

**C L I F F O R D
C H A N C E**

CLIFFORD CHANCE

LEVEL 16, NO. 1 O'CONNELL STREET
SYDNEY NSW 2000
AUSTRALIA

TEL +612 8922 8000
FAX +612 8922 8088

www.cliffordchance.com

Your ref: 60424

Our ref: 21-40628766

Direct Dial: +61 2 8922 8033

E-mail: mark.grime@cliffordchance.com
dave.poddar@cliffordchance.com

Ms Kabita Prasad and Mr David Hatfield
Australian Competition & Consumer
Commission
23 Marcus Clarke Street
Canberra ACT 2601

29 September 2016

By email: kabita.prasad@acc.gov.au
david.hatfield@acc.gov.au

Dear Ms Prasad and Mr Hatfield

Port of Townsville – Authorisation Application A91545

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

1. Introduction and purpose of supplementary submission

The purpose of this submission is to provide a high-level response to subsequent submissions made by the Port of Townsville Limited ("**POTL**") and Far North Queensland Ports Corporation Limited (collectively referred to as the "**Applicants**"), and others in relation to the application for authorisation (A91545) to jointly procure, negotiate and contract for towage services for the ports of Cairns, Mourilyan, Lucinda and Townsville in Northern Queensland ("**Ports**").

More specifically, we wish to draw attention to a number of key misconceptions that some interested parties appear to have relied upon in their submissions to the Australian Competition and Consumer Commission ("**ACCC**").

At the outset, Svitzer wishes to restate that it notes that it is possible that the Ports in question may ultimately only be appropriate to have one towage operator in each respective port because of the configuration and nature of vessel movements in the relevant port or region. However, Svitzer strongly believes that the benefits said to be associated with exclusive licences can be obtained through non-exclusive arrangements, which also require towage operators to man tugs within a Port, but do not inhibit or restrict choice of competition in a way that limits the ability of shipping customers to pursue favourable outcomes that can be facilitated by competition *within* ports. Further, Svitzer believes that recent experience has shown that the benefits initially claimed

in exclusive licences in terms of pricing rapidly erode through price increases or contractual variations as a result of volume changes or other cost escalations.

2. **Misconceptions identified that are not supported by evidence or real world examples**

- (a) *Towage jobs are not a relevant or effective benchmark to assess the stability of port operations, efficiencies or customer outcomes*

A number of parties, including the Applicants, continue to rely on the conclusion put forward by the Productivity Commission in its 2002 report that economies of scale are typically exhausted at approximately 8000 towage jobs per year. This is notwithstanding the fact that considerable changes have occurred within the Australian towage sector since 2002.

There have also been substantial advances in the way in which market participants (including both towage providers and customers) can now forecast and assess supply and demand having regard to asset utilisation and prevailing market conditions within each port so that the number of towage jobs is not determinative of the number of towage vessels and operators. Svitzer also notes that significant changes can occur in respect of port dynamics over a five-year period, which can affect efficient planning and utilisation.

Accordingly, Svitzer believes that towage jobs do not provide an accurate metric to determine the number of towage operators a port can accommodate looking forward in order to ensure stability of port operations or to assess (and maximise) efficiencies and customer outcomes.

We believe that adopting a towage-jobs based approach to assess the benefits and detriments associated with, or as a basis to issue, an exclusive licence is arbitrary and fails to give appropriate regard to the unique characteristics and customer demand profiles that exist within each Port. The importance of an economic benchmark or analytical paradigm being able to accurately reflect prevailing economic circumstances cannot be overstated.

There is likely to be sufficient consensus that the individual characteristics of relevant Ports are critical in assessing the likely benefits and detriments of an exclusive licence and its effect on competition and port dynamics more generally. In this respect, we draw the ACCC's attention to the Ports Australia submission annexed to the Applicant's submission dated 21 September 2016 that was previously critical of Svitzer's Economic Report in 2012 for failing to have regard to the significance of the:

"...individual characteristics of the [two] ports in question, their particular operations and trades all of which having a bearing on the relative impact of exclusive licences viz alternative arrangements. Even the geographical characteristics of a port have a bearing on this matter".

Svitzer believes that there is an inherent risk in relying on the Productivity Commission's framework as it focuses on economic considerations that were shaped by market dynamics as they existed nearly 15 years ago, and which have since changed significantly. As such, we would emphasise the importance of the ACCC looking beyond the mere number of towage jobs (and the arguments that are based upon such a metric), and consider more relevant characteristics such as tug utilisation, port operations and geography, and customer activity within each of the ports for the purposes of their assessment.

(b) *Exclusive licences do not guarantee certainty of service*

The Applicants note that non-exclusive models involve higher risks in respect of the stability of towage service providers. We believe that this argument is highly theoretical in nature and lacks support by way of real-world examples. From a practical perspective, exclusive licences provide no additional protections than non-exclusive alternatives insofar as ensuring towage operators are not forced to exit for reasons such as insolvency or strategic decisions by a parent entity to withdraw assets that are otherwise unforeseen at the time of the tender process.

Significant disruptions to shipping customers and port operations resulting from the exit of a towage provider has not been the experience of Svitzer in Australia in recent times. One only needs to look to the relatively seamless transfer and minimal disruption to shipping customers that followed Svitzer's exit from the Port of Townsville following Pacific Basin Towage's successful tender for that exclusive licence in 2010.

Importantly, since the Productivity Commission Report of 2002, the availability of towage vessels has greatly increased with both the ability to bring them in from overseas and the availability of second hand vessels in Australia.

In the absence of an exclusive licence, towage providers will typically have a business plan that involves building and/or winning volume from competitors within the port or the region. In the event that one operator exits a port, there will either be an existing operator that will have the ability to service the remaining volume or a new operator who would be able to enter quickly and ensure that the potential inconvenience on shipping customers is minimised. The ability for a new entrant to enter a port quickly and build and/or win sufficient volume has

increased significantly due to the increasing prominence of partnership models that enable towage providers to pass on to customers a range of cost savings.

We also wish to highlight that the way in which exclusive licences restrict competition limits the ability of shipping customers to minimise disruption by switching to an alternative towage provider or sponsoring a new entrant in the event that a licence holder exits a port. Therefore, in the absence of evidence to the contrary, Svitzer believes that the stability of port operations can be addressed just as effectively through non-exclusive alternatives without limiting the ability of customers to seek out alternative towage providers or removing the flexibility provided by market dynamics and normal principles of competition. That is, Svitzer remains of the view that granting monopolies and/or removing competition are not good for customers due to the competition concerns that are typically associated with monopolies.

(c) *Claimed public benefits associated with exclusive licences are attainable without exclusivity*

The effects associated with restricting or limiting competition through an exclusive licence will ultimately lead to a decrease in choice and impose costs on customers that would not otherwise arise in the presence of actual or potential competition within the port. Svitzer's key concern with the exclusive licence in the context of the Applicant's application is that it will construct and impose a natural monopoly in circumstances where competition would otherwise provide for increased efficiency and allow customers to pursue more favourable outcomes. For instance, it stands to reason that a 5 year business case will impose higher costs on customers to ensure that a towage provider can achieve a year-on-year return on investment than would be the case in a scenario where the only limits imposed on the tenure of a towage provider are market forces driven by competition and efficiencies.

These concerns are particularly heightened when most, if not all, of the public benefits claimed by the Applicants and indeed other interested parties, could be achieved through non-exclusive alternatives. Port authorities have the ability to impose minimum requirements on any towage operator who wishes to operate within a port so as to ensure that operational expectations in terms of vessel capabilities, availability and other service requirements are met. This can be achieved without the need to limit and restrict competition in a way that protects a licence holder from having to maintain a competitive offering to remain viable and/or build volume.

As towage is a more flexible and less capital-intensive part of the port supply chain, Svitzer believes that towage operators have the ability to adapt to the prevailing circumstances within a port or risk losing volume to a more efficient towage provider. In the circumstances, we do not believe that the Applicants have submitted sufficiently compelling evidence in support of their position that the claimed public benefits associated with their application for an exclusive licence could not be achieved without the negative implications associated with removing actual or potential competitive constraints from incumbent towage providers.

3. **Conclusion**

Since the release of the Productivity Commission's report in 2002 and the David Round paper in 2011, there have been substantial advances and developments in the way in which competition issues relevant to harbour towage can be assessed and measured. We also note that the size and structure of the towage industry in Australia has changed significantly since 2002. As such, we believe that towage jobs are no longer a relevant or effective benchmark to assess the stability of port operations, efficiencies or customer outcomes and that a more sophisticated and comprehensive analytical approach to assessing the impacts of exclusive licences needs to be adopted by the ACCC having regard to the individual characteristics and dynamics in each port.

We also do not believe that the Applicants have sufficiently demonstrated by way of hard evidence that the benefits of replacing competition with an exclusive licence outweigh the detriments in a way that satisfies the statutory test under the *Competition and Consumer Act 2010* (Cth). This is particularly the case when most, if not all, of the benefits claimed could be achieved without restricting or limiting competition. In this respect, Svitzer strongly believes that competition should always be the preferred framework for maximising efficiencies and for ensuring market-based competitive outcomes.

Please contact me on (02) 8922 8033 or Mark Grime on (02) 8922 8072 if you would like to discuss these issues.

Yours sincerely



Dave Poddar

Mark Grime

Partner

Associate