

Reflections on Competition Law Issues

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Key points

1. There are broadly four ways in which competition law assumes relevance to long term contracts: (a) a pre-contract authorisation application; (b) a post-contract authorisation application; (c) an application to revoke an authorisation; or (d) court proceedings involving the ACCC or private litigants. Scenarios (a), (b) and (c) raise questions as to the balance between public benefit and public detriment whereas scenario (d) does not.
2. The ACCC has shown a preparedness to acknowledge the public benefits that flow from anti-competitive aspects of long term agreements such as take-or-pay clauses. However, there are limits to the ACCC's tolerance (for example, in the context of pre-emptive rights).

A distinction can be drawn between those long term contracts that are necessary to sustain substantial, long-lived sunk investments ... and those that create no such social utility but are, rather, an instrument of foreclosure.¹

The Principal Paper provides an extremely useful account of the operation of competition law rules and principles in relation to long term contracts that are typical in the Australian resources sector, namely supply agreements, particularly for material inputs such as natural gas, that impose long term obligations on the seller to supply, and the buyer to pay for, a substantial quantity of a product.

Such long term contracts may give rise to competition law concerns 'because they hinder acquisitions from other suppliers and constitute a barrier to entry to new suppliers.'² They may also limit the freedom of suppliers to sell to other customers. Those concerns will be more acute

¹ *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997) ATPR ¶41-593 at 44,216 (Tribunal).

² P Rose, 'Long Terms Gas Sales Agreements: Trade Practices Act Implications' (2001) 20 *AMPLJ* 165 at 171.

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