions vary between contracts?

17 **MR THOMAS:** Very much so.

18 **CHAIR:** What determines the variation?

19 **MR THOMAS:** The requirements of the buyers, if they're looking  
20 for a more flexible contract they would probably tend to pay  
21 a higher price for that flexibility. The requirements of  
22 the sellers, they want to get the takes up as high as  
23 possible. It is obviously more economic if you're relying  
24 on by-products, the likes of oil or condensate, to help with  
25 the field of economics. They would like to push the takes  
26 up as high as possible. Where it ultimately lands is really  
27 a measure of the relative power between a buyer and a  
28 seller.

29 **MR DELLOW:** Just to finish that point off, we also submit that a  
30 condition should be imposed on an authorisation that would  
31 require the Joint Venture Parties to only be able to avoid



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1 the obligation to supply under normal maintenance  
2 arrangements and normal force majeure provisions. That's  
3 set out in our written submission.

4 Finally, no on-sale conditions: We're aware that the  
5 Joint Venture Parties have told their advisors that they  
6 will not unreasonably restrict the resale of gas. Contact  
7 considers this is a critical condition that should be  
8 imposed on any authorisation. The ability to on-sell gas is  
9 an important check on market power of gas producers and  
10 suppliers in such a thin market. The ability to on-sell gas  
11 is necessary for two reasons; to enable purchasers to  
12 arbitrage away any price discrimination, and to enable  
13 purchasers to manage risks associated with take  
14 requirements.

15 **CHAIR:** We've heard evidence that price discrimination in this  
16 case may very well be efficient; do you have any comments on  
17 that? [**Pause**].

18 **MR DELLOW:** Efficient in the sense that it can't be arbitrated  
19 away? We're not talking about price discrimination as such,  
20 we're talking about on-sell.

21 **CHAIR:** Yeah, I'm talking about price discrimination. If the  
22 on-sale condition is meant to deal with arbitraging away the  
23 price discrimination effects, when you come to a conclusion  
24 that that needs to be dealt with you'd have to come to a  
25 view that there's something wrong in this case with whatever  
26 price discrimination is possible here.

27 I'm being a little careful when I ask you because I  
28 notice in your submission there's some square brackets  
29 around some of your submission on this matter, so if you  
30 don't want to discuss it further for commercial reasons,  
31 that's fine; I do know that some of that material has

1 confidential brackets around it, but I do want to give you  
2 the opportunity to address it if you wish to.

3 **MR DELLOW:** No, we don't want to, no.

4 Still on that subject: Yesterday afternoon the  
5 Commission asked Professor Evans whether he considered that  
6 the Commission should rely on behavioural undertakings  
7 relating to the resale of gas. The one thing I would say to  
8 respond to your points is that, it does seem to us that the  
9 applicants have conceded this point to some extent by saying  
10 in their submissions that they -- at least that they've told  
11 their advisors they won't unreasonably restrict the resale  
12 of gas.

13 We submit that the Commission should not rely on  
14 unenforceable undertakings, it should impose a condition  
15 securing compliance of the applicant's statement of intent.  
16 It's difficult to see why the applicant should object to  
17 such a condition in view of what they have told the  
18 Commission in this regard.

19 Some of those conditions -- I'm conscious that Dr Berry  
20 submitted earlier in the day that some of these conditions  
21 shouldn't be put on because the contracts would be subject  
22 to s.27 and that authorisation isn't being granted in  
23 relation to the contracts themselves.

24 I think the answer to that for the Commission is quite  
25 simple; that is, that the conditions we are proposing is  
26 either to address the detriments or to secure the benefits  
27 that the Commission has identified and in that case the --  
28 in our submission the Act doesn't in any way restrict what  
29 conditions that the Commission is able to put on, and that  
30 relates to some of those conditions that I've talked about.

31 That's all of our submissions. We're happy to take any

1 more questions.

2 **CHAIR:** Thank you. I'll just follow-up one matter; that is, the  
3 applicants -- and apologise if I paraphrase this wrong, I  
4 undoubtedly will -- but my understanding of one of their  
5 submissions was that, where the benefits are agreed to be  
6 reasonably high it would be inappropriate for the Commission  
7 to impose conditions that go to reducing the detriment.

8 **MR DELLOW:** Yes.

9 **CHAIR:** I would value your comment on that, if you have them?

10 **MR DELLOW:** I think actually, from my memory of the exchange,  
11 that you answered that yourself. That is, that if the  
12 reason -- in relation to securing benefits, if the reason  
13 for the condition is to ensure that the benefits are  
14 actually realised, that is to say you're faced with a --  
15 you're not being satisfied that in the absence of the  
16 condition the benefit wouldn't be realised, then of course  
17 the condition is necessary to tip the balance. Because, in  
18 the absence of the condition, you're covering the  
19 possibility that the benefit might not actually take place  
20 at all.

21 **CHAIR:** But if you have another condition that ensures the  
22 benefit is achieved, say we have your first condition, it  
23 should secure the benefits it seems to me. Would it still  
24 be valid to impose a further condition that reduces the  
25 detriments, once you know you've got the benefits secured,  
26 and they substantially outweigh any detriments?

27 **MR DELLOW:** Well, there's two parts to answer that. The first  
28 is that, in our submission the set of conditions that we've  
29 proposed are necessary to bring the benefits to outweigh the  
30 detriments, so that's the substantive submission. But the  
31 simple answer to your question is that you should impose

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1 conditions that bring the conduct to a state where the  
2 benefits outweigh the detriments and no more.

3 **MS BATES QC:** You may have covered this, but remember I asked  
4 you a question about the necessity to have long-term  
5 contracts in place for financing, did you deal with that?

6 **MR THOMAS:** No, I don't think we did, but we can talk to that.

7 **MS BATES QC:** You said you would come back to it.

8 **MR DELLOW:** Did I?

9 **MS BATES QC:** You did.

10 **MR DELLOW:** I think I did come to it, but I'm not sure.

11 **MS BATES QC:** I was just clarifying. You may have, but...?

12 **MR THOMAS:** Are you talking on behalf of the producers, or of  
13 the buyers?

14 **MS BATES QC:** No, on behalf of the producers, the necessity for  
15 them to have long-term contracts in place.

16 **MR THOMAS:** Okay, I guess I'd take it from the -- like the  
17 perspective for the buyers, it's like building a piece of  
18 generation plant. If you're going to put a whole lot of  
19 investment into something that costs hundreds of millions of  
20 dollars and needs to operate for quite a number of years to  
21 get an economic return, you'd want a gas supply contract to  
22 match that, and that is also -- the same would be true from  
23 the producers.

24 **MS BATES QC:** Do you think they would need to be in place before  
25 development goes any further?

26 **MR THOMAS:** I don't think that's particularly true if you are  
27 relying on banks to provide limited recourse financing, yes.

28 **MS BATES QC:** Yes.

29 **CHAIR:** Okay, it's left for me to say thank you to Contact for  
30 the submission and for answering the questions, and we'll  
31 take two minutes and take NGC's submission next. Thank you.

1                   Adjournment taken from 4.37 pm to 4.41 pm

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PRESENTATION BY NGC

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7 **CHAIR:** Well, we'll reconvene this session and I will invite NGC  
8 to present your submission. Could you please start by  
9 introducing yourselves yet again; I'm afraid I have to ask  
10 you to do that.

11 **MR BIELBY:** Thank you Commissioners, I'm Steve Bielby, I'm the  
12 Director Corporate Services at NGC. General Counsel in that  
13 role as well.

14 On my left I have Mr Andrew Knight, who is our General  
15 Manager of Energy Sales, and on my right is Dr Paul Hodgson,  
16 who is our Manager of Regulatory Affairs. I think you've  
17 got some bio notes there, otherwise if you need more detail.

18 **CHAIR:** That's fine.

19 **MR BIELBY:** You should have in front of you one group of papers  
20 which will take you through all we want to say today, and in  
21 short I'll make some opening remarks and then ask each of  
22 these gentlemen to speak to you briefly.

23 If I could turn first to the first document you have in  
24 front of you which are my introductory comments. I won't  
25 read out the first two paragraphs which are really just  
26 introduction and reiterate NGC's position in the world.  
27 Paragraph 3, though, NGC's interest in this application is  
28 firstly as a general participant of the gas industry, and  
29 secondly as a potential purchaser of Pohokura gas, and I  
30 note that we were listed by the applicant kindly in their  
31 appendix 4 as a potential purchaser of their gas.

1 NGC strongly supports the early development of Pohokura  
2 and other gas fields to ensure a diverse and reliable gas  
3 supply. In the application and the Government's Policy  
4 Statement on Pohokura there is a proper emphasis on the  
5 importance of Pohokura to New Zealand's gas markets and to  
6 the economy as a whole.

7 NGC generally maintains the position expressed in its  
8 written submissions. In summary these support important  
9 developments of the field but raise a number of competition  
10 concerns which flow from the applicant's market positions  
11 and the way NGC expects the market will develop. NGC agrees  
12 that each joint marketing application should be considered  
13 on a case-by-case basis. In this case we say the key  
14 circumstances are firstly the national interest in early  
15 development of the field, and secondly, consolidation of the  
16 production market around a few main players.

17 NGC's particular concerns flow from the latter point.  
18 All the Pohokura JV partners have significant upstream  
19 interests and the potential to use these to co-ordinate both  
20 horizontally across fields and virtually to downstream  
21 associates.

22 In their application materials, at least two of the  
23 applicants have indicated an intention to co-ordinate in  
24 this way.

25 Perhaps if I could just add there, I think it's been an  
26 underlying theme in all we've heard over the last day or so,  
27 and that's -- they're quite open about that, and I  
28 congratulate them for that. Absent conditions, the result  
29 would be that there is potential for co-ordination of  
30 contract terms and price across field and that downstream  
31 associates will have more information than other potential

1 purchasers. Although the application rightly emphasise that  
2 gas contracts do not form part of this application, these  
3 are the circumstances that will be created in the market if  
4 joint marketing is approved without conditions as the  
5 applicants request.

6 If I could just pause there and interpolate briefly on  
7 one point; a point's been raised a couple of times a moment  
8 ago with Contact as well about whether effectively the  
9 submissions from NGC and Contact -- I guess the term used  
10 was 'looking to shift market power downstream', or I think  
11 the term yesterday was 'whether our submissions were trying  
12 to seek to contract leverage, if you like, in this forum'.

13 The thing we'd say about that is, we're emphasising here  
14 let's set the context; we have a highly consolidated  
15 upstream market, this is the only field in prospect for the  
16 next several years that will fill the Maui gap, if you like.  
17 As Mr Thomas says in contrast at the moment at least the  
18 downstream market is reasonably competitive; that's the  
19 context in which we're operating. It's certainly not NGC's  
20 intention to come to the Commission today and seek any  
21 contract advantage. We're really just seeking to emphasise  
22 that context and deal with it appropriately.

23 In my paragraph 6 then, the position is that the  
24 national interest is in ensuring field development and that  
25 delays from separate marketing are likely. From there the  
26 applicant's best argument is that there is not much  
27 difference between the outcome of their proposal and the  
28 counterfactual.

29 Given their already strong market position and the  
30 relative immaturity of the market, there may not be such a  
31 lessening of competition that joint marketing should be

1 declined completely. As proposed in the Draft  
2 Determination, the matter should then turn to consideration  
3 of conditions.

4 Conditions on any authorisation should be aimed at  
5 ensuring claimed benefits are delivered, and that's  
6 particularly from early development, and that potential  
7 detriments are minimised. At the same time NGC acknowledges  
8 that for the gas to come early to market such conditions  
9 need to be realistic and workable.

10 If I could just pause again and add one further point  
11 there; again one you took up again with our friends at  
12 Contact about whether conditions could address detriments as  
13 well as benefits. I didn't come prepared to talk to the  
14 issue today but on reviewing the section it seems to me the  
15 condition has -- the Commission has a very broad power to  
16 attach conditions as it sees fit.

17 But I also noted that in my friend's submission from  
18 Contact a moment ago the citation he gives from the  
19 New Zealand Kiwi Fruit Exporters case appears to address  
20 exactly this point in saying conditions designed to enhance  
21 competition or to remove detriments flowing from an absence  
22 of competition could be appropriate. So, it seems to me  
23 that that confirms the point I would want to make.

24 **MS BATES QC:** Can I just ask you this: You would have heard the  
25 arguments when you've mentioned them about the  
26 applicant's putting -- well, let me start again. The  
27 applicants put forward that there's very little difference  
28 in competitive effect between Scenario 1 and joint  
29 marketing. Do you accept that or not?

30 I'm talking about, as far as competitive effect is  
31 concerned, because from that they said, well therefore, no



1 detriment therefore...

2 **MR BIELBY:** Therefore, yes. Look, I'd like to focus on the  
3 legal aspects. Dr Hodgson is going to take us a little bit  
4 into benefits and detriments in particular, so I'd like for  
5 you to hear from him. Perhaps what I would say is that I  
6 think the applicants have rightly focused thinking around  
7 just how wide the difference is between the factual and the  
8 counterfactual, and they may correctly be saying that some  
9 of the assumptions about what separate marketing is need  
10 looking at, and it's a little bit closer.

11 At the same time, in summary I think again our friends  
12 at Contact got it pretty much right when they indicated that  
13 perhaps, whilst there will be a degree of co-ordination  
14 under the Scenario 1 counterfactual, the question must be  
15 whether it's quite as tight as the applicants are  
16 suggesting, or should be quite as tight, whether all terms  
17 effectively have to be dictated by the Joint Venture  
18 arrangement. I have no doubt that's optimal for the Joint  
19 Venture, but as I said, Dr Hodgson will come to a couple of  
20 elements in a moment will which take us past that comment.

21 **MS BATES QC:** All right. Well, I'll wait for him then.

22 **CHAIR:** I think when we come to that, in addition to addressing  
23 the question of terms and conditions and looking at terms,  
24 comment on the price side of this would be useful as well  
25 between the factual and the counterfactual; whether you see  
26 there being any price effects.

27 **MR KNIGHT:** If I could comment directly to that question now;  
28 it's our view, and hopefully the theme will come through in  
29 our submission, that the market power issue upstream has  
30 arisen through consolidation over the last couple of years,  
31 and is not -- and I appreciate the Commission is only

1 looking at an application relating to Pohokura. But the  
2 market power issue is far broader than Pohokura, it relates  
3 to the co-ordination of interests across fields and the co-  
4 ordination vertically from the producers and --

5 **CHAIR:** I understand that point, but for the purposes of this  
6 application.

7 **MR KNIGHT:** We understand that.

8 **CHAIR:** There's market power there that has nothing to do with  
9 what will arise as a result of comparing the factual to the  
10 counterfactual. I think it's beyond the consideration we  
11 have to make here; do you agree with that?

12 **MR KNIGHT:** And we acknowledge that. The issue we have is that  
13 just as the market power issues are to some extent beyond  
14 the authorisation we are discussing, we believe that greater  
15 upstream competition has the potential to reduce the impact  
16 of those broader issues somewhat. The extent of that impact  
17 is difficult to determine given the extent of their power --  
18 the power issue at the moment.

19 **MR BIELBY:** Without elongating things, can I just add the nub of  
20 what I've just said to you -- if I could get a little bit  
21 down and dirty about this is -- we're saying, yes, there is  
22 a market power situation, a consolidation upstream, let's  
23 just put it on the table and talk about it. Let's overlay  
24 it with the national interest, the unique situation around  
25 Pohokura, let's put those two things together and say what's  
26 the answer that you get.

27 I guess what we're signalling here is that, including  
28 the basis on the discussion around Maui there are some real  
29 imperatives to get the gas to market, and joint  
30 marketing in an immature market is a key factor.

31 **CHAIR:** You were saying without question that you believe the

1 proposed arrangement results in a substantial lessening of  
2 competition, is that correct? Leaving aside all the others,  
3 does the arrangement, in your view, looking at the factual  
4 compared to the counterfactual, result in a substantial  
5 lessening of competition?

6 **MR BIELBY:** Broadly, yes. So although I indicated earlier I  
7 think the gap between the factual and the counterfactual is  
8 less than perhaps some people initially -- yes, when you  
9 look at the market power issues, the consolidation upstream,  
10 there is an issue of competition for the reasons we are  
11 giving.

12 **CHAIR:** Is it a substantial lessening of competition?

13 **MR BIELBY:** What we're saying is that, absent conditions, that  
14 could well be the case.

15 **CHAIR:** Could well be the case, or do you believe it is the  
16 case? Has the case been established that this represents a  
17 substantial lessening of competition?

18 **MR BIELBY:** Well, without trying to avoid the question at all,  
19 it depends on a number of factors; but broadly we're saying,  
20 yes, it could well be a substantial lessening of competition  
21 absent conditions.

22 **MS BATES:** Can I just pick up further on that because there was  
23 quite a lot of evidence around the similarity, as was said,  
24 between the Scenario 1 and the joint marketing, and it came  
25 down to Professor Evans saying there would be actually very  
26 little difference in the price between the two arrangements,  
27 and that seems to me to be very little difference, so I  
28 don't know what you mean -- what is meant by 'very little  
29 difference' but let's focus on price for one thing. Do you  
30 think there would be such difference that it would amount to  
31 substantial lessening?

1 **MR BIELBY:** Let me see which of my colleagues wants to talk to  
2 price.

3 **DR HODGSON:** I was going to talk briefly around Professor Evans'  
4 evidence, and I think -- I'd prefer to talk to it in the  
5 context when I get there, but I think there is certainly  
6 some issues which the applicants have actually been  
7 completely silent on which go to competition issues, and I  
8 think there are also issues about some of their base  
9 assumptions about benefits and how the whole thing might  
10 play out.

11 **MS BATES QC:** Are you going to directly address that question  
12 I've just asked about differences in price, what they really  
13 amount to?

14 **DR HODGSON:** I couldn't quantify them for you, but I can say  
15 that we believe there may be differences in price and in  
16 fact the CRA report, the second one, indicates as a  
17 justification for the internal tension between parties, the  
18 Joint Venture Parties that is, is that they will -- are  
19 liable to have different views on price and forward price  
20 curves.

21 Now, clearly if they are using it as a justification for  
22 internal tension, if they are standing in the market as  
23 three separate sellers and they have different views on  
24 forward price curves, then someone trying to buy from them  
25 has the opportunity to strike a different deal, whether  
26 that's price terms I mean, that's a market condition but I  
27 guess in terms of this context I guess my belief is that the  
28 objective is protecting competition, not particularly any  
29 particular competitor, and that is a function of the market  
30 as I see it.

31 **MS BATES QC:** I guess what we've got to come to a view is, is

1       how significant is the lessening; you understand that,  
2       that's why we're asking these questions, and the other thing  
3       that was put was, well, there are these internal tensions,  
4       but in fact I think it was Professor Evans who said they  
5       were more likely to tend towards having a very similar price  
6       for the gas balancing arrangements as much as anything else.

7   **DR HODGSON:** Yes, I accept that with respect to Pohokura, but it  
8       may result in other price effects at other fields in terms  
9       of horizontal issues that haven't been addressed by the  
10      applicants.

11 **MS BATES QC:** We'll come back to that when you present.

12 **MR BIELBY:** Other than that, I'll just come back to my last  
13      paragraph which really just says, what we'll now do is offer  
14      statements expanding on those issues above, and I just  
15      outline there which points we are going to cover.

16           Unless you have any further questions of me what I  
17      propose to do is to get Mr Knight to read his statements  
18      which follows in the documents that you have.

19 **CHAIR:** I don't think that there are further questions at this  
20      time. [No comments].

21 **MR KNIGHT:** Any consideration of joint marketing of Pohokura gas  
22      must carefully examine the situation in both the upstream  
23      and downstream markets. Pohokura will replace the majority  
24      of gas supplied previously by Maui; therefore, as Pohokura  
25      is developed and marketed, it is critical to the future of a  
26      competitive gas market in New Zealand.

27           The following provides an overview of these markets and  
28      of the potential impact and influence of Pohokura in these  
29      markets.

30           If I turn to the upstream market: Currently the  
31      upstream market is dominated by the Maui partners which

1 supplies approximately 75% of the market. It is anticipated  
2 supply under the Maui contracts will run out in 2007, to be  
3 replaced in the main by Pohokura.

4 The consolidation of the upstream sector followed the  
5 acquisition of Fletcher Challenge by Shell and has resulted  
6 in the removal of the only substantial competitor to Shell  
7 and Todd. Since then the short-term gas market has  
8 significantly tightened. Other companies such as Swift  
9 Energy provide some gas supply but are predominantly price  
10 takers in the market.

11 All significant current production is contracted under  
12 relatively long-term contracts with the exception of short-  
13 term contracts for McKee/Mangahewa and from small production  
14 potential from Kauri. The majority of uncontracted gas that  
15 could provide future competition to Pohokura is held by the  
16 companies comprising the Pohokura Joint Venture.

17 The upstream consolidation has created a potential  
18 competition issue in relation to Pohokura, particularly the  
19 potential for the Joint Venture participants to co-ordinate  
20 their interests across a number of fields to take advantage  
21 of vertical integration and supply constraints.

22 In addition, the perception of a shortfall in supply has  
23 significant national implications. There is a serious risk  
24 the key users will switch from gas to environmentally  
25 damaging fuels or they will leave New Zealand.

26 Accordingly, it is important that the Pohokura Joint  
27 Venture is encouraged to bring production to the market as  
28 quickly as possible and further encouraged to prove up  
29 additional reserves. The provision of useful reserves  
30 information will provide the confidence of future supply.

31 The total market for gas in the current calendar year is

1 estimated by NGC at approximately 175 petajoules assuming  
2 some 40 petajoules is used by Methanex. Excluding Methanex,  
3 current demand of 135 petajoules is made up of 80 petajoules  
4 of generation; industrial/retail at 45 petajoules and  
5 petrochemicals at 10.

6 In the future it is expected that, due to increases in  
7 gas prices, demand may reduce further and Huntly will  
8 increasingly run on coal, potentially reducing gas load to  
9 approximately 120 petajoules. Even allowing for an  
10 additional gas fired generation utilising some 20  
11 petajoules, total demand of around 140 petajoules compares  
12 to current known reserves of around 2,200 petajoules, giving  
13 a reserve production life in the order of 15 years. This  
14 does not include additional reserves that may be developed  
15 outside of the Maui contract of potentially a further 200  
16 petajoules.

17 Therefore, provided production is brought to market in  
18 an orderly manner, sufficient supply should be available to  
19 meet demand. The market issues have been inappropriately  
20 characterised as long-term supply constraints, when in  
21 reality the market is transitioning to a new pricing regime.  
22 NGC believes that the ongoing market issues are contractual  
23 risk allocations and short-term supply flexibility.

24 Supply from Pohokura is needed from 2006 and it is  
25 important for the national interest that this occurs.  
26 However, in the absence of controls it appears that  
27 consolidation of the industry has provided an opportunity  
28 for anti-competitive behaviour to occur to the detriment of  
29 the national interest. That is all.

30 **CHAIR:** Any questions? [**No comments**].

31 I might come back to that, but we'll proceed with the

1 rest of your presentation, thanks.

2 **MR BIELBY:** In that case I'll ask you to turn the page and we  
3 have there the statement of Dr Hodgson. I'll ask him to  
4 read from that.

5 **DR HODGSON:** Thank you. This statement addresses some key  
6 issues -- key elements raised in NGC's submission and  
7 addresses some practical issues that may assist in achieving  
8 the early development of the Pohokura field.

9 I intend to read from this statement, but as I've been  
10 asked by the Commissioners to expand on some points I'll  
11 depart when I get to those sections of the statement.

12 NGC maintains its views that there are four significant  
13 competition concerns at the heart of this application,  
14 namely, lessening of competition between the Joint Venture  
15 Partners with respect to Pohokura gas; I think this is the  
16 issue of having the single JV in the market rather than  
17 three sellers in the market.

18 A lessening of competition horizontally across fields;  
19 this is an issue that the partners have largely been silent  
20 on. Potential vertical distortion of the supply chain;  
21 again, other than talking about a single price, there has  
22 not been mention of the potential for negative --  
23 inappropriate information flows and the effect that they may  
24 have in markets vertically, and also a lack of constraints  
25 on the market power of the seller.

26 Turning to the feasibility of separate marketing: Some  
27 submitters have expressed concern about separate marketing  
28 being a disincentive for exploration, particularly for small  
29 players. NGC agrees with the Commission's view that  
30 separate marketing will be technically feasible in the  
31 New Zealand market in some cases, however, consideration of



1 whether it is practicable and desirable should be made on a  
2 case-by-case basis. In particular, a small field may well  
3 face a different competitive circumstance to Pohokura.

4 The position for joint marketing of one of the small  
5 fields by small players, who the applicants rightly say are  
6 important to future supply, is quite different to that  
7 applying to a JV which controls the majority of industry  
8 reserves.

9 In terms of the counterfactual, NGC broadly agrees with  
10 the analysis of the counterfactual in the Draft  
11 Determination. In simple terms, the market demand is so  
12 strong and is likely to remain so that it is hard to  
13 conceive that the Pohokura field cannot be successfully  
14 marketed. The only question practically speaking, or in  
15 determining the counterfactual, is how it will be developed;  
16 in particular, how quickly it will be developed.

17 With regards to departing from the written submission,  
18 I'm now going to speak to the second CRA report, and I think  
19 this goes to the heart of some of the questions we've had so  
20 far, and I'll expand as I go through that.

21 The point that -- the fundamental point that I'd wish to  
22 make regarding the second CRA report is that a number of the  
23 assumptions on which it is based are open to question. For  
24 example, the three year delay, the JV acting as a separate  
25 seller, the possibility of resale, and the internal JV  
26 tension.

27 In NGC's view the result is, the applicant's assessment  
28 of benefits is still overstated and the detriments  
29 considerably understated.

30 Before I come back to the CRA assumptions, I will say  
31 that an example of this are the comments regarding the NZIER

1 report. That report was intended to estimate the welfare  
2 impact of monopolisation of the sector, not simply the  
3 Pohokura field, and this goes to the heart of our discussion  
4 about horizontal co-ordination of pricing.

5 In particular with respect to the CRA assumptions I'd  
6 like to comment.

7 **CHAIR:** Can I just stop you there. I want to make sure I  
8 understand what you're saying.

9 You seem to be suggesting that -- I hate to use a term  
10 that's no longer appropriate in this Act -- but you seem to  
11 be suggesting that the Joint Venture Parties basically have  
12 a dominant position across all the whole of the market right  
13 now, and that they have the ability and that they will co-  
14 ordinate across all fields, is that essentially what you're  
15 saying, and in that sense are behaving as if they were a  
16 monopoly?

17 **DR HODGSON:** The issue of cross-ownership is one of significance  
18 and I believe the ACCC in its Northwest Shelf authorisation  
19 pointed to this very fact that there were limited  
20 competition, or potential competition concerns where  
21 competing Joint Ventures had a high degree of cross-  
22 ownership, and we would support that view.

23 **CHAIR:** I'd be interested in what references those are to the  
24 ACCC decisions.

25 **DR HODGSON:** It was in page 27 of the Northwest Shelf  
26 authorisation.

27 **CHAIR:** I would have thought that sort of co-ordination across  
28 fields, if it were happening by these parties, would be  
29 attackable under the Commerce Act.

30 **MR KNIGHT:** If I can answer that question; we currently are in a  
31 position where Maui provides the dominant source of supply.

1 The issue we're alluding to here, and probably in a none too  
2 subtle way, is that Pohokura provides the opportunity for  
3 that to be recreated, and the short answer to your earlier  
4 question is, yes, but the behaviours of the monopolists are  
5 not being exhibited because the current market is tied up  
6 under long-term contracts, but the opportunity may exist.

7 **CHAIR:** We might want to come back to that, but go ahead and  
8 proceed with the submission.

9 **DR HODGSON:** Some of the other assumptions in the Charles River  
10 report is that JV would be acting as a single seller in the  
11 market, or as a separate seller in the market, I should say.  
12 That assumes that all of the decisions are taken in  
13 isolation from other parties in the market.

14 We've heard today various views on the Joint Venture --  
15 from the Joint Venturers whether they would or would not act  
16 in the JVs interests as opposed to their own interest. I  
17 guess that assumption is fair enough, but that assumption  
18 only holds if the marketing of Pohokura is fully ringfenced.  
19 And, I guess the follow-on point in the CRA line of argument  
20 is that, because the -- it is a separate seller, therefore,  
21 it doesn't need to be ringfenced, but if the assumption only  
22 holds that it's a separate seller because it's ringfenced,  
23 you've got a circular line of logic which underpins what  
24 they're trying to say.

25 As I mentioned, the question of misalignment with  
26 incentives, and the CRA report relies on this in terms of  
27 forcing the JV to act to not give one advantage to one of  
28 its own parties, and in particular I think the quote is, the  
29 Joint Venture Parties are likely to have disparate views  
30 about factors such as future gas demand, supply conditions  
31 and therefore gas prices. NGC believes that these

1 differences should be played out in the market rather than -  
2 - even if it results in a common price, which I think is the  
3 argument, there would be some pressure on that.

4 The other key point I think with regard to price was  
5 that the CRA second report does concede Professor  
6 Hazledine's view that there may be some variation in price  
7 due to the nature of the type of investment and contracts  
8 involved; I think that's spelt out more fully in Professor  
9 Hazledine's work than I can explain to you here.

10 I guess the other key one I think is that there's an  
11 assumption of unanimity of decision-making in the joint  
12 venture. We understand -- and this comes from the  
13 discussion when Todd's were seeking to increase their  
14 share -- that the JV voting arrangements are such that  
15 neither OMV or Todd would have a veto vote in the  
16 development decisions, and that was the position that we  
17 were led to believe. We don't have any evidence other than  
18 what the Commission staff told us. I guess, by going to a  
19 situation where there's joint marketing, you then have --  
20 any one of the parties has a veto vote on decisions.

21 I will make one other point: The CRA report -- and  
22 Professor Evans did agree with this -- was that their work  
23 assumes that buyers can resell the gas. Now, we've heard --  
24 we haven't seen a commitment -- we've heard that it would be  
25 not unreasonably withheld, which will take that statement at  
26 face value, but if the economic analysis relies on that as  
27 an input assumption it does mean there are questions about  
28 whether the benefits will actually be realised.

29 That's all the comments I would like to make regarding  
30 that report, but I'm happy to discuss issues further.  
31 Otherwise, I'll continue.

1 **CHAIR:** Continue please.

2 **DR HODGSON:** I'll turn now, and just to finish off where I was,  
3 is that our view is that the assessment of benefits is still  
4 overstated by the applicants and the detriments understated;  
5 in some cases not stated at all. So, really we need to turn  
6 to conditions that protect the public interest in  
7 New Zealand.

8 NGC has strongly supported the early development of the  
9 Pohokura field throughout this process. The applicants have  
10 made it clear through this and other fora that unreasonable  
11 conditions would cause delay. Consequently, the potential  
12 for delay if joint marketing is not authorised suggests that  
13 the focus of the discussion should be on how to minimise the  
14 harm to competition from the joint marketing arrangement and  
15 to ensure the positive benefits are realised; in other  
16 words, the nature of conditions to be imposed on the  
17 authorisation.

18 The Commission has proposed some conditions to address  
19 these issues and sought submissions on their implementation.  
20 NGC supports the use of conditions to minimise harm and  
21 realise benefits. However, it is acknowledged that the  
22 conditions need to be workable so NGC proposes some  
23 refinements to the draft conditions to help the overall  
24 public interest.

25 In terms of fixed data for gas supply: NGC agrees with  
26 other submitters that a single fixed date for gas supply to  
27 commence may lead to unnecessary contractual and  
28 authorisation problems, for example when a delay may be  
29 caused by a technical supply issue; I think other parties  
30 have outlined those type of issues.

31 Authorisation cannot be assigned: The applicants have

1 proposed that any future assignees or successors would be  
2 subject to the scrutiny of the Commission. Because of the  
3 small number of assignees who could be problematic in this  
4 regard, NGC accepts these views and would support scrutiny  
5 of any ownership changes at the time that they are proposed.

6 Period of authorisation: Most submitters have expressed  
7 concern with respect to a five year limit as it may be  
8 desirable to have contracts of medium to long-term duration.  
9 Simple time limits on the contract duration, eg five years,  
10 may well distort efficient decision-making and contract  
11 terms and length. Consequently, any time based limit on the  
12 extent would need to allow for contract duration that  
13 extends beyond the marketing period.

14 With respect to limiting the authorisation period, NGC  
15 believes the objective is to minimise the potential for  
16 anti-competitive conduct that may be afforded by joint  
17 marketing, to that necessary to allow early development of a  
18 field. Therefore, it is important to separate the concepts  
19 of, A) how long the JV partners can act jointly, and B) the  
20 extent of the marketing arrangement.

21 The first of these points could be considered to be the  
22 marketing period and could commence as soon as the  
23 authorisation is granted. It is likely that both sellers  
24 and buyers will be seeking to contract gas supply before  
25 production starts.

26 NGC believes that a backstop date may need to be  
27 considered to limit this marketing period. The end of 2007  
28 may be an appropriate backstop termination date for the  
29 marketing period and, as we say in terms of the earlier  
30 discussion, to balance the incentives for the gas being  
31 contracted but also to allow for proper consideration of

1 contracts, we view this as a backstop rather than some form  
2 of drop dead date constraint.

3 The second point, the extent of the marketing  
4 arrangement, could be defined in terms of time or gas  
5 quantum. Again, the time based approach is likely to be  
6 problematic as highlighted by submitters and discussed  
7 above.

8 NGC believes a limit on the potential extent to the  
9 marketing arrangement might be better achieved by  
10 restricting the quantity of gas that can be jointly  
11 marketed. This could be achieved either by specifying a  
12 fixed amount of gas or basing the amount on the percentage  
13 of the P90 reserves.

14 NGC favours the latter approach as the percentage can be  
15 initially set to underwrite the field development while an  
16 incentive is established to take actions that increase the  
17 P90 reserves over the development period.

18 I just deviate from the script here just to clarify;  
19 we've heard today that the Joint Venture Partners are  
20 seeking incentives to chase hydrocarbons. Our intention  
21 with regard to certainly a percentage of P90 reserves is,  
22 that would be a ratchet provision. So, if during the  
23 development period the P90 reserves were found to be greater  
24 than, the set percentage would remain the same, so they have  
25 an incentive to go out and prove up more reserves.

26 NGC has not had access to the confidential information  
27 in the application, so can only speculate on the precise  
28 quantity that may be required to make the development  
29 economic. The CRA report outlines the development costs  
30 that is less than the present value of the LPG and  
31 condensate revenues. The Commission may be able to more

1 precisely define the quantity required. However, when the  
2 value of liquids is considered -- and Professor Evans  
3 indicated these are around 50% of the revenues -- it would  
4 seem unlikely that more than two-thirds of the P90 reserves  
5 would need to be jointly marketed.

6 NGC notes as a positive step, the applicants offered  
7 today to provide the Commission with an economic model for  
8 the field and believes this would provide the basis for an  
9 informed and reasonable condition to be developed.

10 I would also note, Mr Tweedie said the bank is liable to  
11 recover its money over the first 75% of the production of  
12 the field, and it would seem that a condition based on  
13 bankability would be a reasonable condition.

14 Any gas held back from the market for own use, such as  
15 supply to downstream associates of the applicants, should be  
16 considered as part of this joint marketing quantity as it  
17 also provides field revenue. Revenue in that term can also  
18 mean an avoided liability.

19 Turning to the condition of ringfencing: In the absence  
20 of a ringfencing condition, the Commission will need to  
21 consider how it can address the potential for inappropriate  
22 information flows and co-ordination of pricing, both  
23 horizontally across fields and vertically between associated  
24 companies.

25 The applicants have raised a number of matters in their  
26 submission on the Draft Determination, and I point to their  
27 latest written submission paragraphs 10.4.5, there's  
28 subparagraphs A, B and C for each of the applicants; and  
29 these appear to confirm an intention by some of them to co-  
30 ordinate with other fields and to remain integrated with  
31 downstream associates.



1           For example, this must call into question any assumption  
2 of the claimed competition across fields to the extent that  
3 it exists.

4           The legal consideration of ringfencing needs to separate  
5 the overall field investment decision from the decisions on  
6 marketing the gas. The applicants appear to assume a wide  
7 range of functions would need to be ringfenced. If only the  
8 marketing of Pohokura gas is ringfenced, the applicants'  
9 concerns should be reduced. For example, Shell and Todd  
10 with NGC and Rockgas are already party to ringfenced  
11 marketing arrangements through their involvement in  
12 Liquigas.

13           As the Commission is aware, Liquigas has put in place a  
14 pricing board with specific arrangements such as an  
15 independent Chair. Shareholder directors participate on  
16 that pricing board, and shareholders' interests are  
17 otherwise satisfied by their directors scrutinising all  
18 elements except pricing.

19           NGC believes that ringfenced marketing as presented in  
20 our written submissions may be necessary to address the  
21 potential for inappropriate information flows related to  
22 this authorisation.

23           However, my colleagues advise me that it has become  
24 apparent in another forum that this form of ringfencing is  
25 likely to be considered an unreasonable condition by the  
26 applicants. If this view is accurate the potential for  
27 delay and flow-on public detriments, I would say in this  
28 forum and in other forums, suggest that on balance an  
29 effective ringfencing condition on this authorisation may  
30 not be in the net public interest.

31           In conclusion, NGC believes this approach to the

1 authorisation satisfies the objectives of, A) ensuring the  
2 JV partners can contract sufficient gas to make the field  
3 development economic, B) provide time for the JV partners to  
4 finalise separate marketing arrangements to apply after the  
5 jointly marketed gas has been delivered. C) limiting the  
6 amount of gas that is sold subject to this joint marketing  
7 arrangement, ie, minimising the harm to competition, and D)  
8 improving market information with respect to field reserves.  
9 Thank you.

10 **CHAIR:** Can I start by asking you what the basis was of the  
11 date -- the end of 2007 in paragraph 13 as an appropriate  
12 backstop termination date for the marketing period?

13 **DR HODGSON:** Our expectation, all things being equal, is that  
14 Pohokura will start producing in 2006 given that it may take  
15 some time to ramp up teething difficulties, whatever; the  
16 parties may not wish to jump in and sell all the gas  
17 straight away. We thought giving them until 2007 was a  
18 reasonable date for a backstop. I think we suspect they'll  
19 want to sell it before then, but we're just trying to have a  
20 small back position, so there's no particular science on  
21 that date.

22 **CHAIR:** Would that date ensure that the benefits of avoiding  
23 delay were achieved?

24 **DR HODGSON:** In my personal view, possibly not, no.

25 **CHAIR:** Then why would you suggest that it's been an appropriate  
26 date, because that's the purpose of the date, isn't it, to  
27 ensure the benefits of avoiding delay are achieved?

28 **DR HODGSON:** I think the incentive would be, if they are  
29 required to contract -- I believe, once there's an  
30 authorisation that they feel is reasonable in place, the  
31 incentive is they will want to develop up the field and that

1 would mean getting gas contracts sold, and that's -- the  
2 economic drivers of how much money is at stake would come  
3 into play.

4 So, that was simply a date that was put in place to say  
5 that there is an end date. We could have equally put the  
6 end of 2006, but we weren't doing it with the intention of  
7 driving the benefits. I think once they accept the  
8 conditions as reasonable, then the economic drivers should  
9 be enough to get them over the line.

10 **CHAIR:** So, what is the purpose of that condition if it isn't to  
11 secure the benefits of the authorisation?

12 **DR HODGSON:** Well, recalling back to our discussions -- and I'm  
13 not saying this is the way they will behave, but there is --  
14 scarcity has a value, and I guess if they're required to  
15 only jointly market a certain amount they may feel that by  
16 holding out the amount, the prices that the price that they  
17 get for tranches of that amount may be higher. And I guess  
18 we wanted a date in place so there was at least some  
19 backstop, I guess, to prevent the opposite of what -- you  
20 know, of the period being too short where there's a question  
21 of the sellers being squeezed if the date's too short as  
22 opposed to the buyers getting squeezed if the date's  
23 unreasonably far out into the future.

24 **CHAIR:** I assume from your comments in the piece on ringfencing  
25 that despite your own experience with ringfenced marketing  
26 arrangements you still accept that there's the possibility  
27 that it could cause delay and therefore you're not  
28 supportive of a ringfencing condition, is that fair to say.

29 **DR HODGSON:** Because of the potential delay and the flow-on  
30 effects in this and other fora, we would not support  
31 ringfencing now. We believe it would address --

1 **CHAIR:** Are there any confidentiality issues around the liquid  
2 gas matter that I need to be aware of if I ask you  
3 questions -- I'm going to put questions to you and if anyone  
4 has difficulty with it please advise me, because I don't  
5 want to --

6 **MR BIELBY:** I was going to say, Chair, the matter was I think  
7 publicised in the Commission's last newsletter.

8 **CHAIR:** I don't know how much of the detail was however. Are  
9 there any confidentiality issues?

10 **MR AINSWORTH:** [Shakes head].

11 **CHAIR:** No. I just want to know whether in agreeing to that  
12 settlement -- it was a settlement wasn't it?

13 **MR BIELBY:** Yes.

14 **CHAIR:** In agreeing to that settlement was there any discussion,  
15 or did any of the parties ever raise this issue that we've  
16 heard about issues around obligations under the Companies  
17 Act?

18 **MR BIELBY:** There were a number of issues raised, it was quite a  
19 detailed discussion.

20 **CHAIR:** A protracted discussion, I do remember a fair amount of  
21 that.

22 **MR BIELBY:** I hasten to add, and it's a bit like the Kapuni  
23 example that was referred to earlier today, it's an example,  
24 it's not a template to apply to the Pohokura situation. I  
25 think it's fair to say that the shareholders and directors,  
26 which includes NGC in this case, were reluctant to accept a  
27 form of control by way of a pricing board for a number of  
28 reasons which are broadly aligned with what you heard today  
29 from the applicants, you'd strongly prefer to have the  
30 freedom to act.

31 But then the point we're making is that having reached a

1 point of discussion with the Commission, we agreed that to  
2 ensure we were within the bounds of the Act that a  
3 limitation was to be placed on the freedom for the company  
4 and its shareholders to act because of the concern that we  
5 should stay within the Act.

6 **CHAIR:** Presumably parties wouldn't have agreed to that  
7 settlement if they thought it breached their obligations  
8 under other legislation, would that be fair to say?

9 **MR BIELBY:** Certainly speaking for NGC we did so to remain in  
10 bounds with the Commerce Act. No, we had no concerns that  
11 it breached other legislation.

12 **CHAIR:** Thank you for that. I want to come back to the  
13 discussion we had earlier about Kapuni, and I would like to  
14 seek NGCs input into how you view the marketing arrangements  
15 with respect to Kapuni and whether you have any comments to  
16 make about the earlier submission.

17 **MR KNIGHT:** We view our Kapuni arrangement as akin to separate  
18 marketing. I appreciate that it was arrived at in quite a  
19 different circumstance in that the field had already been  
20 developed, capital had already been committed and it  
21 was come to by virtue of litigation.

22 However, we do see that our role within the Kapuni  
23 arrangements is as a separate marketer if you like of gas.  
24 I know that the -- unfortunately I wasn't here when the  
25 comment was raised yesterday, but the balancing question was  
26 raised and at a practical level NGC provides the balancing.  
27 So, the Kapuni mining companies nominate through an agreed  
28 process, NGC provides balancing and makes up any shortfalls  
29 on a daily basis from our Maui.

30 **CHAIR:** How difficult was that to put into place?

31 **MR KNIGHT:** As with the liquid gas arrangements there were a

1 number of discussions at the time around the Kapuni  
2 litigation. This was one of the things we put in place. It  
3 has worked, and it's worked very effectively.

4 **CHAIR:** How long did it take you to put it in place?

5 **MR KNIGHT:** It moved reasonably quickly. We have a good  
6 relationship particularly with our colleagues from Todds and  
7 it works quite effectively. We -- Todd's subsidiary is the  
8 main other purchaser and through communication we've managed  
9 to develop quite an effective ongoing relationship. As  
10 supply tightens up we expect that relationship to come under  
11 greater pressure, but it's been effective to date.

12 **CHAIR:** Okay, any further comments? **[Pause]**. **[No comments]**.  
13 Unless you have further comments.

14 **MR BIELBY:** We have no further comment, thank you.

15 **CHAIR:** Just like to thank you for your submission and your  
16 willingness to take questions.

17 I might, before I adjourn for the day, indicate that it  
18 is my intention now to start at 9 o'clock in the morning  
19 with Ballance, followed by Shell, and then the right of  
20 reply from the applicants.

21 And unless there are any questions or comments on that,  
22 just pause for a moment to see whether we have any questions  
23 on that? **[Pause]**. **[No comments]**. Thank you all very much  
24 and I'll see you in the morning.

25

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Conference adjourned at 5.35 pm

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Resuming Thursday, 3 July 2003 at 9.00 am

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