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IPART Submission

23 June 2023

This submission is submitted by Anglo Ports Pty Ltd.
(Anglo Ports was a consortium member of the successful proponent to construct and operate a container terminal in Newcastle in 2011-2013)

PORT of NEWCASTLE COMPENSATION Review

IPART is requesting input from interested parties to effectively assist in unwinding an anti-competitive arrangement where one party has been able with the help of the State to purchase a monopoly on the handling of containers in the State of NSW for a fifty-year period and on the other hand where one party has secured a port concession without financial consideration of the additional value of being able to operate a container terminal without constraints.

BACKGROUND

In 2009 the Newcastle Port Corporation (NPC), a State Owned Corporation (SOC), was authorized by Government to tender for proposals to construct a cargo handling facility that included a dedicated Container terminal with a minimum capacity for at least one million twenty foot equivalent units (TEU).

NPC selected a winning consortium in 2010, initially named Newcastle Stevedores Consortium (NSC), which was later renamed Mayfield Development Corporation (MDC). NPC Board approved and sought final ratification from Government in 2011, 2012 and 2013 to execute a state significant contract with the successful tenderer to immediately construct and operate a multi-purpose and dedicated container terminal.

In 2012 the NSW government decided to lease Port Botany and Port Kembla and secured conditional offers for a 99-year lease of circa \$3 billion.

In 2012 NPC secured legal planning approvals from the NSW Department of Planning to operate a container terminal at the 90 hectare Mayfield site as is, for 1.2 million TEU and up to 2 million TEU with additional infrastructure.

In 2013 the government sought final unconditional offers from four short listed parties, for the lease of Port Botany and Port Kembla, but with one important inclusion, a strategy defined as Port Commitment Deeds (PCD) that would neutralise competition from the Newcastle MDC proposal. PCDs created an artificial monopoly over the handling of containers in the State of NSW that resulted in “extraordinary” unconditional offers of circa \$5 billion being received and accepted by Government.

The mitigation of container competition from Newcastle by way of the secret (PCD’s) provided the winning bidder for Port Botany and Kembla, with compensation provisions in the event they encountered competition from the MDC’s proposed Newcastle container terminal.

Whilst the ACCC unsuccessfully sought to overturn these anti-competitive arrangements via Federal Court action the NSW State Parliament saw differently and in 2022 passed the Port of Newcastle (Extinguishment of Liability) Act 2022. The ACCC case did not use evidence offered of the MDC commercially closed arrangements, feasibilities and assessments of the NPC Board and management between 2010-2013.

In May 2014 the Government privatised the Port of Newcastle on a 98-year lease that included PCD reimbursement provisions for any containers handled over a capped figure plus an annual percentage for organic growth. The impact of the organic throughput growth for Port

of Newcastle or a developer of a container terminal can be seen in [Appendix A – Column C](#).

The Port of Newcastle (Extinguishment of Liability) Act 2022 provides Port of Newcastle with an option to request determination of an upfront compensation payment to extinguish its liability for containers handled over its cap.

The arrangements via the PCD's between the State and NSWP's will remain unchanged, and the State will be required to compensate NSW Ports the established fee for every container handled by Newcastle in excess of the defined cap. As a consequence of the Port of Newcastle (Extinguishment of Liability) Act 2022 the impact of the organic throughput growth for the State can be seen in [Appendix A – Column D](#).

IPART has sought submissions from interested parties to help inform their review and assist in determining the quantum of a one-off compensation payment by Port of Newcastle to the State.

REVIEW

The intent of the 2022 legislation is to create an environment where the Port of Newcastle can compete on a level playing field with other NSW ports for containerised trade.

Between 2008 and 2013, NPC endeavoured to provide the State with fair competition between ports for container trade in NSW but the State required PCD's as part of its privatisation transaction documents.

It has taken nine years for State Parliament via the Port of Newcastle (Extinguishment of Liability) Act 2022 to recognise and rectify this anti-competitive arrangement.

QUANTUM

In considering the amount of compensation that Port of Newcastle should pay the State, it should be noted that:

- 1) When Port of Newcastle executed the transaction documents PoN knowingly accepted the reimbursement provisions.
- 2) The Port of Newcastle paid a price that far exceeded the next best bid by some \$400m.
- 3) The number of containers that the Port of Newcastle has the potential to secure over 50 years is subjective.
- 4) There needs to be a relevant base line to confirm and accept reasonable calculation inputs from both parties.

The only detailed business plans for the construction of a container terminal in Newcastle and evaluated in sufficient detail by a selection committee, independent government appointed consultants and the NPC Board and management, with Probit oversight, were those prepared by MDC in 2011, 2012 and 2013.

Commercial negotiations had been concluded and all contract documentation between NPC and the private consortium, MDC, were agreed, signed in 2011 and initialed in 2012 and 2013 ready for execution.

This successful proposal provided the SOC and its State shareholders (finance and Treasury) with acceptable investment return hurdle rates.

The proposal was fully funded and consisted of a new entrant with substantial international port operations and included a Tier 1 Australian Superannuation and Investment Fund Manager as the funding arranger and sizable beneficial shareholder.

MDC's proposal was real, credible and would have been successfully executed.

MDC's container terminal should have been constructed beginning 2013.

Anglo Ports has successfully delivered substantial operations both prior to 2011 and post 2013, including the VICT automated container terminal in the Port of Melbourne in 2014/2015.

CALCULATION

Only the container traffic that would have been handled in Newcastle over the 50-year PCD reimbursement period becomes relevant.

The TEU throughput handled in Botany for the period 2013 through 2022, sourced from Waterline Reports 57 through 68, and data from Transport NSW Freight Data – Port Botany TEU Throughput Volumes.

The TEU handled in Botany in 2023 is estimated to be 2,882,111, and using a conservative growth rate of 3.5% per annum, for the remainder of the 50 years, the total TEU handled during the period ending in 2063, would equate to 279,623,567 TEU (refer [Appendix A – Column A](#)).

Given the global network of existing shipping line relationships, the MDC Business plan had always expected to conservatively capture a minimum of no less than 10% of the Botany market which equates to 27,962,357 TEU over the 50 year period ending in 2063. (refer [Appendix A – Column B](#))

Using data sourced from the ACCC Container Stevedoring Monitoring report dated 2021-2022 (see [Appendix B](#)), revenue per lift is quoted as \$346.10, made up of \$199.90 net quayside revenue per lift and \$146.20 for landside and other revenue per lift). Using the reported Cost per lift figure of \$268.00 this translates to a profit of approximately \$78.10 per lift.

Using the TEU volume calculations, a Newcastle CT would expect to handle 27,962,357 TEU, suggesting an approximate profit figure of circa \$2,183,860,055 over the 50-year period.

The following two extracts from the NSW Legislative Council – Public Works Committee Report titled “Impact of Port of Newcastle sale

arrangements on public works expenditure in New South Wales” dated 19th Feb 2019 (p.6) outlined the ...

“PCDs contain provisions that require the government to provide a payment to the Port Botany/Port Kembla Port Manager should container volumes through the Port of Newcastle exceed a certain threshold Container volumes through Newcastle exceed a threshold level of 30,000 TEUs (twenty-foot equivalent units) as at June 2013 escalated at the higher of 6% pa or the growth rate of container throughput at Port Botany (‘excess’).”

After 50 years the total number of TEU permitted to be handled without penalty would be 9,262,682 TEU (refer [Appendix A – Column C](#)).

If a penalty payment equivalent to the \$78.10 profit per lift was used, a Newcastle CT would be penalised ONLY for handling the excess of 18,699,675 TEU, suggesting a penalty payment circa \$1,460,444,609 payable by PoN to the State (refer [Appendix A – Column D](#))

If IPART were to apply a discount rate of 3%, this would result in a one-off payment today of \$333,137,755 payable by PoN to the State.

If a penalty payment equivalent to Port Botany wharfage was used of \$145.75 (as per NSW Ports Schedule of Port charges Port Botany January 2021 per full container – import), rather than the \$78.10 profit figure per lift, a Newcastle CT would be penalised ONLY for handling the excess of 18,699,675 TEU, suggesting a penalty payment circa \$2,725,477,615 payable by PoN to the State. (refer [Appendix A – Column D](#))

If IPART were to apply a discount rate of 3%, this would result in a one-off payment today of \$621,700,740 payable by PoN to the State.

The table below summarises the range of penalty payments payable by PoN to the State as a one off payment, in nominal terms and real terms:

| Calculation Method | Nominal terms | Discounted @ 3% |
|------------------------------|----------------------|------------------------|
| Profit of \$78.10 per lift | \$1,460,444,609 | \$333,137,755 |
| Wharfage of \$145.75 per teu | \$2,725,477,615 | \$621,700,740 |

The latter approach would fund the State's obligation under the Port of Newcastle (Extinguishment of Liability) Act 2022 to compensate NSW Ports the established fee for every container handled by Newcastle in excess of the defined cap.

Yours sincerely,

For and on behalf of Anglo Ports

Appendix A: Compensation Calculations using TEU volumes

| Growth Rate | | 3.5% | 6.0% | | |
|-------------------------------------|-------------------------|-------------|----------------------------|-----------------------------|----------------------------------|
| Number of Years | | 50 | 50 | | |
| Calendar Years | Total Botany TEU Market | | No less than 10% Mkt Share | Permitted Organic Threshold | Net Additional Traffic Penalised |
| | Column A | | Column B | Column C | Column D |
| Actual Port Botany TEU Market Share | | | | | |
| 2013 | Yr 0 | 2,153,100 | 215,310 | 30,000 | 185,310 |
| 2014 | Yr 1 | 2,247,066 | 224,707 | 31,800 | 192,907 |
| 2015 | Yr 2 | 2,310,009 | 231,001 | 33,708 | 197,293 |
| 2016 | Yr 3 | 2,362,016 | 236,202 | 35,730 | 200,471 |
| 2017 | Yr 4 | 2,530,012 | 253,001 | 37,874 | 215,127 |
| 2018 | Yr 5 | 2,647,961 | 264,796 | 40,147 | 224,649 |
| 2019 | Yr 6 | 2,571,591 | 257,159 | 42,556 | 214,604 |
| 2020 | Yr 7 | 2,522,711 | 252,271 | 45,109 | 207,162 |
| 2021 | Yr 8 | 2,571,705 | 257,171 | 47,815 | 209,355 |
| 2022 | Yr 9 | 2,613,084 | 261,308 | 50,684 | 210,624 |
| 2023 | Yr 10 | 2,882,111 | 288,211 | 53,725 | 234,486 |
| Estimated TEU Market Share | | | | | |
| 2024 | Yr 11 | 2,982,985 | 298,298 | 56,949 | 241,350 |
| 2025 | Yr 12 | 3,087,389 | 308,739 | 60,366 | 248,373 |
| 2026 | Yr 13 | 3,195,448 | 319,545 | 63,988 | 255,557 |
| 2027 | Yr 14 | 3,307,289 | 330,729 | 67,827 | 262,902 |
| 2028 | Yr 15 | 3,423,044 | 342,304 | 71,897 | 270,408 |
| 2029 | Yr 16 | 3,542,850 | 354,285 | 76,211 | 278,074 |
| 2030 | Yr 17 | 3,666,850 | 366,685 | 80,783 | 285,902 |
| 2031 | Yr 18 | 3,795,190 | 379,519 | 85,630 | 293,889 |
| 2032 | Yr 19 | 3,928,021 | 392,802 | 90,768 | 302,034 |
| 2033 | Yr 20 | 4,065,502 | 406,550 | 96,214 | 310,336 |
| 2034 | Yr 21 | 4,207,795 | 420,779 | 101,987 | 318,793 |
| 2035 | Yr 22 | 4,355,068 | 435,507 | 108,106 | 327,401 |
| 2036 | Yr 23 | 4,507,495 | 450,749 | 114,592 | 336,157 |
| 2037 | Yr 24 | 4,665,257 | 466,526 | 121,468 | 345,058 |
| 2038 | Yr 25 | 4,828,541 | 482,854 | 128,756 | 354,098 |
| 2039 | Yr 26 | 4,997,540 | 499,754 | 136,481 | 363,273 |
| 2040 | Yr 27 | 5,172,454 | 517,245 | 144,670 | 372,575 |
| 2041 | Yr 28 | 5,353,490 | 535,349 | 153,351 | 381,998 |
| 2042 | Yr 29 | 5,540,862 | 554,086 | 162,552 | 391,535 |
| 2043 | Yr 30 | 5,734,792 | 573,479 | 172,305 | 401,175 |
| 2044 | Yr 31 | 5,935,510 | 593,551 | 182,643 | 410,908 |
| 2045 | Yr 32 | 6,143,253 | 614,325 | 193,602 | 420,724 |
| 2046 | Yr 33 | 6,358,267 | 635,827 | 205,218 | 430,609 |
| 2047 | Yr 34 | 6,580,806 | 658,081 | 217,531 | 440,550 |
| 2048 | Yr 35 | 6,811,134 | 681,113 | 230,583 | 450,531 |
| 2049 | Yr 36 | 7,049,524 | 704,952 | 244,418 | 460,535 |
| 2050 | Yr 37 | 7,296,257 | 729,626 | 259,083 | 470,543 |
| 2051 | Yr 38 | 7,551,626 | 755,163 | 274,628 | 480,535 |
| 2052 | Yr 39 | 7,815,933 | 781,593 | 291,105 | 490,488 |
| 2053 | Yr 40 | 8,089,491 | 808,949 | 308,572 | 500,378 |
| 2054 | Yr 41 | 8,372,623 | 837,262 | 327,086 | 510,176 |
| 2055 | Yr 42 | 8,665,665 | 866,567 | 346,711 | 519,856 |
| 2056 | Yr 43 | 8,968,963 | 896,896 | 367,514 | 529,383 |
| 2057 | Yr 44 | 9,282,877 | 928,288 | 389,564 | 538,723 |
| 2058 | Yr 45 | 9,607,778 | 960,778 | 412,938 | 547,839 |
| 2059 | Yr 46 | 9,944,050 | 994,405 | 437,715 | 556,690 |
| 2060 | Yr 47 | 10,292,092 | 1,029,209 | 463,978 | 565,232 |
| 2061 | Yr 48 | 10,652,315 | 1,065,231 | 491,816 | 573,415 |
| 2062 | Yr 49 | 11,025,146 | 1,102,515 | 521,325 | 581,189 |
| 2063 | Yr 50 | 11,411,026 | 1,141,103 | 552,605 | 588,498 |
| Total number of TEUs | | 279,623,567 | 27,962,357 | 9,262,682 | 18,699,675 |

| | | | | |
|-------------------------------|-----------------|-----------------|-----------------|-----------------|
| Total number of TEUs | 279,623,567 | 27,962,357 | 9,262,682 | 18,699,675 |
| | Column A | Column B | Column C | Column D |
| Revenue per TEU lift | \$ 346.10 | | | |
| Net Quayside rev per lift | | 199.9 | | |
| Landside & other rev per lift | | 146.2 | | |
| Cost per TEU Lift | \$ 268.00 | | | |
| Gross Profit per TEU lift | \$ 78.10 | | | |
| Gross Profit from TEU Lifts | 21,838,600,547 | 2,183,860,055 | 723,415,446 | 1,460,444,609 |
| Discount Rate | | | | 3.0% |
| PV=FV/(1+Rate)^period | | | | 333,137,755 |
| Port Botany Wharfage per TEU | \$ 145.75 | | | |
| State Compensation Liability | | | 1,350,035,867 | 2,725,477,615 |
| Discount Rate | | | | 3.0% |
| PV=FV/(1+Rate)^period | | | | 621,700,740 |

Sources:

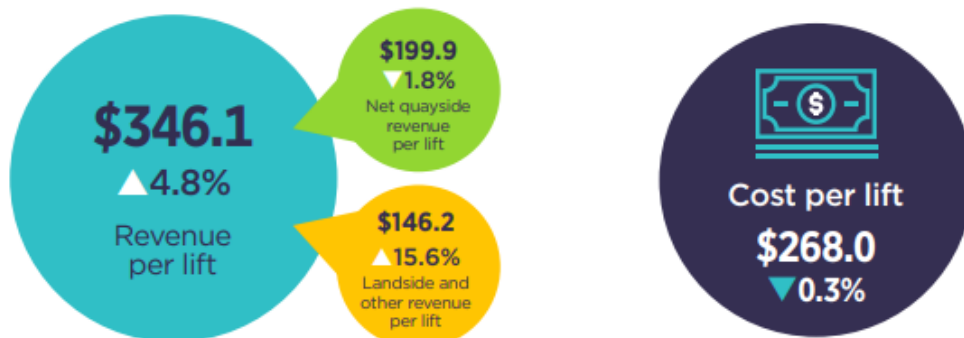
Waterline Report no 57
 Waterline Report no 58
 Waterline Report no 61
 Waterline Report no 63
 Waterline Report no 64
 Waterline Report no 66
 Waterline Report no 67
 Waterline Report no 68
 Transport NSW Freight Data - Port Botany Throughput Volumes in TEUs

Appendix B:

Key stevedoring results 2021-22

Revenue, cost, profit and investment

| | | |
|------------------------|---------------------|----------------------------|
| Total revenue | Total cost | Profit margin ^a |
| \$1,826 m | \$1,415 m | 24.2% |
| ▲ 5.1% | — 0.0% | ▲ 3.3 pp |
| Investment (additions) | Tangible asset base | Operating profit (EBITA) |
| \$180.1 m | \$1,696 m | \$441.4 m |
| ▲ 240.8% | ▼ 2.8% | ▲ 21.8% |



Source: ACCC Container Stevedoring Monitoring Report 2021-2022