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Trans-Tasman Study
Productivity Commission
LB2 Collins Street East
Melbourne
Victoria 8003
Australia

Captive Port Customers Group ("CPC Group"): Submission to Productivity Commission on the Australian and New Zealand competition and consumer protection regimes

Introduction

The CPC Group represents the interests of a number of shipping, stevedoring, shipper and shipping agency customers of New Zealand port companies.[1] CPC Group was established in 1997 as a representative industry body with the objective of achieving reform of port companies for the benefit of users of port services, and for the direct benefit of the New Zealand economy as a whole, through lowering costs in the supply chain.

The CPC Group makes this submission on the Productivity Commission's (the "Commission's") study of the Australian and New Zealand competition and consumer regimes as an interested party which monitors, and has input into, law reform in the competition law and regulatory areas.

CPC Group's submission may be summarised **as follows:**

- **Port companies in New Zealand have market power in respect of non-contestable services. Port companies are abusing that market power and, in particular, are making excessive returns (through over-pricing) on those non-contestable services;**

- **The generic regulatory regime in New Zealand is inadequate to protect port users from abuse of market power by port companies. This may be contrasted with the regulatory regime in other New Zealand natural monopoly infrastructure sectors such as electricity, telecommunications, gas, airports and the recently established Track Co. (in relation to railways);**

- **The lack of regulatory intervention in New Zealand is in dramatic contrast to the regulatory regime present in Australia and the specific ports regimes in the Australian States and Territories. Most of the States have undertaken thorough reviews of the ports sector (including the market power of port companies) and implemented appropriate controls and protections.**

- **New Zealand should look to the Australian policy objectives, and substantive law, when addressing the issues arising in the ports sector, in an endeavour to closer align the competition law and regulatory regime for ports in the two countries.**

Although CPC Groups submissions are not directly about enhancing the trans-Tasman business environment, CPC Group believes that the issues raised by this submission are important and are a

[1] Includes the New Zealand Shipping Federation members, Golden Bay Cement, Southern Cross Stevedores and PanPac Forest Products Limited.

contributing subset to the overall terms of reference. In particular, aligning the ports regimes to enable New Zealand ports to compete on the same, or similar, terms to the Australian ports. The issues raised should not be 'lost' as part of the wider review framework of this broad inquiry.

Context and Background

CPC Group members have faced increasing seaport charges since 1988 when port companies were corporatised under the Port Companies Act 1988. That Act requires port companies to act as "successful businesses". However, there is currently no regulation of those businesses, thus enabling them to charge prices in excess of what is fair and reasonable. Indeed, there is no requirement for port companies to enter meaningful negotiations over charges or service quality with users, neither is there an information disclosure regime in place for port companies.

Issues in relation to asset valuation, rates of return, allocation of overheads and utilisation are faced by CPC Group members, some of whom are "captive" to a particular port. Shippers who are "captive" are vulnerable to increased port charges in an unregulated environment. This has been recognised in Australia in numerous reports undertaken by State bodies.[2]

Ports' Abuse of Market Power

The experience of port users over the last 13 years is that ports have, and do abuse, market power in respect of the non-contestable trades. This has been evidenced by over-charging, excessive profits and high-handed and peremptory conduct towards customers.

Part of the problem faced by port users is that the absence of an appropriately designed information disclosure regime, and a lack of voluntary information disclosure by ports outside of the litigation context, means that it has been almost impossible for port users to get an understanding of the basis and appropriateness of the prices charged. There is a lack of transparency which creates inefficiencies in the sector.

The New Zealand Regulatory Regime

The corporatisation of New Zealand ports through the legislative vehicle of the Port Companies Act 1988 effectively transferred control of the commercial activities of ports from Harbour Boards to the port companies. The underlying rationale for this reform was the promotion of efficiency, economy and performance in the management and operation of the commercial aspects of ports in the creation of a competitive environment.

The Commerce Act 1986 (the "Commerce Act") and the common law are the only regulatory pillars applicable to the ports sector. The Commerce Act deals with restrictive trade practices, merger control, and price control generally, as part of an overall scheme to promote competition in New Zealand markets. It follows, that the key provisions relating to port companies are the general prohibitions on the improper use of a dominant position in a market, which is contained in section 36 of Part II of the Act, the section 66 process for seeking clearance from the Commerce Commission before companies merge, and the underlying threat of the price control regime under Part IV.

This legislative framework has proved ineffective in dealing with competition issues in the port sector. The inability of Part II of the Act to deal with such issues, places considerable focus on the provisions of Part IV relating to the imposition of price control as a deterrent to monopoly pricing. There has been an unwillingness by the government in New Zealand to impose price control under Part IV and the effectiveness of that Part as a deterrent is in question.

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[2] The most recent report is the Final Report of the Essential Facilities Commission (Victoria), "Regulation of Victorian Ports", June 2004.

There is no specific statutory regime in place to adequately restrain potential anti-competitive behaviour which can arise in relation to ports, such as access disputes, the charging of port services, or disclosure requirements to provide transparency of operations and pricing.

The Australian Regime

National Competition Policy ("NCP")

There is an agreement between all Australian state and territory governments to enhance competition in Australia. The resulting NCP is underpinned by three intergovernmental agreements: the Competition Principles Agreement; the Conduct Code Agreement; and the Agreement to Implement the National Competition Policy and Related Reforms.

The implementation of the competition policy reforms in Australia has led to profound structural changes in the port sector. In summary these are:

- **Separation of regulatory and commercial activities at a port;**
- **Separation of ownership of channels and land based infrastructure in some States;**
- **Where port activities are provided under licence, changes in the nature of the operating licence and the manner in which it is let; and**
- **Expansion of greater rigour and competitive tendering and contracting procedures.**

The Trade Practices Act

Part IIIA of the TPA establishes a legislative regime to facilitate access by third parties to certain facilities that are considered to be of national significance. The object of the regime is to encourage competition in upstream or downstream markets. The ports industry is included under Part IIIA and some access regimes for ports have been declared or certified under that Part. New Zealand has no equivalent to Part IIIA.

Part IV of the TPA (restrictive trade practices) also governs all trade practices within the port and shipping industry and provides a general prohibition on anti-competitive behaviour.

State and Territory Specific Laws

Along with the TPA, ports, and in particular the market power of ports, are regulated in Australia through public authorities established under statute in each State or Territory. The arrangements differ across the country, however, all States and Territories are required to comply with the provisions of the TPA and the NCPs.

Ports, marine and shipping activities have been subject to government regulation in Australia for many years. Many of the statutes date from the early 1900s and were enacted to regulate, manage and set prices and safety standards for the use of shipping channels and port infrastructure. The regulations that restrict competition and abuse of market power include:

- **provisions on access to shipping berths, channels and port infrastructure;**
- **pilotage requirements;**
- **marine safety and navigation requirements;**
- **vessel operating requirements, including crewing;**
- **provisions that enable organisations governing ports and shipping to determine market products and to set prices and regulations;**

the exemption of organisations governing ports and shipping from paying taxes and government charges; and

provisions to issue licences for vessels and vessel operations.

It is the existence and implementation of these kinds of regulations in the Australian States and Territories that protect port users from the market power of port companies. The Commission should consider the implementation of a regulatory regime for ports in New Zealand on the basis of the Australian models. In particular, regulation requiring information disclosure and mandatory dispute resolution procedures would increase efficiency in the ports sector in New Zealand.

Conclusion

It has long been recognised that port costs form a significant element in the supply chain for the New Zealand economy as a whole. The Productivity Commission should note that the ports industry is one where the competition law and regulatory regimes in New Zealand and Australia differ dramatically for no good reason. Regulation of the port companies in New Zealand is crucial to obtaining ongoing efficiencies in the performance of New Zealand ports. Such cost efficiency will benefit all of New Zealand, and enhance the country's international competitiveness.

Australia has, not only a specific regulatory regime in Part IIIA of the TPA which can be applied in the ports sector, but also state and territory specific laws which govern the industry. These provide mechanisms to help protect port users against any misuse of monopoly power by port companies.

In comparison, there is no specific regulatory regime for ports in New Zealand. This leaves Port companies able to abuse their market power. The CPC Group believes that this is an important area where the substantive competition laws in New Zealand and Australia differ. New Zealand should look to the Australian models, undertake a review of the market power of ports in New Zealand, and their pricing, and then implement an appropriate regulatory regime.

The CPC Group appreciates the opportunity to submit its views on these issues and looks forward to meeting with the Commission when it visits New Zealand later in the year.

Yours faithfully

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