



## TRADE PRACTICES ACT 1974

Conference in relation to applications for authorisation, registration numbers A90637, A90638, A90639, A90640, A90641, A90642, A90643, A90644 and A90645.

### Certificate

I, Allen Asher a Member of the Australian Competition and Consumer Commission at the conference in relation to the draft determination in respect of the abovementioned authorisation applications, **HEREBY CERTIFY**, as required by paragraph 90A(9)(c) of the Trade Practices Act 1974 that the date on which the first notification under sub-section 90A(6) of the said Act was received by the Commission was 13 January 1998 and the day on which the conference terminated was 25/1/1999

Allen Asher

25/1/1999

**Mereenie Producers – Gasgo Sales Agreement  
Pre-determination Conference  
Monday 25.1.99**

**List of Attendees - Sydney**

<u>Organisation</u>	<u>Name and Position</u>
AGL (for NT Gas)	Michael McCormack, Manager Regulatory Affairs
Envestra	Ollie Clark, Managing Director
Mereenie Producers	Hedley Howard, Commercial Manager, Magellan John Anderson, Corporate Counsel, Santos Barrie Brandt, Senior Marketing Officer, Santos Peter Rose, Freehill Hollingdale & Page
NT Government	David Anderson, Deputy Secretary, Attorney-General's Dept. Dennis Bree, Ministerial Officer, Minister for Essential Services Peter Caldwell, Director, Gasgo John Tarca, General Manager, Gasgo James Noonan, James Noonan Solicitors Geoff Witham, James Noonan Solicitors John Morgan, Allen Allen & Hemsley Solicitors
NT Power Group	Paul Everingham, Chairman Jeff Hutchison, Director John Bowman, Director Shane Doyle, General Counsel



**Australian  
Competition &  
Consumer  
Commission**

**Mereenie Producers - Gasgo Sales Agreement**

**Applications for authorisation A90637-A90645**

**PRE-DETERMINATION CONFERENCE**

**9.00am, 25 January 1999**

**Skygarden, Level 5, 77 Castlereagh Street, Sydney**

**ANNOTATED AGENDA**

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9.00 am	Opening remarks	Mr Allan Asher Deputy Chairman
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The following topics will then be raised by Mr Asher for discussion during the conference.

**(1) Pre-emptive rights contained in the original agreement**

The original agreement between the Mereenie Producers and Gasgo Pty Limited ('Gasgo') contains a provision which requires the Mereenie Producers, prior to selling gas for sale to third parties, to first offer that gas to Gasgo. Gasgo may choose to accept the offer or it may waive its rights with respect to that gas, in which case the Mereenie Producers may then sell the gas to the other party.

Some interested parties expressed concern that Gasgo could use its pre-emptive rights to hinder competition in the electricity market.

In its Draft Determination the Commission considered the issue of the relevance of the pre-emptive rights to this authorisation, given that the pre-emptive rights are contained in a previous agreement and not the agreement that is the subject of the applications for authorisation. The Commission considered that the Gasgo Agreement and the pre-emptive rights attached to the original agreement operate together and that the existence of the pre-emptive rights increases the anti-competitive effects that are likely to flow from the Gasgo Agreement. Accordingly, the Commission concluded that the Gasgo Agreement cannot be considered in isolation of the provisions of the original agreement.

The Commission considered that, when compared with the likely future situation if the Gasgo Agreement were not performed, the detriment to the public constituted by the lessening of competition which would be likely to result from the performance of the provisions of the Gasgo Agreement, in particular the take-or-pay, length of the contract and quantity of gas contracted, is significant. The Commission noted that this detriment is greater than it would be if the pre-emptive rights contained in the original agreement did not exist. However, the Commission concluded that the overall public benefits of the Gasgo Agreement outweighed the anti-competitive detriment.

*Points for discussion:*

- (a) *What impact do the pre-emptive rights have on the public benefits and detriments?*
- (b) *Do the pre-emptive rights have the potential to hinder competition?*
- (c) *Other issues*

(2) **The term of the authorisation**

In its Draft Determination the Commission proposed that the term of the authorisation would be the current term of the contract. That is, until the earlier of 1 July 2009 or completion of delivery of 67.5 PJ.

Provision is allowed for in the Gasgo Agreement for, firstly, the contract quantity to be increased under certain circumstances and, secondly, the term of the contract to be extended up to a specified time to allow the purchaser to take any gas 'banked' as at 1 July 2009.

*Points for discussion:*

- (a) *Should the term of the authorisation as proposed in the Draft Determination stand?*
- (b) *What would be the effect, if any, on the public benefits and detriments of varying the term of the authorisation to cater for the any change in contract quantity or extension of the term of the Gasgo Agreement?*

(3) **Other items**

(4) **Closing remarks**

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STATEMENT OF PUBLIC BENEFITS ARISING FROM THE 1997 GASGO AGREEMENT

The concept of public benefit is given a wide ambit and may encompass any conduct that produces direct or indirect benefits to the Australian public. Listed below are the public benefits that the Northern Territory Government (the *NT Government*) submits arise from the Mercenie Gas Sales Agreement dated 19 November 1997 (the *Gasgo Agreement*).

1. The supply of gas under the Gasgo Agreement will generate considerable public benefit to the economy and society of the Northern Territory.
2. The Northern Territory Government is dependent upon the supply of gas under the Gasgo Agreement to meet the electricity needs of consumers within the Northern Territory in the near to mid term future. Every aspect of Territory life, industry and the economy, depends upon confidence that electricity supplies can be maintained. The Gasgo Agreement, therefore, is an integral part of the NT Government's obligation to ensure the security of the supply of natural gas to generate electricity to the Northern Territory.
3. The Gasgo Agreement is separate from and provides gas additional to the arrangements under the earlier two gas agreements, namely the Mercenie Gas Purchase Agreement dated 28 June 1985 and the Mercenie Gas Sales Agreement dated 29 May 1995 (the *Earlier Agreements*) which were entered into between the Mercenie Producers and Gasgo Pty Limited (*Gasgo*) pursuant to which the producers currently supply natural gas from the Mercenie Oil and Gas Field to Gasgo.

In part, the need for the Gasgo Agreement has arisen because of the uncertainty of the supply capability of the Palm Valley gas field.

The Gasgo Agreement and the Earlier Agreements have assisted competition in Northern Territory industry including capital intensive industries in the mining sector. In this case, the very nature of the gas market in the Northern Territory requires long term contracting to encourage the investment required to support not only gas production but also the generation of electricity. The supply of gas under the Gasgo Agreement will continue to support the investment in additional production facilities and the continued supply of electricity to consumers.

4. The Gasgo Agreement is important to sustain substantial, long-lived investments. The continued support of the NT Government has provided assurance to parties who have made major investments, otherwise they would be less willing to make such investments in the future and this would be detrimental to the economy.
5. The ability to secure long term supply of the type contemplated by the Gasgo Agreement protects the NT Government, and indirectly the economy, from substantial financial exposure.
6. The continued support of the NT Government has allowed the development of gas generated electricity in the Northern Territory at substantially lower prices than other forms of available energy. This in turn will continue to advance competition in the wider energy market and provide real opportunities for increased competition in energy using markets in the Northern Territory.
7. The demand for gas generated electricity in the Northern Territory cannot be met by the total quantity of gas supplied under the Earlier Agreements. The Gasgo Agreement, therefore, is integral in meeting the demand for electricity in the Northern Territory at an affordable cost to the consumer. This in turn has contributed to the growth in the Northern Territory and increased downstream competition.
8. Gasgo's demand for gas is greater than the uninterruptable capacity of the processing facilities and Gasgo's incremental supply above the contract quantities of the Earlier Agreements is on an interruptable basis. Underpinning the Gasgo Agreement is investment in additional production facilities designed to increase the uninterruptable capacity of the plant. This in turn will assist the NT Government to maintain a continued supply of gas to generate electricity to satisfy demand.
9. The efficiencies gained through co-ordinated marketing will also lead to a more reliable supply of gas.
10. The introduction of gas generated electricity in Darwin has resulted in that city moving from having the highest airborne particulates (pollution) of any city in Australia to the lowest. In other words, there are substantial environmental advantages in the use of gas to generate electricity.

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**MINOR CORRECTIONS TO**  
**DRAFT DETERMINATION - 6 JANUARY 1999**

**APPLICATION FOR AUTHORISATION A90637 - A90645**  
**MEREENIE PRODUCERS - GASGO SALES AGREEMENT**

1. Section 2, sub-section 2.1 - The last sentence of paragraph 3 - "Today 97 percent of electricity supply in the Northern Territory is generated using gas as a fuel source". The correct statement is "**Today 97 percent of PAWA electricity supply...**"
  
2. Section 2, sub-section 2.2.1 - The last sentence of the second paragraph should preferably have added to it the words: "**despite almost 2 years of production utilizing field compressors**".
  
3. Section 2, sub-section 2.2.1 - The last sentence in the second to last paragraph should refer to the "**relevant Land Council**" not "Central Land Council".
  
4. Section 2, sub-section 2.3 - To the first paragraph should be added "**generating plant owned by third parties is supplied by gas from PAWA (via Gasgo):**
  - **Pine Creek Power Station (34 MW);**
  - **McArthur River Power Station (15 MW);**
  - **Alice Springs Brewer Power Station (8.7 MW);**
  - **Cosmo Howley Power Station (7.5 MW)**".
  
5. Section 5, sub-section 5.1.1 - In the last sentence of the final paragraph words appear to be missing after the word "energy" and before the word "electricity".
  
6. Section 5, sub-section 5.3.1 - The last sentence in the second to last paragraph, the words "**(or PAWA itself)**" should be inserted after "Gasgo" to reflect the fact that PAWA purchases gas directly from the Palm Valley producers.



**MEREENIE PRODUCERS- GASGO SALES AGREEMENT  
APPLICATIONS FOR AUTHORISATION**

**OUTLINE OF POINTS FOR FURTHER CONSIDERATION**

1. These notes address the issues which NT Power Generation Pty Ltd and Power Facilities Pty Ltd (collectively referred to herein as Power Facilities) would wish to raise for the Commission's consideration arising out of the draft determination dated 6 January 1999.
2. These notes are not intended to be a substitute for the submissions previously made on behalf of Power Facilities. Rather they address specific issues arising from the draft determination.
3. There are two matters to be mentioned.
  - (a) First, the conclusion expressed in the draft determination is reached only by applying the wrong test or applying the test wrongly;
  - (b) Secondly, if the applications are to be allowed, the Commission should only do so on terms which adequately address the detriment to be public which the Commission has (correctly) identified.

**Background**

4. These issues are not to be dealt with in a vacuum. The Gasgo Agreement has (it is submitted) a significant anti-competitive operation: see Draft Determination pages 32 and 33. It is not proposed to repeat what has been said before on that issue.
5. Power Facilities has previously identified three matters as affecting that conclusion-
  - the length of the agreement -it is for 10 years. That of itself is not objectionable,

but can become so when taken in conjunction with other factors.

- the take and pay provisions.
- the existence of the right of pre-emption (which it seems exists under the 1985 agreement).

6. These features -

- (i) are likely to operate as a restriction on the emergence of any new supplier of gas (or other form of energy). Gasgo is required to pay for the minimum amount (the take or pay level) of gas from the applicants. The applicants say that there is nothing requiring Gasgo actually to take the gas. That is so. That does not, however, address the substance of the issue. If it must pay for it anyway, it is unlikely to look to an alternative supplier.

Accordingly the only suppliers of gas will have bound the major purchaser of gas to pay for a minimum amount of gas (which at least is a significant volume) for a period of 10 years. In practice this will restrict or delay the emergence of an alternative supplier (because of the tying up of the major purchaser).

- (ii) are likely to operate as a significant restriction on the emergence of an alternative purchaser (because of the inability to secure gas); and the emergence of a market competitive price.

- The right of pre-emption has this effect, as explained in the draft determination at page 33. It is correct that this right is part of the background to which the ACCC must have regard.
- The take and pay provisions compound the anti-competitive effect. Gasgo would be able to exercise the right of pre-emption (and thereby prevent the entry of another purchaser). It may do so even if it does not then need the additional gas because it can "bank" its excess off for the future ( a right recognised by the Gasgo Agreement): see Issues Paper para 3.4.

- It cannot be determinative that (as has been put to the Commission) that Gasgo has in the past always waived the right of pre-emption. Only recently has it become subject to possible competition (by reason of the purchase by NT Power Generation Pty Ltd of the Mount Todd Power Station). It has not agreed to waive its right of pre-emption in favour of the applicants dealing with Power Facilities.
  - The applicants are obliged to ensure continuous supply of gas as required by Gasgo: see ACCC Issues Paper page 32. If (as Power Facilities hopes and seeks to do) a competitor purchaser were to emerge, it would not be able to secure uninterrupted supply even though (in circumstances where it was supplying power in competition with PAWA) its demand for gas was not an additional demand, because without Gasgo's concurrence the applicants would not be free not to make the supply available to Gasgo. This 'reserving' of gas will persist for the term of the agreement, and be an effective barrier to competition. This is what Power facilities referred to as production plant being 'reserved' by Gasgo: see submission page 3C. The Applicants deny this (see Santos letter of 14 December 1998 to the ACCC, pg 2 para 3), but that is precisely the basis upon which they say they will deal with Power Facilities (see clauses 5 and 7 of Indicative Terms).
  - The provisions are having this effect; the NT Government seems confident Power Facilities will not be able to secure gas; see Media Release 11 December 1998; the applicants do not wish to deal with Power Facilities except on terms that do not permit disclosure of the terms of the ACCC.
- (iii) assist the maintenance of artificially high prices for gas. Prices in the NT are significantly higher than elsewhere. Why this should be so must be justified to the ACCC.

7. These matters are also touched on by the Commission: see draft determination pages 33.

### THE TEST AND ITS PROPER APPLICATION

#### The Test

8. The test which the Commission must apply is set out in s 90 (6) & (8) of the TPA. It is not suggested there is any difference of substance between these two tests: cf Draft Determination page 14.

9. The Commission has (correctly) stated the tests at page 14 of the draft.

10. These is (at least) a three staged process.

- First it is necessary to see that the proposed contract will produce benefits to the public. An essential element of this is the identification of what would be the position if the contract were not approved (and therefore not entered into): see *Re John Dee (Export) Pty Ltd* (1989) 87 ALR 321 at 337-338; *Re Media Council of Australia* (1987) ATPR 40-774 at 48,419; *Re QIW* (1995) 132 ALR 225 at 235.
- Secondly, to identify the detriment to the public from the lessening (if any) of competition which the contract produces.
- Thirdly, to weigh these two against each other.

Unless the outcome of that process is a positive satisfaction that the benefits to the public exceed the detriments, the approval must be rejected.

11. The application in this case does not sufficiently identify the public benefits to enable the Commission to be satisfied to the requisite standard. This is essentially because the application advances as benefits, the advantages of gas fired power stations in the NT, and

does not (it is submitted) establish that those benefits would not be available even if the approval sought was not granted. Put another way, it is accepted that the exploration and commercial exploitation of natural gas and in particular its supply for power generation are matters in the public interest, and from which the public benefits. However, those ends would be pursued and achieved without detriment to the public even if the Gasgo Agreement (in the form that it presently takes) was not approved.

### **The Correct Approach**

12. There are parts of the draft determination which suggest the Commission has approached the situation as if it were established if authorisation of the Gasgo agreement is not given, there would be no mechanism established between the parties for additional supply of gas to Gasgo (and on to PAWA) : see for example page 33.7; 33.9-34.5.
13. The application (because it does not identify particular provisions as those that may be at risk of breaching the Act: see Draft Determination page 2.2) shifts focus from the real issue. The choice is **not** between there being additional gas supplied under the Gasgo Agreement (with the attendant benefits to the public for which the applicants contend) and no additional gas at all for Gasgo (with whatever disadvantages to the public may flow). That would be the choice only if it was established that if this agreement was not approved Gasgo could not secure the additional gas it required and the applicants would not supply that gas, by some other arrangement.
14. Yet this is not said and in any event it is implausible.
15. It requires the Commission to accept that the applicants would not undertake capital works (not necessarily the same works as are now being undertaken) needed to enable them to supply Gasgo the additional gas it required pursuant to some other agreement when-
  - 84% of electricity in the NT is from gas powered generators, and this is not likely

to readily change. The applicants accordingly have a strong, increasing demand for their product. The NT Government plainly favours the continued use of gas: see draft pg 17.5.

- The applicants have the gas to supply Gasgo's future needs (in terms of reserves)
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- They have no present competition. All present gas fields (Mereenie and Palm Valley) are owned by companies in the Santos and Magellan Groups. There is not likely to be any independent source of gas for an indeterminate period: see draft pg 6.2.
- The whole of the Palm Valley gas supply is committed under existing contracts.
- Gas is being purchased at a rate much higher than was apparently anticipated as recently as 1995 given that the 1995 agreement was to run for 15 years (May 1995 to July 2010) with a quantity of 25 PJ but is now anticipated to cease Aprior to 2002" see Draft Determination page 8. This does not suggest any need for the applicants to have a minimum take or pay provision prescribed.
- The only source for gas for PAWA (or indeed any new purchaser) is the applicants.

16. The applicants have not offered adequate evidence of need for the take or pay provision. Moreover, the forecast demand exceeds the quantities to be provided under the Gasgo agreement and the other Mereenie agreements. There must accordingly be an expectation that sales will take place outside the Gasgo agreement, on terms which have not been disclosed, but which need to be explained to enable the ACCC to properly assess public benefit and detriment.
17. The applicants would, it is submitted, act to meet the demand which exists. Gasgo would (plainly) seek to buy it. The Commission ought be skeptical of the inference which the

applicants wish to have drawn that but for the take or pay provisions the applicants would not supply.

18. The Commission should consider what would be the position if the Gasgo Agreement was not approved in its present form. There can be no doubt at all that the applicants would still seek to fill the market which they know exists and which is growing. There is no basis for suggesting that supply can only be assured by agreements which offend (but for the effect of any approval) the TPA. Accordingly, the Commission ought conclude an agreement or agreement could be made which did not have the anti-competitive effect of the Gasgo agreement. Indeed when one looks at what is identified as the public detriment if authorisation is not granted, it is not said supply to PAWA would not be provided, or that some other agreement would be made: see para 97 of annexure 2 to the application. What is referred to is a destabilising concern about the existing agreement's enforceability and performance.
19. There is no consideration by the Commission of the true comparison which the Act requires.
20. There is no explanation as to why it was the applicants were able to supply the Mt Todd Power Station with its gas requirements up to 15 November 1997, but cannot now give the assurance of doing so for the future.
21. If the proper comparison is made, there would be no appreciable public benefit from approval of the Gasgo Agreement. There would be no net benefit which would justify the grant of the authorisation sought.

**ALTERNATIVELY AUTHORISATION ON TERMS**

22. The Commission has power to grant the authorisation on conditions: s 91(3).
23. The Commission has not (in the draft determination at least) given consideration to imposing conditions.
24. The Commission should impose conditions that the authorisation be subject to conditions (which address the detriment to the public identified by the Commission) namely-
- (a) that the applicants secure from Gasgo its waiver of the right of pre-emption granted under the 1985 agreement. In the past that waiver has been given every time it was sought. There is no basis for concluding it would cause any (legitimate) difficulty to the applicants or Gasgo to impose this condition.
  - (b) that the applicants shall supply gas to any person seeking to purchase gas from the applicants in excess of 1 PJ per annum (for one or more years up to the termination of the Gasgo Agreement) at a price which reflects the prices paid by other large users of gas and in the event of a dispute at such price as shall be set by the ACCC after receiving submissions from the applicants and the proposed purchaser of gas.
25. The imposition of these conditions would reduce the detrimental impact on the public interest without undue burden on the applicants.
26. It is noted (correctly) by the Commission that the promotion of greater competition in the gas market will have benefits for consumers and for Australia as a whole: see Draft page 12. The imposition of these conditions will further this goal.
27. Power Facilities has demonstrated that it is seeking to enter the market to obtain supplies of gas to generate power to compete with PAWA. That will be for the benefit of the



public if it can take place. This will lead to lower power prices for the public. This is an immediate and real benefit to which no real weight has been given in the Draft Determination, but which is plainly of primary significance.



**Australian  
Competition &  
Consumer  
Commission**

**Mereenie Producers - Gasgo Sales Agreement  
Applications for authorisation A90637-A90645**

**PRE-DETERMINATION CONFERENCE**

25 January 1999

Level 5  
77 Castlereagh Street  
Sydney

**Record of conference**

**Attendees**

<b>Organisation</b>	<b>Name</b>
ACCC	Allan Asher, Deputy Chairman Mark Pearson, Senior Assistant Commissioner, Gas Group Suzie Copley, Director, Gas Group Sydney John Bastick, Industry Analyst Meredith Hooper, Industry Analyst
AGL	Michael McCormack, Manager Regulatory Affairs Sandra Dureau, Manager Regulatory Affairs Strategic Support
Envestra	Ollic Clark, Managing Director
Magellan Petroleum	Hedley Howard, Commercial Manager
NT Government	Peter Caldwell, Director, Gasgo John Tarca, General Manager, Gasgo David Anderson, Deputy Secretary, Attorney-General's Dept. Dennis Bree, Ministerial Officer, Minister for Essential Services John Morgan, Allen Allen & Hemsley Jenny Zaverdinos, Allen Allen & Hemsley James Noonan, James Noonan Solicitors Geoff Witham, James Noonan Solicitors
NT Power Group	Paul Everingham, Chairman Jeff Hutchison, Director John Bowman, Director Shane Doyle, General Counsel
Santos	John Anderson, Corporate Counsel Barrie Brandt, Senior Marketing Officer Peter Rose, Freehill Hollingdale & Page

## Record of conference

The conference was held at the offices of the Australian Competition and Consumer Commission in Sydney on Monday 25 January 1999. The conference began at approximately 9.00am and closed at approximately 11.30am.

Mr Allan Asher, Deputy Chairman of the Commission, opened the conference and welcomed participants. He explained the procedure of the conference and welcomed comments from those in attendance.

Mr Asher stated that in addition to the submissions by the applicants and interested parties, the Commission's consideration of this authorisation application has also taken into account the view expressed in the Australian Competition Tribunal's review of the AGL Determination that the development of competition between producers would be important if the concentration of market power in production and transmission were to be addressed and the pro-competitive CoAG reform directions realised.

Mr Asher noted that in its Draft Determination the Commission concluded that separate marketing was not viable in the Northern Territory under current market conditions. Mr Asher stated, however, that this is not to say that separate marketing would not become feasible at some stage in the future.

Mr Asher stated that the existence of the pre-emptive rights contained in the Original Gas Purchase Agreement ('GPA') was one of the main issues that has arisen during the authorisation process. Mr Asher reiterated that the Commission, in its Draft Determination, considered that the Gasgo Agreement and the pre-emptive rights attached to the Original GPA do operate together in the sense that the existence of the pre-emptive rights is likely to increase the anti-competitive effects which are likely to flow from the other contracts negotiated by the Mereenie Producers, including the Gasgo Agreement. Accordingly, the Gasgo Agreement cannot be considered in isolation from the provisions of the Original GPA.

The following summarises the main issues raised by interested parties at the conference.

### 1. Pre-emptive rights contained in the original agreement

#### *Mr John Anderson, Santos (on behalf of the Mereenie Producers)*

Mr Anderson reiterated the applicants' view that the pre-emptive rights that are held by Gasgo and contained in the Original GPA are irrelevant to the current applications for authorisation.

Nevertheless, in terms of any anti-competitiveness of the pre-emptive rights themselves, it is not the existence of the pre-emptive rights that should be of concern, but the manner in which those rights are exercised. Mr Anderson noted that there is no evidence to date that the pre-emptive rights have been used for the express purpose of blocking supply of gas to a third party. The applicants accept that if the pre-emptive rights were to be used in this manner, this may come under scrutiny for a possible breach of the Trade Practices Act. Mr Anderson suggested that the use of the pre-emptive rights would be less likely if authorisation was granted and the Gasgo Agreement came into effect.

Mr Anderson stated that the applicants are willing to discuss the supply of gas to any third party that comes forward and hope that the pre-emptive rights are not used to hinder supply to third parties. In relation to NT Power Group, the applicants consider that while preliminary discussions have been held regarding the supply of gas, they are not yet in the position to submit the details of the offer to Gasgo to consider whether to waive its pre-emptive rights. Mr Anderson stated that negotiations would effectively have to be completed between the Mereenie Producers and a third party before the proposed arrangements could be submitted to Gasgo.

***Mr Shane Doyle, NT Power Group***

Mr Doyle expressed NT Power Group's view that the pre-emptive rights contained in the Original GPA are relevant to the current authorisation, as they are part of the present marketplace. NT Power Group considers that the pre-emptive rights have a considerable impact on the market and potential gas users by making terms of a contract available to Gasgo and by Gasgo blocking supply of gas from the Mereenie Producers to a third party. NT Power Group considers this to be anti-competitive.

NT Power Group considers that the pre-emptive rights are effectively a fallback position should the authorisation not be granted.

In NT Power Group's opinion, negotiations with the Mereenie Producers have gone beyond the preliminary stage. Mr Doyle stated that NT Power wrote to Gasgo on 24 December 1998 requesting that Gasgo waive its pre-emptive rights, but this was rejected by Gasgo on 9 January 1999.

Regarding the issue of Crown immunity of the Gasgo Agreement, Mr Doyle stated that it was NT Power Group's view that the previous contracts between Gasgo and the applicants are subject to the Trade Practices Act.

***Mr David Anderson, NT Government***

Mr Anderson stated that the NT Government views arrangements in the gas and electricity markets as very much of public policy and as such have the endorsement of the NT Government. Mr Anderson also noted that the arrangements are very important to the Northern Territory and represent an investment of approximately \$1.5 billion in comparison to the total Northern Territory budget of approximately \$2 billion. He stated that the supply of energy was important in the Northern Territory for competition in downstream markets.

Mr Anderson stated that gas is cheaper than other fuels in the Northern Territory. Nevertheless, electricity costs to industrial users in the Northern Territory are about twice the costs in other States. Even so, electricity in the Northern Territory is subsidised by the NT Government. However, Mr Anderson stated that he did not consider that the electricity market is a relevant factor to the current applications for authorisation and should be considered in an alternative forum.

In addition, as there is no prospect of offshore gas competing with current suppliers in the near term, the Northern Territory is quite dependent on the gas from the Amadeus Basin.

The Northern Territory considers that the Original GPA and the pre-emptive rights are not relevant to the current applications for authorisation. Mr Anderson stated that the

pre-emptive rights together with the supply contracts provide the level of comfort required by the Northern Territory Government that ensures a secure supply of gas for electricity generation. Mr Anderson stated that the Commission does not have before it all the relevant background material surrounding the negotiations that culminated in the Original GPA, including the pre-emptive rights provisions.

Mr Anderson rejected any suggestion that the NT Government would use the pre-emptive rights to hinder competition and noted that the rights have been waived on five previous occasions to allow the applicants to supply gas to third parties. He also stated that the rights would only be used in the case of a major event and electricity supplies were threatened, was in the public interest and not anti-competitive.

## **2. Term of the authorisation**

### ***Mr John Anderson, Santos***

Mr Anderson stated that the applicants have always sought authorisation for the Gasgo Agreement in its entirety. In the applicants' view, the variations that can occur to alter the provisions of the Gasgo Agreement (firstly, to increase contract quantities up to a specified level under certain circumstances and, secondly to extend the term for a specified period in the event of 'banked' gas remaining at the end of the initial term) are minor and would not affect the balance of public benefits and detriments as assessed by the Commission. Mr Anderson also pointed out that the contract quantity might decrease under certain circumstances

### ***Mr David Anderson, NT Government***

Mr Anderson stated that the NT Government supports the applicants' view in regard to the term of the authorisation.

### ***Mr Shane Doyle, NT Power Group***

Mr Doyle noted that NT Power Group is not privy to the details of how the Gasgo Agreement can be varied. However, based on available information on gas reserves and demand from Table 2.1 of the Commission's Draft Determination, NT Power Group estimated that there is a shortfall of gas supplies of approximately 20-30PJ from the current contracts. Mr Doyle suggested that if this were to be met by varying the Gasgo Agreement then this would have a significant impact on the likelihood of any other parties obtaining gas and would greatly increase the detriment arising from the Gasgo Agreement.

### ***Mr Hedley Howard, Magellan***

Mr Howard stated that assumptions regarding linear projections of gas supply in accordance with contract quantities are incorrect and in fact no gap existed. Mr Howard stated that the ACCC has the relevant figures.

## **3. Long term, take-or-pay contracts**

### ***Mr Shane Doyle, NT Power Group***

According to Mr Doyle the pre-emptive rights, length of the contract and take-or-pay provisions are all inter-related. NT Power Group considers that there are a number of

features of the Gasgo Agreement that are anti-competitive and are not necessary, including the take-or-pay provisions. Mr Doyle stated that take-or-pay provisions, including the 'banking' of gas, tie the purchaser to the one supplier.

Public detriments arise from these features, which are not outweighed by public benefits, may potentially hinder and frustrate NT Power Group from competing with PAWA in the provision of electricity. NT Power Group is offering prospective electricity customers a discount of 20 per cent from the current PAWA price.

In addition, Mr Doyle noted that the applicants have appeared to suggest that if the Gasgo Agreement is not authorised and is not put in place then there will be no other gas supply contract in its place. NT Power Group rejects this suggestion and states that it would expect that the two parties (the applicants and Gasgo) would come to some other arrangement (without any potentially anti-competitive provisions) for the supply of gas and investment in additional facilities would be carried out to meet the demand.

Accordingly, the Commission, when applying the with-or-without test, needs to assess the public benefits in light of any alternative contract being negotiated between the parties if authorisation is not granted to the Gasgo Agreement and that contract does not proceed. Mr Doyle stated that in this situation any public benefits associated with the Gasgo Agreement would still be realised as alternative arrangements will take its place.

Mr Doyle stated that NT Power Group has received indicative terms for supply from the applicants. This document suggests to NT Power Group that some gas in Mereenie is 'reserved' for Gasgo.

NT Power Group was not able to say whether it would be seeking take-or-pay in its proposed supply arrangements with the Mereenie Producers.

***Mr John Anderson, Santos***

Mr Anderson referred the Commission to the written submissions made by the applicants in regard to take-or-pay. Mr Anderson reiterated that the applicants consider negotiations with NT Power Group as preliminary and question the assertion that the Gasgo Agreement or the pre-emptive rights in the Original GPA have hindered NT Power Group.

Mr Anderson suggested that it was tenuous for NT Power Group to claim that a new contract would emerge if the Gasgo Agreement did not become operational. He also expressed grave doubts that the capital expenditure, necessary to underpin the Gasgo Agreement, would proceed.

Mr Anderson stated that under the Trade Practices Act, the with-or-without test relates to the proposed conduct itself, and not to whether or not authorisation is granted.

Mr Anderson refuted the argument that gas is 'reserved' for Gasgo and stated that the applicants do have reserves of gas available for third parties on a firm basis.

*Mr David Anderson, NT Government*

Mr Anderson stated that the NT Government did not have any concerns with the take-or-pay requirements of the Gasgo Agreement. The NT Government accepts the commercial reality of take-or-pay provisions in gas supply contracts.

**4. Conditions of authorisation**

*Mr Shane Doyle, NT Power Group*

Mr Doyle referred to the submission prepared by NT Power Group that includes conditions that it believes the Commission should impose if it grants authorisation. The first condition is that the pre-emptive rights contained in the Original GPA are waived for all third parties, or at least the same class of third parties. That is, those seeking to compete in the electricity market. Mr Doyle stated that if this condition is not feasible, then the Commission should not grant authorisation.

The second condition is that NT Power Group proposes that prices to third parties reflect the price of gas supplied to large users and that the Commission is empowered to determine a price in the event of a dispute.

NT Power Group considers the existence of pre-emptive rights, and not merely the manner in which it is exercised, to be crucial. Mr Doyle noted that the rights have been waived in the past in relation to the supply of relatively small amounts of gas. However, as NT Power Group wishes to compete for the supply of electricity, and seek substantial volumes of gas to do so, the rights have assumed more importance than in the past.

*Mr John Anderson, Santos*

In regard to the proposed condition to waive the pre-emptive rights, Mr Anderson stated that the applicants would consider it inappropriate to place a condition on authorisation that the applicants could not perform, as it is Gasgo's, not the applicant's, prerogative to waive the rights.

In addition, the applicants do not consider that it is suitable to set prices in the manner suggested by NT Power Group. The applicants do not agree that it is the Commission's role to set prices for the supply of gas. Moreover, determining a price that reflects the prices paid by large users is open to interpretation and unreflective of commercial negotiations.

**5. Close of conference**

After the participants had no further issues to raise, Mr Asher explained that the Commission would prepare a summary of the proceedings at the conference. This will be forwarded to participants and placed on the public register.

The Commission will accept additional submissions from participants in relation to this matter until the close of business Monday 1 February 1999. After consideration of today's conference and any submissions received, the Commission will issue its Final Determination.

Mr Asher thanked participants for attending and closed the conference.



## 6. Submissions

Since the release of the Draft Determination the Commission has received two submissions (from the applicants and NT Power Group). These submissions were circulated to interested parties at the conference.

## 7. Information to be provided to the Commission

During the conference the participants undertook to provide the Commission with the following items.

Organisation	Item
NT Government	Details of applications to waive pre-emptive rights (including dates, amount of gas, intended use of gas)
NT Power Group	Details of calculations re 'gap' between demand and supply of gas from Mereenie and extent of varying the Gasgo Agreement beyond current term
NT Power Group	Basis on which company can offer prices 20% less than those from PAWA
NT Power Group	Written response to Mr Asher's question as to whether NTPG would expect, or seek, similar terms and conditions in a gas supply contract as those between the applicants and Gasgo.

**AUSTRALIAN COMPETITION AND  
CONSUMER COMMISSION**

**Mereenie Producers – Gasgo Sales Agreement**

**Pre-determination Conference - Monday 25.1.99**







**Please sign to register**

# AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

## Mereenie Producers – Gasgo Sales Agreement

### Attendance at the Pre-determination Conference - Monday 25 January 1999

Organisation	Name	Position	Attendance
AGL (NT Gas)	Michael McCormack	Manager Regulatory Affairs	<i>[Signature]</i>
	<i>Sandra Dulean</i>	<i>Mgr Regulatory Aff. Strategic Support</i>	<i>[Signature]</i>
Allen Allen & Hemsley	John Morgan	Adviser to NT Government	<i>[Signature]</i>
" "	<i>Senny Zaverdinos</i>	" "	<i>[Signature]</i>
Envestra	Ollie Clark	Managing Director	<i>[Signature]</i>
Freehill Hollingdale & Page	Peter Rose	Adviser to Mereenie Producers	<i>[Signature]</i>
Gasgo	Peter Caldwell	Director	<i>[Signature]</i>
	John Tarca	General Manager	<i>[Signature]</i>
James Noonan Solicitors	James Noonan	Adviser to NT Government	<i>[Signature]</i>
	Geoff Witham	Adviser to NT Government	<i>[Signature]</i>
Magellan Petroleum	Hedley Howard	Commercial Manager	<i>[Signature]</i>
NT Government	David Anderson	Deputy Secretary, Attorney-General's Department	<i>[Signature]</i>
	Dennis Bree	Ministerial Officer, Minister for Essential Services	<i>[Signature]</i>

Organisation	Name	Position	Attendance
NT Power Generation	Paul Everingham	Chairman	
	Jeff Hutchison	Director	
	John Bowman	Director	
	Shane Doyle	General Counsel	
Santos	John Anderson	Corporate Counsel	
	Barrie Brandt	Senior Marketing Officer	

**JAMES NOONAN**

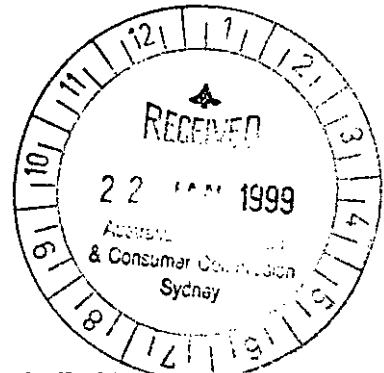
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Our Reference M98607  
Your Reference CA97/41

5838013  
99/752

Mr. Mark Pearson  
Senior Assistant Commissioner  
Gas Group  
(Attn. Meredith Hooper)  
Australian Competition and Consumer Commission  
GPO Box 3648  
Sydney NSW 1044



Facsimile 02 9231 5652

22 January 1999

Dear Mr. Pearson

**APPLICATIONS FOR AUTHORISATION A90637 -A90645**

We act for the Northern Territory Government and for Gasgo Pty Limited and refer to the Commission's draft determination issued 7 January 1999 and to the Commission's letter of 15 January.

<b>FOLIOS</b>	
RESTRICTION OF PUBLICATION	
<input checked="" type="checkbox"/>	CLAIMED
<input checked="" type="checkbox"/>	GRANTED 2.2.99
<input type="checkbox"/>	DECISION PENDING

**CONFIDENTIAL**

As noted in the draft determination the Applicants "have requested that the term of the authorisations should be aligned with the term of the Gasgo Agreement" and "The Commission considers this is the most appropriate term for the present authorisations as they relate to the implementation of that contract."

We submit on behalf of our clients that these issues and their concerns regarding confidentiality can be accommodated by a determination that the term of the authorisations coincide with the implementation of the contract in its form as at its date of execution.

The information enclosed by brackets is commercially sensitive to Gasgo's position as a gas purchaser and is commercially sensitive to other parties and we request, pursuant to section 89(5) of the *Trade Practices Act*, that such information be excluded from the register and seek the Commission's written confirmation that such information will not be disclosed by the Commission to any third party. If the Commission is not able to meet such requests we are instructed to totally withdraw such information.

Yours faithfully



James Noonan