AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Container stevedoring monitoring report

2021–22

December 2022

accc.gov.au

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

ACCC 12/22_22-64

www.accc.gov.au

Contents

Glossary and Abbreviations

ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
Berth	A ship's allotted space in a stevedore's container terminal.
BITRE	Bureau of Infrastructure and Transport Research Economics
Blank sailing	Where a shipping line cancels ('blanks') a scheduled service, or where certain ports are omitted along a particular route. Also known as a "void" sailing.
Cargo owners	Importers and exporters, also known as shippers.
CCA	*Competition and Consumer Act 2010* (Cth)
Container exchange	The total number of containers that are unloaded and loaded while a ship is at berth.
CPI	Consumer Price Index
Crane intensity	Total number of allocated crane hours divided by the elapsed time from labour first boarding the ship to labour last leaving the ship. Crane intensity is an input to calculating 'net crane rate' and 'ship rate'.
Crane rate	An indicator of capital productivity that reflects the intensity to which quayside cranes are worked. It is measured by dividing the total number of containers (TEUs) handled by the crane by the 'elapsed crane time'.
De-hiring	The process of returning an empty container to either an empty container park or a terminal.
DP World	DP World Australia Ltd operates container terminals in Brisbane, Fremantle, Sydney and Melbourne.
EBIT	Earnings before interest and taxation
EBITA	Earnings before interest, taxation, and amortisation.
Elapsed crane time	The crane time allocated by the stevedores. It is computed as the total allocated crane hours less operational and non-operational delays. Elapsed crane time is an input to calculating the 'crane rate'.
Elapsed labour rate	An indicator of labour productivity. The elapsed labour rate is computed as the 'number of containers handled' divided by the 'elapsed labour time'.
Elapsed labour time	The elapsed time between labour first boarding the ship and labour last leaving the ship, less any time the labour has not worked, including non-operational delays. Elapsed labour time is an input to calculating 'elapsed labour rate'.
ESC	Essential Services Commission of Victoria
ESCOSA	Essential Services Commission of South Australia
FACT	Flinders Adelaide Container Terminal Pty Ltd. FACT is wholly-owned by the South Australian port operator and is the sole container stevedore at Port Adelaide.
Freight forwarder	A person or a company that organises shipments for cargo owners to get containerised goods from the manufacturer or producer to a market, customer or final point of distribution.

Hutchison	Hutchison Ports Australia, a member of Hutchison Ports Holdings Group. Hutchison operates terminals in Brisbane and Sydney.
Just-in-case	An inventory management strategy in which greater inventories of goods are kept to protect against possible disruptions in the supply chain. Contrasts with a 'just-in-time' strategy.
Just-in-time	An inventory management strategy in which businesses order and receive goods from suppliers only as they are needed to minimise warehouse space requirements. Contrasts with a 'just-in-case' strategy.
Land transport operators	Truck or rail operators under contract with cargo owners to transport container goods from the stevedores' container terminals to the cargo owner and vice versa.
Landside operations	Operations facilitating the exchange of containers between land transport operators and container stevedores.
Lifts	A 'lift' refers to the lifting of a single unit of container.
Monitored port	Ports under Part VIIA of the CCA subject to monitoring by the ACCC; the international container ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne, and Sydney.
MUA	Maritime Union of Australia, a division of the CFMMEU.
Operating profit	Measured by earnings (revenue less cost) before interest, taxation and amortisation.
Patrick	Patrick Terminals operates container terminals in Brisbane, Fremantle, Melbourne and Sydney.
Profit margins	In this report, this is the ratio of EBITA (earnings before interest, taxes, and amortisation) to total revenue.
Quayside operations	The lifting of containers on and off container ships at berth.
Real terms	A value expressed in the money of a particular base time period (e.g. 2021–22 dollars). Values in real terms remove the impact of inflation and provide a better comparison of values over time.
Rolled cargo	Containerised cargo that is moved to a later shipping line service.
Restrictive work practices	Provisions in Enterprise Agreements that restrict what actions a business can take in relation to its operations.
Ship rate	An indicator of labour and capital productivity while the ship is being serviced by stevedores.
Shipping lines	These companies facilitate the ocean-borne transport of containerised cargo from one port to another. Shipping lines may be directly under contract from cargo owners or through intermediary logistics companies. Shipping lines are the primary customers of stevedores.
Stevedores	Firms under contract with shipping lines and port authorities to operate specialist equipment that lift containerised cargo on and off ships in Australia's monitored container ports.
Tangible assets	The physical infrastructure used by stevedores to provide container stevedoring services e.g. cranes, straddle carriers or automated stacking cranes.

TAC	Terminal Access Charge. Previously known as an infrastructure access charge. Charges collected by stevedores on land transport operators when collecting or delivering laden (i.e. not empty) containers.
TEU	20-foot equivalent unit. TEU is the standard unit of measurement for shipping containers. One TEU is equivalent to one 20-foot shipping container. One 40-foot shipping container is equivalent to 2 TEUs.
THC	Terminal Handling Charge. THCs are charges issued by shipping lines to cargo owners to recover the costs involved in the handling of an ocean container. Different shipping lines will decide differently what costs are included in its freight rate and what costs are included in its THC.
UNCTAD	United Nations Conference on Trade and Development
VBS	The 'Vehicle Booking System'. The VBS is an online software tool that enables truck operators to book a time to pick up or drop off a container at the terminal.
Vessel bunching	Occurs when vessels arrive off their schedules back-to-back or within a short time of each other.
VICT	Victorian International Container Terminal Ltd, wholly owned by International Container Terminal Services Inc. VICT operates a container terminal in Melbourne.

Key industry insights and developments

Supply chain disruptions continued in 2021–22

Significant congestion and delays continued throughout 2021–22, exacerbated by persistent low shipping schedule reliability, increase in the size of ships visiting Australian container ports and labour shortages throughout the entire supply chain. There are signs of improvement, with global container port congestion estimated to have halved between January and August 2022.

Higher costs for cargo owners have translated into higher prices for Australian consumers

Throughout 2021–22, cargo owners have continued to pay highly elevated freight rates and incur higher costs in using the supply chain. Cargo owners have passed on these costs to Australian consumers through higher prices for imported goods, which has directly contributed to Australia's recent increase in inflation.

Stevedores' profits have increased significantly in the last few years, coinciding with changes in market dynamics due to COVID-19

Since 2019–20, stevedores' operating profit margins have increased significantly, coinciding with the COVID-19 pandemic. The changed market dynamics due to the pandemic appear to have contributed to less intense price competition between stevedores. The ACCC will continue to monitor stevedores' charges and financial performance. If profits remain elevated on a sustained basis, we will closely scrutinise whether any structural or behavioural market impediments are contributing to this and whether any further policy or regulatory responses are warranted.

Privatised Australian container ports are not adequately regulated, nor subject to a credible threat of further regulation

The current level of regulation at Australian container ports is not adequate. There is high potential for exercise of market power by container ports, through higher than efficient port charges and land rents, to exist undetected due to an insufficient level of regulatory oversight. This in turn creates a lack of credible threat of further regulation.

Some shipping lines have unreasonably levied detention fees on cargo owners

Some shipping lines have levied detention fees on cargo owners in circumstances where cargo owners could not return containers on time due to delays to which the shipping lines contributed. Cargo owners in Australia currently do not have adequate protection against such unreasonable practices, resulting in them paying significantly higher amounts of detention fees in 2021–22.

Key reforms needed to improve efficiency of the supply chain

Reform is needed across the supply chain. Australia needs to bolster its regulation of privatised container ports, repeal Part X of the *Competition and Consumer Act 2010*, address industrial relations issues, develop an enhanced framework for measuring and benchmarking container port productivity, and provide greater protection to cargo owners against unreasonable detention fee practices.

Executive Summary

About this report

This year's Container Stevedoring Monitoring Report is the 24th report produced by the ACCC under an Australian Government direction to monitor prices, costs and profits of container stevedores at international container ports in Adelaide, Brisbane, Fremantle, Melbourne and Sydney.[1]

Given the interconnected nature of the supply chain and the significant challenges the Australian container trade has faced in recent years, this report includes a broader analysis of the container freight supply chain.

State of the container freight supply chain

Supply chain disruptions continued in 2021–22

The COVID-19 pandemic, and other developments, continued to cause significant congestion and delays in the container freight supply chain throughout 2021–22. These effects were exacerbated by persistently low shipping schedule reliability, increases in the size of ships calling Australian container ports and labour shortages throughout the entire supply chain.

Many market participants informed the ACCC that low vessel schedule reliability is a critical factor contributing to congestion at container ports. Figure 1 shows the percentage of vessels on major global routes that arrived at container ports 'on time' since 2018.[2]

Figure 1: Global vessel schedule reliability: January 2018 – October 2022[3]

Source: Sea-Intelligence Global Liner Performance Report – Issue 135.

Figure 1 shows that shipping schedule reliability decreased in the second half of 2020, following the onset of the COVID-19 pandemic. Stevedores have informed the ACCC that this has resulted in 'vessel bunching' at ports and created large peaks and troughs for stevedores in handling containers. While global schedule reliability started to improve over 2022, it remains well below pre-pandemic levels.

1 The direction also requires the ACCC to monitor Burnie, but it does not currently have a container terminal.

2 Sea-Intelligence has defined 'on time' as being one calendar day either side of the scheduled arrival.

3 Sea-Intelligence, *Schedule reliability continues on its upwards trend* [media release], Sea-Intelligence website, 1 December 2022, accessed 6 December 2022.

There has been a longer-term trend towards larger ships in container shipping globally.[4] The proportion of port calls made by large ships (gross tonnage between 80,000 and 110,000) at Australian container ports has increased from 3.8% in 2018–19 to 14.3% in 2021–22.[5] Stevedores explained to the ACCC that servicing larger ships presents more operational challenges for them and further amplifies the peaks and troughs throughout the container supply chain.

Some market participants raised concerns about availability of staff throughout 2021–22 due to sickness or isolation requirements. This has been worsened by broader labour shortages throughout the supply chain, with market participants finding it difficult to identify appropriate new hires and retain them long enough to develop skills and industry knowledge. The shortage of truck drivers in particular has contributed to increased congestion at some storage facilities and empty container parks.

Market participants told the ACCC that delays caused by congestion have led to some importers preferring to hold higher levels of inventory, moving from a 'just-in-time' to a 'just-in-case' business model. This is putting further pressure on the supply chain and has also increased demand for warehousing space, driving higher rents. In the first half of 2022, the national vacancy rate for industrial and logistics property was down to 0.8%, compared with 6.3% in the second half of 2019, and is one of the lowest in the world.[6] This had led to increases in rent, with average industrial and logistics rents growing around 13–14% nationally in 2021–22.[7]

The ACCC has also been informed by market participants that all these factors contributed to ongoing congestion in the supply chain, at times overwhelming its capacity to efficiently unload, transport, process, unpack and return containers. Stevedores stated that it has been more challenging for them to optimise allocation of labour and equipment to efficiently load and unload containers, resulting in stevedores taking longer, on average, to move containers to and from ships.

Notwithstanding the challenges in 2021–22, there are signs of improvement. It is estimated that global container port congestion has halved between January and August 2022.[8]

Higher costs for cargo owners have translated into higher prices for Australian consumers

Freight rates increased substantially in 2020–21, as cargo owners everywhere tried to outbid each other to secure scarce space on vessels. Data from S&P Global indicates that global freight spot rates reached their peak in September 2021 at nearly US$8,000 per 40-foot container, approximately 8 times their pre-COVID levels.[9] Freight rates remained elevated above their pre-pandemic levels throughout 2021–22, though falling to around US$5,000 by the end of the financial year.

Higher freight rates, combined with higher costs incurred by cargo owners in using the supply chain, have contributed to higher prices for Australian consumers. The Reserve Bank of Australia has indicated that high shipping costs had contributed directly to Australia's recent increase in inflation.[10]

The slowdown in global trade is starting to ease pressure on global supply chains and has put downward pressure on freight rates in recent months. As of November 2022, freight rates have fallen

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4 Economic Commission for Latin America and the Caribbean (ECLAC), 'Ongoing challenges to ports: the increasing size of container ships', *Facilitation of Transport and Trade in Latin America and the Caribbean Bulletin*, 2020, 379(3), accessed 25 October 2022.

5 ACCC calculation based on data from BITRE's upcoming Waterline report.

6 CBRE, *Australia's Industrial and Logistics Vacancy First Half 2022 (1H22)*, CBRE website, 1 July 2022, accessed 28 October 2022. This is based on buildings with net lettable area of greater than 5,000 square metres in Sydney and Melbourne, and 3,000 square metres in Brisbane, Adelaide and Perth.

7 CBRE, *Australia's Industrial and Logistics vacancy rate dips to 0.8% as rental growth reaches double digits*, CBRE website, 12 July 2022, accessed 28 October 2022.

8 Sea-Intelligence, *50% of congestion has been resolved* [media release], Sea-Intelligence website, 5 October 2022, accessed 27 October 2022.

9 Freight spot rates refer to a one-off rate charged by shipping lines to cargo owners for transporting freight. In contrast, cargo owners might negotiate with shipping lines to pay a fixed, contracted freight rate over an agreed period.

10 See Reserve Bank of Australia (RBA), *Statement on Monetary Policy – May 2022*, RBA website, 5 May 2022, accessed 26 October 2022; RBA, *Statement on Monetary Policy - February 2022*, RBA website, 3 February 2022, accessed 26 October 2022.

to below US$2,000 per 40-foot container, which is still around double average 2019 rates.[11] Industry analysts have told the ACCC that contracted freight rates have also fallen. Going forward, increased energy prices, geopolitical tension and contractionary monetary policy across major economies are expected to further reduce consumer consumption and therefore global trade.[12]

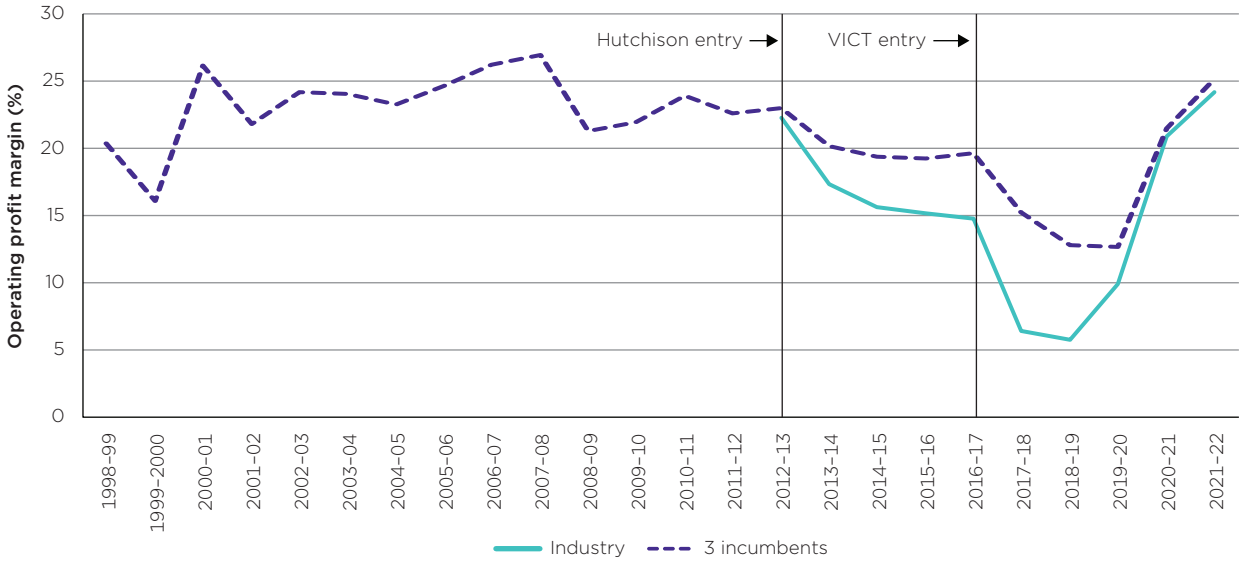
Long-term trends in the supply chain

Stevedores' profits have increased significantly in the last few years coinciding with changes in market dynamics due to the COVID-19 pandemic

The market for stevedoring services at each Australian container port remains concentrated. Prior to 2013, the stevedoring industry was largely comprised of a duopoly between Patrick and DP World. This changed with entry by Hutchison (Brisbane in May 2013 and Sydney in November 2013) and VICT (Melbourne in April 2017).

Figure 2 illustrates how the total operating profit margin of all 5 stevedores and of the 3 incumbents (DP World, Patrick and FACT) have changed during the ACCC's monitoring period.[13]

Figure 2: Stevedores' total operating profit margins, industry and 3 incumbents: 1998–99 to 2021–22



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

Figure 2 shows that prior to 2013, the incumbent stevedores consistently achieved total operating profit margins between 21% and 27%. The level of competition for stevedoring services at the 3 largest Australian container ports increased from 2013, following entry by Hutchison and VICT. In the period between 2012–13 and 2019–20, stevedores made significant investments in equipment and infrastructure and competed more intensively on prices. This, combined with other developments, led to the total operating profit margin of the incumbent stevedores dropping to 13% by 2019–20.

Figure 2 shows that the operating profit margins of the Australian container stevedores have increased significantly since 2019–20, with the incumbents' average reaching 25% in 2021–22. The operating profit margins have increased at each of the 3 east coast container ports, as shown in Figure 3.

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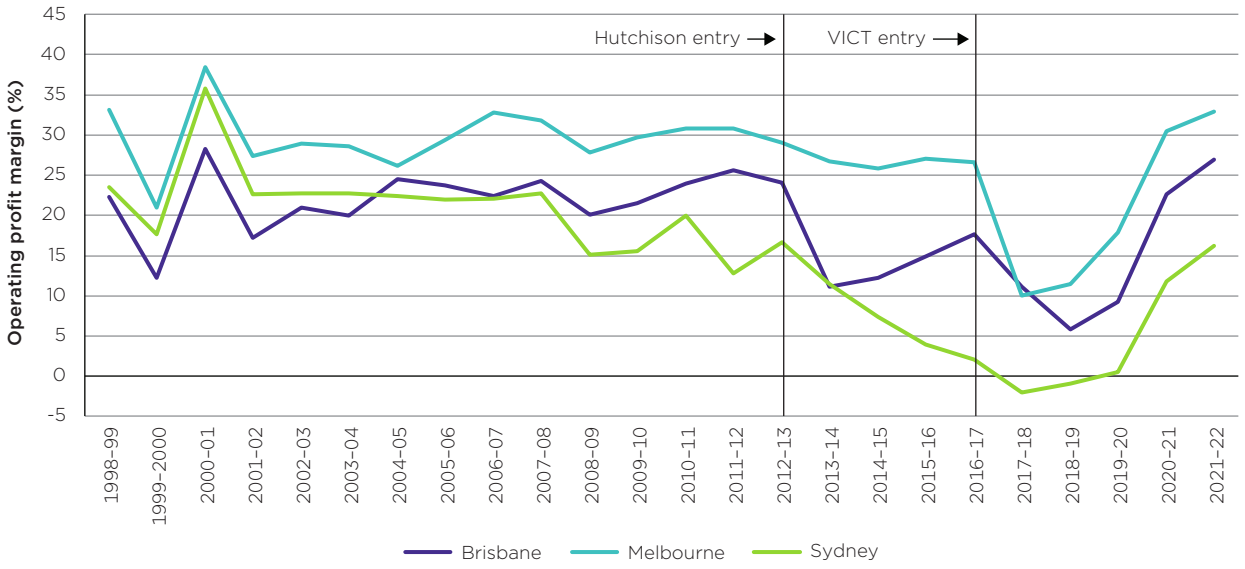
11 S&P Global Commodity Insights Platts Container Index. The Platts Container Index is a weighted average of Platts' key container assessment including North Asia to North America, and North Asia to North Continent routes. FEU (forty-foot equivalent unit) is a measure of volume in units of 40-foot long containers. The Platts Container index methodology can be found in the Platts Specifications Guide Global Freight [PDF 263KB].

12 World Trade Organization (WTO), *Trade growth to slow sharply in 2023 as global economy faces strong headwinds*, WTO website, 5 October 2022, accessed 26 October 2022.

13 The ACCC calculates operating profit margin by taking a ratio of earnings before interest, tax, and amortisation (EBITA) relative to total revenue.

Figure 3: Stevedores' total operating profit margins in Melbourne, Sydney and Brisbane: 1998–99 to 2021–22



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

The recent increases in operating profits have coincided with significant changes to market dynamics caused by the COVID-19 pandemic. We understand that severely constrained global shipping capacity has reduced cargo owners' ability to switch to a different shipping service and, by implication, a different stevedore.

This has also meant that cargo owners have not been in position to make decisions based on price, therefore reducing the pricing signals observed by shipping lines. In the absence of normal pricing signals, shipping lines may not be able to assess the benefits of switching to another stevedoring terminal. Their ability to switch may have also been affected by the operational issues arising at the container terminals due to poor shipping schedule reliability and workforce-related issues.

The ACCC has not formed a conclusive view on the drivers behind recent increases in operating profits. At this stage, the ACCC considers that the changed market dynamics may have reduced the effective options available to both shipping lines and cargo owners in choosing stevedores, as well as the ease of switching between them. It appears that this has contributed to less intense price competition between stevedores. Some stevedores have also commented to the ACCC that profit margins can fluctuate according to investment cycles.

The stevedores' profits over the past two years have returned to the levels that were observed prior to new entry by Hutchison and VICT. This has eroded the benefits that cargo owners and, ultimately, Australian consumers obtained following new entry by Hutchison and VICT.

The ACCC will continue to monitor and analyse stevedores' charges and financial performance over the coming years to evaluate the extent to which the recent increases in profits are temporary or likely to be sustained.

If the recent increased profits are due to an unusual combination of external factors, the ACCC would expect that the current profit levels would not be sustained once the factors that are causing constrained shipping and terminal capacity alleviate. However, if the profit levels remain elevated on a sustained basis, the ACCC will closely scrutinise if any structural or behavioural market impediments are contributing to this and whether any further policy or regulatory responses are warranted.

Privatised Australian container ports are not adequately regulated, nor subject to a credible threat of further regulation

The ACCC considers container ports in Australia are regional monopolies with substantial market power. In the absence of effective constraints, such monopolies have the incentive and ability to extract monopoly rents from port users who are unable to substitute their services.

All major container ports across Australia, except for the Port of Fremantle, have been privatised. Container ports are subject to varying levels of regulation and oversight by state governments. The ACCC considers that the current level of regulation at Australian container ports is not effective and the threat of further regulation in most states is not sufficiently credible to constrain container ports from exercising their market power.

The Port of Melbourne is subject to more rigorous regulation than other privatised Australian container ports. Since its privatisation in 2016, the Essential Services Commission of Victoria (ESC) has found that the Port of Melbourne has exercised its market power with respect to the setting of land rents and demonstrated significant and sustained non-compliance with its regulatory pricing requirements. Despite the significant nature of these findings, there has not been any material escalation in the level of regulation.[14]

The regulatory oversight at other container ports does not appear to be sufficient to enable state regulators to proactively identify the exercise of market power. This is most pronounced at the Port of Brisbane, which does not appear to be subject to any active regulatory oversight.

There is high potential for exercises of market power to go undetected if a regulatory regime is not designed to proactively identify and investigate them. If state regulators are not actively assessing whether ports are exercising market power, state governments cannot determine whether current regulation is adequate, and so the threat of further regulation lacks credibility.

Some shipping lines have unreasonably levied detention fees on cargo owners

Shipping lines charge 'detention fees' to cargo owners for the continued use of containers beyond a certain agreed period, to incentivise their prompt return for reuse.

Some cargo owners have informed the ACCC that the amount of detention fees they have paid to shipping lines has increased considerably in 2021–22. One cargo owner reported that the number of shipments incurring detention had almost doubled between 2018–19 and 2021–22, and that their total detention fees paid increased from approximately $150,000 in 2018–19 to nearly $1 million in 2021–22.

In many instances, higher detention fees have been caused by delays experienced by cargo owners and transport operators in returning empty containers due to a range of COVID-related congestion and logistics issues across the supply chain.

Cargo owners and transport operators have informed the ACCC that, on many occasions, the delays occurred due to some action or inaction on the part of the shipping line. Most commonly this is where a shipping line has failed to make appropriate arrangements for the de-hire of an empty container or has delayed the loading of export cargo due to its own scheduling issues.

The ACCC considers that, in circumstances where no level of detention fees can incentivise the cargo owner to return the container on the due date, the levying of the detention fees is unreasonable.

14 Essential Services Commission (ESC), *Port of Melbourne – Market rent inquiry 2020*, ESC, Victorian Government, 2020, accessed 13 September 2022, pp 32, 50; ESC, *Inquiry into Port of Melbourne compliance with the pricing order 2021*, ESC, Victorian Government, 2021, accessed 13 September 2022, pp ii–iii.

The issue of unreasonable charging of detention fees has been addressed in the United States. The US Shipping Act of 1984 created a general rule that, in effect, requires shipping lines and container terminal operators to act reasonably in their dealings with transported cargo.[15] The Federal Maritime Commission has taken steps to apply this rule in relation to container detention fees. In May 2020, it released guidance on how it would enforce the Shipping Act's rule in relation to unreasonable detention fee practices. In June 2022, it agreed a US$2 million penalty with shipping line Hapag-Lloyd after it charged US$10,135 in detention fees, which it failed to waive, for 11 containers unable to be returned to a terminal due to a lack of available appointments.[16]

There is no legislation equivalent to this rule in Australia. Cargo owners in Australia informed the ACCC that while sometimes shipping lines agreed to waive fees that were incurred unreasonably, this has not always happened. Cargo owners also said the ad hoc detention fee appeals processes provided by shipping lines are not practicable due to the administrative burden they impose, given that shipping lines required separate proof from cargo owners about why a fee was unreasonably levied each time a detention fee was appealed.

Provisions of the Australian Consumer Law (ACL), including the unfair contract terms regime and the prohibition on unconscionable conduct, seek to address undesirable business practices. However, these existing provisions may not necessarily apply to the charging of unreasonable detention fees.

We expect the incidence of unreasonably charged detention fees is likely to reduce going forward as congestion in the supply chain eases. We will continue to consult with cargo owners as part of our monitoring to assess whether this occurs. However, cargo owners in Australia currently do not have adequate protection against unreasonable detention fee practices and this has resulted in harm to both cargo owners and Australian consumers.

Key reforms needed to improve efficiency of the supply chain

Container shipping is of critical importance to the Australian economy. A well-functioning, efficient supply chain ensures our exports remain competitive and Australian consumers are not paying higher than efficient prices for imported goods. While there are signs the supply chain is recovering from the COVID-19 pandemic and conditions are normalising, the ACCC considers there are several key areas across the supply chain where reform is needed.

Port rents and charges should reflect efficient pricing to encourage efficient use of, and investment in, port infrastructure. There is a need to bolster regulation of privatised container ports to ensure they do not levy excessive rents and charges on port users and provide inferior services. At a minimum, these ports should be subject to greater regulatory oversight. However, price monitoring alone is not sufficient. An industry-specific negotiate-arbitrate model should be implemented at all container ports to assist port users in negotiations.

Cargo owners in Australia also need more protection against unreasonable detention fee practices. Consideration should be given on how best to address this, including whether to repeal the exemption for shipping contracts from the ACL's unfair contract terms regime or create a distinct prohibition on such unfair or unreasonable commercial conduct (either specific to the shipping industry or more broadly).

15 46 USC § 41102c (2006):
A common carrier, marine terminal operator, or ocean transport intermediary may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling storing, or delivering property.

16 E Johnson, 'Hapag-Lloyd agrees to increase $2 million penalty in detention case', *The Journal of Commerce online*, 8 June 2022, accessed 3 November 2022.

In its recent draft report, *Lifting productivity at Australia's container ports: between water, wharf and warehouse,* the Productivity Commission (PC) made a number of draft findings and recommendations to improve productivity at Australia's container ports.[17] The ACCC supports the majority of the PC's findings and draft recommendations, particularly with respect to:

- Shipping lines (Part X): The ACCC supports draft PC recommendation to repeal Part X of the *Competition and Consumer Act 2010*, which allows shipping lines to collaborate on prices, capacity, and schedules. This exemption is outdated and could be replaced with a more targeted exemption that delivers the net benefits without unnecessary costs.
- Industrial relations: 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 associated protected industrial action.
- Measuring productivity: The ACCC supports improving the measurement of productivity in transporting container freight as well as developing appropriate benchmarks to track the performance of Australian container ports against one another as well as relative to their international counterparts.

The ACCC will continue to monitor stevedores' performance and charging practices. We will also monitor broader developments in the supply chain to continue to inform governments' container freight policy and provide transparency to industry participants.

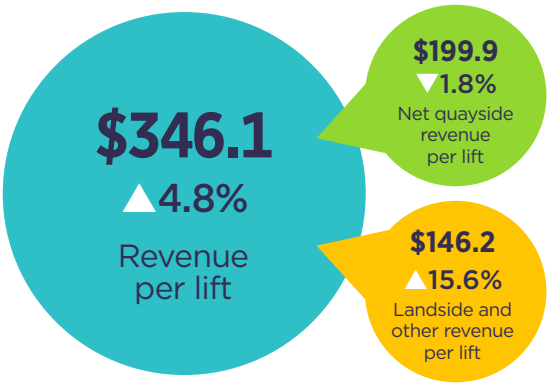
17 See Productivity Commission (PC), *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, PC, Australian Government 2022.

Key stevedoring results 2021–22

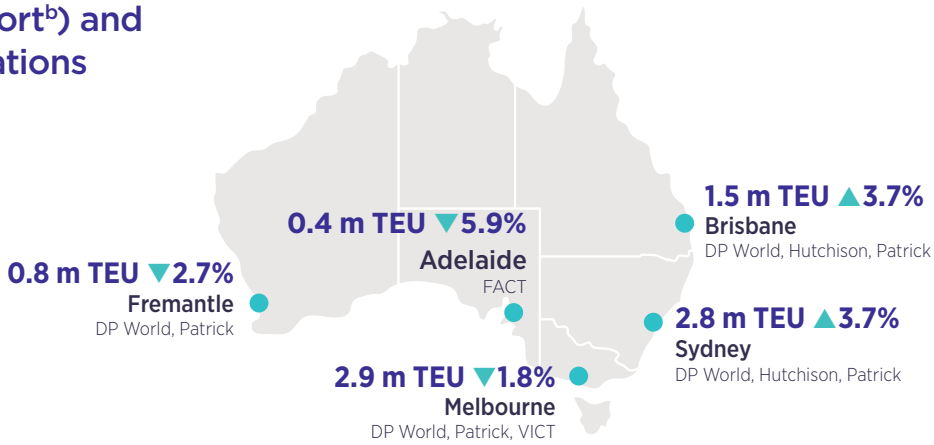
Revenue, cost, profit and investment

Total revenue	Total cost	Profit margin[a]
$1,826 m	**$1,415 m**	**24.2%**
▲5.1%	— 0.0%	▲3.3 pp

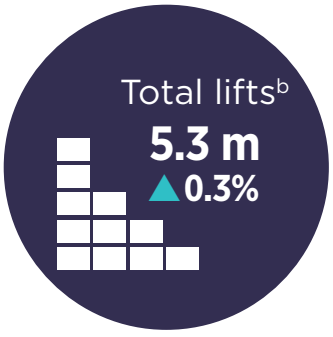
Investment (additions)	Tangible asset base	Operating profit (EBITA)
$180.1 m	**$1,696 m**	**$441.4 m**
▲240.8%	▼2.8%	▲21.8%



Total TEU (by port[b]) and stevedore's locations



Lifts per stevedore[b]



a Earnings before interest, tax and amortisation (EBITA) as a percentage of total revenue.
b Includes international container terminal volumes only.

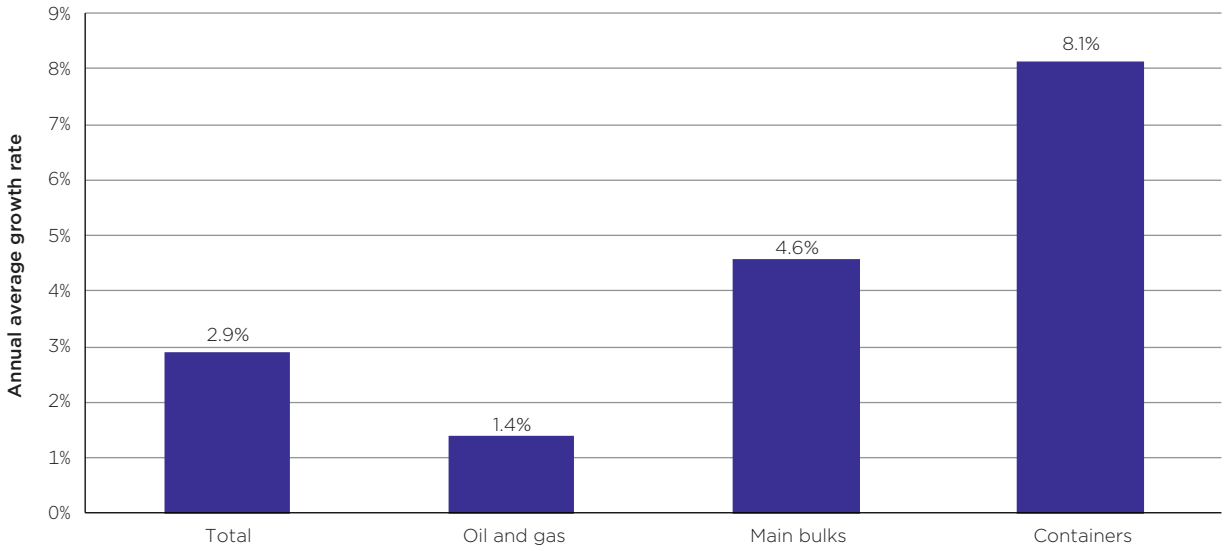
1. Introduction

1.1 The container freight supply chain in Australia

Development of containerisation has revolutionised the world maritime industry. The use of containers has dramatically lowered the cost of transporting goods across the globe. As global trade exploded over the past 70 years, containerised trade has become the dominant form of international shipping.

Figure 1.1 compares the average annual growth rate of container shipping volumes with other forms of shipping since 1980, and with seaborne trade overall.

Figure 1.1: Average annual growth rate of seaborne trade by shipping method, 1980–2018



Source: ACCC calculation of UNCTAD data (UNCTAD, Review of Maritime Transport 2018).

As shown, since 1980, containerised trade has grown more than any other form of trade.

The container freight supply chain (the supply chain) consists of a broad range of participants including shipping lines, ports, stevedores, road and rail operators and empty container parks.

The Australian Government has directed the ACCC to monitor prices, costs and profits of stevedores at container ports in Adelaide, Brisbane, Fremantle, Melbourne and Sydney.[18] This is the ACCC's 24th report.

This chapter introduces:

- the importance of the supply chain to Australia
- the key supply chain participants
- how the ACCC conducts its monitoring.

1.1.1 Australia's economy is heavily dependent on container trade

The Australian economy has benefited significantly from global trade. Australia's exports and imports make up 24% and 20% respectively of Australia's gross domestic product.[19] Australian exporters use the container freight supply chain to transport large quantities of agricultural products such as grain,

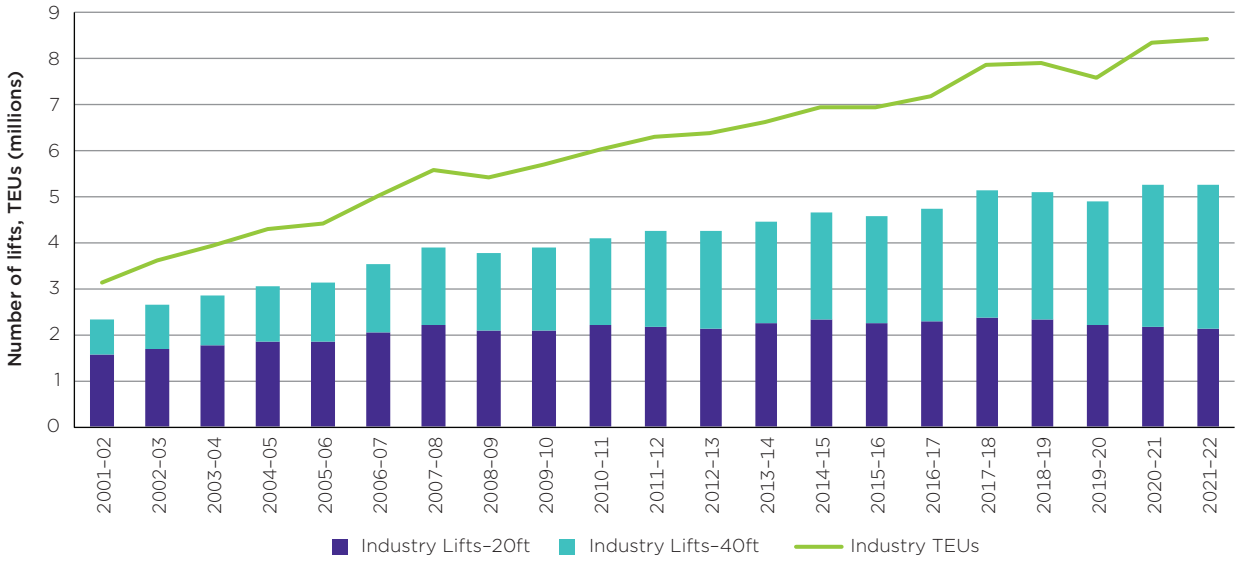
18 The direction also requires the ACCC to monitor Burnie in Tasmania, but it currently does not have a container terminal.

19 The World Bank, *World Bank national accounts data, and OECD National Accounts data files* [data set], data.worldbank.org, 2021, accessed 6 October 2021.

meat and dairy products.[20] In addition, Australian retailers import significant quantities of manufactured goods, which are used by consumers or as intermediate inputs in Australian production processes.

Over the past few decades, Australia has become heavily reliant on containerised trade. Since the ACCC began monitoring in 1998–99, the volume of containers passing through Australia's 5 major container ports has increased by an average of 7.4% each year (Figure 1.2).

Figure 1.2: Total annual TEU throughput of Australia's five international container ports



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

The 2 main units of measurement of container stevedoring throughput are lifts (number of containers) and TEUs (equivalent number of 20-foot containers).[21] The ACCC generally uses lifts as a unit of throughput because the revenues and costs of most stevedoring services are dependent on lifts rather than TEUs. This is because the operational cost to lift a container onto or off a ship does not change significantly between a 20-foot or 40-foot container.

1.1.2 Efficient operation of the container freight supply chain is critical for Australia

Australia's distance from other markets means that the efficiency of the supply chain has a large bearing on our competitiveness in overseas markets and the cost of imported goods.

Australian exporters selling into international markets need to overcome differentials in shipping costs to effectively compete with rivals that are located closer to customers. Improvements in productivity and efficiency at Australian container ports, and the supply chain more generally, will lead to lower costs for Australian exporters. This will greatly assist them to be more competitive in global markets.

With the exception of petroleum products and vehicles, Australia's imports are dominated by manufactured goods that are typically shipped in containers. This means most of Australia's imported goods are transported into Australia using the container freight supply chain.[22] Improving productivity and efficiency of the supply chain will lead to more timely and reliable delivery of many goods and lower prices for Australian households and businesses.

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20 M Calfas, N Lockwood, M James, D Simon, *Inquiry into National Freight and Supply Chain Priorities* [PDF 1.7MB], Department of Infrastructure, Regional Development and Cities, Australian Government, 2018, accessed 13 October 2021, p 10.

21 One 40-foot container is equivalent to 2 TEUs.

22 Bureau of Infrastructure, Transport and Research Economics (BITRE), 'Ports: Job generation in the context of regional development', *Information sheet 56*, BITRE, Australian Government, 2014, accessed 29 November 2022, p 7; A Kemp, T Chen, S Morrison, C Lo, *Containerised trade trends and implications for Australian ports*, report to the Port of Newcastle, HoustonKemp Economists, 2019, pp 12–14.

1.1.3 Substitutes for container freight shipping services are limited

Cargo owners only have two alternatives – air freight and bulk cargo – to transport their cargo overseas without using the container freight supply chain. Some cargo owners can use these options for shipping certain types of goods under particular circumstances. However, as discussed below, these options are not viable alternatives for the majority of cargo owners.

Air freight is unsuitable for shifting large volumes of cargo

Air freight is generally low-risk, flexible and ideal for sending cargo long distances quickly. This makes it a good choice for transporting cargo that is perishable or has a high value by weight and volume, with pharmaceutical products being a typical example. However, it has several disadvantages compared to containerised cargo.

Air freight is typically far more expensive than sea freight.[23] Aircraft also have very limited space compared with shipping vessels and are unable to transport high volumes of cargo.

Additionally, as a significant amount of airfreight is flown in the belly-hold of passenger planes, routes are subject to disruption based on consumer whims and other impacts on passenger numbers.

Bulk shipping is only viable in certain cases

Bulk cargo refers to cargo that is shipped without being packed into containers. This includes:

- Solid bulk: loose, unpackaged and solid goods of a homogeneous nature, such as cement, coal, iron ore and wheat.
- Break bulk: cargo that can be quantified as units in some way, such as pallets, barrels or crates. It is usually too large to fit inside a container.
- Liquid bulk: liquid goods that are shipped in purpose-made tankers, such as petroleum, liquid natural gas, liquid chemicals and cooking oils.

Shipping in bulk is typically more suited to large volumes of durable, homogeneous cargo where cargo owners benefit from economies of scale. Bulk shipping is unlikely to be economically viable for cargo owners seeking to transport smaller volumes. For exporters of some goods, such as those which are more fragile or which cannot easily be stacked, bulk shipping may not be possible.

There are currently refrigerated cargo ships ('reefers') that can be used for transporting perishables such as meat, fish and dairy products. However, these are gradually being replaced by refrigerated containers, so there will likely be fewer of them available in the future.[24]

Bulk shipping also lacks the flexibility of containerised shipping. It typically requires special facilities and additional dock workers to load and discharge, as well as specialised storage facilities. Consequently, not all origin and destination ports will have the infrastructure or resources to discharge bulk shipments.

1.2 Participants in the container freight supply chain

Figure 1.3 shows the contractual relationships between the parties and the flow of charges in the supply chain (both represented by arrows). The arrows point from the service provider to the party paying the charges (which is not always the party that has chosen to use the service).

Figure 1.3 shows that the supply chain is an interconnected ecosystem of many service providers, all of which ultimately serve cargo owners.

The following sections explain the roles of the parties in the supply and how they interact with each other.

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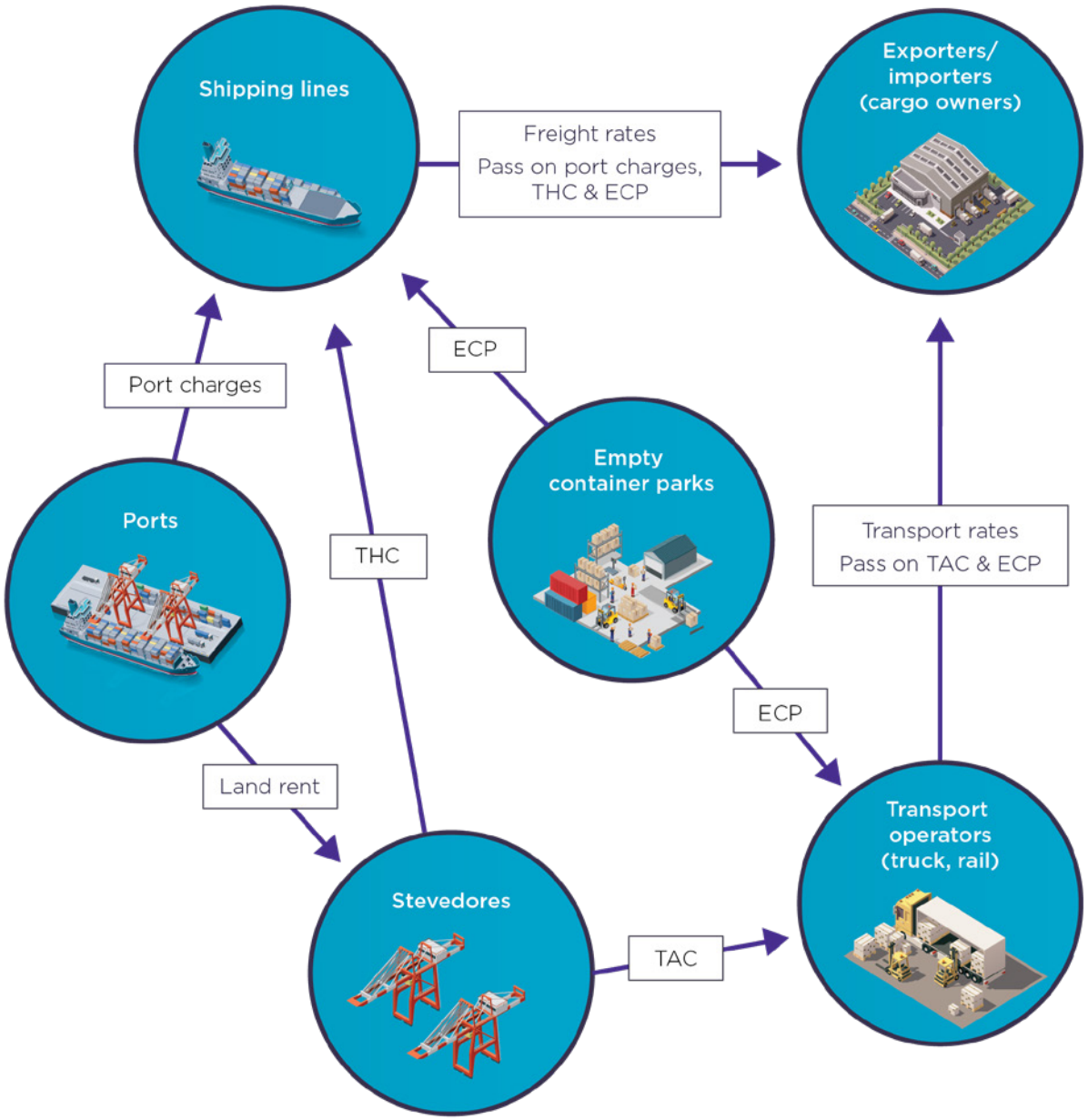
23 See, e.g. International Forwarding Association (IFA), *Pros and Cons of Air Freight*, IFA website, 22 August 2019, accessed 5 October 2021; J Vineyard, *4 Factors for Considering Air Freight vs. Ocean Freight*, Universal Cargo website, 16 August 2011, accessed 6 October 2021.

24 Marvest, *Reefer Vessel*, Marvest, n.d., accessed 5 October 2021.

Figure 1.3: Contractual relationship and flow of charges between parties in the supply chain



1.2.1 Ports

The vast majority of Australia's container shipping trade moves through 5 international container ports. These ports, located in Adelaide, Brisbane, Fremantle, Melbourne and Sydney, are currently the only significant container ports in their respective states. 4 of these ports are privately owned, with the Port of Fremantle being government owned.

Ports manage a large area of land and accommodate tenants ranging from stevedores to warehouses. They also manage and provide access to infrastructure (such as port channels and berths) which allow vessels to dock and discharge and load cargo. Additionally, port operators provide necessary day-to-day services to vessels to ensure they can navigate safely to, and from, their berths.

Ports impose a range of charges on shipping lines that use their facilities and services. These vary by port, but typically include vessel-based costs associated with the services they provide to shipping lines, such as:[25]

- Port dues: these are charged to the vessel for each harbor entry, usually on a gross tonnage basis, and go towards the costs of basic port infrastructure and equipment.
- Pilotage fees: pilotage refers to assisting the master of a ship in navigation when entering or leaving a port or in confined water. The fee associated with this service is normally based on the ship's tonnage, draft, or length.
- Berth hire charges: the berth refers to the place in which a vessel is moored or secured, alongside a quay where a ship loads or discharges cargo. The charge is usually based on the duration of a vessel's stay and overall length.

Ports also usually charge cargo-based fees (per TEU) such as wharfage, based on the type and volume of cargo moving through the port.

1.2.2 Cargo owners

Cargo owners are the beneficial users of the supply chain. Cargo owners choose the key elements of the supply chain that are needed to transport their cargo from point of origin to the destination. Specifically, cargo owners choose:

- the port of origin and the destination port for transporting their goods, usually based on where the goods are made (or stored) and where the customers are located
- the shipping line service, which specifies:
  - the shipping line (or the consortium of shipping lines) that will transport goods from the port of origin to the destination port
  - container stevedores at the port of origin and the destination port that will act as an intermodal terminal for shipping lines and transport operators
- the transport operator (either rail or trucks) to transport the containers between the stevedore's terminal and either the cargo owner's warehouse or customer's premises, often via the transport operator's own distribution depot.

Cargo owners may also utilise the services of freight forwarders, who act as intermediaries to arrange some or all of the cargo's journey on their behalf. Freight forwarders deal directly with shipping lines and can hire transport operators for pickup and delivery of containers or supply those services themselves. Customs agents/brokers arrange clearance of cargo on behalf of importers.[26]

A cargo owner's choice of shipping line is informed by a number of factors, including which shipping lines provide services on each Australian trade route. A cargo owner's choice is limited by the availability of services on its desired trade route and the availability of space on those services. When choosing between multiple shipping lines that offer suitable services (or multiple services offered by the same shipping line), cargo owners also take into account the 'bundle of prices' they expect to pay for using that service, which includes:

- the freight rates tendered by the shipping line for its services
- the pass-through charges that the shipping line includes in its tender (which covers the fees and charges that the shipping line expects to pay to all the relevant ports, stevedores and empty container parks)
- the landside fees and charges levied by stevedores

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25 See e.g. NSW Ports, *Port Botany – Schedule of Charges (effective from 1 July 2022)*, NSW Ports website, 19 May 2022, accessed 21 October 2022; Flinders Ports, *Ports Charges July 2022 – June 2023* Flinders Ports website, n.d., accessed 21 October 2022; Fremantle Ports, *Ship and cargo charges from 1 July 2022*, Fremantle Ports website, n.d., accessed 21 October 2021; Port of Melbourne, *2022-23 Reference Tariff Schedule*, Port of Melbourne website, n.d., accessed 21 October 2021; Port of Brisbane, *1 July 2022 Schedule of Port Tariffs*, Port of Brisbane website, n.d., accessed 21 October 2021.

26 Nine Squared, *Strategic Review of the Victorian Empty Container Supply Chain* [PDF 2.5MB], Report to Freight Victoria, Nine Squared, 2021, accessed 30 November 2022, p 13.

- the fees and charges levied on transport operators by the empty container parks that are used by the shipping line.

Cargo owners contract a transport operator that provides the most suitable and cost-efficient services. Many agricultural exporters are located in regional areas far from ports and usually transport large volumes of produce. These exporters often prefer to use rail to transport their produce to the closest container port owing to the efficiencies of that mode of transport over longer distances and at larger scale. Many retailers store their imported products at warehouses in major cities that are located much closer to container ports, so they often prefer to use trucks to transport their cargo.

Cargo owners do not have a direct contractual relationship with ports, stevedores or empty container parks. Shipping lines and transport operators pay those service providers for their services and then pass on their fees and charges to cargo owners. Cargo owners ultimately pay for all the costs in the supply chain.

1.2.3 Stevedores

Container stevedores are firms that primarily act as an intermodal terminal for shipping lines and transport operators. Stevedores' primary services include:

- quayside: loading and discharging of container ships, primarily using ship-to-shore cranes once a ship has berthed
- at terminal: temporary storage (pending loading or pickup) and repositioning of containers
- landside: loading and discharging of trucks or rail, using equipment such as straddle carriers, rail-mounted gantry cranes, rubber-tyred gantries and automatic stacking cranes.

The quayside, at terminal and landside services are perfect complements. For each full container being imported, the stevedore performs the following as part of its service: it unloads the container from a vessel, provides temporary storage for the container at its terminal and provides access to, and loading services for, a transport operator to pick up the container. For each empty or full container being exported, the stevedore provides the following as part of its service: it provides access to a transport operator to drop off the container, unloads the container from the transport operator and provides temporary storage for it, then loads the container onto a vessel.

Stevedores can also provide versions of these services as ancillary services to shipping lines. In some instances, containers being sent from one port to another will need to be 'transhipped' via some third port to reach their ultimate destination. In such a case, a stevedore provides both quayside and at terminal services by unloading containers from one vessel, temporarily storing them pending arrival of the second vessel, then reloading those containers onto the second vessel bound for their destination. Transhipment might be required when there are no direct routes between the required origin and destination ports, or when a vessel originally bound for a destination port skips or 'blanks' that port, as might be the case with vessels already experiencing substantial delays.

As transhipments do not need to occur at any particular port, provided whichever terminal performing the transhipments is common to both legs of the container's journey, stevedores at different ports are able to compete to secure these transhipment volumes. In practice, this means that the revenues a stevedore may obtain from transhipments are different to, and often less than, what would be obtained for a full container at its origin or destination.

Stevedores also provide quayside, at terminal, and landside services to shipping lines with respect to empty containers. Predominantly this is to facilitate the repositioning of empty containers from Australia to net export ports overseas.[27] As empty containers are most commonly stored at empty container parks rather than in terminals' scarce yard area, the export of empty containers requires coordination between a shipping line and a terminal. A shipping line will utilise low periods with fewer landside pick-up/drop-off bookings to perform a 'bulk run' of empty containers by contracting truck operators to shuttle empty containers from an empty container park to the terminal.

27 Some Australian ports are net exporters with respect to goods in particular kinds of containers. For example, the Port of Adelaide requires empty food-grade 20-foot containers to be sent to it to facilitate its heavy agricultural exports, but remains a net importer of the more common 40-foot containers.

A stevedore operates the necessary equipment and labour to accomplish these functions. It leases land space and infrastructure from the relevant port authority, which in turn charges land rent to the stevedore. Land rent is the most significant component of stevedores' lease costs.

Stevedores compete for contracts to form part of a shipping line's service to cargo owners. The contracts require stevedores to provide berthing facilities to shipping lines in accordance with a specified sailing schedule. The contracts also require the provision of sufficient cranes, labour and other equipment. They can also require the stevedore to agree to certain key productivity standards. Typically, the length of stevedores' contracts with shipping lines ranges from 2 to 5 years.

On the landside, stevedores provide access to their respective terminals to transport operators. Stevedores use platforms such as the Vehicle Booking System (VBS) to allocate time slots for trucks to drop off, or collect, full or empty containers at the terminal. Rail operators are offered access via rail windows.

Figure 1.4 shows the stevedores that are currently operating at the five monitored container ports in Australia.

Figure 1.4: Container stevedores in Australia's monitored ports

1.2.4 Shipping lines

Shipping lines contract stevedores and empty container parks at each port they intend to service. Shipping lines then contract with cargo owners to transport containerised cargo from ports of origin to destination ports, providing and operating container ships for this purpose.

A standard shipping service will typically involve a vessel calling at a series of ports on a predetermined route. Cargo owners usually prefer direct shipping services, where their cargo remains on the same vessel from the port of origin until its destination. However, direct services do not exist between all ports, and where a direct service does not exist cargo will be unloaded at an intermediate port known as a transhipment hub.

Shipping lines usually base their networks around these hubs, connecting short-distance, intra-regional 'feeder' lines with long-distance deep-sea lines. For instance, where direct services are not available between two ports, one vessel will transport cargo to a transhipment hub. There, this cargo will await shipment to its final destination on another vessel (perhaps after being transported to another hub).

Congestion or delays at one port may affect a vessel's ability to reach subsequent ports on its schedule. This can have significant flow-on effects, not just for the shipping line but also elsewhere along the supply chain. Stevedores and transport operators may lose productivity while equipment and labour sit idle. They may have to pay overtime and employ additional resources to clear congestion due to off-window arrivals.

Shipping lines typically have a range of options to mitigate scheduling disruptions, such as slowing down in anticipation of delays, or speeding up to recover lost time. Shipping lines may also skip a port altogether, 'roll' cargo to a later service or add additional capacity to clear congestion.

Shipping lines charge freight rates for their services to cargo owners (or the relevant freight forwarder) plus a range of surcharges or incentive-based fees (such as detention fees). Freight rates are set according to supply and demand and are closely correlated with fleet utilisation.[28] Shipping lines also levy or pass on a range of other fees and charges including terminal handling charges (THCs), port charges (including wharfage costs and any customs or duties) and empty container park charges.

1.2.5 Transport operators

Transport operators provide a service of transporting cargo owners' cargo to and from ports. The majority of containers in Australia are currently transported by trucks, with a much smaller share handled by rail. In some cases, both road and rail are used for carrying containerised goods. With 'intermodal' freight, for example, trucks provide local pick-up from and delivery to the rail terminal.

Cargo owners choose which shipping line service they will use, which determines the stevedore that will handle their cargo. The transport operator must then go to the chosen terminal to pick up, or drop off, containers. Stevedores have standard agreements with truck operators for access to their terminal. These agreements allow truck operators to access stevedore's terminal on standard terms and conditions. Truck operators do not have the option of negotiating their own individual terms of access (including prices).

The same arrangements apply for truck operators accessing empty container parks. Transport operators pass on the fees and charges levied by stevedores and empty container parks to cargo owners.

1.2.6 Empty container parks

Shipping lines typically own the containers used to transport cargo. Shipping lines contract with empty container parks to store their empty containers after the containers are returned by transport operators. Empty container parks may also provide ancillary services such as container cleaning, repairs and repositioning. Empty container parks typically (but not always) have contracts with multiple shipping lines and allocate space for each shipping line to store their empty containers.

Empty container parks have booking systems and trucks must pay a fee (usually called a 'notification fee') to make a booking to collect or de-hire containers.[29] Empty container parks can also issue redirections to cargo owners, freight forwarders and transport operators, requesting that empty containers be returned to an alternative location. For example, an empty container park operator or shipping line may issue a redirection when there is insufficient capacity at a site, or unforeseen issues arise.

28 Calfas et al, *Inquiry into National Freight and Supply Chain Priorities* [PDF 1.7MB], p 5.

29 'De-hire' refers to the process of returning an empty container to either an empty container park or a terminal.

1.3 The ACCC's container stevedoring monitoring program

The focus of the ACCC's monitoring has evolved since it commenced its monitoring program in 1999. This section sets out the current focus of the ACCC's monitoring program and the steps taken in preparing this report.

1.3.1 The focus of the ACCC's monitoring

In 1998, there was a protracted labour dispute between Patrick Terminals and the Maritime Union of Australia (MUA). Following the introduction of a workplace reform package by the Australian Government, the ACCC was directed by the government to monitor the prices, costs and profits of stevedores and provide a report to the Minister within 4 months of the end of every financial year.[30]

Given the environment at the time the direction was made, the initial purpose of the monitoring regime was to assess the impact of the reforms and to monitor the potential for wage-driven cost increases.

Over time, the ACCC has shifted its focus to matters covered under Part VIIA of the *Competition and Consumer Act 2010* (CCA). Specifically, Part VIIA stipulates that the ACCC must have particular regard to the following matters:

- the need to maintain investment and employment, including the influence of profitability on investment and employment
- the need to discourage a person who is in a position to substantially influence a market for goods or services from taking advantage of that power in setting prices
- the need to discourage cost increases arising from increases in wages and changes in conditions of employment inconsistent with principles established by relevant industrial tribunals.

Pursuant to Part VIIA, the ACCC monitors a range of matters, including the degree of competition between the stevedores, whether the stevedores' returns are indicative of excessive pricing, the level of investment by the stevedores and other port operators, and the degree of productivity and efficiency at Australian container ports.

The ACCC considers that to correctly interpret the data it collects and to understand the drivers behind the observed trends, it is essential to monitor developments across the entire supply chain. This is because the supply chain is an interconnected system of service providers, where developments in one part of the supply chain have flow-on effects on the operations of service providers in other parts of the supply chain.

The ACCC's monitoring serves a number of purposes, including:

- to inform governments' container freight policy and planning
- to provide transparency to industry participants about stevedores' operations to facilitate more informed decision making.

Relevant sections of Part VIIA are reproduced in Appendix C. The Ministerial direction setting out the ACCC's price monitoring framework is included in Appendix D.

30 On 20 January 1999, the Federal Treasurer directed the ACCC under s 27A of the *Prices Surveillance Act 1983* (PSA) to monitor prices, costs and profits of container terminal operator companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney. The PSA has since been repealed and the price surveillance provisions are now contained in Part VIIA of the CCA. The direction under the former s 27A of the PSA is now deemed a direction under s 95ZE of the CCA.

1.3.2 Steps the ACCC took in preparing this report

The ACCC analysed data from a range of sources to examine issues affecting the overall supply chain

The ACCC obtained data from a range of sources in preparing this year's monitoring report, including:

- data collected on a voluntary basis from each of the 5 stevedores about their operations at the conclusion of the financial year
- data from the Bureau of Infrastructure, Transport and Research Economics (BITRE) in advance of the publication of its upcoming Waterline report
- data from S&P Global Commodity Insights on freight rates
- publicly available information about short-term and longer-term developments in the supply chain.

The ACCC appreciates the cooperation of all the parties that provided information in preparation for this report.

The ACCC consulted with market participants

The ACCC consulted with a wide range of parties across the supply chain, including stevedores, shipping lines, ports, cargo owners (both importers and exporters), freight forwarders, industry bodies and transport operators.

In June and July 2022, as part of our consultation, the ACCC sent out surveys to market participants across the supply chain. These surveys contained a range of questions, including about historical trends in the supply chain, key challenges experienced by market participants, costs of using the supply chain, the level of service provided by stevedores and the broader operation of the supply chain. We received 33 responses.

This consultation formed a vital part of this year's report preparation and the ACCC thanks participants for their time and contributions.

1.4 Outline of the 2021–22 container stevedoring monitoring report

As in previous reports, the 2021–22 monitoring report continues to look at the financial performance and productivity of stevedores at Australia's 5 container ports. To provide context and highlight the interconnected nature of the supply chain, this report also looks at developments across the entire supply chain.

Chapter 2 discusses the current state of the supply chain. It examines the enduring impact of the COVID-19 pandemic on container shipping both internationally and domestically. It also discusses how disruptions have affected supply chain participants.

Chapter 3 discusses some of the long-term trends in the supply chain, namely developments prior to the COVID-19 pandemic. This includes the need for enhanced productivity measures, and the impact of industrial relations.

Chapter 4 examines stevedores' financial performance. It discusses how stevedores' profitability has changed over the course of the ACCC's monitoring period and the drivers behind recent increases in profits.

Chapter 5 discusses the market power of container ports and investigates whether they are subject to adequate regulation or a credible threat of further regulation.

Chapter 6 examines the issue of increasing detention fees charged by shipping lines to cargo owners for the ongoing hire of a shipping line's containers. It discusses the drivers behind the increases in these fees, the circumstances in which levying those fees becomes unreasonable, and the options available to cargo owners to respond to unreasonable detention fees.

2. The state of the container freight supply chain

Key Points

- The COVID-19 pandemic, and other developments, continued to cause significant congestion and delays in the supply chain in 2021–22, exacerbated by persistent low shipping schedule reliability, an increase in the size of ships calling Australian container ports and labour shortages throughout the entire supply chain.
- This has made it more challenging for stevedores to optimise their allocation of labour and equipment to efficiently load and unload containers. As a result, stevedores are taking longer, on average, to move containers to and from ships. Total throughput in 2021–22 was largely on trend with pre-pandemic growth levels, both in terms of TEU and the number of containers handled.
- State governments and market participants are taking active steps to ease congestion and improve the flow of containers.
- Freight rates remained elevated throughout 2021–22. Higher freight rates, combined with higher costs incurred by cargo owners in using the supply chain, contributed to higher prices for Australian consumers.
- In the second half of 2022, there have been signs the supply chain is recovering from the disruption caused by the COVID-19 pandemic. Freight rates have fallen to near pre-COVID levels, and schedule reliability and port congestion have improved.

As detailed in last year's report, COVID-19 had a profound impact on global supply chains. Demand for shipping services increased as consumer patterns shifted towards online purchases of goods. Combined with the impact of lockdowns and restrictive border practices, this led to significant vessel delays and port congestion.[31]

In preparation for this report, the ACCC surveyed and held meetings with 49 parties, including market participants across the entire supply chain (as discussed in section 1.3). The parties informed the ACCC that the challenges triggered by the COVID-19 pandemic persisted throughout 2021–22.

This chapter is based on the information obtained through this consultation process and other information and data the ACCC has obtained. It describes the state of the supply chain and the impact this has had on various market participants and Australian consumers.

2.1 Supply chain disruptions continued in 2021–22

2.1.1 Schedule reliability remained low, but has improved in recent months

Many market participants informed the ACCC that low vessel schedule reliability is a critical factor contributing to congestion. Schedule reliability plummeted at the time of COVID-19 and continues to be well below pre-pandemic levels.

Figure 2.1 shows the percentage of vessels on major global routes that arrived at container ports 'on time' in the past four years.[32]

The ACCC does not have data for schedule reliability at Australian container ports but considers that the global data is indicative of the trend in Australia. Vessels call at a series of ports in different countries before they eventually return to the first port of call on their route. Consequently, congestion and delays

31 ACCC, *Container stevedoring monitoring report 2020-21*, ACCC, Australian Government, 2021.

32 Sea-Intelligence has defined 'on time' as being one calendar day either side of the scheduled arrival.

in overseas ports can have knock-on effects, putting ships off-schedule at other ports along the route. One stevedore advised the ACCC that as few as 10% of ships in 2021–22 arrived within 2 hours of their designated berthing window.

Figure 2.1: Global vessel schedule reliability: January 2018 to October 2022[33]

Source: Sea-Intelligence Global Liner Performance Report – Issue 135

Figure 2.1 shows that global schedule reliability has improved over 2022, though remains well below pre-pandemic levels in 2018 and 2019. This has helped to ease container port congestion, which is estimated to have halved globally between January and August 2022.[34] One stevedore informed the ACCC that most recently, schedule reliability at their terminal had improved to 30–40% of vessels arriving within their designated window.

Stevedores have informed the ACCC that low schedule reliability leads to 'vessel bunching' at ports. This creates large peaks and troughs for stevedores in handling containers, on both quayside and landside. Stevedores informed the ACCC that reduced predictability in when ships will arrive can make it difficult for them to efficiently allocate labour and equipment to load and unload containers, leading to congestion at the port. This means ships can be waiting longer at berth, but also reduces spare capacity in stevedores' yards to handle the volume of containers.

Higher peak volumes, resulting from vessel bunching, can also create difficulties along other parts of the supply chain. It can overwhelm the capacity to efficiently unload, transport, process, unpack and return containers. Congestion at stevedores' yards can flow through to congestion at warehousing and can also lead to increased blanked sailings, as shipping lines seek to avoid delays and optimise their schedules. These factors undermine the efficient importing and exporting of containers for cargo owners.

Market participants also spoke of extreme weather events as another factor contributing to low schedule reliability and congestion. Weather events at Port Botany and Port Brisbane caused temporary closures at each port.[35]

Flooding in South Australia in early 2022 severed critical road and rail connections between South Australia, Western Australia and the Northern Territory.[36] The Federal Government responded by offering a temporary relaxation of restrictions on international shipping lines engaging in domestic

33 Sea-Intelligence, *Schedule reliability continues on its upwards trend* [media release].

34 Sea-Intelligence, *50% of congestion has been resolved* [media release].

35 See I Ackerman, 'Wild weather hampers freight operations at Botany', *Daily Cargo News*, 1 June 2022, accessed 27 October 2022; D Sexton, 'Wild weather causes Brisbane port disruption', *Daily Cargo News*, 14 December 2021, accessed 27 October 2022.

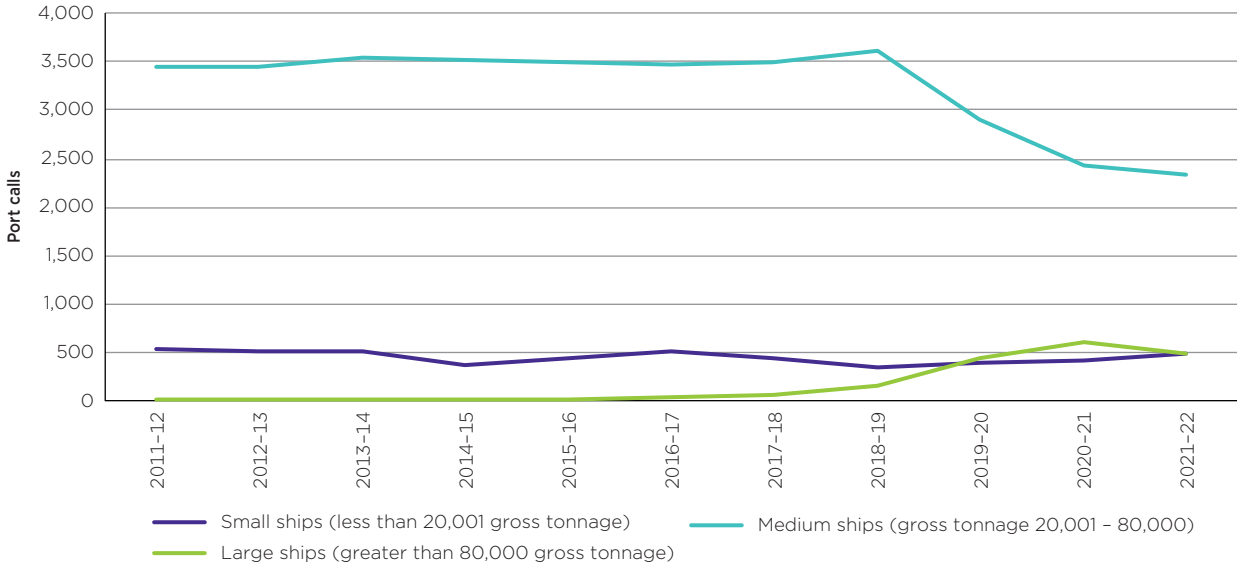
36 J Wiggins, 'Rail and road flooding intensifies supply chain crisis', *Financial Review*, 31 January 2022, accessed 9 November 2022.

coastal trade,[37] which ordinarily requires a licence, to Western Australian ports.[38] This enabled domestic freight, which could only have otherwise been transported by rail or road, to come through the Port of Fremantle.[39]

2.1.2 Increase in ship size exacerbated supply chain congestion

In recent years, there has been a longer-term trend towards larger ships in container shipping globally.[40] Figure 2.2 below shows the number of ships by ship size, measured by tonnage, arriving at Australian container ports in each year from 2011–12 to 2021–22. Larger ships, with greater tonnage, will generally have capacity to carry a higher number of containers.

Figure 2.2: Number of port calls by container ships, by tonnage: 2011–12 to 2021–22



Source: ACCC calculation based on data from BITRE's upcoming Waterline report.

Figure 2.2 shows that medium ships (tonnage between 20,001 and 80,000) are making fewer port calls, whereas the number of port calls made by large ships (tonnage greater than 80,000) has been increasing. The proportion of port calls made by large ships at Australian container ports has increased from 3.8% in 2018–19 to 14.3% in 2021–22.

Industry analysts have informed the ACCC that a large proportion of new ships on order are large ships. However, those large ships are likely to be deployed on the busiest international routes and so the size of ships visiting Australia is likely to grow relatively gradually over the years. For example, there are already some 'mega-ships' in operation with capacity of around 24,000 TEU, which is nearly double the maximum capacity that can be serviced by Australian container ports, that only travel along higher-volume shipping routes.[41]

With an increasing number of larger ships arriving, Figure 2.3 shows that there is a general trend towards more lifts per ship in recent years.

37 Coastal trade is the movement of freight on ships between Australian ports, as opposed to between an Australian port and an overseas port.

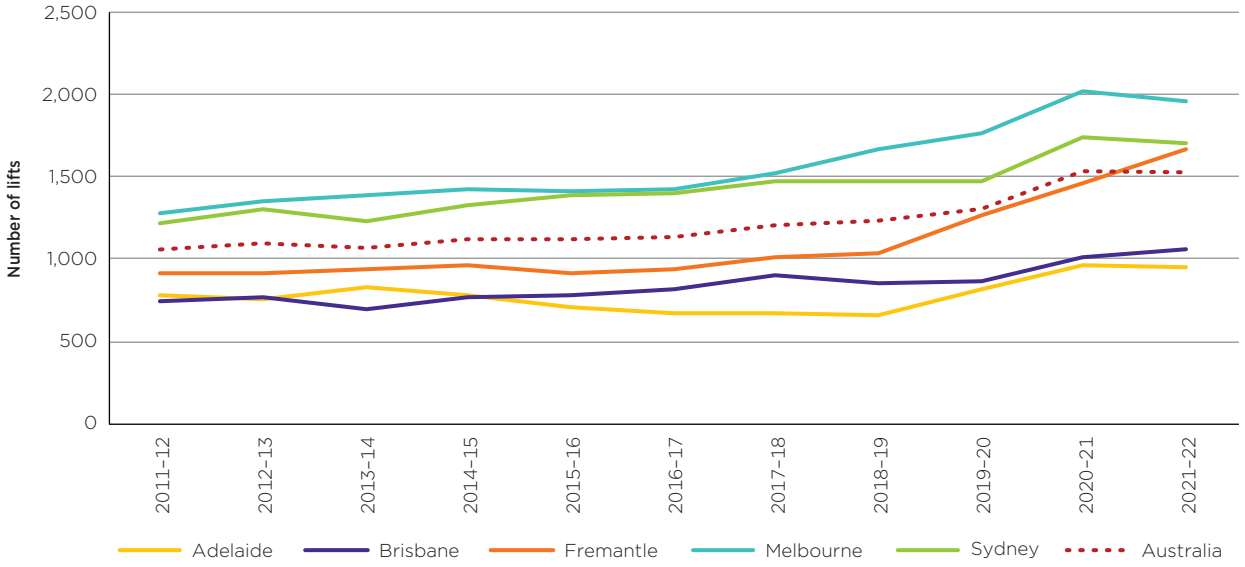
38 See *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth), Pt 4.

39 A Williams, 'Coastal Shipping an Alternative to Rail and Road Freight Following SA Floods', *Daily Cargo News*, 7 February 2022, accessed 9 November 2022.

40 Economic Commission for Latin America and the Caribbean (ECLAC), 'Ongoing challenges to ports: the increasing size of container ships'.

41 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, pp 212–215.

Figure 2.3: Lifts per ship, by port: 2011–12 to 2021–22



Source: ACCC calculation based on data from BITRE's upcoming Waterline report.

Since 2018–19, the average number of lifts per ship across each of the 5 monitored ports has increased significantly, with a 25% increase in the average container exchange nationally.

Stevedores explained that servicing larger ships presents more operational challenges for them and results in more peaks and troughs in workloads. Specifically, it makes it more difficult for stevedores to optimise the allocation of staff and equipment, which can lead to stevedores 'under' or 'over' resourcing. Higher peak volumes, coupled with limited flexibility in rostering staff, can result in increased overtime costs and 'idle-time' where staff have little to do between ships. In addition, stevedores have had to invest more in equipment, particularly larger cranes, to service higher peak volumes and larger ships.

Building larger ships allows shipping lines to take advantage of economies of scale. However, initially the introduction of larger ships adversely affects productivity and efficiency at container ports until ports and stevedores make the necessary investments in infrastructure on both the quayside and the landside to efficiently service them. These inefficiencies have been aggravated during the pandemic by vessel bunching and port congestion.

2.1.3 Labour shortages presented an increasing challenge

Some market participants raised concerns about availability of staff throughout 2021–22 due to sickness or isolation requirements. However, a bigger theme to emerge was of a secondary impact of COVID-19 on the labour market. Operators throughout the freight supply chain have expressed concerns about labour shortages, finding it difficult to find appropriate new hires and retain them long enough to develop skills and industry knowledge. This has been exacerbated by the current tight employment market in Australia, with unemployment rates at historic lows.

Transport operators and cargo owners told the ACCC of a shortage of truck drivers. Some market participants viewed this as having directly contributed to landside congestion as timely movement of containers, once they have been unloaded from ships, is critical to the efficient operation of the supply chain.

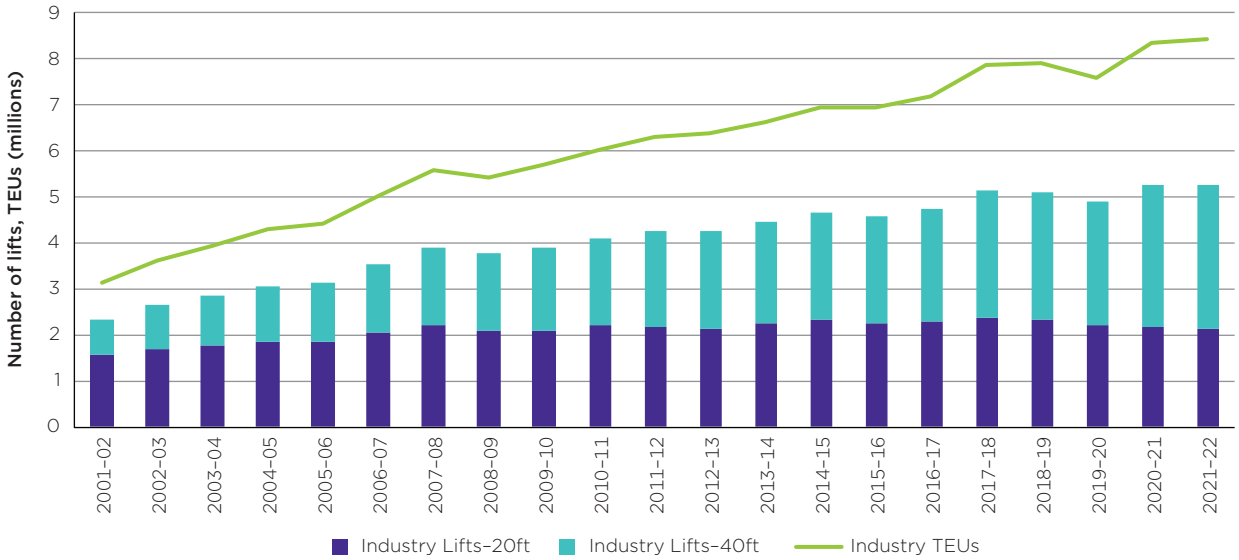
With fewer available drivers, transport companies have found it harder to pick up full containers in a timely manner, leading to a greater number of containers remaining in a stevedore's yard. This is worsened by reduced shipping schedule reliability, requiring transport operators to find drivers at short notice.

The shortage of drivers has also contributed to congestion at some storage facilities and empty container parks. Shipping lines could sometimes not find enough drivers to perform 'bulk runs' of empty containers, which is required to reposition empty containers from empty container parks into stevedores' yards to be loaded onto ships and taken out of Australia.

2.1.4 Increase in throughput has been on trend with pre-pandemic growth

Figure 2.4 shows total annual throughput, measured in terms of TEU and lifts respectively, at each of the container ports monitored by the ACCC since 2001–02. It also shows the breakdown of this throughput, 20-foot containers compared with 40-foot containers.

Figure 2.4: Industry TEUs and lifts by container type: 2001–02 to 2021–22



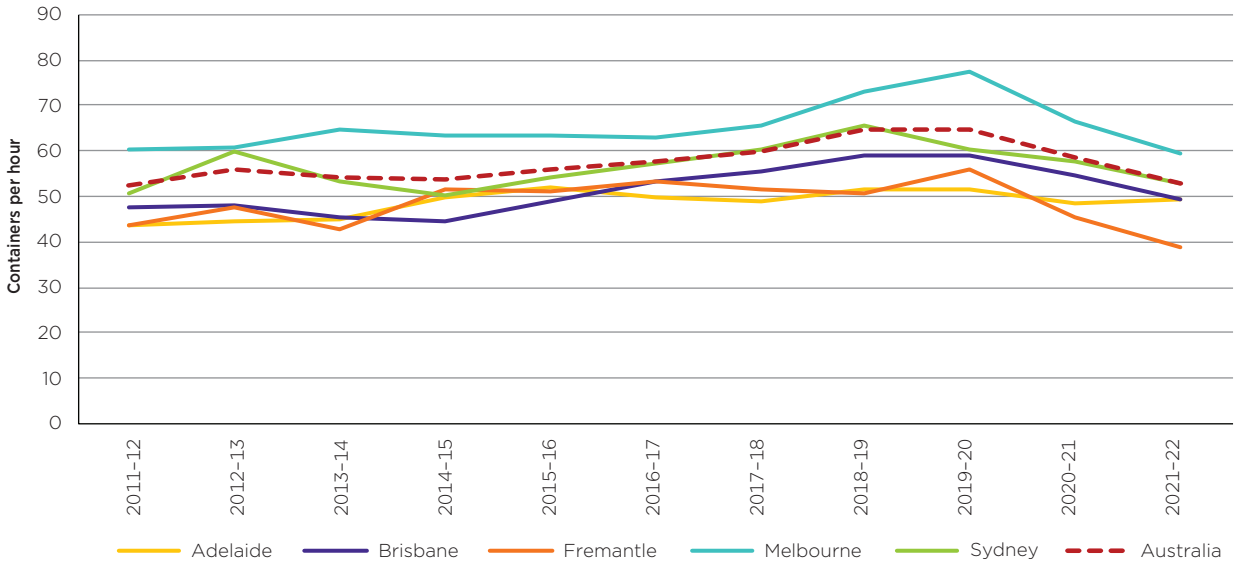
Source: ACCC analysis of information received from stevedores as part of the monitoring regime.

The onset of the COVID-19 pandemic caused a contraction in container volumes in 2019–20. However, the overall annual container volumes in 2021–22 are 3.3% higher than pre-pandemic levels in 2018–19. That increase is in line with the general trend in growth that can be observed over the reporting period.

2.1.5 Stevedores have found it harder to optimise their use of cranes and labour

Figure 2.5 shows the net ship rate at Australian container ports since 2011–12.[42]

Figure 2.5: Net ship rate at Australian container ports: 2011–12 to 2021–22



Source: ACCC calculation based on data from BITRE's upcoming Waterline report.

Figure 2.5 shows that since 2019–20, the net ship rate has declined significantly across each of the Australian container ports, except for the Port of Adelaide. Nationally, it has fallen by 18% in the past 2 years.

This is likely due to the combination of factors set out earlier in this chapter, which have impacted on the efficiency of stevedores' operations. As an example, a stevedore may be able to service one large ship efficiently, but not have the equipment and staff to also service a second large ship simultaneously, particularly if one or both of those ships has arrived 'off-window'. Higher peak volumes of containers can result in stevedores moving fewer containers, on average, to or from a given ship per hour.

2.1.6 State governments and industry have taken steps to ease congestion

State governments and market participants have taken steps to improve the operation of the supply chain.

NSW Ports, which owns Port Botany, has introduced a scheme to incentivise better management of the balance of import and export containers through Port Botany. The goal of the scheme is to avoid the build-up of empty containers and prevent congestion in empty container parks and container terminals. The Empty Container Incentive Scheme was implemented from 1 July 2021 and either discounts, or increases, the wharfage fees paid by shipping lines to export empty containers according to the overall balance of containers exported and imported (whether empty or full). A shipping line that, in a given quarter, exports as many or more containers overall than it imports receives a discount to the standard empty container wharfage rate. If, instead, the shipping line exports significantly fewer empty containers than it imports, it is penalised with a higher wharfage rate.[43]

The ACCC notes that this scheme received mixed feedback from market participants. One major shipping line stated that the scheme is too blunt and inflexible. A particular complaint was the asymmetry of the scheme's incentives, with the highest financial penalty for exporting too few empty

42 The net ship rate measures the number of containers transferred to, or from, ships using combined input of labour and cranes per hour.

43 NSW Ports, *Empty Container Incentive Scheme update*, NSW Ports website, 17 March 2022, accessed 8 November 2022.

containers (a doubling of empty container wharfage) being greater than the highest discount (a 40% reduction in empty container wharfage) offered for clearing out additional empty containers.[44]

New empty container parks are under construction at Port Botany and the Port of Brisbane. The new empty container park at Port Botany is expected to provide an additional 6,000 TEU capacity by 2023.[45] The new empty container park at the Port of Brisbane is expected to be operational towards the end of 2022.[46]

The NSW Government also gave its approval to increase empty container stacking heights, which gives empty container park operators greater storage capacity in their yards, provided the greater heights can be serviced by their equipment.[47]

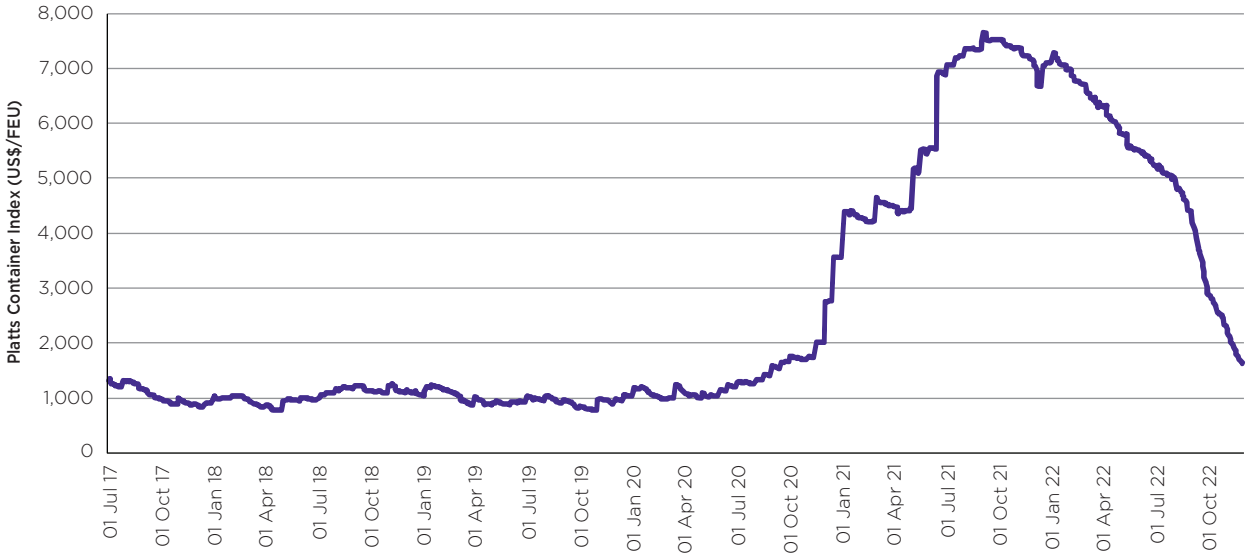
DP World recently demolished 2 warehouses at its Sydney logistics park to allow for greater empty container storage capacity. [48]

2.2 Cargo owners and consumers continued to face delays and higher costs in 2021–22

2.2.1 Freight rates remained elevated in 2021–22, but have fallen in recent months

Figure 2.6 shows the average cost per FEU (40-foot equivalent unit) since July 2017.

Figure 2.6: S&P Global Commodity Insights Platts Container Index (US$/FEU): July 2017 to November 2022[49]



Source: S&P Global Commodity Insights, copyright 2022 by S&P Global Inc.

Note: The Platts Container Index is a weighted average of Platts' key container assessment including North Asia to North America, and North Asia to North Continent routes. FEU (40-foot equivalent unit) is a measure of volume in units of 40-foot long containers.

44 NSW Ports, *Empty Container Incentive Scheme (ECIS) Factsheet*, NSW Ports website, 21 May 2021, accessed 30 November 2022.

45 A Williams, 'Port Botany to Receive New Empty Container Park', *Daily Cargo News*, 1 September 2022, accessed 8 November 2022.

46 A Williams, 'Port of Brisbane Welcomes Medlog Container Park Project', *Daily Cargo News*, 8 April 2022, accessed 8 November 2022.

47 NSW Ports, *Significant Extra Empty Container Storage Capacity for Port Botany*, NSW Ports website, 5 September 2022, accessed 9 November 2022.

48 NSW Ports, *Significant Extra Empty Container Storage Capacity for Port Botany*.

49 The Platts Container index methodology can be found in the Platts Specifications Guide Global Freight [PDF 263KB].

As discussed in last year's report, freight rates increased substantially in 2020–21, as cargo owners everywhere tried to outbid each other to secure scarce space on vessels.[50]

Figure 2.6 shows that global freight spot rates reached their peak in September 2021 at nearly US$8,000 per 40-foot container, approximately 8 times their pre-COVID levels. Freight rates started falling in early 2022 and had reached around US$5,000 for a 40-foot container by the end of 2021–22.

Higher freight rates have contributed to record profits for shipping lines. The major shipping lines reportedly earnt higher operating profits in the last year alone than in the previous 10 years combined.[51] For example, A.P. Moller – Maersk, one of the biggest global shipping companies, recorded annual profits in 2021 of US$19.7 billion.[52] This is a more than 10-fold increase relative to profits before the pandemic, which were US$1.7 billion in 2019.[53]

It appears that the slowdown in global trade is starting to ease pressure on global supply chains and is putting downward pressure on freight rates. Figure 2.6 shows that, as of November 2022, freight spot rates had fallen to below US$2,000 per 40-foot container, although they remain around double average 2019 rates. Industry analysts have informed the ACCC that contracted freight rates have also fallen.[54] Increased energy prices, geopolitical tension and contractionary monetary policy across major economies is expected to reduce consumer consumption and therefore global trade.[55]

2.2.2 Delays and higher costs for cargo owners have led to higher costs for Australian consumers

Supply chain disruptions have continued to cause delays for cargo owners and consumers. Market participants informed the ACCC that some importers now have a preference to hold higher levels of inventory, moving from a 'just-in-time' to a 'just-in-case' business model.

Increased demand for warehousing space is producing record low vacancy rates in the industrial and logistics sector. In the first half of 2022, the national vacancy rate for industrial and logistics property was down to 0.8%, compared with 6.3% in the second half of 2019, to be one of the lowest in the world.[56] Low vacancy rates are driving high rent growth, with average industrial and logistics rents growing by around 13–14% nationally in 2021–22. This was most pronounced in Sydney, which had seen rents for super-prime[57] industrial and logistics properties grow by 22.8% over that period.[58]

Market participants have also told the ACCC that lack of available warehousing space has led some cargo owners to use containers as temporary storage. This contributed to cargo owners incurring increased detention fees for containers (as discussed in Chapter 6) and further exacerbating congestion at ports and empty container parks.

Significant increases in freight rates from pre-pandemic levels, combined with other cost increases, have contributed to higher prices for Australian consumers and the higher cost of living over the past few years. Australia, along with many other economies, is experiencing higher inflation. The Reserve Bank of Australia has indicated that shipping costs have contributed directly to inflation, furthering price increases in consumer durable items and groceries in recent months.[59]

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50 ACCC, *Container stevedoring monitoring report 2020-21*, p 17.

51 Sea-Intelligence, *USD 110bn carrier EBIT in 2021 (so far...)* [media release], Sea-Intelligence website, 25 March 2022, accessed 26 October 2022.

52 In this instance, profit is measured by EBIT which is earnings before interest and taxation.

53 A.P. Moller - Maersk, *2021 Annual Report*, A.P. Moller - Maersk website, 9 February 2022, accessed 8 November 2022.

54 Freight spot rates refer to a one-off rate charged by shipping lines to cargo owners for transporting freight. In contrast, cargo owners might negotiate with shipping lines to pay a fixed, contracted freight rate over an agreed period.

55 World Trade Organization (WTO), *Trade growth to slow sharply in 2023 as global economy faces strong headwinds* [media release], WTO website, 5 October 2022, accessed 26 October 2022.

56 CBRE, *Australia's Industrial and Logistics Vacancy First Half 2022 (1H22)*. This is based on buildings with net lettable area of greater than 5,000 square metres in Sydney and Melbourne, and 3,000 square metres in Brisbane, Adelaide and Perth.

57 Super-prime properties are those at the very top-end of the market which are most sought after.

58 CBRE, *Australia's Industrial and Logistics vacancy rate dips to 0.8% as rental growth reaches double digits*.

59 See RBA, *Statement on Monetary Policy – May 2022*; RBA, *Statement on Monetary Policy - February 2022*.

3. Long-term trends in the container freight supply chain

Key Points

- In September 2022, the Productivity Commission released its draft report into the maritime logistics system. The PC made a number of recommendations to improve the productivity of Australian container ports and the operation of the supply chain.
- The ACCC supports improving the measurement of container port productivity and developing appropriate benchmarks to track the performance of Australian container ports relative to their international counterparts.
- The ACCC supports the repeal of Part X of the *Competition and Consumer Act 2010*, as this exemption has become outdated. A class exemption or authorisation process could provide a more targeted approach, minimising costs and ensuring a net public benefit.

The Australian logistics supply chain is subject to a number of transformative long-term trends, as explored in last year's report.[60] Following the release of that report, the Federal Government requested that the Productivity Commission (PC) undertake an inquiry into the long-term productivity of Australia's maritime logistics system. The PC published its draft report on 9 September 2022 (the draft report), making several findings and recommendations regarding Australia's maritime, and particularly container, supply chain productivity.[61]

This chapter provides updates on the trends identified in last year's report, based on information obtained from market participants through consultation, and highlights some of the PC's findings and recommendations in relation to the following areas:

- productivity measurement
- industrial relations
- Part X of the *Competition and Consumer Act 2010* (CCA).

The ACCC will continue to monitor these trends.

3.1 Productivity measurement

The productivity of Australian container ports is important to the Australian economy. The PC has estimated that improved productivity at Australian container ports could save up to $605 million per year for Australian importers and exporters.[62] To assess whether Australian container ports are performing efficiently, it is necessary to have accurate and appropriate measurements of productivity and to benchmark the performance of Australian container ports against one another and against international counterparts.

60 ACCC, *Container stevedoring monitoring report 2020-21*, pp 21–34.

61 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*.

62 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, p 14.

3.1.1 The ACCC supports improving the measurement of container port productivity

Stevedores have stated, both in submissions to the PC and during the ACCC's consultation, that the current publicly reported productivity measurements do not adequately reflect overall port and stevedore productivity. Stevedores consider that productivity should be reported wholistically with consideration of both quayside and landside operations. For example, stevedores have claimed to the ACCC that Australian container terminals have world-leading landside productivity which is only shown in limited metrics such as truck turnaround times.

The ACCC currently receives productivity data for each of the 5 monitored container ports from the Bureau of Infrastructure and Transport Research Economics (BITRE) in advance of its periodic Waterline Report publication. The available metrics include quayside performance indicators (such as net crane rate, ship rate, and labour rate) and some limited landside and port performance indicators. A selection of this data is presented in Appendix A.

In the draft report, the PC observed that the data currently collected by BITRE has several limitations:[63]

- Productivity metrics for some legs of a container's journey, such as container dwell time in stevedores' yards, are not available.[64] Among other things, lower container dwell times mean greater effective throughput capacity for a given amount of yard space for a stevedore, and so greater landside productivity.
- Some productivity metrics need to be adjusted. For example, to function as a conventional measure of labour productivity, the elapsed labour rate needs to be divided by the number of workers assigned to the vessel while it is being serviced.[65]
- The quayside productivity metrics are 'net' measurements which do not include operational or non-operational delays, such as industrial action. 'Gross' measures of productivity are also necessary to provide a more complete picture of productivity, allowing examination of the effect of delays.

The PC found that time-based productivity metrics should be collected for each key step from ship to port gate.[66] The PC also found that data disaggregated by stevedore, rather than by port, is also necessary to make accurate assessments of container terminal productivity.

The ACCC supports the recommendations made by the PC to improve the publicly available information in relation to container port and container terminal performance.

3.1.2 The ACCC supports benchmarking container port productivity nationally and internationally

Last year's report examined the quayside productivity and efficiency of Australian container ports relative to their international counterparts, drawing on the following sources:

- a study conducted by the World Bank's Transport Global Practice, in collaboration with IHS Markit (the World Bank study)
- data released by the United Nations Conference on Trade and Development
- data published by the New Zealand Ministry of Transport.

The ACCC found that, despite productivity improvements, Australian container ports are outperformed by many of their international counterparts.

63 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, pp 35–37.

64 Dwell time is the time import containers spend in stevedores' yards after they are unloaded from a ship until being collected by a land transport operator or exports are delivered to the stevedores' yard until being loaded onto ships.

65 The elapsed labour rate shows the number of containers handled in each hour workers are servicing a ship.

66 The port gate is the point at which a land transport operator drops off, or collects, a container.

Some market participants have argued that most comparisons of Australian container ports to international container ports are not valid due to the differences in operations between countries. For example, several participants have argued that comparisons between Australian container ports and top performing container ports such as Yokohama Port are not valid due to differences in port geography and terminal capital intensity. The PC noted that Yokohama Port does indeed perform very well in metrics such as gross crane rates, but that the high number of cranes used per vessel is not necessarily an efficient allocation of capital.[67]

The World Bank study, in particular, was a novel, wide-ranging comparison of a large number of international container ports. The study focuses on quayside time-based metrics and, therefore, does not provide a complete comparison of port performance. However, the ACCC considers that even a limited form of benchmarking is useful as it examines an important aspect of port performance. Ship turnaround time, which was the focus of the World Bank study, is most valued by industry participants like shipping lines and is crucial for examining the international competitiveness of a container port. This, in combination with a suite of other quayside and landside performance measures, can enable a broader comparison across container ports domestically and internationally.

Benchmarking can be used to identify port and terminal performance gaps and changes as well as their drivers. In the absence of national and international comparisons, it is harder to effectively assess the performance of Australian container ports and to test their relative performance and competitiveness. This makes it harder to assess whether there has been a slow adoption of emerging technologies or inefficient investment by supply chain participants.

The ACCC supports the development of new and improved comparisons of Australian and international container ports. We also acknowledge that inherent differences in operating environments between container ports need to be taken into account, wherever possible, when interpreting the results.

3.2 Industrial Relations

Last year's report examined the state of industrial relations within the maritime industry. The report found that restrictive work practices and industrial actions escalated over the past decade and contributed to the relatively poor performance of Australian container ports.[68]

This section discusses the PC's findings on this matter in its draft report as well as other developments since last year's container stevedoring monitoring report.

3.2.1 The PC recommended reforms to industrial relations

The PC considered the industrial relations issues in the maritime industry as part of its inquiry. In the draft report, the PC found that:[69]

- unions hold substantial bargaining power over stevedores
- restrictions on merit-based hiring and promotion harm workers and productivity
- the current industrial framework has not prevented protracted bargaining periods between unions and stevedores.

The PC found that the average duration of enterprise agreement negotiations had been increasing, with the average negotiation period since 2018 increasing to 525 days.[70] The PC has made a number of draft recommendations for reform of the *Fair Work Act 2009* (Cth) which are intended to improve the productivity of the stevedoring labour force.[71]

67 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, p 140.
68 ACCC, *Container stevedoring monitoring report 2020-21*, p viii.
69 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, pp 265–315.
70 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, p 287.
71 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, pp 43–51.

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.

3.2.2 Industrial relations remain an issue across the supply chain

Patrick reached agreement with the MUA

In March 2022, Patrick and the MUA concluded a new enterprise agreement following 2 years of negotiations.[72]

Patrick has publicly stated that the new enterprise agreement gives it more flexibility to make recruitment decisions. [73]

Last year's report noted that the MUA was demanding that Patrick include in its enterprise agreement a 'friends and family' provision similar to clause 10.4 in Hutchison's enterprise agreement.[74] This clause would stipulate that a proportion of new employees be chosen by the MUA or from the 'friends and family' of existing employees. A clause of this nature was not included in Patrick's 2022 enterprise agreement, but restrictive clauses that limit the supply and deployment of labour remain in Patrick's and other stevedores' enterprise agreements.

Negotiations between Svitzer and the MUA remain unresolved

Svitzer is one of the main tugboat operators at each Australian container port. Tugboats form an integral link of the container supply chain, as they are required to bring ships to and from their berths.

Svitzer's most recent enterprise agreement expired in December 2019, and it has been in negotiations with its workforce over a new enterprise agreement for the past 3 years.[75] Protected industrial action related to this dispute has resulted in several hundred hours of protected industrial action across the monitored container ports in 2021–22, with additional stoppages likely until an agreement is reached.

Protected industrial action, by employers or employees, taken in any part of the supply chain has knock-on effects that can affect the productivity of the entire supply chain. Industrial action affecting tugboat operations can delay ships being brought to berths to commence unloading and loading and prevent ships from departing in a timely manner once the container exchange is complete.

On 14 November 2022, Svitzer announced that it intended to indefinitely lock out its harbour towage employees at all of the 17 ports it operates in, in response to what it claimed to be "damaging and ongoing industrial action being organised by the unions".[76] This would have meant that no vessels would be towed into or out of ports where Svitzer was the only tugboat operator, had the lockout occurred.

On 17 November 2022, the Fair Work Commission made an order suspending Svitzer's protected industrial action for a period of 6 months. As a result of the order, no party will be able to take protected industrial action for the period of the suspension.[77] In making the order, the Commission found that Svitzer's intended lockout threatened to endanger the welfare of the Australian population and could have caused significant damage to the Australian economy.[78]

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72 I Ackerman, 'Patrick terminals employees vote up enterprise agreement', *Daily Cargo News*, 17 March 2022, accessed 8 November 2022.

73 Australian Financial Review, 'Patrick Terminals removes union hiring veto in docks peace deal', *Daily Cargo News*, 7 February 2022, accessed 14 November 2022.

74 ACCC, *Container stevedoring monitoring report 2020-21*, p xvii.

75 I Ackerman, 'Unions respond to Svitzer's plan to cancel EBA', *Daily Cargo News*, 4 August 2022, accessed 8 November 2022. Svitzer's workforce is represented by 3 separate unions, being the MUA, the Australian Institute of Marine and Power Engineers, and the Australian Maritime Officers Union.

76 I Ackerman, 'Svitzer announces indefinite lockout of harbour towage employees', *Daily Cargo News*, 14 November 2022, accessed 14 November 2022.

77 *Re Svitzer Australia Pty Ltd* [2022] FWCFB 209, [Fair Work Commission decision].

78 *Re Svitzer Australia Pty Ltd* [2022] FWCFB 209, [2].

DP World enterprise agreement expires next year

DP World and the MUA concluded their most recent set of enterprise agreements in February 2021, following more than 2 years of negotiations.[79] These agreements will expire at the end of 2023, after which any replacement will require further negotiation and bargaining.

3.3 Shipping lines

3.3.1 Part X of the CCA exempts shipping lines from Australia's competition laws

Part X of the *Competition and Consumer Act 2010* (CCA) contains various exemptions for ocean carriers providing international liner cargo shipping services to and from Australia (Liners).

Part X allows Liners with registered agreements to:

- agree on prices
- pool or apportion earnings, losses or traffic
- regulate capacity
- coordinate schedules.

In the absence of Part X, these types of agreements would otherwise breach the CCA's prohibitions on cartel arrangements, or its other prohibitions on anti-competitive conduct.

Part X was introduced by the Australian Government in 1989 to facilitate a more competitive and efficient shipping industry servicing Australia. It was intended to benefit cargo owners by incentivising shipping lines to deliver more frequent and reliable liner cargo shipping services to Australia.

The ACCC supports the PC's recommendation to repeal Part X

The PC recommended that Part X be repealed and replaced by either:

- a class exemption, in which the ACCC may grant shipping lines an exemption from competition law for certain 'classes of conduct' that may otherwise carry a risk of breaching competition laws, but:
  - do not substantially lessen competition, and/or
  - are likely to result in overall public benefits
- requiring individual shipping lines to apply for authorisation under Part VII of the CCA to engage in conduct that would otherwise breach existing provisions under Part IV of the CCA, on the basis that the conduct offers a net public benefit.[80]

No other industry has such a broad legislated exemption from Australia's competition laws, even though there are industries with similar characteristics to the shipping industry. For example, air freight does not benefit from similar exemptions but is able to perform a similar function to ocean freight, with similar levels of risk.

Over the years, other countries that had similar exemptions to Australia's Part X have removed or limited them on the basis that the potential harm from allowing cartel behaviour by shipping companies may outweigh the benefits of regularity and reliability of service.

79 DP World noted that there had been no industrial action in the 5 months preceding the February 2021 finalisation of its last enterprise agreement. See DP World, *Enterprise Agreement Finalised at DP World in Australia*, DP World website, 22 February 2021, accessed 10 November 2022.

80 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, p 188.

While consolidation can bring benefits, namely economies of scale and coordination across a global network, increased concentration of the shipping industry combined with the exemptions provided by Part X could lead to artificially elevated freight rates. Determining what forms of collaboration should be exempt from competition laws should be a matter for the ACCC after a transparent process, and only where the ACCC has assessed that the reduction in competition would be outweighed by significant efficiencies or public benefits. The ACCC considers that a class exemption or authorisation process could provide a more targeted approach, minimising costs and ensuring a net public benefit.

4. Financial performance of stevedores

Key Points:

- The market for stevedoring services at each of the monitored container ports is concentrated. Prior to 2013 the stevedoring industry, which was largely composed of a duopoly between Patrick and DP World, consistently achieved total operating profit margins between 21% and 27%.[81]
- The intensity of competition between stevedores increased after 2013, following new entry by Hutchison (in Brisbane and Sydney) and VICT (in Melbourne). This, combined with other developments, led to the total operating profit margin of incumbent stevedores dropping to 13% by 2019–20.
- The operating profit margins of the Australian container stevedores have increased significantly since 2019–20, with the incumbents' average reaching 25% in 2021–22. This coincided with the onset of the COVID-19 pandemic, which created significant operational challenges for the global supply chain and changed its market dynamics.
- The degree of competition between stevedores at a particular container port depends primarily on the number of effective options available to shipping lines and cargo owners, and the ease to either party of switching between stevedores.
- While the ACCC has not reached a conclusive view, it considers that the changed market dynamics due to the pandemic have reduced effective options available to shipping lines and cargo owners, and the ease of switching between them. This appears to have contributed to less intense price competition between stevedores.
- These developments have eroded the benefits that cargo owners and, ultimately, Australian consumers obtained following new entry by Hutchison and VICT.
- The ACCC will continue to monitor and analyse stevedores' charges and financial performance to determine if the recent increases in profits are temporary (due to impacts of the pandemic). If the profit levels remain elevated on a sustained basis, the ACCC will closely scrutinise whether any structural or behavioural market impediments are contributing to this and whether any further policy or regulatory responses are warranted.

Stevedores are an integral component of the Australian logistics supply chain. The market for stevedoring services at each monitored container port is concentrated. During the first 13 years of ACCC monitoring, the stevedoring industry was largely composed of a duopoly between Patrick and DP World.[82] Throughout that period, the ACCC regularly raised concerns about the lack of competition between the 2 stevedores and the impact this had on the supply chain. The ACCC was most concerned about:

- sustained high profit margins earned by the 2 stevedores
- lack of investment in infrastructure, particularly to increase capacity, by the 2 stevedores
- lack of incentives for stevedores to efficiently respond to the requirements of their customers.

The ACCC was concerned that these observations indicated that cargo owners, and ultimately consumers, paid too much for stevedoring services.

81 The ACCC calculates operating profit margin by taking a ratio of earnings before interest, tax, and amortisation (EBITA) relative to total revenue.

82 The ACCC commenced monitoring the Australian container stevedoring industry in 1998–99. While there were a few cases of entry and exit, stevedoring services at the major Australian container ports had been dominated by a duopoly until 2011–12. DP World's terminals were previously operated by P&O Ports until they were acquired by DP World in 2006. Appendix B shows the changes in stevedoring terminal ownership throughout the monitoring regime.

The level of competition for stevedoring services at the 3 largest Australian container ports increased from 2013, following entry by Hutchison (Brisbane in May 2013 and Sydney in November 2013) and VICT (Melbourne in April 2017).

As we reported last year, enhanced competition brought benefits. In the period between 2012–13 and 2019–20, stevedores made significant investments in equipment and infrastructure and the incumbent stevedores' profit margins fell. However, the profit margins of all container stevedores in Australia substantially increased in 2020–21.[83]

This chapter will cover:

- how stevedores compete and the factors that influence the level of competition between them
- the trends in stevedores' profits
- the key drivers behind stevedores' profits
- the impact of changed market dynamics on effective shipping and container terminal capacity
- possible explanations for increased stevedoring profits in the past few years.

The financial information in this chapter, and the broader report, only relates to stevedoring operations. The financial figures throughout the report are presented in real terms with values in 2021–22 dollars.[84]

4.1 How stevedores compete and the factors that influence the level of competition between them

The strength, or lack, of competition between stevedores is a critical determinant of their ability to earn excess returns. Effective competition is likely to drive stevedores' returns towards a level closer to the market cost of capital (accounting for industry risk) in the long-term. Stevedores may hold substantial market power in the absence of effective competition. Substantial market power would allow stevedores to charge prices that enabled them to earn supernormal returns on a sustained basis.

Therefore, to interpret stevedores' financial performance, it is necessary to understand the way stevedores compete in the provision of their services and the factors that influence the strength of competition between them.

The explanation of how the market operates set out in this section is based on the information provided to the ACCC by market participants during consultation as well as market research.

How stevedores compete

As described in section 1.2, stevedores primarily act as intermodal terminals for shipping lines and transport operators.[85] They provide complementary services of loading, storing and unloading containers between these two forms of transport. However, a stevedore's revenue is directly dependent on the number of containers that it handles, rather than the number of vessel or truck arrivals that carry the containers to, and from, the stevedore's terminal. Therefore, a stevedore's objective is to maximise the number of containers that it handles.

To achieve this, stevedores compete on price and service quality to contract with shipping lines. The contract is typically designed for stevedores to provide their container handling services to a particular shipping service (that is, route). A shipping line incorporating a stevedore's terminal as part of its service offering to cargo owners is a necessary precondition for a stevedore to be involved in the handling of containers as part of the supply chain.

83 ACCC, *Container stevedoring monitoring report 2020-21*, p 36.

84 Deflator series derived from the ABS CPI (cat. no. 6401.0, tables 1 and 2, Index Numbers; All Groups CPI; Australia). Base year for the ACCC deflator series is 2021–22.

85 While stevedores also provide other services, such as transhipment services and stack/bulk runs, these comprise a relatively small fraction of their total revenue.

A shipping line incorporates a stevedore's services as part of its shipping service and offers the bundled service to cargo owners. A shipping service offered to cargo owners specifies, amongst other things:

- origin and destination ports
- container terminals that will be used at the origin and destination ports
- the estimated dates and times of departure at the origin port and arrival at the destination port.

When cargo owners choose a shipping service, they simultaneously choose the bundle of services above which includes the stevedore at the Australian container port that will handle their containerised cargo. This happens when the cargo owner books capacity both on a spot and contract basis.

The ACCC understands that many shipping services operate on a weekly basis. When a cargo owner enters a long-term contract to book capacity on such a service, the cargo owner usually commits to a minimum annual number of containers that it will be required to transport using this service. The cargo owner often has some discretion as to how many containers it can transport in any given week.

The fact that a stevedore contracts out quay line capacity at its terminal to a shipping line does not create an economic activity that generates revenue for the stevedore. Such economic activity only arises when a cargo owner has chosen and booked a shipping service. Therefore, cargo owners are effectively the economic buyers of stevedoring service, even though they pay for that service indirectly, through shipping lines and transport operators. Stevedores compete for the volumes of cargo owners based on their overall value proposition, which includes cost and service level on both quayside and landside.

Recognising the system context within which stevedores service cargo owners has important implications on defining the relevant markets for competition analysis. Specifically, if cargo owners have the incentive and ability to effectively switch stevedores in response to an unfavourable change in stevedore price and/or quality, then they should be included as the relevant customer for the purpose of market definition. This view is also expressed by the US Department of Justice and the US Federal Trade Commission which can be found in the submission to the Organisation for Economic Co-operation and Development on analysing port competition issues.[86]

Stevedores offer standard contracts to transport operators to access their terminal to pick up or drop off containers. The interaction between stevedores and transport operators is a necessary precondition for stevedores to complete their service to cargo owners. Transport operators interact with stevedores on behalf of cargo owners and this interaction includes participating in the container exchange and handling of the payment for the stevedoring service. When the cargo is delivered to the owner, the transport operator invoices the owner for its own services as well as landside charge levied by the stevedore.

Factors that influence the level of competition between stevedores

Stevedores collect revenue for their service through two sets of charges: quayside charges levied to shipping lines under the contract between them and landside charges levied to transport operators under a standard contract. While the quayside and landside charges are levied separately, they both relate to the handling of a given container. This dual pricing structure is not unique in the supply chain. Empty container parks levy charges to shipping lines agreed under a contract for empty container services and separate standard contract 'notification fees' to transport operators for picking up and dropping off containers.

As discussed above, stevedores compete to attract contracts with shipping lines for stevedoring services, but a stevedore's performance is dependent on how many containers cargo owners choose to transport using its services. Cargo owners are typically price sensitive and seek to minimise the total cost of using the supply chain, while maintaining a desired quality of service. When cargo owners choose between shipping line services, they consider, amongst other things, the total end-to-end price they would expect to pay for transporting the container using the service. This includes the

86 E Van de Voorde, H Meersman, T Vanelslander, 'Competition in ports and port services' [conference note], *OECD Competition Committee Roundtable on Competition concerns in Ports and Port Services*, Paris, 27 June 2011.

stevedore's quayside charges that are factored in by the shipping line in its tender for the service and the stevedore's landside charges, which are published on the stevedore's website.

The market share of both the shipping line and the stevedore is dependent on the cargo owner choosing their bundled service over a competing bundled service. This means that, to the extent each faces competition, both shipping lines and stevedores have incentives to minimise the overall cost of the bundle to win cargo owners' business.

The degree of competition between stevedores at a particular port depends primarily on the number of effective options available to shipping lines and cargo owners, and the ease to either party of switching between stevedores.[87]

For cargo owners, their ability to switch to a different shipping line service that uses a different stevedore is influenced by a range of factors, including:

- availability of shipping capacity
- number of suitable services between desired ports
- ability to reliably deliver goods between port gates in the required time
- whether the cargo owner is using the spot or contract market, and in the case of the latter, how long the cargo owner is locked-in by its current contract
- any costs associated with switching (for example, where an alternative service operates on a different schedule, any additional costs that cargo owner would incur by having containers delivered or picked up at different times).

For shipping lines, their ability to switch a particular shipping service to using a different stevedore is influenced by a range of factors, including:

- availability of spare terminal capacity
- availability of berthing windows at specific times, in circumstances where the shipping line service is scheduled to call multiple ports and needs to align arrival times across multiple ports
- ability to reliably turnaround vessels in the required time
- how long the shipping line is locked-in by its current contract with the stevedore in relation to that specific service.

4.2 Stevedoring profits

This section discusses how stevedores' profits have changed over the course of the ACCC's monitoring period and the key drivers behind those changes. Appendix B shows a selection of historical events throughout the monitoring regime that affected stevedoring throughput, revenues and costs.

4.2.1 Stevedores' profits have risen over the last few years

The ACCC has used 2 primary measures to monitor stevedores' profits: operating profit margin and return on average tangible assets. Both metrics show a similar trend over time. For the purpose of this report, the ACCC will focus on changes in operating profit margin.

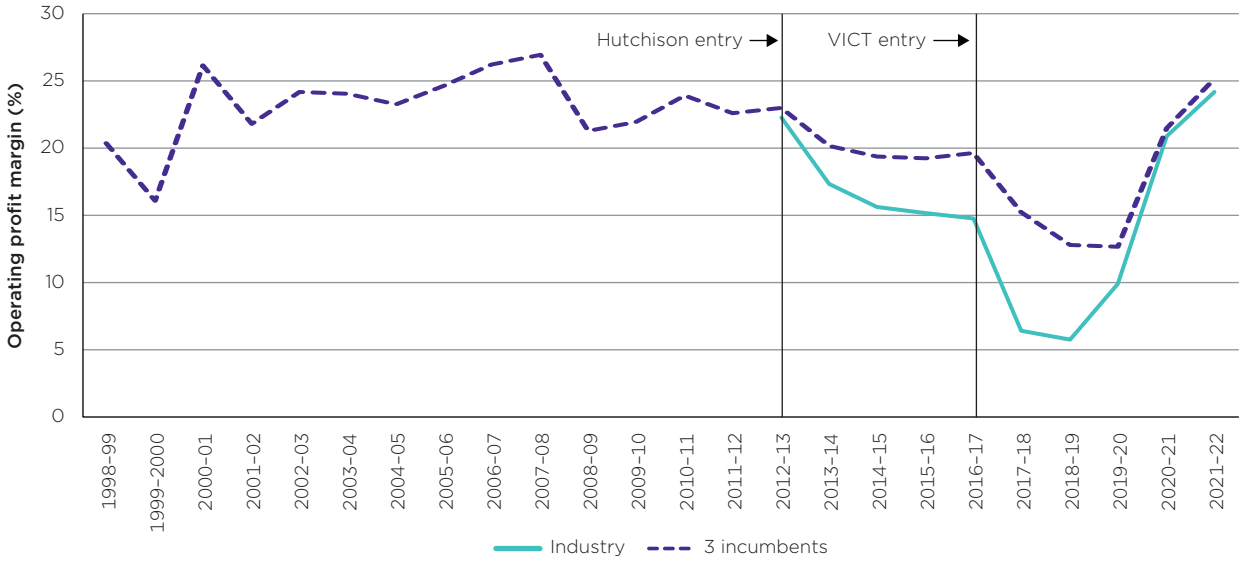
The ACCC calculates operating profit margin by taking a ratio of earnings before interest, tax, and amortisation (EBITA) relative to total revenue. This isolates the effects of variation in operational size and scale among stevedores and allows a broader assessment of the industry's operating profits.[88]

87 The ACCC considers that inter-port competition is limited due to the long distances between major container ports and the relatively high costs of land transport. Most demand for goods is highly concentrated in the cities where only one major container port is within the vicinity. There are relatively few cargo owners with reasonably comparable landside and port costs of importing or exporting through two container ports.

88 Return on average tangible assets is another profit measure that indicates stevedores' operating profits relative to the value of their deployed tangible assets. For details, please refer to Appendix Figure A.1.

Figure 4.1 illustrates how the total operating profit margin of the industry (all 5 stevedores) and of the 3 incumbents (DP World, Patrick and FACT) has changed during the ACCC's monitoring period.[89]

Figure 4.1: Stevedores' total operating profit margins, industry & 3 incumbents: 1998–99 to 2021–22



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

Figure 4.1 shows that the industry total operating profit margin from 2000–01 to 2012–13 ranged between 21% and 27%. In the monitoring reports during this period, the ACCC raised concerns about the stevedores' sustained high profits.

The ACCC is aware that stevedoring is a capital intensive, high risk business, characterised by large fixed costs and significant economies of scale. However, the ACCC considered that the stevedores' level of profit prior to 2012–13 was likely to be excessive, in comparison to similar businesses.[90]

In the period between 2012–13 and 2019–20, the total operating profit margin of incumbent stevedores fell significantly, dropping to 12.7% by 2019–20. Both Hutchison and VICT incurred significant losses during their initial start-up period. Because of this, the total operating profit margin of all 5 stevedores was even lower, reaching as low as 5.8% in 2018–19.

The industry total operating profit margin has increased significantly in the past few years, reaching 25.1% in 2021–22. This is the highest that industry total operating profit margins have been since 2007–08. The 2 new entrants have closed the gap in the total operating profit margin with the 3 incumbents.

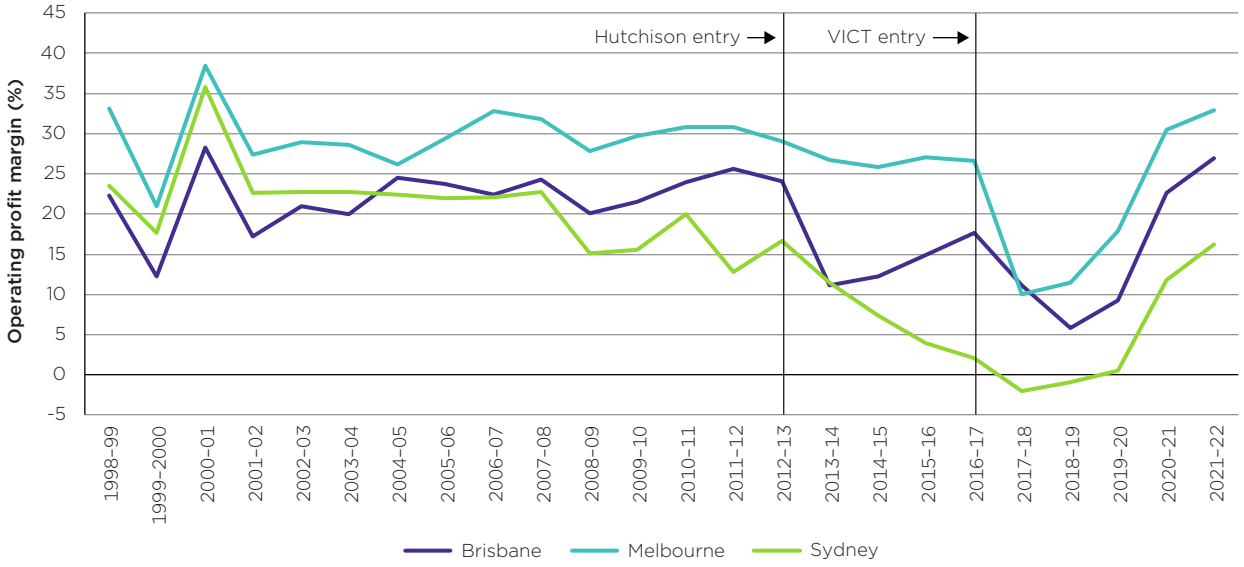
89 The ACCC exempted VICT from providing data for the 2016–17 report as it commenced operation in the last quarter of the financial year, in April 2017. VICT commenced reporting its data in full for the 2017–18 monitoring program.

90 ACCC, *Container stevedoring monitoring report no.15*, ACCC, Australian Government, 2013, p 56.

4.2.2 Stevedores' profits have increased at each monitored container port over the past few years

Figure 4.2 shows stevedores' total operating profit margins at the 3 largest monitored container ports over the ACCC's monitoring period.

Figure 4.2: Stevedores' total operating profit margins in Melbourne, Sydney and Brisbane: 1998–99 to 2021–22



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

Figure 4.2 shows that prior to the entry of Hutchison and VICT, total operating profit margins at each of these container ports were relatively constant, with stevedoring terminals earning the highest profits in Melbourne and generally the lowest profits in Sydney.

The entry of new competitors Hutchison and VICT, combined with other factors, had a significant impact on the stevedores' total operating profit margins at each of the container ports prior to the COVID-19 pandemic. Total operating profit margin fell in Brisbane from 24.1% in 2012–13 to a low of 5.8% in 2018–19, in Sydney from 16.6% in 2012–13 to a low of -2.0% in 2017–18 and in Melbourne from 26.6% in 2016–17 to a low of 10.0% in 2017–18.

In part, the decreases in the total operating profit margin figures in the chart reflect that the two new entrants incurred significant losses during their initial start-up period, as was mentioned earlier. However, examination of the individual operating profit margins of DP World and Patrick shows that new entry has had a material impact on their individual operating profit margins at each of the three container ports. This is particularly apparent in Sydney, where the 3 stevedores combined incurred overall operating losses in 2017–18 and 2018–19.

There has been a significant shift in these trends in the last 3 years, with total operating profit margins returning to levels observed prior to new entry at Brisbane, Sydney and Melbourne. Table 4.1 highlights the change in stevedoring total operating profit margins over the last 3 years at each monitored container port.

Table 4.1: Change in stevedores' total operating profit margins at each monitored container port: 2018–19 to 2021–22

	Adelaide	Brisbane	Fremantle	Melbourne	Sydney
Percentage point change in total operating profit margins between 2018–19 to 2021–22	5.9 pp	21.1 pp	11.1 pp	21.5 pp	17.1 pp
Percentage change in the number of lifts between 2018–19 to 2021–22	-12.6%	13.3%	-1.4%	3.3%	2.7%
Number of container stevedoring terminals	1	3	2	3	3

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

Table 4.1 shows that significant increases in stevedores' total operating profit margins have occurred across each monitored container port in the last 3 years. The largest increases in total operating profit margins have occurred in Brisbane, Sydney and Melbourne, each of which have 3 stevedores and experienced modest to significant growth in throughput.

Due to the high fixed-cost nature of stevedoring terminals, the 13.3% increase in throughput in Brisbane may have contributed to the increase in stevedores' total operating profit margins at that port. For the same reason, the 12.6% decrease in throughput in Adelaide may have contributed to its total operating profit margins increasing less than at other ports.

The following section looks at unit revenues and costs to examine the key drivers behind stevedores' recent increase in profits.

4.3 Industry costs and revenues

This section shows how stevedores' revenues and costs have changed over the course of the ACCC's monitoring period.

The ACCC uses unit revenues to provide an indication of average service prices per unit of throughput, rather than actual prices charged by stevedores.

The two main units of measurement of container stevedoring throughput are lifts (number of containers) and TEUs (equivalent number of twenty-foot containers).[91] The ACCC generally uses lifts as a unit of throughput because the revenues and costs of most stevedoring services are dependent on lifts rather than TEUs. For example, the operational cost to lift a container onto or off a ship does not change significantly between a 20- or 40-foot container.

The largest component of stevedoring revenue comes from quayside charges to shipping lines. The ACCC does not collect actual quayside prices charged by stevedores to shipping lines, which are commercially confidential. Stevedores also charge landside users for terminal access and other services. These charges are generally published on the stevedores' websites.

The ACCC calculates total revenue per lift by dividing total revenue by the total number of container lifts performed each year. This includes all revenues and lifts of all types. This approximates average overall stevedoring charges but is not the actual price paid by cargo owners. Actual stevedoring charges vary for different container lift types, and for additional incentive-based charges. The ACCC does not currently collect revenue data disaggregated by container lift type.

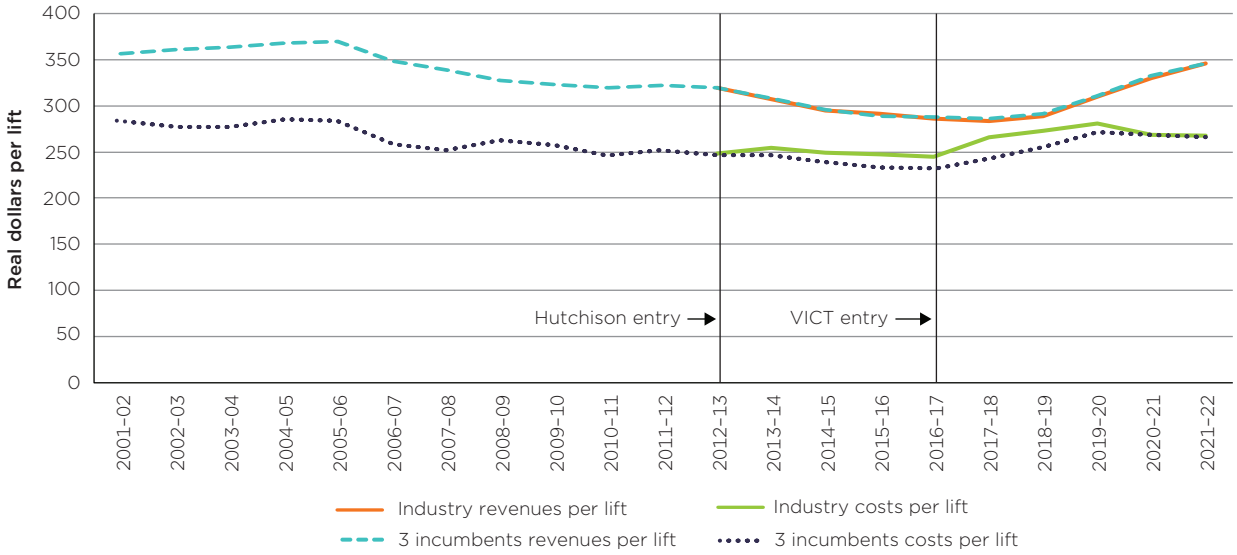
Figure 4.3 shows how real total revenues and costs per lift of the industry (all 5 stevedores) and of the 3 incumbents (DP World, Patrick and FACT) have changed since 2001–02.[92] The gap between real total revenues and costs per lift is the real total EBIT per lift.[93]

91 One 40-foot container is equivalent to 2 TEU.

92 Stevedores only began reporting the number of lifts to the ACCC in 2001–02, so data between 1998–99 and 2001–02 is not available.

93 This is not quite the same as the total operating profit margin shown in Figure 4.1, which uses EBITA. EBITA is equal to EBIT plus amortisation.

Figure 4.3: Real total revenues and costs per lift, industry & 3 incumbents: 2001–02 to 2021–22



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

Figure 4.3 shows that real total revenues and costs per lift of the incumbents declined slowly in the period between 2006–07 and 2012–13, though the real total EBIT per lift remained relatively stable. This is part of the period of sustained high profits observed in Figure 4.1.

The effect of new entry can be observed from 2012–13 onwards. The new entrants' revenues per lift have stayed close to that of the incumbents throughout the series, with both falling after new entry in 2012–13, despite the large investments made by incumbents and new entrants alike. New entrants' real total costs per lift have been higher than the incumbents' due to higher fixed costs and lower volumes associated with starting up a new terminal. As a result, the new entrants' total operating profit margins were lower than the incumbents' during this period.

Real total costs per lift increased between 2016–17 and 2019–20 for both the industry and the incumbent groups, which reversed the prior long-term trend. Real total revenues per lift remained relatively stable in the period.

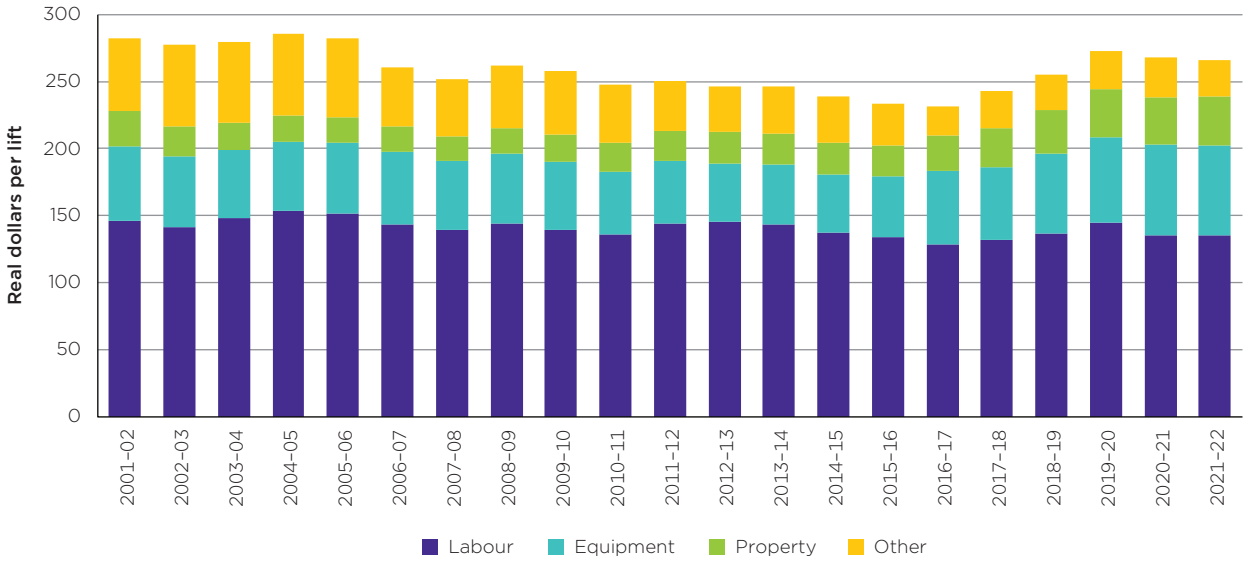
Industry real total revenues per lift have increased steadily since 2019–20, while real total costs per lift have decreased and then stabilised. In the last two years the new entrants' costs per lift have also reduced to close to the industry average.

The remaining analysis in this chapter will focus on the 3 incumbents as a group to remove the effects of new entrants' higher costs. The next sections examine the changes in the 3 incumbents' real total costs and revenues per lift over the monitoring period.

4.3.1 Higher recent stevedoring profits not due to cost savings

Figure 4.4 shows the components that make up the 3 incumbent (DP World, Patrick and FACT) stevedores' real total costs per lift.

Figure 4.4: 3 incumbent real total costs per lift, by component: 2001–02 to 2021–22



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

Figure 4.4 shows that after 2004–05, the incumbent stevedores' real costs per lift generally trended down from $261/lift in 2006–07 to $232/lift in 2016–17. Unit costs then increased to $273/lift in 2019–20 but dropped to $266/lift in 2021–22.

Labour is generally the largest cost component for all stevedores. The labour cost per lift varies significantly between each terminal and fluctuates at different times, which is likely due to new bargaining agreements or increases in terminal automation.

Equipment cost per lift primarily includes operational equipment depreciation, maintenance and running costs. Equipment cost per lift varies between terminals due to differences in automation, equipment age and utilisation.

Property cost per lift also varies widely between terminals. Property costs principally include terminal lease costs (land rents) paid to port operators, property maintenance and other fees and charges. The increases in property costs per lift coincide with the privatisation of the ports of Brisbane, Botany and Melbourne in 2010, 2013 and 2016 respectively, as discussed in Chapter 5.

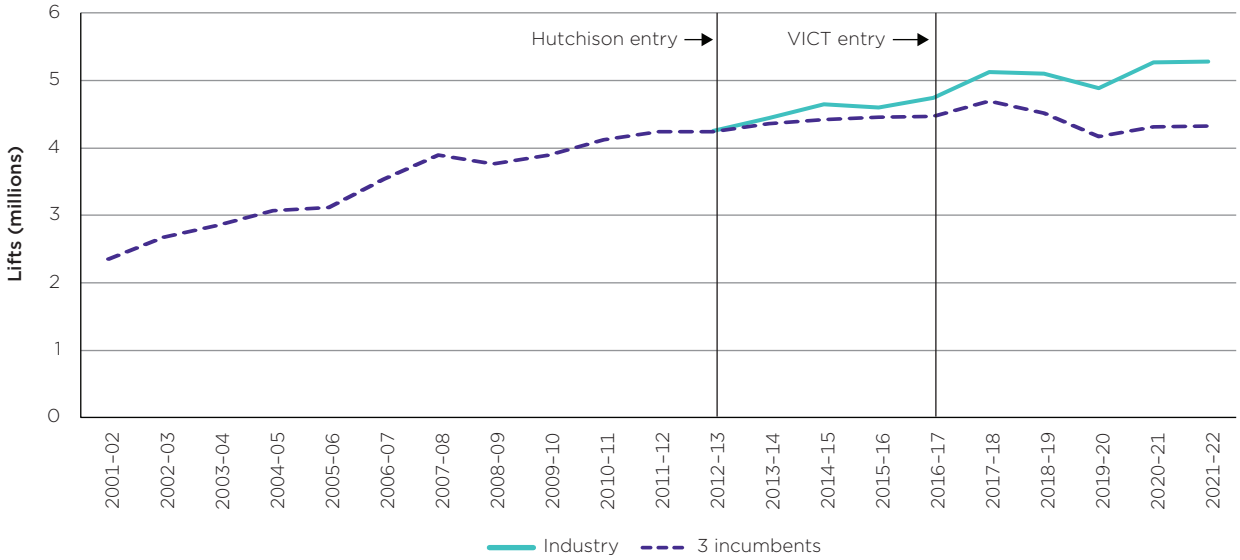
'Other costs' include overheads such as security, cleaning, insurance, communications, general office expenses, legal fees, marketing, and professional services.

As discussed earlier, stevedoring businesses are characterised by economies of scale, which means unit costs generally reduce when throughput increases and vice versa. Therefore, in interpreting changes in unit costs, it is important to simultaneously have regard to changes in throughput, discussed in the next section.

Throughput has increased over time, but incumbents have lost market share to new entrants

Figure 4.5 shows the total number of lifts of the industry (all 5 stevedores) and of the 3 incumbents (DP World, Patrick and FACT) since 2001–02.

Figure 4.5: Throughput in lifts, industry & 3 incumbents: 2001–02 to 2021–22



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

Figure 4.5 shows that the overall number of container lifts performed by the industry has increased modestly in a linear trend since 2001–02. Despite a drop in 2019–20, the total number of lifts returned to the long-term trend in 2021–22. The 5.3 million lifts performed in 2021–22 was only 3.3% higher than the number of lifts performed in 2018–19, before the pandemic.

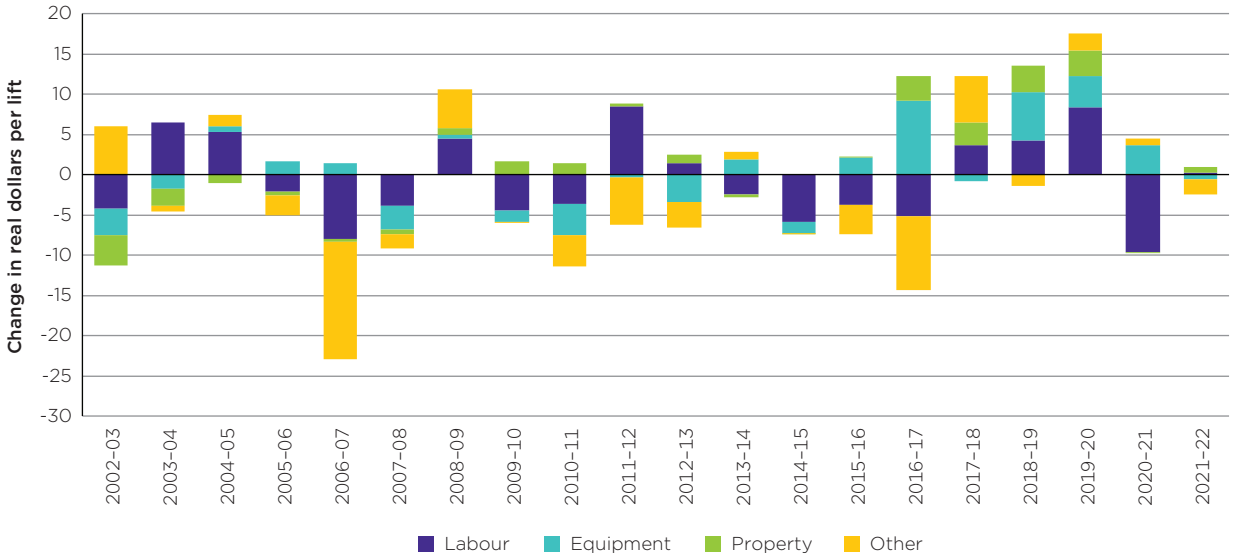
The gap between the solid and dotted lines shows the market share lost by incumbents and gained by the new entrants. This has grown since 2012–13, particularly following the entry of VICT in 2016–17.[94] As a result, the number of lifts performed by the 3 incumbents in 2021–22 has reduced compared with 2017–18.

Drivers of changes in costs per lift

Figure 4.6 highlights the change in components of real total costs per lift of the 3 incumbents (DP World, Patrick and FACT) in each year over the monitoring period. The values shown are the change in the unit cost of each component from the previous year. For example, the change in labour cost per lift in 2002–03 shown in the graph below is the 2002–03 real labour cost per lift minus the 2001–02 labour cost per lift. For each year, positive changes and negative changes are stacked respectively in the upper and lower segment of the chart. Overall unit cost is the net of all positive changes less all negative changes.

94 As discussed in Box 4.1 of last year's report, VICT has been more successful in gaining market share than Hutchison.

Figure 4.6: Change in 3 incumbent real total costs per lift, by component: 2002–03 to 2021–22



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

The large decrease in costs per lift in 2006–07 is mostly associated with the end of the stevedoring levy in May 2006.[95] The incumbent stevedores' overall unit costs decreased in the period from 2006–07 to 2015–16. As shown in Figure 4.5, the total throughput increased relatively modestly over this period, so these real unit cost decreases were largely due to cost reductions, rather than increases in throughput. Figure 4.6 shows that over this period, the incumbents achieved cost savings by lowering their labour costs by $10/lift, equipment costs by $9/lift, and 'other costs' by $13/lift, although property costs increased by $4/lift.

Figure 4.6 shows that in the period between 2016–17 and 2019–20, incumbents' unit costs increased by $41/lift. In part, this is due to a loss of market share, particularly to VICT. However, in this is also due to absolute increases in labour, equipment and property costs in this period.

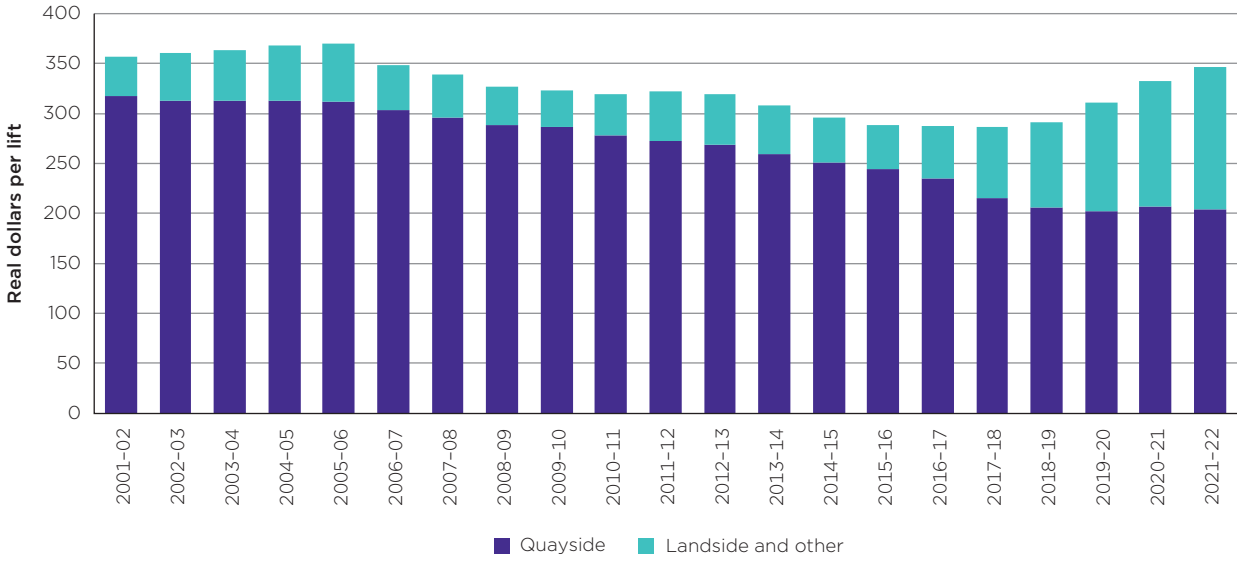
Although there was a notable $10/lift reduction in labour costs in 2020–21, overall unit costs have remained largely unchanged in the last two years. Therefore, cost savings is not a key driver behind the significant recent increases in stevedores' profits.

4.3.2 Stevedoring revenues have increased significantly in the past few years

Figure 4.7 shows the components that make up the real total revenues per lift of the 3 incumbents (DP World, Patrick and FACT). As discussed at the start of section 4.3, quayside revenue per lift is a proxy for quayside charges per container paid by shipping lines, whereas landside revenue per lift is a proxy for landside charges per container paid by transport operators.

95 The Stevedoring Levy came into effect in February 1999, to ensure that all stevedoring employees made redundant as part of waterfront reform process received full redundancy entitlements. The levy ended in May 2006. See Minister for Transport and Regional Services, *Stevedoring Levy Ends This Month* [media release], Minister for Transport and Regional Services, 26 May 2006, accessed 17 October 2022.

Figure 4.7: 3 incumbent real total revenues per lift, by component: 2001–02 to 2021–22



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

As seen in Figure 4.7, the balance of quayside and landside revenues has changed over time. In the first 10 years of the ACCC's monitoring, stevedores recovered an average of 87% of their revenue through quayside charges to shipping lines. By 2021–22, this had fallen to 59%, with the incumbent stevedores recovering 41% of their revenue through landside charges to transport operators.

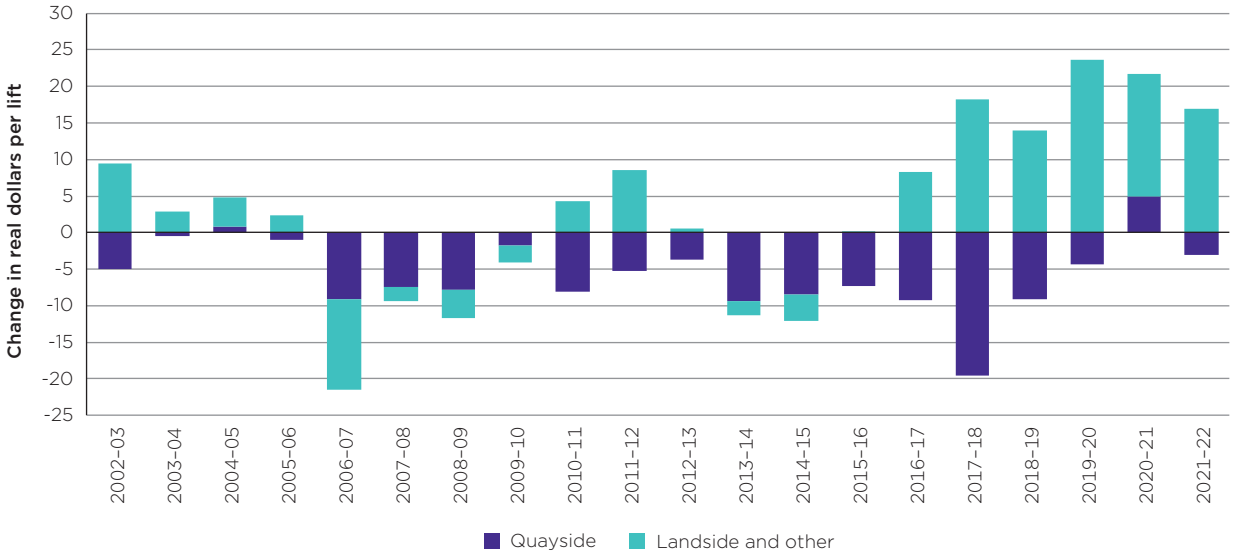
As discussed in section 1.2, cargo owners ultimately pay both sets of charges through shipping lines and transport operators. Therefore, the total cost of stevedoring services to cargo owners depends on the total stevedoring price per container, rather than the distribution between quayside and landside charges.

Figure 4.7 shows that the total revenue per lift, which is a proxy for the total stevedoring price per container, was decreasing in the period between 2005–06 and 2017–18. However, the total revenue per lift has increased significantly in the past 3 years. This is examined more closely in the next section.

Drivers of changes in revenues per lift

Figure 4.8 shows the change in real quayside and landside unit revenue components of the 3 incumbents (DP World, Patrick and FACT) over the monitoring period. The values shown are the change in the unit revenue from each source from the previous year. For example, the quayside revenue per lift shown in 2002–03 in the graph below is the 2002–03 real quayside revenue per lift minus the 2001–02 real quayside revenue per lift. The analysis will focus on post-2006–07 changes in real revenues per lift to remove the effect of the end of the stevedoring levy in May 2006

Figure 4.8: Change in 3 incumbent real revenues per lift, by source: 2002–03 to 2021–22



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

Figure 4.8 shows that quayside revenues per lift declined by $34/lift in real terms between 2006–07 and 2012–13. Despite some fluctuations, landside revenue per lift remained at similar rates during that period.

The decline in quayside revenues per lift accelerated between 2012–13 and 2018–19, falling by $63/lift in that period. As the ACCC previously reported, increased competition from new entrants pushed the incumbents into offering discounted quayside charges to shipping lines to defend their market share.[96] At the same time, consolidation in the shipping industry increased the bargaining power of the shipping lines, which also adversely affected stevedores' relative bargaining position and further intensified competition for shipping line services.

Stevedores began significantly increasing landside charges, particularly terminal access charges (TACs), in 2016–17, which led to an increase in landside revenues per lift. Figure 4.8 shows that in the period between 2016–17 and 2019–20, the overall increase in landside revenue per lift was greater than the decrease in quayside revenues per lift. However, as discussed earlier, DP World and Patrick lost market share to VICT during this period, which led to an overall loss of revenue and higher costs per lift. Consequently, as shown in Figure 4.1, operating profit margins of the incumbents fell from 19.6% in 2016–17 to 12.8% in 2018–19.

Figure 4.8 shows that in the past three years, landside revenue per lift has continued to increase, as incumbent stevedores have continued to increase landside charges. However, there has been a change in the trend of quayside revenue per lift. After decreasing substantially over the preceding 6 years following new entry, quayside revenue per lift has remained largely unchanged over the past 3 years. This indicates that shipping lines have generally not bargained down quayside charges during this period. Increasing landside charges, in addition to steady quayside charges appears to have been a key factor in stevedores' profits increasing significantly over the past few years.

The following section discusses changes in market dynamics that may have led to the change in the trend in quayside charges.

96 ACCC, *Container stevedoring monitoring report 2016-17*, ACCC, Australian Government, 2017, p 8.

4.4 Market dynamics have changed significantly in recent years

As the ACCC reported last year and discussed in Chapter 2 of this report, the global supply chain has been affected by significant operational challenges in the past few years. These challenges have altered the market dynamics and have reduced the effective capacity of shipping lines and container terminals.

4.4.1 Congestion has reduced effective shipping capacity

As reported last year, simultaneous congestion at many ports around the world has severely impacted vessel scheduling. These disruptions of shipping schedules, combined with shipping lines spending an increasing amount of time waiting in port congestion queues, have drained shipping line capacity. For example, if a shipping line offers a service which previously had taken 6 weeks to ship a set number of containers, but now takes 7 weeks, this results in an overall loss of capacity on the part of the shipping line.

While the shipping lines have deployed all the vessels they can, continued congestion has prevented the extra capacity from being efficiently utilised. Congestion has led to lost voyages, shipping lines omitting port calls and an increase in rolled cargo. In response, shipping lines have allocated additional capacity on their vessels to carry cargo already under contract to ensure they meet their contractual obligations. This has left less space available for uncontracted cargo, further contributing to the squeeze of shipping line capacity.

Cargo owners' ability to switch between shipping services in response to price increases has been very limited, with price becoming a secondary concern to availability and timeliness of shipping capacity. Cargo owners and freight forwarders reported having difficulty booking capacity for their cargo at all, with some reporting either having to make payment immediately to shipping lines to secure space on a vessel or paying premiums to ensure that their cargo would travel on a particular service and not be rolled to a later one.

The significant reduction in effective shipping capacity is evident in the shipping freight rates. As shown in Figure 2.6, freight rates increased significantly in late 2020 and remained substantially higher than pre-pandemic levels throughout 2021–22.

4.4.2 Decreased shipping reliability and workforce shortages reduced effective terminal capacity

Several factors have impacted on effective container terminal capacity. First, as shown in Figure 2.1, global shipping schedule reliability significantly fell in the second half of 2020 and has remained well below its pre-pandemic level since.

With vessels predominantly arriving 'off window', there has been an increased incidence of vessel bunching due to delays at container ports along service routes. By arriving off window, shipping lines also lose their usual contractual service rights, giving stevedores more discretion on how they service ships (for example, the number of cranes allocated to particular ships). One shipping line reported that this has led to them attempting to move windows to maintain schedule reliability.

Second, a range of workforce-related issues have impacted on stevedores' operations over the past two years. Workforce capacity was reduced by COVID-related illness and restrictions. In addition, the unemployment rate around 3.5–5.2% in 2021–22 created a tight labour market,[97] which reduced the ability of companies to hire and train new staff.

This resulted in a reduction in impacted terminals' moves per hour, in turn reducing the effective capacity of the terminal with containers taking longer to load to and from ships, trains and trucks.

97 Australian Bureau of Statistics (ABS), *Labour Force, Australia*, ABS website, 20 October 2022, accessed 2 November 2022.

4.5 The ACCC will closely monitor whether increased profits are temporary or likely to be sustained

Stevedores' rapid profit increases in the past few years seem to suggest a loss of competitive pressure in the industry. As there have not been any stevedore exits during this time, possible explanations for the loss of competitive pressure may include:

- strong demand for shipping services, leading to reduced sensitivity of cargo owners with respect to the prices for stevedore services
- reduced ability for cargo owners to switch stevedores by choosing an alternative shipping service
- reduced transparency of stevedores' prices or increased difficulty for cargo owners to compare stevedores' prices
- stevedore terminals reaching capacity, constraining their incentive to compete over price.

In addition to the possible explanations identified above, it would be of significant concern to the ACCC if the apparent abatement in competitive pressure is an outcome of anticompetitive conduct. To this end, the ACCC may consider closer investigation if subsequent industry monitoring suggests that the growth in stevedore's profit margin cannot be fully explained by reasons other than anticompetitive conduct.

Industry data and information has been used to identify the cause of observed profit increases by stevedores. The information is used to assess whether the underlying cause is likely to be short-lived or persistent. Reduced price sensitivity amongst cargo owners arising from strong demand for shipping services and related difficulties for cargo owners to switch between shipping lines are examples of causes that may be attributed to shocks to the market should have a limited duration of effect over time. Conversely, profit gains due to successful coordination are likely to be more enduring in the absence of competition law enforcement or, ultimately, government intervention.

Based on available information, the ACCC has not formed a conclusive view on the role and contribution of the potential explanations outlined above. At this stage, the ACCC considers that the changed market dynamics in the past few years may have reduced effective options available to shipping lines and cargo owners in choosing stevedores, and the ease of switching between them.

We understand that severely constrained global shipping capacity has reduced cargo owners' ability to switch to a different shipping service and, by implication, a different stevedore. This has also meant that cargo owners have not been in a position to make decisions based on price, therefore reducing the pricing signals observed by shipping lines. In the absence of normal pricing signals, shipping lines may not be under competitive pressure to switch to another stevedoring terminal. Their ability to switch may have also been affected by the operational issues arising at the container terminals due to poor shipping schedule reliability and workforce-related issues.

It appears that this has contributed to less intense price competition between stevedores. In other words, the changed market dynamics have likely weakened the constraints on stevedore pricing, both quayside and landside. This may explain why quayside revenue per lift has stopped its declining trend in the last 3 years, as shown in Figure 4.7. This appears to explain at least some of the recent increases in stevedores' profits.

The stevedores' profits over the past 2 years have returned to the levels that were observed prior to new entry by Hutchison and VICT. This has eroded the benefits that cargo owners and, ultimately, Australian consumers and exporters obtained following new entry.

The ACCC will continue to monitor and analyse stevedores' charges and financial performance over the coming years to evaluate the extent to which the recent increases in profits are temporary or likely to be sustained. If the recent increased profits are due to short term external factors (beyond the influence of market participants), the ACCC would expect that the current profit levels would not be sustained once the factors that are causing constrained shipping and terminal capacity alleviate.

However, if the profit levels remain elevated on a sustained basis, the ACCC will closely scrutinise if any structural or behavioural market impediments are contributing to this and whether any further policy or regulatory responses are warranted.

5. Container ports

Key Points

- Container ports in Australia are regional monopolies with substantial market power. Market-based constraints do not appear to be effective in limiting their ability to exercise market power:
  - there is limited threat of new entry due to high barriers to entry, which in NSW and Victoria were increased even further by the way state governments privatised their respective container ports
  - port users, such as shipping lines and stevedores, have little countervailing power over container ports
  - while long-term leases provide stevedores with reasonable protection, these agreements do not provide a complete safety net against exercises of market power
  - port users do not appear to have access to robust dispute resolution mechanisms.
- The ACCC considers that the current level of regulation at Australian container ports is not effective and the threat of further regulation in most states is not sufficiently credible to constrain container ports from exercising their market power.
- The Port of Melbourne is subject to more rigorous regulation than other privatised Australian container ports. Since its privatisation in 2016, the ESC has found that the Port of Melbourne has exercised its market power with respect to the setting of land rents and demonstrated significant and sustained non-compliance with its regulatory pricing requirements. There has not, however, been any material escalation in the level of regulation.
- The regulatory oversight at other container ports does not appear to be sufficient to enable state regulators to proactively identify the exercise of market power. This is most pronounced at the Port of Brisbane, which does not appear to be subject to any active regulatory oversight.
- The ACCC considers that steps should be taken to bolster the regulation of privatised container ports, to ensure they do not levy excessive rents and charges.
- At a minimum, the privatised container ports should be subject to greater regulatory oversight. The absence of any requirements for active price monitoring at the Port of Brisbane and Port Botany is a concern.
- However, price monitoring alone is not sufficient to constrain the exercise of substantial market power. The ACCC supports the Victorian Essential Services Commission's recommendation to introduce an industry-specific negotiate-mediate-arbitrate model to assist port users to negotiate land rents with the Port of Melbourne.
- The ACCC considers that a similar framework should be implemented at all privatised container ports and extend to all forms of pricing by a port (not just land rents).

In our last report, the ACCC discussed the trend towards privatisation at Australian ports, both at container ports but also key bulk ports such as the Port of Newcastle and Port Kembla. The report noted that privatisation can result in cost efficiencies, which are likely to be passed on to port tenants including stevedores. However, it also found that most container ports were privatised without effective regulation in place. The report identified that port land rents per square metre, paid by stevedores, have been growing rapidly.[98]

98 ACCC, *Container stevedoring monitoring report 2020-21*, pp 28, 43.

For this report, the ACCC has further researched the regulation which applies across the different container ports, considered recent findings by state regulators, consulted with market participants and analysed financial data provided by the stevedores. This chapter builds upon previous reports and covers:

- constraints on container ports' market power
- an overview of current regulation at Australian container ports
- recent findings by state regulators
- whether Australian container ports face a credible threat of further regulation
- observations about port charges and port rents
- the need for greater protection for container port users.

5.1 Market-based constraints not a limit on container ports' market power

As stated in last year's report, the ACCC considers that container ports in Australia are regional monopolies with substantial market power. In the absence of effective constraints, such monopolies have the incentive and ability to extract monopoly rents from port users who are unable to substitute their services. This would translate to higher prices throughout the supply chain and would ultimately result in Australian consumers paying higher prices for imported goods and reduce the competitiveness of our exports.

Theoretically, there are a number of market-based constraints that could limit the ability of container ports to exercise their market power:

- threat of new entry
- countervailing power of port users
- long-term contracts
- effective dispute resolution mechanisms.

In practice, these potential market-based constraints do not appear to be effective in limiting the ability of container ports in Australia to exercise market power.

In the short to medium term, there is limited threat of new entry. Container ports have natural monopoly characteristics, such as limited geographic locations where ocean-going ships can safely berth, or economies of scale where services can be provided more efficiently by a single port than 2 or more ports in competition with each other.

There are also significant barriers to entry, with long lead time and infrastructure investment. In major metropolitan areas like Melbourne and Sydney, there may be sufficient demand for more than one container port in the foreseeable future. However, the Victorian and NSW governments privatised their respective container ports in a manner that impedes or precludes new entry and entrenches those ports' monopoly positions (discussed in Box 5.1).

Box 5.1: Privatisation preventing new entry

The NSW Government privatised Port Botany and Port Kembla in 2013. The consortium, NSW Ports, was granted 99-year leases to operate both ports. Under the sales deal, the NSW Government was obligated to compensate NSW Ports if container shipping volumes at the Port of Newcastle exceeded a specified cap. When the Port of Newcastle was later privatised in 2014, the sales agreement required the Port of Newcastle to reimburse the NSW Government for any compensation paid to Port Botany and Port Kembla for a period of 50 years.

The ACCC instituted proceedings against NSW Ports in the Federal Court in 2018. The ACCC alleged that the compensation provisions in the privatisation agreements with the NSW Government had an anti-competitive purpose. The ACCC alleged that the compensation provisions make the development of a container terminal at the Port of Newcastle uneconomic, substantially lessening competition for Port Botany and Port Kembla who remain the major supplier of port services for container cargo.[99] The Federal Court dismissed the ACCC's proceedings against NSW Ports in 2021, though the matter was appealed and is currently awaiting judgment.

In November 2022, the NSW Parliament passed the *Port of Newcastle (Extinguishment of Liability) Act 2022*. The Act allows for the extinguishment of the Port of Newcastle's contractual obligation to reimburse the NSW Government for any compensation paid to NSW Ports.[100] The obligation is only extinguished once the Port of Newcastle pays compensation to the NSW Government to reflect the difference between the amount paid for the Port of Newcastle and its value had the reimbursement provision never been included.[101] The amount of this compensation will be independently determined.[102] The ACCC supports this change to the extent it will remove a significant barrier to the development of a competing container terminal at the Port of Newcastle.

The Victorian Government privatised the Port of Melbourne in 2016. As part of the privatisation, the state government offered protection to the new private operator against the commencement of any planning for new container ports in Victoria for the first 15 years of the Port of Melbourne's lease. The legislation, which facilitated the privatisation, allowed the agreement between the Port of Melbourne and the Victorian Government to include a provision for compensation.[103] Some stevedores have raised concerns that the Port of Melbourne is using that opportunity to prematurely expand its container capacity by creating a fourth container terminal at Webb Dock North, to entrench its market position and discourage investment in a new container port at Bay West.[104]

The ACCC has previously expressed concerns that state governments have sought to maximise sale proceeds of essential infrastructure by protecting private operators from competition in the future.[105] While this can be of benefit to state budgets in the short-term, the ACCC considers restricting competition ultimately harms Australian consumers into the future.

Port users, such as shipping lines and stevedores, have little countervailing power over container ports. Countervailing power might come from the threat of bypassing a port and taking their business elsewhere. Neither shipping lines nor incumbent stevedores can make that threat credibly. This has been supported by the recent Productivity Commission (PC) draft report into the maritime logistics sector.[106]

As discussed, container ports are regional monopolies, which rarely compete with one another. With few exceptions, if cargo owners want to import goods into Australia, they must use one of the 5 major container ports. Importers typically seek access to one of the major metropolitan hubs where the

99 See *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720.

100 *Port of Newcastle (Extinguishment of Liability) Act 2022* (NSW), s 8.

101 *Port of Newcastle (Extinguishment of Liability) Act 2022* (NSW), s 7.

102 *Port of Newcastle (Extinguishment of Liability) Act 2022* (NSW), s 6.

103 *Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016* (Vic), Div 2, Pt 7.

104 DP World Australia, *Submission to Productivity Commission inquiry into Australia's Maritime Logistics System*, submission 49 to the PC, DP World Australia, 2022, accessed 13 October 2022.

105 Gina Cass-Gottlieb, *Competition in container shipping*, speech at Ports Australia conference, 1 September 2022.

106 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, p 169.

consumers and, in turn, the ports are located. There is limited commercial advantage for shipping lines to bypass a particular port, and then transport cargo via rail or road to another city as the costs would be too high.[107] These alternatives are not commercially viable and so do not give rise to a credible of threat to bypass container ports. As such, there has been little increase in countervailing power of shipping lines despite increasing consolidation in the shipping industry over the recent years.

At the point of first entering into a new lease with port operators, stevedores have some countervailing power and are in a stronger position to reject terms and conditions they do not agree with. However, once operational, stevedores make a significant investment in equipment and have very large sunk costs.

When leases are up for re-negotiation, there is a considerable difference in bargaining power between the ports and stevedores. A stevedore runs the risk of having their assets 'held-up' and failing to renew its lease will result in the loss of future benefits of its investments. While the investment may be sunk, the additional reinvestment cost significantly weakens the commercial ground for a stevedore to 'bypass' a port by moving to another substitutable port. Consequently, a stevedore has little countervailing power once it has established itself at a port and this can result in less favourable terms during lease renewals.

Lease agreements at Port of Melbourne contain ratchet clauses, which prevent rent from ever decreasing, even if the market value of the land being rented decreases. Coupled with fixed annual rent increases, ratchet provisions can create an upward spiral in port rents paid by stevedores, above their market values.[108] Such terms reflect stevedores' lack of power to bargain-down prices in subsequent contract years after it has entered into an agreement with a port.

Stevedores enter into long-term lease agreements with container port operators. These often span 30–50 years and so provide stevedores with reasonable protection against the exercise of market power by ports. However, as noted in the recent PC draft report, these agreements cannot completely guard against exercise of market power.[109] It is unlikely a long-term lease agreement can provide total certainty across the life of the lease.

During consultation, some stevedores spoke to the ACCC about 'shifting goal posts', where the port makes investment decisions which impact the stevedores after they have signed a lease agreement. For example, a stevedore may agree to certain lease terms and conditions, based on an understanding of the port's long-term investment plans. However, a port could subsequently alter its investment plan, without agreement from the stevedore, in a way that could reduce the value of the lease to the stevedore. Lease terms do not typically provide opportunities for stevedores to re-negotiate the terms of their lease based on the new investment plan.

Port users do not appear to have access to robust mechanisms for dispute resolution in place at container ports. The Victorian state regulator, the ESC, recommended a negotiate-mediate-arbitrate model following its finding about the exercise of market power in relation to rents charged by the Port of Melbourne. This finding by the ESC is further discussed in the sections below.

Given the potential market-based constraints do not appear to be effective, this raises the question as to whether a port's exercise of market power is constrained by:

- effective regulation, or
- credible threat of further regulation.

This is discussed in detail in the following sections.

107 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, pp 164–169.

108 ESC, *Port of Melbourne – Market rent inquiry 2020*, p 39.

109 See PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, pp 164–165.

5.2 Overview of current regulation at Australian container ports

Container ports are subject to varying levels of regulation and oversight. Most Australian container ports are operated by private companies. Starting with the sale of the Port of Adelaide in 2001, most other state governments sold their container ports to private operators over the following two decades. State governments privatised container ports to gain revenue and could also take advantage of Federal Government 'asset recycling' incentives,[110] but also with a view to driving efficiencies. The Port of Fremantle is an exception as it operates as a government-owned business.

The state governments of South Australia, Queensland, Victoria and New South Wales all privatised their container ports by way of long-term lease arrangements. Under this model, the state governments retain ultimate ownership of the port land but grant the right to the private operator to provide certain port services and levy fees accordingly. Under the privatised arrangements, state governments typically retain responsibility for certain safety, environmental and regulatory functions, though this can vary across ports.[111]

Container ports are subject to varying levels of regulation and oversight by state governments, as summarised in Table 5.1.

Table 5.1: Regulation and oversight of monitored Australian container ports

	Adelaide	Botany	Brisbane	Fremantle	Melbourne
Year of privatisation	2001	2013	2010	N/a	2016
Lease duration	99 years	99 years	99 years	N/a	50 years
Regulation – port charges	Price monitoring + access regime (negotiate-mediate-arbitrate)[112]	Price notification	Nil	Pricing subject to a government-approved rate of return	Building block methodology with annual increases capped to CPI (until at least 2032) + price monitoring
Regulation – port rents	Nil	Nil	Nil	Ministerial approval required for lease agreements over 5 years	Rent review mechanism + price monitoring
Regulation – state-based access regime	Yes	Nil	Nil	Nil	Nil

Source: *2022 Ports Access Regime and Price Determination Review: Stage one final report*, October 2022, *Ports and Maritime Administration Act 1995* (NSW); *Transport Infrastructure Act 1994* (Qld), *Overview of the Port of Melbourne and the Essential Services Commission's regulatory roles*, 21 March 2017, *Port Authorities Act 1999* (WA).

As shown in the Table 5.1, the Port of Melbourne is subject to the most robust regulatory oversight of all privatised Australian container ports, while the Port of Brisbane does not appear to be subject to any regulatory oversight.

110 See J Gordon, 'Victoria is being dudded by Malcolm Turnbull over sale of Port of Melbourne lease', *The Age*, 20 September 2016, accessed 26 October 2016.

111 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, p 157.

112 The ACCC understands that some charges paid in relation to container shipping are subject to price monitoring, and others are covered by the access regime which has an negotiate-mediate-arbitrate framework. It is also understood that there can be some overlap between the charges. See Essential Services Commission of South Australia (ESCOSA), *2022 Ports Access Regime and Price Determination Review: Stage one final report*, ESCOSA, South Australian Government, 2022, accessed 12 October 2022, pp 12–13.

The following sections describe in further detail the regulation and oversight of port fees and rents at Australian container ports, and recent findings made by state regulators with respect to these.

5.2.1 Regulation of container port charges differs considerably across ports

Container ports charge shipping lines a range of fees to use their facilities and services. These charges vary by port, but typically include port dues, berth hire charges and cargo-based charges such as wharfage (refer to Chapter 1 for further details).

Container port operators in Australia largely have the discretion to set the level of these charges, though this can vary across ports.[113] State governments typically monitor the level of and movements in these charges via some price monitoring regime.

Port Adelaide

Flinders Ports, which owns the Port of Adelaide as well as a number of other ports in South Australia, must publish a schedule of charges on its website. It must provide the schedule to the regulator, the Essential Services Commission of South Australia (ESCOSA), which prepares an annual report summarising and explaining any price movements.[114] Certain services are also subject to an access regime, underpinned by a negotiate-mediate-arbitrate model. ESCOSA reviews its pricing and access regulation every 5 years.

Port Botany

Port Botany must publish a schedule of charges and notify the relevant Minister ahead of any changes to these charges. The Port must also provide the Minister with an annual report, detailing total revenue received and any changes to port charges.[115] Port Botany may be subject to greater oversight from the state regulator, the Independent Pricing and Regulatory Tribunal (IPART), if directed by the Minister responsible for IPART.[116]

Port of Brisbane

The Port of Brisbane is not subject to any price monitoring of port charges but must publish charges on its website.[117] If declared by the relevant Minister, the Port may be subject to further regulation. This declaration follows a recommendation made from the regulator, the Queensland Competition Authority, based on the Port meeting certain criteria.[118] The ACCC notes that these criteria mirror that of Part IIIA of the *Competition and Consumer Act 2010* (CCA). The ACCC has concerns that the threshold for declaring a service under Part IIIA of the CCA is prohibitively high. Accordingly, the Queensland legislation may face the same problem and it may be very difficult to declare the Port of Brisbane and therefore increase the level of regulation. The ACCC's views on Part IIIA of the CCA are further discussed later in this Chapter.

Port of Fremantle

The Port of Fremantle is the only major Australian container port which has not been privatised. The port operates as a government enterprise which returns a dividend to the Western Australian Government. While there is no formal pricing regulation, operations are subject to ministerial oversight and financial targets.[119] The ACCC understands that the Port is bound by a ministerial-approved rate of return, which will influence the level of port charges.

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113 For example, the private operator of Port Botany only fixes wharfage and site occupation charges. See *Ports and Maritime Administration Act 1995* (NSW), Pt 5.

114 See ESCOSA, *Ports price determination: 2022-2027*, ESCOSA, South Australian Government, 2022, accessed 12 October 2022, p 3.

115 *Ports and Maritime Administration Act 1995* (NSW), ss 78–81.

116 *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), s 9, Pt 3.

117 *Transport Infrastructure Act 1994* (Qld), s 279A.

118 *Queensland Competition Authority Act 1997* (Qld), ss 1, 76.

119 See *Port Authorities Act 1999* (WA), ss 32-34A, 84.

Port of Melbourne

The Port of Melbourne is subject to price monitoring as well as further pricing regulation.

Until at least 2032, but no later than 2037, the Port of Melbourne cannot increase its port charges at a rate higher than the consumer price index (CPI) (known as the 'tariff adjustment limit'). The Port of Melbourne must still calculate its revenue requirements according to an accrual building block model, which allows the port to recover the efficient cost of providing services.[120]

The effect of this is that the Port can defer any unrecovered depreciation into the future. If the calculated revenue requirement exceeds the revenue allowable during the period of the tariff adjustment limit, the Port can ultimately recover this through higher port charges once the limit expires.[121]

The Port must also publish a schedule of charges and provide an annual compliance statement to the ESC on price regulation. The ESC, the state regulator, prepares a report every 5 years into the Port of Melbourne's compliance with the pricing regulation in the years elapsed.[122]

5.2.2 Land rents are subject to minimal regulatory oversight

Private container port operators, as the head lessors of the land on which the port operates, charge land rents to stevedores and other port tenants such as logistics and warehousing operators.

The Port of Melbourne is the only privatised container port which is subject to any oversight of land rents. The ESC undertakes 5-yearly reviews into whether the Port of Melbourne has market power in setting rents, and if so whether the Port has exercised its market power.[123] In addition, the port concession deed which effected the sale of the Port of Melbourne, requires the Port to offer certain lease conditions. These include offering an initial rent which does not exceed 'reasonable market rent', an opportunity for a market rent review every 5 years from the commencement of the lease, and the right for a port tenant to seek an independent valuation as part of the rent review.[124]

For the Port of Fremantle, the relevant Minister must approve all lease agreements to port users over 5 years in length.[125] The Port is also subject to broader financial targets set by the Government of Western Australia, which indirectly impacts the levels of rent it is able to charge.

5.2.3 Recent findings by state regulators

Port of Melbourne

The Port of Melbourne is subject to more rigorous regulation than that of any other privatised Australian container port. The Port of Melbourne's regulation is largely '*ex-post*', rather than '*ex-ante*', meaning that compliance is only assessed in retrospect. Since privatisation, the ESC has found that the Port of Melbourne has exercised its market power with respect to land rents and demonstrated significant and sustained non-compliance with its regulatory pricing requirements. These are further discussed below.

Port charges

In January 2022, the ESC publicly released its final report into the Port of Melbourne's compliance with its pricing regulation. This was the first report since privatisation. The ESC found significant and sustained non-compliance by the Port of Melbourne.

120 ESC, *Inquiry into Port of Melbourne compliance with the pricing order 2021*, p 14.

121 ESC, *Inquiry into Port of Melbourne compliance with the pricing order 2021*, p 14.

122 See ESC, *The Port of Melbourne Regulatory Regime: Overview of the Port of Melbourne and the Essential Services Commission's regulatory roles*, ESC, Victorian Government, 2017, accessed 13 September 2022.

123 See ESC, *The Port of Melbourne Regulatory Regime: Overview of the Port of Melbourne and the Essential Services Commission's regulatory roles*. The wording of the provision is neutral, and also contemplates a tenant with market power exercising that power over the Port of Melbourne.

124 Port of Melbourne, *Port Concession Deed extract of Clause 18 & 19 and relevant definitions*, Port of Melbourne website, 4 March 2022, accessed 13 September 2022.

125 *Port Authorities Regulations 2001* (WA), reg 117.

The existing pricing regulation only requires the Port of Melbourne to adopt a 'well accepted' approach for deriving a its weighted average cost of capital (WACC),[126] thereby providing scope for the Port to choose more favourable methodologies. The ESC found the Port of Melbourne's approach was not 'well accepted' and that the Port overstated its revenue requirement by around $300-$650 million, by using a WACC that was on average 2% higher than that of a benchmark efficient entity with a similar degree of risk.[127]

As the Port of Melbourne pointed out at the time, the immediate impact of this non-compliance was not reflected in the Port's charges, which were constrained by the tariff adjustment limit's CPI cap.[128] This does not mean, however, that the overstatement of the Port of Melbourne's revenue requirement would not have adverse future pricing repercussions. The tariff adjustment limit will end by 2037 at the latest. Once the tariff adjustment limit expires, the ESC observes that port users could face a significant price shock as those higher than efficient stated revenue requirements would be realised, and port charges would climb accordingly.[129]

In response to the ESC's findings, the Port of Melbourne provided an undertaking to the Victorian Government. The undertaking mandates the models and methods by which the Port of Melbourne will calculate its WACC and revenue requirements in future. This is legally binding until the next review in 2027 and commits the Port of Melbourne to address the areas in which the ESC found non-compliance.[130]

Land rents

In 2020, the ESC found that the Port of Melbourne had exercised its market power with respect to land rents, causing material detriment to port users. The ESC concluded that land rents were above efficient levels. The ESC recommended further economic regulation, with a 'negotiate-mediate-arbitrate' model.[131]

The Victorian Government has not actioned the ESC's recommendations in relation to enhanced regulation. Instead, the Port of Melbourne introduced a tenancy customer charter to provide tenants with greater clarity around the process of lease negotiations.[132] Under the charter, tenants can access a 'rental pause' mechanism which moderates ratchet provisions if current rent levels exceed independently determined market rents.[133]

The charter only applies to leases entered into following the Port's privatisation, which therefore excludes VICT and DP World, but applies to Patrick. The charter provides the ESC with an additional role in resolving disputes regarding the Port's compliance with the charter's mechanisms, but not in relation to lease negotiations themselves.[134] The ACCC also understands that the terms in the tenancy charter are not yet reflected in Patrick's lease agreement and this is subject to ongoing negotiations.

The ESC's findings on the Port of Melbourne, both in relation to its use of market power and its non-compliance with the pricing regulation, are significant. The ACCC is concerned about the broader impact this can have on the supply chain. The ACCC notes the ESC's concern that the incentives within the regulatory framework are not meeting the statutory objectives, including the efficient use of port services for the long-term interests of users and Victorian consumers.[135]

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126 Weight average cost of capital is a ratio that measures a business' financing costs and reflects a return that an investor could expect to earn through investing in the business. It is weighted based on existing levels of debt and equity within the business.

127 ESC, *Inquiry into Port of Melbourne compliance with the pricing order 2021*, pp 27–30.

128 Port of Melbourne, *Port of Melbourne Response to ESC Reviewing Findings – Public Summary*, Port of Melbourne website, 20 May 2022, accessed 16 October 2022.

129 ESC, *Inquiry into Port of Melbourne compliance with the pricing order 2021*, p 98.

130 Port of Melbourne, *Victorian Government accepts Port of Melbourne Undertaking in response to ESC findings* [media release], Port of Melbourne website, 20 May 2022, accessed 13 September 2022.

131 ESC, *Port of Melbourne – Market rent inquiry 2020*, pp 50, 56–59.

132 Premier of Victoria, *New Tenancy Customer Charter For The Port Of Melbourne* [media release], Premier of Victoria website, 4 November 2021, accessed 13 September 2022.

133 Port of Melbourne, *Tenancy Customer Charter*, Port of Melbourne website, 4 March 2022, accessed 13 September 2022.

134 Port of Melbourne, *Tenancy Customer Charter*.

135 ESC, *Inquiry into Port of Melbourne compliance with the pricing order 2021*, p 16.

Other Ports

We are not aware of other state regulators making similar findings with respect to other container ports. However, the 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. There may be instances where container ports exercise market power, but the level of regulatory oversight is insufficient to identify this.

With respect to the Port of Adelaide, ESCOSA has recently decided to increase its level of regulatory oversight moving forward. In addition to the existing price monitoring of port charges, ESCOSA will now also monitor Flinders Ports' annual revenue, costs and profits.[136]

Flinders Ports operates several ports across South Australia, including the Port of Adelaide. There is some vertical integration at Port of Adelaide, with Flinders Ports operating the port, as well as owning Flinders Adelaide Container Terminal (FACT) which is the Port of Adelaide's only container stevedore. Stakeholders have raised concerns about the level of vertical integration and the ability of Flinders Ports to use its monopoly position to favour its operations in related markets.[137] In response to these concerns, ESCOSA will increase its monitoring of Flinders Ports' financial performance to increase transparency and help with any assessment of potential uses of market power. The ACCC does not have a view on whether the proposed changes address stakeholder concerns on vertical integration, though is supportive of increased oversight of ports generally.

The ACCC does not consider the current level of regulation at Australian container ports to be effective. The experience at the Port of Melbourne in particular highlights the need for greater regulatory oversight at a minimum. The following section will examine whether the threat of further regulation, rather than the regulation currently in place, acts as a constraint.

5.3 Container ports do not face a credible threat of further regulation

State governments can increase the level of regulation of container ports if they identify the need. As such, container ports always face a 'threat of regulation' should they exercise their market power. However, it doesn't appear that the threat of further regulation in most states is sufficiently credible to constrain container ports from exercising their market power.

In the case of the Port of Melbourne, the regulation is more rigorous than that of any other Australian container port. Despite the ESC uncovering exercises of market power and sustained non-compliance with its pricing regulation, there was no material escalation in the level of regulation.

With respect to the other container ports, the threat of further regulation is even less apparent. The regulatory oversight of the other container ports does not appear to be sufficient to enable state regulators to proactively identify the exercise of market power. This is most pronounced at the Port of Brisbane, which does not appear to be subject to any active regulatory oversight.

The New South Wales government's ongoing review into the *Ports and Maritime Administration Act 1995* focuses principally on the objectives of the Act but excludes any broader assessment of whether regulation of privatised container ports is adequate. The review has yet to be finalised, though the draft options paper does not make any substantive recommendations on port regulation.[138]

With respect to the Port of Adelaide, the ACCC notes that ESCOSA gives regard to market power in its 5-yearly reviews and has recently decided to increase the level of regulatory oversight somewhat. While ESCOSA has in the past done some benchmarking on port charges across Australia, it does not do any detailed or regular financial analysis of efficient prices.[139]

136 ESCOSA, *2022 Ports Access Regime and Price Determination Review: Stage one final report*, pp 41–45.

137 ESCOSA, *2022 Ports Access Regime and Price Determination Review: Stage one final report*, p 28.

138 Transport for NSW (TfNSW), *Ports and Maritime Administration Act 1995 & Port Botany Landside Improvement Strategy: Options Paper*, TfNSW, NSW Government, 2022, accessed 12 October 2022.

139 See ESCOSA, *2017 Ports Access and Pricing Review – Final*, ESCOSA, South Australian Government, 2017, accessed 14 October 2022.

There is potential for exercises of market power to exist undetected if a regulatory regime is not designed to proactively identify them. If state regulators are not actively assessing whether ports are exercising market power, state governments cannot determine whether current regulation is adequate, and so the threat of further regulation lacks credibility.

5.4 Observations about ports charges and land rents

Prices that are higher than the efficient costs of providing a service, either for land rents or port charges, are one way in which ports may exercise market power. Higher than efficient port charges and rents would be detrimental to the Australian economy. Higher prices flow through the supply chain, ultimately resulting in Australian consumers paying higher prices for imported goods and reducing the competitiveness of our exports. Monopoly pricing also discourages the efficient use of, and investment in, port infrastructure.

This section looks at recent trends in stevedore property costs, and how those costs compare across ports. It also considers the level of port charges, and the absence of complaints by port users about these charges. This section draws from information the ACCC has obtained from stevedores, as well as broader consultation and research. It does not make any conclusions about the efficient levels of existing stevedore property costs or port charges.

5.4.1 Stevedore property costs are trending up at major container ports

The ACCC does not monitor the performance or pricing of container ports, as this is the responsibility of state governments. However, as part of the financial monitoring of stevedores, we obtain data from stevedores on their property costs.

Our last report showed that real land rents per square metre had grown between 2017–18 and 2020–21. The report found that the Port of Melbourne has by far the highest aggregate land rents per square metre of the 5 container ports.[140]

The ACCC does not have data on land rents paid by stevedores prior to 2017–18, as the specific data category was not collected prior to that date. We do have data on total property costs over a longer period. Property costs are principally made up of the land rents paid to port operators, but also include some other fees, charges and maintenance relating to property.

Figure 5.1 below shows how total stevedore property costs per lift have changed at each Australian container port between 2001–02 to 2021–22. The data has been presented per lift, to normalise the property costs in recognition that stevedores will perform significantly more lifts at the bigger, busier ports. Accordingly, the ACCC would expect rents, and therefore property costs, to be higher at those ports.

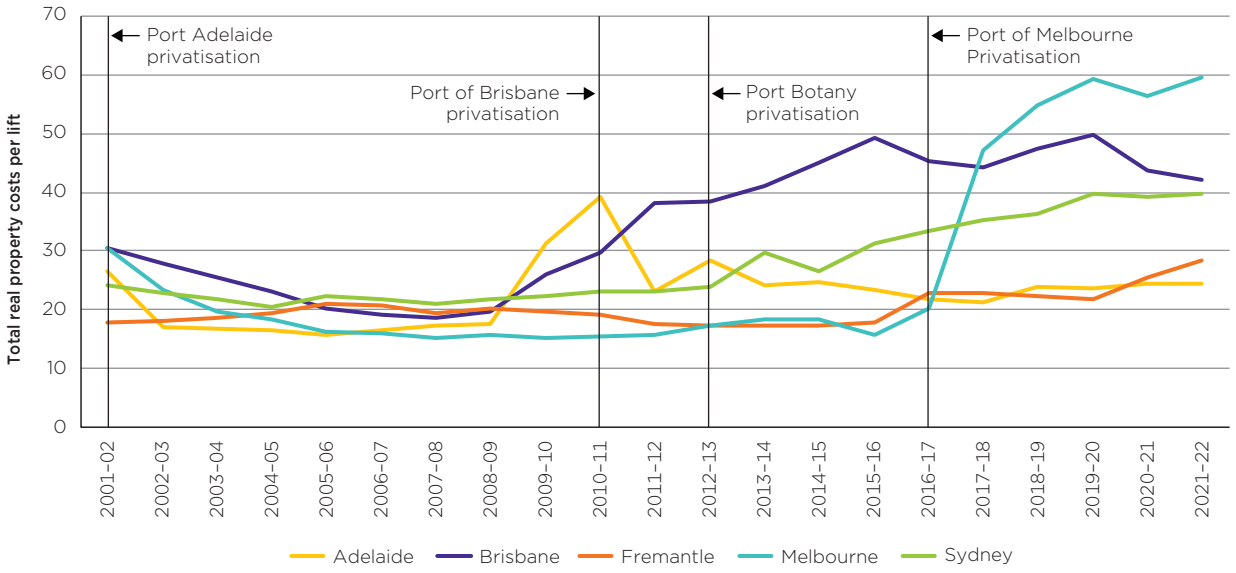
There are several key qualifications with respect to this data. Stevedores typically enter into long-term leasing agreements with ports (generally between 30 and 50 years), and several of the lease agreements were entered into prior to privatisation. VICT and Hutchison executed their lease agreements several years before they started operations.[141] This means there is a lag between when the lease was signed and when their property costs are captured by the ACCC's monitoring. It should also be noted that averages across ports can obscure considerable variation at individual terminals, given that property costs per lift for different stevedores may be different due to factors such as land size, location, access to roads or rail, and utilisation of capacity.

140 ACCC, *Container stevedoring monitoring report 2020–21*, p 43.

141 Hutchison Ports, *HPH to Invest in New Container Terminal at Port Botany* [media release], Hutchison Ports, 18 December 2009, accessed 21 October 2022; Hutchison Ports, *HPH to Invest $200 million in Port of Brisbane* [media release], Hutchison Ports, 18 December 2009, accessed 21 October 2022; R Pablo, 'ICTSI partner win $508M deal to operate Melbourne port', *Port Calls*, 2 May 2014, accessed 21 October 2021.

While it is useful to gain insight into how property prices have changed over time, it is not sufficient to draw conclusions about whether ports are exercising their market power and charging higher than efficient rents. The central issue is whether the rent charged by a port currently reflects its efficient cost. Small increases in charges over time can still be a cause for concern if the base cost is already higher than efficient levels.

Figure 5.1: Stevedores' total property costs per lift in real terms, by container port, 2001–02 to 2021–22[142]



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

Given the limitations of the data, the ACCC cannot draw any firm conclusions about the timing of privatisation and growth in property costs. However, Figure 5.1 shows that shortly after privatisation, property costs per lift increased significantly in real terms at the Port of Melbourne, Port Botany and Port of Brisbane. As at 2021–22, total property costs per lift were much higher in the container ports in Melbourne, Brisbane and Port Botany than in the container ports in Adelaide and Fremantle.

Figure 5.1 shows there was a period following the privatisation of the Port of Brisbane in 2010, where total property costs per lift at the port were materially higher than all other ports. Average property cost per lift for the two incumbents, DP World and Patrick, increased from $30 in 2010–11 (the year of the privatisation) to $38 in 2011–12. With Hutchison commencing operation in Brisbane in 2013–14, average cost per lift of the 3 stevedores continued to rise significantly and peaked at $49 in 2015–16. Since then, average property cost per lift fluctuated and was $42 in 2021–22. As noted above, the Port of Brisbane is the least regulated of the privatised container ports.

Analogously, following privatisation in 2013 and subsequent entry of Hutchison, average property cost per lift in Port Botany has increased from $24 in 2012–13 to nearly $40 in 2021–22.

Most notably, with privatisation of the Port of Melbourne in 2016 and subsequent entry of VICT, average property cost per lift more than doubled to $47 in 2017–18, largely attributable to significantly higher rents paid by the entrant compared to the incumbent stevedores.[143] It continued to rise materially, reaching $59 in 2019–20.

Prior to privatisation, average property costs per lift in each of the 3 container ports had been relatively stable and comparable to the level at the Port Adelaide and the Port of Fremantle. The ACCC notes that since 2012, the private operator of Port Adelaide, Flinders Port Holdings, has also been the sole owner of the stevedore operating at Port of Adelaide, Flinders Adelaide Container Terminal. The Port of Fremantle remains under government ownership.

142 The figures are presented in real terms with values in 2021–22. Deflator series derived from the ABS CPI (cat. no. 6401.0, tables 1 and 2, Index Numbers; All Groups CPI; Australia). Base year for the ACCC deflator series is 2021–22.

143 A Dømmestrup, *VICT Response to Port of Melbourne – Market Rent Inquiry*, submission to ESC, Victorian International Container Terminal (VICT), 25 October 2019, accessed 14 November 2022.

It appears that profit-maximising vertically separated private container ports may have strong incentives to recoup their initial and ongoing investments from port users. This may be exacerbated by privatisation of some ports where the state governments sought to maximise sale proceeds of essential infrastructure by protecting private operators from competition in the future, as noted in Box 5.1. Bidders may have priced their bids based on the perceived protections from competition and then may have sought to recover their investment through monopoly pricing.

Conversely, under government ownership, container port operators may not have faced the incentives to charge rent at efficient levels and thus rents prior to privatisation could instead be too low under those circumstances. In such circumstances, we would expect rents may increase to an efficient level after privatisation. However, in the case of the Port of Melbourne, there were attempts to increase stevedore rents by many multiples of their previous levels in the lead up to privatisation to maximise the port's revenues and therefore value of the asset.[144]

As discussed in section 5.2, the ESC found that since privatisation the Port of Melbourne had exercised its market power in land rents for port users. The ESC found that rent rises since privatisation were significant for some port tenants, in certain cases more than double, and likely exceeded tenant expectations. The ESC also found that the Port of Melbourne's starting point for rent negotiations were substantially higher compared to independent third-party valuations, and any valuations commissioned by tenants.[145]

While the ESC concluded that port rents at the Port of Melbourne were in general above their efficient level, it did not make any specific findings in relation to stevedore rents. The ESC noted the annual escalation applied by the Port of Melbourne combined with ratchet clauses could contribute to an upward spiral of rents to be sustained above efficient levels.[146] The ratchet clauses were part of a standard form lease entered by tenants both prior to, and after, privatisation. The ESC also described a 'concerning' trend that the 'premium' rents paid by stevedores were used as a benchmark when setting rents for other port tenants.[147]

5.4.2 Comparable data on container port charges is limited

The ACCC consulted with shipping lines in preparation of this report and sought their views on how Australian container port charges compare internationally. One shipping line indicated that the Australian container port charges are relatively high compared to overseas. The shipping line noted that the costs it incurs through container port charges comprise a higher proportion of its total port related costs in Australia compared to overseas.

5.4.3 Lack of complaints from container port users does not necessarily indicate efficient prices

Complaints from port users could also point to potential exercises of market power. The PC observed in its recent draft report into the maritime sector that it received relatively few complaints about container ports. The complaints it did receive principally related to the Port of Melbourne.[148]

There may be various reasons why port users are not actively complaining about container port charges or land rents at other container ports:

- By virtue of being a monopoly, there are no competitor container ports operating in the same market. It is therefore harder for port users to compare charges and assess what a fair price might be. This is relevant for both port charges and land rents.

144 For instance, the Victorian Government attempted to dramatically increase stevedore rents (by up to 8 times previous rates) in the period immediately before the Port of Melbourne's privatisation, see J Wiggins and M Smith, 'DP World wins rent battle with Port of Melbourne', *Financial Review*, 3 August 2015, accessed 4 October 2022.

145 ESC, *Port of Melbourne – Market rent inquiry 2020*, p viii.

146 ESC, *Port of Melbourne – Market rent inquiry 2020*, pp 39–40.

147 ESC, *Port of Melbourne – Market rent inquiry 2020*, pp 42–43.

148 PC, *Lifting productivity at Australia's container ports: between water, wharf and warehouse: Draft report*, p 172.

- The presence of asymmetric information, such as lease agreements being commercially confidential, prevents port users benchmarking charges and land rents. Port landlords may use the information selectively and to their advantages.
- Individual shipping lines may face limited incentives to actively advocate for lower container port charges, since:
  - it is unlikely that container port charges have a material impact on the competition between shipping lines, as all shipping lines pay the same charges
  - international shipping lines operate through many different ports across the world, therefore charges from Australian ports may not be significant as a proportion of their total port charges and sea transportation costs
  - shipping lines may also be able to pass on these charges to cargo owners
  - their competitors will also benefit from any price reductions, resulting in a 'free-rider' problem.
- The absence of a regulatory regime which provides a mechanism to make and handle complaints.
- Port users may choose not to make a complaint when weighed against, for instance, the potential for retaliation by the monopoly port.
- In the absence of a credible threat of further regulation of container ports, ports users may not consider it worthwhile to make a complaint, anticipating that state governments or regulators will not act.

5.5 Greater protection for container port users is needed

Overall, it does not appear there are effective constraints to protect container port users from the exercise of market power by privatised container ports. The ACCC does not consider the current level of regulation at privatised container ports to be sufficient, nor the potential threat of further regulation to be credible. While we do not have the data to assess whether land rents and port charges at privatised ports are above efficient levels, there is a possibility for exercises of market power to exist undetected if they are not being actively monitored.

The ACCC considers 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' market 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.

At a minimum, the ACCC considers that privatised container ports should be subject to greater regulatory oversight. The absence of any requirements for active price monitoring at the Port of Brisbane and Port Botany is a concern. However, price monitoring alone is unlikely to be sufficient to constrain exercise of substantial market power.

The Victorian regulator, the ESC, recommended further regulation following its review into land rents at the Port of Melbourne. It recommended a negotiate-mediate-arbitrate model, implemented through amendments to the relevant state legislation applicable to the Port of Melbourne. The ESC's view is that a negotiate-mediate-arbitrate model would reduce the Port of Melbourne's ability to exploit its market power by mandating the freer flow of information, enabling access to arbitration on price and non-price terms and broadly defining the expectations and responsibilities of all parties.[149]

The ACCC supports the ESC's recommendation. The ACCC considers that such a framework, implemented effectively, could serve as a model for regulation at other privatised container ports. This model could extend beyond just land rents and be a complement to any existing price monitoring at other ports.

149 ESC, *Port of Melbourne – Market rent inquiry 2020*, pp 56–59.

Under a negotiate-arbitrate model, a port operator and port user are free to commercially negotiate the terms and conditions around the use of the port. If they fail to reach agreement, a nominated third party can be called upon to arbitrate the dispute. The main benefit of a negotiate-arbitrate model is that it maintains the primacy of commercial negotiations. The threat of arbitration increases the bargaining power of port users and incentivises the port operator to offer fair terms and conditions. Ultimately a well-designed negotiate-arbitrate model sees that arbitration rarely occurs.

We note that similar models already exist at the Port of Adelaide for many types of non-container shipping.[150] The Port of Darwin is another example where this model is in place.[151]

Part IIIA of the CCA provides a negotiate-arbitrate framework in certain, very limited circumstances.[152] However, the process for having a service declared under Part IIIA can be very costly, take a significant amount of time, and be uncertain. Recent history after amendments were made to the legislation suggest that it would be very difficult to get a service provided by a vertically separated entity declared under Part IIIA. Except at the Port of Adelaide, there is no vertical integration at Australian container ports.

The ACCC considers that steps should be taken to bolster the regulation of privatised container ports, to ensure they do not levy excessive rents and charges.

150 The South Australian Ports Access Regime is certified by the National Competition Council, with the certification just recently extended until 2031. The access regime applies to 'regulated services', whereas the 'essential maritime services' are subject to price monitoring. The ACCC understands there could be some overlap in the two services, and only some port charges relevant to container shipping would be regulated under the access regime.

151 *Ports Management Regulations 2015* (NT), Pt 3.

152 Where ports users are unsatisfied with the terms and conditions at the port, there is the declaration process under Part IIIA of the CCA. Ports users seeking access, or increased access, can apply to the National Competition Council for the port to be declared. For example, a port user may seek increased access to the port if they consider the charges too high. If the port is declared, this effectively establishes a negotiate-arbitrate framework between the port and port user.

6. Detention fees

Key Points

- The detention fees many cargo owners have paid to shipping lines have increased considerably in 2021–22. Often, higher detention fees have been caused by delays experienced by cargo owners and transport operators in returning containers due to a range of COVID-related congestion and logistics issues across the supply chain.
- Cargo owners and transport operators have informed the ACCC that, on many occasions, those delays occurred due to some action or inaction on the part of the shipping line. Most commonly this is where a shipping line has failed to make appropriate arrangements for the de-hire of an empty container or has delayed the loading of export cargo due to its own scheduling issues.
- The ACCC considers that in the circumstances where no level of detention fees can incentivise the cargo owner to return the container on the due date, the levying of the detention fees is unreasonable.
- Cargo owners informed the ACCC that while sometimes shipping lines agreed to waive fees that were incurred unreasonably, in some cases this has not happened. Current shipping line practices make it hard for cargo owners to challenge unreasonably incurred detention fees and cargo owners have few available legal avenues.
- The incidence of unreasonably charged detention fees is likely to reduce going forward as congestion in the supply chain eases.
- Nonetheless, cargo owners in Australia currently do not have adequate protection against unreasonable detention fee practices and this has resulted in harm to cargo owners and, ultimately, Australian consumers.
- The ACCC considers that consideration should be given on how to address this, including whether to repeal the exemption for shipping contracts from the ACL's unfair contract terms regime or create a distinct prohibition on such unfair or unreasonable commercial conduct (either specific to the shipping industry or more broadly).

Shipping lines charge 'detention fees' to cargo owners[153] for the continued use of a container beyond a certain agreed period, to incentivise their prompt return for reuse.

During our consultation in preparing this report, market participants informed the ACCC that detention fee invoices to cargo owners had increased significantly since the start of the COVID-19 pandemic, and particularly in 2021–22. A number of industry participants complained that shipping lines had charged detention fees in circumstances where cargo owners were ready to return a container to a shipping line but were unable to do so for reasons outside their control.

This chapter will cover:

- the impact of the COVID-19 pandemic on detention fees
- when detention fees are levied unreasonably
- external avenues available to cargo owners when detention fees are levied unreasonably
- addressing the levying of unreasonable detention fees.

153 Charges are levied on the party that has contractually engaged the shipping line, which might be a freight forwarder or a cargo owner directly. This chapter will refer only to 'cargo owners' as they typically bear the ultimate burden of detention fees which would be passed on by freight forwarders. References to 'cargo owners' are, in the appropriate context, references to the party contracting with the shipping line.

6.1 The impact of the COVID-19 pandemic on detention fees

6.1.1 How detention fees are levied

Shipping lines typically own the containers that they are engaged by cargo owners to transport. Container hire is an included part of the freight rates offered to cargo owners and includes the time that a container spends in transit, as well as a certain agreed period of time before and after to allow loading and unloading of the container. This is known as a container's 'free time' period.

To incentivise the prompt return of containers, shipping lines charge detention fees (sometimes characterised as 'ongoing container hire fees') for those additional days beyond the agreed 'free time' period for which a cargo owner keeps possession of a container. By default, exporters have between 12 and 20 days from the picking up of an empty container to load the container and return it to a terminal for transfer onto a ship. Importers have, by default, between 7 and 10 days after a container is discharged from a ship to return their emptied container to a 'de-hire' location specified by the shipping line.

Larger cargo owners with longer contracts with shipping lines can use their stronger bargaining power to negotiate longer free time periods as may fit their circumstances.

Outside Australia, shipping lines often distinguish between 'demurrage' charges, which are charges for containers being left in terminals for too long, and 'detention' charges which are charges for containers kept for too long by a cargo owner outside of the terminal. In Australia, however, shipping lines typically charge a 'combined' demurrage and detention fee that provides only one free time period to account for a container's time both inside and outside the terminal. Australian stevedores charge separate storage fees, ultimately payable by a cargo owner, for containers left for too long in their terminals. [154]

Shipping lines take different approaches to the calculation of free time, for example:

- The dates used for the start and end of the container hire period can differ.
  - For imports, most shipping lines use the date of vessel unloading as the start date for free time calculations, while others take different approaches such as 'the first day of availability at the terminal',[155] which can provide material benefits to cargo owners at times of high congestion.
  - For exports, shipping lines end container detention calculations either on the date a container is returned full to the terminal[156] (in which case the free time period is slightly shorter, accounting for the free storage period stevedores provide) or on the date that the container is actually loaded onto a vessel (which is longer to account for the time a container spends waiting in the terminal).[157] Only some shipping lines, however, specify that rolled cargo and vessel delays occurring after pick-up will trigger adjustments to the free time period.[158]
- Some shipping lines count public holidays as part of their free time period, while others exclude them. This can cause issues at times such as Christmas and Easter when container free time can include multiple public holidays.

154 Terminals' storage fees are significantly higher than shipping line detention fees. Cargo owners typically have a 3-day 'free' period to collect imports. Exports can typically be delivered to a terminal in a 5-day window prior to a vessel's scheduled arrival.

155 OOCL, *Demurrage & Detention Free Time and Charges*, OOCL website, n.d., accessed 1 November 2022.

156 For example, OOCL, *Demurrage & Detention Free Time and Charges*: 'Detention is calculated from the day of empty pickup at the depot to the day received at the terminal.'

157 For example, ANL, *Demurrage Detention – General Terms*, ANL website, n.d., accessed 11 November 2022: 'For export cargo, the merged D&D time is the duration elapsed as from "pick up" of the empty equipment till full container "loaded" on board vessel'.

158 For example, Maersk, *Shipping to and from Australia: Export*, Maersk website, n.d., accessed 11 November 2022: 'The Export Detention and Demurrage period in Australia is calculated from container pick-up empty date to vessel load date. Carrier rollings and vessel delays occurring after container pick up will be adjusted accordingly.'

Shipping lines charge detention fees on a per TEU per day basis, with rates escalating after certain time thresholds are reached. Default rates for imports currently begin at between $80 and $90 per TEU per day, but by the third week of container hire they climb as high as $175 per TEU per day.[159]

Detention fees are intended by shipping lines to incentivise the prompt and efficient return of their containers by cargo owners to allow their recirculation in the container supply chain. The more quickly containers can be recirculated, the fewer containers a shipping line will need to purchase for its 'fleet' to move a given volume of cargo in a given time period.

In the absence of a price for the ongoing use of a container, cargo owners would not have an incentive to return containers outside of avoiding their own cost of storing that container. Cargo owners could even benefit from the ongoing use of containers serving as additional storage space, especially if their own warehousing space was constrained. By way of example, dairy farmers' previous issues with lost milk crates demonstrates the problems with not creating incentives for containers to be returned after use.[160]

Freight forwarders and cargo owners that the ACCC spoke to acknowledged that detention fees do in principle serve a useful purpose in incentivising the prompt return of containers to allow their reuse and recirculation.[161]

A number of industry participants told us that prior to COVID, shipping lines took a significantly more flexible approach to detention fees, especially in the context of significant ongoing commercial relationships. One industry participant commented that detention fees were, in their experience, seldom charged or enforced even when containers were kept for short periods in excess of their agreed free period.

Disputes between shipping lines and cargo owners over detention fee bills, especially when they were incurred for reasons beyond a cargo owner's control, are not a new occurrence.[162] However, the ACCC understands that detention fees were much more infrequently charged prior to the onset of the COVID-19 pandemic, and industry participants had not previously raised detention fees with us as being a systemic problem in Australia.

6.1.2 Detention fees post-COVID

Industry participants have told the ACCC that the amounts they have paid in detention fees have climbed considerably following the onset of the COVID-19 pandemic, particularly in the 2021–22 financial year (see Box 6.1).

159 For example, ANL, *D&D Tariffs Australia*, ANL website, 15 September 2022, accessed 1 November 2022; OOCL, *Demurrage & Detention Free Time and Charges*.

160 Katelyn John, 'One million milk crates lost every year', *Brisbane Times*, 23 March 2007, accessed 11 November 2022.

161 Container Transport Alliance Australia (CTAA), *Rising Container Detention an Insidious Consequence of Shipping Capacity Squeeze* [PDF 221KB] [media release], 18 August 2021, accessed 15 November 2022:
CTAA doesn't dispute that shipping lines have the right to impose container detention fees if shippers hold onto container equipment for too long. Empty containers are the shipping lines' assets, and of course shipping lines have the right to maximise the use of their containers to generate ocean freight revenues and to minimise their capacity stock levels commensurate with shipping demand.

162 See, for example, training slides published by the Freight & Trade Alliance (FTA) providing guidance on the issue of unreasonable detention fees in January 2020: Hunt & Hunt Lawyers, *Container detention when it is impossible to return empties* [PDF 860KB], FTA website, January 2020, accessed 9 November 2022.

Box 6.1: Increases in detention fees in 2021–22

The ACCC does not collect data on charges levied by shipping lines as part of its monitoring regime. However, in the course of preparing this report, the ACCC asked industry participants, including cargo owners and freight forwarders, to provide details on how the detention fees they have paid have changed over the last 4 years, and how those changes compared to changes in their cargo volumes.

Some industry participants who responded to the surveys provided data to the ACCC showing that amounts they paid in detention fees to shipping lines in 2021–22 were many multiples – up to 10 times – the amounts they paid in 2018–19 and 2019–20. For example, one respondent reported that the number of shipments incurring detention fees had almost doubled between 2018–19 and 2021–22, and that their total detention fees paid climbed from approximately $150,000 to almost $1 million over the same period.

In the US, which tracks, and to some extent regulates, detention fees (as explained below), the Federal Maritime Commission (FMC) reported that shipping lines had billed US$5.3 billion in detention fees, collecting US$4 billion and waiving US$646.7 million during the 2021 calendar year.[163] By Q3 of 2021, billed and collected detention fees had increased by more than 6 times compared with a Q2 2020 baseline.[164]

Cargo owners have reported incurring detention fees with greater frequency, and for longer periods. Some cargo owners have commented that they have shorter free time periods than they had in the past. While the *default* container free time periods and detention fee rates that shipping lines disclose on their websites have not significantly changed in recent years, reports from industry participants may indicate that shipping lines are less willing to negotiate additional free time than was previously the case.

Cargo owners and transport operators have stated that a range of COVID related congestion and logistics issues across the supply chain have significantly contributed to cargo owners incurring detention fees:

- Due to congestion at some stevedores' yards, transport operators have not always been able to collect some containers from a stevedore on the day those containers were unloaded from a vessel. This meant that cargo owners effectively had less time to return containers to avoid detention fees in circumstances where a container's free time period commenced on the day the container was unloaded.
- Shortages of truck drivers have resulted in land transport operators requiring longer lead times to book for and pick up containers from stevedores and then deliver them to cargo owners. Transport operators often have to deal with containers, whether full or empty, in two steps via their own depots as a distribution point.
- Cargo owners' ability to unload containers efficiently once delivered has been constrained by:
  - staff shortages
  - more containers than usual arriving at once, due to 'lumpier' delivery schedules caused by blanked sailings and vessel bunching, or waves of back-orders placed earlier in the pandemic arriving
  - lack of available warehouse space into which the containers can be loaded.
- Lack of available space at empty container parks for the de-hire of containers, meaning that there is either no place available for a container to be de-hired, or the de-hire location is changed such that alternative plans need to be made by transport operators, requiring additional time.[165] Transport operators informed the ACCC that sometimes these redirection notices have come when a truck is already dispatched to an empty container park, or they have been turned away at empty container park gates despite having made a booking. This factor is within the control of shipping lines.

163 Federal Maritime Commission (FMC), *VOCC Audit Update: Briefing to the Commission, May 2022* [PDF 325KB], FMC website, May 2022, accessed 1 November 2022.

164 FMC, *VOCC Audit Update: Briefing to the Commission, January 2022* [PDF 380KB], FMC website, January 2022, accessed 1 November 2022.

165 The role played by ECPs in the container freight supply chain is discussed in detail in Chapter 1.

- Similarly, some cargo exporters informed the ACCC that they have been charged detention fees for full containers that were ready to be returned for shipping but were unable to be loaded because of vessel delays or cargo being 'rolled' from a cancelled service to another one.[166] This factor is within the control of shipping lines.

The delays caused by these factors have been exacerbated by existing restrictions and inflexibilities of the container supply chain. Cargo owners identified delays relating to customs and biosecurity clearances as being a frequent cause of problems.

Transport operators also cited restrictive opening hours at many empty container parks as a problem. Many empty container parks are closed on weekends (or operate on much reduced weekend hours), and close early on weekdays. Transport operators highlighted the mismatch between longer container terminal operating hours and shorter empty container park hours as creating inefficiencies, preventing them from combining trips to de-hire empty containers with collections of full containers from nearby terminals, generating unnecessary additional journeys.

6.2 When detention fees are levied unreasonably

As previously outlined, detention fees can serve a valuable incentive function, to encourage the prompt return of containers to a shipping line to allow their recirculation. This is the case when detention fees are charged for delays occurring for reasons within the control of a cargo owner such as the speed with which containers are unpacked. It is also the case where delay is caused by a party contracted by the cargo owner, such as a transport operator, as the cargo owner can then pass on those detention fees to the party at fault.

However, detention fees do not serve their intended incentivising purpose in circumstances where a delay occurs for reasons outside of the control of the cargo owner (or the party contracted by the cargo owner). This is most clearly the case when detention fees are incurred because of some action or inaction on the part of the shipping line that is levying the fee. Most commonly this is where a shipping line has failed to make appropriate arrangements for the de-hire of an empty container or has delayed the loading of export cargo due to its own scheduling issues.

The ACCC considers that in the circumstances where no amount of detention fees can incentivise the cargo owner to return a container on its due date, the levying of a detention fees is unreasonable. This is also a view that has been reached by the US FMC, as set out in Box 6.2.

166 Regardless of whether a shipping line's export detention calculation ends with the date of vessel loading or the date of return of a container to the terminal, exporters are disincentivised from returning a container to a terminal more than outside of the receival window, which commences approximately 5 days prior of a vessel's loading as otherwise they will incur storage fees from the relevant stevedore, which are priced even higher than container detention fees.

Box 6.2: FMC's approach to detention fees in United States

The issue of unreasonable charging of detention fees has been most thoroughly addressed in the United States. The US Shipping Act of 1984 created a general rule that, in effect, requires shipping lines and container terminal operators to act reasonably in their dealings with transported cargo.[167]

In 2020, the FMC formally clarified that rule's effect on detention fees by issuing an interpretive rule on the matter.[168] The interpretive rule's central guidance is that detention fees are only reasonably incurred when they can have a useful incentivising purpose. The FMC concluded that cargo owners should not be penalised through detention fees in circumstances where they cannot retrieve containers from container terminals, or return containers to a de-hire location, because in those circumstances the charges cannot serve their incentive function.[169]

The FMC has taken steps to enforce this rule, and in June 2022 agreed a US$2 million penalty with Hapag-Lloyd after Hapag-Lloyd charged US$10,135 in detention fees, which it failed to waive, for 11 containers unable to be returned to a terminal due to a lack of available appointments.[170]

Some industry participants in Australia have called for the adoption of the US regulatory approach with respect to detention fees.

Shipping lines acknowledge that there are circumstances where a strict application of their detention fee rules is unreasonable and have provided some redress mechanisms to cargo owners.

Shipping lines informed the ACCC that they provide processes by which cargo owners can appeal detention fees that cargo owners consider were unreasonably incurred, with each case considered on its merits. In times of particularly high empty container park congestion, some shipping lines proactively 'stopped the clock' on free time and detention calculations.[171]

Shipping lines contend, though, that empty container park congestion was not the most significant driver of higher detention fee revenue. One major shipping line the ACCC consulted stated that it believed a major factor was cargo owners using containers as additional temporary storage space. It highlighted the need for shipping lines to be able to distinguish, with evidence, between those cases and cases where detention fees might have been unreasonably incurred.

In contrast, several transport operators told the ACCC that their own depots were sometimes being effectively used as container storage by shipping lines. This was because containers unable to be returned to an empty container park for lack of space were instead, by default, being stored by transport owners in their own yards until suitable de-hire arrangements could be made. This meant transport operators were effectively providing a service to shipping lines for which cargo owners were being charged.

Cargo owners have complained that that shipping lines typically required detention fee invoices to be paid regardless of whether those fees were the subject of a dispute.

Cargo owners have also said that the ad hoc detention fee appeals processes provided by shipping lines are not practicable due to the administrative burden they impose, given that shipping lines required separate proof from cargo owners each time a detention fee was appealed. Industry participants noted that this requirement seemed unnecessary in at least some cases, such as when the shipping lines

167 46 USC § 41102c (2006):
A common carrier, marine terminal operator, or ocean transport intermediary may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling storing, or delivering property.

168 Although the final rule was released in 2020, the process for devising it began in 2014 following industry complaints about detention and demurrage fee practices made during an FMC investigation into congestion: FMC, 'Interpretive Rule on Demurrage and Detention under the Shipping Act', Federal Register, 18 May 2020, 85(96):29638–29666, p.29639, accessed 1 November 2022.

169 FMC, 'Interpretive Rule on Demurrage and Detention under the Shipping Act'.

170 FMC, *FMC Approves $2 Million Settlement Agreement with Hapag-Lloyd* [media release], FMC website, 8 June 2022, accessed 3 November 2022.

171 Australian Consumer Law (ACL) s 28(1).

charging detention fees also owned the empty container parks to which the containers in question could not be returned.

Some cargo owners also claimed that detention fees were not always waived by shipping lines even when proof of them having been unreasonably incurred was supplied.

6.3 External avenues available to cargo owners when detention fees are charged unreasonably

6.3.1 Legal responses

Australian law does not have a counterpart to the US Shipping Act provision outlined above.

The Australian Consumer Law (ACL) contains provisions that seek to address undesirable business practices such as those regarding unfair contract terms and unconscionable conduct.

As was highlighted by the Productivity Commission in its recent draft report, contracts for the carriage of goods by ship are currently exempt from the ACL's unfair contract terms provisions.[172] Even absent that exemption, for the provisions to apply, the relevant contract must be a standard form small business contract within the definition of the ACL.[173] Further, a court would need to determine (among other things) that the detention fee term being enforced was 'not reasonably necessary' to protect the shipping line's 'legitimate interests'.[174] Currently, the remedy available under the ACL for unfair contract terms is to have the term declared void, and so unenforceable.[175] A court cannot seek to improve a term by altering its text, and a term might still be applied in what is in our view an unreasonable manner even if it is not an unfair contract term.

The ACL's unconscionable conduct provisions impose a relatively high bar to meet. Conduct is not "unconscionable" merely because it is unfair. It requires conduct which is "*so far outside societal norms of acceptable commercial behaviour to warrant condemnation as conduct that is offensive to conscience*".

6.3.2 Market responses

One response that cargo owners may have to the unfair charging of detention fees is to switch shipping lines.

Short term

In the short-term, under the current market dynamics, options to switch might be more limited than under more 'normal' market conditions. As previously noted, shipping capacity has been scarce since the onset of COVID, and many cargo owners have been scrambling to book space on vessels. Space that is guaranteed not to be rolled to future vessels has come at a premium.

Switching away from a shipping line with which cargo owners are able to secure relatively reliable capacity may not be realistic, even in circumstances where a cargo owner has incurred significant unreasonable detention fees. That would be the case if no alternative shipping lines have available capacity to facilitate that switch or the switch is likely to lead to much higher overall costs or increased risk for the cargo owner.

172 See ACL s 23(4). The recent amendments have expanded the scope of the unfair contract terms regime so that it applies to small business contracts where one party to a contract is a business that employs fewer than 100 people or has a turnover in the last income year of less than $10 million. See, *Treasury Laws Amendment (More Competition, Better Prices) Act 2022*.

173 ACL s 24(1).

174 Recent amendments to the ACL prohibit the use of unfair contract terms, meaning that when a regulator such as the ACCC takes action with respect to an unfair contract term, it can also seek that financial penalties be imposed. See, *Treasury Laws Amendment (More Competition, Better Prices) Act 2022*.

175 Australian Securities and Investments Commission v Kobelt, [2019] HCA 18, [92] (Gageler J).

Longer term

As previously outlined in this Chapter, shipping lines do negotiate more favourable detention fee periods for some cargo owners, and there is considerable variability between shipping lines in their default free time periods and calculation methodologies. Cargo owners who frequently incur detention fees unreasonably, through the action or inaction of a shipping line, would have an incentive to switch to a more reliable shipping line, or one offering better free time terms.

However, in practice, a cargo owner's choice of shipping line is influenced by a number of factors. While amounts some cargo owners have paid in detention fees have been significant, they may still comprise a relatively small proportion of the overall cost of freight and so the incentive to switch over this issue may not be strong. Additional factors preventing cargo owners from switching to a different shipping line may include:

- available shipping line capacity being too limited to facilitate switching
- similar detention fee terms and practices being used by the different shipping lines providing services for Australian ports, meaning there are no alternatives to switch to
- cargo owners' existing contract terms with shipping lines constraining their flexibility to switch between shipping lines.

A key concern about shipping lines' unreasonable detention fee conduct is that it was opportunistic behaviour engaged in at times of high congestion in the supply chain. In circumstances with less supply chain congestion and more available shipping line capacity to facilitate switching, shipping lines would have less incentive to charge detention fees for delays caused by factors that might have been mitigated by the shipping line in question (as was observed prior to the pandemic).

6.4 Addressing the levying of unreasonable detention fees

Many cargo owners have been paying markedly higher amounts in detention fees since the onset of the COVID-19 pandemic. To the extent that these fees have been incurred due to some action or inaction of a shipping line, they cannot fulfil their useful incentivising function and are levied unreasonably.

Cargo owners have said that while sometimes shipping lines agreed to waive fees that were demonstrated to have been incurred unreasonably, this has not happened in many cases. The processes involved in obtaining those waivers create barriers, in the form of time and resource commitments, that mean that not all unreasonably incurred fees can practicably be challenged. If a shipping line refuses to waive a fee that a cargo owner believes was unreasonably levied, that cargo owner has few legal avenues available to them to challenge it.

Easing container supply chain congestion and increased vessel schedule reliability may do much to alleviate the empty container park capacity issues that appear to be a central cause of importers incurring unreasonable detention fees. Similarly, reduced congestion and increased schedule reliability may resolve any issues exporters had with detention fees incurred through vessel delays, blanked sailings and rolled cargo.

Nonetheless, cargo owners in Australia currently do not have adequate protection against unreasonable detention fee practices and this has resulted in harm to cargo owners and, ultimately, Australian consumers.

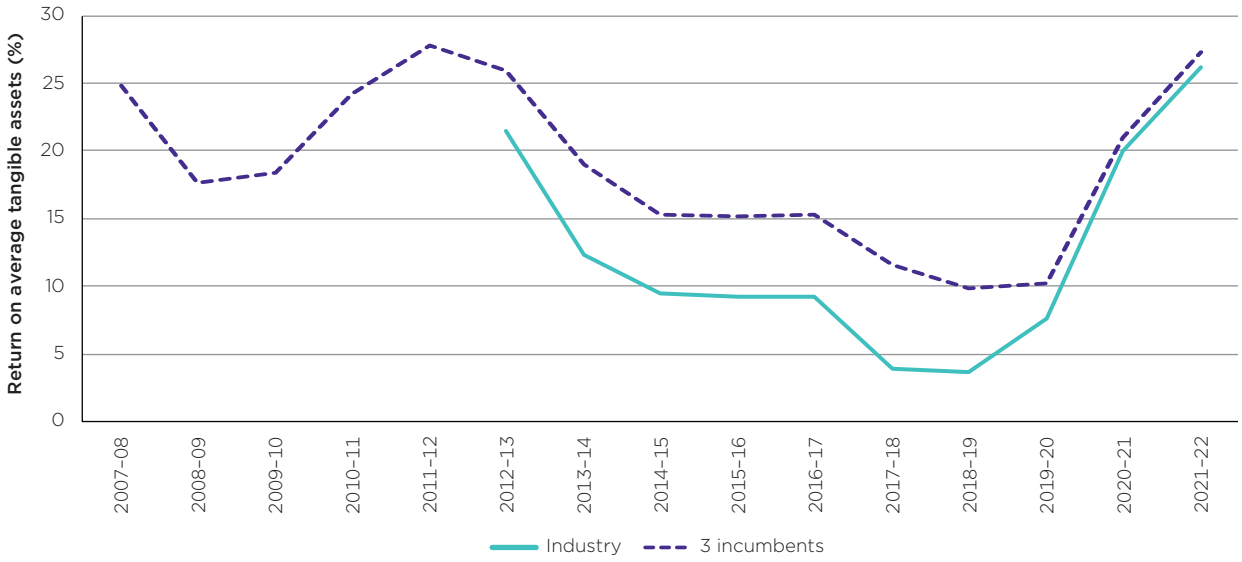
Consideration should be given as to how the problem might be most effectively addressed. Options for doing this include repealing the exemption for shipping contracts from the ACL's unfair contract terms regime or creating a distinct prohibition on such unfair or unreasonable commercial conduct, either confined to the shipping industry as with the US model, or more broadly.

Appendix A: Additional graphs

Return on average tangible assets

Return on average tangible assets is a profitability measure that indicates stevedores' operating profits relative to the value of their deployed tangible assets. This ratio provides a measure of the efficiency with which stevedores use their tangible assets to produce operating profit. Tangible assets do not include intangibles such as the value of terminal leases. The monitored stevedores have taken a variety of approaches to the reporting of the value of their intangible assets, which prevents a direct comparison of the stevedores' total (tangible and intangible) asset bases. Most prominently, the monitored stevedores take significantly different approaches to the valuation of their terminal leases.

Figure A.1: Return on average tangible assets (excluding leases) (industry & 3 incumbents): 2007–08 to 2021–22

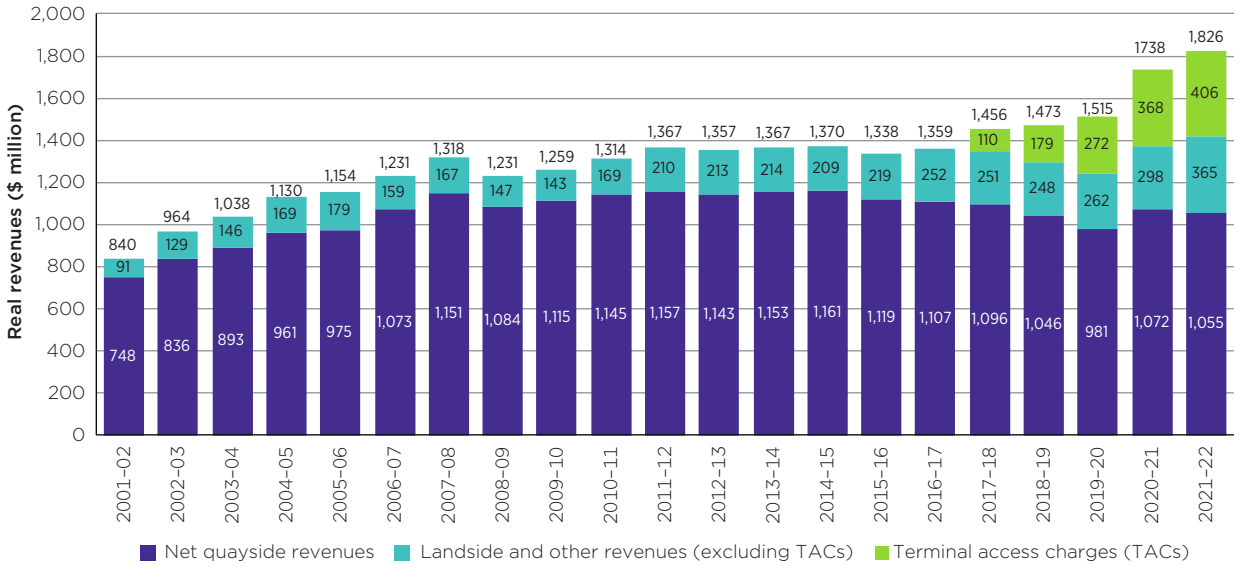


Source: ACCC analysis of information received from stevedores as part of the monitoring regime.

Notes: Industry comprises 5 monitored stevedores: DP World, Patrick, FACT, Hutchison and VICT. DP World-Patrick-FACT represents 3 established incumbents: DP World, Patrick, and FACT.
Data availability dictates the chart, asset base data collection began in 2006–07.
In calculating return on average tangible assets, neither EBITA nor asset values are indexed.
Asset values recognise a write-down in the value of Hutchison's assets in 2015–16, 2018–19, and 2021–22.

Total revenues in real terms

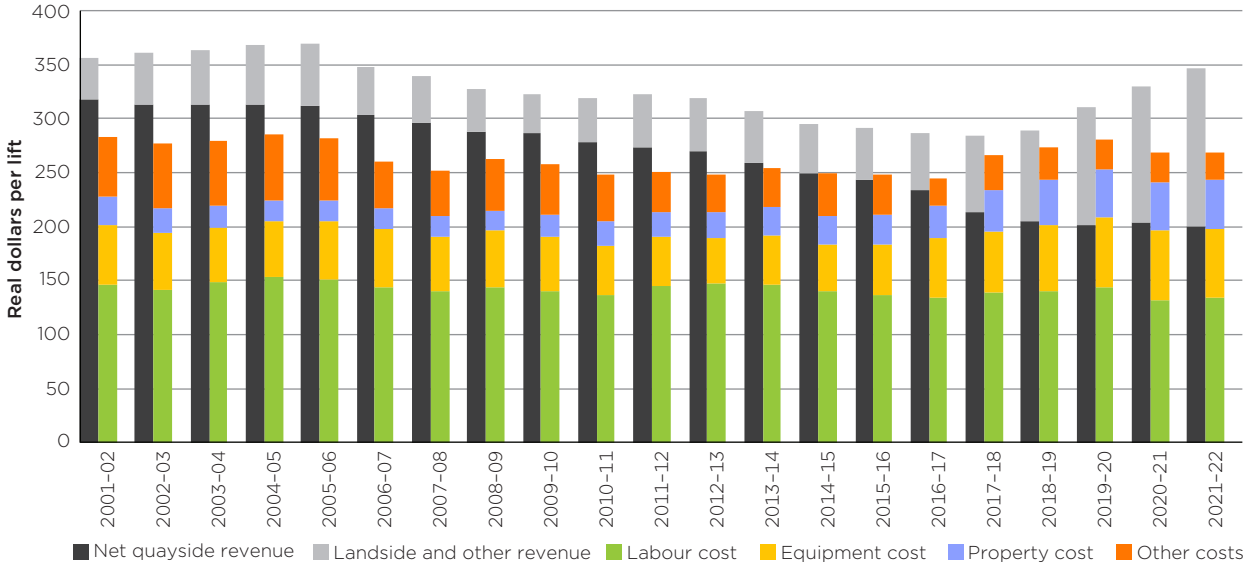
Figure A.2: Total industry revenues in real terms: 2001–02 to 2021–22



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

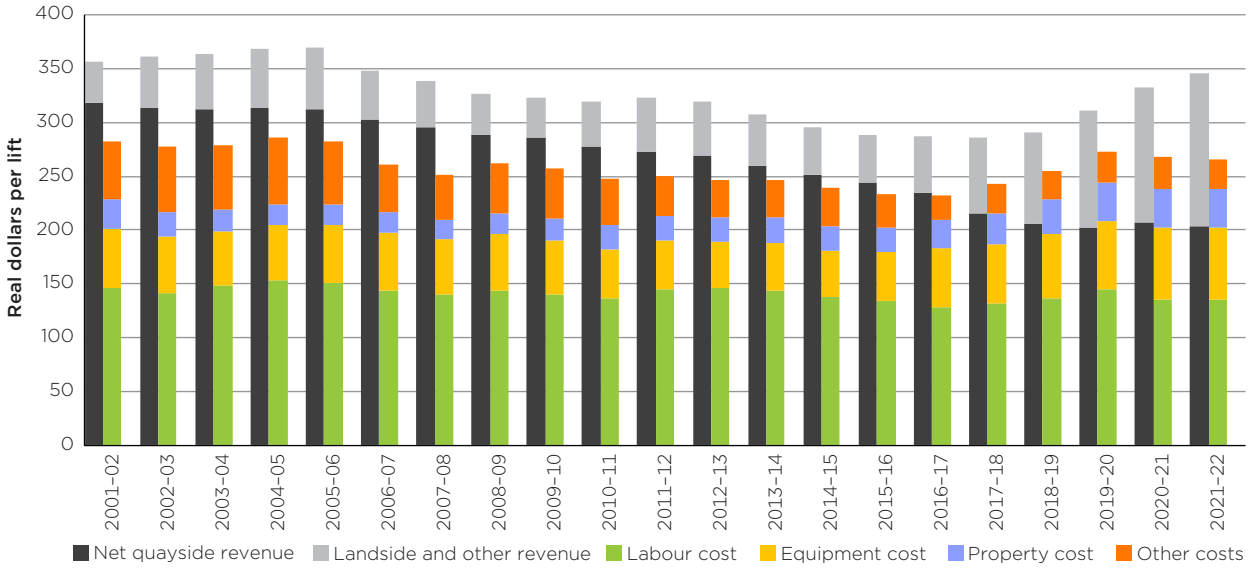
Revenues and costs per lift in real terms

Figure A.3: Industry total revenues and costs per lift in real terms: 2001–02 to 2021–22



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

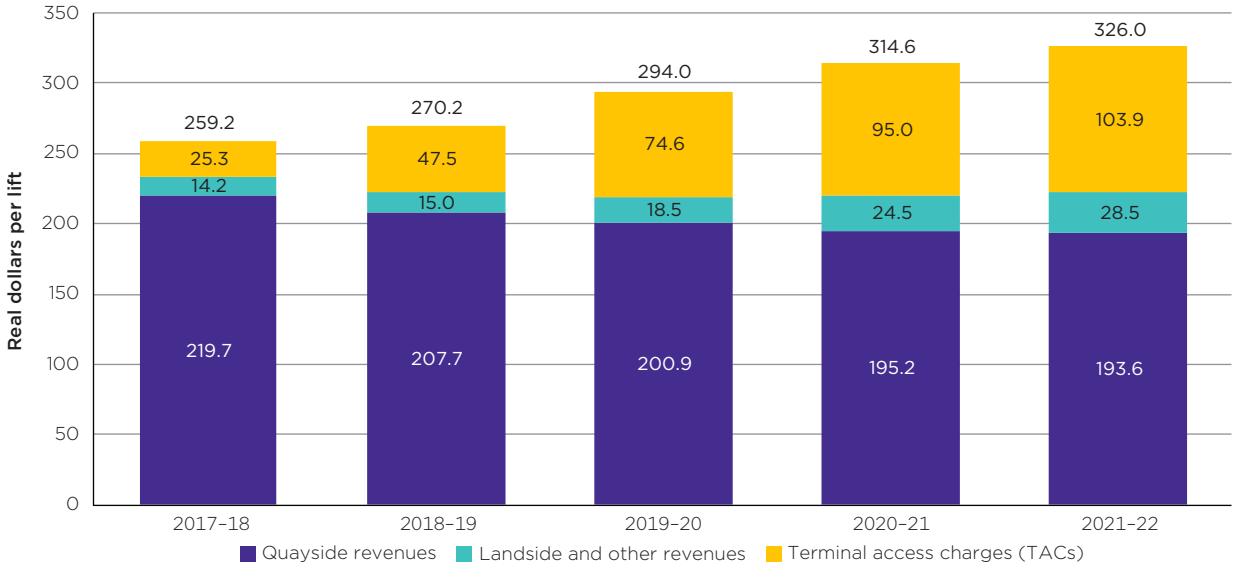
Figure A.4: 3 incumbent total revenues and costs per lift in real terms: 2001–02 to 2021–22



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

Full containers

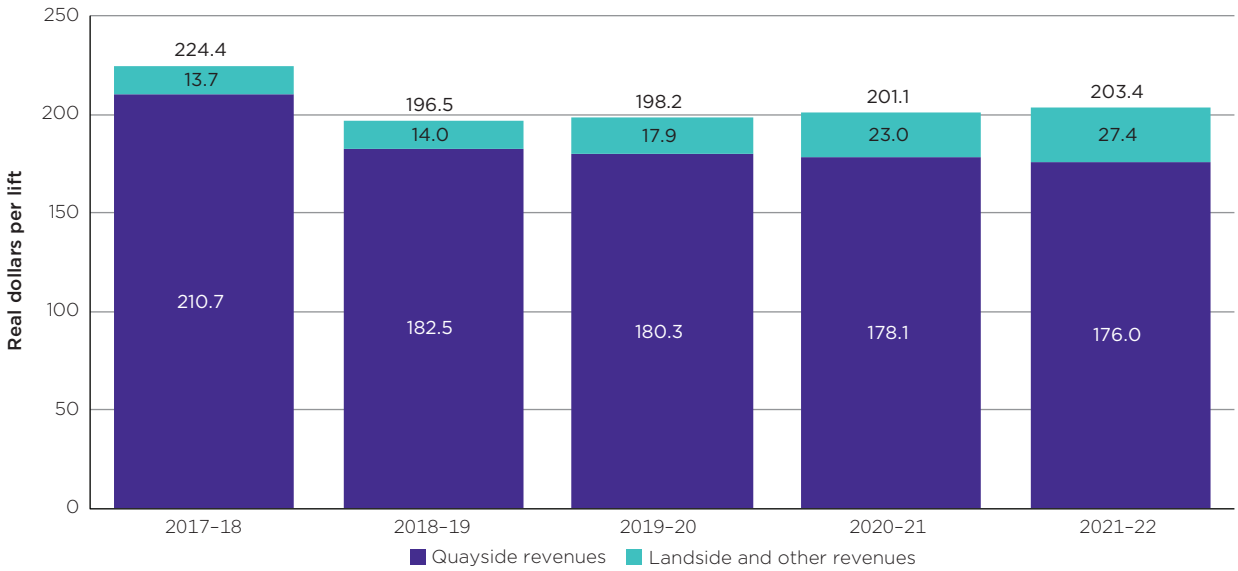
Figure A.5: Industry revenue per lift in real terms – full containers: 2017–18 to 2021–22



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

Empty containers

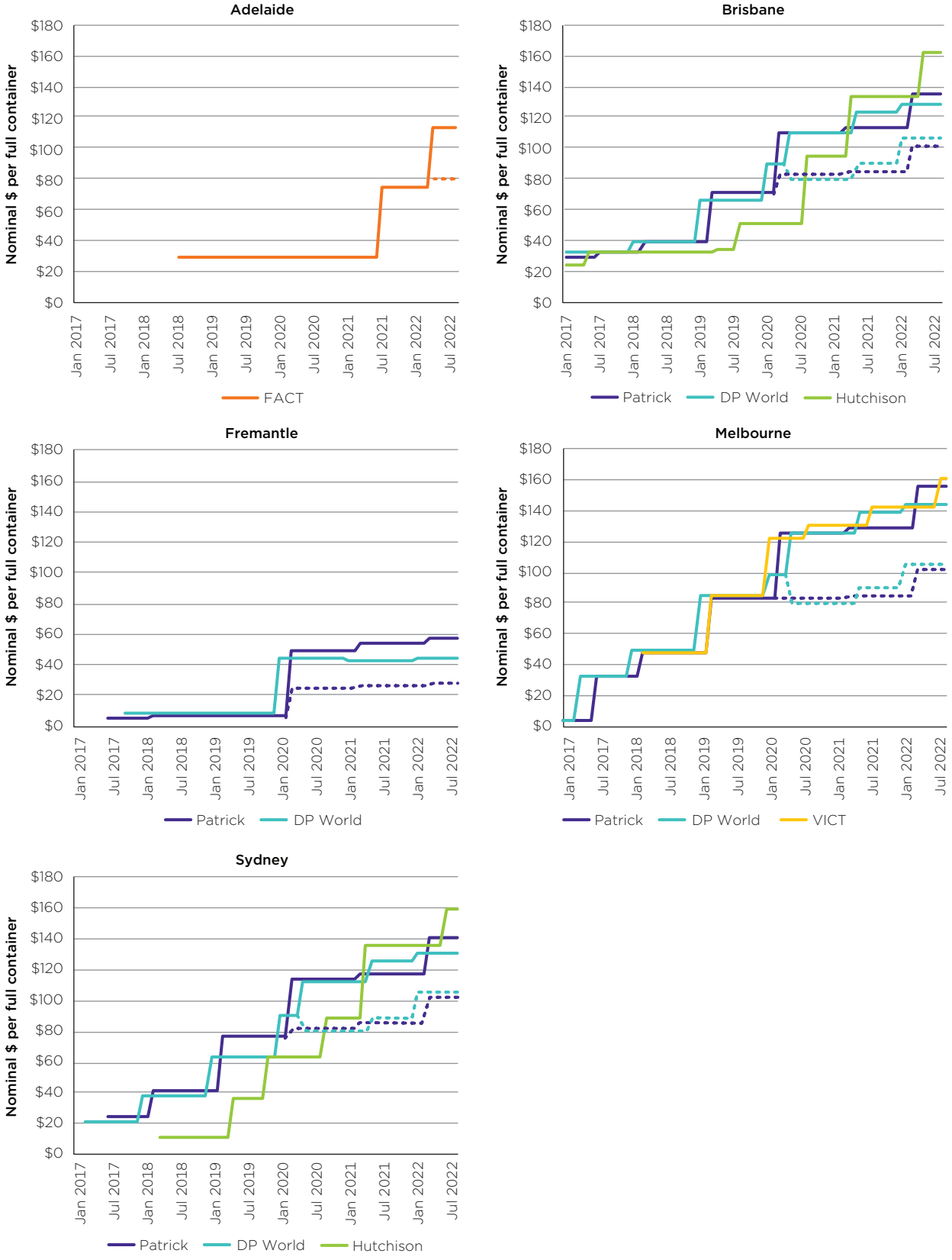
Figure A.6: Industry revenue per lift in real terms – empty containers: 2017–18 to 2021–22



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

Stevedore fees and charges

Figure A.7: Terminal access charges levied by stevedores in nominal dollars at each monitored container port: January 2017 to August 2022



Source: ACCC analysis of publicly available stevedore pricing information.

Note: Solid lines indicate 'import' or both 'import & export' charges, while dotted lines indicate 'export' charges only.

Investment

Gross additions to tangible asset base

Figure A.8: Gross additions to tangible asset base, industry and 3 incumbents: 2006–07 to 2021–22

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

Note: Data availability dictates the chart, asset base data collection began in 2006–07.

Tangible asset base

Figure A.9: Tangible asset base, industry and 3 incumbents: 2006–07 to 2021–22

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

Note: Closing tangible asset base is equal to opening tangible asset base plus the net of additions, disposals and depreciation.

Data availability dictates the chart, asset base data collection began in 2006–07.

Examples of Stevedore investments

Table A.1: Selected stevedore investment completed or in-progress in 2021–22, and planned for future years

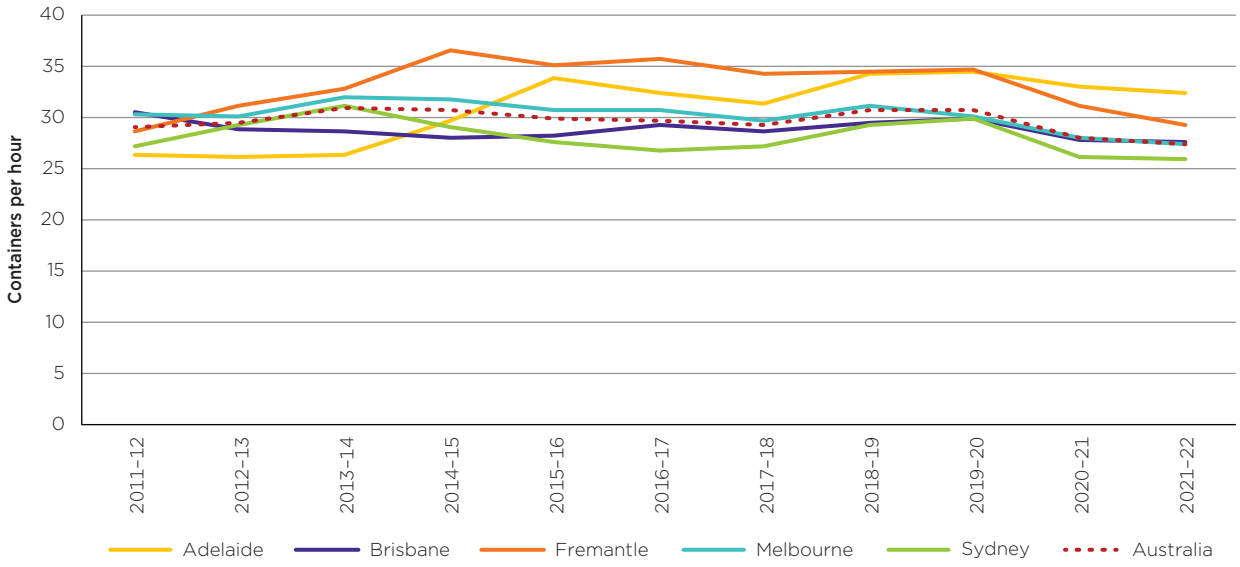
Stevedore	Infrastructure	Location	Status
DP World	Quay Crane	Fremantle	In progress
	RTGs	Sydney	In progress
	Truck marshalling area	Fremantle	In progress
	Shuttle carriers	Brisbane	In progress
	Straddles	Brisbane	In progress
	Fenders and bollard for larger vessels	Sydney	In future
Patrick	Sydney Liebherr crane purchase	Sydney	Complete
	Straddle purchases	Brisbane, Sydney	Complete
	Fremantle Terminal Redevelopment	Fremantle	In progress
	Port Botany Automated Rail Terminal	Sydney	In progress
	Liebherr crane purchase and automation	Brisbane	In progress
	Straddle purchases	Brisbane, Sydney	In progress
	ESD Rail project	Melbourne	In progress
	Automated Truck Handling	Brisbane, Sydney	In progress
	Fender & Bollard Upgrades	Sydney	In future
	ITV Replacement & Electrification	Fremantle	In future
FACT	Straddle Carrier Replacement Project	Adelaide	Complete
VICT	Phase 3A – 2 x new Quay Cranes, 6 x new ACC and 6 x new ASC, 3 x new 325 slot container blocks	Melbourne	In progress

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

BITRE data for each monitored container port

Crane rate

Figure A.10: Net crane rate at each monitored container port: 2011–12 to 2021–22

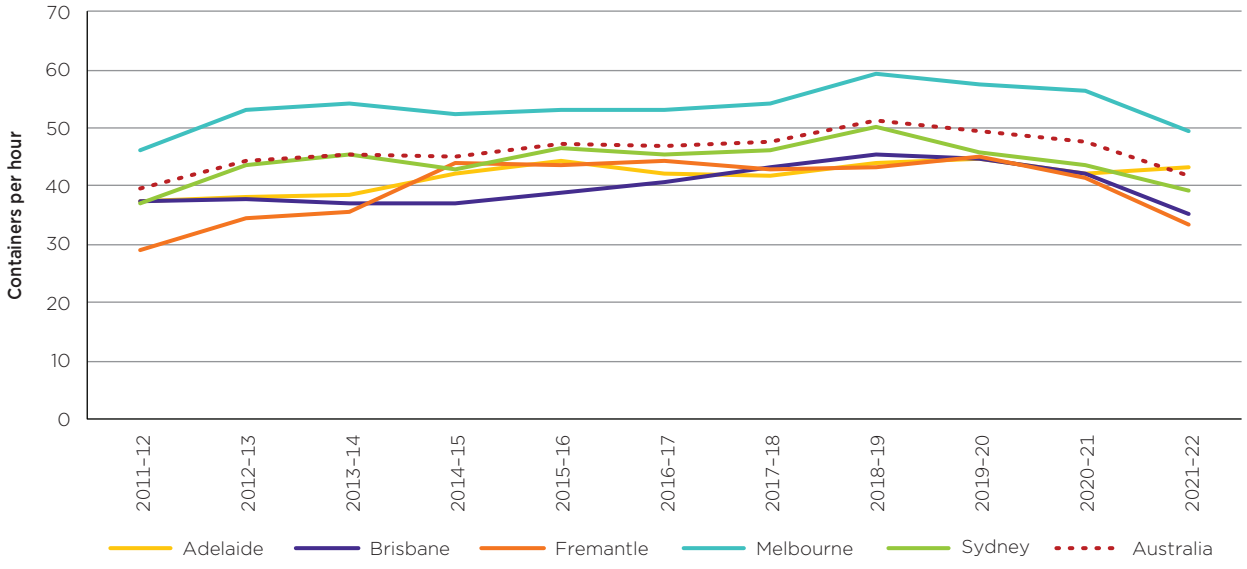


Source: ACCC analysis of Waterline data provided by BITRE.

Note: Data points may differ slightly to previous reports due to corrections and updates made to the Waterline data by BITRE.

Labour rate

Figure A.11: Net elapsed labour rate at each monitored container port: 2011–12 to 2021–22

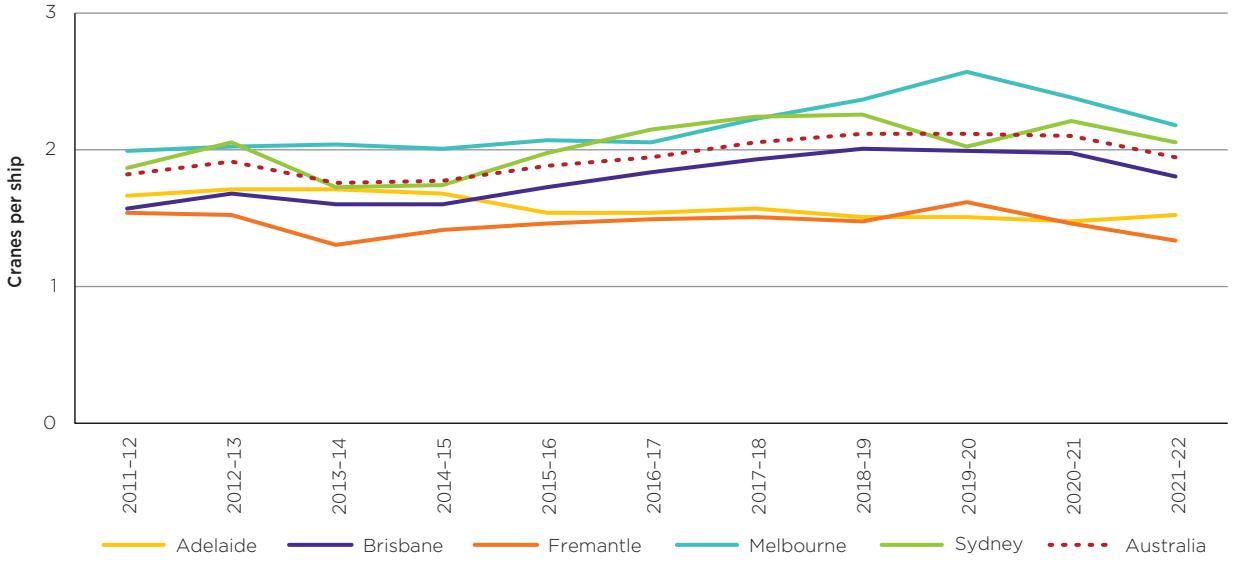


Source: ACCC analysis of Waterline data provided by BITRE.

Note: Data points may differ slightly to previous reports due to corrections and updates made to the Waterline data by BITRE.

Crane intensity

Figure A.12: Crane intensity at each monitored container port: 2011–12 to 2021–22

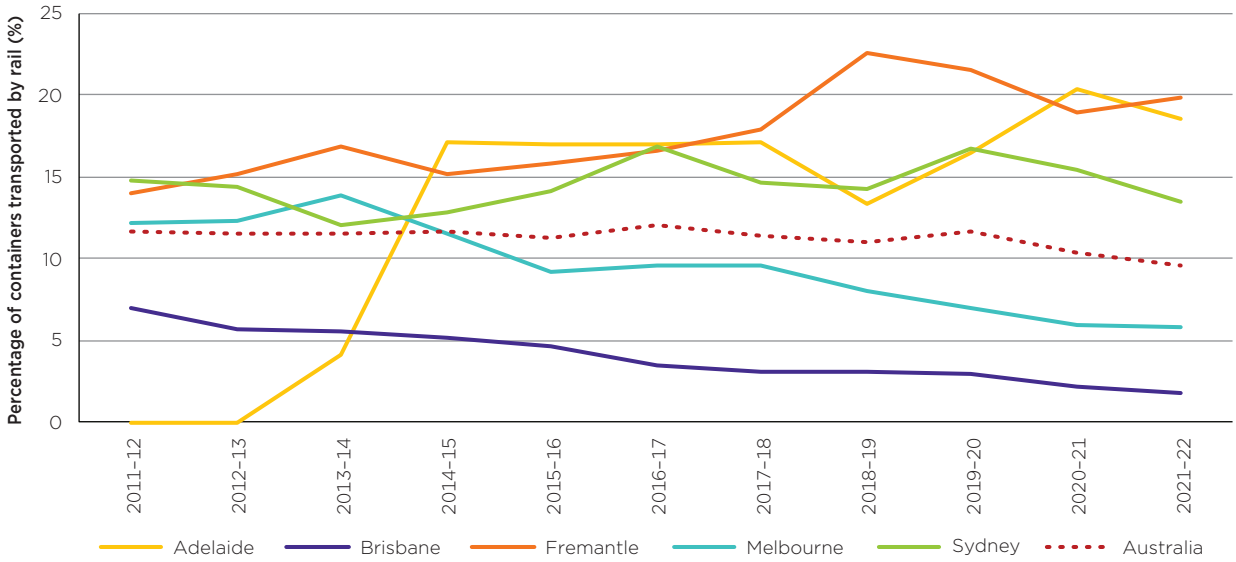


Source: ACCC analysis of Waterline data provided by BITRE.

Note: Data points may differ slightly to previous reports due to corrections and updates made to the Waterline data by BITRE.

Freight on rail

Figure A.13: Percentage of containers transported by rail at each monitored container port: 2011–12 to 2021–22

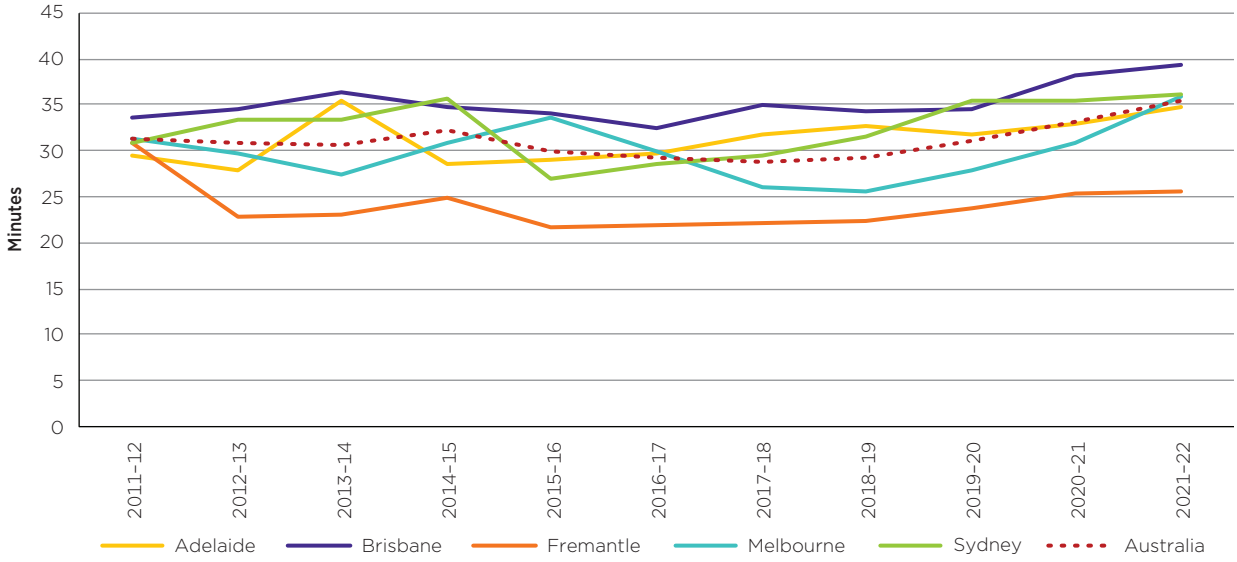


Source: ACCC analysis of Waterline data provided by BITRE.

Note: Data points may differ slightly to previous reports due to corrections and updates made to the Waterline data by BITRE.

Truck turnaround times

Figure A.14: Average truck turnaround time at each monitored container port: 2011–12 to 2021–22

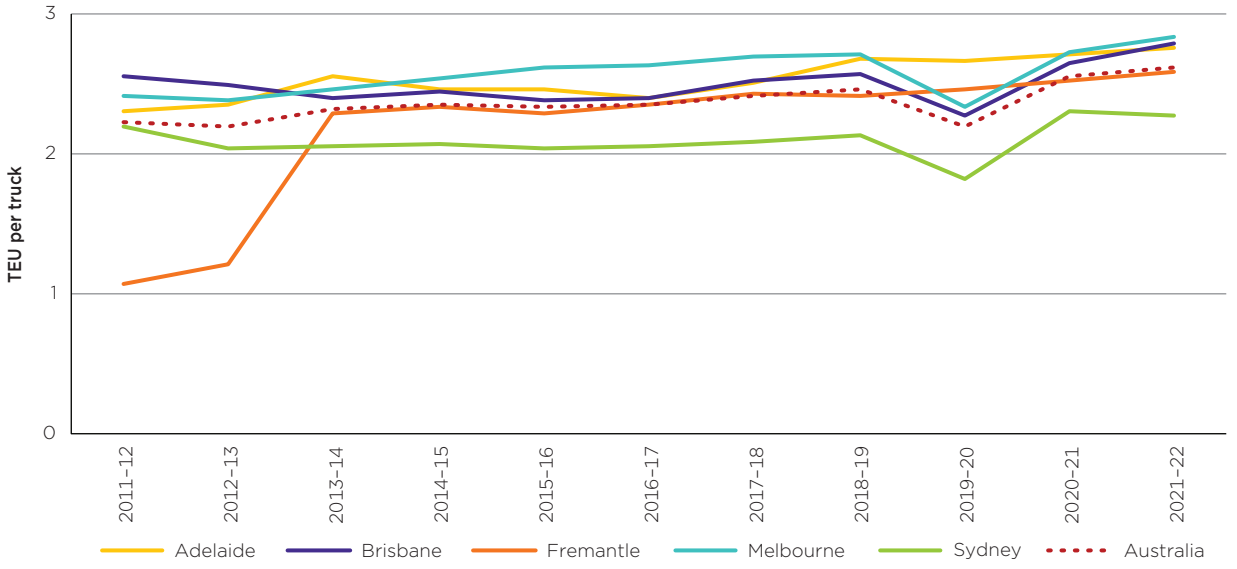


Source: ACCC analysis of Waterline data provided by BITRE.

Note: Data points may differ slightly to previous reports due to corrections and updates made to the Waterline data by BITRE.

TEU per truck

Figure A.15: TEUs per truck at each monitored container port: 2011–12 to 2021–22

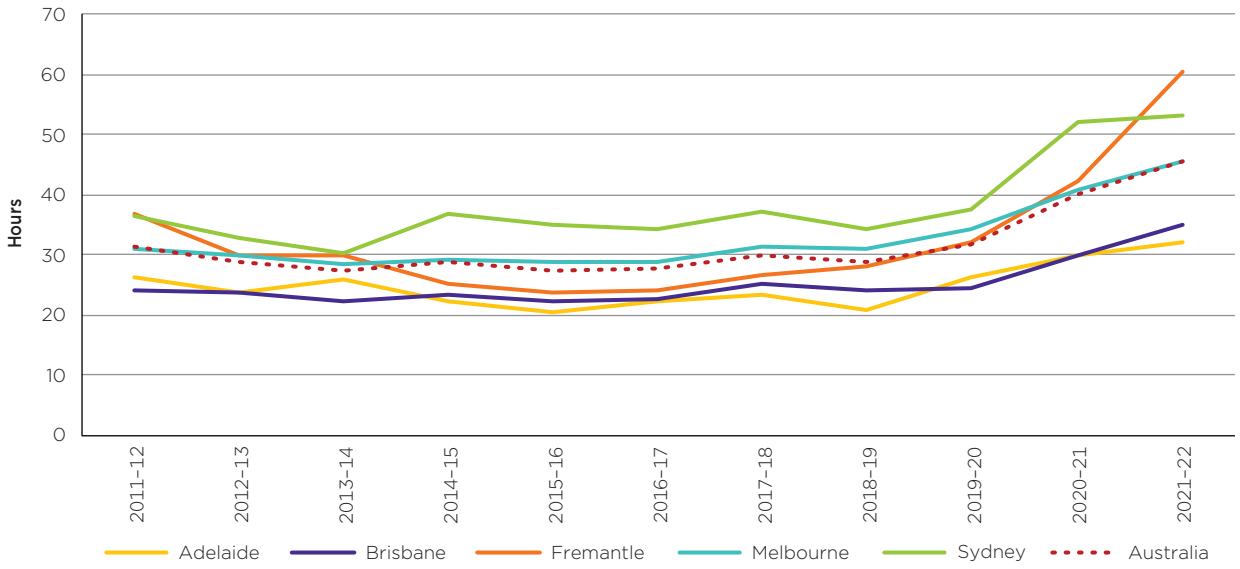


Source: ACCC analysis of Waterline data provided by BITRE.

Note: Data points may differ slightly to previous reports due to corrections and updates made to the Waterline data by BITRE.

Ship time at berth

Figure A.16: Mean ship time at berth at each monitored container port and Australia: 2011–12 to 2021–22



Source: ACCC analysis of Waterline data provided by BITRE.

Note: Data points may differ slightly to previous reports due to corrections and updates made to the Waterline data by BITRE.

Appendix B: Historical events

Table B.1: Selection of historical events throughout the monitoring regime affecting stevedoring throughput, revenues and costs

Month	FY	Event	Event category
Jan-98	1997–98	Waterfront dispute	Australia
Dec-98	1998–99	Sea-Land enters Brisbane	Stevedores
Jan-99	1998–99	Ministerial direction	Regulatory
Feb-99	1998–99	Start of Stevedoring levy	Regulatory
Jun-99	1998–99	First ACCC CSMR	Regulatory
Aug-01	2001–02	Sea-Land exits Brisbane	Stevedores
Nov-01	2001–02	Port Adelaide privatisation	Ports
Jan-05	2004–05	DPW acquires CSX Adelaide	Stevedores
Mar-06	2005–06	DPW acquires P&O Ports	Stevedores
May-06	2005–06	End of Stevedoring Levy	Regulatory
Sep-08	2008–09	Global Financial Crisis	World
Nov-10	2010–11	Port of Brisbane privatisation	Ports
May-11	2010–11	Patrick exits Burnie	Stevedores
Jul-12	2012–13	FPH fully acquires FACT from DPW	Stevedores
Apr-13	2012–13	Port Botany privatisation	Ports
May-13	2012–13	Hutchison enters Brisbane	Stevedores
Nov-13	2013–14	Hutchison enters Sydney	Stevedores
Sep-16	2016–17	Port of Melbourne Privatisation	Ports
Apr-17	2016–17	VICT enter Melbourne	Stevedores
Mar-20	2019–20	COVID-19 pandemic declared	World

Appendix C: Part VIIA, Competition and Consumer Act 2010

s. 95ZE

Directions to monitor prices, costs and profits of an industry

(1) The Minister may give the Commission a written direction:

(a) to monitor prices, costs and profits relating to the supply of goods and services by persons in a specified industry; and

(b) to give the Minister a report on the monitoring at a specified time or at specified intervals within a specified period.

Commercial confidentiality

(2) The Commission must, in preparing such a report, have regard to the need for commercial confidentiality.

Public inspection

(3) The Commission must also make copies of the report available for public inspection as soon as practicable after it gives the Minister the report.

s. 95ZG

Exceptions to price monitoring

(1) The Minister must not direct the Commission under this Division to monitor prices, costs and profits relating to a supply of goods or services of a particular description that is an exempt supply in relation to goods or services of that description.

(2) The Minister must not direct the Commission under this Division to monitor prices, costs and profits of a State or Territory authority that supplies goods or services unless the State or Territory concerned has agreed to the direction being given.

s. 95G(7)

The Commission's functions under this Part

General

(7) In exercising its powers and performing its functions under this Part, the Commission must, subject to any directions given under section 95ZH, have particular regard to the following:

(a) the need to maintain investment and employment, including the influence of profitability on investment and employment;

(b) the need to discourage a person who is in a position to substantially influence a market for goods or services from taking advantage of that power in setting prices;

(c) the need to discourage cost increases arising from increases in wages and changes in conditions of employment inconsistent with principles established by relevant industrial tribunals.

Appendix D: Ministerial direction

COMMONWEALTH OF AUSTRALIA

Prices Surveillance Act 1983

DIRECTION NO 17

(1) I, Peter Costello, Treasurer, pursuant to section 27A of the Prices Surveillance Act 1983, hereby direct the Australian Competition and Consumer Commission to undertake monitoring of prices, costs and profits relating to the supply of services by a container terminal operator company in ports at the following locations:

(a) Adelaide;

(b) Brisbane;

(c) Burnie;

(d) Fremantle

(e) Melbourne; and

(f) Sydney.

(2) In this direction, 'container terminal operator company' means a provider of container stevedoring services in ports at the locations listed in paragraph (1).

(3) The ACCC is to report to me on its monitoring activities referred to in paragraph (1) within 4 months after the end of each financial year.

PETER COSTELLO

January 1999


ACCC
AUSTRALIAN COMPETITION
& CONSUMER COMMISSION