Australian Competition & Consumer Commission	**Ports Australia Biennial Conference** **'Ports – What Measure of Regulation'?** **Joe Dimasi, Commissioner** **25 October 2012, Adelaide**

Introduction

Thank you for the invitation to speak to you today.

The ACCC recognises the pivotal role that ports play in the Australian economy, with many Australian industries depending upon ports to support their own competitiveness.

I would like to first acknowledge the work of Ports Australia in providing this forum for the exchange of views on strategic issues central to the efficient development and management of Australia's ports and maritime facilities.

Such events provide a valuable opportunity for the ACCC to explain its roles in relation to ports and port-related supply chains.

Regulation affecting ports occurs on a number of layers, with Federal, State and local governments all having an impact. The Commonwealth and State governments are currently active in infrastructure policy and regulation affecting ports. The State governments take the lead role in determining the form of much of the specific regulation applying to port operators.

The ACCC, as an independent statutory authority with responsibility for administering the Competition and Consumer Act 2010 (CCA), is an advocate for competition and fair trade in the market place to benefit consumers, business and the community. Where markets are competitive, they will drive efficient outcomes and the need for economic regulatory intervention should be minimal. However, where competition is not possible, the ACCC may have a specific regulatory role to encourage efficient outcomes.

Outline

The focus of my presentation will be to explain the ACCC's varying roles that may impact on ports, and in particular on our role in trying to facilitate competition in order to achieve the best outcomes for the welfare of all Australians. In doing so I will cover the following areas:

- outline how the laws the ACCC administers promote competition, which helps to improve the welfare of Australians

- explain how the ACCC can authorise conduct that would otherwise be in breach of competition laws, with reference to recent examples relevant to the operation of supply chains in port-related industries

- explain the particular roles the ACCC has in concentrated industries, in particular the handling of container stevedoring industry and the bulk wheat exports.

1. The ACCC's role in promoting competition

The ACCC believes that through competition firms become more efficient and innovative. This leads to more efficient prices and greater choice for consumers. Competition is also a means of enhancing community welfare by promoting a more efficient use of resources, which benefits the wider community.

Markets that work in this way are the aim. However, certain parts of Australia's transport sector have concentrated industry structures, high barriers to entry, or other monopoly characteristics. Where there is infrastructure that is inefficient to duplicate, or constitutes a bottleneck to effective competition in other markets, economic regulation may have a role in seeking to achieve the outcomes competition would otherwise provide. To further these aims, the ACCC has a number of regulatory and other tools available to it under the CCA, some of which I will discuss later.

The ACCC's key roles relevant to ports and related industries are:

1. Maintaining and promoting competition– by preventing anticompetitive mergers, prosecuting cartels and intervening when we identify misuse of market power
2. Promoting the efficient use of and investment in infrastructure – through industry specific regulation and access regimes.

The CCA contains provisions that aim to maintain and promote competition, for example, by prohibiting the misuse of market power, cartel conduct and other agreements that substantially lessen competition and mergers that would be likely to substantially lessen competition in a market in Australia. By preventing anti-competitive conduct, the CCA encourages competition and efficiency in business. In turn, this helps to achieve a greater choice for consumers in price, quality and service.

However, there are times when allowing arrangements or conduct that might restrict competition but which enhance efficiency and welfare may be in the public interest. This is where the ACCC's authorisation role fits in and the authorised arrangements at the Port of Newcastle are a good example.

In other circumstances, it is not always possible for market-based competition to take hold, for example where an industry has natural monopoly characteristiecs. In these cases, economic regulation seeks to deliver some of the efficiency benefits competition would otherwise provide.

The ACCC monitors prices and regulates infrastructure in markets where competition is limited. The ACCC's industry monitoring role, for example, in container stevedoring, exists because of concern about the level of competition in that industry. Monitoring, while not itself a direct regulatory intervention, can improve transparency and provide information both to government and industry, and assist in deliberations about whether regulation, or further regulation, is required.

1.1 The ACCC's role in preventing anti-competitive mergers

Competition law recognises that not all mergers and acquisitions are harmful – many are benign and some enhance competition. The ACCC recognises that it is important to have an active market for corporate control to ensure that inefficient owners and managers are replaced by more efficient ones. In some cases, however, mergers have anti-competitive effects resulting in significant consumer detriment.

Section 50 of the CCA is designed to allow the ACCC to take action when a merger threatens to damage the competitive structure of a market and therefore the incentives for firms to behave in a competitive manner. Section 50 prohibits mergers and acquisitions that are likely to result in a substantial lessening of competition in a market in Australia. In this way it aims to preserve competitive market structures and market participants' incentives to compete rather than relying on other regulation of anti-competitive conduct.

It is particularly important that the ACCC carefully considers proposed mergers and acquisitions in highly concentrated markets. As markets connected with port related services are often highly concentrated, the ACCC will closely scrutinise mergers which could reduce competition in these markets.

The ACCC will also look closely at vertical mergers, where a party at one level of a supply chain seeks to acquire another party which is active in a related market. Such mergers can have significant anti-competitive effects if the merged firm is able to discriminate and potentially foreclose its rivals at one level of the supply chain.

In considering the extent to which vertical integration may reduce competition, for instance, by foreclosing rival stevedores from operating at a port, the ACCC will take into account a range of factors, including the control that the successful bidder will have over stevedoring operations at port. The ACCC will also take into account the amount of existing capacity at the port and forecast increases in container volumes to determine whether a new stevedore would in fact be likely to commence operations in the foreseeable future.

Although there is no compulsory pre-merger notification requirement in Australia, parties proposing to undertake a merger or acquisition are encouraged to approach the ACCC when a merger or acquisition is contemplated, particularly when it involves concentrated markets. The majority of problematic transactions are notified to the ACCC and the ACCC undertakes its own monitoring to identify any acquisitions that it considers require review as well as relying on complaints.

The sooner the merger parties approach us to discuss a proposed merger or acquisition, the sooner we will be able to provide our view on whether or not the ACCC will oppose the transaction. In the event that the ACCC considers that a proposed merger or acquisition is likely to breach section 50, it may institute proceedings in the Federal Court seeking a range of orders, including an injunction to prevent the transaction occurring. In some cases however, merger parties can provide the ACCC with a court enforceable undertaking under section 87B of the CCA to implement measures that address the competition concerns identified by the ACCC. These undertakings or remedies provide a flexible alternative to opposing an acquisition where the ACCC reaches a view that an acquisition is likely to substantially lessen competition.

The ACCC can and does conduct reviews of acquisitions that have already been completed, and where appropriate may take court action to have the relevant assets divested, and seek other remedies it considers appropriate.

In addition to engaging with the merger parties, the ACCC is equally keen to get the views of third parties during market inquiries. This is a valuable and necessary input into the ACCC's decision making and the ACCC acknowledges and appreciates the assistance industry provides on many occasions.

Privatisation of ports

Governments are increasingly looking to the private sector to play its part in investing in ports. In responding to the challenge to provide sufficient capacity at Australian ports to cater for the large and continuing increase in demand, it is important to ensure that opportunities to maintain or even increase competition and contestability are not lost.

The ACCC expects to consider the tender arrangements for the privatisation of NSW ports as they progress. In doing so, we will look closely at bidders (including bidders taking a minority interest as part of a consortium bid), to ensure that any change in control does not result in a substantial lessening of competition as a result of:

- a common interest in port facilities, or
- vertical links in the supply chain into and out of the ports, such as stevedores' ownership of ports.

2 The CCA should not prevent competitors from cooperating where there is sufficient public benefit

Another key point I would like to convey today is that the CCA does not aim to prevent competitors from cooperating where it can be shown that such arrangements would result in a public benefit that outweighs any anticompetitive effects. The ACCC can authorise or exempt from legal action certain conduct that would otherwise breach the Act and in doing so, facilitate supply chain coordination.

Parties in the industry can collaborate to address issues they are facing where that would promote efficiency and benefit the public without raising competition

concerns. Where industry-based arrangements raise potential competition concerns, but the benefits outweigh any detriment from reduced competition, then seeking ACCC authorisation under the CCA may be appropriate.

The authorisation provisions in the CCA enable parties to seek protection from legal action under the competition provisions of the CCA (except misuse of market power) where the public benefits outweigh the public detriments.

When assessing an application for authorisation the ACCC essentially balances the costs to competition likely to result from the arrangements against the benefits from promoting more efficient outcomes than would be the case in the absence of the arrangements that require authorisation.

The authorisation process is public and transparent and the ACCC's assessment of the public benefits and detriments is informed by interested party submissions. The ACCC releases a draft decision prior to making its final determination, which it must do within 6 months from the application being lodged.

The ACCC invites early discussion from parties seeking to lodge an authorisation application. Of course, when considering collaborations with industry peers to address supply chain coordination and efficiency issues, it may be prudent to seek advice from a competition lawyer to identify whether these activities may raise concerns under the CCA. If they do, the firms involved need to then approach the ACCC.

Hunter Valley coal chain – port and rail

A good example of the ACCC's authorisation role is provided by industry's arrangements to address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain.

Around 140 + million tonnes of coal is exported from the Hunter Valley every year, worth in excess of $10 billion per annum in export earnings to Australia. It is one of the largest and most complex coal export operations in the world. Multiple parties are involved in getting coal from the mine to ship. These include coal producers, port operators, the Australian Rail Track Corporation (ARTC), the above-rail operators and the Hunter Valley Coal Chain Coordinator.

Several years ago excess demand for coal loading services at the Newcastle port resulted in large vessel queues forming offshore. Over time, industry participants worked to understand and develop solutions to the capacity management problems plaguing the network.

As far back as 2004, the operator of the then only coal loader in Newcastle, Port Waratah Coal Services (PWCS), first sought authorisation for a queue management system, (the 'Capacity Balancing System') which was designed to

address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain.

The ACCC always considered the capacity balancing system was in the public interest as a transitional measure only and continued to encourage the industry to develop a longer-term arrangement.

In 2009 the ACCC granted the most recent authorisation to PWCS, Newcastle Port Corporation and the Newcastle Coal Infrastructure Group for long-term Capacity Framework Arrangements at the Port of Newcastle until 31 December 2024. These arrangements:

- allow producers to sign long-term export contracts with PWCS for the first time which will underpin future investment decisions to expand capacity;
- establish a framework which should assist producers to align their contracts with track and rail operators in the Hunter Valley; and
- support centralised modelling of system capacity and monitoring of performance standards.

Among public benefits considered, the ACCC considered that the Capacity Framework Arrangements are likely to generate significant public benefits because they enable coal producers to sign long-term coal export contracts at the port, which establishes a commercial framework to support accurate and timely investment decisions in the Hunter Valley coal chain.

The ACCC also has a role under Part IIIA of the CCA to assess an access undertaking proposed by ARTC for the rail network in the Hunter Valley. In considering the undertaking, the ACCC looked at the extent to which ARTC's arrangements work together with those at the port to ensure contractual alignment across the entire coal chain. The ACCC's involvement in the Hunter Valley demonstrates how its processes – in this case the authorisation and access undertaking processes – can take a supply chain-wide view, and assist industry to achieve more efficient outcomes.

More recently the ACCC has authorised coal producers in Queensland to collectively negotiate the price and other terms and conditions for the development of, and access to, port infrastructure at the Dudgeon Point Terminal.

3. The ACCC's roles in industries where competition is limited

The ACCC may be given a specific role in concentrated industries where competition is limited. Two examples I will talk about relating to ports are container stevedoring and wheat ports.

3.1 Container stevedoring

Container stevedoring is an example of a highly concentrated industry that the ACCC has been monitoring since 1998-99. We will release the 2012 report in the coming weeks.

Since the ACCC commenced its monitoring of price, costs and profits of stevedoring companies operating at Australia's major container ports, there has been a significant improvement in the performance of the container stevedoring industry. However, some challenges remain in terms of capacity building and driving on-going productivity improvements.

The number of containers processed through Australian terminals has increased significantly—by 8.4 per cent per annum since 1998–99. Over the same period, the cost of using stevedoring services has fallen (by 38 per cent in real terms).

Having said that, the stevedoring business is considerably more profitable compared to when the industry reforms began over ten years ago. Industry rates of return on average assets were 24 per cent in 2010–11 compared with 11 per cent in 1998–99.

However, for many years now, the ACCC has raised concerns about the lack of competition between the two stevedores operating in Brisbane, Sydney, Melbourne and Fremantle (now owned by Asciano and DP World) and the reduced incentives for the duopoly to respond efficiently to the requirements of their users.

Investment in additional quay-line capacity by port authorities is important for ensuring that Australian container ports are able to meet future demand. Quay-line capacity expansion is almost complete at a number of ports. An increased number of terminals at several ports is likely to result in additional benefits including the potential for more competition in the supply of stevedoring services.

In Brisbane, Hutchison Port Holdings (HPH) has been appointed to operate a new container terminal. Operations are expected to commence in early 2013. At full scale, the additional container facilities are expected to increase Brisbane's container handling capacity by 25 per cent.

In Sydney, HPH has secured the rights from the NSW Government to operate the new container terminal at Port Botany. It is due to start operating around mid next year.

At Melbourne, Australia's largest container port, the Victorian Government announced plans in April 2012 to establish a third container terminal at Webb Dock sometime in 2016; and enhance the existing capacity of Swanson Dock.

The entry of a third stevedore in Brisbane and Sydney, and possibly in due course in Melbourne, is a structural change that has been a long time in coming. These recent decisions by state governments reflect a move to a more contestable stevedoring industry. In the longer term, this new entry coupled with significant planned capacity expansion can be expected to result in some competition benefits and companies involved in the supply of container stevedoring services should ensure that they engage in competitive conduct in accordance with their trade practices obligations. The ACCC will be observing the potential competitive effects of an expanded and more contestable market with much interest.

3.2 Bulk wheat exports

The ACCC also has a specific regulatory role in a part of the supply chain in wheat export facilities. We regulate access to port terminal services used for bulk wheat export through the assessment of Part IIIA access undertakings. Our role arose as a part of the removal of AWB's single-desk for the export of Australian wheat and the desire for competition to be introduced into wheat export and marketing.

Operators of port facilities who also export wheat are required to provide access undertakings to the ACCC under Part IIIA of the CCA. These undertakings provide the terms and conditions on which the vertically integrated port operators provided access to their wheat exporting competitors.

In determining whether to accept the Part IIIA Undertakings from GrainCorp, Viterra, CBH and Australian Bulk Alliance, the ACCC was careful to find a balance between the legitimate business interests of the port terminal operators and third party access seekers whilst ensuring that the arrangements promoted the efficient allocation of terminal capacity, and prevented the bulk handlers from discriminating against other wheat exporters.

The ACCC accepted more prescriptive access arrangements in WA and SA than what applies on the East Coast, because we recognised that there is less competitive constraints operating in the South and the West relative to the East.

In WA, CBH and in SA Viterra are required to use an auction system to allocate port terminal capacity to be used for the exporting of bulk wheat. On the East Coast the ACCC has accepted the use of first in, first served capacity allocation systems by GrainCorp and Australian Bulk Alliance.

In WA and SA, the ACCC considered that on economic efficiency grounds an auction system is the preferred mechanism to allocate capacity. This is particularly the case when capacity is constrained relative to demand and administrative approaches—such as a first come, first served system—are unlikely to result in economically efficient outcomes. Auctions are usually the preferred approach because they allocate capacity to the users with the highest willingness to pay.

Recently, the Australian Government accepted a Productivity Commission recommendation that, from 2014, vertically integrated bulk handlers will no longer need to submit undertakings that govern third-party access to their port terminal facilities. This is conditional upon port operators developing a voluntary industry code of conduct.

Conclusion

Ports, are critically important to the Australian economy. In the performance of our roles relating to ports, the ACCC recognises their pivotal role and aims to assist in industry achieving effective economic outcomes.

The basis of our actions, reflected in our powers contained in the CCA, is that competition is beneficial to the direct and indirect users of port infrastructure services, and to the economy generally.

We enforce the trade practices laws in the CCA to promote competition, including by preventing mergers and acquisitions that substantially lessen competition. However, where certain types of conduct that would otherwise breach the Act are outweighed by a public benefit, we can and do authorise such conduct.

Where competition is limited, the ACCC may have a specific regulatory or monitoring role. The ACCC has a range of regulatory and other tools that we can use to help solve some of the problems that arise when competition is structurally not possible in an industry, or where it is not as effective as it could be. We take a flexible approach to the use of these tools, and we adapt our approach to a specific competition problem in a way that considers the overall picture of the industry.

Thank you again for inviting me to speak to you today.