

EXECUTIVE OFFICE



Australian
Competition &
Consumer
Commission

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7 June 2013

Mr Rob Oakeshott MP
Federal Member for Lyne
PO Box 1112
PORT MACQUARIE NSW 2444

Dear Mr Oakeshott

Thank you for your correspondence dated 26 April 2013 on behalf of Mr Greg Cameron in relation to decisions made by the New South Wales Government (NSW Government) regarding the Port of Newcastle.

The role of the Australian Competition and Consumer Commission (ACCC) is to enforce the *Competition and Consumer Act 2010* (the Act), which contains a range of provisions designed to ensure integrity of markets through the promotion of competition and the prevention of restrictive trade practices.

I understand that the Port of Newcastle, which is state government owned, was identified in the NSW Government's Ports Growth Plan in 2003 as the state's next major container port when Port Botany reached capacity. However, when the NSW Government announced in 2012 its plans to privatise Port Botany and Port Kembla (which subsequently occurred earlier this year), it identified Port Kembla as the location for developing the second major container port.

The competition provisions of the Act apply to state government bodies only to the extent that they 'carry on a business'. 'Carrying on a business' is not defined by the Act. When determining whether a government entity is carrying on a business, the Courts have held that regard is to be given to whether:

- the entity is engaged in the conduct on a systemic or regular basis;
- the conduct contains an element of trade or commerce as a private citizen may undertake; and
- the activities take place in a business context or have a business character.

From the information provided it was unlikely that the NSW Government was carrying on a business when it decided not to develop a container terminal at the Port of Newcastle. As such, policy or planning decisions are likely to fall outside the operation of the Act, therefore the ACCC will not be taking any further action.

Should you wish to discuss this matter further, please contact the ACCC's General Manager of Intelligence, Infocentre and Policy Liaison Branch, Mr Bruce Cooper on (02) 6243 1256.

I trust this information is of assistance and thank you for taking the time to write in relation to Mr Cameron's concerns.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rayne de Gruchy', with a long horizontal flourish extending to the right.

Rayne de Gruchy
Deputy Chief Executive Officer