

NOTICE OF FILING

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Details of Filing

Document Lodged:	Concise Statement
File Number:	VID1328/2019
File Title:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v TASMANIAN PORTS CORPORATION PTY LTD
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 6/12/2019 3:36:23 PM AEDT

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

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.

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Concise Statement

No. VID of 2019

Federal Court of Australia

District Registry: Victoria

Division: General Division

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

TASMANIAN PORTS CORPORATION PTY LTD

Respondent

IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 1 This proceeding concerns misuse of market power by the Respondent (**TasPorts**) in contravention of s 46(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) in relation to the attempted entry by a competitor, Engage Marine Tasmania Pty Ltd (**Engage Marine**), into markets for the supply of marine services, and in particular towage services at Tasmanian and/or northern Tasmanian ports and pilotage services at Port Latta and/or Tasmanian ports (**relevant markets**).
- 2 Apart from the attempted entry by Engage Marine, TasPorts carries on business as the sole provider of marine services at Tasmanian ports. In 2017, by offering more competitive prices and better quality of service, Engage Marine won a contract for the supply of marine services at Tasmanian ports from TasPorts, and in particular for towage and pilotage services to Grange Resources Limited (**Grange**) at Port Latta. TasPorts had previously supplied towage and pilotage services at Port Latta to Grange since 2009.
- 3 In response to Engage Marine's attempted entry, TasPorts has engaged in the following conduct:
 - (a) imposed a new charge on Grange in relation to Port Latta;
 - (b) offered to reduce that charge along with Grange agreeing to a new contract with TasPorts for the provision of pilotage services, in place of Engage Marine;

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[Version 2 form approved 09/05/2013]

- (c) introduced a new charge targeted to apply to Engage Marine's tug boats and requirements to use temporary berths;
 - (d) failed or refused to provide any pilot training to Engage Marine;
 - (e) failed or refused to facilitate the provision of long term berths for Engage Marine's tugs in northern Tasmania; and
 - (f) failed or refused to include Engage Marine on the Shipping Schedule as a towage service provider.
- 4 TasPorts has engaged in that conduct for the anti-competitive purpose of preventing or hindering Engage Marine from competing in the relevant markets. TasPorts' conduct had the purpose and/or the effect, and/or was likely to have the effect, of substantially lessening competition in the relevant markets.

Towage and pilotage

- 5 "Towage services" refers to using tug boats to guide ships. "Pilotage services" refers to using a marine pilot to assist the ship's captain (master) to move a ship in port waters. In order to access Tasmanian ports, large vessels must employ the services of a licensed pilot.

TasPorts' substantial market power

- 6 TasPorts is a trading corporation for the purposes of s 4 of the CCA. TasPorts owns marine port assets and facilities in Tasmania, including at the ports of Hobart, Devonport, Burnie and Bell Bay. Port Latta is the only commercial or community port in northern Tasmania where the port assets and facilities are not owned by TasPorts.
- 7 TasPorts carries on business providing marine services in Tasmania, including access to commercial berthing facilities and marine pilotage services and towage services at Tasmanian ports. TasPorts is the sole provider of those services in Tasmania, other than the towage services at Port Latta provided by Engage Marine to Grange since 1 July 2018.
- 8 TasPorts is also the sole provider of marine pilot training for Tasmanian ports. Since at least 2011, pursuant to a deed between the Marine and Safety Authority of Tasmania (**MAST**), the Crown in Right of the State of Tasmania, and TasPorts (**Deed**), MAST has engaged TasPorts to, amongst other things, develop and publish a Marine Pilotage Code, ensure that pilots are trained in accordance with the Marine Pilotage Code, conduct pilot examinations, and ensure that vessels employ pilots at the Tasmanian ports listed in Schedule 2 to the Deed. The ports listed in Schedule 2 to the Deed include Port Latta.

Entry of Engage Marine

- 9 Engage Marine Pty Ltd (**Engage Marine Australia**) (through subsidiaries such as Engage Marine) provides towage services at various ports around Australia, including in competition with other towage providers at the ports of Sydney and Geelong.
- 10 Grange owns and operates Port Latta, from which it exports iron ore pellets.
- 11 In August 2017, Grange sent Engage Marine Australia a letter of intent to engage it to provide marine services at Port Latta, and also informed TasPorts that it had decided to transition to a new provider. TasPorts and Grange agreed that TasPorts would continue to provide marine services to Grange at Port Latta until 30 June 2018.
- 12 In March 2018, Grange and Engage Marine entered into a long-term Marine Services Agreement (**Grange MSA**) for Engage Marine to exclusively provide marine services to Grange at Port Latta. Grange considered that the Grange MSA offered substantial cost savings and other features designed to improve the quality and efficiency of marine services provided to it at Port Latta.
- 13 Grange is currently Engage Marine's only customer in Tasmania. Engage Marine is currently supplying towage services to Grange at Port Latta using a single tug boat. Engage Marine wants to provide marine services, and particularly towage, in competition with TasPorts in Tasmania beyond Port Latta.
- 14 However, as explained below, TasPorts' conduct has prevented Engage Marine from providing towage beyond Port Latta. TasPorts' conduct has also prevented Engage Marine from providing pilotage services to Grange and has forced Engage Marine to sub-contract those services to TasPorts.

TasPorts' imposition of a new charge on Grange

- 15 In October 2017, TasPorts advised Grange that in circumstances where it was ceasing to engage TasPorts to supply marine services at Port Latta, TasPorts would require Grange to pay a new 'marine precinct tonnage charge' for vessels calling at Port Latta from 1 July 2018 (**MPTC**).
- 16 At the same time, TasPorts revised the 2017/18 version of its Schedule of Port Charges to state that *"The vessel Tonnage charge applies to any TasPorts marine precinct and covers those TasPorts responsibilities under Schedule 2 of the Deed of Agreement with MAST and the EPA. These include responsibilities related to Pilotage activities, all Navigational matters, Emergency Response, Environmental Protection and Port Security issues."*
- 17 Grange refused to pay the MPTC, which would total approximately \$750,000 per annum. The MPTC had never before 1 July 2018 been imposed by TasPorts at Port Latta. It was

not payable under Grange's previous agreements with TasPorts. TasPorts also sought to impose tonnage charges on the shipping agents for vessels calling at Port Latta (a cost that would ultimately be passed on to Grange), which had not previously been imposed on vessels at Port Latta.

- 18 TasPorts introduced and imposed the MPTC on Grange without conducting any, or any proper, assessment of the costs to TasPorts of the services, if any, TasPorts would need to provide to Grange at Port Latta in order to perform any of the responsibilities conferred on it under the Deed.
- 19 In further communications in 2018 and 2019, TasPorts presented a number of proposals to Grange for TasPorts to provide pilotage services directly to Grange in lieu of Engage Marine along with significantly discounted rates for the MPTC.

TasPorts' introduction of new charges and requirements for Engage Marine to use temporary berths

- 20 In or about June 2018, TasPorts imposed on Engage Marine a 'Layup Minimum Charge' of \$965 (plus GST) per day for use of a temporary berth at the Port of Burnie. This was not a charge included in TasPorts' Schedule of Port Charges.
- 21 From 1 July 2018, TasPorts introduced a new type of 'tonnage' charge in its Schedule of Port Charges for 'non-cargo' vessels of \$984 (plus GST) per day (**Minimum Lay Up Charge**). According to TasPorts, the Minimum Lay Up Charge is applicable to Engage Marine's tug boats if using temporary berthing facilities in Tasmanian ports. It was targeted to apply to Engage Marine's tug boats.
- 22 The new Minimum Lay Up Charge made it uneconomical for Engage Marine to use TasPorts' temporary berths for its tugs.
- 23 Further, TasPorts told Engage Marine it would need to constantly 'man' its tug if it used TasPorts' temporary berths in case other users required access to the berth. This would impose substantial additional costs on Engage Marine. TasPorts' tugs have long term berths.

TasPorts' failure or refusal to provide pilot training

- 24 Despite repeated requests by Engage Marine from 2017 to 2019, TasPorts has failed or refused to provide Engage Marine with pilot training in accordance with the Marine Pilotage Code, which is necessary to obtain a pilot's licence to provide pilotage services to Grange at Port Latta.
- 25 On 29 June 2018, Engage Marine was required to enter into a Memorandum of Understanding with TasPorts (**MOU**) in order to fulfil its obligations under the Grange MSA.

In the MOU, TasPorts acknowledged the requirement to provide pilot training to Engage Marine and agreed to enter into a Pilot Training Agreement to govern the training arrangements (cl 6(c)). In the meantime, under the MOU, Engage Marine sub-contracted the provision of pilotage services to Grange at Port Latta to TasPorts.

- 26 Notwithstanding the terms of the MOU, TasPorts has not provided any pilot training to Engage Marine or engaged in any genuine discussions with Engage Marine about any Pilot Training Agreement or proposal to train Engage Marine pilots.
- 27 In any event, in a meeting in November 2018, TasPorts advised Engage Marine that any trained Engage Marine pilot would not be able to work as a pilot unless contracted to do so by TasPorts.

TasPorts' failure or refusal to facilitate the provision of long term berths for Engage Marine's tugs

- 28 In September 2017, Engage Marine had discussions with a shipping company about sub-leasing berths for Engage Marine's tugs at the Port of Devonport. The shipping company indicated that it needed TasPorts' consent to do so. In January 2018, TasPorts refused to consent to the shipping company sub-leasing a berth to Engage Marine.
- 29 TasPorts failed or refused to engage in any genuine discussions with Engage Marine about long term berthing facilities until at least September 2019. This was more than two years after Engage Marine approached TasPorts regarding access to berth space in May 2017, and was also after TasPorts had become aware, in around July 2019, of the ACCC's investigation.
- 30 In the circumstances, Engage Marine has had to deploy a temporary offshore mooring outside Port Stanley to park its tug so that it can provide towage services at Port Latta. Engage Marine has not been able to deploy a second tug in Tasmania, which is required under the Grange MSA for the provision of towage services to Grange at Port Latta on occasion (due to bad weather) and also to expand its operations beyond Port Latta in northern Tasmania. Engage Marine will continue to be hindered in, or cease, providing towage services at Port Latta or elsewhere in Tasmania if it does not have access to a long term berth on reasonable commercial terms.

TasPorts' failure or refusal to place Engage Marine on the Shipping Schedule

- 31 Despite repeated requests by Engage Marine in 2018 and 2019, TasPorts has also failed or refused to place Engage Marine on the Shipping Schedule as a towage service provider for Tasmanian ports, which is necessary for it to provide towage services (other than at Port Latta).

Purpose of TasPorts' conduct

- 32 The conduct of TasPorts referred to in paragraphs 3 and 15 to 31 above was engaged in for the purpose of substantially lessening competition in the relevant markets.
- 33 The purpose of TasPorts' conduct was to prevent or hinder Engage Marine from competing in those markets. In particular, TasPorts' strategy was to limit Engage Marine to a single tug towage service operation in Port Latta and prevent or hinder Engage Marine from expanding into other Tasmanian ports and supplying pilotage services at Port Latta.

Effect and likely effect of TasPorts' conduct

- 34 TasPorts' conduct referred to in paragraphs 3 and 15 to 31 above was likely to have the effect, and/or had the effect, of substantially lessening competition in the relevant markets.
- 35 But for TasPorts' conduct, Engage Marine would or would likely be competing to provide pilotage services at Port Latta, and towage services in Tasmania at ports additional to Port Latta.

PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

- 36 By reason of paragraphs 6 to 8 above, TasPorts has a substantial degree of power in markets for the supply of marine services in Tasmania and particularly the supply of towage services and pilotage services in the relevant markets and the supply of berthing facilities at Tasmanian ports.
- 37 By reason of paragraphs 3 and 15 to 35 above, TasPorts has engaged, and continues to engage, in conduct that has the purpose, effect and/or likely effect of substantially lessening competition in the relevant markets.

RELIEF SOUGHT FROM THE COURT

- 38 The ACCC seeks the relief in the accompanying Originating Application.

ALLEGED HARM

- 39 TasPorts' conduct has prevented or hindered Engage Marine from competing or effectively competing in the relevant markets. TasPorts' conduct has substantially lessened competition in the relevant markets and denied Grange and other Tasmanian customers the benefits of competition in the supply of marine services, including in relation to the price and quality of those services.

Date: 6 December 2019

This Concise Statement was prepared by Andrew Riordan, James Love and Kelvin Ng of Norton Rose Fulbright, and Norman O'Bryan SC and Nick De Young SC of Counsel.

Certificate of lawyer

I, Andrew Riordan, certify to the Court that, in relation to the Concise Statement 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: 6 December 2019



Signed by Andrew Riordan, Norton Rose Fulbright Australia
Lawyer for the Applicant