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Ms Kabita Prasad and Mr Darrell Channing
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5 August 2016

Dear Ms Prasad and Mr Channing

Port of Townsville – Authorisation Application A91545

We act for Svitzer Australia Group Limited ("**Svitzer**"). This submission is for the public ACCC register.

The purpose of this submission is to provide an initial submission with respect to authorisation application A91545 ("**Application**") by the Port of Townsville Limited ("**Applicant**") seeking authorisation until 30 June 2024 to jointly procure, negotiate and contract for towage services for the ports of Cairns, Mourilyan, Lucinda and Townsville in Northern Queensland ("**Ports**"), with Far North Queensland Ports Corporation Limited.

Svitzer is a towage company and is the existing service provider at the Ports of Lucinda, Mourilyan and Cairns, the subject of this Application.

Svitzer confirms it had no objections to the interim authorisation application, but wishes to set out why it is in principle opposed to exclusive licences.

In summary, Svitzer's position is that exclusive licences operate to the detriment of the shipping customer by eliminating competition over the term of the licence and that it is only in rare cases that they can be economically justified. Svitzer has consistently held this view, both globally and domestically, as evidenced by its previous objections to the Port Hedland, Port of Gladstone and Port of Townsville exclusive licenses applications.

That said, while Svitzer accepts, as it did in 2012 in relation to the Port of Townsville's Notification 93755, that towage volumes will not always be sufficient to justify a second or multiple operators, this does not in and of itself necessitate an exclusive licence regime. In relation to this Application, it covers more than just the Port of Townsville and there needs to

be a greater understanding of why a non-exclusive licence is not a preferable and better outcome for shipping customers.

1. **Background - Material changes in the Australian Towage Industry**

Since the 2002 Productivity Commission report titled *Economic Regulation of Harbour Towage and Related Services* Report No. 24, 20 August 2002 (**Productivity Commission's 2002 Report**), that is cited as supporting material for the Application, there have been material changes to the Australian towage industry. There are now a greater number of towage providers operating in Australia than in 2002 and a more varied range of towage services (eg harbour towage, terminal towage, offshore support vessels etc).

Another significant change is the development and growth of so called "partnership models" for the provision of towage services, such as that used by Rivtow Marine in Port Hedland in Western Australia and the Hay Point Coal terminal in Northern Queensland. However, due to Australia's workplace legislation this crewing model is prohibited for incumbent operators with an existing workforce.

Svitzer believes that, other than in rare circumstances, an exclusive licensing regime is not the optimal regulatory outcome for customers because of the decrease in choice and costs associated with the licence that would not otherwise arise when there is an ongoing competition for services within a Port.

Svitzer also believes that exclusive licensing regimes in ports may in fact be holding back growth and innovation in competition for the provision of towage services as the creation of local port monopolies through these licences leads to a decrease in service, inherent loss of flexibility and responsiveness to growth or reductions in port operations, increased overall costs and a reduction in the available towage work in a region.

Another general concern is the ports' growth aspirations and its impact on towage requirements. Under an exclusive license, a towage provider's operational set-up is aligned with maximum requirements of the license, based on port growth expectations, often leading to larger numbers of crew and assets than likely required in the initial years of the contract. In a non-exclusive license arrangement towage providers invest in crews and assets as demand requires. That way current end-users are not subsidizing future users of the port.

There is also a detrimental impact to investment / tariffs from exclusive licenses compared to a non-exclusive licence arrangement. Exclusive licences have a

significant impact on capital expenditure and return on investment calculations which in turn result in an inevitable upward pressure on tariff rates in order to achieve a reasonable return on the assets over the life of the licence (which is an artificial timespan compared to non-exclusive licence operations).

Further, the social costs in regional communities are not being factored in as crew and associated team members of the existing service provider become redundant and need to move locations to find alternative employment where they lose the exclusive licence. These costs are not taken into account by the Port operator, but will have to be taken into account by rational towage providers bidding for the licenses. This issue is likely to become the standard and will have a negative impact on the prices paid by end-users in the ports.

Issues also arise with an exclusive licence where volumes fall due to commodities cycles or other reasons associated with particular production companies, that see the incumbent towage operator seek a cost uplift that affects all shipping customers and would not arise in an open port subject to normal competitive constraint.

In certain circumstances, a theoretically sound tender arrangement may also be practically impossible for parties in the market to participate in due to the nature of the terms of the tender.

In these circumstances, Svitzer's global policy is that exclusive licences and the awarding of monopoly rights in ports are not in the best interests of towage customers, unless the case can clearly be made out.

In this Application, the relevant market is said to be "at least as wide as the market for port services in Queensland and is not limited to the few ports the subject of this application". It would appear this is based on the submission in the Application that "towage vessels are capable of moving between ports and up and down the East Coast of Australia". Over such a wide area and for these particular Ports, Svitzer believes that the Applicant has not yet demonstrated that competition would otherwise exist from companies with sound business operations and from partnership models. Accordingly, Svitzer believes that additional data should be submitted to provide an economic basis for the assessment of the Application.

2. **Social impact of exclusive licences**

In 2009, the ACCC allowed Notification N93770 in relation to the Port of Gladstone, to stand after applying the public benefit versus detriment test. The public benefits identified by the ACCC were increased efficiency and cost savings. The ACCC

believed these benefits flowed from the notified conduct's potential to increase competition by providing an incentive for competitors to tender for the market, and that the competitive tender process was likely to subject prospective providers to a higher degree of competitive pressure than other towage arrangements.

However, the costs of redundancy due to these exclusive arrangements can be significant and potentially outweigh the benefits. Unlike non-exclusive licences, exclusive licences are granted to a towage operator for a fixed term. However, crews are traditionally engaged as permanent employees. As a result, employees face uncertainty of whether they will be offered further employment at the end of the licence term and towage providers have to include their redundancy exposure when the license expires. This exposure is included in the tariff rates; thereby adversely impacting port users. In the case of Svitzer, it paid $4.6 million in redundancy costs when its licence ended at the Port of Gladstone.

Further, recent experiences, including in Western Australia and Queensland, have seen a majority of existing crew not being recruited by the new exclusive licence entrant. This obviously results in unemployment, negative community impacts and social dislocation.

Svitzer does not believe that these broader factors are being considered in the ACCC's authorisation analysis.

3. **Insufficient information to allow proper assessment of Application at this time**

The information publicly available in relation to the Application and which we believe to be all that is currently also before the ACCC, provides very limited material on the "proposed arrangement". We believe that this is insufficient, at this time to assess or make a submission on the substantive application from a public benefits versus detriments perspective.

Additionally, in an application for an authorisation, the onus is upon the applicant to satisfy the ACCC that authorisation should be granted. We submit that the ACCC should not make a decision on the substantive authorisation application until it receives sufficient information to satisfy itself of certain conditions, as required by section 90 of the *Competition and Consumer Act 2010* (Cth) (**CCA**). In particular, we believe that until more details are available of the proposed tender terms, it is difficult to assess public benefits and detriments. As an example, the benefits to customers of the conduct may differ based on length of term, nature of services and licence conditions.

Svitzer notes that consistent with how it has not objected to an interim authorisation to allow the Applicant to prepare the relevant tender material, it does not express a final view at this stage, other than to strongly submit at this time that there is insufficient material to reach any considered view.

4. **Interaction between exclusive dealing notification and cartel authorisation application**

The Applicant has also lodged an exclusive dealing notification under section 47 of the CCA, and is also seeking an authorisation application under section 45 of the CCA for conduct which is inextricably linked. However, the procedure for each application involves different tests and appeal rights.

Moreover, the conduct set out in the section 93 notification raises not only third line forcing conduct under sections 47(6) and (7), but also broader exclusive dealing conduct under section 47(4) that is subject to a substantial lessening of competition test.

We submit that as there is a clear overlap of the conduct in the two applications, in particular the issues raised by the exclusive dealing notification on its face raise coordinated conduct, that the two matters should be considered together with the section 45 authorisation application.

As a practical matter this could be addressed by an additional form being filed by the Applicant, and it would allow the ACCC to assess the conduct as a whole as it does with other authorisation matters.

Please contact me on (02) 8922 8033 if you would like to discuss these issues.

Yours sincerely

Dave Poddar

Partner