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PORT BOTANY NSW 2036
AUSTRALIA

29 January 2020

Mr Marcus Crudden
Director, Pricing Group
Essential Services Commission

Patrick Terminals - Public Submissions (Port of Melbourne Rebalancing Application)

Dear Mr Crudden,

I refer to the Port of Melbourne's (**PoM**) Rebalancing Application dated 23 December 2020 and to information materials provided by PoM to Patrick Terminals in October and November 2020.

The regulatory framework applicable to the Port of Melbourne was known to PoM at the time of acquisition and the ESC plays an important role in ensuring that port pricing and development decisions occur in line with that framework for the period of the port lease arrangements.

Background – Patrick Terminals

Patrick Terminals is one of two container terminal operators at Swanson Dock, operating at East Swanson Dock for many decades. Since 2017, with VICT commencing operations at Webb Dock, there have been three container terminal operators at the Port of Melbourne. There is excess capacity in the market which is forecast to persist across the medium term.

Patrick has substantial sunk assets at East Swanson Dock. Across the last 8 years alone, Patrick has invested over \$110 million at East Swanson Dock. Patrick now has a long term lease to 2066 at both the East Swanson Dock site and the adjacent logistics site on Coode Road. Patrick has also committed approximately \$20 million to deliver dock adjacent rail as part of the Government endorsed Port Rail Transformation Project. There is additional sunk capital in the form of site specific equipment and systems.

Patrick entered into these long term leases and made capital commitments for rail in September 2020.

Patrick Terminals – A party with standing

Under clause 3.2.5 of the Pricing Order, PoM must consult Port Users about its proposal to make a Rebalancing Application and provide a reasonable opportunity for Port Users to express their views to PoM. A broad definition of Port Users is adopted by the *Port Management Act 1995* (Vic). Under section 55(1)(e) of the *Essential Services Commission Act 2001* (Vic), a person whose interests are affected by a Commission port Pricing Order decision may apply to VCAT for a review of the decision, including where the decision is unreasonable having regard to all the relevant circumstances. Further, the purpose of regulation at the Port of Melbourne was to have regard to the impact of the port privatisation on the broader supply chain.

As a Port User and a person whose interests are affected by the ESC's decision on the Rebalancing Application, Patrick Terminals is clearly a party with standing in this matter.

Concerns with PoM's Rebalancing Application

It is important to note from the outset that this investment and its impacts cannot be undone and so warrant careful consideration by the ESC.

PoM's proposal to commence works as early as 2021 to remove the 'knuckle' at Webb Dock East to extend the berth length is of concern to Patrick. Patrick and PoM concluded negotiations for Patrick's long-term lease to 2066 and Patrick made a capital commitment to the Port Rail Transformation Project in early September 2020. At no time before these commitments were made did PoM communicate a material change to the timing for removal of the knuckle.

Patrick's understanding from all engagement with PoM up to October 2020 was that the project was being considered across a 10+ year horizon. We also understood that PoM would, at the appropriate time, give careful consideration to the state of the container terminal market, including whether excess capacity continued to persist, and the implications for effective competition and the economic efficiency of the material investment required.

The materials provided by PoM do not clearly state the proposed timing for removal of the knuckle. The Port Development Strategy released on 6 October 2020 continues to reference the knuckle project as 'by 2035'. Patrick relied on PoM's Port Development Strategy in making long term business and investment decisions in September 2020. Patrick was first advised of the Rebalancing Application in October 2020.

Separate to our concerns with PoM's approach to engagement with Patrick on the status of this project, we are concerned that removal of the knuckle at this time will have both adverse effects on economic efficiency and competition.

To be approved by the ESC, a Rebalancing Application must propose Prescribed Service Tariffs that comply with clauses 2, 3.1.1, 4 and 5 of the Pricing Order. Our third-party economic analysis confirms that the proposed capacity investment does not satisfy the economic requirements for approval under the Port of Melbourne's Pricing Order, including the objectives of the Port Management Act. These objectives include to promote the efficient use of, and investment in, port infrastructure for the long-term interests of users and Victorian consumers, and to facilitate and promote competition between commercial operators at the port.

An investment is not prudent and efficient if there is not a demonstrated need for the investment at the time it is undertaken having regard to the lead time for construction. The container forecasts and estimates of total container handling capacity at the Port of Melbourne do not support any investment to substantially increase capacity being made in the short term. Even if container trade growth outperforms the forecast, there is ample scope to reconsider the timing of the next capacity expansion increment, since the knuckle removal can be delivered in 2 years.

We do not consider that PoM has demonstrated that there is a legitimate need for additional capacity for very large vessels at this time, with existing capacity being sufficient to handle the market for the foreseeable future.

Infrastructure Victoria advised on the issues associated with increasing capacity at Webb Dock to accept larger vessels in its report titled '*Advice on Securing Victoria's Port Capacity, 2017*'. Given the nature of this advice, we consider that these issues should be given close consideration by the ESC in assessing the Rebalancing Application. It would also be appropriate for the independent advice provided by Infrastructure Victoria to be refreshed before proceeding with major port development, noting that a five yearly review was recommended by Infrastructure Victoria in 2017.

Adequacy of Consultation

Clause 3.2.5 of the Pricing Order requires PoM to consult about a proposal to rebalance tariffs and provide reasonable opportunity to affected parties to express their views. We have considered whether the requirements of clause 3.2.5 have been met in the context of the International Association for Public Participation (IAP2) Quality Assurance Standard.

We refer to the letter from Utilities Regulation Advisory (**URA**) to PoM dated 18 December 2020 in relation to URA's review of customer engagement underpinning PoM's Rebalancing Application. Whilst the scope of URA's engagement was very narrow, we agree with URA's identification of areas for improvement in the consultation process. In relation to the scope of engagement, we note that PoM did not engage URA to:

- (i) *"[speak to] stakeholders involved during the engagement process to ascertain the views of the rigour and appropriateness of engagement completed;*
- (ii) *'rate' the quality of the engagement completed [or] assess against best practice; or*
- (iii) *determine whether PoM has complied with the requirements of the ESC's Statement of Regulatory Approach, the Pricing Order or the objectives set out in section 48 of the Port Management Act 1995."*

However, URA found that PoM's stakeholder engagement could be improved by:

- (i) *“Rebalancing options co-design or surveying stakeholder preferences;*
- (ii) *more clearly articulating up front the elements of its submission that were negotiable and non-negotiable (and hence what level of participation/influence stakeholders could have on its application);*
- (iii) *providing more detailed supporting information earlier, to improve transparency and the quality of stakeholder feedback; and*
- (iv) *maintaining documentation of the outcomes of in person engagement and statistical analysis of stakeholders engaged to demonstrate the appropriate representation.”*

The IAP2 'core values' contemplate that those affected will have a right to be involved in the decision making process and that an affected party's contribution to the process will influence the decision.

In our view, PoM's process was limited to information provision and provided no scope to influence or change the outcome. Whilst we note PoM's emphasis on their decision to adopt the lowest wharfage increase scenario following stakeholder feedback, we do not consider that there was genuine consultation on the substantive issue of whether the works to remove the knuckle should be undertaken now and in particular, the extent of existing excess capacity and the implications of the expansion for excess capacity.

Accordingly, we do not consider that the requirements of clause 3.2.5 of the Pricing Order have been met.

Absence of Essential Supporting Information

The removal of the Webb Dock knuckle is a material decision which requires a fulsome, objective assessment of a broad range of factors. We do not consider that the Rebalancing Application represents a well-defined, orderly capital investment strategy which has had regard to the overall impact on port users as is required by the regulatory framework. It is not actually clear on the face of the materials provided by PoM exactly what the investment is, why it is required now or how and when it will be undertaken.

At a minimum, the following essential supporting information should be provided to stakeholders to allow a proper consideration of major port development decisions:

- objective and independent assessment of port capacity supported by relevant modelling and quantitative analysis with fulsome assessment of the types of issues considered by Infrastructure Victoria in its 2017 Port Capacity paper, including the effects of under-utilisation at Swanson Dock;
- clear details of the proposal including project design, costings and program and a clear Port Development Implementation Plan to translate PoM's Port Development Strategy into more specific project plans and provide port users with required investment certainty;
- fulsome consideration of lower cost capacity options for large vessels, including obtaining approvals for larger vessels at Swanson Dock;
- detailed analysis of supply chain impacts of large vessels and forecast speed and nature of vessel cascade to Australian trades;

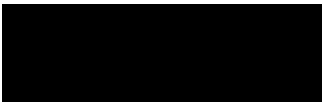
- evidence in support of the prudence and efficiency of the investment; and
- detailed analysis on impact of the proposal on a broad range of stakeholders across the supply chain, including comprehensive details on how the investment supports the objectives of section 48 of the Port Management Act.

We have not seen any such materials from PoM as part of its Rebalancing Application.

We also consider, in line with URA's report, that genuine co-design with stakeholders is essential and that a full independent review of PoM's consultation process and assessment of compliance with the requirements of the ESC's Statement of Regulatory Approach, the Pricing Order and the objectives of section 48 of the Port Management Act would be appropriate.

I look forward to discussing these important matters with you.

Yours sincerely,



Michael Jovicic
Chief Executive Officer
Patrick Terminals