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By email

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Dear Ms Clancy

Applications for authorisation submitted by Australian Amalgamated Terminals Pty Limited (AAT) – AAT's response to Draft Determination

We refer to the Australian Competition & Consumer Commission's (**Commission**) letter dated 19 October 2009 advising AAT that it has issued a draft determination in respect of the applications lodged by AAT on 10 June 2009 and 5 August 2009 (**Draft Determination**).

As a general submission, AAT welcomes the Commission's decision to authorise the AAT joint venture and is open to operating under a commercially workable conditional authorisation.

However, AAT does not agree that there is sufficient reliable evidence before the Commission on which to base the finding set out in the Draft Determination that there are limited public benefits and potentially significant detriments arising from the operation of AAT. Importantly, AAT already operates under open access and non-discriminatory principles and has never denied access to any party seeking to do business at any AAT terminal. The ACCC has made no finding to the contrary.

Therefore, AAT submits that the conditions upon which the Commission has proposed to grant authorisation go beyond those required to address the Commission's reasons for the grant of authorisation.

We have set out in this letter proposed revisions to the ACCC's conditions which AAT believes would result in a dispute resolution framework that is commercially acceptable to AAT and consistent with a workable and effective process of consultation with industry participants. We shall send separately a set of proposed conditions that give effect to the matters raised in this letter. AAT is open to the proposed conditions being provided to interested parties to facilitate consultation. In summary, we believe that the ACCC should make the following changes to the proposed conditions contained in the Draft Determination:

1. A longer **term** of authorisation of at least 10 years should be granted.
2. The authorisation should extend to future **parties** where there is no material change in circumstances.
3. To the extent a dispute resolution process is required, it should only be available to parties who **contract with AAT** or **seek to contract with AAT**.

4. The **scope** of the dispute resolution process should:

   (i) be limited to disputes about terminal access and non-discrimination;

   (ii) only apply at ports where there are no alternative suppliers of automotive terminal services; and

   (iii) only apply to disputes arising after the date of the authorisation.

5. To the extent there are concerns about alleged unreasonably high prices, such concerns have and can in the future be dealt with by way of **price monitoring** by port authorities.

6. The dispute resolution **process** should be streamlined and simplified to maximise its effectiveness and minimise the cost and management time for all parties.

7. The **auditing** provisions should be simplified or replaced by the price monitoring provisions, noting they are complex, multilayered and potentially time-consuming;

8. Additionally, there are a number of **factual errors** contained in the Draft Determination which AAT has identified in Appendix A to this document which should be corrected.

Each of these issues is dealt with in more detail below:

1. Term of Authorisation

In the Draft Determination, the Commission proposes to grant authorisation for 5 years, referring to the changes in international trade and associated adjustments to port facilities and services as reasons for its proposal.

AAT maintains its position that authorisation should be granted for the duration of the joint venture, taking into account the scope of integration and level of investment involved, and noting the ACCC's power to review and potentially revoke the authorisation in the event of a material change of circumstance.

However, if the ACCC is proposing to limit the term of authorisation, AAT submits that, for the following practical reasons, an authorisation term of not less than 10 years would be appropriate the proposed authorisation time frame (5 years) will expire prior to the end of the AAT's leases at two of its most significant operations:

(i) Fisherman Islands (6 May 2016); and

(ii) Webb Dock West (31 December 2017)

At Fisherman Islands a number of customers have raised capacity as an important issue. AAT is prepared to invest in new infrastructure to meet demand but is likely to require lease extensions to do so. The uncertainty arising from a short 5 year authorisation period will make lease negotiations and investment potentially uncommercial given the short time frame, and, owing to uncertainty, is likely to act as a disincentive to investment by AAT in that terminal, ultimately to the detriment of users of the facilities. In other words, the benefits which currently accrue to users of the terminal which are identified in the Draft Determination are likely to be dissipated by the imposition of this relatively short time frame.

Investment in new automotive facilities at Webb Dock West will be vital to ensure that automotive imports and exports remain in the Port of Melbourne, as preferred by the automotive industry, rather than having to relocate out of the capital city to a regional port (such as Geelong), as happened with the transfer of the automotive business from Sydney to Port Kembla.

AAT has spoken to Shipping Australia Limited (**SAL**) in relation to the 5 year authorisation term as it was SAL that proposed this term in their submission to the ACCC. SAL has advised that so long as AAT was complying with the other terms of the authorisation then SAL would have no objection to a longer authorisation period being agreed.

In addition to the above AAT has started the process of seeking long term bank funding. In the current economic climate any bank funding is not straight forward. A 10 year authorisation period is more reasonable for the procurement of long term funding.

Lastly, the proposed 5 year time frame fails to take into account the time frame for planning of port infrastructure for all stakeholders, including port authorities and State Governments, which is commonly undertaken decades ahead because of the nature and amount of investments required. These issues are referred to at some length in sections 4.32 to 4.39 of the Draft Determination. It is appropriate that in circumstances where port infrastructure is under consideration, this time horizon is taken into account to allow appropriate infrastructure planning for port facilities to occur. A shorter time frame would, indirectly, amount to an interference in the planning and deployment of port infrastructure because it introduces an uncertainty distortion into the processes of port authorities and State Governments when making decisions on granting leasehold interests on port land for port infrastructure.

2 Future parties

At paragraph 5.14 of the Draft Determination the Commission has indicated that "the proposed authorisation does not include the addition of future parties to the AAT joint venture or to new terminals established and/or operated by AAT."[1]

We seek to clarify the Commission's decision not to grant authorisation with respect to "future parties". From our discussion with the Commission, we understand that this is simply intended not at this time to automatically extend authorisation to a future party to the AAT joint venture agreement (that is a future shareholder in AAT).

We do wish to bring to your attention that there may potentially be changes to the ownership interests in the existing AAT shareholders, namely Plzen Pty Limited (**Plzen**) and P&O Wharf Management Pty Ltd (**POWM**). AAT understands that it is not the Commission's intention that authorisation would not continue to apply in the event of a change in the ownership of Plzen and POWM.

It is our understanding that any change in ownership of the beneficial owners of Plzen and POWM may result in a review of the authorisation, but only where the ACCC reasonably believes that such a change would constitute a material change in circumstances.

[Commence confidential]

[End confidential]

3 Parties to the dispute resolution process

The Commission also appears to suggest that there can be a dispute between third parties and AAT where there is no contractual relationship with them. One example would be importers of motor vehicles. AAT fails to see that any rights or obligations arise between such parties and AAT that would or, indeed, could, require resolution. The Commission's Draft Determination seems to suggest that,

[1] ACCC, *Application for authorisation lodged by Australian Amalgamated Terminals Pty Limited (A91141, A91142, A91181 and A91182), Draft Determination*, 19 October 2009, at 5.12.

despite there being no contract between them, such persons have an "interest" in the use of terminals such that a dispute could be notified to AAT by such persons. It is further suggested in the draft that the resolution of such disputes could have consequences for the terms and conditions and even price of use of terminals under contracts to which they are not a party (see clause 2.2 of the Appendix D). Paragraph 4.88 demonstrates the lack of connection between these third parties and AAT. AAT does not see how any amendment to binding contractual terms could result from or be effective at law as a consequence of the resolution of a dispute with a third party in the manner proposed. The more appropriate method for redress for such industry participants would be to provide for price monitoring and to allow such persons to make submissions in that respect.

For reasons described below, AAT does not believe a dispute resolution process as proposed by the ACCC is required. However, if, despite the absence of any principled basis for a mandatory dispute resolution process to apply to these contractual relationships, the Commission considers that such a process is warranted, AAT submits that only parties who contract with AAT or seek to contract with AAT should participate in any dispute resolution process. It should be noted that nothing precludes shipping lines, importers and/or exporters from contracting with AAT, even if they may choose to outsource the loading and unloading of cargo.

Accordingly, in the event the Commission includes section 2 of Appendix D in the Determination, AAT submits that the following amendments should be made to the definition of Terminal End-User proposed by the Commission.

Amended definition of "Terminal End-user"

"**Terminal End-user**" means a person, other than an Applicant, who as a consequence of their requirement for access to Port Terminal Services has an interest in the terms and conditions of use of the Port Terminals and:

(a) who has a direct contractual relationship with AAT; and

(b) does not include a person carrying on, or proposing to carry on, a stevedoring business or business as a stevedore.

4 Scope of the dispute resolution process

AAT has reviewed the proposed scope of the dispute resolution process and believes it significantly exceeds what is reasonably required to address the ACCC's reasons.

Existing mechanisms adequate for other terminal users

AAT does not believe the proposed dispute resolution procedures are necessary for terminal users who are not stevedores and who have a direct contractual relationship with AAT such as PDI operators.

First, these entities are not obliged to use AAT's facilities when processing cars and have other alternatives available to them, which indeed are currently used, such as off-wharf storage and processing facilities.

Second, and in any event, any users of AAT facilities, including PDI operators who have direct contractual relationships with AAT pertaining to the use of AAT's facilities can resolve disputes with AAT in the usual commercial manner and without the need for a dispute resolution process.

There is no evidence before the Commission which suggests that there is any need for additional dispute resolution mechanism for these end-users. As such, section 2 of Appendix D should be omitted from the final Determination.

Access and non-discrimination only

AAT submits that there is no basis for the implementation of a dispute resolution framework that goes beyond ensuring that AAT will provide access to parties seeking to use its facilities for automotive stevedoring purposes and to ensure that its terms and conditions of access are non-discriminatory.

For reasons set out below, AAT does not believe it is appropriate or necessary for the dispute resolution procedures to be applicable to pricing issues, beyond questions of discriminatory pricing.

Not applicable where alternative suppliers of automotive terminal services

The dispute resolution process and price monitoring should only be applicable to AAT at ports where there are no alternative suppliers of automotive terminal services.

Only applicable to disputes arising after the date of the authorisation.

AAT requests that the final determination confirm for the information of all stakeholders that the dispute resolution process is not intended to apply to any disputes arising from:

- changes notified by AAT prior to the date the authorisation comes into effect and currently remain pending; and
- changes notified by AAT prior to the date the authorisation comes into effect and are implemented after the authorisation comes into effect.

To reflect the Commission's intent and to clarify the applicability of the dispute resolution process for Terminal End-users we suggest amending clause 2.1(b)(iii).

Suggested amendments (in red mark-up)

(b) This dispute resolution process:

(i) is available for Terminal End-User Disputes; and

(ii) is intended to facilitate the genuine and good faith negotiation of resolutions to bona fide commercial disputes between AAT and Terminal End-users; and

(iii) applies only to disputes about conduct which occurred after the date this Authorisation comes into effect. For the avoidance of doubt, this dispute resolution process does not apply to disputes arising from changes notified by AAT prior to the date the authorisation comes into effect and that remain pending or are implemented after the authorisation comes into effect.

5 Price Monitoring

The ACCC's analysis does not support price regulation as the AAT joint venture does not give rise to pricing power on the part of AAT.

There are existing substantial constraints on AAT's pricing power. In ports where AAT is currently the only operator of automotive terminals – the Port of Brisbane and Port Kembla, each port lease and management agreement control AAT's pricing. Significantly, the Draft Determination notes that the main reason for the increase in Fisherman Island charges in 2008 was the land rental increase, and acknowledges that increase to be "*beyond AAT's control.*" The ACCC also notes in the Draft Determination that that the Port of Brisbane and Port Kembla Port Corporation reviewed AAT's recent price increases, and concluded that they were "*reasonable and justified.*" (Draft Determination paragraphs 4.70-.71). At other ports, eg Melbourne and Adelaide, AAT competes with other facilities. Accordingly, there is simply no basis for the imposition of a form of broad price regulation over AAT's prices as a condition of authorisation.

If, despite the foregoing, the ACCC considers that some form of additional price monitoring is warranted, AAT submits that price monitoring by the relevant port corporation (such as occurs in Brisbane and Port Kembla) is a more appropriate solution and is also workable for AAT as it would avoid protracted arbitration every time AAT is unable to agree with industry participants over rate increases. Therefore, although AAT maintains it is not necessary, a condition of authorisation could be that AAT use its best endeavours to establish with each relevant port authority where it operates a framework similar to that used in Brisbane pursuant to which AAT must submit its tariffs and any changes to tariffs to the port authority for confirmation as reasonable and justified, with an information gathering power on any properly formulated complaint to the relevant port authority from any customer of AAT. The relevant port authority is well qualified to take into account in reviewing the reasonableness of any price increases established principles for pricing of use of infrastructure, including allowing AAT to generate a reasonable rate of return on the amount of funds invested on a terminal by terminal basis taking into account factors such as all input costs, an appropriate allocation of head office costs, expected volumes, the level of capital investment at that terminal (including the discounted value of future lease commitments) and AAT's overall weighted average cost of capital.

AAT believes that this proposal properly balances the interests of third parties in providing adequate protection against AAT unreasonably increasing prices while not imposing unreasonable conditions and costs on AAT which will be passed on to all users in the absence of any reliable evidence of the necessity of doing so.

AAT submits that this proposal should be considered in the context of AAT's demonstrated track record over a lengthy period (acknowledged by the ACCC) of not unreasonably increasing prices in an environment where it was not subject to any regulation.

6 Complex Process

The ACCC's proposed conditions propose two separate tracks for dispute resolution:

> Access Disputes: these dispute procedures apply to direct users of AAT's services (e.g., stevedores)
>
> Terminal End-user Disputes: these dispute procedures apply to other third parties, including those "with an interest in the terms and conditions of use" of AAT's terminals, including but not limited to shipping lines, importers and exporters, as well as their representatives.

Each process provides the ACCC with the ability to arbitrate disputes subject of the conditions, based on the framework provided for under Part IIIA of the Act in relation to access regimes. These dispute resolution processes have the potential to be very costly and time consuming for AAT.

It is unclear how these provisions relate internally to each other and how they operate in tandem with dispute resolution procedures contained in external arrangements such as stevedoring licensing agreements which are on foot. Moreover, the ACCC's proposed conditions appear to be internally inconsistent. For example, the definition of Access Dispute (procedure proposed for users of AAT services) set out in the proposed conditions is (emphasis added):

> *A bona fide dispute between an Applicant or Stevedore and AAT relating to access to Port Terminal Services but* ***excludes any dispute in relation to any agreement relating to Port Terminal Services between the parties once executed.*** *For the avoidance of doubt, an Access Dispute can exist notwithstanding AAT has complied with clauses 1.1, 1.3 and 1.4 of these Conditions.*
>
> However, clause 1.7.1(b) in relation to Access Disputes, states that (emphasis added):
>
> ***Notwithstanding any agreement between AAT and a Stevedore relating to Port Terminal Services, an Applicant or Stevedore may raise an Access Dispute*** *in accordance with this clause 1.7. For the avoidance of doubt, an Access Dispute can be raised in relation to discrimination and/or the hindering of access to Port Terminal Services.*

AAT believes that its proposals outlined above to limit the scope of issues to which the dispute resolution process would apply as well as limiting the types of parties that can use the dispute processes will address this issue by resulting in a single dispute resolution process, thereby making the process more efficient and effective for all relevant parties.

7 Auditing Provisions

Given that there have been no past issues whatsoever in relation to stevedoring access, AAT believes that the proposed audit arrangements included in clauses 1.3 (b) and 1.5 of Attachment D are onerous and potentially very costly. These costs will ultimately be borne by AAT's customers.

The ACCC's concerns relating to stevedore access are covered in clauses 1.6 and 1.7 of Attachment D and AAT can see no need for the additional audit clauses 1.3 (b) and 1.5.

In relation to Clause 1.7.7 dealing with arbitration, AAT believes that point (i) needs to be expanded to say "Other than where the determination or direction is the subject of review by a court of law, or is not in compliance with AAT's lease obligations, AAT will comply with the lawful determination or directions of the arbitrator". AAT will comply with the directions of the arbitrator but clearly cannot do so in the event that the direction is inconsistent with its leases.

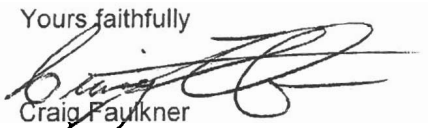
8 Factual Errors

The Draft Determination contains a number of factual errors which suggest that the Commission's conclusions and conditions are not well-based. **Appendix A** to this letter contains a list of those matters which are factually incorrect and which should be corrected in the Determination when issued.

Next Steps

We would welcome the opportunity to discuss the contents of this letter with you in more detail to address any questions you may have in order to try and reach a mutually acceptable outcome. We will also forward a proposed set of conditions shortly for your review and industry consultation.

Yours faithfully



Craig Faulkner
Chief Executive Officer
Australian Amalgamated Terminals

APPENDIX A

Page (ii)

2nd last para – AAT is not owned by Australia's two national stevedores – it is owned by two companies, one of whom is owned by Asciano and the other is 51% owned by DP World and 49% by K-AATerminals Pty Ltd. DP World is not involved in motor vehicle or general cargo stevedoring at any of AAT's facilities.

Page (ii)

2nd last para – Illawarra Stevedores operates at Port Kembla. Accordingly the last sentence in this para is incorrect.

Page (ii)

Last para – We don't believe that the ACCC is in a position to be definitive in relation to stevedore access on the evidence before it. We suggest "could" in sentence one and two rather than "would" and "will".

Page (iii)

First para – Same point as above – suggest "could" rather than "will"

Page 4

1.16 is incorrect – DP World does not operate at any of AAT's terminals.

Page 8

FCAI submission – The FAC charge in Brisbane per motor vehicle is currently $24.05. This charge represents 0.1% of the cost of a new motor vehicle costing $20,000. The new Brisbane facilities, with close access to all facilities including "on wharf" vehicle PDI operators afford significant benefits to FCAI's members compared to facilities which existed before yet the FCAI makes no reference to them.

Page 18

4.45 and 4.47 – Illawarra Stevedores operates out of AAT's Port Kembla facility. Accordingly these statements are incorrect.

Page 18

4.48 – AAT believes that the assertion in this para is incorrect. AAT already affords access to any stevedore. All that the stevedore must do is complete an application form and satisfy some basic requirements, including safety and insurance. The stevedore must also pay the SAC. The level of the SAC is low such that no stevedore should be discouraged. AAT is not sure what else it can do to further enhance access arrangements for stevedores. The table in 4.67 clearly shows that increases in AAT's SAC charges have been modest.

In 4.69 the FCAI have raised concern that there is preferential apportionment of the fees such that the SAC increases at a lower rate than the FAC. Were AAT to increase SAC at a higher rate or in line with FAC then entry of new stevedores who would pay this fee would be discouraged (note - SAC charges have increased much less than FAC as FAC charges are based on facility costs and facility costs have increased significantly due to rent increases). It is also self evident that if SAC charges were increased then the stevedores would seek to recover this cost as part of its charges.

Page 19

4.54 – AAT cannot understand how individual stevedores each providing their own equipment could provide the same cost efficiencies as AAT with its one pool of equipment. Two equipment pools cost more than one.

Page 20

4.59 – If AAT's facilities were operated by one of the stevedore shareholders on an exclusive basis or multi-user then the stevedore shareholder would have less incentive to promote competition than the AAT model of open access for all stevedores. Accordingly AAT does not agree with the ACCC's view that the benefits arising from AAT's joint venture are limited.

Page 24

AAT does not believe that the data included in this table is accurate or comparable.

AAT recommends that this data is thoroughly verified to a level which can be authoritatively relied upon as the Commission appears to do..

Page 25

4.82 – AAT notes that so far as access pricing is concerned that its leases requires AAT to provide open access on a non discriminatory basis. As such any access granted to new stevedores must be at the same price level as existing stevedores.

Page 28

4.85 – As noted above Illawarra Stevedores operates at Port Kembla. Accordingly the statement in sentence one is incorrect.

Page 28

4.87 – AAT already provides open access on a non discriminatory basis