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5 June 2002

Mr. A. Hinton
Commissioner
Productivity Commission
Harbour Towage Inquiry
Level 28
35 Collins Street
MELBOURNE VIC 3000

Dear Mr. Hinton

Supplementary Submission - Harbour Towage Inquiry

Adsteam Marine Limited feels it must respond to the remarks attributed to Professor Fels of the ACCC, in an article in Monday's *Australian Financial Review* (p.1 and 16).

The *AFR* article reported on Adsteam's submissions to the Productivity Commission which drew attention to the unauthorised disclosure by the ACCC of certain Adsteam confidential information to eight so called industry participants in February 2002, during the recent inquiry held under the *Prices Surveillance Act*.

The *AFR* article attributed to Professor Fels a comment that:

"The Commission considers that these claims [(that is, Adsteam's claims of confidentiality)] were mainly about keeping secrets from many big customers about their high rates rather than any commercial considerations."

If the ACCC Chairman expressed this view, the ACCC is clearly operating under a serious misapprehension as to Adsteam's position. Such remarks could be viewed as quite misleading.

Adsteam's major customers are of course already well aware of the rate they pay for Adsteam's services.

As stated in our submission, and in a letter sent to the ACCC on 14 February 2002, Adsteam's objection to the release of confidential information by the Commission was the disclosure to eight parties, of the detailed description of Adsteam's internal pricing methodology. Adsteam's chief concern was and is that its commercial rivals could use Adsteam's own internal pricing approach to pre-empt Adsteam in competitive tenders for towage services.

When, in February 2002, the ACCC released its public version reasons for rejecting Adsteam's price notification, the information deleted from its reasons (at Adsteam's request) was not its rates but rather, the particular rate of return targets and other quantitative figures used in Adsteam's confidential pricing methodology.

Furthermore, when the ACCC ruled on the release of Adsteam's confidential information, in each case the ACCC stated that it "*proceeded on the basis that the [Adsteam] claim [for confidentiality] is justified*" but was of the opinion that "*disclosure of the information is necessary in the public interest*".

Taking this into account, Adsteam submits that no weight whatsoever should be placed on media comments as above raised some 3 months later after the decision in question. In any event, the comments appear to confuse rates with Adsteam's pricing methodology.



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Did Adsteam "belatedly" raise its confidentiality concerns with the ACCC?

The *AFR* article next attributes to Professor Fels a comment that:

"The Commission made substantial concessions when Adsteam belatedly raised its concerns and believes Clayton Utz is making a mountain out of a mole hill."

We cannot allow this statement to go unchallenged. Adsteam raised questions with the ACCC about breaches of confidentiality on two occasions. To refer to Adsteam only "belatedly" raising issues is quite wrong.

On the first occasion, Adsteam objected within half an hour when it learned that, on 12 February, the information had already been released to eight so called interested parties by the ACCC. As we set out in our submission to the Productivity Commission Inquiry the facts are clear (see Attachment "A" particularly Section 2.10 to and including Section 2.16). They are also unchallenged by the ACCC.

The Davis Report was released on 12 February 2002, without deleting the information including numerical percentages (later deleted after Adsteam's protests). On that day, within half an hour of receiving advice that the Davis Report had been released to eight parties Adsteam contacted the ACCC and protested vigorously. We continued so to do until changes were reluctantly made by the ACCC, to the final version released with the ACCC's statement of reasons two weeks later.

Again, on Tuesday 4 June, there was a further article in the *AFR* (p. 18) in which the *AFR* quotes from an ACCC submission to the Productivity Commission Inquiry as follows:

"Although the methodology may provide Adsteam's competitors with some insight into a model Adsteam uses to determine prices, such competitors would need to estimate the input 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."

There are two concerning issues that arise out of the above statement;

Firstly,

- ## There is a tacit acknowledgment by the ACCC that even the release of a mildly edited Davis Report could cause Adsteam some commercial damage.
- ## More importantly however the ACCC seeks to depict themselves as being responsive to Adsteam's concerns by stating they had "excluded numerical percentages".
- ## The facts are, however, that the ACCC released the Davis Report on 12 February 2002 to eight so called interested parties **without deleting the numerical data**.

The damage was done on 12 February and nothing in the ACCC supplementary submission can change the facts which remain unchallenged by them.

Secondly, according to the file maintained by Adsteam and by Clayton Utz, our lawyers, the facts concerning the "second round" debate about release of the Davis Report between 21 and 27 February are that:

- ## the Commission later made only minor concessions on deletion of confidential information when requested by Adsteam; the ACCC imposed an unreasonable timetable on Adsteam in making those submissions, with which Adsteam complied;
- ## when on 21 February 2002, Adsteam drew to the ACCC's attention the new entrant in the Melbourne port, the Commission then decided to delete, from Professor Davis' report, certain figures (only) used in the discussion of Adsteam's pricing methodology



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The Adsteam submission of 21 February resulted in the removal of approximately 9 numerals from paragraphs 6 to 8 of the Davis report. Despite requests by Adsteam, none of the text of the Davis Report was removed.

In this light, the concessions made by the ACCC were anything but "substantial".

Further, given the urgency which the ACCC imposed upon Adsteam making the submissions about confidentiality, prior to the public release, (that is, between 20 and 27 February) Adsteam does not see how the ACCC could conclude that Adsteam acted "belatedly" in the circumstances.

The Productivity Commission Inquiry

Finally, the AFR article attributes to Professor Fels the following comment:

"We hope the Productivity Commission will agree with us that more information should be revealed about the substantial profits Adsteam makes from its monopoly position."

As the Productivity Commission is aware, Adsteam Marine Limited is listed on the Australian Stock Exchange and is required to comply with the rules for continuous disclosure. Recently, Adsteam released a profit warning concerning, amongst other things, the lower than expected profit that might be attributed to Adsteam's Australian operations, which were the subject of the ACCC decision in February this year. Unfortunately, Adsteam's profits are not "substantial" in the declared ports, which was one of the reasons for the profit warning issued last month.

Adsteam's customers and shareholders can rightly claim to be confused if they attempt to reconcile public statements such as these by the ACCC Chairman with the ASX releases made by Adsteam.

Given the high standard of care and accuracy which Adsteam and others in the private sector must observe in their public statements, to avoid breach of the Act by "misleading conduct", Adsteam finds comments such as this wholly unhelpful and not in keeping with a balanced and fair system of business regulation.

These statements, if in fact made by Professor Fels, are inaccurate and above all damaging to the 24,500 Adsteam shareholders, 2,000 employees and our relationship with our customers.

If Adsteam made public inaccurate statements about its business affairs, we would expect to be prosecuted for misleading and deceptive behaviour under the Trade Practices Act, and required to issue a prominent retraction.

Yours sincerely

David Ryan
Managing Director
ADSTEAM MARINE LIMITED

CLAYTON UTZ

23 April 2002

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Partner
M T Corrigan

Dear Mr Ryan

**Submission to the Productivity Commission - Inquiry into the Economic Regulation of
Harbour Towing and Related Services**

You have asked us to assist Adsteam Marine Limited ("Adsteam") in preparing part of its Submission to the Productivity Commission. Specifically, you have asked us to prepare the section of the Submission addressing Adsteam's experiences in its recent notification lodged with the Australian Competition and Consumer Commission ("**Commission**") under the *Prices Surveillance Act 1983* ("**PSA**") concerning:

- the release of confidential information;
- the Commission's use of powers under section 22(2)(b)(iii) of the PSA; and
- the relevance of media interest to the decision making process.

Attached to this letter is a note prepared on your instructions and in conjunction with you addressing each of these issues.

Yours sincerely
CLAYTON UTZ



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Enclosure

Appendix

1. The Notification Process

Executive Summary

1.1 In this part of the submission, Adsteam describes its experiences with the latest notification lodged with the Australian Competition and Consumer Commission ("**Commission**") in December 2001, and which resulted in the Commission rejecting Adsteam's application. Detailed below are Adsteam's concerns about:

- release of confidential information;
- the Commission's use of powers under section 22(2)(b)(iii) of the *Prices Surveillance Act* 1983 ("**PSA**"); and
- the relevance of media interest to the decision making process.

The key point of this part of the submission is to outline why, in Adsteam's submission, the procedures prescribed under the PSA have significant deficiencies and lend themselves to excessive regulatory costs and risks. Currently, Adsteam is required to submit highly confidential information and risk the public release of that information in circumstances where Adsteam has little control over the process, or over the subsequent publicity generated about the notifications. The utility of this procedure is highly questionable.

Background to Adsteam's notification

1.2 On 13 December 2001, pursuant to the PSA,¹ Adsteam (on behalf of four subsidiaries²) lodged five notifications of proposed price increases to the Commission (the "**First Notifications**").

¹ Section 17(1) of the PSA empowers the Commission to consider proposed price rises for specified goods or services notified to the Commission by companies that have been 'declared' by the Minister.

² The following subsidiaries of Adsteam, namely: (a) Adsteam Towage Pty Limited; (b) Queensland Tug and Salvage Co Pty Limited; (c) Adsteam Towage Holdings Pty Limited; and (d) Waratah Towage Pty Limited, (referred to as the "**Subsidiaries**") are 'declared persons' in relation to 'notified services'. The notified services are harbour towage services supplied by them at the ports of Sydney (Jackson and Botany), Adelaide, Melbourne and Brisbane. Under s. 21 of the PSA, the Minister may also declare that an organisation, in relation to certain goods or services, be deemed a 'declared person' for the purposes of the PSA.

When lodging the First Notifications, Adsteam indicated that in light of the Christmas/New Year periods, Adsteam did not oppose a 14 day extension of the 21 day 'prescribed period', if required by the Commission.

- 1.3 At the same time Adsteam provided the Commission with a 76 page submission on towage prices in Brisbane, Port Jackson, Port Botany, Melbourne and Adelaide (the "**Adsteam Submission**"). The Adsteam Submission was provided on a confidential basis. The Adsteam Submission included extensive details of Adsteam's costs, industry changes, capital expenditure programs, financial data, rebate arrangements and credit terms. Much of this information, by its very nature was highly confidential to Adsteam and sensitive information if disclosed to competitors. In Adsteam's view, international competitors would highly value this information and could use it to Adsteam's detriment, if the information was disclosed. Adsteam competes in markets in South East Asia and Europe as well as in Australia.

The notification requirements under the PSA

- 1.4 The effect of a declaration under the PSA is that companies (such as the Subsidiaries) that have been 'declared' must notify the Commission of a proposed price increase for the specified goods or services.

Subject to satisfying the obligations regarding such notification set out in s.22(2), a declared company (such as the Subsidiaries) must not increase the price of 'notified goods or services' above the previous highest prices (s.22(1) of the PSA).³ However, the prohibition on supplying goods or services at the higher price ceases if:

- (a) the declared company provides the Commission a notice specifying the **proposed new price** of the goods or services; and
- (b) **one of the following events has occurred:**
 - (i) the prescribed period of 21 days from the day on which the notice was given expires;
 - (ii) the Commission advises it does not object to the proposed price increase;
or
 - (iii) the Commission provides a notice to the declared company that it would accept a lower price to that originally notified to the Commission, and

³ A maximum penalty of \$11,000 applies if a company breaches this section.

the declared organisation agrees to implement that lower price.

- 1.5 As occurred with the First Notifications, a declared company and the Commission may agree upon extending the 21 day prescribed period (s.2(6) of the PSA). Furthermore, if the Commission issues a notice described in 1.4(b)(iii) above, (that is, a notice under s.22(2)(b)(iii) of the PSA), the 21 day prescribed period will be increased by a further period of 14 days (s.22(7) of the PSA).

The Commission purported to issue such a notice in this case, even though it rejected Adsteam's application entirely.

The role of the Commission under the PSA

- 1.6 As noted in the Productivity Commission's interim report on the PSA, the PSA does not contain powers of price control but relies on persuasion through public reporting.⁴

- 1.7 In performing its functions under the PSA, the Commission must take into account the following factors (s.17(3)):

1. *the need to maintain investment and employment, including the influence of profitability on investment and employment;*
2. *the need to discourage an organisation which is in a position substantially to influence a market for goods or services from taking advantage of that power in setting prices; and*
3. *the need to discourage cost increases arising from increases in wages and changes in conditions of employment inconsistent with principles established by relevant industrial tribunals.*

- 1.8 The Commission's role regarding price notifications is to examine the price increases proposed by declared companies and issue determinations as to whether the price increases are acceptable or not.

Under the PSA, the Commission has 21 days in which to make this determination. If no determination is made, or if the Commission proposes a lower price which is accepted by the declared company, the declared company may increase its prices.

Any determinations made by the Commission are not enforceable but are merely voluntarily

⁴ Productivity Commission, Review of the PSA, Interim Report (2000), p.xx.

adopted, but there is a penalty for increasing prices during the prescribed period of 21 days (or 35 days if extended), without the approval of the Commission.

Confidential information and the Public Register

- 1.9 Under s.23 of the PSA, the Commission is required to maintain a public register of notifications and its decisions. Following the expiry of the prescribed 21 day period, the Commission must publish on the register the price notification provided by the declared company, the outcome reached by the Commission and the reasons for the outcome.
- 1.10 A declared company which has provided confidential information to the Commission may ask the Commission to exclude that information from the register.⁵

The Commission may exclude the information if the Commission is satisfied that the claim is justified and is not of the opinion that the disclosure of the information is necessary in the public interest⁶ (emphasis added).

Obligations on the Commission - Public Interest Disclosure

- 1.11 The Commission is required to maintain strict secrecy of information acquired in connection with the performance of its duties under the PSA, except to the extent that disclosure to the public is permitted by the PSA.⁷
- 1.12 In addition, the Commission may, in conducting its consideration of a declared company's notification, require the company to furnish information or produce documents relating to the affairs of the company.⁸

⁵ s.23(2A) of the PSA.

⁶ s.23(2B) of the PSA.

⁷ s.43 of the PSA provides that disclosure of information, other than that authorised, is an offence under that provision.

⁸ Section 33 of the PSA provides that where: (a) a declared company claims that the information provided to the Commission is information, the disclosure of which would damage the competitive position of the company; and (b) the Commission is satisfied that the claim is justified and is not of the opinion that disclosure of the relevant information is "necessary" in the public interest, the Commission shall take all reasonable steps to ensure that the relevant information is not, without the consent of the company, disclosed in the proceedings or by the Commission to a person other than a member of the Commission, or a member of the staff of the Commission who receives the information in the course of his or her duties.

- 1.13 In this matter, over Adsteam's objection, the Commission decided to release a significant amount of confidential information which had been furnished by Adsteam in relation to its notifications. In doing so the Commission purported to rely on the power to disclose information where "*necessary in the public interest*".
- 1.14 As discussed in section 4.11 below, Adsteam vigorously disputes the "*necessity*" for the disclosure to have been made in this matter.

Adsteam accepts that the Commission is entitled to release a public decision which is sufficient to enable the public to understand the basis of its decision to accept or reject a notification. In this matter, Adsteam offered to work with the Commission to 'facilitate a clear statement of reasons' whilst at the same time, preserving confidentiality in Adsteam's proprietary methodology.⁹

However, only in exceptional cases where it is essential to do so (as witnessed by the legislative use of the term "necessary") and not merely "desirable", is the Commission entitled to override the normal protection afforded to a company's valuable proprietary commercial information.

- 1.15 At no stage, throughout the recent Adsteam notification did the Commission challenge Adsteam's claims that the information in question was not in fact "confidential".

Rather, the Commission, acting under s.23 of the PSA, chose to override Adsteam's claims in the alleged "public interest" and did so in a time frame which left Adsteam with no effective ability to challenge or review the Commission's decision to release the information.

Use of Information

- 1.16 In Adsteam's submission, this illustrates one of the key regulatory costs imposed by this legislation. The costs outweigh the benefits to the community at large. The third parties most likely to make use of Adsteam's confidential information to the detriment of Adsteam are foreign and local towage companies who compete against Adsteam in various tenders in South East Asia or who could use the information in entering a market.

2. The recent Adsteam notification

- 2.1 On or about 17 December 2001, representatives of Adsteam met with representatives of the Commission. At that meeting, amongst other things, the issue of confidential material

⁹ Adsteam letter to Commission 14 February 2002.

contained in the Adsteam Submission was discussed. It was agreed that Adsteam would prepare a version of the Adsteam Submission which would have excised from it the material that was confidential to Adsteam ("**Public Submission**"). The Public Submission was emailed to the Commission on 17 December 2001.

- 2.2 On 24 December 2001, Adsteam was informed by the Commission that the First Notifications were not valid under the PSA as they did not detail to the Commission's satisfaction the relevant prices, terms and conditions on which towage services were proposed to be provided, as required under the PSA.
- 2.3 On 28 December 2001, Adsteam lodged with the Commission the necessary price schedules and statement of terms and conditions to validate the First Notifications. It was accepted that the prescribed period of 21 days would commence from this date.

Extensions of Time

- 2.4 On 4 January 2002, Adsteam provided the Commission with some confidential supplementary information (the "**Supplementary Information**"), in response to information requests by the Commission.
- 2.5 On 15 January 2002, Adsteam granted the Commission a further 14 day extension of time to consider the First Notifications, given that the 21 day prescribed period was due to expire on 17 January 2002.

Second Notifications - Extension of Time

- 2.6 On 30 January 2002, Adsteam withdrew the First Notifications and lodged 5 new notifications ("**Second Notifications**") based on the material already provided to the Commission, which was relodged with 2 minor corrections.

By relodging the notices, Adsteam allowed the "clock" to start to run again. This also allowed the Commission to consider various late submissions which had been lodged by third parties.

- 2.7 On 4 February 2002 the Commission provided Adsteam with a paper entitled "*Adsteam Marine Price Notification Issues Paper - Approach to Determining Prices*" ("**Issues Paper**") in relation to Adsteam's Second Notifications. On 11 February 2002, Adsteam provided the Commission with a detailed response to the Issues Paper on a confidential basis, including an expert's report from Core Research (Professors Gans and King, economists at Melbourne University).

The Davis Report

- 2.8 As part of the Commission's investigations, in early February (without informing Adsteam), the Commission requested Professor Kevin Davis of Melbourne University Department of Finance, to prepare a report on Adsteam's Notifications. This report, entitled "*Report on Financial Information Provided by Adsteam Marine*" and dated 12 February 2002 (the "**Davis Report**") contained and commented critically on confidential information that was drawn from Adsteam's submission to the Commission.
- 2.9 In its final reasons for its decision released after 19 February 2002, the Commission stated that the Davis Report "*forms part of the Commission's reasons for its decision*".¹⁰ As noted below, in early February, the Commission decided to release the Davis Report publicly at least a week before its final decision on the Notifications. This Report was critical of Adsteam's application.

The Davis Report is Released

- 2.10 On 12 February 2002, Mr David Salisbury of the Commission notified Adsteam by email of the Commission's intention to post the Davis Report on its public register that day. The email stated that the Davis Report had already been sent to 8 'interested parties'. This was the first time the Commission indicated that the Commission intended to disclose material Adsteam provided to the Commission on a confidential basis.
- 2.11 The Davis Report was then faxed to Adsteam that day.
- Upon receipt, Adsteam reviewed it and raised its immediate concern that the Davis Report contained material that had been derived from the confidential material Adsteam had provided to the Commission.
- Mr Ryan (Managing Director of Adsteam) telephoned Mr Salisbury of the Commission, noting the potential breach of confidentiality and requesting that the Davis Report not be posted on the public register.
- At around 6.00pm, Mr Ryan also telephoned Mr Joe Dimasi, Executive General Manager, Regulatory Affairs Division, reiterating Adsteam's concerns regarding the disclosure.
- 2.12 The next day, 13 February 2002, Mr Ryan informed the Commission that the Davis Report contained significant amounts of confidential information in it, and that Adsteam objected to

¹⁰ Commission Reasons, p.15.

such information being released.

Later that day, Adsteam received a facsimile from Mr Salisbury of the Commission attaching a copy of the proposed public version of the Davis Report, with text crossed out, to accommodate the confidentiality concerns expressed by Adsteam.

The facsimile also stated that, as it was the Commission's intention to post the Davis Report onto the Commission's website later that day, Adsteam should provide its response to Ms Arblaster by 4 pm that day.

- 2.13 On 14 February 2002 Adsteam sent a letter to the Commission confirming the confidentiality concerns in releasing detailed mathematics of Adsteam's methodology for setting charter rates. Adsteam also indicated its willingness to work with the Commission to allow discussion of Adsteam's methodology so as to facilitate a 'clear statement of reasons', but explained why disclosure of the methodology Adsteam used to derive revenues would prejudice Adsteam.

Adsteam noted that the Commission had already emailed the Davis Report to eight other parties without having given Adsteam any opportunity to prevent or object to such release.

- 2.14 Adsteam understands that the eight parties were said by the Commission to be "interested" in the matter. However, it has subsequently emerged (according to information provided by the Commission to Adsteam) that only two of those parties had actually made submissions to the Commission in relation to the Notifications.

- 2.15 The other six parties were various shipping lines or pilots associations who apparently had not lodged any submission.

- 2.16 Adsteam does not know why or how the Commission selected the recipients of the Davis Report, as being 'interested'. Adsteam does not know why the Commission would, of its own accord, release confidential information in this way, to at least 6 parties who had not shown interest in Adsteam's application. Such disclosure seems beyond the proper scope of a light handed regulation.

Was There Urgency?

- 2.17 Adsteam also regards the very tight deadlines imposed on it by the Commission, to either object or permit release of Adsteam's confidential information, to have been inappropriate. In Adsteam's submission, the Commission could have and should have consulted with Adsteam much earlier to allow a reasonable time to consider any public disclosure of the information.

- 2.18 In response to Adsteam's concerns, on 14 February 2002, Ms Arblaster of the Commission wrote to Adsteam stating that the Commission had emailed and telephoned the eight parties

who were sent the original Davis Report *"to ensure that copies of the [Davis Report] were destroyed"*.

- 2.19 To this day however, Adsteam cannot be sure whether the information was copied or further disseminated by any of those 8 parties. The information set out Adsteam's pricing methodology. That methodology is proprietary to Adsteam. If known by rivals, it can be used to predict and pre-empt Adsteam's pricing strategies in tenders. Adsteam remains concerned that it will suffer prejudice from the leak.
- 2.20 Later that day, Mr Ryan of Adsteam wrote to Ms Arblaster of the Commission expressing his deep concerns about the Commission's breach of its confidentiality.
- 2.21 On 15 February 2002, the Commission wrote to Adsteam indicating that the Davis Report would not be made public until after its decision on Adsteam's Second Notifications had been made and would not be provided to further parties.

3. The Commission decision to Reject the Second Notifications

- 3.1 On 19 February 2002, the Commission wrote to Adsteam notifying of its decision in relation to the Second Notifications.

The Commission objected to Adsteam supplying towage services at the proposed prices set out in the Second Notifications.

Purporting to act pursuant to s.22(2)(b)(iii), the Commission stated that it did not object to Adsteam supplying the services *"at the prices in operation at the time of the notification of 30 January 2002, being prices that are lower than the proposed prices"*.

In other words, the Commission agreed to not object to a 'lower' price, being Adsteam's existing prices.

The Commission's attempt to use s.22(2)(b)(iii) in this way is believed to be without precedent.

Was the Commission's Decision To Rely on s.22(2)(b)(iii) Valid?

- 3.2 Adsteam has been advised by Senior Counsel that 'sensibly construed' the power of the Commission under s.22(2)(b)(iii) of the PSA to extend the embargo on price increases by 14 days is not available when the Commission decides that it objects to any price increase at all. This occurred here. The Commission did not propose a lesser increase than that sought by Adsteam.

The prohibition in the PSA is against increasing an existing price. Adsteam was advised that,

'sensibly construed', the whole of s.22(2) is also concerned with increasing an existing price.

Whilst Adsteam's existing prices might fall within the literal description of "a price that is lower than the proposed price," if those words were to be considered in isolation, so too might a price that is lower than Adsteam's existing prices.

Yet neither charging an existing price nor charging a lower price falls within the scope of the prohibition imposed by the PSA. If a price does not fall within the scope of the prohibition, why should it fall within the scope of the exception?

The power of the Commission under s22(2)(a) is a power to propose a lower price increase. Senior Counsel advised that *"to read it as encompassing a power to propose that the existing price be maintained would...be contrary to the scheme of the Act"*.

Such a reading would serve no purpose other than to allow the Commission, without the consent of the declared person concerned, to extend the prescribed period of 21 days by a further 14 days where the Commission objects to any price increase. Yet the scheme of the PSA, in such a case, is clear enough, to give the Commission 21 days and no more.

As a result, Senior Counsel concluded that the Commission's notice of 19 February 2002 did not constitute a valid exercise by the Commission of its power under s.22(2)(b)(iii) of the PSA.

The Government's Intentions

- 3.3 Adsteam also notes the second reading speech of the then Treasurer, Paul Keating in 1983 when introducing the PSA which stated:

"Where the Authority [(a reference to the predecessor Prices Surveillance Authority, now the Commission)] objects to a proposed increase, it will be able to suggest a lower increase to the person concerned or, where necessary, recommend an enquiry" (emphasis added).

- 3.4 Plainly, the purpose of permitting the Commission to suggest a lower increase to the person concerned is to enable that person to accept or reject the lesser increase. Thereupon the prescribed period (under which the person may not increase price) is extended until he either accepts the lesser increase or a further period of 14 days expires.

- 3.5 For the Commission to propose to the person that he or she accept a lesser increase, being "a zero increase" is a rejection and not a decision under s.22(2)(b)(iii). Having gone to the trouble and expense of lodging detailed submissions, and incurring the regulatory risks associated with disclosure of confidential information, no person in Adsteam's position would be minded to accept as a "lesser increase" a "zero increase".

The Commission has not explained why it purported to act under s.22(2)(b)(iii) as it did in this matter.

It is believed to be the first time the Commission has so acted.

- 3.6 Adsteam believes that the Commission's purported reliance on s.22(2)(b)(iii) of the PSA was not valid. One purpose of invoking s.22(2)(b)(iii) is to extend the prescribed period by a further 14 days - to 6 March 2002. This delayed a decision on Adsteam's notification for 81 days, after the lodgement on 13 December 2001.
- 3.7 Adsteam gave serious consideration to challenging the Commission's decision in the Federal Court. However, the utility of doing so was questionable, despite the real question as to the validity of the Commission's reliance on s.22(2)(b)(iii). Ultimately, success in court would have involved further cost and not resolved any of Adsteam's concerns with the costs and problems associated with the compliance with the PSA.
- 3.8 Adsteam draws this issue to the attention of the Productivity Commission as it believes it illustrates the problems encountered with this type of regulation.
- 3.9 There is, for this reason alone, sufficient compelling reasons for the Productivity Commission to recommend that the PSA procedures be radically overhauled to prevent this type of use of regulatory powers.

4. Public Release of the Commission's Reasons for Decision - And the Lack of Consultation with Adsteam.

- 4.1 The Commission, in its letter of 19 February 2002, informed Adsteam that its Statement of Reasons would be provided to Adsteam by 10 am on 20 February 2002.

The letter stated that Adsteam must, if it wished to seek appropriate confidentiality protection under s.23(2A) of the PSA, provide a written submission to the Commission by 10 am on 21 February 2002 - that is, within 24 hours.

The Commission indicated that it would then make a decision in relation to public release in accordance with s.23(2B) of the PSA.

- 4.2 On 20 February 2002, the Commission provided its 37 page Statement of Reasons, which it proposed to make public, to Adsteam.

The Commission's proposed public Statement of Reasons contained a complete and unedited copy of the Davis Report (that the Commission had previously required 8 receiving parties to destroy), despite Adsteam's earlier protests (see 2.10 - 2.16 above).

- 4.3 On 20 February 2002, correspondence passed between the Commission and Adsteam's lawyers in which Adsteam submitted that 24 hours was not a sufficient or reasonable time in which to allow Adsteam to provide a written submission on confidentiality.

Adsteam requested an extension until 5.30 pm on 22 February 2002 for its submissions on release.

The Commission granted an extension to Adsteam, but only until 5.30 pm on 21 February 2002 - an additional 7.5 hours.

Grounds of Urgency for Release of Reasons?

- 4.4 In Adsteam's submission, the Commission's approach to consultation with Adsteam about release of Adsteam's confidential information (as contained in the Commission's reasons and the Davis Report), was inadequate.

The timeframes within which Adsteam was required to comment and respond on the proposed release were extremely tight. No satisfactory explanation for the urgency was provided by the Commission.

When this issue was raised with Commission staff, Adsteam understands that the reason given was a perception by the Commission about the likely 'media interest' in the Commission's reasons.

This is notwithstanding that the Commission had, on the day of its decision, already released a detailed media release about its decision. The Commission stated in its media release of 20 February 2002 that:-

- The Commission had undertaken a "limited public consultation process within the 21 day time constraints of the notification".
- The Commission found any price rise would be likely to give Adsteam "excessive returns" and that even on existing prices Adsteam achieved estimated returns on equity "exceeding Adsteam's cost of equity".
- Hence, the Commission concluded that Adsteam was not justified in raising price - the Chairman of the Commission commented that the Commission had estimated that Adsteam would achieve returns on equity "at a rate approximately double that observed for Australian shares over recent years and in some cases even significantly higher". The Commission found that in setting its proposed prices, Adsteam "had double counted its profit margins". It was said that "only a company with significant market power could propose to implement such a pricing strategy."

- A copy of the statement of reasons would be made available on the Commission's website "next week".

The media widely reported the Commission's decision to reject, entirely, Adsteam's application.

- 4.5 It can be seen from the media release of 20 February that the Commission had by that release stated its reasons in some detail. This attracted widespread media commentary.
- 4.6 For the Commission then to assert that 'media interest' is a reason for imposing unrealistic urgent deadlines on Adsteam's ability to make proper submissions about the release of its confidential information under the PSA is, in Adsteam's submission, inappropriate.
- 4.7 Adsteam points out that the Commission's decision, by purporting to rely upon s.22(2)(b)(iii) of the PSA, effectively meant that the earliest date on which Adsteam could have moved to increase prices in accordance with its original notification, was 6 March 2002 - a further 14 days after the date of the Commission's reasons. There was therefore no real urgency on 20 February.
- 4.8 Over the course of 20 and 21 February 2002, numerous correspondence (both written and by telephone) passed between Adsteam's lawyers and the Commission concerning the Commission's basis for the urgency in publicly disclosing the Statement of Reasons. The Commission's approach was questioned, in light of the concerns previously raised by Adsteam concerning the Davis Report, which was attached to the Commission's proposed public Statement of Reasons.
- 4.9 The PSA does not specify any period for the declared person to make submissions under s.23. In Adsteam's opinion a 'reasonable period' should be allowed for this purpose. For a 37 page set of reasons, which reflected and analysed 4 volumes of Adsteam's submissions, at least 3-5 full working days should have been allowed, even if there was a case for 'urgency' - which, in this matter, did not exist.
- 4.10 At 5 pm on 21 February 2002, Adsteam's lawyers provided a detailed submission to the Commission on confidentiality, reiterating its concerns about the release of the entire Davis Report and other confidential aspects in the Statement of Reasons themselves.

Adsteam given a 3 Hour Response Time

- 4.11 On 26 February 2002 - that is, taking 5 days to respond - the Commission notified Adsteam's lawyers that it rejected the request to edit confidential parts of the Davis Report. The Commission did not dispute the fact that the information was confidential. Nor did the

Commission state in any detail why disclosure of the particular confidential information was 'necessary' in the public interest, as is the test set out in s.23(2B) of the PSA (see 4.19 below).

- 4.12 Further, when the Commission provided this notification between 1 and 2pm on 26 February 2002, it stated that the Statement of Reasons (including the Davis Report) would be put on the public register in 3 hours, that is, at 4.30 pm that day (later deferred at Adsteam's request to 5pm).
- 4.13 The Commission stated that if before 4.30 pm on 26 February, Adsteam were to inform the Commission that it has filed an application in the Federal Court seeking, as a matter of urgency, an interlocutory injunction restraining release, then the Commission undertook not to release the Statement of Reasons until the matter could come before the duty judge. Adsteam was advised that in practice it would have been extremely difficult to have approached the Court on such a complex issue within 3 hours.
- 4.14 For a pricing regulator to operate in this way is, in Adsteam's view, unwarranted. The threatened deadline prevented Adsteam having any proper opportunity to question or challenge the Commission's approach.
- 4.15 At 4.50 pm on 26 February 2002, Adsteam's lawyers wrote to the Commission objecting to the Commission's decision to place the Davis Report on the public register in its entirety, and referred to risks to Adsteam if the Davis Report was disclosed to competitors, including a rumoured new competitor in Melbourne.
- 4.16 On 28 February 2002, the Commission wrote to Adsteam's lawyers notifying that it had partially changed its decision on what to release, due to the potential new entrant in the Port of Melbourne. The Commission stated that certain confidential figures in 3 parts of the Davis Report would now not be placed on the public register. Other sections of the Davis Report which Adsteam considered confidential would remain unedited and were to be placed on the public register.

Whilst Adsteam was comforted by the Commission's eventual decision, the Commission appeared only to take Adsteam's submissions seriously when Adsteam drew the fact of new entry to their attention.

Adsteam is surprised that its general comments regarding the risks to Adsteam of the disclosure of commercially sensitive information contained in its submission to the Commission were ignored by the Commission, and it was only after being alerted to the potential new entrant did the Commission consider that it was not in the public interest that such information be disclosed. Adsteam submits that the Commission, in evidently basing its decision not to release certain information solely on the introduction of a potential new entrant,

did not correctly apply the test in s.23(2B) of the PSA. Adsteam considers its concerns contained in its submission to the Commission should clearly have been taken into account in the Commission's initial determination as to whether to exclude the information from the public register.

- 4.17 On 28 February 2002, the Commission lodged the Statement of Reasons and the Davis Report onto its public register.
- 4.18 Considering the length of time it took the Commission to reach its final decision, and following the number of extensions provided by Adsteam to the Commission, allowing Adsteam such an extremely short period of time in which to protect its position was inappropriate. No urgency justified such a short time frame in these circumstances.

Disclosure where "Necessary" In the Public Interest?

- 4.19 What was the 'public interest' test for disclosure in s.23(2B) of the PSA?

The Commission's view appeared to be that disclosure should be made if any part of the confidential information would be "relevant" or "desirable" to the Commission's reasoning. In Adsteam's view, this is not what the section requires - rather, disclosure is permitted only if 'necessary', i.e. if it is essential.

The Commission did not indicate precisely why the particular information objected to was 'necessary' to be disclosed, as compared to disclosure of the balance of the Davis Report.

Background to Section 23

- 4.20 Sub-section 23(2B) was inserted into the PSA in 1995. The Explanatory Memorandum to the amending bill, no. 88 of 1995, paragraph 400 makes it clear that the intention of this provision is that the Commission is able to give reasons for its decisions but that *"in order to protect confidential information the Commission can exclude from the public register information that the provider claims is confidential where the Commission is satisfied that the claim is justified and is not of the opinion that disclosure is necessary in the public interest"*.
- 4.21 Sub-section 23(2B) reflects the long-standing equitable rule whereby a duty of confidence is legally enforceable, subject to certain limited exceptions, one of which concerns disclosure in the public interest.

Adsteam submits (as it stated to the Commission) that the onus falls upon the discloser - here, the Commission - to consider and justify any disclosure as being necessary in that public interest.

The statutory requirement is high - it must be '*necessary*' and not merely desirable in the Commission's view, that disclosure occur. (It is a different test to s.89(5A) of the Trade Practices Act or s.55 of the ASIC Act). The Commission must be satisfied that release of the reasons without that critical material would not be sufficient or adequate to allow the public to understand the essential basis for the Commission's decision.

- 4.22 Adsteam's view is that s.23(2B) does not merely require a balancing by the Commission of the confidentiality claim on the one hand as against a desire to disclose the information on the other.

Rather, the Commission must be positively satisfied, in the particular circumstances of the case, that disclosure of the information is "*necessary in the public interest*" to enable the public to understand the decision. On that test, was the Davis Report 'necessary'? A reading of it makes the answer clear - no, it was not central to the Commission's reasons.

What were the "Reasons"?

- 4.23 The PSA requires release of the Commission's reasons - see s.23(2)(a)(iii).

Professor Davis' report to the Commission was not part of those reasons in the form as originally sent to Adsteam, but a consultant's report to the Commission.

There was only one reference to the Davis Report in the Commission reasons (p.14).

This reference appears following a statement on page 14 that the Commission has already "*concluded...that price increases are not supported*", and in a context of discussing cost models, where the Commission notes "*it has not been necessary to carry out a detailed analysis of operating expenditures*". The relevance or essentiality of the Davis Report to the Commission's decision and reasons was not explained and nor was it obvious, from the draft statement.

- 4.24 When this omission was drawn by Adsteam to the Commission's attention on 21 February, the Commission then responded by adding a one line to its reasons that the Davis report "*forms part of the Commission's reasons*". This was added five days after the Commission's decision.
- 4.25 To the extent that the Davis Report was not part of the Commission's reasons, there was no power under the PSA for disclosure of any confidential material in that report.

5. Commission media releases after its decision

- 5.1 On 28 February 2002, the Commission issued a media release to announce that it had released its reasons, including the Davis Report which, the Commission asserted "*showed that Adsteam*

Marine has double counted its rate of return on capital. In deriving its proposed prices Adsteam has added an 18% margin on costs that already contain a profit margin".

The Commission also stated *"To clarify the reason behind the decision, the ACCC has decided that it is in the public interest to release the Davis Report in its entirety".*

(In fact, as noted above, in response to Adsteam's legitimate concerns the Commission had, after repeated requests, removed certain passages from the Davis Report to protect Adsteam's confidential information).

- 5.2 Adsteam does not believe that the Commission's media release of 28 February was a fair and balanced report of the submissions put forward by Adsteam and the Commission's reasons for its decision. Accepting that the PSA requires publicity about a decision to reject a price notification as a form of regulation, this places a premium upon that publicity being presented in an objective way which carefully states the declared person's reasons for seeking a price rise, and the Commission's response. These concerns were magnified by the Commission's subsequent release of 6 March, discussed below.

Adsteam release

- 5.3 On 6 March Adsteam issued a media release to announce that it would increase its towage prices in line with the Second Notifications. Adsteam indicated that it did not accept the Commission's assertions and in its reasons, and it did not accept that Adsteam had double counted its profit margins. Adsteam's report set out the findings of Core Research (Professors Gans and King) as supporting Adsteam's approach. Adsteam also compared its approach to that used by the shipping industry generally, to the theoretical approach adopted by the Commission.

Commission media release of 6 March

- 5.4 In response, on the same day, the Commission released a media statement which accused Adsteam of misrepresenting the Commission's reasons.
- 5.5 The Commission media release accused Adsteam of relying upon a 'theoretical work' (being the report from Professors Gans and King), notwithstanding the Commission's own use of the (highly theoretical) work of Professor Davis. The Commission stated that *"the ACCC understands from Adsteam's claims of confidentiality that prices for tug boat leases cannot readily be observed"*.

Adsteam observes here that the Commission was using Adsteam's arguments as to why certain material was confidential, (and should not be released), as justification for the antecedent

decision by the Commission to place no reliance upon the report from Professor Gans and King.

Adsteam at no stage informed the Commission that prices for tug boat leases 'cannot readily be observed by the Commission' in evaluating the application. To the contrary, Adsteam provided a report from Wotech which directly addressed that issue.

- 5.6 The Commission also posed a question - *"If Adsteam assumes for the purposes of setting prices - that it leases rather than owns its tugs, then what is an appropriate margin? Under the theoretical Adsteam model there is no investment in assets. As there is no readily identifiable benchmark to asses [sic] returns in these circumstances [sic], the ACCC resorted to the cost based approach commonly used to assess returns in regulated industries".*

- 5.7 As a rhetorical question, the release fails to note that, in the material put forward to the Commission by Adsteam, Adsteam provided objective identifiable benchmarks to assess the returns on assets, derived from industry specialists, Wotech.

The Wotech Report was provided by Western Offshore Technology Pty Limited, an independent ship brokerage firm which reported on the actual evidence of charter rates for tug boat leases.

As far as Adsteam is aware, there was no material before the Commission to contradict the Wotech Report as being an accurate and independent measure of this data.

The Commission did not state in its reasons why it did not accept the Wotech Report as credible evidence of the objective charter rates for tug boat leases.

Yet the Commission stated in its media release, controversially, that tug boat lease rates "cannot readily be observed".

Adsteam strongly disputes this statement particularly when it was given prominent media exposure.

- 5.8 Whilst Adsteam accepts the fact the PSA was intended to generate publicity about decisions on proposed price notifications. For the PSA to be effective and the public interest properly served, the publicity must be accurate and responsible.

In this case however, Adsteam's concern is that the Commission's approach was more directed at generating criticism of Adsteam's application than fair and objective reporting of the merits of the arguments.

Criticism of Time Frame

5.9 In its media release of 6 March the Commission also stated:

The ACCC conducted the price review in an unusually fast time. At all times Adsteam had control of its timeframe."

The media release then accused Adsteam of "*stopping and restarting the process on 19 January*".

5.10 These comments in themselves are, in Adsteam's submission, quite unhelpful. The timeframe is set by the legislation. In fact Adsteam allowed the Commission effectively 2 months to reach its decision. Adsteam cannot be criticised for this timeframe. It is wrong to say that Adsteam had 'control' of the timeframe when the timeframe is set by the legislation.

5.11 Adsteam had, as noted above, informed the Commission on 26 February 2002 that a new entrant was preparing to enter the towage market in Melbourne to compete against Adsteam. In its decision, the Commission consistently referred to Adsteam as a "monopoly" and that "the Government has continued to apply prices surveillance to the harbour towage industry in recognition that, if left to itself, Adsteam could introduce monopoly prices".

In Adsteam's submission, the use of the media in this way did not present a balanced view of Adsteam's application and did not serve the public interest in allowing a proper evaluation of the reasons for and against the notification sought by Adsteam. Adsteam is not a monopoly and is constrained by actual and threatened competitive entry in each of its ports.

In conclusion therefore, Adsteam believes that the PSA process does not operate nearly as well as it might in the public interest. This is witnessed by this recent experience.