



Australian  
Competition &  
Consumer  
Commission

# Determination

## Applications for authorisation

**lodged by**

**Australian Amalgamated Terminals Pty Limited**

**in respect of**

**giving effect to the agreements and related arrangements  
which establish Australian Amalgamated Terminals Pty Limited**

**Date: 3 December 2009**

**Authorisation no.: A91141,  
A91142, A91181 & A91182**

**Public Register no.: C2009/1098**

**Commissioners:** Samuel  
Kell  
Schaper  
Court  
Dimasi  
Walker

## Summary

The ACCC grants conditional authorisation to Australian Amalgamated Terminals Pty Limited (AAT), P&O Wharf Management Pty Limited and Plzen Pty Limited to give effect to section 2 of the Shareholders Agreement, together with the other provisions of the Shareholders Agreement and the Constitution of AAT, being provisions that establish and constitute the AAT joint venture, but only to the extent that those provisions allow the parties to engage in certain conduct at AAT's terminals.

Authorisation is granted until 31 December 2019.

Broadly the conditions:

- provide a mechanism for stevedores to seek access to AAT's terminals
- impose a process for independent review of AAT's price increases to terminal end-users
- require AAT to provide end-users with a dispute resolution process for non-price disputes.

On 10 June 2009 and 5 August 2009, AAT lodged applications for authorisation to give effect to the agreements and related arrangements which establish the AAT joint venture.

The AAT joint venture establishes, develops and operates motor vehicle and general cargo handling facilities (terminals) at various Australian ports.

AAT was formed in 2002 by Patrick and P&O Ports which previously operated as vertically integrated stevedores in competition with each other. Following AAT's creation, its shareholders no longer operate terminals in competition with each other. AAT applied for authorisation as part of the settlement of court proceedings commenced by the ACCC against it in relation to alleged breaches of the *Trade Practices Act 1974* arising in connection with the establishment of the AAT joint venture.

While the ACCC considers that the consolidation and operation of a single terminal at a port generates efficiencies, these efficiencies arise whether the terminal is operated by AAT, its shareholders or another party. For this reason, the ACCC considers that the benefits arising from AAT's joint venture arrangements are limited.

Without the AAT joint venture, AAT's shareholders might be expected to compete for the right to operate terminals. This competition could include their dealings with third party stevedores and terminal end-users over price, service and other terms and conditions of access.

AAT is a related entity of stevedoring businesses which creates an incentive for AAT to deny access to its terminals to competing stevedores. AAT claims that it lowers barriers to entry by operating on a non-discriminatory, multi-user, open access basis. However, since the establishment of AAT, no new entrant automotive stevedore has sought to operate at any of AAT's terminals.

An arrangement, imposed by way of a condition of authorisation, that improves the conditions for competition between stevedores by providing a mechanism for stevedores to seek access to AAT's terminals would result in significant public benefits.

AAT's position as the sole supplier of terminal services at some ports provides the potential for it to price its services at levels substantially above the efficient costs of providing those services. Interested parties have raised concerns about the price of AAT's services, particularly at the Port of Brisbane and Port Kembla where AAT is the sole provider of automotive terminal services.

The ACCC considers that providing access to AAT's terminals to competing stevedores at a competitive price will facilitate downstream competition and put pressure on downstream price and non-price terms. The condition providing access to AAT's terminals by stevedores also provides a transparent process to enable AAT's pricing to be assessed in accordance with the interests of all parties.

Terminal end-users have raised concerns about their inability to deal with AAT directly. Contractual relationships in the industry mean that importers and exporters do not tend to deal directly with AAT. AAT's contractual relationship occurs with stevedores and interested parties are concerned that, as related businesses of AAT, the stevedores do not have an incentive to dispute issues with AAT on behalf of importers and exporters. As a consequence terminal end-users consider that AAT provides its services on a take it or leave it basis.

The ACCC considers that a process for independent review of AAT's price increases, imposed by way of a condition of authorisation, provides an opportunity for terminal end-users to raise pricing issues with AAT and for pricing issues to be reviewed and resolved in an efficient manner.

The ACCC also considers that a formal mechanism to provide terminal end-users with the opportunity to discuss non-price concerns and negotiate on relevant issues with AAT is appropriate. These mechanisms will enhance the transparency of AAT's terms and conditions and provide greater assurance to terminal end-users that the claimed public benefits are being realised by AAT and shared with them appropriately, including in ports where there is not independent oversight of AAT by a port authority.

The ACCC is concerned that there are limited public benefits and potentially significant detriments from the operation of AAT. To ensure that AAT's joint venture arrangements deliver a net public benefit the ACCC imposes conditions of authorisation requiring AAT to:

- provide a mechanism for stevedores other than AAT-aligned stevedores to seek access to AAT's terminals
- subject any proposed price increases to terminal users to review by an independent party
- offer a dispute resolution process to terminal users for non-price disputes.

The ACCC grants conditional authorisation until 31 December 2019.

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## List of abbreviations

AAT	Australian Amalgamated Terminals Pty Limited
ACCC	Australian Competition and Consumer Commission
the Act	Trade Practices Act 1974
AQIS	Australian Quarantine Inspection Service
ASA	Australian Steel Association Inc
Asiaworld	Asiaworld Shipping Services Pty Ltd
CPI	Consumer price index
Customs	Australian Customs and Border Protection Service
FAC	Facility Access Charge
FCAI	Federal Chamber of Automotive Industries
Flinders Ports	Flinders Ports Pty Ltd
GM Holden	GM Holden Ltd
PAAT	Port Adelaide Automotive Terminal
Patrick Autocare	Patrick Autocare Pty Limited
PBC	Port of Brisbane Corporation Limited
PDI	Pre-delivery inspection
PKPC	Port Kembla Port Corporation
POAGS	P&O Automotive & General Stevedoring Pty Ltd
PoMC	Port of Melbourne Corporation
SAC	Stevedore Access Charge
SAL	Shipping Australia Limited
Subaru	Subaru (Aust) Pty Limited
Swire Shipping	Swire Shipping Ltd
Tasports	Tasmanian Ports Corporation Pty Ltd
Tribunal	Australian Competition Tribunal
Toyota	Toyota Motor Corporation Australia Limited

# 1. The applications for authorisation

- 1.1. On 10 June 2009 Australian Amalgamated Terminals Pty Limited (AAT) lodged applications for authorisation A91141 and A91142 with the Australian Competition and Consumer Commission (ACCC).
- 1.2. AAT is seeking authorisation to give effect to the agreements and related arrangements which established the AAT joint venture in 2002. The AAT joint venture establishes, develops and operates motor vehicle and general cargo handling facilities (terminals) at various Australian ports.
- 1.3. On 5 August 2009 AAT lodged two further applications for authorisation, A91181 and A91182, with the ACCC. These additional applications are for conduct that is identical to that sought in applications A91141 and A91142 and were lodged to take account of amendments introduced by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* which commenced on 24 July 2009.
- 1.4. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in [Attachment A](#). A chronology of the significant dates in the ACCC's consideration of these applications is contained in [Attachment B](#).
- 1.5. Application A91141 was made under section 88(1) of the Act to give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 1.6. Application A91142 was made under section 88(1) of the Act to give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 1.7. Application A91181 was made under section 88(1A) of the Act to give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of the Act.
- 1.8. Application A91182 was made under section 88(1A) of the Act to give effect to a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision.
- 1.9. In particular, AAT seeks authorisation to:
  - give effect to the joint venture of AAT, established by section 2 of the Shareholders Agreement (being the section that establishes the AAT joint venture), together with the other provisions of the Shareholders Agreement and the Constitution of AAT

- engage in conduct under or pursuant to, and in the fulfilment of, the AAT joint venture on its own behalf and on behalf of parties to the AAT joint venture and any future parties to the AAT joint venture.
- 1.10. In its applications, AAT has named the original parties to the AAT joint venture, P&O Wharf Management Pty Limited and Plzen Pty Limited, as parties to the arrangements for which authorisation is sought.
- 1.11. At the time the joint venture was established, Plzen Pty Limited was a holding vehicle of Patrick Corporation Limited. Plzen Pty Limited is now a subsidiary of Asciano Limited. P&O Wharf Management Pty Ltd was a holding vehicle of P&O Ports Limited. P&O Ports Limited, now DP World Australia Limited, subsequently divested:
- a 75% share in its automotive and general stevedoring business, P&O Automotive & General Stevedoring Pty Limited, through a holding company structure, to a consortium of KFM Diversified Infrastructure and Logistics Fund and Kaplan Equity Limited (together, Kaplan), Wilh Wilhelmsen ASA, Kawasaki (Australia) Pty Ltd and management
  - a 49% share in P&O Wharf Management Pty Ltd to a consortium of Kaplan, Wilh Wilhelmsen ASA, Kawasaki (Australia) Pty Ltd and management.
- 1.12. AAT has also sought authorisation for future parties to the AAT joint venture.
- 1.13. AAT seeks authorisation for the term of the joint venture.
- 1.14. On 24 August 2007 the ACCC commenced proceedings against AAT, its shareholders, related corporations and certain individuals in relation to alleged breaches of the Act arising in connection with the establishment of the AAT joint venture. Pursuant to an agreement between AAT and the ACCC, the proceedings against AAT are to be dismissed on the condition that, without any admissions, AAT commence and prosecute an application for authorisation of its conduct in giving effect to the arrangement between its shareholders for the establishment and operation of automotive and general cargo terminals in the ports in which AAT operates.

### **AAT's operations**

- 1.15. AAT provides access to its terminals and related services to stevedores and other terminal users to facilitate the loading and unloading of automobiles, general cargo and containers. The services supplied by AAT include:
- Facility development and maintenance - the development of infrastructure such as berths, wharves, cargo lay down areas, secure perimeters, offices, amenities and internal road systems, to support cargo handling and the maintenance of equipment within a terminal.
  - Facility access - the provision of a space, known as the cargo lay down area, where cargo may be placed immediately before it is loaded on a vessel, or immediately after it is discharged from a vessel. The cargo lay down area must be suitable for imported cargo to be cleared by the Australian Customs and Border Protection Service (Customs) and Australian Quarantine Inspection Service (AQIS).
  - Stevedore access - the provision of access to the terminal facility to licensed stevedores, to enable the loading of cargo onto vessels, or the unloading of cargo

from vessels. This includes the provision of all equipment (excluding loose tools and specialised equipment), employee amenities and service vehicles.

- IT systems - the provision of a cargo management system, which is linked to Customs and AQIS, and a communications system.
- Receival and delivery - the provision of clerical and manual processing services for the proper loading and unloading of cargo to or from road, water or rail transport.
- Storage - the provision of storage services for cargo that remains in the facility beyond the timeframe allowed under the facility access terms.
- The provision of mobile machinery and equipment such as cranes, fork lift trucks and trailers.
- The provision of ancillary services such as quarantine cleaning, customs clearance message receival and unpacking of general cargo from a ship's cargo trailers.

1.16. AAT's terminals are located at the following five ports in Australia:

- **Port Adelaide (South Australia).** Since May 2004, AAT has operated the Port Adelaide Automotive Terminal (PAAT) under a sub-lease with Flinders Ports Pty Ltd (Flinders Ports). The PAAT provides 3000 vehicle slots and a pre-delivery inspection (PDI) sublease area.<sup>1</sup> It is primarily used to export vehicles, but it can be used for imported vehicles if capacity is available. AAT's sublease for the PAAT is for a period of six years, with an option to renew for a further term of five years. The sublease is limited to the land adjacent to berths 1, 2, 3 and 4, not for the berths themselves.

Flinders Ports is a private company which operates South Australia's ports subject to a lease and port operating agreement with the state government.

- **Port of Bell Bay (Tasmania).** AAT commenced terminal operations in the Port of Bell Bay in 2003, after acquiring a sublease from P&O Automotive & General Stevedoring Pty Limited. The site is 25 000 m<sup>2</sup> in size and has one berth. The terminal receives general cargo and containers.

The Port of Bell Bay is operated and managed by Tasmanian Ports Corporation Pty Ltd, a private company that is fully owned by the Tasmanian Government.

- **Port of Brisbane (Queensland).** AAT operates a terminal at Fisherman Islands which is a multi-user facility handling cars, containers and general cargo. The site covers 26 hectares and includes 3 berths (with access to a fourth berth at the adjacent grain terminal if required and available), 4300 vehicle slots, 1500 container slots (twenty foot equivalent unit containers, triple stacked), shed space of 15 000 m<sup>2</sup>, open air general cargo areas, an off-wharf cargo overflow area, and bridge access to additional PDI areas leased to PDI operators.

AAT commenced operations at Fisherman Islands in January 2006. It has a ten year lease with the Port of Brisbane Corporation Limited, a state-owned corporation. Among other things, the lease and related agreements govern access by terminal users, types of terminal use, non-discrimination among terminal users and provide a dispute resolution process.

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<sup>1</sup> PDI operators provide services to importers of motor vehicles. See page 5 for further information.



- **Port Kembla (New South Wales).** AAT's terminal at Port Kembla covers 40 hectares, has 4 berths and the capacity for 7000 vehicles, 1500 hundred containers (triple stacked) and 15 000 m<sup>2</sup> of cargo shed space as well as open air general cargo areas.

AAT commenced operations at Port Kembla in May 2007. It has a 20 year lease with the Port Kembla Port Corporation (PKPC), a state-owned corporation, with two ten year renewal terms. Renewal is subject to PKPC being satisfied that AAT has met minimum throughput and minimum capital expenditure requirements. The lease and related agreements also impose other requirements on AAT including non-discrimination in the charges levied by AAT on terminal users, the provision of a 30 business day notice period for any variation to AAT's charges, third party access to terminal premises and berthing coordination with PKPC.

- **Port of Melbourne (Victoria).** AAT has operated the automotive terminal at Webb Dock West since July 2005. The terminal has one pontoon berth, 6000 vehicle slots and a PDI sublease area. AAT operates Webb Dock West under a lease (acquired from Toll Holdings Limited) with the Port of Melbourne Corporation (PoMC) which will expire in 2017. Under the lease, AAT is required to operate the terminal as an automotive and general cargo terminal, and must meet minimum throughput requirements.

PoMC is a state government statutory authority with the responsibility for management and developing the Port of Melbourne.

1.17. AAT submits that at all of its terminals, its operating principles – necessitated by its ownership structure and by its agreements with certain port authorities - provide for:

- non-discriminatory, open access to all licensed stevedores and other users wanting to do business at an AAT terminal, based on a standard, published license application process and published standard terms and conditions
- published charges, charged equally to all stevedores using and potentially using AAT's facility
- procedures for protecting confidential information of stevedore customers from disclosure to the shareholders or board of AAT, or any third party.

1.18. AAT does not provide stevedoring services. AAT is a related entity of Patrick Stevedoring and P&O Automotive & General Stevedoring Pty Ltd, which operate at AAT's terminals.

## **Draft determination**

1.19. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

1.20. On 19 October 2009 the ACCC issued a draft determination proposing to grant conditional authorisation to AAT, P&O Wharf Management Pty Limited and Plzen Pty Limited to give effect to section 2 of the Shareholders Agreement, together with the other provisions of the Shareholders Agreement and the Constitution of AAT, being provisions that establish and constitute the AAT joint venture, but only to the extent that

those provisions allow the parties to engage in certain conduct at AAT's terminals. Authorisation was proposed to be granted for 5 years.

1.21. A conference was not requested in relation to the draft determination.

## 2. Background to the applications

### Port operations

2.1. The majority of goods imported to, and exported from, Australia go through one of Australia's many ports. The choice of port for importers and exporters is determined by factors including the origin and destination of the goods being transported, the type of goods and the infrastructure at the particular port.

2.2. The main participants in the sea freight supply chain are:

- **Port authorities.** Most major ports in Australia are government owned and operated by port authorities, which are responsible for the overall management and development of the port. They manage port infrastructure, such as dredged channels and berths, and recover the costs of doing so by levying charges on port users. The larger port authorities generally contract out the operation of terminals at the port to third parties.
- **Sea transporters.** Shipping lines own and operate shipping vessels for sea transportation of freight. The importer/exporter contracts with a shipping line for the movement of their cargo across the waterfront.
- **Stevedores.** Stevedores load cargo on and off vessels. The shipping line contracts with the stevedore for the loading or unloading of vessels at the terminal. Increasingly, stevedores also provide services that facilitate the movement of cargo from the wharves to road and rail transport links.<sup>2</sup> In some cases, particularly with containers, stevedores also act as terminal operators.
- **Terminal operators.** Operators such as AAT or the port authority provide terminal space for the temporary storage of cargo after it is discharged from a vessel or prior to it being loaded onto a vessel. At the terminal, cargo is processed for either import or export. For imported cargo, Customs and AQIS clearances are obtained. Machinery for the loading or unloading of vessels may be provided by the terminal operator or the stevedore depending on whether the terminal is operated on a multi-user or common-user basis.<sup>3</sup> Stevedores contract with terminal operators for the use of the terminal space and related equipment.
- **PDI operators.** PDI operators provide services to importers of motor vehicles, including surveying any vehicle damage, ensuring vehicles are built to specifications, mechanical testing, fitting accessories, cleaning and washing vehicles, and performing any rectification services to repair any damage. These services may be performed at PDI facilities located on or off wharf. On wharf PDI facilities are generally located on land sub-leased from the automotive terminal operator.
- **Land transporters.** Road and rail transport operators move cargo between ports and storage facilities on behalf of importers/exporters.

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<sup>2</sup> ACCC Container stevedoring monitoring report no. 10, October 2008.

<sup>3</sup> For the purpose of this draft determination, common-user facilities are those which are generally operated by a port authority and include a berth and cargo laydown area but generally not equipment or machinery which is supplied by the stevedores using the facility. Multi-user terminals are those which are generally operated by someone other than a port authority and include a berth, cargo laydown area, machinery and other equipment which is available for use by the stevedores which use the facility.

- **Importers/exporters.** Importers and exporters own the cargo that is transported by shipping lines to and from sea ports. Importers/exporters have a contractual relationship with the shipping line. They do not generally have a contractual relationship with the stevedore or the terminal operator.

### **3. Submissions received by the ACCC**

3.1. The ACCC tests the claims made by the applicant in support of applications for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the arrangements for which authorisation is sought to provide them with the opportunity to comment on the applications. A summary of the submissions received by the ACCC from the applicant and interested parties follows.

#### **Prior to the draft determination**

##### **AAT**

3.2. AAT submitted that it operates on a multi-user, open-access, non-discriminatory basis and has operated consistent with these principles at all times. AAT advised that it has not denied access to its terminals to any licensed stevedore or port user.

3.3. AAT noted that it operates in the context of broader government policies and commercial forces including:

- policy decisions of state governments and port authorities for the use of valuable waterfront land
- requirements of port authorities with respect to the allocation of port land among port users, to maximise benefits to all port users and to realise commercial returns for port authorities
- pressures from terminal users to enhance efficiencies in the import supply chain
- the capital requirements of new terminal capacity and the need to meet those requirements at the lowest possible cost.

3.4. AAT submitted that its operations produce public benefits by:

- facilitating competition by lowering the barriers to entry for stevedores and other third parties wishing to do business at a port where there is an AAT terminal
- promoting greater efficiency through use of the lowest cost terminal facilities. Scale and rationalisation efficiencies are generated from the removal of duplicated infrastructure, systems and other inputs in to the operation of terminal facilities and the introduction and availability of one pool of machinery and equipment, a centralised IT system and one set of personnel.
- generating operational efficiencies resulting from AAT's new, superior terminal facilities which provide single point of cargo discharge, processing and collection, particularly for automotive cargo.

3.5. AAT submitted that its operations cause no public detriment.

##### **Interested parties**

3.6. The ACCC sought submissions from 106 interested parties potentially affected by the applications, including stevedores, shipping lines, shipping agencies, importers, exporters, freight forwarders, transport operators, industry associations, port authorities,

government departments and government agencies. A summary of the public submissions received from interested parties follows.

### *Motor vehicle importers*

- **Federal Chamber of Automotive Industries (FCAI)** submitted that there is a lack of alternative automotive terminals at the key locations at which AAT operates which is of considerable concern given the strategically critical position held by AAT in the logistics supply chain for the importation of new vehicles into Australia and the preparation and delivery of those vehicles to market. FCAI is concerned by the possibility that AAT might commence operations in ports where common-user facilities are currently available. FCAI submitted that AAT unilaterally increases fees and charges, and introduces new fees and charges and changes to service provisions, with terminal users suffering significant cost increases and business disruption as a result. FCAI submitted that AAT refuses to negotiate with terminal end-users and there is no dispute resolution mechanism or review procedure to address the concerns of terminal end-users. FCAI does not believe that the efficiencies claimed by AAT are produced and noted that since AAT was created, no independent third party stevedore has used AAT's automotive terminals. FCAI submitted that the anti-competitive detriment arising from AAT's joint venture arrangements is not outweighed by the public benefits claimed by AAT.
- **GM Holden Ltd** (GM Holden), a FCAI member, submitted its support for FCAI's submission. GM Holden stated that in the absence of other options, importers must invariably accept the charges imposed by AAT. GM Holden submitted that there is a need for independent regulatory scrutiny over proposed changes to either the scope of AAT's operating footprint or increases to its infrastructure and service charges.
- **Subaru (Aust) Pty Limited** (Subaru), a FCAI member, submitted its support for FCAI's submission. Subaru considers that AAT's automotive port facilities are each a bottleneck monopoly in each state where AAT operates and are not subject to any form of regulation. Subaru considers that the claimed efficiencies for new entrant stevedores resulting from the AAT joint venture do not exist because there has been no new entry since the creation of AAT.
- **Toyota Motor Corporation Australia Limited** (Toyota), a FCAI member, submitted that it has had major concerns with the conduct of AAT since it commenced its operations in 2002. It is Toyota's experience that, due to a lack of competition, AAT is able to unilaterally impose price increases, refuse to negotiate on price and has failed to address operational problems.

### *PDI operators*

- **Patrick Autocare Pty Ltd** (Patrick Autocare), a related entity of AAT, submitted that the operation of AAT's terminals as the sole automotive terminals at certain ports has enabled increased efficiency to be achieved via greater utilisation of terminal space and by ensuring that PDI services are able to be provided 'on-wharf'. This eliminates the need for additional vehicle movements to off-wharf PDI premises prior to the vehicles being delivered to the importer. Patrick Autocare considers that AAT's operations ensure that all PDI operators are able to operate at the same terminal, thereby enabling alignment between berthing locations and the locations of PDI operators. Additionally, Patrick Autocare submitted that AAT's long term leases of its terminal sites have provided far greater certainty for PDI operators in carrying out substantial investment in PDI processing facilities at those terminals.

### *Port authorities*

- **Port Kembla Port Corporation (PKPC)** endorsed AAT's applications for authorisation. PKPC considers that the arrangements in place at Port Kembla lead to operational efficiencies and effectiveness by reducing the need for resource duplication. PKPC advised that its Management Deed with AAT requires that all users of AAT's berths and facilities are treated on an equal and fair basis.
- **Port of Brisbane Corporation Limited (PBC)** submitted that it neither supports, nor opposes, the applications for authorisation made by AAT. PBC advised that by way of its Management Agreement with AAT, it has measures in place to address potential competition concerns to its satisfaction.
- **Port of Melbourne Corporation (PoMC)** provided a number of clarifications to factual statements made by AAT. PoMC also advised that it has been requested by the Victorian Government to undertake detailed planning work in preparation for additional container capacity within the Port of Melbourne, which may impact on the configuration of the existing automotive terminals.
- **Tasmanian Ports Corporation Pty Ltd (Tasports)** submitted that AAT's joint venture arrangements, if managed properly, will provide efficiency gains without lessening competition.

### *Shipping lines*

- **Asiaworld Shipping Services Pty Ltd (Asiaworld)** submitted that AAT's joint venture arrangements have not resulted in cost savings or productivity improvements. On the contrary, costs have increased and terminals (particularly Brisbane) have suffered congestion and confusion in cargo delivery to receivers. Asiaworld considers that the inability for shipping lines or their agents to deal directly with AAT creates inefficiencies with respect to berth access and dealing with damaged or missing cargo.

Asiaworld submitted that dismantling AAT would be counterproductive. However, it suggests that authorisation should only be granted for a defined period of time and that reviews of AAT's relationships with its customers, AAT's process for setting and changing tariffs and AAT's pricing anomalies are necessary. Asiaworld also considers that extensive industry involvement is needed before any development of further AAT terminals is undertaken.

- **Shipping Australia Limited (SAL)** submitted that AAT's establishment of a pool of specialised labour and equipment at its terminals has entrenched its strong position and created a situation in which AAT is not subject to any commercial imperative to ensure capital expenditure is directed to ensure efficiency or cost effectiveness. SAL noted significant increases in AAT's tariffs relative to AAT's costs. It also submitted that it is extremely difficult for shipping lines and shipping agents to have any normal commercial interaction with AAT because there is no direct relationship between AAT and shipping lines. This makes determining the liability for damaged cargo very difficult.

SAL does not propose that AAT be dismantled. However, SAL considers that authorisation should only be granted for a defined period of time subject to the ACCC imposing a price monitoring system on AAT. SAL also considers that authorisation should be reviewed if there is a change in AAT's shareholders. SAL submitted that no further sites should be acquired by AAT without a public tender system and associated public consultation and that AAT should be more consultative and proactive in its dealings with terminal users on pricing and operational issues.

- **Swire Shipping Ltd** (Swire Shipping) queried the public benefit claims made by AAT. Swire Shipping submitted that there have been significant increases in AAT's charges relative to increases in AAT's costs. It also noted that the absence of any contractual relationship between shipowners and AAT is detrimental to Swire Shipping's operations.
- **Wallenius Wilhelmsen Logistics** did not object to AAT's application.

#### *Steel importers*

- **Australian Steel Association Inc** (ASA) submitted that as a result of the AAT joint venture, port charges and shipping costs have increased, service levels have decreased and cargo damage has increased. ASA raised particular concerns about AAT's Brisbane facility, submitting that reduced berth space has caused periods of berth congestion which in turn has impacted on service levels and additional, but avoidable costs, both in demurrage (storage) and extra sorting costs. ASA noted that while AAT claims its operating principles provide for non-discriminatory, open access to all licensed stevedores and other users wanting to do business at an AAT terminal, there is no evidence of any new stevedores operating at an AAT terminal and on balance, steel break bulk cargo is accorded a much lower priority than automobiles and containers.

In two supplementary submissions, ASA advised that AAT had commenced productive discussions with ASA members. AAT indicated that it will work to address ASA's concerns, particularly about the level of service at the Brisbane facility. ASA considers that authorisation should be granted by the ACCC subject to a condition enabling ASA members to deal directly with AAT through a negotiated Service Level Agreement. This would ensure that there is a more accountable and productive relationship with AAT and ensure that there is no misuse of market power.

- **Stemcor Australia Pty Ltd**, an ASA member, submitted its support for the ASA's submission.

#### *Stevedores*

- **Patrick Stevedoring**, a related entity of AAT, submitted that having single terminals has resulted in increased efficiency for customers of Patrick Stevedoring, particularly in the areas of terminal utilisation, equipment and labour utilisation, and IT systems efficiencies for shipping lines. Patrick Stevedoring considers that the provision of facility services by AAT reduces a new entrant stevedore's start up costs and removes the need to duplicate these services by each individual stevedore. Patrick Stevedoring noted that it continues to compete vigorously against P&O Automotive & General Stevedoring Pty Ltd in the supply of stevedoring services, including by tendering competitively when tender opportunities arise.



- **P&O Automotive & General Stevedoring Pty Ltd (POAGS)**, a related entity of AAT, submitted that AAT's terminal facilities, IT systems and equipment provide a 'level playing field' for stevedores and allow efficient use of port resources and significant assets under an efficient pricing structure. This enables stevedoring companies such as POAGS to focus their operations on service quality, reliability, productivity and cargo care, rather than expend capital on specialist stevedoring equipment to service variable cargo volumes.

## **Following the draft determination**

- 3.7. On 19 October 2009 the ACCC issued a draft determination in relation to the applications for authorisation. In the draft determination the ACCC proposed to grant conditional authorisation for 5 years.
- 3.8. A conference was not requested in relation to the draft determination.
- 3.9. A summary of the submissions received by the ACCC from AAT and interested parties in response to the draft determination follows.

### **AAT**

3.10. AAT submits that:

- a longer term of authorisation of at least 10 years should be granted to enable AAT to negotiate lease extensions and secure finance for capital improvements at some of its terminals
- the authorisation should extend to future parties where there is no material change in circumstances
- to the extent a dispute resolution process is required, it should only be available to parties who contract with AAT or seek to contract with AAT
- the dispute resolution process should be limited to disputes about terminal access and non-discrimination
- the dispute resolution process should only apply at ports where there are no alternative suppliers of automotive terminal services
- the dispute resolution process should only apply to disputes arising after the date of the authorisation
- to the extent there are concerns about alleged unreasonably high prices, such concerns have and can in the future be dealt with by way of price monitoring by port authorities
- the dispute resolution process should be streamlined and simplified to maximise its effectiveness and minimise the cost and management time for all parties.
- the auditing provisions, which are complex, multilayered and potentially time-consuming, should be simplified or replaced by a price monitoring regime proposed by AAT
- there are a number of factual errors in the draft determination.

## Interested parties

3.11. **Asiaworld Shipping Services Pty Ltd** submits its general support of the draft determination although it notes that the dispute resolution process must enable the resolution of disputes to be ratified by the contractual parties otherwise any agreement between AAT and the end-user could give rise to further claims. Asiaworld advises it has already begun discussions with AAT on the tariff structure with the aim of altering the tariffs to reflect a more equitable treatment of particular cargo passing through AAT's terminals.

3.12. **Federal Chamber of Automotive Industries** submits its support for the conclusions in the draft determination but considers that the proposed conditions of authorisation require some amendment to more adequately address the public detriment arising from the ongoing operation of AAT. FCAI proposed:

- express conditions of authorisation relating to pricing. FCAI is concerned that the conditions proposed in the draft determination will not ensure that fees charged by AAT reflect the efficient costs of supplying the relevant services.
- an additional condition of authorisation to expressly address the situation where the conditions of authorisation are determined to not be effective at any time throughout the term of the authorisation. FCAI suggests that under such a condition, should the ACCC determine that the conditions are not effective, it can require AAT within 6 months to lodge an acceptable Part IIIA access undertaking in respect of each of its existing automotive terminals.
- that authorisation should not extend to the expansion of an existing AAT terminal's footprint.

FCAI also commented on the likely counterfactual scenario. It considers that the relevant counterfactuals are:

- an individual AAT shareholder selling its 50% joint interest in AAT to an independent third party ((probably not an entity with interests in stevedoring)
- AAT's terminals being sold entirely to a third party or third parties
- the relevant port authorities resuming the lease of respective terminals and operating them on an open-access basis.

3.13. **GM Holden Ltd** submits its support for the FCAI's submission.

3.14. **Honda Australia Pty Ltd** submits its support for the FCAI's submission.

3.15. **Port of Brisbane Corporation Limited** submits that:

- the draft determination did not accurately compare charges levied by port authorities and transport regulators for each of the relevant ports. The differing charging regimes applied at the various ports make direct comparisons of port charges difficult.
- The present shareholding of AAT differs from that when it was formed. The present shareholders include a consortium of, amongst others, shipping lines, companies involved in stevedoring and PDI operators. The interaction of shareholders and their incentive to collude to extract monopoly prices is constrained by, amongst other things, the shipping line shareholders within AAT.

- the reasoning behind the price increases at the Port of Brisbane was not explained appropriately. The increase in the FAC is attributable to increases in rent charged to AAT which is itself directly attributable to an increase in the market value of the land occupied by the terminal.

3.16. **Shipping Australia Limited** submits its support of the draft determination.

3.17. **The Maritime Union of Australia** submits that it is in the interests of the stevedoring industry to require any third party seeking access under the terms of the AAT Stevedore License to maintain labour standards and conditions according to Australian industrial law and industry conventions.

3.18. **Toyota Motor Corporation Australia Limited** submits that it is generally pleased with the dispute resolution process for terminal end-users. Toyota suggests a number of amendments to the proposed dispute resolution process for end-users including:

- making the dispute resolution process available for disputes which arise prior to the date of authorisation
- requiring that matters under dispute not take effect until the dispute is resolved
- prohibiting AAT from discriminating against an end-user on the basis of a dispute being initiated
- shortening the time periods for, and between, each step in the dispute resolution process and providing a mechanism for urgent resolution of relevant disputes
- allowing matters to be escalated to senior managers, rather than just the chief executive officer of the terminal end-user
- requiring that AAT and the terminal end-user agree on the appointment of a mediator and if no agreement can be reached, the mediator will be appointed by the ACCC or an independent third party
- requiring AAT to inform the ACCC of a dispute within 30 days of it being initiated
- allowing commercially sensitive details of disputes to be excluded from the public register
- amending the definition of ‘Terminal End User’ to specifically include the FCAI so that it can initiate a dispute on behalf of car importers and exporters and clarifying the definition of ‘Terminal End-user dispute’
- requiring that the terminal end-user dispute resolution process override other processes available as a consequence of AAT’s agreements with port authorities.
- requiring that the outcome of any dispute resolution is binding on AAT as well as its related parties in the supply chain between AAT and end-users.

3.19. The views of AAT and interested parties are further outlined in the ACCC’s evaluation of AAT’s joint venture arrangements in Chapter 4 of this determination. Copies of public submissions are available from the ACCC website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)).

## 4. ACCC evaluation

4.1. The ACCC's evaluation of AAT's joint venture arrangements is in accordance with tests found in:

- section 90(8) of the Act which states that the ACCC shall not authorise an exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the provision would result or be likely to result in such a benefit to the public that the contract, arrangement or understanding should be authorised
- section 90(7) of the Act which states that the ACCC shall not authorise a provision of a contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
  - the provision of the contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the contract or arrangement was made and the provision concerned was given effect to
- section 90(5B) of the Act which states that the ACCC shall not authorise a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
  - the provision has resulted or is likely to result, in a benefit to the public and
  - that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

4.2. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

### The market

4.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

#### Product market/s

4.4. The majority of cargo handled at AAT's terminals is automotive and general cargo. Some containerised cargo is able to be received at AAT's terminals at the Port of Bell Bay and the Port of Brisbane, however, dedicated container terminals handle the majority of containers which pass through Australia's major ports.

4.5. AAT submits that it develops and operates terminal facilities and provides related services to stevedores for the loading and unloading of automotive and general cargo. This is within a broader market for terminal services. Automotive and general cargo stevedoring are provided within a broader market for stevedoring services.

4.6. The characteristics of the supply of automotive terminal services, general cargo terminal services and container terminal services are considered below.

### ***Automotive***

- 4.7. Automotive cargo is generally carried on special purpose vessels which enable the vehicles to be driven directly on to, or off, the ship. Terminals that can accommodate such vessels generally include a berth with sufficient strength to handle automotive cargo and an area adjacent to the wharf which is large enough to securely accommodate large volumes of motor vehicles.
- 4.8. Automotive terminals can either be dedicated to the handling of motor vehicles or they can be mixed cargo terminals which also accommodate the loading and unloading and temporary storage of general cargo.
- 4.9. The ACCC understands that automotive terminals are not generally suitable for stevedoring containers without significant investment in expanding and strengthening the terminal area, strengthening the wharf and acquiring relevant cranes and other machinery.
- 4.10. Further, automotive cargo can not be handled at all general cargo terminals.

### ***General cargo***

- 4.11. General cargo includes bulk cargo, such as coal and grain, and break-bulk cargo, which is cargo that is generally loaded on and off ships one piece or bundle at a time (such as timber, steel or large machinery parts). AAT's terminals can receive break-bulk cargo but not bulk cargo.
- 4.12. General cargo is likely to require specialised mechanical equipment for it to be unloaded from, or loaded on to, vessels.
- 4.13. Vessels carrying general cargo have different berthing and stevedoring requirements to vessels carrying wheeled vehicles. Some general cargo terminals may be able to accommodate automotive cargo.

### ***Containers***

- 4.14. Some freight, such as manufactured goods, paper, electrical equipment and furniture, is transported in shipping containers. Container terminals require large marshalling areas and specialised gantry cranes for the lifting of containerised cargo on and off ships.<sup>4</sup> Container terminals do not provide undercover storage which is often a requirement for general cargo such as some steel and timber products.
- 4.15. Interested parties including Asiaworld, SAL and Swire Shipping suggest that container terminals are not able to handle automotive or general cargo.

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<sup>4</sup> Essential Services Commission, *Review of port planning: final report*, December 2007.

## **Geographic markets**

- 4.16. AAT's automotive and general cargo terminals are located at Port Adelaide, Port of Brisbane, Port Kembla, Port of Melbourne and Port of Bell Bay.
- 4.17. Generally, there is little demand or supply side substitutability between automotive and general cargo terminals located in different ports. Shipping lines carrying motor vehicles and general cargo for import and export generally stop at multiple Australian ports. This is because distances between ports and the cost of land transport results in cargo passing through the port closest to the point of production or consumption. This suggests that the geographic dimension of the relevant markets is regional.
- 4.18. AAT submits that its terminals operate within the following regions: Brisbane, Sydney, Melbourne, Adelaide and Launceston.
- 4.19. Interested party submissions tend to support the view that the relevant geographic markets are regional as suggested by AAT.

## **Conclusion on markets**

- 4.20. For the purposes of assessing AAT's applications for authorisation, the ACCC considers the relevant areas of competition affected by AAT's joint venture arrangements to be:
- the supply of automotive terminal services on a port by port basis
  - the supply of general cargo terminal services on a port by port basis.
- 4.21. The ACCC considers that barriers to entry to the markets for the supply of automotive and general cargo terminal services are high and include site availability, government regulation, sunk capital costs and economies of scale.
- 4.22. Submissions by AAT and interested parties tend to suggest that competition for the supply of container terminals is not significantly impacted by AAT's applications for authorisation. The ACCC therefore does not consider it necessary for the purpose of these applications to consider whether there is a separate market for the provision of container terminal services.
- 4.23. The ACCC does not consider there is a broader market for terminal services as suggested by AAT. There appears to be limited demand and supply side substitutability in terminal services. As noted, automotive and general cargo importers can not use container terminals and specialist equipment is required to operate container terminals compared to automotive and general cargo terminals.
- 4.24. The ACCC notes the following features of AAT's operations:
- AAT's terminals at Port of Brisbane, Port Kembla and Port of Melbourne receive the majority of motor vehicles imported into Australia.
    - AAT is currently the only supplier of automotive terminal services at the Port of Brisbane and Port Kembla.

- At the Port of Melbourne, an alternative automotive terminal is operated by Patrick Stevedoring at Webb Dock East although there is no choice of stevedore at this facility.<sup>5</sup>
- AAT's terminal at Port Adelaide is primarily an export facility for GM Holden.
- At Port Adelaide, motor vehicle imports are primarily delivered to two common-user berths operated by Flinders Ports.
- General cargo can be received at AAT's terminals at the Port of Bell Bay, Port of Brisbane, Port Kembla and Port Melbourne.
- There are alternative facilities for receiving general cargo at each of the ports at which AAT operates although they may not be suitable for all consignments.
- PBC is currently considering development options for Port West which is located 6 kilometres from the Port of Brisbane. The current strategic position of PBC is for Port West to be a future motor vehicle and general cargo facility in addition to the current facility operated by AAT at Fisherman Islands.
- PKPC is also undertaking development of the Outer Harbour at Port Kembla to provide for new berths.

4.25. The ACCC is mindful that the functions and activities performed at a port are subject to the overall planning and coordination measures undertaken by state governments and port authorities. Port authorities determine the nature and number of terminals to be located within a port, the purpose for which they may be used and select the operator(s) of the terminal(s). They may also seek, through terms in a lease with terminal operators, to place some obligations on those operators regarding facilities access or pricing.

## **The 'future-with-and-without test' or counterfactual**

- 4.26. The ACCC applies the 'future with-and-without test' established by the Australian Competition Tribunal (the Tribunal) to identify and weigh the public benefit and public detriment generated by the arrangements for which authorisation has been sought.<sup>6</sup>
- 4.27. Under this test, the ACCC compares the public benefit and public detriment generated by the arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the 'counterfactual'.
- 4.28. AAT submits that there are three theoretical counterfactuals:
- Operation by vertically integrated automotive/general cargo stevedoring/terminal operating companies on an exclusive basis, meaning that only the terminal operator/stevedoring company supplies stevedoring services at the terminal and the terminal operator/stevedoring company supplies all equipment and machinery (scenario A)

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<sup>5</sup> Port of Melbourne Corporation Customer Handbook 2009-2010, p 17.

<sup>6</sup> Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

- Operation by vertically integrated automotive/general cargo stevedoring companies on a multi-user basis, meaning that multiple stevedores supply stevedoring services at the terminal while the terminal operator supplies all equipment and machinery at the terminal which is used by all stevedores (scenario B) and/or
  - Operation by an independent third party, such as a port authority, which manages a common-user facility for use by all automotive/general cargo stevedores, meaning that multiple stevedores supply stevedoring services at the terminal and each stevedore supplies its own equipment and machinery at the terminal (scenario C).
- 4.29. The ACCC notes that a fourth possible counterfactual is the operation of the terminal by an independent operator (not vertically integrated) on a multi-user basis, meaning that multiple stevedores supply stevedoring services at the terminal while the terminal operator supplies all equipment and machinery at the terminal which is used by all stevedores (scenario D). The difference between scenario D and scenario B is the vertical integration of the terminal operator.
- 4.30. Identifying the most likely counterfactual is difficult given the central role of port authorities in determining the type of terminal services that are available at ports and the providers of those terminal services. Further the likely counterfactual may differ between ports as port authorities undertake development of port precincts to accommodate changes in trade activity.
- 4.31. Scenario A reflects the situation that was in place prior to the establishment of AAT. There were no private terminal operators providing multi-user terminal services in Australia. AAT's shareholders, P&O and Patricks operated as vertically integrated duopolies where they provided terminal services in competition with each other in Sydney, Melbourne, Adelaide and Brisbane. However, the stevedoring services were provided at their respective terminals on an exclusive basis. A vessel that used a Patricks' terminal was required to use Patricks as the stevedore and vice versa. This is still the case at Webb Dock East in Melbourne where Patricks operates an automotive and general cargo terminal and exclusively provides the stevedoring services to shipping lines using this terminal.
- 4.32. The ACCC notes that decisions by various state governments and port authorities suggest it is unlikely that the future without authorisation would see AAT's shareholders separately operating terminals in competition with each other as they did prior to the formation of the joint venture.
- 4.33. In this regard it is relevant to note that:
- The New South Wales state government consolidated and moved automotive imports and exports from Darling Harbour and Port Jackson to Port Kembla. AAT's terminal at Port Kembla commenced operations in May 2007.
  - PBC's decision to locate an automotive terminal at Fisherman Islands led to the closure of the two separate terminals operating at Maritime and Hamilton Wharves. AAT's terminal at Fisherman Islands commenced operations in January 2006.
  - PoMC has been asked by the Victorian Government to undertake detailed planning work in preparation for additional container capacity within the Port of Melbourne. PoMC advise that options being considered may impact on the configuration of the existing automotive terminals operated by AAT and Patrick in the Port of Melbourne.



- 4.34. Further, under scenario A or B a return to multiple providers of automotive and general cargo terminal services within a port is unlikely in the short to medium term because of the scarcity of port land. However, the ACCC notes that development plans are under consideration at Port Kembla, Brisbane and Melbourne which may result in additional terminals being available within those ports.
- 4.35. Scenario C, where port authorities return to actively managing their assets as a common-user facility, seems unlikely. The ACCC notes that in recent times there has been a move by state governments and port authorities, particularly at Brisbane, Melbourne and Port Kembla, to lease port land to private terminal operators rather than manage common-user terminals themselves.<sup>7</sup> This allows the port authority to focus on the overall planning and coordination of the functions and activities of the port rather than engaging in the day to day running of a particular facility. The ACCC notes that common-user facilities run by the relevant port authority operate at Port Adelaide and the Port of Fremantle.
- 4.36. In the absence of authorisation, the ACCC considers it to be unlikely that AAT would continue to supply terminal services. AAT's applications for authorisation were lodged pursuant to an agreement between the ACCC and AAT to settle legal proceedings taken by the ACCC against AAT in relation to alleged breaches of the Act arising in connection with the establishment of the AAT joint venture.
- 4.37. As such, the ACCC considers that in the absence of authorisation, it is more likely that AAT's existing terminals will be operated by one of AAT's individual stevedore shareholders, subject to the requirements of section 50 of the Act if relevant, or by an independent party on an exclusive basis or multi-user basis. Decisions to appoint terminal operators are made by the respective port authority.
- 4.38. In the counterfactual, there could be competition *for the market* between AAT's shareholders and any third party potential terminal operators. This could include competition over price and other terms and conditions of access for stevedores and other terminal users. If the terminal was operated by a party without interests in stevedoring this could improve the potential for new entry and competition in stevedoring.
- 4.39. Under the counterfactual, there will continue to be two automotive terminals in Melbourne.

## Public benefit

- 4.40. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>8</sup>

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<sup>7</sup> PoMC advise that while it agrees with this statement it still manages some common-user berths and terminals in circumstances when it believes that such management provides more efficient risk allocation, better utilisation of infrastructure or improved access.

<sup>8</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

4.41. AAT submits that its operations will deliver the following public benefits:

- the promotion of competition by lowering the barriers to entry for a stevedore and other users wishing to do business at a port where there is an AAT terminal
- the generation of efficiencies with respect to the use of the lowest cost terminal facilities and particularly the generation of:
  - scale and rationalisation efficiencies resulting from the removal of duplicated infrastructure, systems and other inputs into the operation of terminal facilities and the introduction and availability of one pool of machinery and equipment, a centralised IT system and one set of personnel
  - operational efficiencies resulting from AAT's new, superior terminal facilities which provide a single point of cargo discharge, processing and collection, particularly for automotive cargo.

4.42. The ACCC's assessment of the public benefits and likely public benefits from AAT's joint venture arrangements follows.

#### **Reduced barriers to entry for stevedores**

4.43. AAT claims that it facilitates new entry by stevedores because it operates on a multi-user, open access, non-discriminatory basis which enables a new entrant stevedore to do business at an AAT terminal, including on a contract-by-contract basis, without the need to secure a terminal lease and incur capital costs to establish and maintain infrastructure and facilities.

4.44. AAT's stevedore shareholders, Patrick Stevedoring and POAGS, support this view. In particular, Patrick Stevedoring submits that the provision of terminal facilities and related services by AAT reduces a new stevedore's start up costs. POAGS considers that the use of AAT's facilities and equipment by stevedoring companies reduces or eliminates risk, and the associated cost, connected with capital expenditure by stevedores. This provides the opportunity for stevedores to service relatively short term contracts with shipping lines for variable cargo volumes.

4.45. On the other hand, ASA, Asiaworld, FCAI, SAL and Subaru submit that as there has been no new entry by stevedores at any of the terminals operated by AAT this claimed public benefit should not be accepted.

4.46. In response, AAT submits that Illawarra Stevedores operates at its Port Kembla facility. Australian National Stevedores (ANS) is also licensed to operate at AAT's facility at the Port of Bell Bay but does not currently operate there following a route change of the vessel serviced by ANS, from Launceston to Burnie. AAT argues that it has created the potential for entry, and that it is this potential for entry that drives competition.

4.47. While the ACCC considers that the provision of equipment and facilities at AAT's terminals reduces the capital expenditure required of new entrant stevedores, there has been limited new entry by stevedores at AAT's terminals. In particular, new entry has not occurred with respect to automotive stevedoring. The ACCC understands that Illawarra Stevedores handles break-bulk cargo, rather than motor vehicles at AAT's Port Kembla terminal. As such it is difficult to assign much weight to this claimed public benefit.

4.48. Given the dominance of POAGS and Patrick Stevedoring in automotive and general cargo stevedoring, and the lack of new entry with respect to automotive stevedoring, an arrangement that facilitates new entry would result in significant public benefits through the promotion of competition between stevedores. The potential for new entry by stevedores is likely to be enhanced if access to terminals at a range of ports across Australia is possible. This will enable the new entrant stevedore to offer a shipping line stevedoring services at multiple ports.

### **Enhanced efficiencies**

4.49. AAT submits that its multi-user terminals facilitate the efficient operation of port land and eliminate the need for multiple IT systems, personnel and pools of equipment to be in operation at a port. It also considers that its operations offer more efficient logistics by providing a single point of discharge for cargo and collection for car transporters and PDIs, and by enabling importers to process vehicles on-wharf at one terminal, rather than either moving the vehicle from one terminal to another, or requiring two processing facilities.

4.50. Interested parties provide divergent views on whether AAT results in enhanced efficiencies. AAT's stevedore shareholders, POAGS and Patrick Stevedoring, agree that AAT's operations support the efficient use of significant assets such as cranes as well as scarce port resources such as land.

4.51. For example, Patrick Stevedoring submits that AAT's operations facilitate the maximum utilisation of terminal facilities. It considers that AAT's operations enable the more efficient utilisation of wharf and other storage space within the terminal which, when terminal services were supplied individually by Patrick Stevedoring and POAGS, could not be swapped between the parties to take account of peaks and troughs in demand. Improved utilisation rates mean that AAT is able to handle a greater volume of freight per square metre of terminal space and end-consignees receive their cargo faster.

4.52. Patrick Stevedoring also submits that when terminal services were supplied individually by Patrick Stevedoring and POAGS, it was not uncommon for vessels to be in a queue to berth at one terminal while the berth at the other terminal lay empty. AAT's operations address this problem by providing multiple berths and the ability to allocate berths without regard to whether the relevant stevedore is Patrick Stevedoring or POAGS or another party. Patrick Stevedoring considers that this has enabled AAT to offer reduced waiting times for vessels and facilitate a more efficient schedule for shipping lines through improved turnaround times.

4.53. PKPC noted that the arrangements in place at Port Kembla reduce the need for resource duplication.

4.54. However, Asiaworld, FCAI, SAL and Swire Shipping do not consider that AAT's operations generate efficiencies. In particular, Swire Shipping and SAL do not accept that one pool of machinery and one pool of receipt and delivery personnel have produced a benefit different to that which could have been achieved through stevedores providing the same service at a common-user facility. Asiaworld noted that the consolidation of terminals at the Port of Brisbane resulted in a reduction in the number of available berths which has led to inefficiencies.

- 4.55. As noted previously, the ACCC understands that port authorities are moving away from operating common-user facilities. In the absence of authorisation, the ACCC considers it more likely that AAT's terminals will be operated by one of AAT's individual stevedore shareholders or another party on an exclusive or multi-user basis rather than by the port authorities as common-user terminals.
- 4.56. The ACCC accepts that efficiencies arise from the consolidation and operation of a single terminal at a port, if that terminal is of sufficient size and adequately equipped to deal with the volume of cargo delivered to the port.<sup>9</sup> In particular, the establishment and operation of a well-designed, well-equipped terminal enables the efficient use of scarce land within the port precinct and reduces the need for significant assets such as cranes and other lifting equipment to be duplicated at another site within the port precinct.
- 4.57. However, the efficiencies associated with the consolidation and operation of a single terminal arise whether the terminal is operated by AAT, its shareholders or another party on an exclusive or multi-user basis.
- 4.58. There are likely to be efficiencies for shipping lines from dealing with a single national stevedore. Terminals operated on a multi-user basis, by AAT or another party, provide this opportunity. These efficiencies would not be achieved if AAT's terminals were operated by its shareholders or other parties on an exclusive basis, since this would likely result in a different (single) stevedore operating in each port.

### **ACCC conclusion on public benefit**

- 4.59. Given the counterfactual situation where AAT's existing terminals will be operated by one of AAT's individual stevedore shareholders or by an independent party on an exclusive basis or multi-user basis, the ACCC considers that the benefits arising from AAT's joint venture arrangements are limited.

### **Public detriment**

- 4.60. Public detriment is not defined in the Act but the Tribunal has given the concept a wide ambit, including:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>10</sup>
- 4.61. AAT submits that its operations are unlikely to substantially lessen competition and there is no counterfactual scenario that is any more competitive than AAT.
- 4.62. The ACCC considers that the public detriments arising from AAT's joint venture arrangements are associated with:

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<sup>9</sup> The ACCC notes that the volume of cargo received by a terminal is dependent on a variety of factors, including international trade. The dynamics of global supply and demand and the operation of factors such as trade agreements, trade barriers (such as import quotas) and biosecurity (including quarantine) measures are beyond the control of the terminal operator.

<sup>10</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- the price of AAT's services
- the terms and condition of access by stevedores to AAT's terminals
- the inability for importers/exporters to negotiate directly with AAT.

4.63. In the absence of authorisation there could be competition for the market between the joint venture parties and others to provide terminal services. This could include competition over price and other terms and conditions of access for stevedores and other terminal users.

### **Price of AAT's services**

4.64. Public detriment may arise if AAT is able to set prices for its services that are above the efficient costs of providing those services. The ACCC considers that any monopoly provider of terminal services has an incentive to charge monopoly prices for those services. If AAT is able to charge monopoly prices, this may not only affect the sharing of efficiency gains with terminal users, but also potentially the realisation of such efficiencies in the first place.

4.65. AAT's tariff schedules are published on its website. AAT advises that its objective in pricing is to sustain a return after costs, including capital costs. AAT submits that its tariffs at each port are reviewed annually and are set on the basis of:

- predicted cargo volumes
- costs, including lease, equipment and site maintenance costs
- the nature of the cargo (automotive, general cargo or container)
- the services provided at the terminal.

4.66. AAT's charges include the:

- facility access charge (FAC) – a charge for the use of the terminal space and other resources used for the laydown of cargo for export or import, charged to the stevedore if there is no separate agreement with the importer/exporter. These charges are levied per unit or per cubic metre in the case of motor vehicles, per revenue tonne in the case of general cargo and per unit in the case of containers. Included in the FAC is 3 days storage at the terminal. Additional charges are levied each day cargo remains at the terminal after 3 days.
- stevedore access charge (SAC) – a charge for equipment and other resources used for stevedoring cargo, charged to the stevedore.

4.67. The tables below set out AAT's FACs and SACs at each of its terminals since it has operated each terminal.

## AAT's facility access and stevedore access charges

### Port Adelaide (Outer Harbour)

Tariff date (with effect from)	10-May-04	01-Jul-06	01-Apr-08	% increase 04-08
FAC – export vehicle per unit	20.15	20.15	20.15	0
FAC – import vehicle per m <sup>3</sup>	0.00	0.00	1.35	N/A
SAC – vehicle per unit	7.75	8.25	8.25	6

### Port of Bell Bay

Tariff date (with effect from)	04-Dec-03	01-Jan-05	01-Sep-05	01-Oct-07	01-Jan-09	% increase 03-09
Container lift	38.00	39.00	45.00	49.00	50.00	32
General cargo lift per R/T*	2.00	2.00	2.00	2.20	2.30	15
Minimum charge			2000.00	2100.00	2200.00	(05-09) 10

### Port of Brisbane (Fisherman Islands)

Tariff date (with effect from)	01-Jan-06	01-Oct-07	01-Sep-08	% increase 06-08
FAC – vehicle per m <sup>3</sup>	1.00	1.35	1.85	85
FAC – container per unit	40.00	42.00	63.10	58
FAC – general cargo per R/T*	2.50	3.50	4.85	94
SAC – vehicle per unit	10.20	10.20	10.50	3
SAC – container per unit	25.00	26.00	27.00	8
SAC – general cargo per R/T*	2.50	2.65	2.80	12

### Port Kembla (replaced Glebe Island)

Tariff date (with effect from)	14-May-07	01-Mar-09	% increase 07-09
FAC – vehicle per m <sup>3</sup>	2.20	2.50	14
FAC – container per unit	38.00	40.00	5
FAC – general cargo per R/T*	2.60	3.50	35
SAC – vehicle per unit	10.50	10.90	4
SAC – container per unit	24.00	25.00	4
SAC – general cargo per R/T*	2.60	2.70	4

### Port of Melbourne (Webb Dock West)

Tariff date (with effect from)	01-Jul-05	01-May-08	% increase 05-08
FAC – export vehicle per unit	23.00	25.15	9
FAC – import vehicle per unit	18.75	20.50	9
SAC – vehicle per unit	9.50	9.50	0

### Glebe Island (closed 11/08)

Tariff date (with effect from)	04-Dec-02	01-Jun-05	01-Jul-06	01-Jul-07	% increase 02-07
FAC – vehicle per m <sup>3</sup>	2.10	2.15	2.45	2.50	19
SAC – vehicle per unit	10.00	10.20	10.20	10.20	2

\*R/T refers to revenue tonne.

- 4.68. AAT claims that its formation has generated operating efficiencies, and as noted above, the ACCC accepts the argument that a single terminal operator would usually be able to operate at lower cost than two or more operators in a given port. For any given level of throughput, operational efficiencies should lead to a reduction in operating costs and thus a reduction in charges.
- 4.69. The FCAI is concerned that there is preferential apportionment of the fees such that the SAC increases at a lower rate to the FAC even though it is the stevedore that works on the facility and uses the equipment and services to undertake their stevedoring activities, whereas the imported product merely occupies the facility. In response, AAT has submitted that the SAC has increased much less than the FAC because FAC charges are based on facility costs. Facility costs have increased significantly due to rent increases. AAT also submits that if SAC charges were increased, the stevedore would seek to recover this cost as part of its charges.
- 4.70. The ACCC accepts that a range of factors impact on both AAT's costs and charges, including capital costs and throughput. The ACCC is not in a position to undertake a full audit of AAT's costs through the authorisation process. However, it understands that land rental is reflected in the FAC and these costs are beyond AAT's control and were significantly increased by the PBC in 2008. PBC advises that the rental increases were attributable to increases in the market value of the land which the terminal occupies (as AAT's rent is determined as a percentage of the market value of the land).
- 4.71. AAT's agreements with the port authorities at the Port of Brisbane and Port Kembla include provisions which subject AAT's tariffs to oversight by the port authorities. The PBC and PKPC have advised that they reviewed AAT's recent tariff increases at the Port of Brisbane and Port Kembla. In both cases the port authority concluded that the tariff increases were reasonable and justified.
- 4.72. However, since AAT's pricing is in part made up of costs imposed by the port authority, primarily in the form of rental charges, port authorities may not be in the best position to independently and transparently assess access terms and conditions (including prices). Further, in the event of privatisation of the ports, end-users will have even less protection from tariff increases.
- 4.73. An incentive to set prices at levels higher than could be achieved under effective competition will be present as long as a port has only one terminal operator, whether or not that operator is AAT. As noted previously, port authorities select terminal operators and in doing so, determine the nature of competition with respect to terminal services at the port. A decision by a port authority that, for example, a single automotive terminal is appropriate forecloses the possibility of competition between terminals at the port. However, absent the AAT joint venture, its shareholders could compete for the right to operate the terminal. Competition for the market could involve competition over how they deal with third party stevedores and terminal end-users over price, service and other terms and conditions of access.
- 4.74. The ACCC notes that, in recognition of the competitive consequences of appointing single terminal operators, port authorities may seek to place obligations on the operator regarding facilities access or pricing, for example through lease terms. However, the ACCC notes that the obligations imposed by port authorities vary from port to port.

- 4.75. The ACCC considers that a condition of authorisation that will provide an independent and transparent mechanism for reviewing AAT's proposed price increases at all ports is appropriate.
- 4.76. In the draft determination, the ACCC proposed that AAT's tariffs would be subject to the independent and transparent mechanisms provided through the proposed condition providing access to AAT's terminals by stevedores and the proposed condition establishing the dispute resolution process for terminal users.
- 4.77. Following the draft determination, AAT expressed concern that the dispute resolution process as a mechanism to deal with price disputes from terminal end-users will be numerous, costly and administratively burdensome to deal with. AAT proposed that, as an alternative, any increases to its prices be subject to oversight by port authorities. Some interested parties expressed the view that, while the dispute resolution process would enhance the transparency of AAT's pricing decisions, the process was reactive only.
- 4.78. Interested parties have suggested that review of AAT's tariffs should be performed by a party independent of AAT and the port authorities and involve consultation with terminal users.
- 4.79. The ACCC considers that a condition of authorisation requiring independent review of AAT's price increases for charges incurred by terminal end-users (particularly the FAC) will provide a transparent mechanism for reviewing AAT's prices to terminal end-users. In broad terms, the price review condition will operate as follows:
- AAT is required to provide all relevant parties (including terminal users) with 60 business days notice of a proposed price increase
  - The parties have 15 business days to lodge an objection to the proposed price increase with an independent price expert.
  - The independent price expert will assess the proposed price increase, having regard to a range of pricing principles and with the ability to obtain information from AAT and relevant parties.
  - The independent price expert may have regard to the current or base price when considering whether a proposed price increase is reasonable and justified.
  - If the independent price expert determines that the proposed price increase is not reasonable and justified, he or she may impose a lesser price increase or no price increase. Alternatively, if the independent price expert determines that the proposed price increase is reasonable and justified, he or she will allow the proposed price increase to take effect.
  - The determination of the independent price expert must be made within the 60 business day period and is final and binding on AAT. The independent price expert will be approved by the ACCC prior to his or her appointment.
  - Terminal end-users may negotiate alternative tariffs directly with AAT as is currently the case.
- 4.80. The condition providing access to AAT's terminals by stevedores also provides a transparent process to enable AAT's pricing (particularly the SAC) to be assessed in



accordance with the interests of all parties, but also the public interest (including the interest in having competition in markets).

### **Terms and conditions of access by stevedores to AAT's terminals**

4.81. As a supplier of terminal services, AAT's direct customers are stevedores. AAT's shareholders are the only national stevedoring businesses in Australia. Public detriment could arise should AAT deny access to its terminals to stevedores in competition with its shareholders. While this may not be an outright refusal to grant access, AAT may discourage new entry through price and non-price conditions of access.

4.82. AAT advises that its terminals are operated on a non-discriminatory, multi-user, open-access basis and that there are measures in place to ensure that these operating principles are applied, without exception. These measures include:

- A standard, published, stevedore license application process. Any stevedore wishing to do business at an AAT terminal may do so subject to obtaining a stevedoring license with AAT. AAT's stevedore license provides that AAT may not discriminate between stevedores using AAT's facility. It also provides that access under the license is non-exclusive, meaning that other stevedores may access the facility concurrently. In order to qualify for a stevedore license, the stevedore must complete an application form and meet certain insurance, credit rating and occupational health and safety requirements.
- A standard process for third parties other than stevedores, such as crane operators, wanting access to an AAT terminal. Such parties are required to enter into a contractor safety agreement which addresses insurance, job safety, environmental and occupational health and safety requirements.
- Procedures for the protection of confidential information of AAT's stevedore customers from disclosure to the shareholders or board of AAT, or any other third party.
- Requirements within AAT's agreements with some port authorities to provide open access on a non-discriminatory basis. AAT's lease and related agreements with the PKPC, PBC and Tasports impose obligations on AAT to ensure that AAT provides open access on a non-discriminatory basis. AAT's failure to comply with these obligations could ultimately result in the termination of its agreement with the port authority.
  - At the Port of Bell Bay, AAT is required to allow third parties access to AAT terminal when directed to do so by Tasports.
  - At the Port of Brisbane, AAT is required to:
    - allow qualified stevedores and PDI operators access subject to payment of relevant charges and compliance with stevedore access terms
    - advise PBC prior to publishing general access terms and stevedore access terms
    - provide PBC with 14 days written notice if there are any changes to general access terms
    - obtain prior written consent from PBC before changing stevedore access terms

- impose access terms that are ‘reasonable in light of all relevant factors’
    - meet with PBC annually to discuss general access terms and stevedore access terms
    - not unfairly discriminate between different users
    - submit any dispute between AAT and PBC in relation to provisions of the general access terms or stevedore access terms to an appropriate qualified expert for determination.
  - At Port Kembla, AAT is required to process all third party operator applications in an efficient and expeditious manner that does not discriminate and allows those parties to access the premises on the terms set out in the relevant terms/licenses.
- Provisions within AAT’s agreements with some port authorities which provide some oversight of AAT’s charges.
  - At the Port of Brisbane, the Management Agreement between AAT and PBC requires that:
    - AAT advise PBC prior to publishing the fees to be imposed on users of the wharves, including stevedores and PDI operators (known as ‘user charges’)
    - AAT provide PBC 14 days written notice if there are any changes to user charges (other than rental charged to sub-lessees)
    - user charges must not exceed those “that would reasonably be expected to be imposed on users having regard to certain matters....”
    - AAT meet with PBC to discuss user charges annually
    - AAT disclose to PBC’s Chief Executive Officer details of how charges are calculated if the amount of user charges is questioned
    - any dispute between AAT and PBC in relation to user charges be referred to an appropriately qualified expert for determination
    - AAT must not unfairly discriminate between different users.
  - At Port Kembla, the Management Deed between PKPC and AAT requires that:
    - AAT must not discriminate in respect of the fees and charges it levies
    - Any variation by AAT to the tariff schedule requires AAT to provide 30 business days notice to PKPC and each third party user
    - any variation to the tariff schedule must be based on the units of pricing agreed, or otherwise may only be varied based on objective units of measure such as weight, length, time, volume, rate or action, with PKPC’s prior written consent
    - AAT display and provide copies of the amended tariff
    - From 2009, AAT provide PKPC with an audit report after the end of each audit period, which must include information regarding charges levied by AAT.
  - At the Port of Bell Bay, the lease between Tasports and AAT requires AAT to provide Tasports with details of its charges and variations of its charges from time to time. The ACCC has not been provided with further information about

the oversight by Tasports, however, concerns about AAT's tariffs have not been raised in respect of the Port of Bell Bay.

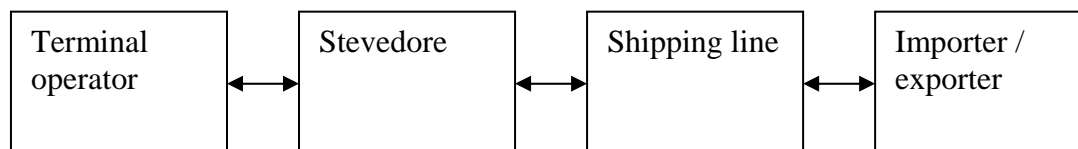
4.83. While there are some measures aimed at providing non-discriminatory open access by stevedores to AAT's terminals, there is currently only one stevedore, other than AAT's shareholders, operating at AAT's terminals (Illawarra Stevedores operating at Port Kembla).<sup>11</sup> The ACCC understands that Illawarra Stevedores deals with break-bulk cargo, and not automotive cargo, which means that there are no automotive stevedores operating at AAT's terminals other than stevedore businesses related to AAT. In this context, the ACCC is concerned that the measures currently in place are not adequate to encourage stevedores to seek access to AAT's terminals. Furthermore, the ACCC notes that independent access arrangements for new entrant stevedores are not available at all of the ports at which AAT operates.

4.84. The provision of access to AAT's terminals at a competitive price will facilitate downstream competition and put pressure on downstream price and non-price terms.

4.85. The condition of authorisation that will provide a mechanism for stevedores other than AAT's shareholders to seek access to AAT's terminals is intended to create a uniform, universally applied process for the provision of access to stevedores to AAT's terminals.

#### **Inability for end-users to negotiate directly with AAT**

4.86. AAT supplies terminal services to stevedores for cargo transported by shipping lines on behalf of importers and exporters. The industry is structured such that there is a contractual relationship between AAT and stevedores, between stevedores and shipping lines and between shipping lines and importers and exporters, as set out in the following diagram.



4.87. Generally, AAT's fees are charged to the stevedores who pass them on to shipping lines which in turn pass them on to importers/exporters.

4.88. As a consequence, importers and exporters tend to have no direct contractual relationship with the supplier of terminal services although the price and quality of the terminal services available at a port has a direct impact on the business of importers and exporters.

4.89. Interested parties including Asiaworld, SAL and Swire Shipping submit that as a result of this structure, it is difficult for shipping lines and importers/exporters to have a commercial interaction with AAT, for example to address issues such as anomalies in

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<sup>11</sup> Australian National Stevedores (ANS) is licensed to operate at AAT's facility at the Port of Bell Bay but does not currently operate there following a route change, from Launceston to Burnie, of the vessel serviced by ANS.

AAT charges or damaged or missing cargo. Interested parties are also concerned that as shareholders in AAT, the stevedores do not have an incentive to dispute issues with AAT on behalf of importers and exporters.

- 4.90. Additionally, FCAI, GM Holden and Toyota submit that there is no ability for end-users, such as importers and exporters, to negotiate or dispute the terms on which AAT's terminal services are provided. They consider that AAT's terminal services are provided on a take it or leave it basis reflecting AAT's market power.
- 4.91. AAT has advised that it will negotiate directly with terminal users on the price and terms of its terminal services and has done so with a variety of parties including importers/exporters, shipping lines and consignees.<sup>12</sup> AAT confirmed that absent this negotiation, its published terms and conditions, including price, apply.
- 4.92. AAT submits that in order to negotiate with a terminal user other than the stevedores, it requires a commitment from that user as to the volume of cargo to be received by AAT's terminal. In this regard, the ACCC notes that ASA has advised that it has recently commenced negotiations with AAT on such things as AAT's charges and standard of service. ASA submits that it is pleased with AAT's willingness to negotiate and contract directly with steel importers on the receipt and delivery component of the inward cargo transaction. ASA accepts that the importing party should be required to advise AAT in advance of the incoming volumes and types of steel cargos. ASA has suggested a condition of authorisation to ensure there is a more accountable and productive relationship with AAT and to ensure there is no misuse of market power.
- 4.93. The ACCC believes it is not unreasonable for negotiations to require the exchange of certain information and some form of commitment as to the volume of cargo to be received by a terminal. However, the ACCC also notes that in many cases, AAT is likely to have the superior bargaining position in such negotiations.
- 4.94. The ACCC considers that an independent and transparent mechanism to provide terminal end-users with the opportunity to discuss concerns, negotiate on and dispute relevant issues with AAT is desirable. The type of issues that may be raised include:
- cargo storage, such as where cargo is stored within a terminal
  - cargo damage, such as how damage which has occurred at AAT's terminal may be avoided in the future
  - cargo collection, such as how the efficient collection of large cargo shipments can be achieved.
- 4.95. As a condition of authorisation, AAT is required to provide a dispute resolution process with provision for mediation and, ultimately, expert determination which can be accessed by end-users of AAT's terminals.
- 4.96. The ACCC notes that there are already some mechanisms available for resolving disputes at certain ports. For example, there are provisions in AAT's agreements with PBC and PKPC which provide terminal users with an avenue to raise concerns about

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<sup>12</sup> AAT provided information to the ACCC to illustrate this claim on a confidential basis.

AAT with the port authority. However, such arrangements are not in place at all the ports at which AAT operates.

- 4.97. The ACCC considers that the dispute resolution process for terminal users will provide a mechanism through which negotiation and if necessary, dispute resolution, is available to all users of AAT's terminal facilities at any port.
- 4.98. In response to the draft determination, interested parties and AAT submitted that outcomes negotiated between AAT and terminal end-users should be ratified by the contractual parties in each case.
- 4.99. The ACCC intends that the dispute resolution process is available to parties which do not have a contract with AAT, but whose businesses are affected by the quality and standard of AAT's terminal services. The ACCC expects that the majority of disputes will be resolved between the parties themselves, without the need for escalation of a dispute.
- 4.100. The ACCC notes that dispute resolution between the parties will involve negotiation and the ACCC expects that the parties to a dispute will work constructively and reasonably to resolve the dispute in good faith. Under the condition, AAT is required to use its best endeavours to ensure outcomes are reflected in contracts with stevedores and shipping lines.
- 4.101. The ACCC does not intend that the dispute resolution process be available to resolve disputes arising under a contract. Contractual disputes should be resolved via the mechanisms available in the contract or at law. The dispute resolution process is not available for disputes about price.
- 4.102. Toyota has submitted that the dispute resolution process should override other procedures available via AAT's lease agreements with some port authorities. Additionally, Toyota considers that the outcome of disputes should bind AAT as well as its related parties in the supply chain between AAT and end-users. In response, the ACCC notes that it has no ability to require that a condition of authorisation override existing contractual arrangements. The question of which dispute resolution procedure takes precedence is ultimately a matter for a court to determine. The ACCC also cannot impose conditions of authorisation on parties that are not parties to the authorisation.
- 4.103. The process provided by the dispute resolution process for terminal users is not intended to replace the role of port authorities' dispute resolution processes or compromise the operation of these existing processes. The process provided by the dispute resolution process for terminal users is intended to allow AAT to operate in a manner which is consistent with its obligations under its agreements with port authorities.

## **ACCC conclusion on public detriment**

- 4.104. The ACCC considers that AAT's joint venture arrangements have the potential to result in significant public detriment.
- 4.105. Public detriment may arise if AAT is able to set prices for its services that are substantially above the efficient costs of providing those services. In some ports, AAT is a monopoly provider of automotive terminal services and has the potential to charge monopoly prices.

- 4.106. Public detriment could also arise should AAT deny or restrict access to its terminals to stevedores in competition with the stevedore businesses related to AAT.
- 4.107. The ACCC notes that terminal end-users consider they have limited ability to negotiate directly with AAT. Importers and exporters do not tend to have a direct contractual relationship with the supplier of terminal services although the price and quality of the services has a direct impact on their businesses. While AAT has advised that it will negotiate directly with terminal users on terms and price of its services, and has done so with a variety of parties, the ACCC considers that AAT does so from a position of strength.

## **Balance of public benefit and detriment**

- 4.108. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, AAT's joint venture arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.109. In the context of applying the net public benefit test at section 90(8)<sup>13</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>14</sup>
- 4.110. The ACCC is concerned that relative to the counterfactual there are limited public benefits and potentially significant detriments from the operation of AAT. The ACCC considers that conditions are appropriate to ensure that the public benefit test is met.

## **Conditions**

- 4.111. The Act allows the ACCC to grant authorisation subject to conditions.<sup>15</sup>
- 4.112. To ensure that AAT's joint venture arrangements will deliver a net public benefit over the period of authorisation the ACCC imposes the conditions contained in Attachment D to this determination. The conditions:
- establish a mechanism for stevedores other than AAT's shareholders to seek access to AAT's terminals. This condition is intended to open the door to third party stevedoring competition with access to AAT's services at regulated non-monopoly price and non-price terms and conditions. It is intended to do this by:
    - requiring an open and non-discriminatory process for the offer of access by AAT to stevedores
    - providing a non-discriminatory approach to pricing and the provision of terminal services by AAT

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<sup>13</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>14</sup> Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

<sup>15</sup> Section 91(3).

- reaching an appropriate balance between the legitimate business interests of AAT, the interests of access seeking stevedores and the public interest
  - providing an efficient and effective dispute resolution process in the event that AAT and the access seeking stevedore are unable to negotiate a mutually acceptable agreement.
  - require independent review of proposals by AAT to increase its prices to terminal users. This condition is intended to provide an opportunity for terminal users to seek the review of AAT's prices by an independent expert whose decision is final and binding on AAT.
  - require AAT to introduce a dispute resolution process available for terminal users for non-price issues. This condition is intended to provide an opportunity for terminal users to raise and resolve issues with AAT where there is no contract with AAT.
- 4.113. In order for the ACCC to monitor the nature of the disputes between AAT and stevedores, or AAT and terminal users, as well as the effectiveness of the conditions in providing mechanisms to resolve disputes, the ACCC requires AAT to report to the ACCC details of all disputes which arise under the stevedore access and dispute resolution conditions. The ACCC is aware that some details may be commercially sensitive and notes that it is able to exclude such information from the public register. However, the ACCC also considers that information required to be provided to the ACCC is general in nature.
- 4.114. As noted previously, the processes provided by the conditions are not intended to compromise the operation of the existing processes or replace the role of port authorities' dispute resolution processes. The processes provided by the conditions are intended to allow AAT to operate in a manner which is consistent with its obligations under its agreements with port authorities. The ACCC would welcome submissions on the potential interaction between the conditions and their interaction with existing processes.
- 4.115. As noted, the conditions of authorisation are contained in Attachment D.

## **Length of authorisation**

- 4.116. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>16</sup> The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 4.117. In the draft determination, the ACCC proposed that authorisation be granted for 5 years.
- 4.118. In response, AAT submits that the proposed authorisation period of 5 years will expire prior to the end of AAT's leases at Fisherman Islands (6 May 2016) and Webb Dock West (31 December 2017). AAT considers that a 5 year authorisation period creates uncertainty and, in an environment where AAT is prepared to invest in new infrastructure to meet demand at Fisherman Islands, makes lease extension negotiations and investment potentially uncommercial. AAT submits that a 10 year authorisation

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<sup>16</sup> Section 91(1).

period is more reasonable for the procurement of the long term funding that is necessary for it to undertake investment.

- 4.119. The ACCC notes concerns from interested parties about a longer period of authorisation with conditions that are untested and therefore a short term of authorisation is more appropriate.
- 4.120. The conditions of authorisation require AAT to report to the ACCC on the nature of disputes between AAT and stevedores, and AAT and terminal users. This will assist the ACCC to monitor the effectiveness of the conditions in providing mechanisms to resolve disputes.
- 4.121. The ACCC may review an authorisation if it is satisfied that:
- the authorisation was granted on evidence or information that was materially false or misleading
  - a condition of authorisation had not been complied with
  - there has been a material change of circumstances since the authorisation was granted. A material change of circumstances is one that has ‘an impact or likely impact upon public benefit and/or detriment’.<sup>17</sup>
- 4.122. The ACCC considers that an authorisation period of 10 years will facilitate lease re-negotiations and AAT’s ability to secure funding for future infrastructure improvements.
- 4.123. On this basis, the ACCC grants conditional authorisation until 31 December 2019.

## **Future parties**

- 4.124. At the time it lodged its applications for authorisation, AAT requested authorisation to extend to future parties to the AAT joint venture.
- 4.125. In the draft determination, the ACCC proposed that authorisation would not extend to future parties to the AAT joint venture arrangements. The ACCC’s intention was that authorisation would not automatically extend to a future shareholder in AAT. The revocation and substitution process is available to deal with changes to parties to the AAT joint venture arrangements and would enable the ACCC to assess the public benefits and detriments from proposed changes in AAT’s ownership.
- 4.126. In response to the draft determination, AAT has advised that there may potentially be changes to the ownership interests in the existing AAT shareholders, namely Plzen Pty Limited and P&O Wharf Management Pty Ltd. In other words, whilst Plzen Pty Limited and P&O Wharf Management Pty Ltd would remain the only shareholders of AAT, the ownership of those corporations may change.
- 4.127. Any change in ownership of Plzen Pty Limited and P&O Wharf Management Pty Ltd may result in a review of the authorisation in circumstances where the ACCC considers that such a change constitutes a material change in circumstances. However, it is not the

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<sup>17</sup> *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997), ATPR 41-593 at 44,212. See also *re 7-Eleven Stores Pty Ltd* (1998), ATPR 41-666 at 41,462.



ACCC's intention that authorisation would not automatically continue to apply in the event of some change in the ownership of Plzen Pty Limited and P&O Wharf Management Pty Ltd not amounting to a material change.

- 4.128. The ACCC does not grant authorisation to extend to future parties to the AAT joint venture arrangements, being shareholders in AAT. Any changes to parties to the joint venture arrangements during the term of this authorisation are not covered by this authorisation.

## **Future terminals**

- 4.129. AAT has sought authorisation for its operations at current and future locations. In the draft determination, the ACCC proposed to grant authorisation for AAT's current operations at its existing terminals. The ACCC considered that on the information currently before it, the ACCC could not be satisfied that any and every possible new terminal operated by AAT will be established and operated in a manner that will deliver a net public benefit such that they should automatically receive legal protection from this authorisation.
- 4.130. In response to the draft determination, FCAI submitted that authorisation should also not apply to any expansion of AAT's existing terminal footprints.
- 4.131. The ACCC notes that the expansion or re-location of AAT's existing terminal facilities is a matter for port authorities in consultation with relevant parties and in accordance with competition principles. With respect to AAT's applications for authorisation, the ACCC is concerned about the detriment associated with AAT's operations at particular ports. The detriment arises from AAT being the only supplier of terminal services at a port, rather than from the size or location of AAT's terminal at the port.
- 4.132. Authorisation is only granted for AAT's current operations at its existing terminals. Authorisation extends to any expansion of AAT's current terminals and to any re-location of a terminal within a port. Authorisation is not granted for any new terminals that AAT may develop from time to time.
- 4.133. Should AAT wish to establish a new terminal at a port where it does not currently operate, it is open to AAT to utilise the authorisation revocation and substitution process to seek a new authorisation to cover the new terminal operations.

## 5. Determination

### The applications

- 5.1. On 10 June 2009 Australian Amalgamated Terminals Pty Limited (AAT) lodged applications for authorisation A91141 and A91142 with the ACCC. On 5 August 2009 AAT lodged two further applications for authorisation, A91181 and A91182, with the ACCC. These additional applications are for conduct that is identical to that sought in applications A91141-42 and were lodged to take account of amendments introduced by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* which commenced on 24 July 2009.
- 5.2. Application A91141 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act to give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 5.3. Application A91142 was made using Form B, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act to give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 5.4. Application A91181 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1A) of the Act to give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of the Act.
- 5.5. Application A91182 was made using Form B, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1A) of the Act to give effect to a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision.
- 5.6. AAT seeks authorisation to:
  - give effect to the joint venture of AAT, established by section 2 of the Shareholders Agreement, together with the other provisions of the Shareholders Agreement and the Constitution of AAT
  - engage in conduct under or pursuant to, and in the fulfilment of, the AAT joint ventureon its own behalf and on behalf of parties to the AAT joint venture and any future parties to the AAT joint venture. In its applications, AAT named P&O Wharf Management Pty Limited and Plzen Pty Limited, the original parties to the AAT joint venture, as parties to the arrangements for which authorisation is sought.

### The net public benefit test

- 5.7. For the reasons outlined in Chapter 4 of this determination, and subject to the conditions below, the ACCC considers that in all the circumstances the arrangements for which

authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.

5.8. Similarly, subject to the conditions below, the ACCC is satisfied that:

- the provisions have resulted or are likely to result, in a benefit to the public and
- that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

## **Conduct for which the ACCC grants authorisation**

5.9. In respect of applications A91141, A91142, A91181 and A91182, the ACCC grants authorisation to AAT, P&O Wharf Management Pty Limited and Plzen Pty Limited to give effect to section 2 of the Shareholders Agreement, together with the other provisions of the Shareholders Agreement and the Constitution of AAT, being provisions that establish and constitute the AAT joint venture until 31 December 2019, but only to the extent that those provisions allow the parties to engage in the following conduct at the Terminals:

- a. the development of infrastructure including berths, wharves, cargo lay down areas, secure perimeters, offices, amenities and internal road systems, to support cargo handling and the maintenance of equipment within a terminal (facility development and maintenance);
- b. the provision of space at a terminal, known as the cargo lay down area, where cargo may be placed immediately before it is loaded on a vessel, or immediately after it is discharged from a vessel (facility access);
- c. the provision of access to a terminal to licensed stevedores, to enable the loading of cargo onto vessels, or the unloading of cargo from vessels, including the provision of all equipment (excluding loose tools and specialised equipment), employee amenities and service vehicles (stevedore access);
- d. the provision to terminal users of:
  - i. a cargo management information technology system, which is linked to the Australian Customs Service and the Australian Quarantine and Inspection Service, and
  - ii. a communications system (IT systems);
- e. the provision to terminal users of clerical and manual processing services for the proper loading and unloading of cargo to or from road, water or rail transport (receival and delivery services);
- f. the provision to terminal users of storage services at terminals for cargo that remains at a terminal beyond the timeframe allowed under the terms on which terminal access is provided (storage services);
- g. the provision to terminal users of mobile machinery and equipment such as cranes, fork trucks and trailers;
- h. the provision to terminal users of ancillary services such as quarantine cleaning, customs clearance message receipt and unpacking of general cargo from a ship's cargo trailers; and

- i. conduct that is incidental or necessary to the conduct referred to in the preceding paragraphs.

5.10. For the purposes of paragraph 5.9, 'Terminals' means the terminals presently operated by AAT and located at Port Adelaide, Port of Bell Bay, Port of Brisbane, Port Kembla and Port of Melbourne.

5.11. The authorisation is subject to the conditions contained in Attachment D to this determination.

5.12. This determination is made on 3 December 2009.

5.13. The attachments to this determination are part of the determination.

### **Conduct not authorised**

5.14. The authorisation does not include the addition of future parties to the AAT joint venture or to new terminals established and/or operated by AAT.

### **Date authorisation comes into effect**

5.15. This determination is made on 3 December 2009. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 25 December 2009.

## **Attachment A — the authorisation process**

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

## Attachment B — chronology of ACCC assessment for applications A91141-2 & A91181-2

The following table provides a chronology of significant dates in the consideration of the application by AAT.

DATE	ACTION
10 June 2009	Applications for authorisation A91141 and A91142 lodged with the ACCC.
8 July 2009	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
5 August 2009	Applications for authorisation A91181 and A91182 lodged with the ACCC to take account of amendments introduced by the <i>Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009</i> .
14 September 2009	Final submission received from AAT in response to interested party submissions.
16 September 2009	Final submission received from an interested party concerning AAT's applications for authorisation.
19 October 2009	Draft determination issued.
3 December 2009	Determination issued.

# Attachment C — the tests for authorisation and other relevant provisions of the Act

## Trade Practices Act 1974

### Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
- (a) make a determination in writing granting such authorization as it considers appropriate; or
  - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.
- Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.
- Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
- (a) that the provision would result, or be likely to result, in a benefit to the public; and
  - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
    - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
    - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
- (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
  - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
  - (b) the proposed covenant were given, and were complied with; or
  - (c) the proposed conduct were engaged in;
- as the case may be.

- (7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.
- (8) The Commission shall not:
- (a) make a determination granting:
- (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
  - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
  - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
  - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;
- unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or
- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.
- (9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.
- (9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):
- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
- (i) a significant increase in the real value of exports;
  - (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.



## Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.<sup>18</sup>

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>19</sup>

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

## Conditions

The Act allows the ACCC to grant authorisation subject to conditions.<sup>20</sup>

## Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future<sup>21</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>22</sup>

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<sup>18</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>19</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

<sup>20</sup> Section 91(3).

<sup>21</sup> Section 88(10).

<sup>22</sup> Section 88(6).

## **Six- month time limit**

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>23</sup>. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

## **Minor variation**

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.<sup>24</sup> The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.<sup>25</sup>

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

## **Revocation; revocation and substitution**

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.<sup>26</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>27</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>28</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>29</sup>

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<sup>23</sup> Section 90(10A)

<sup>24</sup> Subsection 91A(1)

<sup>25</sup> Subsection 87ZD(1).

<sup>26</sup> Subsection 91B(1)

<sup>27</sup> Subsection 91B(3)

<sup>28</sup> Subsection 91C(1)

<sup>29</sup> Subsection 91C(3)

## **Attachment D — the conditions of authorisation**

### **1. ACCESS CONDITIONS**

#### **1.1 AAT to offer access**

AAT must offer to supply an Applicant such Port Terminal Services as required by the Applicant on terms no less favourable than what are offered to any Stevedore currently obtaining those Port Terminal Services, except to the extent that the costs of providing access to other Applicants or Stevedores is higher.

#### **1.2 AAT to publish Stevedore Licence Application Form, tariffs and terms**

- (a) AAT must publish on AAT's website:
  - (i) the Stevedore Licence Application Form;
  - (ii) current reference tariffs (**Reference Tariffs**) for each Port Terminal Service; and
  - (iii) the terms and conditions on which Port Terminal Services are offered (the **Terms**).
- (b) AAT must give the ACCC copies of the Stevedore Licence Application Form, the Reference Tariffs and the Terms within 5 Business Days of publication.
- (c) Clause 1.2(b) does not prevent AAT and any Applicant from negotiating non-standard tariffs and terms for Port Terminal Services.
- (d) Nothing in this clause 1.2 prevents AAT from:
  - (i) varying the Stevedore Licence Application Form, Reference Tariffs and the Terms from time to time; or
  - (ii) publishing different Stevedore Licence Application Forms, Reference Prices or Terms for each Port Terminal.

#### **1.3 Non-discriminatory access**

- (a) In providing access to Port Terminal Services, AAT must not discriminate between different Applicants or Stevedores in favour of its Related Bodies Corporate, except to the extent that the costs of providing access to other Applicants or Stevedores is higher.
- (b) During the term of this Authorisation, the ACCC may by notice in writing require AAT to appoint an Auditor to provide a report in relation to AAT's compliance with clause 1.3(a). If the ACCC requires AAT to appoint an Auditor, the provisions of clause 1.5 apply.

- (c) The ACCC may authorise a member of the ACCC to exercise any powers under clause 1.3(b) on behalf of the ACCC.

#### **1.4 No hindering access**

- (a) AAT, or its Related Bodies Corporate, must not engage in conduct for the purpose of preventing or hindering access to the Port Terminal Services by any Applicant or Stevedore in the exercise of a right to access to the Port Terminal Services.
- (b) A person may be taken to have engaged in conduct for the purpose referred to in clause 1.4(a) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This clause 1.4(b) does not limit the manner in which the purpose of a person may be established for the purposes of clause 1.4(a).
- (c) During the term of this Authorisation, the ACCC may by notice in writing require AAT to appoint an Auditor to provide a report in relation to AAT's compliance with clause 1.4(a). If the ACCC requires AAT to appoint an Auditor, the provisions of clause 1.5 apply.
- (d) The ACCC may authorise a member of the ACCC to exercise any powers under clause 1.4(c) on behalf of the ACCC.

#### **1.5 Audit of access arrangements**

##### **1.5.1 Appointment of Auditor**

- (a) If, at any time during the term of this Authorisation, the ACCC issues a notice under clause 1.3(b) and/or 1.4(c), AAT must, within 5 Business Days, advise the ACCC in writing of the identity of the person that it proposes to appoint as the Auditor (**Proposed Auditor**), together with such information or documents (including the proposed terms of engagement) that the ACCC requires to assess the skill and independence of the Auditor. For the avoidance of doubt, the ACCC may issue a notice under clause 1.3(b) and clause 1.4(c) at the same time and one Auditor may provide one report in relation to AAT's compliance with clauses 1.3(a) and 1.4(a).
- (b) The Proposed Auditor must be a person who has the relevant skill to perform the role of Auditor and is independent of AAT and its Related Bodies Corporate. Without limitation, an Auditor is not independent if he or she:
  - (i) is a current employee or officer of AAT or its Related Bodies Corporate;
  - (ii) has been an employee or officer of AAT or its Related Bodies Corporate in the past 3 years;
  - (iii) in the opinion of the ACCC, holds an interest in AAT or its Related Bodies Corporate;

- (iv) has within the past 3 years been a professional adviser to AAT or its Related Bodies Corporate;
  - (v) has a contractual relationship, or is an employee or contractor of a firm or company that has a contractual relationship, with AAT or its Related Bodies Corporate;
  - (vi) is a supplier, or is an employee or contractor of a firm or company that is a supplier, of AAT or its Related Bodies Corporate; or
  - (vii) is a material customer, or is an employee or contractor of a firm or company that is a material customer, of AAT or its Related Bodies Corporate.
- (c) If, within 5 Business Days of receipt by the ACCC of the information or documents from AAT referred to clause 1.5.1(a), or such further period as required by the ACCC and notified to AAT:
- (i) the ACCC does not object to the Proposed Auditor, AAT must appoint the Proposed Auditor as Auditor as soon as practicable thereafter (but in any event within 5 Business Days) on terms approved by the ACCC and consistent with the performance by the Auditor of its functions under this Authorisation and forward to the ACCC a copy of the executed terms of appointment of the Auditor; or
  - (ii) the ACCC does object to a Proposed Auditor, AAT must as soon as practicable (but in any event within 5 Business Days) appoint a person identified by the ACCC at its absolute discretion as the Auditor on terms approved by the ACCC and consistent with the performance by the Auditor of its functions under this Authorisation.

### **1.5.2 Scope of the audit**

- (a) AAT must, within 30 Business Days of the date on which the Auditor is appointed in accordance with clause 1.5.1(c), provide to the ACCC a written report from the Auditor in relation to AAT's compliance with its obligations under clause 1.3(a) and/or clause 1.4(a).
- (b) AAT must provide to the Auditor any information or documents requested by the Auditor that the Auditor reasonably considers necessary and relevant for fulfilling its obligations in relation to compliance by AAT with its obligations under clause 1.3(a) and/or 1.4(a) or for reporting to or otherwise advising the ACCC.
- (c) AAT must procure the Auditor to provide information or documents or access to the ACCC, as required by the ACCC to ensure compliance with the Undertaking.
- (d) In complying with the obligations in this clause 1.5.2, AAT must:

- (i) take any steps directed by the ACCC in relation to any matter arising from the report of the Auditor referred to in clause 1.5.2(a) within 10 Business Days of being so directed (or such longer period agreed with the ACCC);
  - (ii) direct its personnel, including directors, managers, officers, employees and agents to act in accordance with the obligations set out in this clause 1.5.2 and ensure such personnel are aware of the Auditor and its role; and
  - (iii) provide access, information and/or documents required by the Auditor.
- (e) AAT must maintain and fund the Auditor and must indemnify the Auditor for reasonable expenses and any loss, claim or damage arising from the proper performance by the Auditor of functions required to be performed by the Auditor under this Authorisation.

## **1.6 Negotiating for access**

- (a) AAT must negotiate with an Applicant for the provision of access to Port Terminal Services in good faith. Applicants must also negotiate with AAT in relation to the provision of access to Port Terminal Services in good faith.
- (b) Applications for access to the Port Terminal Services are to be submitted to AAT in the form of a Stevedoring Licence Application Form.
- (c) Upon receiving a Stevedoring Licence Application Form from an Applicant, AAT must acknowledge receipt of the Stevedoring Licence Application Form in writing to the Applicant within 5 Business Days.
- (d) If an Applicant believes that the Stevedore Licence Application Form has the effect of reasonably preventing the Applicant from making an application for the provision of Port Terminal Services, the Applicant may give AAT a notice under clause 1.7.1 and the provisions of clause 1.7 will apply.

## **1.7 Resolution of Access Disputes**

### **1.7.1 Access Disputes**

- (a) Any Access Dispute will, unless otherwise expressly agreed to the contrary by both parties, be resolved in accordance with this clause 1.7. Either party may give to the other party to the Access Dispute notice in writing (**Dispute Notice**) specifying the Access Dispute and requiring it to be dealt with in the manner set out in this clause 1.7. AAT and the Applicant must act in good faith to seek to resolve the Access Dispute in accordance with this clause 1.7.
- (b) Notwithstanding any agreement between AAT and a Stevedore relating to Port Terminal Services, an Applicant or Stevedore may raise an Access Dispute in accordance with this clause 1.7. For the avoidance of doubt, an Access Dispute can be raised in relation to discrimination and/or the hindering of access to Port Terminal Services.

### 1.7.2 Negotiation

Within 15 Business Days of a party giving the other a Dispute Notice, senior representatives from each party will meet and use reasonable endeavours acting in good faith to resolve the Access Dispute by joint discussions.

### 1.7.3 Mediation

- (a) If the Access Dispute is not resolved in accordance with clause 1.7.2 within 15 Business Days of the date the Dispute Notice is received by the recipient, then:
  - (i) if the parties agree, they will attempt to resolve the Access Dispute by mediation pursuant to this clause 1.7.3; or
  - (ii) if the parties do not wish to resolve the Access Dispute by mediation, either party may by notice in writing to the other (and without limiting clause 1.7.4(a)) refer the Access Dispute to be determined by arbitration under clause 1.7.4.
- (b) If the parties agree to attempt to resolve the Access Dispute by mediation, the Access Dispute will be referred to the chief executive officers of each party, or their representatives, who will attempt to resolve the Access Dispute, including by informal mediation.
- (c) If the Access Dispute is not resolved within 15 Business Days after being referred to the chief executive officers or their representatives, under clause 1.6.3(b) (or such longer period as is agreed between the chief executive officers or their representatives), the Access Dispute will be referred to formal mediation in the State in which the Port Terminal Services to which the Applicant is seeking access are located. If the Applicant is seeking access to Port Terminal Services in more than one State, then the Access Dispute will be referred to formal mediation in the State of the Applicant's choosing.
- (d) An Access Dispute referred to mediation in accordance with clause 1.7.3(c) will be mediated by a single mediator appointed by agreement of the parties or, if they fail to agree within 10 Business Days, a mediator appointed by the President of the Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**) in the State in which the mediation will be conducted acting on the request of either party.
- (e) Unless the parties agree otherwise:
  - (i) the mediation, by either a mediator appointed by the parties or a mediator appointed by the President of the Chapter of IAMA in the State in which the mediation will be conducted, will be conducted under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner);

- (ii) each party may appoint a person, including a legally qualified person, to represent it or assist it in the mediation;
  - (iii) each party will bear its own costs relating to the preparation for and attendance at the mediation;
  - (iv) the costs of the mediator will be borne equally by the parties;
  - (v) AAT and the Applicant or Stevedore will use reasonable endeavours to ensure that the mediation is completed within 30 Business Days from the date the mediator is appointed, or such longer period as agreed between the parties.
- (f) The parties will execute a deed to indemnify the mediator against any loss or damage incurred by the mediator in the course of carrying out his or her functions in accordance with his or her terms of appointment.

#### **1.7.4 Referral to arbitration**

- (a) A party may, by notice in writing to the other (**Arbitration Notice**), refer an Access Dispute to arbitration in accordance with this clause 1.7.4 at any time following the issue of a Dispute Notice. The Arbitration Notice must specify:
- (i) the nature of the Access Dispute;
  - (ii) the matters in respect of which the party is seeking arbitration;
  - (iii) the contact details of the person issuing the Dispute Notice (and, if that person is AAT, the contact details of the party to whom the Dispute Notice is issued); and
  - (iv) whether the parties have agreed, or are likely to agree, upon a private arbitrator if the ACCC does not arbitrate the Access Dispute.
- (b) If the Access Dispute referred to in the Arbitration Notice is already the subject of mediation in accordance with clause 1.7.3, that mediation will cease immediately.
- (c) Any arbitration will be conducted in accordance with clauses 1.7.5 to 1.7.7.

#### **1.7.5 Appointment of arbitrator**

- (a) If an Access Dispute is referred to arbitration in accordance with clause 1.7.4, AAT must, within 2 Business Days, provide the ACCC with a copy of the relevant Dispute Notice and Arbitration Notice. All correspondence with the ACCC under this clause 1.7 must be addressed to:



The General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
Canberra ACT 2600  
Fax: (02) 6243 1211

- (b) If within 10 Business Days of receiving notice in accordance with clause 1.7.5(a) the ACCC advises AAT and any other party to the Access Dispute in writing that it wishes to be the arbitrator in respect of the Access Dispute, then the ACCC will be appointed to arbitrate the dispute and the arbitration will be conducted in accordance with clause 1.7.6.
- (c) If the ACCC:
  - (i) advises AAT and any other party to the Access Dispute in writing within 10 Business Days of receiving notice in accordance with clause 1.7.5(b) that it does not wish to be the arbitrator in respect of the Access Dispute; or
  - (ii) does not advise AAT and any other party to the Access Dispute in writing within 10 Business Days of receiving notice in accordance with clause 1.7.5(b) that it wishes to be the arbitrator in respect of the Access Dispute,then, subject to clause 1.7.5(e) the arbitration will be conducted by an arbitrator appointed by the agreement of the parties to the Access Dispute.
- (d) If clause 1.7.5(c) applies and the parties fail to agree an arbitrator within 10 Business Days of the expiry of the 10 Business Days referred to in clause 1.7.5(c)(i) or (ii), or such longer period as may be agreed by the parties, then either party may request the ACCC to appoint an arbitrator. AAT must notify the ACCC of the identity of the arbitrator within 2 Business Days of the parties agreeing on the arbitrator or the ACCC appointing the arbitrator (as the case requires).
- (e) The ACCC may authorise a member of the ACCC to make a decision or to exercise any powers under clauses 1.7.5(b), (c) or (d) on behalf of the ACCC.

#### **1.7.6 Arbitration procedure if the ACCC is the arbitrator**

- (a) If the ACCC is the arbitrator, then except as set out in clause 1.7.6(b), the arbitration will be conducted in accordance with the procedures, and the ACCC will have the powers, set out in Subdivisions C-E and G of Division 3 of Part IIIA of the Act and any references to a “final determination” or “interim determination” in those Subdivisions will be taken to mean a final or interim determination made by the ACCC under clause 1.7.6.
- (b) In any arbitration conducted by the ACCC under this Authorisation:

- (i) the ACCC may not make a determination which would have any of the effects described in section 44W of the Act;
  - (ii) the ACCC must have regard to this Authorisation;
  - (iii) section 44ZG(5), and the penalties referred to in sections 44ZG(2), 44ZI, 44ZJ and 44ZK, of the Act will not apply;
  - (vv) sections 44ZO(1)-(4) of the Act will not apply. A determination or direction of the ACCC will be final and binding, subject to any rights of review, and will have effect on and from the date specified by the ACCC. Any or all of the provisions of a final determination may be expressed to apply from a specified day which is earlier than the day on which it takes effect.
- (c) Other than in circumstances where the determination or direction is the subject of review by a court of law, if an Applicant or Stevedore does not comply with a determination or direction of the ACCC, AAT will not be obliged to continue negotiations for the provision of access to Port Terminal Services for that Applicant.
  - (d) Other than where the determination or direction is the subject of review by a court of law, AAT will comply with the determination or directions of the ACCC.
  - (e) AAT must provide to the ACCC a copy of any previous arbitration award conducted under this clause 1.7 if requested to do so by the ACCC.

#### **1.7.7 Arbitration procedure if the arbitrator is not the ACCC**

- (a) If the arbitrator of an Access Dispute is not the ACCC, the parties may agree on the terms on which the arbitration will be conducted.
- (b) If the parties are unable to reach agreement on the terms on which the arbitration will be conducted within 10 Business Days of the arbitrator being appointed, the arbitration will be conducted in accordance with the following procedures:
  - (i) the arbitrator will not be required to proceed with the arbitration unless and until the party that issued the Arbitration Notice has agreed to pay the arbitrator's and other costs as determined in accordance with clause 1.7.7(j) and provided any indemnity as required in accordance with clause 1.7.7(l);
  - (ii) unless the parties to the Access Dispute agree otherwise, the arbitration will be conducted in private;
  - (iii) a party may appoint a person, including a legally qualified person, to represent it or assist in the arbitration;

- (iv) the arbitrator must observe the rules of natural justice, but is not bound by technicalities, legal forms or rules of evidence;
  - (v) the arbitrator must act as speedily as a proper consideration of the Access Dispute allows, having regard to the need to carefully and quickly enquire into and investigate the Access Dispute and all matters affecting the merits, and fair settlement, of the Access Dispute;
  - (vi) the arbitrator may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an Access Dispute, and may require that the cases be presented within those periods;
  - (vii) the arbitrator may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument;
  - (viii) the arbitrator will present its determination in a draft form to the parties and allow the parties the opportunity to comment before making a final determination;
  - (ix) the arbitrator will hand down a final determination in writing which includes its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based;
  - (x) unless the parties to the Access Dispute agree otherwise, any determination by the arbitrator will be confidential;
  - (xi) the arbitrator may make any determination or direction in relation to the Access Dispute that it considers appropriate. For the avoidance of doubt, such determination or direction may include making a binding determination in relation to the Access Dispute, or requiring the parties to continue or re-commence negotiations.
- (c) The arbitrator may at any time terminate an arbitration (without making an award) if he or she thinks that:
- (i) the notification of the Access Dispute is vexatious;
  - (ii) the subject matter of the Access Dispute is trivial, misconceived or lacking in substance; or
  - (iii) the party who notified the Access Dispute has not engaged in negotiations in good faith.
- (d) In deciding an Access Dispute, the arbitrator must have regard to:
- (i) this Authorisation; and

- (ii) the matters set out in section 44X(1) of the Act.
- (e) In deciding an Access Dispute, the arbitrator may have regard to any other matters that he or she thinks are relevant.
- (f) In deciding an Access Dispute, the arbitrator must not:
  - (i) without the consent of all parties, make a determination which relates to matters which were not specified in the Arbitration Notice;
  - (ii) without the consent of all parties, allow any other party to join or intervene in the arbitration (except as set out in clause 1.7.7(k)(iii)); or
  - (iii) make a determination which would have any of the effects described in section 44W of the Act.
- (g) A determination or direction of the arbitrator will be final and binding, subject to any rights of review by a court of law, and will have effect on and from the date specified by the arbitrator. Any or all of the provisions of a final determination may be expressed to apply from a specified day which is earlier than the day on which it takes effect.
- (h) Other than in circumstances where the determination or direction is the subject of review by a court of law, if an Applicant or Stevedore does not comply with a determination or direction of the arbitrator, AAT will not be obliged to continue negotiations for the provision of access to Port Terminal Services for that Applicant.
- (i) Other than where the determination or direction is the subject of review by a court of law, AAT will comply with the lawful determination or direction of the arbitrator.
- (j) The arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines. Each party may make submissions to the arbitrator on the issue of costs at any time prior to the arbitrator's costs determination.
- (k) If the arbitrator of a Dispute is not the ACCC, the parties' appointment of the arbitrator must provide that:
  - (i) the arbitrator must keep the ACCC advised, not less frequently than fortnightly, about the progress of the arbitration, including timelines and processes;
  - (ii) the arbitrator must provide a copy of any correspondence between the arbitrator and the ACCC relating to procedural or other matters to the parties within 3 Business Days; and
  - (iii) the ACCC will have the absolute right to make submissions to the arbitrator in respect of the Access Dispute (subject only to complying

with the procedures and timeframes for submissions determined by the arbitrator).

- (l) The arbitrator may require the parties to indemnify it from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 1.7.7, such indemnity excluding circumstances where the conduct of the arbitrator constitutes negligence (whether wilful or otherwise), dishonest or unlawful conduct.
- (m) AAT must send a copy of any determination made by the arbitrator to the ACCC within 2 Business Days of the determination being made.
- (n) Any laws relating to arbitrations applying in the jurisdiction in which any arbitration undertaken in accordance with this clause 1.7.7 is conducted will apply to the arbitration. Subject to any legal requirement to the contrary, to the extent of any inconsistency between those laws and this Authorisation, this Authorisation will prevail.

## **2. PRICING**

### **2.1 Prices for Port Terminal Services**

- (a) AAT must only set, and charge, prices (other than the Stevedore Access Charge) in relation to the supply of any Port Terminal Services provided by AAT in accordance with this clause 2. For the avoidance of doubt, this clause 2 applies to the Facility Access Charge, but not the Stevedore Access Charge howsoever described.
- (b) AAT must not increase the price AAT charges, or proposes to charge, in relation to the supply of any Port Terminal Services provided by AAT unless the process contained in clause 2.4 is followed.
- (c) Notwithstanding clauses 2.1(a) and (b):
  - (i) AAT and any other person may:
    - (A) negotiate with respect to the prices charged by AAT in relation to the supply of any Port Terminal Services provided by AAT; and
    - (B) agree on the prices to be charged by AAT in relation to the supply of Port Terminal Services to that person; and
  - (ii) this clause 2 does not apply to any increase in the price AAT charges, or proposes to charge, a person in relation to the supply of any Port Terminal Services provided by AAT to the extent that such a price increase is dealt with, or contemplated by, the provision of any agreement between AAT and that person.
- (e) Clause 2.6 applies to any increase in the price charged by AAT for the supply of any Port Terminal Services that takes effect in January 2010.

## 2.2 Appointment of Independent Price Expert

- 2.2.1 (a) Within 20 Business Days of the date of this Authorisation, AAT must identify a prospective independent price expert (**Proposed Independent Price Expert**) and provide the ACCC with written notice of the identity of the Proposed Independent Price Expert, together with such information and documents as the ACCC requires to assess whether to object to the appointment of the Proposed Independent Price Expert, including a copy of the proposed terms of appointment.
- (b) The Proposed Independent Price Expert must be a person who has the qualifications and experience necessary to carry out the functions of the Approved Independent Price Expert and is independent of AAT and its Related Bodies Corporate. The criteria by which the independence of the Proposed Independent Price Expert will be determined include whether the person is:
- (i) a current employee or officer of AAT or its Related Bodies Corporate;
  - (ii) a person who has been an employee or officer of AAT or and its Related Bodies Corporate in the past 3 years;
  - (iii) a person who, in the opinion of the ACCC, holds a material interest in AAT or its Related Bodies Corporate;
  - (iv) a professional adviser of AAT or its Related Bodies Corporate, whether current or in the past 3 years;
  - (v) a person who has a contractual relationship, or is an employee or contractor of a firm or company that has a contractual relationship, with AAT or its Related Bodies Corporate, but for the terms of any Approved Independent Price Expert agreement with AAT;
  - (vi) a supplier, or a person who is an employee or contractor of a firm or company that is a supplier of AAT or its Related Bodies Corporate; or
  - (vii) a material customer of, or a person who is an employee or contractor of a firm or company that is a material customer of, AAT or its Related Bodies Corporate.
- (c) The ACCC may, in its absolute discretion, consult with any other person in relation to the appointment of the Proposed Independent Price Expert as the Approved Independent Price Expert.

### 2.2.2 If:

- (a) within 5 Business Days of receipt by the ACCC of the written notice referred to in clause 2.2.1(a); or

- (b) such further period as is required by the ACCC and notified to AAT in writing prior to the expiration of the 5 Business Day period,

the ACCC informs AAT that it:

- (c) does not object to the Proposed Independent Price Expert, AAT will:
  - (i) appoint the Proposed Independent Price Expert as the Approved Independent Price Expert as soon as practicable on terms approved by the ACCC and consistent with the performance by the Approved Independent Price Expert of his or her functions under this clause 2; and
  - (ii) forward to the ACCC a copy of the executed terms of appointment within 2 Business Days of their execution; and
  - (iii) publish the name and contact details of the Approved Independent Price Expert on AAT's website within 2 Business Days of the appointment; or
- (d) does object to the Proposed Independent Price Expert, AAT will:
  - (i) appoint a person identified by the ACCC at its absolute discretion as the Approved Independent Price Expert on terms approved by the ACCC and consistent with the performance by the Approved Independent Price Expert of his or her functions under this clause 2; and
  - (ii) forward to the ACCC a copy of the executed terms of appointment within 2 Business Days of their execution; and
  - (iii) publish the name and contact details of the Approved Independent Price Expert on AAT's website within 2 Business Days of the appointment.

- 2.2.3 (a) The Approved Independent Price Expert is to be appointed for a term of two years, commencing on the date this Authorisation commences. Prior to the end of the Approved Independent Price Expert's term, AAT must appoint another person as the Approved Independent Price Expert.
- (b) Each Approved Independent Price Expert who is appointed after the first Approved Independent Price Expert is to be appointed for a term of two years, commencing on the day after the end of the previous Approved Independent Price Expert's term. Prior to the end of each subsequent Approved Independent Price Expert's term, AAT must appoint another person as the Approved Independent Price Expert.
  - (c) Clauses 2.2.1 and 2.2.2 apply to the appointment of any subsequent Approved Independent Price Expert required by clauses 2.2.3(a) and (b) as if the reference in clause 2.2.1(a) to 'Within 20 Business Days of the date of this Authorisation' reads 'At least 20 Business Days prior to the end of the Approved Independent Price Expert's term'.

- (d) A person who is, or who has been, the Approved Independent Price Expert is eligible for reappointment as the Approved Independent Price Expert.

### **2.3 Conditions relating to the Approved Independent Price Expert's functions**

AAT must:

- (a) procure that the terms of appointment of the Approved Independent Price Expert include obligations on the Approved Independent Price Expert to:
  - (i) continue to satisfy the independence criteria in clause 2.2.1(b) for the period of his or her appointment;
  - (ii) provide any information or documents requested by the ACCC about AAT's compliance with this clause 2 directly to the ACCC;
  - (iii) report or otherwise inform the ACCC directly of any issues that arise in the performance of his or her functions as Approved Independent Price Expert or in relation to any matter that may arise in connection with this Condition.
- (b) comply with and enforce the terms of appointment for the Approved Independent Price Expert;
- (c) maintain and fund the Approved Independent Price Expert to carry out his or her functions;
- (d) indemnify the Approved Independent Price Expert for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Price Expert of his or her functions as the Approved Independent Price Expert except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Price Expert;
- (e) not interfere with, or otherwise hinder, the Approved Independent Price Expert's ability to carry out his or her functions as the Approved Independent Price Expert;
- (f) provide and pay for any external expertise, assistance or advice required by the Approved Independent Price Expert to perform his or her functions as the Approved Independent Price Expert;
- (g) provide to the Approved Independent Price Expert any information or documents requested by the Approved Independent Price Expert that he or she considers necessary for carrying his or her functions as the Approved Independent Price Expert or for reporting to or otherwise advising the ACCC;
- (h) ensure that the Approved Independent Price Expert will provide information or documents requested by the ACCC directly to the ACCC;



- (i) ensure that the Approved Independent Price Expert reports or otherwise informs the ACCC directly of any issues that arise in the performance of his or her functions as Approved Independent Price Expert or in relation to any matter that may arise in connection with this clause 2;
- (j) not appoint the Approved Independent Price Expert, or have any agreements, understandings or arrangements with the Approved Independent Price Expert, to utilise the Approved Independent Price Expert's services for anything other than this clause 2.

## 2.4 Process for increasing prices for Port Terminal Services

2.4.1 At least 60 Business Days before AAT proposes to increase the price it charges for the supply of any Port Terminal Service at a Port Terminal, AAT must:

- (a) notify any Terminal End-User who:
  - (i) has informed AAT in writing that the Terminal End-User wishes to be notified of any proposed price increase; and
  - (ii) uses the Port Terminal for which the proposed price increase relates, in writing of the proposed price increase.
- (b) notify the Approved Independent Price Expert in writing of the proposed price increase; and
- (c) publish on AAT's website, details of the proposed price increase.

2.4.2 A notice given under clause 2.4.1(a) or (b), or a publication made under clause 2.4.1(c) must include the following:

- (a) the amount of the proposed price increase;
- (b) the date on which the proposed price increase will take effect;
- (c) the reasons for the proposed price increase;
- (d) information about the process for increasing prices for Port Terminal Services, including the requirements of this Condition 2.4; and
- (e) the name and contact details of the Approved Independent Price Expert.

2.4.3 Any Terminal End-User who uses the Port Terminal for which the proposed price increase relates, may lodge a written notice with the Approved Independent Price Expert and AAT objecting to the proposed price increase (**Objection Notice**). Such notice must:

- (a) be lodged no later than 15 Business Days following the notification by AAT of the proposed price increase; and

- (b) include the reasons the Terminal End-User objects to the proposed price increase.

2.4.4 In the event that:

- (a) no Objection Notice is received within the period referred to in clause 2.4.3(a), then the proposed price increase takes effect on the date that AAT notified under clause 2.4.2(a) that the proposed price increase would take effect; or
- (b) an Objection Notice is received within the period referred to in clause 2.4.3(a), then clause 2.4.6 applies.

2.4.5 Within 5 Business Days of receiving an Objection Notice, AAT must:

- (a) publish a copy of the Objection Notice on AAT's website; and
- (b) give a copy of the Objection Notice to the ACCC.

2.4.6 The Approved Independent Price Expert must, within:

- (a) the 60 Business Day period referred to in clause 2.4.1; or
- (b) such further period, being not more than 20 Business Days, as the Approved Independent Price Expert in his or her sole discretion, requires,

determine whether the proposed price increase is reasonable and justified, having regard to the following principles:

- (c) that AAT is entitled to generate a reasonable rate of return on the amount of funds invested; and
- (d) the price for the supply by AAT of Port Terminal Services should be set on a terminal by terminal basis taking into account:
  - (i) all efficient input costs, including Port Terminal lease costs, among others;
  - (ii) an appropriate allocation to that Port Terminal of AAT's head office costs;
  - (iii) expected volumes over the period that AAT has used to calculate the proposed price increase, including where appropriate any split between committed / un committed volume and associated risks;
  - (iv) the level of capital reasonably invested by AAT at that Port Terminal;
  - (v) AAT's overall weighted average cost of capital; and
  - (vi) the interests of Stevedores and Terminal End-Users who use the Port Terminal for which the proposed price increase relates; and

- (e) the reasonableness and appropriateness of the existing price for the supply of the Port Terminal Service.
- 2.4.7 In the event that more than one Objection Notice is received in relation to a proposed price increase, the Approved Independent Price Expert must make only a single determination in relation to the proposed price increase.
- 2.4.8 The Approved Independent Price Expert may, in his or her sole discretion, direct the parties to provide such further information as he or she thinks fit to enable him or her to make the determination. The parties must use all reasonable endeavours to ensure that the Approved Independent Price Expert is provided with:
- (a) all relevant information available to the parties about the proposed price increase; and
  - (b) all reasonable assistance,
- in a timely manner, to enable the Approved Independent Price Expert to make a determination in relation to the proposed price increase within the period referred to in clause 2.4.6.
- 2.4.9 Notwithstanding clause 2.4.6, the Approved Independent Price may, in his or her sole discretion, determine that there is to be no increase in price for the Port Terminal Service as proposed by AAT on the basis that AAT has not complied with clause 2.4.8.
- 2.4.10 The Approved Independent Price Expert must notify:
- (a) AAT; and
  - (b) any party which lodged an Objection Notice in relation to the proposed price increase,
- of his or her determination under clause 2.4.6 as soon as practicable after making the determination. Within 2 Business Days of receiving the determination, AAT must publish the Approved Independent Price Expert's determination on AAT's website.
- 2.4.11 In the event that the Approved Independent Price Expert determines that the proposed price increase is reasonable and justified, then the proposed price increase will take effect on the date that AAT notified under clause 2.4.2(a) that the proposed price increase would take effect.
- 2.4.12 In the event that the Approved Independent Price Expert determines that the proposed price increase is not reasonable and justified, then the Approved Price Expert must also either:
- (a) set a new price for the Port Terminal Service that is different to the proposed price increase but that is not:
    - (i) a price higher than the existing price plus the proposed price increase; or

- (ii) a price lower than the existing price for the Port Terminal Service; or
- (b) determine that there is to be no increase in price for the Port Terminal Service as proposed by AAT.

2.4.13 If the Approved Independent Price Expert sets a new price for the Port Terminal Service under clause 2.4.12(a), then the new price takes effect on the date that AAT notified under clause 2.4.2(a) that the proposed price increase would take effect.

2.4.14 When making a determination under clause 2.4.6, the Approved Independent Price Expert is acting as an expert and not as an arbitrator.

2.4.15 Any:

- (a) determination by the Approved Independent Price Expert under clause 2.4.6; and
  - (b) decision by the Approved Independent Price Expert under clause 2.4.12,
- is final and binding on AAT.

## **2.5 Resignation of the Approved Independent Price Expert**

2.5.1 AAT must immediately notify the ACCC in the event that an Approved Independent Price Expert resigns or otherwise stops acting as the Approved Independent Price Expert.

2.5.2 If clause 2.5.1 applies, then clause 2.2.1 applies as if the reference to ‘Within 20 Business Days of the date of this Authorisation’ reads ‘Within 20 Business Days of the date the Approved Independent Price Expert resigns or otherwise stops acting as the Approved Independent Price Expert’.

## **2.6 Price increases taking effect in January 2010**

- (a) This clause 2.6 applies to any increase in a price charged by AAT (other than the Stevedore Access Charge) in relation to the supply of any Port Terminal Services provided by AAT that takes effect in January 2010 (**January 2010 Price Increase**). Nothing in this clause prevents AAT from charging a price including a January 2010 Price Increase from the date of its effect.
- (b) If this clause 2.6 applies, then any Terminal End-User who uses the Port Terminal for which the January 2010 Price Increase relates, may lodge a written notice with the Approved Independent Price Expert and AAT objecting to the January 2010 Price Increase (**January 2010 Objection Notice**). Such notice must:
  - (i) be lodged by 31 January 2010; and
  - (ii) include the reasons the Terminal End-User objects to the January 2010 Price Increase.

- (c) In the event that a January 2010 Objection Notice is received within the period referred to in clause 2.6(b), then the Approved Independent Price Expert must, within:
- (i) 60 Business Days of the date of the January 2010 Objection Notice; or
  - (ii) such further period, being not more than 20 Business Days, as the Approved Independent Price Expert in his or her sole discretion, requires,
- determine whether the January 2010 Price Increase is reasonable and justified, having regard to the principles contained in clause 2.4.6(c) and (d).
- (d) The Approved Independent Price Expert may, in his or her sole discretion, direct the parties to provide such further information as he or she thinks fit to enable him or her to make the determination. The parties must use all reasonable endeavours to ensure that the Approved Independent Price Expert is provided with:
- (i) all relevant information available to the parties about the proposed price increase; and
  - (ii) all reasonable assistance,
- in a timely manner, to enable the Approved Independent Price Expert to make a determination in relation to the January 2010 Price Increase within the period referred to in clause 2.6(c).
- (e) Notwithstanding clause 2.6(c), the Approved Independent Price Expert may, in his or her sole discretion, determine that there is to be no January 2010 Price Increase in price for the Port Terminal Service as proposed by AAT on the basis that AAT has not complied with clause 2.6(d).
- (f) The Approved Independent Price Expert must notify:
- (i) AAT; and
  - (ii) any party which lodged an Objection Notice in relation to the proposed price increase,
- of his or her determination under clause 2.6(c) as soon as practicable after making the determination. Within 2 Business Days of receiving the determination, AAT must publish the Approved Independent Price Expert's determination on AAT's website.
- (g) In the event that the Approved Independent Price Expert determines that the proposed price increase is reasonable and justified, then AAT may continue to charge the price, including the January 2010 Price Increase.

- (h) In the event that the Approved Independent Price Expert determines that the January 2010 Price Increase is not reasonable and justified, then the Approved Price Expert must also either:
  - (i) set a new price for the Port Terminal Service that is different to the price plus the January 2010 Price Increase but that is not:
    - (A) a price higher than the existing price plus the January 2010 Price Increase; or
    - (B) a price lower than the existing price for the Port Terminal Service; or
  - (ii) determine that there is to be no increase in price for the Port Terminal Service as increased by the January 2010 Price Increase.
- (i) If clause 2.6(h) applies:
  - (i) the new price (being either a new price set under clause 2.6(h)(i) or the price existing prior to the January 2010 Price Increase under clause 2.6(h)(ii)) takes effect on the date the Approved Independent Price Expert states will be the date that the new price will take effect, being a date that is not more than 30 Business Days after the date of the determination under clause 2.6(c); and
  - (ii) AAT is not required to compensate or otherwise reimburse any person who was charged a price plus the January 2010 Price Increase in relation to the supply of any Port Terminal Services provided by AAT prior to the date on which the new price referred to in clause 2.6(i)(i) takes effect.
- (j) When making a determination under clause 2.6(c), the Approved Independent Price Expert is acting as an expert and not as an arbitrator.
- (k) Any:
  - (i) determination by the Approved Independent Price Expert under clause 2.6(c); and
  - (ii) decision by the Approved Independent Price Expert under clauses 2.6(h) and (i),
 is final and binding on AAT.

### **3. CONDITIONS RELATING TO DISPUTE RESOLUTION FOR TERMINAL END-USERS**

#### **3.1 Commencement and objectives of the dispute resolution process for Terminal End-Users**

- (a) Within 40 Business Days of the date this Authorisation commences, AAT is required to make available a dispute resolution process to Terminal End-Users in accordance with the requirements of this clause 3. The availability of this dispute resolution process must be published on AAT's website within 40 Business Days of the date this Authorisation commences.
- (b) This dispute resolution process:
  - (i) is available for Terminal End-User Disputes; and
  - (ii) is intended to facilitate the genuine and good faith negotiation of resolutions to bona fide commercial disputes between AAT and Terminal End-Users;
  - (iii) applies only to disputes about conduct which occurred after the date this Authorisation comes into effect; and
  - (iv) does not apply to disputes relating to the prices set and charged by AAT in relation to the supply of Port Terminal Services.

#### **3.2 Appointment of AAT Complaints Officer**

AAT must appoint an appropriate staff member (referred to as the “**AAT Complaints Officer**”) to receive complaints from Terminal End-Users. The AAT Complaints Officer must be sufficiently empowered to make decisions regarding:

- (a) the terms and conditions of use of Port Terminal Services; and
  - (b) the price and quality of Port Terminal Services,
- as they relate to Terminal End-Users.

#### **3.3 Terminal End-User Disputes**

- (a) A Terminal End-User may give written notification to AAT of a Terminal End-User Dispute.
- (b) The notification must include details of:
  - (i) the nature of the Terminal End-User Dispute;

- (ii) the outcome sought by the Terminal End-User in relation to the Terminal End-User Dispute; and
  - (iii) the action on the part of AAT the Terminal End-User believes will resolve the Terminal End-User Dispute.
- (c) Notification of a Terminal End-User Dispute must be sent by registered post to AAT's registered office, and is deemed to be received by AAT upon the expiration of 2 Business Days after the date on which it was sent.

### **3.4 Negotiation**

- (a) The AAT Complaints Officer and the Terminal End-User must undertake genuine and good faith negotiations to resolve the Terminal End-User Dispute.
- (b) If the AAT Complaints Officer and the Terminal End-User cannot negotiate a resolution within 15 Business Days of the Terminal End-User's notification being deemed to be given, the Terminal End-User Dispute must be referred to the chief executive officers (or their representatives) of AAT and the Terminal End-User,.
- (c) AAT's chief executive officer and the chief executive officer of the Terminal End-User, or their representatives as the case may be, must attempt to resolve the Terminal End-User Dispute, including by undertaking genuine and good faith negotiations and informal mediation.

### **3.5 Mediation**

- (a) If AAT's chief executive officer and the chief executive officer of the Terminal End-User, or their representatives as the case may be, cannot negotiate a resolution within 15 Business Days of the Terminal End-User's notification being referred to them, the Terminal End-user Dispute must be referred to formal mediation in the State in which the subject of the Terminal End-User Dispute has arisen. If the subject matter of the Terminal End-User Dispute has arisen in more than one State, then the Terminal End-User Dispute will be referred to formal mediation in the State of the Terminal End-User's choosing.
- (b) A Terminal End-User Dispute referred to mediation in accordance with clause 3.5(a) will be mediated by a single mediator appointed by agreement of the parties or, if they fail to agree within 10 Business Days, a mediator appointed by the President of the Chapter of IAMA in the State in which the mediation will be conducted acting on the request of either party.
- (c) AAT and the Terminal End-User will use all reasonable endeavours to ensure that:
  - (i) the mediation occurs within 20 Business Days after a mediator has been appointed; and



- (ii) the mediator is provided with all relevant information available to AAT and the Terminal End-User and all reasonable assistance to enable the mediator to conduct the mediation.
- (d) AAT and the Terminal End-User will execute a deed to indemnify the mediator against any loss or damage incurred by the mediator in the course of carrying out his or her functions in accordance with his or her terms of appointment.
- (e) Unless otherwise agreed between AAT and the Terminal End-User:
  - (i) each of AAT and the Terminal End-User may be represented at the mediation by another party, including by a legally qualified person;
  - (ii) the cost of the mediation will be shared equally between AAT and the Terminal End-User,
  - (iv) AAT and the Terminal End-User will bear their own costs relating to the preparation for and attendance at the mediation; and
  - (v) the mediation will otherwise be conducted under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner).

### **3.6 Choice of expert determination or arbitration**

- (a) If the Terminal End-User Dispute is not resolved by mediation, AAT or the Terminal End-User may refer the Terminal End-User Dispute to:
  - (i) an expert for determination in accordance with clause 3.7; or
  - (ii) an arbitrator for arbitration in accordance with clause 3.8.
- (b) AAT and the Terminal End-User will agree on:
  - (i) which of expert determination or arbitration will be conducted to resolve the Terminal End-User Dispute; and
  - (ii) the identity of the expert or arbitrator to be appointed to conduct the expert determination or arbitration,

within 15 Business Days of the end of the mediation of Terminal End-User Dispute.
- (c) In the event that AAT and the Terminal End-User cannot agree on either:
  - (i) which of expert determination or arbitration will be conducted to resolve the Terminal End-User Dispute; or
  - (ii) the identity of the person to conduct the expert determination or arbitration as the case may be,

then the ACCC may determine those matters. In so determining the ACCC may:

- (iii) consult with relevant industry associations, government departments or other parties and
  - (iv) have regard to any other matter it considers is relevant.
- (d) The ACCC may authorise a member of the ACCC to exercise any powers under clause 3.6(c) on behalf of the ACCC.

### **3.7 Expert Determination**

If the Terminal End-User Dispute is referred to an expert for expert determination, then the following provisions apply:

- (a) The parties will use all reasonable endeavours to ensure that the expert provides the expert's determination on the Terminal End-User Dispute within 40 Business Days of its commencement.
- (b) The expert will decide the Terminal End-User Dispute as an expert not an arbitrator and the expert's decision will be final and binding on both AAT and the Terminal End-User. AAT must take all steps within its power to ensure that the expert's decision is fulfilled or otherwise given effect to, including by enforcing AAT's contractual rights against third parties.
- (c) The cost of the expert determination will be shared equally between the parties, unless agreed otherwise.
- (d) AAT and the Terminal End-User will use all reasonable endeavours to ensure that the expert is provided with
  - (i) all relevant information available to AAT and the Terminal End-User; and
  - (ii) all reasonable assistance,in a timely manner, to enable the expert to make a determination in relation to the Terminal End-User Dispute within the period mentioned in clause 3.7(a).
- (e) AAT and the Terminal End-User will execute a deed to indemnify the expert against any loss or damage incurred by the expert in the course of carrying out his or her functions in accordance with his or her terms of appointment.

### **3.8 Arbitration**

- (a) If the Terminal End-user Dispute is referred to an arbitrator, then the provisions in clause 1.7.7 apply:
  - (i) as if a reference to:

- (A) “Access Dispute” is a reference to “Terminal End-User Dispute”;
  - (B) “Applicant” or “Stevedore” is a reference to “Terminal End-User”; but
    - (ii) clauses 1.7.7(d)(ii), 1.7.7(f)(iii) and (iv) do not apply to the arbitration.
- (b) AAT must take all steps within its power to ensure that any determination by the arbitrator is fulfilled or otherwise given effect to, including by enforcing AAT’s contractual rights against third parties.

#### 4. REPORTING ABOUT DISPUTES

##### 4.1 Requirement to report on Active Disputes

- (a) On an annual basis for the duration of this Authorisation, AAT must provide the ACCC with a report about Active Disputes for the previous calendar year (**Active Dispute Report**).
- (b) AAT must provide the first Active Dispute Report on 1 February 2011. The first Active Dispute Report will concern Active Disputes for the period commencing on the date this Authorisation becomes effective and ending on 31 December 2010. All subsequent Active Dispute Reports must be submitted to the ACCC prior to 1 February of each year and will concern Active Disputes for the previous calendar year (**Reporting Period**).

##### 4.2 Contents of Active Dispute Reports

- (a) Each Active Dispute Report must include a description of each Active Dispute including:
  - (i) a description of the issue the subject of the Active Dispute;
  - (ii) the outcome sought by the Applicant, Stevedore or Terminal End-user in relation to the Active Dispute;
  - (iii) whether the Active Dispute has been resolved or not;
  - (iv) if the Active Dispute has been resolved, the action taken by AAT and the Applicant, Stevedore or Terminal End-user to resolve the Active Dispute;
  - (v) if the Active Dispute has been resolved, how the Active Dispute was resolved;
  - (vi) if the Active Dispute has been resolved, the time taken to resolve the Active Dispute; and

- (vii) if the Active Dispute is resolved, the costs associated with resolving the Active Dispute and the apportionment of the costs to the parties to the Active Dispute.
- (b) The ACCC will place all Active Dispute Reports on the public register of authorisations maintained in accordance with section 89 of the Act.

## 5. AAT TO PUBLISH THESE CONDITIONS

At least 5 Business Days before the commencement date of this Authorisation, AAT must publish a copy of these Conditions on its website.

## 6. DEFINITIONS, INTERPRETATION AND CONFIDENTIALITY

### 6.1 Definitions

In these Conditions:

“**AAT Complaints Officer**” means the AAT staff member appointed as such as required by clause 3.2.

“**Access Dispute**” means a bona fide dispute between an Applicant or Stevedore and AAT relating to access to Port Terminal Services but excludes any dispute in relation to any agreement relating to Port Terminal Services between the parties once executed. For the avoidance of doubt, an Access Dispute can exist notwithstanding AAT has complied with clauses 1.1, 1.3 and 1.4 of these Conditions.

“**Act**” means the *Trade Practices Act 1974* (Cth).

“**Active Dispute**” means a Dispute which is:

- (i) notified to AAT by an Applicant, Stevedore or Terminal End-User during the Reporting Period; or
- (ii) resolved during the Reporting Period; or
- (iii) not notified during the Reporting Period, and remaining unresolved at the conclusion of the Reporting Period.

“**Active Dispute Report**” means the report required to be provided by AAT under clause 4.1(a).

“**Applicant**” means a person seeking access to Port Terminal Services under clause 1.6.

“**Approved Independent Price Expert**” means the expert appointed under clause 2.2.1(b).

“**Arbitration Notice**” has the meaning given in clause 1.7.4(a).

“**Auditor**” means the independent auditor appointed at the direction of the ACCC in accordance with clause 1.5.

“**Authorisation**” means this determination of AAT’s applications A91141, A91142, A91181 and A91182 for authorisation.

“**Business Day**” means a day that is not a Saturday, Sunday or public holiday in the Australian Capital Territory, except that if used in relation to a specific Port Terminal means the State in which the relevant Port Terminal is located.

“**Conditions**” means these conditions on which the Authorisation is granted.

“**Confidential Information**” means information exchanged between AAT and an Applicant, Terminal End-User or Stevedore in relation to the business of those persons that:

- (a) is by its nature confidential;
- (b) is specified to be confidential by the person who supplied it; or
- (c) is known, or ought to be known, by a person using or supplying it to be confidential or commercially valuable,

but excludes information that:

- (d) is comprised solely of the name, address and contact details of a person; or
- (e) was in the public domain at the time when it was supplied; or
- (f) subsequently becomes available other than through a breach of confidence or breach of this provision; or
- (g) was in lawful possession of a party prior to being provided by the party; or
- (h) ceases to be confidential in nature by any other lawful means.

“**Dispute**” means either an Access Dispute or a Terminal End-user Dispute.

“**Dispute Notice**” means a written notice provided by an Applicant or Stevedore to AAT or by AAT to an Applicant or Stevedore specifying the Access Dispute and requiring the Access Dispute to be dealt with in the manner set out in clause 1.7.1(a).

“**Facility Access Charge**” means the charge, levied in the case of motor vehicles per unit or cubic metre, and levied in the case of general cargo per revenue tonne, for the use of the Port Terminal and other resources used for the laydown of cargo for export or import, charged to the Stevedore if there is no separate agreement with the Terminal End-User.

“**IAMA**” has the meaning given in clause 1.7.3(d).

“**January 2010 Price Increase**” has the meaning given in clause 2.6(a).

“**January 2010 Objection Notice**” has the meaning given in clause 2.6(b).

“**Objection Notice**” has the meaning given in clause 2.4.3.

“**Port Terminal**” means each of the terminals presently operated by AAT and located at Port Adelaide, Port of Bell Bay, Port of Brisbane, Port Kembla and Port of Melbourne.

“**Port Terminal Services**” means:

- (a) the use of facilities and infrastructure owned, operated or controlled; or
- (b) services and anything else provided,

by AAT at a Port Terminal which in each case AAT makes available to allow a Stevedore to facilitate export and import motor vehicles and other cargo and which, at a minimum, includes those services AAT currently makes available to Stevedores.

“**Proposed Auditor**” means a proposed independent auditor to undertake the independent audit as outlined in clause 1.5.

“**Proposed Independent Price Expert**” means the person proposed by AAT under clause 2.2.1(a) to be the Approved Independent Price Expert.

“**Reference Tariffs**” means the tariffs charged by AAT to stevedores for access to AAT's terminals. For the avoidance of doubt, Reference Tariffs includes the Stevedore Access Charge but excludes the Facilities Access Charge.

“**Related Body Corporate**” has the same meaning as in the *Corporations Act 2001* (Cth).

“**Reporting Period**” has the meaning given to that term in clause 4.1(b).

“**Stevedore**” means a person who has entered into a contract, arrangement or understanding with AAT in relation to the provision by AAT of Port Terminal Services to that person and for the avoidance of doubt:

- (a) includes a person carrying on, or proposing to carry on, a stevedoring business or business as a stevedore;
- (b) includes any Related Body Corporate of AAT who currently obtains Port Terminal Services from AAT; and
- (c) excludes a Terminal End-User.

“**Stevedore Access Charge**” means the charge for equipment and other resources used for stevedoring cargo, charged by AAT to the Stevedore.

**“Stevedore Licence Application Form”** means the application form AAT requires Applicants to complete in order to obtain access to Port Terminal Services.

**“Terminal End-User”** means a person, other than an Applicant or Stevedore, with an interest in the terms and conditions of use of the Port Terminals and:

- (a) includes, but is not limited to, shipping lines, importers and exporters, and representatives of Terminal End-Users; but
- (b) does not include a person carrying on, or proposing to carry on, a stevedoring business or business as a Stevedore.

**“Terminal End-User Dispute”** means bona fide commercial disputes between Terminal End-Users and AAT associated with the provision of Port Terminal Services by AAT as they relate to Terminal End-Users, including the terms and conditions of use of Port Terminal Services or the quality of Port Terminal Services but excludes any dispute in relation to:

- (a) the price of any Port Terminal Service; and
- (b) any agreement relating to Port Terminal Services between the parties once executed.

## **6.2 Interpretation**

In these Conditions, unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to a person includes companies and associations;
- (c) a reference to a consent of a party means the prior written consent of that party;
- (d) headings are for convenient reference only and do not affect the interpretation of these Conditions;
- (e) a reference to a clause is a reference to a clause of these Conditions;
- (f) a reference to a party includes its successors and permitted assigns;
- (g) a reference to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (h) a reference to the word “include” or “including” is to be construed without limitation; and
- (i) a reference to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced.

## **6.3 Confidentiality**

### **6.3.1 Treatment of Confidential Information**

- (a) Subject to clause 6.3.1(b), if a party provides Confidential Information to another party either:
- (i) as part of the negotiation process for access to the Port Terminal Services;  
or
  - (ii) for the purpose of resolving any Access Dispute or Terminal End-user Dispute,

the recipient of that Confidential Information will treat that Confidential Information as confidential, the property of the provider of that information, and will use that information solely for the purpose of negotiating access to the Port Terminal Services or resolving any Access Dispute or Terminal End-User Dispute in accordance with this Authorisation.

- (b) A party is permitted to disclose Confidential Information:
- (i) to the extent necessary for the provision of advice from legal advisers, financiers, accountants or other consultants or professional advisers, provided they are under a legal obligation not to disclose the Confidential Information to any third party;
  - (ii) to any mediator, expert or arbitrator appointed in accordance with clause 1 or 3 for the purposes of that mediation, expert determination or arbitration (and, if the ACCC is the arbitrator, subject to the ACCC's standard confidentiality protocols and procedures);
  - (iii) to the ACCC to the extent necessary for a party to comply with any written request by the ACCC (subject to the ACCC's standard confidentiality protocols and procedures); or
  - (iv) if and to the extent required by law, provided that it first consults with the party that provided the Confidential Information in relation to the manner and timing of that disclosure.

### **6.3.2 Provision of confidential information to Approved Independent Price Expert, mediator, expert or arbitrator**

- (a) If Confidential Information is provided to:
- (i) the Approved Independent Price Expert for the purpose of clause 2; or
  - (ii) a mediator, expert or arbitrator for the purpose of assisting in the resolution of any Dispute in accordance with clauses 1 or 3,



the Approved Independent Price Expert, mediator, arbitrator or expert as the case may be must (and the terms and conditions of appointment of the Approved Independent Price Expert, mediator, arbitrator or expert must require them to) take all reasonable steps to protect the confidentiality of information that any party to the dispute has identified as confidential or commercially sensitive. This clause 6.3.2(a) is subject to the ACCC's obligations under legislation.

(b) For the purpose of clause 6.3.2, any arbitrator appointed in accordance with clauses 1 or 3 may require the parties to a Dispute to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:

- (i) requiring each party and their advisers to give confidentiality undertakings to each other party; and
- (ii) limiting access to Confidential Information to specified individuals subject to confidentiality undertakings provided by those individuals.

(c) Any:

- (i) arbitrator appointed in accordance with clause 1;
- (ii) Approved Independent Price Expert appointed in accordance with clause 2; or
- (iii) expert or arbitrator appointed in accordance with clause 3,

may make confidential and non-confidential versions of his, her or its determination and limit access to the confidential versions to specific individuals.