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Australia's Maritime Logistics System

Please find attached a submission to the above inquiry from the Federal Chamber of Automotive Industries (FCAI). FCAI is the peak industry body for Australia's importers and distributors of new passenger motor vehicles, light commercials, motorcycles and ATVs.

With over one million new vehicles imported into Australia each year the logistics supply chain is an integral element in ensuring that Australian consumers have the widest possible choice of vehicle delivered as efficiently as possible. The maritime logistics, including the key role played by Australia's roll-on, roll-off automotive terminals around Australia, are key components in the overall supply chain.

Please contact me if you would like any further information or to discuss the attached in more detail.

Yours faithfully,

Tony McDonald

Director Industry Operations

Executive Summary

Motor Vehicle Maritime Logistics Supply Chain

With the closures of the last three remaining motor vehicle producers in 2016 and 2017, Australia is now entirely dependent on the maritime logistics supply chain for the supply of new motor vehicles to service Australian domestic markets.

Original Equipment Manufacturers (OEMs) and other importers of new motor vehicles contract with shipping lines for the transport of new motor vehicles between different ports (Australian Competition and Consumer Commission, 2015, p. 5).[1]

New motor vehicles are transported on roll-on, roll-off (ro-ro) ships. Deep sea ro-ro vessels have multiple decks accessed by ramps in the stern, bow or side of the vessel and are capable of transporting forest products, cars, containers, pallets and heavy lift cargoes (Stopford, 2009, p. 492).

The process of moving motor vehicles from the vessel to land requires a terminal facility of sufficient size and strength to handle the vessel and automotive stevedoring services to unload the cargo. [2] An automotive terminal is a piece of infrastructure that is suited to the loading, unloading and storage of motor vehicles. There are five major automotive terminals operating at various ports across Australia.

Stevedores are contracted by shipping lines to load cargo off vessels which berth at the automotive terminal (Australian Competition and Consumer Commission, 2015, p. 6). While OEMs or motor vehicle importers have a contractual relationship with shipping lines for the transportation of their motor vehicles, they do not generally have a contractual relationship with the stevedore nor the terminal operator (Australian Competition and Consumer Commission, 2009, p. 12). Automotive stevedoring involves driving motor vehicles on and off ro-ro ships and is relatively labour intensive. Unlike other forms of stevedoring, automotive stevedoring does not require cranes or other significant capital equipment.

The State of Competition at Ports with Automotive Terminals

According to the Australian Competition and Consumer Commission (ACCC) (2007, p. 22):

> *Ports are often natural monopolies due to the limited availability of suitable sites for deep water ports and the high sunk costs of the provision of port infrastructure such as berths and channels.*

Natural monopoly creates the problem of trying to gain the potential advantage of productive efficiency by a single firm without creating the conditions for monopolistic conduct or losing incentives for management control of costs (Dnes, 1991, p. 210). There have generally been three solutions generally applied to the problem of natural monopoly ports in Australia:

- price regulation
- price monitoring
- public ownership.

There is no doubt that major ports along with automotive terminal operators possess monopoly or market power.

[1] The Australian motor vehicle market is categorised by four classes: passenger motor vehicles; sports utility vehicles; light commercial vehicles; and heavy commercial vehicles.

[2] *Australian Competition and Consumer Commission v PRK Corporation Pty Ltd* [2009] FCA 715 at 16.

Competition and Infrastructure Reform Agreement

In 2006, the Commonwealth, state and territory governments signed the Competition and Infrastructure Reform Agreement (CIRA). Under clause 2.3, the parties agreed that the introduction of price monitoring for services provided by means of significant infrastructure facilities should be considered, where this would improve the level of price transparency, as a first step where price regulation may be required, or when scaling back from more intrusive regulation.

In relation to ports, the parties agreed that ports should only be subject to economic regulation where a clear need for it exists in the promotion of competition in upstream or downstream markets or to prevent the misuse of market power (clause 4.1a). Where the regulation of ports was warranted, the CIRA stipulated it should conform to a consistent national approach based on the following principles (clause 4.1b):

- wherever possible, third party access to services provided by means of ports and related infrastructure facilities should be on the basis of terms and conditions agreed between the operator of the facility and the person seeking access
- where possible, commercial outcomes should be promoted by establishing a competitive market framework that allows competition in and entry to port and related infrastructure services, including stevedoring, in preference to economic regulation
- where regulatory oversight of prices is warranted pursuant to clause 2.3, this should be undertaken by an independent body which publishes relevant information
- where access regimes are required, and to maximise consistency, those regimes should be certified in accordance with the then Trade Practices Act (now the *Competition and Consumer Act 2010* (Cwth) and the Competition Principles Agreement.

The CIRA included an agreement to allow for competition in the provision of port and port related infrastructure facility services, unless a transparent public review indicated that the benefits of restricting competition outweighed the costs to the community (clause 4.2). Under clause 4.3 each of the signatories were also required to review the regulation of ports and port authorities, handling and storage facility operations at significant ports to ensure they were consistent with the principles contained in clauses 4.1 and 4.2.

Where independent state price regulators were commissioned to conduct CIRA port reviews they recognised the potential for major seaport operators to exercise market power even if it was acknowledged that operators had not done so. As such, price monitoring regimes operate in Victoria and South Australia consistent with those states' obligations under the CIRA.

On the other hand, where CIRA port reviews were left in the hands of government agencies, and in some instances contracted out to private consultants, they tended to find no evidence of the abuse of market power and on that basis concluded there was no need for the imposition of economic regulation of any sort.

Charges at Major Port Automotive Terminals

A study comparing port costs for pure car carriers conducted by GHD Pty Ltd (GHD) (2017, p. 12) in 2017 found the Port of Fremantle and the Port of Brisbane were the notable standouts in terms of charging relatively higher total port call costs.

A comparison of current cargo charges levied at each major port on the importation of a new motor vehicle reveals that the Port of Fremantle and the Port of Brisbane by far levy the highest cargo charges.

It is perhaps no coincidence that the two ports completely lacking any sort of price oversight regime for the provision of monopoly port infrastructure also appear to levy the highest port charges on pure car carriers and cargo charges on the importation of new motor vehicles.

Excessive port charges due the absence of a robust regulatory regime will contribute towards the slower upgrade of the motor vehicle fleet, with the associated adverse safety, consumer and environmental consequences.

ACCC Undertakings in Relation to Automotive Terminals

The automotive terminals operated by Melbourne International RoRo & Auto Terminal Pty Ltd (MIRRAT) at the Port of Melbourne and the two Australian Amalgamated Terminals Pty Limited (AAT) automotive terminals at Port Kembla and Fisherman Islands Cargo Terminal (FICT) at the Port of Brisbane are subject to court enforceable undertakings under section 87B of the *Competition and Consumer Act 2010* (Cwth) accepted by the Australian Competition and Consumer Commission (ACCC).

Both the AAT and MIRRAT undertakings provide for a price dispute resolution process that allows an annual dispute right under which the expert must assess whether any tariff increases proposed by AAT or MIRRAT comply with cost-based (i.e. building block) requirements (Gilbert + Tobin, 2021).

As part of the dispute resolution process, the automotive terminal operators are required to appoint an independent price expert to adjudicate on price disputes.

It is eminently reasonable that automotive terminal operators should be able to cover their fixed costs and it is recognised that such fixed costs are high for terminal operators. However, automotive terminal operators should cover their fixed costs on the basis of reasonable and independently verifiable import volumes forecasts. If automotive terminal operators seek to raise prices to cover their fixed costs based on unrealistically pessimistic import volumes, then this would effectively amount to price gouging.

If automotive terminal operators seek to impose and rationalise substantial price increases based on questionable volume forecasts and terminal throughput, that in turn is deemed reasonable by the independent price expert, then as an added discipline there should be the capacity for any significant over-recovery to be handed back to OEMs and other new motor vehicle importers in some form. This could be in the form of discounted future terminal prices from any windfall gains. The terms and conditions of the ACCC undertaking should be renegotiated to facilitate such an outcome to enable such redress.

Biosecurity Services at Automotive Terminals

The task of biosecurity is managing the risk of entry, establishment and spread of pests, diseases and weeds that could pose a threat to animal, plant or human health or the environment (Commonwealth of Australia, 2015, p. 123). The Commonwealth Government Department of Agriculture, Water and the Environment (DAWE) has primary responsibility for implementing pre-border and border biosecurity measures.

Notwithstanding increasing efforts to minimise biosecurity risks via offshore treatments and protocols, imported new motor vehicles do pose a biosecurity risk.

When new motor vehicles arrive in Australia, DAWE biosecurity officers conduct surveillance inspections to ensure compliance with Australia's import requirements (Department of Agriculture and Water Resources, 2016, p. 19).

Five per cent of each shipment of new cars is inspected unless two contaminated vehicles are discovered. If two contaminated vehicles are discovered, the inspection level is increased to 20 per cent (Inspector-General of Biosecurity, 2018, p. 56). If a further two contaminated vehicles are found, the whole consignment will require detailed inspection, cleaning to remove any visible seeds and then re-inspection. The importer/manufacturer may elect to have the whole consignment cleaned at any stage before re-inspection. This process continues until the biosecurity officer is satisfied the cargo is not carrying any further risk material. If any insects are detected, the vehicles

are cleaned and released while the insects are sent for identification by the department's entomologists.

The charges imposed by both AAT and MIRRAT for the provision of quarantine services such as washing and cleaning new motor vehicles appear to be excessive and exorbitant.

Automotive terminal operators seem to have leveraged their monopoly power into the provision of quarantine services. The provision of these quarantine services by automotive terminal operators should be contestable for other parties to provide these services, not the exclusive domain of monopoly automotive terminal operators.

Clauses 4.1b and 4.2 of the Competition and Infrastructure Reform Agreement would appear to impose an obligation upon states to ensure that the provision of quarantine services at automotive terminals should be contestable, and not locked up and captive to monopoly automotive terminal operators. Unlike with shipping containers, motor vehicles cannot be removed from the terminal for cleaning without incurring significant additional expense.

Port of Fremantle

There is arguably a conflict of interest for the WA Government in both its role as an economic regulator to ensure the monopoly power of commercial ports is not abused, and also as the owner and the beneficiary of dividends and dividend equivalent payments generated by commercial port authorities such as Fremantle Ports. For the time being, it appears the WA Government has chosen to ignore any problems in relation to the exploitation of monopoly power by commercial ports.

Fremantle Ports' imposes the Cargo Berth Hire charges to cargo loaded onto or discharged from a vessel berthed at a heavy duty berth in the Port of Fremantle (Fremantle Ports, 2021a, p. 3).

Up until the end of September 2021 Fremantle Ports did not apply this charge to empty containers, livestock, pipeline products (including bunkers), scrap metal and new and used vehicles up to 25 m^3.[3] However, Fremantle Ports wrote to shipping lines in August 2021 informing them that following a review of fees and charges, it was going to cease providing an exemption on new and used motor vehicles from the Cargo Berth Hire charges.[4] As a consequence, Fremantle Ports (2021a, p. 3) now imposes the Cargo Berth Hire charges on the importation of all motor vehicles at the rate of $1.9785 per m^3.

Fremantle Ports justified the imposition of the Cargo Berth Hire charges upon the importation of motor vehicles on the basis of the significant increase in demand for heavy duty cargo berth space which was being experienced at Fremantle Ports' Inner Harbour, with the demand for berth space arising as a consequence of the increase in trade for new and used motor vehicles, heavy machinery, and steel.[5]

The rationale provided for the imposition of the Cargo Berth Hire charges upon the importation of new motor vehicles appears disingenuous when considered within the broader historical context. New motor vehicle sales in 2019-20 were dramatically affected by the financial impact of the COVID-19 pandemic, especially during March and April of 2020.

If the reason for the imposition of the Cargo Berth Hire charges upon the importation of new motor vehicles was due to competition for heavy duty berths and the resulting the congestion, then the available evidence would suggest this is far from the case. During 2020-21, there were only 178 ship visits to the Port of Fremantle by vehicle carriers, that compares to 186 visits during 2019-20 and an average number of visits of around 196 in the 10-year period to the end of 2019-20.

[3] See Fremantle Ports (2018, p. 3).
[4] Private correspondence from Fremantle Ports to a shipping line.
[5] *ibid*.

While the importation of new motor vehicles did increase by 29.4 per cent in 2020-21 over the previous financial year, the importation of new motor vehicles through the Port of Fremantle was unusually low during 2019-20 largely due to the financial impact associated with the onset of the COVID-19 pandemic. On the other hand, the amount of new motor vehicles imported through the Port of Fremantle during 2020-21 was not unusually high, and was surpassed in 6 out of the previous 10 years from 2010-11 to 2019-20.

The heavy duty berths at the Port of Fremantle Inner Harbour are specifically designed to cater for high and heavy cargo - types of cargos that have unusual height and weight requirements (White, 2018).[6] While vehicle carriers do use these heavy duty berths, they are not necessarily for the discharge of new motor vehicles such as passenger motor, sport utility and light commercial vehicles. Where infrastructure only generates exclusive and direct benefits for a specific group of individuals, efficiency requires that these beneficiaries should bear at least some of the cost of financing the investment (Chan, Forwood, Roper, & Sayers, 2009, p. 230).

Fremantle Ports had previously imposed the Cargo Berth Hire charges for the use of the heavy duty berths on the basis of the beneficiary pays principle.[7] If high and heavy cargo wasn't been loaded or unloaded, then the additional charges for using the heavy duty berths was waived while the other standard port fees and charges continued to apply.

This appears to be an exercise in the naked abuse of monopoly power by Fremantle Ports that will extract around an additional $2 million per annum from car carrier shippers, with some of these additional costs passed through to new motor vehicle importers, dealers and ultimately consumers.

The WA Government should refer Fremantle Ports to the WA Economic Regulation Authority for an independent investigation under s. 38 of the *Economic Regulation Authority Act 2003* (WA) to determine whether it is abusing its monopoly power in relation to cargo charges levied on the importation of new motor vehicles.[8] An independent investigation would overcome the potential conflict of interest that the WA Government has in relation to the Port of Fremantle as both an economic regulator of a natural monopoly port and as a potential beneficiary of its monopoly rents.

[6] Shipping line RTM Lines (2020) has classified ocean cargo as high and heavy if its length exceeds 18m, its height exceeds 4.5m, its width exceeds 4.5m, and its weight exceeds 80mt.

[7] The beneficiary pays principle has been described as being the situation where anyone who benefits from an activity is required to contribute to the cost of undertaking it (Productivity Commission, 2001, p. xxi) The beneficiary pays principle is a commonly used means for attributing costs and recouping them from beneficiaries.

[8] S. 38 of the of the *Economic Regulation Authority Act 2003* (WA) enables the relevant WA Minister to refer to the ERA any matter relating to an industry that is not regulated.

Motor Vehicle Maritime Logistics Supply Chain

With the closures of the last three remaining motor vehicle producers in 2016 and 2017, Australia is now entirely dependent on the maritime logistics supply chain for the supply of new motor vehicles to service Australian domestic markets. In 2021 over 1 million motor vehicles were imported and sold in Australia (Federal Chamber of Automotive Industries, 2022).

Original Equipment Manufacturers (OEMs) and other importers of new motor vehicles contract with shipping lines for the transport of new motor vehicles between different ports (Australian Competition and Consumer Commission, 2015, p. 5).[9] Motor vehicles are large, high-value and fragile units which need careful stowage (Stopford, 2009, p. 66). Shipping lines, such as Wallenius Wilhelmsen, Mitsui O.S.K. Lines, and Kawasaki Kisen Kaisha ("K" Line), own and operate shipping vessels suitable for the sea transportation of motor vehicles.

New motor vehicles are transported on roll-on, roll-off (ro-ro) ships. Deep sea ro-ro vessels have multiple decks accessed by ramps in the stern, bow or side of the vessel and are capable of transporting forest products, cars, containers, pallets and heavy lift cargoes (Stopford, 2009, p. 492). Forest products, containers and palletised cargo are loaded with forklift trucks, while cars, trucks and other wheeled cargo are driven on (Stopford, 2009, p. 492). While it is technically possible to carry motor vehicles on container ships and bulk carrier ships, wheeled cargoes can be handled more efficiently with ro-ro access (Stopford, 2009, p. 470).

The types of ro-ro ships that carry motor vehicle to and from Australia are usually Pure Car Carriers (PCC) and Pure Car and Truck Carriers (PCTC). PCC and PCTC are distinctive looking ships with a box-like superstructure running the entire length and breadth of the hull, fully enclosing and protecting the cargo (Federal Chamber of Automotive Industries, 2009, p. 4). They typically have a stern ramp for dual loading of many thousands of vehicles, as well as extensive automatic fire control systems (Federal Chamber of Automotive Industries, 2009, p. 4). The PCTC has liftable decks to increase vertical clearance as well as heavier decks for 'high and heavy' cargo (Federal Chamber of Automotive Industries, 2009, p. 4).[10]

The process of moving motor vehicles from the vessel to land requires a terminal facility of sufficient size and strength to handle the vessel and automotive stevedoring services to unload the cargo.[11] An automotive terminal is a piece of infrastructure that is suited to the loading, unloading and storage of motor vehicles. In particular, the area adjacent to the wharf must generally be large enough to accommodate large volumes of motor vehicles and generally be free from any obstructions that might restrict the movement of motor vehicles. It is not practical to stevedore motor vehicles at port terminals that are not set up to accommodate motor vehicles, such as bulk and container terminals.

Terminal operators or the port authorities provide terminal space for the temporary storage of motor vehicles after they are discharged from a vessel (Australian Competition and Consumer Commission, 2009, p. 11). Customs and biosecurity clearances need to be obtained.

The terminal operator is generally responsible for the day-to-day operation of the terminal, which includes managing the arrival of vessels, providing temporary storage for motor vehicles and facilitating access to the terminal by stevedores, mooring service providers and pre-delivery inspection (PDI) operators (Australian Competition and Consumer Commission, 2015, p. 6). The terminal operator also facilitates a receipt and delivery process where land based logistics/transport

[9] The Australian motor vehicle market is categorised by four classes: passenger motor vehicles; sports utility vehicles; light commercial vehicles; and heavy commercial vehicles.

[10] Shipping line RTM Lines (2020) has classified ocean cargo as high and heavy if its length exceeds 18m, its height exceeds 4.5m, its width exceeds 4.5m, and its weight exceeds 80mt.

[11] *Australian Competition and Consumer Commission v PRK Corporation Pty Ltd* [2009] FCA 715 at 16.

carriers access the terminal to support movement of cargo to or from the terminal in order to deliver automotive new motor vehicles to OEMs, other importers and dealers.

Stevedores are contracted by shipping lines to load cargo off vessels which berth at the automotive terminal (Australian Competition and Consumer Commission, 2015, p. 6). While OEMs or motor vehicle importers have a contractual relationship with shipping lines for the transportation of their motor vehicles, they do not generally have a contractual relationship with the stevedore nor the terminal operator (Australian Competition and Consumer Commission, 2009, p. 12). Automotive stevedoring involves driving motor vehicles on and off ro-ro ships and is relatively labour intensive. Unlike other forms of stevedoring, automotive stevedoring does not require cranes or other significant capital equipment.

Stevedores contract with the terminal operator for the use of the terminal space and related equipment (Australian Competition and Consumer Commission, 2009, p. 11). In some cases, stevedores also act as terminal operators.

There are five major automotive terminals operating at various ports across Australia. Australian Amalgamated Terminals Pty Limited (AAT) (2020) is Australia's largest motor automotive terminal operator and can handle in excess of 600,000 motor vehicles per annum from its two locations:

- Inner Harbour at Port Kembla (80 km south of Sydney)
- Fisherman Islands Cargo Terminal (FICT) at the Port of Brisbane.

In the 2021 calendar year just over 336,000 motor vehicles were imported through Port Kembla (NSW Ports, 2022), while during the 2020-21 financial year just under 250,000 motor vehicles were imported through the Port of Brisbane (Ports Australia, 2022).

The largest automotive terminal in Australia is located at Webb Dock West at the Port of Melbourne and operated by Melbourne International RoRo & Auto Terminal Pty Ltd (MIRRAT), that is ultimately a wholly owned shipping line Wallenius Wilhelmsen. In excess of 430,000 motor vehicles passed through the Webb Dock West automotive terminal during the 2021 calendar year (Port of Melbourne, 2022).

The port operator Flinders Ports operates an automotive terminal in the Outer Harbour at Port Adelaide. Over 57,000 motor vehicles were imported through the Port of Adelaide during the 2021 calendar year (Ports Australia, 2022).

The port operator at the Port of Fremantle, Fremantle Ports, provides automotive terminalling services from two locations in the Inner Habour. The Port of Fremantle is able to process more than 100,000 motor vehicle imports per annum.[12]

There are two main automotive stevedores operating across Australia: Qube Ports and the Linx Cargo Care Group. The holding company for Qube Ports is also the owner of AAT.

PDI operators are contracted by OEMs or motor vehicle importers to inspect, clean and process vehicles prior to delivery to their ultimate destination (Australian Competition and Consumer Commission, 2015, p. 6). The functions of PDI includes removal of the motor vehicle from the wharf, fitting compliance plates, insertion of log books into the vehicle, removing protective wrapping from vehicles, surveying any vehicle damage, ensuring vehicles are built to specifications, mechanical testing, fitting accessories, cleaning and washing vehicles, and performing any rectification services to repair any damage. These services may be performed at PDI facilities located on or off wharf (Australian Competition and Consumer Commission, 2009, p. 11). Motor vehicles that are subject to on wharf PDI are delivered direct to motor vehicle dealers.

[12] See Fremantle Ports (2021).

Finally, road and rail transport operators move motor vehicles between ports and storage facilities on behalf of OEMs and other new motor vehicle importers.

The State of Competition at Ports with Automotive Terminals

The World Bank (2007, p. 270) suggests there are three types of port competition:

- interport competition arises when two or more ports or their terminals are competing for the same trades
- intraport competition refers to a situation where two or more different terminal operators within the same port are vying for the same markets
- intraterminal competition refers to companies competing to provide the same services within the same terminal.

While the transport by land of motor vehicle cargoes through interstate ports is possible providing the opportunity for interport competition, whether it occurs will depend on the costs of land transport compared to the cost of shipping (Essential Services Commission of Victoria, 2014, p. 39). The Essential Services Commission of Victoria (2014, p. 42) has previously concluded that high land transport costs and the established supply chains for imported motor vehicles already operating in close vicinity to other ports, materially constrain the scope for competition between east coast Australian ports in relation to motor vehicle port services. Further movement of imported motor vehicles leads to additional transport costs as well as the increased potential for vehicle damage during transit.

Intraport competition is not always feasible, being dependent on sufficient volumes of cargo to allow two or more operators to run profitable and effective businesses (Essential Services Commission of South Australia, 2017, p. 16). There is generally an absence of intraport competition in the provision of automotive terminalling services around Australia.

When both interport and intraport competition is muted or absent, the port and terminal operators may have an incentive to use their market power to charge high tariffs (particularly for captive cargoes) (Essential Services Commission of South Australia, 2017, p. 16).

This leaves intraterminal competition between automotive stevedores as the only effective means of competition within port supply chain. While automotive stevedoring consists of a duopoly composed of Qube Ports and the Linx Cargo Care Group, there is arguably effective competition as barriers to entry into automotive stevedoring are reasonably low as it is a labour intensive activity requiring little, if any, capital equipment.

According to the Australian Competition and Consumer Commission (ACCC) (2007, p. 22):

> *Ports are often natural monopolies due to the limited availability of suitable sites for deep water ports and the high sunk costs of the provision of port infrastructure such as berths and channels.*

Natural monopoly is the situation where the entire demand within the relevant market can be satisfied at lowest cost by one firm (Posner, 1969, p. 548). It usually reflects the existence of unexhausted economies of scale, but can persist beyond the point at which economies of scale have been exhausted and average costs begin to rise.

A monopoly is objectionable on economic grounds because it reduces output and increases price, in turn creating a deadweight or efficiency loss. The outcome under monopoly is that an inefficient level of output is produced because some of the consumers who would have purchased the product in a competitive market do not choose to do so at the higher price, which is referred to as a loss of allocative efficiency. Monopoly pricing also results in a wealth transfer from consumers to the seller of a product (Depoorter, 1999, p. 501).

Productive efficiency (also known as technical efficiency) is achieved where individual firms produce the goods and services that they offer consumers at least cost. (Hilmer, Rayner, & Taperell, 1993, p. 4). In a natural monopoly market, it will be less costly for one firm to serve demand than two or more firms (Productivity Commission, 2013, p. 81). The case of natural monopoly has sometimes been presented as a trade-off between allocative and productive efficiency in that while a single producer will minimise production costs, an unregulated market will lead to prices that are too high resulting in a loss of allocative efficiency:

> *The existence of a natural monopoly obliges a society to face a conflict between productive and allocative efficiencies whose solutions require government intervention in the form of regulation. To achieve productive efficiency, it would be necessary to allow only one firm in the market, because it is the only case when the value of the inputs used to supply the market is minimized. However, this lack of competition would encourage the monopolist to set prices above marginal cost, therefore impeding the achievement of allocative efficiency that is produced when prices are set as close as possible to production costs. (Angeldonis, 2010, p. 16)*

Natural monopoly creates the problem of trying to gain the potential advantage of productive efficiency by a single firm without creating the conditions for monopolistic conduct or losing incentives for management control of costs (Dnes, 1991, p. 210). There have generally been three solutions generally applied to the problem of natural monopoly ports in Australia:

- price regulation
- price monitoring
- public ownership.

Price regulation is generally reserved for markets where competition is not strong with market participants able to exercise market power. When price regulation is imposed in some form, regulators generally attempt to emulate an outcome closely akin to that achieved in a competitive marketplace. Because the price of a product is generally linked back to the marginal cost of the product in a competitive marketplace, price regulation usually operates with some reference being made back to the cost of production, generally some measure of long run marginal cost that incorporates consideration of the cost of fixed capital. This is consistent with the building block approach to price regulation adopted by various Australian competition regulatory bodies.

A lighter touch alternative to price regulation is price monitoring that can provide some transparency over an operators' performance and allows for some general observations to be made regarding whether they are taking advantage of the lack of competition. This in turn can help inform governments about whether some form of price regulation may be required to better protect consumers and promote more efficient outcomes. Following port privations, state governments have exhibited a preference to rely on price monitoring arrangements as a means of influencing monopoly port infrastructure pricing (Sims, 2016).

One of the reasons for retaining port authorities in public ownership has been to guard against the abuse of market power. According to Professor Malcolm Tull of Murdoch University and Professor Fred Affleck of the University of Western Australia (2007, p. 2):

> *Historically the majority of ports in Australia – and until recently virtually all worldwide – have been publicly owned, owing to the perception they are natural monopolies and that public ownership can potentially prevent abuse of their market power.*

However, it has been contended that private sector firms will always display higher levels of productive efficiency than public sector enterprises because of the different incentives between private and public sector owners and managers.[13] In many countries, public enterprises have developed a reputation for inefficiency and control problems that offset any possible pricing advantage of a public enterprise operating under natural monopoly conditions (Dnes, 1995).

There is no doubt that major ports along with automotive terminal operators possess monopoly or market power. The Essential Services Commission of South Australia (2017, p. 16) has found that the operator of Port Adelaide, Flinders Ports, has the potential to exercise market power even though it has not found any evidence of this market power being exercised.

Specifically in relation to automotive terminalling, the ACCC (2014a, p. 6) has observed in relation to the Port of Melbourne:

> *The Port Capacity Project will result in the terminal operator of the [Webb Dock West] Terminal controlling a monopoly asset, which will give it market power in respect of that asset ….*

More recently the Essential Services Commission of Victoria (2020, p. 16) has observed:

> *With respect to motor vehicle imports, on the basis of the evidence provided, we see little prospect that the trade could relocate to Geelong or Hastings within a reasonable timeframe if rental costs at the Port of Melbourne increased.*

Competition and Infrastructure Reform Agreement

In 2006, the Commonwealth, state and territory governments signed the Competition and Infrastructure Reform Agreement (CIRA). Under clause 2.3, the parties agreed that the introduction of price monitoring for services provided by means of significant infrastructure facilities should be considered, where this would improve the level of price transparency, as a first step where price regulation may be required, or when scaling back from more intrusive regulation.

In relation to ports, the parties agreed that ports should only be subject to economic regulation where a clear need for it exists in the promotion of competition in upstream or downstream markets or to prevent the misuse of market power (clause 4.1a). Where the regulation of ports was warranted, the CIRA stipulated it should conform to a consistent national approach based on the following principles (clause 4.1b):

- wherever possible, third party access to services provided by means of ports and related infrastructure facilities should be on the basis of terms and conditions agreed between the operator of the facility and the person seeking access
- where possible, commercial outcomes should be promoted by establishing a competitive market framework that allows competition in and entry to port and related infrastructure services, including stevedoring, in preference to economic regulation
- where regulatory oversight of prices is warranted pursuant to clause 2.3, this should be undertaken by an independent body which publishes relevant information
- where access regimes are required, and to maximise consistency, those regimes should be certified in accordance with the then Trade Practices Act (now the *Competition and Consumer Act 2010* (Cwth) and the Competition Principles Agreement.

The CIRA included an agreement to allow for competition in the provision of port and port related infrastructure facility services, unless a transparent public review indicated that the benefits of restricting competition outweighed the costs to the community (clause 4.2). Under clause 4.3 each

[13] See Davies (1971; 1977).

of the signatories were also required to review the regulation of ports and port authorities, handling and storage facility operations at significant ports to ensure they were consistent with the principles contained in clauses 4.1 and 4.2.

CIRA port reviews and Economic Regulation of Ports

Where independent state price regulators were commissioned to conduct CIRA port reviews they recognised the potential for major seaport operators to exercise market power even if it was acknowledged that operators had not done so. As such, price monitoring regimes operate in Victoria and South Australia consistent with those states' obligations under the CIRA.

On the other hand, where CIRA port reviews were left in the hands of government agencies, and in some instances contracted out to private consultants, they tended to find no evidence of the abuse of market power and on that basis concluded there was no need for the imposition of economic regulation of any sort.

New South Wales

The NSW Government engaged PriceWaterhouseCoopers (PwC) to conduct a CIRA review of port arrangements. PwC (2007, p. 59) found the existing pricing review framework to be reasonable in terms of achieving a balance between promoting efficient costs and reducing the scope to extract monopoly rents. It also found that wider objectives of the port corporations, contained in legislation should constrain the significant use of monopoly power in setting port charges. However, this conclusion is no longer applicable given the decision of the NSW Government to privatise Port Kembla and Port Botany.

PwC (2007, p. 80) concluded that it was not necessary to have the prices of terminal operators subject to regulation as their returns and productivity were already monitored by the ACCC with prices regularly reported by the ACCC. However, this price monitoring and reporting only relates to container terminal operators and stevedores and does not include automotive terminalling and other break bulk and bulk commodities.

With the privatisation of NSW ports, the NSW Government imposed economic regulation of ports through a port price monitoring framework contained in Part 6 of the *Ports and Maritime Administration Act 1995* (NSW) (Essential Services Commission of South Australia, 2017, p. 48). The price monitoring scheme applies to all ports in NSW (including Port Kembla) and to all port operators (Port Corporations and declared private port operators). Port operators are required to publish information on charges, provide reports to the Minister, and publish notifications of price changes.

Queensland

The Queensland Government established a Port Competition Review Committee (PRC) comprising four senior representatives from Queensland Transport, Queensland Treasury and the Department of Premier and Cabinet (Queensland Transport, 2007, p. 6). The PRC was responsible for overseeing the review and making recommendations to the Queensland Government in respect of any changes required in the current arrangements and practices, to ensure compliance with the CIRA principles. In relation to clause 4.1a, the PRC concluded:

> *Stakeholders have not identified any need for ports to be regulated to further promote competition in other markets. Additionally, stakeholders have not raised any concerns regarding the misuse of market power by port authorities in Queensland. In light of the fact that Queensland already has a third party access regime which can be applied to port infrastructure, there is no need for any reform in this area. (Queensland Transport, 2007, p. 18)*

This conclusion was reached despite Shipping Australia Limited (2007, p. 3) suggesting that price monitoring should be imposed upon port authorities and major service providers in ports to

determine if price regulation may be required, and the Queensland Competition Authority (QCA) (2007, pp. 2-3) warning that users may be dissatisfied with prices at Queensland's non-regulated ports and terminals.

In 2009 the FCAI applied to the QCA for the declaration of the vehicle import service provided by the Fisherman Islands Cargo Terminal (FICT) at the Port of Brisbane under the *Queensland Competition Authority Act 1997* (Qld) (QCAA). In April 2011 the QCA determined that the vehicle import service was not a candidate service and thus rejected the FCAI's application.

The FCAI's experience is consistent with the views expressed by ACCC Chairman Rod Sims (2012, p. 7), who contended businesses perceive the risk of declaration as very low and that in light of the delays, cost and uncertainties, suggested that declaration was not considered credible. Mr Sims further added:

> *If this is so, governments faced with decisions about whether or not to regulate should exercise extreme caution in relying on declaration to solve access problems.*

While there is provision under Queensland legislation for the Queensland Competition Authority (QCA) regulate all the ports in Queensland if directed to do so, only the Dalrymple Bay Coal Terminal (DBCT) is presently subject to economic regulation by QCA.

KPMG (2009) was engaged by the Council of Australian Governments (COAG) to undertake an assessment of the state and territory reviews of port regulation. KPMG made a number of observations in relation to the PRC report, including:

> *… whilst the report does not recommend any further regulation, it does not explicitly address existing regulation and whether or not this is still adequate.* (KPMG, 2009, p. 31)
>
> *… Queensland conducted a concise review that was not supported by the depth of analysis of reviews of the other jurisdictions. Furthermore, it appears to rely heavily on one source of information, the consultation phase.* (KPMG, 2009, p. 33)
>
> *… the review relies heavily on the consultation phase and provides limited independent and research and analysis and consideration of the impact of the existing legal and regulatory framework on competition and the CIRA principles. Furthermore, it does not include any empirical evidence to support its findings …* (KPMG, 2009, p. 77)

Western Australia

The WA Government engaged the Allen Consulting Group (ACG) to conduct the CIRA port review. The ACG (2009, p. xii) report concluded in relation to WA ports that:

> *There is no evidence of port and related infrastructure service providers having misused market power and accordingly there are no instances where economic regulation of providers of port facilities is required to either prevent the misuse of market power in the provision of port facilities by the port authorities or to increase competition in the downstream markets for port services.*

There is no ministerial approval of port charges of the port authorities, nor is there independent regulatory oversight of port charges in Western Australia (Essential Services Commission of South Australia, 2017, p. 50). Ports are not a 'regulated industry' for the purpose of the *Economic Regulation Authority Act 2003* (WA) and, as such, the WA Economic Regulation Authority powers of economic regulation are not currently applied to any ports.

Victoria

The Victorian Government commissioned the Essential Services Commission of Victoria (ESCV) (2009) to conduct the CIRA port review as part of its review of Victorian ports regulation. In its final report, ESCV (2009, p. 168) concluded:

> *Given that the Commission has demonstrated that PoMC has substantial market power in a number of sub-markets, it is appropriate to subject PoMC to economic regulation to prevent the misuse of market power.*

The Victorian Government assigned several regulatory roles to the ESCV (2020, p. 1) in 2016 when legislation was passed to enable the Port of Melbourne's commercial operations to be leased to a private operator. This includes monitoring and reporting on the port licence holder's compliance with the Pricing Order, which governs how the port licence holder is to set its prices for prescribed services and the port licence holder's setting of rents for Port of Melbourne land (Essential Services Commission of Victoria, 2017).

South Australia

The South Australian Government engaged the Essential Services Commission of South Australia (ESCOSA) to review the port access regime for consistency with SA's obligations under clause 2 of the CIRA. This review coincided with the scheduled reviews of the price monitoring regime and the access regime in 2007.

The SA Department for Transport Energy and Infrastructure (SADTEI) (2008) undertook a further review of significant ports in 2008 consistent with SA's obligation under clause 4.3 of the CIRA. The only port nominated as 'significant' and requiring review in SA was Port Adelaide. The review conducted by SADTEI considered other aspects of regulation and competition at Port Adelaide relevant to clause 4 of the CIRA, which were not covered by the ESCOSA review.

In its review, ESCOSA (2007, p. 20) concluded that the structure of the market for essential maritime services suggested there was the potential for market power to be misused. However, ESCOSA did not find any clear evidence that port operators had misused this market power. Based on these findings, ESCOSA concluded that there was no justification for introducing a more "heavy-handed" price regulation framework than what was already in place. It argued that the major benefits from price monitoring were that it provided transparency to access seekers through the publication of its port charges. Although it was acknowledged that regulation imposed some compliance costs, ESCOSA found that these costs were outweighed by the benefits provided by price monitoring.

The *Maritime Services (Access) Act 2000* (SA) (MSA Act) provides for the establishment of the South Australian ports access and pricing regimes (Essential Services Commission of South Australia, 2017, p. 1). The purpose of those regimes is to provide for access to proclaimed ports on fair commercial terms, and to promote the economically efficient use and operation of, and investment in, ports infrastructure services. It is intended to protect the interests of ports users from the potential exercise of market power by port operators.

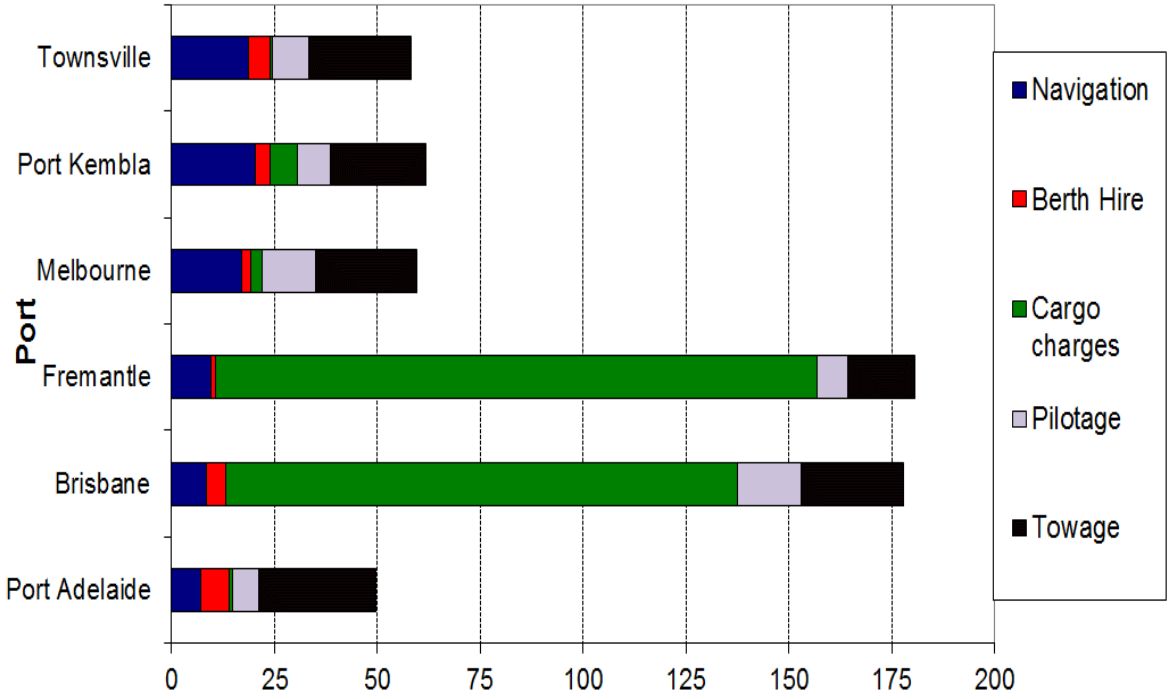
The MSA Act allows for the regulation of 'Maritime Services' for all proclaimed ports (Essential Services Commission of South Australia, 2017, p. 1). Within those services are 'Regulated Services' which are subject to access regulation (Access Regime) and 'Essential Maritime Services' (EMS) and 'Pilotage Services' (Pilotage) which are subject to price regulation (Pricing Regime). Under the MSA Act, the ESCOSA is authorised to make a price determination (Determination). The current Determination provides for price regulation through a price monitoring framework.

Charges at Major Port Automotive Terminals

A study comparing port costs for pure carriers conducted by GHD Pty Ltd (GHD) (2017, p. 12) in 2017 found the Port of Fremantle and the Port of Brisbane were the notable standouts in terms of charging relatively higher total port call costs.

GHD (2017, p. 12) opined that the reasons for the higher total port call costs were unclear, but noted that both ports were the gateway (only choice) ports for their respective catchments. Further details on the total costs per port visit reproduced from the GHD report is provided in Figure 1 below.

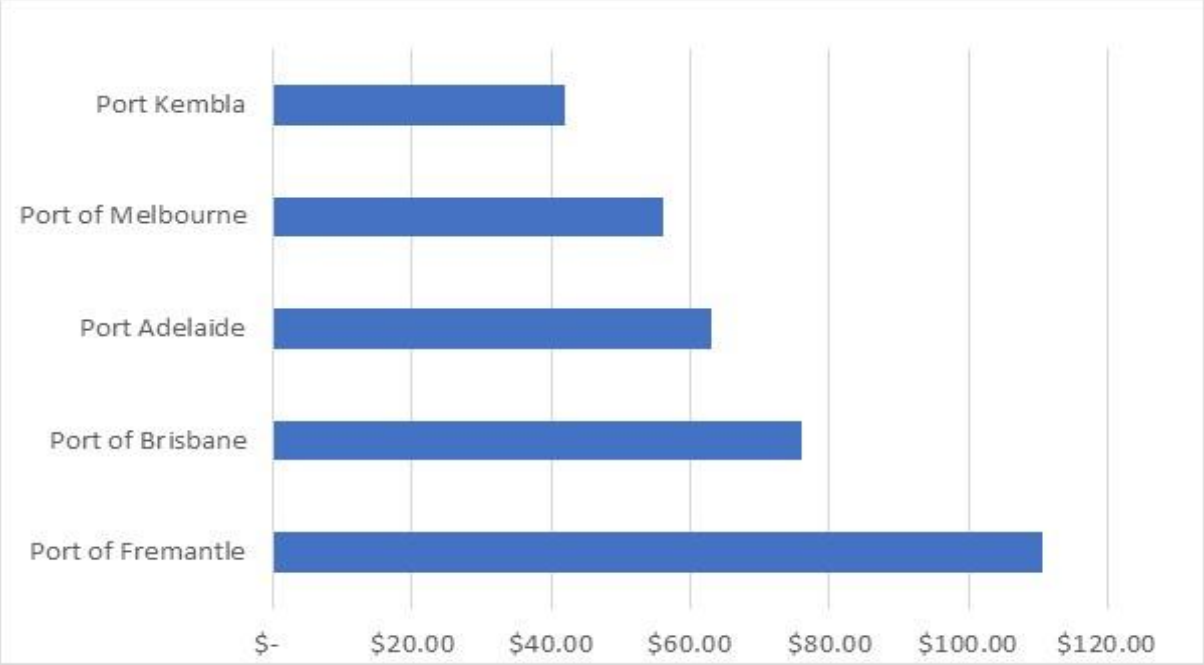
Figure 1: Charges for Essential and Non-Essential Maritime Services per Port Visit for Pure Car Carriers ($000) in 2017



Source: GHD (2017, p. 25).

A comparison of current cargo charges levied at each major port on the importation of a new motor vehicle reveals that the Port of Fremantle and the Port of Brisbane by far levy the highest cargo charges. This is outlined in Figure 2 below.

Figure 2: Cargo Specific Charges per New Motor Vehicle Imported into Major Automotive Terminals – Average Cost per New Motor Vehicle ($)*



Sources: Port of Melbourne (2021); Port of Brisbane (2021); Fremantle Ports (2021a); Flinders Ports (2021); NSW Ports (2021).

* Assumes average volume of a new motor vehicle imported into the Port of Melbourne, the Port of Brisbane, Port Kembla and the Port of Fremantle is 15.33 cubic metres (m^3). Also assumes that the percentage of new motor vehicles imported into Port Adelaide less than 10 m^3 is 15.7 per cent, 24.1 per cent for new motor vehicles in the range of 10 m^3 but less than 15 m^3, and 60.2 per cent for new motor vehicles in the range of 15 m^3 and over. These percentages are based on FCAI (2022a) and assumes that passenger motor vehicle categories of micro, light and small correspond with motor vehicles less than 10 m^3, new motor vehicles in the range of 10 m^3 but less than 15 m^3 corresponds with the remaining categories of passenger motor vehicles along with sports utility vehicle categories of light and small, and the remainder constitutes vehicles 15 m^3 and over.

It is perhaps no coincidence that the two ports completely lacking any sort of price oversight regime for the provision of monopoly port infrastructure also appear to levy the highest port charges on pure car carriers and cargo charges on the importation of new motor vehicles.

Economic theory suggests the abuse of market power through inefficient port and terminal charges will be passed through to new motor vehicle buyers to some extent. The price increase in new motor vehicles due to inefficient port charges means consumers will purchase less imported new motor vehicles The price elasticity of demand for new motor vehicles has been estimated to be around -1.5 per cent (Smyrk & Morris, 2006), which essentially means a 1 per cent rise in the price of a new vehicle leads to a 1.5 per cent fall in sales.

An increase in new motor vehicle prices will increase demand for and the price of used motor vehicles. Given used motor vehicles are to some degree substitutes for new motor vehicles, then an increase in the price of new motor vehicles also increases demand for used vehicles, which in turn will increase the price of used motor vehicles.

An increase in the price of new vehicles is also associated with a decrease in the rate at which older vehicles are scrapped (Gruenspecht, 1982). Older vehicles by definition lack the most up-to-date safety features. In Australia there is already a very slow turnover in the passenger vehicle fleet which means the stock of vehicles is less safe than what is optimal. Older vehicles are also less fuel efficient than new vehicles, which in turn means consumers spend more on fuel than they otherwise would and consequently there are more CO_2 emissions from operating older vehicles.

Excessive port charges due the absence of a robust regulatory regime will contribute towards the slower upgrade of the motor vehicle fleet, with the associated adverse safety, consumer and environmental consequences.

ACCC Undertakings in Relation to Automotive Terminals

The automotive terminals operated by MIRRAT at the Port of Melbourne and the two AAT automotive terminals at Port Kembla and Fisherman Islands Cargo Terminal (FICT) at the Port of Brisbane are subject to court enforceable undertakings under section 87B of the *Competition and Consumer Act 2010* (Cwth) accepted by the ACCC.

On 27 March 2014 the ACCC (2021a) announced it had accepted an undertaking from MIRRAT in relation to its proposed acquisition of a long term lease to operate the Webb Dock West automotive terminal at the Port of Melbourne. In the absence of the undertaking, the ACCC (2014) was concerned that MIRRAT could use its position as a vertically integrated operator of the sole automotive terminal at the Port of Melbourne to discriminate against rival automotive shipping lines and other terminal users that MIRRAT may compete with in future, including stevedores and PDI facility operators.

On 24 November 2016 the ACCC (2021) announced it had accepted an undertaking from AAT and Qube in relation to Qube's proposed acquisition of the remaining 50 per cent shareholding in AAT that it didn't already own. In the absence of the undertaking, the ACCC (2016) was concerned that Qube, as the sole owner of AAT, could discriminate against other existing and potential downstream operators, and favour its own interests in stevedoring and vehicle inspection services.

Both the AAT and MIRRAT undertakings are in a similar form and provide for:

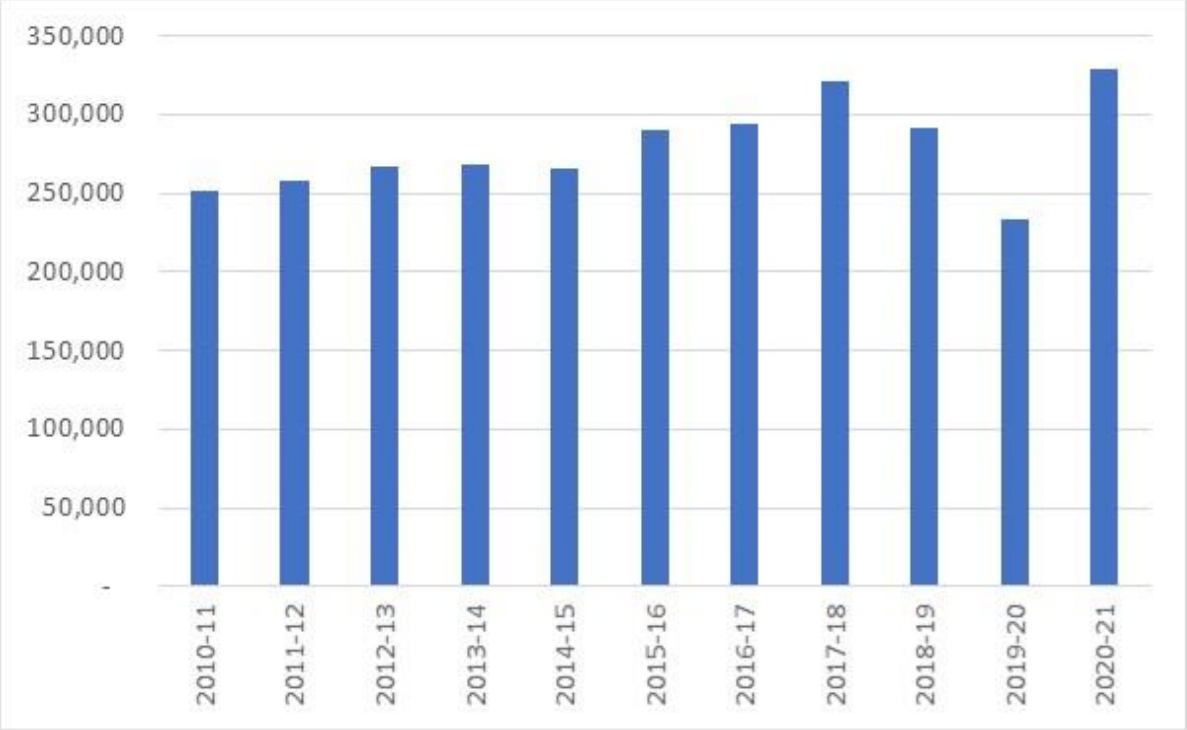
- a structural obligation that prevents the terminal operator from engaging in contestable downstream activities (i.e. these must be undertaken through a separate entity)
- commitments to open and non-discriminatory provision of services – including specific requirements to publish non-discriminatory berthing protocols for the relevant automotive terminals with a public process for amendment
- confidentiality and information security rules as well as staff separation rules
- minimum training requirements regarding the obligations under each undertaking
- compliance and reporting obligations – including through the appointment of an independent auditor and associated annual compliance reporting
- a price dispute resolution process that allows an annual dispute right under which the expert must assess whether any tariff increases proposed by AAT or MIRRAT comply with cost-based (i.e. building block) requirements
- a non-price dispute process (Gilbert + Tobin, 2021).

As part of the dispute resolution process, the automotive terminal operators are required to appoint an independent price expert to adjudicate on price disputes.

In 2021 the FCAI received advice that MIRRAT was intending to apply a price increase of between 2 and 5 per cent on vehicle handling on and from 1 July 2021. The price increase was justified on the basis that MIRRAT believed that their long-term outlook was for declining inbound volumes and sustained volume degradation that was significantly impacting their largely fixed cost base.

Ironically, as MIRRAT was justifying a price hike on the basis of expected falling import volumes, the processing of new vehicle imports at the Port of Melbourne reached a new all-time record in 2020-21 as outlined in Figure 3 below.

Figure 3: New Motor Vehicle Imports at the Port of Melbourne – 2010-11 to 2020-21



Sources: Port of Melbourne (2020; 2022) and Ports Australia (2022).

It is eminently reasonable that automotive terminal operators should be able to cover their fixed costs and it is recognised that such fixed costs are high for terminal operators. Where fixed costs are high, pricing at short-run marginal cost would prevent firms being able to fully recover their fixed costs which would have a detrimental impact on future investment decisions and service provision. However, automotive terminal operators should cover their fixed costs on the basis of reasonable and independently verifiable import volumes forecasts. If automotive terminal operators seek to raise prices to cover their fixed costs based on unrealistically pessimistic import volumes, then this would effectively amount to price gouging.

If automotive terminal operators seek to impose and rationalise substantial price increases based on questionable volume forecasts and terminal throughput, that in turn is deemed reasonable by the independent price expert, then as an added discipline there should be the capacity for any significant over-recovery to be handed back to OEMs and other new motor vehicle importers in some form. This could be in the form of discounted future terminal prices from any windfall gains. The terms and conditions of the ACCC undertaking should be renegotiated to facilitate such an outcome to enable such redress.

Biosecurity Services at Automotive Terminals

The task of biosecurity is managing the risk of entry, establishment and spread of pests, diseases and weeds that could pose a threat to animal, plant or human health or the environment (Commonwealth of Australia, 2015, p. 123). The Commonwealth Government Department of Agriculture, Water and the Environment (DAWE) has primary responsibility for implementing pre-border and border biosecurity measures.

Notwithstanding increasing efforts to minimise biosecurity risks via offshore treatments and protocols, imported new motor vehicles do pose a biosecurity risk. Exotic nematode, fungal bacterial or viral pathogens of both plants and animals can be imported on the surface of new motor vehicles (Inspector-General of Biosecurity, 2018, p. 21). New motor vehicles may become contaminated during extended periods on wharves or transport during storm events.

When the new motor vehicles arrive in Australia, the DAWE biosecurity officers conduct surveillance inspections to ensure compliance with Australia's import requirements (Department of Agriculture and Water Resources, 2016, p. 19). Five per cent of each shipment of new motor vehicles is inspected unless two contaminated vehicles are discovered. If two contaminated vehicles are discovered, the inspection level is increased to 20 per cent (Inspector-General of Biosecurity, 2018, p. 56). If a further two contaminated vehicles are found, the whole consignment will require detailed inspection, cleaning to remove any visible seeds and then re-inspection. The importer/manufacturer may elect to have the whole consignment cleaned at any stage before re-inspection. This process continues until the biosecurity officer is satisfied the cargo is not carrying any further risk material. If any insects are detected, the vehicles are cleaned and released while the insects are sent for identification by the department's entomologists.

The New Motor Vehicle Inspection Program was negotiated between the Thai Department of Agriculture and DAWE, with the Australian industry's heavy involvement. Its purpose was to identify supply chain initiatives which could mitigate biosecurity risks. The program involves training and accrediting personnel in Thailand to inspect, clean and certify that new vehicles being exported to Australia are free from biosecurity risk material. It also involves the Thai Port Authority improving the weed and pest environment around the terminal area, with regular inspection and maintenance. Improved communications are also vital. Since implementation, the number of contaminated new vehicles being detected in Australia from Thailand has reduced by more than 90 per cent. This scheme is now being considered for extension to cover some new motor vehicle imports from Japan and South Korea (Inspector-General of Biosecurity, 2018, p. 10).

The charges imposed by both AAT and MIRRAT for the provision of quarantine services such as washing and cleaning new motor vehicles appear to be excessive and exorbitant, as outlined in Tables 1, 2 and 3 below.

Table 1: MIRRAT Tariff Schedule for Quarantine Services at the Port of Melbourne for New Motor Vehicles (GST inclusive)

Service	**Tariff***
Wash – Passenger Utility and Vans	$146.27
External Clean – Passenger, Utility and Vans	$99.37
Internal Clean – Passenger, Utility and Vans	$109.42
Underbody Clean – Passenger, Utility and Vans	$102.80
Movement to Washing Area	$74.80

Source: MIRRAT (2021).

* Rounded to the nearest whole cent.

Table 2: AAT Tariff Schedule for Quarantine Services at Port Kembla for New Motor Vehicles (GST inclusive)

Service	**Tariff***
Wash	$207.54
Internal Clean	$77.09
Yard Move	$51.24
Yard Jump Start	$100.80

Source: AAT (2021a).

* Rounded to the nearest whole cent.

*Table 3: AAT Tariff Schedule for Quarantine Services at the Port of Brisbane for New Motor Vehicles (GST inclusive)**

Service	Tariff
Wash – Passenger	$133.63
Wash – Commercial	$267.51
Internal Clean – Passenger	$80.53
Internal Clean – Commercial	$250.39
Yard Move	$72.04
Yard Jump Starts	$133.55

Source: AAT (2021).

* Rounded to the nearest whole cent.

Automotive terminal operators seem to have leveraged their monopoly power into the provision of quarantine services. The provision of these quarantine services by automotive terminal operators should be contestable for other parties to provide these services, not the exclusive domain of automotive terminal operators.

Clauses 4.1b and 4.2 of the CIRA agreement would appear to impose an obligation upon states to ensure that the provision of quarantine services at automotive terminals should be contestable, and not locked up and captive to monopoly automotive terminal operators. Unlike with containers, motor vehicles cannot be removed from the terminal for cleaning without incurring significant additional expense.

Port of Fremantle

Background

Fremantle Ports is a Western Australian Government trading enterprise responsible for strategic management of the Port of Fremantle .

The Port of Fremantle is the principal general cargo port for Western Australia and operates from two locations - the Inner Harbour at the mouth of the Swan River adjacent to the city of Fremantle, and the Outer Harbour in Kwinana that is 20 km further south on the shores of Cockburn Sound (Fremantle Ports, 2018a, p. 1; 2018b, p. 14). The Inner Harbour provides facilities for handling container trade, break bulk trade, livestock exports and motor vehicle imports. It also accommodates cruise ships and visiting naval vessels (Fremantle Ports, 2021b, p. 1). The container terminals on North Quay are privately operated on land leased from Fremantle Ports. The Inner Harbour also has several common user berths used for break bulk trades.

The Outer Harbour is a major bulk cargo ports, handling grain, liquid petroleum products, liquid petroleum gas, alumina, fertilisers, sulphur, spodumene, silica sands, bauxite, iron ore and other bulk commodities (Fremantle Ports, 2021b, p. 1).

The North Quay of the Inner Harbour accommodates all container trade within the Port of Fremantle and is Western Australia's only dedicated container-handling facilities (Fremantle Ports, 2016, p. 2). This area also accommodates common-user port facilities for the handling of non-containerised general cargo. Victoria Quay has continuous quayage 1289m long with 7 berths in commercial use (Fremantle Ports, 2018b, p. 57). While berths A and B are no longer available to shipping, berths C to H are common user berths. Berths C and D are available for limited lay-up, berths E to H for general cargo excluding livestock and car carriers are discharged at berths E and H.

The Port of Fremantle is the only port in Western Australia that is used for the import of motor vehicles (Australian Competition and Consumer Commission, 2015, p. 2). Victoria Quay is the preferred berthing area for pure car carriers from Asia which handle two-thirds of the port's motor vehicle imports (Fremantle Ports, n.d.). Victoria Quay currently provides sufficient stacking area to

handle single shipments of up to 4,800 vehicles. Some motor vehicle imports are also handled at common-user berths 11 and 12 at North Quay.

While Fremantle Ports (Fremantle Ports, 2017, p. 40) opined in its 2017 Annual Report that the eastern end of Victoria Quay would be "required for the foreseeable future for operational purposes, in particular for motor vehicle and machinery imports", by 2020 in its *Statement of Corporate Intent 2020-21*, Fremantle Ports (2020, p. 5) commented that it would "continue to work with government and industry to investigate the most appropriate location - including the Outer Harbour - for non-container trades currently handled in the Inner Harbour." In this regard, Fremantle Ports (2020, p. 5) also commented that it was also:

> *Investigating the most efficient way to handle roll on/roll off and other general bulk products, including assessment of the merits and potential economic benefits that could be achieved by moving these trades to the Outer Harbour.*

Rate of Return for Fremantle Ports

Five port authorities currently have functions and powers established under the *Port Authorities Act 1999* (WA) (PAA), which is the principal legislative framework covering the port industry in WA – including Fremantle Ports. The port authorities are semi-autonomous government trading enterprises, with their own boards of directors and management structures (Essential Services Commission of South Australia, 2017, p. 50). The PAA gives port authorities the power to levy fees for licences and approvals (provided for in regulations) and impose port charges as the port authority determines. However, the WA Transport Minister is able to issue directions to a port authority.

In 2020-21, Fremantle Ports' earned an economic rate of return of 11.4 per cent, considerably higher than its target rate of 8.3 per cent, based on non-current assets valued at deprival value (Fremantle Ports, 2021).

Although the Economic Regulation Authority (ERA) provides independent regulatory advice to the WA Government for a range of industries, ports are not a 'regulated industry' for the purpose of the *Economic Regulation Authority Act 2003* (WA), and as such, the ERA does not have a regulatory role in relation to commercial ports.

There is arguably a conflict of interest for the WA Government in both its role as an economic regulator to ensure the monopoly power of commercial ports is not abused, and also as the owner and the beneficiary of dividends and dividend equivalent payments generated by commercial port authorities such as Fremantle Ports. For the time being, it appears the WA Government has chosen to ignore any problems in relation to the exploitation of monopoly power by commercial ports.

While Fremantle Ports is not subject to any direct economic regulation of its pricing, it does operate under a *de facto* rate-of-return (ROR) regulation where its ROR target is announced in its annual statement of corporate intent that must be approved by the WA Minister for Ports each year. The problem with ROR regulation is that it may not necessarily be compatible with efficient pricing. According to Braeutigam and Panzar (1993, p. 191):

> *For decades the economic regulation literature has been critical of rate-of-return regulation.*

A critical problem with ROR regulation is the lack of incentive for the regulated firm to reduce its costs. The deficiencies in ROR regulation were originally articulated by Averch and Johnson (1962, p. 1068) who concluded:

> *... a misallocation of economic resources may result from the use by regulatory agencies of the rate-of-return constraint for price control. The firm has an*

incentive to substitute between factors in an uneconomic fashion that is difficult for the regulatory agency to detect.

Braeutigam and Panzar (1993, p. 193) have outlined a number of problems with ROR regulation, including incentives for a firm to produce inefficient levels of outputs.

Cargo Berth Hire Charges

Fremantle Ports' imposes the Cargo Berth Hire charges to cargo loaded onto or discharged from a vessel berthed at a heavy duty berth in the port (Fremantle Ports, 2021a, p. 3). The heavy duty berths are H berth on Victoria Quay and berths 11 and 12 at North Quay. This is a long-standing charge imposed at least since 1995.[14]

Up until the end of September 2021 Fremantle Ports did not apply this charge to empty containers, livestock, pipeline products (including bunkers), scrap metal and new and used vehicles up to 25 m^3.[15] However, Fremantle Ports wrote to shipping lines in August 2021 informing them that following a review of fees and charges, it was going to cease providing an exemption on new and used motor vehicles from the Cargo Berth Hire charges.[16] As a consequence, Fremantle Ports (2021a, p. 3) now imposes the Cargo Berth Hire charges on the importation of all motor vehicles at the rate of $1.9785 per m^3.

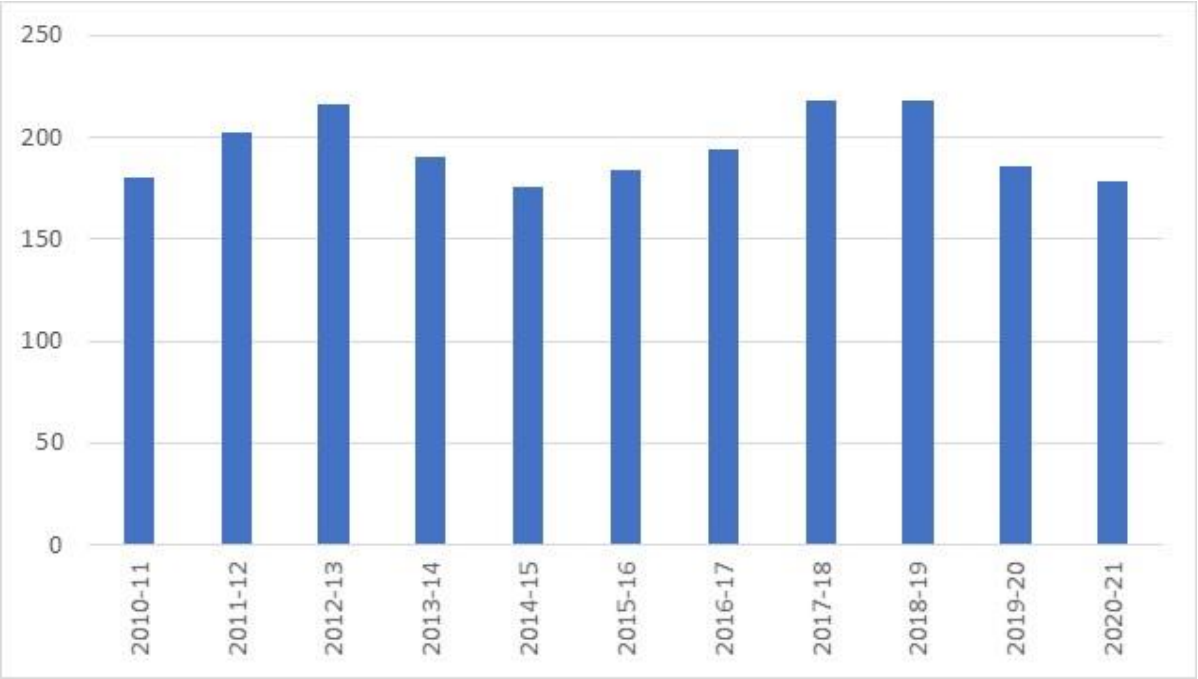
Fremantle Ports justified the imposition of the Cargo Berth Hire charges upon the importation of motor vehicles on the basis of the significant increase in demand for heavy duty cargo berth space which was being experienced at Fremantle Ports' Inner Harbour, with the demand for berth space arising as a consequence of the increase in trade for new and used motor vehicles, heavy machinery, and steel.[17] In particular, Fremantle Ports quoted an increase in the importation of new motor vehicles during 2020-21 of 29.4 per cent over the previous financial year of 2019-20.

While the figures quoted by Fremantle Ports are correct, the rationale provided for the imposition of the Cargo Berth Hire charges upon the importation of new motor vehicles appears disingenuous when considered within the broader historical context. New motor vehicle sales in 2019-20 were dramatically affected by the financial impact of the COVID-19 pandemic, especially during March and April of 2020.

If the reason for the imposition of the Cargo Berth Hire charges upon the importation of new motor vehicles was due to competition for heavy duty berths and the resulting congestion, then the available evidence would suggest this is far from the case. During 2020-21, there were only 178 ship visits to the Port of Fremantle by vehicle carriers, that compares to 186 visits during 2019-20 and an average number of visits of around 196 in the 10-year period to the end of 2019-20. This is outlined in Figure 4 below.

[14] See section 139A of the former *Port Authorities Regulations 2001* made under the *Fremantle Port Authority Act 1902* (WA).
[15] See Fremantle Ports (2018, p. 3).
[16] Private correspondence from Fremantle Ports to a shipping line.
[17] *ibid*.

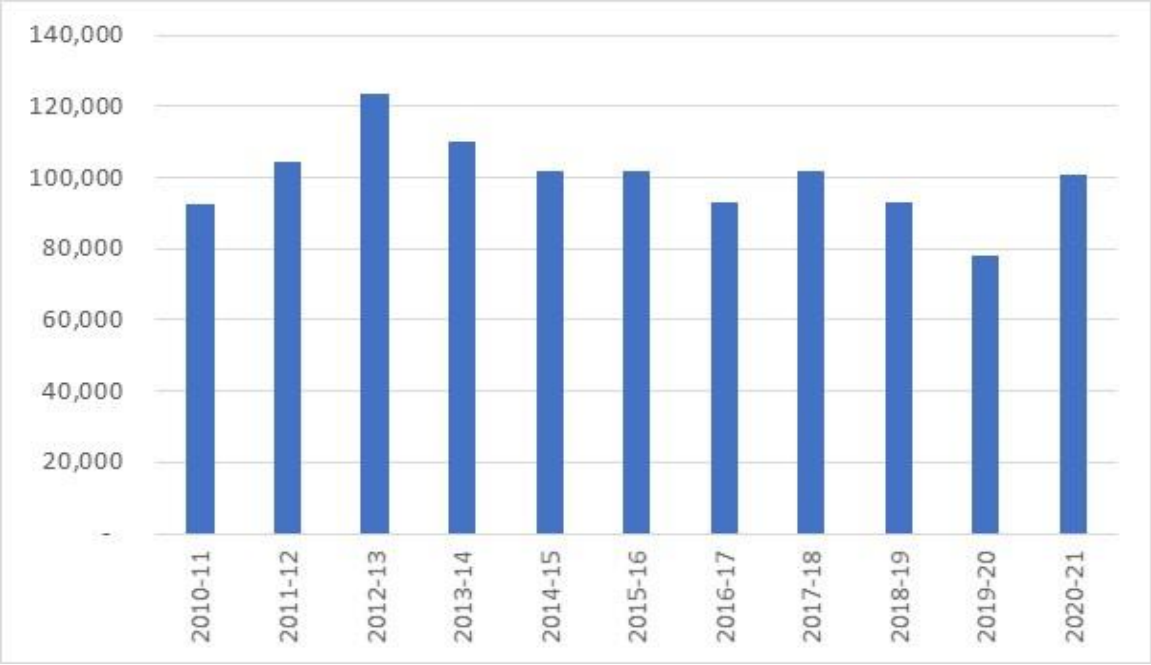
Figure 4:Ship Visits by Car Carriers to the Port of Fremantle – 2010-11 to 2020-21



Source: Fremantle Ports (2021, p. 133).

While the importation of new motor vehicles did increase by 29.4 per cent in 2020-21 over the previous financial year, the importation of new motor vehicles through the Port of Fremantle was unusually low during 2019-20 largely due to the financial impact associated with the onset of the COVID-19 pandemic. On the other hand, the amount of new motor vehicles imported through the Port of Fremantle during 2020-21 was not unusually high, and was surpassed in 6 out of the previous 10 years from 2010-11 to 2019-20. This is outlined in Figure 5 below.

Figure 5: New Motor Vehicle Imports through the Port of Fremantle – 2010-11 to 2020-21



Source: Fremantle Ports (2021, p. 35).

The heavy duty berths at the Port of Fremantle Inner Harbour are specifically designed to cater for high and heavy cargo - types of cargos that have unusual height and weight requirements (White,

2018).[18] While vehicle carriers do use these heavy duty berths, they are not necessarily for the discharge of new motor vehicles such as passenger motor, sport utility and light commercial vehicles. Where infrastructure only generates exclusive and direct benefits for a specific group of individuals, efficiency requires that these beneficiaries should bear at least some of the cost of financing the investment (Chan, Forwood, Roper, & Sayers, 2009, p. 230).

Fremantle Ports had previously imposed the Cargo Berth Hire charges for the use of the heavy duty berths on the basis of the beneficiary pays principle.[19] If high and heavy cargo wasn't been loaded or unloaded, then the additional charges for using the heavy duty berths was waived while the other standard port fees and charges continued to apply.

This appears to be an exercise in the naked abuse of monopoly power by Fremantle Ports that will extract around an additional $2 million per annum from car carrier shippers, with some of these additional costs passed through to new motor vehicle importers, dealers and ultimately consumers.

The WA Government should refer Fremantle Ports to the ERA for an independent investigation under s. 38 of the *Economic Regulation Authority Act 2003* (WA) to determine whether it is abusing its monopoly power in relation to cargo charges levied on the importation of new motor vehicles.[20] An independent investigation would overcome the potential conflict of interest that the WA Government has in relation to the Port of Fremantle as both an economic regulator of a natural monopoly port and as a potential beneficiary of its monopoly rents.

[18] Shipping line RTM Lines (2020) has classified ocean cargo as high and heavy if its length exceeds 18m, its height exceeds 4.5m, its width exceeds 4.5m, and its weight exceeds 80mt.

[19] The beneficiary pays principle has been described as being the situation where anyone who benefits from an activity is required to contribute to the cost of undertaking it (Productivity Commission, 2001, p. xxi) The beneficiary pays principle is a commonly used means for attributing costs and recouping them from beneficiaries.

[20] S. 38 of the of the *Economic Regulation Authority Act 2003* (WA) enables the relevant WA Minister to refer to the ERA any matter relating to an industry that is not regulated.

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