



Australian  
Competition &  
Consumer  
Commission

## Public Competition Assessment

14 October 2015

### Victoria Quay International RoRo Terminal Pty Ltd and Australian Amalgamated Terminals Pty Ltd – separate proposed acquisitions of the long term lease of the new automotive and RoRo terminal at the Port of Fremantle

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#### Purpose

1. This public competition assessment outlines reasons for the following separate decisions by the Australian Competition and Consumer Commission (**ACCC**):
  - on 2 April 2015, not to oppose Victoria Quay International RoRo Terminal Pty Ltd's (**VQIRT**) proposed acquisition of the long term lease of the new automotive and roll-on roll-off (**RoRo**) terminal on Victoria Quay at the Port of Fremantle (the **Terminal**) subject to a court-enforceable undertaking accepted by the ACCC pursuant to section 87B of the *Competition and Consumer Act 2010* (the **Act**); and
  - on 23 April 2015, not to oppose Australian Amalgamated Terminals Pty Ltd's (**AAT**) proposed acquisition of the long term lease of the Terminal (together, the **proposed acquisitions**) subject to a court-enforceable undertaking accepted by the ACCC pursuant to section 87B of the Act.
2. VQIRT and AAT both separately sought to acquire the long term lease of the Terminal. Given that the proposed acquisition by VQIRT and the proposed acquisition by AAT both raised vertical competition concerns, this Public Competition Assessment provides a summary of both decisions.
3. A Public Competition Assessment is a detailed summary of the ACCC's reasons and issues considered by the ACCC in a merger review and is generally published when:
  - A merger is opposed
  - A merger is subject to enforceable undertakings
  - The merger parties seek such disclosure
  - A merger is cleared but raises important issues that the ACCC considers should be made public
4. By publishing a Public Competition Assessment, the ACCC aims to provide guidance to the public about the ACCC's analysis of the competition issues involved in certain merger reviews.

5. The ACCC considers each acquisition on a case-by-case basis. While some transactions may involve the same or related markets, the analysis and decision outlined in one assessment will not necessarily reflect the ACCC's view about other transactions.
6. The ACCC considers confidential information from merger parties and other market participants when making a decision. Our public competition assessments may not identify and explain all issues that we considered because we must maintain confidentiality about certain information and sources.

## The ACCC's decisions

7. On 2 April 2015, the ACCC announced its decision not to oppose the proposed acquisition by VQIRT subject to a s 87B undertaking. On 23 April 2015, the ACCC announced its decision not to oppose the proposed acquisition by AAT subject to a s 87B undertaking.
8. The ACCC decided that, subject to each of the undertakings, each of the separate proposed acquisitions by VQIRT and AAT would be unlikely to have the effect of substantially lessening competition in the relevant markets in contravention of section 50 of the Act.
9. Without the undertakings, the ACCC considered that the proposed acquisition by VQIRT and proposed acquisition by AAT would each have raised similar competition concerns related to the vertical integration that would occur post acquisition. These concerns relate to the potential for the successful bidder to exercise market power by leveraging its position as the operator of the sole automotive terminal at the Port of Fremantle to benefit its other upstream or downstream interests at the port. These concerns are detailed in the competition analysis below.

## The parties

### Fremantle Ports

10. The Fremantle Port Authority (**Fremantle Ports**) is a government trading enterprise and is the owner and manager of the Port of Fremantle. Fremantle Ports is the current operator of the existing automotive terminals at the Port of Fremantle.
11. The Port of Fremantle operates through two harbours; the Inner Harbour and the Outer Harbour. The Inner Harbour handles almost all of Western Australia's container trade, in addition to livestock exports, motor vehicle imports, other general cargo, cruise ships and visiting naval vessels.
12. The Port of Fremantle is the only port in Western Australia that is used for the import of motor vehicles. Fremantle Ports' existing automotive and other RoRo trade is spread across the North Quay (Berths 11 and 12) and Victoria Quay (Berths E and H) within the Inner Harbour.

### VQIRT

13. VQIRT is a wholly owned subsidiary of Wallenius Wilhelmsen Terminals Holding AS (**WW Terminals**), a company which operates automotive terminals in Europe, the United States and Asia. WW Terminals is a wholly owned subsidiary of

Wallenius Wilhelmsen Logistics AS (**WW Logistics**). WW Logistics is a full service global shipping and logistics provider. WW Logistics' vessels call at a number of ports in Australia, including the Port of Fremantle.

14. VQIRT does not currently operate at any other port in Australia. However, VQIRT is a related body corporate of Melbourne International RoRo & Auto Terminal Pty Ltd (**MIRRAT**) which is also a wholly owned subsidiary of WW Terminals. In 2014, MIRRAT successfully bid for the right to lease, redevelop and operate the automotive terminal at Webb Dock West at the Port of Melbourne until 30 June 2040. It is expected that MIRRAT will commence operations at the Port of Melbourne in early 2016.

## AAT

15. AAT is an incorporated joint venture, the shares of which are equally held by:
  - P&O Wharf Management Pty Limited, a wholly owned subsidiary of Qube Holdings Ltd (**Qube**); and
  - Plzen Pty Limited, a wholly owned subsidiary of Asciano Ltd (**Asciano**).
16. Qube and Asciano have interests in the supply of land based logistics services for automotive cargo at the Port of Fremantle. In particular:
  - Qube and Patrick Stevedoring Pty Ltd (a wholly owned subsidiary of Asciano) have automotive stevedoring operations at the Port of Fremantle; and
  - Prixcar Services Pty Limited (in which Qube has an indirect 25% shareholding) and Patrick Autocare Pty Limited (in which Asciano has an 80% interest) provide pre-delivery inspection (**PDI**) services for motor vehicles at the Port of Fremantle.
17. AAT currently operates automotive terminals at the following ports in Australia:
  - Port Adelaide (South Australia);
  - Port of Brisbane (Queensland);
  - Port Kembla (New South Wales); and
  - Port of Melbourne (Victoria).<sup>1</sup>
18. AAT's operations at these terminals are covered by a conditional authorisation granted by the ACCC on 3 December 2009, which will expire on 31 December 2019. The conditions of authorisation broadly require AAT to:
  - provide a mechanism for stevedores other than AAT aligned stevedores to seek access to AAT's terminals;
  - subject any proposed price increases to terminal users to review by an independent party; and
  - offer a dispute resolution process to terminal users for non-price disputes.

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<sup>1</sup> AAT will cease operating at the Port of Melbourne once consolidation is complete and MIRRAT is fully operational.

19. The authorisation would not extend to cover AAT's operations at the Port of Fremantle, should it be successful in its bid for the long term lease. Consequently, in the absence of the separate undertakings accepted by the ACCC, AAT's operations at the Port of Fremantle would only be subject to the open access regime set out in the proposed terminal licence between the terminal operator and Fremantle Ports.

## **The proposed transaction**

20. In December 2013, Fremantle Ports sought expressions of interest from parties interested in developing and operating a new dedicated automotive and RoRo terminal under a long term lease on Victoria Quay in the Port of Fremantle's Inner Harbour. The term of the lease is expected to be for approximately 20 years.
21. Fremantle Ports seeks to provide increased automotive and RoRo capacity at the Port of Fremantle by consolidating automotive and RoRo trade from a number of common user terminals within the Port of Fremantle to the new Terminal, which will be the sole dedicated automotive and RoRo terminal at the Port of Fremantle.
22. As part of this consolidation, Fremantle Ports will appoint a single terminal operator to operate the Terminal on a multi-user, open access basis. The terminal operator will have no responsibility for berthing allocation. Fremantle Ports will retain responsibility for berthing allocation and the provision of mooring services at the Terminal.
23. The proposed terminal lease and terminal licence to be granted by Fremantle Ports requires the terminal operator to operate the Terminal in accordance with open access principles including:
- a mechanism for stevedores, PDI operators and others to access the Terminal;
  - non-discrimination provisions in relation to the terminal operator's provision of services;
  - a price dispute resolution process for terminal users and other interested third parties to raise price disputes which includes a procedure for resolving the disputes by negotiation and, if the dispute is not resolved, a procedure for referring the dispute to an independent expert for binding determination; and
  - a dispute resolution process for non-price disputes.
24. Following completion of its expression of interest phase for interested parties, Fremantle Ports announced that AAT and VQIRT had each been shortlisted to proceed to the Request For Proposal phase. As part of their proposals, AAT and VQIRT were required by the vendor to submit a letter of no objection from the ACCC.

## Review timeline

25. The following tables outline the timeline of key events in these matters.

<b>VQIRT</b>	
<b>Date</b>	<b>Event</b>
23 December 2014	ACCC commenced a review under the Merger Review Process Guidelines.
2 February 2015	Closing date for submissions for interested parties.
11 February 2015	ACCC commenced market inquiries on the draft section 87B undertaking.
16 February 2015	Closing date for further submissions from interested parties regarding draft key performance indicators.
20 February 2015	Former proposed decision date of 26 February delayed at the request of VQIRT.
2 April 2015	ACCC announced it would not oppose the proposed acquisition, subject to a section 87B undertaking accepted by the ACCC.

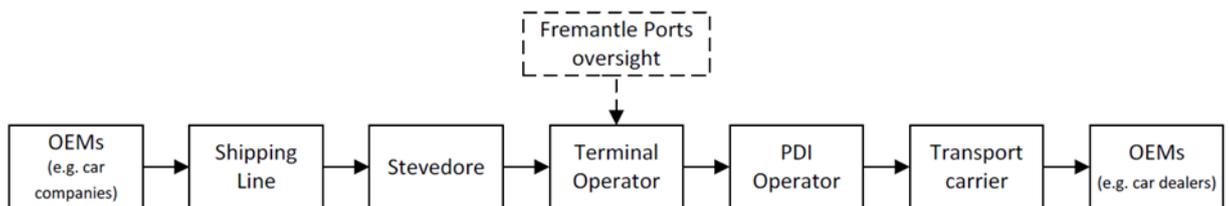
<b>AAT</b>	
<b>Date</b>	<b>Event</b>
23 December 2014	ACCC commenced a review under the Merger Review Process Guidelines.
2 February 2015	Closing date for submissions for interested parties.
18 February 2015	Former proposed decision date of 26 February delayed.
8 April 2015	Draft section 87B undertaking offered by AAT. ACCC commenced market inquiries on the draft section 87B undertaking.
14 April 2014	Closing date for submissions relating to draft section 87B undertaking.
23 April 2015	ACCC announced it would not oppose the proposed acquisition, subject to a section 87B undertaking accepted by the ACCC.

## Industry background

26. Car manufacturers and other original equipment manufacturers (**OEMs**) contract with shipping lines for the transport of vehicles between different ports and the delivery of vehicles to the automotive terminal.

27. Stevedores are contracted by shipping lines to load cargo on and off vessels which berth at the automotive terminal. PDI operators are contracted by OEMs or motor vehicle importers to inspect, clean and process vehicles prior to delivery to their ultimate destination.
28. The terminal operator is generally responsible for the day-to-day operation of the terminal, which includes managing the arrival of vessels, providing temporary storage for cargo and facilitating access to the terminal by stevedores, mooring service providers and PDI operators.
29. The terminal operator also facilitates a receipt and delivery process where landbased logistics/transport carriers access the terminal to support movement of cargo to or from the terminal in order to deliver automotive cargo to OEMs and car dealers.
30. Figure 1 represents the supply chain for automotive cargo for the Port of Fremantle.

**Figure 1: supply chain for automotive cargo**



31. In Australia, the following ports have dedicated automotive terminals:
  - Port Kembla (NSW);
  - Port of Brisbane (Qld);
  - Port Adelaide (SA);
  - Port of Fremantle (WA); and
  - Port of Melbourne (Vic).<sup>2</sup>

## Market inquiries

32. The ACCC received written submissions from and/or spoke with a number of interested parties including OEMs, motor vehicle importers, shipping lines, stevedores, PDI providers, transport carriers and relevant associations.
33. The ACCC sought feedback from interested parties on the open access regime as initially proposed by Fremantle Ports, focussing on its effectiveness (including the proposed open access services terms and conditions and price and non-price dispute resolution processes) and enforceability (given that the proposed open access regime would be included in a terminal licence between Fremantle Ports and the terminal operator).

<sup>2</sup> Other ports in Australia, including Darwin and Townsville, also have terminals that are in part used for automotive trade. Only a relatively small proportion of automotive trade goes through those ports.

34. The ACCC also sought submissions from interested parties in relation to the separate undertakings after they were offered by VQIRT and AAT, particularly in relation to the key performance indicators included in each of the undertakings.

## **Market definition**

35. The ACCC considers that the relevant markets for assessing the proposed acquisitions are:
- the supply of automotive terminal services in the Fremantle region;
  - the supply of automotive shipping services in the Fremantle region;
  - the supply of automotive stevedoring services in the Fremantle region; and
  - the supply of vehicle PDI services in the Fremantle region.
36. Automotive terminal services are an input to downstream terminal users that in turn supply stevedoring, PDI and shipping services. Automotive terminal services include, but are not limited to, providing licensed stevedores with access to the terminal facility.
37. The Port of Fremantle is the only port that receives and processes automotive vehicles in Western Australia. The ACCC considered that automotive terminals in other capital cities are not close substitutes for the Terminal at the Port of Fremantle given the long distances between those terminals and the destination of the vehicles. The ACCC therefore considered that the relevant geographic scope of the markets affected by the proposed acquisition is the Fremantle region.

## **Likely future with and without the proposed acquisitions**

38. Section 50 of the Act prohibits mergers or acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a market. In assessing a proposed acquisition pursuant to section 50 of the Act, the ACCC considers the effects of the acquisition by comparing the likely future competitive environment post-acquisition if the acquisition proceeds (the “with” position) to the likely future competitive environment if the acquisition does not proceed (the “without” position) to assist in determining whether the proposed acquisition is likely to substantially lessen competition in any relevant market.
39. There has been no indication from Fremantle Ports that it would be likely to develop and operate the Terminal itself in the absence of the proposed acquisitions. Accordingly, for each of the proposed acquisitions, the ACCC considered the most likely future without the proposed acquisition is that another party would be appointed as the terminal operator.

## **Competition analysis**

### **VQIRT**

40. In the course of market inquiries, interested parties expressed concerns regarding VQIRT’s status as a vertically integrated operator of the sole automotive terminal at the Port of Fremantle, given WW Logistics’ interests in automotive shipping (and potentially in stevedoring or PDI services at the Port of Fremantle in the future).

41. The ACCC considered that VQIRT's proposed acquisition would provide VQIRT with the ability and incentive to exercise market power to:
- discriminate against rival shipping lines by charging higher prices for automotive terminal services to non VQIRT related entities (for example, by raising the standalone price for access to the Terminal above efficient levels, raising the input costs of its rivals);
  - discriminate against rival shipping lines by providing less favourable non-price terms and conditions and/or giving preferential treatment to WW Logistics in the provision of ancillary services;
  - discriminate against downstream terminal users that VQIRT or its related bodies corporate may compete with in the future should VQIRT or its related bodies corporate enter those downstream markets (e.g. stevedoring); and
  - access commercially sensitive information of rival shipping lines and other terminal users, which WW Logistics, VQIRT or its related bodies corporate may use to their advantage.

## AAT

42. Interested parties also expressed concerns regarding AAT's position as a vertically integrated operator of the sole automotive terminal at the Port of Fremantle, having regard to the interests held by each of AAT's two shareholders in automotive stevedoring and PDI operations at the Port of Fremantle.
43. The ACCC considered that AAT's proposed acquisition would provide AAT with the ability and incentive to exercise market power to:
- foreclose the entry and expansion of third party stevedores or PDI operators which compete with entities associated with AAT's two shareholders, by setting higher prices for access services supplied to those third party terminal users;
  - frustrate or restrict access to the Terminal by third party stevedores or PDI operators which compete with entities associated with either of AAT's two shareholders, through non-price terms of supply; and
  - gain access to commercially sensitive information of terminal users, shipping lines and car manufacturers, and use or disclose such commercially sensitive information in order to benefit the downstream entities associated with AAT's shareholders.
44. The ACCC considered that the competition concerns identified above in relation to VQIRT and AAT could not be resolved through an open access regime established in a terminal licence between Fremantle Ports and the successful bidder. This is because the terminal licence would not be subject to independent oversight and enforcement. In addition, the ACCC was concerned that as the terminal licence is a private agreement, it could be changed in the future by agreement between the parties.

## Undertakings

45. Given the ACCC's concerns with the deficiencies in the proposed open access regime, VQIRT and AAT each offered the ACCC separate court enforceable undertakings pursuant to section 87B of the Act to address the competition

concerns associated with each of VQIRT and AAT's separate proposed acquisitions in the context of section 50 of the Act.

46. Unlike the proposed open access regime, the obligations in the separate undertakings can be enforced and monitored by the ACCC. On 2 April 2015, the ACCC accepted a court enforceable undertaking offered by VQIRT under section 87B of the Act. On 23 April 2015, the ACCC accepted a court enforceable undertaking offered by AAT under section 87B of the Act.
47. Each undertaking aims to address the ACCC's competition concerns in the context of section 50 of the Act by requiring VQIRT or AAT, whichever is the successful bidder, to:
  - comply with open access conditions in their operation of the Terminal;
  - ring fence terminal users' confidential information, to ensure it is not inappropriately used or disclosed;
  - provide mechanisms for independent resolution of price and non-price related disputes if parties consider they have been discriminated against or have other concerns relating to the supply of terminal services by VQIRT or AAT;
  - provide for oversight of VQIRT's or AAT's compliance with the undertakings through self-reporting (including reporting on key performance indicators) and the requirement for regular independent audits by an ACCC-approved auditor; and
  - allow terminal users to request that an independent auditor conducts an audit check of VQIRT's or AAT's compliance with the undertaking at any time if a terminal user is concerned that VQIRT or AAT has breached its undertaking obligations.
48. Fremantle Ports will retain responsibility for berthing allocation and the provision of mooring services at the Terminal. However, given that this may change over the term of the lease, each undertaking contains a clause prohibiting VQIRT or AAT from being responsible for berthing unless the ACCC accepts a further section 87B undertaking or a variation to the undertaking.
49. As the undertaking of the successful bidder is expected to be in place for the length of the lease (a period of approximately 20 years), the ACCC was concerned to ensure that each of the undertakings can continue to meet their objectives throughout their entire term. To address this concern, each undertaking makes provision for it to be publicly reviewed by the ACCC two years after commencement and no more than once in each five year interval thereafter.
50. During the ACCC's reviews of the proposed acquisitions, market participants expressed significant concerns about the decision by Fremantle Ports to offer a long term lease for the Terminal. Effectively, the lease will transfer a monopoly asset from the Western Australian Government to private ownership. Without adequate protections, terminal users may be subject to monopoly pricing and/or declining service levels, with flow-on effects to downstream parties such as car manufacturers and ultimately consumers.

51. The undertakings given by VQIRT and AAT comprehensively address the section 50 competition concerns arising from the proposed acquisitions. However, merger remedies cannot address all competition issues arising from the monopoly characteristics of an asset that exist regardless of who owns it.
52. Where an infrastructure asset such as a port has natural monopoly characteristics, the sale of that asset transfers any market power arising from the ownership of the asset from one party to another. In these circumstances, merger remedies do not provide an adequate mechanism for addressing any underlying monopoly pricing concerns.
53. It may be more appropriate in these circumstances for monopoly pricing concerns to be addressed under Part IIIA of the Act. Part IIIA sets out a regime which governs access to monopoly infrastructure services throughout Australia. It is designed to address concerns through a public assessment process in industries where an infrastructure asset with natural monopoly characteristics forms a bottleneck for firms operating in upstream or downstream markets.

## **Conclusion**

54. On the basis of the above, including taking into account the undertaking given by VQIRT and the undertaking given by AAT which were accepted by the ACCC, the ACCC formed the view that the proposed acquisition of the long term lease of the new automotive and RoRo terminal at the Port of Fremantle by either VQIRT or AAT would not have the effect or be likely to have the effect of substantially lessening competition in any relevant market in contravention of section 50 of the Act.