

Our reference
ECS/JC

ONE ONE ONE Eagle Street
111 Eagle Street Brisbane QLD 4000
GPO Box 9925 Brisbane QLD 4001
Tel +61 7 3228 9333
Fax +61 7 3228 9444
www.corr.com.au

**CORRS
CHAMBERS
WESTGARTH**
lawyers

Sydney
Melbourne
Brisbane
Perth

25 August 2016

By email: kabita.prasad@acc.gov.au
Kabita Prasad
Assistant Director
Merger and Authorisation Review Division
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Contact
James Cameron (07) 3228 9752

Partner
Eddie Scuderi (07) 3228 9319
Email: eddie.scuderi@corr.com.au

Dear Kabita,

Response to submission by Pacific Tug (Aust) Pty Ltd

We refer to the submission made by Pacific Tug (Aust) Pty Ltd (**Pacific Tug**) dated 5 August 2016 (**Pacific Tug submission**) to the application for interim and final authorisation (A91545) lodged on 8 July 2016 by Port of Townville Limited (**POTL**) on behalf of itself and Far North Queensland Ports Corporation Limited (together, the **Applicants**).

This letter responds to the Pacific Tug submission.

Response to Pacific Tug submission

POTL rejects the claims made in the Pacific Tug submission for the following reasons:

- 1 Pacific Tug argues that notification N93770 lodged by the Port of Gladstone is 'directly comparable' and supportive of the claims made in its submission. However, notification N93770 is not directly comparable to authorisation A91545, including for the following reasons:
 - (a) the notification was for exclusive dealing conduct limited to the Port of Gladstone, it was not an application for authorisation with respect to exclusionary provisions and associated cartel provisions for a proposed open and competitive tender process;
 - (b) the notified conduct was limited to the Port of Gladstone (POTL understands that the Gladstone Ports Corporation Limited made a decision not to adopt exclusive towage arrangements for the ports at Bundaberg and Rockhampton for commercial reasons, not due to any competition concerns of the ACCC);

Merger and Authorisation Review Division
Australian Competition and Consumer Commission
Response to submission by Pacific Tug (Aust) Pty Ltd

- (c) the volumes and customer profiles of the ports at Gladstone, Bundaberg and Rockhampton are not comparable to the four ports the subject of authorisation A91545.
- 2 The Pacific Tug submission fails to acknowledge the effects of the open and competitive tender process that the Applicants propose to conduct. The effects of such a procurement process were clearly described in the Federal Court of Australia decision of *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (emphasis added in underline):

An exclusive licensee will be insulated from competitive pressures for the period of the licence, subject to any pressures associated with the extension or renewal of the terms of the licence. There will be a shift from a natural monopoly to a legally enforced and controlled monopoly, but the market behaviour of the successful tenderer will be regulated by the terms of the agreement which results from the competition for the market brought about by the tender process. The tender process creates competition between rivals for the opportunity to supply towage services for the next five years on the basis that the prices will be capped. Competitive outcomes are prescribed or sought within the contract entered into as a result of the bidding process, rather than through the operation of market forces during the term of the contract.¹

The successful towage service provider(s) that are awarded exclusive licences by the Applicants will be regulated by the terms of the agreement which results from the competition for the market brought about by the open competitive tender process that the Applicants intend to conduct and which is described in the application A91545.

- 3 The Applicants have had a statutory right under the *Transport Infrastructure Act 1994* (Qld) to grant exclusive licences since 2002 and its right to do so has been consistently allowed to stand pursuant to notifications it has lodged with the ACCC.
- 4 In the opinion of POTL, the 2002 Productivity Commission Inquiry Report titled '*Economic Regulation of Harbour Towage and Related Services*' (**Productivity Commission Report**) is and remains the most authoritative, evidence-based and thorough report on competition issues relevant to harbour towage services in Australia. The competition principles considered in that report are as relevant in today's towage market as they were in 2002. Finding 8.4 of the Productivity Commission Report states:

In certain circumstance, exclusive licence for the provision of towage services have the potential to generate greater benefits for towage users than non-exclusive licences.

¹ *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 1381, [25].

Merger and Authorisation Review Division
Australian Competition and Consumer Commission
Response to submission by Pacific Tug (Aust) Pty Ltd

- 5 POTL submits that, in combination with an open competitive tender process that permits bids for individual ports (and which does not require respondents to bid for one exclusive licence for all four ports the subject of the application of authorisation), the circumstances that justify the granting of exclusive licences exist.
- 6 Professor Round, in his report titled '*Competition in the provision of towage services in Australian ports: Is exclusive licensing necessary?*' of 27 November 2011, concludes that competition amongst more than one towage operator is sustainable in ports that are larger in size, namely those with vessel calls on average greater than 10,000 tug jobs in the past three financial years.²

Conclusion

POTL argues that competitive tenders for the exclusive right to operate towage services at low volume ports for a fixed period promotes more competitive towage outcomes for port users and is likely to achieve the public benefits described in its application.

Further information

Please contact me if you have any queries or require further information.

Yours faithfully

Corrs Chambers Westgarth



Eddie Scuderi
Partner

² Professor D Round and Dr M Agarwal, *Competition in the provision of towage services in Australian ports: Is exclusive licensing necessary?* (27 October 2011), 38.