



Australian  
Competition &  
Consumer  
Commission

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Greg Cameron  
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Florey ACT 2615

By email: [gdc99@bigpond.com](mailto:gdc99@bigpond.com)

Dear Mr Cameron

### **Correspondence regarding Port of Newcastle**

We refer to your recent correspondence to the Chairman of the ACCC dated 31 January 2017 regarding the Port of Newcastle.

### ***Correspondence to Mr Rob Oakeshott MP***

In your correspondence you assert that the following statements made by the ACCC in correspondence directed to the former Member for Lyne, Mr Rob Oakeshott MP, on 7 June 2013, were incorrect:

1. When the NSW government announced in 2012 its plans to privatise Port Botany and Port Kembla, it identified Port Kembla as the location for developing the second major container port, and
2. 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 *Competition and Consumer Act 2010 (CCA)*.

These statements were based on the information available to the ACCC at the time they were made. In the ACCC's view, the first statement is an accurate reflection of the NSW Government's position at that time and the second statement is (and remains) the ACCC's view as to the application of the CCA to the conduct of the NSW government.

Further, regardless of whether this was the subject of a formal decision by the NSW Government, the ACCC considers that it was clear from at least 27 July 2012 that the NSW Government's position was for a further container terminal to be developed at Port Kembla when this became required to supplement Port Botany. Although negotiations between Newcastle Port Corporation (NPC) and Newcastle Stevedores Consortium (NSC) were not formally concluded until a later date, this appears to remain an accurate reflection of the NSW Government's position from 27 July 2012 to the present time.

## ***Response to further questions***

In your correspondence you also ask the following questions:

1. Whether the ACCC claims that NPC was carrying on a business outside the operation of the CCA by conducting commercial negotiations with NSC in relation to the development and operation of a container terminal at the Port of Newcastle, and
2. The date on which the ACCC became aware that NPC was negotiating commercial terms with NSC in relation to the development and operation of a container terminal at the Port of Newcastle.

In relation to the first question, as previously outlined, the CCA applies to the conduct of a government entity only insofar as that entity is carrying on a business. Even if some business is carried on by the relevant government entity at a particular date, that does not mean the CCA applies to all activities undertaken by the entity at that time – what is required is a determination that, in undertaking the conduct complained of, the entity did so as part of carrying on business (see, for example, *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337).

In this instance, the relevant conduct that the ACCC examined was the privatisation of the three NSW ports via long-term leases. The ACCC's position in relation to this conduct is that where a government engages in a one-off sale or long-term lease of an asset such as this, it is unlikely that such conduct would fall within the definition of 'carrying on a business' within the CCA.

In the period prior to November 2013, the ACCC understands that NPC (a NSW Government owned entity) and NSC were engaged in negotiations in relation to the Port of Newcastle. However, these negotiations ultimately did not result in any concluded agreement. During this period, NPC may have been carrying on business within the scope of the CCA in some capacity but, as noted above, that is not necessarily sufficient for the purposes of the CCA. In any event, the conduct outlined during this period did not lead to any contract, arrangement or understanding.

In relation to the second question, the ACCC investigated the contractual arrangements for the long-term leases of Ports Botany, Kembla and Newcastle in 2014.

In reaching its decision the ACCC had access to relevant information about the prior negotiations between NPC and NSC, which ultimately did not proceed. The ACCC took this information into account in reaching its decision not to pursue the investigation.

Should you wish to discuss this matter further, please feel free to contact Marcus Bezzi, Executive General Manager Competition, on (02) 9230 9130.

Yours sincerely



Rayne de Gruchy  
Chief Operating Officer