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Australian Government
The Productivity Commissioners

Attention: Julie Abramson & Stephen King

Further submission following release of draft report

Victoria International Container Terminal (VICT) welcomes the draft report released by the Productivity Commission (Commission) regarding its inquiry in to Australia's Maritime Logistics System.

At a high level, VICT generally supports the industrial relations recommendations proposed by the Commission in the draft report, particularly those that seek to rectify the unbalanced distribution of power which currently sits in favour of unions in the maritime industry.

VICT otherwise notes that the details of several of the draft report's recommendations are yet to be outlined by the Commission, and will be dependent on further feedback gained from submissions and public hearings.

To this end, VICT has sought to provide further information to support the Commission in its design of the recommendations. VICT otherwise relies on its previous submissions to the Commission dated February 2022 and 27 May 2022.

Information Request 9.2: Is tenure the deciding factor on who receives training in container terminals because so much training happens within the workplace? That is, it makes sense to train someone who has the required points for promotion because they are better placed to use that training.

No, in VICT's experience tenure is not the deciding factor in which employee's receive training. However, other restrictive content in enterprise agreements often mandate which type of training can be provided to which employees. The content of these clauses extends to which employees can be trained to be considered for particular roles.

Enterprise Agreements can otherwise restrict an employer's ability to provide a role to the employee with the most suitable training and experience. For example, Schedule seven of the *Victoria International Container Terminal Operations Agreement 2021*, contains prescriptive criteria for recruitment. The Schedule requires VICT to consider various factors, including length of service, in recruiting a candidate. Length of service is given disproportionate weight in this process, with one point per month of service allocated to the candidate's overall score. This process undermines productivity and a merit-based process, as a candidate's length of service can outweigh other more critical attributes required for the role (such as evidence of leadership qualities and people management).

Information request 9.3: The Commission is interested in further evidence on how container terminal enterprise agreements enable or restrict the flexible allocation of labour. To what extent do existing arrangements provide sufficient flexibility to employers to manage the allocation of labour given variable peaks and troughs in demand?

Existing enterprise agreements are overly restrictive and do not provide sufficient flexibility for employers to respond to changing labour demands. These arrangements fundamentally impact productivity in the maritime logistics industry.

As outlined in our previous submission, during bargaining VICT faced claims for restrictive terms to be inserted into VICT's enterprise agreement. These terms were consistent with historical arrangements entered into by other operators. Several of the terms sought by unions imposed restrictive work practices that undermined productivity and impeded effective allocation of labour. As a result, VICT faced protracted periods of negotiation and threats of industrial action.

Another example is outlined in our response above regarding Schedule seven of the *Victoria International Container Terminal Operations Agreement 2021.* A further issue that arises in relation to Schedule seven is that VICT can only recruit externally for existing permanent positions which require replacement in '*exceptional circumstances'* and after consultation with employees and their representatives.

VICT is also currently involved in a dispute in the Fair Work Commission (**FWC**) regarding VICT's ability to allocate labour to particular employees. In short, VICT has decided to train a group of its existing employees in remote control desk operator skills, to address issues VICT is facing with absenteeism and leave. However, the union is disputing VICT's ability to train its existing workforce with this skill, to ensure that other workers who have traditionally performed the remote control desk operator skills can only be rostered on to do this work, resulting in more overtime hours being allocated. Whilst this dispute remains in the FWC, VICT cannot train its existing workforce in remote control desk operator skills, undermining productivity and opportunities for career progression.

VICT's experience reflects the unbalanced bargaining power borne upon new entrants to the sector who seek to avoid antiquated clauses that no longer meet the needs of the maritime industry's operational environment.

A common claim sought by unions is to place further limitations upon an employer's use of casual employment. This sacrifices flexibility in favour of strict rules regarding rostering requirements and an increase in the number of permanent employees.

Restrictions on the use of casual employment, curtails an employer's ability to efficiently deploy productive labour appropriate for the operational environment. Such arrangements also detrimentally effect employees, as employers cannot provide meaningful labour opportunities to employees who would genuinely prefer a flexible allocation of work.

Consistent with the Commission's draft finding 9.3, where employers do have available casual employees to respond to a labour need, "order of pick rules", further restrict the employer's ability to deploy the most productive workers to meet the need.

In addition to the difficulties in utilising casual employees, restrictions on the allocation of skills across different classifications and rosters means that employers often face challenges having certain tasks completed, even where there is available labour amongst their workforce.

It is in this context that many employers are forced to make additional payments to employees for overtime, rather than engage or otherwise redirect other available members of their skilled labour pool.

Although it is open to an employer to seek to challenge the application of these restrictions, either by agreement during bargaining or by application to the FWC, such an approach generally has a detrimental impact on productivity, and requires expenditure of resources whilst disputes are heard in the FWC.

Information Request 9.6: What would be the benefits and drawbacks of classifying the ports as an 'essential service' under the Fair Work Act 2009 (Cth)? What rights and obligations should follow if the ports were classified in that way?

The Fair Work Act 2009 (Cth) (**FW Act**) does not currently contain a definition of '*essential services'*, outside of certain provisions dealing with the referral of state powers to the Commonwealth.

Without further accompanying legislation, there are no rights and obligations that would be automatically conferred by simply defining the port as an essential service for the purposes of the FW Act. For example, none of the provisions in Part 3-3 of the FW Act (which deals with industrial action and when it can be terminated or suspended) turn on whether a business is an 'essential service'.

However, VICT supports a framework that recognises the unique industrial and economic context of Australia's ports, along with a need to ensure that prolonged or unfair protected industrial action is avoided. The framework must be targeted to ensure economic stability (for operators and dependant parties) and rectify the imbalance of power present in the current system.

Information Request 9.8: What content should be made unlawful in enterprise agreements in the ports?

How could the most restrictive content in enterprise agreements be curtailed without limiting the rights of workers to be consulted on issues including major workplace change?

How might draft recommendation 9.1 be practically implemented? What are the technical or legal issues which should be addressed and how should they be addressed?

As a priority, VICT recommends prohibiting "*family and friend*" recruitment clauses, which mandate that a percentage of new recruits be sourced from family and friends covered by the enterprise agreement.

Such clauses:

- undermine productivity and competition in the industry, by unduly restricting an employer's right to hire based on merit, skillset, experience, aptitude and suitability for the job;
- decrease opportunities for a diverse range of society to obtain gainful employment, particularly in respect of new entries to the sector;
- reduce the diversity of the sector more broadly; and
- fail to ensure that the job is filled by the best candidate for the role.

Other clauses which unduly restrict the ability of employers to productively operate their business and deploy labour, such as 'order of pick' clauses, should be prohibited to ensure an employer is able to efficiently organise its labour in a way that appropriately utilises an employee's skills and availability. Clauses which allow for unions to continually bring disputes and delay the implementation of operational matters falling within managerial prerogative should also be prohibited. VICT also supports prohibiting clauses which place restrictions on subcontracting, automation, recruitment and/or promotion opportunities. Such clauses undermine productivity and the industry's ability to remain competitive and responsive to external pressure points.

An expanded prohibition on restrictive content in enterprise agreements would not limit the rights of workers to be consulted on issues such as major workplace change. All modern awards contain the model consultation term which requires that employees are consulted on major changes that will have a significant effect on their

employment. All enterprise agreements are required to have an equivalent consultation clause. Such provisions would not fall within the scope of the contemplated prohibitions, and accordingly workers would not lose their right to be consulted on such matters.

Information Request 9.9: The Commission invites feedback on draft recommendation 9.2, including options to supplement or enhance the effectiveness of the proposed reforms in addressing protracted bargaining.

Feedback is also sought on the best approach to implementation, in particular:

- **whether mechanisms to address protracted bargaining should apply only to some subsectors within the ports, such as container terminal operations**
- **the design of the thresholds;**
- **any technical or legal issues.**

VICT supports draft recommendation 9.2, providing that the thresholds for mandatory FWC intervention are carefully designed to ensure the mechanism does not cause unnecessary regulation and disruption to the maritime logistics industry.

Accordingly, VICT supports the Commission's recommendation that the FWC's intervention be scalable. In short, the Commission's level of intervention must be proportionate to the disruption occurring at ports.

Mandatory FWC intervention should also be considered in other sectors outside container terminal operations, given that the same dynamics which affect container terminal operators are at play. Such intervention should occur where there is significant impact to other operators in the industry and on the supply chain. As different parts of the supply chain can have a direct impact on other providers, it is appropriate to have revised provisions for the entire supply chain.

Examples of appropriate thresholds include:

1. The first notification of protected industrial action triggers a mandatory right to conciliation in the FWC;
2. Time limits could apply, where disputes are referred to the FWC once protected industrial action has exceeded a particular time limit. Applicable time limits would vary depending on the terminal or industry.
3. Any disputes referred to the FWC under the above thresholds must be considered in context, including in light of the provisions that have already been agreed by the parties in principle, and the prevailing standards in the broader economy.

However, for the avoidance of doubt, VICT does not support any suggestion that the FWC be given additional powers to arbitrate and determine the content of enterprise agreements. Rather, the FWC should play a facilitatory role in bringing the parties together to reach a mutual agreement.

Information Request 9.12: Would the broader range of employer industrial action in draft recommendation 9.3 be practical for employers to use? Are there other approaches, including forms of employer response action other than those cited in draft recommendation 9.3 that should be considered?

VICT supports a broader range of employer industrial action articulated at recommendation 9.3 and considers they would be of practical use.

VICT considers that a broader range of employer response action is necessary to address the imbalance of power present in the existing system, which results in prolonged and protracted periods of bargaining and industrial action.

In particular, VICT recommends that employer response action include that an employer is able to stand down employees without pay in respect of protected industrial action which has been threatened and aborted at late notice (for example, 48 hours before the commencement date).

As contemplated in draft recommendation 9.4, this employer response action should be available to employers who can establish that they made arrangements for a contingency plan to be in place in respect of the expected period of protected industrial action.

Response to Draft Recommendation 6.2

VICT is concerned by the Commission's draft recommendation to regulate terminal access fees (***TACs***) so that they cannot be charged to transport operators (***Draft Recommendation 6.2***).

Regulation of this nature would reflect a marked shift in price regulation in circumstances where container terminal operators, including VICT, have already made long-term investment decisions.

VICT notes the ACCC's recent statements that VICT's entry as a third container terminal operator at the Port of Melbourne had 'enlivened competition' there.[1] Any move towards regulation of TACs would serve to undermine VICT's commercial position and put further development at risk.

VICT's parent company, ICTSI operates 35 terminals in 20 countries. Only one international container terminal in this portfolio does not have landside charges. Implementing the commission's recommendation regarding landside charges is not in line with globally accepted practices. ICTSI landside revenue accounts for 30 per cent of total revenue, meaning the Australian landside charges are consistent with the global situation.

VICT considers that regulation of TACs is unwarranted because:

- Prices charged by container terminal operators (including TACs) reflect costs actually incurred in investing in landside infrastructure.
- It is appropriate that the companies that receive the benefit of services (i.e. on the land side) pay for them.
- Cargo owners are free to switch between terminal operators and shipping lines.
- The overwhelming evidence in recent years is that container terminal operators are not receiving excessive returns.

[1] ACCC, *Container Stevedoring Monitoring Report*, 2021, page xviii.

We further address these issues below:

Increases in landside charges such as TACs are justified

As set out in VICT's submission to the Commission in February 2022, VICT was awarded the concession to design, build and operate the third international container terminal in the Port of Melbourne in 2014.

Since VICT was awarded the concession, it has "changed the competitive dynamics … by generating stronger competition for shipping lines, lowering quayside prices, and increasing investment in equipment and infrastructure."[2]

It is appropriate for prices to be commensurate with the cost of providing a service, plus a return on investment.[3] As such, it is to be expected that landside charges increase over time.

Any further changes to the regulatory environment in which VICT operates, such as Draft Recommendation 6.2, would undermine VICT's original investment decision.

Transport operators are the beneficiaries of the services container terminal operators provide

Transport operators are the beneficiaries of the landside services that VICT (and other container terminal operators) provide (ie, delivering containers from landside storage to vehicles and vice versa).

With Draft Recommendation 6.2, the Commission suggests that an alternative model is for TACs to be charged to shipping lines rather than transport operators. However, it is appropriate that the parties that receive the benefit of services pay for them.

Container terminal operators are constrained by indirect competition from cargo owners

The imposition of TACs (and other landside fees) charged by container terminal operators is constrained by indirect competition.

The Draft Report envisages a scenario whereby cargo owners can apply competitive pressure to container terminal operators by changing shipping lines based on container terminal operators' fees, although it concludes that it has received no information to support this theory to date.

However, cargo owners can – and do – switch shipping lines. In fact that Draft Report found that "cargo owners can easily switch between" shipping lines.[4] Further, in its Container Stevedoring Monitoring Report 2020-21, the ACCC was presented with evidence that some exporters "take into account a bundle of prices" when comparing offers from shipping lines.[5]

VICT appreciates that costs for total freight costs cargo owners have increased due to COVID-19, but this impact is likely to be temporary and should not form the basis upon which regulation is recommended.

TACs are not resulting in excessive returns for container terminal operators

If container terminal operators were not constrained by indirect competitive pressure, it follows that they would be receiving excessive returns.

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[2] Ms Gina Cass-Gottlieb, ACCC Chair, addressed the Ports Australia conference on 1 September 2022 to focus on competition in the container shipping industry.

[3] ACCC, *Container Stevedoring Monitoring Report*, 2021, page 48.

[4] Draft Report, page 41.

[5] ACCC, *Container Stevedoring Monitoring Report*, 2021, page 47.

The Productivity Commission's Draft Report states that "container terminal operators with market power and unconstrained by any indirect competition or regulation would not have needed to wait for profits to be squeezed before raising landside charges such as TACs".

However, this has repeatedly been found not to be the case. The Draft Report itself did not find that container terminal operators were receiving excessive returns, nor did the ACCC's Container Stevedoring Monitoring Report for 2020-21[6] or the Victorian Government's Independent review of the Victorian Ports System in 2020.[7]

Victorian Voluntary Pricing Protocol

VICT understands that indirect competition is most effective when there is transparency of the fees charged at each stage in the maritime logistics supply chain hence VICT's full support and collaboration with the Victorian Department of Transport to provide feedback and develop a suitable framework for the Victorian Voluntary Pricing Protocol (***VPP***). VICT is supportive of any discussions about improving the VPP.

Yours truly

Donovan Bubb

Chief Financial Officer

[6] ACCC, *Container Stevedoring Monitoring Report*, 2021, page 49.

[7] Victorian Government, *Independent review of the Victorian Ports System*, 2020, page 82.