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COMMERCE COMMISSION

Decision No. 453

Determination pursuant to the Commerce Act 1986 in the matter of an application for clearance of a business acquisition involving:

PORT OF TAURANGA LIMITED

and

OWENS SERVICES BOP LIMITED

The Commission:	PR Rebstock DR Bates QC DF Curtin
Summary of Application:	The acquisition by Port of Tauranga Limited or one of its interconnected bodies corporate of up to 100% of the shares in Owens Services BOP Limited, but not including certain subsidiaries and assets which are specified in the Share Sale and Purchase Agreement annexed to the application.
Determination:	Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.
Date of Determination:	8 February 2002

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THE PROPOSAL

1. A notice pursuant to section 66(1) of the Commerce Act 1986 (the Act) was received on 6 December 2001. The notice sought clearance for the acquisition by Port of Tauranga (POTL or the Applicant) or one of its interconnected bodies corporate of 100% of the shares in Owens Services BOP Limited (OSBOP), but not including certain subsidiaries and assets which are specified in the Share Sale and Purchase Agreement annexed to the application.

THE PROCEDURES

2. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under section 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. Extensions of time were sought by the Commission and agreed to by the Applicant. Accordingly, a decision on the application was required by 8 February 2002.

3. In its application, POTL sought confidentiality for specific aspects of the application. A confidentiality order was made in respect of the information for a period of 20 working days from the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.

4. The Commission's determination is based on an investigation conducted by staff.

5. The Commission's approach is based on principles set out in the Commission's *Practice Note 4*.[1]

THE PARTIES

Port of Tauranga

6. POTL is a publicly listed company, listed on the New Zealand Stock Exchange. The principal activities of POTL are the ownership and operation of the wharf infrastructure and marine services at the Port of Tauranga. This involves:

   - on land - the provision of wharf front berthage and loading and marshalling areas adjacent thereto from which other parties may store and load goods;
   - at the rear of the immediate wharf face and marshalling areas - POTL owns property which is leased to wharf users requiring space for storage for industries related to the export or import of goods through the Port of Tauranga. Examples include the leases to OSBOP, The Cargo Company and Tauranga Container Park Limited; and
   - on the seaward side - POTL provides pilotage, towage and other services necessary to berth ships, and it maintains dredged channels to an adequate depth.

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[1] Commerce Commission, *Practice note 4: The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in section 47 – A Test of Substantially Lessening Competition*, May 2001.

7. The Port of Tauranga is New Zealand's largest export port by volume and second largest by container throughput. There are two major sites of operation at the Port: the Mount Maunganui side of the harbour where logs are loaded onto ships, and Sulphur Point on the western side of the harbour, where the Tauranga Container Terminal is situated.

Metroport Auckland (Metroport)

8. In 1999, POTL commenced the operation of its inland port facility, Metroport, which is situated at Wiri in South Auckland. As 80 percent of New Zealand's imports are destined for north of Taupo[2], with the majority being distributed in the greater Auckland region, POTL established Metroport in a bid to compete with the Port of Auckland for business, particularly imports.

9. Shipping lines contracted to use Metroport call at the Port of Tauranga where import cargo destined for Auckland is offloaded at the Tauranga Container Terminal. Cargo is then railed to Metroport before distribution to its final destination. The same process occurs in reverse for Auckland-sourced export cargo. The cargo is aggregated at Metroport, railed to Tauranga and loaded on to the vessel. Metroport and the Tauranga container terminals only deal in containers.

10. In addition to the ownership and operation of wharf infrastructure and provision of marine services, POTL has interests in the following entities, which are relevant to the application.

The Cargo Company Limited

11. The Cargo Company is owned 50/50 by POTL and OSBOP. This company provides secure warehousing space for the transit of dried goods (predominantly paper and wood products) together with materials handling and distribution services, including container loading. The Cargo Company only operates at the Sulphur Point container terminal.

12. The proposed acquisition involves the applicant moving from a 50% shareholding in the Cargo Company to a 100% shareholding. The Commission accepts that the acquisition is unlikely to substantially alter the commercial relationship between the Cargo Company and the Applicant, and as a result, this market is not considered further.

OSBOP

13. The following are the business activities carried out by OSBOP that are to be acquired by POTL:

    - Log marshalling;
    - Materials handling;
    - Container maintenance services;
    - Wharf handling (forklifts);

[2] Shipping Industry Review *A Future for New Zealand Shipping*, December 2000.

- Mechanical services workshop;
- Wagner agency;
- Freight Bureau International; and
- Ships agency.

The Commission has examined the subsidiary companies of OSBOP and concluded that the subsidiaries listed below require further competition analysis.

Tauranga Container Park Limited

14. OSBOP is a 50% shareholder in Tauranga Container Park Limited (TCPL). The other 50% shareholding is held by Owens Container Services Limited which is a subsidiary of Owens Group Limited. TCPL operates a container depot at Sulphur Point and is involved in the cleaning, maintenance and storage of containers for users.

Log Marshalling

15. Log Marshalling is the most significant part of OSBOP's operations, accounting for around [ ]% of the total revenue of the company.

ASSOCIATION

16. In determining whether two or more persons are associated, s 47(3) provides as follows:

> "For the purposes of this section, a person is associated with another person if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other".

17. In assessing whether a company has such influence over another, the Commission will have regard to such factors as:

- the nature and extent of ownership links between the companies;
- the presence of overlapping directorates;
- the rights of one company to appoint directors of another; and
- the nature of other shareholder agreements and links between the companies concerned.[3]

18. The Applicant and OSBOP have one director in common, Mr Alastair Capamagian. Mr Capamagian is a trustee of three of the four OSBOP shareholder trusts; the Coronel Trust (75.1%), the Mildon Trust (10%), and Kastan Trust (10%). In addition, Mr Capamagian is a director of POTL.

19. There are no agreements or understandings between the parties, relating to the appointment of directors, and neither company has a shareholding in the other. Furthermore, Mr Capamagian is one of seven directors of POTL and to this extent has a limited degree of influence over its board.

[3] Commerce Commission, *Practice note 4: The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in section 47 – A Test of Substantially Lessening Competition*, May 2001.

20. Accordingly, the Commission is satisfied that POTL and OSBOP are not associated in terms of s 47(3) of the Act.

OTHER RELEVANT PARTIES

Carter Holt Harvey Limited (CHH)

21. CHH is New Zealand's largest forest products company and its largest pulp and paper producer. CHH is listed on both the New Zealand and Australian Stock Exchanges and has substantial interests in forests, wood products, pulp and paper, tissue, packaging and building products.

Lodestar

22. Lodestar is the business unit of CHH that is involved with the transportation and shipping of CHH's bulk products such as logs, timber and paper.

Fletcher Challenge Forests Limited (FCF)

23. FCF is an international company with operations in New Zealand, Australia, South America, North America, Asia and the Pacific Rim. FCF is one of New Zealand's largest forestry companies, managing a forestry estate of around 300,000 hectares in the central North Island region. It is a partner in the Central North Island Forestry Partnership (CNIFP) which was placed in receivership in February 2001, and which owns the Kaingaroa pinus radiata forest. FCF manages CNIFP's operations on behalf of the receiver.

Quality Marshalling

24. Quality Marshalling (QM) is a privately owned company and a division of the Lambert Group. QM commenced operations on 1991, after CHH approached Michael Lambert, Managing Director of the Lambert Group, with a view to obtaining log marshalling services at the Port of Tauranga that would be competitive with OSBOP's log marshalling services. QM currently provides all such services for CHH at the Port of Tauranga.

Ports of Auckland Ltd (POAL)

25. POAL is a public company which is listed on the New Zealand Stock Exchange. Eighty percent of its shares are owned by Infrastructure Auckland, and a mix of large and small shareholders owns the remaining 20% of shares. The port handles 43% of New Zealand's total container trade and 56% of the North Island's container trade.

International Stevedoring Operations Ltd (ISO)

26. ISO is a privately owned stevedoring company which has operations at the ports in Whangarei, Auckland, Tauranga, Gisborne, Napier, New Plymouth and Wellington.

Specialised Container Services (Wgtn) Ltd (SCS)

27. SCS is a privately owned company which offers container maintenance, repair and storage services at seven locations throughout the country, including its operation at Sulphur Point at the Port of Tauranga. SCS commenced its Tauranga operation in

1999 at the invitation of a shipping company which was seeking higher service levels than it was receiving from its existing service provider.

Australia-New Zealand Direct Lines (ANZDL)

28. ANZDL is a Division of CP Ships (UK) Ltd, a major global container shipping company. In New Zealand, ANZDL is party to a vessel sharing agreement (VSA) with P&O Nedlloyd, Columbus Lines and FESCO. The parties to the VSA operate 15 vessels which primarily carry containerised cargo with a small amount of breakbulk (non containerised or loose cargo such as palletised timber), and 2 roll-on-roll-off ships.

29. Of the 15 container vessels that ANZDL et al operate under the VSA, eight vessels call at the Port of Auckland and seven at the Port of Tauranga.

30. Prior to entering the VSA, ANZDL operated seven of its own vessels that only called at the Port of Auckland. In 1999, after POTL had introduced Metroport and [ ], the parties to the VSA decided to direct a number of the shared vessels to the Port of Tauranga.

INDUSTRY BACKGROUND

Log Exporting

31. The majority of the logs exported from New Zealand are shipped from the Port of Tauranga. The total volume of logs exported from New Zealand in the year ended 30 September 2001 was 6,897,000 cubic metres (m^3). The total value of those logs was NZ$762,913,000. Log export volumes and values by main ports of loading for the September 2001 year are shown in Table 1 below:

Table 1: Log Export Volumes and Values by Port of Loading for the September 2001 year

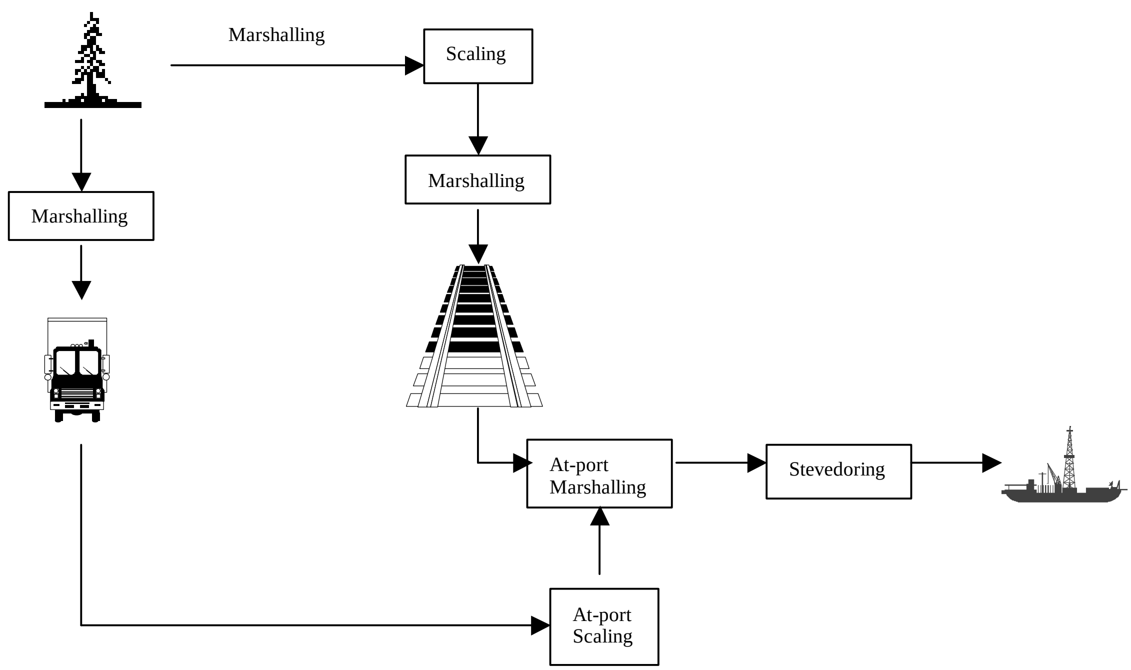
Port of Loading	Volume (000 m^3)	% of Total	Value* (NZ$000)	% of Total
Whangarei	775	11.2	92,581	12.1
Auckland	13	0.2	1,775	0.2
Tauranga	3308	48.0	374,410	49.1
Gisborne	602	8.7	48,054	6.3
Napier	569	8.3	65,910	8.6
New Plymouth	14	0.2	1,115	0.1
Wellington	120	1.7	9,777	1.3
Nelson	695	10.1	87,133	11.4

Picton	134	1.9	12,175	1.6
Lyttelton	133	1.9	14,395	1.9
Timaru	50	0.7	7,273	1.0
Dunedin	331	4.8	32,085	4.2
Bluff	151	2.2	16,231	2.1
Total	**6896**	**100**	**762,913**	**100**

Source: Adapted from the Ministry of Agriculture and Forestry website.
* Value is free-on-board

32. Logs for export typically go from the forest to the ship by train or truck. At the Port of Tauranga, the majority of logs arrive by train having been scaled at the central processing yard near the forest. Those logs which are transported by truck, are generally scaled at the port. Figure 1 below illustrates this process.

Figure 1: Flow Diagram Illustrating the Various Routes of Logs to the Exporting Ship



Log Scaling

33. Log scaling involves the measuring and grading of logs according to volume and quality. Where bulk logs are sent to the exporting port by rail, it is usual for the logs to be scaled before they are loaded onto the rail wagon. After scaling, an electronic barcode is attached to the log, which contains details of the forest from which the log was cut, its grade, quality and so on.

34. Approximately [ ] of OSBOP's revenue is derived from inland log scaling at forest sites at Kaingaroa, Murupara and Kawerau where logs are assembled ready for transportation to various ports but primarily Port of Tauranga. This activity is undertaken through a subsidiary, Forestry Services N.Z. Limited.

Log Marshalling

35. Log marshalling activities can be broken up into two categories:

– Inland or on site forest log scaling and marshalling; and

– At-port or wharf log marshalling.

36. Inland log marshalling activities are undertaken through related companies such as Kinleith Log Stackers Limited and Forest Services (Tapanui) Limited. Kinleith Log Stackers Limited operates in the Kinleith area and is responsible for feeding the Kinleith Mill with logs and managing log and timber movements in the Kinleith Mill yards. Forest Services (Tapanui) Limited provides similar mill marshalling services in Tapanui, Southland.

37. At-port marshalling begins when logs arrive at the port of export. As distinct from stevedoring, log marshalling is the receiving of cargo from road or rail transport, and loading and assembling it on the wharf ready for export. At-port log marshalling involves the assembling and stockpiling of logs on the wharf hinterland, selection of logs in accordance with the shippers' instructions as to type of cargo into ship loads, and arranging those ship loads under the hook of the ship's crane so that they can be loaded on to the vessel by stevedores. This activity is supported by information systems that collect and process relevant data and prepare shipping summaries of logs loaded to each vessel.

38. Table 2 below shows the port marshalling volume figures for logs estimated to be carried out at ports in New Zealand, the proportion by volume carried out by the various operators in the log marshalling industry and their estimated market share in New Zealand as a percentage.

Table 2: Estimated Market Share by Volume of Log Marshalling Services at Ports in New Zealand

Port	OSBOP ($000m^3$)	QM ($000m^3$)	John Ray Limited ($000m^3$)
Whangarei and Otiria	[ ]		
Tauranga	[ ]	[ ]	
Gisborne	[ ]		
Napier	[ ]		
Wellington			[ ]

Port	**OSBOP (000m^3)**	**QM (000m^3)**	**John Ray Limited (000m^3)**
New Plymouth			[ ]
Nelson	[ ]		
Picton	[ ]		
Lyttleton	[ ]		
Timaru	[ ]		
Port Chalmers	[ ]		
Bluff	[ ]		
Totals	[ ]	[ ]	[ ]
% of National Volume	[ ]	[ ]	[ ]

Source: POTL's application

39. OSBOP is the largest operator in New Zealand with a market share of approximately [ ]%. It has no competitors in any of the ports at which it provides services except at the Port of Tauranga. In that port QM is the only other competitor.

40. Of particular relevance to this application is log marshalling services at the Port of Tauranga.

Stevedoring

41. Stevedoring involves the loading and discharging of cargo on to and from ships. The stevedoring company takes responsibility for the cargo once the marshalling company has delivered it to the 'bunks', or space beneath the ship's hook. In addition, the stevedoring company takes responsibility for the efficacious loading of the ship, in order to maximise stowage. Further, the stevedoring company may discharge imported cargo from the vessel.

Shipping

42. Exports may be carried to their destination markets in one of two ways. First, they may be placed on a liner service which is controlled and scheduled by the shipping company. Alternatively the exporter may charter a ship, and direct the shipping company in regard to the schedule and ports visited. Typically, chartered ships carry log exports from New Zealand, and breakbulk and containerised products are carried in liner services.

MARKET DEFINITION

Introduction

43. The purpose of defining a market is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition being considered. Identification of the relevant markets enables the Commission to examine whether the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

44. Section 3(1A) of the Act provides that:

> "the term 'market' is a reference to a market in New Zealand for goods and services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them."

45. For the purpose of competition analysis, a relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, could impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the '*ssnip* test'). For the purpose of determining relevant markets, the Commission will generally consider a *ssnip* to involve a five percent increase in price for a period of one year.

46. Markets are usually defined in relation to three dimensions, namely product type, geographical extent, and functional level. A market encompasses products that are close substitutes in the eyes of buyers, and excludes all other products. The boundaries of the product and geographical markets are identified by considering the extent to which buyers are able to substitute other products, or across geographical regions, when they are given the incentive to do so by a change in the relative prices of the products concerned. A market is the smallest area of product and geographic space in which all such substitution possibilities are encompassed. It is in this space that a hypothetical, profit maximising, monopoly supplier of the defined product could exert market power, because buyers, facing a rise in price, would have no close substitutes to which to turn.

47. A properly defined market includes products which are regarded by buyers or sellers as being not too different ('product' dimension), and not too far away ('geographical' dimension), and are therefore products over which the hypothetical monopolist would need to exercise control in order for it to be able to exert market power. A market defined in these terms is one within which a hypothetical monopolist would be in a position to impose a *ssnip*, assuming that other terms of sale remain unchanged.

48. Markets are also defined in relation to functional level, and it is this level which is of particular relevance to the current application. Typically, the production, distribution, and sale of products takes place through a series of stages, which may be visualised as being arranged vertically, with markets intervening between suppliers at one vertical stage and buyers at the next. Hence, the functional market level affected by the application has to be determined as part of the market definition. As noted earlier, the acquisition currently being considered involves a party operating at one functional level (POTL, which provides port infrastructure) acquiring another party at a different functional level (OSBOP, which provides log marshalling services).

The Relevant Markets

49. The applicant has argued that the proposed joint venture will involve no horizontal aggregation of market power, as the activities of the two parties to the venture take place at different functional levels: [4]

> "it is submitted that there are no markets in which POTL (and/or any interconnected or associated companies) and OSBOP (and/or any interconnected or associated companies) are both engaged. Each operates within a distinct market."

50. The applicant accepts that the proposed acquisition will result in vertical integration of different functional activities. The applicant submits that the following markets are relevant to the acquisition:

- the provision of log marshalling services, inland and at ports;
- the provision of port infrastructure at Tauranga;
- the provision of bulk warehousing and distribution services at the Port of Tauranga; and
- the provision of container servicing and cleaning services at the Port of Tauranga.

51. The market for the provision of bulk warehousing and distribution services is that in which The Cargo Company operates. As discussed above, the Commission does not intend to further consider this market.

52. The remaining markets are discussed below, in terms of their product, functional and geographic dimensions.

The Provision of Log Marshalling Services

53. As noted earlier, log marshalling relates to the movement and storage of logs. Some marshalling is undertaken at inland processing yards, where logs may be scaled and measured prior to loading onto rail wagons. Logs are typically barcoded for identification, and information is loaded into a data system with which the exporter can assess volumes and track the movement of individual logs. Export manifests are derived from the exporters' tracking systems, and in turn provide the basis for wharfage, marshalling, and stevedoring charges.

54. Marshalling also takes place at the port. Once the logs arrive at the port gate, marshallers unload the trucks or wagons, using converted front-end loaders. The logs are stockpiled in storage areas to await the ship visit. The logs are then moved onto the wharfside and placed under the ship's 'hook'. From that point, stevedores operating the ship's cranes load the logs into the hull of the vessel.

55. At a product level, marshalling is not restricted to the movement of logs. All products passing through a port need to be prepared for loading. For example, container traffic at Tauranga's Sulphur Point container terminal is marshalled using specialised container straddle carriers and container forklifts. However, the equipment used for marshalling different types of product is quite different: [5]

> "the area known as Sulphur Point is the container terminal, dedicated to the loading, unloading, storage and marshalling of containers and related facilities. The container terminal uses a sophisticated container marshalling and storage computer system which links in with an

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[4] Application, page 14.
[5] Paragraph 9.3, Application.

> internationally recognised system used by most container lines. These systems are not used for log marshalling or product supply marshalling or distribution. POTL operates its own container services terminal in one area, using straddle carriers, while the adjacent area is open to other competing users."

56. Given that log marshalling machinery is not suited to the movement of other product types, the Commission accepts that the appropriate product level is in relation to logs.

57. Inland marshalling and at-port marshalling are distinct functions and are considered not to be substitutable. The applicant has also raised a possible distinction between marshalling and stevedoring.

58. All parties interviewed accepted that stevedoring and marshalling are quite different activities, with the former in particular being quite specialised. The efficient loading of logs into an irregularly shaped vessel hull requires specific expertise in order to be able to maximise stowage rates. In addition, the capital requirements are quite different. Log marshalling requires capital-intensive heavy loaders. For example, the Commission understands that the three main brands of loaders – Komatsu, Wagner, and Caterpillar – each cost up to $1.5 million per unit. However, in relation to logs, stevedores operate cranes affixed to the ship.

59. The acquisition relates to the operations of OSBOP not only at Tauranga, but also at other ports around New Zealand. In addition to Tauranga, OSBOP marshals logs at nine other ports. However, given that POTL is the provider of port services at Tauranga, the relevant geographic dimension is taken to be Tauranga.

The Provision of Port Infrastructure at Tauranga

60. The principal activities of the Applicant relate to the provision of port infrastructure at Tauranga. Tauranga is a major export port, handling significant volumes of containerised and non-containerised exports.

61. Port companies typically publish a range of charges for different services provided at the ports. Wet services, such as pilotage and the use of tugs incur specific charges, while dry services, which include wharfage and storage attract separate charges.

62. Some dry service charges are differentiated according to type of product. For example, POTL has a range of tariffs relating to containers – such as full or empty twenty-foot-equivalent units (TEU)[6] – as well as a single 'commodity' tariff and a 'breakbulk' tariff. Other ports publish tariffs that are even more disaggregated; for instance, CentrePort's tariff schedule includes separate wharfage tariffs for logs, bulk cement, and bulk liquids; while the Port of Napier's non-containerised and bulk charges range across six product groups (excluding vehicles).

63. The ability to charge separate tariffs for different products has important implications for defining the market(s) served by a particular port company. In particular, the geographic boundaries are likely to vary, depending on the product passing through the port.

64. The application states that: [7]

> "POTL in its port owning and infrastructure level is engaged in the export of logs and insofar as its Tauranga operations are concerned, OSBOP is also engaged in the export of logs at the marshalling

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[6] There are two standard sizes of shipping containers: twenty-foot-equivalent units (TEU) and forty-foot-equivalent units (FEUs).
[7] Application, page 14.

> functional level. … The product market is the supply of services for the export of logs from New Zealand."

65. The Commission has considered the geographic dimension of the provision of port infrastructure in relation to logs. Most of the parties spoken to informed the Commission that Tauranga is the predominant export port for logs sourced from the major Central North Island forestry areas, such as the Kinleith and Kaingaroa forests. In addition to its proximity to the main forestry areas, Tauranga also has direct rail connections to the processing yards of both FCF and CHH. FCF has a railhead at Murupara on the eastern fringe of the Kaingaroa forest, and this provides a direct rail link through to the port at Tauranga. Similarly, CHH has a railhead at its processing yard at Kinleith, and this line runs through the Kaimai tunnel to Tauranga. According to CHH, [ ] of its export logs through Tauranga arrive at the port by rail.

66. There are no direct rail connections from Kinleith and Murupara to Napier. The Port of Napier has confirmed that the vast majority of logs exported through Napier arrive at the port by truck.[8]

67. FCF has indicated that the forests around the Napier-Taupo road represent the geographic fringe of the Tauranga catchment area for logs. This fringe represents the southern extremity of the Kaingaroa forest, and logs from this area can be trucked through to Napier. FCF estimated that of its total log exports through Tauranga, [ ] could be considered to be contestable between Tauranga and Napier. However, both CHH and FCF have noted that a significant limitation of Napier is that on-wharf storage space is limited. As a result, logs stored away from the wharf incur higher handling costs. Port of Napier (PON) has informed the Commission that around 35% of log storage is currently away from the wharf, [ ].

68. PON has also confirmed that the southern end of the Kaingaroa forest could supply export radiata through either Tauranga or Napier. However, according to PON, the proportion of logs sourced from this area is very small. Other higher value species such as Douglas fir tend to be trucked from further afield, although again the volumes are negligible compared to radiata.

69. According to CHH, internal freight costs would be significantly higher for logs exported through Napier as compared to Tauranga. This applies even to logs sourced from the southern end of its Kinleith forest. CHH estimates that trucking rates from southern Kinleith to Napier are about [ ] per tonne[9], compared to [ ] per tonne to Tauranga. A 5% *ssnip* in Tauranga wharfage rates (from a published rate of around $3.45 per tonne of logs to $3.60 per tonne) would not induce CHH to switch log exports from Tauranga to Napier.

70. It would therefore appear that a relatively narrow geographic market, based on the central North Island, exists for logs exported through the port at Tauranga. This is consistent with previous Commission decisions, which have defined markets for the production and supply of logs within relatively small and specific geographic areas.[10]

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[8] Port of Napier has indicated that a very small volume of logs arrives by coastal freighter.

[9] Industry participants informed the Commission that one tonne is approximately equal to one cubic metre. The two terms are used interchangeably.

[10] See, for example, Decisions 424: *Carter Holt Harvey Ltd/Norske Skog indistrier* ASA and 426: *Carter Holt Harvey Ltd/Central North Island Forest Partnership*.

71. It is also important to note that the geographic boundaries of the market for the provision of port infrastructure are likely to be different for other product types. For example, the Commission has previously defined a North Island market for the production and supply of sawn timber. This is further discussed below in the section on countervailing market power.

The Provision of Container Maintenance and Cleaning Services at Tauranga

72. Container maintenance and cleaning includes the storage, handling, washing, and repair of empty containers. Providers such as TCPL and SCS lease land from POTL at Sulphur Point, and provide these services under contract to shipping companies. Facilities include storage and repair yards, as well as local authority-approved washing areas. Purpose-built container forklifts, with adjustable spreaders to handle TEUs and FEUs' are used to shift and stack the containers.

73. The provision of these services is a specialised and necessary role, with no obvious substitute. While such services are sometimes provided by an arm of a vertically integrated container operator, such as P&O, container servicing is also undertaken by independent operators such as SCS. The successful operation of SCS indicates that container servicing can be viewed as a distinct activity.

74. The location-specific nature of these services also suggests that the market can be appropriately confined to the port at Tauranga.

Conclusion on the Relevant Markets

75. The Commission has concluded that the markets which are relevant to its assessment of the proposed acquisition are those for:

- the provision of log marshalling services at Tauranga;
- the provision of port infrastructure for the export of logs from the central North Island; and
- the provision of container maintenance and cleaning services at Tauranga.

COMPETITION ASSESSMENT

Substantially Lessening Competition

76. Section 47 of the Act prohibits particular business acquisitions. It provides that:

> "A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market."

77. Section 2(1A) provides that substantial means "real or of substance".[11] Substantial is taken as meaning something more than insubstantial or nominal. It is a question of degree. What is required is a real lessening of competition that is not minimal. The lessening needs to be of such size, character and importance to make it worthy of consideration.

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[11] See Section 2 of the Commerce Commission's "Practice Note 4: The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in Section 47 – A Test of Substantially Lessening Competition".

78. Section 3(2) provides that references to the lessening of competition include references to the hindering or preventing of competition.

79. While the Act defines the words "substantial" and "lessening" individually it is desirable to consider the phrase as a whole. For each relevant market, the Commission will assess:

- the probable nature and extent of competition that would exist in a significant section of the market, but for the acquisition (the counterfactual);

the nature and extent of the contemplated lessening; and

- whether the contemplated lessening is substantial.

80. In interpreting the phrase "substantially lessening competition", the Commission will take into account the explanatory memorandum to the Commerce Amendment Bill (No 2). The memorandum notes that:

> "Two of the 3 key prohibitions are strengthened to bring New Zealand into line with Australian competition law, which will facilitate a more economic approach to defining anti-competitive behaviour."

and, in relation to s47:

> "This proposed new threshold is the same as the threshold for these types of acquisitions in section 50 of the Trade Practices Act 1974 (Australia)."

81. For the purposes of the analysis, the Commission takes the view that a lessening of competition and a strengthening of market power may be taken as being equivalent, since they are the two sides of the same coin. Hence, it uses the two terms interchangeably. Thus, in considering whether the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market, the Commission will take account of the scope for the exercise of market power, either unilaterally or through co-ordination between firms.

82. When the impact of enhanced market power is expected predominantly to be upon price, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material, and able to be sustained for a period of at least two years, for the lessening, or likely lessening, of competition to be regarded as substantial. Similarly, when the impact of increased market power is felt in terms of the non-price dimensions of competition, these also have to be both material and able to be sustainable for at least two years for there to be a substantial lessening, or likely substantial lessening, of competition.

The Counterfactual

83. The Commission uses a forward-looking, counterfactual type of analysis in its assessment of business acquisitions, in which two future scenarios are postulated: that with the acquisition in question, and that in the absence of the acquisition (the counterfactual). The impact of the acquisition on competition can then be viewed as the difference between those two scenarios. It should be noted that the status quo cannot necessarily be assumed to continue in the absence of the acquisition, although that may often be the case. For example, in some instances a clearly developing trend

may be evident in the market, in which case the appropriate counterfactual may be based on an extrapolation of that trend.

84. However, in the current case, it appears that the most likely counterfactual will be a continuation of the status quo, or possibly OSBOP under ownership of another party. It is important to note that POTL's market power with respect to port infrastructure is likely to continue under the counterfactual scenario.

Vertical Acquisitions

85. The Act prohibits business acquisitions that would be likely to have the effect of substantially lessening competition in a market. The Commission makes this assessment against a counterfactual of what it considers would be likely to happen in the absence of the acquisition. In the present case, the counterfactual is considered to involve both log marshallers continuing to provide services at Tauranga.

86. The proposed acquisition does not involve any horizontal aggregation, as both parties operate at different functional levels. However, the Applicant accepts that the acquisition would give rise to three instances of vertical integration as a result of POTL entering a number of downstream markets. However, as noted earlier, POTL would be moving from a 50% shareholding in The Cargo Company to a 100% shareholding, and the corresponding market for bulk warehousing and distribution is therefore not considered any further. This leaves two situations of vertical integration, namely POTL's entry into log marshalling (through OSBOP), and POTL's entry into container servicing (through TCPL).

87. In assessing vertical acquisitions, the Commission's main concern will be where a position of substantial market power in one market is likely to be strengthened or leveraged into another market. The Commission's Practice Note 4 states that: [12]

> "in general, the vertical aspects of acquisitions leading to vertical integration are unlikely to result in a substantial lessening of competition in a market unless a situation of a substantial degree of market power exists at one of the functional levels affected by a vertical acquisition. Where such a situation is found to exist, the Commission will examine the acquisition to determine whether that position is likely to be strengthened or extended to other markets, and whether that will substantially lessen competition."

88. The Practice Note goes on to outline some of the competition concerns that may be raised by vertical acquisitions: [13]

- Vertical integration may facilitate coordination effects. For example, the efforts of a group of manufacturers to collude may be undermined by the competition between the downstream retailers. This might be prevented if each retailer were to be acquired by a manufacturer.

- Vertical integration may foreclose entry into one or other of the vertical levels affected. For example, a commodity processor that vertically integrates with upstream suppliers of the commodity may be able to foreclose others from the processing market. Likewise, a manufacturer that gains control of a downstream distribution level of the market may be able to foreclose others from the manufacturing market.

[12] Practice Note 4, Page 44.
[13] ibid.

- Vertical integration may increase entry barriers. Foreclosure as just described may raise barriers to entry, by requiring an entrant at one functional level of the market to enter simultaneously at the other, foreclosed, level.

- Vertical integration may raise access concerns. A vertically integrated firm which owns an essential facility to which others need access in order to compete at a downstream level, has the ability to discriminate in favour of its own affiliated activities in the downstream market. Those affiliated activities could also benefit from information gained about rivals through those rivals requiring access at the upstream level.

89. Of the markets relevant to the current application, POTL appears to have a substantial degree of market power in the market for the provision of port infrastructure for the export of logs from the Central North Island. As there is no horizontal aggregation in this market as a result of the proposed acquisition, there is no change in this degree of market power when compared to the counterfactual. However, this leaves the question of whether this market power could be expanded into the other relevant markets and whether this would represent a substantial lessening of competition, again relative to the counterfactual. The assessment of whether such leveraging is likely to take place as a result of an acquisition will depend on factors such as entry conditions and access.

90. Therefore, the implications of the proposed acquisition for the markets for log marshalling and container servicing are now considered.

THE MARKET FOR THE PROVISION OF LOG MARSHALLING SERVICES AT TAURANGA

Existing Competitors

91. There are currently two log marshalling operators at Tauranga, OSBOP and QM. QM handles logs exported by CHH through Tauranga, and OSBOP handles all other logs through the port. The market shares of the two operators are set out in Table 3 below.

Table 3: Log Marshalling Market Shares, Tauranga

Company	**($000m^3$)**	**(%)**
OSBOP	[ ]	[ ]%
QM	[ ]	[ ]%
Total	**[ ]**	**100%**

92. The proposed acquisition does not result in any horizontal aggregation, as POTL is not currently involved in log marshalling. Therefore there will be no change in the above market shares as a result of the acquisition. POTL will simply acquire OSBOP.

Vertical Integration

93. A vertical acquisition of the type being proposed may give rise to a substantial lessening of competition in a number of ways, such as those outlined in the Commission's Practice Note and referred to in paragraph 89 above.

94. The first concern is that vertical integration may facilitate coordination effects. However, in the present case, this is considered unlikely, as POTL is the only party increasing its degree of vertical integration. Therefore, there does not appear to be any increase in the risk of collusive behaviour, compared to the counterfactual.

95. The other concerns relate to market foreclosure and access. The ability of the combined entity to foreclose entry into the log marshalling market or to discriminate in favour of its own log marshalling operations will depend on the degree to which competitors (or potential competitors) require access to the port facilities. The Commission understands that log marshalling operators at Tauranga do not pay for access to the wharves. The only payment that the marshallers make to POTL is in respect of any land leased from POTL. The bulk of the storage land involved in exporting logs is leased from the port company by the exporter. Furthermore, log marshallers are required to conform to port user operating rules, which apply to all port users.

96. Entry barriers are discussed further below. The proposed acquisition does not appear to raise entry barriers, as port ownership is not necessary to enter the log marshalling market. However, to the extent that POTL could introduce some form of access charges for log marshallers and subsequently use that as a basis for discrimination, entry barriers could be raised. Exporters informed the Commission that they would resist the imposition of such discriminatory charges, and this suggests that the countervailing power of such parties is an important consideration in this particular circumstance.

97. Some parties have raised the possibility that the combined entity may be able to bundle port charges to exporters in such a way that competing operators may be squeezed out. The concern is that non-contestable charges, such as those pertaining to wharfage, may end up cross-subsidising contestable charges. To the extent that this occurs, such practices would be considered under Part II of the Act. The credibility of this threat may be strengthened in this area, given the court precedents in relation to the bundling of port charges[14], and the fact that industry participants are well aware of these precedents and their implications.

98. However, in the past, ports have demonstrated a propensity to engage in such practices. The Commission generally adopts a timeframe of two years in assessing the competition effects of a proposed merger, and it is likely that action under Part II of the Act would extend beyond the two year period.

99. The ability to engage in anticompetitive practices through the leveraging of upstream market power will be influenced by entry conditions in the log marshalling market and these are considered below. The position of the exporters using Tauranga will also be an important consideration, as the exercise of any market power is ultimately likely to be to the detriment of these port users. Countervailing power is also discussed below.

[14] See for example *Commerce Commission v Port Nelson* (1995) 6 TCLR 406; on appeal, *Port Nelson v Commerce Commission* (1996) 7 TCLR 217.

CONSTRAINTS FROM MARKET ENTRY

Barriers to Entry

100. The key requirements for entry into the log marshalling market relate to securing a large enough supply of logs, and capital outlays on marshalling machinery. In the case of Tauranga, the presence of two major log exporters is an important factor, which as discussed below, is likely to be conducive to new entry. However, entry conditions would be considerably more difficult if there was a large number of small log exporters operating at the port.

101. A party considering entry into this market would need to establish a relationship with an exporter. OSBOP has informed the Commission that the minimum scale for a new entrant is around 500,000 m^3 per annum, although other parties have estimated that a new entrant would need to handle a minimum of approximately 1 million tonnes of logs per annum. These are large volumes relative to the log throughputs at most New Zealand ports.

102. Tauranga is the only port in the country with more than one log marshalling operation. It appears that no other port handles sufficient log volumes to support more than one log marshaller. For example, the next largest port in terms of log exports is Whangarei, which handles a total of around 800,000 m^3 of logs per annum. Figures provided by the applicant show that just over 3 million m^3 of logs are handled at Tauranga each year.

103. These volumes are marshalled under short-term contracts with the exporters. [ ]

104. As noted earlier, log marshallers use specialised front-end log loaders. Such machinery is readily available, at a purchase price of around $1.5 million per loader. According to OSBOP, smaller units cost around $400,000. This does not represent a sunk cost, as such equipment can be readily sold upon exit.

105. OSBOP and QM both noted that an additional set-up cost relates to establishing a log tracking system, which involves software development and hardware costs including portable bar-code readers. These costs were estimated to be in the vicinity of [ ]. However, both CHH and FCF noted that the exporter owns the tracking system, although the marshallers do invest in some of the tracking equipment. CHH views the marshalling activity as predominantly the physical act of shifting logs, quite distinct from the tracking systems which are retained by the exporter.

106. Other requirements for setting up a log marshalling operation include access to land on which to park machinery and locate a workshop, and satisfying port user operating rules, which apply to all port users and relate to issues such as health and safety and traffic management. Neither of these requirements represents a barrier to new entry.

107. Most parties spoken to conclude that entry barriers into this market are not significant, although this is based on there being two large log exporters at Tauranga. Reference was made to the ease with which QM entered the market in the early 1990s. [

]. As a result, QM was formed and has been marshalling CHH logs through Tauranga since.

The 'LET' Test

Likelihood of New Entry

108. Both FCF and CHH have informed the Commission that their likely response to any attempt to raise marshalling rates or reduce the quality of service would be to encourage an independent operator to enter the marshalling market, as happened previously with QM. For example, FCF could divert at least some of its Tauranga log volumes, which currently amount to around [ ] tonnes, to a new operator. OSBOP currently handles a total of [ ] tonnes at Tauranga.

109. The Applicant submitted that one possible new entrant is ISO, a major stevedoring company that operates at Tauranga and other ports throughout New Zealand. [ ].

110. It therefore appears that entry into this market is likely if the merged entity attempted to exercise increased market power, due to the presence of several major log exporters at Tauranga.

Extent of New Entry

111. Given the presence of FCF and CHH at Tauranga, and the comments of both that they would encourage new entry by placing log volumes with the new operator, any such entry into this market is likely to be of sufficient scale to constrain the merged entity.

Timeliness of New Entry

112. The Commission understands that a new log marshalling operation could be quickly established. QM commenced marshalling operations at Mount Maunganui in 1991, and was set up within a couple of months. As QM was able to initially use some existing machinery from its inland marshalling, this reduced the lead-in time. New log loaders were ordered from the USA, with a delivery time of four to five months.

113. It therefore appears that new entry into this market is likely to be sufficiently timely to constrain the combined entity.

Conclusion on the "LET" Test

114. The Commission concludes that all the components of the "LET" test are likely to be satisfied with respect to the log marshalling market.

Conclusion on Constraints from Market Entry

115. The Commission concludes that the threat of new entry into the log marshalling market at Tauranga is likely to provide some constraint on the combined entity. This threat of new entry is largely underpinned by the presence of two major log exporters at Tauranga.

OTHER COMPETITION FACTORS

Countervailing Power of Acquirers

116. The applicant has argued that the major forestry exporters have a significant amount of countervailing power: [15]

> "Although it can be argued that logs are captive to the nearest port, inland freight cost being approximately 12 cents per cubic metre per kilometre compared to C&F log value of $70 per tonne, other processed products are not subject to the same constraint.
> FCF and CHH combined control [ ] tonnes of processed timber products and therefore can significantly influence the volume of product through the port. As far as POTL is concerned, these products result in a higher revenue per tonne than is the case with logs and it would not make economic sense to trade this off against trying to obtain higher marshalling revenue, presently approximately $3.55 per cubic metre."

117. Any countervailing power held by CHH and FCF directly in relation to log marshalling at Tauranga is likely to be limited. Although both exporters put significant volumes of logs through Tauranga, it appears that the vast majority of these volumes are effectively captive to that port. However, the applicant argues that higher value processed products, such as sawn timber and wood panels, can sustain higher internal freight costs, and can therefore be transported further afield. As a result, the threat of switching these products to another port may provide a means of keeping the log charges of the merged entity in check.

118. Table 4 below summarises forestry product volumes (in millions of tonnes) exported through Tauranga by the major exporters.

Table 4: Summary of Projected Forestry Product Volumes through Tauranga for 2002

Exporter	Logs	Sawn Timber	Pulp & Paper	Wood Panels	Wood chips	Total
FCF	[ ]	[ ]		[ ]		[ ]
CHH	[ ]	[ ]	[ ]			[ ]
Rayonier	[ ]					[ ]
Tachikawa		[ ]				[ ]
Wood Exports					[ ]	[ ]
Other	[ ]	[ ]		[ ]		[ ]
Total	**[ ]**	**[ ]**	**[ ]**	**[ ]**	**[ ]**	**[ ]**

Source: Appendix F, application – all figures in million tonnes and rounded

119. FCF and CHH export a total of approximately [ ] tonnes of logs through Tauranga each year. These volumes could be regarded as largely captive to the port on account of the proximity of the major forestry areas and the low unit value of logs. The applicant notes an average fob price of $70 per m^3 for logs. The Ministry of Agriculture and Forestry (MAF) records an average log export price at Tauranga of $113 per m^3 for the year ending September 2001.

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[15] Page 4, Appendix F, Application.

120. However, these companies also export around [ ] tonnes of sawn timber, [ ] tonnes of pulp and paper, and [ ] tonnes of wood panels through Tauranga. These products are of a considerably higher value. According to the MAF website, sawn timber exports through Tauranga for the September 2001 year amounted to 751,000 m^3 and were valued at $375 million. This translates to a unit value of $500 per m^3. Similarly, particleboard exports were on average worth $675 per m^3, and fibreboard exports, $462 per m^3. Chemical pulp exports were worth an average of $842 per m^3.

121. CHH has informed the Commission that it exports a total of around [ ] tonnes of breakbulk and containerised cargoes from New Zealand each year, and that approximately [ ]% of this volume goes out through Tauranga. The main products exported in this form include paperboard, particleboard, pulp, timber, MDF, and tissue. CHH has indicated that of the [ ] tonnes of breakbulk and containerised cargo through Tauranga, around [ ] tonnes could be easily switched to Auckland in response to any increase in port rates at Tauranga. In fact, several years ago, CHH transferred a similar volume of forestry exports from Auckland to Tauranga. CHH believes that Auckland has a number of competitive advantages relative to Tauranga,[16] and that a significant proportion of its exports is contested by the two ports.

122. CHH has provided the Commission with information relating to the additional cost it would incur in switching timber export volumes from Tauranga to Auckland. CHH's main sawmills which currently export through Tauranga are located at Putaruru and Tokoroa. The average additional cost of exporting that timber through Auckland is estimated by CHH to be $[ ] per m^3, depending on type and packing size. [

]

123. Any increase in log marshalling charges relating to log exports at Tauranga could place at risk some of the timber and other processed exports through Tauranga. This may affect the port companies in several ways, as noted by CHH: [17]

> "Also our ability to switch the volumes may impact the TGA and AKL port companies in two ways. Loss of revenue/profits from switched volume plus loss of revenue from shipping companies if decided to switch the port calls depending on which port has the biggest volumes."

124. The merged entity would therefore lose a combination of 'dry' charges such as wharfage, that it would otherwise have received in relation to the volume of products switched to Auckland; and possibly 'wet' charges, such as berthage and towage, to the extent that shipping lines rearrange their service schedules. POTL has noted that it would stand to lose total revenue of $[ ] for every tonne of container cargo switched to another port. This includes revenue from truck unloading, storage, container packing, wharfage, crane charges, and vessel fees. Therefore, the POTL revenue impact associated with the loss of [ ] from a customer such as CHH would amount to a loss of just over $[ ]. A 5% increase in log marshalling rates, applied to the 3.1 million tonnes of logs currently exported through Tauranga, would result in

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[16] The two advantages noted by CHH are the frequency of scheduled shipping services calling at Auckland, and Auckland's extensive distribution network. This latter point is important when CHH is exporting a particular product, and decides to switch some of that volume into the domestic market. This switching is easier to facilitate when the exported volume is going through Auckland.

[17] Email from Chin Abeywickrama, Manager Marine Logistics, CHH-Lodestar, to Commerce Commission (Thursday 31 January 2002).

a revenue gain of $550,000, leaving a net loss of approximately $[ ]. This is summarised in Table 5 below.

Table 5 – Revenue implications of cargo switching by exporters

Revenue lost per tonne of cargo switched	-$[ ]
Revenue gained through 5% increase in log marshalling charges	+$550,000
Net revenue loss to POTL	-$[ ]

Based on 100,000 tonnes switched from POTL

125. FCF has informed the Commission that it operates a mouldings plant in Taupo, which makes products such as architraves for export to the United States. Approximately [ ]% of the plant's production is trucked to Tauranga for export, with the remainder sent up to Auckland. This split could be shifted in favour of Auckland, although this would to some extent depend on the schedules of shipping lines.

126. While an increase in log marshalling rates may be unprofitable for POTL, this conclusion depends on the response of the major exporters in switching other products to Auckland. At least in the short term, CHH would incur higher inland freight costs in making such a switch. However, a number of parties have commented that major exporters, as well as the main shipping lines, often split their export volumes between several ports in order to maintain some competitive constraint on the port companies. [ ]

127. [ ] CHH referred to a similar switching of cargo by the Dairy Board and Maersk, again in favour of Tauranga.

128. This is supported by comments of ANDZL, a major partner in the VSA calling at Tauranga and Auckland. [ ] ANZDL characterised competition between POTL and POAL as strong in 1999, and fierce in 2001.

129. POAL has confirmed that POTL is the major competitor of POAL for contestable breakbulk and containerised cargo. Reference was made to the above example of the Dairy Board switching exports in favour of Tauranga. Dairy products manufactured in the Waikato are currently exported through Tauranga [ ] and Auckland [ ]. To some extent, this split is determined by factors such as shipping services to overseas markets; however another important factor in splitting exports between ports is to maintain competition between port companies. [

] To this extent, POAL considers that both exporters and shipping lines pose considerable constraint on port companies.

130. POAL added that it currently operates at [ ]% of its capacity, although an additional 10 ha of land is being developed in anticipation of growth in the manufacturing sector in the upper North Island. It is understood that POAL will spend in the vicinity of $100 million in expanding the main Fergusson container terminal. This suggests that POAL intends to compete aggressively for cargo volumes.

131. Ports are particularly sensitive to changes in volumes on account of the high proportion of fixed costs associated with the provision of port infrastructure. Because of this, CHH believes that the switching of a magnitude of [ ] tonnes of processed product from Tauranga to Auckland is likely to have a significant impact on POTL's profits. CHH see this as an important source of countervailing power for itself and FCF.

132. It therefore appears that the major exporters currently using Tauranga possess countervailing power that is likely to constrain the combined entity. This is on account of the size of CHH and FCF in particular, and the fact that both these companies export a variety of products, some of which is contested between ports. Such countervailing power would likely be significantly diminished if port usage was characterised by smaller, disparate exporters.

133. The position of the major exporters is an important factor underpinning entry conditions as discussed earlier.

Conclusion on Countervailing Power of Acquirers

134. It therefore appears that the major exporters, in particular CHH and FCF, are likely to possess countervailing power in relation to the higher value forestry products exported through Tauranga. In terms of assessing the proposed acquisition, this power could be exercised in response to any attempt by POTL to increase log marshalling or other rates at Tauranga.

Conclusion on the Market for the Provision of Log Marshalling Services at Tauranga

135. Market shares are unlikely to change as a result of the vertical acquisition, and Quality Marshalling is likely to continue to constrain the operation of the merged entity.

136. In addition, any attempt by the combined entity to increase marshalling rates or reduce the quality of service is likely to attract new entry at the behest of the major log exporters. This has occurred at Tauranga in the past.

137. More significantly, there appears to be countervailing power in the hands of the main exporters through Tauranga, and this is likely to act as an important constraint on the merged entity.

138. The Commission has therefore concluded that the proposed acquisition would not have, nor would be likely to have the effect of substantially lessening competition in the log marshalling market at Tauranga.

THE MARKET FOR THE PROVISION OF CONTAINER MAINTENANCE AND CLEANING SERVICES AT TAURANGA

Existing competitors

139. Currently, there are three major providers of container maintenance and cleaning services at the Port of Tauranga:
- OSBOP (through TCPL);
- SCS; and
- P&O

140. Estimated market shares of the parties are set out in Table 6 below.

Table 6: Estimated Shares of the Market for the Provision of Container Maintenance and Cleaning Services at Tauranga

Company	Value of services provided in NZ$ (000)	Market share (%)
OSBOP - TCPL	[ ]	[ ]
SCS	[ ]	[ ]
P&O	[ ]	[ ]
Total	**[ ]**	**100**

141. Table 6 shows that OSBOP, through its subsidiary TCPL, has [ ]% of the market share, with its competitors SCS and P&O [ ]. There will be no change in market shares post acquisition.

State of Existing Competition

142. SCS advised the Commission that the market for the provision of such services is one in which margins are relatively low and in which participants constantly seek a competitive advantage over their rivals. SCS further advised that the market for container servicing and cleaning services at the Port of Tauranga is highly competitive with market participants constantly seeking new business. SCS said that this keeps margins low and service quality levels high.

Vertical Integration

143. The discussion of the issues arising from the vertical integration of POTL into the market for the provision of container maintenance and cleaning services at Tauranga is as for the discussion relating to the log marshalling market at paragraphs 94 – 100 above.

CONSTRAINTS FROM MARKET ENTRY

The "LET" Test

Likelihood of entry

144. Market participants agree that new entry is very likely should any of the current participants cease operations, or should prices rise or quality drop. The relatively recent entry of SCS at the invitation of a shipping company substantiates this claim.

145. Entry to this market is likely to be from a shipping company that owns its own containers, such as the operation conducted by P&O or from a party that currently provides similar services at another port in New Zealand.

Extent and timeliness of entry

146. Again, the fact that SCS was able to enter this market and gain [ ]% of the market share within two years, would suggest that entry can be effected on such a scale and in a reasonably short timeframe, so as to provide effective competition for existing market participants. The Commission understands there are no long-term contracts between exporters and shipping companies and their container maintenance service providers that would hinder entry to the market.

Barriers to entry and expansion

147. Market participants advised the Commission that the major requirements for entering the market are:

- Customers;
- Container handling machinery (purpose-built forklifts) at a total cost of around $1.6 million;
- MAF approval and authorisation; and
- Space near the container terminal from which to operate.

148. SCS informed the Commission that the requirements for entry to this market are not onerous and that expansion for an existing participant could be effected with relative ease. In support, SCS stated that, as a range of customers own the containers and as there are no long-term contracts, those customers are highly contestable. Furthermore, although market participants have to some degree customised their machinery, the machinery required would not be difficult for a new entrant to obtain, particularly if the new entrant was already a service provider at another port.

149. Furthermore, SCS advised that MAF approval would not be difficult to obtain and that suitable land is available at Sulphur Point. The Commission understands that rentals at Sulphur Point are set by independent valuers, and are subject to arbitration in the event of dispute.

Conclusion on the LET test

150. The Commission concludes that the various components of the LET test are satisfied.

Conclusion on Barriers to Entry

151. The Commission concludes that there are no barriers to entry likely to deter expansion or new entry to the market for the provision of container servicing and cleaning services. Potential competition is likely to provide constraint on POTL in this market.

OTHER COMPETITION FACTORS

Countervailing power of acquirers

152. The Applicant contends that acquirers of container maintenance services can, and do, use more than one service provider in order to maintain the level of competition in the market. Market participants support this claim and add that self-provision is an option for the owners of the containers, the exporters and shipping lines. The example given to the Commission was that of P&O which currently provides container maintenance services for itself and other parties.

Conclusion on Countervailing Power of Acquirers

153. The Commission concludes that some degree of constraint would be posed on the merged entity by the acquirers of container maintenance services.

Conclusion on the Market for the Provision of Container Servicing and Cleaning Services at Tauranga

154. The Commission has considered the probable nature and extent of competition that would exist in the market for the provision of container maintenance and cleaning services at Tauranga but for the acquisition.

155. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition;
- potential competition from entry; and
- other competition factors.

156. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the market for the provision of container maintenance and cleaning services at Tauranga.

OVERALL CONCLUSION

157. The Commission is therefore satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the following markets:

- the provision of log marshalling services at Tauranga; and
- the provision of container maintenance and cleaning services at Tauranga.

DETERMINATION ON NOTICE OF CLEARANCE

158. Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for Port of Tauranga Limited or any interconnected body corporate of Port of Tauranga Limited to acquire up to 100% of the shares in Owens Services BOP Limited, but not including certain subsidiaries and assets which are specified in the Share Sale and Purchase Agreement annexed to the application.

Dated this 8th day of February 2002

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PR Rebstock
Deputy Chair