



**Maritime Interest Group & Maritime Law
Association Of Australia & New Zealand
NSW Branch**

Bi-Annual Mini Conference, Wollongong

***Shipping and Ports Competition and the
Trade Practices Act***

**Commissioner John Martin
3 April 2009**

1. Introduction

Competition underpins the *Trade Practices Act (TPA)* because competitive markets act to align the interests of consumers and efficient suppliers. This alignment is not altered by the state of economic conditions. Indeed it is important that despite current financial pressures and economic uncertainties, the Australian Competition and Consumer Commission (ACCC) continues to administer the TPA in its usual consistent, rigorous and where appropriate, aggressive manner.

It would be counter productive to step back from the disciplines imposed by competition and fair trading laws given that the current crisis can be traced back to financial sector regulatory shortcomings.

However it is recognised that markets do not always work effectively, especially in the areas of infrastructure provision where historically there have been monopoly or duopoly providers. For such markets increased competition paradoxically, can only be achieved with increased intervention.

The ACCC has a range of powers and resources to gather evidence, enforce the law, promote compliance and apply varying degrees of regulation

It is the ACCC's objective that where intervention is required an approach is adopted that is as "light-handed" as possible to achieve the desired outcomes. If an objective can be achieved with less rather than more intervention this should be the approach adopted.

In today's discussion I will outline:

- How the ACCC operates in its various guises;
- The TPA tools that are available to the ACCC in dealing with shipping and ports issues;

- Enforcement matters affecting the sector;
- Increasing spotlight on merger issues in this time of financial and economic uncertainty;
- Authorisation of immunity with examples of cooperative port related arrangements; and finally
- The Commission's regulatory role in respect of the maritime sector

2. ACCC Operations and Powers

The ACCC is an independent statutory authority. To take enforcement action the ACCC has to litigate in the Federal Court although it is empowered to accept court enforceable undertakings.

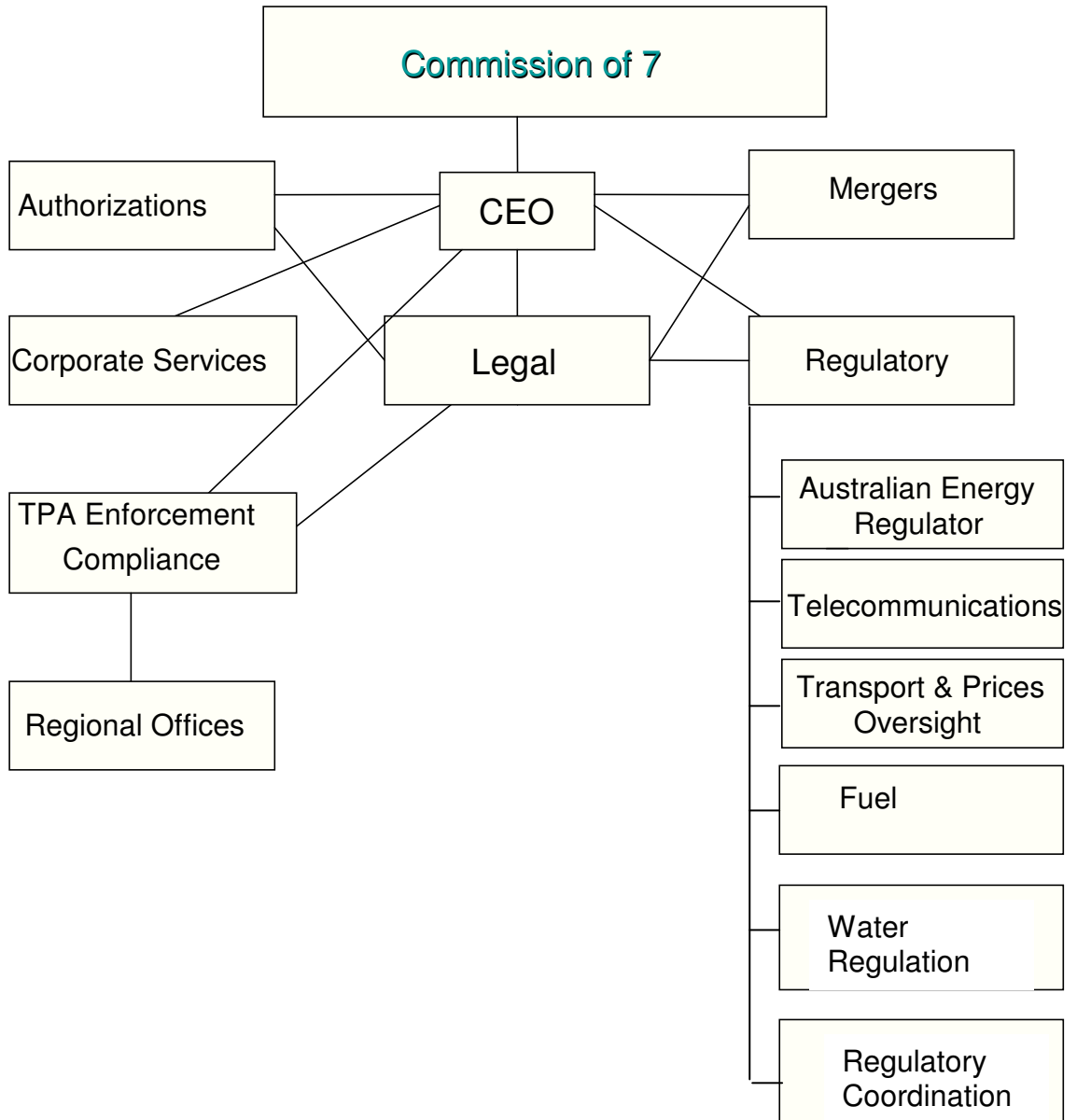
As an administrator of the law, the Commission does not have any formal role in the setting of policy or the making of laws. Of course the Commission is often consulted by policy makers as to limitations of existing laws and regulations and the case for amendment. The Commission also is a strong advocate through the media and other avenues, in support of open competition and fair dealing.

The ACCC has had a high profile as a firm enforcer of the law and over recent years has focussed on improved practices related to transparency, certainty and timeliness of its activities. The Commission also has developed clear criteria to assist business compliance processes related to the TPA.

The ACCC is internationally unique in terms of the breadth of its role as a competition and fair trading regulator. As the chart of the ACCC structure (below) illustrates, it handles a range of functions covered in other economies by a multiplicity of agencies particularly in respect of infrastructure sectoral regulation.

A major development over the past decade has been the growing international consultation and cooperative action between counterpart competition agencies. Initially this operated mainly through an OECD based network but has transformed into the International Competition Network (ICN) and the International Consumer Protection and Enforcement Network (ICPEN). These forums have facilitated greater consistency and best practice techniques particularly in areas such as mergers and acquisitions, cartel detection, immunity programs and imposition of criminal sanctions.

ACCC Structure



All shipping and port services are subject to the core of the TPA (Part IV – Anticompetitive Conduct and Part V – Consumer Protection) and other elements such as unconscionable conduct (part IV A) and Industry Codes (Part IV B).

In addition, regulatory are tools available to the ACCC which are a mix of so-called 'light-handed' and more 'heavy-handed' forms of regulation. They range from price monitoring, designed to provide hands-off information on how markets are performing, through to regulating access on important forms of infrastructure where smaller players risk being shut out without some form of assistance to enter or maintain their position in a market.

A range of general and specific regulatory TPA provisions affecting shipping and ports in Australia include:

- Part IIIA Third party access to nationally significant essential facilities;
- Part IV Section 50 prohibiting mergers or acquisition which substantially lessen competition;
- Part VII authorisation and notification;
- Part VIIA Prices surveillance; and
- Part X international liner cargo shipping.

At various times these parts of the TPA have had relevance to stevedoring, other port services, coastal shipping and international shipping agreements

3. Enforcement matters

STEVEDORES

In August 2007, the ACCC instituted proceedings against PRK formerly (Patricks and then Toll), DP World (formerly P&O), Australian Amalgamated Terminal (AAT) and associated individuals. The ACCC alleged the making of an arrangement, or arriving at an understanding, containing provisions which had the purpose, effect or likely effect, of substantially reducing competition in a market.

As this matter remains before the courts it is not appropriate to comment in any detail on the matter. The ACCC's case at the time of filing the proceedings in 2007 can be summarised as follows.

In 2001, Patrick and P&O Ports entered into an arrangement, which they extended and affirmed in 2002, to:

- set up a joint venture company, AAT, to acquire terminals from which they could both stevedore cars; and
- share access to their existing terminals.

Consequently, Patrick and P&O Ports ceased to compete for the acquisition and development of the best terminal sites and in respect of the provision of terminal services to stevedores and, through them, to shipping lines and importers. It is alleged that this substantially lessened or eliminated competition in the markets for:

- terminal acquisition;
- terminal services; and
- stevedoring services in the ports of Brisbane, Sydney, Melbourne, Port Kembla and Adelaide.

The ACCC alleged that the entering into, and giving effect to, the arrangements between Patrick and P&O amounted to a substantial lessening of competition in each of the 15 pleaded markets - that is, 3 markets in each of the 5 pleaded ports. The ACCC further alleged that each of the individuals was knowingly concerned in the conduct.

Following the filing of pleadings, the ACCC was required to file an Amended Statement of Claim (ASOC) as a result of complaints made by the Respondents about the complexity of the pleadings. In early 2008, the Respondents filed a number of strike out motions (to either strike out the pleadings in their entirety, or strike out particular allegations). These motions were largely unsuccessful.

However Sackville J, in his judgment on the strike out motions, noted that the pleadings were very complex. He ordered that clarification should be provided in respect of certain allegations and urged the ACCC, wherever possible, to simplify its case. Orders were made to file a Further Amended Statement of Claim (FASOC) to provide clarification over certain allegations in the pleadings.

In August 2008 the Respondents filed their defences denying almost all of the allegations in the pleadings. In October and November 2008 the ACCC filed its lay evidence and in mid December 2008, filed its expert evidence being a report by Professor Michael A Salinger.

AIR FREIGHT CARTEL

The recent enforcement action against airlines for alleged air freight cartel activity will be of interest to maritime industries given that air freight is an important element of the transportation chain.

The ACCC has been conducting its investigations into alleged air cargo cartel behaviour since 2006. The contraventions alleged by ACCC relate to fuel surcharges applied to international carriage of air cargo during that period.

The investigation has been extensive involving many airlines operating in many jurisdictions. The ACCC has been required to use its compulsory information gathering powers in relation to a number of airlines and has been required to assess volumes of information provided.

Allegations and progress to date

The allegations in relation to each airline are different, reflecting the different facts in each case and the different admissions the parties have made.

The general allegations investigated by the ACCC relate to:

- The rise in oil prices by 2000 affecting revenues of international airlines to be derived from carrying air cargo internationally.
- Rather than each airline individually adjusting their prices by free market forces in response to rising oil prices, some airlines sought to coordinate the use of an index to adjust their prices.
- Those airlines using the index in this way meant that they adjusted the fuel surcharge component of freight rates by the same amount generally at the same time or increased base rates by the same amount.
- This amounted to an agreement between competitors on price or a component of price.
- The ACCC alleges this to be in contravention of section 45 (through section 45A) of the TPA.

The ACCC is limited in its ability to comment on matters before the court and prefers to direct enquiries to the documents filed with the Court at this stage.

A range of the airlines involved – Qantas, British Airways, Air France – KLM, Martinair and Cargolux - have made voluntarily admissions. The ACCC took such cooperation into account in deciding how a matter should be dealt with and reflect the degree of cooperation in submissions put to the Court in resulting proceedings as to level of penalty or other orders.

In each case the parties reached separate agreement with the ACCC as to the penalty which was recommended as appropriate for the court to impose. Ultimately it is a matter for the Court to determine what orders may be appropriate including the quantum of penalty.

The range of pecuniary penalties ranged from \$20 million for Qantas to \$5 million for small freight operations into Australia along with orders restraining each party from engaging in similar conduct for a period of up to five years, and \$200,000 contribution from each party towards the ACCC's costs

Singapore Airlines

In a contested matter, the ACCC on 22 December 2008 instituted proceedings in the Federal Court, Sydney, against Singapore Airlines seeking pecuniary penalties, injunctions and declarations for alleged price fixing between 2002 and early 2006. The alleged contraventions relate to fuel surcharges and security surcharges applied to international carriage of air cargo during that period.

The matter has been listed for 23 April 2009 before Justice Jacobson, to hear Singapore Airlines' strike out motion claiming that almost all of the ACCC's claims are outside the TPA's reach because they do not concern the supply of services in an Australian market.

Overseas investigations

Overseas regulators have brought a number of actions concerning similar conduct. While the conduct being investigated overseas is similar, the matters relevant to each jurisdiction will differ as will the matters put before any court.

Collusion classed as cartel conduct varies across jurisdictions as do both the level of penalties and how and where they are determined.

In both the USA and the UK cartel conduct is a serious criminal offence and cartelists may be jailed by the courts. The outcomes announced by the US DoJ are criminal fines to be imposed by a court.

The Department of Justice in the United States of America has reached settlements with British Airways (US\$300 million), Qantas (US\$61 million), Korean Airlines (US\$300 million), Japan Airlines (US\$110 million), Air France-KLM (US\$350 million), Cathay Pacific Airways Limited (US\$60 million), Scandinavian Airlines Systems (US\$52 million) Martinair (US\$42 million), LAN Cargo (US\$109 million), and El AL (US\$15.7 million). A total of 12 airlines and three executives have pleaded guilty or agreed to plead guilty in the DOJ's ongoing investigation into price fixing in the air transportation industry. To date, more than \$1 billion in criminal fines have been imposed by the DOJ and executives have been sentenced to serve a total of 20 months in jail.

Ongoing investigations and demonstrated effects

The ACCC continues to investigate other airlines and further court actions may follow over the next few months.

This matter has demonstrated the benefits and value of cooperation with other regulators in the prosecution of cartels which obliges cooperating parties to provide incriminating evidence available to them against other cartelists.

There is no safe home for cartelists with incentives for whistleblowers and other cooperating parties. The Austrian Government's intentions to introduce

criminal sanctions should also provide cartel parties greater incentives to assist the ACCC in its investigations.

4. Spotlight on Merger Issues

Major changes are being made in the transport sector especially with regard to service integration. Integration—particularly vertical integration—can lead to increased efficiencies as companies take advantages of economies of scale and scope.

For example, integrating a company's freight forwarding service with its line haul service can lead to increased efficiencies in service levels and communication between segments of the logistics chain. This in turn can increase the efficiency of a company's operations, and improve the competitiveness of the industry as a whole.

But while integration can reduce costs and increase efficiency, it also has the potential to pose competition issues. As the number of players in the market reduces, there is increased concern that the intensity of competition, and as a consequence efficiency, also reduces.

The ACCC has an almost unique process for informally assessing whether proposed mergers are likely to substantially lessen competition in a market and thus contravene section 50 of the Act. Of course most merger activity does not come near the ACCC.

During the last financial year 397 matters were examined (212 confidentially) with 11 being opposed outright (6 on a confidential basis) and 6 being allowed to proceed after acceptance of undertakings to address anti-competitive detriment. Those not opposed included P&O Automotive and General Stevedoring Pty Ltd's proposed joint venture with Tasports.

Given the topic of today's conference I will outline the ACCC's position in relation to mergers and the financial crisis using as a case study the recent BankWest takeover by Commonwealth Bank. In addition I will provide an update on the Toll / Patrick merger and our approach to merger Undertakings..

GLOBAL FINANCIAL CRISIS

In the current economic climate there is a school of thought that merger regulation should be relaxed, regardless of the anti-competitive consequences. The ACCC believes that the administration of merger law does not need to be softened because the ACCC's assessment process has the capacity and flexibility to accommodate failing firm arguments in the counterfactual analysis

for any merger review.

The ACCC will assess the competition aspects of mergers involving a failing firm on their merits by comparing the future state of competition *with* the merger (the factual) with the future state of competition *without* the merger (the counterfactual). In the case of a failing firm, the counterfactual would be that the firm exits the market.

The ACCC has recently cleared two mergers on failing firm grounds:

- Ramsay Health Care Limited – proposed acquisition of the Coolenberg Clinic day surgery at Port Macquarie.
- P & M Quality Smallgoods (Primo) – proposed acquisition of Hans Continental Smallgoods

In each of these matters, the ACCC accepted that, absent the merger, the firm was likely to exit the market, and that there was no substantially less anti-competitive alternative to the merger.

The analytical framework applied by the ACCC enables it to take account of the prevailing economic and market conditions in assessing a failing firm argument. For example, the ACCC will seek to determine whether a firm is likely to exit the market due to an inability to raise funds, or whether an alternative purchaser is unlikely due to difficulties in obtaining investment finance.

The ACCC recognises that failing firm claims are easily made and merger parties (and in some cases receivers and administrators) often have an incentive to make these claims out of self-interest. Accordingly, the ACCC will take a cautious approach by requiring the merger parties to provide compelling evidence to support their claims.

What this all boils down to is that we should not allow anti-competitive structures to develop and undo the good work done over a decade of national competition policy reforms. We need to ensure the economy remains competitive once the financial crisis has passed.

BANKWEST

In December last year, the ACCC decided not to oppose the Commonwealth Bank of Australia's purchase of BankWest.

BankWest had previously been a vigorous and effective competitor, particularly in the saving/term products and home loan markets. However evidence produced to the ACCC indicated that without the merger, BankWest would not be in a position to continue its previously aggressive competition and expansion plans due to the problems of its parent company in the UK caused by the financial crisis.

In the absence of the funding difficulties faced by BankWest's parent company,

the ACCC may have concluded differently. However in light of the circumstances, the ACCC determined that the removal of BankWest as an independent competitor would not result in a substantial lessening of competition.

I emphasise Chairman Graeme Samuel's sentiments that the approval of the BankWest sale is specific to the circumstances of the case. There is no green light signalling that further banking mergers will be automatically approved.

TOLL-PATRICK

The biggest issue in transportation over recent year was the Toll Patrick merger. The *Trade Practice Act* prohibits mergers, acquisition and joint ventures which would substantially lessen competition. The test applied by the ACCC rested on recognition of the link between market structure and resulting market power, and the need to respond to potential threats from the exercise of unilateral or coordinated market power.

In early 2006 the ACCC accepted court-enforceable undertakings from Toll which addressed the ACCC's competition concerns arising from Toll's proposed acquisition of Patrick Corporation. The ACCC took into consideration submissions made by many participants in the transport industry, including customers, competitors and industry bodies.

Toll agreed to divest 50% of the shares in Pacific National, Patrick's Bass Strait operations, and other assets. Toll also undertook not to utilise control of Patrick's port operations to discriminate in favour of its own land-side logistics operations. In light of the 50% divestment and Toll's behavioural undertakings not to discriminate against competitors, the ACCC determined that Toll would not be able to operate Pacific National in a way that unfairly favoured its own interests.

The ACCC has since considered a number of variations to Toll's undertakings including to deal with a restructure of Toll's business that involved the creation of a new listed company, Asciano Limited, and the transfer of the businesses and assets that comprise Toll's infrastructure assets, including Pacific National, to Asciano.

The ACCC therefore required new undertakings from Toll, Asciano and their directors. These relieved Toll of its obligation to divest 50 per cent of Pacific National, among other assets, and transferred certain obligations to Asciano. Further, Toll became subject to new obligations to ensure the separation of Toll and Asciano. Specifically, Toll was prohibited from, among other things:

- having an interest in Asciano;
- entering into joint ventures with Asciano;
- seconding or sharing management or employees with Asciano;
- employing or otherwise engaging any person who is or has been a senior manager of Pacific National's intermodal business.

The ACCC continues to receive independent audit reports regarding compliance by Toll and Asciano with their undertakings.

Details of the merger, the subsequent restructure and the related evolution of the Undertakings are set out at Appendix A.

ACCC'S APPROACH TO MERGER UNDERTAKINGS

In recent years the ACCC has adopted a much more sophisticated approach to undertakings. We have done this to assist the business community. It means that some mergers, which may otherwise breach the TPA are able to proceed once competition concerns are addressed through an undertaking.

It is widely known the ACCC prefers structural undertakings, that is, undertakings which restructure the merged entity through a divestiture of one or more of its businesses. The businesses divested must be viable and competitive and be sold to a purchaser approved by the ACCC.

It is a system designed to be flexible enough to facilitate mergers that otherwise may fail to pass the tests contained in section 50 – it is there to assist businesses.

The ACCC takes the undertakings in good faith, and expects those that give them to also act in good faith. This is generally the case. Indeed, good faith in the undertaking process has been integral to the ability of some mergers to be cleared.

The ACCC has a dedicated team working with merger parties to develop appropriate undertakings. That team is also responsible for monitoring and enforcing compliance such merger undertakings.

The ACCC will take appropriate action to enforce and remedy compliance with merger undertakings. However the ACCC has also issued a warning that if there were concerted efforts to game the undertaking process, it would seriously look at whether undertakings are an effective solution to dealing with problematic takeovers, or whether we need to seriously consider removing them from our consideration.

5. Authorisation Case Studies

AUTHORISATION OF VESSEL QUEUE MANAGEMENT SYSTEMS AT COAL LOADING PORTS

The TPA recognises that there are circumstances where conduct that may be anti-competitive should, nevertheless, be allowed where it provides an overall public benefit. Businesses can lodge an application with the ACCC seeking immunity from the operation of the *Trade Practices Act* for such arrangements. This is known as authorisation.

Over the past four years the ACCC has considered a number of authorisation

applications dealing with coal ship queue management at the Port of Newcastle and Dalrymple Bay Coal Terminal (DBCT).

The need for a vessel queue management system stems from an imbalance between the volume of coal that producers want to export and the capacity of the coal supply chain.

A large queue of coal vessels first formed at Newcastle and Dalrymple Bay in early 2004 and 2005 respectively. These queues formed in response to a surge in global demand for coal and coal prices. Producers incurred significant demurrage costs while vessels waited in the queue for days to be loaded.

To overcome this problem, the coal industry developed a number of 'short' and 'medium term' schemes to manage the vessel queue. These capacity balancing systems, essentially involved producers receiving a pro-rata allocation of the available coal export capacity while capacity expansions were undertaken.

Where have we got to...

Initially, the capacity balancing system in the Hunter Valley was seen as a short term measure to minimise demurrage during a period of high demand – there was some uncertainty about how long the surge in demand would continue.

As we all know, strong demand and record coal prices continued and the industry developed new capacity balancing systems. These systems were seen as transition mechanisms until capacity expansion projects were completed.

Over time, it became apparent to the ACCC that capacity expansion alone was not going to solve the problem. The ACCC became increasingly concerned that the underlying causes of the capacity imbalance were not being addressed by the industry.

In the **Hunter Valley**, the ACCC identified these underlying problems as including:

- the common user provisions of Port Waratah Coal Services' Kooragang Island lease with the NSW Government which, in effect, have required PWCS to accommodate every shipper of coal, restricting its ability to enter into long term, binding contracts to underpin investment; and
- service providers contracting based on assessments of individual capacity without reference to the capacity of the coal chain as a whole.

While producers actually had long term contracts with the terminal owner at **Dalrymple Bay**, the ACCC identified the following factors as contributing to the ongoing problem:

- service providers contracting based on their individual capacities without reference to the capacity of the coal chain as a whole

- insufficient commercial drivers to provide the required capacity to maximise supply chain throughput.

Last year, the ACCC expressed doubt whether the operation of capacity balancing systems beyond 2008 would continue to be in the public interest in the absence of progress towards the development of a long term solution.

The ACCC has also seen positives over this same period. The formation of supply chain logistics teams – particularly the Hunter Valley Coal Chain Logistics Team – has not only improved the operational efficiency of coal chains, but also focused industry participants on the importance of managing the coal chain as a whole – for example, through greater coordination of infrastructure maintenance schedules, master planning for coal chain investment and more recently, contracting across the coal chain.

Over the last 12 months, the involvement of independent facilitators working with the industry – through the Greiner and O'Donnell reviews – has resulted in progress being made towards developing a long term solution to the ongoing capacity issues, particularly in the Hunter Valley. The participation of the NSW Government since December last year has greatly assisted this process.

The most recent coal decisions...

Late last year, the ACCC received two new applications essentially seeking authorisation for the continued operation of capacity balancing systems at both the Port of Newcastle and Dalrymple Bay coal terminals, while the respective industry's developed a long term solution to the capacity issues.

In short, the ACCC has proposed to grant authorisation in the Hunter Valley and proposed to deny authorisation at Dalrymple Bay.

There are key differences between these two matters, which the ACCC took into account in proposing to grant authorisation in Newcastle:

- Firstly - the Hunter Valley coal industry is now making significant progress towards finalising a long term solution to coal chain capacity issues. The ACCC was not satisfied that similar progress was being made by the industry at Dalrymple Bay;
- And secondly – due to a significant drop in demand for coking coal, a large ship queue is unlikely to form off Dalrymple Bay in the absence of a capacity system. The demand for thermal coal had not softened to the same extent, which is the predominant export from Newcastle. For 2009, there was still an expected capacity imbalance at the Port of Newcastle of 29 million tonnes. In the absence of a capacity balancing system, a larger vessel queue was likely to form offshore, with resulting demurrage costs and potential environmental risks.

Turning more closely to the **Hunter Valley** application – the two terminal operators – PWCS and the Newcastle Coal Infrastructure Group – seek authorisation of a capacity balancing system called 'PWCS Tonnage Allocation

Stage 1' until 30 June 2009, when a long term solution to the capacity issues is expected to be implemented.

The draft determination proposing to grant authorisation was issued on 26 February 2009. Overall, the ACCC considers that significant progress towards developing and finalising a long term solution is now being made by the Hunter Valley coal industry and NSW Government – particularly through the drafting of a detailed Implementation Memorandum which is due to be completed by the Newcastle Port Corporation and terminal operators in mid-late March.

Some of the key issues the industry is addressing within the Implementation Memorandum are:

- the obligation on terminal operators to expand to accommodate capacity demand that is supported by long term 'ship or pay' contracts;
- processes for ensuring timely delivery of expanded terminal capacity;
- nominations and allocations processes for the implementation of a long term contractual framework at the terminals; and
- a framework for the development of new terminal capacity at the Port of Newcastle (called T4) if demand requires.

As part of the long term solution, a separate working group is also developing a mechanism to align contracted capacity with service providers across the coal chain.

To ensure the Stage 1 Allocation system will continue to deliver a net public benefit, the ACCC's draft determination proposes to grant authorisation to the Stage 1 Allocation system until 30 June 2009, on condition that the parties finalise an Implementation Memorandum which sets out an agreed framework and details how the long term solution will be implemented on a timely basis, and provide a copy of it to the ACCC by 31 March 2009.

The draft determination sets out that the Implementation Memorandum must be sufficiently detailed that it enables parties to enter long term contracts to give effect to the long term solution, and in so doing underpin efficient investment.

Ongoing progress by the Hunter Valley coal industry towards implementing a 'whole of coal chain' long term solution is critical to the arrangements continuing to be in the public interest. The ACCC has been monitoring ongoing progress by the industry through monthly progress reports being provided by the applicants, in accordance with the terms of the ACCC's interim authorisation.

The next steps for this matter – a pre-decision conference has been requested by Pacific National, which will be held in Sydney on 2 April. The ACCC expects to issue its final decision in May.

Turning now to **Dalrymple Bay** – 8 coal producers lodged an application seeking authorisation for a maximum 6 month extension of the operation of the capacity balancing system during 2009.

While recognising that some progress had been made in 2008, the ACCC initially denied interim authorisation and proposed to deny authorisation in its draft determination of 23 February because:

- an extension of the scheme was not in the public interest in the absence of a long term solution having been developed; and
- given a significant drop in demand for coking coal, the applicants themselves advised that a vessel queue is unlikely to form in the next 6 months, meaning it is unlikely that there will be demurrage savings during this time – which was the main public benefit previously accepted by the ACCC.

In its draft determination, the ACCC strongly encouraged all relevant parties to work together to finalise details of a long term solution as soon as possible. This application was subsequently withdrawn on 27 February 2009.

I note that it remains open for the Queensland industry to seek authorisation, if required, once a long term solution has been developed.

Looking forward...

- The ACCC's Adjudication role in connection with coal chains is set to continue for a little while yet.
- We are advised that the ACCC can expect to receive a separate application for authorisation in relation to the long term solution in the Hunter Valley in the coming weeks.

FEDERAL CHAMBER OF AUTOMOTIVE INDUSTRIES AUTHORISATION

On 6 June 2007, the ACCC authorised the Federal Chamber of Automotive Industries (FCAI) to negotiate model terms and conditions with port facilities managers and automotive stevedores for the use of their facilities for importing and exporting motor vehicles at Australian ports.

FCAI members include Australia's four domestic passenger motor vehicle manufacturers and all major international brands importing vehicles into Australia. Facilities used by motor vehicle manufacturers at ports include loading and unloading of vehicles and short term vehicle storage facilities.

The ACCC considered that authorising the FCAI to directly negotiate model terms and conditions with port facilities managers and stevedores would provide FCAI members with an opportunity to have a greater say in contract terms and conditions, provide greater transparency in respect of contractual arrangements and improve flows of information between the parties.

One concern for FCAI members in this regard was that generally charges for the use of these facilities were passed on indirectly to car importers and exporters through shipping lines rather than negotiated directly with port facility managers and stevedores.

The ACCC denied authorisation for the FCAI to negotiate model terms and conditions with shipping lines, pre-delivery inspection service providers and land transport service providers. The ACCC was concerned that in these markets, where there are a number of competing buyers and sellers, the combined bargaining power of FCAI members could be used to force service providers to accept terms and conditions which they may not otherwise, potentially distorting market outcomes, both in terms of price and quality of service.

The ACCC also denied authorisation for the FCAI to coordinate and disseminate its members' views and liaise with relevant stakeholders regarding the development and design of new and existing port facilities for the import and export of motor vehicles on the basis that the FCAI could represent its members' views on these issues without the need for authorisation.

6. ACCC Regulatory Role in respect of the Maritime sector

Fundamentally, regulatory tools must fit the purpose of the regulation. The Council Of Australian Governments (COAG) considered the role of monitoring in the context of the regulation of significant infrastructure facilities.

COAG expressed the following as a guide:

- I. where possible, third party access agreements should be commercially agreed.
- II. price monitoring should be considered:
 - Where it can improve the level of price transparency;
 - As a first step where price regulation may be required; or
 - When scaling back from more intrusive regulation.
- III. Finally, where 'light-handed' regulation is not possible access regimes should promote efficiency and should also try to achieve national consistency.

ACCC MONITORING ROLE - CONTAINER STEVEDORING

Monitoring can be important in providing the community with pricing and other financial information. It can also provide information to governments about, for example, structural changes in particular sectors of the economy. Monitoring of quality of service can also provide a gauge of the performance of firms with

market power. This information may help governments determine the nature of future oversight arrangements.

The ACCC monitors prices, costs and profits of container terminal operators at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney.

As part of this role, the ACCC publishes an annual monitoring report which is usually released in late October/early November each year.

- This task is conducted under a direction from the Federal Treasurer pursuant to Part VIIA of the *Trade Practices Act 1974*.
- The monitoring direction has been in place since 1999.
- The purpose of the monitoring program is to provide information to the Government and the wider community about the progress of reform in Australia's stevedoring industry.

The ACCC's 10th annual report was published on 5 November 2008 and is available from the ACCC's website.

- The report presents the monitoring results for the 12 months from July 2007 to June 2008 and the ACCC's observations regarding the role of competition in Australian stevedoring.

A copy of the ACCC's media release that accompanied the report's release is presented at Appendix B. The report shows that unit costs and revenues remained steady in 2007–08.

Profits, however, increased because of increases in volumes and improved productivity. Profitability as measured by an average rate of return on assets remains at levels significantly above the average of the top 200 companies listed on the Australian Stock Exchange as well as comparable overseas container port operators tracked during the ACCC's monitoring program.

Information provided by the stevedores indicates that the industry continued to invest in new assets during 2007–08 and additional future terminal capacity.

The report also shows that, over the past 10 years:

- Australian stevedores have benefited from waterfront reform by becoming increasingly efficient and profitable. The number of containers processed through Australian terminals has risen significantly.
- At the same time, users of stevedoring services have benefited as the cost of using stevedoring services has fallen in real terms. Stevedoring businesses have become increasingly efficient and profitable.

- However, despite the apparent sustained profitability, the Australian stevedoring industry has essentially remained a duopoly, with attempts by competitors to enter it being rare and unsuccessful. Questions remain about the extent to which existing stevedores compete to win each other's business.

Land-side efficiency at port terminals

The ACCC noted that during 2007–08 a number of state governments increased their scrutiny of the degree of efficiency by which containers are moved through the terminals onto trucks and trains.

Where solutions that involve cooperation or coordination among industry players are proposed, parties should seek their own legal advice to determine whether trade practices issues arise.

In some cases, industry-based solutions can be authorised under the Trade Practices Act. Industry participants should consult with the ACCC early and before implementation to ensure potential trade practices concerns are addressed.

Future competition opportunities

The report highlights that demand for stevedoring services is expected to grow over the next decade, which presents opportunities for more intense competition in Australian stevedoring.

- Some ports, such as the Port of Brisbane and Port Botany, are planning to expand terminal capacity using three rather than two terminals, with the additional terminal due to commence operation within the next five years.
- Other ports, such as the Port of Melbourne and the Port of Fremantle, are relying on expansion of existing terminals with new facilities not expected to come on line until around 2015 to 2017.
 - Decisions regarding the role of competition in meeting Australia's future stevedoring needs will need to be made.
 - More intense levels of competition can not only improve efficiency but may also result in a greater share of the benefits being passed on to users and the wider community that rely on the movement of goods into and out of Australian ports.

Monitoring report for 2008–09 and Implications of global crisis

The ACCC will shortly commence work on its next monitoring report covering the period July 2008 to June 2009. One aspect that is likely to emerge as a key issue for this upcoming report is the impact that the current global economic crisis has had on shipping volumes into and out of Australia during the period

and the flow-ons effects to stevedoring activity levels across our major container ports.

PART X - LINER SHIPPING CONFERENCES

As part of the Legislative Review Program agreed to by Australian Governments in 1995, Part X must be reviewed every 5 years. This means that the next review is due to take place sometime in 2009–10.

Part X of the *Trade Practices Act 1974* (the Act) is the Australian regulatory regime for international liner cargo shipping operations.

Part X describes the conditions under which international liner operators are permitted to form “conferences” to provide joint liner cargo shipping services for Australian exporters and importers. Part X gives conditional exemptions from s45 and s47 of the Act to allow shipping lines to engage in what otherwise would constitute illegal anti-competitive behaviour.

In return for specific exemptions from key provisions of Part IV of the Act, conference members must meet specified obligations. These include registering their conference agreements, negotiating matters such as minimum levels of service, freight rates and other negotiable shipping arrangements with government-designated exporter shipper bodies and, to a more limited extent, importer shipper bodies.

PC review 2004–05

Part X was reviewed (for the fifth time since 1977) in 2004–05 by the Productivity Commission as part of the Legislation Review Program. In its report to the Treasurer, the PC’s preferred option was to repeal Part X in order to make international liner cargo shipping subject to the general provisions of the Act. It recommended a four year transition period to an authorisation regime.

However, the PC also made alternative recommendations should the Government decide to retain Part X. The PC said that if Part X were to be retained, one option would be to exclude discussion agreements from eligibility for registration and to introduce certain measures to protect confidential individual service contracts. The Government accepted this option.

Government’s response

On 4 August 2006 the then Treasurer and then Minister for Transport and Regional Services issued a media release saying the Government had decided to retain Part X but to amend it to:

- clarify its objectives;
- remove discussion agreements from its scope;
- protect individual confidential service contracts between carriers and shippers; and
- introduce a range of penalties for breaches of its procedural provisions.

Under the current Rudd government Parliament has not yet made any changes to Part X of the Act in response to the PC's Review.

AUSTRALIAN COASTAL SHIPPING INDUSTRY

The Commission has not had direct involvement in the area since the release of its third coastal shipping freight rate monitoring report in 1995.

However there have been a few market developments that potentially affect the structure of and competition within the Australian coastal shipping industry. These include the acquisition of Patrick Corporation by Toll Holdings and subsequent de-merger of assets between Toll logistics and Asciano infrastructure. In addition PAN Logistics commenced a coastal shipping service between Melbourne and Fremantle

The competition impact of Australian coastal shipping is reflected by the following range of factors:

- coastal shipping is by far the smallest mode of transport, representing about 3 per cent of all cargo volume. On a distance by volume basis its share rises to 28 per cent;
- there are limited examples of head to head competition between rail / road and sea.
- where there does exist some inter-modal competition, from the eastern states to WA for instance, coastal shipping has to offer price discounts to compensate for the slow speed and double handling through the stevedores;
- 86 per cent of all coastal shipping tonnages are bulk. Coastal shipping in many circumstances is conducted in-house as part of vertically integrated operations by the shipper;
- for the smaller non-bulk coastal shipping sector, the only area where there is direct competition between coastal shipping companies is between the mainland and Tasmania;
- there are few economic barriers to entry into coastal shipping except that companies must abide by the conditions pursuant to the *Navigation Act 1912*. This effectively prohibits foreign carriers from

engaging in coastal shipping in competition with licensed coastal operators;

- on routes where there are no licensed coastal vessels operating, foreign vessels have succeeded in lowering real freight rates and winning market share in long distance freight corridors from road even though coastal shipping is not as flexible or fast as road;
- foreign vessels operators using Short Voyage Permits and Continuing Voyage Permits are able to marginally cost price and may have a lower cost structure than licensed vessel operators;

Coastal Shipping Inquiry report

On 22 May 2007, the then Shadow Transport Minister announced an intention to review coastal shipping policy, 'as requested by the shipping industry to improve the efficacy of the current cabotage regime'. The inquiry was also in response to the Morris/Sharp review which called for the coastal shipping provisions of the *Navigation Act 1912* to be reviewed.

On 12 March 2008, the Minister for Infrastructure, Transport, Regional Development and Local Government, the Hon Anthony Albanese MP, announced that he wrote to the House of Representatives Standing Committee on Infrastructure, Transport, Regional Development and Local Government (the Committee) asking it to conduct an inquiry into the Australian coastal shipping industry and report back to Parliament.

On 20 October 2008, Minister Albanese announced the tabling of the report from the parliamentary inquiry - *Rebuilding Australia's Coastal Shipping Industry* - in the House of Representatives. Minister Albanese issued a media release on that day indicating that the Government would consider the report's recommendations in detail and respond to each of them during 2009.

The Government has not yet publicly announced its response to the inquiry's recommendations. Recommendations of the report are set out in Appendix C.

However Ministerial Guidelines for granting licenses and permits to engage in Australia's Domestic Shipping industry were updated during the inquiry and came into effect on 1 August 2008. Details of these guidelines are set out in Appendix D. ACCC staff have briefly reviewed the Guidelines and there does not appear to be any changes to the single voyage permit (SVP) or a continuing voyage permit (ie CVP arrangements between the 2007 and the 2008 guidelines).

REGULATING ACCESS

In certain circumstances – most notably markets having natural monopoly characteristics – competition cannot be relied upon to ensure efficient

outcomes. Part IIIA of the *Trade Practices Act* provides safeguards for those seeking access when the incentives may not be in place for a commercial agreement to be struck.

Under Part IIIA, the ACCC may have a role in determining terms and conditions of such services. In broad terms, the ACCC has a role either through arbitrating disputes about access in those cases where services have been “declared” or through assessing access undertakings that are submitted to it by infrastructure owners. An example of how the ACCC applies this function to transport infrastructure owners is the undertakings provided to the ACCC by the Australian Rail Track Corporation (ARTC).

7. Conclusion

The causes of the financial crisis are generally seen to be regulatory shortcomings in the financial system that failed to control excessive risk taking. The crisis and ongoing economic uncertainty will not subvert the ACCC from its decisive and transparent application of competition law and its various regulatory functions.

Where the impact on the non-financial sector economy is concerned the ACCC remains vigilant against any rise in anti-competitive conduct to alleviate pressures stemming from the crisis. The Commission believes its processes for analysing mergers can effectively deal with failing firm issues.

Where challenges are faced in a sector the Commission has a very useful mechanism in its powers to authorise anti competitive arrangements that provide overall public benefit. The authorisation process enables arrangements to be exposed to stakeholder views and provides confidence to all involved if authorisation is granted.

Looking to the future, the ACCC’s close involvement in some sections of the maritime sector will continue with the aim of facilitating more competitive, efficient and transparent outcomes.

Toll —Patrick—Asciano

The Toll merger with Patrick Corporation (and the subsequent restructure) has been, and continues to be, the largest and most significant merger in the transport sector that the ACCC has dealt with.

Toll-Patrick merger

- In August 2005, Toll announced its intention to make a takeover bid for all the shares in Patrick that it did not already own. Toll subsequently provided a bidder's statement to Patrick. One of the conditions of the offer was that the ACCC did not propose to intervene or seek to prevent the proposed acquisition.
 - Toll is a provider of transport and logistics services.
 - Patrick was a provider of port stevedoring, transport and logistics services.
 - Toll and Patrick each held a 50% interest in Pacific National (PN), which, amongst other things, provides rail line haul services for the interstate movement of containerised freight between Sydney, Melbourne and Perth.
- In January 2006, the ACCC announced that it would oppose the proposed acquisition on the grounds that it would have the effect, or be likely to have the effect, of substantially lessening competition in a market in contravention of section 50 of the Trade Practices Act.
 - The ACCC identified seven competition concerns with the then proposed acquisition. These are detailed in the ACCC's public competition assessment that is available from the ACCC's website.¹
 - One of the key competition concerns identified by the ACCC was that by acquiring Patrick, Toll would acquire a 100% interest in PN and that Toll would have the ability and incentive to cause PN to favour Toll's freight forwarding operations on the East-West Corridor to the detriment of other freight forwarding customers of Pacific National on that corridor.

¹ See ACCC, Public Competition Assessment, Toll Holdings Limited's proposed acquisition of Patrick Corporation Limited, 5 May 2006, p.5.

- The ACCC then commenced proceedings in the Federal Court seeking orders to prevent the proposed acquisitions going ahead.
 - Toll denied that the proposed acquisition would substantially lessen competition in contravention of section 50 and filed a defence in the proceedings.
 - It also offered the ACCC and Federal Court a set of court enforceable undertakings pursuant to section 87B of the Act to address and remedy the ACCC's competition concerns (the final undertaking offered to the Court was more extensive than those that were previously offered up by Toll)
- On 11 March 2006, the ACCC announced that it accepted Toll's substantially revised offer of undertakings and, in so doing, decided that the proposed acquisition of Patrick by Toll would not contravene section 50 of the Act.
- On 3 July 2006, Toll Holdings announced to the Australian Stock Exchange that it held 100% of all equity securities in Patrick Corporation.

Toll restructure

- In early November 2006, Toll informed the ACCC of its intention to restructure its business. The restructure involved the creation of Asciano Limited, and the transfer of the assets that comprise Toll's infrastructure assets—ports & rail (including Pacific National) to Asciano.
- Toll told the ACCC it considered the restructure would address more comprehensively a number of the ACCC's competition concerns arising from the company's acquisition of Patrick in early 2006. Toll sought to be relieved of a number of obligations it had undertaken in connection with the original merger.
- When the ACCC took Toll's new proposals to the market, enquiries revealed the restructure would only benefit competition if there was a complete and clean break between Toll and Asciano.
- In April 2007, the ACCC consented to a variation to Toll's undertakings in connection with the restructure of Toll's business which required Toll make a clean break of its logistics and infrastructure assets into two separate and unrelated companies
- On 6 June 2007, Asciano Limited was listed on the Australia Stock Exchange.
- On 15 June 2007, Toll was restructured and the Patrick infrastructure assets were acquired by Asciano.

Amended Toll undertaking

- Toll's final undertakings that apply as a consequence of the 2007 restructure subject Toll and Asciano to obligations regulating cross shareholdings, directorships, joint ventures, arm's lengths dealings, employment and secondment of personnel – all designed to ensure the complete and clean separation of Toll and Asciano.
- These obligations are subject to strict scrutiny by independent auditors – with a requirement to divest the vehicle transport and PrixCar interests (in the case of Toll) and 50 per cent of Pacific National (in the case of Asciano) if the obligations are not completely satisfied.

Subsequent variations to amended Toll undertaking

- Since that time, Toll has applied to the ACCC to vary its undertakings seven times.
- The intention of the undertakings that apply to Toll and Asciano is to ensure that effective and vigorous competition remains a feature of the national transport chain.

ACCC media release (5 November 2008)

A.C.C.C. QUESTIONS COMMITMENT TO COMPETITION IN AUSTRALIAN STEVEDORING

The Australian Competition and Consumer Commission today issued its tenth annual monitoring report which questions the future direction of the container stevedoring industry.

"The report shows that the Australian community has benefited from the significant reforms that commenced ten years ago," ACCC Chairman, Mr Graeme Samuel said. "During this time, demand for stevedoring services has doubled. The cost of using stevedoring services has fallen in real terms. In turn, the stevedoring businesses have become more productive and profitable, even during a period when significant expenditure on assets was made.

"However, as the ACCC has noted in previous reports, questions remain about the extent to which the stevedores actually compete to win each other's business. This is important when we look forward ten years and consider the high rates of demand that are forecast to continue.

"The ACCC urges State governments and port planners to ask themselves: What role can competition play in meeting Australia's future stevedoring needs? While some ports are well progressed in testing the market for new competitors, others seem to have settled for the convenience of the current duopoly.

"While the ports of Sydney and Brisbane have forged ahead, Melbourne—our largest port—is lagging behind, with a third container terminal not due to commence operation until around 2017. This is several years after new terminals are expected to be operating in Sydney and Brisbane in around 2012. Any unnecessary delays in establishing additional container terminal facilities could result in lost opportunities for greater competition. The future challenge is in coping with growth while ensuring that the incentives for improving efficiency are maintained. More intense levels of competition can not only improve efficiency but may also result in a greater share of the benefits being passed on to users and the wider community that rely on the movement of goods into and out of Australian ports."

The report will be available on the ACCC's website at www.accc.gov.au under Publications - For Regulated Industries – Waterfront and shipping.

For media inquiries to the ACCC Chairman, Mr Graeme Samuel, please call Ms Lin Enright, ACCC Media, on (02) 6243 1108 or 0414 613 520. For general inquiries, please call the Infocentre: 1300 302 502.

Report of the Parliamentary Inquiry into Coastal Shipping

Rebuilding Australia's Coastal Shipping Industry

The report recommended that a new policy framework for coastal shipping should include:

- reform of Part VI of the *Navigation Act 1912*, the *Navigation (Coasting Trade) Regulations 2007* and the *Ministerial Guidelines for Granting Licences and Permits to Engage in Australia's Domestic Shipping*;
- the implementation of a single national approach to maritime safety for commercial vessels;
- the introduction of an optional tonnage tax regime in Australia that is linked to mandatory training requirements;
- the re-introduction of accelerated depreciation arrangements;
- a one year review of the Maritime Crew Visa;
- amendments to the *Seafarers' Rehabilitation and Compensation Act 1992* and the *Occupational Health and Safety (Marine Industry) Act 1993*;
- the creation of a national port development plan to address current and potential capacity constraints in Australia's ports;
- the creation of a national maritime training authority and the introduction of a national training vessel;
- a review of Section 23 AG of the *Income Tax Assessment Act 1936*; and
- the creation of a reform implementation group to implement any future Commonwealth Government reforms.

The Ministerial Guidelines for Granting Licences and Permits to Engage in Australia's Domestic Shipping

- The guidelines provide guidance for DITRDLG staff in administering the coasting trade provisions of the Navigation Act 1912 and Navigation (Coasting Trade) Regulations, and in issuing Australian coasting trade licences permits.
- The delegate of the Minister may depart from the Guidelines where it is judged reasonable to do so, provided that the requirements of the Act and the Regulations are adhered to.
- Licences are issued on condition that:
 - a) seafarers employed on the ship are paid at least Australian wage rates; and
 - b) if applicable, the crew has access to the passengers' library.
- Permits, either a single voyage permit (SVP) or a continuing voyage permit (CVP), may be issued to unlicensed vessels to engage in a coastal trade between ports where:
 - a) no licensed ship is available for the service; or
 - b) that the service as carried out by the licensed ships is inadequate; and the Minister is satisfied that it is in the public interest to do so.
- When considering an application, the matters relevant to vessel availability will depend, in large part, on information provided in the permit application itself, for instance, the specified ports, nominated time for the voyage, and the intended cargo.