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SAL 18124

8 August 2018

PON Revocation,
National Competition Council,
GPO Box 250,
Melbourne VIC 3001

By email to pon@ncc.gov.au

Re: Shipping Australia Limited's (SAL) submission to the consideration of possible recommendation to revoke the declaration of shipping channel service at the Port of Newcastle

1. Background

1.1 Shipping Australia Limited (SAL) is a peak shipowner association with 28 member lines and shipping agents and 50 corporate associate members, which generally provide services to the maritime industry in Australia. Our member lines are involved with over 80 per cent of Australia's international trade and car trade as well as over 70 per cent of our break bulk and bulk trade. A number of our members are also actively engaged in the provision of coastal cargo services to Australian consignors and consignees. A list of members is available at www.shippingaustralia.com.

1.2 A major focus of SAL is to promote efficient and effective maritime trade for Australia whilst advancing the interests of ship owners and shipping agents. SAL also provides secretariat services to the many liner companies and agencies who are members of conferences, discussion agreements, consortia and joint services that have their agreements registered under Part X of the Australian Competition and Consumer Act 2012. These agreements specifically seek to facilitate and encourage growth of Australia's liner shipping trades.

1.3 A port's competitiveness worldwide to attract ship arrivals is fundamentally determined by the interaction of different factors, including the capacity of the shipping channels and constraints associated with it. SAL has been concerned that the privatisation processes and associated regulatory structure of NSW's monopoly port assets, including the provision of shipping channel access service (the service) has had no effective price regulation.

1.4 SAL supports the Australian Competition Tribunal's 2016 decision to declare the service as well the subsequent Federal Court decision to uphold it, as it provides for price certainty and an avenue to seek for arbitration in cases of access dispute. The suggested attempt to revoke this decision is not supported.

2. Access to the Service promotes competition

2.1 As mentioned in SAL's initial submission on this issue, the shipping channel at all ports constitutes the critical link to the transport of goods, including coal exports to and from the port of Newcastle. It provides a means by which access seekers, such as shipping companies or their agents, gain access to the port and the monopoly provision of these services reduces their ability to negotiate lower charges. In fact, the free reign by private enterprises, such as at the Port of Newcastle Operations Pty Ltd (PNO), to raise these service charges adds an uncontrolled fixed cost to all exports through the port and thus reduces their international competitiveness.

2.2 Australia is the world's largest coal exporter, with 78 per cent of the coal we mine sent to over 30 countries. The top five destinations for coal from Australia are Japan, China, South Korea, India and Taiwan. Coal is Australia's second biggest export after iron ore with a value of around $50 billion per annum and the Port of Newcastle is the world's biggest coal export hub, shipping more than 150 million tonnes in the last year.

2.3 It is well documented that PNO's 2015 coal tariff restructure resulted in a 60 per cent increase in the navigation service charge and based on the number of coal vessel visits to the port at the time the increase in the navigation service charge provided a conservative estimated yearly financial windfall of over AUD 22 million to PNO. This was not sufficiently justified against any increased cost base and was clear evidence of price gouging by the private port operator.

2.4 During the entire 3-year legal deliberations on this matter, there has never been any dispute that the shipping channels are a natural "bottleneck" monopoly and that the Service is necessary for the export of coal from the Hunter Valley.

2.5 The Tribunal's declaration provides a pathway to facilitate and enforce fair and reasonable priced access to NSW shipping channels. Additionally, it establishes some price certainty and permits more effective competition in the global coal market.

3. Price monitoring - Absence of regulating monopoly port infrastructure in NSW

3.1 Key port assets have historically been owned by the States and Territories and it their onus to ensure appropriate laws and regulations concerning the nature of the arrangements are enacted and apply post-privatisation of key port assets.

3.2 As part of the privatisation process of the NSW ports, consequential amendments were made to the *Ports and Maritime Administration Act 1995* (PMAA) prescribing a private port operator as a "*relevant port authority"* thereby enabling them to set and control port charges, including the navigation services charge directly related to the service, in question.

3.3 The NSW Government in their eagerness to boost a one-off sale proceeded through the privatisation process and clearly did so at the expense of creating a competitive market structure and putting in place appropriate regulation to curb monopoly pricing. This has effectively provided a one-off windfall but has placed a 'tax' on future generations of Australia.

3.4 The extent of price monitoring under the PMAA is limited to merely providing a reason for a change in the charge and does not prescribe any limits, criteria or justification for the application of any increase in the charge. The PMAA does not provide any access seeker in

relation to the Service, with any right to negotiate the terms and conditions of access or to provide for any enforcement process if agreement as to the terms of access cannot be reached.

3.5 The prices levied by PNO (and other NSW ports) are subject to price-reporting to the relevant Minister of the State of NSW under Part 6 of the PMAA, and the Minister *may* refer the pricing for investigation to the New South Wales Independent Pricing and Regulatory Tribunal (IPART).

3.6 In the absence of the existing NCC declaration, at a State level, there is a clear conflict of interest when the NSW State government who privatised the port asset is the only entity that can make a referral to the State body (IPART) with the power to provide oversight.

3.7 Also, it is well known that the NSW IPART regime is not a certified or effective access regime. This was clearly identified in the Tribunal's reasoning for the declaration noting that, had there been an effective access regime in NSW, the NCC would not have been able to recommend the declaration.

3.8 In contrast to NSW, Victoria has a certified access regime where the Essential Services Commission is the independent regulator responsible for administering a number of economic regulatory functions applying to the leased port of Melbourne including to monitor and report on the private operator's (Port of Melbourne Operations) compliance with a Pricing Order, which governs how the private operator is to set its prices for prescribed services which include shipping channel fees.

3.9 Based on the undisputable recognition in this case that shipping channels are a natural "bottleneck" monopoly infrastructure and a vital access service to the State, NSW IPART should declare the shipping channel services provided by relevant port authorities as monopolies under the IPART Act and exercise its functions in this regard. Until such time the Tribunal's declaration decision should remain in force as it will generate overall gains to the community.

3.10 Revocation of the declaration of the shipping channel service at the Port of Newcastle would prove disastrous for all access seekers and should be maintained until NSW has an effective access regime for bottleneck monopoly infrastructure such as shipping channels.

3.11 In its advocacy work which won an international prize for promoting pro-competition measures in 2016-17, the ACCC included the following three key messages to governments in relation to privatising ports[1] :

i) price monitoring is not effective for regulating monopoly port infrastructure;
ii) a negotiate-arbitrate framework is the minimum for effective regulation of monopoly port infrastructure, and
iii) market structures or arrangements that hinder potential for future competition should not be created or maintained.

This clear and credible guidance from the national regulator should be relied upon whilst deciding to maintain the declaration of the shipping channels at the Port of Newcastle.

3.12 The major contributory factor for this matter being deliberated for more than three (3) years is because the NSW Government failed to identify the shipping channels as a monopoly service and with self-interest, focused on achieving high one-off sale proceeds at the expense of appropriately addressing competition and economic efficient concerns.

[1] ICN-WBG Competition 2016-17 ACCC IRD submission

4. Reasonable terms and Conditions versus ACCC's Negotiate-Arbitrate Framework

4.1 The legislative amendment and inclusion of the phrase *"reasonable terms and conditions*" to s44CA(1) of the *Competition and Consumer Act 2010 (Cth)* is makes no substantial improvement in providing certainty to access seekers. It is open to interpretation and does not in any way assist in ensuring that an effective access regime is maintained. This amendment provides no price certainty and merely opens the door to expensive litigation. The amended declaration criteria has made it more difficult for access seekers to obtain declaration where monopoly infrastructure coupled with non-existent regulatory negotiate-arbitrate framework of such infrastructure is prevalent.

4.2 Enough evidence has been on display leading to the Tribunal's declaration, that a private operator could price gouge to the extent of a 60 per cent price increase and the so-called NSW independent pricing regulator take no notice. The current NSW access regime is unreasonable and access seekers have no negotiating framework to seek "reasonable terms and conditions".

4.3 SAL acknowledges that the current Tribunal's declaration itself does not give rise to any access rights or particular terms of access, but it opens the door to the "negotiate-arbitrate" framework in Part IIIA whereby, if the service provider and an access seeker are unable to agree on one or more terms of access, either party may refer the dispute to the ACCC for determination. Such a process provides a level playing field for users as opposed to the uncontrolled terms and conditions imposed by private port operators and could set a precedent for other monopoly port assets.

4.4 The second key message delivered by the ACCC to governments privatising ports was to include a "negotiate-arbitrate" framework as a minimum for effective regulation of monopoly port infrastructure. The ACCC's advocacy efforts led to strengthening pricing regimes, improved scope of oversight and independent dispute resolution for the privatisation of the Port of Melbourne, Port of Darwin and the Utah Point Bulk Handling facility at Port Hedland. These changes have reduced the potential for monopoly pricing and increased the likelihood that users will be able to access these monopoly port services on reasonable terms and conditions.

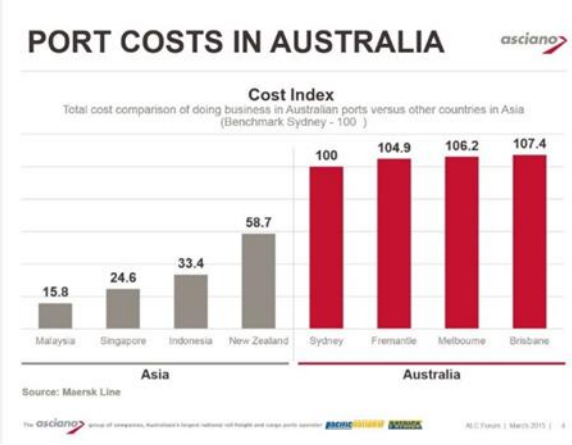
4.5 It evident that the effect of the ACCC's efforts was to protect users and consumers from unreasonably high prices and deliver better outcomes for the long-term interests of Australians. Unfortunately, the NSW community's interest could not be served by these actions of the ACCC which were undertaken post-privatisation of the NSW's ports and well after Glencore's application for the declaration.

4.6 In the absence of a certified or effective access regime in NSW, the above-mentioned "negotiate-arbitrate" framework (under the declaration) is the only fair and reliable confidential dispute resolution mechanism available which, provides oversight or has the ability to set terms (including pricing) of access for all access seekers.

5. Fostering a competitive container terminal requires pricing certainty

5.1 SAL contends the declaration criteria set out in section 44CA(1) of the CCA are satisfied and PNO itself demonstrated such during a series of public consultations it conducted in February 2018 to announce its intention to develop a container terminal, "the Port is ready and has the required infrastructure to begin developing a container terminal now (including existing land, channel, road and rail connections)".

5.2 SAL considers that this ambition is served through declaration of the navigation channel as monopoly infrastructure as the price certainty provided will attract vessels and cargo that currently call at Port Botany and possibly Port of Brisbane. The lack of competition in the Australian container ports is widely understood and evident, a new entrant with services provided on reasonable terms and conditions up to 2031 will assist development of the PNO container terminal ambition and promote a material increase in competition in the container port market.



5.3 Characteristics of the container trade at Port Botany and the Port of Brisbane are presented in the following table derived from data taken from the Bureau of Infrastructure, Transport and Regional Economics (BITRE) 2017, Waterline 61, Statistical Report.

July 2016 –June 2017	**Sydney**	**Brisbane**
Container Ship Calls, July 2016 – June 2017	1,089	942
Container ship calls, vessels < 50,000 GT	670 *(62%)*	593 *(63%)*
Container ship calls, Vessel > 50,000 GT	419	349

5.4 As the hinterland of Port of Newcastle is a smaller population than the capital cities of Sydney and Brisbane the demand for containerised cargo is less and likely to be most efficiently served by vessels in the less than 50,000 GT category.

5.5 The prospect of a pricing restructure and the realignment of the navigation charge by removing the two-tiered charge and replacing it with a flat rate / GT for container ships (as was applied to coal vessels in 2015 prior to the declaration of the channel) would see the potential port call cost increase by more than $15,000. This cost equates to $100 a unit for the first 150 containers exchanged which is a significant number for vessels less than 50,000 GT and is a source of future price uncertainty especially during the development of a fledgling market.

5.6 The significance of an additional $100 per TEU cost was identified by PNO as a competitive barrier to entering the container trade market when it called on the ACCC to investigate the 'cap and fee' arrangement provided to the Port Botany lessee. It has been revealed that under the arrangement PNO is required to pay the Port Botany lessee this amount for every container over 30,000 TEU per year. As noted in the Australian Financial Review on 18 April 2018, *"Patently, the intent and effect of the cap and fee mechanism is to constrain competition in the container business".*

5.7 In 2017 the number of containers exchanged was 9,500 TEU indicating the price uncertainty of a potential $100 TEU increase would prevent a shipping line from assessing a service to the port as a competitive alternative to Port Botany well before the 30,000 TEU cap it reached.

5.8 It is the view of SAL that declaration of the channel will assist PNO's stated intention to attract container ships to the port as it provides a measure of price certainty that is required to build up the trade.

5.9 To bolster price certainty SAL would also support the additional port services of wharfage, site occupation, security and access to utilities to be included in an extended declaration. This would provide a basis for the Port of Newcastle to compete with Port Botany which has recently increased wharfage charges without restrained with increases in 2016 for the wharfage of transhipped containers increased by 155% and in 2018 the wharfage on import and exported coastal containers has increase 186% and 91% respectively; both of these increases achieved through 'restructuring' (removal of tiers in the pricing structure).

5.10 The new criterion (a) puts the focus on the effect of declaration. Under this, the new test should have regard to existing and likely future usage of the service without declaration. A revocation of the declaration would have a material negative effect on the competitiveness of the Port of Newcastle with the Ports of Brisbane and Botany. The third message from the ACCC for governments privatising ports was that market structures or arrangements that hinder potential for future competition should not be created or maintained.

6. Conclusion

6.1 Private ports and their shipping channels are natural bottleneck monopolies which can impose excessive prices and impact on export industries unless effective access regimes with appropriate negotiating frameworks are established and implemented.

6.2 Until such time that the NSW government establishes an effective negotiate-arbitrate framework as the minimum to effectively regulate its monopoly port infrastructure, the Tribunal's declaration of the service at Newcastle should be retained for its entire period. This provides the appropriate framework for greater price certainty to access seekers, including shipping lines and their agents and assists in promoting competition and business confidence to port users and relevant stakeholders in the supply chain.

6.3 It is timely that with the Tribunal's declaration the ACCC now proceed with its arbitration of the access dispute previously notified to it by Glencore, only the second occasion, since 2006-07 that the ACCC will be called upon to arbitrate an access dispute under the National Access Regime.

6.4 The path way for immunity from declaration would be for the NSW's government to have an effective access regime (for the shipping channels) consistent with the NCC's clause 6 principles outlined in its Guide to Certification under Part IIIA of the Competition and Consumer Act 2010 (Cth) (Dec 2017).

Authorised by:
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Chief Executive Officer