



Australian
Competition &
Consumer
Commission

Draft Notice

in respect of a notification lodged by

GeelongPort Pty Limited

Date: 28 June 2007

Notification no. N92776

Public Register no. C2007/363

**Commissioners: Samuel
Sylvan
King
Martin
McNeill
Smith
Willett**

Summary

The ACCC has decided to issue a draft notice proposing to revoke exclusive dealing notification N92776 lodged by GeelongPort Pty Limited (GeelongPort).

The notification process

The Australian Competition and Consumer Commission (ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act).

Section 47 of the Act describes conduct known as exclusive dealing. Broadly, exclusive dealing involves one trader imposing restrictions on another person's freedom to choose with whom, in what or where they deal.

A form of exclusive dealing is the supply of goods or services on condition that the buyer will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier. Such exclusive dealing is prohibited where it would substantially lessen competition.

Businesses may obtain immunity for conduct that might risk breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the ACCC.

The ACCC may revoke a notification for exclusive dealing if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition and the likely benefit to the public will not outweigh the detriment to the public from the lessening competition.

The notification

GeelongPort lodged the notification with the ACCC on 19 January 2007. It described the notified conduct as involving it providing access to Lascelles Wharf in Geelong Port on condition that potential port users use GeelongPort's figee cranes for the purpose of unloading fertiliser and other dry bulk cargos.

The proposed requirement on customers to use GeelongPort's figee cranes is subject to their availability. Customers are also required to use GeelongPort's hoppers and grabs in conjunction with the figee cranes.

Background

GeelongPort submits the aim of the notified conduct is to maximise port efficiency.

GeelongPort advises that the figee cranes were installed at Lascelles Wharf at the request of customers around 12 years ago. Until recently it has been standard practice for all bulk discharge customers to use the figee cranes. GeelongPort has now decided to lodge the notification as a result of a small number of its customers increasing the volume of cargo discharged at Lascelles Wharf using cranes onboard vessels (referred to as 'ships' cranes'), rather than the shore based figee crane discharge system.

GeelongPort advises that in the absence of an ability for it to require port users to use the figee cranes at Lascelles Wharf when they are available, it expects the volume of

cargo discharged using ships' cranes will grow, which they submit will have a detrimental impact on port efficiency.

ACCC assessment

The ACCC considers the notified conduct effectively restricts customers from electing to use ships' cranes to discharge fertiliser and other dry bulk cargoes at Lascelles Wharf, and consequently, from hiring mobile discharge equipment (that is, hoppers and grabs) from competitors of GeelongPort.

The ACCC considers the notified conduct imposes a significant barrier to existing and future suppliers of bulk discharge equipment from operating at Lascelles Wharf. The ACCC considers the notified conduct is likely to result in a substantial lessening of competition for the provision of bulk cargo unloading equipment at the Port of Geelong. Therefore that ACCC considers the anti-competitive detriment resulting from the notified conduct is substantial, particularly demonstrated by:

- customers being prevented from choosing between alternative suppliers of bulk discharge equipment based on price and other commercial considerations
- higher port charges for some customers
- removal of competitive pressure on GeelongPort.

The ACCC notes that there are other less restrictive ways for GeelongPort to achieve its stated objectives.

The ACCC considers the notified conduct is likely to result in some public benefit. The ACCC is not satisfied that imposing a requirement to use the figee cranes is likely to result in significant efficiency gains at Lascelles Wharf, particularly given that the majority of interested parties have expressed a preference for using the figee cranes regardless, and that customer receival rates and other factors largely drive the figee crane discharge rate.

Overall, the ACCC is satisfied that the conduct described in the notification has the purpose or effect, or is likely to have the effect, of substantially lessening competition and that the benefit to the public that has resulted or is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition from the conduct.

Draft notice

Accordingly, the ACCC gives notice under section 93A of the Act that it proposes to issue a Notice under section 93(3) of the Act in respect of notification N92776. Such a Notice, if issued, would remove the immunity provided by the notification 31 days after the date the ACCC issues the Notice.

The next steps

The ACCC will now seek further submissions from interested parties. In addition, GeelongPort or any interested party may request that the ACCC hold a conference in relation to this Draft Notice, in accordance with section 93A of the Act.

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List of abbreviations

BSBC	Bruce Stevens Bulk Cargo Services Pty Ltd
ESA	Eastern Shipping Associates Pty Ltd
ESC	Essential Services Commission
GeelongPort	GeelongPort Pty Limited
Price Monitoring Determination	<i>Price Monitoring Determination for the Victoria Ports, 30 March 2005</i>
PSA	<i>Port Services Act 1995</i>
TGP	Toll GellongPort
The Act	<i>Trade Practices Act 1974</i>
VRCA	Victorian Regional Channels Authority

1. Introduction

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2 Section 47 of the Act describes conduct known as exclusive dealing. Generally speaking, exclusive dealing involves one business which trades with another, imposing restrictions on the freedom of the second business to choose with whom, or in what, it deals. In some cases, exclusive dealing is prohibited per se – in others, only where it has the purpose, effect or likely effect of substantially lessening competition.
- 1.3 A form of exclusive dealing is the supply of goods or services on condition that the buyer will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier. Such exclusive dealing is prohibited where it would substantially lessen competition.
- 1.4 Businesses may obtain immunity in relation to conduct that might be at risk of breaching these exclusive dealing provisions of the Act by lodging a ‘notification’ with the ACCC. Once lodged, immunity for the notified conduct commences automatically.
- 1.5 The ACCC may revoke such a notification where it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition within the meaning of section 47 and it has not resulted or is not likely to result in a benefit to the public, or any benefit to the public that has resulted or is likely to result from the proposed conduct would not outweigh the detriment to the public constituted by any lessening of competition that has resulted from or likely to result from the conduct.
- 1.6 In effect, revoking a notification removes the immunity conferred by lodging the notification. The ACCC conducts a public consultation process before making a decision to revoke a notification.
- 1.7 The Act requires that, prior to issuing a notice revoking the immunity afforded under the notification process, the ACCC must first issue a draft notice setting out its reasons and providing an opportunity for interested parties to request a conference.
- 1.8 This document is a draft notice to revoke in relation to notification N92776 lodged by GeelongPort Pty Limited (GeelongPort) with the ACCC on 19 January 2007.
- 1.9 Notification N92776 describes the conduct as:

GeelongPort proposes to provide access to Lascelles Wharf in Geelong Port on condition that potential port users use GeelongPort’s figee cranes for the purpose of unloading fertiliser and other dry bulk cargos.

1.10 GeelongPort considers the notified conduct may potentially constitute exclusive dealing under section 47(2)(d) of the Act.

Chronology

1.11 Table 1.1 provides a chronology of significant dates in the consideration of this matter. The ACCC received submissions from interested parties at various stages, as GeelongPort implemented the notified conduct at Lascelles Wharf.

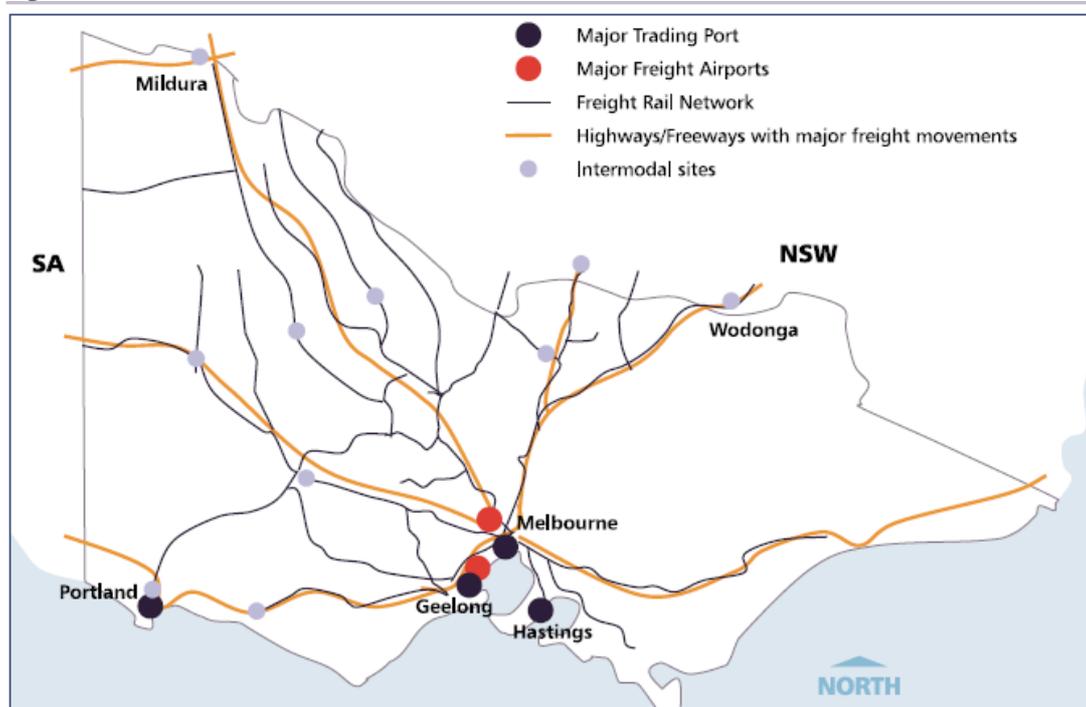
DATE	ACTION
19 January 2007	Exclusive dealing notification N92776 lodged with the ACCC. Immunity commenced from this date.
1 February 2007	Information requested from GeelongPort.
19 February 2007	Closing date for submissions from interested parties in relation to the notified conduct.
19 February 2007	Information received from GeelongPort.
19 March 2007	Submission received from GeelongPort in response to issues raised by interested parties the ACCC.
20 March 2007	Meeting with GeelongPort to discuss issues raised in public submissions from interested parties.
27 March 2007	Meeting with Bruce Stevens Bulk Commodities Pty Ltd to discuss the exclusive dealing notification.
20 April 2007	Additional public submissions received from interested parties provided to GeelongPort.
27 April 2007	Additional public submission received from interested party provided to GeelongPort.
16 May 2007	Submission received from GeelongPort in response to issues raised in interested party submissions.
28 June 2007	Draft notice issued

2. Background

Commercial trading ports in Victoria

2.1 There are four commercial trading ports in Victoria – the ports of Melbourne, Geelong, Portland and Hastings. Figure 1 shows the location of these ports and key transport networks. The landside assets of the ports of Geelong and Hastings are owned and operated by private businesses. The ports of Melbourne and Hastings are in public ownership under the control of two statutory port corporations. The operation of the Port of Hastings is contracted by the port corporation to a private business.

Figure 1¹



¹ Sourced from Department of Infrastructure Victoria, *Victorian Ports Strategic Framework November 2006*, p1, viewed at www.doi.vic.gov.au on 15 May 2007.

The Port of Geelong

- 2.2 The Port of Geelong was privatised in July 1996 and is now owned by a consortium of Hastings Funds Management (35%), Reef Infrastructure (35%) and Toll Holding Ltd (30%).² GeelongPort, a division of Toll Holdings Ltd³, manages the Port of Geelong, except for Point Wilson Explosives Pier (Commonwealth Government) and Bulk Grain Pier Number 3 (GrainCorp).
- 2.3 There are approximately 550 ship visits to Geelong Port per year. The port handles 25 per cent of Victoria's overseas exports (12 million tonnes), most of which are raw materials like petroleum products, bulk and bagged grain and woodchips. Crude oil, petroleum products and fertiliser raw material dominate the port's imports. The volume of trade through the port has grown by ten per cent a year in the past five years.⁴
- 2.4 The following facilities are located at the Port of Geelong:

Facility	Product type
Pt. Henry Pier	Aluminium smelting raw materials
Bulk Grain Pier No. 1	Bulk grain, lay-up
Bulk Grain Pier No. 2	
Bulk Grain Pier No. 3	
Corio Quay North Nos. 1, 2, & 3 Corio Quay South Nos. 1	Woodchip, bulk and general
Lascelles Wharf Nos. 1, 2, & 3	Dry bulk and general
Refinery Pier Nos. 1, 2, 3, & 4	Bulk liquids and gases
Pt. Wilson Explosives Pier	Dangerous and explosive cargo

² Toll GeelongPort *Your Total Logistics Solution*, brochure viewed on Toll Ports' website <http://www.tollports.com.au> 16 March 2007.

³ On 11 March 2006, the ACCC announced that it decided that the proposed acquisition of Patrick Corporation Limited by Toll Holdings Limited would not have the effect of substantially lessening competition after taking into account court enforceable undertakings given to the ACCC by Toll Holdings pursuant to section 87B of the Act. On 18 April 2007, the ACCC consented to a variation to Toll Holdings' undertaking in connection with a proposed restructure of Toll Holdings' business. The restructure involves a clean separation of Toll Holdings' logistics and infrastructure assets into two separate and unrelated companies. This has resulted in the creation of a new listed company, Asciano Limited, and the transfer of the assets, entities and or businesses that comprise Toll Holdings' infrastructure assets to this company.

⁴ Department of Infrastructure Victoria website, <http://www.doi.vic.gov.au>, viewed 16 March 2007.

*The Port of Portland*⁵

- 2.5 The Port of Portland is a deep water bulk port located between Melbourne and Adelaide. The port specialises in the storage and handling of bulk commodities. Approximately 4 million tonnes of cargo are moved through the port annually. In 2006, 450 ships moved through the port.⁶ Cargoes exported include grain, woodchips, logs, aluminium ingots and livestock. The major commodities imported through the port include alumina, liquid pitch and fertiliser products.

*Port of Hastings*⁷

- 2.6 The Port of Hastings is a deep water port located in the north arm of Western Port Bay, 72 km southeast of Melbourne. Cargoes moved through the port include oil, LPG, ULP and steel. Trade comprises approximately 3 million tonnes of petroleum products (oil, LPG and ULP) and 1 million tonnes of steel product per year. Around 180 vessel visits are recorded each year with vessels ranging in size up to 100 000 tonnes.
- 2.7 The Port of Hastings' facilities are owned by the Victorian government through Hastings Port (Holdings) Corporation. Steel Wharfs No's 1 and 2 are owned and operated by Bluescope Steel.⁸
- 2.8 Toll WesternPort manages the Port of Hastings, including Long Island Point, Crib Point, Stony Point Jetties and approaches.

The Port of Melbourne

- 2.9 The Port of Melbourne is Australia's largest and busiest container port, handling nearly 40 per cent of national container trade. It is also the largest automotive port in Australia and one of the largest general cargo ports. Approximately 3200 ships move through the port per year.
- 2.10 The Port of Melbourne has 34 commercial berths at five docks. The berths service two purpose-built international container terminals as well as multi-purpose berths that handle cargoes ranging from timber to motor vehicles and specialised berths for dry cargoes including cement, grain, sugar, fly ash and gypsum. The port also has dedicated bulk liquid facilities.⁹
- 2.11 In 2005-06 containerised cargo comprised 69 per cent of total trade at the port. Break bulk cargoes accounted for 13 per cent of total trade, liquid bulk 8 per cent, dry bulk 6 per cent and other 4 per cent.¹⁰
- 2.12 The port is managed by the Port of Melbourne Corporation (PoMC) which was established on 1 July 2003 under the *Port Services Act 1995* (PSA).

⁵ Information contained under this heading was obtained from the Port of Portland website, www.portofportland.com.au, viewed 15 May 2007.

⁶ Essential Services Commission Price Monitoring Report 2005-06, February 2006, p9, viewed at www.esc.vic.gov.au on 18 June 2007.

⁷ Unless otherwise stated, information contained under this heading was obtained from the Port of Hastings Corporation Annual Report 2005-06.

⁸ Toll Ports website, <http://www.tollports.com.au>.

⁹ Port of Melbourne Corporation *Annual Report 2005-06*, p10.

¹⁰ *Ibid*, p22.

The PoMC owns and manages the land within the Port of Melbourne. The PoMC is also responsible for the commercial navigation channels in the port waters of Melbourne.

- 2.13 Within the port, private terminal operators provide stevedoring services to operate dedicated ship loading and cargo handling equipment.¹¹ Common user facilities for general cargo are operated by the PoMC.

Government agencies

Victorian Regional Channels Authority¹²

- 2.14 The Victorian Regional Channels Authority (VRCA) commenced operations on 1 April 2004. The VRCA was established by the Victorian Government under the *Port Services (Port Management Reform) Act 2003*, to manage the commercial navigation of the channels in Geelong Port and to manage the channel licences for the Port of Hastings and Port of Portland.

- 2.15 At Geelong, the VRCA's key responsibilities include:

- management of shipping control
- provision of navigation aids
- channel management
- marine environment protection
- safety and security.

Essential Services Commission

- 2.16 The PSA declares the port industry in the commercial ports of Melbourne, Geelong, Portland and Hastings to be a regulated industry for the purposes of the *Essential Services Commission Act 2001*. The Essential Services Commission (ESC) therefore, has an ongoing regulatory role in relation to basic infrastructure services at these ports.

- 2.17 The PSA provides a price monitoring framework for the following Prescribed Services¹³ within the ports of Melbourne, Geelong, Portland and Hastings:¹⁴

- the provision of channels for use by shipping
- the making available of berths, buoys or dolphins in connection with the berthing of vessels

¹¹ Ibid, p11.

¹² Information under this heading was obtained from the VRCA's website, www.regionalchannels.vic.gov.au.

¹³ As described in paragraphs 49(c)(i), 49(c)(ii) and 49(c)(iii) of the Port Services Act.

¹⁴ Essential Services Commission, *Implementation of Price Monitoring Framework*, viewed at www.esc.vic.gov.au.

- the provision of short term storage or cargo marshalling facilities in connection with the loading or unloading of vessels at adjacent berths, buoys or dolphins.

2.18 The ESC has implemented a price monitoring framework through the Price Monitoring Determination¹⁵ since 1 July 2005. The key features of the framework are that:

 - port operators determine and publish Reference Tariff Schedules to set out standard terms and conditions for providing Prescribed Services
 - port users and port operators may negotiate prices for Prescribed Services that differ from the published reference tariff
 - prices of prescribed port services are subject to monitoring by the ESC
 - the ESC will publish an annual Monitoring Report to provide information to interested parties on the provision of prescribed port services.

2.19 Section 2.1.4 of the Price Monitoring Determination notes that a Reference Tariff Schedule for the supply of berth services would need to specify each prescribed price relating to berth services, such as charges for wharfage (including the different rates for different types of cargo), any charges for berth hire or for other facility hire, and charges for other relevant services. The ACCC understands that the figee cranes at Lascelles Wharf are not a Prescribed Service.

2.20 Section 2.1.1 of the Price Monitoring Determination states that in publishing Reference Tariff Schedules for Prescribed Services, the providers of such services are not required to seek the ESA's approval of those Reference Tariff Schedules.

2.21 The ESC's Annual Monitoring Reports may include information about:¹⁶

 - changes to Reference Tariffs over the previous 12 months
 - the extent of discounting from the Reference Tariffs
 - changes to the costs of providing Prescribed Services or related services
 - changes in profitability of providers of Prescribed Services
 - capital expenditure undertaken by providers of Prescribed Services
 - trends in efficiency
 - trends in service levels and

¹⁵ Essential Services Commission, *Price Monitoring Determination for the Victorian Ports*, 30 March 2005.

¹⁶ Section 4.1.2 of the *Price Monitoring Determination for the Victorian Ports*, 30 March 2005.

- complaints made to the ESC about the market conduct of providers of Prescribed Services, including complaints about the setting of Prescribed Prices.

Lascelles Wharf

- 2.22 Lascelles Wharf at the Port of Geelong comprises three common user berths. The wharf is 621 metres in total length and the depth alongside the wharf is 12.3 metres. There are two shore-based rail mounted figee cranes which can be located alongside berths two and three only, and are capable of discharging bulk cargoes up to 450 tonnes per hour per crane.¹⁷ The average discharge rate of the figee cranes, allowing for hold clean outs, is approximately 290 tonnes per hour.¹⁸
- 2.23 Each figee crane is linked to a mobile hopper which can discharge direct to road trucks or to a wharf conveyor. The wharf conveyor runs along the length of No.2 berth and discharges either to a truck loading station or to an onsite storage shed. A wharf receival hopper is located at the northern end of Lascelles No.2 berth, allowing self discharge vessels to unload directly to the storage shed or truck loading facility.
- 2.24 Lascelles No. 1 berth is not capacity rated to accommodate a figee crane and it is too narrow for safe operation and turning of trucks for bulk unloading. This berth is primarily used to discharge sulphuric acid.
- 2.25 There are two storage sheds located alongside the wharf. These sheds are owned by Ports Pty Ltd and leased to Incitec Pivot Limited and Huntergrain under contract.¹⁹
- 2.26 The average number of vessel arrivals at Lascelles Wharf per annum is 135. The majority of these vessels carry fertiliser. In particular, the typical split between cargo types is:
- fertiliser – 76 ships
 - other dry bulk – 10 ships
 - break bulk (steel, aluminium ingots, paper pulp) – 12 ships
 - bulk liquids (acid) – 25 ships
 - other – 12 ships.²⁰
- 2.27 As previously mentioned, the notified conduct only relates to the use of figee cranes for the import of fertiliser and other dry bulk cargoes. Other dry bulk cargoes include gypsum, bentonite, cement, clinker, soybean meal, palm kernel and canola. GeelongPort advises that these products are typically unloaded using the figee cranes.

¹⁷ Toll GeelongPort *Your Total Logistics Solution* brochure.

¹⁸ GeelongPort's response to ACCC request for further information, 1 February 2007, p5.

¹⁹ GeelongPort record of meeting 20 March 2007, p2.

²⁰ GeelongPort's response to ACCC's request for further information, 1 February 2007, p1.

- 2.28 GeelongPort advises that the only other dry bulk product that presently comes through Lascelles Wharf is calcite, which is discharged by employing a vessel's self discharge system. Self-discharge vessels do not require the use of figee cranes or ships' cranes and rely on an inbuilt auger for discharge. GeelongPort advises that presently 120 000 tonnes of calcite are discharged by self discharging vessels at Lascelles Wharf.²¹
- 2.29 Break bulk and bulk liquid cargoes are not suitable for unloading by the figee cranes. Ships gear is used to discharge these products with specialised pumping gear and connections to handle acid.²²
- 2.30 The ships listed against 'other' relate to lay up and bunkering vessels, neither of which have any requirement for figee or ships' cranes.
- 2.31 In 2005-06 the total volume of cargo discharged at Lascelles Wharf was approximately 1 410 120 tonnes. Of this number:²³
- 85 per cent of cargo was discharged using the figee cranes
 - 10 per cent of cargo was discharged by self discharge vessels
 - 2 per cent of cargo was discharged using ships' gear
 - 3 per cent of cargo was discharged using the shore conveyor ship loader.
- 2.32 In 2006-07, the forecast total volume of cargo discharged at Lascelles Wharf is 1 186 504 tonnes. Of this number, GeelongPort expects:²⁴
- 83 per cent of cargo to be discharged using figee cranes
 - 8 per cent of cargo to be discharged from self-discharge vessels
 - 7 per cent of cargo to be discharged using ships' gear
 - 2 per cent of cargo to be discharged using the shore conveyor ship loader.
- 2.33 Customers incur the following charges to discharge cargo at Lascelles Wharf:
- Berth hire - \$203.69 per hour (while the vessel is alongside the berth)
 - Facility hire (wharfage) - \$0.909 per tonne of cargo discharged
 - Figee crane rates – a sliding scale from \$2.80 to \$7.58 per tonne is adopted based on tonnes discharged.

²¹ Record of meeting with GeelongPort, 20 March 2007, p2.

²² Ibid.

²³ GeelongPort's response to ACCC request for further information, 1 February 2007, p2.

²⁴ Ibid.

2.34 Table 2.1 summarises GeelongPort's current figee crane rates:

Table 2.1 – current figee crane rates at Lascelles Wharf²⁵

Volume discharged	Rate per tonne (inclusive of standby labour)
Up to 4000 tonnes	\$7.58
4000 - 5000	\$6.20
5000 - 6000	\$5.44
6000 - 8000	\$5.18
8000 - 11 000	\$4.85
11 000 - 15 000	\$4.51
15 000 - 17 000	\$4.14
17 000 - 18 000	\$3.83
18 000 - 20 000	\$3.47
20 000 - 22 000	\$3.13
22 000 +	\$2.80

2.35 GeelongPort advises that for major customers, specific rates and packages are usually negotiated directly with GeelongPort, rather than being set by the tariff schedule in Table 2.1. Figee crane charges can be significantly reduced from tariff rates when volume agreements are established. It submits that it is open for all port customers to negotiate specific rates and contract terms and fixed contract periods with GeelongPort if they wish to do so. For example, Incitec Pivott has a detailed set of negotiated contract terms that arose due to Incitec Pivott wanting to lock in agreed rates and special conditions for a fixed contract period.

2.36 GeelongPort also advises that customers are encouraged to share cargo space on the same vessel in order to reduce figee crane costs. In these circumstances, the figee crane charge is calculated based on the total volume of cargo onboard the vessel, rather than on the individual customer cargoes. GeelongPort advises that it is common place for fertiliser companies to share cargoes.

Unloading cargo²⁶

2.37 When a customer requires access to Lascelles Wharf, the ship's agent, on behalf of that customer, submits various application forms to GeelongPort – that is, an Application for Berth and an Application for Facility Hire (covering the berth platform and the berth operating area allocated by GeelongPort to the ship). An Application for Port Services is also submitted where various services are required onboard the vessel such as, fresh water or garbage removal.

²⁵ Ibid, p4.

²⁶ Information under this heading was obtained from GeelongPort's response to ACCC request for information, 16 February 2007.

- 2.38 In completing these application forms, the ship's agent acknowledges GeelongPort's rates and charges on behalf of the customer, as well as adherence to a detailed set of Port Standards and Procedures. GeelongPort invoices the ship's agent for berthing and vessel services, and charges the cargo owner/customer directly for facility hire (wharfage).
- 2.39 Equipment use, including the hire of figee cranes, is organised by the stevedore who is engaged by the relevant customer. The stevedore completes what is known as a requisition for equipment (or Agreement for Lease of Equipment) with GeelongPort. GeelongPort bills the customer directly for hire charges. When the stevedore provides a quote to a port customer, the generally accepted practice is to exclude equipment hire from the quote.

Suppliers of bulk discharge equipment

- 2.40 Other businesses currently provide mobile discharge equipment (that is, hoppers and grabs) to customers for use at Lascelles Wharf when discharging cargo using ships' cranes and self discharging mechanisms.
- 2.41 In particular, GeelongPort advises that there are currently two other businesses that supply hoppers at Lascelles Wharf – namely, Bruce Stevens Bulk Commodities Pty Ltd, and Incitec Pivot Limited.²⁷
- 2.42 In addition, GeelongPort submits there are two other suppliers of grabs at Lascelles Wharf – namely, Bruce Stevens Bulk Commodities Pty Ltd and the ship owners themselves.²⁸
- 2.43 GeelongPort advises that Bulk Cargo Services Pty Ltd has supplied grabs in the past and would appear to also be a viable alternative supplier of hoppers and grabs at Lascelles Wharf.²⁹

Stevedores

- 2.44 Toll's stevedoring services compete with Dubai World Ports (formerly P&O) for stevedoring work at Lascelles Wharf.³⁰
- 2.45 GeelongPort advises that each shift to discharge a vessel using a single figee crane requires three stevedores – one to operate the hopper and two rotating through the crane.³¹ The ACCC understands the same number of stevedores would be required to discharge cargo using a single ship's crane.

²⁷ GeelongPort supplementary submission in response to interested parties, 16 March 2007, p8.

²⁸ Ibid.

²⁹ GeelongPort supplementary submission in response to interested parties, 16 May 2007, p5.

³⁰ GeelongPort's response to ACCC request for further information, 1 February 2007, p3.

³¹ Ibid, p6.

Newcastle Port

- 2.46 GeelongPort advises that Lascelles Wharf is only one of two common user facilities in Australia that have shore based cranes for unloading bulk cargoes. The other is 'K2 Terminal' at Kooragang Island in Newcastle.³²
- 2.47 K2 Terminal is leased from the Newcastle Port Corporation by P&O Ports. It is a common user facility which operates on a 'first come first served' basis. Two shore-based gantry cranes are available to unload dry bulk cargoes such as fertilisers, phosphate rock, ores and meals. The gantry cranes have two 80 tonne hoppers and are capable of unloading at a rate of 600 tonnes per hour. Dust extraction systems have recently been installed on both gantry cranes.³³
- 2.48 The ACCC understands that customers at K2 Terminal are charged a flat rate of around \$2.50 per tonne to use the gantry cranes.
- 2.49 The ACCC also understands that P&O prefers customers to use the gantry cranes to unload but it is not a requirement of berthing at K2 Terminal. P&O may discount their berthing charges or other charges to parties that use P&O stevedores and the gantry cranes.
- 2.50 Having said that, due to the terminal's proximity to residential areas, the ACCC understands that Newcastle Port Corporation will not allow unloading of certain fine cargoes (including fertiliser) by ships' gear on windy days.
- 2.51 K2 Terminal unloads approximately 1 million tonnes of product per annum, of which approximately 20 per cent is unloaded using ships' gear.

³² Record of meeting with GeelongPort, 20 March 2007, p2.

³³ Newcastle Port Corporation website www.newportcorp.com.au, *Facilities*, viewed 28 May 2007.

3. The notified conduct

3.1 As previously mentioned, the notified conduct involves:

GeelongPort proposes to provide access to Lascelles Wharf in Geelong Port on condition that potential port users use GeelongPort's figee cranes for the purpose of unloading fertiliser and other dry bulk cargos.

3.2 GeelongPort advises that the figee cranes were installed at Lascelles Wharf at the request of customers around 12 years ago. Until recently it has been standard practice for all bulk discharge customers to use the figee cranes. GeelongPort has now decided to lodge the notification as a result of:

...a shift to ships' cranes away from the figee cranes by a few fertiliser importers in recent times.³⁴

3.3 GeelongPort advises that in the absence of an ability for it to require port users to use the figee cranes at Lascelles Wharf when they are available, it is expected that the volumes of cargo discharged using ships' cranes will grow. In particular, it notes that in 2005-06 the total volume of cargo discharged using ships' gear was 2 per cent. In 2006-07 GeelongPort expects this figure to increase to 7 per cent. Without the notified conduct, GeelongPort believes the volume of cargo discharged using ships' gear would increase to 20 per cent in 2007/08, which will have a detrimental impact on port efficiency.

3.4 GeelongPort submits the aim of the exclusive dealing conduct is to maximise port efficiency.³⁵

Operation of the conduct in practice

3.5 GeelongPort submits the proposed requirement to use figee cranes is subject to their availability.³⁶ Port users also have to use GeelongPort's hoppers and grabs in conjunction with the figee cranes.

3.6 GeelongPort advises that should a customer wish to use ships' cranes, rather than figee cranes, the customer would not be denied access to a berth, but would be denied permission to discharge their fertiliser or other dry bulk cargo using ship's gear where the figee cranes are available.³⁷

3.7 While GeelongPort proposes to impose this requirement on all port users, it submits that current port users that might have to adjust their operations, and are therefore most affected by the notified conduct, are three fertiliser companies – namely, HiFert Pty Ltd, Interfert Australia Pty Ltd and Impact Fertilisers Pty Ltd.³⁸

³⁴ GeelongPort supplementary submission in response to interested party submissions, 16 March 2007, p9.

³⁵ GeelongPort supplementary submission in response to interested party submissions, 16 May 2007, p6.

³⁶ GeelongPort's submission in support of notification N92776, 19 January 2006, p1.

³⁷ GeelongPort's response to ACCC request for further information, 1 February 2007, p3.

³⁸ GeelongPort submission in response to interested parties, 16 March 2007, p10.

- 3.8 There are three berths at Lascelles Wharf. GeelongPort advises that only two of these are suitable for bulk discharge – Lascelles No.2 and Lascelles No.3. There are two figee cranes at the wharf, with one crane typically allocated to Lascelles No.2 and one crane to Lascelles No.3.
- 3.9 In the event that two vessels are berthed at the wharf, GeelongPort advises that one figee crane will be allocated to each berth for bulk discharge.
- 3.10 If there is only one vessel berthed at the wharf and two holds are to be discharged, then the second figee crane will be required to be used, unless a second vessel is due along the berth to commence loading within the first discharge shift of the first vessel.³⁹
- 3.11 In addition, GeelongPort advises that if there is an ability to have two holds discharged on the one vessel at the same time, and the other figee crane is unavailable then the ships' gear may be used on the second hold.⁴⁰ However, the ACCC understands this is subject to the customer demonstrating that a substantial productivity improvement can be achieved.⁴¹
- 3.12 Further, GeelongPort advises that if one customer agrees to forgo their allocated figee crane and allow the other vessel to employ two figee cranes whilst they use ships' gear, then GeelongPort would agree to this arrangement.⁴²
- 3.13 If, after discharge commences using ships gear, and on account of the unavailability of the figee crane, the use of ships gear may continue for the balance of the shift. However, if the figee crane becomes available, it must be used from the next available shift change.⁴³
- 3.14 Figee cranes may also be unavailable for use due to damage, repairs or breakdown. In these circumstances, GeelongPort advises that it has no problems with customers using ship's gear.⁴⁴
- 3.15 The proposed conduct does not include a requirement to use Toll's stevedoring services at Lascelles Wharf.⁴⁵
- 3.16 Apart from availability of the figee cranes, GeelongPort also advises that it will allow the use of ships' gear in certain other circumstances. It submits that it will consider requests to use a ship's cranes on a case by case basis.⁴⁶

³⁹ GeelongPort letter to customers, 21 February 2007 *Attachment 1 Proposed procedures for future figee crane use at Lascelles Wharf*, provided as an attachment to the submission from Bruce Stevens Bulk Commodities dated 5 March 2007.

⁴⁰ GeelongPort's response to ACCC request for further information, 1 February 2007, p3.

⁴¹ GeelongPort letter to customers, 21 February 2007 *Attachment 1 Proposed procedures for future figee crane use at Lascelles Wharf*, provided as an attachment to the submission from Bruce Stevens Bulk Commodities dated 5 March 2007.

⁴² GeelongPort's response to ACCC request for further information, 1 February 2007, p3.

⁴³ GeelongPort letter to customers, 21 February 2007 *Attachment 1 Proposed procedures for future figee crane use at Lascelles Wharf*, provided as an attachment to the submission from Bruce Stevens Bulk Commodities dated 5 March 2007.

⁴⁴ GeelongPort's response to ACCC request for further information, 1 February 2007, p3.

⁴⁵ Ibid.

⁴⁶ Record of meeting with GeelongPort, 20 March 2007, p3.

1999 section 87B undertakings

3.17 Some interested parties have raised the issue of section 87B undertakings that were given to the ACCC by Toll Transport Pty Ltd and GeelongPort Pty on 21 July 1999. These interested parties have expressed concern that the notified conduct might breach the undertakings.

3.18 In particular, one of the obligations on GeelongPort under the undertaking is:⁴⁷

- GeelongPort will not hinder or prevent the operator of any business which:
 - uses or proposes to use the Port of Geelong for land transport or freight forwarding operations, the movement by sea of goods or produce or
 - provides or proposes to provide services at the Port of Geelong for the purpose of its business

from having access to berths, cargo marshalling areas, navigational control services, access roads within the Port of Geelong and amenity services for workers at the Port of Geelong for the purpose of its business.

3.19 The ACCC considers the assessment of this exclusive dealing conduct is a separate issue. The ACCC will consider its position in relation to the notification separate from dealing with any concerns that may or may not be present vis-à-vis the 1999 undertakings.

⁴⁷

GeelongPort Pty Ltd section 87B undertaking, 99/29C, 21 July 1999.

4. Statutory provisions

- 4.1 Section 47(1) of the Act provides that a corporation shall not engage in the practice of exclusive dealing. Section 47(2) then provides that the practice of exclusive dealing includes the supply of goods or services on condition that the purchaser will not acquire, or will limit the acquisition of goods or services from a competitor of the supplier, where the condition has the purpose, effect or likely effect of substantially lessening competition.
- 4.2 Section 93(1) of the Act provides that a corporation that engages or proposes to engage in conduct of a kind referred to in section 47 may give to the ACCC notice, as prescribed, setting out particulars of the conduct or proposed conduct. The effect of lodging such a notification is to afford protection to the corporation for engaging in the said conduct from legal proceedings under the Act.
- 4.3 The ACCC assesses notifications involving exclusive dealing under section 47(2) by applying the public interest test in section 93(3) of the Act. This test states that the ACCC may move to revoke a notification for exclusive dealing if it is satisfied that the conduct described in the notification has the purpose or has or is likely to have, the effect of substantially lessening competition within the meaning of section 47 and that in all the circumstances:
- the conduct has not resulted or is not likely to result in a benefit to the public or
 - any benefit to the public that has resulted or is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct.
- 4.4 Section 47(13) of the Act states that the reference to competition shall be read to mean competition in *any* market in which:
- the business engaging in the exclusive dealing conduct or
 - any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct
- supplies or acquires, or is likely to supply or acquire goods or services, or would, but for the conduct, supply or acquire goods or services.
- 4.5 To revoke a notification, the ACCC may, at any time, give a notice in writing outlining its reasons. The effect of giving such a notice is to revoke the immunity afforded by lodging the notification.
- 4.6 Before revoking the immunity obtained by a notification, the ACCC must first issue a draft notice of its intention and give the notifying party and interested parties the opportunity to respond and to call a conference to discuss the draft notice.⁴⁸

⁴⁸ Section 93A(1) and section 93A(2) of the *Trade Practices Act 1974*.

5. Submissions received by the ACCC

- 5.1 GeelongPort provided a submission in support of its exclusive dealing notification.
- 5.2 In its notification, GeelongPort identified three of its customers at Lascelles Wharf as being affected by the notified conduct. The ACCC invited submissions from the three customers identified by GeelongPort – namely, Hi Fert Pty Ltd, Interfert Australia Pty Ltd and Impact Fertilisers Pty Ltd.
- 5.3 The ACCC subsequently received public submissions from:
- Interfert Australia Pty Ltd (Interfert)
 - Impact Fertilisers Pty Ltd (Impact Fertilisers)
 - Bruce Stevens Bulk Commodities Pty Ltd (BSBC)
 - BioAg
 - GrainCorp
 - Blue Circle Southern Cement
 - Omya Australia & New Zealand (Omya)
 - Eastern Shipping Associates Pty Limited (ESA).
- 5.4 Interfert, Impact Fertilisers, BSBC, Omya and ESA oppose the notified conduct.
- 5.5 BioAg, GrainCorp and Blue Circle Southern Cement support GeelongPort’s exclusive dealing notification.
- 5.6 GeelongPort provided further submissions in response to interested party submissions and requests for further information from the ACCC.
- 5.7 The ACCC also sought information from Bulk Cargo Services Pty Ltd, a supplier of bulk discharge equipment at ports around Australia, and P&O Ports which manages a similar bulk cargo unloading facility in Newcastle.
- 5.8 The views of GeelongPort and interested parties are summarised in the ACCC’s evaluation of the notified conduct in Chapter 6 of this Draft Notice. Copies of public submissions are available on the ACCC’s website (www.accc.gov.au) by following the ‘Public Registers’ and ‘Authorisations and Notifications Registers’ links.
- 5.9 The ACCC received additional submissions from GeelongPort and BSBC shortly before issuing this Draft Notice. These submissions will be taken into account as part of the consultation process following release of this Draft Notice.

6. ACCC evaluation

The market

- 6.1 To assist with necessary assessment of the purpose, effect or likely effect of proposed conduct on competition, it is helpful to identify the relevant markets affected.

Submissions received

- 6.2 In its original submission in support of the notification, GeelongPort submitted that the relevant market for the purpose of assessing the impact of the proposed conduct on competition is the ‘market for port services’.⁴⁹
- 6.3 GeelongPort also submits that there are a number of other ports capable of unloading fertiliser and other dry bulk cargoes both within Victoria and interstate. These include the ports of Melbourne, Portland, Fremantle (Kwinana), Esperance, Albany, Bunbury, Geraldton, Adelaide, Port Kembla, Newcastle, Brisbane, McKay, Gladstone, Darwin, Townsville, and the Tasmanian ports at Bell Bay, Devonport and Burnie.⁵⁰
- 6.4 Further, GeelongPort submits that the ports of Melbourne and Geelong occupy a particularly close area of competition for both bulk and break bulk cargoes. In this regard, GeelongPort submits that:

It is not unusual for customers to move their business from Melbourne to Geelong or vice versa based on the overall service package they can negotiate and we suggest that similar options would be open at the Port of Portland and Port Kembla.⁵¹

- 6.5 GeelongPort believes it actively competes against the Port of Melbourne for bulk trades. It submits:

...a fertiliser company recently discharged a vessel in Geelong using the Figeer cranes and then carted it to Melbourne for storage. The opposite does also occur.⁵²

- 6.6 GeelongPort considers the following factors influence a customer’s choice of port: discharge method; berthing and facility hire charges; and transport costs.⁵³

- 6.7 In contrast, Impact Fertilisers submits that the relevant market is not the market for ‘port services’, rather it is the market for ‘grab discharge of vessels in the Port of Geelong.’ It submits that generally there are two competing providers, being shore based cranes (that is, figee cranes) and the ships’ cranes.⁵⁴

⁴⁹ GeelongPort’s submission in support of notification N92776, 19 January 2006, p1.

⁵⁰ GeelongPort’s response to ACCC request for further information, 1 February 2007, p1.

⁵¹ Ibid.

⁵² GeelongPort’s supplementary submission in response to interested party submissions, 16 May 2007, p4.

⁵³ Ibid.

⁵⁴ Submission from Impact Fertiliser, 23 February 2007, p1.

- 6.8 Another interested party, in a confidential submission to the ACCC, submits that the effect of the proposed conduct will also extend to suppliers of mobile discharge equipment currently servicing port users for vessel discharge at Lascelles Wharf as an alternative to GeelongPort's figee cranes.
- 6.9 Further, Impact Fertilisers submits that:
- Geelong Port is the only feasible option for bulk fertiliser importers in the Geelong area.⁵⁵
- 6.10 Similarly, Omya considers that Lascelles Wharf is the only economic method for supplying its Geelong Mill. In particular, it submits:
- Our company regularly uses this wharf to import calcite (Limestone) from our Bajool Quarry in Queensland via the Port of Gladstone, refines and distributes to industries in the Victorian region. It is the only economic method of supplying our Geelong Mill.⁵⁶
- 6.11 In response, GeelongPort submits some product is received in Geelong and trucked to Melbourne based storage. GeelongPort believes this suggests 'a preference for vessel berthing in Geelong against a shorter transport solution by berthing at Melbourne'. It submits that some Geelong-based customers (break bulk steal customers) berth vessels in Geelong and transport their cargo to Dandenong, located to the south east of Melbourne.⁵⁷
- 6.12 BSBC is of the view that fertiliser companies at Geelong Port would not shift volumes of cargo to the Port of Melbourne to take advantage of BSBC's lower unloading costs if they were no longer available in Geelong. BSBC considers that now these companies have storage sheds in Geelong, the costs of trucking fertiliser from Melbourne to Geelong would negate the cost saving in unloading. Having said this, BSC submits it might be viable to unload small volumes in Melbourne, if they were transporting cargo direct to customers, rather than into storage first.⁵⁸
- 6.13 BSBC is of the view that bulk commodity business has moved to Geelong Port from Melbourne due to increased volumes of container traffic at Melbourne. This increase has resulted in trucking congestion at the Port of Melbourne and the city.

ACCC view

- 6.14 Market definition is purposive, meaning the market may be defined differently depending on the conduct being assessed.
- 6.15 As previously mentioned, GeelongPort describes the notified conduct as:
- GeelongPort proposes to provide access to Lascelles Wharf in Geelong Port on condition that potential port users use GeelongPort's figee cranes for the purpose of unloading fertiliser and other dry bulk cargos.

⁵⁵ Ibid, p2.

⁵⁶ Submission from Omya Australia, 26 April 2007, p1.

⁵⁷ Supplementary submission from GeelongPort in response to interested party submissions, 16 March 2007, p3.

⁵⁸ Record of meeting with Bruce Stevens Bulk Commodities, 27 March 2007, p3.

- 6.16 The ACCC notes there are currently other businesses supplying bulk discharge equipment at the wharf in competition with GeelongPort's figee crane discharge system – namely, the ships' cranes and grabs, BSBC grabs and hoppers, and Incitec Pivot Limited⁵⁹ also makes hoppers available to third parties. The ACCC understands that Bulk Cargo Services has 1-2 shipments at Lascelles Wharf per year. The ACCC also understands that Bulk Cargo Services hires BSBC hoppers in Geelong from time to time.⁶⁰
- 6.17 The ACCC is advised that grabs are readily transported between ports on flatbed trucks. Hoppers, which are not as easy to transport between ports, can be transported on vessels or barges. The ACCC understands a supplier of bulk discharge equipment might transport a hopper once a year at a cost of around \$20 000.⁶¹ The ACCC considers that, in the absence of the notified conduct, there does not appear to be significant barriers for new and existing suppliers of mobile discharge equipment from operating at Lascelles Wharf.
- 6.18 GeelongPort agrees that grabs are readily transportable by truck between ports.⁶² It also noted that Bulk Cargo Services supplies hoppers in Melbourne and could supply them in Geelong if the need arose.⁶³
- 6.19 Having regard to submissions from interested parties, it appears that certain port users are tied to unloading at Lascelles Wharf, at least in the short term, particularly where they have invested in storage or production facilities nearby.
- 6.20 While some port users have storage facilities located in both Melbourne and Geelong, the ACCC understands that it would not be possible to unload all cargo volumes at the one facility, due to the different capacities of such facilities.
- 6.21 The ACCC notes that the Port of Melbourne may be a substitute for port services for some fertiliser and other dry bulk cargo importers. This substitutability is limited by a number of features such as the extent to which importers have necessary infrastructure in the Geelong area and the additional cost considerations that would influence a decision about which port to use.
- 6.22 For the purposes of assessing this notification, the ACCC believes a relevant area of competition impacted upon by the notified conduct is the provision of bulk cargo unloading equipment at the Port of Geelong.

⁵⁹ The ACCC understands that Incitec Pivot Limited currently has a three year contract with GeelongPort to use the figee cranes which includes an arrangement to use ship's gear for certain products up to 4 shipments per year.

⁶⁰ Bruce Stevens Bulk Commodities submission, 3 April 2007, p1.

⁶¹ Oral submission from Bulk Cargo Services Pty Ltd, 31 May 2007, p2.

⁶² Supplementary submission from GeelongPort in response to interested party submissions, 16 May 2007, p5.

⁶³ Ibid, p6.

The counterfactual

6.23 To identify and measure the effects of the notified conduct, the ACCC applies the ‘future with and without test’. Under this test, the ACCC compares the situation in the relevant markets in the future with the notified conduct in place with the situation in the relevant markets without the notified conduct. This requires the ACCC to predict how the relevant markets will react if the notifying parties do not engage in the notified conduct. This prediction is referred to as the ‘counterfactual’.

Submissions received

6.24 As previously mentioned, GeelongPort submits there has been a recent shift away from using the figee cranes by certain fertiliser importers. GeelongPort expects around 7 per cent of fertiliser will be discharged using ships’ gear in 2006/07. If this trend continues, GeelongPort considers the volumes discharged using ships’ gear could increase to 20 per cent in 2007/08.⁶⁴

6.25 GeelongPort contends that if the trend towards ships gear continues then the ultimate outcome would be the decommissioning of the figee crane system, as it could no longer justify the high fixed maintenance costs. It submits that any reduction in the use of the figee cranes will result in an increase in the cost of using them for the remaining users.⁶⁵

6.26 Further, GeelongPort believes the efficiency of Lascelles Wharf would substantially be reduced and could result in the formation of a queue of vessels waiting offshore to berth.⁶⁶ In particular, GeelongPort submits:

If the notified conduct was to be rejected by the ACCC, and all port customers were to move to ships gear, Toll GeelongPort would for the first time ever, have significant ship queuing issues...There would then be a need to prematurely look to construct a new berth....at a cost of approximately \$20 million...⁶⁷

6.27 GeelongPort also notes, however, that an alternative to the notified conduct might be:

...increasing the wharfage charge per tonne to the refusal customers [that is, those customers that refuse to use the figee cranes] by an amount that at least captures the capital recovery and maintenance component of the Figee crane charges that would have been levied if the Figee cranes had been used. Any additional costs arising out of slower throughput, inefficient wharf capacity or environmental issues as a consequence of using ship’s gear may also have to be examined and factored into such a charge.⁶⁸

⁶⁴ GeelongPort submission, 16 March 2007, p10.

⁶⁵ Record of meeting with GeelongPort, p4.

⁶⁶ Ibid.

⁶⁷ GeelongPort’s response to ACCC request for further information, 1 February 2007, p5.

⁶⁸ Ibid, p4.

6.28 The ACCC notes a number of interested parties have expressed a preference for using GeelongPort's figee cranes. In particular, Impact Fertilisers submits:

The Figee cranes compete with ships gear. Impact Fertilisers will on most occasions use the Figee cranes, however, we see many other instances when the discharge cost, vessel charter conditions, shed receipt conditions etc will be such that for us to be compelled to use the Figee crane will result in much higher costs.⁶⁹

6.29 Interfert submits:

We agree the figee cranes reduces unloading times at the berth, however, the cranes are not always available to all customers when berth congestion occurs and as such other means of discharge have to be instituted (eg ship's gear) or incur substantial increased costs.⁷⁰

6.30 BSBC submits:

Only some fertiliser importers elect to use BSBC equipment at Geelong – Incitec Pivot Ltd, Huntergrain Pty Ltd, for example, only use GeelongPort's figee cranes. Toll only has 2 figee cranes which restrict the port discharge capacity.⁷¹

6.31 BioAg, recently a new customer at Lascelles Wharf, submits:

GeelongPort due to its existing figee crane discharge facilities offered a cheaper and more environmentally capable system than the ship's gear than we had previously been using in Port Kembla.⁷²

6.32 Similarly, GrainCorp submits:

...GeelongPort and GrainCorp have been working together to attract import grain and meal trade across Lascelles Wharf. The figee crane, by way of their reliability and high discharge rates, offer a competitive price resulting in some trade being attracted to Geelong that would otherwise have been directed through other ports, typically Melbourne.⁷³

6.33 Also in support of the figee crane system, Blue Circle Southern Cement submits that it:

...has received approximately 270 000 tonnes of cement clinker across Lascelles Wharf over a two period. The majority of this cement clinker has been unloaded using the Figee Crane System with the remainder being received in self discharging vessels which required the use of a third party hopper.⁷⁴

ACCC view

6.34 The ACCC is of the view that without the notification, customers at Lascelles Wharf would be free to use ships' gear to unload fertiliser and other dry bulk cargo and to hire bulk discharge equipment from third party suppliers.

⁶⁹ Impact Fertilisers submission, 27 February 2007, p2.

⁷⁰ Interfert submission 16 February 2007, p1.

⁷¹ Bruce Stevens Bulk Commodities submission, 6 March 2007, p4.

⁷² BioAg submission, 21 March 2007, p1.

⁷³ GrainCorp submission, 23 March 2007, p1.

⁷⁴ Blue Circle Southern Cement, 28 March 2007, p1.

- 6.35 The ACCC considers there is insufficient information before it to determine, in the absence of the notified conduct, the volume of any increased usage of ships' gear and whether any such increase is likely to result in GeelongPort decommissioning the figee cranes at Lascelles Wharf. However, the ACCC considers that GeelongPort's claim it would decommission the figee cranes appears extreme.
- 6.36 The ACCC notes that public submissions received from interested parties suggest that on most occasions, customers at Lascelles Wharf are likely to prefer to use the figee crane system. The ACCC also notes that the figee cranes appear to have been an important factor which enabled GeelongPort to attract new customers to Lascelles Wharf.
- 6.37 By way of comparison, the ACCC notes that at the similar K2 bulk unloading facility in Newcastle, where there is no such compulsion to use shore-based cranes, approximately 20 per cent of cargo is unloaded using ships' gear.
- 6.38 GeelongPort advises that certain customers have also indicated a move towards chartering larger ungeared panamax vessels. GeelongPort notes that figee cranes are required to unload these vessels. For example, GeelongPort advises that Huntergrain's business was attracted to Lascelles Wharf primarily due to the figee cranes. Huntergrain originally contracted with GeelongPort to unload 14 ships per annum, generally around 14 000 tonnes per shipment. Huntergrain has now adopted a strategy to bring panamax vessels to Lascelles Wharf around seven times per year to discharge much larger volumes per vessel at both Geelong and Newcastle.⁷⁵
- 6.39 In addition, GeelongPort considers the move to larger panamax vessels will gather pace following the success of Huntergrain's initial panamax vessel. GeelongPort understands that one of the fertiliser companies and some grain importers are also planning to use panamax shipments.⁷⁶
- 6.40 Therefore, based on historic use of the figee cranes, combined with the ability for GeelongPort to attract new customers to Lascelles Wharf because of the figee crane system, the ACCC considers it unlikely that all customers would move to ships' gear or that GeelongPort would decommission the figee cranes in the absence of the notified conduct. The ACCC also notes that the potential for congestion at Lascelles Wharf may be decreased to the extent that customers charter larger panamax vessels to Lascelles Wharf.

⁷⁵ GeelongPort supplementary submission in response to interested parties, 16 May 2007, p2.
⁷⁶ Ibid.

- 6.41 In any event, the ACCC notes there are currently two peak periods driven by fertiliser importers where there is a higher potential for congestion to occur at the wharf – being March to May and September to November. GeelongPort describes port access as being ‘excellent for the vast majority of the year’.⁷⁷ GeelongPort advises that there was recent congestion at Lascelles Wharf during April/May 2007, noting that at times there were 2 – 3 vessels waiting for a berth.⁷⁸
- 6.42 GeelongPort believes the potential for congestion at Lascelles Wharf will increase in the future as it looks to diversify trade through Lascelles Wharf to ensure more consistent shipping throughout the year.⁷⁹
- 6.43 As previously mentioned, GeelongPort claims it has lodged the notification as a result of increasing volumes being discharged by ships’ gear by ‘a few fertiliser importers in recent times’. Therefore it believes the practical effect of the notification is that only three fertiliser importers might have to adjust their operations – namely, HiFert, Interfert and Impact Fertilisers.
- 6.44 In this regard, the ACCC believes that GeelongPort has reacted disproportionately to this recent trend by proposing to restrict the ability of all of its customers to choose to use ships’ gear and hire mobile discharge equipment from competitors of GeelongPort. In the absence of the notified conduct, the ACCC considers that GeelongPort could simply respond by negotiating discounted figee crane rates in order to retain business in the face of increased competition.
- 6.45 To the extent that increased use of ships’ gear creates congestion due to vessels taking longer to unload, this could be addressed by introducing cost-reflective berthing charges - potentially with higher peak time rates. Alternatively, Geelong Port could seek to encourage vessels to arrive out of peak periods with discounted charges at those times.
- 6.46 The ACCC would be concerned with any counterfactual scenario as suggested by GeelongPort (see paragraph 6.27) effectively charging users for failure to use the figee cranes. This would potentially have the same effect as the notified conduct.

Purpose of notified conduct

- 6.47 As noted in Chapter 4 of this Draft Notice, the ACCC may only revoke notification N92776 if it is satisfied that the conduct has the **purpose** or has, or is likely to have, the effect of substantially lessening competition in a relevant market and where it considers the conduct is otherwise not in the public interest. It is therefore relevant to consider GeelongPort’s purpose with respect to the notified conduct.

⁷⁷ Ibid, p11.

⁷⁸ Record of conversation with GeelongPort, 1 June 2007, p1.

⁷⁹ Ibid.

- 6.48 GeelongPort submits the purpose of the notified conduct is to maximise the efficiency of Lascelles Wharf for all customers. In particular, GeelongPort submits:
- ...if all smaller volumes were to be handled by ship based gear, the overall efficiency of Geelong Port decreases, the unit rate of the figee crane will be forced to rise and the figee cranes will no longer be economic to maintain.⁸⁰
- 6.49 The ACCC notes the figee cranes have been operational at Lascelles Wharf for over ten years without such a requirement being imposed on customers. The requirement imposed by GeelongPort has occurred in an environment when the use of ships cranes by a few customers has increased and GeelongPort expects this trend to continue.
- 6.50 Information obtained by the ACCC, but not otherwise placed on the public register, suggests that in recent times GeelongPort has become increasingly concerned about the volume of its business being diverted to ships' cranes.
- 6.51 Indeed GeelongPort's own submission seems to be that it proposes to engage in the notified conduct to prevent substitutes for figee cranes from taking market share from GeelongPort. The ACCC would need to further explore GeelongPort's purpose should it wish to rely upon it in this assessment.

Public detriments

Effect on competition

- 6.52 As mentioned above, the ACCC may revoke a notification where it is satisfied that the conduct described in the notification has the purpose **or has, or is likely to have, the effect** of substantially lessening competition in a relevant market and where it considers the conduct is otherwise not in the public interest. Therefore it is also relevant to consider the effect or likely effect of GeelongPort's notified conduct on competition.
- 6.53 To assess the effect or likely effect of conduct on a market, it is necessary to look at the relevant market, ask how and to what extent there would have been competition in the market but for the conduct, assess what is left and determine whether what has been lost in relation to what would have been if the conduct had not occurred, is a substantial lessening of competition.⁸¹
- 6.54 Generally speaking, exclusive dealing conduct will be more likely to have a substantial effect if it is engaged in by a significant market player across a wide section of the market, if there are limited substitute products available or if customers are forced to buy a product or acquire a second product. It can also have a more detrimental effect on competition if the business engaging in the conduct has significant leverage in other markets or where the conduct impedes entry into a market.

⁸⁰ Ibid, p3.

⁸¹ *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238, at 259 - 260

- 6.55 GeelongPort submits the proposed requirement to use figee cranes at Lascelles Wharf (when available) will only have a slight impact, if any, on competition for the following reasons:
- the proposed requirement will not have the effect of denying access to GeelongPort for any user
 - any port user wishing to avoid the proposed requirement for personal financial gain will retain the option of discharging cargo at other ports
 - the requirement will not have the effect of denying access to GeelongPort for any alternative suppliers of ship discharge equipment. On the contrary, there will remain a requirement for ship discharge equipment when the figee cranes are unavailable for use and
 - the requirement will only impact on alternative suppliers of ship discharge equipment at Lascelles Wharf if and to the extent that the figee cranes are available for use and are not being utilised.⁸²
- 6.56 As previously discussed, the ACCC considers a relevant area of competition impacted upon by the notified conduct is the provision of bulk cargo unloading equipment at the Port of Geelong.

Submissions received

- 6.57 GeelongPort submits it has no intention of denying port users the right to hire hoppers and grabs from the supplier of their choice. It submits that the reality is that ships' gear (and third party hoppers and grabs) will still be required to be used from time to time. GeelongPort also notes that self-discharging vessels will be unaffected by the notified conduct.⁸³
- 6.58 In the case of self discharging vessels, GeelongPort submits:
- ...providers of hoppers will still be able to compete for the cargo owner's business as GeelongPort does not provide hoppers in such instances...the total tonnes discharged by self discharge ship will remain fairly constant going forward...⁸⁴
- 6.59 Further, GeelongPort submits that self discharge vessels:
- ...represented 82% of the tonnage that went through third party hoppers during 05/06.⁸⁵
- 6.60 In this regard, GeelongPort considers:
- ...the notification will effectively impact on 18% of the tonnes going through third party hoppers which is not a substantial adverse effect on competition.

⁸² GeelongPort supplementary submission in response to interested parties, 16 March 2007, p12.

⁸³ Ibid, p4.

⁸⁴ Ibid.

⁸⁵ Ibid, p7.

- 6.61 As regards the use of ships' gear, GeelongPort considers historic volumes of cargo unloaded using ships' gear (around 2-3 per cent) is appropriate and is likely to continue under the notified conduct. GeelongPort considers this volume is sufficient to ensure third party suppliers of mobile discharge equipment have a viable business.⁸⁶
- 6.62 Impact Fertilisers believes the notified conduct will have a detrimental impact on the business of suppliers of mobile hoppers and grabs. In particular, Impact Fertilisers submits:
- Providers of hoppers and grabs, normally used in the ships gear discharge process, may suffer significant economic loss as berth users are not permitted to hire their equipment.⁸⁷
- 6.63 BSBC considers the notified conduct will result in a substantial lessening of competition. It believes it will have a material impact on the finances of BSBC and could certainly result in customer dissatisfaction due to the inability to elect to use its mobile discharge equipment or GeelongPort's discharge system.⁸⁸
- 6.64 Further, BSBC submits:
- ...should BSBC effectively be barred from supplying unloading services at Geelong, this would have a major impact on the future viability of BSBC and other small companies. It would set a precedent that could spread to other ports around Australia and create monopolies.⁸⁹
- 6.65 Similarly, Bulk Cargo Services believes the notified conduct restricts its ability to hire its grabs and hoppers to customers at Lascelles Wharf.⁹⁰

ACCC view

- 6.66 As previously discussed, the ACCC believes that without the notified conduct customers at Lascelles Wharf would be free to use ships' gear to unload fertiliser and other dry bulk cargo and to hire bulk discharge equipment from third party suppliers. Under the notified conduct, all customers are effectively denied the ability to choose the method of discharge at Lascelles Wharf based on normal commercial considerations, which in turn restricts their ability to hire hoppers and grabs from competing suppliers. If customers refuse to use GeelongPort's figee crane system, while they will not be denied a berth at Lascelles Wharf, they will be denied permission to unload fertiliser and other dry bulk cargoes using ship's gear where the figee cranes are available.
- 6.67 GeelongPort believes there is some flexibility in the operating procedures which allows it to consider applications to use ships' cranes on a case by case basis. It also notes that mobile discharge equipment suppliers will still be able to compete for 'historic volumes' of cargo when figee cranes are unavailable (that is, 2-3 per cent of total throughput).

⁸⁶ Record of meeting with GeelongPort, 20 March 2007, p3.

⁸⁷ Impact Fertilisers submission, 27 February 2007, p2.

⁸⁸ BSBC submission, 7 March 2007, p4.

⁸⁹ Ibid, p5.

⁹⁰ Record of conversation with Bulk Cargo Services Pty Ltd, 31 May 2007, p2.

- 6.68 By its own admission, GeelongPort submits that the notified conduct will alter the take-up of use of ship's gear to unload dry bulk cargo from potentially 20% to historic levels of 2-3%.
- 6.69 Further, the ACCC is of the view that in practice, the proposed figee crane operating procedures are more restrictive than suggested by GeelongPort. In particular, GeelongPort contends that if a second figee crane is unavailable to discharge the second hold of a vessel, then it would be entirely consistent with the operating procedures for a customer to use ships' gear in association with a figee crane. However, the ACCC notes that this permission is not automatic and that GeelongPort has an ability to refuse permission for this to occur. In addition, even after discharge commences using ships' gear, a customer is still potentially required to use the second figee crane if it becomes available during the unloading process. In particular, the operating procedures provide that:
- The use of ships' gear to discharge the second hold (when a figee crane is unavailable) is subject to demonstrating to GeelongPort that a 'substantial productivity improvement can be achieved'.⁹¹
 - If, after discharge commences using ships gear, and on account of the unavailability of the figee crane, the use of ships' gear may continue for the balance of the shift. However, if the figee crane becomes available, it must be used from the next available shift change.⁹²
- 6.70 Contrary to GeelongPort's claims, the ACCC also notes there is potential for the notified conduct to impact upon the business of mobile hopper suppliers when customers that usually charter self discharging vessels decide to charter a non-self discharging vessel, as occurred recently at Lascelles Wharf. That is, the conduct may jeopardise the ongoing availability of alternative hoppers and grabs at Lascelles Wharf, thereby limiting options available to vessels where figee cranes are unavailable, unsuitable or simply not competitive.
- 6.71 In this regard, Omya advises that it usually charters self discharging vessels to import calcite through Lascelles Wharf. However, it was recently required to charter a smaller vessel with cranes onboard. Omya submits:
- ...after futile attempts to the Port for permission we reluctantly used the Fige set up at additional costs.⁹³

⁹¹ GeelongPort letter to customers, 21 February 2007 *Attachment 1 Proposed procedures for future figee crane use at Lascelles Wharf*, provided as an attachment to the submission from Bruce Stevens Bulk Commodities dated 5 March 2007.

⁹² Ibid.

⁹³ Submission from Omya Australia and New Zealand, 26 April 2007, p1.

6.72 In response, GeelongPort submits that the recent geared vessel used by Omya to import calcite is only the second time a self-discharging vessel has not been used to bring in their product. Further, GeelongPort submits it charged the figee crane tariff rate applicable to once off discharge. GeelongPort advised Omya that if there was going to be a sustained move to figee cranes it:

...was happy to enter into a long term contract at significantly discounted rates.⁹⁴

6.73 Given that all customers are effectively restricted from using ships' cranes and consequently, hiring mobile hoppers and grabs from third party suppliers, the ACCC considers the notified conduct imposes a significant barrier to existing and future suppliers of bulk discharge equipment from operating at Lascelles Wharf. The ACCC considers therefore, that the notified conduct has or is likely to have the effect of substantially lessening competition in the market for the provision of bulk cargo unloading equipment at the Port of Geelong.

6.74 This reduction in competition has flow on effects for customers and downstream markets. The ACCC has received submissions from port customers that contend that they will face additional costs as a consequence of being forced to use GeelongPort's figee crane system. The ACCC notes that some port users will face higher prices to unload dry bulk cargoes at Lascelles Wharf as a result of the notified conduct preventing them from accessing a competing provider of bulk discharge equipment. Even parties that typically use the figee cranes or self unloading vessels for the vast majority of their cargo will be restricted in their flexibility to bring in occasional shipments on a vessel with ship's gear and have it unloaded at a substantially lower rate than the applicable top end of the sliding figee crane rates. The ACCC believes this is indicative of a substantial lessening of competition.

Business uncertainty

Submissions received

6.75 Submissions to the ACCC have focused on whether the notified conduct results in increased uncertainty in relation to unloading arrangements at Lascelles Wharf.

6.76 There is some concern that the notified conduct is creating uncertainty regarding unloading arrangements at Lascelles Wharf. The ACCC understands that GeelongPort has already implemented the new figee crane operating procedures at Lascelles Wharf. BSBC submits that port users have little time (in some cases only hours) to plan and organise their vessel discharge operations, particularly in relation to stevedore labour allocation and ship discharge, shed receival rates and road transport.⁹⁵

6.77 In particular, BSBC submits that:

⁹⁴ GeelongPort supplementary submission in response to interested parties, 16 May 2007, p8.
⁹⁵ Bruce Stevens Bulk Commodities submission, 8 May 2007, p1.

Port users don't know how they will be discharging their vessel and whether Toll Geelong Port will give them one figee crane or two figee cranes or whether Toll GeelongPort will permit them to use ships gear and hire BSBC Grabs and Hoppers solely or in conjunction with the figee cranes.⁹⁶

6.78 In response, GeelongPort submits that 'port users in the vast majority of cases, currently have ample time in which to plan and organise discharge operations'.⁹⁷

6.79 Further, GeelongPort submits:

TGP [Toll GeelongPort] has provided customers with a clear protocol for access to and use of the Figee cranes. In the interests of good and efficient port management, the protocol has flexibility and TGP discretions built into it to ensure fairness in the public interest. TGP has not had a single complaint about how the protocol is being applied due to the flexible approach that TGP has always and continues to apply to its customers.⁹⁸

ACCC view

6.80 As previously noted, the ACCC considers that under the notified conduct GeelongPort retains the discretion over granting customers permission to use alternative unloading equipment at Lascelles Wharf. In addition, even where GeelongPort grants permission for ships' gear to commence unloading a second hold on a vessel, there is no guarantee that the ships' gear will be permitted to continue for the balance of the unloading process if a figee crane later becomes available.

6.81 The ACCC considers that any increased uncertainty in relation to unloading arrangements for customers and competing suppliers of mobile discharge equipment at Lascelles Wharf would be a public detriment arising from the notified conduct. This could also potentially result in increased discharge costs to customers if they are required to switch to the figee cranes part way through unloading. The ACCC currently has insufficient information before it to determine the size of any such detriment.

Increased costs to smaller customers

6.82 Some interested parties submit that the notified conduct results in smaller port users paying higher discharge rates than larger customers at Lascelles Wharf, therefore placing smaller customers at a competitive disadvantage to larger customers.

6.83 As previously described in Chapter 2 of this Draft Notice, GeelongPort's figee crane rates are set on a sliding scale based on tonnes discharged. This means that customers discharging smaller volumes at Lascelles Wharf are charged a higher tariff rate than customers discharging larger volumes.

⁹⁶ Ibid.

⁹⁷ GeelongPort supplementary submission in response to interested parties, 16 May 2007, p11.

⁹⁸ Ibid.

6.84 GeelongPort admits that:

On isolated cargoes for small tonnages and there is no contract in place between the Port and the customer, then ships gear may be cheaper for these once off events.⁹⁹

6.85 However, GeelongPort submits that figee crane charges can be significantly reduced from the tariff rates when volume agreements are negotiated with it. In addition, GeelongPort submits that it encourages customers to share cargoes on larger vessels, thereby increasing the efficiency of the wharf and helping to minimise customer discharge costs. When customers share cargoes, the figee crane hire rate is charged based on the total tonnes discharged from the vessel, rather than each customer's individual tonnes. It advises that it is common place for this to occur.

6.86 In contrast, a confidential submission from an interested party suggests that by hiring grabs and hoppers from other suppliers, it is able to fix its costs, regardless of parcel size, at tariff levels well below GeelongPort's current sliding tariff rates.

6.87 Impact Fertilisers also submits that vessels with onboard cranes do not utilise a sliding scale in terms of tonnes discharged. In addition, Impact Fertilisers submits:

The cost of the vessel may already include the use of the vessel's cranes (particularly as the vessel will be required to self discharge in other ports) and hence the hire of the Figee cranes, while the ships cranes remain idle, is a double cost to the charterer.¹⁰⁰

6.88 In response, GeelongPort submits that:

Any decision to use ship based equipment is ultimately referable to a desire to cut costs and thereby maximise profits. Whilst the decision not to use the more efficient figee cranes may be rational...from the point of view of the individual Port user, the decision to do so comes at the expense of other Port users...

If the figee cranes are left idle while the ship's gear is being used, then ultimately the cost of the cranes has to be borne by other Port users and this results in increased costs to those users.¹⁰¹

6.89 GeelongPort is of the view that there is no double cost to cargo owners, as the ships gear is included in the charter party cost irrespective of whether the ships gear is used or not. Regarding vessel charter costs, GeelongPort understands:

...vessels are chartered at a cost inclusive of all operating equipment, ie, the existence of cranes whether utilised or not forms part of the case charter cost. Ships typically have multi-port discharges where ships cranes will be used when shore based cranes are not available.¹⁰²

⁹⁹ GeelongPort supplementary submission in response to interested parties, 16 May 2007, p3.

¹⁰⁰ Impact Fertilisers submission, 23 February 2007, p2.

¹⁰¹ GeelongPort's supplementary submission in response to interested parties, 16 March 2007, p3.

¹⁰² Ibid.

6.90 Eastern Shipping Associates Pty Ltd (ESA) opposes the notified conduct. It believes that 'it has the propensity to increase the costs of raw materials that will ultimately flow on to the Australian consumer'.¹⁰³ It submits the hire of a grab and hopper (used in conjunction with ships' gear) and labour cost at Lascelles Berth is approximately \$5.95 pmt compared to the cost of using figee cranes (plus labour) of \$7.68 pmt. ESA advises that these costs were relevant to a recent vessel that was chartered through it to discharge bulk cargo at Lascelles Wharf. In this regard, ESA submits:

Our clients were forced by Toll GeelongPort to use the figee cranes at this extra cost despite our client's wish to utilise the ship's cranes and hired hoppers/grabs.¹⁰⁴

6.91 Further, ESA submits:

Many ships carrying bulk fertiliser to Australia have their own grabs, and the charterers pay a premium for this as the grabs give them flexibility to discharge at a range of ports that do not have shore based discharging equipment. Australia has in excess of 40 licensed ports and very few have shore based discharge facilities. Those that do, unlike Geelong, leave it to the port users to decide whether they will use ship or shore based equipment.¹⁰⁵

6.92 Impact Fertilisers submits its last ships' gear discharge cost \$5.15 pmt, whereas the quote to use the Figee cranes was at a rate of \$7.16 pmt.¹⁰⁶

6.93 BSBC claims the cost of using its hoppers and grabs 'can be as low as one quarter of the cost of using GeelongPort figee cranes, particularly for small volumes of product'.¹⁰⁷

6.94 Some interested parties have also expressed concern that the notified conduct removes a competitive constraint on GeelongPort's figee crane tariff rates.

6.95 In response, GeelongPort notes that it has demonstrated a responsible approach to pricing in the past and that it remains under a price monitoring regime by the Essential Services Commission (ESC). In this regard, GeelongPort notes that in the latest report from the ESC, dated February 2007, it was reported that:

...Port charges increased by approximately 2.0% from 1 July 2005, which represented a decrease of approximately 0.4% in real terms. The new port charges, applying since 1 July 2006 represents an average increase of approximately 2.6% or approximately minus 4% in real terms.¹⁰⁸

¹⁰³ Eastern Shipping Associates submission, 5 June 2007, p1.

¹⁰⁴ Ibid, p3.

¹⁰⁵ Ibid.

¹⁰⁶ Impact Fertilisers submission, 23 February 2007, p2.

¹⁰⁷ Record of Meeting with Bruce Stevens Bulk Commodities, 27 March 2007, p1.

¹⁰⁸ GeelongPort supplementary submission in response to interested parties, 19 March 2007, p5.

ACCC view

- 6.96 The ACCC considers that any increase in discharge costs incurred by fertiliser and other dry bulk importers as a result of the notified conduct would be a public detriment. The ACCC notes that if customers are required to use GeelongPort's figee crane discharge system, they are prevented from the ability to choose between alternative suppliers of bulk discharge equipment based on price and other commercial considerations.
- 6.97 For customers importing smaller volumes through Lascelles Wharf, and therefore facing higher figee crane charges, the ACCC considers the notified conduct is likely to result in increased discharge costs. As noted above, GeelongPort agrees that ships gear may be cheaper on isolated cargoes for small tonnages and where customers do not have a contract in place with it. The ACCC considers this potential detriment is mitigated to the extent that customers have the ability to negotiate discounted figee crane rates with GeelongPort or share cargoes with other importers in order to incur a lower figee crane charge based on the total tonnes onboard the vessel.
- 6.98 The ACCC also holds the view that the notified conduct removes the competitive pressure currently provided by the ships' cranes and suppliers of mobile bulk discharge equipment at Lascelles Wharf. The ACCC notes the ESC has a price monitoring role at the Port of Geelong for Prescribed Services only. The ESC's price monitoring role does not extend to figee crane charges. The ACCC considers the notified conduct could have the effect of either reducing the size of discounts offered by GeelongPort in negotiations with customers or the extent that it is willing to enter into such negotiations.
- 6.99 Therefore the ACCC considers the reduction in competition is likely to result in a public detriment in the form of higher port charges for some customers.
- 6.100 As previously discussed, the ACCC considers the notified conduct is likely to result in a substantial lessening of competition in relation to the provision of bulk cargo unloading equipment at the Port of Geelong. This will increase costs to shippers, effecting downstream markets. The ACCC holds the view therefore, that the anti-competitive detriment of the notified conduct is substantial.

Other regulatory provisions

- 6.101 As outlined in Chapter 2 of this Draft Notice, the ESC has an ongoing price monitoring role in relation to basic infrastructure services at the Port of Geelong. The ESC's price monitoring framework is established in the *Price Monitoring Determination for the Victoria Ports*, 30 March 2005 (Price Monitoring Determination).
- 6.102 Section 2.1.7 of the Price Monitoring Determination states that:

A Provider of Prescribed Services must not require a Port User to acquire services that are not Prescribed Services or Related Services in order to be supplied with Prescribed Services.

- 6.103 As previously mentioned, the ACCC understands that making a berth available to vessels is a Prescribed Service. However, use of GeelongPort's figee cranes is not a Prescribed Service. GeelongPort advises that customers will not be denied permission to berth at the wharf under the notified conduct but they will be denied permission to discharge their cargo, should they wish to use ships' cranes instead of the figee cranes.
- 6.104 It is ultimately a matter for the ESC to consider whether the notified conduct raises concerns under its Price Monitoring Determination. However, the ACCC considers that the notified conduct seems to have implications under the ESC's Price Monitoring Determination and is relevant to the ACCC's public detriment assessment. The ACCC invites further submissions on this issue from the ESC, GeelongPort and other interested parties.

Public benefits

- 6.105 In its notification, GeelongPort submitted that the conduct will result in the following public benefits:¹⁰⁹
- the use of purpose- built figee cranes reduces unloading time and shipping time, thereby increasing the operational efficiency of Lascelles Wharf
 - figee cranes minimise environmental risks by reducing the amount of dust and other harmful substances released into the environment
 - the income generated by the use of the figee cranes assists in ensuring GeelongPort's economic viability which is a precondition to providing necessary infrastructure for expansion to the operations of the port.

Improved operational efficiency at Lascelles Wharf

Submissions received

- 6.106 GeelongPort submits that the use of its figee cranes will improve the operational efficiency of Lascelles Wharf, thereby minimising the potential for vessel queuing during peak times. In particular, GeelongPort submits:¹¹⁰
- figee grabs used for discharge are larger and capable of handling a greater quantity of any cargo
 - figee cranes are demonstrably faster in mechanical operation compared to ships' cranes (for example, when discharging fertiliser products such as MAP, DAP, urea and Phosphate rock, GeelongPort's figee cranes can discharge at an average rate of 290 tonnes per hour allowing for hold clean outs. This is against an average rate of discharge of 110 tonnes per hour using ships' cranes)

¹⁰⁹ GeelongPort's submission in support of notification N92776, 19 January 2006, p1.

¹¹⁰ GeelongPort's response to ACCC request for further information, 1 February 2007, p4.

- figee cranes can, on account of their greater height and positioning alongside the vessel, give the crane operator greater advantage than ships' cranes to see the product and deliver it directly to the hopper more quickly.
- 6.107 Further, GeelongPort submits that efficiency gains are also made from built-in weighing functions in its hoppers. In particular, GeelongPort advises that its figee cranes and associated hoppers are able to weigh loads going into trucks, making each load more precise and avoiding the potential overloading of trucks and resultant 'tip offs' of product and reweighing of the truck prior to it leaving the wharf.¹¹¹
- 6.108 As a result, fewer stevedore gang shifts will be required to discharge fertiliser and other dry bulk cargoes at Lascelles Wharf. This will lead to cost savings for port users in the form of reduced stevedore and berth charges.
- 6.109 BioAg supports this view. It submits:

...the high productivity figee cranes...in our opinion make the Port of Geelong a more effective Port in terms of cost, discharge rate...¹¹²
- 6.110 Similarly, GrainCorp submits:

The figee crane, by way of their reliability and high discharge rates, offer a competitive price resulting in some trade being attracted to Geelong that would otherwise have been directed through other ports...¹¹³
- 6.111 Blue Circle Southern Cement believes the figee crane system at Lascelles Wharf to be:

...a highly efficient unloading system. They have ensured vessels are turned around in the shortest possible time thereby reducing the risk of vessel queuing which is in the best interests of all port users.¹¹⁴
- 6.112 A number of interested parties submit it is possible to achieve similar discharge rates by utilising multiple ships' cranes.
- 6.113 ESA advises that a bulk carrier generally has four cranes and the ship is designed so that these four cranes can all be operated simultaneously in a safe manner. It is possible for two cranes to safely service one hopper, on a 'one in, one out of the hold' basis.¹¹⁵
- 6.114 ESA also believes the most efficient discharge process involves:

...at least three ship's cranes...with each crane having the capacity to discharge at close to 300 tph (they slow down towards the end of the discharge when they are not 'free grabbing')...¹¹⁶

¹¹¹ Record of meeting with GeelongPort, 20 March 2007, p3.

¹¹² BioAg submission, 19 March 2007, p1.

¹¹³ GrainCorp, 19 March 2007, p1.

¹¹⁴ Blue Circle Southern Cement submission, 28 March 2007, p1.

¹¹⁵ Eastern Shipping Associates submission, 5 June 2007, p2.

¹¹⁶ Ibid.

6.115 Further, ESA advises that at Geelong, it is achieving the 14 000 tonnes per day on the conveyor belt self unloaders, which are only restricted by the capability of trucks to take the cargo away, and approximately 12 000 tonnes per day on craned bulk carriers.

6.116 BSBC also believes that ships' gear can discharge at a similar rate to the figee cranes if multiple cranes are used. In particular, BSBC submits:

The four point grab and hopper discharge operation works extremely well at many other Australian ports...the four point discharge operation is highly productive and cost efficient. It is important to note that there is very little increase to the cost of stevedoring between two gang operation and a four gang operation, as only a few extra men are required over the base manning levels of a two gang operation...¹¹⁷

6.117 In response, GeelongPort submits that the use of three or four ships' cranes and associated equipment is not practicable, efficient or cost effective. In particular, it contends:

The use of four ship's cranes, particularly with the four attendant hoppers on the ground, would present serious safety concerns that GeelongPort would be reluctant to consider. There is little doubt that there would not be sufficient labour to accommodate the operation of four ship's cranes, particularly when other vessels were in port for discharge or loading.¹¹⁸

6.118 In addition, GeelongPort submits that:

The cost of four stevedore crews, four hoppers and four grabs would be substantially more than the figee cranes...Ship's masters would not allow the practice to occur due to the risk of collision between ships' cranes...¹¹⁹

6.119 BSBC does not support GeelongPort's claims regarding safety, availability of labour and costs of operating multiple ship cranes. It submits that:

BSBC provide the four grab and hopper hire service at many Australian ports...Ship's are built with four cranes to be worked simultaneously, four crane discharges are common place at Australian ports...four crane / gang discharge is a very flexible system and can be adjusted...to meet peak demand as can be demonstrated by Stevedoring companies operating at many other Australian Ports.¹²⁰

6.120 Submissions from interested parties have also noted that not all port users can take advantage of higher figee crane unloading rates and that other factors impact on the ultimate vessel discharge rate.

6.121 Impact Fertiliser submits that:

Shed receival rates vary considerably and a shed capable of receiving at 400 mt per day will be awash with product by the Figees cranes, potentially resulting in large truck and stevedore waiting time costs for the receiver.¹²¹

¹¹⁷ BSBC submission, 3 April 2007, p3.

¹¹⁸ GeelongPort supplementary submission in response to interested parties, 19 March 2007, p8.

¹¹⁹ Ibid, p9.

¹²⁰ BSBC submission, 3 April 2007, p3.

¹²¹ Impact Fertilisers submission, 23 February 2007, p2.

- 6.122 Omya submits that the majority of customers at Lascelles Wharf cannot receive cargo at the maximum figee crane rate (700 tonnes per hour) unless discharge is directly into bulk storage sheds.¹²²
- 6.123 Similarly, BSBC submits that many of the fertiliser companies that hire its bulk discharge equipment have shed receival rates that are well below the unloading rate of the figee cranes, which means they do not place a value on the ability of the figee cranes to unload ships at a higher rate.¹²³
- 6.124 The ACCC sought further information from GeelongPort about the different receival rates of its customers and the impact of this on the operation of the figee crane system. GeelongPort confirmed that some customers cannot receive cargoes at the maximum figee crane discharge rate because of slower receival rates at their storage sheds. As a result, the entire unloading chain slows down – for example, it is likely that fewer trucks would be used in the unloading cycle, the figee crane ‘swing rate’ may be slower and figee cranes may have to wait at various times through the unloading process.¹²⁴

ACCC view

- 6.125 The ACCC notes that customers at Lascelles Wharf appear to agree that a single figee crane is capable of unloading cargo at a higher rate than a single ship’s crane. However, there appears to be different views about the extent to which similar discharge rates can be achieved in a cost efficient manner using multiple ships cranes.
- 6.126 The ACCC considers there are already commercial incentives for customers to minimise total unloading charges. The ACCC notes that absent the notified conduct, customers wishing to unload fertiliser or other dry bulk cargoes using multiple ships’ cranes would consider the costs associated with hiring additional stevedore crews and weigh this against the cost of the figee crane system.
- 6.127 In any event, the ACCC notes that the majority of customers are likely to use the figee cranes at Lascelles Wharf absent the notified conduct. In addition, the discharge rate of the figee crane system appears to be driven by other factors, such as the receival rate of the customer, weather and the type of cargo being unloaded. Indeed, GeelongPort advises that the figee crane discharge system is slowed down to match the receival rates of individual customers. The ACCC understands that other factors can also impact on the time taken to unload a vessel. For example, a recent figee crane discharge of soybean meal at Lascelles Wharf took longer than expected as a result of:
- inclement weather that resulted in suspension of discharge to ensure that the product did not get wet
 - customer requirements to completely fill the storage shed which meant a number of stops in discharging to conduct AQIS inspections

¹²² Omya submission, 26 April 2007, p1.

¹²³ Record of meeting with BSBC, 27 March 2007, p1.

¹²⁴ Record of conversation with GeelongPort, 1 June 2007, p2.

- the customer misjudging the available space in the shed and the amount of product on the ship which resulted in the ship having to be used as ‘floating storage’ until sufficient room was made available in the shed
 - the need to undertake multiple excavations in the shed so that the optimum amount of product could be stored.¹²⁵
- 6.128 As such, the ACCC is not satisfied that imposing a requirement to use the figee cranes is likely to result in significant efficiency gains at Lascelles Wharf.
- 6.129 Further, the ACCC has previously concluded that overall, the risk of congestion at Lascelles Wharf appears relatively low, with that risk being higher during peak fertiliser shipping periods in Autumn and Spring. GeelongPort advises that port access is ‘excellent for the vast majority of the year’.¹²⁶
- 6.130 Indeed, it may be argued that should the notified conduct reduce the ongoing availability of alternative hoppers and grabs at Lascelles Wharf, efficiencies that such alternatives bring could be lost. For example, the ability to use the two figee cranes on one vessel while ship’s gear is used on another vessel, or the ability for ship’s gear to be used alongside a figee crane to unload a vessel more quickly.

Environmental benefits

- 6.131 GeelongPort submits the figee cranes minimise environmental risks by reducing the amount of dust and other harmful substances released into the environment. In particular, GeelongPort submits that its figee cranes and associated hoppers are able to weigh loads going into trucks, making each load more precise and avoiding the potential for overloading of trucks and resultant ‘tip offs’ of product onto the wharf. In contrast, GeelongPort submits that third party hoppers do not have weighing capabilities which results in frequent overloading of trucks.
- 6.132 GeelongPort also submits that its grabs are closed, while the grabs used with ships’ gear are typically open or partially open grabs. These grabs do not fully contain the product so when a larger ‘bite’ of the product is taken than the grab has capacity, the excess product is squeezed out the top spilling onto the deck of the ship, into the water and onto the wharf. GeelongPort notes that grabs utilised on ships’ cranes can be fully closed, but this has not been its experience at Lascelles Wharf to date.

¹²⁵ GeelongPort supplementary submission in response to interested parties, 16 May 2007, p11.
¹²⁶ Ibid.

- 6.133 GeelongPort provided photographs to illustrate the level of spillage that commonly results from using ships' gear in conjunction with third party hoppers and grabs.¹²⁷ GeelongPort submits the photographs demonstrate that the product spillage and dust associated with the use of ships gear are serious issues from an environmental and occupational health and safety point of view.¹²⁸
- 6.134 GeelongPort submits the figee cranes also have a protective screen that is lowered against the side of the vessel to prevent any spillage from the grab from falling into the water. In comparison, GeelongPort submits the 'save alls' used in a ships' gear operation are not as effective as the figee crane system.
- 6.135 BioAg, an importer of phosphate rock that recently moved its import operations to Geelong Port, submits that:
- GeelongPort due to its existing figee crane discharge facilities offered a cheaper and more environmentally capable system than the ship's gear that we had previously been utilising in Port Kembla.¹²⁹
- 6.136 Blue Circle Southern Cement also submits:
- The use of the Figee Crane system incorporating an enclosed grab and integrated hopper arrangement linked with our dust extraction system has proven the most effective system in controlling dust when compared to a self discharge vessel and third party hopper.¹³⁰
- 6.137 In contrast, a number of interested parties do not support GeelongPort's environmental public benefit claims.
- 6.138 Interfert submits that:
- The figee cranes use clam shell grabs to discharge vessels as do conventional bulk carrier ships gear and as such the environmental impact of dust created by the drop into the wharf hopper is almost the same in both cases.¹³¹
- 6.139 Similarly, Impact Fertilisers submits:
- We can see very little environmental difference between a Figee grab passing the ships rail into a hopper and ships grab passing the ships rail into a hopper, whilst stevedores operate appropriately.¹³²
- 6.140 BSBC acknowledges that while its hoppers do not have weighing capabilities, operators can accurately load trucks 'to within a tonne' and do not have issues with 'tip offs' at the wharf.¹³³

¹²⁷ Attached to GeelongPort's supplementary submission in response to interested parties, 16 May 2007.

¹²⁸ GeelongPort's supplementary submission in response to interested parties, 16 May 2007, p5.

¹²⁹ BioAg submission, 19 March 2007, p1.

¹³⁰ Blue Circle Southern Cement submission, 28 March 2007, p1.

¹³¹ Interfert submission, 16 February 2007, p1.

¹³² Impact Fertilisers submission, 23 February 2007, p2.

¹³³ Record of meeting with BSBC, 27 March 2007, p3.

6.141 ESA submits that:

...modern ship and shore based grabs discharging into state of the art shore based hoppers such as those available at Geelong have almost no cargo spillage by leakage or by wind (dust), so there is little or no environmental disruption caused by this equipment.¹³⁴

ACCC view

- 6.142 The ACCC considers that any reduction in the potential risk for spillage of fertiliser and other dry bulk cargoes as a result of the notified conduct would result in environmental public benefits. However, the ACCC notes that the majority of customers at Lascelles Wharf are likely to use the figee crane system with or without the notified conduct.
- 6.143 Further, GeelongPort advises that it will continue to allow the use of ships' cranes when the figee cranes are unavailable or when they break down. The ACCC also notes that GeelongPort will permit the use of ships' gear and third party hoppers in certain circumstances under the notified conduct. Accordingly, the ACCC considers that the notified conduct does not fully address potential environmental issues at Lascelles Wharf from the use of ship's gear.
- 6.144 The ACCC also notes that there are contrasting views amongst interested parties about the extent of any additional environmental benefit from using GeelongPort's figee crane discharge system as opposed to ships' gear and third party hoppers. For instance, it would seem that modern ship grabs are also available which minimise the amount of cargo spillage. The ACCC also understands that it is possible to hire equipment for use with ships' cranes for the purpose of minimising spillage, including portable spill protectors and hoppers with deflector shields.
- 6.145 Therefore, the ACCC is not satisfied on the basis of information before it that a requirement to use GeelongPort's figee crane discharge system will reduce the amount of dust and other harmful substances released into the environment. Accordingly, the ACCC attributes little weight to this public benefit claim.
- 6.146 The ACCC understands that the *Port Services Act 1995* requires port managers to develop and implement Safety and Environment Management Plans (SEMPs) for their ports. SEMPs are intended to compliment existing legislation. The ACCC seeks further information about the extent to which cargo spillage at Lascelles Wharf is, or can be, addressed in existing environmental regulations.

Ensuring GeelongPort's economic viability

- 6.147 As previously mentioned, GeelongPort submits that requiring customers to use its figee cranes assists in ensuring GeelongPort's economic viability which is a precondition to providing necessary infrastructure for expansion to the operations of the port.

¹³⁴

Eastern Shipping Associates submission, 5 June 2007, p3.

6.148 Interfert submits that investment at the Lascelles Wharf should not be dependent on forcing customers to use equipment over which they have no cost control.¹³⁵

6.149 In response GeelongPort submits that it has invested in wharves and other infrastructure requirements, including the figee cranes. It believes:

It is neither reasonable or in the public interest for GeelongPort to pass on costs to those committed users of the figee cranes for those who wish to pick and choose.¹³⁶

ACCC view

6.150 As previously noted, GeelongPort lodged the notification as a result of three customers recently increasing the volume of cargo being unloaded using ships' gear. It would seem that GeelongPort considers it preferable for certain customers to pay additional costs than they otherwise would in order to protect the current cost positions of other importers at Lascelles Wharf.

6.151 The ACCC notes that the notified conduct will provide greater revenue certainty to GeelongPort which would benefit it. However, this is achieved through reducing GeelongPort's exposure to competition and at the cost of customers. The ACCC is not satisfied that ensuring the economic viability of GeelongPort is a public benefit resulting from the notified conduct.

Balance of public benefits and detriments

6.152 As previously mentioned, the ACCC is required to assess whether any benefit to the public that has resulted or is likely to result from the conduct will outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct.

6.153 The ACCC considers that the notified conduct is likely to generate some public benefit. As regards public detriment, the ACCC considers that the notified conduct generates substantial public detriment as a result of the substantial lessening of competition. In addition, the ACCC considers the notified conduct is likely to result in higher port charges for some customers.

6.154 Therefore, the ACCC believes the anti-competitive detriments outweigh any public benefits generated from the notified conduct.

¹³⁵ Interfert submission, 16 February 2007, p1.

¹³⁶ GeelongPort supplementary submission in response to interested parties, 19 March 2007, p7.

7. Draft notice

7.1 Notification N92776 was lodged by GeelongPort Pty Ltd (GeelongPort) on 19 January 2007 for conduct that potentially constitutes exclusive dealing under section 47(2)(d) of the *Trade Practices Act 1974* (the Act).

7.2 In particular, notification N92776 describes the conduct as:

GeelongPort proposes to provide access to Lascelles Wharf in Geelong Port on condition that potential port users use GeelongPort's figee cranes for the purpose of unloading fertiliser and other dry bulk cargos.

7.3 For the reasons identified in Chapter 6 of this Draft Notice, the ACCC considers that the conduct has the effect or likely effect of substantially lessening competition in the market for the provision of bulk cargo unloading equipment at the Port of Geelong.

7.4 The ACCC considers notification N92776 is likely to result in some public benefit. The ACCC is not satisfied that imposing a requirement to use the figee cranes is likely to result in significant efficiency gains at Lascelles Wharf, particularly given that the majority of interested parties have expressed a preference for using the figee cranes regardless and that customer receival rates and other factors largely drive the figee crane discharge rate.

7.5 The ACCC considers the notified conduct is likely to result in public detriment resulting from a substantial lessening of competition in the market for discharging fertiliser and other dry bulk cargoes at the Port of Geelong. The ACCC is of the view that there is likely to be a detriment to some port customers in the form of higher port charges with flow-on downstream effects.

7.6 As a result, the ACCC is satisfied that the conduct described in the notification has the purpose or effect, or is likely to have the effect, of substantially lessening competition in any market and that the benefit to the public that has resulted or is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct.

7.7 Accordingly, the ACCC gives notice under section 93A of the Act that it proposes to issue a Notice under section 93(3) of the Act in respect of notification N92776. Such a Notice would remove the immunity provided by the notification 31 days after the date the ACCC issues the Notice.

Next steps

7.8 The ACCC will now seek further submissions from interested parties. In addition, GeelongPort or any interested party may request that the ACCC hold a conference in relation to this Draft Notice, in accordance with section 93A of the Act.