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## 1. Further Submissions on Market Definition and SSNIP Test

GeelongPort has previously made submissions in relation to the issue of 'market definition', most notably in the report prepared by Dr John Fallon of Economic Insights Pty Ltd (titled 'Competition and Efficiency Issues relating to the Hire of Bulk Cargo Unloading Equipment at GeelongPort') ("**Dr Fallon's Report**") which was enclosed with Clayton Utz's letter to Mr David Hatfield of the ACCC dated 20 August 2007.

GeelongPort now provides the following further submissions as a further explanation of its position in relation to the issue of 'market definition'.

### 1.1 The Approach for Defining Markets for the Purposes of Assessing Competition Issues

1. As explained in Dr Fallon's Report, for *competition* purposes:
  - 1.1 The term 'market' refers to a field of economic rivalry where there is 'close competition'.
  - 1.2 The definition of a market should comprise a number of parameters, including the specific type(s) of product(s) in that market and the geographical boundaries of that market.
  - 1.3 The parameters of a 'market' for a particular product or service ("**Product X**") are defined by the ease with which:
    - (a) the customers for Product X may use a different product or service as a substitute for Product X ("**demand-side substitution**");
    - (b) the producers of other products, and the suppliers of other services, are able to switch to producing or supplying Product X ("**supply-side substitution**"); and
    - (c) the customers within the defined 'market' may 'import' Product X from producers/suppliers outside the defined market's geographical boundaries, and the producers/suppliers who are outside those geographical boundaries may 'export' Product X to customers within the defined 'market'.
2. If customers can *easily* switch to a different product or service, then the price of Product X cannot be significantly increased before there will be demand-side substitution. Similarly, the price of Product X cannot be significantly increased within a defined 'market' if the customers who are *within* the geographical boundaries of that market can easily 'import' Product X from *outside* that 'market'.
3. If the producers of other products, and the suppliers of other services, can *easily* switch to producing or supplying Product X then the price of Product X cannot be significantly increased before there will be supply-side substitution. Similarly, the price of Product X cannot be significantly increased *within* a defined 'market' if producers/suppliers of Product X who are *outside* the geographical boundaries of that market can easily 'export' Product X into that 'market'.
4. A standard test of whether a particular market definition is correct for competition purposes is the SSNIP test. 'SSNIP' is an acronym for '**S**mall but **S**ignificant **N**on-transitory **I**ncrease in **P**rice' ("**SSNIP**"). The SSNIP test considers whether the suppliers/producers within the 'market' (i.e. the market as it is defined by the proposed market definition) are able to increase the price of Product X (i.e. the good or service which they produce or supply) without experiencing demand-side substitution or supply-side substitution as a measure of the

- competition within that market. If suppliers/producers with a market (howsoever described) cannot collectively increase the price of Product X without worrying about substitution then the SSNIP test concludes that there must be 'close competition' within that market.
5. If the SSNIP test is used to test whether a market definition for a particular product or service (i.e. Product X) is correctly defined in terms of its geographic boundaries, then that test will entail:
    - 5.1 Firstly, an assumption that the market for the Product X is a monopoly (i.e. it assumes one of the producers/suppliers of Product X has acquired or merged with all other producers/suppliers of Product X within the relevant geographical boundary).
    - 5.2 Secondly, a consideration of whether demand-side substitution and/or supply-side substitution would take place if the monopolist increased the price of Product X by a SSNIP.
    - 5.3 If the SSNIP is likely to cause some substitution of Product X in those circumstances, then the SSNIP test is indicating that the market definition is too narrow. In that event, the definition of the market can be expanded and the SSNIP test can be undertaken again. The correct market definition will be determined when the market is defined in terms which are as narrow as possible while still allowing a hypothetical monopolist to increase the price of Product X without any substitution taking place. The logical extreme of this, in terms of the geographical area of the market, would be defining the market of Product X as a global market.
  6. As explained in Dr Fallon's Report:-
 

*"This paradigm [(i.e. the concept which underpins the SSNIP test)] is accepted by the Australian Competition and Consumer Commission (ACCC 1999) and by the Courts in Australia and in other jurisdictions, but there are three difficulties in its practical application. First, a significant price increase is not defined, although 5–10 per cent is often used as a benchmark. Second, it is often quite difficult to determine the "competitive market" price. Third, there is usually very limited information about substitutes and likely responses so that the actual process used is usually quite qualitative. Despite these problems, this paradigm is widely used as a basic guide to define markets for the purposes of analysing competition (i.e. antitrust) issues.*

*Finally, following legal and economic precedent, a purposive approach to market definition is adopted. That is to say, market definition is not undertaken in a vacuum, but is undertaken to address the specific competitive issues of interest. This implies that it is difficult if not impossible to dissociate the process of market definition from the competitive concerns at hand. In other words, market definition is only a preliminary step in a competitive assessment exercise".*

(see clauses 2.4 & 2.5 of Dr Fallon's Report).
  7. Accordingly, GeelongPort's **primary submission** is that the SSNIP test, which the ACCC relies on in its 'Draft Notice' in respect of GeelongPort's 'Exclusive dealing notification' number N92776 (the "**Notification**"), is *not* a valid way of determining the market definition for the purposes of assessing whether the conduct described in the Notification (the "**Notified Conduct**") has the effect, or is likely to have the effect, of lessening competition for the purposes of section 93 of the *Trade Practices Act* (Cth) 1974 (the "**TPA**"). This means the conclusion that the ACCC has reached on the basis of the SSNIP test (i.e. that the Notified Conduct has the effect, or is likely to have the effect, of lessening competition) is invalid.

8. GeelongPort's *secondary submission* is that even if the SSNIP test were a valid way of determining whether the Notified Conduct has or is likely to have that effect (which is denied), *then* the correct application of the SSNIP test indicates that the ACCC's definition of the relevant market as "[the market for] *the provision of bulk cargo unloading equipment at the Port of Geelong*" (the "**ACCC Market Definition**") is far too narrow.

## 1.2 Recent statement on the SSNIP test

9. Without prejudice to GeelongPort's primary submission, we note that His Honour, Justice Sackville of the Federal Court adopted the following statement by Professor George Hay (a well respected expert economist) about the SSNIP test in His Honour's decision in *Seven Network -v- News Limited & Ors* [2007] FCA 1062 at [1777] (the "**C7 Decision**"). This statement support's GeelongPort's understanding of the SSNIP test, as explained in GeelongPort's earlier submissions in that relation to the issue of 'market definition' and as explained above.:-

*"[If we apply the SSNIP test to the proposed definition of a market for electric toothbrushes, then], we assume that all current producers of electric toothbrushes merge into one (or otherwise act as one) and ask whether the "hypothetical monopolist" could profitably increase or maintain prices above the competitive level by a "small but significant" amount for a sustained period of time. If so, then electric toothbrushes are a proper product market.*

*Both demand and supply side considerations can come into play when defining a market. We can ask not only how many consumers of electric toothbrushes would over time switch to manual toothbrushes (cross-elasticity of demand) but also the extent to which producers of related products (such as electric drills) could and would (in response to the assumed higher prices for electric toothbrushes) convert some or all of their facilities to the manufacture of electric toothbrushes and would succeed in making sales (cross-elasticity of supply)".*

## 1.3 Applying the SSNIP test to the Notified Conduct

10. *If we apply the SSNIP test to the ACCC Market Definition, in accordance with the explanation given for that test in the C7 Decision (see above) and Dr Fallon's explanation of that test, then:*
- 10.1 we must assume that *all* suppliers of bulk cargo unloading equipment (i.e. other than the suppliers of ship based cranes) have merged into one entity and then attempted to apply a SSNIP to their charges for unloading bulk cargoes at the Port of Geelong; and
- 10.2 in that event, GeelongPort believes that its customers who import bulk cargoes would elect to avoid the Port of Geelong and instead go to other ports to unload their cargoes, being:
- (a) at least, the Port of Melbourne; and
- (b) probably also, the ports of Portland, Adelaide and Port Kembla.
11. On that basis, GeelongPort maintains that the correct definition of the relevant market for competition purposes is *not* limited to the Port of Geelong, but includes all those ports which the GeelongPort's customers would seriously consider as alternatives for unloading their bulk cargoes.