BHP Billiton

4 July 2001

Telecommunications Inquiry
Productivity Commission
P O Box 80
Belconnen ACT 2616

Dear Sir/Madam,

This submission to the Productivity Commission's inquiry into the telecommunications competition law regime provides brief comments from BHP in relation to the analogous competition regime under the *Gas Industry Act* 1994 (Vic), the so-called significant producer legislation ("**SPL**").

The SPL is modelled on the regime that applies to telecommunications carriers and carriage service providers under Part XIB of the *Trade Practices Act* 1974 (Cth) ("**TPA**"), a regime which is currently under review by the Productivity Commission.

In its Draft Report concerning competition law regulation in telecommunications, the Productivity Commission recommended the repeal of Part XIB because, *inter alia*, the effects test combined with the competition notice regime increases the possibility of regulatory error and overreach. The Productivity Commission further recommended that telecommunications market conduct regulation should be left to the general provisions of the TPA.

BHP strongly supports and welcomes the economic reasoning behind the Productivity Commission's recommendations. More specifically, BHP believes that the SPL should be repealed and that market conduct for gas in Victoria should be regulated under the general competition law provisions of the TPA.

Background

In its evidence to the Productivity Commission's public hearings into the inquiry into Part IIIA of the TPA, BHP commented that:

> "... The Victorian significant producer legislation has a number of parallels with Part XIB and we would suggest that it has proven to be a barrier to competition in terms of its activities and, frankly, a frustration in trying to actually grow the Victorian gas

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market. ... we would suggest that the Victorian significant producer legislation has the same negative attributes as Part XIB".[1]

In BHP's view, the market conduct regime for the Victorian gas industry, introduced by the Victorian SPL legislation reflects a policy of haste that may have lead to not all competition issues being fully considered similar to Part XIB.[2] It does so by:

(a) introducing a competition notice regime to be administered by the Office of Regulator General ("**ORG**"), with competition notices having prima facie evidentiary effect;

(b) creating only limited judicial rights of review of ORG decisions; and

(c) limiting the need for ORG to either define a market for the purpose of issuing a competition notice or the need to establish any "use" of market power.

In sum, in BHP's view, the SPL regime substantially increases the likelihood of regulatory error and acts as a block on normal, pro-competitive, efficiency-enhancing conduct by BHP.

SPL FRAMEWORK

Part 3A of the SPL prohibits a "significant producer" from engaging in anticompetitive conduct.[3] The term "significant producer" is defined as the holder of a production licence for petroleum in the adjacent area in respect of Victoria and which has a substantial degree of power in one or more Victorian gas markets.[4]

The SPL removes the need for ORG to define a market or to engage in any detailed analysis of the competitive conditions in the market. The expression "Victorian gas market " is critical in relation to an alleged breach of the competition rule.[5] The competition rule is defined in section 40 of the Gas Industry Act in terms of an anti-competitive effects test.

The SPL does not require any nexus between the producer being "significant" (that is, having substantial market power) and "using" that market power in a relevant sense. This aspect of the SPL represents a substantial watering down of the normal market conduct provisions that apply to industries and is even more restrictive than Part XIB of the TPA.

Furthermore, the SPL (section 45) provides that ORG may issue a competition notice identifying the contravention or proposed contravention of the competition rule, if ORG believes, on reasonable grounds, that a person is a significant producer and that the person has contravened or is contravening, or is proposing to contravene, the competition rule. Section 45A of the SPL removes any right of judicial review in respect of the ORG's decision to issue a competition notice (although alternative avenues of appeal are available through a specialist appeals tribunal). Section 45C of the SPL provides that the competition notice is evidence of the matters contained in the notice.

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1 Transcript available at: http://www.pc.gov.au/inquiry/access/trans/melbourne280501.pdf (at approximately page 38 of the web-based transcript.

2 The Victorian legislation became effective as of June 8 1999.

3 GIA, section 41(1).

4 GIA, section 3.

5 This term is defined in section 3 of the GIA as a market in which gas is supplied in Victoria to a gas retailer; or is supplied to customers in Victoria – whether or not the market extends beyond Victoria.

The SPL also provides that the ORG may make mandatory orders directed to the person in relation to whom the competition notice has been served. In examining the rationale for the Victorian provisions, one finds sentiments similar to those expressed in relation to the telecommunications amendments – most notably, a concern with limiting any delay associated with regulatory intervention. This is illustrated by the removal of the need for ORG to establish a nexus between "having" substantial market power and "using" or "taking advantage of" that market power. Further, in introducing the SPL amendments, the Victorian Treasurer discussed the delays that may arise from judicial review of ORG decisions in justifying the limitations on judicial review that were introduced.[6]

CONCLUSIONS

We believe that the tightening of the well understood provisions of the TPA should not be undertaken lightly. Under the SPL, sound economic principles and clear competition policy practices have been dispensed with, or substantially altered, in order to address perceived needs to regulate market power. In BHP's view, these measures have been enacted without due regard to the error costs of doing so.

BHP therefore welcomes the fact that, in its Draft Report on Telecommunications, the Productivity Commission has recognised that these measures can generate regulatory error; stymie legitimate, efficient market conduct; and deprive consumers of the benefits of strong and vigorous competition. Furthermore, in BHP's view, these measures greatly increase the likelihood of error costs while representing a stumbling block for BHP's legitimate, welfare-enhancing, commercial conduct.

If you would like to discuss this further please do not hesitate to contact me on (03) 9652 7398.

Yours sincerely,

David Biggs
Vice President Gas Marketing

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6 Victorian Parliament, Hansard, 23 April 1998.