



Access to Third Party Facilities

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New Zealand Petroleum Conference 2008

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1. Definition of “Facilities”

- Processing facilities
- Storage facilities
- Transporting pipelines (gas and liquids)
- Port export facilities

2. The problem

- Developer will seek most efficient means for the development
- Existing facilities may have spare capacity
- Facility owner has incentive to maximise return
- Monopoly characteristic/opportunistic behaviour

3. Solution in summary

- Regulatory intervention necessary to maintain a viable and efficient industry
- Information disclosure regime for gas transmission pipelines and processing facilities already
- Should extend to all facilities that have monopoly characteristics
- Need efficient dispute resolution mechanism

4. Gas transmission pipelines

- Gas (Information Disclosure) Regulations 1997
 - Enables sufficient information to be disclosed for parties to make an informed assessment
 - Does not provide for direct sanctions; only indirect sanctions

5. Processing facilities

- Information disclosure regime for processing facilities similar to the pipeline information disclosure regime recently adopted
- Does not include storage facilities
- Will not stop the owners of the facilities with monopoly characteristics engaging in opportunistic behaviour

6. Section 36, Commerce Act 1986

- Section 36:

(2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of –

*(a) restricting the entry of a person into that or any other market;
or*

(b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or

(c) eliminating a person from that or any other market.

6. Section 36, Commerce Act 1986 (cont)

- Previously, section 36 targeted firms with a “dominant position”
- Amended to target firms who have a “substantial degree of power in the market” - (Australian) Trade Practices Act 1974

6. Section 36, Commerce Act 1986 (cont)

- Explanatory memorandum to the Australian Trade Practices Revision Bill 1986:

... 'substantial' is intended to signify 'large or weight' or 'considerable, solid or big' (Palser v Grinline [1948] AC 291 at 317). The word imparts 'a greater rather than less' degree of power, per Smithers J in Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd (1982) 64 FLR 238 at 260. At the same time 'substantial' in this context is not intended to require the high degree of market power connoted by ... being in a position substantially to control a market, or by the reference ... to the power to determine the prices of a substantial part of the goods in a market.

7. Section 36 problems

- Gas Industry Company's ("GIC") Statement of Proposal published in September 2007:

“there are some practical issues [with section 36] which make it a fairly blunt instrument” (clause 3.3)

“enforcement [under section 36] is therefore time-consuming and costly”

7. Section 36 problems (cont)

- Clear v Telecom (C.A.) (1993) 5 TCCR 413 at 442:

“The parties must return to the negotiations. It is unprofitable to reflect upon the economic efficiency of the process by which they reached this point. The Court clearly has no jurisdiction to direct the negotiations for interconnection.”

8. Gas Industry Company recommendations

- GIC a regulatory body under the Gas Act 1992
- Reviewed access to gas processing facilities in 2006
- December 2006: recommended to Minister of Energy that information disclosure should be implemented
- 14 March 2007: Minister approved recommendation
- 28 January 2008: GIC published their *Recommendation to the Minister of Energy on Information Disclosure by Owners of Gas Processing Facilities*

8. GIC recommendations (cont)

- Clause 1.10 of GIC's *Statement of Proposal: Information disclosure by owners of gas processing facilities* (September 2007):

Information disclosure will:

- *Allow Gas Industry Co to publish basic information on gas processing facilities, including forecasts of available capacity, so as to provide an efficient means for potential access seekers to screen processing opportunities;*
- *Report information on approaches by third parties seeking to have gas processed and the outcomes of those approaches; and*
- *Provide information on the gas processing sector which will assist Gas Industry Co to make a later, and final, recommendation to the Minister on the need for, and the form of, access protocols.*

8. GIC recommendations (cont)

- GIC's *Recommendation to the Minister of Energy on Information Disclosure by Owners of Gas Processing Facilities* (January 2008):

...Gas Industry Co is recommending rules to establish a limited information disclosure regime which will require gas processing facility owners to:

- Make information available to Gas Industry Co, which Gas Industry Co will publish on its website, on the capability of, and availability of capacity at gas processing facilities; and*
- Provide information to Gas Industry Co on the gas processing facility owner's responses to requests for third party access;*

These rules will expire after six years unless the Minister decides to extend the rules.



9. Problems with the status quo

- Information disclosure regime is limited to processing facilities
- Information disclosure regime is inadequate to address third party access

10. Solutions

- Information disclosure regime does not stop monopoly rents or conditions
- *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR at 390:

In the absence of guidance as to the principles applicable, the parties were, as the High Court said, “negotiating in a fog”. It is a regrettable fact that the decision of this appeal will only decide whether, in the past, Telecom has abused its dominant market position. It will not decide whether Clear’s past stance in negotiations was reasonable, let alone fix the terms for interconnection.

10. Solutions (cont)

- Pipelines, processing and storage facilities – should be subject to the same regulatory regime
- Policy environment:
 - Minerals Programme for Petroleum (2005), section II, 5:

To promote the responsible discovery and development of New Zealand's petroleum resources that contribute substantially to our economy, consistent with ... the Crown obtaining a fair return from the extraction of petroleum ...
 - Notes that attractiveness of the petroleum regime to investors is relevant consideration (chapter 2, 2.13)

10. Solutions (cont)

- Section 53, Crown Minerals Act 1991
- Recognises:
 - Land owner might by chance have a monopoly and engage in opportunistic behaviour
 - Effect of frustrating the policy objectives and development of resources
- Is there any difference between this situation and the one we are discussing today?

10. Solutions (cont)

- Information disclosure regime needs to be extended to storage facilities and (by application other facilities) supplemented by compulsory arbitration
- Example: (Australian) Trade Practices Act 1974