

12 September 2007

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
GPO BOX 3131
CANBERRA ACT 2601

FILE No:	
DOC:	
MARS/PRISM:	

Dear Sir / Madam,

Exclusive dealing notification N92776 (the “Notification”) lodged by GeelongPort Pty Limited (“GeelongPort”)

The Essential Services Commission (“the Commission”) welcomes this opportunity to respond to matters contained in the Australian Competition & Consumer Commission’s (the “ACCC”) Draft Notice in respect of the Notification lodged by GeelongPort.

As noted in the Draft Notice, the Commission has an ongoing regulatory role in the port industry of Victoria, which includes the commercial port of Geelong, under the *Port Services Act 1995*.

Prescribed Services & Prescribed Prices

Clause 49 (c) of the *Port Services Act 1995* lists Prescribed Services for the port industry as including the following services:

(c) the following are prescribed services—

...

- (ii) *the provision of berths, buoys or dolphins in connection with the berthing of vessels in the ports of Melbourne, Geelong, Portland and Hastings;*
- (iii) *the provision of short term storage or cargo marshalling facilities in connection with the loading or unloading of vessels at berths, buoys or dolphins in the ports of Melbourne, Geelong, Portland and Hastings; ...*

The charges for these Prescribed Services are Prescribed Prices.

The Commission's understanding is that in practice, figee crane bulk discharge is not a necessary requirement for the provision of any of the Prescribed Services listed above, and shares the ACCC's understanding that this is not a Prescribed Service as noted in the ACCC's Draft Notice (at paragraphs 2.19 and 6.103).

As a separate observation, under the price monitoring framework of the Price Monitoring Determination ("the Determination") made on 30 March 2005, as a provider of Prescribed Services in the port industry, GeelongPort is required to provide the Commission with a Reference Tariff Schedule which lists prices at which Prescribed Services are offered. Under section 2.1.4 of the Determination, a description of the services that are provided for each Prescribed Price must be included in the Reference Tariff Schedule. Also, under section 3.4 of the Determination, GeelongPort is required to annually provide financial and business information to the Commission. This includes, among other things, detailed information on Prescribed Prices and revenues from Prescribed Services.

The most recent Reference Tariff Schedule of GeelongPort provided to the Commission makes no reference to figee crane bulk discharge being part of the Prescribed Services. The Commission's understanding is that GeelongPort's Prescribed Services are Berth Hire; Facility Hire; and Security (See Attachment for full details). These observations illustrate that to date, figee crane bulk discharge has not been considered to be a necessary requirement for the provision of any of the Prescribed Services covered by GeelongPort's Reference Tariff Schedule.

Related Services

Subsection 54 (4) of the *Port Services Act 1995* provides as follows:

- (4) *The Commission may, when making a determination in relation to prescribed services in a commercial trading port, have regard to the costs associated with any service related to the prescribed services if—*
- (a) *the related service is necessary or essential to the provision of prescribed services; and*
 - (b) *the related service cannot readily be provided by another provider; and*
 - (c) *it is not feasible to charge a separate price for the related service.*

The Price Monitoring Determination addresses Related Services in clause 1.10. It enables the Commission to determine that a service is a Related Service, if the criteria in 1.10.2 are met as follows:

The Commission must not determine that a service is a Related Service unless:

- (a) the service is related to a Prescribed Service;*
- (b) the criteria specified in paragraphs 54(4)(a) to 54(4)(c) of the Port Services Act apply to the service; and*
- (c) the Commission has consulted with Providers of Prescribed Services who provide the relevant service.*

The Commission has not made any previous determinations that figee crane bulk discharge is a Related Service for the purposes of the Determination.

Further, the Commission has not been presented with evidence in support of a position that the service of figee crane bulk discharge would meet the criteria specified in paragraphs 54(4)(a) to 54(4)(c) of the Port Services Act; nor has it been requested to make a determination that figee crane bulk discharge is a Related Service by Toll GeelongPort or any other provider of Prescribed Services.

Compliance with the Determination

Clause 2.1.7 of the Determination provides as follows:

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.

As noted above, the Commission does not consider that figee crane bulk discharge services falls within the definition of Prescribed Services. Nor has it determined that figee crane bulk discharge services are Related Services.

If GeelongPort proceeds with the proposed arrangements set out in Notification, the Commission would need to consider the application of Clause 2.1.7 of the Determination, and whether GeelongPort is requiring a Port User to acquire figee crane bulk discharge services in order to be supplied with a Prescribed Service such as a berth service.

The Commission notes that a contravention, or likely contravention, of a determination can have serious consequences. Section 53 of the *Essential Services Commission Act 2001* relevantly provides:

(1) This section applies if a person has contravened or is contravening or, in the opinion of the Commission, is likely to contravene –

(a) determination;

...

and the Commission considers that the contravention or likely contravention is not of a trivial nature.

(2) The Commission may service a provisional order or a final order on the person requiring the person -

(a) to comply with the determination or licence condition; and

(b) if a contravention has already occurred, to take such actions as are specified in the order to rectify the contravention.

A failure to comply with such orders is an offence (s53(9)).

Please do not hesitate to contact either Michael Cunningham, Manager, Industry Sectors & Special References (ph 03 9651 0247) or myself (03 9651 0229), should you wish to discuss these issues further.

Yours faithfully,



Andrew Chow
Director, Regulation
Essential Services Commission

ATTACHMENT

This list is taken from the most recent Reference Tariff Schedule of GeelongPort, as provided to the Commission. The Commission considers the following to be Prescribed Services and Prescribed Prices:

1. GENERAL TARIFF SCHEDULE

Applications for all services are to be made on the appropriate forms. The following rates are effective from 1st July, 2006 but are subject to variation and all rates are exclusive of GST.

1.1 BERTH HIRE (Rate per hour of part thereof)

	\$
Refinery Pier (Berths 1,2,3 & 4)	329.43
Lascelles Wharf (Berths 1,2 & 3)	203.69
Corio Quay (All Berths)	103.11
Bulk Grain Pier (Berths 1 & 2)	P.O.A
Lay up berth (subject to availability)	P.O.A

As a condition of entry to the Port of Geelong, all Australian and internationally registered vessels that are on or are returning from an international voyage using the Port of Geelong as first port of call in Australia and all Australian and internationally registered vessels that have been on the Australian coast for less than 21 days prior to berthing at the Port of Geelong must (unless they have a certified shipboard waste processing plant) pay a flat fee of \$743.15 (exclusive of GST) per visit to the Port in addition to the applicable hourly berth rate tariff."

1.2 FACILITY HIRE (Rate per tonne of part thereof)

	\$
Liquid Bulk	1.261
Dry Bulk	0.909
Logs	1.499
Steel Products	0.756
Other Break Bulk	3.170
Bagged Grain	POA

1.3 SECURITY (Rate per hour of part thereof)

Charge for Security Guards at Corio Quay and Lascelles Wharf whenever	\$44.56
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