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COMMERCE COMMISSION

Decision No. 343

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

P & O Nedlloyd Limited

and

Tasman Express Line Limited

The Commission:	E C A Harrison (Division Chair) P R Rebstock E M Coutts
Summary of Proposed Acquisition:	The acquisition by P & O Nedlloyd Limited of the assets of the business of Tasman Express Line Limited.
Determination:	Pursuant to s 66(3)(a) of the Commerce Act, the Commission determines to give clearance for the proposed acquisition.
Date of Determination:	26 February 1999

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TABLE OF CONTENTS

THE PROPOSAL

1 On 2 February 1999, the Commission registered a notice pursuant to s 66(1) of the Commerce Act 1986 ("the Act") seeking clearance for the acquisition by P & O Nedlloyd Limited ("PONL") of the assets of the business of Tasman Express Line Limited ("TEL"). The assets being purchased are goodwill, leased containers, spare parts for vessels and chartered vessels.

THE PROCEDURES

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 the notice agree to a longer period. An extension of eight working days was sought by the Commission and agreed to by the applicant. Accordingly, a decision on the application is required by Friday 26 February 1999.

3 PONL sought confidentiality for certain information contained in the notice seeking clearance, and a confidentiality order was made in respect of that information for a period of 20 working days from the Commission's determination of the notice. When the confidentiality order expires, the provisions of the Official Information Act 1982 will apply to the information.

4 The Commission's determination is based on an investigation conducted by its staff and their subsequent advice to the Commission.

5 In investigating the acquisition, Commission staff sought comments and information from a number of parties. These are listed in Appendix A.

THE PARTIES

P & O Nedlloyd Limited ("PONL")

6 PONL is a United Kingdom company with a branch in New Zealand. It is owned by P & O Nedlloyd Container Lines Limited. PONL operates a container shipping business at ports located around New Zealand, and also serves ports throughout the world.

7 PONL is a "cross trader operator". Cross traders are operators whose services are heavily geared to their main international trades. Cross traders use the trans-Tasman trade service as a leg in their world wide service.

8 From New Zealand, PONL provides shipping services to Northern Europe and the Mediterranean, Asia, the Middle East, and North and South America. PONL calls at New Zealand and Australian ports as part of its international trade routes.

Tasman Express Line Limited ("TEL")

9 TEL operates a container shipping business at ports located around New Zealand and Australia. TEL is owned by the following shareholders:

- McKay Shipping Limited (25% shareholding);
- Geo H Scales Limited (25% shareholding);

- Heatherington Kingsbury Pty Limited (25% shareholding); and
- Refrigerated Freight Lines Limited (25% shareholding).

10 TEL is a “dedicated operator”, servicing the trans-Tasman shipping market. Dedicated services operate according to an advertised timetable between specified ports. TEL operates two chartered ships on its trans-Tasman service.

11 TEL’s two dedicated ships currently call at Bluff, Port Chalmers, Lyttelton, Wellington and Nelson, then on to Sydney and Melbourne. This is a fortnightly, advertised service. The North Island port calls of Auckland, Tauranga and Napier (to and from a number of Australian ports) are made by PONL ships, under an arrangement with TEL.

Current Relationship between PONL and TEL

12 A relationship exists between PONL and TEL whereby one shipping operator purchases container space in another shipping line’s vessel. This practice is commonly referred to as a “slot charter”. Under this practice, the operators continue to compete for custom, market their services separately, and advertise their rates separately, regardless of whichever operator actually carries the freight. It is not known how long this practice has been in operation between PONL and TEL, although industry sources suggest a number of years.

13 The ports of Bluff, Port Chalmers, Lyttelton, Nelson and Wellington are served by TEL’s dedicated ships. PONL can purchase “slots” as described above. Similarly, on North Island routes, being Auckland, Tauranga, Napier and Wellington, TEL purchases “slots” on PONL vessels. The cargo is then shipped to Australia (or from Australia).

OTHER RELEVANT PARTIES

Australia New Zealand Direct Line (“ANZDL”)

14 ANZDL is an oceanfreight transportation company, offering services between Australia, New Zealand, North America and the Pacific Islands. ANZDL has two “roll on, roll off” vessels which are dedicated to the trans-Tasman trade. Roll on roll off vessels are able to carry a variety of goods, including heavy lifts, break-bulk cargo and motor vehicles, as well as containerised cargo.

15 ANZDL provides direct port calls at Auckland, Tauranga, Wellington and Nelson. In Australia ANZDL calls Brisbane, Sydney, Melbourne and (in one vessel) Adelaide. The ANZDL trans-Tasman service has a 10-11 day frequency. In 1998, ANZDL discontinued direct calls to Lyttelton, and a “feeder service” is now offered to Nelson. This feeder service is a mixture of coastal vessels and rail options, directed toward transporting South Island cargo to Nelson for export.

BHP Transport (“BHP”)

16 BHP (part of the Broken Hill Proprietary Company Limited) has been a dedicated operator on the trans-Tasman trade since the 1970’s. BHP operates two vessels on this service, making direct calls at Auckland, Tauranga, Napier and Lyttelton every ten days.

These vessels call at Melbourne, Sydney and Brisbane in Australia. BHP vessels carry both bulk cargo and containerised cargo.

17 On 12 February 1999, BHP announced that it was exiting the Tasman trade, "due to continued loss of earnings in the liner shipping service".[1] BHP's two ships will be withdrawn from service and their charters terminated in early March 1999.

Chief Container Services ("CCS")

18 CCS is a Sydney-based shipping operator, ultimately under the ownership of the John Swire Limited group ("Swires"). Swires is a long-established international shipping group. CCS has been operating in the trans-Tasman trade for approximately two years, through a slot charter arrangement with Pacific Forum Line ("PFL").

19 Following the announced withdrawal of BHP, it was reported that CCS would handle the majority of BHP's trans-Tasman trade.[2] CCS have confirmed that it will operate a trans-Tasman service, calling at the ports of Lyttelton, Napier, Tauranga and Auckland, and Melbourne, Sydney, Brisbane, Townsville and Darwin. CCS will operate multi-purpose vessels, capable of uplifting both break-bulk and containerised cargo.

BACKGROUND

20 Industry sources have commented that shipping operators worldwide are showing a general trend towards rationalisation, with fewer, but larger carrier groups emerging. Internationally, there has been a trend to larger ships and hubbing, that is, shipping schedules focussed on high volume routes calling on major hub ports, such as Singapore. The mega carriers that operate on these routes do not divert to smaller markets like Australasia. Shipping services to or from New Zealand move on feeder routes, and by international standards Auckland, New Zealand's busiest port, can only be considered a secondary hub port.[3]

The Trans-Tasman Maritime Accord

21 Industry sources advised that, for many years, the carriage of cargo between Australia and New Zealand was governed by the provisions of the Trans-Tasman Maritime Accord ("the Accord"). Under the Accord, the New Zealand Seafarers' Union and the Maritime Union of Australia agreed that the transportation of cargo between New Zealand and Australia be limited to vessels crewed by either New Zealand or Australian nationals.

22 In recent years the New Zealand government has implemented a number of regulatory reforms impacting upon port management and coastal shipping. Primary among these reforms was the removal of cabotage[4] and deregulation of coastal shipping. The recent breaking down of the Accord has resulted in an increase in the number of foreign cross trader vessels calling at New Zealand ports, and a simultaneous decline in the number of

[1] BHP Press Release, 12 February 1999
[2] Daily Commercial News, 15 February 1999
[3] A Second Register for New Zealand Shipping, NZIER, September 1998, p6.
[4] In the maritime sense, cabotage refers to the practice of limiting access to a country's coastal trade to national ship operators of national flag vessels with national crews.

New Zealand registered ships. The number of New Zealand-owned vessels on trans-Tasman routes has fallen to five currently.[5]

Trans-Tasman Shipping

23 Increased competition in New Zealand's international trades over recent years has seen increased participation by independent carriers. In the trans-Tasman trade, a number of foreign cross traders have joined existing Australasian tonnage operations. For example, Union Shipping New Zealand operates in conjunction with Australia New Zealand Direct Line ("ANZDL"), PONL operates with TEL, and BHP Transport (Australia), until very recently, operated ships on the trans-Tasman trade.

24 Industry sources expect that cross traders will exercise an increasingly important role in the trans-Tasman trade. The fact that cross traders have significantly lower crewing costs, and their ability to marginally cost, provides them with a significant cost advantage over those shipping companies which provide dedicated services.

THE MARKETS

Introduction

25 The purpose of defining markets is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition under consideration. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in terms of s 47(1) of the Act in any of those markets.

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

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

27 The Commission's *Business Acquisition Guidelines* outline the Commission's approach to market definition.[6] A brief discussion of this approach follows.

28 Markets are defined in relation to product type, geographical extent, and functional level. With the first two dimensions, market boundaries are determined by testing for substitutability in terms of the response to a change in relative prices of the good or service in question, and possible substitute goods or services. A properly defined market will include products which are regarded by buyers as being not too different ("product" dimension), and not too far away ("geographical" dimension), and are thus products to which they could switch if a small yet significant and non-transitory increase in price ("ssnip") of the product in question was to occur. It will also include those suppliers currently in production who are likely, in the event of such a ssnip, to shift promptly to offer a suitable alternative product, even though they do not do so currently.

29 In practice, the process of defining markets is unlikely to be as precise and as scientific as suggested by the ssnip test. However, in the Commission's view, the ssnip approach

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[5] See note 3, p 1.

[6] Commerce Commission, *Business Acquisition Guidelines 1996*, pp 11-16.

provides a useful framework for assessing the question of what other products, or products from other areas, are substitutable for the product in question as a matter of fact and commercial common sense.

Market Definition

30 PONL submits that the relevant market is that for the shipment of goods by container into and out of New Zealand and out of and into Australia ("the national trans-Tasman shipping market").

Product/Function

31 Cargo is shipped trans-Tasman either in containers, or in bulk. Containers normally take the form of "twenty foot equivalent units" ("TUES"), although forty foot containers are available, and their use is increasing. The Lyttelton Port Company reported that the use of forty foot containers at their container terminal increased from 11% in 1996-97, to 15% in 1997-98.[7] In the 1997-98 year, 22% of containers handled through the Fergusson Terminal at Ports of Auckland were forty foot containers.[8]

32 The shipping of bulk cargo is managed by either specialised bulk vessels, or multi-purpose vessels. Examples of specialised bulk vessels include two trans-Tasman forest product vessels owned by Tasman Pulp & Paper, and the bulk ore vessel used to carry alumina from Queensland to the Tiwai Point aluminium smelter. Multi-purpose vessels are those with the capability to carry both bulk cargo, and containerised cargo. Bulk cargo consists primarily of cars and trucks, steel and machinery from Australia to New Zealand, and timber, plywood and board products and paper reels from New Zealand to Australia.

33 PONL and TEL both operate only containerised shipping services. PONL submits that there is substitutability between shipping in containers, or in bulk. PONL cites the example of the Kiwifruit Marketing Board, which changed from shipping kiwifruit in containers to shipping in bulk (by pallet), and is now negotiating a change back to containers. PONL submits that, because of the substitutability between containers and bulk cargo, the freight rates offered by bulk carriers is considered when PONL sets its freight rates for containers.

34 Internationally, there is a trend towards greater use of containers rather than bulk handling methods. Reasons given include the wish from customers for greater protection against damage and pilfering, and the recent growth in the use of forty foot containers, allowing for larger and more awkwardly shaped objects to be transported in this manner. With the trend towards "mega carriers" (large vessels) calling at major "hub" ports, the emphasis is on a quick turnaround time for cargo, and it is generally accepted that containerised cargo is much quicker and easier to handle than bulk cargo.

35 In general, parties spoken to by the Commission accepted that shipping in containers was, to some degree, substitutable for bulk shipping. However, a number of parties believed that there will always be commodities which do not lend themselves to containerisation. Examples of such products include; crude oil, tallow, vegetable oil, and heavy low-value products such as sand and grain. Logs were cited as an example of a product which could

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[7] Lyttelton Port Company Annual report 1998, p 9.
[8] Ports of Auckland Annual Report 1998, p 12.

not be economically shipped by container, although some sources commented that it was feasible to containerise logs.

36 With regard to many bulk products, particularly liquified products, the limited possibility for containerisation appears to indicate that containers may form its own product market.

37 While recognising the differing views on the substitutability of containers and bulk cargo, the Commission is inclined to adopt, for the purposes of this application, a separate containerised product market. In so doing it is recognised that if the acquisition is analysed by use of a container product market, this is more likely to reveal competition concerns than if a wider market (comprising both containers and bulk cargo) is adopted. If no competition concerns are apparent using the container market, it is unlikely there will be concerns if the acquisition was analysed in a wider market.

Geographic Market

38 PONL submits that there is a national market for the trans-Tasman shipment of goods, largely centred on Auckland. PONL contends that exporters (or importers) of goods can choose a shipping company operating out of any regional port.

39 Exporters (or importers) at various locations in New Zealand need shipping services in order to convey their goods to various ports in Australia. From a demand perspective, the point-to-point demand of each exporter is likely to be highly specific. For example, an exporter in Christchurch wishing to meet an order from a buyer in Sydney would likely (and all else being the same) have a preference for a Lyttelton/Sydney shipping service. The extent to which, for example, an Auckland/Sydney service would provide a close substitute would depend upon the extra costs imposed on the exporter in using the alternative. The major extra cost is likely to be the trans-shipment cost between, in this example, Christchurch and Auckland.

40 The scope for a hypothetical monopolist of the Lyttelton/Sydney route to impose a *ssnip* (ie. raise the price by at least 5% for at least a year) would depend upon whether users could more cheaply switch to alternative routes such as Auckland/Sydney.

41 Industry sources all commented upon the high internal transport costs in New Zealand. A number of shippers contacted advised that trans-shipment to other ports is not usually an attractive alternative. It has been recorded that internal trans-shipment of a container to Auckland from most cities further away than Tauranga or Whangarei may add 50% or more to the cost of transport to Australia. This is largely irrespective of whether trans-shipment is by road, rail, or coastal freighter.[9] Figures given to the Commission indicate that the cost of freighting a container by road between Bluff and Port Chalmers is approximately $600, while the actual cost of shipment from Bluff to ports on the east coast of Australia is in the vicinity of $1,000-$1,200.

42 These figures, and the comments of industry sources, indicate that a shipping operator, dominant on a particular route, would be able to impose a *ssnip* without losing customers. The application of the *ssnip* test in this instance tends to suggest that the geographic market is a narrow, “route” market.

43 This definition concentrates on “demand side” factors. It is the Commission’s normal practice to do this, and to then consider “supply side” factors in the later competition analysis, when evaluating the constraints on the merged entity. However, with respect to

[9] See note 3, p 9.

this application, it is proposed to include "supply side" factors at the market definition stage. Such an analysis will generally result in the same conclusions, irrespective of whether the supply side factors are dealt with at the market definition stage rather than in the competition analysis.[10]

44 Consideration of supply-side substitutability leads to the following question: if a shipping operator was dominant on a particular route, and was able (from a demand-side perspective) to impose a *ssnip* without losing customers, would it be constrained from so doing by the ability of vessels on other routes to switch to the route in question? It is likely that a *ssnip* would not be sustainable if other vessels would enter the route in response. The geographic market using the hypothetical monopolist test would then have to be expanded to incorporate those vessels, and hence by implication the routes on which those vessels operate.

45 Industry sources commented that the shipping industry is very "dynamic", with operators constantly reviewing their schedules and services. It is recognised that shipping services are provided by means of highly mobile plant, each unit of which supplies capacity in quite large discrete "lumps" (accepting the relatively small volume of New Zealand exports). There appear to be no significant physical constraints on particular ships using given ports (in terms of depth of water or port capacity).

46 At the same time, there is excess capacity in local (and international) shipping. Statutory barriers to near entrants (such as cross traders) also appear to be non-existent, as New Zealand operates an "open ocean" policy, with foreign vessels allowed to carry New Zealand and Australian cargo (discussed in paragraphs 21-24). In recent years, a number of overseas operators have entered the New Zealand market, and now provide regular international services.

47 These considerations support the views of many industry players that if there are cargoes available at a particular port, a vessel will call to pick them up (recognising that a certain minimum volume will be required to make it worthwhile for the port and other costs to be incurred).

48 The Commission has considered the market definition in terms of the supply-side and the demand-side considerations. For the purposes of this application, it is considered that the supply-side factors outweigh the demand-side factors, and that the acquisition is most appropriately analysed using a national geographic market.

Conclusion on Market Definition

49 The Commission has concluded that the relevant market for the purpose of analysing the competition issues arising from the proposed acquisition is the market for the shipment of goods by container into and out of New Zealand, from or to Australia, and out of and into Australia, to or from New Zealand ("the national Trans-Tasman shipping market").

[10] See note 6, p 12.

ASSESSMENT OF DOMINANCE

Overview

50 Section 66(3) of the Act, when read in conjunction with s 47(1) of the Act, requires the Commission to give clearance for a proposed acquisition if it is satisfied that the proposed acquisition would not result, and would not be likely to result, in a person acquiring or strengthening a dominant position in a market. If the Commission is not so satisfied, clearance must be declined.

51 Section 3(9) of the Act states that a person is in a "dominant position" if:

> ... a person as a supplier or an acquirer of goods or services either alone or together with an interconnected or associated person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market ...

52 That section also states that a determination of dominance shall have regard to:

- market share, technical knowledge and access to materials or capital;
- the constraint exercised by competitors or potential competitors; and
- the constraint exercised by suppliers or acquirers.

53 In *Port Nelson Ltd v Commerce Commission* [1995] 3 NZLR 554, the Court of Appeal approved the following dominance standard, adopted by McGechan J in the High Court:

> ...dominance involves more than "high" market power; more than mere ability to behave "largely" independently of competitors; and more than power to effect "appreciable" changes in terms of trading. It involves a high degree of market *control*.

54 In the Commission's view, a dominant position in a market is generally unlikely to be created or strengthened where, after the proposed acquisition, either of the following situations exist:[11]

- the merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market;

- the merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market and faces competition from at least one other market participant having no less than in the order of a 15% market share.

55 However, as Tipping J stated in the High Court decision of *New Zealand Magic Millions Limited & Anor v Wrightson Bloodstock Limited* (1990) 3 NZBLCA 99-175:

> [M]arket share is not the sole determinant of the presence or absence of dominance or market power. The most that can be said is that dominance is

[11] See note 6, p17.

frequently attended by substantial market share but all the other relevant factors must be brought to account. For example, a substantial market share without barriers to entry will seldom, if ever, be indicative of dominance.

56 Accordingly, before a conclusion on dominance is reached, it is necessary to consider all factors listed in s 3(9) and any other relevant factors.

The National Trans-Tasman Shipping Market

Market Shares

57 Trans-Tasman shipping services are currently undertaken by a number of shipping operators. In addition to the dedicated operators such as TEL, ANZDL and BHP, there are a number of cross traders principally calling at Auckland, as part of a longer international route.

58 PONL submits that "the constraint exercised by the numerous competitors of PONL is significant". In addition to ANZDL, PONL estimates that three other shipping operators [ ] had market shares ranging from [ ] to [ ].

59 PONL estimates that the combined entity would have a market share of approximately [ ] of the national trans-Tasman shipping market. It submits that ANZDL, with an estimated market share of [ ], acts as a significant constraint upon PONL.

60 On the basis of information provided by PONL, shipping operators, and port companies, the Commission estimates that market shares in the national trans-Tasman shipping market would be as follows:

Table 1: Number of TEUS (20 foot equivalent units) imported and exported into and out of New Zealand and Australia ("trans-Tasman" only)

Port	Comb	**%**	ANZDL	%	BHP	%	Other	%
Auck [ ]	[ ]	**[ ]**	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Taur [ ]	[ ]	**[ ]**	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Napier [ ]*	[ ]	**[ ]**	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Well [ ]*	[ ]	**[ ]**	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Nelson [ ]	[ ]	**[ ]**	[ ]	[ ]	---	---	[ ]	[ ]
Lytt [ ]	[ ]	**[ ]**	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
PtChal [ ]	[ ]	**[ ]**	[ ]	[ ]	-----	-----	[ ]	[ ]
Bluff [ ]	[ ]	**[ ]**	------	-----	-----	-----	-----	-----
Total [ ]	**[ ]**	**[ ]**	**[ ]**	**[ ]**	**[ ]**	**[ ]**	**[ ]**	**[ ]**

* number of TEUS estimated by port company

61 On the basis of the above figures, the combined entity's market share would fall within the first of the Commission's "safe harbours" (refer para 54).

Constraint by Existing Competitors

62 The Commission's view is that it is likely that the combined entity will continue to face effective competition from ANZDL, as well as from a number of other cross trader operators.

63 As stated earlier (para 17) BHP has recently announced its withdrawal from trans-Tasman service. The date of withdrawal has been reported as March 1999. PONL advises that it is not in a position to estimate what impact BHP's withdrawal will have on the market shares of existing competitors. PONL does submit that BHP's withdrawal is an indication of the competitive nature of the shipping business.

64 The Commission is unable to estimate the likely redistribution of BHP's existing trade. The recently announced expansion of CCS, to collect "the majority of BHP's steel cargo and Fletcher group's forest products" is noted, and it has been further reported that BHP may complete its contractual obligations through the use of another shipping operator.[12]

Conclusion on the Constraint by Existing Competitors

65 Taking into account the above factors, the Commission is satisfied that if the proposal were to proceed, there would be an effective constraint provided by existing competitors on the combined entity.

Constraint from Potential Competitors

66 PONL submits that the combined entity will be constrained by potential competition from market entry and from the expansion of existing competitors. It states that potential competitors include other shipping companies which do not presently service the trans-Tasman trade. PONL gives examples of major international operators, Maersk and COSCO, which presently operate in New Zealand, but do not operate trans-Tasman. It is submitted that such operators, being experienced multi-national carriers, could enter the trans-Tasman market and compete.

67 PONL submits further that the barriers to entry are low, and this is reflected in the number of shipping operators who have recently entered the New Zealand market.

68 PONL also submits that those shipping companies which ship in bulk are potential competitors of the merged entity. This is due to the claim that some cargo can be effectively shipped either in containers, or in bulk. For this reason, PONL submits, bulk carriers will effect a potential constraint upon the merged entity.

69 Industry sources generally supported the view that potential competitors acted as a constraint upon a market participant. They noted the arrival of a number of major overseas operators into New Zealand in recent years and, while recognising they did not service the trans-Tasman route, their size and experience is such that they are viewed as potential competitors for such trade.

[12] See note 2.

70 Cross traders which are currently servicing other trades, but not offering space for trans-Tasman cargo, could provide containerised services in the trans-Tasman trade. However, the Commission recognises that there are limitations on the level of competitive constraint which could be offered, due to the restricted range of ports which they generally service, and because such companies are not always in a position to provide space for trans-Tasman cargo because of the demands of the trade which they serve.

71 The principal entry requirement into trans-Tasman shipping services is access to a suitable vessel, and repositioning it. For a new entrant, there would be a significant cost involved in purchasing a vessel. Chartering a container vessel is a possible alternative. However, the recent arrival of a number of major overseas shipping operators appears to be evidence of the low barriers to entry into this market. Port companies and shipping operators both advised that there are no significant regulatory barriers to entering the market. The Maritime Safety Authority of New Zealand (“MSA”) advised that a vessel is issued with “international safety certificates” by the state in which it is registered (the “flagged state”). Once a vessel has obtained the requisite certificates, it can immediately trade and call at ports throughout the world. The MSA advised further that there were no regulatory barriers at present, for shipping operators, in either New Zealand and Australia.

72 A number of parties commented that, in their experience, the withdrawal of a particular service, or the exit of a participant, is quickly met by replacement by either the expansion of a current participant, or a new entrant. [

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73 [

].

74 [

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75 However, a number also commented that recent developments had proven otherwise, and noted the exit of South Pacific Shipping (receivership), TEL (merger) and BHP (withdrawal). These parties claimed that the trend was towards a lessening of trans-Tasman shipping operators, with no introduction or expansion by any other party.

76 As discussed earlier in this decision, it is generally acknowledged that some cargoes can be shipped either in containers, or in bulk. One publicised example of this is that of the apple industry. For the 1997-1998 year, Lyttelton Port shipped all apples from the port in containers, in contrast to previous years when a mix of containerised and conventional means were used. It was reported that the same trend applied for other products, such as timber.[13]

77 Given the possibility that some cargoes can be shipped by either means, the availability of bulk shipping appears to act as a form of constraint upon the containerised shipping services of the merged entity.

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[13] see note 7, p 9.

78 The Commission normally considers whether the threat of market entry is a sufficient constraint on the exercise of market power. That is, the threat of market entry must be likely, sufficient in extent, timely and sustainable (the "*lets*" test).[14]

79 In this case the Commission considers that, given the above considerations, the market entry is likely to be both likely and sustainable, to be of sufficient extent, and to be effected in a timely manner.

Conclusion on Constraint from Potential Competitors

80 Given the above factors, the Commission is satisfied that potential entry to, or expansion within, the market by an existing or new operator would act as a constraint on the combined entity.

Constraint by Major Customers

81 PONL submits that the merged entity will be subject to a degree of constraint from customers. PONL submits that the cost to the customer of switching between competitors is low and that customer loyalty is limited to a company's ability to meet service and price expectations. That is, it is a feature of the market that customers compare the services and value offered by different operators.

82 Industry sources contacted by the Commission agreed that larger customers, such as the New Zealand Dairy Board and a number of meat companies, have some countervailing power in the market through the volume of cargo that they ship, and there is the potential for these customers to switch with relative ease from one shipping operator to another.

83 The major customers contacted by the Commission agreed that they could exercise some constraint if the merged entity was to significantly increase freight rates, and it is common practice for customers to tender transport requirements, or to seek favourable freight terms and conditions from a number of shipping operators.

84 [

]

Conclusion on Constraint from Major Customers

85 The Commission is satisfied that the countervailing power of major customers for container shipping services will act as a constraint upon the merged entity to some extent. These customers will continue to be able to use their market strength as buyers to negotiate favourable freight rates and other terms and conditions of service.

OVERALL CONCLUSION

86 Having regard to the factors outlined above, the Commission is satisfied that the proposed acquisition would not result, and would not be likely to result, in P & O Nedlloyd Limited acquiring or strengthening a dominant position in a market.

[14] See note 6, p 19.

DETERMINATION ON NOTICE OF CLEARANCE

87 Accordingly, pursuant to section 66(3) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by P & O Nedlloyd Limited of the assets of the business of Tasman Express Line Limited.

Dated this 26th day of February 1999

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E C A Harrison
Member

APPENDIX A

Parties contacted during the investigation into the proposed acquisition

- Customs Brokers & Freight Forwarders Association of NZ Inc;
- Mainfreight International Limited;
- Australia-New Zealand Direct Line;
- Axis Intermodal (Ports of Auckland);
- Columbus Line New Zealand Limited;
- Seatrans New Zealand Limited (agents for BHP Transport);
- New Zealand Shipping Federation;
- Affco Holdings Limited;
- New Zealand Dairy Board;
- South Port New Zealand Limited;
- Lyttelton Port Company Limited;
- Alliance Group Limited;
- Port Nelson Limited;
- Port Wellington Limited;
- Pacifica Shipping;
- Port of Tauranga Limited;
- Port of Napier Limited;
- Tasman Pulp & Paper Limited;
- Chief Container Services;
- Port Otago Limited; and
- the Maritime Safety Authority of New Zealand.