Productivity Commission, *Lifting productivity at Australia's container ports: between water, wharf and warehouse*

ACCC supplementary submission

October 2022

Introduction

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to respond to the Productivity Commission's (PC) draft report, *Lifting productivity at Australia's container ports: between water, wharf and warehouse* (the draft report). The information provided in this supplementary submission is intended to build on the views contained within the ACCC's primary submission that the ACCC provided to the PC in February 2022.

The ACCC supports the majority of the findings and recommendations in the draft report. We consider that many of the changes proposed by the PC should provide significant long-term benefits to many Australian businesses and consumers as well as the Australian economy.

The ACCC welcomes the recommendation to repeal Part X of the *Competition and Consumer Act 2010* (CCA). We have long held the view that Part X of the CCA is unnecessary and no longer relevant and there is a risk it could be used by shipping lines to charge higher freight rates.

The ACCC also broadly supports the PC's findings and recommendations in relation to industrial relations and productivity. We have previously voiced concerns that certain work practices at Australian ports inhibit productivity and efficiency gains. While the ACCC does not take a position on any potential changes to the *Fair Work Act 2009*, we support the report highlighting the problems of excessive restrictions on hiring and automation placed on stevedores in their enterprise agreements, as well as the disruptions and harms of prolonged industrial negotiations and their associated protected industrial action.

The ACCC has been concerned that Australian ports have not been performing efficiently, especially given their importance to the Australian economy as a whole. This is highlighted by the $605 million in annual benefits that the PC has identified could be obtained if Australian port productivity was enhanced. We note the PC's findings about the variability of Australian ports' performance at different stages of the container supply chain.

We welcome the development of an enhanced framework for measuring Australian port productivity, to identify areas in which efficiency gains could be made. We consider benchmarking port productivity, both domestically and internationally, an important exercise. Whilst there will always be difficulties in making comparisons across ports, and it is necessary to be cautious when interpreting results, it is critical we gain further insight into how Australian ports perform.

The ACCC notes the PC's extensive requests for further information in relation to multiple critical areas of the container supply chain. We look forward to receiving the PC's further insights into those areas when its final report is published.

We consider there are two matters in the draft report which may warrant further consideration – the appropriate level of port regulation and whether there is sufficient evidence to justify regulation of stevedores' terminal access charges (TACs) and other fixed landside fees. These are covered in more detail below. We will provide further information in our Container Stevedoring Monitoring Report 2021-22 (Stevedoring Report), expected for release in December 2022.

Port Regulation

The ACCC agrees with the PC's finding that the privatisation of ports in NSW impeded efficient outcomes.

We agree with the PC's finding that container ports are regional monopolies, with little countervailing power from shipping lines or stevedores. Despite these findings, the PC has expressed a view, due to the absence of complaints by port users about the conduct of the privatised ports (outside of the Port of Melbourne), that there is no case for further regulation. The PC concluded that:

- in the case of Port of Melbourne, it is appropriate to wait for the Essential Service Commission's (ESC) review of the voluntary tenancy customer charter in 2025 before further assessing the need for increased regulation
- in the case of Port of Adelaide, Port Botany and Port of Brisbane, there is sufficient threat of regulation to constrain ports' behaviour.

In our view, container ports do not face a credible threat of regulation that is sufficient to limit the exercise of their market power.

The regulation of Port of Melbourne is more rigorous than that of any other Australian container port. Since privatisation, the Essential Services Commission of Victoria (ESC) has found that the Port of Melbourne has:

- exercised its market power to the material detriment of its tenants, resulting in land rents that are above their efficient levels[1]
- demonstrated significant and sustained non-compliance with the pricing order, which may impact future consumers through prices that are higher than efficient levels.[2]

Port of Melbourne's exercise of market power and non-compliance with its pricing regulation were only uncovered by the careful analysis of a regulator mandated to undertake that exercise.

Despite the significance of these findings, the subsequent responses did not materially escalate the level of regulation. The two ESC reviews into Port of Melbourne resulted in:

- a voluntary tenancy customer charter which, as observed in the draft report, will not apply to either DP World or VICT as they were signed prior to privatisation of the port[3]
- an undertaking to the Minister overseeing the Essential Services Commission that Port of Melbourne will rectify issues identified by ESC.[4]

Further, the experience in Port of Melbourne highlights the shortcomings of an 'ex-post' regulatory regime, which periodically assesses compliance after the fact. The immediate impact of Port of Melbourne's non-compliance with its pricing order was constrained by the tariff adjustment limit, which effectively caps any price increases to that of the consumer price index. However, the tariff adjustment limit ends by 2037 at the latest, posing concerns for pricing into the future.

With respect to the other privatised container ports, the threat of regulation is much less apparent.

---

[1] Essential Services Commission (ESC), Port of Melbourne market rent inquiry 2020, ESC website, 14 August 2020, accessed 13 September 2022, p. 32, 50.

[2] ESC, Inquiry into Port of Melbourne compliance with the pricing order 2021, ESC website, 28 January 2022, accessed 13 September 2022, p. ii-iii.

[3] Port of Melbourne, Tenancy Customer Charter, Port of Melbourne website, 4 March 2022, accessed 26 September 2022.

[4] Port of Melbourne, Undertaking to the Essential Services Commission Minister, Department of Transport (Vic) website, 20 May 2022, accessed 26 September 2022.

Unlike Port of Melbourne, regulatory regimes of other privatised container ports are not designed to proactively identify the exercise of market power to the same degree. Port Botany, similar in size to the Port of Melbourne, is only required to notify the relevant Minister annually of the prices it charges port users and the reason for any changes. It does not require any further action to be taken in relation to that information.[5] In the case of the Port of Brisbane, there are no price notification requirements at all.

The ACCC does not consider the absence of complaints from port users, made either publicly or confidentially to the PC, about exercise of market power by Australia's privatised container ports is sufficient to conclude that port users are adequately protected. There may be instances where container ports exercise market power, but the regulatory oversight is insufficient to identify this. The absence of complaints could also be explained by a lack of mechanisms to address them such that it would be worth complaining when weighed against, for instance, the potential for retaliation by the monopoly port.

The ACCC agrees that state governments can increase the level of regulation if they identify the need. However, if those governments are not actively assessing whether ports are exercising market power, they cannot determine whether current regulation is adequate, and so the threat of further regulation lacks credibility.

We consider it is incumbent on governments to introduce an appropriate regulatory regime at the time they privatise essential infrastructure, especially when it has monopoly characteristics, to constrain the pricing powers of the privatised entity. Effective regulation of monopolies promotes allocative, productive and dynamic efficiency. If ports' monopoly power is not adequately constrained, ports can charge prices above efficient levels. This would result in Australian consumers paying higher prices for imported goods, and harm the competitiveness of our exports. Established from the outset, effective regulation gives certainty to all market participants and avoids the sovereign risk issues inherent in making significant changes to the regulatory regime under which assets were sold.

The ACCC's view is that major container ports in Australia were privatised without effective regulation in place. The ACCC considers that steps need to be taken to bolster the regulatory oversight of privatised container ports to ensure that they do not levy excessive rents and fees.

Stevedores' terminal access charges

The PC found that stevedores have substantial market power with respect to transport operators. Responding to recent price increases in TACs, the PC has recommended regulation that prohibits stevedores from charging TACs to transport operators.

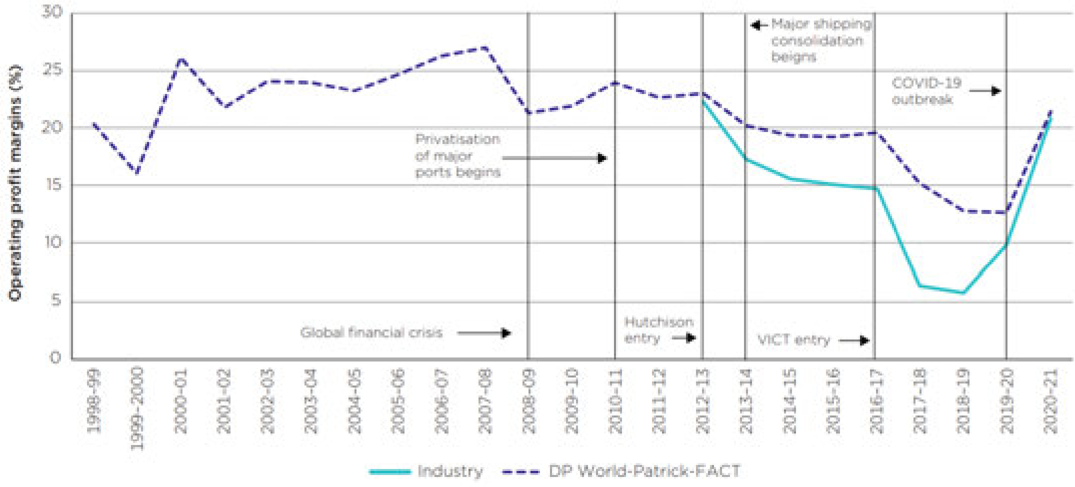
The ACCC agrees that stevedores have some market power by virtue of there being a small number of providers of stevedoring services. ACCC considers substantial market power to be the ability to sustainably set prices above competitive levels. Companies exercising substantial market power would be expected to earn supernormal profits on a sustained basis.

The ACCC has been monitoring the financial performance of container stevedores since 1999. We track the prices, costs and profits of container stevedores operating across the 5 main container ports in Australia.

[5] *Ports and Maritime Administration Act 1995* (NSW), Part 6. There is no price monitoring oversight of the rents paid by the tenants of Port Botany.

Figure 1 shows the operating profit (EBITA) margins of the three incumbent stevedores (Patrick Terminals, DP World and Flinders Adelaide Container Terminal) throughout the entire ACCC monitoring period.

Figure 1: Aggregate operating profit (EBITA) margins (industry vs. 3 incumbents): 1998–99 to 2020–21



Source: ACCC analysis of information received from stevedores as part of the monitoring regime.

As shown, since 2013, the operating profit margins of the three incumbent stevedores (DP World, Patrick and FACT) declined significantly due to competitive pressure following the entry of Hutchison and VICT.

Figure 1 shows that stevedores' operating profit margins fell even further in the period between 2016-17 and 2019-20, during which they significantly increased terminal access charges.

Stevedores' operating profit margins sharply increased in 2020-21 following the beginning of the COVID-19 pandemic. This coincided with changed market dynamics during the pandemic. It could be that these changed dynamics have weakened the competitive constraints on stevedores and have eroded the benefits that were achieved following new entry. It is unclear whether these changes are temporary or likely to be sustained. This will be discussed further in our upcoming Stevedoring Report.

Unlike ports, which are regional monopolies and face little countervailing power, there is some competition amongst stevedores and a credible threat of new entry. We recommend the PC further consider the costs and benefits of imposing additional regulation with respect to TACs at this time, given the uncertainty about the drivers behind the recent spike in profits.