



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation

lodged by

**DP World Australia Limited and
Patrick Stevedores Operations Pty Ltd**

in respect of

truck carrier access to container terminals at the Port of Fremantle

Date: 30 September 2010

**Authorisation no.: A91238,
A91239 & A91240**

Public Register no.: C2010/636

Commissioners: Samuel
Kell
Schaper
Dimasi
Walker

Summary

The ACCC proposes to grant authorisation to a proposed arrangement between DP World Australia Limited and Patrick Stevedores Operations Pty Ltd to agree on some of the terms on which they will give preferential treatment to truck carriers engaged in ‘dual runs’ (where a truck both delivers a container and collects a container during the same run) at the Port of Fremantle. The ACCC proposes to grant authorisation for 5 years.

DP World Australia Limited and Patrick Stevedores Operations Pty Ltd (**the Applicants**) have applied for authorisation of an arrangement (**the proposed arrangement**) under which they agree to give preferential treatment to truck carriers engaging in ‘dual runs’, where a truck both delivers and collects containers from their terminals at the Port of Fremantle (**the Port**) on the same trip.

The Applicants operate the only two container terminals at the Port and provide stevedoring services at their respective terminals. Access to their terminals for truck carriers to deliver and/or collect containers is arranged through an online vehicle booking system (**VBS**) operated by 1-Stop. The Applicants propose to amend the current VBS to facilitate the booking of dual runs.

The proposed arrangement is a government and industry initiative, intended to address the problem of road congestion at the Port and its effect both on the efficiency of the Port’s operations and on the surrounding community.

Under the proposed arrangement, the Applicants will agree to offer ‘Port Slots’ - booking opportunities that allow truck carriers undertaking dual runs to make bookings before other carriers have access to those slots. The Applicants will reach agreements as to the time that these Port Slots would be made available, the times for their progression through the VBS and the provision of a ‘Grace Period’ to allow for carriers delayed at one terminal to finish a dual run at the other without incurring late fees. There will be no agreements between the Applicants on the price or number of any of the slots they each make available at their terminals.

The ACCC notes that there is significant support from industry and government for the role of the arrangement in increasing the overall efficiency of the Port of Fremantle. The ACCC accepts that the proposed arrangement is likely to result in an increase in the efficiency of the Port, as an increase in the rate of dual runs is likely to reduce the number of trucks required to move the same volume of containers. This is likely to allow the Port to handle larger volumes of containers without increasing truck traffic and reduce the operating costs for industry participants for the movement of containers into and out of the terminals.

The ACCC also accepts that, by reducing the number of trucks moving to and from the Port and consequently reducing road congestion, the proposed arrangement is likely to increase community amenity around the Port and provide environmental benefits.

The ACCC considers that there are limited public detriments that may result from the proposed arrangement. The Applicants will continue to individually decide on truck carrier access pricing, the total number of slots available and the level of service offered to truck carriers. Further, the proposed arrangement is unlikely to provide any additional advantage to transport carriers in which the Applicants have a financial interest and truck carriers that do not undertake dual runs will still be able to access slots at the Applicants’ terminals.

The ACCC considers that the likely public benefits from the proposed arrangement would outweigh the likely public detriments, including any lessening of competition, and therefore proposes to grant authorisation for 5 years.

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1. The applications for authorisation

- 1.1. On 2 July 2010, DP World Australia Limited (DP World Australia) and Patrick Stevedores Operations Pty Ltd (Patrick) (together the Applicants), lodged applications for authorisation A91238, A91239 and A91240 with the ACCC. The Applicants provide stevedoring services at their container terminals at the Port of Fremantle (the Port). In broad terms, the Applicants are proposing to agree to give preferential treatment to truck carriers engaged in dual runs (i.e. where the truck both delivers a container and collects a container during the same run) at their terminals at the Port of Fremantle, and to agree on some of the terms on which such preferential treatment would occur (see paragraph 3.8).
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of these applications is contained in Attachment B.
- 1.3. Application A91238 was made under:
- section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act
 - section 88(1A) of the Act to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 1.4. Application A91239 was made under:
- section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act
 - section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 1.5. Application A91240 was made under section 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing.
- 1.6. The Applicants seek authorisation for 5 years.

Interim authorisation

- 1.7. At the time of lodging the applications for authorisation, DP World Australia and Patrick requested interim authorisation so that they could proceed with the development of the necessary changes to the VBS to facilitate the proposed arrangement.
- 1.8. On 28 July 2010 the ACCC granted interim authorisation.
- 1.9. In granting interim authorisation, the ACCC considered that:
 - Interim authorisation will provide the Applicants with sufficient certainty to proceed with, and fund, the second phase of the development of the VBS.
 - Interim authorisation will enable the public benefits associated with more efficient use of the roads in and around the Port of Fremantle, as identified by the Transport Forum WA, to be realised sooner.
 - The development of the VBS was unlikely to be completed before the ACCC issues its final determination in this matter and as such, granting interim authorisation is unlikely to alter the status quo for Port users.
 - Amendments to the VBS which occur while interim authorisation is in place can be unwound if the ACCC decides not to grant final authorisation.
- 1.10. At the time of granting interim authorisation, the ACCC noted that the issue of access to the VBS by any new entrant container terminal operators will be an important consideration for the ACCC during its assessment of the substantive applications for authorisation. The ACCC accepted that the possibility of another container terminal operator commencing operations at the Port of Fremantle during the term of the interim authorisation was unlikely.

2. Background to the applications

The applicants

- 2.1. DP World Australia and Patrick are the two major providers of container stevedoring services in Australia.
- 2.2. DP World Australia is a subsidiary of DP World Limited, which operates 49 marine terminals, and is developing 12 new terminal sites, across 31 countries. In Australia, the DP World Group operates container terminals in Brisbane, Sydney, Melbourne, Adelaide and Fremantle. At each location, it provides container stevedoring services to shipping lines, which involves both unloading and loading of ships docked at those terminals. DP World Australia owns a 50 percent interest in P&O Trans Australia, which operates a land-side port service logistics business servicing container terminals in Brisbane, Sydney, Melbourne, Perth and Adelaide.
- 2.3. Patrick is a subsidiary of Asciano Limited, a public company listed on the Australian Stock Exchange. Asciano Limited's key operations concern the ownership and operation of transport infrastructure assets. Patrick operates container terminals in Sydney, Melbourne, Brisbane, Fremantle and Burnie. It offers a range of land based services to shipping lines, freight forwarders, customs brokers, importers and exporters.

Port operations

- 2.4. The majority of goods imported to, and exported from, Australia go through one of Australia's many ports. The choice of port for importers and exporters is determined by factors including the origin and destination of the goods being transported, the type of goods and the infrastructure available at the particular port.
- 2.5. The main participants in the container logistics chain are:
 - **Port authorities.** Most major ports in Australia are government owned and operated by port authorities, which are responsible for the overall management and development of the port. They manage port infrastructure, such as dredged channels and berths, and recover the costs of doing so by levying charges on port users. At all container terminals in Australia (except Adelaide) the port authority contracts out the operation of terminals to stevedores.
 - **Sea transporters.** Shipping lines own and operate shipping vessels for sea transportation of freight. Importers/exporters contract with shipping lines for the movement of cargo.
 - **Stevedores.** Stevedores load cargo on and off vessels. The shipping line contracts with the stevedore for the loading or unloading of vessels at the terminal. Stevedores operate the terminal and provide other services that facilitate the movement of cargo from the wharves to road and rail transport links. Space is provided at the terminal for the temporary storage of cargo after it is discharged from a vessel or prior to it being loaded onto a vessel. At the terminal, cargo is processed for either import or export. For imported cargo, Customs and AQIS clearances are obtained.
 - **Land transporters.** Road and rail transport operators move cargo between ports and storage facilities on behalf of importers/exporters.

- **Importers/exporters.** Importers and exporters own the cargo that is transported by shipping lines to and from sea ports. Importers/exporters have a contractual relationship with the shipping line. They do not generally have a contractual relationship with the stevedore.

The Port of Fremantle

- 2.6. The Port of Fremantle is managed by Fremantle Ports, a Western Australian Government trading enterprise. The Port of Fremantle is the principal port of Western Australia. It handles approximately 75 percent of Western Australia's imports, 16 percent by value of Western Australia's seaborne exports and 90 percent of Western Australia's general cargo and containerised trade.¹
- 2.7. The container terminals operated by DP World Australia and Patrick are located in the Inner Harbour of the Port of Fremantle.
- 2.8. DP World Australia operates its container terminal under a long term lease from Fremantle Ports. DP World Australia's container terminal comprises a total land area of 14 hectares with substantial latent capacity in the terminal beyond current volumes.²
- 2.9. Patrick also operates its terminal under a long term lease from Fremantle Ports. Patrick's container terminal has a capacity of 300 000 TEU and a total land area of 25 hectares.³
- 2.10. Land-side access to the container terminals operated by DP World Australia and Patrick is predominantly by Port Beach Road and Tydeman Road (see map). Containers can also be transported to and from the Port via rail. Although, containers transported by rail to DP World Australia's terminal need to be ferried by road between the rail terminal and the container terminal.
- 2.11. An automated vehicle booking system is used to manage the flow of containers into and out of the land-side of the Port of Fremantle (see paragraphs 2.12 to 2.17).

¹ <http://www.fremantleports.com.au/About/Port.asp> Accessed 16 September 2010 and DP World and Patrick *Submission to the Australian Competition and Consumer Commission: Application for Authorisation of a proposed arrangement between DP World Australia and Patrick*, 2 July 2010, 6.

² DP World and Patrick *Submission to the Australian Competition and Consumer Commission*, 2 July 2010, 4.

³ TEU refers to a "twenty-foot equivalent unit", which is a unit of cargo capacity often used to describe the capacity of container ships and container terminals. One TEU represents the cargo capacity of a standard intermodal container, 20 feet (6.1 m) long and 8 feet (2.4 m) wide.



Inner Harbour

Fremantle Ports Map Guide INNER AND OUTER HARBOURS



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The vehicle booking system (VBS) at the Port of Fremantle

- 2.12. The VBS is a web based online slot booking system designed for container terminals to organise truck carrier access for the purpose of receiving and delivering shipping containers. It is owned and operated by 1-Stop, which is jointly owned by DP World Australia and Plzen Pty Limited, a subsidiary of Asciano (each have a 50 percent interest). Access to the VBS is available only to registered carriers through the 1-Stop website.
- 2.13. The VBS currently operates as follows:
- DP World Australia’s Fremantle container terminal is open from 6 am to 9.40 pm on weekdays for collection and delivery of containers by truck carriers. Patrick’s Fremantle container terminal is open from 7 am to 11 pm on weekdays. Access out of normal hours is also offered when required.
 - Entry to each container terminal is tightly controlled by each Applicant, and collection and delivery of containers by truck carriers must be scheduled in advance at the relevant terminal.
 - To schedule entry to the terminals, carriers log on to the VBS online and make a booking for a scheduled time (called a ‘slot’). Currently there are three types of slots:
 - export slot – for delivering a container
 - import slot – for collecting a container
 - unspecified slot – must be confirmed as an import or export slot within 2 hours of booking
 - Truck carriers either collect or deliver containers at the relevant terminal at the scheduled slot time. Sometimes, when visiting the Port, trucks will both deliver a container and collect a container at the same time, which is called a ‘dual run’. When a truck visits the Port only to deliver or collect a container (not both) this is referred to as a ‘single run’ or ‘empty run’ (referring to the inbound or outbound leg of the truck’s journey, where it is not carrying a container).
- 2.14. At present, the Applicants each individually release slots in the VBS to enable truck carriers to access their respective terminals at the nominated times. Each Applicant releases slots at different times. Patrick releases slots between 8.30 am and 11 am on weekdays. Patrick’s slots are made available 24 hours in advance. DP World Australia releases slots at 9 am (for B Class carriers) and at 10 am (for A Class carriers) on the day two days prior to the booking day.⁴
- 2.15. Once slots are released by the Applicants, they are available on the VBS for carriers to reserve until they are to be used. Carriers may also modify their bookings until this time.
- 2.16. There are a finite number of slots offered each day by each Applicant. This is because the number of slots available each day at a container terminal corresponds to the

⁴ A Class carriers pay a lower subscription fee than B Class carriers. In return for paying a higher subscription fee, B Class carriers are given preferential rights and a bigger proportion of slots at the DP World Australia terminal.

Stevedore's capacity to load trucks at that terminal on that day. A key factor which can affect this capacity is ship arrival patterns at the Port. This can mean that slots are only available for use at a terminal at particular times on a particular day (instead of for the entire period).

- 2.17. The finite number of slots, when combined with the high demand amongst truck carriers for slots between certain times (6 am and 6 pm at the DP World Australia terminal and between 7 am and 6 pm at the Patrick terminal), means that the slots for these times are reserved very quickly. Accordingly, it is difficult for a significant number of truck carriers to coordinate slots across terminals, or even within a terminal in order to arrange a dual run.⁵

Government and industry initiatives to address road congestion at the Port of Fremantle

- 2.18. In 2001-02 the WA Government undertook a review of the metropolitan freight network in Western Australia.⁶ The review brought together representatives from the community, industry and government to find better ways to move freight in the metropolitan area. Among other things the review identified the need to increase truck productivity at the Port in the interests of freight efficiency and community amenity.

- 2.19. In December 2006, a discussion process involving the WA Government and industry was established to further progress initiatives to make better use of roads around the Port by increasing truck productivity. This group was chaired by the Department of Transport (formerly the Department for Planning and Infrastructure) and involved the Applicants, representatives from the road transport industry, the road transport union, Fremantle Ports and the Port Operations Task Force (an industry consultative body established by the WA Government). Discussion focused on improving truck productivity by encouraging dual runs rather than single runs, which was identified as providing the potential to significantly reduce road congestion around the Port. However, three major obstacles to dual runs were identified, namely:

- difficulties in reserving suitable times to access each terminal given the high level of competition for access
- difficulties in coordinating truck movements across the two container terminals due to the slots for each terminal being on different pages of the online VBS website
- the tendency of many carriers to focus on either import or export trade.⁷

- 2.20. As a result of this process, it was concluded that the best way to facilitate dual runs would be to introduce changes to the VBS and to the manner in which DP World Australia and Patrick offer truck carriers access to their terminals. The Applicants state that the proposed arrangement for which authorisation is sought is intended to address the obstacles identified and facilitate the changes necessary to increase dual runs at the Port.

⁵ A dual run may occur within one terminal or across the two separate terminals.

⁶ The Metro Freight Network Review. For more information see <http://www.dpi.wa.gov.au/freight/19738.asp>

⁷ DP World Australia and Patrick *Submission to the Australian Competition and Consumer Commission*, 9.

- 2.21. The need to improve land side efficiency and reliability at Australia's ports has also been identified as a priority in the draft National Ports Strategy. The National Transport Commission and Infrastructure Australia were asked to develop a National Ports Strategy for consideration by the Council of Australian Governments in 2010. The objective of the National Ports Strategy is *“to improve the efficiency of port related freight movements across infrastructure networks, minimise externalities associated with such freight movements and influence policy making in areas relevant to freight.”*⁸

⁸ <http://www.ntc.gov.au/filemedia/general/NationalPortsStrategyPublicMay10.pdf>

3. The proposed arrangement

- 3.1. The proposed arrangement aims to facilitate and increase the number of dual runs out of the Applicants' container terminals at the Port. Specifically, the Applicants are proposing to agree to give preferential treatment to truck carriers engaged in dual runs, and to agree some of the terms on which such preferential treatment would occur.
- 3.2. The preferential treatment would take the form of making available special slots for accessing the container terminals at the Port. These special slots could be used for dual runs, and would be called 'Port Slots'.
- 3.3. It is proposed that two types of Port Slots would be created – one type for delivering a container and one type for collecting a container. Accordingly, a carrier would need to reserve either two Port Slots or a Port Slot and a regular slot (which would be for collection if the Port Slot is for delivery and vice versa) to undertake a dual run.
- 3.4. Following the implementation of the proposed arrangement the VBS would operate as follows:
 - Port Slots would be set aside by the Applicants in the VBS for each terminal but would not yet be released for booking by carriers (the Applicants would not agree the number or percentage of Port slots they individually release)
 - Regular slots would then be released by the Applicants in the VBS for booking by carriers.
 - After both Applicants have released their regular slots, Port Slots would then be released in the VBS for a predetermined period by the Applicants for booking by those carriers who had already booked a regular slot. At this stage, Port Slots would only be available for use for dual runs. To use these slots, carriers could convert slots already booked as regular slots to Port Slots. They could also book additional Port Slots.
 - The remaining Port Slots would then be made available for a predetermined period for booking by all carriers. At this point, the Port Slots could be used for either dual runs or single runs (but only for a designated kind of activity, i.e. as an import, export or dual slot).
 - After this, any remaining Port Slots would be converted to regular slots for general use by all carriers. These regular slots would be available for booking by all carriers until they are to be used, as per the existing practice.⁹
- 3.5. The Applicants would also make allowances for any delays at the other stevedore's terminal where those delays affect inter-terminal dual runs. Specifically, a Stevedore would allow a truck to be up to 1 hour late to pick up or drop off a container at its terminal (without a penalty) where that lateness has been caused by delays experienced at the other Stevedore's terminal when dropping off or picking up other containers as part of that dual run (known as the Grace Period). For example, if a truck is late to pick up a container from the DP World Australia terminal during its designated 10 am – 11 am Port Slot due to delays experienced in dropping off a container at the Patrick

⁹ DP World Australia and Patrick *Submission to the Australian Competition and Consumer Commission*, 11-12.

terminal, DP World Australia would effectively extend the truck's slot to 10 am to 12 pm to accommodate that delay.

- 3.6. The Applicants advise that the VBS needs to be changed to accommodate the introduction of the Port Slots, including by:
- adding the new Port Slots to the range of slots available on the VBS
 - redesigning the booking screen in the VBS so that truck carriers would be able to view and book the Port Slots available at each terminal at the same time (a dual screen). This would be useful where a carrier needs to visit both container terminals at the Port to undertake a dual run.
- 3.7. The Applicants advise that the changes that are necessary to facilitate this will require 2-3 months of work by 1-Stop once it has completed a high level design for the amended VBS.
- 3.8. The **proposed arrangement**, for which authorisation is sought, consist of arrangements or understandings from time to time between the Applicants:
- that they will each give preferential treatment to carriers for dual runs by arranging to make Port Slots available
 - regarding the time when Port Slots for dual runs only would appear in the VBS for those truck carriers who had already reserved a regular slot
 - regarding the time at which the Port Slots would be available for all carriers to use either dual runs or single runs (as either an import, export or dual slot) before conversion to regular slots
 - regarding the time at which the Port Slots would be converted to regular slots for general use by carriers not engaging in dual runs
 - that they would each provide a Grace Period (during which no late penalties or fees would be charged) to allow for delays caused at the terminals, and the length of that Grace Period.
- 3.9. The Applicants have sought authorisation because the proposed arrangement potentially involves the making of, or giving effect to, an arrangement between the Applicants containing:
- an exclusionary provision within the meaning of section 4D of the Act in contravention of section 45 of the Act;
 - a cartel provision in contravention of sections 44ZZRF and 44ZZRG and sections 44ZZRJ and 44ZZRK of the Act; and/or
 - exclusive dealing conduct (third line forcing) by DP World Australia or Patrick in contravention of section 47 of the Act. Namely the supply by DP World Australia of access to Port Slots through the VBS (and the benefit from the preferential

treatment associated with Port Slots) on the condition the carrier books a slot to facilitate a dual run from Patrick at the Port of Fremantle (and vice versa).¹⁰

- 3.10. The Applicants advise they will separately and independently decide how many Port Slots would be made available for dual runs at the agreed time at their own terminal each day, and the price at which the Port Slots would be offered.
- 3.11. While there is no agreement between the Applicants to offer at least a minimum number, if any, of Port Slots to carriers each day, the Applicants advise that there is an incentive on them to provide Port Slots given the WA Government's interest in the level of congestion around the Port and the Applicants' role in reducing that congestion, and the likely consequences for the Applicants if truck productivity does not increase.

¹⁰ The third line forcing conduct may also include the refusal by DP World Australia to supply access to Port Slots through the VBS (and the benefit from the preferential treatment associated with Port Slots) for the reason that the carrier has not agreed to book a slot to facilitate a dual run from Patrick at the Port of Fremantle (and vice versa).

4. Submissions received by the ACCC

The Applicants

- 4.1. Broadly, the Applicants submit that the proposed arrangement will facilitate, and therefore encourage, carriers to undertake dual runs at the Port. There will be an increase in truck utilisation if carriers are engaging in dual runs instead of single runs for the same amount of containers. This increase in truck utilisation is expected to result in public benefits, including:
- a reduction in the traffic and an improvement in community amenity around the Port
 - environmental benefits for the area around the Port
 - lower costs and increased convenience for industry participants using the Port
 - a more optimal method of allowing the Port to handle larger throughput.
- 4.2. The Applicants submit that the proposed arrangement will generate little, if any, public detriment because:
- it does not affect the total number of slots generally available
 - it does not affect the ability or incentive of the Applicants to compete on the level of service offered to truck carriers
 - truck carriers are not able to substitute between container terminals, rather, each truck carrier must access the particular terminal holding, and/or expecting, the container that it is to transport and therefore the Applicants are not in close competition in relation to supplying truck carrier access
 - truck carriers who cannot take advantage of the Port Slots would still have access to regular slots for general use
 - there is little impediment to carriers who currently do not have the capacity to undertake dual runs (because they have focused on either import or export runs) to diversify their operations so that they can perform both functions.
- 4.3. The ACCC tests the claims made by the Applicants in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

Interested parties

- 4.4. The ACCC sought submissions from 27 interested parties potentially affected by the proposed conduct, including industry associations, port corporations, trade unions, truck carriers and federal, state and local government authorities. A summary of the public submissions received from interested parties on the substantive applications for authorisation follows.
- **Customs Brokers and Forwarders Council of Australia Inc (CBFCA)** advises that it sees merit in cost-efficient and cost-effective measures that will provide transparent and sustainable benefits to all participants in the relevant part of the land-side logistics process. However, the CBFCA considers that the public benefits

claimed by the Applicants should be qualified and quantified. The CBFCA advised that it is guided by industry and Government discussions (see paragraph 2.19 above). The CBFCA is the peak industry association representing service providers in the international trade logistics and supply chain management. It advises that its members are one of the major contractors to transport operators in the port land-side logistics process.

- **Freight and Logistics Council of Western Australia** (the Freight and Logistics Council) is comprised of organisational heads from industry and government with freight and logistics responsibilities and was created to advise the State Minister for Transport. The Freight and Logistics Council supports the applications for authorisation and notes that the arrangement stems from an initiative led by the WA Government with the support of the road industry and Fremantle Ports. The Freight and Logistics Council states that while the involvement of the Applicants in progressing the arrangement is essential because they run the VBS, they are unlikely to receive any significant benefits from an increase in dual runs. It considers that an increase in dual runs will lead to public benefits including increased truck productivity, reduced traffic and more efficient use of scarce port land.
- **Jayde Transport** raised a number of questions relating to the operation of the arrangement which it submits needs to be considered before a final determination is made. The questions relate to pricing and recovery of costs, availability of Port Slots, monitoring of Key Performance Indicators, penalty arrangements and terminal access.
- **Mr Gary Davies** (a truck carrier) does not support authorisation being granted to the applications. While Mr Davies considers it appropriate that two-way truck loading is encouraged, he believes that the proposed arrangement will favour the large transport companies that have a substantial network of container importers and exporters, to the detriment of small, or owner-driver, transport companies. Further, as the Applicants are vertically integrated companies offering truck services to the container trade a potential already exists for them to provide preferential treatment to their carriers. Mr Davies submits that the application formalises and legitimates that potential.
- **Ports Australia**, the peak industry body, representing all port corporations at the national level, supports the application for authorisation and states the establishment of two way loading arrangement is strongly supported by its member ports, which are considering implementing this type of initiative on a wider basis. Ports Australia submits that the arrangement will promote increased efficiency in port operations and reduce truck numbers, improving community amenity at a time when it is predicted that container numbers and truck traffic at ports will increase significantly in the future. Ports Australia also notes that encouraging dual runs is closely aligned with the type of initiative advocated in the National Ports Strategy.
- **The Hon Simon O'Brien MLC, West Australian Minister for Transport, Disability Services** supports the applications for authorisation and submits that the proposed amendments to the VBS are intended to encourage two-way truck loadings, which will benefit the surrounding community and is consistent with WA Government policy.
- **Transport Forum WA Inc** (Transport Forum), the West Australian peak body for the road transport industry and member of the Port Operations Task Force (see below), submits its support for the applications for authorisation. The Transport

Forum states that the arrangement has been adopted by the Applicants as a result of an approach by the Transport Forum, trucking industry representatives and Government and is not expected to significantly benefit the Applicants. The Transport Forum submits that the arrangement will bring a number of benefits including reduced traffic around the port and improved transport efficiencies which may allow the Port to clear larger cargo vessels within the same timeframe presently allowed for smaller vessels.

- **Victorian Transport Association (VTA)**, the prime contractor/employer organisation representing transport operators and other businesses in the transport and logistics industry in Victoria, supports the applications for authorisation and advises it would welcome the introduction of a similar port-wide time-slot matching system at the Port of Melbourne.
- **West Australian Port Operations Task Force (Port Operations Task Force)** is an industry consultative body which includes members from the road transport industry, customs brokers/freight forwarders, stevedores, container park operators, shipping lines, shippers, the Port Authority and relevant government agencies. The Port Operations Task Force considers that a reduction in empty running by trucks, the primary aim of the proposed arrangement, is central to improving trucking productivity. Improvements in truck productivity are critical to both managing impacts on the community and enhancing the efficiency of the container supply chain. There is nothing in the proposed arrangement that could lead to a conclusion that there would not continue to be strong competition in this sector, as all operators will have access to Port Slots. Carriers may need to make adjustments to their operations to take advantage of the proposed change, and the extent to which they use Port Slots will determine the extent of the public benefits.

4.5. The views of the Applicants and interested parties are further outlined in the ACCC's evaluation of the proposed arrangement in Chapter 4 of this draft determination. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) and by following the links to this matter.

5. ACCC evaluation

5.1. The ACCC's evaluation of the applications for authorisation is in accordance with tests found in:

- Sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
 - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.
- Sections 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
 - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- Section 90(8) of the Act which states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.
- Section 90(8) of the Act which states that the ACCC shall not authorise the proposed exclusive dealing conduct unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.

5.2. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

The relevant areas of competition

5.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant areas of competition affected by that conduct.

5.4. The Applicants submit that the markets potentially affected by the proposed arrangement are:

- the supply of access to truck carriers at the Port of Fremantle
- the supply of truck carrier services at the Port of Fremantle
- the supply of container stevedoring services at the Port of Fremantle.

Container stevedoring services at the Port of Fremantle

- 5.5. For the purpose of assessing the applications for authorisation the ACCC considers the relevant area of competition affected by the proposed arrangement to be the supply of container stevedoring services at the Port of Fremantle. The ACCC notes that the proposed arrangement affects some of the terms of access provided by the Applicants (through the VBS) to the approximately 170 truck carriers who use the Port.
- 5.6. DP World Australia and Patrick operate the only two container terminals located at the Port of Fremantle under an exclusive, long term lease from Fremantle Ports. While there are other terminals available in the Port of Fremantle, they are not suitable for use as container terminals.
- 5.7. The provision of container stevedoring services involves lifting container boxes onto and off ships. Related to this function, stevedores provide other “quay-side services” such as storage, maintenance and repositioning of containers within the terminal. Stevedores also provide certain “land-side services” to facilitate the movement of containers from the terminal to road and rail transport links. For example, vehicle booking systems are used to manage the flow of containers into and out of the land-side of Australia’s major container ports.
- 5.8. Container terminals require large marshalling areas and specialised gantry cranes for the lifting of containers on and off ships. In Australia, container terminals are operated by stevedores, which lease berthing and terminal space from the relevant port authority.
- 5.9. Generally, there is little demand or supply side substitutability between container terminals located at different ports. A key characteristic of Australia’s shipping trade is that there tends not to be a single point of call for ships servicing Australia. Rather, vessels operate across several ports that are separated by long distances.
- 5.10. Importers and exporters contract with shipping lines, either directly or indirectly via freight forwarders, to transport their products internationally in containers. Importers and exporters also contract, either directly or indirectly, with road or rail transport operators to transport their containerised products to or from the container terminal.
- 5.11. The shipping lines contract with the stevedores to provide stevedoring and quay-side services. Shipping lines also contract with the trucking companies for the delivery of empty containers back to the terminals.
- 5.12. As noted by the Applicants, once a container has arrived at a particular terminal, truck carriers are not able to substitute between terminals; each truck carrier must access the particular terminal holding and/or expecting the containers that it is to transport. IPART confirms this view and has stated that ‘once the containers are on the wharf, each

stevedore becomes effectively a monopolist in the sense that the rail and road operator must deal with that stevedore if it is to take delivery of a particular container'.¹¹

- 5.13. However, there is an incentive on stevedores to maintain a degree of land-side efficiency within the terminal gate. This is because there is a commercial incentive by the stevedores to move containers into and out of the terminal quickly and efficiently to meet ship-driven volumes and manage stack densities.¹²
- 5.14. A stevedore's ability to provide a whole of terminal service which is efficient, within specified time windows, and thus minimising waiting costs, is important in facilitating faster transit times for shipping lines and the overall shipping logistics chain.
- 5.15. For the purpose of assessing the applications and the likely public benefits and detriments from the proposed arrangement, the ACCC considers it is not necessary to reach a conclusion on whether there are separate markets relating to the supply of access (and related services) to truck carriers and the supply of container stevedoring services at the Port of Fremantle.

The counterfactual

- 5.16. The ACCC applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.¹³
- 5.17. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangement in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the 'counterfactual'.
- 5.18. DP World Australia and Patrick provided separate confidential submissions outlining their views on the future if authorisation is not granted.
- 5.19. The ACCC considers that in the absence of authorisation:
 - It is unlikely that either DP World Australia or Patrick could proceed to implement the dual run system as currently proposed *across* both terminals at the Port. The proposed arrangement allows for coordination across the terminals, which is not possible without the involvement of both parties.
 - It may be possible for DP World Australia or Patrick to individually introduce an alternate preferential access system for dual runs *within* their own terminals. While such an arrangement may facilitate some additional dual runs within the individual terminals, it will not facilitate the booking of dual runs across both terminals. Therefore it will not fully address the difficulties identified as limiting the growth in dual runs (see paragraph 2.19).

¹¹ IPART, *Reforming Port Botany's links with inland transport Final Report* March 2008 page 3

¹² IPART, page 4

¹³ *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

- 5.20. The ACCC notes that there is significant support from the WA Government for measures to reduce road congestion around the Port. If the proposed arrangement is not authorised the WA Government may consider other options for reducing truck congestion. However, the ACCC notes that the focus of government and industry consultation to date has strongly encouraged the Applicants to adopt a coordinated approach to facilitate dual runs across their terminals. As such alternate measures may take some time to develop if authorisation is not granted.
- 5.21. The ACCC notes that currently, with no co-ordination between the Applicants, dual runs represent around 44% of truck visits to the Port (the status quo).¹⁴
- 5.22. The ACCC considers that in the absence of authorisation, and in the short to medium term, the most likely counterfactual situation is either that the status quo will continue or that DP World and Patrick will individually introduce a preferential access system to facilitate dual runs within their own terminal. In either scenario there will be no coordination between the Applicants to facilitate cross terminal dual runs and transport carriers who are in a position to undertake dual runs will continue to book slots separately at each terminal and hope to find matching slots.

Public benefit

- 5.23. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹⁵
- 5.24. The Applicants submit that the proposed arrangement will deliver the following public benefits:
- a reduction in traffic and an improvement in community amenity around the Port
 - environmental benefits for the area around the Port
 - lower costs and increased convenience for industry participants
 - a more optimal method of allowing the Port to handle larger throughput.
- 5.25. The public benefits claimed by the Applicants result from carriers being encouraged to undertake dual runs rather than single runs, leading to an increase in ‘truck utilisation’. The Applicants submit that there is scope for an increase in truck utilisation at the Port because:
- trucks using the Port currently make a large volume of unladen runs, with a truck either arriving at or departing the Port without a cargo in approximately 28% of all truck runs (or 150 000 unladen runs per year)¹⁶

¹⁴ DP World Australia and Patrick *Submission to the Australian Competition and Consumer Commission*, 14.

¹⁵ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

- carriers have tended to specialise in either import or export containers, but the proposed arrangement may provide an incentive for them to switch to dual runs, for cost and efficiency reasons. Dual runs are currently difficult to arrange without the providing the ability to match slots between both terminals at the Port.
- 5.26. The Applicants submit that the demand for Slots at peak times makes it difficult for carriers to secure slots at the correct times to allow for a dual run. It is also difficult to arrange slots at both terminals as carriers are unable to view and book slots available at each terminal at the same time. The proposed arrangement will address these current difficulties, resulting in increased truck utilisation.
- 5.27. In general, competition can be relied upon to deliver the most efficient market arrangements. However, in circumstances where there is market failure the competitive outcome of the market is not the most efficient. In this situation the ACCC notes that absent the proposed arrangement truck carriers and stevedores have some incentive to facilitate and undertake dual runs because they represent a lower cost and hence more efficient way of operating. However, the ACCC recognises that there are market failures that may result in less than optimal use of dual runs by truck carriers. In particular:
- some of the benefits from dual runs accrue to external parties (for example other truck carriers, stevedores, the port authority and local community). These external benefits are not taken into account by either the stevedores when designing a terminal access system or the carriers when organising themselves to make use of dual runs. This means that from the perspective of society, the incentives for carriers to engage in dual runs and stevedores to encourage/enable them to do so are sub-optimal
 - transaction and other costs associated with booking dual runs through the current VBS across the two terminals results in fewer dual runs than society would prefer.
- 5.28. The ACCC considers that the proposed arrangement addresses these market failures by allowing the Applicants to agree to give preferential treatment to carriers to facilitate dual runs over and above the incentive that is provided by the market and to reduce the transaction costs to carriers of co-ordinating dual runs across both terminals.
- 5.29. The ACCC notes that the co-ordination between the Applicants is limited to those issues that are necessary to facilitate the booking of dual runs and does not include the price of the slots or the number of slots made available.
- 5.30. The ACCC also notes that whether the arrangement actually results in an increase in dual runs by carriers may depend on the number of Port Slots which are available to carriers, on the timing of their release so as to allow carriers to plan dual runs and whether they are priced in a manner that does not discourage dual runs. That being said, the ACCC expects that the arrangement will lead to an increase in dual runs compared to the counterfactual situation where there is no co-ordination between the Applicants.
- 5.31. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

¹⁶ DP World Australia and Patrick *Submission to the Australian Competition and Consumer Commission*, 14.

Improved efficiency at the Port

5.32. The Applicants claim that the arrangement, through increasing truck utilisation, has the potential to result in the following efficiencies:

- lower operating costs for carriers and terminal operators, and fewer landside logistic delays as fewer trucks are required to move the same number of containers leading to shorter queues at container terminals and faster movement of containers through the Port.
- a more optimal method of allowing the Port to handle larger throughput and reach capacity.

Reduced operating costs

5.33. The Applicants advise that approximately 28 percent of trucks servicing the Inner Harbour undertake single runs in one direction, which correlates to approximately 28 percent of runs being unladen in the opposite direction. The Applicants estimate that empty runs to and from the Port cost carriers an average of \$70 an hour. Therefore the Applicants claim that the proposed arrangement would encourage carriers to undertake more dual runs at the Port which would increase truck utilisation and reduce operating costs (in the sense that fewer truck hours would be required to move the same number of containers).

5.34. The Applicants also submit that increased truck utilisation would mean that terminal operators would have to engage with fewer trucks for the same amount of containers (for example, they would only have to open the container gate once).

5.35. Further, the Applicants claim that because of increased truck utilisation, queues at the terminal would be shorter and containers would move into and out of the terminal faster and for a lower cost, which may also reduce costs for importers and exporters.

5.36. A number of interested parties, including the WA Minister for Transport, the Freight and Logistics Council, the Transport Forum and the Port Operations Task Force, agree that significant efficiencies will result from the arrangement by reducing the number of unproductive empty runs by carriers. The ACCC notes that representatives of truck carriers are part of many of these groups. Further, the VTA considers the ability of operational staff in transport companies to match slots across terminals will reduce empty truck running and optimise the use of trucks and equipment. The VTA considers the functionality provided by port-wide time-slot matching should be introduced at the Port of Melbourne.

5.37. The ACCC accepts that an increase in dual running is likely to lead to an increase in truck utilisation with associated efficiencies for carriers, the Applicants and other industry participants such as importers and exporters.

5.38. The ACCC notes the Applicants advice that 1-Stop will record and collect data regarding the operation of the Port Slots proposal. The Applicants advise that the WA Government has asked that certain information be recorded for the purpose of assessing the success and impact of the dual run proposal over time, and the ability to record data and run reports on Port Slots has been scoped into the implementation project with 1-Stop. The ACCC considers that such data will be an important consideration in any future application for re-authorisation of the arrangement following the expiration of the current authorisation, and would be sought by the ACCC during that process.

Utilisation of Port capacity

- 5.39. The Applicants claim that if truck numbers around the Port reach levels unacceptable to the surrounding community, a move of the existing container terminals to the Port's Outer Harbour, which is located 15 kilometres south of Fremantle at Kwinana, would be required. The Applicants claim this would be inefficient because the full capacity of the Port's Inner Harbour would not be realised and moving trade to the Outer Harbour would require significant government and industry investment.
- 5.40. Industry forecasts suggest that by 2015-16 throughput at the Port's Inner Harbour is expected to increase to 1.2 million TEUs – which is approximately double the present throughput of the Port. The Freight and Logistics Council advises that meeting this expected growth is achievable with current Port infrastructure. However, issues of road congestion around the Port are already a concern to sectors of the community and a growth in truck numbers would exacerbate this concern.
- 5.41. A number of interested parties, including the WA Minister for Transport, the Transport Forum, the Freight and Logistics Council and the Port Operations Task Force, raise concerns about an early shift to the Outer Harbour as a means to address increasing metropolitan traffic around the Port of Fremantle. In particular, the WA Minister for Transport advises there is substantial fixed investment in the Port's Inner Harbour and the surrounding freight system on the part of both industry and government which means the life of this infrastructure should be maximised. The Minister advises that a key factor threatening such an outcome is the impact on the surrounding community of associated Port truck activity.
- 5.42. The ACCC accepts that developing the Outer Harbour to create additional capacity involves significant costs. The ACCC notes the submission by the Freight and Logistics Council that to give the Inner Harbour its best chance of reaching full capacity, the growth in port trucks must be held to something less than the growth in port trade.
- 5.43. While the arrangement for which authorisation is sought forms only part of any strategy to address congestion and capacity at the Port, the ACCC accepts that it is likely to contribute to limiting the growth in truck numbers which may better enable the Port to handle current and expected increases in container throughput.
- 5.44. However as noted, trade trends indicate that the Inner Harbour is expected to reach optimal capacity by about 2015-16. As such the planning and development for the additional capacity provided by new container facilities at the Outer Harbour is already underway with or without the arrangement for which authorisation is sought.

Reduction in traffic and improvement in community amenity

- 5.45. The Applicants submit that the number of trucks which access the Port is significant and has an impact on the metropolitan areas around the Port. The Applicants claim that any increase in dual running would reduce the number of trips by trucks to the Port, thereby reducing truck congestion in that area which will improve community amenity and reduce the stress on road infrastructure.
- 5.46. The operation of large infrastructure assets, such as ports, can have significant effects on surrounding cities or towns. The ACCC notes that the issue of truck congestion at the Port of Fremantle and its effect on the surrounding community has been identified by several interested parties, including groups representing both the trucking industry and the WA

Government, who are well placed to assess the impact of truck traffic on the community and to identify measures that might reduce that impact.

- 5.47. The ACCC notes that the arrangement is the result of a lengthy period of industry consultation which has identified the arrangement as a way to reduce truck numbers and encourage dual runs, with reducing the impact of truck traffic on the community being a major objective (see paragraph 2.19).
- 5.48. The ACCC accepts that the arrangement is likely to result in a reduction in the number of truck movements in and out of the Port and consequently a reduction in road congestion and road wear and tear and increased community amenity in the area around the Port. The ACCC accepts this is a benefit to the public. The magnitude of this public benefit depends on the extent to which the incidence of dual runs increases under the proposed arrangement.

Environmental benefits

- 5.49. The Applicants submit that a reduction in truck trips would bring an environmental benefit through the lowering of carbon emissions.
- 5.50. The ACCC accepts that, to the extent that the arrangement results in an overall reduction in truck movements, it is likely to result in an environmental benefit.

ACCC conclusion on public benefits

- 5.51. The ACCC notes that the proposed arrangement makes it easier and less costly for carriers to co-ordinate dual runs across both terminals and increases the incentives for dual runs over and above the incentive that is currently provided by the market (because dual runs are a lower cost/more efficient way of operating for carriers and stevedores). By increasing the number of dual runs the proposed arrangement is likely to result in public benefits from:

- improved efficiency at the Port
- reduction in road congestion and road wear and tear and improvement of community amenity
- environmental benefit due to a reduction in truck movements.

Public detriment

- 5.52. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹⁷

- 5.53. The Applicants submit that the proposed arrangement will result in little if any, public detriment constituted by a lessening of competition. Importantly, the Applicants advise

¹⁷ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

that the proposed arrangement would not affect their ability to compete on truck carrier access pricing, the total number of slots available or the level of service offered to truck carriers. The ACCC notes that these will continue to be determined by each of the Applicants on an individual basis.

- 5.54. The Applicants submit that if there were a relevant level of competition between them in relation to the supply of truck carrier access to container terminals at the Port, the proposed arrangement could only potentially affect minor aspects of that rivalry, namely:
- the number of particular kinds of slots available at certain times
 - the time when Port Slots would appear in the VBS
 - the period after which Port Slots would be converted to regular slots for general use by carriers not engaging in dual runs
 - the time when Port Slots are no longer available to reserve and
 - the charging of late penalties in circumstances where a Port Slot is used inter-terminal.
- 5.55. The ACCC considers that any potential detriment that may arise from the proposed arrangement relates to the impact on :
- truck carriers
 - potential new entrant stevedores

Impact on truck carriers

- 5.56. Mr Gary Davies submits that the proposed arrangement will favour large carriers with substantial networks of importers and exporters whereas smaller carriers that are not supported by a large customer base of container importers and exporters, will be disadvantaged.
- 5.57. Further, Mr Gary Davies notes that both DP World Australia and Patrick are vertically integrated companies that operate container terminals with associated companies providing trucking services to and from those terminals. Mr Gary Davies submits that a potential exists for the Applicants to provide preferential treatment to the carriers in which they have an interest.
- 5.58. Jayde Transport also raised concern that the arrangement will result in differential pricing for dual runs and single runs.
- 5.59. The Applicants acknowledge that the proposed arrangement may affect the competitive process between carriers at the Port, if carriers having the capacity to undertake dual runs are advantaged by the ability to book Port Slots before other carriers that lack this capacity. However, the Applicants submit that there will be no material lessening of competition compared to the counterfactual because carriers unable to take advantage of Port Slots can still access regular slots and because there is little impediment to carriers diversifying operations to allow them to undertake dual runs. The Applicants submit that there is no ability or incentive for them to discriminate against road transport operators in which they have no financial interest.

- 5.60. The Port Operations Task Force states that while larger carriers may be better placed to take advantage of the proposed arrangement; most carriers currently focus on either import or export traffic. To take full advantage of the proposed change carriers may need to make adjustments to their operations either through changing the balance of their own business or through alliances or other arrangements. The Port Operations Task Force regards the arrangement as both facilitating the making of dual runs, but also encouraging carriers to make these adjustments.
- 5.61. The ACCC notes that the purpose of the arrangement is to provide preferential treatment to truck carriers engaged in dual runs.
- 5.62. Under the arrangement, each Applicant will individually decide the number of slots it will make available for booking through the VBS as Port Slots (for use as a dual run). The Port Slots will then be set aside and not yet released for booking by carriers. Regular slots will then be released and able to be booked by all carriers, regardless of their size, links to the Applicants or intention to undertake dual runs. After both Applicants have released their regular slots, Port Slots would then be released for carriers who are able to make dual runs. In this way carriers who are engaging in dual runs will be able to use the VBS to match up an initial booking for a regular slot with one of the Port Slots put aside, or book two Port Slots. Unused Port Slots will then be converted for booking by all carriers.
- 5.63. The preferential treatment also extends to the provision of a Grace Period for carriers undertaking dual runs, during which no late penalties or fees would be charged to allow for delays caused at one terminal and impacting on the delivery or collection at the other.
- 5.64. The proposed arrangement does not provide for an agreement on the price for Port Slots, or other slots, between the Applicants. Pricing will continue to be decided by the Applicants on an individual basis.
- 5.65. For carriers that do not engage in dual runs, the ACCC notes that not all slots will be designated as Port Slots and there will still be slots available for booking as single runs. Although, there is a high demand for slots at the Port, particularly during the peak times of around 7am to 7pm, the ACCC notes there will continue to be slots available throughout the day and capacity remains available outside peak times.
- 5.66. Further, the ACCC does not consider that the proposed amendments to the VBS, to facilitate dual runs, provide any additional advantage to transport carriers in which the Applicants have a financial interest.
- 5.67. The ACCC has not been provided with evidence to suggest that the intention or effect of the proposed arrangement is to exclude any carrier, or class of carriers, from accessing slots overall.
- 5.68. The ACCC's assessment of public detriment for the proposed arrangement is made on the basis that the VBS will not be operated in a manner that gives an anticompetitive advantage to truck carriers linked to either of the Applicants. Under the Act, the ACCC can review an authorisation where there has been a material change of circumstances and may revoke an Authorisation if it is satisfied that the authorised conduct no longer

satisfies the relevant public benefit test. Should the ACCC receive information to suggest that the Applicants are limiting access to slots, or otherwise using the proposed arrangement to give anticompetitive advantage to truck carriers in which they have an interest, the ACCC considers that the proposed arrangement may no longer satisfy the relevant public benefit test and the ACCC may review and possibly revoke this authorisation.

Impact on potential new entrant stevedores/terminal operators

- 5.69. At present DP World Australia and Patrick operate the only two container terminals at the Port and provide stevedoring services exclusively at their respective terminals. The ACCC considers that should new entry occur the ability to access the VBS and offer dual runs is likely to be important for future competition.
- 5.70. The ACCC notes the advice of the Applicants that the changes that are to be made to the VBS to facilitate the dual run proposal will be based upon an open architecture. The Applicants advise that this means that other facilities (including empty container parks and future additional container terminals) would be able to be included on the VBS with port slot capability if that would assist in further improving the level of dual running.
- 5.71. The ACCC notes that the ability for new entry to occur in the short term, particularly before the Port reaches capacity around 2015-2016, may be limited. Nonetheless the ACCC considers significant detriment would result should the arrangement impacting the land-side of the Port increased barriers to entry on the quay-side.
- 5.72. As such the ACCC expects that, should new entry occur, access, on reasonable terms, would be provided to the VBS and the ability to offer dual runs.
- 5.73. As detailed at 5.68 above, the ACCC can review and may revoke an Authorisation where there has been a material change in circumstances such that the authorised conduct no longer satisfies the relevant public benefit test. The ACCC considers that should the Applicants fail to grant access on reasonable terms to any new entrant stevedores/terminal operators, the proposed arrangement may no longer satisfy the relevant public benefit test and the ACCC may review and possibly revoke this authorisation.

ACCC conclusion on public detriments

- 5.74. The ACCC considers that the public detriment that may arise from the proposed arrangement is limited. The Applicants will not agree on the pricing of slots, the total number of slots available or the level of service offered to truck carriers. These will continue to be determined by each of the Applicants on an individual basis. The proposed arrangement is also unlikely to provide any additional advantage to transport carriers in which the Applicants have a financial interest. Truck carriers that do not undertake dual runs will still be able to access slots at the Applicants' terminals.

Balance of public benefit and detriment

- 5.75. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 5.76. In the context of applying the net public benefit test in section 90(8)¹⁸ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹⁹
- 5.77. For the reasons outlined in this chapter the ACCC considers the public benefits likely to result from the proposed conduct are significant and result from the increased efficiency in the operation of the Port, improvement in community amenity around the Port and environmental benefits due to reduced truck movements.
- 5.78. The ACCC considers the public detriments likely to arise from the proposed arrangement are limited. The Applicants will continue to individually decide on the price of slots, the total number of slots they will each make available and the level of service offered to truck carriers. Further, the proposed arrangement is unlikely to provide any additional advantage to transport carriers in which the Applicants have a financial interest and truck carriers that do not undertake dual runs will still be able to access slots at the Applicants' terminals.
- 5.79. The ACCC notes that the Applicants have been asked by the WA Government to collect data regarding the impact of the proposed arrangement over time. The ACCC considers that such data will be an important consideration in any future application for re-authorisation of the arrangement following the expiration of the current authorisation and would be sought by the ACCC during that process.
- 5.80. The ACCC considers the public benefit that is likely to result from the proposed arrangement is likely to outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A), 90(5B) and 90(8) are met.

Length of authorisation

- 5.81. The Act allows the ACCC to grant authorisation for a limited period of time.²⁰ The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 5.82. In this instance, the Applicants seek authorisation for five years.

¹⁸ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

¹⁹ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

²⁰ Section 91(1).

- 5.83. The CBFCA does not support this time frame and submits that a shorter length of time would be appropriate. In reply, the Applicants state that five years are needed to justify the upfront investment in amending the VBS to facilitate the arrangement, that there is little if any public detriment arising from the arrangement and the road transport industry will need time to adjust. The Applicants submit that a review of the impact of the arrangement may not be appropriate until at least three or four years have passed.
- 5.84. The ACCC proposes to grant authorisation for five years. The ACCC acknowledges that the Applicants will face upfront costs from amending the VBS and that the full impact of the arrangement may take some time to be realised.

Variations to the arrangement

- 5.85. The ACCC notes that any amendments to the proposed arrangement during the proposed term of this authorisation would not be covered by the proposed authorisation.

6. Draft determination

The application

- 6.1. On 2 July 2010, DP World Australia Limited and Patrick Stevedores Operations Pty Ltd (the Applicants) lodged applications for authorisation A91238, A91239 and A91240 with the Australian Competition and Consumer Commission (the ACCC).
- 6.2. Application A91238 was made using Form A Schedule 1, of the Trade Practices Regulations 1974 under:
- section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act
 - section 88(1A) of the Act to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 6.3. Application A91239 was made using Form B Schedule 1, of the Trade Practices Regulations 1974 under:
- section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act
 - section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 6.4. Application A91240 was made using Form E Schedule 1, of the Trade Practices Regulations 1974 under section 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing.
- 6.5. In particular, the Applicants have applied for authorisation of an arrangement (**the proposed arrangement**) under which they agree to give preferential treatment to truck carriers that engage in ‘dual runs’, where a truck both delivers and collects containers from their terminals at the Port of Fremantle (**the Port**) on the same trip.
- 6.6. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

- 6.7. For the reasons outlined in Chapter 5 of this draft determination, the ACCC considers that in all the circumstances the proposed arrangement for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) are met

- 6.8. In addition, the ACCC is satisfied that test in section 90(8) is met as the proposed arrangement for which authorisation is sought is likely to result in such a benefit to the public that the proposed arrangement should be allowed to take place.
- 6.9. The ACCC therefore **proposes to grant** authorisation to applications A91238, A91239 and A91240

Conduct for which the ACCC proposes to grant authorisation

- 6.10. The ACCC proposes to grant authorisation to the proposed arrangement which consists of arrangements or understanding from time to time between the Applicants:
- that they will each give preferential treatment to carriers for dual runs by arranging to make Port Slots available
 - regarding the time when Port Slots for dual runs only would appear in the VBS for those truck carriers who had already reserved a regular slot
 - regarding the time at which the Port Slots would be available for all carriers to use either dual runs or single runs (as either an import, export or dual slot) before conversion to regular slots
 - regarding the time at which the Port Slots would be converted to regular slots for general use by carriers not engaging in dual runs
 - that they would each provide a Grace Period (during which no late penalties or fees would be charged) to allow for delays caused at the terminals, and the length of that Grace Period.
- 6.11. This draft determination is made on 30 September 2010.
- 6.12. The attachments to this determination are part of the draft determination.

Conduct not proposed to be authorised

- 6.13. The proposed authorisation does not extend to the Applicants to engage in agreements or understandings with respect to the price or number of Port Slots, or any slots, they each make available at their terminal.

Interim authorisation

- 6.14. At the time of lodging the application the Applicants requested interim authorisation so that they could proceed with the development of the requisite functionality in the VBS to facilitate the proposed arrangement. The ACCC granted interim authorisation on 28 July 2010.
- 6.15. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

- 6.16. The ACCC will now seek further submissions from interested parties. In addition, the Applicants or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Attachment A — the authorisation process

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 conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

Attachment B — chronology of ACCC assessment for applications A91238 – A91240

The following table provides a chronology of significant dates in the consideration of the applications by DP World Australia and Patrick.

DATE	ACTION
2 July 2010	Applications for authorisation lodged with the ACCC, including an application for interim authorisation.
16 July 2010	Closing date for submissions from interested parties in relation to the request for interim authorisation.
28 July 2010	The ACCC granted interim authorisation to DP World Australia and Patrick to develop a system to provide preferential treatment to truck carriers engaged in ‘dual runs’ at the Port of Fremantle.
6 August 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
10 September 2010	Submissions received from the DP World Australia and Patrick in response to interested party submissions.
30 September 2010	Draft determination issued.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.

- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
 - (b) the proposed covenant were given, and were complied with; or

- (c) the proposed conduct were engaged in;
as the case may be.
- (7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.
- (8) The Commission shall not:
- (a) make a determination granting:
- (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
- (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
- (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
- (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;
- unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or
- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.
- (9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.
- (9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):
- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
- (i) a significant increase in the real value of exports;
- (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of

those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.²¹

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.²²

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.²³

Future and other parties

Applications to make or give effect to contracts, arrangement or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future²⁴
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.²⁵

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation²⁶. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

²¹ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

²² *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

²³ Section 91(3).

²⁴ Section 88(10).

²⁵ Section 88(6).

²⁶ Section 90(10A)

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.²⁷ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.²⁸

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a ‘minor variation’ and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.²⁹ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.³⁰

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.³¹ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.³²

²⁷ Subsection 91A(1)

²⁸ Subsection 87ZD(1).

²⁹ Subsection 91B(1)

³⁰ Subsection 91B(3)

³¹ Subsection 91C(1)

³² Subsection 91C(3)