Australian Competition & Consumer Commission

ICN-WBG Competition Advocacy Contest 2016-17— ACCC IRD Submission

Competition advocacy work of the ACCC in relation to privatisations of Australian ports

Theme: Elevating competition policies in economic policy agendas: innovative advocacy strategies to address market challenges

Sub-theme: Levelling the playing field through competitive neutrality or by elevating competition policy to the economic policy agenda

Summary

In the wave of numerous port privatisations, the Australian Competition and Consumer Commission **(ACCC)** has been concerned that some Australian governments have focused on achieving high one-off sale proceeds at the expense of appropriately addressing competition and economic efficiency concerns. While the sale proceeds may be used to fund new projects now, over the longer-term worsening or entrenching significant market power and/or putting in place inadequate regulatory arrangements through the privatisation process will lead to higher prices for port users and consumers. This is effectively a 'tax' on future generations of Australians.

Working within the difficult confines of often having no legislated or formal role in the privatisation processes, the ACCC has therefore used a variety of approaches to advocate for governments to put in place arrangements that would deliver better outcomes for the long-term interests of Australians. For example, during 2015–16, the ACCC's advocacy efforts have led to strengthened pricing regimes, improved scope of oversight and independent dispute resolution for the privatisations of the Port of Melbourne, Port of Darwin, and the Utah Point Bulk Handling Facility (**Utah Point BHF**) at Port Hedland. These changes reduce the potential for monopoly pricing and increase the likelihood that users will be able to access those monopoly port services on reasonable terms and conditions post-privatisation.

More broadly, the ACCC's advocacy efforts have elevated competition policy onto the agenda of all Australian governments seeking to privatise ports and other monopoly assets (such as data registries) and have influenced a shift towards more competitive and efficiency focused outcomes in those privatisation processes.

Background to the Australian system of government

Australia is a federation whereby powers are divided between a central government, referred to in this submission as the Australian Government, and individual states and territories. The Australian Government oversees matters that affect the whole country as defined in the Australian Constitution. The states and territories have their own constitutions, parliaments, governments and laws and oversee matters that are not controlled by the Australian Government.

In Australia, key port assets (such as major container ports) have historically been owned by States and Territories. Accordingly, it is a decision for individual states and territories to privatise port assets and make laws and regulations concerning the nature of the arrangements that will apply post-privatisation.

ACCC's concerns with approaches to port privatisations

Due to a number of factors, such as large geographical distances between states and territories, many key ports in Australia are monopoly bottleneck infrastructure. Over time, state and territory governments have sought to privatise port assets as a means to obtain significant proceeds, which can then be used to fund new projects.

The ACCC has on many occasions stated that privatisation can facilitate innovative management and improve the efficiency of infrastructure in the interests of users and the general community. At the same time, the ACCC has cautioned that such economic efficiency benefits will only be realised where privatisations are implemented with sufficiently competitive market structures and/or appropriate access and pricing arrangements.

In relation to recent port privatisations, however, the ACCC has observed a preference by state and territory governments to rely on price monitoring arrangements as a means of influencing prices. The ACCC has also observed the implementation of arrangements that hinder the potential for future competition and entrench the significant market power already held by the private operator.

While such arrangements may lead to high one-off sale proceeds by effectively conferring unregulated monopoly port assets upon private operators, over the longer-term they will also lead to higher prices that are ultimately paid for by port users and consumers. This is effectively a 'tax' on future generations of Australians. As such, the ACCC has been concerned that state and territory governments have been too focused on the shorter-term objective of achieving high one-off sale proceeds at the expense of appropriately addressing longer-term competition and efficiency concerns.

The New South Wales (**NSW**) Government's privatisation of the Port of Newcastle, Port Botany and Port Kembla absent of any effective regulatory regime to constrain pricing and including anti-competitive arrangements is an example of the ACCC's concerns. The Port of Newcastle, which is one of the world's largest coal export ports, was privatised in 2014 with a sale price of $1.75 billion. Less than a year later, the private operator revalued its port assets to $2.4 billion and increased some charges by between 40 and 60 per cent with no independent check on the appropriateness of those revaluations and price increases. The price increases are now the subject of a lengthy and costly dispute between an access seeker and the private operator. In relation to Port Botany and Port Kembla, it has been reported that the NSW Government privately agreed to compensate the private operator (who paid $5.07 billion for the two ports) for any loss of trade to a future competing container terminal in Newcastle.

Challenges and the ACCC's approach to competition advocacy work in port privatisations

In light of the above, the ACCC has advocated for governments to put in place market structures and regulatory arrangements through the privatisation process that would deliver better outcomes for the long-term interests of Australians. However, opening a dialogue between the ACCC and state and territory governments about their approaches to privatisations and the longer-term considerations has taken some time due to a number of challenges.

Most significantly, the ACCC has no legislated or formal role in the privatisation process beyond assessing bidders that raise competition concerns through the mergers and acquisitions review process under section 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**).As could be expected, this has meant that State and Territory governments have been hesitant to provide what is often sensitive information to the ACCC beyond that which is necessary for assessment under section 50. It follows that obtaining the right information for the ACCC to be able to make a meaningful assessment of whether concerns may arise and be in a position to provide constructive input into the privatisation process more broadly has been difficult.

The ACCC therefore undertook a range of approaches to open the dialogue with governments and subsequently work with them to take steps to address the longer-term considerations. In the first instance, the ACCC began highlighting its general concerns about the likely long-term effects of past approaches to privatisation through public speeches, media interviews, industry monitoring reports and submissions to government reviews on matters of competition and economic policy. This re-invigorated public debate about the merits of privatisation, elevating competition and economic policy onto the agenda of

governments seeking to privatise assets, and signalled to governments that the ACCC had concerns that it would like to work together to address.

This is highlighted by a number of public reports on the matters. Over the past 12 months, the ACCC Chair Rod Sims has spoken at public events and to journalists on issues relating to privatisation of public assets on multiple occasions. This has resulted in some 144 mentions in the Australian media, which potentially reached an audience of 13,576,109 (based on circulation figures).

The ACCC also wrote to relevant senior government officials inviting early engagement on section 50 issues, and used this as an opportunity to open the dialogue on the privatisation process more broadly. For example, the ACCC outlined its general concerns and invited governments to approach the ACCC to discuss the appropriateness of proposed market structure and regulatory arrangements.

In some instances, the ACCC also sought to escalate issues by highlighting its initial concerns with particular privatisations in its public commentary as well as highlighting subsequent productive engagement with the relevant government and any positive changes to the arrangements where applicable. This was particularly effective in cases where the privatisation was also the subject of a parliamentary inquiry process and the government sought the ACCC's support for the proposed arrangements, such as the privatisation of the Port of Melbourne and Utah Point BHF (discussed further below).

Over time, the ACCC's advocacy efforts have influenced a shift towards more competitive and efficiency focussed outcomes in privatisation processes. This is evidenced by some governments beginning to approach the ACCC and initiating conversations in the first instance to get a sounding for the ACCC's likely reaction to the proposed privatisation arrangements as well as the positive outcomes discussed below.

Outcomes of ACCC's advocacy efforts in recent port privatisations

The ACCC has delivered three key messages to governments privatising ports:

1. price monitoring is not effective for regulating monopoly port infrastructure
2. a negotiate-arbitrate framework is the minimum for effective regulation of monopoly port infrastructure, and
3. market structures or arrangements that hinder potential for future competition should not be created or maintained.

During 2015–16, the ACCC's advocacy efforts led to strengthened pricing regimes, improved scope of oversight and independent dispute resolution for the privatisations of the Port of Melbourne, Port of Darwin, and Utah Point BHF. Evidence of the direct link between the ACCC's advocacy efforts and the changes to the privatisations are drawn out in government media releases and commentary in parliamentary debates, which are referenced below.

Port of Melbourne

The Victorian Government initially proposed CPI price caps and price monitoring for certain charges for the first 15 years. Most notably, the covered charges excluded land rents even though this was an area of port operations over which the private operator would have significant market power. Indeed, land rent changes were the subject of a lengthy dispute with an access seeker during the privatisation process when the Port of Melbourne Corporation sought to increase land rent by 750 per cent. The Victorian Government also proposed to pay compensation to the private operator if a second port operating in

competition with the Port of Melbourne was developed by the government sometime over an unspecified period of up to 50 years.

While the ACCC had some engagement with the Victorian Government early in the privatisation process, the ACCC ultimately made a submission and appeared at the hearings for the Victorian Legislative Council Select Committee inquiring into the privatisation. The ACCC also provided commentary of some concerns with the proposed arrangements in media interviews and speeches. This resulted in a constructive dialogue with the Victorian Government about how it could improve the proposed arrangements.

The ACCC's advocacy work resulted in there being more regular reviews by the Victorian regulator of the private operator's compliance against strengthened pricing principles, and the ability for more direct forms of price regulation to be imposed. Reviews of land rents and the ability for access seekers to seek independent dispute resolution of these charges were also included. Further, the compensation clause was limited to only 15 years with increased transparency of the arrangements.[1]

Although not perfect, these changes move the dial towards a more robust regulatory regime, providing stronger incentives for parties to negotiate sensibly and ensuring that all services where significant market power exists are covered so as to reduce the potential for monopoly pricing. It is noted that the Victorian Government went on to achieve a sale price of $9.7 billion for the port, which was almost double original estimates.

Port of Darwin

The Northern Territory (**NT**) Government initially proposed a light-handed monitoring regime to apply to a limited scope of services. The ACCC raised its concerns about such a proposal for regulating monopoly port infrastructure pricing with the NT Government when it approached the ACCC regarding section 50 issues.

The ACCC's advocacy work was successful in changing the NT Government's approach to this port privatisation. Legislative requirements were put in place for the private operator to develop an 'access policy' that needed to be approved by the NT Utilities Commission. Most significantly, the access policy would be required to include a negotiate-arbitrate framework that covered price terms. This provides an incentive for the private operator to offer reasonable terms and conditions in order to avoid the process of arbitration, and it levels the negotiating playing field by providing leverage to access seekers.[2]

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1 Premier, Victorian Government, media release (30 September 2015):

- 'Following productive discussions with the ACCC, Treasurer Tim Pallas and Minister for Ports Luke Donnellan today announced that the Andrews Labor Government will include additional economic safeguards in the Port of Melbourne lease transaction documents.'
- 'The ACCC submission to the Select Committee states that 'privatisation can facilitate innovative management and improve the efficiency of infrastructure in the interests of users and the general community'. The Government agrees with this, and is working to provide a framework around the lease that ensures strong competition and better outcomes.'
- 'We have listened to and sought to positively address the matters discussed with the ACCC, and the measures announced will provide even more protection for competitive outcomes.'

2 Legislative Assembly of the Northern Territory: Port of Darwin Select Committee (April 2015):

- 'Ensuring the model incorporates a dispute resolution mechanism was also considered important. Where access regulation is appropriate, the ACCC notes that competition issues, including those relating to pricing, are best addressed through Part IIIA of the Competition and Consumer Act and recently called on governments to consider giving the ACCC, as the regulator, authority to intervene in access and pricing disputes.' (p. 49)
- 'Ensuring rights to fair access to the Port of Darwin is vital for the development of the Northern Territory economy. As pricing is an essential element of access, the dispute resolution mechanism should also cover pricing. The Committee

Utah Point BHF

The Western Australian (**WA**) Government initially proposed that prices would be subject to a price monitoring regime, benchmarked against CPI, and provided that an ex-post review of price movements could instigate changes to the pricing regime.

The ACCC made a submission to the WA Standing Committee on Legislation inquiring into the privatisation setting out the limits of the proposed pricing regime to constrain monopoly pricing. This instigated a direct and constructive dialogue with the WA Government about how to improve the proposal.

The ACCC's advocacy work ultimately resulted in the WA Government changing its approach to the privatisation. In particular, the WA Government decided to replace the price monitoring regime with a strengthened negotiate-arbitrate framework to enable access seekers to seek independent arbitration if there is a dispute about price or non-price terms and conditions of access. This change provides a more credible constraint on monopoly pricing and ensures that users can access the monopoly port infrastructure on reasonable terms and conditions.[3] [4]

Conclusion

As evidenced by the outcomes in relation to the Port of Melbourne, Port of Darwin, and Utah Point BHF, the ACCC's advocacy efforts have elevated competition and economic policy onto the agenda of governments seeking to privatise assets and have influenced a shift towards more competitive and efficiency focussed outcomes. The effect of these efforts is to protect users and consumers from unreasonably high prices and deliver better outcomes for the long-term interests of Australians.

recommends that the Ports Management Bill be amended to provide an alternative mechanism to taking legal action for resolving access and pricing disputes.' (p. 58)

[3] Treasury, WA Government, media release (18 November 2016):

- 'The Treasurer said the changes introduced to the pricing regime were consistent with the recommendations of both the Legislation Committee and the Australian Competition and Consumer Commission, with a 'negotiate/arbitrate' model now adopted for pricing as well as access.'
- 'Bidders will be required to base their prices on the access and pricing regime and any associated constraints. From a user perspective, the legislation sets out a clear mechanism to promote fairness in access and pricing.'

[4] Standing Committee on Legislation: Pilbara Port Assets (Disposal) Bill 2015

- The Committee makes Recommendation 7 based on the ACCC's submission (see pp. 28–29): 'The Committee recommends that the 'negotiate-arbitrate' model proposed by the Pilbara Port Asset (Disposal) Bill 2015 be extended to apply to prices to access the facility.'