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24 October 2022

Ms Julie Abramson/Dr Stephen King
Commissioners
Productivity Commission

cc: Ms Lou Will, Assistant Commissioner – Productivity Commission

Dear Commissioners

Submission on Productivity Commission's Draft Maritime Logistics System Inquiry Report

I refer to the Productivity Commission's Draft Inquiry Report on *Lifting productivity at Australia's container ports: between water, wharf and warehouse (Draft Report)*.

This submission follows earlier detailed submissions by Patrick to the Commission, including with supporting economic reports from Synergies, on 16 February 2022 and meetings with the Commission between February and June 2022, principally on industrial relations matters. Patrick also wrote to the Commission in September 2022 to raise concerns about the process by which the Commission has reached draft conclusions and recommendations regarding stevedore landside fees in its Draft Report.

Patrick provides this submission in response to draft recommendations related to landside fees.

Having regard to competition and commercial sensitivities associated with the issues raised in the Draft Report, Patrick's detailed submissions, including an economic report from Synergies Economic Consulting (**Synergies**), are provided on a confidential basis. I would be happy to consider a request from the Commission to make aspects of our confidential submissions available where required to support further analysis and inquiry by the Commission.

Patrick broadly supports the Commission's draft findings and recommendations related to industrial relations.

1. Process concerns – lack of engagement, supporting analysis or reference to evidence

Despite Patrick's detailed submissions and further follow up in June 2022 to reiterate Patrick's availability to engage with the Commission, the Commission failed to substantively engage in relation to issues related to landside fees prior to making the remarkable draft recommendation to prohibit landside fees to landside customers.

We did, however, welcome the opportunity to meet with the Commission to discuss our concerns following release of the Draft Report.

The draft recommendation reflects largely hypothetical and incomplete reasoning, where the incidence and increase of landside fees is relied on, in and of itself, to justify regulation of fixed landside fees (such as terminal access charges and vehicle booking fees). The key "findings" underpinning the draft recommendation are not supported by evidence or analysis. For example:

- (a) The Draft Report simply asserts that stevedores have market power on the landside, without reference to any evidence that such market power exists, and if it were to exist, that the exercise

of market power creates economic harm. This assertion overlooks the reality that shippers make choices about their overall supply chain when engaging a shipping line, including stevedore service offering. Landside transport operators (both road and rail) have also been demanding better performance levels and capacity from stevedores and there is clear evidence that stevedores have responded.

- (b) The Draft Report simply assumes, by extension, that landside fees reflect the market power returns enjoyed by stevedores and that assumption is reached despite contrary evidence over several years in ACCC monitoring reports that neither landside fees nor stevedore profitability are excessive.
- (c) The Draft Report similarly asserts that a lack of competition between stevedores means consumers pay too much, despite the ACCC concluding, for several years now, that the stevedoring industry is workably competitive, and no evidence being provided by the Commission to indicate consumer prices are higher than what they otherwise should be.
- (d) The Draft Report simplistically assumes switching of the initial incidence of landside fees away from the landside to shipping lines will result in lower prices for consumers. This conclusion is based on an untested assumption that shipping lines will simply pass on the benefits of lower charges that they may be able to negotiate with stevedores; and that there will be no deterioration in landside productivity or broader supply chain efficiency (leading to costs that are ultimately borne by consumers).

The Draft Report does not even raise (let alone answer) the question of risks to landside productivity and efficiency that may result from its draft recommendation (at the heart of the Commission's terms of reference), nor does it examine the implications for costs for Australian shippers *overall*. The potential and likely distortion in landside charges between shippers with countervailing power and those shippers with no countervailing power is not mentioned in the Draft Report.

Further, the Commission has not undertaken analysis that is sufficient to justify its proposition that customers 'pay too much'. In particular, we understand that a critical basis of the finding in the Draft Report that port inefficiencies cost Australian consumers \$605m a year is analysis conducted by the Commission of the potential improvements in quayside productivity in line with global performance. The implication of this is that the Commission's reasoning in relation to landside fees has involved no analysis of the costs to consumers in the 'separate landside market'. Cost analysis related to quayside productivity alone cannot be used as a basis to support the proposition that landside customers 'pay too much'. Clearly, the Commission must also analyse the cost of inefficiencies on the landside (adopting a whole of supply chain view) and revisit whether its initial proposition remains valid. In this regard, and as set out below and further in the Synergies Report, the prohibition of landside charges to landside transport operators is not likely to lead to efficiencies in the 'separate landside market' but in fact the opposite.

Finally, none of these assumptions have regard to the findings and outcomes of previous government reviews or the effect of the National Voluntary Guidelines and other industry initiatives that are currently underway to constructively improve landside pricing, landside industry engagement and landside productivity. The Commission recommends replacing these processes with a mandatory regulatory solution, even before there has been time to review and make any objective assessment of their effectiveness.

Patrick is concerned that the Commission's procedure in reaching the conclusions that it relies on as a basis for its recommendations represents a departure from due process.

The issue of landside fees was not explicitly identified as a matter for specific review in the Treasurer's terms of reference to the Commission. The terms of reference did, however, require the Commission to have regard

to the ACCC's container stevedoring report. The Draft Report does not provide any material justification or explanation on the basis for departing from the ACCC's findings. Third party submissions that called for a prohibition on charging landside fees to landside transport operators did not provide any demonstrated case for such a prohibition or present any new evidence or material that would call into question the various reviews that have been undertaken in respect of this issue. Further, the Commission did not raise any evidence 'gaps' in the 10 months since it commenced its inquiry.

Despite this, the Draft Report, devoid of an evidence-based case presented to it by any party, now rests on assertions to justify introducing a new industry regulation. This is directly contrary to the statutory policy guidance to the Commission that, in the performance of its functions, it must have regard to the need to *reduce* regulation of industry.¹

This policy guidance is reflective of a critical feature of Australian economic policy: that those proposing economic regulation demonstrate a clear and evidence-based case for such regulation. This also requires a proper assessment of the potential costs of such regulation, including the costs of implementation and compliance with such regulation and the potential adverse economic consequences of such regulation.

It is not appropriate that some form of onus falls on industry to disprove the Commission's hypothetical reasoning. The onus rests on those proposing regulation. Accordingly, it is for the Commission to gather the evidence properly and carefully relevant to its inquiry and properly, carefully, and fully consider the implications to support any recommendations included in the Final Report.

2. Restructuring of stevedore charges

Given the draft recommendation to pursue regulatory intervention in an industry which has been monitored by the ACCC since 1999, it is notable that the ACCC has expressed the view that market forces are the key drivers necessitating landside fee reviews, including greater competition between stevedores following the entry of Hutchison and VICT, increases in land rents charged by port operators, capital investments made by stevedores in automation and large vessel handling capability and limitations on the ability of stevedores to reduce labour costs as a result of industrial relations.²

Across the past 10 years, Patrick has invested close to \$1 billion in its terminals and continues to maintain a comprehensive investment program benefiting both quayside and landside customers. These investments contribute significantly to the efficiency of the overall container logistics supply chain and support Patrick's overall business strategy to ensure acceptable financial performance over the long term. Patrick's landside fee reviews have been explained in multiple regulatory processes and monitored by the ACCC. Patrick's landside fee reviews have had regard to cost increases experienced by Patrick (principally post-privatisation property cost increases and energy increases), Patrick's ongoing landside capital investment program and a requirement to generate a reasonable return on investment in existing landside infrastructure.

The restructuring of charges that has taken place in recent years has established a genuine commercial relationship between landside transport operators and stevedores. The effects of the lack of such a relationship have been well-documented and driven industry concerns about the relative neglect of landside efficiency for decades.

Stevedores rightly levy charges for their services on the party with the most proximate contractual relationship to the shipper in respect of those services. In the case of quayside services, this is the shipping line and in

¹ Section 8(1)(b) of the *Productivity Commission Act 1998* (Cth).

² ACCC (2021) Container Stevedoring Monitoring Report 2020-21, (October 2021), p48.

the case of landside services, this is the landside transport operator. In each case the shipping line/landside transport operator recovers those charges from the shipper.

The Commission has relied on a 4 year old report by the ACCC to support its proposition that landside transport operators do not recover landside fees from shippers in the short term;³ subsequent monitoring reports by the ACCC do not present further evidence of ongoing concern. Moreover, the Commission has not presented any updated analysis of this point itself in order to substantiate this draft position.

The ACCC acknowledges that, given stevedores provide landside services to transport operators, it is both reasonable and efficient for stevedores to levy fees and charges on the transport operators to whom they supply services, provided such fees are not excessive.⁴ The ACCC further observes that at current levels of landside fees, stevedores do not appear to be earning excessive returns⁵ and the average industry return on assets over the past 5 years remains low.⁶ The ACCC also highlights the benefit to the shipper of some charges being charged to transport operators on the landside, with greater transparency of landside fees available to the shipper to assess margins applied by transport operators which is not provided by shipping lines to shippers.⁷

The restructuring of charges has increased pricing transparency for shippers, enfranchised the land transport industry and led to increased engagement of stevedores with transport operators and their industry associations. The Draft Report proposes to interfere with those arrangements by regulating landside fees to landside customers effectively to zero. To be clear, the Draft Report is recommending that stevedores cannot charge landside transport operators in respect of services they provide to those customers.

Patrick has been unable to identify any analogous precedent where a service provider is prohibited from charging its *commercial* customer for comprehensive and valued services provided. The Draft Report contends that the regulatory approach it recommends has been used elsewhere but identifies only one purported instance — namely, in the regulation of ATM charges.⁸

To point to one non-relevant precedent does not support the proposition that the Commission's recommendation is some form of usual industry regulation — in fact, the absence of any relevant precedent or appropriate comparator demonstrates the opposite.⁹

3. Stevedore charges in context

It is important to recognise that Australian stevedore charges (both quayside and landside overall) represent a very small proportion of the total supply chain costs faced by Australian shippers. By way of example, the estimate of total costs incurred in exporting containers to, and importing containers from, China to Port Botany as at January 2022 was around \$5,900 per TEU for imports and \$3,700 per TEU for exports. Total import costs per TEU are estimated to have increased by around 85% and total export costs per TEU are estimated to have increased by around 54% since December 2019. The key driver of this change is an increase of shipping line costs from 47% to 72% of total supply chain costs for imports and an increase from 34% to 58% for exports.

³ ACCC (2018), Container stevedoring monitoring report 2017-18, October 2018 p.24.

⁴ ACCC (2021) Container Stevedoring Monitoring Report 2020-21, (October 2021), p48.

⁵ ACCC (2021) Container Stevedoring Monitoring Report 2020-21, (October 2021), p48.

⁶ ACCC (2019), Container Stevedoring Monitoring Report 2018-19, October 2019, p.73. See also ACCC (2021), Container stevedoring monitoring report, October 2021, p. xxii, p.74.

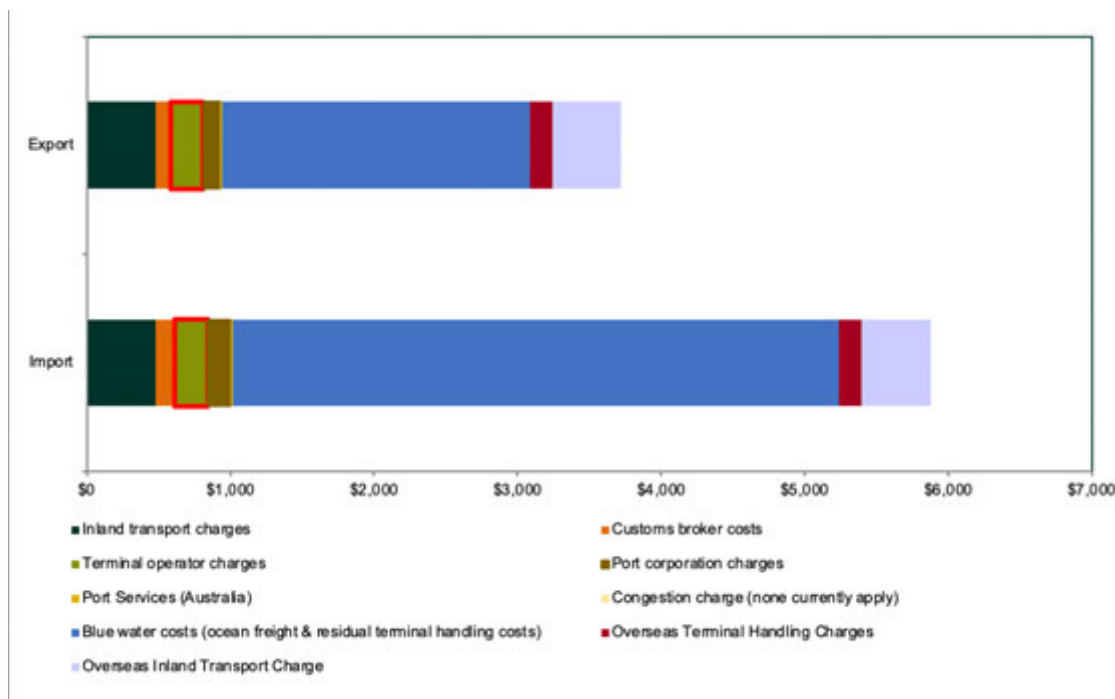
⁷ ACCC (2021) Container Stevedoring Monitoring Report 2020-21, (October 2021), p55.

⁸ ACCC (2021) Container Stevedoring Monitoring Report 2020-21, (October 2021), p200.

⁹ In any event, the changes to the regulation of ATM charges in 2009 arose in a wholly different context. Further, the 2009 ATM charge reforms — which permitted, for the first time, ATM operators charging ATM customers their own prices ('direct charges') — were the exact opposite of any prohibition on a service provider from charging its customers.

Synergies estimate that charges levied by terminal operators account for around 4% of total support chain costs for imports and around 6% of total supply chain costs for exports. The proportion of total supply chain costs that is comprised of Australian terminal operator charges is depicted below.

Figure 1 Terminal costs in context (January 2022)



Source: Synergies' estimates

4. Anticipated adverse consequences of draft recommendation

Patrick engaged Synergies to examine the Draft Report's conclusion that consumers will be better off if stevedores are only allowed to levy fixed landside fees on shipping lines. In short, that conclusion is wholly unsupported, and the draft recommendation is likely to have a range of adverse, unintended consequences detrimental to shippers and the supply chain overall. In particular:

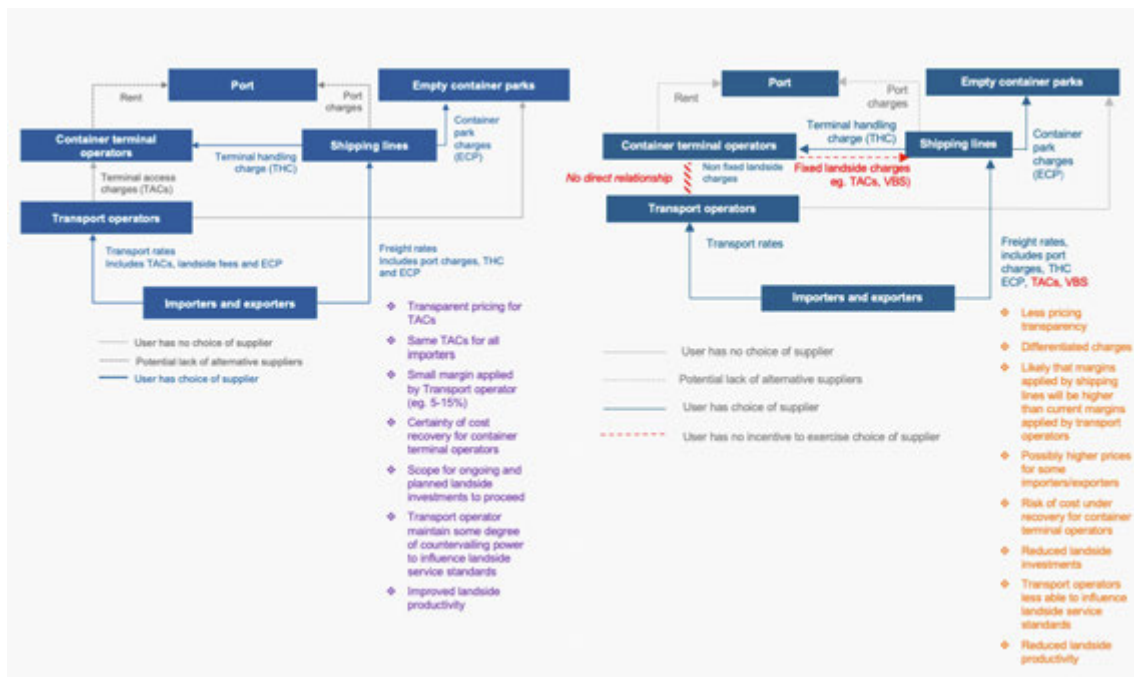
- (a) *Loss of transparency and higher margins* – There will no longer be a transparent pricing mechanism for these charges. The ACCC has also expressed concern that shippers do not have sufficient transparency of existing pass through charges from shipping lines.¹⁰ It is also possible that greater margins will be applied to landside fees by shipping lines than those currently applied by landside transport operators (which are currently essentially to cover administrative costs).
- (b) *Differential pricing benefiting only powerful shippers* – The fees levied by shipping lines on shippers are likely to become more differentiated, in a manner consistent with existing pricing practices of shipping lines in which shippers with significant countervailing power will reap the benefits of greater opportunity for negotiated prices, at the expense of shippers with little such power. The likely impact is that the differential between more powerful and less powerful shippers will increase even further. The fact that some shippers may be able to negotiate preferential pricing with shipping lines does not indicate that this is likely to be the experience of most, or even many, shippers.

¹⁰ ACCC, (2021), Container stevedoring monitoring report, October 2021, p.55.

- (c) *Any savings unlikely to be passed onto all shippers* - To the extent that any cost savings are captured by shipping lines in relation to landside fees (resulting in stevedores being paid less from landside fees to recover the costs of landside investment and operating costs), these are unlikely to be fully passed onto all shippers, which is consistent with the Commission's own observations which noted some evidence that shipping lines have not been passing through declines in Terminal Handling Charges that are paid by cargo owners.¹¹ Given average returns that have characterised the stevedoring industry in recent years, reduced revenue may force reductions in the level of landside investment and operational resources, increasing costs to Australian importers and exporters.
- (d) *Risk of deterioration in landside performance* - A misalignment of incentives away from the landside to the quayside risks a deterioration in landside service standards as a result of attention and finite resources being diverted elsewhere. Shipping lines are very much focused on quayside productivity affecting vessel efficiency.
- (e) *Impact on competitiveness of markets where shipping lines are vertically integrated* - The imposition of landside fees on shipping lines may affect the competitiveness of markets for landside operations where shipping lines are more frequently vertically integrated into landside operations.

The impacts of the Commission's proposed changes are summarised in the below figure.

Figure 2 Container supply chain – commercial relationships – status quo vs Commission's alternate preferred model



Source: Status Quo is based on Figure 10 in Commission's Draft Report, Synergies

¹¹ Productivity Commission (2022), p.180.

5. Pursuing a best practice approach to regulation

A more measured approach to landside fees, being the pursuit of a national voluntary regime coupled with continuing ACCC monitoring, is consistent with the principles of best practice regulation (including as reflected in the Productivity Commission's statutory policy guidelines¹²) where regulation should only be applied in circumstances where the need for government action has been clearly established and the consequence of such action is properly understood and will result in net benefit to society. No convincing evidence based case for the need for regulatory intervention is included in the Draft Report.

To the contrary, the Draft Report has concluded that the national voluntary protocol for landside stevedore charges that was endorsed by all State and Territory Transport and Infrastructure Ministers in March 2022 is inadequate, primarily because it is a voluntary scheme and uptake is not guaranteed. This is despite continued support for the national guidelines from state governments and the experience in Victoria (which introduced its own voluntary protocol in July 2020), where industry participants consider the pricing protocol has added value and responded to some of the key concerns identified in previous state government port reviews.¹³ The Draft Report acknowledges that the status quo, under which the national voluntary protocol is implemented and there is continued ACCC monitoring of container stevedoring services, imposes 'no costs' on existing landside supply chains.

The Draft Report also completely ignores the costs and complexity of implementing such a regulatory intervention and contains no practical consideration of how its prescriptive regime would be implemented, or how it would be monitored and enforced. The Draft Report's lack of consideration of its recommendation's practical consequences is typified by the fact that the changes would prohibit vehicle booking fees — a long-standing, highly-regarded method of ensuring the efficient coordination and utilisation of terminal access — from being levied on transport operators.

6. Critical missing evidence and analysis

In light of the significant concerns regarding due process and onus of proof discussed above, Patrick considers that is essential that the Commission detail its existing analysis and evidence, or undertake further analysis and gather evidence as part of its ongoing inquiry, in respect of the following matters:

- (a) the basis for assumptions that (i) stevedores have market power on the landside; (ii) that by extension landside fees are a reflection of market power returns by stevedores; (iii) that a lack of competition between stevedores means consumers pay too much; (iv) that consumers will pay less if landside fees are charged to shipping lines;
- (b) the basis on which the Draft Report has analysed and validated that regulatory intervention will not lead to adverse outcomes such as (i) loss of transparency and higher margins; (ii) differential pricing benefiting powerful shippers; (iii) any savings unlikely to be passed onto all shippers; (iv) risk of deterioration in landside performance; (v) increased ability to leverage market power for vertically integrated shipping lines;
- (c) how shipping line fees are currently passed onto shippers overall and the variability of those practices between shippers with countervailing power and those without;
- (d) the potential effects of the draft recommendation on landside productivity and/or broader supply chain efficiency, as well as the economic costs of reduced landside productivity (taking a whole of supply chain view);

¹² See s 8(1)(b) of the *Productivity Commission Act (Cth)* 1998.

¹³ Victorian Government (2022), *Navigating our Port Futures, The Victorian Commercial Ports Strategy*, July 2022, p.48.

- (e) whether landside customers value stevedores' investment in landside capacity and efficiency and the overall costs for supply chain participants (that may ultimately be borne by consumers) of a decline in terminal landside service levels such as reduced operating hours, reduced landside resource allocation, slower truck and rail turnaround times;
- (f) whether landside customers overall are in favour of the draft recommendation or status quo and the reasons for that position;
- (g) the implications for landside access decision making where Vehicle Booking Fees are charged to shipping lines;
- (h) analysis undertaken in relation to the findings and outcomes of previous government reviews;
- (i) the basis for departing from the ACCC's findings without any material justification or explanation in the Draft Report, noting the inquiry's terms of reference for the Commission to have regard to the ACCC's container stevedoring report;¹⁴
- (j) the basis for the Draft Report concluding that voluntary regimes will not be effective, including whether the Commission engaged with stevedores to ascertain whether they do or do not intend to comply;
- (k) how such a regulatory intervention would be implemented in practice, including by reference to any analogous precedents between two *commercial* parties.

In Patrick's view, which is supported by the detailed economic report from Synergies, regulatory intervention related to landside fees is not economically justified and an appropriate and reasonable time should be given to allow the national voluntary landside protocol and other industry initiatives to first become fully effective before further review. This could include further enhancements to the national voluntary model over time. Patrick is supportive of continued industry engagement on this matter.

Patrick encourages the Commission to carefully consider these matters and to openly engage with all key stakeholders as the Commission reviews the appropriateness of its draft recommendation.

Yours sincerely,

Michael Jovicic
Chief Executive Officer
Patrick Terminals

¹⁴ See point 7 of the Commission's terms of reference issued by the then Treasurer, the Hon Josh Frydenberg MP. A copy is available at <https://www.pc.gov.au/inquiries/current/maritime-logistics/terms-of-reference>.