



Captive Port Customers Group

PO Box 10-739
Wellington
Ph: 04-499 6222

18 November 2004

Trans-Tasman Study
Productivity Commission
LB2 Collins Street East
Melbourne
Victoria 8003
Australia

Captive Port Customers Group (“CPC Group”):

Submission on the Draft Report of the Productivity Commission on the Australian and New Zealand competition and consumer protection regimes

1 Introduction

The CPC Group appreciated the opportunity to meet with the Productivity Commission (“the Commission”) on 5 November 2004 in relation to the Draft Report. We now make the following written submission in relation to the preliminary findings and recommendations in the Draft Report.

CPC Group’s submission can be **summarised** as follows:

- The Commission should **recommend** that the New Zealand and Australian governments commence an inquiry into the differences in the law in relation to the generic access regime (provided for in part IIIA of the TPA and not provided for in New Zealand).
- The Commission should **recommend** that the two governments commence an inquiry into the regulatory regime for Ports, the differences between them and the inadequacy of the New Zealand regime in comparison to the Australian States.

CPC Group acknowledges that the Commission has referred (at page 10 of the Draft Report) to these two issues as being “aspects of competition and consumer protection policy that are not covered by the study’s terms of reference”. However, CPC Group feels that they are significant enough to warrant a recommendation of an inquiry by the Commission.

2 Generic Access Regime

Three parties who provided initial submissions to the Commission (CPC Group, New Zealand Commerce Commission and Telstra Corporation) noted that there is no generic access regime in NZ equivalent to the one provided for in Part IIIA of the TPA.

Telstra proposed that the New Zealand approach could be harmonised with Australia by the enactment of an essential facilities access regime (such as that contained in Part IIIA of the TPA) into the Commerce Act. CPC Group supports that proposal.

New Zealand has not incorporated an essential facilities access regime into the Commerce Act. Rather, New Zealand has continued to rely on the application of section 36 of the Commerce Act, being New Zealand's general misuse of market power provision. The absence of a generic access regime in New Zealand is a serious oversight. It is therefore important that the New Zealand Government recognises the importance of market and regulatory failures occurring in the context of access to essential facilities, and takes appropriate steps to promote access.

The Commission should **recommend** that the New Zealand and Australian governments commence an inquiry into the differences in the law in relation to the generic access regime (provided for in part IIIA of the TPA and not provided for in New Zealand).

3 Review of the regime for Ports

There is no specific statutory regime in place in New Zealand to adequately restrain potential anti-competitive behaviour which can arise in relation to ports, such as access disputes, the charging of port services, or disclosure requirements to provide transparency of operations and pricing. In addition to there being no specific statutory regime, the decision by the Court of Appeal in the Vector case¹ means that the common law doctrine of prime necessities is of little use to port companies facing monopoly charges. For users of monopoly services in New Zealand, the judicial avenues for seeking to enforce fair and reasonable prices for monopoly services through the common law are at best limited.

Australia has, not only a generic regulatory regime in Part IIIA of the TPA which can be applied in the ports sector, but also state and territory specific laws which govern the industry. These provide mechanisms to help protect port users against any misuse of monopoly power by port companies. As noted above, there is no specific regulatory regime for ports in New Zealand or effective common law remedies. This leaves Port companies able to abuse their market power.

The Commission should **recommend** that the New Zealand and Australian governments commence an inquiry into the regulatory regimes for Ports, the differences between them and the inadequacy of the New Zealand regime in comparison to the Australian State and national access regime.

4 Conclusion

CPC Group reiterates that regulation of access to essential facilities (particularly ports) in New Zealand is crucial to obtaining ongoing efficiencies for all industries. The Commission should extend its note (in the Draft Report on page 10) in relation to the generic access regime in Part IIIA of the TPA, to a **recommendation** that an inquiry is undertaken.

¹ *Vector Ltd (formerly Mercury Energy Ltd) v Transpower New Zealand Ltd* [1993] 3 NZLR 646.

It has long been recognised that port costs form a significant element in the supply chain for the New Zealand economy as a whole. The Commission should extend its note (on page 10) in relation to port companies, to a **recommendation** that an inquiry is undertaken.

The CPC Group appreciates the opportunity to submit its views on these issues and looks forward to receiving a copy of the Final Report when it is published.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'P. Nicholas'.

Captive Port Customers Group

Paul Nicholas, Secretary

Email: pjn.nzsf@xtra.co.nz