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## Submission on the draft determination

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Application by Brisbane Marine Pilots Pty Ltd for authorisation under section 88 of the Trade Practices Act (Authorisation no. A91235)

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## 1 The market

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- 1.1 For the purposes of assessing BMP's application, the ACCC concludes, in its draft determination, that it considers the relevant market is 'the supply of marine pilotage services at the Port of Brisbane'.<sup>1</sup>
- 1.2 The ACCC's assessment of the relevant market is wrong. The consequences of failing to properly identify the relevant market adversely impairs the ACCC's analysis as to:
  - (a) the public benefit achieved under the exclusivity provided to BMP by MSQ; and
  - (b) any public detriment as a consequence of that exclusivity.
- 1.3 The relevant market in which BMP operates is the provision of pilotage services to MSQ.
- 1.4 The relevant market is reflected by the terms of the pilotage services agreement (**PSA**) which has been entered into between BMP and MSQ. That document recognises:
  - (a) that it is MSQ that has the sole responsibility to provide marine pilotage services in the Port of Brisbane;
  - (b) that BMP's sole customer is MSQ;
  - (c) that the sole participants in the relevant market are MSQ and BMP;
  - (d) that BMP does not have any direct contractual relationship with shipowners or shipping agents in the Port of Brisbane;
  - (e) that BMP invoices MSQ alone, and is paid by MSQ alone, for the services it provides;
  - (f) that the fee MSQ charges shipowners and shipping agents for pilotage services is not calculated by reference to, nor does it have any correlation with, the price paid by MSQ to BMP for BMP's services;
  - (g) that the price to be paid to BMP under the PSA was calculated after extensive and intense negotiations with MSQ by way of comparison to an existing model developed by MSQ regarding the likely cost of those services if MSQ was to provide the service on its own account (in place of BMP);
  - (h) that if MSQ and BMP had failed to reach agreement regarding the terms of the PSA, MSQ would itself have become the provider of those services and that MSQ threatened to commence advertising for applications from individuals to be employed by it in the provision of those services on more than one occasion during the period of negotiation;

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<sup>1</sup> Paragraph 4.16 of the draft determination.

- (i) that, upon termination, it is envisaged that the services provided to MSQ will either be transitioned and transferred from BMP to MSQ or to another State entity nominated by MSQ;
- 1.5 The ACCC's failure to properly identify the relevant market, in turn, results in its flawed analysis of whether:
  - (a) there is competition **in** the market; or
  - (b) there is competition **for** the market.
- 1.6 Much of the analysis in the draft determination proceeds on the mistaken view that competition for the supply of marine pilotage services to shipowners and shipping agents at the Port of Brisbane would increase in the absence of the exclusivity provision in the PSA. That, of course, is wrong. As the result of a statutory monopoly, the sole provider of services to shipping agents and shipowners in the Port of Brisbane for pilotage services is MSQ. Competition in that market (i.e. the market identified by the ACCC in the draft determination) is not possible without amendment to the statutory regime.
- 1.7 The ACCC's misunderstanding of the relevant market results in it misplacing relevance on its conclusion that:
  - (a) '... [it] does not consider that pilotage at the port is a natural monopoly and therefore does not accept that greater efficiencies will be achieved by having a single operator provide pilotage at the port';
  - (b) 'Without the [PSA], BMP will be constrained by the actual entry or the potential for competition for the provision of pilotage services';
  - (c) 'With the [PSA], there is no incentive for another provider to attempt to enter the market and compete.
  - (d) '... [it] considers that the threat of entry can discipline BMP's price and service offering. This pro-competitive effect is removed by the exclusive agreement'; and
  - (e) '... [it] considers that the absence of any competitive pressure on BMP may lead to public detriment in the form of higher pilotage costs which may be passed on to shipping companies and ultimately, consumers.'
- 1.8 The flaw in each of these observations is that the market to which the ACCC is referring is a market over which BMP has absolutely no control or influence. It is the market which is solely and exclusively the responsibility of MSQ as the representative of the State.
- 1.9 The suggestion that BMP has freedom to set price and service offerings shows a complete misunderstanding of the obligations undertaken by BMP under the PSA. That document prescribes both price and service offerings.
- 1.10 There is no automatic right for BMP to pass on any increase in its costs. If there is an event which causes, or is reasonably likely to cause BMP to suffer a material cost increase, BMP can give notice to MSQ to meet to discuss ways of alleviating the impact of that increase.<sup>2</sup> The notice BMP gives in these circumstances must include details of the relevant event, how that event has resulted or is reasonably likely to result in a material increase in its costs, the quantum or estimated quantum of the increase, the basis for BMP's calculation, the financial or operational

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<sup>2</sup> Clause 7(a) of the PSA

solutions that, in BMP's view, might alleviate that impact and the persons who will represent BMP in the negotiation.

- 1.11 If the parties cannot agree on a method to alleviate the impact, BMP can give a transition notice to MSQ, the result of which would be to have the service provided by BMP transition back to MSQ. In addition, if BMP gives MSQ three or more notices in any 12 month period, MSQ may cause the service to be transitioned to others.
- 1.12 The draft termination the ACCC concludes that '*In the medium-long term, the ACCC considers it is possible that, in the absence of an exclusive agreement, another provider may seek to establish itself in competition to BMP or seek to tender for the market*'.<sup>3</sup> For the reasons described above this statement misunderstands the market the ACCC considers is relevant for the determination.

## 2 Term

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- 2.1 Several statements in the draft determination appear to lose sight of the term of BMP's agreement with MSQ. The document has a term of four years. The term ends, therefore, on 31 December 2013. Despite this, in assessing the potential public detriment, the ACCC appears to have had regard to:
  - (a) potential growth of the coal exports to a period ending 2030;<sup>4</sup>
  - (b) projected increased demand for pilotage services in Australian ports as a whole by 2014.<sup>5</sup>
- 2.2 Further, the ACCC appears to be unaware of the lack of correlation between an increase in container through-put and an increase in shipping movements in a port.
- 2.3 Further, the ACCC seems to be confused in its view that the Port of Brisbane is a port likely to experience significant increase in coal exports by 31 December 2013 given that any transport of coal to the Port of Brisbane would require a significant increase in the traffic of coal trains through the suburbs of Brisbane (which is unlikely from an environmental, community and political perspective).

## 3 Competition for the market and in the market

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- 3.1 During the negotiations of the PSA, MSQ evaluated BMP's offers against MSQ's assessment in providing the service itself (i.e. by 'internalising' the pilotage service). The exclusivity arrangement was offered by MSQ to BMP as a negotiating tool to secure a beneficial price **for MSQ** compared to what MSQ determined the services would cost MSQ if it undertook those services itself.
- 3.2 Consequently, in negotiating the PSA, BMP was, in effect, competing with MSQ **for** the market. The pricing for the provision of pilotage services under the PSA reflects the certainty created by the exclusive arrangement offered by MSQ. This was MSQ's preferred model compared with its assessment of its own competitiveness.
- 3.3 The ACCC refers, in the draft determination, to two key issues to consider in assessing the potential for public detriment to result from the exclusive arrangement.<sup>6</sup>

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<sup>3</sup> Paragraph 4.23.

<sup>4</sup> See paragraph 4.56.

<sup>5</sup> See paragraph 4.65.

### **Competition in the market for pilotage services**

- 3.4 Under the statutory regime in place it is not possible to achieve competition in the market for the supply of marine pilotage services at the Port.
- 3.5 MSQ is the only party capable, under the relevant legislation, of providing pilotage services to shipping in the Port of Brisbane. They have publicly acknowledged that they are not interested in pursuing competition in pilotage services in Queensland.<sup>7</sup>
- 3.6 Multiple providers could not perform these services under the statutory regime. Consequently, competition in the ACCC's mistaken view of the relevant market could not be achieved.

### **Competition for the market**

- 3.7 The draft determination and submissions received from third parties suggest that there was no competition **for** the market.
- 3.8 Competition for the provision of pilotage services to MSQ is reflected by the intense, extensive and protracted negotiation process undertaken in settling the terms of the PSA. In negotiating the PSA with BMP, MSQ considered BMP's offer against its own model for providing the services itself (i.e. internalising the pilotage service). BMP, in effect, had to compete with MSQ's internalisation model in securing the contract.
- 3.9 The ACCC concludes<sup>8</sup> that 'the exclusive arrangement is likely to foreclose any potential competition for the market beyond the short term'.
- 3.10 In this regard, the ACCC's conclusion is, again, fundamentally flawed. If MSQ assesses that the services provided to it by the BMP could be provided more cost effectively (without diminution in standards), it would, presumably, cause the service to be transitioned to MSQ or an entity nominated by it.
- 3.11 The beneficiary of a reduction in any price for the services currently provided by BMP is MSQ alone. That is to say, there is no correlation between the price paid to BMP for its services under the PSA and the price charged by MSQ for marine pilotage services in the Port of Brisbane. The greater the differential the greater the 'profit' for MSQ.
- 3.12 Therefore, in negotiating the PSA, MSQ created a model to determine the likely cost of providing the services which BMP now provides to it. If BMP had failed to offer a price less than or equal to MSQ's model, MSQ would presumably not have agreed to BMP's engagement.
- 3.13 Consistent with this, is the requirement that, under the PSA, the parties must commence early good faith negotiations for the purposes of reaching a further agreement for a period commencing 1 January 2014. If a further agreement between the parties has not been entered into by 30 June 2013, either party may give a 'transition notice'. If a transition notice is given, the business of BMP will, in effect, be transitioned or transferred to MSQ or a State owned nominee.
- 3.14 Consequently, competition for the market already exists and was a significant factor in the negotiation process for the PSA, in particular, in relation to the pricing offered by BMP. In negotiating any further contract, BMP will be competing with MSQ with regard to any extension.

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<sup>6</sup> Paragraph 4.53.

<sup>7</sup> See the minutes of Shipping Australia Limited meeting held on 14 October 2010.

<sup>8</sup> Paragraph 4.84.

## 4 Growth and pricing

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### Growth

- 4.1 The draft determination assumes that the Port of Brisbane will experience significant growth in shipping movements in the next 10 to 20 years. That assumption appears to be based upon the Ports Australia submission and the projected growth of container trades and coal exports<sup>9</sup>.
- 4.2 These figures do not necessarily reflect the growth in the market for the provision of pilotage services in the Port of Brisbane because:
- (a) they do not take into account projected and actual increase in ship size. Larger vessels decrease the number of shipping movements, and therefore the pilotage task, required to achieve a given level of cargo movement through the port. As an example, while the number of containers handled in Brisbane have increased by 26% in the last 5 years, the average container exchange has increased 60%, from under 500 to over 800 containers per vessel. Consequently, despite the trade growth, there has been a reduction in container vessel movements over this period<sup>10</sup>.
  - (b) they are figures based on Australia wide throughputs and can not be relied upon to represent the projected growth at the Port of Brisbane;
  - (c) they assume that the expected growth in Australian coal exports will result in shipping growth at the Port of Brisbane. Coal export at the Port of Brisbane is limited due to infrastructure restrictions in rail transport, loading and port facilities. While BMP agrees that it is likely coal exports will increase significantly in Australian ports, this increase will not be reflected at the Port of Brisbane; and
  - (d) they do not reflect the projected growth in the period ending 31 December 2013.
- 4.3 Experience in large overseas ports such as Hong Kong and Rotterdam, each with over 33,000 shipping arrivals per annum<sup>11,12</sup>, indicates that a single pilotage service provider is the preferred model for port pilotage provision regardless of scale.
- 4.4 The arrangement for exclusivity is only relevant for the period of the PSA and it is improbable that there will be significant growth in shipping movements in the Port of Brisbane during the term. In BMP's view, any competitive opportunities arising from the projected growth in shipping movements over the term of exclusivity are not sufficient to outweigh the public benefit of preferential pricing and certainty of outcomes that MSQ has achieved by offering the exclusive arrangement. This is discussed further below.

### Pricing

- 4.5 The ACCC appears to have accepted the submissions made by Ports Australia and Australian Reef Pilots regarding the pricing of pilotage services in the Port of Brisbane. In particular, it has included a table<sup>13</sup> comparing the pilotage costs in the Port of Brisbane with the costs involved in pilotage for the inner route of the Great Barrier Reef.
- 4.6 Reliance on these submissions and figures is inappropriate because they are misleading:

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<sup>9</sup> Summarised in paragraph 4.56 of the draft determination.

<sup>10</sup> Port of Brisbane Corporation Annual Report 2004/05 and 2009/10

<sup>11</sup> [www.mardep.gov.hk/en/publication/pdf/portstat\\_ast\\_2009.pdf](http://www.mardep.gov.hk/en/publication/pdf/portstat_ast_2009.pdf)

<sup>12</sup> [www.portofrotterdam.com/en/Port/port-statistics/Documents/Port\\_Statistics\\_2009\\_tcm26-64785.pdf](http://www.portofrotterdam.com/en/Port/port-statistics/Documents/Port_Statistics_2009_tcm26-64785.pdf)

<sup>13</sup> In paragraph 4.89 (as submitted by Australian Reef Pilots).

- (a) the prices quoted is the price charged by MSQ for the services and does not reflect, in any way, the price paid to BMP for providing the service to MSQ;
  - (b) the price quoted for pilotage in the Great Barrier Reef does not take into account infrastructure and other charges and fees levied by the service providers in connection with the pilotage. The price quoted for pilotage in the Port of Brisbane includes all of these charges and these are included in the price paid by MSQ to BMP for each ship movement;
  - (c) the role and skills of a Reef or coastal pilot are not directly comparable to that of a port pilot and
  - (d) the 'approximate time' does not take into account any of the following matters:
    - (i) travelling time spent to arrive at the ship launch;
    - (ii) time spent on passage planning prior to arriving on the ship; or
    - (iii) the "active duty" time spent by a pilot on a ship.
- 4.7 The Ports Australia submission suggests that BMP has 'secured a monopoly price'<sup>14</sup> under the PSA. That is not the case. As set out above, the negotiation process resulted in MSQ offering an exclusive contract with the specific purpose of ensuring favourable pricing for BMP's services. MSQ has a monopoly price on the provision of pilotage services to ships under the statutory regime.
- 4.8 MSQ profits from the provision of pilotage services to ships in the Port of Brisbane. The price quoted and relied upon by the ACCC includes a premium set by MSQ. MSQ uses this profit to provide services in other ports and areas over which it has jurisdiction that are less profitable.

## **5 Public benefit regarding certainty and safety**

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- 5.1 The price paid by MSQ should not, in BMP's view, be given the weight ACCC has in determining whether the arrangement is in the public interest. Safety, protection of the environment and continuity of pilotage service provision are also important considerations in determining public benefit.
- 5.2 The exclusivity arrangement provides both BMP and MSQ with the certainty required to ensure BMP invests in the relevant "fit for purpose" infrastructure, technology, training and development of pilots and management systems for the maintenance of safety and protection of the environment that not only comply with any legislative requirements, but are based on worlds best practice.
- 5.3 Multiple pilotage providers would require duplication of expensive services and infrastructure such as pilot launches, dispatch and administrative systems in a limited market. The cost of duplication would have to be recovered from the market or, alternatively, would result in a reduction in the standard of these services.
- 5.4 Failure of marine pilotage safety systems can result in collision, allision or grounding leading to damage to the marine environment, oil spills, port closures and damage to and reduction in available port infrastructure. These risks are increased with larger vessels operating with ever

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<sup>14</sup> See paragraph 4.86 of the draft determination



- reducing safety margins. Any increased risk of incidents will far outweigh benefits derived from a competitive pilotage market.
- 5.5 Regulators are likely to have difficulty in setting specific procedures in complex safety critical industries where specific local knowledge is required. The difficulty in setting specific procedures is likely to result in regulation that is reactive rather than proactive. Regulators are more likely to set general standards and then audit to ensure compliance. Competing operators inevitably develop different systems to comply with regulatory standards and requirements. The monitoring of multiple providers results in increased auditing and regulatory costs. The interaction of a number of safety systems in a confined safety critical space where close coordination is required will contribute to confusion and a heightened risk to safety. In these situations a sole provider of services ensures the best safety outcomes. An example of this would be airport air traffic control. It is also true of marine pilotage.
- 5.6 The provision of Brisbane pilotage services to the Queensland Government is currently (and has been for the past 20 years) provided solely by BMP. It is the only party with the necessary port knowledge and experience to determine best practice safety management in the Port of Brisbane. The exclusive arrangement provides BMP with the certainty required to invest in safety management systems that reflect best practice over and above any legislative requirements that would likely be imposed.
- 5.7 There is a conflict of interest between the commercial interests of ship owners and the public interest of safe passage, for example pressure to navigate in restricted visibility or at increased speed to maintain a vessel's schedule. If shipowners are able to choose between pilot providers in a competitive environment, pilots or their organisations would be required to compete for the available work. Their livelihood then depends on acting in the shipowner interest rather than the public interest.
- 5.8 Exclusivity ensures that the safety benefits resulting from provision of pilotage by a sole provider are captured for the public benefit.
- 5.9 This fact has been recognised in other jurisdictions. For example, the Florida Statutes (2010), section 310.015, states that "piloting is an essential service of such paramount importance that its continued existence must be secured by the state and may not be left open to market forces."
- 5.10 Hong Kong, Turkey and the United Kingdom have all reversed decisions that allowed competition in pilotage following safety concerns.
- 5.11 BMP understands that AMSA, the statutory body regulating pilotage in the Great Barrier Reef, has significant concerns regarding the safety outcomes of the current competitive model in that jurisdiction. BMP suggests that the ACCC should seek AMSA's view and the views of individuals engaged in the operations on the Great Barrier Reef on the effectiveness of the model proposed in a number of the submissions received.
- 5.12 Exclusivity provides the State, and hence the public, with certainty regarding the provision of pilotage services in the Port of Brisbane. Continuity of service provisions in the PSA ensure continuity of service both during the contract and at the end of the term.
- 5.13 Exclusivity ensures that all vessels in the Port of Brisbane receive an equal non-discriminatory pilotage service. The PSA ensures that pilots are available at all times and to all vessels equally. In a competitive environment pilots and their organisations would seek to service the most desirable assignments based on ease of task, duration of pilotage and ability to maximise revenue.

- 5.14 The PSA only exists because of the exclusivity conferred upon BMP. In the absence of such a provision, there is no commercial incentive for BMP to enter into any form of contract with MSQ at all. In those circumstances, the price set by BMP for the services it supplies to MSQ could be set on an ad hoc basis (depending upon daily, weekly or monthly demand).
- 5.15 The party that receives the benefits from conferring exclusivity on BMP is MSQ. MSQ in turn can confer benefits upon the shipping public and wider community by ensuring that pilotage in the Port of Brisbane is undertaken according to world's best practice and by an organisation with a pre-eminent international reputation.
- 5.16 The benefit of exclusivity is best illustrated by what might happen to the services provided to MSQ if it is removed. In the event that MSQ (freed from any obligation of exclusivity) engage pilots qualified to pilot shipping in Brisbane, BMP would be faced with the following risks:
- (a) the reduced ability to recruit and train new "high calibre" pilots (given market uncertainty);
  - (b) the need to minimise expenditure on future "fit for purpose" infrastructure (due to market uncertainty); and
  - (c) the inability to achieve consistency of service provision in the Port (especially if MSQ did not adopt identical safety management, fatigue management, and service delivery protocols)
- 5.17 These detriments would arise without any corresponding advantage to the broader shipping community or general public because the cost paid by shipowners for any relevant pilotage is set by and paid to MSQ without any correlative relationship to changes in its marginal costs. MSQ is a price setter, both in relation to pilotage services in the Port of Brisbane (i.e. the market identified by the ACCC) and for the services provided to it by BMP (in the market in which BMP operates).

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