



Australian  
Competition &  
Consumer  
Commission

# Notice

in respect of a notification lodged by

**GeelongPort Pty Limited**

**Date: 4 February 2008**

**Notification no. N92776**

**Commissioners: Sylvan  
King  
Smith**

**Public Register no. C2007/363**

## Summary

The ACCC has decided to issue a notice under section 93(3) of the *Trade Practice Act 1974* revoking 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 of 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 dry bulk cargo unloading equipment at the Port of Geelong. Therefore, the 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 considers the notified conduct is likely to result in some public benefit in the form of operational efficiencies and environmental benefits. However, the ACCC is of the view that these benefits could also be achieved through commercial negotiations with the relevant port users. The ACCC is also not satisfied that imposing a requirement to use the figee cranes is likely to result in the level of efficiency gains claimed by GeelongPort, 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 also impact upon 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.

### **Notice**

Accordingly, the ACCC issues notice under section 93(3) of the Act in respect of notification N92776. The immunity provided by this notification ceases to be in force on 7 March 2008.

# Contents

<b>1. INTRODUCTION.....</b>	<b>1</b>
CHRONOLOGY .....	2
<b>2. BACKGROUND .....</b>	<b>3</b>
COMMERCIAL TRADING PORTS IN VICTORIA.....	3
<i>The Port of Geelong</i> .....	3
<i>The Port of Portland</i> .....	4
<i>Port of Hastings</i> .....	4
<i>The Port of Melbourne</i> .....	5
GOVERNMENT AGENCIES .....	5
<i>Victorian Regional Channels Authority</i> .....	5
<i>Essential Services Commission</i> .....	6
LASCELLES WHARF.....	7
<i>Unloading cargo</i> .....	11
<i>Suppliers of bulk discharge equipment</i> .....	11
<i>Stevedores</i> .....	11
NEWCASTLE PORT.....	12
<b>3. THE NOTIFIED CONDUCT .....</b>	<b>13</b>
OPERATION OF THE CONDUCT IN PRACTICE .....	13
1999 SECTION 87B UNDERTAKINGS.....	15
<b>4. STATUTORY PROVISIONS.....</b>	<b>16</b>
<b>5. SUBMISSIONS RECEIVED BY THE ACCC.....</b>	<b>17</b>
<b>6. ACCC EVALUATION.....</b>	<b>18</b>
THE MARKET .....	18
THE COUNTERFACTUAL .....	22
PUBLIC DETRIMENTS .....	27
PURPOSE OF NOTIFIED CONDUCT .....	27
<i>Effect on competition</i> .....	27
<i>Business uncertainty</i> .....	31
<i>Increased costs to smaller customers</i> .....	32
<i>Other regulatory provisions</i> .....	36
PUBLIC BENEFITS.....	37
<i>Improved operational efficiency at Lascelles Wharf</i> .....	38
<i>Environmental benefits</i> .....	43
<i>Ensuring GeelongPort's economic viability</i> .....	45
BALANCE OF PUBLIC BENEFITS AND DETRIMENTS .....	46
<b>7. NOTICE.....</b>	<b>47</b>

## 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 GeelongPort
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 The ACCC issued a draft notice under section 93A of the Act on 28 June 2007, proposing to revoke notification N92776 lodged by GeelongPort Pty Limited (GeelongPort) with the ACCC on 19 January 2007. This document is a notice under section 93(3) of the Act, revoking the immunity provided by this notification.
- 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 the consideration of this matter. The ACCC received submissions from interested parties at various stages.

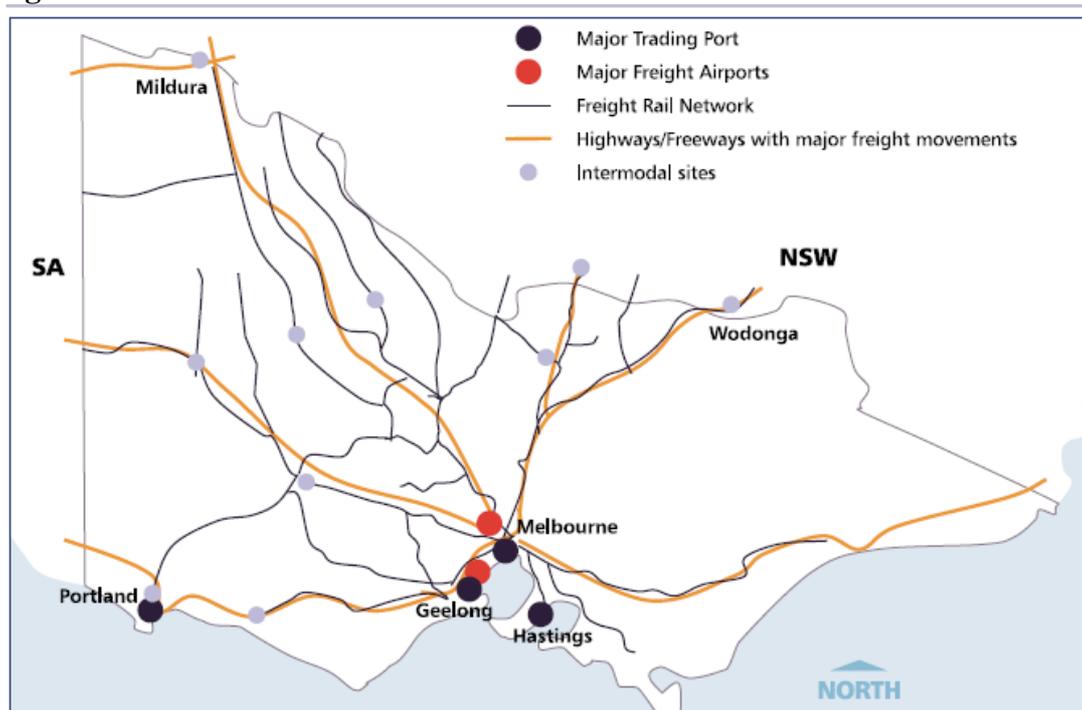
<b>DATE</b>	<b>ACTION</b>
19 January 2007	Exclusive dealing notification N92776 lodged with the ACCC. Immunity commenced from this date.
1 February 2007	Information requested from GeelongPort.
19 February 2007	Closing date for submissions from interested parties in relation to the notified conduct.
19 February 2007	Information received from GeelongPort.
21 February 2007	GeelongPort advises customers of the notified conduct.
16 March 2007	Submission received from GeelongPort in response to issues raised by interested parties and 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.
20 July 2007	Closing date for submissions in relation to the ACCC's draft notice.
20 July 2007	GeelongPort requested additional time to present submissions in response to the draft notice. GeelongPort undertook to refrain from engaging in the notified conduct until the matter was finalised.
20 August 2007	GeelongPort provides submission in response to ACCC draft notice.
7 September 2007	Closing date for interested parties to provide submissions in relation to the GeelongPort's submission of 20 August 2007.
30 October 2007	GeelongPort provides further submissions to the ACCC.
4 February 2008	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 1<sup>1</sup>



#### *The Port of Geelong*

- 2.2 The Port of Geelong was privatised in July 1996 and the ACCC understands it is now owned by a consortium of Hastings Funds Management (35%), Reef Infrastructure (35%) and Asciano Ltd (30%). GeelongPort 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

<sup>1</sup> Sourced from Department of Infrastructure Victoria, *Victorian Ports Strategic Framework November 2004*, p1, viewed at [www.doi.vic.gov.au](http://www.doi.vic.gov.au) on 31 January 2008.

dominate the port's imports.<sup>2</sup> The volume of trade through the port has grown by ten per cent a year in the past five years.

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 Pier No. 2 Bulk Grain Pier No. 3	Bulk grain, lay-up
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

#### *The Port of Portland<sup>3</sup>*

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.<sup>4</sup> 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<sup>5</sup>*

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 2 million tonnes of petroleum products (oil, LPG and ULP) and 1 million tonnes of steel product per year<sup>6</sup>. Around 200 vessel visits are recorded each year with vessels ranging in size up to 100 000 tonnes.

<sup>2</sup> Department of Infrastructure Victoria website, <http://www.doi.vic.gov.au>, viewed 31 January 2008.

<sup>3</sup> Information contained under this heading was obtained from the Port of Portland website, [www.portofportland.com.au](http://www.portofportland.com.au), viewed 31 January 2008.

<sup>4</sup> Essential Services Commission *Ports Monitoring Report 2005-06*, February 2006, p9, viewed at [www.esc.vic.gov.au](http://www.esc.vic.gov.au) on 31 January 2008.

<sup>5</sup> Unless otherwise stated, the majority of this information contained under this heading was obtained from [www.portofhastings.vic.gov.au](http://www.portofhastings.vic.gov.au), viewed 31 January 2008.

<sup>6</sup> Port of Hastings Corporation *Annual Report 2006-2007*, p10

- 2.7 The ACCC understands that 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.
- 2.8 Patrick Ports Hastings manages the Port of Hastings, including Long Island Point, Crib Point, Stony Point Jetties and approaches.

#### *The Port of Melbourne*<sup>7</sup>

- 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.<sup>8</sup>
- 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.<sup>9</sup>
- 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). 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.<sup>10</sup> Common user facilities for general cargo are operated by the PoMC.

#### **Government agencies**

##### *Victorian Regional Channels Authority*<sup>11</sup>

- 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

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<sup>7</sup> Unless otherwise stated, information contained under this heading was obtained from [www.portofmelbourne.com.au](http://www.portofmelbourne.com.au), viewed 31 January 2008.

<sup>8</sup> Port of Melbourne Corporation *Annual Report 2006-07*, p13.

<sup>9</sup> Ibid, p22.

<sup>10</sup> Ibid, p11.

<sup>11</sup> Information under this heading was obtained from the VRCA's website, [www.regionalchannels.vic.gov.au](http://www.regionalchannels.vic.gov.au), viewed 31 January 2008.

- 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 Services<sup>12</sup> within the ports of Melbourne, Geelong, Portland and Hastings:<sup>13</sup>
- the provision of channels for use by shipping
  - the making available of berths, buoys or dolphins in connection with the berthing of vessels
  - 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 Determination<sup>14</sup> 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

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<sup>12</sup> As described in paragraphs 49(c)(i), 49(c)(ii) and 49(c)(iii) of the *Port Services Act 1995*.

<sup>13</sup> Essential Services Commission, *Implementation of Price Monitoring Framework*, viewed at [www.esc.vic.gov.au](http://www.esc.vic.gov.au), 31 January 2008.

<sup>14</sup> Essential Services Commission, *Price Monitoring Determination for the Victorian Ports*, 30 March 2005.

(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:<sup>15</sup>
- changes to Reference Tariffs over the previous 12 months
  - the extent of discounting from the Reference Tariffs
  - changes to the costs or 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
  - 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.<sup>16</sup> The average discharge rate of the figee cranes, allowing for hold clean outs, is approximately 290 tonnes per hour.<sup>17</sup>
- 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 receipt 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.

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<sup>15</sup> Section 4.1.2 of the *Price Monitoring Determination for the Victorian Ports*, 30 March 2005.

<sup>16</sup> Toll GeelongPort *Your Total Logistics Solution* brochure.

<sup>17</sup> GeelongPort's response to ACCC request for further information, 1 February 2007, p5.

- 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.<sup>18</sup>
- 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.<sup>19</sup>
- 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.
- 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.<sup>20</sup>
- 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.<sup>21</sup>
- 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 1 401 120 tonnes. Of this number:<sup>22</sup>
- 85 per cent of cargo was discharged using the figee cranes
  - 10 per cent of cargo was discharged by self discharge vessels

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<sup>18</sup> GeelongPort record of meeting 20 March 2007, p2.

<sup>19</sup> GeelongPort's response to ACCC's request for further information, 1 February 2007, p1.

<sup>20</sup> Record of meeting with GeelongPort, 20 March 2007, p2.

<sup>21</sup> Ibid.

<sup>22</sup> GeelongPort's response to ACCC request for further information, 16 February 2007, p2.

- 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 was 1 186 504 tonnes.<sup>23</sup> As of May 2007, 1 135 000 tonnes had been unloaded using the following methods:

- 70.3 per cent of cargo had been discharged using figee cranes
- 17.3 per cent of cargo had been discharged from self-discharge vessels
- 12.4 per cent of cargo had been discharged using ships' gear.<sup>24</sup>

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.

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<sup>23</sup> Ibid.

<sup>24</sup> Meyrick and Associates, "Lascelles Wharf: Additional Information" 30 October 2007, p 3

2.34 Table 2 summarises GeelongPort's current figee crane rates:

**Table 2 – current figee crane rates at Lascelles Wharf<sup>25</sup>**

<b>Volume discharged</b>	<b>Rate per tonne (inclusive of standby labour)</b>
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. 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 Pivot has a detailed set of negotiated contract terms that arose due to Incitec Pivot 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.

<sup>25</sup> GeelongPort's response to ACCC request for further information, 1 February 2007, p4.

### *Unloading cargo*<sup>26</sup>

- 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.
- 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.<sup>27</sup>
- 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.<sup>28</sup>
- 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.<sup>29</sup>

### *Stevedores*

- 2.44 Patrick's (formerly Toll) stevedoring services compete with Dubai World Ports (formerly P&O) for stevedoring work at Lascelles Wharf.<sup>30</sup>

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

<sup>27</sup> GeelongPort supplementary submission in response to interested parties, 16 March 2007, p8.

<sup>28</sup> Ibid.

<sup>29</sup> GeelongPort supplementary submission in response to interested parties, 16 May 2007, p5.

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

- 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.<sup>31</sup> The ACCC understands the same number of stevedores would be required to discharge cargo using a single ship’s crane.

### **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.<sup>32</sup>
- 2.47 K2 Terminal is leased from the Newcastle Port Corporation by Dubai World Ports. It is a common user facility which operates on a ‘first come first served’ basis. Two shore-based 18 tonne gantry cranes are available to unload dry bulk cargoes such as fertilisers, phosphate rock, ores and meals. The gantry cranes are capable of unloading at a rate of 600 tonnes per hour. Dust extraction systems have recently been installed on both gantry cranes.<sup>33</sup>
- 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, historically, the port has preferred customers to use the gantry cranes to unload but it is not a requirement of berthing at K2 Terminal. Customers may receive discounts on their berthing charges or other charges if they use 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.

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<sup>31</sup> Ibid, p6.

<sup>32</sup> Record of meeting with GeelongPort, 20 March 2007, p2.

<sup>33</sup> Newcastle Port Corporation website [www.newportcorp.com.au](http://www.newportcorp.com.au), *Facilities*, viewed 31 January 2007.

### **3. The notified conduct**

3.1 As previously mentioned, the notified conduct is described as follows:

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.<sup>34</sup>

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. GeelongPort submits the aim of the exclusive dealing conduct is to maximise port efficiency.<sup>35</sup>

3.4 GeelongPort advised its customers on 21 February 2007 that it had decided to lodge the notification and commence engaging in the notified conduct.

#### **Operation of the conduct in practice**

3.5 GeelongPort submits the proposed requirement to use figee cranes is subject to their availability.<sup>36</sup> 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 ships' gear where the figee cranes are available.<sup>37</sup>

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.<sup>38</sup>

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

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

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

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

<sup>38</sup> 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.<sup>39</sup>
- 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.<sup>40</sup> However, the ACCC understands this is subject to the customer demonstrating that a substantial productivity improvement can be achieved.<sup>41</sup>
- 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.<sup>42</sup>
- 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.<sup>43</sup>
- 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 ships' gear.<sup>44</sup>
- 3.15 The proposed conduct does not include a requirement to use Patrick's stevedoring services at Lascelles Wharf.<sup>45</sup>
- 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.<sup>46</sup>

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<sup>39</sup> 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.

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

<sup>41</sup> 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.

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

<sup>43</sup> 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.

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

<sup>45</sup> Ibid.

<sup>46</sup> 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 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:<sup>47</sup>

- 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 arise in relation to the 1999 undertakings.

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<sup>47</sup>

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 (section 47(10)).
- 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 from legal proceedings under the Act.
- 4.3 The ACCC assesses notifications involving exclusive dealing under section 47(2) by applying the test in section 93(3) of the Act. This test states that:
- (3) If the Commission is satisfied that the engaging by a corporation in conduct or proposed conduct of a kind described in subsection 47(2) ... has or would have the purpose or has or is likely to have, or would have or be likely to have, the effect of substantially lessening competition within the meaning of section 47 and that in all the circumstances:
    - (a) the conduct has not resulted or is not likely to result, or the proposed conduct would not result or be likely to result, in a benefit to the public; or
    - (b) any benefit to the public that has resulted or is likely to result from the conduct, or would result or be likely to result from the proposed 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 or would result or be likely to result from the proposed conduct;the Commission may at any time give notice in writing to the corporation stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.
- 4.4 The effect of giving the notice referred to in section 93(3) is to revoke the immunity afforded by lodging the notification
- 4.5 Section 47(13)(b) of the Act states that the reference to competition shall be read as a reference to competition in any market in which:
- (i) the corporation engaging in the conduct or any body corporate related to that corporation; or
  - (ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate; supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.
- 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.<sup>48</sup>

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<sup>48</sup> 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)
  - Essential Services Commission (ESC).
- 5.4 Interfert, Impact Fertilisers, BSBC, Omya and ESA oppose the notified conduct. BioAg, GrainCorp and Blue Circle Southern Cement support GeelongPort’s exclusive dealing notification.
- 5.5 GeelongPort provided further submissions in response to interested party submissions and requests for further information from the ACCC.
- 5.6 Following the ACCC’s Draft Notice, GeelongPort requested additional time to present submissions to the ACCC, including seeking advice from economic consultants. In order to obtain this time extension from the ACCC, GeelongPort undertook to refrain from engaging in the notified conduct until the matter was finalised.
- 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 Notice. Copies of public submissions are available on the ACCC’s website ([www.accc.gov.au](http://www.accc.gov.au)) by following the ‘Public Registers’ and ‘Authorisations and Notifications Registers’ links.

## 6. ACCC evaluation

### The market

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

#### *GeelongPort's submission in support of N92776*

- 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'.<sup>49</sup>
- 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.<sup>50</sup>
- 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.<sup>51</sup>

- 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 Figees cranes and then carted it to Melbourne for storage. The opposite does also occur.<sup>52</sup>

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

#### *Interested party submissions*

- 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.<sup>54</sup>

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<sup>49</sup> GeelongPort's submission in support of notification N92776, 19 January 2006, p1.

<sup>50</sup> GeelongPort's response to ACCC request for further information, 1 February 2007, p1.

<sup>51</sup> Ibid.

<sup>52</sup> GeelongPort's supplementary submission in response to interested party submissions, 16 May 2007, p4.

<sup>53</sup> Ibid.

<sup>54</sup> 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.<sup>55</sup>
- 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.<sup>56</sup>
- 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 steel customers) berth vessels in Geelong and transport their cargo to Dandenong, located to the south east of Melbourne.<sup>57</sup>
- 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, BSBC submits it might be viable to unload small volumes in Melbourne, if they were transporting cargo direct to customers, rather than into storage first.<sup>58</sup>
- 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.

*GeelongPort's response to the draft notice*

- 6.14 In the draft notice the ACCC concluded that the relevant market for assessing this notification was the market for the provision of dry bulk cargo unloading equipment at the Port of Geelong, and that the conduct restricts customers from hiring mobile discharge equipment (that is, hoppers and grabs) from competitors of GeelongPort.
- 6.15 In it's response to the draft notice, GeelongPort submitted that it does not compete for the provision of hoppers and grabs because these operate as

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<sup>55</sup> Ibid, p2.

<sup>56</sup> Submission from Omya Australia, 26 April 2007, p1.

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

<sup>58</sup> Record of meeting with Bruce Stevens Bulk Commodities, 27 March 2007, p3.

“seamless parts of the integrated unloading infrastructure” at Lascelles Wharf.<sup>59</sup>

6.16 In addition, GeelongPort asserted that the “Small but Significant Non-transitory Increase in Price (SSNIP)” test used by the ACCC is not a valid way to determine the market, as it cannot be applied rigorously enough to make a decision based on section 93 of the Act.

6.17 Furthermore, GeelongPort stated that the SSNIP test, if applied properly, shows “the provision of bulk cargo unloading equipment at the Port of Geelong” to be far too narrow a market. If hire of Port of Geelong bulk cargo unloading equipment underwent a small but significant increase in cost, GeelongPort submits that:

customers who import bulk cargos would elect to avoid the Port of Geelong and instead go to other ports to unload their cargoes, being:

a) at least, the Port of Melbourne; and

b) probably also, the ports of Portland, Adelaide and Port Kembla.

On that basis, GeelongPort maintains that the correct definition of the relevant market for competition purposes is not limited to the Port of Geelong, but includes all those ports which the GeelongPort's customers would seriously consider as alternatives for unloading their bulk cargos.<sup>60</sup>

#### *ACCC view*

6.18 Market definition is purposive, which means that the definition of a relevant market cannot be separated from the particular conduct being assessed. Market definition always depends on the specific facts and circumstances of the conduct, and current evidence from market participants will often be critical.

6.19 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.

6.20 The ACCC notes there are currently a number of alternative suppliers of dry bulk discharge equipment at Lascelles Wharf in competition with GeelongPort's figee crane discharge system – namely, the ships' cranes and grabs, self-discharge vessels, BSBC grabs and hoppers, and Incitec Pivot Limited<sup>61</sup> 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.<sup>62</sup>

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<sup>59</sup> GeelongPort response to ACCC draft decision, 20 August 2007, p3

<sup>60</sup> GeelongPort supplementary response to ACCC draft decision regarding market definition and SSNIP test, 7 November 2007

<sup>61</sup> 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.

<sup>62</sup> Bruce Stevens Bulk Commodities submission, 3 April 2007, p1.

- 6.21 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.<sup>63</sup> 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.
- 6.22 GeelongPort agrees that grabs are readily transportable by truck between ports.<sup>64</sup> It also noted that Bulk Cargo Services supplies hoppers in Melbourne and could supply them in Geelong if the need arose.<sup>65</sup>
- 6.23 The ACCC notes that the average time taken to unload a vessel at GeelongPort is 36 hours<sup>66</sup>, and the average tonnes per vessel is 10,379 tonnes.<sup>67</sup> Based on the charges to discharge cargo at Lascelles Wharf set out at 2.33 above, the average ship will cost \$16,767 in berth and facility hire charges and \$50,338 to use the figee cranes at the current tariff rates set out in Table 2 above. On their face, these comparative costs, with the cost of discharge equipment forming a significant proportion of the cost of using the Port of Geelong, appear to support GeelongPort's submission that increases in the cost of discharge equipment would lead to port users switching to other ports.
- 6.24 However, having regard to submissions from interested parties, the ACCC is of the view 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.
- 6.25 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.
- 6.26 The ACCC notes that the Port of Melbourne may be a substitute for port services for some fertiliser and other dry bulk cargo importers. However, the ACCC considers that 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. These cost considerations include additional transportation costs associated with longer road transportation times, the impact of trucking curfews at the Port of Melbourne and the ability of customers of fertiliser companies to backload trucks with fertiliser after delivering produce to port.

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<sup>63</sup> Oral submission from Bulk Cargo Services Pty Ltd, 31 May 2007, p2.

<sup>64</sup> Supplementary submission from GeelongPort in response to interested party submissions, 16 May 2007, p5.

<sup>65</sup> Ibid, p6.

<sup>66</sup> Meyrick and Associates, "Lascelles Wharf: Additional Information", submission to ACCC 30 October 2007, p 13

<sup>67</sup> GeelongPort's response to ACCC request for further information, 16 February 2007

- 6.27 As a result of these additional factors that impact upon the ability of GeelongPort's customer to choose to unload the ACCC believes 'the provision of dry bulk cargo unloading equipment at the Port of Geelong' is a relevant area of competition impacted upon by the notified conduct, for the purposes of assessing this notification.

### **The counterfactual**

- 6.28 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*

- 6.29 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.<sup>68</sup>
- 6.30 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.<sup>69</sup>
- 6.31 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.<sup>70</sup> 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...<sup>71</sup>
- 6.32 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.<sup>72</sup>
- 6.33 GeelongPort has also put forward a report from Meyrick and Associates titled "Lascelles Wharf: Impacts of increasing use of ships' cranes" ('the Meyrick report'). In assessing the congestions and productivity impacts of the increasing use of ships' cranes, the Meyrick report assumes three trajectories for the future use of ships' gear – low, medium and high. The

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<sup>68</sup> GeelongPort submission, 16 March 2007, p10.

<sup>69</sup> Record of meeting with GeelongPort, p4.

<sup>70</sup> Ibid.

<sup>71</sup> GeelongPort's response to ACCC request for further information, 16 February 2007, p5.

<sup>72</sup> Ibid.

scenarios see the use of ships' cranes increase from 20% in 2006-2007 to 30% (low), 35% (medium) and 40% (high) respectively.<sup>73</sup>

- 6.34 The Meyrick report also indicates that the recent increases in the use of ships' gear since 2004-05 has occurred simultaneously with a fall in productivity at Lascelles Wharf.<sup>74</sup> GeelongPort submits that this reduction in productivity is a result of the longer timeframes involved in unloading vessels using ships' gear, which has resulted in congestion at Lascelles Wharf.
- 6.35 Also in regard to congestion at Lascelles Wharf, GeelongPort advises that certain customers have indicated a move towards chartering larger ungeared panamax vessels. These vessels can only be unloaded using the figee cranes. 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.<sup>75</sup>
- 6.36 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.<sup>76</sup>
- 6.37 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.<sup>77</sup>

- 6.38 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.<sup>78</sup>

- 6.39 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.<sup>79</sup>

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<sup>73</sup> Meyrick and Associates, "Lascelles Wharf: Impacts of increasing use of ships cranes", p21

<sup>74</sup> Meyrick and Associates, "Lascelles Wharf: Impacts of increasing use of ships cranes", p11

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

<sup>77</sup> Impact Fertilisers submission, 27 February 2007, p2.

<sup>78</sup> Interfert submission 16 February 2007, p1.

<sup>79</sup> Bruce Stevens Bulk Commodities submission, 6 March 2007, p4.

6.40 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 that we had previously been using in Port Kembla.<sup>80</sup>

6.41 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.<sup>81</sup>

6.42 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 year 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.<sup>82</sup>

*ACCC view*

### **Increased use of ships' gear**

6.43 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.

6.44 The ACCC considers there is insufficient information before it to determine the volume of any increased usage of ships' gear in the absence of the notified conduct and whether any such increase is likely to result in GeelongPort decommissioning the figee cranes at Lascelles Wharf. However, the ACCC considers that GeelongPort would be unlikely to decommission the figee cranes.

6.45 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. In light of this and historical 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.

6.46 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

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<sup>80</sup> BioAg submission, 21 March 2007, p1.

<sup>81</sup> GrainCorp submission, 23 March 2007, p1.

<sup>82</sup> Blue Circle Southern Cement, 28 March 2007, p1.

ships' gear. The ACCC notes that the use of ships' gear is currently much lower at GeelongPort, although the submissions from GeelongPort assert that this level will be surpassed within the next 12-18 months.

- 6.47 Based on these submissions from interested parties, the ACCC considers that the three scenarios put forward by GeelongPort in the Meyrick report appear to overstate the current potential for increased use of ships' gear at Lascelles Wharf. The ACCC is of the view that the likely counterfactual scenario is one that will see a moderate increase in the use of ships' gear over time. In order to assess the notified conduct, the ACCC will use the "Low use of ships' cranes" scenario from the Meyrick report to assess the public benefit claims raised by GeelongPort, as it considers this to be the most likely of the three scenarios put forward. The ACCC notes that if the conduct is found to generate a net public detriment with this scenario as the counterfactual, then the conduct would also generate a net public detriment if there is a lower increase in the use ships' gear.

### **Increased congestion at Lascelles Wharf**

- 6.48 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, during which approximately 44% of annual vessel calls occur – being March to May and September to November. GeelongPort describes port access as being 'excellent for the vast majority of the year'.<sup>83</sup> 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.<sup>84</sup>
- 6.49 The ACCC notes that there is a correlation between the fall in productivity at Lascelles Wharf and the increased use of ships gear since 2004-05. However, the ACCC is unable to conclude that there is likely to be an increase in congestion at the wharf in the absence of the notified conduct. GeelongPort has been unable to provide evidence that congestion is currently a significant issue at Lascelles Wharf, or that there is likely to be an increase in congestion in the future, particularly because historical data regarding the time ships spend waiting for a berth at the Wharf has not been kept.<sup>85</sup>
- 6.50 The ACCC also considers that while there is a possibility that the use of ships' gear may potentially lead to increased congestion at Lascelles Wharf, the potential may be decreased to the extent that customers charter larger panamax vessels to Lascelles Wharf.

### **Alternative methods for achieving aims of the notified conduct**

- 6.51 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

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<sup>83</sup> Ibid, p11.

<sup>84</sup> Record of conversation with GeelongPort, 1 June 2007, p1.

<sup>85</sup> Meyrick and Associates, "Lascelles Wharf: Additional Information", submission to ACCC 30 October 2007, p3

of the notification is that only three fertiliser importers might have to adjust their operations – namely, HiFert, Interfert and Impact Fertilisers.

- 6.52 In this regard, the ACCC indicated in the draft notice that it considers 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 put forward that GeelongPort could simply respond by negotiating discounted figee crane rates in order to retain business in the face of increased competition.
- 6.53 To the extent that increased use of ships' gear creates congestion due to vessels taking longer to unload, the ACCC suggested 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.
- 6.54 In response to the draft notice, GeelongPort submitted that the notified conduct represents the most efficient way to address its concerns regarding the increased use of ships' gear at Lascelles Wharf. In particular, GeelongPort has submitted that an alternative approach involving GeelongPort using time-based berthing charges to increase the incentive for users to use higher productivity handling techniques have three significant problems:
- the magnitude of the pricing change required to generate the necessary incentive can not be achieved within the regulatory constraint of constant overall revenue;
  - heavy reliance on time based charges provides a “perverse incentive” for the port operator, as investments that reduce the time a vessel spends at wharf lead to a reduction in revenue; and
  - heavy reliance on time based charges increase the risk associated with investment in port infrastructure as the operator is exposed to demand risk and a risk that port users may switch to self-discharging vessels.
- 6.55 GeelongPort had also submitted, 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.<sup>86</sup>
- 6.56 The ACCC would be concerned with this counterfactual scenario suggested by GeelongPort. In particular, the ACCC would have concerns regarding any conduct by a corporation that possesses significant market power, which involved recovery of investment costs by effectively charging customers for

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<sup>86</sup>

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

failing to use infrastructure. This would potentially have the same effect as the notified conduct. It remains open to GeelongPort to address environmental issues at Lascelles Wharf in a less anti-competitive manner.

## **Public detriments**

### **Purpose of notified conduct**

6.57 As noted in Chapter 4 of this notice, the ACCC may only revoke notification N92776 if it is satisfied that:

the engaging by a corporation in conduct or proposed conduct of a kind described in subsection 47(2) ... has or would have the **purpose** or has or is likely to have, or would have or be likely to have, the **effect** of substantially lessening competition within the meaning of section 47

6.58 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.<sup>87</sup>

6.59 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' gear by a few customers has increased and GeelongPort expects this trend to continue.

6.60 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. However, the ACCC considers that it does not have sufficient evidence to conclude that GeelongPort has the purpose of substantially lessening competition and, therefore, does not rely upon it in this assessment.

### **Effect on competition**

6.61 It is also relevant to consider the effect or likely effect of GeelongPort's notified conduct on competition.

6.62 To determine whether a substantial lessening of competition may occur, the effect of the exclusive dealing conduct on the overall market for the particular product and its substitutes must be analysed.

6.63 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.

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<sup>87</sup>

Ibid, p3.

- 6.64 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.<sup>88</sup>
- 6.65 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*

- 6.66 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.<sup>89</sup>
- 6.67 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...<sup>90</sup>
- 6.68 Further, GeelongPort submits that self discharge vessels:
- ...represented 82% of the tonnage that went through third party hoppers during 05/06.<sup>91</sup>
- 6.69 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.
- 6.70 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

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<sup>88</sup> GeelongPort supplementary submission in response to interested parties, 16 March 2007, p12.

<sup>89</sup> Ibid, p4.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid, p7.

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.<sup>92</sup>

- 6.71 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.<sup>93</sup>

- 6.72 BSBC states that ‘the notification should also be refused on the basis it would result in a substantial lessening of competition at GeelongPort’<sup>94</sup>. 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.<sup>95</sup>

- 6.73 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.<sup>96</sup>

- 6.74 Similarly, Bulk Cargo Services believes the notified conduct restricts its ability to hire its grabs and hoppers to customers at Lascelles Wharf.<sup>97</sup>

#### *ACCC view*

- 6.75 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. A customer who refuses to use GeelongPort’s figee crane system will not be denied a berth at Lascelles Wharf, but they will be denied permission to unload fertiliser and other dry bulk cargoes using ships’ gear where the figee cranes are available.

- 6.76 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).

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<sup>92</sup> Record of meeting with GeelongPort, 20 March 2007, p3.

<sup>93</sup> Impact Fertilisers submission, 27 February 2007, p2.

<sup>94</sup> BSBC submission, 7 March 2007, p5.

<sup>95</sup> Ibid, p4.

<sup>96</sup> Ibid, p5.

<sup>97</sup> Record of conversation with Bulk Cargo Services Pty Ltd, 31 May 2007, p2.

- 6.77 By its own admission, GeelongPort submits that the notified conduct will alter the use of ships' gear to unload dry bulk cargo from current levels of approximately 12% and potentially up to 20% (the counterfactual scenario) to historic levels of 2-3%.
- 6.78 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. While permission for this to occur is not automatic, GeelongPort put forward an undertaking in response to the draft notice which, if put in place, would ensure that the operating procedures provide for this practice to be allowed at Lascelles Wharf.
- 6.79 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.
- 6.80 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 Figee set up at additional costs.<sup>98</sup>
- 6.81 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.<sup>99</sup>
- 6.82 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 ships' gear and have it unloaded at a substantially lower rate than the applicable top end of the sliding figee crane rates. The ACCC considers that this is indicative of a substantial lessening of competition.

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<sup>98</sup> Submission from Omya Australia and New Zealand, 26 April 2007, p1.

<sup>99</sup> GeelongPort supplementary submission in response to interested parties, 16 May 2007, p8.

6.83 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 dry bulk cargo unloading equipment at the Port of Geelong.

### **Business uncertainty**

#### *Submissions received*

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

6.85 There is some concern that the notified conduct is creating uncertainty regarding unloading arrangements 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.<sup>100</sup>

6.86 In particular, BSBC submits that:

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.<sup>101</sup>

6.87 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'.<sup>102</sup>

6.88 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.<sup>103</sup>

#### *ACCC view*

6.89 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'

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<sup>100</sup> Bruce Stevens Bulk Commodities submission, 8 May 2007, p1.

<sup>101</sup> Ibid.

<sup>102</sup> GeelongPort supplementary submission in response to interested parties, 16 May 2007, p11.

<sup>103</sup> Ibid.

gear will be permitted to continue for the balance of the unloading process if a figee crane later becomes available.

- 6.90 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**

- 6.91 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.

- 6.92 As previously described in Chapter 2 of this 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.

- 6.93 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.<sup>104</sup>

- 6.94 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.

- 6.95 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.

- 6.96 In response, GeelongPort submits that such comparisons are not justified:

The GeelongPort cost covers the grab, hopper and crane whereas the BSBC cost is for hopper and grab only. The assumption that the ship's crane is "free" is false and it is an element of the ship's charter cost and this cost is a matter of negotiation based on a range of factors including number of days charter, number of port calls, weather, ship space taken up, whether ships gear will be used or not used etc<sup>105</sup>.

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<sup>104</sup> GeelongPort supplementary submission in response to interested parties, 16 May 2007, p3.  
<sup>105</sup> GeelongPort response to ACCC position on pricing, 20 October 2007, p2.

6.97 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.<sup>106</sup>

6.98 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.<sup>107</sup>

6.99 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.<sup>108</sup>

6.100 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'.<sup>109</sup> 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.<sup>110</sup>

6.101 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

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<sup>106</sup> Impact Fertilisers submission, 23 February 2007, p2.

<sup>107</sup> GeelongPort's supplementary submission in response to interested parties, 16 March 2007, p3.

<sup>108</sup> Ibid.

<sup>109</sup> Eastern Shipping Associates submission, 5 June 2007, p1.

<sup>110</sup> Ibid, p3.

that do, unlike Geelong, leave it to the port users to decide whether they will use ship or shore based equipment.<sup>111</sup>

- 6.102 Impact Fertilisers submits its last ships' gear discharge cost \$5.15 pmt, whereas the quote to use the Figeo cranes was at a rate of \$7.16 pmt.<sup>112</sup>
- 6.103 In response to the draft decision, GeelongPort submitted that the tariff quote of \$7.16 pmt was incorrectly reported by Impact Fertilisers and that the quoted rate was actually \$3.83 pmt, a significant saving compared to ships' gear discharge<sup>113</sup>.
- 6.104 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'.<sup>114</sup>
- 6.105 GeelongPort maintains that BSBC's claim is inconsistent with the cost disadvantages alleged by ESA and Impact Fertilisers. GeelongPort maintains that BSBC's comparison may not have taken all relevant costs into account and uses a tariff rate from a one-off shipment. GeelongPort also reiterated that where there is a shared cargo with other fertiliser importers, the figee rate charged is a function of the total tonnes of all customers on the ship not the lower individual customer tonnes.
- 6.106 Some interested parties have also expressed concern that the notified conduct removes a competitive constraint on GeelongPort's figee crane tariff rates.
- 6.107 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.<sup>115</sup>

#### *ACCC view*

- 6.108 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.

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<sup>111</sup> Ibid.

<sup>112</sup> Impact Fertilisers submission, 23 February 2007, p2.

<sup>113</sup> GeelongPort response to ACCC draft decision, 20 August 2007, p13.

<sup>114</sup> Record of Meeting with Bruce Stevens Bulk Commodities, 27 March 2007, p1.

<sup>115</sup> GeelongPort supplementary submission in response to interested parties, 19 March 2007, p5.

6.109 Meyrick has provided estimates of the difference between the cost of hiring figee cranes and the cost of hiring grabs and hoppers to use with ships' cranes. The cost of hiring grabs and hoppers is estimated as being cheaper than figee cranes by between \$0.89 and \$2.32 per tonne. Averaging the estimates considered by Meyrick (which notably excludes Impact Fertilisers' reported quote of \$7.16 per tonne for figee hire) results in an estimated cost difference of \$1.41 per tonne. Meyrick provides that this difference would be at least partially offset by eliminating costs associated with providing and using ships' cranes, such as fuel use and additional maintenance.<sup>116</sup>

6.110 Meyrick has also provided a summary of the different discharge methods at the Lascelles Wharf between 1 July 2006 and 31 May 2007:

Ships using Figee cranes handled 798,000 tonnes, accounting for 70.3% of the total. Self discharge vessels — which make use of mobile hoppers — handled a further 197,000 tonnes, or 17.3% of the total. The remaining 141,000 tonnes (12.4%) was discharged from ships that used only ships cranes — these ships make use of both hired grabs and hired mobile hoppers.<sup>117</sup>

6.111 If GeelongPort had enforced the use of Figee cranes for the 2006/07 financial year, 137,000 tonnes discharged using ships' gear would instead have been subject to the price increase range estimated above. Table 3 contains three estimates of the total increase in immediate out-of-pocket costs over the year.

**Table 3**

Average increase in cost.	Total increase in immediate out-of-pocket cost over a year.
\$0.89 / tonne	\$121,725
\$1.41 / tonne	\$192,846
\$2.32 / tonne	\$317,306

6.112 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.

6.113 The ACCC also considers 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.

<sup>116</sup> Meyrick and Associates, "Lascelles Wharf: Impacts of increasing use of ships cranes", p11  
<sup>117</sup> Meyrick and Associates, "Lascelles Wharf: Additional Information", submission to ACCC 30 October 2007, p3.

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.

- 6.114 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.
- 6.115 In response to the ACCC's Draft Notice, GeelongPort offered an undertaking to not "increase its figee crane 'rack rates' by more than the consumer price index for at least three years"<sup>118</sup> "in the event that the ACCC approves the notification".<sup>119</sup> The ACCC considers that the proposed undertaking would not address detriments involving increased prices for smaller customers as the proposed undertaking does not address the immediate price impact of the notified conduct set out in table 3 and would not address the removal of competitive pressure which may otherwise force GeelongPort to reduce the Figee crane rack rates.
- 6.116 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, affecting downstream markets. Consequently, the ACCC is of the view that the anti-competitive detriment of the notified conduct is substantial.

### **Other regulatory provisions**

- 6.117 As outlined in Chapter 2 of this 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).
- 6.118 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.
- 6.119 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.
- 6.120 Following the ACCC's draft notice of 28 June 2007, the ESC provided a submission to the ACCC which advised that, 'If GeelongPort proceeds with the proposed arrangements set out in the Notification, the [ESC] would need to consider the application of clause 2.1.7 of the Determination, and whether

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<sup>118</sup> GeelongPort response to ACCC draft decision, 20 August 2007, p23

<sup>119</sup> GeelongPort response to ACCC draft decision, 20 August 2007, p2

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.<sup>120</sup>

- 6.121 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, which is relevant to the ACCC's public detriment assessment. In particular, the ACCC notes that the aims of the regulatory framework for the ports industry administered by the Essential Services Commission is to enhance competition, efficiency and investment in the ports while protecting the interests of port users. To the extent that the conduct would operate in breach of the Price Monitoring Determination, the ACCC considers that this indicates the conduct is likely to result in anticompetitive detriment.

## Public benefits

- 6.122 Before it can issue a notice, the ACCC must be satisfied that:

the engaging by a corporation in conduct or proposed conduct of a kind described in subsection 47(2) ... has or would have the purpose or has or is likely to have, or would have or be likely to have, the effect of substantially lessening competition within the meaning of section 47 and that in all the circumstances:

(a) the conduct has not resulted or is not likely to result, or the proposed conduct would not result or be likely to result, in a benefit to the public; or

(b) any benefit to the public that has resulted or is likely to result from the conduct, or would result or be likely to result from the proposed 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 or would result or be likely to result from the proposed conduct.

- 6.123 The ACCC must, therefore, consider any public benefit arising or likely to result from the conduct or proposed conduct.

- 6.124 In its notification, GeelongPort submitted that the conduct will result in the following public benefits:<sup>121</sup>

- 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.

<sup>120</sup>

Essential Services Commission submission, 12 September 2007

<sup>121</sup>

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

## Improved operational efficiency at Lascelles Wharf

### *Submissions received*

- 6.125 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:<sup>122</sup>
- 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)
  - 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.
- 6.126 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.<sup>123</sup>
- 6.127 To support these points, GeelongPort has provided historical information from the port which demonstrates that the figee cranes are able to handle larger parcels than ships' gear (see table 4 below), resulting in operational savings due to reduced shipping and berth hire costs of approximately \$800,000 in 2007-08 up to \$1,720,000 in 2011-12. These estimates take into account existing constraints on discharge rates due to the inability of customer receival systems to take full advantage of the potential of the figee cranes and are based upon queuing theory to estimate the additional cost of ship and berth hire charges as a result of potential time delays.<sup>124</sup>

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<sup>122</sup> GeelongPort's response to ACCC request for further information, 1 February 2007, p4.

<sup>123</sup> Record of meeting with GeelongPort, 20 March 2007, p3.

<sup>124</sup> Meyrick and Associates, "Lascelles Wharf: Additional Information" 30 October 2007, p 5

**Table 4: Average tonnes per parcel<sup>125</sup>**

Method of cargo handling	Average tonnes per parcel
Shore crane	12,954
Ships' gear	7,272
Self discharging	12,031
Overall	12,228

- 6.128 GeelongPort also submit that this cost is not wholly born by the party choosing whether to use ships' gear or the figee cranes, as the public cost of the decision to use ships' gear is greater than the private cost and "as berth utilisation levels increase, the impact of the original decision will begin to cascade through subsequent arrivals, and have an effect that extends well beyond the time of departure of the original ship".<sup>126</sup>
- 6.129 Meyrick and Associates estimate that this public cost currently exceeds the private cost by up to one-third in off-peak months, and by up to five times during peak times. Should berth occupancy rates increase in peak months, Meyrick and Associates estimate that this could become as much as ten times by 2011/12.<sup>127</sup>
- 6.130 BioAg supports GeelongPort's 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...<sup>128</sup>
- 6.131 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...<sup>129</sup>
- 6.132 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.<sup>130</sup>
- 6.133 A number of interested parties submit it is possible to achieve similar discharge rates by utilising multiple ships' cranes.
- 6.134 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

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<sup>125</sup> Meyrick and Associates, "Lascelles Wharf: Impacts of increasing use of ships cranes", p22  
<sup>126</sup> Meyrick and Associates, "Lascelles Wharf: Additional Information", submission to ACCC 30 October 2007

<sup>127</sup> Ibid

<sup>128</sup> BioAg submission, 19 March 2007, p1.

<sup>129</sup> GrainCorp, 19 March 2007, p1.

<sup>130</sup> Blue Circle Southern Cement submission, 28 March 2007, p1.

safe manner. It is possible for two cranes to safely service one hopper, on a 'one in, one out of the hold' basis.<sup>131</sup>

6.135 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')...<sup>132</sup>

6.136 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.

6.137 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...<sup>133</sup>

6.138 In response, GeelongPort submits that the use of three or four ships' cranes and associated equipment is not practicable, efficient or cost effective at Lascelles Wharf. 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.<sup>134</sup>

6.139 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...<sup>135</sup>

6.140 BSBC does not agree with 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...Ships 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.<sup>136</sup>

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<sup>131</sup> Eastern Shipping Associates submission, 5 June 2007, p2.

<sup>132</sup> Ibid.

<sup>133</sup> BSBC submission, 3 April 2007, p3.

<sup>134</sup> GeelongPort supplementary submission in response to interested parties, 19 March 2007, p8.

<sup>135</sup> Ibid, p9.

<sup>136</sup> BSBC submission, 3 April 2007, p3.

- 6.141 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.
- 6.142 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 Figee cranes, potentially resulting in large truck and stevedore waiting time costs for the receiver.<sup>137</sup>
- 6.143 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.<sup>138</sup>
- 6.144 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.<sup>139</sup>
- 6.145 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.<sup>140</sup> However, as noted above, the figures detailing the unloading speed of the figee cranes are based on historical observations and, therefore, take into account any slowing down of the figee cranes as a result of slower receival rates of customers.

*ACCC’s view*

- 6.146 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’ gear.
- 6.147 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. The ACCC is also of the view that the efficiency gains could be achieved through commercial negotiations with the three port users that are likely to be the most affected by the notified conduct<sup>141</sup>.

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<sup>137</sup> Impact Fertilisers submission, 23 February 2007, p2.

<sup>138</sup> Omya submission, 26 April 2007, p1.

<sup>139</sup> Record of meeting with BSBC, 27 March 2007, p1.

<sup>140</sup> Record of conversation with GeelongPort, 1 June 2007, p2.

<sup>141</sup> GeelongPort’s submission in support of notification N92776, 19 January 2006

6.148 In any event, the ACCC notes that while, on average, the figee cranes operate with a faster discharge rate than ships' cranes, 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 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
- 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.<sup>142</sup>

6.149 As such, the GeelongPort submits that imposing a requirement to use the figee cranes is likely to result in efficiency gains at Lascelles Wharf of \$800,000 in 2007-08 to \$1,720,000 in 2011-12 (in the 'low use of ships' gear scenario. However, the ACCC considers that several factors will restrict the extent of these efficiencies as this figure:

- assumes that the producers who are forced to switch back to figee cranes as a result of the notified conduct are capable of unloading at the average figee crane discharge rate; and
- is based on an assumed level of queuing and congestion at Lascelles Wharf, based on queuing theory rather than historical observations regarding vessel queues at Lascelles Wharf. The ACCC notes that GeelongPort does not collect data on vessel queues at Lascelles Wharf, and did not study the impacts of congestion at the wharf prior to lodging this exclusive dealing notification.

6.150 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 ships' gear is used on another vessel, or the ability for ships' gear to be used alongside a figee crane to unload a vessel more quickly. In response to the draft notice, GeelongPort proposed a possible undertaking to ensure ongoing availability of grabs and hoppers at

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<sup>142</sup>

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

‘a reasonable price’ to be used when figee cranes are unavailable.<sup>143</sup> The ACCC considers that, depending on factors such as price and operating procedures, such an undertaking would reduce this potential loss of efficiency.

- 6.151 For these reasons, the ACCC considers that the notified conduct is likely to generate some public benefit in the form of improved operational efficiency at Lascelles Wharf, but is of the view that the benefit is likely to be less than that claimed by GeelongPort. In addition, the reduction in competition may see some operational efficiency lost if alternative forms of unloading are unavailable and may also lead to a loss of dynamic efficiency as GeelongPort’s unloading services are exposed to less pressure to innovate.

### **Environmental benefits**

- 6.152 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.
- 6.153 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.
- 6.154 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.
- 6.155 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.<sup>144</sup>

- 6.156 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

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<sup>143</sup> GeelongPort response to ACCC draft decision, 20 August 2007, p24  
<sup>144</sup> BioAg submission, 19 March 2007, p1.

effective system in controlling dust when compared to a self discharge vessel and third party hopper.<sup>145</sup>

6.157 In contrast, a number of interested parties do not support GeelongPort's environmental public benefit claims.

6.158 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.<sup>146</sup>

6.159 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.<sup>147</sup>

6.160 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.<sup>148</sup>

6.161 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.<sup>149</sup>

6.162 In response to these submissions, GeelongPort provided the ACCC with a further submission detailing the environmental benefits of the figee crane system. GeelongPort submitted that the entire figee crane system should be examined, not just the crane and grab component. GeelongPort maintains that typical ships' gear grabs used at the port over the last five years are open or partially open grabs, which do not fully contain the product being loaded and cause spillage onto the deck, wharf and water<sup>150</sup>.

6.163 In contrast, GeelongPort submits that the figee cranes fully contain the product being discharged, and have 'save-alls', which are bigger and tighter than save-alls used on ships' gear. The save-alls direct any spillage away from the berth apron and the water. Furthermore, GeelongPort maintains that the portable save-alls used with ships' gear must be physically moved with machinery such as a forklift, and the save-alls are not always moved to suit the movement of loading sites<sup>151</sup>.

6.164 GeelongPort reiterated that the lack of weighing facilities in the mobile hopper discharge process led to truck overloading and resultant 'tip offs'. GeelongPort submitted that BSBC's assertion regarding the ability of hopper operators to accurately load trucks has been proved false by the previously

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<sup>145</sup> Blue Circle Southern Cement submission, 28 March 2007, p1.

<sup>146</sup> Interfert submission, 16 February 2007, p1.

<sup>147</sup> Impact Fertilisers submission, 23 February 2007, p2.

<sup>148</sup> Record of meeting with BSBC, 27 March 2007, p3.

<sup>149</sup> Eastern Shipping Associates submission, 5 June 2007, p3.

<sup>150</sup> GeelongPort submission, 20 October 2007, p1.

<sup>151</sup> Ibid p2.

provided photographs showing debris left by tip offs. GeelongPort submits that BSBC attempted to repair the problem by implementing a weight platform system when loading from mobile hoppers, but the scheme was abandoned. The load cells on each figee crane hopper remain the only way of ensuring that the correct amount is exactly loaded into trucks<sup>152</sup>.

- 6.165 Finally, GeelongPort submits that the figee cranes reduce the amount of dust spillage. This is due to the material being dropped on a small bed of remaining material, rather than directly onto bare metal. For the transfer of cement clinker, a dust extraction system is fitted around the figee hopper, reducing airborne dust emissions. The BSBC mobile hoppers unsuccessfully trialled this system<sup>153</sup>.

#### *ACCC view*

- 6.166 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.
- 6.167 Further, GeelongPort advises that, even under the notified conduct, it will continue to allow the use of ships' gear when the figee cranes are unavailable or when they break down and in other circumstances. Accordingly, the ACCC considers that the notified conduct does not fully address potential environmental issues at Lascelles Wharf from the use of ships' gear.
- 6.168 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.
- 6.169 The ACCC considers that a requirement to use GeelongPort's figee crane discharge system will generate some benefit as a result of a reduction in the amount of dust and other harmful substances released into the environment, compared to the counterfactual when various types and standards of ships' cranes are used more frequently at Lascelles Wharf.

#### **Ensuring GeelongPort's economic viability**

- 6.170 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.

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<sup>152</sup> Ibid pp2-3.

<sup>153</sup> Ibid p3.

6.171 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.<sup>154</sup>

6.172 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.<sup>155</sup>

#### *ACCC view*

6.173 The ACCC notes that GeelongPort will benefit from greater revenue as a result of the notified conduct. 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**

6.174 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.

6.175 The ACCC considers that the notified conduct is likely to generate some public benefit in the form of operational efficiencies and environmental benefits. However, as discussed above, it appears unlikely that the claimed operational efficiencies will be realised in practice.

6.176 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 the provision of dry bulk discharge equipment at Lascelles Wharf. In addition, the ACCC considers the notified conduct is likely to result in higher port charges for some customers in the order of \$200,000 per annum initially, as well as a significant loss in competitive pressure on an ongoing basis.

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

6.178 The ACCC notes that if the potential congestion, productivity and demurrage concerns that have been raised by GeelongPort occur at Lascelles Wharf in the future, it is open to GeelongPort to seek to address those issues and, if necessary, apply for authorisation under section 88(8) of the Act, or notify an alternative exclusive dealing arrangement under section 93 of the Act.<sup>156</sup>

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<sup>154</sup> Interfert submission, 16 February 2007, p1.

<sup>155</sup> GeelongPort supplementary submission in response to interested parties, 19 March 2007, p7.

<sup>156</sup> Section 93(10) of the Act removes the entitlement for a corporation to notify conduct that is the same or similar to the conduct described in an exclusive dealing notification for which the ACCC has issued a notice under section 93(3).

## 7. 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 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 the provision of dry bulk cargo unloading equipment 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 issues a notice under section 93(3) of the Act in respect of notification N92776. This notice removes the immunity provided by the notification on 7 March 2008.