

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
File Number: NSD1144/2020  
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v  
NQCRANES PTY LTD  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 19/10/2020 12:50:00 PM AEDT

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



### STATEMENT OF CLAIM

IN THE FEDERAL COURT OF AUSTRALIA No  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL  
NPA: Commercial and Corporations, sub-area Economic Regulator, Competition and Access

### AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

and

**NQCRANES PTY LTD (ACN 060 375 699)**

Respondent

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### A Parties

- 1 The Applicant (**ACCC**) is a body corporate:
  - (a) established by section 6A of the *Competition and Consumer Act 2010* (Cth) (the **Act**);

Filed on behalf of (name & role of party)		Australian Competition and Consumer Commission, the Applicant	
Prepared by (name of person/lawyer)		Tom Jarvis	
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78176307			

(b) able to sue in its corporate name.

2 The Respondent, NQCranes Pty Ltd (ACN 060 375 699) (**NQC**), is, and was at all material times:

(a) an Australian proprietary company;

(b) a corporation within the meaning of section 4 of the Act;

(c) able to be sued;

(d) supplying goods and services in trade or commerce in connection with:

(i) the design, manufacture and supply of new overhead cranes (or parts thereof);

(ii) the servicing of overhead cranes; and

(iii) the supply of spare parts for overhead cranes in Australia, primarily in Queensland and Newcastle.

## **B Other Parties**

3 MHE-Demag Australia Pty Ltd (ACN 000 406 717) (**Demag**), is, and was at all material times:

(a) an Australian proprietary company;

(b) a corporation within the meaning of section 4 of the Act;

(c) a wholly owned subsidiary of MHE-Demag (S) Pte Ltd, a company incorporated in Singapore;

(d) supplying goods and services in trade or commerce in connection with:

(i) the supply of new overhead cranes (or parts thereof) and material-handling equipment;

(ii) the servicing of overhead cranes and material-handling equipment; and

- (iii) the supply of spare parts for overhead cranes and material-handling equipment in Australia, including in Queensland and Newcastle.

## **C Overhead Cranes Market**

- 4 At all material times, there was a market, within the meaning of section 4E of the Act, for the design, manufacture, supply and servicing of overhead cranes that included, at least, Queensland and Newcastle (**Overhead Cranes Market**).

### **Particulars**

Overhead cranes can be described as fixed indoor cranes used to handle heavy loads, which usually include a hook-and-line mechanism that runs along a horizontal beam, which runs along two widely separated rails.

Overhead cranes are usually installed in large warehouses and are often used as a part of production processes, transporting semi-finished goods between workstations.

Overhead cranes are also used in storage facilities and major mining and construction projects.

The design, manufacture, supply and servicing of overhead cranes, involves, *inter alia*:

- (i) manufacturing and installing crane steelwork;
- (ii) installing “crane kits”, which typically comprise a hoist, the electrics and the drives of the crane;
- (iii) providing crane servicing services to customers, including 24-hour break down support, periodic, compliance and maintenance services, third-party inspections, major assessments, overhauls, repairs and refurbishments; and
- (iv) the sale of spare parts incidental to any servicing operations.

- 5 At all material times, NQC and Demag were participants in the Overhead Cranes Market.

- 6 At all material times, NQC and Demag were in competition with each other, or but for the agreement alleged below, would have been, or would have been likely to be, in competition with each other, within the meaning of

section 44ZZRD(4) of the Act, as in force prior to 6 November 2017, and section 45AD(4) of the Act since 6 November 2017, in the Overhead Cranes Market.

**D Discussions between NQC and Demag concerning a distributorship agreement**

7 In or around 2015, Demag and NQC entered into negotiations in relation to a proposed distributorship agreement whereby NQC was to be appointed to provide servicing and supply of spare parts to Demag's overhead crane customers in North Queensland. These negotiations continued, on an intermittent basis, between 2015 and August 2016.

**Particulars**

The commercial negotiations during this period included the following communications:

- (i) Exchanging of text messages and telephone calls, predominantly between NQC's founder and managing director, Mr Wayne Pidgeon (**Mr Pidgeon**) and Demag's managing director, Mr Vincenzo (Vince) Di Costanzo (**Mr Di Costanzo**);
- (ii) Exchanging of text messages and telephone calls, between NQC's operations manager, Mr Addo Romyn (**Mr Romyn**) and Mr Di Costanzo;
- (iii) a meeting held in Brisbane on 5 May 2015 which was attended by, *inter alia*, Mr Pidgeon, Mr Romyn and Mr Di Costanzo;
- (iv) a meeting held in Brisbane on 1 September 2015 which was attended by, *inter alia*, Mr Pidgeon, Mr Romyn and Mr Di Costanzo; and
- (v) a meeting held in Carole Park, Queensland, on 24 May 2016 which was attended by, *inter alia*, Mr Pidgeon and Mr Di Costanzo.

8 On or around 11 August 2016, as part of the negotiations in relation to the distributorship agreement, representatives of the senior management teams of NQC and Demag attended a meeting in Sydney and discussed, *inter alia*, entering into an arrangement whereby NQC and Demag would not target each other's clients for overhead crane parts and servicing in South East Queensland (Brisbane) and Newcastle.

### Particulars

This meeting was attended by Mr Pidgeon, Mr Romyn, Mr Di Costanzo, and Mr Rowland Hudd (**Mr Hudd**), then Demag's National Sales and Marketing Manager.

- 9 Between 15 August 2016 and 25 August 2016, NQC and Demag communicated in relation to the proposed distributorship agreement, including its terms.

### Particulars

These communications were oral, either in person at meetings between senior managers of NQC and Demag or by telephone, and by email, on, at least, the following occasions:

- (i) On 15 August 2016, Mr Pidgeon sent an email to, *inter alia*, Mr Di Costanzo, which stated:

Thank you for meeting with Addo and myself last week.

We believe the discussions were of mutual benefit to both parties.

Topic of discussion was to investigate how MHE Demag and NQCranes and could best work together and provide an alliance between the two companies.

I have listed a few of the points we discussed below, they are basic please review.

...

7. MHE Demag and NQCranes to compete but not actual target clients for component and service sales in the Brisbane and Newcastle area.

...

As we stated last Friday Myself and NQCranes are committed to making this alliance work for both parties.

We look forward to a long and lasting working relationship.

- (ii) On 16 August 2016, Mr Di Costanzo sent an email to, *inter alia*, Mr Pidgeon in response to his email of 15 August 2016, which stated:

With the dot points below all looks good except for the 'north of Maryborough' for the start of the Nth Qld region.

- (iii) On 16 August 2016, Mr Di Costanzo sent an email to, *inter alia*, Mr Pidgeon attaching an earlier distributorship agreement between the parties. In this email. Mr Di Costanzo stated:

Went looking through the archives. Here is an old document that I found which can be used as a starting point. Let me know your thoughts.

- (iv) On 17 August 2016, Mr Pidgeon sent an email to Mr Di Costanzo, which stated:

NQCranes had a great day of meeting. We let the managers know of the new agreement between MHE Demag and NQCranes. A very positive acceptance, but lots of questions.

The main thing is NQCranes are rearing to go..

- (v) On 25 August 2016, Mr Pidgeon sent an email to Mr Di Costanzo, attaching a draft of the distributorship agreement, which stated:

Please see attached our take on the agreement.

We have tried to clarify some of the points.

As discussed this is a gentlemen's agreement and will require open ongoing discussion for both parties to ensure smooth operation.

Please review our thoughts.

Let's get this new venture on the road.

Thank you for the solid effort by all parties in this week's discussions.

Further particulars will be provided after discovery.

## **E Distributorship Agreement**

10 On 26 August 2016, NQC and Demag signed a written agreement, described as a distributorship agreement (**Distributorship Agreement**).

11 The Distributorship Agreement provided that the agreement was to operate in two territories, defined as Territory 1 and Territory 2.

## Particulars

Clauses 2 and 3 of the Distributorship Agreement.

Clause 2 of the Distributorship Agreement defines Territory 1 and Territory 2 as follows:

Territory 1: State of Queensland excluding the area south of Gladstone on a non-exclusive basis.

Territory 2: State of Queensland south of Gladstone, and in Newcastle, on a non-exclusive basis.

- 12 The Distributorship Agreement contained, *inter alia*, the following terms:
- (a) [NQC] is hereby given the right to sell Demag products [set out in Appendix A to the Distributorship Agreement] in the above territories and must do so exclusively except under the following situations:
    - (i) Spare parts for non-Demag/Donati equipment;
    - (ii) Demag/Donati equipment is not technically feasible.
  - (b) [NQC] to become the exclusive Demag service agent for Territory 1.
  - (c) Demag to transfer service clients and service technicians to [NQC] for Townsville and Mackay initially with the aim of transferring all remaining Gladstone service work over in the next 12-18 months.
  - (d) For Territory 2 [NQC] and Demag will operate in the service markets in a co-ordinated approach so that their current customers are not targeted by the other. For potential future customers the two organizations will ensure that their energies are focused on the other service competitors and not each other (**Co-Ordinated Approach Provision**)
  - (e) For Territory 2 all new crane enquiries will be passed directly to Demag for quoting and booking orders. In return any successful sales will have a "For Service call NQCranes" sticker affixed to the product prior to commissioning.
- 13 The Co-Ordinated Approach Provision had the purpose of directly or indirectly allocating between NQC and Demag, persons or classes of persons, being

customers of NQC and Demag who had acquired or who were likely to acquire overhead crane parts and/or servicing of overhead cranes from NQC or Demag in the State of Queensland south of Gladstone, and in Newcastle, within the meaning of section 44ZZRD(3)(b)(i) of the Act, as in force prior to 6 November 2017, and section 45AD(3)(b)(i) of the Act since 6 November 2017.

- 14 As at 26 August 2016 and at all material times thereafter NQC and Demag were in competition with each other, or but for the Co-Ordinated Approach Provision, would have been, or would have been likely to be, in competition with each other, within the meaning of section 44ZZRD(4) of the Act, as in force prior to 6 November 2017, and section 45AD(4) of the Act since 6 November 2017, for the supply of overhead crane parts and/or servicing of overhead cranes in the State of Queensland south of Gladstone, and in Newcastle.
- 15 By reason of the matters alleged in paragraph 13 above, the Distributorship Agreement was an agreement containing a cartel provision, within the meaning of section 44ZZRD(1) of the Act, as in force prior to 6 November 2017.
- 16 By reason of the matters alleged in paragraph 15 above, in entering into the Distributorship Agreement with Demag, NQC contravened section 44ZZRJ of the Act, as in force prior to 6 November 2017.

**F Giving effect to the Co-Ordinated Approach Provision**

- 17 On or around 17 August 2016, at a management meeting held in Mackay, senior management at NQC communicated to NQC's operational managers, including its area managers, that:
  - (a) NQC was not to target Demag's customers in Brisbane and Newcastle when seeking to acquire new customers; and
  - (b) Demag would not target NQC's current customers in Brisbane and Newcastle.

## Particulars

This communication to NQC's operational managers is recorded in minutes of the meeting which state, *inter alia*:

New Crane enquiry Brisbane and Newcastle to Demag.  
Issues - Brisbane cannot actively target.

...

Bris & Newcastle actively competing for service but not targeting.

- 18 On and from 26 August 2016 until 18 October 2018, NQC gave effect to the Co-Ordinated Approach Provision of the Distributorship Agreement through, and by reason of:
- (a) senior managers of NQC proposing to senior managers of Demag that Demag and NQC exchange lists of customers held by each company in the State of Queensland south of Gladstone, and in Newcastle;
  - (b) senior managers of NQC:
    - (i) exchanging emails with senior managers of Demag in relation to the implementation or effect of the Distributorship Agreement, including the Co-Ordinated Approach Provision; and
    - (ii) attending meetings, and having telephone discussions, with senior managers of Demag in relation to the implementation or effect of the Distributorship Agreement, including the Co-Ordinated Approach Provision;
  - (c) senior managers of NQC holding meetings with operational managers at NQC, including its area managers, at which the existence and implementation or effect of the Distributorship Agreement, including the Co-Ordinated Approach Provision, were discussed;
  - (d) senior managers of NQC raising complaints from NQC's area managers with Demag regarding the targeting of NQC's customers in Brisbane and Newcastle by Demag employees; and/or
  - (e) senior managers of NQC responding to complaints raised by Demag's area managers regarding the targeting of Demag's customers in

Brisbane and Newcastle by NQC's employees, including discussing these complaints with the relevant NQC employees.

### Particulars

As to subparagraph (a), the proposals to exchange customer lists were made orally, either in person at meetings with senior managers of Demag or by telephone, and by email, on, at least, the following occasions:

- (i) On 6 or 10 October 2016, at a meeting(s) attended by Mr Pidgeon, Mr Romyn and Mr Di Costanzo.
- (ii) On 17 October 2016, by email sent by Mr Romyn to Mr Di Costanzo, which relevantly stated:

Hi Vince,

As requested below are some of the items that we need to discuss.

...

Client lists for Brisbane and Newcastle

By proposing that NQC and Demag exchange customer lists, NQC acted in pursuance of, or in accordance with, the Co-Ordinated Approach Provision.

As to subparagraph (b)(i), examples of emails that were exchanged are as follows:

- (i) On 17 October 2016, Mr Romyn sent an email to Mr Di Costanzo, which stated, *inter alia*:

Hi Vince,

As requested below are some of the items that we need to discuss.

...

Quoting cranes from NQCranes enquires, what is the process

NQCranes/MHE Demag Signage design for new cranes

...

Client lists for Brisbane and Newcastle.

- (ii) On 20 January 2017, Mr Di Costanzo sent an email to Mr Romy, forwarding an email from Mr Hudd to Mr Di Costanzo, which states:

My understanding of the agreement at itme (sic) 14 from the meeting is:

Territory 1 (Gladstone north) all enquire for Demag hoist / components to be quoted by NQC. ALL crane enquiries passed to MHE-DEMAG

Territory 2 (SEQ Newcastle) enquire for Demag hoist / components to be quoted by NQC and MDA for their respective service clients. MHE-DEMAG to "take the lead" for All new client enquires not serviced by either NQ Cranes or MHE-DEMAG at the time of enquiry

- (iii) On 4 June 2018, Mr Pidgeon sent an email to Mr Di Costanzo, which stated:

Our NQCranes team is focused and keen to continue our mutual business together.

The past 22 months [ our anniversary 26th August 2016 ] has been a learning and getting to know each other period. NQCranes persons are generally happy with what has been put in place and the development between MDA and NQCranes.

I given a lot of thought about MDA and NQC working in Newcastle and Brisbane.

My feelings are although we compete sometimes, this appears to be less and less. Maybe our people have almost stopped mentioning our dealings in the same area.

My thoughts are that if we continue as we are the two companies have a larger slice of the Market. And our clients have choices other than Kone and Eilbeck.

In exchanging the above email correspondence with senior managers of Demag, NQC acted in pursuance of, or in accordance with, the Co-Ordinated Approach Provision.

As to subparagraph (b)(ii), the following meetings and discussions took place between senior managers of NQC and senior managers of Demag:

- (i) On 6 or 10 October 2016, Mr Pidgeon, Mr Romyn and Mr Di Costanzo attended a meeting at which the exchange of client lists in Brisbane and Newcastle and Demag approaching NQC's customers in Territory 2 were discussed.
- (ii) On 20 January 2017, Mr Romyn, Mr Di Costanzo and Mr Brad Gibson (**Mr Gibson**), NQC's area manager in Newcastle, attended a meeting at which, amongst other things, NQC's concerns in relation to discounts being offered to customers by Demag in Newcastle and Demag targeting NQC's customers in Newcastle were discussed.
- (iii) On 28 August 2017, Mr Pidgeon, Mr Romyn, Mr Di Costanzo and Mr Hudd, amongst others, attended a meeting at which NQC's plan to hire a sales representative in Brisbane was discussed.

In attending the above meetings and discussing the Distributorship Agreement with senior managers of Demag, NQC acted in pursuance of, or in accordance with, the Co-Ordinated Approach Provision.

As to subparagraph (c), the following internal meetings and discussions took place between senior managers and operational managers of NQC:

- (i) On 16 February 2017, Mr Pidgeon, Mr Romyn, Mr Kris Pidgeon (**Mr K Pidgeon**), Operations Manager at NQC, and Mr Ian Gampe, Financial Controller at NQC, attended a senior management meeting in Mackay, at which it was agreed that if a client was unhappy with Demag, NQC would provide a quote to that client directly.
- (ii) On 7-8 August 2017, Mr Pidgeon, Mr Romyn, Mr Gibson and others attended a meeting of NQC's management in Mackay at which the Distribution Agreement, as it relates to Territory 2, was discussed. This is recorded in the

minutes of the meeting of NQC managers, which state,  
*inter alia*:

Demag in Neswcastle (sic) are gunning all our customers. We doing same to them Callan picked up 4 news service contracts. Our good clients have Demag knocking on door and knocking our work. Lost 2 clients to Demag on warpath but we playing nice.

...

We don't bag Demag but they bag us. They are partners in crime but still opposition.

In holding the above meetings and discussing the Distributorship Agreement with senior and operational managers within NQC, NQC acted in pursuance of, or in accordance with, the Co-Ordinated Approach Provision.

As to subparagraph (d), senior managers of NQC raised complaints from NQC's area managers with Demag by email and orally, in person and/or by telephone. By way of example:

- (i) On 5 January 2017, Mr Gibson sent an email to Mr K Pidgeon, Mr Pidgeon and Mr Romyn, which states:

I have just contact our client Setco to schedule the overdue services.

I attempted to complete them in December but they would not lock in a date due to their workload.

Today I contact Jon who advised me that Demag have gone to site, undercut our service rate and completed quoted repairs.

They advised Jon that most of the repairs we quoted were not required and completed \$4K of work from our \$19K repair quote.

This has occurred within the last month with no consultation with our branch.

The customer has advised that I can submit a cheaper rate if preferred and they may review it.

Demag were aware that this was our customer.

Can you please advise on how I should proceed with this.

Later that day, Mr K Pidgeon sent an email to Mr Gibson, which states:

Brad

Thanks for the call

We will prepare a response for Demag and keep you in the loop

They are allowed to quote but should have phoned to let you know

- (ii) On 17 January 2017, Mr Romyn sent an email to Mr Mark Beckwith, Division Manager at Demag, which states:

Would you be able to provide an explanation why our customer (end user) is being offered a discount greater than offered to us (distributor) and the range of clients being offered this level of discount.

Obviously not being competitive in the market is a major concern for us and we will need to consider how this will impact on our strategy.

In raising complaints, NQC acted in pursuance of, or in accordance with, the Co-Ordinated Approach Provision. Further or alternatively, in raising these complaints with Demag, NQC purported to enforce the Co-Ordinated Approach Provision.

As to subparagraph (e), senior managers of NQC responded to complaints from Demag's senior managers by email and orally, in person and/or by telephone. By way of example:

- (i) On 15 May 2017, Mr Beckwith sent an email to Mr Pidgeon and Mr Romyn, which stated:

I have had reports from my Service Manager (that came from our customers) that NQC Newcastle personnel have been soliciting our service customers. Your people have been promising competitive spares pricing and how they can do and provide anything that Demag can. According the reports I'm getting, this is no accidental stumble as these are longterm MHE-Demag customers that the 2 ex Demag employees employed by NQC in Newcastle (including the service Manager) would be fully aware of.

Can you please investigate and let me know if there's a specific reason this may be happening?

Regardless, I would appreciate your intervention to curtail this activity. I appreciate your assistance with this.

- (ii) On 16 May 2017, Mr Romyn sent an email to Mr Beckwith which stated:

I can assure you we are not knowingly chasing any MDA clients in Newcastle. We are however actively trying to increase our service base all over Qld & NSW and we are offering competitive spares pricing and quality services on all makes and models of cranes. If you can supply specific details on the issues below I would be pleased to supply addition information.

We are trying very hard to make the NQCranes/MDA relationship work and I believe it is evolving splendidly. Vince tells me you've had a rethink about the level of spare discounting you're going to offer your clients, this will be good for all parties.

The larger our client list, the more opportunity for the sales of Demag cranes and components.

- (iii) On 17 May 2017, Mr Beckwith sent a further email to Mr Romyn which stated:

The customer in question is Mill Tech, and the reason this one popped up on the radar is that the NQC guys in Newcastle certainly know that this is a MHE-Demag customer as they were employees when this customer came on board with us.

Later that day, Mr Romyn sent an email to Mr Gibson, forwarding this chain of emails.

- (iv) On 18 October 2018, Mr Beckwith sent an email to Mr Romyn, which states:

I've had separate reports from parts of our QLD team that some NQC salesperson(s) have approached our service customers (Liberty Steel and AVK in the Gold Coast) soliciting their business in new service agreements. Clearly, if this is in fact did happen it's against the spirit of our relationship and I'd ask for this activity to be halted immediately. Of course, if it didn't happen quite the way it's been reported to me than that would potentially change my view on it.-)

What's your take on this? I appreciate that it's possible sales people don't know who is whom's

customer and may well inadvertently approach MHE-Demag service customers, and visa versa, but I would also hope that once they learn that the service is being delivered by one or other of us they would cease service sales activity. I believe our team follows that guideline.

Later that day, Mr Romyn sent an email to Mr Beckwith which stated:

I'm unaware of these actives. I'll look into it and get back to you.

In responding to the above complaints from Demag, NQC acted in pursuance of, or in accordance with, the Co-Ordinated Approach Provision.

Further particulars will be provided after discovery.

- 19 By reason of the matters alleged in paragraphs 16 and 18 above, on and from 26 August 2016 until 18 October 2018, NQC gave effect to a cartel provision, within the meaning of section 4 of the Act, in contravention of section 44ZZRK of the Act as in force prior to 6 November 2017, and section 45AK of the Act since 6 November 2017.

**And the Applicant claims** the relief specified in the Originating Application dated 19 October 2020.



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Signed by Tom Jarvis  
Lawyer for the Applicant

This pleading was prepared by Tom Jarvis and settled by Ronald Gipp and Catherine Dermody, of counsel

### **Certificate of Lawyer**

I Thomas Litchfield Jarvis certify to the Court that, in relation to the Statement of Claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 19 October 2020



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Signed by Tom Jarvis  
Lawyer for the Applicant