



Executive Office

23 Marcus Clarke Street
Canberra ACT 2601

27 April 2017

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Tim Crakanthorp MP
Member for Newcastle
414 Hunter Street
NEWCASTLE NSW 2300

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Dear Mr Crakanthorp

Port of Newcastle

Thank you for your letter of 29 March 2017 in relation to the Port of Newcastle enclosing a letter from Mr Greg Cameron addressed to the ACCC.

You request the ACCC to consider Mr Cameron's concerns and provide a response to the issues he raises regarding the Port of Newcastle. We received this letter directly from Mr Cameron. The letter is dated 17 March 2017.

Mr Cameron has been contacting us and copying us on his correspondence with several parliamentarians on numerous occasions.

The ACCC wrote to Mr Cameron on 23 February 2017. Attached to this letter is a copy of our letter.

As outlined in our correspondence to Mr Cameron, the ACCC's investigation focused on 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 *Competition and Consumer Act 2010* (Cth) (CCA).

A number of Mr Cameron's queries relate to the period prior to November 2013, when the ACCC understands that Newcastle Port Corporation (NPC), a NSW government owned entity, and Newcastle Stevedores Consortium (NSC) were engaged in negotiations in relation to the Port of Newcastle. This period was not the focus of the ACCC's investigation as the 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, however 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 for the purposes of the CCA.

We have written to Mr Cameron to say that we are not in a position to provide him with any further information. A copy of that letter is also enclosed.

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

Yours sincerely

Rayne de Gruchy
Chief Operating Officer



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Our ref: 55516

23 February 2017

Greg Cameron
29 Eddy Crescent
Florey ACT 2615

By email: 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



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27 April 2017

Greg Cameron
29 Eddy Crescent
Florey ACT 2615

By email: gdc99@bigpond.com

Dear Mr Cameron

Correspondence regarding Port of Newcastle

We refer to your recent correspondence to the ACCC regarding the Port of Newcastle.

The ACCC investigated the contractual arrangements for the long-term leases of Ports Botany, Kembla and Newcastle in 2014. The ACCC has provided you with information in relation to this matter on a number of occasions. We therefore refer you to our previous correspondence and advise that the ACCC is not in a position to provide you with further information in relation to this matter.

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