

Supplementary Submission to the Inquiry into Economic Regulation of Harbour Towage and Related Services

Introduction

In reviewing the submissions to the Productivity Commission's Issues Paper, the ACCC became aware of Appendix D to the Adsteam submission. Appendix D, prepared by the law firm Clayton Utz, contains a "summary of events and issues" arising from Adsteam's recent price notification. The ACCC is concerned that the description of the process contained in Appendix D may omit relevant information and misrepresent the assessment process and the ACCC's conduct. Part A of this supplementary submission responds to Appendix D.

In addition, Adsteam contacted the ACCC to request that the ACCC's calculation of price increases presented at Table 3.3 of the ACCC's Submission to the Productivity Commission on Economic Regulation of Harbour Towage and Related Services ('ACCC's submission'), be made more transparent. The ACCC has checked the calculations and has found that price decreases for one of the ports, Fremantle, may have been understated. Part B of this supplementary submission makes a correction for Fremantle and sets out the ACCC's information and assumptions concerning price changes at declared ports.

Part A: Response to Appendix D to the Adsteam submission

This part of the submission sets out the significant events that occurred in the ACCC's consideration of Adsteam's recent price notifications. In particular, issues concerning the ACCC's administration of the Prices Surveillance Act and claims for confidentiality are discussed. This discussion demonstrates that throughout the notification process the ACCC had clear procedures in place and was responsive to matters raised by Adsteam.

A1 ACCC's Procedures

In order that the Productivity Commission may place the comments of Adsteam in context, the ACCC provides the following chronology.

<i>Date</i>	<i>Event</i>
Mid 2001	Future price notification from Adsteam identified to an ACCC Commissioner. No details provided to ACCC.

29 August 2001	Meeting at ACCC with Adsteam representatives to discuss process for future price notification. ACCC gives Adsteam a copy of Guidelines for Price Notifications. Adsteam identifies that it desires assessment to be completed before Christmas for implementation in January 2002.
October 2001	ACCC representative (Margaret Arblaster) contacts Adsteam to inquire about timing of Adsteam's notification.
14 December 2001	Adsteam meets with ACCC to brief on pricing proposal. Adsteam is advised that ACCC considers that it requires until 31 March 2002 to assess the notification, given that the statutory time frame for considering the notification covers the December – January holiday period and the complexity and significance of issues raised. Notwithstanding this, Adsteam presents ACCC with 5 price notifications and a letter allowing a 14-day extension. ACCC's decision due 17 January 2002. Adsteam provides the ACCC with a 76 page document over which a claim for confidentiality was made. ACCC asked that Adsteam provide a version of its submission that could be made available to the public.
17 December 2001	Public version of Adsteam's submission emailed to ACCC.
18 December 2001	ACCC writes to interested parties inviting comments by 2 January 2002 on Adsteam's notifications.
24 December 2001	ACCC advises Adsteam that (1) Adsteam's notifications appear to be invalid as the notifications did not contain proposed prices; and (2) the ACCC wishes to discuss the timing for completion of the project.
28 December 2001	Adsteam resubmits 5 notifications with price schedules and statements of terms and conditions. ACCC's decision due 17 January 2002. Adsteam indicated that they "are quite prepared to discuss appropriate timing for completion of the Commission's assessment".
4 Jan 2002	Adsteam provides supplementary information to ACCC in response to ACCC requests. Confidentiality was claimed for all information provided.
15 January 2002	Meeting with Adsteam. Although the ACCC understood that timing was to be a matter of discussion, Adsteam arrived at the meeting with a signed letter for a 14-day extension. ACCC decision due 31 January 2002.

25 January 2002	Adsteam contacts ACCC and offers extension until 14 February 2002.
30 January 2002	ACCC advises Adsteam in writing that the <i>Prices Surveillance Act 1974</i> ('PS Act') does not allow for extensions once the initial 21-day period has expired. Adsteam is advised of the alternatives available to it that would allow more time for the ACCC to make a decision, but is also advised that a period longer than 21 days would be required to allow adequate time for public comment.
30 January 2002	Adsteam withdraws its 5 price notifications and resubmits identical notifications. ACCC decision due 19 February 2002.
31 January 2002	ACCC commissioned report by Professor Kevin Davis.
4 February 2002	ACCC distributes Issues Paper, comments to be provided by 11 February 2002. The paper focuses on alternative approaches to determining prices. In particular, the Issues Paper outlines Adsteam's approach of using lease charges to determine prices. Adsteam did not raise any confidentiality concerns.
11 February 2002	ACCC receives from Adsteam a submission to the Issues Paper. Adsteam claims confidentiality for the entirety of its submission.
12 February 2002	<p>Prof Davis provides two versions of his report to the ACCC. One version contained information that was confidential to Adsteam. The other version was considered not to contain confidential information ('the public version'). It is the ACCC's usual practice to provide a copy of an expert report commissioned by the ACCC to interested parties, and to place a copy of the report on the ACCC's website, in order to provide all parties with an opportunity to comment on the report. In accordance with this practice, the public version of the report was e-mailed to 9 parties including Adsteam. The report was e-mailed to these particular parties as the parties had previously received all material sent by the ACCC in relation to Adsteam's notifications, and the ACCC had e-mail addresses for the parties.</p> <p>Contrary to the claim made on behalf of Adsteam in par 2.16 of Appendix D, these matters were fully explained in two letters from the ACCC to Adsteam dated 14 and 15 February 2002.</p>
12 February 2002	In response to concerns expressed by Adsteam, the ACCC acted promptly to protect Adsteam's position until the public version of the report could be reviewed, despite the ACCC's view that the public version of the report did not contain confidential information. The report was not put on the website and the ACCC contacted the other 8 parties to request that copies of the e-mailed report be destroyed.

	<p>The ACCC recognised that it would not be possible to resolve the issue of confidentiality of the report prior to making its decision on the notifications (due 19 February 2002) as Adsteam would not have a fair opportunity to make a submission. As a solution, the ACCC, in letters dated 14 and 15 February 2002, proposed that Adsteam would be given an opportunity to review the report as part of the ACCC's statement of reasons and to make any confidentiality claims in accordance with the process set out in ss 23(2A) and 23(2B) of the PS Act (which apply to documents to be placed on the public register after the ACCC has made a decision).</p> <p>The ACCC considered this to be a significant accommodation of Adsteam's interests. It gave rise to a highly unusual situation where only one party, namely Adsteam, had an opportunity to comment on the merits of an expert report prior to the ACCC's decision. Although Adsteam was expressly invited to provide a submission on the merits of the Davis report, no such submission was provided.</p>
19 February 2002	<p>ACCC decided that it:</p> <ul style="list-style-type: none"> • objected to the proposed prices; and • pursuant to s 22(2)(b)(iii) of the PS Act, did not object to the services being supplied at the prices in operation at the time of notification of 30 January 2002, being prices that were lower than the proposed prices. <p>This extended the prescribed period to 5 March 2002, being 14 days after the ACCC notified Adsteam of its decision under s 22(2)(b)(iii) (unless Adsteam were to file a notice under s 22(2)(b)(iii)). As stated in par 3 of Appendix D, Adsteam could have, and did not, seek judicial review of this decision.</p> <p>Adsteam was provided with written notice of the decision and (1) advised that the statement of reasons would be forwarded by 10am 20 February 2002; and (2) invited to provide a submission to the ACCC in accordance with s 23(2A) by 10am 21 February 2002.</p>
20 February 2002	<p>ACCC issues media release announcing the ACCC's decision, but noting that a statement of reasons for the decision would not be available until the following week.</p> <p>Adsteam was provided with a copy of the ACCC's statement of reasons. Appendix B set out the public version of the Davis report.</p>

20 February 2002	<p>In response to a letter sent on behalf of Adsteam dated 20 February 2002, the time for Adsteam's submission was extended to 5:30pm 21 February 2002. This time was considered reasonable as:</p> <ul style="list-style-type: none"> • Adsteam had access to a copy of the Davis report since 12 February 2002; • the information that could be subject to a claim by Adsteam under s 23(2A) was information in Adsteam's own submissions and documents; and • the ACCC was cognisant of, and had attempted to address, Adsteam's confidentiality concerns when it prepared the statement of reasons. <p>The ACCC considered that any further delay would not be in the public interest. Any decision made by the ACCC to object to a proposed price increase is not enforceable. The scheme embodied in the Act is one of price surveillance, not price control. Compliance with the ACCC's decision depends on 'the force of public opinion and companies' recognition of their public responsibilities'. The PS Act cannot operate as intended unless, prior to the date on which Adsteam was legally entitled to increase its prices, members of the public are informed of the ACCC's decision and the reasons for that decision.</p> <p>These reasons were fully explained and repeated to Adsteam in letters dated 20, 26 and 28 February 2002.</p>
21 February 2002	Submission provided on behalf of Adsteam under s 23(2A).
26 February 2002	<p>ACCC notified Adsteam of its decision under s 23(2B). Contrary to the claim made in par 4.11 in Appendix D, the ACCC provided a five page table setting out its reasons for its decision.</p> <p>As Adsteam had previously been advised, the ACCC, as a matter of courtesy, also undertook not to release the statement of reasons until 4:30pm, being at least 3 hours after Adsteam received the letter, or, if Adsteam were to seek an interlocutory injunction in the Federal Court, until the matter could come before a duty judge.</p> <p>In the ACCC's experience, given that Adsteam had been on notice since 12 February 2002, 3 hours would have been sufficient time for Adsteam's legal advisers to make a phone call to a Federal Court registry to request a hearing before a duty judge.</p>

26 February 2002	Adsteam provided a submission in response to the ACCC's letter of 26 February 2002 which raised new information.
27 February 2002	ACCC reviewed the decision that it made on 25 February 2002 in light of Adsteam's second submission.
28 February 2002	ACCC notified Adsteam of its revised decision under s 23(2B) and provided reasons for its revised decision.
28 February 2002	Adsteam advised ACCC's legal advisers that it would not be seeking an interlocutory injunction. ACCC published the statement of reasons in accordance with s 23(2). ACCC issues a media release announcing that the statement of reasons for the ACCC's decision is now available to the public.
6 March 2002	Adsteam issues media release announcing increased prices for harbour towage services and the ports subject to declaration.
6 March 2002	ACCC issues media release in response to statements made in the Adsteam media release.

A2 ACCC's Decision to Issue a s 22(2)(b)(iii) Notice

At par 3 of Appendix D, Adsteam sets out its views concerning the issuing of a notice under section 22(2)(b)(iii) of the PS Act ('an objection notice') in circumstances where the ACCC considers that no price increase is justified.

The issuing of such a notice extends by two weeks the period within which a notified price increase cannot be effected.

Can an objection notice be issued where the ACCC considers that no price increase is justified?

Adsteam submits that the PS Act does not countenance the issue of an objection notice in these circumstances. In support, Adsteam avers to but does not reproduce Counsel advice.

For its part, the ACCC considers that such a power exists and that it is proper for it to be exercised.

Adsteam does not dispute that, on its face, the PS Act provides power to the ACCC to issue an objection notice in these circumstances. It nonetheless contends that the power should be read down so that an objection notice may only be issued where the ACCC considers that a notified price increase is in part justified.

At law, clear words used in an enactment should be given their ordinary meaning. The only exception to this is where to do so would lead to an absurd or unreasonable result.¹ Whether a result is absurd or unreasonable should be assessed in light of the purpose of the relevant provisions of the Act.

The ACCC considers the relevant purpose of the notification regime is to ensure that proposed price increases for relevant goods and services are subject to scrutiny, and to allow public opinion to inform the business decision as to whether or not to proceed to implement a proposed increase.

In regard to the importance of public opinion in the operation of the notification regime, the second reading speech states:

The Government expects that bodies subject to the Authority will abide by its decisions. While compliance will be voluntary ... the force of public opinion and companies' recognition of their public responsibilities will be powerful factors ensuring compliance with the findings of the Authority

It is entirely unclear how reading down the power to issue an objection notice to circumstances where a notified price increase is only in part unjustified (as opposed to entirely unjustified), as advocated by Adsteam, would in any way serve this purpose.

To the contrary, it appears quite reasonable for the legislature to have intended that the implementation of a price increase that is assessed as entirely unjustified should be subject to an objection notice. This has the effect of delaying implementation of such an increase by a two-week period, in which time the public can, in light of the ACCC's decision, consider the proposed price increase, and make known its opinion of it.

Should such a notice be issued?

Adsteam submits that the purpose of an objection notice is:

plainly ... to suggest a lower increase to the person ... to enable that person to accept or reject the lesser increase.

Based upon this view, Adsteam states that issuing an objection notice in circumstances where no price increase is considered justified is of no utility because no person in Adsteam's position would be minded to accept such a notice. The ACCC does not accept Adsteam's assumption that all companies would ignore a decision by the ACCC and public opinion that no price increase is justified.

Is it ACCC practice to issue objection notices in these circumstances?

Adsteam believes that, in response to its recent notifications, the ACCC acted without precedent in issuing an objection notice that specified current prices. This belief is misplaced.

As it is rare for the ACCC to object to a price notification, it is also rare for ACCC to issue an objection notice that specifies existing prices. Precedents do however exist.

¹ See section 15AA and 15AB of the *Acts Interpretation Act 1901*.

Indeed Adsteam itself has previously been the subject of such an objection notice. In 1997 an Adsteam subsidiary, Waratah Towage Pty Ltd, notified the ACCC of proposed price increases for harbour towage services at Port Jackson. Waratah Towage was advised that:

Pursuant to Section 22(2)(b)(iii) ... the Commission has no objection to the schedule of towage charges in Port Jackson which were operating at the time of the submission of your price notification.

Conclusion

The ACCC maintains that it acted in accordance with the powers provided to it under the PS Act during its assessment of Adsteam's recent notification. The ACCC considers that it both had power to issue the notice and that it was reasonable for it to do so.

A3 ACCC's Decision on Adsteam's Confidentiality Claims

At par 1.13 of Appendix D, Adsteam states that the ACCC decided to release a significant amount of confidential information which had been furnished by Adsteam in relation to its notifications. Adsteam disputes the decision made by the ACCC under s 23(2B) of the PS Act.

The following table summarises the confidentiality claims made by Adsteam in relation to the statement of reasons, and the ACCC's response.

Adsteam's Claim	ACCC Response
Page 5 – table: typographical error	corrected in statement of reasons
Page 6 – one sentence: misquote of Adsteam	corrected in statement of reasons
Page 6 – one sentence: confidentiality	deleted from public version of statement of reasons
Page 12 – one sentence and one phrase: confidentiality	not deleted
Page 19-20 – two paragraphs: disagreed with analysis	explained reasons for analysis
Page 22 – one paragraph: misquote of Adsteam	corrected in statement of reasons
Appendix B: Davis report pars 6, 7 and 8: confidentiality	deleted certain percentage references but retained discussion of methodology
Appendix B: Davis report par 9 first four words: confidentiality	not deleted

The principal area of disagreement was the discussion, in pars 6, 7 and 8 of the Davis report, of the methodology used by Adsteam to derive its proposed price increases. The Productivity Commission may wish to read these paragraphs which are set out at Appendix B to the public version of the ACCC's statement of reasons.

Under s 23(2B) of the PS Act, the ACCC cannot exclude information from the public register unless (a) it is satisfied that the claim is justified; and (b) it is not of the opinion that disclosure of the information is necessary in the public interest. As explained to Adsteam in letters dated 26 and 28 February 2002, the ACCC was prepared to accept that the method used by Adsteam to generate a target rate of return was not widely known. However, the ACCC considered that the disclosure of the methodology was necessary in the public interest.

In assessing the public interest, the ACCC balanced the public interest in the statement of reasons containing sufficient information to enable a reader to understand, and form an opinion on, the ACCC's reasons for its decision; against the public interest in protecting commercially sensitive information. In the ACCC's view, a description of the methodology was necessary to understand how Adsteam's approach resulted in a different revenue requirement to that derived from alternative approaches. The discussion in pars 6, 7 and 8 is an important part of Professor Davis' analysis as it directly critiques Adsteam's methodology. That Professor Davis' report finds fundamental concerns with Adsteam's application of this methodology is important to understanding the ACCC's reasons for adopting alternative approaches to estimating revenue requirements. The ACCC further considered that:

- although the methodology may provide Adsteam's competitors with some insight into a model that Adsteam uses to determine prices, such competitors would need to estimate the inputs to that model from a broad range of possible values; and
- accordingly, the exclusion of the numerical percentages reduced the possible commercial damage to Adsteam.

As clearly stated in the ACCC's letters to Adsteam dated 14, 15, 26 and 28 February 2002, the ACCC also strongly disputes Adsteam's claims that the Davis report does not form part of the ACCC's reasons for its decision.

A4 Time Frame

At par 5.10 of Appendix D, Adsteam states that it allowed the ACCC effectively 2 months to reach its decision.

As set out in the chronology above, the price notifications were originally lodged on 14 December 2001 and a decision was made on 19 February 2002. Although the ACCC had requested until 31 March 2002, the ACCC's decision was originally due on 17 January 2002. This was subsequently extended to 31 January 2002 but not until 2 days before the decision was due. Adsteam renotified on 30 January 2002 but again, this was one day before the decision was due. Adsteam's control over the process made it extremely difficult for the ACCC to plan and conduct a reasonable process for the assessment of Adsteam's price notifications.

A5 ACCC's Media Release of 6 March 2002

At Appendix D (par 5) of Adsteam's submission, comment is made regarding the perceived fairness or objectivity of the ACCC's media release of 6 March 2002. The ACCC made this media release primarily to ensure that the public would be apprised of the ACCC's reasoning in making its decision notwithstanding the claims made by Adsteam in its media release of earlier the same day. The ACCC's media release noted that the "...details of the ACCC's reasoning are set out fully in the Statement of Reasons which can be obtained from the ACCC's website www.accc.gov.au".

Part B: Price Trends of Towage Operators

Section 3.2 of the ACCC's submission discussed the regulatory costs of the current declaration of harbour towage services. The ACCC included in this discussion, at Table 3.3, a description of the known price trends in average prices for harbour towage services at declared ports.

Adsteam has contacted the ACCC and requested that the ACCC's calculation of price increases presented at Table 3.3 of the ACCC's submission be made more transparent. The ACCC has checked the calculations and has found that price decreases for one of the ports, Fremantle, may have been understated. This supplementary submission makes a correction for Fremantle and sets out the ACCC's information and assumptions concerning price changes at declared ports.

The changes in towage rates that the ACCC understands occurred for the following ports are set out in the tables below. The information is based on price notifications made to the ACCC, publicly available price schedules, and on the ACCC's knowledge of price increases and decreases outside of the notification process. The ACCC did not have sufficient information to track price trends for the Port of Newcastle.

Port Botany

October 2000 GST weighted average increase	Cumulative increase to December 2001	March 2002 increase	Cumulative to March 2002
7.55%	7.55%	13.1%	21.6%

Port Jackson

February 1998	October 2000 GST	Cumulative increase to December 2001	March 2002 increase	Cumulative increase to March 2002
15.0%	7.26%	23.3%	26.2%	55.66%

Melbourne

March 1999	July 2000 GST	Cumulative increase to December 2001	March 2002 increase	Cumulative increase to March 2002
10.0%	8.08%	18.9%	23.4%	46.7%

Adelaide

April 1992	October 2000 GST	Cumulative increase to December	March 2002 increase	Cumulative increase to March 2002

		2001		
13.4%	6.84%	21.1%	15.8%	40.3%

Brisbane

January 1994 decrease	July 2000 GST	Cumulative increase to December 2001	March 2002 increase	Cumulative increase to March 2002
-3.1% *	7.94%	4.6%	11.7%	16.8%

* - refers to GRT range 15,000 to 20,000 only

Sources: PSA (1993) Monitoring Report no 7 Towage Charges Table 2 p 7

ACCC notifications

As mentioned earlier, in reviewing the ACCC's calculations, an error was detected for the towage rate charges at the Port of Fremantle. A closer estimate of changes is shown below:

Fremantle

December 1992	January 1997 average *decrease	October 2000 GST	March 2001 decrease	Cumulative decrease to December 2001
6.8%	-7.5%	8.24%	-15.0%	-9.2%

Sources: PSA notifications

- average across tonnage schedules not weighted according to proportion of vessels in those tonnage ranges

CPI : Weighted Average of eight capital cities all groups

September Quarter 1991	December Quarter 2001	Cumulative increase since Sep 1991	March Quarter 2002	Cumulative increase since Sep 1991
106.6	135.4	27.0%	136.6	28.1%

Source: ABS Catalogue No 6404.0

Methodology used to derive Table 3.3

The ACCC applied the weighted average towage rate increases that were approved by the PSA / ACCC and / or implemented by the declared towage company.

For example, for Port Botany, there was an approved 7.55 per cent increase in towage rates as a result of the introduction of the GST in July 2000. In March 2002, Waratah increased its rates by a further 13.1 per cent giving a cumulative rise in rates of 21.6 per cent over the period of the declaration.

These increases were checked against the actual price increases contained in the price schedule and weighted across the schedule to obtain an average towage price increase

over all schedules. For Port Botany this resulted in an average 7.57% increase in rates in October 2000.

For decreases in towage rates, such as occurred for the Port of Brisbane and the Port of Fremantle, the average decrease across the price schedule was calculated (but not weighted in terms of number of vessels in each tonnage range, since this is not known to the ACCC). In the case of Brisbane, prior to January 1994 there was only one price for one tonnage range that was available to the Commission. This was used as a base point to calculate the decrease in towage rates in January 1994.