

## COMMERCE COMMISSION

### Decision No. 533

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**

**TOLL LIMITED**

**The Commission:** Paula Rebstock  
Donal Curtin  
Denese Bates

**Summary of Application:** The acquisition by a yet-to-be formed joint venture company (Newco) owned 50% by Port of Tauranga Limited and 50% by Toll Limited of all the shares in:

- The Owens Cargo Company Limited;
- Toll Logistics (NZ) Limited; and
- Leonard and Dingley.

**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:** 24 September 2004

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## EXECUTIVE SUMMARY

1. A notice pursuant to s 66(1) of the Commerce Act was received on 22<sup>nd</sup> June 2004. The notice sought clearance for the acquisition by a yet-to-be formed joint venture company (Newco) owned 50% by Port of Tauranga Limited (POTL) and 50% by Toll Limited (Toll) of all the shares in:
  - The Owens Cargo Company Limited;
  - Toll Logistics (NZ) Limited; and
  - Leonard and Dingley.
2. The proposed joint venture would involve the provision of land-based services for the export and import of different types of cargo into and out of thirteen commercial ports in New Zealand.<sup>1</sup> The industry participants directly affected are those that use the Port of Tauranga (POT) and log exporters generally.
3. The proposed joint venture would potentially link all parts of the export and import supply chain from the transport provided at the door of shippers' premises, to various cargo handling services supplied at the POT, to the provision of port infrastructure itself. Consequently, the Commission, for the purposes of this clearance application, considered relevant markets for the provision of:
  - intermodal transport services in New Zealand between exporters/importers and ports;
  - log marshalling at each port;
  - log stevedoring at each port;
  - general cargo marshalling at each port;
  - general cargo stevedoring at each port;
  - container handling in the North Island;
  - container handling in the South Island; and
  - port services within a region.
4. The proposed joint venture would lead mainly to vertical integration in the supply chain, and some horizontal aggregation.
5. The joint venture would result in horizontal aggregation in the provision of general cargo marshalling at Tauranga. The Commission found that despite the fact that Newco would have a market share of [ ] by revenue in that market, it would be likely to be constrained by three other competitors, as well as by the threat of entry, potentially from a [ ]. In conclusion, the proposal is considered unlikely to give rise to a substantial lessening of competition in the Tauranga general cargo marshalling market.
6. The key issues investigated by the Commission were those that resulted from vertical linkages. In particular, the Commission investigated the concerns raised by industry participants regarding the potential foreclosure in general cargo marshalling and

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<sup>1</sup> Tauranga, Auckland, Lyttelton, Dunedin, Gisborne, Bluff, Napier, Nelson, New Plymouth, Picton, Timaru, Wellington, Marsden Point. The majority of goods that were exported and imported through the Port of Whangarei are now being shipped through Marsden Point. Therefore, the Commission has not considered the Port of Whangarei as a commercial port.

stevedoring at Tauranga, and in log marshalling and stevedoring at Marsden Point, Tauranga, Gisborne, Napier and Lyttelton.

7. The Commission also considered Carter Holt Harvey's concerns that its countervailing power would be reduced as a result of the joint venture reducing its ability to switch ports for the export of its processed forestry products. In addition, the Commission investigated Ports of Auckland's concerns regarding inter-port competition.
8. In conclusion, the Commission considers that the majority of exporters utilising the POT have a degree of countervailing power over POTL and Toll in respect of the carriage and handling of their cargo. Furthermore, post JV inter-port competition would continue as in the counterfactual. In particular, the Commission considers that in the event that Toll or POTL attempted to exercise their respective market power, CHH has available to it a number of ways in which it could exercise its countervailing power.
9. On balance, 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 following markets:
  - intermodal transport services in New Zealand between exporters/importers and ports;
  - log marshalling at each port;
  - log stevedoring at each port;
  - general cargo marshalling at each port;
  - general cargo stevedoring at each port;
  - container handling in the North Island;
  - container handling in the South Island; and
  - port services within a region.
10. Accordingly, pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by a yet-to-be formed joint venture company (Newco) owned 50% by Port of Tauranga Limited (POTL) and 50% by Toll Limited (Toll) of all the shares in:
  - The Owens Cargo Company Limited;
  - Toll Logistics (NZ) Limited; and
  - Leonard and Dingley.

## THE PROPOSAL

1. A notice pursuant to s 66(1) of the Commerce Act was received on 22<sup>nd</sup> June 2004. The notice sought clearance for the acquisition by a yet-to-be formed joint venture company (Newco) owned 50% by Port of Tauranga Limited (POTL) and 50% by Toll Limited (Toll) of all the shares in:
  - The Owens Cargo Company Limited;
  - Toll Logistics (NZ) Limited; and
  - Leonard and Dingley.

## PROCEDURE

2. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. An extension of time was agreed between the Commission and the Applicants. Accordingly, a decision on the Application was required by 24<sup>th</sup> September 2004.
3. The Applicants sought confidentiality for specific aspects of the Application on the grounds that the information is commercially sensitive and that its release will be prejudicial to Newco, POTL, and Toll. In this respect, the Applicants rely on section 9(2)(b) of the Official Information Act 1982.
4. The Commission's approach to analysing this proposed acquisition is based on principles set out in the Commission's Mergers and Acquisitions Guidelines.<sup>2</sup>

## STATUTORY FRAMEWORK

5. Under s 66 of the Commerce Act (the Act), the Commission may grant clearances for acquisitions where it is satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market. The standard of proof that the Commission must apply in making its determination is the civil standard of the balance of probabilities.<sup>3</sup>
6. The Commission considers that it is necessary to identify a real lessening of competition that is not minimal.<sup>4</sup> Competition must be lessened in a significant and sustained fashion. For the purposes of its analysis, the Commission is of the view that a lessening of competition and the creation, enhancement or facilitation of the exercise of market power may be taken as being equivalent.
7. When the impact of market power is expected to be predominantly upon price, for the lessening, or likely lessening, of competition to be regarded as substantial, 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.
8. Similarly, when the impact of market power is felt in terms of the non-price dimensions of competition such as reduced service, quality or innovation, for there to be a substantial lessening, or likely substantial lessening, of competition, these also have to be both material and sustainable for at least two years.

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<sup>2</sup> Commerce Commission, *Mergers and Acquisition Guidelines*, January 2004.

<sup>3</sup> *Foodstuffs (Wellington) Cooperative – Society Limited v Commerce Commission* (1992) 4 TCLR 713, p 721-722.

<sup>4</sup> See *Fisher & Paykel Limited v Commerce Commission* (1990) 2 NZLR 731, 758, and also *Port Nelson Limited v Commerce Commission* (1996) 3 NZLR 554.

## **ANALYTICAL FRAMEWORK**

9. The Commission applies a consistent analytical framework to all its clearance decisions. The first step is to determine the relevant market or markets. As acquisitions considered under s 66 are prospective, the Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely in the defined market(s). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:
- with the acquisition in question (the factual); and
  - in the absence of the acquisition (the counterfactual).
10. The Commission analyses the extent of competition in each relevant market for both the factual and counterfactual scenarios, in terms of:
- existing competition;
  - potential competition; and
  - various other competition factors, including the countervailing market power of buyers or suppliers.
11. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the market between those two scenarios.

## **THE PARTIES**

### **Port of Tauranga Limited (POTL)**

12. The Port of Tauranga (POT) is New Zealand's largest export port by volume and second largest by container throughput. The principal activities of POTL are the ownership and operation of the wharf infrastructure and marine services at the POT. This involves:
- 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 that is leased to wharf users requiring space for storage of export/import goods; and
  - on the seaward side, POTL provides pilotage, towage and other services necessary to berth ships, and it maintains channels dredged to an adequate depth.
13. There are two major sites of operation at the port: the Mount Maunganui side of the harbour, where logs and general cargo are handled, and Sulphur Point on the western side of the harbour, where the Tauranga Container Terminal is situated.

### *The Owens Cargo Company Limited (Owens)*

14. Owens, formerly known as Owens Services Bay of Plenty Services Limited (OSBOP), is a wholly-owned subsidiary of POTL. Its business activities are log marshalling, general cargo marshalling, materials handling and the operation of mechanical services workshops. In addition, Owens has an agency, Allied Wagner Agency, for a brand of log grabbers, which are used to marshal logs, as well as a shipping agency business. Owens has shareholdings in two other companies, one of which is Kinleith Log Stackers Limited, which scales logs at Kinleith Mill near Tokoroa.

### *Northport Limited (Northport)*

15. POTL owns a 50% shareholding in Northport, the other shareholder being Northland Port Corporation (NPC). The company was established for the provision of port infrastructure



services at Marsden Point in Whangarei. It primarily handles logs from the Northland region.

*Metroport Auckland (Metroport)*

16. In 1999, POTL built an inland port facility for containerised cargo called Metroport at Southdown, Auckland. This move was in response to a decision by the shipping company, Australia New Zealand Direct Line (ANZDL), for its ships to call at Tauranga instead of Auckland. Further, given that 80% of New Zealand's imports are destined for north of Taupo<sup>5</sup> with the majority being distributed in the greater Auckland region, POTL established Metroport in a bid to compete for further business, particularly imports, with Ports of Auckland Limited (POAL).

**Toll Limited (Toll)**

17. Toll has a 100% shareholding in Toll Logistics (NZ) Limited, which provides log stevedoring services and general cargo marshalling and stevedoring services at eight ports in New Zealand.
18. Toll's parent company is Toll Group (NZ) Limited, which has an 84% shareholding in Toll NZ Limited (formerly TranzRail), which provides passenger and freight rail services in New Zealand.
19. Toll Group (NZ) Limited is owned by Toll Holdings Limited in Australia. The company operates an integrated logistics service that includes the provision of rail, road and sea transport services, as well as warehousing, distribution and stevedoring services.

*Leonard & Dingley Limited (L&D)*

20. In January 2004, Toll Logistics acquired L&D, which is an Auckland-based stevedoring company. L&D has a 50% shareholding in the Auckland Stevedoring Company Limited and two subsidiaries, namely, Allied Personnel Services Limited and Cruise Line Services Limited.

**OTHER RELEVANT PARTIES**

**Quality Marshalling Limited (QM)**

21. QM is a division of the Lambert Group and provides log marshalling services at the POT. It commenced operations in 1991, after Carter Holt Harvey Limited (CHH) approached the Lambert Group with a view to obtaining log marshalling services at the POT as an alternative provider to OSBOP's log marshalling services.
22. QM also marshals and stevedores woodchips in Napier.

**Ports of Auckland Limited (POAL)**

23. POAL provides port infrastructure and marine services mainly for the import and export of containers, bulk and break-bulk cargo. POAL handles 43% of New Zealand's total container trade and 56% of the North Island's container trade. It is estimated that 68% of imports by value and 33% of exports by value pass through the Ports of Auckland (POA).

**International Stevedoring Operations Limited (ISO)**

24. ISO is a stevedoring company operating at the following ports: Marsden Point, Auckland, Tauranga, Gisborne, Napier, Wellington, Nelson, Picton, Timaru and Bluff. It is involved in log stevedoring and general cargo marshalling and stevedoring.

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<sup>5</sup> Shipping Industry Review, *A Future for New Zealand Shipping*, December 2000.

### **Independent Stevedoring Limited (ISL)**

25. ISL provides stevedoring services for a variety of cargoes including sawn timber, particle board, wood pulp and liner board, and for bulk cargoes such as fertiliser, salt and wheat. ISL operates only at the POT.

### **Southern Cross Stevedores Limited (SCS)**

26. SCS operates at every port in New Zealand. It is involved in stevedoring, marshalling, receipt and delivery, packing and unpacking containers, warehousing, and logistics.

### **NZL Group**

27. The NZL Group comprises of two divisions: NZL Transport, which provides a range of transport services including road transportation, and P&O Ports, which provides marshalling and stevedoring services for containers, bulk and break-bulk cargo.

## **INDUSTRY BACKGROUND**

28. The proposed joint venture (JV) would involve the provision of land-based services for the import and export of different types of cargo into and out of thirteen commercial ports in NZ.<sup>6</sup> The cargoes are of the following broad types:

- **bulk cargo:** loose cargo that is moved in bulk form, such as logs, fertilisers, salt and coal;
- **break-bulk cargo:** non-containerised cargo moved in packages or pallets such as palletised meat; and
- **containers:** cargo carried in metal box structures. Containers can be 20 or 40 foot in length, the standard measure being TEU (20-foot equivalent unit).

29. In most cases the type of cargo shipped through a port reflects economic activity in the port's hinterland. For instance, due to the proximity of logging activities, the majority of the cargo exported by the POTL and Northport is logs and processed forestry products, whilst at the POA imported containers are the major cargo.

30. The main activities involved in the export and import of cargo are:

- **domestic transportation of cargo:** ports are linked to their hinterland by both road and rail networks, with the exception of Port of Nelson and Marsden Point, which have no rail link. Coastal shipping is also another mode of transport, although this is used mainly to move cargo between the North and the South Islands;
- **receipt and delivery:** cargo arriving at the port is warehoused or stored in holding yards prior to the arrival of the ship;
- **marshalling:** moving of cargo from storage and assembly areas to the ship's side;
- **stevedoring:** loading and unloading of cargo between the ship's side and the ship;
- **provision of port infrastructure services:** involves the provision of berths, storage space and equipment like lifting cranes at the port and wet services e.g. tugs, pilots; and

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<sup>6</sup> Tauranga, Auckland, Lyttelton, Dunedin, Gisborne, Bluff, Napier, Nelson, New Plymouth, Picton, Timaru, Wellington, Marsden Point. The majority of goods that were exported and imported through the Port of Whangarei are now being shipped through Marsden Point. Therefore, the Commission has not considered the Port of Whangarei as a commercial port.

- **shipping services:** cargo may be carried to their destination markets either on a liner service or a charter service. A liner service carries a variety of cargo from multiple customers, and is scheduled by the shipping company. A charter service may also carry a variety of cargo, and is scheduled by the exporter. Typically, chartered ships carry log exports from New Zealand, and liner services carry break-bulk and containerised products.

31. Whilst nearly all export and import cargo passes along this chain, there are some differences in the handling of bulk cargo, in particular logs, break-bulk cargo and containers. These differences are considered in further detail below.

### **Logs**

32. The supply chain for the export of logs involves log scaling, which is the measuring and grading of logs according to volume and quality, the transportation of logs to the port either by rail or road, log marshalling and stevedoring.
33. When 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 includes details of the forest from which the log was cut, its grade and quality. Those logs that are transported by truck are generally scaled at the port.
34. Log marshalling activities can be broken up into two categories: inland or on-site at forest and at-port.
35. At-port marshalling begins when logs arrive at the port of export. This 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 onto the vessel by stevedores. This activity is supported by information systems that collect and process relevant data and prepare shipping summaries of logs loaded onto each vessel. Log stevedoring involves the loading and discharging of logs from ships.

### **Bulk Cargo**

36. Bulk cargo, like coal, wheat and salt, is generally transported to and from the port by road and rail. It is stowed onto and discharged from the vessel using hoppers, which are funnel-like cargo handling equipment used to measure and direct bulk cargoes into a truck's or ship's hold.

### **Containers**

37. Most commercial ports in New Zealand own and operate container terminals. These pack and unpack containers, and load them on and off ships. Generally, container terminals comprise: a yard in which containers are stored; handling equipment such as straddle carriers, rubber-tyred gantries and forklifts to transport and stack containers; and shore-based cranes to lift containers on and off ships. There is no clear distinction between marshalling and stevedoring services used for containers, in contrast to other types of cargo.

### **Industry Participants**

38. The main industry participants affected by this proposed JV are listed below:
  - exporters;
  - importers;

- shipping companies;
- port operators;
- transport providers.
- marshallers; and
- stevedores.

39. The industry participants most directly affected by this proposed JV are those that use the POT and log exporters generally. They are considered in further detail below.

#### *Exporters*

40. The majority of exports through the POT are logs and processed forestry products like sawn timber, wood pulp, paper products, wood panels and woodchips. In addition to the POT, logs are exported from every port in New Zealand except Auckland.
41. Some of the main exporters of logs and processed forestry products that use the POT are Carter Holt Harvey (CHH), Tenon and Pru-Timber.
42. Other major exporters that use the POT include Fonterra Co-operative Group Limited (Fonterra), which exports a variety of milk-based ingredient products, milk powder and cheese and Zespri, which is a major exporter of kiwifruit.

#### *Importers*

43. Some of the major importers that use the POT are Genesis, which imports coal from Indonesia, and Ballance Agri-Nutrients Limited, which imports raw material and some finished fertiliser products.

#### *Shipping Companies*

44. The major international shipping companies calling at New Zealand ports, including the POT, are:
- Tasman Orient Line;
  - Chief Container Services;
  - Mediterranean Shipping Co (Aust) Pty Limited;
  - ANZDL;
  - FESCO Lines New Zealand Limited (FNZEL);
  - P&O Nedlloyd; and
  - Maersk New Zealand Limited.

#### *Port Operators*

45. The port most directly affected by this proposed JV is that of the Applicants. POTL has been active in extending its core service of providing port infrastructure services. It has vertically integrated into log and general cargo (bulk and break-bulk) marshalling through its subsidiary Owens, operates a container terminal and established an in-land port called Metroport in 1999.
46. POTL's container terminal is based at the area at the POT known as Sulphur Point. The terminal uses a sophisticated container marshalling and storage computer system that links in with an internationally recognised system used by most container shipping lines.

POTL owns the straddle carriers, and hires labour to operate them from Owens, P&O Ports and ISL.

47. Of particular relevance to this proposed JV is the rail link between the POT and Metroport in Southdown, Auckland, which transports around [ ] TEUs per annum. POTL currently has a freight contract with Toll NZ Limited (Toll Rail) for the provision of rail services for the transportation of containers between Sulphur Point and Metroport. When Metroport was established, POTL initially entered into a [ ] for a weekend rail service. [

].

48. Shipping lines contracted to use Metroport call at the POT, where import containers destined for Auckland are offloaded at the Tauranga Container Terminal. Containers are then railed to Metroport before distribution to their final destination. The same process occurs in reverse for Auckland-sourced export containers: the container is aggregated at Metroport, railed to Tauranga and loaded onto the vessel.

49. [ ].

#### *Transport Providers*

50. There are three modes of transport that can be used to move domestic cargo to and from the POT, namely rail, road and coastal shipping.
51. In New Zealand, rail freight services are provided exclusively by Toll Rail. On 30th June 2004, Toll Rail sold the rail network, railway stations and signalling equipment back to the Crown for \$1. Subsequently, Toll signed an agreement with the Crown, called the “National Rail Access (NRA) Agreement,” that gave it an exclusive licence to provide its freight services on the rail network. Toll Rail will pay the Crown as the infrastructure provider, an access fee to cover the cost of operating, maintaining and renewing the rail network. This fee will be a fixed sum this year, to be followed by a yet-to-be negotiated annual access fee on a rail line-by-line basis in subsequent years.
52. The NRA agreement requires Toll to invest at least \$100 million on upgrading its rolling stock and locomotives by 30 June 2008, and the Crown to invest at least \$100 million on upgrading the rail network by 30 June 2008 and an additional \$100 million in replacement capital expenditure by 30 June 2007.<sup>7</sup>
53. In respect of road transport, there are a large number of trucking companies involved in the export and import trade. Some are specialised, like Rotorua Forest Haulage, in moving particular types of freight. In New Zealand, national trucking companies include Owens Group (unrelated to Owens), Mainfreight Limited, Freightways and Toll.
54. In addition, there are some coastal shipping companies that are involved in shipping products domestically. These companies include Silver Fern Shipping, Strait Shipping and Pacifica Shipping (1985) Limited.

#### *Marshallers and Stevedores*

55. Table 1 identifies the marshalling and stevedoring companies operating at each of the thirteen commercial ports in New Zealand and the broad types of cargoes they are involved with, namely logs or general cargo (bulk and break-bulk cargo). As noted above, containers are handled by the ports themselves.

<sup>7</sup> National Access Agreement between Her Majesty the Queen in right of New Zealand acting by and through her Ministry of Finance and Toll NZ Consolidated Limited Clause 14.1 and 14.2

56. Separate companies provide log marshalling and log stevedoring services. In respect of general cargo there are companies that provide both marshalling and stevedoring services.
57. At Tauranga, there are currently two log marshallers, namely Owens and QM. At all other ports Owens is the only log marshaller, apart from John Ray in Wellington and New Plymouth.
58. Toll and three other companies provide log stevedoring services, although in most cases only a few operate at a port on a permanent basis. The people used to provide stevedoring services, frequently flown into other ports to meet peak demand, are known as the “flying squads”.
59. With regards to general cargo, there are currently four companies that provide both marshalling and stevedoring services at Tauranga.

**Table 1: Logs and General Cargo: Identities of Operators for Marshalling and Stevedoring Services by Port, September 2004**

Port	General Cargo		Logs	
	Marshalling Services	Stevedoring Services	Marshalling Services	Stevedoring Services
<b>Marsden Point</b>	Owens ISO	Toll ISO SCS	Owens	Toll ISO
<b>Auckland</b>	POAL P&O Ports	Toll SCS P&O Ports		
<b>Tauranga</b>	Toll, Owens P&O Ports ISO SCS	Toll P&O Ports ISL ISO SCS	Owens QM	ISO Toll
<b>New Plymouth</b>	SCS Westgate Transport Co	SCS	John Ray	“Toll”
<b>Gisborne</b>	SCS	SCS	Owens	“Toll” ISO
<b>Napier</b>	Toll Omniport Napier SCS QM Port of Napier	Toll Omniport Napier SCS QM ISO P&O Ports	Owens	Toll ISO SCS
<b>Wellington</b>	P&O Ports ISL SCS	The Loading Company ISO SCS Centreport Co P&O Ports	John Ray	“Toll” ISO
<b>Nelson</b>	TBS SCS	TBS ISO SCS The Loading Company	Owens	TBS ISO
<b>Picton</b>	Owens Port Marlborough Co	Port Marlborough Co TBS SCS	Owens	ISO TBS
<b>Lyttelton</b>	Toll SCS Lyttelton Port Co	Toll SCS Lyttelton Port Co Port Marlborough Co	Owens	Toll
<b>Timaru</b>	PrimePort Timaru	ISO Timaru Port Co SCS Caroline Bay Stevedores	Owens	ISO
<b>Port Chalmers</b>	Owens Port Otago	SCS Port Otago	Owens	SCS
<b>Bluff</b>	SouthPort (Port Coy) SCS	ISO SCS	Owens	ISO SCS

Notes: “Toll” - “flying squad” for log stevedoring only

TBS=Tasman Bay Stevedoring

SCS=Southern Cross Services

ISO= International Stevedoring Operations

ISL= Independent Stevedoring Limited

QM=Quality Marshalling

## PREVIOUS DECISIONS

### Decision 453: Port of Tauranga Limited/Owens Services Bay of Plenty Limited

60. The Commission cleared the acquisition by POTL of OSBOP Plc on 8<sup>th</sup> February 2002. This acquisition involved two situations of vertical integration, namely POTL's entry into log marshalling (through OSBOP), and POTL's entry into container servicing (through Tauranga Container Park Limited). The markets considered were those for the provision of:
- log marshalling services at Tauranga;
  - port infrastructure for the export of logs from the central North Island; and
  - container maintenance and cleaning services at Tauranga.
61. In the log marshalling market at Tauranga, the Commission concluded that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition. The Commission found that market shares were unlikely to change as a result of the vertical aggregation, and QM was likely to continue to constrain the operation of the combined entity. In addition, the countervailing power of the main exporters at Tauranga was likely to act as an important constraint on the combined entity.
62. In the provision of container maintenance and cleaning services at Tauranga, the Commission concluded that there would not be a substantial lessening of competition, as the combined entity would be constrained by potential competition and by the countervailing power of some of the customers of container maintenance services.

### Toll Logistics (NZ) Limited/Leonard & Dingley

63. In January 2004, Toll Logistics acquired a 100% shareholding in Leonard & Dingley Ltd, an Auckland stevedoring company. The acquisition also included a 50% shareholding in Auckland Stevedoring Company Limited.
64. The Commission investigated this acquisition and found that the acquisition would not result in a substantial lessening of competition because Toll Logistics had no presence at the POA before the acquisition.<sup>8</sup> The relevant markets considered were the provision of:
- stevedoring services in general cargo at Auckland; and
  - marshalling services in general cargo at Auckland.

## MARKET DEFINITION

65. The Act defines a market as:
- a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.<sup>9</sup>
66. For competition purposes, a market is defined to include all those suppliers, and all those buyers, between whom there is close competition, and to exclude all other

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<sup>8</sup> The Commerce Act ("the Act") provides for a voluntary notification regime for proposed acquisitions, under which parties contemplating an acquisition may submit an application for clearance or authorisation if they are in doubt as to whether their proposed acquisition might contravene s 47. If parties choose to proceed with an acquisition without seeking prior clearance or authorisation, the Commission may initiate an investigation under s 47 of the Act. The analytical and investigation process is the same as it is for clearances. The difference is in the format and publication of the report.

<sup>9</sup> S3 (1) of the Commerce Act 1986.



suppliers and buyers. The focus is upon those goods or services that are close substitutes in the eyes of buyers, and upon those suppliers who produce, or could easily switch to produce, those goods or services. Within that broad approach, the Commission defines relevant markets in a way that best assists the analysis of the competitive impact of the acquisition under consideration, bearing in mind the need for a commonsense, pragmatic approach to market definition.<sup>10</sup>

67. For the purpose of competition analysis, the internationally accepted approach is to assume the 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, would be able to impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the SSNIP test). The smallest space in which such market power may be exercised is defined in terms of the five dimensions of a market discussed below. The Commission generally considers a SSNIP to involve a five to ten percent increase in price that is sustained for a period of one year.
68. The Applicants considered the relevant product markets to be the provision of:
  - marshalling services in general cargo, both inland and at ports;
  - log marshalling services, both inland and at ports;
  - stevedoring services in general cargo; and
  - log stevedoring services.

### **Product Market**

69. Initially, markets are defined for each product supplied by two or more of the parties to an acquisition. For each initial market so defined, the Commission considers whether the imposition of a SSNIP would be likely to be profitable for the hypothetical monopolist. If it were, then all of the relevant substitutes must be incorporated in the market.
70. The greater the extent to which one good or service is substitutable for another, on either the demand-side or supply-side, the greater the likelihood that they are bought and supplied in the same market. The degree of demand-side substitutability is influenced by the extent of product differentiation.
71. Close substitute products on the demand-side are those between which at least a significant proportion of buyers would switch when given an incentive to do so by a small change in their relative prices.
72. Close substitute products on the supply-side are those between which suppliers can easily shift production, using largely unchanged production facilities and little or no additional investment in sunk costs, when they are given a profit incentive to do so by a small change in their relative prices.
73. For the purposes of market definition the Commission has assessed the different shipping activities outlined in paragraph 30 with respect to the different types of cargo listed in paragraph 28. The proposed JV implies a greater degree of vertical aggregation than it does horizontal aggregation. The JV would potentially link all parts of a supply chain, from the transport provided at the door of the shippers' premises through to

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<sup>10</sup> Australian Trade Practices Tribunal, *Re Queensland Co-operative Milling Association*, above note 10; *Telecom Corporation of NZ Ltd v Commerce Commission & Ors* (1991) 3 NZBLC 102,340 (reversed on other grounds).

various cargo handling services supplied at the port, to the port itself providing infrastructure services. The proposed JV would therefore have implications for competitors in transport, cargo handling and in the supply of port services. Accordingly, it is appropriate to consider a wider vertical range of markets than the Applicants have proposed. The following activities are considered in greater detail:

- intermodal transport services;
- receiving and delivery;
- marshalling of cargo;
- stevedoring of cargo;
- port services; and
- shipping services.

#### *Intermodal Transport Services*

74. Exports are carried for international shipping from the point of origin to port or door-to-wharf. Imports are carried—wharf-to-door—from the port to their destination for further processing, distribution or consumption. To fulfil this intermediate transport task, the exporter/importer will usually employ another surface transport mode or a combination of other modes. In general, exporters/importers choose rail, road or coastal shipping to supply intermodal transport. The Commission has considered the degree of substitutability between suppliers of intermodal transport.
75. Supply-side substitution seems limited. There appears to be no opportunity for suppliers of road or coastal sea freight transport to supply rail transport. Toll Rail has exclusive rights to the carriage of freight by rail. There is some potential for Toll Rail to substitute road or sea freight services for rail. Toll Rail could, and does, provide road freight services in New Zealand and sea freight services across the Cook Strait. It therefore seems possible for Toll Rail to substitute road for rail services, either by buying or leasing trucks. Toll could potentially substitute sea for rail transport, or a combination of sea and road, though it would require an investment in coastal ships or the diversion of the inter-island fleet from its current use.
76. The Commission notes that consumers of transport services are partly responsible for supplying themselves with transport services. Apart from supplying time, transport users often supply other components of a transport service, such as location choice and loading facilities. A substitution between the supply of road and rail may impose significant costs on transport users, inhibiting substitution. These costs may vary by location, type of cargo, production processes and other factors.
77. CHH has explained to the Commission that their production processes are developed to utilise particular transport modes. CHH has claimed that [
- ]
78. On the demand-side there may be some substitutability between road and rail and this is analysed in further detail below.
79. The factors that are likely to affect the demand for a particular mode of transport include:
- type of cargo being transported (physical dimensions, value, perishability);

- urgency, or time-sensitivity, of the transport task and the value of time;
  - distance;
  - length of time taken to complete the route;
  - interface costs;
  - price;
  - scheduling;
  - service quality (security and safety of goods, availability of capacity at times needed, whether shipments can be tracked, etc.); and
  - non-commercial factors, such as environmental impact.
80. Modal choice is ultimately based on a comparison between the “generalised costs” of different modes, where the generalised cost takes into account not only explicit freight charges, but also the imputed costs of different modal characteristics listed above. For many exporters/importers, freight rates (or any other single component of the generalised cost) may represent a minor proportion of generalised costs. Exporters/importers take the freight rate into account, but will also consider the cost of mode choice implicit in time, scheduling, service quality and the other factors listed above.
81. There are some instances where rail and road are complements, namely when rail is used for part of the trip and road for the final stage. This could be because there is no continuous rail link from the origin to the final destination.
82. Where rail and road are both available, the majority of industry participants said that there was a large difference in road and rail freight charges. In general, they said, rail was cheaper over longer distances (a commonly proposed definition was “distances greater than 100km”) and road over shorter distances. CHH said that rail was more attractive for long-haul transport, although CHH stated that it varied depending on a number of factors, including the set-up of the mill from which products would be picked up, and the number of stops that need to be made. [ ] Industry participants said that transferring cargo from one land-based mode to another (i.e., “double handling”) during the course of its trip to port was costly, and was another reason why using road exclusively was preferred for short-haul carriage.
83. Various industry participants explained the circumstances in which road transport may have an advantage over rail. These include:
- it is cheaper over short distances—less than 100km;
  - trucks provide a door-to-door service while rail has inflexible timetables and a restricted network; and
  - livestock, perishable items such as fruit and vegetables and refrigerated and dangerous goods are not suited to rail.
84. An example of an exporter switching its main mode of transport is [ ]

85. [

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86. Formal economic evidence on the substitutability between road and rail is mixed and drawn almost exclusively from overseas markets.
87. Cross-price elasticities of demand suggest how much a price rise in one product market will effect a change in the amount consumed of a substitute product. So they provide some information about how close a substitute one product is for another. They are often estimated by studying past data on prices and quantities.
88. There are a number of overseas studies that have estimated cross-price elasticities of demand.<sup>11</sup> While the elasticities were inferred from overseas markets (mainly Australia, Europe and North America), the studies suggest a number of characteristics about the relationship between the price of and demand for road and rail that are likely to feature, at least to some extent, in New Zealand markets. Table 2 presents a selection of results cited in the Bureau of Transport and Regional Economics (BTRE) database. The table also presents certain own-price elasticities, and elasticities of demand with respect to non-price variables.

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<sup>11</sup> The Bureau of Transport and Regional Economics' *Transport Elasticities Database*, <http://www.dotars.gov.au/btre/tedb/index.cfm> refers to a large number of such studies and summarises their elasticity estimates. The database contained some Allen-Uzawa elasticities of substitution, but these are quantitatively and qualitatively questionable. See C. Blackorby & R. Russell, 'Will the real elasticity of substitution please stand up? A comparison of the Allen/Uzawa and Morishima elasticities', *American Economic Review*, Vol. 79, No. 4, September 1989, pp. 882-888. The Commission also sought elasticities of road and rail demand with respect to capacity, but was unable to find any.

**Table 2: Selected Elasticities of Demand Cited from the BTRE**

Elasticity type	Region	Estimate	Model	Study*	Note
<b>Cross-price</b>					
Rail demand wrt truck price	Canada	0.498	Translog	Oum 1989	Linear estimate 0.059, logit estimate -0.175
Rail revenue wrt truck cost	Canada	0.81	na	NCHRP 1997	Rail ton-miles/truck cost 0.52
Rail freight wrt road freight rate	Syd—Mel.	0.12	na	BTCE 1990	
Rail freight wrt sea freight rate	Eastern states-Perth	0.23	na	BTCE 1990	
Rail wrt truck rate	USA	0.111 to 1.209	na	Hsing 1994	Various years 1961 to 1990
Road wrt rail price	Canada	0.592	Translog	Oum 1989	Also log-linear, linear, box-Cox and logit results
<b>Own price</b>					
Rail own-price	Canada	-0.598	Translog	Oum 1989	Also log-linear, linear, box-Cox and logit models
Rail own-price - aggregate commodities	na	-1.52	Log-linear	Oum et al. 1992	Also aggregate logit and translog models
Rail own-price - wood & wood products	na	-0.05	Log-linear	Oum et al. 1992	Also aggregate logit, translog and discrete choice models
Rail own-price - transport equipment	na	-2.68	Disaggregate mode choice model	Winston 1981	
Rail own-price - lumber	na	-0.08	Disaggregate mode choice model	Winston 1981	
Rail wrt price	USA	-1.057 to -0.066	na	Hsing 1994	Various years 1961 to 1990
Rail wrt real freight rate	Various Australian city pairs	-0.92 to -0.1	na	BTCE 1990	
Rail wrt price	na	-0.76 (lumber), -0.87 (pulp and paper), -1.57 (fabricated metal)	na	Babcock and German 1983	
Road freight wrt real road freight rate	Syd -Mel., eastern states-Perth	-0.79, -3.17	na	BTCE 1990	

**Table 2: Selected Elasticities of Demand Cited from the BTRE**

Road freight wrt to road/rail cost ratio-short run	Various Australian city pairs	-0.55 to -0.33	na	BTE 1979, BTE 1985	Long run -0.9 to -0.7
Road own-price	Canada	-0.692	Translog	Oum 1989	Also log-linear, linear, box-Cox and logit models
Road FTKs	Australia	-0.9	na	BTCE 1995b	Long-run
Road freight wrt freight rate	Tasmania	-0.04 (pulp), -0.05 (paper), -0.15 (fertiliser)	na	University of Tasmania 1981	All commodities -0.16 to -0.02
<b>Other</b>					
Rail freight wrt rail transit time	na	-2.33 (fresh produce) to -0.07 (paper)	Disaggregate mode choice model	Winston 1981	
Truck freight wrt truck transit time	na	-0.69 (fresh produce) to -0.15 (paper)	Disaggregate mode choice model	Winston 1981	
Rail wrt service	na	-0.64 (lumber), -0.41 (pulp and paper), -2.11 (fabricated metal)	na	Babcock and German 1983	

wrt with respect to

na not available

\* Readers are referred to the BTRE database for full citations and to the individual studies for a more complete explanation of results and methods.

89. The studies tend to show that:

- demand for road and rail is often inelastic with respect to their own prices, though this varies by commodity type, by region and according to whether or not the estimates are short-run or long-run;
- the cross-price elasticities of demand suggest a reasonable amount, though far from perfect, substitution between road and rail, but that this varies from study to study, as with own-price elasticity; and
- customers are as sensitive to service characteristics (transit times, frequency, etc.) as they are to price.

90. The elasticity estimates from the various overseas studies cannot be used reliably as indicators of rail and road demand characteristics in the present situation. Differences in commodities, volumes, regulation, geography, productivity, network comprehensiveness and a number of other factors mean that demand characteristics, and the relative technical advantages and service qualities of road and rail, will be different between markets.

91. While the numerical estimates might not be directly applicable to the present case, the Commission considers that it is appropriate to draw some general conclusions from the studies:

- time matters: in the short-run, exporters/importers may bear a price increase without switching modes; in the long-run, exporters/importers may substitute road for rail, and rail for road, to a greater degree;

- commodity-type matters: physical and commercial characteristics between commodities are reflected in different demand elasticities; and
  - distance matters: rail becomes more substitutable at greater distances.
92. These conclusions are broadly consistent with a number of assertions made by industry participants to the Commission.
93. In theory, it may be possible to define individual shipments, individual trips, as separate markets, as each is unique in time and space, and each is not completely substitutable for another. But that is an impractical basis from which to proceed to a competition analysis. Some degree of aggregation is required, but aggregation that recognises the significant differences between the transport services demanded and supplied in different circumstances.
94. Exporters/importers are not buying *road* transport or *rail* transport or *coastal shipping* transport, but simply transport from one location to another. The service demanded and supplied defines a market rather than the technology used to produce the service. The Commission considers that shippers will generally be indifferent to how their commodities get from one place to another, everything else being equal, only that they get there at a certain time, with a certain degree of security and care, and at a certain price. For any given trip, time, place, business, commodity, and any other circumstance, there may be one or more potential and actual suppliers of this transport service. Often exporters/importers contract freight forwarders and consolidators to take decisions about which transport mode to use.
95. To some degree, it is possible to generalise about the circumstances that lead either to a particular mode being more suitable than others, or to modes being substitutable. The Commission considers that [

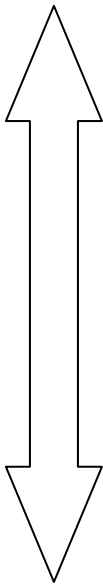
] the generalised cost to CHH of transporting logs by rail tends to be decisively lower than transport by road in most circumstances. Logs produced at Kinleith may therefore lie towards one end of a scale showing the technical substitutability of road and rail transport (see Figure 1 below). On the other hand, a cargo produced where there is no rail-head will tend to travel the whole journey by road. Road might also be the natural choice for a delicate cargo—such as fruit—which would need to avoid unnecessary double-handling.

96. Towards the other end of the scale might be containers which, where road and rail services are both available, may be nearly as easy to take by road or by rail or by coastal shipping where viable. Containers are standard units which are more easily transported on, and transferred between, trucks and trains. Often containerised cargo tends to be of a higher relative value (by weight and volume) than non-containerised cargo—another factor favouring its suitability for transport by different modes. A type of cargo somewhere in between these two ends of the scale might be break-bulk cargo, which might tend to use either rail or road suppliers, but which could feasibly switch between them.

**Figure 1: Factors Determining Substitution between Modes of Land Freight Transport**

Modal substitution	Examples	Characteristics
Very limited: road or rail strongly preferred	Logs produced at Kinleith	<ul style="list-style-type: none"> <li>○ unwieldy</li> <li>○ heavy</li> <li>○ low value</li> <li>○ own-supply of transport</li> </ul>
Limited: potential modal choice, though one mode usually preferred	Bulk/break-bulk	<ul style="list-style-type: none"> <li>○ some specialised handling</li> <li>○ some potential for containerisation</li> </ul>
High: relatively easy substitution	Containers	<ul style="list-style-type: none"> <li>○ standard physical dimensions</li> <li>○ standard handling equipment</li> <li>○ higher value</li> <li>○ no sunk investment in mode</li> </ul>

Single mode



Modes close substitutes

97. While Kinleith logs and containers might lie towards opposite ends on the scale considered above, they are not at the absolute ends of the scale. In some circumstances, when capacity constraints and timing issues dominate the generalised cost of rail, logs can be, and are, transported by road. And the relative advantages of road could be further improved in the long-run with additional investment. At the other end of the scale, while some exporters/importers of containers may swap between road and rail, it is possible that a number of them will prefer one mode to another because of scheduling, available capacity, avoiding additional transactions costs and so on. Cargo exporters/importers are not bound to any point along the scale. For example, an exporter/importer of break-bulk cargo might place the commodity in containers, or a shipper who might use either mode could sink costs into a rail-head, thereafter having less modal choice.
98. In conclusion, for the purposes of assessing the present Application, the Commission considers that there is one general market for intermodal transport services of export and import cargoes to and from ports. However, the Commission emphasises that the degree of differentiation within this market is large, and there is likely to be pockets of market power for particular products, locations, exporter/importer scenarios and transport modes (especially rail). The requirements of individual exporters/importers determine who the appropriate suppliers of intermodal transport services may be.

#### *Cargo Handling*

99. In New Zealand, it is common to refer to three distinct stages of cargo handling:
- receiving and delivery;



- marshalling; and
- stevedoring.

100. The following discussion considers whether or not each of these stages of cargo handling ought to be treated as a separate market for the purposes of assessing the present Application.

#### Receiving and Delivery

101. A Charles River Associates<sup>12</sup> report on Port Companies and Market Power concluded that there was a separate market for the receipt and delivery of cargo, as it was a distinct activity from other labour-intensive port operations due to the need for specific technology to count stock moving into and out of the port. The report noted that these systems are generally customised for the port, although stevedoring companies are also involved in receiving and delivery in some ports such as POAL.
102. The Commission found that receipt and delivery is carried out by third parties, marshallers, stevedores or port companies. There appears to be a great degree of complementarity between receiving and delivery and other cargo handling activities, and scope for supply-side substitution. Industry participants spoken to in the course of the investigation have not tended to emphasise the need to consider receiving and delivering activities separately from marshalling and stevedoring.
103. For the purposes of assessing the present Application, the Commission considers that it is appropriate to treat receiving and delivering activities as an adjunct to other cargo-handling services, rather than analysing it as a separate market.

#### Marshalling

104. In Decision 453 the Commission defined a relevant market for the provision of log marshalling services. One reason for defining log marshalling as a distinct market then was that log marshalling machinery was not suitable for the movement of other types of product. The Commission has found that the machinery and the software for log marshalling continues to be specialised, and there is limited demand-side and supply-side substitutability for other types of product. Therefore, the Commission has found no reason to alter this previously defined market.
105. In addition, in Decision 453, the Commission found that the equipment used for marshalling the other types of product is also specialised. Toll has informed the Commission that the difference in marshalling different types of products depends on the individual characteristics of the product and the equipment required. Toll said that it used different types of forklifts to marshal certain types of cargo, although it could use its current equipment to marshal other types of cargo, but not logs. The equipment currently used by Toll is listed below:
- 4 tonne forklifts to marshal palletised cargo;
  - 12 tonne forklifts to marshal empty containers;
  - 20 tonne forklifts with a prod to handle horizontal steel coils;
  - 30 tonne forklifts to marshal containers;
  - 38 tonne forklifts with 20/40 head to marshal containers; and

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<sup>12</sup> Charles River Associates, *Port Companies and Market Power - A Qualitative Analysis*, Report for Ministry Transport and Ministry of Economic Development 17.

- Mafi trucks and trailers to transport steel to ships side.
106. Heavier forklifts are used for marshalling containers than are used for general cargo. In Decision 453 it was found that containers were marshalled using specialised container straddle carriers, and a sophisticated container marshalling and storage computer system which links in with an internationally recognised system used by most container shipping lines. In investigating this proposed JV the Commission found that the different machinery used for marshalling containers and general cargo still holds.
107. Therefore, it appears that there is unlikely to be any demand-side substitution for marshalling of a particular type of cargo, but there is likely to be supply-side substitution in bulk and break-bulk marshalling. There is unlikely to be substitution in the supply of log and containerised cargo marshalling because of the specialised machinery and software used.
108. The Commission concludes that there is a separate market for log marshalling and another market for marshalling other non-containerised cargo. Given the way that containers are handled at the port, it is difficult to define with any precision where container marshalling services stop and where container stevedoring starts. Therefore, the Commission has found that, as a matter of commercial reality, container marshalling is typically demanded and supplied together with container stevedoring as a bundled service. For the purposes of assessing the present Application, the Commission finds that there is a single market for container marshalling and stevedoring, or a container cargo handling market.

#### Stevedoring

109. In the previous Commission decision separate markets were considered for marshalling and stevedoring of logs. In this proposed JV the Commission has found no reason to believe that this has changed, and that log stevedoring continues to be more labour-intensive than marshalling and involves a different skill set.
110. Whether there are separate markets for the stevedoring and marshalling of bulk or break-bulk cargo is less clear. While most companies that are active in marshalling bulk and break-bulk cargo are also active in stevedoring, industry sources have suggested to the Commission that marshalling and stevedoring are distinct services. On the other hand, many exporters/importers prefer to buy these services as a pair.
111. Given that marshalling and stevedoring are fairly distinguishable for non-containerised cargo, and given that these services can be demanded and supplied separately, for the purposes of assessing the present Application, the Commission will define separate marshalling and stevedoring services for non-containerised cargo.

#### Conclusions on Cargo-handling

112. The Commission defines the following cargo-handling markets for the purposes of assessing the present Application:
- log marshalling;
  - bulk and break-bulk cargo marshalling, or “general cargo marshalling”;
  - log stevedoring;
  - bulk and break-bulk cargo stevedoring, or “general cargo stevedoring”; and
  - containerised cargo handling.

*Port Services*

113. Port services were investigated in Decision 453, defined as “the provision of port infrastructure”, and considered to be distinct from stevedoring and marshalling. The Commission continues to consider that there is a separate market for port services since, for the type of cargo carried by sea, there is seldom a practical alternative to using port infrastructure.
114. While the suppliers in the market for port services can be readily identified—the ports themselves—it is less clear who the buyers are. In different circumstances, those who buy port services include exporters/importers of freight, of course, but also suppliers of complementary services: stevedores, marshallers, intermodal transport operators, ship companies and others.

**Functional Market**

115. The production, distribution and sale of a product typically occur through a series of functional levels, conventionally arranged vertically in descending order. Generally, the Commission identifies separate relevant markets at each functional level affected by an acquisition, and assesses the impact of the acquisition on each.
116. The overall services that might be affected by the proposed JV are first, that for getting export cargoes from their point of origin to a ship, and second, the market for getting imports from a ship to the place at which they are either distributed for sale or processed. Each of the operations considered above is also a functional level in the overall services. The product markets defined above may therefore be considered also as the relevant functional markets.

**Geographic Market**

117. The Commission defines the geographic dimension of a market to include all of the relevant, spatially dispersed sources of supply to which buyers would turn should the prices of local sources of supply be raised.
118. The Applicants submitted that the relevant geographical dimension for marshalling and stevedoring activities is on a “port by port” basis.

*Marshalling*

119. Marshalling of whatever type of product can be considered to be port-specific. This is because the machinery involved cannot be moved around from port to port quickly without incurring significant cost. A marshaller at a port will invest in machinery that will stay at that port. There are times where some machinery is transported for use at another, but this is ad hoc rather than the norm.

*Stevedoring*

120. Stevedoring tends to be port-specific, but it is a labour-intensive activity. Cranes used in stevedoring are supplied by the ports or ship owners, while labour is sometimes moved around from port to port, particularly when stevedores hold national contracts with exporters. For instance, some stevedores such as Toll and SCS will fly in labour from one city to another, especially from larger cities, where the labour might normally reside, to smaller ports, where it may be unavailable. The reason for this is either to load specific shipments of logs and general cargo, as a result of capacity constraints on stevedoring operations at that port, or to fully utilise stevedoring labour that was otherwise under-utilised at their home port.

121. Toll said that its “flying squads” consist of permanent and casual labour and it has provided “flying squads” at New Plymouth, Gisborne, Picton and Wellington. At the other ports where Toll is active, it has permanent on-the-ground staff. [

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122. [

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123. [

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124. While labour can be flown around, it is considered unlikely to constrain the service price of stevedoring at a particular port, as labour is moving to meet peak demands rather than responding to price increases or reduction of quality of service.

125. While noting that for certain contracts stevedoring may be supplied on a national basis, the Commission considers that the market for stevedoring services is, in general, port-specific.

#### *Port Services*

126. In Decision 453, the Commission found that the ability to charge separate tariffs for different products had important implications for defining the market(s) served by a particular port company. In particular, the geographic boundaries were likely to vary, depending on the product passing through the port. The Commission concluded that there was a relevant market for port services for the export of logs from the central North Island.

127. However, in this proposed JV there is also need to consider the geographic dimension of port services in relation to bulk, break-bulk and containerised cargo. In addition, the geographic dimension of port services will, in part, be determined by the availability of intermodal transport, as well as population distribution and the location of export producers and import consumers.

128. Substitution between ports is partly a function of network effects: cargoes will go where the ships call and where the best infrastructure is provided; in turn, ship calls and infrastructure provision are functions of cargo volume. On the other hand, exporters/importers may avoid ports where there is congestion and capacity constraints (these also being network effects). Commodity characteristics determine how easily a port in one region may be substituted for one in another, just as they influence the choice of intermodal transport supplier. For example:

- it might be expedient to send a perishable, cumbersome or fragile product to the nearest port;
- a low-value product might go to the nearest port to avoid unnecessary intermodal transport costs;
- a low-volume product might need to go to a port where a particular line’s ship will be calling;
- containerised cargo tends to be relatively highly mobile, and might be sent to a number of alternative ports; and

- cargoes might be made more mobile through containerisation or specialised carriage equipment, favourable transport contracts, regional distribution centres, etc.
129. For the purposes of assessing the competitive effects of the proposed JV, the Commission considers that it is appropriate to define the market for port services as port-specific for most commodity types, including logs, break-bulk and bulk cargo.
130. This geographical definition is consistent with court findings. For example, *Union Shipping*<sup>13</sup> found that it was appropriate to define a port services market for the Nelson region. This definition may be particularly relevant for the Port of Nelson, given its isolation, but the Commission considers that a region-specific definition is also appropriate in the present case.
131. The Commission noted in Decision 453 that there was some marginal substitution between the Port of Napier and the POT for the export of central North Island logs. The Commission considers that exporters of more mobile cargo would regard certain ports (particularly Tauranga and Auckland) as closer substitutes. However, the evidence available to the Commission suggests that port charges are a minor part of the total costs faced both by shippers of freight and by ship companies, and may be small compared with the costs of switching to another port. In the present case, therefore, the Commission takes the conservative view that it is appropriate to define the market for port services as port-specific, though recognising that for some cargoes and shipping companies, other ports will pose a significant constraint on each port.
132. Exporters/importers of a number of high value, mobile cargoes might consider a number of ports to be viable alternatives in some circumstances. The Commission considers therefore that it is appropriate to define separate North and South Island markets for containerised cargo.

#### *Intermodal Transport Services*

133. Transport market participants truck in time and space. Transport markets are geographical phenomena. They consist of pairs of origins and destinations. In transport markets, there is limited demand-side substitutability. Exporters/importers will tend to demand specific points of origin and will strongly prefer particular destinations.
134. There is some supply-side substitution in a technical sense: where they serve the same origin-destination pairs, they can feasibly fill in for each other, though trucks still have an advantage. Where there is industry, there are roads, and trucks tend to be able to reach more doorsteps than their modal rivals. Like trucks, trains and ships need their particular surfaces to travel upon, but rails and coasts do not reach as many doorsteps and loading bays as roads do.
135. It is possible to define each origin-destination pair as a separate market, as none is strictly substitutable for another. However, because of some supply-side substitutability, and for reasons of convenience, the Commission considers that it is appropriate for the purposes of assessing the present Application to consider a national market for intermodal transport. Nonetheless, as stated above it is important to keep in mind that there is a high degree of differentiation within this broadly defined market, such that there are likely to be pockets of (perhaps limited) market power in respect of certain cargoes, locations, exporter/importers scenarios and transport modes (especially rail).

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<sup>13</sup> *Union Shipping New Zealand Limited & Anor v Port Nelson Limited*, High Court, McGechan J and G. Blunt CP 101/89.

### **Conclusion on Market Definition**

136. The Commission concludes that for the purposes of this Application, the relevant markets are the provision of :
- intermodal transport services in New Zealand between exporters/importers and ports;
  - log marshalling at each port;
  - log stevedoring at each port;
  - general cargo marshalling at each port;
  - general cargo stevedoring at each port;
  - container handling in the North Island ports;
  - container handling in the South Island ports;
  - port services within a region.

### **COUNTERFACTUAL AND FACTUAL**

137. In reaching a conclusion about whether an acquisition is likely to lead to a substantial lessening of competition, the Commission makes a “with” and “without” comparison rather than a “before” and “after” comparison. The comparison is between two hypothetical future situations, one with the acquisition (the factual) and one without (the counterfactual).<sup>14</sup> The difference in competition between these two scenarios is then able to be attributed to the impact of the acquisition.

#### **Factual**

138. Table 3 sets out the general cargo marshalling and stevedoring activities of Owens and Toll by port. The proposed JV would result in horizontal aggregation in the provision of general cargo marshalling services at the POT. This is shown in the third row of Table 3.
139. The proposed JV would result in vertical integration in the following two areas:
- general cargo marshalling and stevedoring at Marsden Point and Tauranga (see Table 3); and
  - log marshalling and stevedoring at Marsden Point, Tauranga, Gisborne, Napier and Lyttelton (see Table 4).

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<sup>14</sup> Commerce Commission, *Decision 410: Ruapehu Alpine Lifts Ltd/Turoa Ski Resorts Ltd (in receivership)*, 14 November 2000, paragraph 240, p 44.

**Table 3: Owens' and Toll's General Cargo Marshalling and Stevedoring Activities**

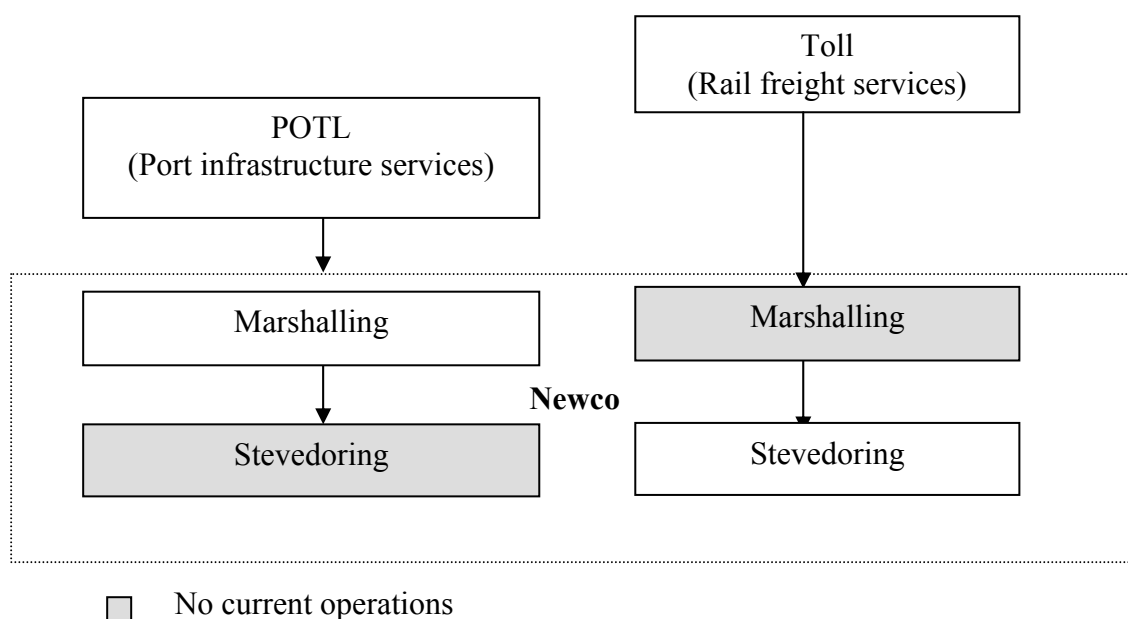
		General Cargo	
	Port	Marshalling	Stevedoring
<b>1</b>	<b>Marsden Point</b>	<b>Owens</b>	<b>Toll</b>
2	Auckland		Toll
<b>3</b>	<b>Tauranga</b>	<b>Toll, Owens</b>	<b>Toll</b>
4	New Plymouth		
5	Gisborne		
6	Napier	Toll	Toll
7	Wellington		
8	Nelson		
9	Picton	Owens	
10	Lyttelton	Toll	Toll
11	Timaru		
12	Port Chalmers	Owens	
13	Bluff		

**Table 4: Owens and Toll's Log Marshalling and Stevedoring Activities**

		Logs	
	Port	Marshalling	Stevedoring
<b>1</b>	<b>Marsden Point</b>	<b>Owens</b>	<b>Toll</b>
2	Auckland		
<b>3</b>	<b>Tauranga</b>	<b>Owens</b>	<b>Toll</b>
4	New Plymouth		"Toll"
<b>5</b>	<b>Gisborne</b>	<b>Owens</b>	<b>"Toll"</b>
<b>6</b>	<b>Napier</b>	<b>Owens</b>	<b>Toll</b>
7	Wellington		"Toll"
8	Nelson	Owens	
9	Picton	Owens	
<b>10</b>	<b>Lyttelton</b>	<b>Owens</b>	<b>Toll</b>
11	Timaru	Owens	
12	Port Chalmers	Owens	
13	Bluff	Owens	

Notes: "Toll"="flying squad" for log stevedoring only.

140. In addition the proposed JV would create two further vertical linkages, as shown in Figure 2, between the parent entities that would be part-owners of Newco :
- between Toll's rail freight services and the JV's marshalling/stevedoring services; and
  - between POTL's port infrastructure services at Tauranga and Marsden Point and the joint venture's marshalling and stevedoring services.
141. Further, in the factual scenario the parent entities of Newco would continue to have a contractual relationship for the provision of rail services for containers transported between Sulphur Point and Metroport.

**Figure 2: Newco's Activities**

142. Figure 2 shows that Newco would provide marshalling and stevedoring services only. However, through the JV, Toll would acquire interests in:

- log marshalling at ten ports;
- general cargo marshalling in three ports where it is currently not active; and
- container handling at Tauranga.

143. Similarly, through the JV, POTL would acquire interests in:

- log stevedoring at seven ports;
- general cargo stevedoring at five ports.

144. Overall, at the POT, the proposed JV would potentially link all parts of the import/export supply chain from the transport provided at the door of the exporters/importers' premises, to marshalling and stevedoring services supplied at the port, to the provision of port infrastructure services. As noted earlier, the POT is New Zealand's largest export port by volume.

#### **Motivation for the JV**

145. POTL highlighted that the driver for the proposed JV is that customers want a one-stop-shop, and Toll is the logical partner with whom to form a joint venture. POTL stated that [

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146. [

]

147. In addition, [



]

148. It appears that Newco's strategy is to [

]. The Commission has considered the Applicants' motivation for the proposed JV and its potential competition effects in the section on vertical integration.

### **Counterfactual**

149. In the counterfactual POTL would continue to operate in log marshalling. [

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150. [

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151. In the counterfactual, the parent entities of Newco would continue to have a contractual relationship for the provision of rail services for containers transported between Sulphur Point and Metroport.

152. In the counterfactual Owens and Toll could form an unincorporated JV. For instance, [

]<sup>15</sup>

153. The formation of an unincorporated joint venture would mean that Owens and Toll could have a contractual relationship in the counterfactual, as compared to a structural relationship under the factual scenario. However, any contractual relationship would be subject to s27 of the Commerce Act. Although this might suggest that the arrangements between Owens and Toll would essentially be the same in the two scenarios, the Commission considers that the contractual relationship might not in the event occur, it might not be permanent and it may not apply to all business activities covered by the proposed JV.

154. In conclusion, the Commission considers that the counterfactual is that POTL and Toll would continue to operate as independent companies at each of the commercial ports in New Zealand, and the subsidiaries Owens and Toll might form an unincorporated JV.

## **COMPETITION ANALYSIS-HORIZONTAL AGGREGATION**

### **General Cargo Marshalling at Tauranga**

155. Existing competition occurs between those businesses in the market that already supply the product, and those that could readily do so by adjusting their product-mix (near competitors). Supply-side substitution by near competitors arises either from redeployment of existing capacity, or from expansion involving minimal investment, in both cases involving a delay of no more than one year.

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<sup>15</sup> [

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156. An examination of concentration in a market can provide a useful indication of the competitive constraints that market participants may place upon each other, providing there is not significant product differentiation. Moreover, the increase in seller concentration caused by a reduction in the number of competitors in a market by an acquisition is an indicator of the extent to which competition in the market may be lessened.
157. The Commission identifies market shares for all significant participants in the relevant market. Market shares can be measured in terms of revenues, volumes of goods sold, production capacities or inputs (such as labour or capital) used.
158. An aggregation that would result in a low concentration level is unlikely to be associated with a substantial lessening of competition in a market. On this basis, indicative safe harbours may be specified.
159. A business acquisition is considered unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:
  - where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is below 70%, the combined entity (including any interconnected or associated persons) has less than in the order of a 40% share; or
  - where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is above 70%, the market share of the combined entity is less than in the order of 20%.
160. The Commission recognises that concentration is only one of a number of factors to be considered in the assessment of competition in a market. In order to understand the impact of the acquisition on competition, and having identified the level of concentration in a market, the Commission considers the behaviour of the businesses in the market. Specifically, the Commission seeks to understand the dynamics of the competition that would exist between the remaining firms in the market, compared to what would exist in the absence of the merger.
161. Presently there are five suppliers in the Tauranga general cargo marshalling market and the proposed JV would reduce the number to four. Table 5 shows their respective market shares in both volume (metric tonnes) and revenue.

**Table 5: Estimated Shares in the Tauranga General Cargo Marshalling Market, Year Ending 30 June 2003/2004**

Company	Volume metric tonnes (000s)	%	Revenue \$ (000s)	%
Owens	[ ]	[ ]	[ ]	[ ]
Toll	[ ]	[ ]	[ ]	[ ]
<b>Newco</b>	[ ]	[ ]	[ ]	[ ]
TSL	[ ]	[ ]	[ ]	[ ]
P&O Ports	[ ]	[ ]	[ ]	[ ]
<b>Post-JV 3-Firm Concentration Ratio</b>		[ ]		[ ]
ISO	[ ]	[ ]	[ ]	[ ]
<b>Total</b>	[ ]	<b>100</b>	[ ]	<b>100</b>

Source: Commission estimates.

Notes: TSL = Tauranga Stevedoring Limited is part of Southern Cross Stevedores (SCS). General cargo consists of bulk and break-bulk cargo as well as containers that are typically loaded onboard by ship-side equipment, and excludes logs and those containers which are loaded by land-based equipment through a designated container terminal.

162. The proposal would lead to the merging of the two largest firms in the provision of general cargo marshalling at Tauranga. Newco would have a market share of [ ] by volume, and [ ] by revenue, and the three-firm concentration ratio would be [ ] by volume and [ ] by revenue. This falls outside the Commission's safe harbours.
163. Owens is presently the largest general cargo marshalling company by revenue at the POT. Owens consolidates and marshals a variety of general cargo, including sawn timber, pulp, linerboard, vegetables, fertilisers and small quantities of milk products.
164. Toll purchased its general cargo marshalling interest at the POT from BHP Transport and Logistics, which was aligned with BHP Steel (now New Zealand Steel), and as a result, Toll marshals mainly steel from the mill at Glenbrook. Recently, Toll successfully re-tendered for the steel marshalling [ ] contract. Toll also marshals sawn timber, pulp and some containerised products that are loaded from the general wharf at Tauranga.
165. The JV would compete with three other general cargo marshallers at the POT:
- TSL, which is part of the SCS stevedoring company with a market share of [ ] by revenue. It marshals sawn timber, containerised products at the general wharf and other products;
  - P&O Ports, which marshals sawn timber, produce and containers at the general wharf; and
  - ISO, which is predominantly a stevedoring operation, particularly in respect of logs, but recently entered the Tauranga marshalling market at the request of Tasman Orient Line for whom ISO marshals containers from the general wharf. It is also the

incumbent marshaller and stevedore of Genesis' coal. As stated previously, [

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166. All industry participants interviewed by the Commission, including shipping lines and exporters, advised that there is vigorous competition in the Tauranga general cargo marshalling market, and that the level of competition is likely to continue with the joint venture. Newco and its competitors are considered likely to continue to compete on price and quality of service provided. The main point of differentiation between the competitors appears to be the software used by the companies in tallying the cargo.
167. Some participants also advised that the JV could enhance competition in the Tauranga general cargo marshalling market, as not all purchasers of marshalling services wished to have their marshalling and stevedoring services provided by the same entity, and in fact some have term contracts with parties other than Toll and Owens.
168. In addition, present competitors either have the existing capacity to expand, or can easily purchase or lease equipment, mainly forklifts, in order to expand.
169. The Commission also found that potential entry in the provision of general cargo marshalling at Tauranga is likely, timely and sufficient in extent with the main barriers being access to land and equipment. [

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170. [

] The Commission considers access to these facilities, equipment and labour to be easy to obtain.

171. In conclusion, the Commission considers that despite high horizontal aggregation with the JV, Newco is likely to be constrained by existing competition as well as the threat of entry, and therefore, the proposed JV is unlikely to give rise to a substantial lessening of competition in the Tauranga general cargo marshalling market.

#### **COMPETITION ANALYSIS-VERTICAL INTEGRATION**

172. Vertical acquisitions are those that involve businesses operating at different functional market levels in the production of a particular good or service. Where a vertical acquisition also has horizontal implications, the Commission considers each aspect of the acquisition in its own right.
173. The Commission is of the view that, in general, the vertical aspects of acquisitions are unlikely to result in a substantial lessening of competition in a market unless market power exists at one of the affected functional levels. Where such a situation is found to exist, the Commission considers whether the acquisition would strengthen that horizontal position, or have vertical effects in upstream or downstream markets, and whether that change would substantially lessen competition at one or other of the horizontal levels.

174. Vertical integration has the potential to raise a number of competition concerns, including:
- Facilitation of co-ordination effects – the efforts of a group of manufacturers to collude may be undermined by the competition between the downstream retailers. This effect might be prevented if each retailer were to be acquired by a manufacturer.
  - Foreclosure of entry into one or other of the vertical levels affected – 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.
  - Increased entry barriers – foreclosure may raise barriers to entry by requiring an entrant at one functional level of the market to enter simultaneously at the other, foreclosed, level.
  - Access concerns – a vertically integrated business that 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 competitors through them requiring access at the upstream level.
175. Vertical integration may also promote efficiencies in circumstances where it leads to the replacement of market transactions with less costly transactions within the business.<sup>16</sup> For example, a firm with very particular supply requirements, or where a critical input is involved, may find it less costly to coordinate supplies of the desired quality through an integrated upstream supplier. Vertical integration may also reduce the transactions costs associated with having to bargain when suppliers are few, and possess market power. Own-supply of part of a firm's requirements for an input may inform the firm about efficient supplier costs. Vertical integration may also overcome supply problems when the supplier may be reluctant to commit to a sunk investment, for fear of opportunistic behaviour by the buyer once the commitment has been made. The transaction costs for the customer may also be reduced, as it may have to negotiate and enforce a contract with only one party, rather than with two.
176. On the other hand, vertical integration also has the potential to create inefficiency from a lack of flexibility, in that the acquirer becomes tied to its own supplier, which may not remain the lowest cost supplier over time. The option to competitively tender for supplies may be lost.
177. As noted in paragraphs 139, 142 and 143, the proposed JV would give rise to two instances of further vertical integration into a downstream market for POTL and one further increase for Toll. For POTL, the increase is in respect of entry into the stevedoring of general cargo and of logs, and for Toll, in respect of the marshalling of logs at seven ports including the POT.
178. There were differing views from industry participants on the likely impact of this vertical integration. [

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<sup>16</sup> Fletcher Metals Ltd and Fletcher Trust and Investment Co Ltd v Commerce Commission (1986) 6 NZAR 33; News Ltd/Independent Newspapers Ltd (1986) 6 NZAR 47; Dunlop NZ Ltd/Goodyear NZ Ltd (1987) 1 NZBLC (Com) 104,190; and Carter Holt Harvey Ltd/Elders Resources NZFP Ltd (1990) 2 NZBLC (Com) 104,549.

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179. However, some industry participants raised concerns that the proposed JV could give rise to competition issues in a number of ways, as follows:
- ‘forced’ integration: requiring marshallers and stevedores of general cargo at the POT to integrate in order to compete with Newco;
  - bundling in general cargo: enabling Newco to bundle general cargo marshalling and stevedoring services in an anti-competitive manner;
  - bundling in logs: enabling Newco to bundle its log marshalling and stevedoring charges at those ports where Owens is the only log marshaller in such a way that competing stevedores may be squeezed out. The concern is that ‘non-contestable’ charges for log marshalling may end up cross-subsidising the contestable stevedoring charges;
  - enhancement of POTL’s market power in logs: enhancing the ability of POTL to exercise its market power in respect of the provision of port services at the POT for the export logs ‘captive’ to the POT; and
  - reduced inter-port competition: providing Toll an incentive to withdraw capacity or raise prices for general cargo on routes to other ports in order to increase its revenue through its activities at the POT, and to diminish the countervailing power of a large exporter, thereby reducing the level of inter-port competition in the North Island in respect of general and containerised cargo.
180. Each of these possible effects and the extent of potentially off-setting competitive constraints are discussed in turn.

### **The Provision of Marshalling Services and Stevedoring Services for General Cargo at the POT**

181. Some competitors raised concerns that post-JV, Newco could force them to vertically integrate in order to provide both general cargo marshalling and stevedoring services at the POT. Further those competitors were concerned that they would not be able to compete with Newco if it bundled marshalling and stevedoring services, and consequently would be forced out of business.
182. Whilst most industry participants had concerns with regards to general cargo marshalling and stevedoring at the POT, the analysis below also applies to the vertical integration arising in the provision of general cargo marshalling and stevedoring at Marsden Point.
183. In the factual, should exporters and shipping lines require integrated marshalling and stevedoring services, there appear to be no barriers to existing marshallers and stevedores replicating Newco’s activities, even contractually, in order to create any efficiencies, should they exist.
184. With regards to the bundling of marshalling and stevedoring, some companies already provide both marshalling services and stevedoring services for the same cargo. For example, Toll already marshals and stevedores general cargo, mainly consisting of steel and sawn timber. In addition, TSL and ISO also provide marshalling and stevedoring services for general cargo exporters/importers and shipping companies.

185. Further, as discussed in the section on horizontal aggregation, in the provision of general cargo marshalling services at the POT, it is likely that Newco would be constrained from exercising market power by three other existing competitors, and from potential competition. Without market power at one of the affected horizontal levels, it is unlikely that Newco would be able to cross-subsidise its stevedoring operation in an anti-competitive fashion.
186. One requirement of entry into the marshalling of general cargo is access to land at the port for the storage of goods before a ship has arrived. Some industry participants suggested that post JV, POTL could deny existing competitors or a new entrant access to such land in order to promote Newco and increase its market share.
187. POTL presently has the physical ability to deny access to space at the port to such parties (albeit that this could be found to be anti-competitive and therefore in breach of the Act). However, marshalling companies are chosen by the exporters or the shipping lines. If POTL tried to deny access to general cargo marshalling companies it could impact the shipping lines calling at the POT. For example, [

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188. Further [ ] stated the following:

[

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189. The Commission considers that there is unlikely to be a difference between the factual and counterfactual scenario in respect of access to facilities for the provision of general cargo marshalling activities.
190. With regards to stevedoring of general cargo at the POT, there are presently five operators: Toll, TSL, ISO, ISL and P&O Ports. Their market shares are shown in Table 6.

**Table 6: Estimated Shares in the Tauranga General Cargo Stevedoring Market Year Ending 30 June 2004**

Company	Volume metric tonnes	%	Revenue \$	%
ISL	[ ]	[ ]	[ ]	[ ]
<b>Toll</b>	[ ]	[ ]	[ ]	[ ]
ISO	[ ]	[ ]	[ ]	[ ]
TSL	[ ]	[ ]	[ ]	[ ]
P&O Ports	[ ]	[ ]	[ ]	[ ]
<b>Total</b>	[ ]	<b>100</b>	[ ]	<b>100</b>

191. ISL is the largest supplier, by revenue,<sup>17</sup> with a market share of [ ] in the provision of general cargo stevedoring services at the POTL. Post-JV, there is unlikely to be any change to the number of suppliers, all of which would continue to compete on price and quality of service. At present, the Commission found that competition between these stevedoring companies is vigorous, with contracts keenly contested and sometimes being switched between providers.

192. For instance, [

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193. Barriers to entering into general cargo stevedoring are relatively low, with a skilled labour force and access to port facilities being the major requirements. As such, the strength of existing competition from four other competitors, coupled with the threat of entry into general cargo stevedoring, indicates that Newco is also unlikely to have market power in respect of the stevedoring of general cargo.

194. Larger exporters/importers and/or shipping companies would also have some degree of countervailing power over Newco, as typically they choose the marshaller and stevedore for their cargo. For example, as noted in paragraph 169, [

]. Therefore, post-JV, in the provision of general cargo marshalling and stevedoring, it is likely that Newco would be constrained by the countervailing power of acquirers.

195. Toll currently has stevedoring interests for general cargo at the POA through its recent acquisition of Leonard and Dingley. Post-JV, the POTL would also have an interest in this business. However, there are also other stevedores and marshalling companies operating at the POA. Accordingly, Newco would not be guaranteed any stevedoring business as a result of a switch of cargo shipped to the POA from the POT.

<sup>17</sup> Market shares by revenue are the better measure given that general cargo consists of products of different value to weight ratios.



196. As the Commission considers that the marshalling of general cargo and the stevedoring of general cargo are contestable services and likely to remain so post-JV, such vertical integration in these markets is unlikely to have an anti-competitive effect.
197. Therefore, the Commission considers that the proposed JV and the resultant vertical integration between marshalling and stevedoring operations is unlikely to give rise to a substantial lessening of competition in the markets for the marshalling and the stevedoring of general cargo at the POT.

#### **The Provision of Log Marshalling Services and Log Stevedoring Services at the POT**

198. As with general cargo, some competitors of Owens and Toll in the log marshalling and log stevedoring markets at the POT expressed concern that Newco would bundle its log marshalling and stevedoring services and that they might have to vertically integrate in order to compete.
199. Table 7 shows that 47% of logs exported from New Zealand ports pass through the POT. The log marshalling companies active in New Zealand, and the volumes of logs at various New Zealand ports are also indicated.

**Table 7: Log Exports by Port of Loading by Quantity for the Year Ended 30 June 2004**

<b>Port of Loading</b>	<b>Log Marshaller</b>	<b>Quantity (m<sup>3</sup>)</b>	<b>%</b>
Marsden Point	Owens	825	13
Auckland		1*	0
<b>Tauranga</b>	<b>Owens QM</b>	<b>2,973</b>	<b>47</b>
Gisborne	Owens	363	6
Napier	Owens	553	9
New Plymouth	John Ray	21	0
Wellington	John Ray	181	3
Nelson	Owens	573	9
Picton	Owens	325	5
Lyttelton	Owens	118	2
Timaru	Owens	45	1
Dunedin	Owens	258	4
Bluff	Owens	61	1
<b>Total</b>		<b>6,297</b>	<b>100</b>

Source: Adapted from Overseas Trade Section, Statistics New Zealand.

Note: logs are those items in HS item code 4403. Logs include posts and poles (poles are value-added logs typically used for house foundations, telegraph poles etc).

\* Only poles were exported through Auckland

200. According to industry participants, the POT is the only log export port at which there is sufficient volume of logs to support two log marshalling operations. Owens and QM have established operations at Tauranga and appear to compete vigorously for business. The Commission considers that in respect of log marshalling at the POT, Newco is

likely to be constrained by the presence and available capacity of QM. The relative current market shares of Owens and QM at Tauranga are shown in Table 8.

**Table 8: Estimated Shares in the Log Marshalling Market at the POT for the Year Ending 30 June 2004**

Company	Volume metric tonnes (000)	%	Revenue (\$000's)	%
Owens	[ ]	[ ]	[ ]	[ ]
Quality Marshalling	[ ]	[ ]	[ ]	[ ]
<b>Total</b>	[ ]	100	[ ]	100

201. Newco, through Owens, would have a market share of [ ] in the provision of log marshalling services at the POT. QM would have the remaining market share. In addition to the constraint on Newco, from existing competition from QM in the provision of log marshalling services at POT, the Commission has assessed other possible constraints in this market.
202. Log marshallers use specialised front-end log loaders. Such machinery is readily available at a purchase price of around \$1.5 million per loader. This does not represent a sunk cost, as there are second-hand markets for such equipment both here and overseas.
203. An additional set-up cost relates to establishing a log tracking system, which involves software development and hardware costs, including portable bar-code readers. For a new entrant into log marshalling, these costs are estimated to be in the vicinity of [ ]. In addition, a new entrant would require a source of logs to marshal.
204. An existing log marshaller, John Ray, has already sunk its investment in its information systems, making entry into log marshalling at another port less difficult. [

] post-JV, John Ray could be considered to be a likely entrant in the provision of log marshalling services at the POT in the event that Newco's prices were increased or the quality of service was reduced.

205. In addition, [ ] Given its recent entry into general cargo marshalling, and given that ISO has a log stevedoring presence at nine commercial ports throughout New Zealand,<sup>18</sup> it is possible that ISO may consider entering log marshalling in the event that Newco raised its log marshalling prices or lowered its service quality levels.
206. CHH Lodestar advised the Commission that in the future it plans to issue an RFP for log marshalling services on behalf of the member companies of Silva. [

] Post-JV, it is considered likely that Newco's provision of log marshalling services at the POT would continue to be constrained by the countervailing power of CHH.

<sup>18</sup> Marsden Point, Tauranga, Gisborne, Napier, Wellington, Nelson, Picton, Timaru and Bluff.

207. In respect of log stevedoring at the POT, there are currently two operators, Toll and ISO. Table 9 shows that over the past three years ISO has gained market share and Toll's market share has fallen.

**Table 9: Estimated Shares in the Log Stevedoring Market at the POT, 2001/02 to 2003/04**

Company	Volume metric tonnes			%		
	YE 2001/02	YE 2002/03	YE 2003/04	YE 2001/02	YE 2002/03	YE 2003/04
Toll	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
ISO	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Total	[ ]	[ ]	[ ]	100	100	100

208. Presently, ISO stevedores all of the logs that CHH exports, which includes logs marshalled by both Owens and QM. During the Commission's investigation of the proposal, [

]. On this basis, the Commission is of the view that post JV in the provision of log stevedoring at the POT, Newco would be likely to continue to be constrained by existing competition from ISO.

209. In addition to existing competition, the Commission has investigated the barriers to entry in the log stevedoring market at the POT. The Commission found that no specialist equipment is required, as logs are loaded onto ships using the ships' cranes. Specialist knowledge and a skilled labour force are the primary requirements. While some log stevedoring companies advised the Commission that the required labour was scarce, the Commission notes that ISO has been able to expand into log stevedoring markets at other ports in recent years.
210. Further, SCS is active in log stevedoring at Napier, Port Chalmers, Bluff and Nelson, and could enter into log stevedoring in Tauranga by moving labour. As stated in paragraph 123, SCS frequently uses "flying squads" to meet demands in particular ports. To this extent, it is likely that there are relatively low barriers to entry in the log stevedoring market at the POT, and that Newco would be constrained by the threat of entry.
211. In conclusion, the Commission considers that existing competition from QM in respect of log marshalling at the POT, the ability of exporters to call for unbundled tender bids, existing competition from ISO in respect of log stevedoring at the POT, and the threat of entry to both the marshalling and stevedoring markets at the POT, taken together, are likely to be sufficient to prevent a substantial lessening of competition in these markets.

#### **The Provision of Log Marshalling and Log Stevedoring Services at Other Ports**

212. As previously mentioned, some industry participants were concerned that the integration of Owens' log marshalling and Toll's log stevedoring operations might enable Newco to bundle their services, and thereby to cross-subsidise 'contestable' stevedoring services with 'non-contestable' marshalling services so that independent stevedores would not be able to compete.

213. As noted in paragraph 147, [

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214. If competitors were forced to follow Newco by providing log marshalling and stevedoring services, then the barriers to entry for the log stevedores could be increased. Log stevedores would also need to enter in log marshalling. Entry into log marshalling for stevedores could be difficult given the required investment in information systems and machinery. This was acknowledged in [

].

215. In order to force this situation, Newco would require substantial market power in respect of log marshalling at ports other than Tauranga.

216. In respect of the log marshalling markets at other ports, Owens is the sole log marshalling company at the following ports: Northport, Gisborne, Napier, Nelson, Picton, Timaru, Port Chalmers, Lyttelton and Bluff, and John Ray is the sole log marshalling company at New Plymouth and Wellington.

217. The Commission considers that the relatively low volumes of logs exported from ports other than the POT (perhaps with the exception of Marsden Point), combined with the high capital investment required to enter as a second competitor at any of these ports, are likely to be a deterrent to entry. However, as noted in paragraph 204 existing log marshallers, John Ray and QM, have experience in log marshalling and have already sunk investment in information systems, making entry into other ports less difficult for them, particularly if their entry was fostered by several log exporters at those ports. [

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218. For example, [

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219. Exporters of logs presently put tenders to the market for the provision of log marshalling and for stevedoring services. Despite low volumes of logs, any attempt by Newco to refuse to supply unbundled services could see those log exporters approach either QM or John Ray with a view to fostering their entry, as CHH did with QM in Tauranga. It is also possible that ISO could enter log marshalling in the event that Newco attempted to act in an anti-competitive manner.

220. In addition, CHH/Silva, as the largest log exporter of logs in the country, could retaliate by switching log marshalling volumes at the POT from Newco to QM in order to constrain Newco in other ports.

221. Also, ISO and SCS are active in log stevedoring in other ports and are likely to continue to constrain Newco.

222. The Commission is of the view that post-JV, Newco would face competition from other log stevedores, the threat of entry from other marshalling companies, and a degree of constraint from the largest exporter of logs in New Zealand through its ability to switch volumes to Newco's competitor at the POT. Therefore, the Commission concludes that

the present proposal is unlikely to give rise to a substantial lessening of competition in the markets for log marshalling and log stevedoring at ports in New Zealand other than the POT.

### **CHH's Concerns**

223. In Decision 453, the Commission considered that a relatively narrow geographic market, based on the central North Island, exists for logs exported through the POT. This was consistent with previous decisions, which defined markets for the production and supply of logs within relatively small and specific geographic areas. Consequently, the Commission found that POTL had 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. In its investigation of the present Application, the Commission has found that POTL continues to have such market power for the reasons given in Decision 453.

224. In that decision, the Commission noted that in [

] At that time, CHH considered the ability to switch higher value cargo to be a credible threat to POTL in the event that it tried to restrict access to, or raise the price for port facilities to major log exporters.

225. In Decision 453, the Commission considered that the ability of CHH to threaten to switch non-captive cargo to an alternative port was an important constraint, as did CHH itself. The Commission considered that CHH was able to switch its higher value and more “footloose” cargo from the POT to the POA as a means of defeating any attempt by POTL to raise infrastructure prices for its ‘captive cargo’, principally logs, through the POT.

226. CHH advised the Commission that in the present scenario, it fears that any countervailing power that it currently has over POTL in respect of its export logs at the POT would be significantly reduced post-JV. This is because Newco would reduce CHH’s ability to switch “footloose cargo” to the POA, because Toll, the principal carrier of such cargo for CHH, would have an incentive to ensure CHH’s cargo was exported through the POT, in order to maximize Newco’s revenues.

227. Further, CHH said that it is currently dependent on Toll for the rail transport of any “footloose” cargo to either the POT or the POA. CHH stated that at present Toll is port-neutral between the POT and the POA, but post-JV Toll’s incentives would change.

228. The Commission has investigated these concerns, and CHH’s ability to exercise any countervailing power to constrain POTL and Toll.

#### *Constraints on POTL*

229. With regards to POTL, CHH was particularly concerned that post-JV POTL would be able to restrict access to, or raise the price it charges for, land for its log storage at the POT.

230. [

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231. It seems likely that CHH would have sufficient countervailing power post-JV to prevent market power being exerted against it. At present, POTL charges Silva, of which CHH

is a member, a lease rate of [

].

232. Compare this with the annual revenue that Owens presently derives from CHH in respect of the handling of CHH's processed forestry products, as shown in Table 10.

**Table 10: Revenue Derived by Owens at the POT from CHH Processed Forestry Products**

Product	Volume	Measure	Revenue (\$)
Pulp	[ ]	tonnes	[ ]
Paper – Linerboard	[ ]	tonnes	[ ]
Sawn Timber	[ ]	m <sup>3</sup>	[ ]
Plywood	[ ]	m <sup>3</sup>	[ ]
Laminated Vaneer Lumber (LVL)	[ ]	m <sup>3</sup>	[ ]
Panels (MDF)	[ ]	m <sup>3</sup>	[ ]
Laserframe	[ ]	units	[ ]
<b>Owens' total revenue derived from CHH</b>			[ ]

Source: Owens

233. If POTL were to increase the price of CHH's leased land by 10%, CHH would only have to switch the handling (including the marshalling) of one type of cargo, [

]

234. If CHH were to switch the marshalling of its [ ] to another service provider, it would be unlikely to incur a switching cost, and other potential suppliers would have the capacity to carry out the work. Potential services providers would be ISO, ISL and P&O Ports, the last of which currently has some [ ] spare capacity. [

]. The

Commission is of the view that switching the handling of one type of product only is unlikely to increase transaction costs significantly, should CHH wish to exercise its countervailing power in the event that POTL tried to increase log storage charges to CHH.

235. Some of CHH's pulp and paper products are containerised at Sulphur Point. CHH has a storage facility (Shed 12) on land which it leases from POTL. [

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236. CHH also has its own pulp store on the Mt Maunganui side of the POT. The land beneath the store is owned by Tram Lease Limited, a company independent of CHH and POTL. This land is subject to a long-term lease and is in no way under the control of POTL. Accordingly, POTL could not deny access to an alternative handler of CHH's pulp.

237. In the event that POTL threatened to terminate the lease for CHH's marshaller in respect of Shed 12, CHH could retaliate by withdrawing the handling of its pulp at the Mt Maunganui side, from Owens and giving it to another supplier. The switching of this pulp business is valued at [ ] (see Table 9), which is [ ] of the revenue Owens currently gains from CHH.
238. The Commission has also considered whether CHH would have the ability to constrain the POTL by switching the cargo handling of its processed forestry products from Newco to another supplier at the POT.
239. Presently Owens provides [ ] of CHH's receiving and delivery, cargo consolidation and handling and marshalling needs in respect of its processed forestry products at the POT (see Table 10).
240. If CHH were to switch all of its cargo handling services from Newco to another cargo handling company, the loss to Newco of [ ] would represent [ ] of Newco's projected revenue for the end of this year (See Table 13 below). The forecast revenue is based on expected growth, including that of CHH.

**Table 13: Forecast Financials for Newco, 2004**

[

]

241. [

]

242. The Commission is of the view that existing competitors would have the ability to expand their capabilities, and that any extra investment in equipment could be offset by CHH entering into a contract with an alternative supplier for around three years. For example, [

].

243. To sum up, the Commission considers that in the event that POTL tried to increase prices for, or restrict access to land, CHH could exercise its countervailing power in several ways. First, it could threaten to switch marshallers and stevedores for some of its processed timber products. However, the most credible threat that CHH has, is to switch all of the cargo handling of its processed forestry products to other marshalling and stevedoring service providers, which would equate to a loss of around [ ] for Newco.

#### *Constraints on Toll*

244. CHH was concerned that post-JV, Toll would have an incentive to divert CHH cargo from the POA to the POT in order to increase Newco's revenues. CHH believes that in the event that CHH asked Toll Rail to freight its products to the POA, Toll would either raise its prices or withdraw wagon capacity for CHH cargo that is captive to rail. In this

way, the ability of CHH to switch ports, and hence its countervailing power would be reduced.

245. The Commission found that there are some general cargoes that are captive to rail because exporters have made significant sunk investments in rail facilities. CHH, Genesis and [ ] are examples of large exporters that have sunk investments in rail.
246. Presently, Genesis imports coal to the POT and trucks it to its power station in Huntly. Genesis has recently made a sunk investment in respect of the transport of its coal, preferring to rail the coal to Huntly rather than transporting it by road. [ ]]. As such, it has negotiated a long-term [ ] contract with Toll for the provision of rail freight services from the POT to Huntly. [ ]].
247. [ ]].
248. [ ]].
249. The Commission understands that because [ ]].
250. With regards to CHH, it [ ]].
251. CHH has made a substantial sunk investment in its railhead at Kinleith. It stated that it had invested approximately [ ] million there to ensure the efficient loading of its processed product on to wagons at the railhead at their Kinleith. The sunk investment in rail consists of:
- a siding from the original New Zealand Railways Wawa yard;
  - a marshalling yard where container traffic can be loaded and unloaded; and
  - loading stations (three fully converted stores which are optimised for loading rakes of wagons).
252. CHH said that it would not be economic for it to switch to transporting its products by road as it would incur approximately [ ] in capital costs to convert its load-out facilities. Given the volumes of export product that are dispatched to port from Kinleith, CHH does not consider that it would be efficient to have a trucking operation that could have the space and turnaround times to deal with those volumes.
253. The Commission has considered whether Toll's track access agreement with the Government would provide any constraint on Toll's ability to divert CHH's export cargo from the POA to the POT.



254. Toll’s agreement with the Crown states that Toll’s right of exclusivity in respect of an individual rail freight line is on a “use it or lose it” basis. Clause 5.1(a)(i) of the agreement states that:

Toll Rail’s right of exclusivity terminates in respect of freight services on a Line Segment if its average annual freight levels over any rolling three Annual Periods fall below the threshold for that Line Segment set in Schedule 2.

The minimum threshold outlined in Schedule 2 is 70% of the annual average tonnage for freight over the 2002, 2003 and 2004 calendar years.

255. However, in the context of an apparently growing demand for rail, recent examples being Genesis and [ ] using rail transportation to and from ports, the “use it or lose it” clause may not significantly constrain Toll. In addition, [ ]].
256. The Commission found that not all of CHH’s “footloose” cargo is transported by rail. Table 11 shows that CHH currently transports around [ ] tonnes of timber, plywood, paper and pulp by road to the POTL from various mills. It is estimated that the handling, including the marshalling of this cargo, would represent [ ] of revenue to Newco. This road-based freight is independent of Toll Rail.

**Table 11: CHH Products Currently Sent By Road to POTL**

Mill	Product	Volume	Handling Rate (\$) per tonne*	Revenue (\$)
Kinleith	Paper	[ ]	[ ]	[ ]
	Pulp	[ ]	[ ]	[ ]
Tokoroa	Timber	[ ]	[ ]	[ ]
	Plywood	[ ]	[ ]	[ ]
Putaruru	Timber	[ ]	[ ]	[ ]
Rotorua	Timber	[ ]	[ ]	[ ]
Marsden Point	LVL	[ ]	[ ]	[ ]
<b>Total</b>				

\* Estimates calculated by dividing Owens’ revenue from CHH for each product, by the total volume of product handled.

257. In Decision 453, the Commission considered that the value-added to logs by processing can be substantial. In its 2002 report on port companies and market power, CRA noted that:

Processing can raise unit values of forestry products by a factor of at least four and up to ten times more. To the extent that the increased value of product per unit reflects an absolute increase in economic margin per unit, these products can be transported greater distances. This relationship between product value, product margin, and geographic hinterland is borne out by experience: while many may contend low-value logs are often geographically captured to their nearest port, few would argue that the cost of transporting a high-value case of wine to a more distant port is prohibitive.<sup>19</sup>

258. CHH confirmed this, and gave the values for its products shown in Table 12.

<sup>19</sup>Charles River Associates, *Port Companies and Market Power-A Qualitative Analysis*, Report for Ministry of Transport and Ministry of Economic Development .

**Table 12: Price of CHH's Processed Timber Products**

Product	Timeframe	Price/Revenue
Logs	Jan 04 – Aug 04	[ ]
	Jan 04 – Aug 04	[ ]
Timber	Jan 04 – Aug 04	[ ]
Paper	Aug 04	[ ]
Plywood	Jan 04 – Aug 04	[ ]
Pulp	Aug 04	[ ]
LVL	Estimate	[ ]
Packaging	Jan 04 – Aug 04	[ ]

259. Presently the sawn timber from Putaruru shown in Table 11 is transported 137 km, and that from Tokoroa 109 km, to the POT. A switch to the POA would mean an additional 54km for the Putaruru timber, and an additional 110km for the Tokoroa timber. CHH provided a per tonne per kilometre road transportation cost of [ ] for processed forestry products but this figure will tend to reduce as the distance carried increases<sup>20</sup>. Therefore, at the most, the additional cost of transporting [ ] of timber from Putaruru (see Table 11) to the POA is estimated to be [ ] and the additional cost of transporting [ ] of timber and plywood (see Table 11) from Tokoroa to the POA is estimated to be [ ].
260. The Commission considers it likely that CHH's higher value products already transported to the POT by road could sustain the additional cost of transportation over the greater distance to the POA. For instance, the additional transport cost from Tokoroa to the POA is estimated to represent [ ] of the total value of goods that would be transported. With regards to Putaruru to POA, the additional transport cost is estimated to be [ ] of the total value of goods that could be transported.
261. If CHH were to switch all the products currently sent by road, from the POT to the POA this could represent a loss of revenue to Newco of [ ] (see Table 11) in cargo handling charges, which would be some disincentive to POTL and Toll to exercise their respective market power. Although Newco would have a presence at the POA, it would not be guaranteed any CHH business, given the presence of other operators at the POA. In addition, POTL could be at risk of losing wet charges if the shipping lines carrying this cargo were to switch their services to Auckland to pick up the cargo.
262. [ ]
- ].
263. In respect of the POA's ability to deal with bulk-break cargo, the Commission notes that the POA does have experience in handling processed forestry products. For instance, [ ]
- [ ]

<sup>20</sup> In Decision 426, *Carter Holt Harvey Limited / Central North Island Forestry Partnership*, 5 July 2001, p13 para 63, the Commission considered the transportation costs of logs as follows, "the per kilometre cost of transportation reduces as the distance carried increases. The current 'on-highway' rate for a distance of 100km is \$12 to \$16 per tonne. A 200km 'cart' would cost between \$22 and \$28 per tonne".

264. Further the concept of transporting forestry products from Kinleith by road is not new. For instance, [

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265. [

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266. The Commission understands that [

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267. [

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268. In addition, as discussed in paragraphs 240-243 above, the ability of CHH to switch the handling of all its processed forestry products to another marshalling company and stevedoring company would mean a loss of around [ ] to Newco and is likely to act as a significant disincentive to Toll exercising any market power that it might have in respect of CHH's cargo.

269. Therefore, the Commission considers that post-JV, CHH would be able to exercise its countervailing power to constrain Toll by switching some of its processed forestry products to the POA by road or by switching the handling of all its cargo to other marshalling and stevedoring service providers. CHH might not need actually to switch; the threat of doing so is credible and would act as a constraint on Toll.

#### *POAL Concerns*

270. POAL, like CHH, expressed concern that Toll's part-ownership of Newco would give it an incentive to encourage exporters/importers using the POA to switch their cargo to the POT so that Newco would gain any related cargo-handling revenue. In addition, POAL contended that the proposed JV would thwart its plans to contract with Toll in respect of the carriage of cargo travelling between Tauranga and the POA, and thereby reduce competition between POAL and POTL.

271. The provision of export facilities for containerised cargo, which is largely considered to be non-captive, is actively contested in the North Island by POTL and the POAL in particular, and to a lesser extent by the port at Napier and Centreport in Wellington. The Commission was advised [

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272. [

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273. In addition, [

274. [ ]].
275. [ ]].
276. [ ]].
277. The Commission understands that [ ]].
278. The Commission also notes [ ]]. In addition, the Commission understands that [ ] of containers exported through the POA arrive at the port by road, and so are not dependent on rail for carriage to port.
279. The containers that POTL is railing to the POT through Metroport are largely captured from the greater Auckland region. If that cargo was to travel to the POA for export, it is likely that it would be more efficient for the cargo to travel to the port by road, as presently those containers are typically double-handled from road to rail. Alternatively, once the inland port at Wiri is established, although double-handling would still occur, the distance travelled by rail would be significantly less to the POA than to the POT.
280. Further, some shipping lines are large customers of Toll, in that they subsidise domestic transportation costs in respect of some of the freight they carry in order to make its calls at any particular port viable. [ ] stated that it provides some customers with transport services. It provides door-to-door services for meat exporters and provides mid-to-long haul train services to [ ] of its export customers. It stated that if it considered dropping a port call, and it had a good relationship with a large exporter, then it would assist the exporter in transporting its cargo to another port. Further, [ ] stated that they have negotiated rail freight rates with Toll.
281. To this extent, the Commission does not consider that POAL is dependent on Toll Rail for the transportation of potential export cargo in order to remain competitive with POTL and therefore, the Commission is of the view that the proposed JV is unlikely to substantially lessen the existing level of competition between POTL and POAL.

### **Conclusion on Vertical Integration**

282. In conclusion, the Commission considers that the majority of exporters utilising the POT have a degree of countervailing power over POTL and Toll in respect of the carriage and handling of their cargo, and for them post-JV, inter-port competition would remain. The Commission considers that CHH's ability to switch the handling of its cargo from Newco to other suppliers at the POT would be sufficient to constrain POTL from exercising any market power in respect of the provision of land for the on-wharf storage

of CHH's logs, and by Toll in respect of the transport of CHH's products to port for export.

283. In addition, the Commission considers that CHH's ability to influence the port calls of shipping lines for which CHH is a major customer will provide a degree of constraint on Newco.
284. The Commission also considers that POAL is not reliant on rail services in order to be competitive with POTL, given that a large number of containers that POTL rails to Tauranga originate from the greater Auckland area. Further POAL [ ]].
285. Therefore, the Commission considers that compared to the counterfactual, the present proposal is unlikely to give rise to a substantial lessening of competition in any of the affected markets.
286. The Commission notes that this view is based on the particular fact situation presented by the Applicants, and would not necessarily apply to any subsequent merger or acquisition by either POTL or by Toll.

## OVERALL CONCLUSION

287. The Commission has considered the probable nature and extent of competition that would exist in the following markets:
- intermodal transport services in New Zealand between importers/exporters and ports;
  - log marshalling at each port;
  - log stevedoring at each port;
  - general cargo marshalling at each port;
  - general cargo stevedoring at each port;
  - container handling in the North Island;
  - container handling in the South Island; and
  - port services within a region.
288. The proposed JV would lead mainly to vertical integration in the supply chain, and some horizontal aggregation.
289. The JV would result in horizontal aggregation in the provision of general cargo marshalling at Tauranga. The Commission found that despite the fact that Newco would have a market share of [ ] by revenue in that market, it would be likely to be constrained by three other competitors, as well as by the threat of entry, potentially from a [ ]. In conclusion, the proposal is considered unlikely to give rise to a substantial lessening of competition in the Tauranga general cargo marshalling market.
290. The key issues investigated by the Commission were those that resulted from vertical linkages. In particular, the Commission investigated the concerns raised by industry participants regarding the potential foreclosure in general cargo marshalling and stevedoring at Marsden Point and Tauranga, and in log marshalling and stevedoring at Marsden Point, Tauranga, Gisborne, Napier and Lyttelton.

291. The Commission also considered CHH's concerns that its countervailing power would be reduced as a result of the JV reducing its ability to switch ports for the export of its processed forestry products. In addition, the Commission investigated POAL's concerns regarding inter-port competition.
292. In conclusion, the Commission considers that the majority of exporters utilising the POT have a degree of countervailing power over POTL and Toll in respect of the carriage and handling of their cargo. Furthermore, post JV inter-port competition would continue as in the counterfactual. In particular, the Commission considers that in the event that Toll or POTL attempted to exercise their respective market power, CHH has available to it a number of ways in which it could also exercise countervailing power.
293. On balance, 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 following markets:
- intermodal transport services in New Zealand between importers/exporters and ports;
  - log marshalling at each port;
  - log stevedoring at each port;
  - general cargo marshalling at each port;
  - general cargo stevedoring at each port;
  - container handling in the North Island;
  - container handling in the South Island; and
  - port services within a region.

**DETERMINATION ON NOTICE OF CLEARANCE**

Accordingly, pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by a yet-to-be formed joint venture company (Newco) owned 50% by Port of Tauranga Limited (POTL) and 50% by Toll Limited (Toll) of all of the shares in:

- The Owens Cargo Company Limited;
- Toll Logistics (NZ) Limited; and
- Leonard and Dingley.

Dated this 24th day of September 2004

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Paula Rebstock  
Chair