Hutchison Ports Australia

Hutchison Ports Australia Pty. Limited
SICTL Terminal, Gates B150 – 153
150 – 160 Foreshore Road
Botany NSW 2019, Australia
Postal Address:
PO Box 734
Botany NSW 1455
Tel : (61 2) 9578 8500
Fax: (61 2) 9316 8305
www.hutchisonports.com.au
ABN: 27 126 649 947

Competition Policy Review Secretariat
The Treasury, Langton Crescent
Parkes ACT 2600

Thursday, 26 June 2014

Hutchison Ports Australia Submission

Hutchison Ports Australia is a new entrant into the Australian east coast container stevedore market; a market that has until now been to sole province of two stevedores. HPA's entry has dramatically changed the market's dynamics, spurred on investment by all three companies and exposed the need to reconsider many existing industry practices. This also applies in the area of competition legislation, beyond consideration of retaining or abolishing Part X.

As a company that is seeking to establish itself in two heavily concentrated markets, container stevedore and port rail freight; we are alive to the many competition issues involved. We hope that the Secretariat finds our comments helpful and worthy of consideration.

Main Points

- The effect of actions should be the test on whether they are anti-competitive, not whether or not it was intended.
- Consideration of granting or authorising shipping conferences should include stevedore agreements with individual conference/conference members to ensure that, in combination, they do not limit competition
- Exclusive stevedore-shipping line agreements that automatically transfer overflow work to another stevedore are no longer appropriate in market where there are more than two suppliers
- Stevedore-shipping line agreements that automatically role over, without notification to shippings lines should not be enforceable in such a small market
- Vertically integrated businesses can affect predatory pricing regardless of market share
- The anti-competitive effect of the dominant market share in a mode of transport should be criteria for consideration, rather than only considering it in the context whether there are competitors in other modes.

Background

Hutchison Ports Australia (HPA) is a member of Hutchison Port Holdings group, a container port developer and operator with a network of 278 berths across 26 countries.

HPA has oversight of the development and operation of new international container terminals, Brisbane Container Terminals in the Port of Brisbane and Sydney International Container Terminals at Port Botany, and an intermodal terminal at Enfield, Hutchison Logistics Australia, 18 kilometres west of Port Botany.

Brisbane Container Terminals (BCT) was the first container stevedoring operation to set up in competition with the two existing stevedores, Patrick and DP World, which had the market split relatively equally between them[1]. BCT began operations in May 2013, while Sydney International Container Terminals (SICTL) began operations in November 2013. For this to occur, governments had to decide to develop and offer extra land for a new operator and Hutchison needed to submit a winning bid and invest hundreds of millions of dollars establishing new terminals.

Hutchison Logistic Australia took up its lease at Enfield in late April 2014 and expects to be operating in the fourth quarter of 2014. Its facility is on a dedicated rail freight line that runs to Port Botany. The rail line also connects with other IMTs in greater metropolitan Sydney and will connect with the proposed IMT at Moorebank.

A concentrated but changed market

The Discussion Paper acknowledges that Australia's markets are both relatively concentrated and have changed markedly since 1993. HPA suggests this particularly true for the container stevedore market, which is highly concentrated and is experiencing radical change. The nature of the change has significant ramifications for competition policy. There are a number of accepted practices that while appropriate or of no consequence in a two-competitor market are now no longer appropriate and impede competition.

Prior to HPA entering the market, DP World and Patrick had the market to themselves. There are relatively few shipping line customers; contracts can be three to five three years duration, and only two or three contracts awarded each year.

HPA is a third competitor in Brisbane and Sydney, while the third operator for Melbourne was recently announced. This of itself raises the question about the suitability of practices geared for a two-competitor market operating in a three-competitor market; do they hinder or help to foster dynamic, robust and responsive market?

Australian ports largely do not compete due to their significant geographic separation. Shipping lines incorporate a number of ports in their route schedules. As a result, stevedores have tended to bundle their ports to offer a price based on a shipping line's total volume for that service or for Australia overall.

Additionally, because of the considerable distances involved in reaching Australia and the relatively small market in global shipping terms[2], shipping lines have frequently formed shipping conferences to provide a combined service to access the market at less cost than they could do individually. The conferences, as provided under Part X, are not of themselves business entities that can enter into contracts. So while the conference members agree collectively which stevedore will handle a service, each conference member must negotiate its own agreement with the stevedore. Part X has no visibility of these agreements.

[1] Flinders Ports is the sole container stevedore in South Australia; neither Patrick nor DP World has stevedoring operations in that state.

[2] Australia total container traffic in 2012/13 was 6.38 million TUEs, while HPH alone handled 78.3 million TUEs globally in 2013.

On occasions when a stevedore was unable to service a ship, due to congestion, equipment failure or some other reason, the work either went to the only other stevedore, or the ship waited until the contracted stevedore was able to do the work. To handle this 'overflow' the two stevedores have overflow agreements.

Issues and options

Intent or effect

HPA believes the effect of actions should be the test on whether they are anti-competitive, not whether or not it was intended. The former deals with impact on competition and the market, the latter is more relevant to considerations of any court order or penalty.

HPA has experienced instances a number of times where a competitor has delayed departure of a vessel from its terminal, resulting in a late arrival at a HPA terminal. As a consequence HPA has incurred greater handling costs because the late arrival moved the service into operating hours that incur weekend or overtime rates. While there might be penalty provision in the agreements between the shipping line and the stevedore, under current competition law arrangements there is little incentive to reduce these incidents occurring. HPA makes no comment about whether such acts are deliberate, simply that intention should not be necessary to demonstrate anti-competitive behaviour.

Overflow agreements as they stand between the two stevedores - anti-competitive

Currently the overflow agreements only exist between the incumbent stevedores. In a two-competitor market shipping lines had no option of selecting another competitor. Stevedores formalising arrangements for overflow work was sensible.

It could also be argued that the stevedore contracted by the shipping line is responsible for meeting its commitments to the shipping line by making whatever arrangements are necessary; again having service agreements for overflow seems sensible. However it could be argued that these overflow agreements in a three or more competitor market are exclusive and anticompetitive in nature.

While the incumbent stevedores can now go to market for overflow work, or have agreements with both competitors, they are not required to do so. (The prospect of helping a new entrant into the market by directing overflow work could be considered by them as a disincentive.)

However the crux of the issue is that neither of these approaches provides shipping lines with an option of deciding where they want to direct their work, when their contracted stevedore can't handle it. They might want to leave that as the stevedore's responsibility. However, a requirement that stevedore-shipping line agreements provide the option of the shipping line nominating a stevedore for the overflow work is a solution that will encourage more competition.

Conference member stevedore contracts must have the same end date

HPA does not have a position as to whether Section X, dealing with shipping conference services remains or is abolished and replaced by an ACCC authorisation process. However HPA believes agreements between shipping lines and stevedores for a conference service should have common end date.

As a new entrant to the market, we have naturally sought to compete with incumbents for business as well as pursue new service opportunities. What has become apparent is that the staggered end dates of various shipping line agreements with stevedores make it very difficult for conference services to go to the market. While contracts for some shippings lines in the conference might be coming to an end, others might be in contract for that service for many months and possibly years.

The prospect of conference members using different stevedores in the same port is problematic. Pick-up and drop-off for a shipping service needs to a common terminal, for the sake of efficient management by carriers and their customers. Transhipping the containers to another terminal effectively halves the revenue received for the container or increases the cost to the shipping line.

The net result is that staggered agreements between a stevedore and conference members, virtually make the arrangement self-perpetuating.

Automatic roll-over provisions should be none-binding

HPA is not privy to the contracts between shipping lines and other stevedores. None-the-less, we are strongly of the opinion that some agreements exist that automatically role over, unless the shipping line contacts the stevedore by a specified date beforehand. While such agreements might be common practice in many markets where there are many customers and many potential suppliers that is not the case here. Notwithstanding that both parties might have entered into such agreements willingly, we would argue that in such a small market, with relatively small turnover of contracts and being for some years, such provisions should not be binding, particularly where there is no requirement for the stevedore to notify the shipping line of an impending role-over date.

Vertically integrated businesses - competitive or predatory?

Excessive discounts fuel shopper dockets, while providing customers with petrol saving, have been recognised as ultimately harmful to a competitive market. The same would apply to large discounts or below cost pricing for an element of the logistics chain by a vertically integrated transport company.

HPA believes competition policy should be alert to the danger of predatory pricing from vertically-integrated transport/logistics companies. Vertical integration provides scope for companies to reduce costs of individual elements of the supply chain because of reduced overheads and the ability to offer an all-in-one service that extracts revenue from each element of the logistics task. This should provide a public benefit in lower overall costs for customers and efficient movement of freight.

However the danger is that a vertically integrated transport/logistics company can set prices for one element of the chain to prevent new competitors from entering or driving out competition from that part of the market. This is achieved by heavily discounting one element of the logistics chain, even below cost, to win the overall business, and extract value from other elements of the logistics chain.

The predatory pricing provisions of the Competition and Consumer Act, (Section 46) currently define predatory pricing within the context of misuse of market power or share. It also requires that there be clear evidence that the pricing was for an anti-competitive purpose, which is acknowledged as hard to prove.

We have addressed the effects test earlier. HPA suggests that market power definitions may need to be revisited to ensure they clearly capture instances of a company using its vertically integrated operation, to undermine competition.

Market share and power considerations

While HPA contends that competition policy should consider the potential for anti-competitive behaviour in a broader context for vertically integrated entities, it should also consider the potential for entities with large market share within one segment of the supply chain.

The landside container freight market is fragmented, with many competitors. However within that market, the rail freight segment is concentrated, the port rail freight business more so.

By way of example, some 14 per cent of the containers moving in and out of Port Botany are carried by rail. Yet almost 100 per cent of that rail freight task is undertaken by one company. HPA understands that current competition policy considers the rail operator's market share in terms of the total port freight market, which includes road freight. While rail freight does compete with road in some areas, it is dominant in heavy containers, where road cannot compete due to weight limits.

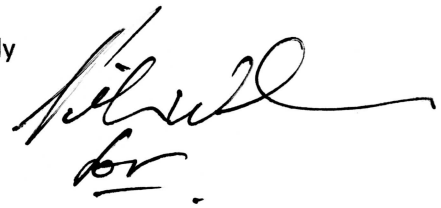
More importantly, the company is clearly in a dominate position in regard to rail service. As a company seeking to enter this market, we are alive to the difficulties faced by new entrants.

HPA makes no charge against the company that currently has market segment dominance simply that in such instances there is more scope for anti-competitive behaviour because, it is not seen as having market power, and the current test must also include intent rather than simply effect. For example scheduling, or delaying services to affect a competitor's rail windows can cause delays, increased costs or both to the competitor.

In order to encourage competition HPA believes competition policy must not only ensure equitable mechanisms such as open access regimes are in place, but also be aware that entities with a dominate position in a market segment also have the opportunity to cruel competition through anti-competitive practices.

I hope the Secretariat finds these comments of value, in its consideration of competition policy, both in the markets in which we operate, and in similar markets where there are low numbers of suppliers and customers.

Yours sincerely



Dr Stephen Gumley AO

Chief Executive Officer