

Australian Determinations of Trade Practices in the Gas Industry

- i Australian Competition Tribunal decision;
- ii Final determinations of the Australian Competition and Consumer Commission (“the ACCC”) or Australian Trade Practices Commission;
- iii Interim determinations of the ACCC (as seen on the ACCC website).

i Australian Competition Tribunal review of ACCC determination

	Date	Parties	Case Ref.	Decision reviewed	Outcome	Timeframe	Conclusions
1	14 October 1997	Cooper Basin Producers AGL	(1997) ATPR 41-593	Review of the ACCC revocation of its 1986 authorisation of the AGL Cooper Basin Letter of Agreement.	The Tribunal set aside the ACCC revocation of its 1986 authorisation. The Tribunal found that while there had been a material change in circumstances, a substantial benefit to the public accrued from allowing the Letter of Agreement to continue to the end of its 30 year term. This outweighed the detriment.	Original authorisation remained in effect.	<p>The Tribunal concluded that:</p> <ul style="list-style-type: none"> • detriment had increased as the current and future need for protection against opportunism had diminished; • restrictions imbedded in the contract now had a greater practical significance; <p>However, while a less restrictive contract would suffice to yield public benefit, the future benefit from not revoking the Agreement outweighed the future detriment.</p> <p>Considerable weight was attached to the fact that the contract had less than 10 years to run and supplementary suppliers to NSW would be needed in 3 years time due to the transaction costs that would arise, if the agreement were to be revoked and a less restrictive contract negotiated in substitution.</p> <p>A distinction was drawn between long term contracts necessary to sustain substantial, long lived, sunk investments, and those long term contracts that create no such social utility.</p> <p>Regarding “take or pay” the Tribunal concluded that while some protection to future cashflows is required, this does not necessarily need to be in the form of a take or pay contract. Rather, the Tribunal concluded that the use of a two part tariff was a more economically efficient way to ensure cashflow.</p>

ii Final determinations of ACCC and ATPC

	Date	Applicants	Case Ref.	The practice for which authorisation was sought	The practice for which authorisation was granted	Timeframe	Conclusions
2	7 April 1999	Mereenie Gas Producers	ACCC website	<ul style="list-style-type: none"> To give effect to the Gasgo Agreement between the Mereenie Producers and Gasgo; and The joint performance of individual gas sales agreements between the Mereenie Producers with Gasgo as contemplated by the Gasgo Agreement. <p>While authorisation was sought for the Gasgo Agreement in its entirety, two aspects were identified as likely to give raise to concern.</p> <ul style="list-style-type: none"> the co-ordinated marketing of gas by the Mereenie Producers to Gasgo; and the provisions relating to the term and quantity of gas supplied under the contract. 	The practice for which authorisation was sought.	1 July 2009 (the term of the Gasgo Agreement).	<p>Regarding co-ordinated marketing:</p> <ul style="list-style-type: none"> the key issue is whether separate marketing is feasible in the particular market. the NT market is a "project" or "contract" market where gas is only produced to meet specific obligations as opposed to "commodity" markets, such as the UK and US where gas is produced and brought to the market for sale. separate marketing of gas in the NT by Mereenie producers may not currently be feasible given the relatively small and immature market. <p>The lessening of competition resulting from the Gasgo Agreement (in particular, take-or-pay, term and quantity) is significant. This detriment is greater due to the pre-emptive right contained in Original GPA. However, the public benefits from the Gasgo Agreement and the marketing arrangements outweigh the likely detriment.</p> <p>Long term contracts such as the Gasgo Agreement may be necessary to ensure requisite cashflows to underwrite investment and deliver associated public benefits.</p>

	Date	Applicants	Case Ref.	The practice for which authorisation was sought	The practice for which authorisation was granted	Timeframe	Conclusions
3	29 July 1998 (minor variation 16 August 2000)	Participants in the Northwest Shelf Project	ACCC website	<ul style="list-style-type: none"> To discuss and agree together the common terms and conditions, including price at which gas produced together would be offered for sale to customers. To discuss and agree on methods for marketing and selling such gas. <p>Authorisation was not sought for gas supply contracts between the applicants and gas users. The applicants would notify the ACCC if a contract is considered to be at risk under the Trade Practices Act.</p> <p>A minor variation was sought and granted on 16 August 2000 in relation to the corporate restructure of Chevron, one of the participants (one Chevron company was substituted for another).</p>	The practice for which authorisation was sought.	<p>7 years</p> <p>The period of authorisation can be extended under certain circumstances. The period for extension is limited in respect of particular gas sales contracts to the initial term of the gas sales contract.</p> <p>Authorisation in all circumstances expires in 2018.</p>	<p>The key issues identified were:</p> <ul style="list-style-type: none"> whether expansion would proceed if authorisation is not granted and, if not, will other producers be in a position to meet the needs of the market; the extent to which the proposed arrangements lessen competition; and whether separate marketing is feasible, and, if it is, whether it would lead to improved economic efficiency and lower gas prices. <p>The features identified as increasing the viability of separate marketing were:</p> <ul style="list-style-type: none"> significant increase in number of suppliers; entry of new competitive suppliers; additional transport options; development of storage facilities; entry of brokers/aggregators; creation of gas related financial markets development of substantial short term and spot markets. <p>None of these features were present in the WA gas market.</p>

	Date	Applicants	Case Ref.	The practice for which authorisation was sought	The practice for which authorisation was granted	Timeframe	Conclusions
4	27 March 1996	Inapplicable	(1996) ATPR (Com) 50-223	<p>Review of the 1986 determination authorising the implementation of a contract for the sale of gas to AGL from the Cooper Basin Producers.</p>	<p>Revocation of 1986 authorisation on the grounds of a material change in circumstances. The anti-competitive detriments now outweighed the public benefits of the authorised arrangements.</p> <p>A new authorisation was substituted allowing AGL and the Producers to give effect to a new clause 24 which established a price and provided for negotiation of a new price.</p> <p>This decision was overturned by the Australian Competition Tribunal which reinstated the earlier authorisation (see separate table).</p>	Inapplicable	<p>The ACCC found that there were material changes in circumstances since the 1986 authorisation:</p> <ul style="list-style-type: none"> AGL was no longer the sole source of metered gas to domestic and industrial consumers in Sydney and regional NSW; and it had become less difficult for other producers, in particular those from Gippsland Basin, to compete in the market for the supply of gas to distributors and end users. <p>In addition, sales since 1988 occurred at a price collectively fixed by the parties under a new clause 24 that had not been authorised.</p> <p>The ACCC concluded that three clauses were anti-competitive:</p> <ul style="list-style-type: none"> right of first refusal; take or pay; exclusive dealing. <p>The anti-competitive effects of these clauses had increased and the ACCC believed that any positive benefits associated with the long term and take or pay provisions were now outweighed by their anti-competitive effects in restricting the entry of a third party producer.</p> <p>However, the ACCC accepted that while the (South Australian) Ratification Act is in force, there continues to be a basis for achieving appreciable cost savings by permitting AGL and the producers to jointly fix and review prices and conduct arbitrations in Sydney. Therefore the new clause 24 was authorised.</p>

	Date	Applicants	Case Ref.	The practice for which authorisation was sought	The practice for which authorisation was granted	Timeframe	Conclusions
5	9 April 1992	SAGASCO Resources	(1992) ATPR (Com) 50-118	<ul style="list-style-type: none"> Extension of 6 April 1998 authorisation to cover SAGASCO which purchased the interests of one of the joint venture parties (the 1988 authorisation did not cover assignees); and To give effect to a Gas Sales Contract between the producers and the Pipeline Authority of South Australia. 	The practice for which authorisation was sought.	Same as 1988 authorisation – 5 year period commencing on date of first delivery.	<p>Both authorisations were granted on the basis that:</p> <ul style="list-style-type: none"> there were no changes in circumstances since the 1988 authorisation; and the Gas Sales Contract fell within the parameters of the conduct that was contemplated by the joint venture arrangements.
6	15 June 1988	Delhi Petroleum Santos	(1988) ATPR (Com) 50 – 076	<p>Joint venture arrangements for the appraisal, development, production, supply, marketing and sale of natural gas reserves from the Cooper Basin in South Australia.</p> <p>This relates to an expansion of the operation authorised on 6 April 1998 to a “fringe area”.</p>	The practice for which authorisation was sought.	31 December 1992	The ACCC was unable to see that the necessary development of the natural gas reserve in the fringe area is likely to occur unless it authorises, or the South Australian Government specifically legislates to bring into force, the collective arrangements proposed by the applicants.
7	6 April 1988	Delhi Petroleum Santos	(1988) ATPR (Com) 50 – 072	Joint venture arrangements for the co-operative appraisal, development and marketing of natural gas reserves from certain areas within the Cooper Basin in Southwest Queensland.	The practice for which authorisation was sought.	5 years commencing on the date of first delivery.	<p>The ACCC accepted that joint venture arrangements, such as those proposed by the applicants are necessary to provide the required capital to develop a resource.</p> <p>While there are inevitably some anti-competitive effects that derive from co-operative arrangements for supply and marketing, the subject arrangements are such as to allow the development within the market of an additional supplier of natural gas.</p>
8	5 May 1986	AGL	(1986) ATPR (Com) 50 -114	<p>The terms of a Letter of Agreement and subsequent deeds between the Cooper Basin Producers and AGL whereby:</p> <ul style="list-style-type: none"> producers undertook long term obligations to prove up gas reserves, supply gas and hold ready capacity to supply contract quantities; and AGL undertook to purchase specified quantities and assumed other obligations (including construction of a pipeline). <p>The South Australian Ratification Act 1975, effectively exempted the Agreement from the Trade Practices Act. The legality of a price arbitration outside South Australia gave rise to the application.</p>	The practice for which authorisation was sought.	Length of Agreement (30 years) terminating in or about 2006.	<p>There were significant public benefits in making available by efficient reticulation, natural gas from the Cooper Basin.</p> <p>Those benefits accrued to the public as a result of the producers being able to negotiate freely about various matters, including the price at which gas would be sold.</p>

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9	8 March 1979	WA Petroleum WA Natural Gas	(1979/80) ATPR (Com) 15-566	<ul style="list-style-type: none"> An agreement establishing a joint venture to engage in exploration and development; An agreement to discuss and agree on terms for the sale of natural gas under existing and new contracts. <p>Authorisation was also sought for an agreement to discuss prices and other terms for the sale of condensate and crude oil.</p>	The practice for which authorisation had been sought.	Indefinite	<p>The project involved the expenditure of substantial risk capital that would not likely be undertaken except as a joint venture.</p> <p>The provision of natural gas as an alternative type of fuel is likely to have a downward influence on prices.</p> <p>The contribution made by the joint venture to the development of energy resources is a public benefit.</p> <p>The joint venturers would be able to use the notification procedure for customer supply arrangements.</p>
10	15 February 1977	Woodside Petroleum Development (the operator)	(1976-77) ATPR (Com) 16 - 555	To discuss and agree the common terms and conditions (including price) upon which natural gas produced pursuant to their programme(s) will be offered for sale to potential customers and to discuss and agree as to method(s) for marketing such gas.	The practice for which authorisation was sought.	Indefinite	<p>The practice is likely to result in a substantial benefit to the public which would not otherwise be available.</p> <p>The nature of the product, the technology of production and distribution, the economies of scale and market characteristics are such that agreement between the joint venturers to sell the gas is as essential to the project as joint exploration and joint production.</p> <p>The joint venture is not replacing competitive deployment by any of the parties of the relevant gas resource, as this is not a real alternative.</p>

iii Interim Determinations of ACCC and ATPC

	Date	Applicants	Case Ref.	The practice for which authorisation was sought	The practice for which authorisation was granted	Timeframe
11	13 October 2000	Producers and marketers of PNG Gas	ACCC website	Common terms and conditions (including price) upon which gas to be produced by the PNG Project will be marketed and offered or sale to customers.	Interim authorisation of the practice for which authorisation was sought, subject to an undertaking to sign a confidentiality deed restricting the disclosure and use of marketing information other than for the purpose of the PNG Gas development project and joint marketing	Until revoked or final determination
12	3 December 1999	Producers and marketers of PNG Gas	ACCC website	Unclear.	<p>Revocation of previous interim authorisation and substitution with a new authorisation.</p> <p>Revised interim authorisation substantially on the same terms as below, but subject to the condition that the applicants will provide the ACCC with an undertaking to provide the ACCC with particulars of arrangements or understandings which are formed between the applicants and customers or between the applicants themselves.</p> <p>ACCC denied the application to extend the interim authorisation to Santos as it considered that separation between Santos and PNG Gas needed to be maintained.</p>	Until revoked or final determination
13	5 August 1998	Producers and marketers of PNG Gas	ACCC Website	Unclear (appears to be the practice for which authorisation was granted).	<p>Interim authorisation:</p> <ul style="list-style-type: none"> • to discuss and negotiate terms (including price) upon which the applicants would be prepared to sell gas to potential foundation customers; • for arrangements or understandings formed between Applicants as to terms (including price) upon which they would be prepared to sell gas to potential foundation customers; • for discussions and negotiations between applicants and potential foundation customers as to the terms (including price). 	Until revoked or final determination

	Date	Applicants	Case Ref.	The practice for which authorisation was sought	The practice for which authorisation was granted	Timeframe
14	9 June 1999	Energex (Allgas)	ACCC website	Unclear (appears to be the practice for which authorisation was granted)	<p>Interim authorisation:</p> <ul style="list-style-type: none"> to discuss, negotiate and arrive at an understanding with each potential user as to the terms of acquiring gas from Allgas (acquired from the PNG project) to continue engagement of Comalco in all discussions between Allgas and the PNG producers and marketers of gas as to the terms of supply <p>Subject to the condition that Allgas will not discuss the details of other prospective Allgas customers with Comalco.</p>	Until revoked or final determination