

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by Tasmanian Ports Corporation Pty Limited ACN 114 161 938.

1. Person giving the Undertaking

- 1.1 This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Tasmanian Ports Corporation Pty Limited ACN 114 161 938 (**TasPorts**), for the purposes of section 87B of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Undertaking**).

2. Background

- 2.1 TasPorts is a corporation owned by the Tasmanian Government. Under the *Tasmanian Ports Corporation Act 2005* (Tas), TasPorts' principal objectives are to facilitate trade for the benefit of Tasmania and to operate in accordance with sound commercial practice.
- 2.2 TasPorts is responsible for the maintenance and management of, where applicable, port berths, channels, wharves, landside assets, marine fleets and navigational aids at eleven sea ports in Tasmania. Under a deed dated 10 January 2014 (**Deed**) between TasPorts, Marine and Safety Authority (**MAST**) and the Crown in right of the State of Tasmania, TasPorts performs functions in relation to emergency response, pollution response, navigation aids, the provision of a pilotage service, pilot training and port communications.
- 2.3 TasPorts supplies towage and pilotage services in Tasmania and, for a number of years prior to 1 July 2018, was the sole supplier of those services at the major ports in Tasmania, including Port Latta.
- 2.4 Prior to 1 July 2018, TasPorts provided towage, pilotage and other services to Grange Resources Limited (**Grange**) at Port Latta. Grange is a publicly-listed mining company that owns and operates ship loading infrastructure at Port Latta, which it uses to load vessels with pellets made from iron ore from the Savage River mine, which is operated by Grange and located in northern Tasmania.
- 2.5 In August 2017, Grange advised TasPorts that Grange was switching to a new service provider, Engage Marine Pty Ltd or its related bodies corporate (**Engage Marine**), following which TasPorts engaged in various conduct of concern to the ACCC under s 46(1) of the CCA.
- 2.6 In particular, on 31 October 2017, TasPorts advised Grange that it would need to pay a "marine precinct tonnage charge" (**MPTC**). TasPorts had not previously imposed such a charge on Grange. Between 6 November 2017 and 1 July 2019, TasPorts maintained that Grange was required to pay the MPTC in circumstances where:
 - (a) TasPorts first sought the MPTC from Grange after Grange had notified TasPorts that it would cease acquiring marine services from TasPorts at Port Latta and begin acquiring those services from Engage Marine;
 - (b) there was a real commercial likelihood that if Grange agreed to pay the MPTC this would have the effect of raising Grange's future costs of acquiring services from Engage Marine compared with if there had been no MPTC;
 - (c) TasPorts did not, without Grange's agreement, have a legal right to require

Grange to pay the charge; and

- (d) TasPorts sought to impose the MPTC without having conducted a full assessment of its costs of providing the services that it would need to provide at Port Latta in order to perform its responsibilities under the Deed.

2.7 On 6 December 2019, the ACCC commenced proceedings against TasPorts in the Federal Court of Australia (**Proceedings**), alleging that, by engaging in various conduct, including the conduct described in clause 2.6 above, TasPorts had engaged in conduct in contravention of s 46(1) of the CCA.

2.8 TasPorts has agreed with the ACCC to resolve the Proceedings on the basis of the terms of consent orders to be sought from the Court and, as part of that resolution:

- (a) admits that, by engaging in the conduct described in clause 2.6 above, in response to the entry or attempted entry of Engage Marine as a competitor, it engaged in conduct that had the likely effect of substantially lessening competition in the markets for towage and pilotage services in northern Tasmania, in contravention of s 46(1) of the CCA; and

- (b) has offered this Undertaking to the ACCC.

2.9 The objective of this Undertaking is to address the ACCC's concerns about TasPorts' conduct described above. The Undertaking aims to achieve this objective by ensuring that:

- (a) charges imposed by TasPorts on Grange on account of or in connection with TasPorts' regulatory functions at Port Latta are reasonable and cannot be varied to discriminate against the use of towage suppliers other than TasPorts at the port;
- (b) Engage Marine has reasonable access to berth space for tug boats in northern Tasmania on reasonable commercial terms; and
- (c) Engage Marine has access to relevant port communications systems required to provide towage services in the ports of Burnie, Bell Bay and Devonport in northern Tasmania.

2.10 If in doubt, the clauses of this Undertaking are to be interpreted so as to facilitate the objectives set out at clause 2.9.

3. Term of this Undertaking

3.1 This Undertaking comes into effect when:

- (a) this Undertaking is executed by TasPorts, and
 - (b) this Undertaking so executed is accepted by the ACCC
- (the **Commencement Date**).

3.2 This Undertaking will expire on the five year anniversary of the Commencement Date.

3.3 TasPorts may request withdrawal of this Undertaking pursuant to section 87B of the CCA at any time. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

4. Tonnage charge undertaking

4.1 TasPorts undertakes that it will not:

- (a) seek or require payment from Grange or any other person for any "tonnage

charge” (or any other similar charge on account of or in connection with TasPorts’ functions under the Deed, or any other agreement with MAST) in respect of Port Latta, unless:

- (i) Grange has agreed to pay the charge or has agreed for any other person to pay the charge; or
- (ii) the amount of the charge has been determined to be reasonable by an independent expert approved by the ACCC, having regard to the costs to TasPorts of providing the services to which the charge relates (including, on a pro rata basis, costs that relate to more than one port, including Port Latta); or
- (iii) TasPorts is entitled, pursuant to legislation, to seek or require the payment of such a charge where, unless the legislation specifies to the contrary:
 - (A) the amount is determined by reference to the costs to TasPorts of providing the services to which the charge relates (including, on a pro rata basis, costs that relate to more than one port, including Port Latta); and
 - (B) in the event of a dispute regarding the amount of the charge determined in accordance with (A) above, the amount of the charge has been determined to be reasonable by an independent expert approved by the ACCC, having regard to the costs to TasPorts of providing the services to which the charge relates (including, on a pro rata basis, costs that relate to more than one port, including Port Latta); or
- (b) vary the amount, or offer to vary the amount, of any tonnage charge (or any other charge on account of or in connection with TasPorts’ functions under the Deed, or any other agreement with MAST) payable pursuant to clause 4.1(a) by reference to the identity of the supplier of towage and/or pilotage services to Grange at Port Latta.

5. Berthing undertakings

5.1 TasPorts undertakes that within five months of the Commencement Date, TasPorts will offer Engage Marine a licence to use berth space at the wharf at Inspection Head which:

- (a) will include the following terms (or terms to the same effect), unless otherwise agreed between TasPorts and Engage Marine:
 - (i) the licensed space will encompass 80 metres of berth space and associated wharf infrastructure, sufficient for Engage Marine to berth two tug boats and will be licensed to Engage Marine for that purpose (**Berth Space**);
 - (ii) the licence will be for a period of not less than five years;
 - (iii) payment by Engage Marine of a reasonable commercial fee for access to the Berth Space, with an adjustment for CPI annually, where the fee has been set taking into account matters including:
 - (A) the market value of the Berth Space or, if that cannot be determined, the fee for which berths are made available for tugs at other Australian ports, having regard to any relevant differences between such berths and the Berth Space, and the terms on which they are made available;
 - (B) the costs to TasPorts associated with granting the licence (including

TasPorts' obligations under the licence and opportunity costs) should not exceed TasPorts' revenue from the licence; and

- (C) the costs associated with making the Berth Space suitable for use by Engage Marine (which costs will be amortised over the term of the licence), but not the costs of maintenance or upgrades to the wharf that are not required in order for Engage Marine to use the Berth Space;
 - (iv) the Berth Space will, prior to the commencement of the licence, be made by TasPorts fit for purpose for tug berthing, without any charge to Engage Marine for doing so other than the fee referred to in clause 5.1(a)(iii);
 - (v) the Berth Space will be maintained by TasPorts, at TasPorts' expense, throughout the term of the licence agreement, subject to clause 5.1(a)(vii) below and save that TasPorts is not required to repair any damage:
 - (A) caused by Engage Marine; or
 - (B) caused by any other person where the damage makes the berth unsafe for berthing (in which case paragraph (vii) below will apply);
 - (vi) TasPorts will use its best endeavours to accommodate reasonable requests related to the use of the Berth Space by Engage Marine, including but not limited to facilitating access to water, power and storage, at reasonable commercial fees;
 - (vii) if TasPorts becomes aware of any substantial deterioration or damage to the Berth Space, or if it becomes unsafe for Engage Marine to continue berthing and unberthing at the Berth Space, TasPorts may require Engage Marine to vacate the berth and TasPorts will use its best endeavours to identify alternative berths in or as near as reasonably possible to Bell Bay for Engage Marine without additional charge to Engage Marine (though Engage Marine would still be required to pay the licence fee), provided that tugs of a person required to provide emergency response will be given preference for berths in or near Bell Bay, as required;
 - (viii) TasPorts will use its best endeavours to provide Engage Marine with access to an alternative berth or berths in or as near as reasonably possible to Bell Bay at no additional charge (though Engage Marine would still be required to pay the licence fee) in circumstances where TasPorts requires Engage Marine to vacate the berth for any reason; and
 - (ix) if any dispute between TasPorts and Engage Marine arises under the terms of the licence, and the dispute is not resolved within 30 days following either party giving the other a written notice containing details of the dispute, either party may give the other party a notice to refer the dispute to expert determination; and
- (b) may be non-exclusive, in that Engage Marine may be required by TasPorts to vacate the berth space from time to time in order for vessels (such as cruise ships and naval vessels) to berth at the wharf.

5.2 TasPorts undertakes to invest, during the term of the Undertaking, a minimum of \$1,000,000 on the wharf or other facilities at Inspection Head to mitigate the risk that deterioration of the wharf or those facilities disrupts or prevents the berthing of tugs or other commercial vessels at Inspection Head.

5.3 Any dispute between TasPorts and Engage Marine that is:

- (a) in respect of the amount of the fee or other terms offered by TasPorts for a licence pursuant to clause 5.1 above; and

- (b) not resolved within 30 days of either party giving the other a written notice containing details of the dispute,

may be referred by TasPorts or Engage Marine to an independent expert approved by the ACCC who will be instructed to determine the dispute having regard to the purpose of this Undertaking, the requirements of clause 5.1 and the reasonableness of the terms of the offer as a whole. The expert's determination shall be final and binding on:

- (c) TasPorts; and
- (d) if Engage Marine refers the dispute to the expert, Engage Marine, in the absence of manifest error, fraud or partiality, negligence or error of law.

6. Port communications system undertaking

6.1 TasPorts undertakes that within 60 days of the Commencement Date and for the duration of this Undertaking, it will take all steps required to enable port users to use TasPorts' port communications system to book a towage service provided by Engage Marine at the ports of Bell Bay, Burnie and Devonport in northern Tasmania, provided that TasPorts is not required to enable port users to book any such service at a port unless:

- (a) Engage Marine has complied with, and continues to comply with, the requirements of the Harbour Master and, if applicable, MAST or any law or regulation in relation to the provision of its towage service at that port; and
- (b) Engage Marine has provided TasPorts with the details of the availability and capability of Engage Marine's towage service at that port as are necessary for TasPorts to facilitate bookings.

7. Expert determination

7.1 In relation to any expert determination referred to in this Undertaking:

- (a) The expert must be independent of the parties and have appropriate skills and qualifications to determine the matter and must not be an employee or officer of TasPorts or have any other commercial relationship with TasPorts, whether current or in the past 3 years.
- (b) The expert will act as an expert and not as an arbitrator. The expert must observe the principles of natural justice. The expert must provide written reasons for the expert's determination, with sufficient details to understand the expert's reasons, at the time the expert gives the determination.
- (c) Any confidential information disclosed by a party in the expert determination process must be kept confidential by the expert and by all parties. Such information must be used only for the purposes of the expert determination.
- (d) The expert will be engaged on terms that require the expert to determine the matter within 6 months of being appointed.

7.2 In relation to any expert determination of a matter referred to in clauses 4.1(a)(ii) and 4.1(a)(iii)(B):

- (a) TasPorts must notify the ACCC when a matter arising under this Undertaking requires expert determination;
- (b) within 14 days of the notification, TasPorts will give the ACCC a notice containing the names of 3 people who are suitably qualified to act as the expert (**Proposed Experts**);
- (c) the ACCC will inform TasPorts within 30 days of the notification in (b) in writing

that it:

- (i) does not object to one or more of the Proposed Experts, TasPorts will, as soon as practicable, appoint one of the Proposed Experts who is not objected to as the independent expert to determine the matter; or
 - (ii) objects to all of the Proposed Experts and specifies another suitable expert in its absolute discretion, TasPorts will, as soon as practicable, appoint that person identified as the independent expert who will determine the matter;
- (d) TasPorts must provide a copy of this Undertaking to the appointed expert and must engage the expert on terms that are consistent with this Undertaking;
- (e) TasPorts undertakes to:
- (i) not interfere with, or otherwise hinder, the expert's determination of the matter; and
 - (ii) provide any reasonable assistance requested by the expert, including by providing all information and documents reasonably requested by the expert (subject to the expert giving TasPorts a confidentiality undertaking in respect of any confidential information);
- (f) the decision of the expert will be final and binding in the absence of manifest error, fraud or partiality, negligence or error of law.

7.3 In relation to any expert determination referred to in clause 5.3 (where the parties are TasPorts and Engage Marine but the expert is approved by the ACCC), the matters set out in clause 7.2(a)-(e) will apply.

8. Information

8.1 In connection with this Undertaking, the ACCC may direct TasPorts to, and TasPorts must:

- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
- (b) produce documents and materials to the ACCC within TasPorts' custody, power or control in the time and in the form requested by the ACCC; and/or
- (c) direct its officers, employees or directors to attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.

8.2 Any direction made by the ACCC under clause 8.1 will be notified to TasPorts, in accordance with clause 12.

8.3 Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 8 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.

9. No derogation

9.1 This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by TasPorts of any term of this Undertaking.

9.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take

action under the CCA for penalties or other remedies in relation to any matter not connected with the subject matter of the Proceedings, in the event that TasPorts does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the CCA for penalties or other remedies. However, the ACCC will not take any action against TasPorts or any of its current or former officers, employees or agents in relation to any matter which is the subject matter of the Proceedings or the ACCC's investigation of that subject matter.

9.3 Notwithstanding anything to the contrary in this Undertaking, nothing in or contemplated by this Undertaking:

- (a) requires TasPorts to act, not act or permit any act or omission that is in any way contrary to any law or regulation, contrary to TasPorts' obligations under the Deed (or any other agreement with or obligation to MAST, the Environment Protection Authority or any other part of the Tasmanian government), contrary to the lawful direction of any government authority, contrary to marine safety or not approved by the Harbour Master; or
- (b) restricts or limits the powers of a Harbour Master, acting Harbour Master or any other person or body delegated or vested, pursuant to legislation, with any power or duty in respect of marine navigation or safety.

10. Acknowledgments

10.1 TasPorts acknowledges that:

- (a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website;
- (b) the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications; and
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

11. Costs

11.1 TasPorts must pay all of its own costs incurred in relation to this Undertaking.

12. Notices

Giving notice

12.1 Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: competition.coordination@accc.gov.au

Attention: Director, Substantial Lessening of Competition Unit

With a copy sent to:

Email address andrew.riordan@nortonrosefulbright.com.au

Attention: Andrew Riordan, Partner

12.2 Any notice or communication to TasPorts pursuant to this Undertaking must be sent to:

Name: Angie Somann-Crawford

Address: Tasmanian Ports Corporation, Level 13, Trafalgar Building, 110 Collins Street, Hobart TAS 7000

Email address: Angie.Somann-Crawford@tasports.com.au

Attention: Angie Somann-Crawford, General Counsel and Company Secretary

With a copy sent to:

Name: Matthew Lees

Address: Arnold Bloch Leibler, Level 21, 333 Collins Street, Melbourne VIC 3000

Email address: mlees@abl.com.au

Attention: Matthew Lees, Partner

When a notice is received

12.3 If sent by post within Australia, notices are taken to be received 5 Business Days after posting unless proved otherwise.

12.4 If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent unless proved otherwise.

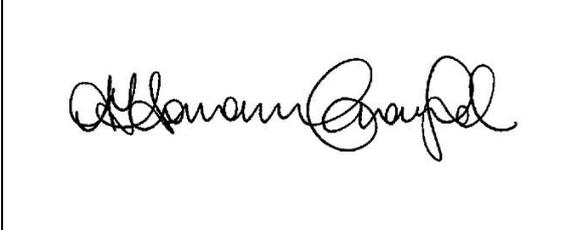
Change of contact details

12.5 TasPorts or the ACCC must promptly notify the other party of a change to its contact details.

12.6 Any notice or communication will be sent to the most recently advised or known contact details and subject to clauses 12.1 or 12.2, will be taken to be received.

Executed as an Undertaking

Executed by Tasmanian Ports Corporation Pty Limited ACN 114 161 938 pursuant to section 127(1) of the *Corporations Act 2001 (Cth)* by:

	
Signature of director	Signature of company secretary
Name of director (print)	Name of company secretary (print)
Stephen Bradford	Angie Somann-Crawford
Date 3 May 2021	Date 3 May 2021

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010 (Cth)* on:

4 May 2021

Date

and signed on behalf of the Commission:



Chairman

4 May 2021

Date