LEGISLATIVE NOTES

GAS INDUSTRY (AMENDMENT) ACT 1998 (VICTORIA)

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In late May 1998, the Victorian Parliament passed the *Gas Industry (Amendment) Act* 1998 (the "Act"). This Act makes various amendments to the *Gas Industry Act* 1994 ("GIA") and the *Electricity Industry Act* 1993 and *Electricity Industry (Further Miscellaneous Amendment) Act* 1997 ("Electricity Acts"). The stated purpose of the Act is to make provisions for regulating certain anti-competitive conduct, to restrict cross-ownership in the gas industry and to make various amendments to the GIA.

Part 3 of the Act effects changes to the Electricity Acts resulting from the change to the corporate status of VENCorp and the Victorian Power Exchange from statutory corporations to companies incorporated under the Corporations Law.

Part 2 of the Act introduces a range of significant as well as consequential amendments to the GIA. These amendments, in brief summary, include:

- Provision of additional statutory functions for VENCorp;
- Establishment of a licensing regime for the proposed Port Campbell underground natural gas storage facility. A person is prohibited from providing services as a market participant by means of this facility without being licensed to do so;
- Provision for the dissolution of the Gas Transmission Corporation with all of its property, rights and liabilities to be allocated to the new gas companies which the Government is to privatize. When the various assets and liabilities have been transferred, the provisions of the Act providing for the GTC's dissolution will be proclaimed to commence;
- The establishment of legislative barriers to and restrictions on cross ownership of the various corporations created via the sale of the Victorian Government's gas assets. In order to prevent subsequent merger activity which in the Government's view would diminish the competitive market structure established by the Victorian privatization, the Act establishes a number of prohibitions on industry participants preventing them from holding prohibited interests in certain other industry participants;
- Provisions providing that land occupied by VENCorp is not and is deemed never to have been rateable land within the meaning of the *Local Government Act* 1980; and
- Introduction of provisions providing for the statutory authorization of the Master Agreement between GASCOR (which is the buyer of gas under the gas sale agreement negotiated with Esso Australia

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Resources Ltd. ("Esso") and BHP Petroleum (Bass Strait) Pty Ltd ("BHPP") as part of the 1997 PRRT pass-on arbitration settlement) and the new gas retailers established by the Government. These provisions provide for authorization of these arrangements under the State authorization powers under Section 51(1)(b) of the *Trade Practices Act* ("TPA").

Despite the significance of some of these changes, the most significant, and arguably controversial aspect of the Act is the introduction into the GIA of the new Part 3A "Significant Producers" provisions. The balance of this report concentrates on a review of these provisions. The explanatory memorandum to the Act prior to the passage of the Act stated that these provisions are aimed at establishing a *"regime designed to prevent a significant producer from engaging in anti-competitive conduct by discriminating among gas retailers in a manner that has the purpose, or is likely to have the effect, of substantially lessening competition in a Victorian gas market."* Although the names are not used, a fairly quick reading of the Act leaves little doubt that the immediate targets of the provisions are Esso and BHPP, presumably due to a perception by the Victorian Government that as primary natural gas suppliers in Victoria they could be an unwanted competitive threat to the viability of the soon to be privatized Victorian retail gas companies.

While a perfunctory examination of the provisions of the new Part 3A may give the impression that these provisions essentially adopt the principles and approach of parts of the TPA (in particular aspects of Parts IV and XIB) and thus just act as an adjunct to the protection against restrictive trade practices under the TPA, a careful examination of the legislation shows significant deviations from the approach under the TPA. The provisions of the Act also raise queries about whether it is consistent with various agreements and codes arising from the CoAG process.

DEFINITION OF "VICTORIAN GAS MARKET"

Part 2 of the GIA is amended to include a definition of *"Victorian gas market"* which is defined to mean:

> .... a market in which gas -
> (a) is supplied in Victoria to a gas retailer; or
> (b) is supplied to customers in Victoria -
> whether or not the market extends beyond Victoria.

In terms of competition law in Australia, particularly in relation to recent decisions involving the natural gas industry, an apparent issue raised by this definition is that it does not identify a market but a sub-market or series of sub-markets of potentially very restricted geographical extent. The proposed definition implicitly recognizes this by acknowledging the market may extend outside Victoria. The definition is certainly at odds with the conclusion of the Australian Competition Tribunal in Re AGL Cooper Basin Natural Gas Supply Agreements[1], who noted that the geographic dimensions of the natural gas market had expanded to a south-east Australian[2] gas market. In paragraph (a), the proposed definition by attaching to a gas retailer at one functional level is essentially confining the scope of the definition to competitive activity in sub-markets.[3] Although paragraph (b) appears to cover the whole functional level with respect to retail sales of gas, it restricts the focus of competition analysis to Victorian customers.

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1 (1997) ATPR 41-593.

2 New South Wales, Victoria, Queensland and South Australia.

3 Sub-market is namely the sub-market in which a significant producer supplies gas to a gas retailer and the sub-market in which a gas retailer acquires gas from a significant producer. No account is taken of the fact that significant producers will compete with other producers in the true geographic dimension of the market.

As a result of this sub-market restriction, proper economic competition analysis traditionally seen with respect to competition matters under the TPA will potentially be significantly distorted due to the myopic nature of the definition.

It is also worthy of note that there is no definition of what is a *"gas retailer"* for the purposes of the Act.

DEFINITION OF "SIGNIFICANT PRODUCER"

A definition of "significant producer" is also to be inserted into Part 2 of the GIA and provides that:

> "significant producer" means a body corporate that -
> (a) is the holder of, or of an interest in, a production licence for petroleum in the adjacent area in respect of Victoria within the meaning of the Petroleum (Submerged Lands) Act 1967 of the Commonwealth; and
> (b) has a substantial degree of power in one or more Victorian gas markets -
> and, in Part 3A and 4A, includes a body corporate that is related within the meaning of Section 36 to such a holder;

Even though the primary part of the definition attaches to a person with offshore production licences in the Victorian adjacent area who has a substantial degree of market power, the definition will also drag into its net any related company that may be operating in completely different jurisdictions if that company offers to sell gas into Victoria.

Other aspects of the definition will potentially give rise to other distorted competition effects. A producer of gas from offshore Victoria, such as Esso or BHPP, will by virtue of the definition of Victorian gas market be a *"significant producer"* and thus subject to the competition risks under the Act, whereas other significant producers who may sell into Victoria, such as Cooper Basin producers[4], although potentially significant market players, will not be significant producers for the purposes of the GIA. This has the potential to bring about various nefarious results when considered in conjunction with the competition rule under the new Part 3A provisions as discussed below.

ANTI-COMPETITIVE CONDUCT

Section 40 of the new Part 3A provisions sets out an anti-competitive conduct rule or test. The section provides that:

> A significant producer engages in anti-competitive conduct if the significant producer discriminates among gas retailers in a manner that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a Victorian gas market.

Section 41 prohibits a significant producer from engaging in such conduct ("competition rule"). Section 40 must also be read in conjunction with Section 34 which expands upon what is considered to amount to conduct for the purposes of the Act.[5]

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4 For example, Santos Limited and Boral Energy Resources Limited. Delhi Petroleum Pty Ltd would be caught by the definition of significant producer by virtue of it being a related body corporate of Esso.

5 Conduct includes doing or refusing to do an act, including making or giving effect to a provision of a

The anti-discrimination test appears to be a reversion to a test which is equivalent to the test that appeared in the now repealed price discrimination provisions of Section 49 of the TPA. Under Section 49 of the TPA, discrimination was held to mean no more than *"difference"*.[6] In the absence of any other clarification, that term presumably would be given an equivalent meaning under the new Section 40.

The other limb of Section 40, whether the discrimination has the purpose or likely effect of substantially lessening competition, is subject to the definition of Victorian gas market. As such, the relevant analysis is not in the context of the whole of the relevant market[7] but in the context of a number of Victorian sub-markets.

The attachment of Section 40 of the new Part 3A to the conduct of significant producers reflects an intention to constrain what is viewed to be anti-competitive conduct of persons holding significant market power in the Victorian gas market. In this respect, the legislation appears to borrow from the concept in Section 46 of the TPA. However, although the apparent object of the Act is to constrain the conduct of a person who is perceived to hold significant market power in the Victorian gas market, the test in Section 40 does not contain a requirement linking the market power of that person with the proscribed conduct. There is no requirement that the significant producer use, mis-use or take advantage of their market power in a discriminatory way, only that they have market power. Further, the introduction of an *"effect"* element in the competition test in the new Part 3A is inconsistent with the mis-use of market power provisions in Section 46 of the TPA which are purposive.

AUTHORISATION

Division 3 of the new Part 3A provisions creates an authorisation process whereby a significant producer can seek authorisation of its conduct by the Office of Regulator General ("ORG"). This division also sets out the powers of the ORG to vary or revoke authorisations previously issued by the ORG[8] and establishes an appeals process from decisions of the ORG in relation to the granting of, variation or revocation of a Division 3 authorisation.[9]

While superficially at least this aspect of the Act bears some resemblance to the authorisation process available under the TPA[10], the authorisation available from the ORG is not based on a public benefit/detriment assessment by the ORG. The ORG can only grant an authorisation if it is of the opinion that the conduct of the significant producer will not breach the competition rule. Therefore, if the significant producer is not in breach of the competition rule, it can apply for an authorisation and its conduct can be authorised. The utility of this procedure would appear to be to provide nothing more than a means by which a significant producer can preclude an interested party (including the ORG) from, at some later date, alleging that the conduct of the significant producer was in breach of Sections 40 and 41.

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contract arrangement or understanding. A reference to a refusal to act includes refraining from or making it know the act will not be done.

6 *O'Brien Glass Industries Ltd v Coal and Sons Pty Ltd* (1993) ATPR 40-376.

7 See footnote 2.

8 Section 43 of the new Part 3A.

9 Section 44 provides certain rights of appeal to 'the appeal tribunal' established under Division 5 of the new Part 3A.

10 Potentially anti-competitive conduct can be authorized by the ACCC in circumstances where it is satisfied that the public benefits out-weigh the attenuate public detriment.

COMPETITION NOTICES PROCESS

The combination of the proposed competition rule with the concept of the ORG being empowered to issue competition notices, appears to in principle be drawn from the approach taken in Part XIB of the TPA.[11] However, although the broad principle concepts show similarities, there are very significant differences between the approach taken in the Act and that is Part IXB when they are examined in any depth.

Section 45 of Part 3A provides that if the ORG *"believes on reasonable grounds"* that a person is a significant producer and that that person *"has contravened or is contravening, or proposes to contravene"* the competition rule, then the ORG may issue a competition notice and exercise its powers under Division 4 that flow from issuing a competition notice. In conjunction with the order making powers discussed below, Section 45 enables the ORG to impose fines of up to $10million purely on the basis that the ORG reasonably believes a significant producer *proposes* to contravene the competition rule. In contrast, under Part XIB of the TPA, the ACCC cannot issue a competition notice purely on the basis that it believes a person *proposes* to contravene the competition rule.

Following the issuing of a competition notice by the ORG, such notice will activate very broad powers held by the ORG to make orders,[12] including mandatory orders,[13] and to impose penalty orders[14] requiring payment of fines of up to $10million. Section 45A further enhances the ORG's potentially draconian powers by legislatively excluding the ability to bring legal action[15] in relation to the ORG's decision to issue a competition notice. The conferring of these powers on the ORG goes substantially beyond the powers held by the ACCC. The ability of the ORG itself to issue orders gives it self-initiated quasi-judicial power. The ORG need only have *"reasonable grounds"* for the issue of a competition notice and therefore power to make various orders. Under Part XIB by contrast, the ACCC has no power to issue orders following its issuing of a competition notice. An application must be made to the Federal Court[16] which must be satisfied of the existence of a contravention of the competition rule.

As discussed above, the Act imposes a process following the issuing of a competition notice by the ORG which avoids the jurisdiction of the Supreme Court in favour of an appeals tribunal set up under Division 5 of the new Part 3A, other than in relation to an appeal from a decision of that body in respect of a question of law. A person who is the subject of an order made by the ORG may apply to the tribunal for review of that order.[17] The decision to issue the competition notice is not open to review. The grounds for appeal to the tribunal are also severely restricted. The grounds for appeal are that *"the ORG made an error of fact or law in a material respect in making an order...."*[18]

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11 Part XIB contains the anti-competitive conduct and record keeping rules relating to the telecommunications industry which identify anti-competitive conduct, prescribe a competition rule in relation to such conduct and empower the ACCC to issue competition notices concerning such conduct.

12 Section 45E of the new Part 3A.

13 Section 45G of the new Part 3A.

14 Section 45H of the new Part 3A.

15 Proceedings seeking grant of relief or remedy in the nature of certiorari, prohibition, mandamus or quo warranto or grants of declaration or injunction or the seeking of orders under the *Administrative Law Act* 1978 (Vic) are excluded.

16 The ACCC may apply for a pecuniary penalty (Section 151BX) or injunction (Section 151CA) to restrain the offensive conduct.

17 Section 45K(1). Applications must be made within fourteen days of the reasons for the order being given.

18 See Section 45K(3). This provision leaves open various issues. Who determines whether the ORG made an error of law or fact or its materiality ?

Section 45N restricts the material that can be presented to the appeal tribunal effectively to submissions made by the applicant to the ORG before the orders were made and any information relied on and reasons given by the ORG.[19] When taken in conjunction with the power to issue mandatory orders under Section 45G, the effect of this Section 45N will be to preclude the applicant from making any submissions or providing information to the appeal tribunal concerning the orders the subject of the appeal. Section 45N(d) provides the tribunal with a very limited right to grant leave to an applicant to lodge other material or information where the applicant could not by the exercise of reasonable skill and diligence have made that information available to the ORG prior to making the order. Fair judicial process aims to provide all parties with, subject to the rules of evidence, the right to submit and be aware of relevant evidence, such that all relevant evidence and information will be placed before the judicial body. The effect of this Section is to potentially deny the applicant a fair hearing before the appeal tribunal by restricting the information that may be placed before it.

Section 45O provides that the appeal tribunal must either affirm an order made by the ORG or set aside and remit the matter for reconsideration by the ORG in accordance with the appeal tribunal's directions, or in the case of a fine imposed under Section 45H, substitute the fine for an amount determined by the tribunal. Section 45P(1) provides that where a matter is remitted to it from the appeal tribunal, the ORG may make such orders as it thinks fit, having regard to the errors of law or fact referred to in the appeal tribunal's decision.

Section 45P(4) appears to re-activate the submissions and appeals process under Divisions 4 and 5 in relation to consequential orders made by the ORG. As mentioned above, Section 45Q provides a right of appeal to the Supreme Court from a decision of the appeal tribunal on a question of law or against a penalty order made by the ORG. The Supreme Court can affirm, set aside or vary the order of the ORG or penalty imposed under Section 45H or remit the matter back to the ORG for re-consideration.

Section 45R provides that an application to the appeals tribunal or Supreme Court does not affect the operation of the ORG order the subject of the application. The Act does go on to provide that both the appeals tribunal and Supreme Court may stay the relevant order if it is satisfied that it is desirable to do so and good cause has been shown. Section 45R(4) sets out directions as to what the tribunal and court should take into account in exercising their discretion to stay an order which pre-supposes that the competition rule has been contravened, even though this may be the very essence of the appeal.

INJUNCTIONS AND STANDING

Section 45S confers standing on any person to seek an injunction in relation to an actual or proposed contravention of the competition rule or against a person who is or may be involved in or conspired to effect the contravention. This raises a potential jurisdictional conflict if an application under this Section is rejected for want of evidence by the Supreme Court but of its own motion the ORG issues a competition notice and orders in respect of the same event or conduct.

Section 45T provides that a person who suffers loss or damage by reason of conduct of another that contravenes the competition rule may recover the amount of the loss or damage against that other person.

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19 Section 45N specifies the limited material that may be presented to the appeal tribunal. Further, Section 45C(1) provides that a competition notice 'is evidence of the matters in the notice'. This is in contrast to the equivalent section in the TPA, Section 151AN, under which a notice issued by the ACCC is only prima facie evidence of the matters in the notice.

The damages recoverable are in no way limited so as to exclude consequential loss and the action can be brought at any time within three years after the date the cause of action accrued.[20]

Section 45U provides a person a right to make an application to the Supreme Court seeking a declaration as to whether that person has or has not contravened the competition rule.[21]

ACCESS TO INFORMATION

Division 7 of Part 3A contains provisions giving the ORG information gathering powers which are in principle similar to those afforded the ACCC under Section 155 of the TPA. If the ORG *"has reason to believe"* that a person has information or a document that may assist the ORG in carrying out its duties, it may require that person to get the ORG the document or information or appear before the ORG to give such information or document.[22] A person *"must not without lawful excuse"* fail to comply with a notice issued under Section 45V.[23] There is no specific guidance as to what is or is not a lawful excuse, other than in Section 45V(5) which provides that a natural person may decline to provide such information on the basis that it may incriminate them.

Section 45W imposes restrictions upon the right of the ORG to publicly disclose information that was given to the ORG and that when given was stated to be confidential or commercially sensitive. Section 45W(2) sets out the procedure of the release of such information by the ORG. This process includes a right of appeal against ORG disclosure decisions to the appeal tribunal previously discussed above.[24]

CONFLICT WITH COMPETITION AGREEMENTS

In light of the presence of the Part IV provisions of the TPA dealing with restrictive trade practices (in particular Sections 45 and 46), a query can be raised as to the need for the significant producer provisions of the Act if the aim of those provisions is to protect and foster competition in a privatized gas industry in Victoria.[25] However, regardless of whether the provisions are necessary, this legislation also raises questions concerning Victoria's compliance with various CoAG agreements.

Victoria introduced the Competition Code by way of the Competition Policy Reform (Victoria) Act 1995. This legislation ensured that the Competition Laws (as defined in the CoAG Conduct Code Agreement) would apply in a uniform way throughout Australia. Clause 6 of the Conduct Code Agreement provides:

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20 See Section 45T(1) and (2) of the new Part 3A.

21 As with Section 45S, there is potential for jurisdictional conflict between the Supreme Court and the ORG if the court was to make a declaration that the competition rule was not breached but the ORG issued a competition notice concerning the same conduct.

22 Section 45V(1) of the new Part 3A. This power can be used in respect of any function of the ORG. However, Section 155 of the TPA can only be used if the ACCC can identify a matter that constitutes or may constitute a contravention of the TPA.

23 Failure to comply exposes a person to a fine of up to $10,000-00 or two years imprisonment.

24 Section 45X of the new Part 3A.

25 The cynical observer may view the real aim of the new provisions set out in the Act to be to shield the buyers of the privatized gas retailers in Victoria from competitive forces, thereby ensuring a better sale price for the Victorian Government.

(i) for modifications to be made to Part IV of the TPA being reflected in the corresponding provisions of the Competition Code;
(ii) for the Commonwealth to consult with participating jurisdictions before it puts forward to Parliament any modifications to Part IV or the Competition code; and
(iii) for a process of consultation and voting on proposed amendments to be undertaken.

It is arguable that the significant producer provisions amount to a *"modification"* which would by-pass the Competition Code and the process and procedures under the CoAG Conduct Code Agreement.

The significant producer legislation is also arguably inconsistent with the Agreement to Implement the National Competition Policy and Related Reforms on the basis that it is:

(i) inconsistent with the Competition Policy Intergovernmental Agreements; and

(ii) inconsistent with the required CoAG objective of effective implementation of a national framework for free and fair trade in natural gas.

If the significant producer provisions of the Act were viewed to be inconsistent with the above CoAG agreements, the Competition Code and the TPA, it would expose Victoria to being the subject of a notice under Section 150K of the TPA.[26] If such a notice was issued, Victoria would cease to be a fully-participating jurisdiction.[27] One of the consequences of such a result would be the loss of the States' ability to exercise the power under Section 51 of the TPA to exempt certain conduct with a State.[28]

UPPING THE ANTE – AMENDING WESTERN AUSTRALIA'S POLLUTION CONTROL PROVISIONS

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As the result of the *Environmental Protection Amendment Act* 1998, assented to 21 May 1998, the price of polluting the environment in Western Australia, breaching licence conditions or failing to comply with the myriad of other pollution control provisions in the *Environmental Protection Act* 1986 (WA) is going up. Introducing the elements of intention and criminal negligence, recent amendments to this Act bring Western Australia's penalty provisions into line with other jurisdictions. In addition, courts now have at their disposal an assortment of innovative sentencing options, ranging from requiring offenders to publicise the environmental harm they have caused to carrying out projects to enhance the environment in public spaces.

POLLUTION CONTROL IN RELATION TO MINING OPERATIONS

The main mechanisms for controlling point source pollution from mining and other potentially polluting operations in Western Australia are found in Part V of the *Environmental Protection Act* 1986 (WA). Part V establishes a pollution control system which requires "prescribed premises" to obtain works approvals

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26 This Section provides for the Federal Minister to issue a notice where the Minister is satisfied that the laws of a participating jurisdiction have substantially modified the Competition Code.
27 See definition in Section 4(1) of the TPA.
28 See Section 51(1C)(e)(I).
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