Australian Competition & Consumer Commission

Chartered Institute of Logistics & Transport Association

Competition & regulatory issues affecting the transport sector

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INTRODUCTION

Transportation and logistics are lifeblood industries that keep our economy on the move. Because these industries are essential to so many businesses and have a huge impact on many facets of the economy, it's little wonder they receive a lot of attention from the business media.

Like any other form of regulation, the way our transport sector is regulated – be it in relation to railways, ports, or airports – is of particular interest and is often controversial. Whenever issues of regulation arise, a storm of publicity and public debate usually follows.

But these are important debates we need to have. The general consensus is that there will be a much greater demand placed on our transport infrastructure over the next decade. We need to be looking ahead to meet these challenges in order to maintain our international competitiveness. This includes a smart, relevant and up-to-date approach to regulating these services.

Today I would like to touch on some of the major issues in a number of important matters the ACCC has been dealing with recently:

- Recent merger transactions - Toll/ Patrick
- Authorisation of short term capacity allocation systems in relation to coal logistics – Dalrymple Bay and Port Waratah
- Recent regulatory developments, including with Part IIIA Trade Practices Act
- ACCC monitoring activities in relation to airports and container stevedoring
- Australia's retail petrol prices – and the ACCC's inquiry

MERGERS

The Toll merger with Patrick Corp has been, and continues to be, the largest and most significant merger in the sector that the ACCC has been dealing with.

In early November 2006 Toll, informed the ACCC of its intention to restructure its business. The restructure involved the creation of Asciano Limited, and the transfer of the assets that comprise Toll's infrastructure assets, including Pacific National, to Asciano.

Toll told the ACCC it considered the restructure would address more comprehensively a number of the ACCC's competition concerns arising from the company's acquisition of Patrick in early 2006.

Toll sought to be relieved of a number of obligations it had undertaken in connection with the original merger.

When the ACCC took Toll's new proposals to the market, enquiries revealed the restructure would only benefit competition if there was a complete and clean break between Toll and Asciano.

Amended Toll undertaking

Toll's final undertakings, which now apply as a consequence of the restructure having been effected, subject Toll and Asciano to new obligations regulating cross shareholdings, directorships, joint ventures, arm's lengths dealings, employment and secondment of personnel – all designed to ensure the complete and clean separation of Toll and Asciano.

These obligations will be subject to strict scrutiny by independent auditors – with a requirement to divest the vehicle transport and PrixCar interests(in the case of Toll) and 50 per cent of Pacific National (in the case of Asciano) if the obligations are not completely satisfied.

Those divestments still required to be effected, including the East/West "starters kit", the Patrick Bass Strait Shipping and Tasmanian Freight Forwarding Businesses, have either been completed or a near completion.

COAL CHAIN LOGISTICS AUTHORISATIONS

You will no doubt be familiar with the current queue of coal ships off Newcastle, and the capacity difficulties coal exporters are having at present. This is an area the ACCC has also been involved in through its authorisation process.

In some instances, the formation of logistic chains or industry based solutions to bottlenecks can raise trade practices concerns. Through the authorisation process, however, the ACCC can approve such solutions where they provide an overall public benefit.

The ACCC has considered two authorisation applications in recent years dealing with logistics chains and coal ship queue management at the Port of Newcastle and Dalrymple Bay. Last month, the ACCC approved amendments to the Newcastle scheme.

The infrastructure issues at and around the Ports of Newcastle and Dalrymple Bay are clear for all to see. At its peak, there have been up to 70 ships in the queue waiting at Newcastle to load coal. The demurrage costs, all deadweight losses, have been estimated to amount to in excess of $250m per annum.

The queue management schemes were designed by the industry as transitional measures to limit the demurrage costs from excessive queues until scheduled expansion projects are operational. Both schemes are designed to provide coal producers with a proportionate share of the available capacity of the coal chain. In both matters, concerns focused on whether the queue management schemes would result in reduced coal exports, and remove pressures for investment to expand the capacity of the respective coal chains.

The ACCC concluded that both schemes would likely result in significant public benefits particularly in reducing demurrage costs and improving economic efficiency – recognising that the industry can't squeeze more coal out of a system already running at full capacity. The quota system provides a way of ensuring the maximum amount of coal is able to move through the constraints of the supply chain.

This is of course a temporary measure while new infrastructure is built to cater to the increased demands of exporters. In Newcastle, construction at the port has been completed well ahead of schedule, increasing the capacity of the port (from 90 million tonnes per annum to 102 million tonnes per annum) and there have been developments in relation to the construction of a third coal loading facility. Other expansion projects in the Hunter Valley, particularly rail, are underway and should increase the capacity of the coal chain later this year.

PART IIIA - NATIONAL ACCESS REGIME

There are, and will always be, some forms of monopoly infrastructure that it is simply uneconomic to replicate. For this reason, Part IIIA of the Trade Practices Act provides for a national access regime to these services. At its most basic level, it is a negotiate/arbitrate framework.

The ACCC's preferred position (and that of the Government as reflected in the legislation) is that wherever possible, third party access to services of significant infrastructure facilities should be done through commercially agreed terms. Part IIIA is not a substitute for commercial negotiation - if anything it underpins a framework for parties to negotiate.

Most recently the negotiate/arbitrate model has been used in relation to the dispute between Virgin Blue and Sydney Airports Corporation Limited.

Private commercial negotiation took place between Virgin Blue and SACL in the first instance, and failed to reach a satisfactory outcome. In October 2002 Virgin Blue applied for services at the airport to be declared under Part IIIA.

What followed was a 5 year process including a series of appeals, applications and further disputes between the two parties.

Ultimately Virgin notified the ACCC of its access dispute earlier this year. However the matter came full circle when Virgin Blue recently withdrew its notification, indicating that the parties had reached a commercial agreement.

What was learnt from the process?

Part IIIA is not an easy or costless process. It took Virgin Blue almost five years to reach an agreement with SACL in relation to access. It is doubtful this experience will ‘open the floodgates’ on Part IIIA and that access seekers will turn to Part IIIA in lieu of seeking private commercial agreements.

Part IIIA can also still support a system of private commercial negotiations. Both processes can occur simultaneously. Part IIIA outcomes should not be seen as a substitute for commercial negotiation.

It is important that the parties realise the ACCC’s role in access regulation is not a given, nor is it a primary focus. The ACCC’s role does not ‘kick in’ until late in the regulatory process. The ACCC is not the first ‘port of call’ of grievances between parties. A negotiated settlement is achievable under Part IIIA.

ACCESS UNDERTAKINGS AND AUSTRALIAN RAIL TRACK CORPORATION (ARTC)

The national access regime also provides scope to develop access undertakings.

At the Commonwealth level, the ACCC has becoming increasingly involved in interstate rail access arrangements.

In 2001, the ARTC submitted an undertaking to the ACCC under Part IIIA in relation to access. The undertaking was accepted by the ACCC in 2002 for a period of five years and has recently expired (on 1 June 2007).

The dispute resolution arrangements that were contained in the undertaking provided the ACCC with a potential role for arbitrating access disputes -in circumstances of ‘last resort’, where there was no alternative means to arbitrate the dispute.

Interestingly, the ACCC was never called upon to arbitrate an access dispute during the life of the undertaking.

On the 20th of June this year the ACCC announced that ARTC had submitted a new access undertaking.

We will be looking at this undertaking under the Part IIIA process. The ACCC is required to use its best endeavours to reach a final position in six months, meaning a final decision is expected in early December.

RECENT REGULATORY DEVELOPMENTS, INCLUDING Part IIIA TPA

In February last year COAG signed a Competition and Infrastructure Reform Agreement calling for consistent regulation for ports, railways and other export-related infrastructure), time limits on regulatory decisions and certification of all State and Territory access regimes by 2010. It also called for a national system of rail access regulation using the ARTC undertaking as a model.

Part IIIA of the Trade Practices Act has also undergone recent amendment. From 1 October 2006, the Part was amended to include an objects clause and a set of pricing principles. The ACCC is bound to have regard to the objects of

Part IIIA and these pricing principles when making decisions under the Part. The amendments also stipulate the ACCC must use its best endeavours to make a decision (in relation to determining an access dispute or assessing an access undertaking) within six months.

ACCC PRICE MONITORING

Price monitoring is another important ACCC function that crosses into the area of infrastructure and transport. The ACCC currently monitors prices at airports, in container stevedoring and petrol.

Price monitoring is not regulation, and that is an important point to remember. The purpose of price monitoring is to provide information to the Government, and stakeholders. It should not be confused with regulation such as imposing price caps.

As the name suggests, monitoring is about observing and gathering information and even when monitoring might point to a problem within a market, it does not automatically trigger action. It is up to the Government to decide what it does with that information.

If you like, price monitoring is hands-off, while regulation on the other hand, is a form of intervention.

On 27 April 2007, the Government tabled the Productivity Commission report into price regulation of airport services. The Government issued its response on 30 April 2007, and announced that price monitoring would continue until 2013.

From 2007-08, Canberra and Darwin airports are to be excluded from the monitoring regime and the Minister for Transport and Regional Services must publicly indicate each year whether further scrutiny of airport conduct is necessary or ask airports to ‘show cause’ why their conduct should be subject to part VIIA or other inquiry.

Aeronautical asset bases for monitoring purposes are to be a set at the value reported to the ACCC as at 30 June 2005. The definition of aeronautical services will be revised such that there is consistency for the purposes of the Airports Act and the TPA.

Prices, quality and service outcomes should be presented as a single report and a separate monitoring regime for car parking is to be introduced.

The ACCC is currently working through how it intends to administer the new regime and intends to consult with all of the monitored airports prior to finalising its intended approach.

Airports

To give you a flavour of the sorts of information we gain through price monitoring, let me give you a few highlights from our most recent report on airports released in February this year.

What we found was that prices, measured as aeronautical revenue per passenger, increased at most airports during 2005-06, although to a lesser degree than in previous years.

Prices ranged from a fall of 1.1 per cent at Canberra Airport to a rise of 49 per cent at Adelaide, which is primarily the result of introducing a Passenger Facilitation Charge at its new Terminal 1.

Since 2001-02, aeronautical revenue has increased by 21 per cent at Sydney to 162% at Adelaide. This is due to increased security costs and increased revenue from related services such as carparking, taxi and check-in fees.

Let me reiterate, this information is designed to arm government with the facts it requires to make its decisions. Just because an ACCC report identifies a particular trend, it does not automatically trigger action on the part of the regulator.

Container stevedoring

In the area of container stevedoring, the ACCC monitors prices, costs and profits of container terminal operators at the ports of Adelaide, Brisbane and Burnie, Fremantle, Melbourne and Sydney.

Our 8th annual report was released in November 2006 and showed that at Australia's largest container terminals, stevedoring unit revenues and costs both increased, while productivity fell.

This contrasts with a pattern of declining real unit revenue and costs and increasing productivity that occurred in the late 1990's following waterfront reform.

Our report also showed that new asset investment continues to occur. The monitoring program provides information to the government and wider community about the progress of reform in Australia’s stevedoring industry.

Petrol

Of course it would be remiss of me to leave here today without addressing one of the hottest topics in the transport sector at present – the cost of petrol.

Australian retail prices are benchmarked to the Singapore Mogas 95 Unleaded price – not as is often misrepresented in the media, Tapis crude oil.

A number of factors go into determining the price we pay, including the Australian/US dollar exchange rate; Australian Government fuel standards and excise and the GST.

Following recent comments by the ACCC on domestic/international petrol price disparities, the Government approved a request by the ACCC that it hold an inquiry into petrol prices across Australia.

This was triggered by the ACCC’s monitoring showing a widening gap between international bench mark prices and Australian retail prices.

This will be the first inquiry conducted by the ACCC under Part VIIA of Trade Practices Act, and is due to report to the Treasurer 15 October 2007.

The ACCC already monitors retail petrol prices across some 4600 service stations nationally.

This inquiry is a more focussed examination of:

- the current structure of the industry,
- the extent of competition at refinery, wholesale and retail levels – including the role of imports,
- how prices are determined, and
- impediments to efficient petrol pricing, and how these might be redressed.

It will be a public inquiry with wide ranging powers including subpoenas, taking evidence on oath and compelling witnesses to appear. Witnesses may be cross-examined by Counsel and businesses will be required to produce internal documents.

This inquiry will allow the ACCC to test stakeholders' propositions and check the veracity of claims made in the public arena. We will be looking for facts, not untested claims or opinions.

Any evidence of breaches of TPA we discover as part of that process will trigger normal enforcement investigative processes.

A number of key questions we will be asking include:

- Are Australian petrol prices based on international benchmarks, and if so, why?
- How are wholesale and retail petrol prices determined, and by whom?
- If Australian petrol prices are truly based on international benchmarks, how can those who determine wholesale and retail prices, manage a sustained deviation from those benchmarks?
- Why do petrol prices move in cycles in the largest metropolitan cities?
- Do consumers benefit from price cycles?
- What is the role and effect of the major supermarket chains?
- Are there impediments to competitive and efficient petrol pricing and if so what might be done to overcome them.

CONCLUSION

With so many areas of the transport and logistics areas in a state of flux, it remains a challenge not only for industry, but regulators and the government to respond to challenges in a way that produces the greatest dividends for the country.

While competition appears to be strong, we still need to be vigilant to ensure those wanting to compete are given an opportunity to do so.

Clearly, with strain on our infrastructure such as that currently being experienced by the coal exporters, there is scope to manage problems in an innovative way.

There are many tools at our disposal to go about that task of protecting competition, from information gathering to identify potential problems through inquiries or price monitoring, through to access regimes that ensure monopoly infrastructure is not used to stifle competition.

There is no magic bullet, it remains a case of getting the mix right and being adaptable to changing circumstances.

Our reward for getting it right will be strong competition, better productivity and an efficient and robust economy.