SUBMISSION TO THE FAIR WORK AMENDMENT (BARGAINING PROCESSES) BILL 2014 INQUIRY BY THE MARITIME UNION OF AUSTRALIA

INTRODUCTION

1. This submission to the Inquiry into the Fair Work Amendment (Bargaining Processes) Bill 2014 (the Bill) is provided by the Maritime Union of Australia (MUA).

2. The principal submission of the MUA is that the proposed amendments unfairly restrict the right of employees to take protected industrial action, are biased and unnecessary and will not increase productivity.

3. Note that the MUA also supports and adopts the submissions of the Australian Council of Trade Unions.

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Section 187 Fair Work Act

4. Section 187 sets out the additional requirements that must be met before the FWC approves an enterprise agreement under section 186. Item 1 of Schedule 1 to the Bill proposes introducing the following additional requirement to those already set out in section 187:

Requirement that productivity improvements be discussed during bargaining

(1A) If the agreement is not a greenfields agreement, the FWC must be satisfied that, during bargaining for the agreement, improvements to productivity at the workplace were discussed.

5. The Explanatory Memorandum explains (at [8]) that the new approval requirement does not require bargaining parties to agree to productivity terms, or to include terms in an agreement about productivity.

6. The Explanatory Memorandum further provides (at [9]) that the new approval requirement does not require the FWC to consider:

   - the merits of the improvements to productivity that were discussed;
   - the detail of the matters discussed;
   - the outcomes of those discussions;
   - or whether it would be reasonable for proposed provisions to be included in an enterprise agreement.

   Nor is the new approval requirement intended to modify or delay current timeframes for FWC consideration and finalisation of applications for agreement approval.

7. The MUA is committed to continuous improvement at our ports and throughout the maritime industry.

8. In this regard, the Australian Competition and Consumer Commission's (ACCC) most recent *Container Stevedoring Monitoring Report No. 16* shows that capital and labour productivity are at their highest levels ever (see at p.34 to p.39 attached). The five port elapsed labour rate, measuring the number of containers handled, divided by the elapsed time between labour first boarding the ship and labour last leaving the ship, was at its highest level in 2013/14, at 45.6 containers per hour, since the ACCC's monitoring began (see at p.36 to p.37).

9. In the MUA's experience, a consensus approach at the workplace, rather than overly proscriptive regulation, is the key to continuous improvement, as evinced in the productivity outcomes at major Australian ports in recent years. Indeed, the data in the ACCC report shows that productivity has decreased at the Port of Brisbane, where automated terminals have been implemented by all three operators, whilst productivity at other major ports, which are all manually operated, has increased (see figure 2.7 and at p.38 to p.39).

10. Conversely, the bare requirement that productivity improvements be discussed in proposed new subsection 187(1A), further watered down by the Explanatory Memorandum as set out at [5] and [6] above, does nothing to assist bargaining parties to achieve continuous improvement. A commitment to continuous improvement is in any event otherwise inherent in the bargain struck between employees and employers when reaching an enterprise agreement. Accordingly, in the MUA's submission, the requirement in the proposed new subsection 187(1A) will not lead to improvements in productivity, and is unnecessary.

11. It is also noteworthy that it is not proposed that the requirement that parties to an agreement discussed "improvements to productivity at the workplace" during bargaining be inserted into the good faith bargaining requirements in section 228 of the FW Act. If an employer, under no positive obligation to discuss productivity requirements to meet the good faith bargaining requirements, refuses to discuss improvements to productivity, in accordance with proposed new section 187(1A), the FWC can refuse to approve an agreement. For this reason alone, the proposed amendment should be rejected.

Section 443 Fair Work Act

Requirement that applicant for a protected action ballot order be genuinely trying to reach an agreement

12. Item 3 of Schedule 1 to the Bill introduces a new subsection 443(1A) requiring that when determining whether an applicant for a protected action ballot order is genuinely trying to reach an agreement within the meaning of subsection 443(1)(b), the FWC must "have regard to all relevant circumstances" including:

    (a) the steps taken by each applicant to try to reach an agreement;
    (b) the extent to which each applicant has communicated its claims in relation to the agreement;
    (c) whether each applicant has provided a considered response to the proposals made by the employer;
    (d) the extent to which bargaining for the agreement has progressed.

13. The Explanatory Memorandum provides that the above non exhaustive list of matters to which the FWC is required to have regard is drawn from the principles of a Full Bench of Fair Work Australia decision in *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368.

14. This decision of the Full Bench, so far as it concerns the determination of whether a bargaining representative applying for a protected action ballot order is genuinely trying to reach an agreement, has not been followed by subsequent Full Bench decisions: see *JJ Richards & Sons v Transport Workers' Union* [2011] FWAFB 9963 (see at [82] to [88]); *John Holland v Australian Manufacturing Workers' Union* [2010] FWAFB 526 (see at [47]); *Farstad Shipping (Inidian Pacific) v Maritime Union of Australia* [2011] FWAFB 1686 (see at [6] to [10]).

15. Furthermore, the decision of the Full Bench in Total Marine Services recognised that "it is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s 443 which must be applied" (at [31]) and that "it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached" (at [32]). Confusingly, as much is also recognised at [17] of the Explanatory Memorandum to the Bill which provides:

These new matters are not intended to require the FWC to establish fixed thresholds that must be met in relation to all applications for a protected action ballot order.

16. The Explanatory Memorandum further provides that the proposed non exhaustive list of matters is not intended to "disturb" existing jurisprudence regarding whether an applicant is genuinely trying to reach an agreement, such as case law concerning an applicant seeking agreement about non permitted matters: see for example the decision of Commissioner Bull in *National Union of Workers v Phillip Leong Stores Pty Ltd* [2014] FWC 6459 and the Full Bench authority discussed therein. However, whilst the proposed list is non exhaustive, it naturally elevates the factors listed therein to the forefront of the Commission's consideration. The proposed non exhaustive list gives primacy to the

factors espoused in one decision of the Full Bench, which has not been followed, without justification as to why those factors are more important than others.

17. Given the substantial jurisprudence regarding the term "genuinely trying to reach an agreement" within the meaning of subsection 443(1), the proposed new subsection 443(1A) is unnecessary and confusing. The law on the meaning of the term has evolved through considered cases, of which there are many, each often dealing with a discrete factor going to whether an applicant is meeting the requisite test.

18. In the MUA's submission, the body of law developed through decisions of the FWC provides sufficient and appropriate guidance to members of the Tribunal as to the meaning of the term. The proposed amendment is both unnecessary and confusing as it elevates certain factors in the FWC's consideration, in the face of a multitude of factors established in the case law, that are nonetheless said in the Explanatory Memorandum to not be "fixed thresholds".

Prohibition on protected action ballot order in certain circumstances

19. Finally, Item 4 of Schedule 1 to the Bill repeals existing subsection 443(2) and replaces it with a requirement that the FWC must not make a protected action ballot order if it is satisfied that a claim, or claims of an applicant, are "manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates" or "would have a significant adverse impact on productivity at the workplace".

20. In the MUA's submission, the requirements proposed to be inserted into subsection 443(2) are biased towards employers, focusing as they do on claims of the applicant for a protected action ballot order, invariably unions as bargaining representatives of employees, and unnecessary. This bias is apparent when one considers that there is no corresponding amendment proposed to be made to section 413 of the FW Act. Section 413 sets out the requirements common to both employees and employers that must be met in order to take protected industrial action, including that an employee or employer must be genuinely trying to reach an agreement. The determination of that threshold question for the purposes of section 413 is left to the case law with no requirement that

an employer's claims not be "manifestly excessive" and not "have a significant adverse impact on productivity at the workplace".

Manifestly Excessive

21. As for the requirement prohibiting claims that are "manifestly excessive", consider the magnitude of executive salaries, often paid in the face of corporate failure. According to the Australian Council of Trade Unions (ACTU), the average total remuneration of a chief executive officer of a top fifty company listed on the Australian Securities Exchange in 2010 is $6.4 millon, or almost 100 times that of the average worker: http://www.actu.org.au/Issues/ExecutivePayWatch/default.aspx. In the MUA's submission, the suggestion that employee claims can be "manifestly excessive" should be viewed dimly in the context of executive salaries enjoyed by Australian corporate leaders.

22. This requirement also undermines the concept of "hard bargaining" inherent in the bargaining framework policy underpinning Part 2 – 4 of the *Fair Work Act 2009* (Cth). As recognised by members of the Fair Work Commission, "hard bargaining is not the same as not genuinely trying to reach agreement": *National Union of Workers – NSW Branch v ACCO Australia Pty Ltd* [2009] FWA 226 per Thatcher at [23]. See also for example the more recent decision of SDP Hamberger in *The Association of Professional Engineers, Scientists and Managers, Australia v Peabody Energy Australia Coal Pty Ltd* [2014] FWC 6061 esp at [12] and [37] concerning what might be characterised as a "manifestly excessive claim" by an employer to reduce wage rates in a proposed enterprise agreement to one third to one half of the actual rates staff were being paid on common law contracts underpinned by an Award. The Commission rejected an argument by the applicant for good faith bargaining orders that the employer's wage rate claim was "non – genuine" and that the employer was not bargaining in good faith.

23. Furthermore, this requirement would have the Commission make an assessment of a claim in circumstances where the final form of the proposed agreement is far from settled. It is often the case that claims which may initially seem to contain ambit may at a later stage, when "hard bargaining" has seen other claims by the applicant fall away, no longer be characterised as "manifestly excessive".

Significant impact on productivity at the workplace

24. As for the requirement prohibiting claims that would have "a significant adverse impact on productivity at the workplace", the implicit assumption in the Bill appears to be that employee claims are adverse to productivity. This ignores the significant contribution that employees make to productivity improvements, often without receiving any corresponding benefit, as borne out by ACTU research (http://www.actu.org.au/Issues/ExecutivePayWatch/default.aspx):

    - Across the economy, profits soared by 27.5% in 2009-10 financial year. Gross operating profits in mining have risen by 60.6%, while wages grew by just 3.8%.

    - Construction profits rose by 55.5%, but wages by just 2.9%. And profits in the information, media and telecommunications sector grew by 10% - five times wages.

    - Company profits as a share of national income are now back to the record levels of 2008, while the wages share is the lowest since 1964.

25. This requirement also undermines the concept of "hard bargaining" inherent in the bargaining framework policy underpinning Part 2 – 4 of the *Fair Work Act 2009* (Cth). Again, hard bargaining is not the same as not genuinely trying to reach agreement: *National Union of Workers – NSW Branch v ACCO Australia Pty Ltd* [2009] FWA 226 per Thatcher at [23]. There are circumstances in which it might be argued that a claim will have a "significant adverse impact on productivity", but which are nonetheless wholly necessary and justified, for example, a claim by employees that their wages and allowances be increased in line with the consumer price index in the face of claims by an employer for no increases in wages and allowances.

26. Furthermore, this requirement would have the Commission make what is essentially an economic assessment of the possible consequences of a claim, with imperfect information regarding the labour and capital requirements of a given respondent employer, in circumstances where the final form of the proposed agreement is far from settled.

27. Additionally, productivity is not defined in the Bill or the FW Act, perhaps because in some industries, including stevedoring and manufacturing, productivity can be used as a euphemism for forced redundancies of often long standing employees with limited capacity to obtain alternative employment.

28. For all of these reasons, in the MUA's submissions, the requirement prohibiting claims that would have "a significant adverse impact on productivity at the workplace" is misconceived, unworkable and unnecessary.

CONCLUSION

29. Further to the MUA's submission at the outset, the proposed amendments in the Bill are biased, unnecessary and should be opposed.

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- real unit revenues have also fallen during the period by 38.4 per cent, from $194.96 to $120.01.

- Real unit margins fluctuated between $23.49 and $37.27 per TEU in real terms between 1998–99 and 2012–13. In 2013–14, however, real unit margins fell significantly to $20.67, a level 12.0 per cent lower than in 1998–99.

In 2013–14:

- Real unit revenue declined by 2.1 per cent from $122.56 in 2012–13 to $120.01.

- Real unit costs, however, increased by 4.2 per cent from $95.36 in 2012–13 to $99.34.

- Because of the effect of an increase in real unit costs and decrease in real unit revenues, real unit margins fell significantly (by 24.0 per cent) to $20.67 in 2013–14, from $27.20 in 2012–13. This was the lowest industry unit margin since the ACCC monitoring commenced.

The longer-term downward trend in real unit costs most likely represents a combination of factors, including the benefits of past reforms as well as the presence of economies of scale in Australian stevedoring. The cost increase in 2013–14 was mainly driven by HPA's entry due to its relatively high fixed costs without accompanying volumes, as well as the depreciation of lumpy investment by Patrick, DP World and HPA.

The long-term downward trend in real unit revenues, which continued in 2013–14, suggests that the benefits of lower real unit costs have been shared with users of stevedoring services. It also reflects a change in product shift from 20-foot containers to 40-foot containers (refer section 3.2.2). Pricing pressure may indicate greater competition as stevedores try to maintain market share and win new business, and greater bargaining power on the part of shipping lines due to the increased number of stevedores and greater capacity at certain ports.

2.4 Productivity

Changes in productivity are an important indicator of industry performance, as well as the quality of service provided to customers. For container stevedoring, indicators are based on the productivity of both labour and capital, which partly reflects the quality of management and investment decisions being made by the stevedores to offer a more efficient service.

This section examines changes in two key areas of productivity: servicing ships (quayside); and servicing trucks (landside). The ACCC's analysis of productivity is based on data collected by the BITRE.

2.4.1 Productivity trends in quayside stevedoring services

The BITRE reports on changes in capital and labour productivity in container stevedoring operations in the five mainland ports. The three key indicators of quayside productivity are: net crane rate; elapsed labour rate; and ship rate. These are defined below:

- Net crane rate – this is a broad indicator of capital productivity and reflects the intensity to which quay cranes are worked and measures the number of containers/TEUs exchanged per crane hour while that quay crane is operating.[103]

[103] The net crane rate is measured by dividing total number of containers/TEUs handled by the elapsed crane time. The elapsed crane time is the crane time allocated by the stevedores. It is computed as the total allocated crane hours less operational and non-operational delays. See BITRE, *Waterline*, issue no. 54.

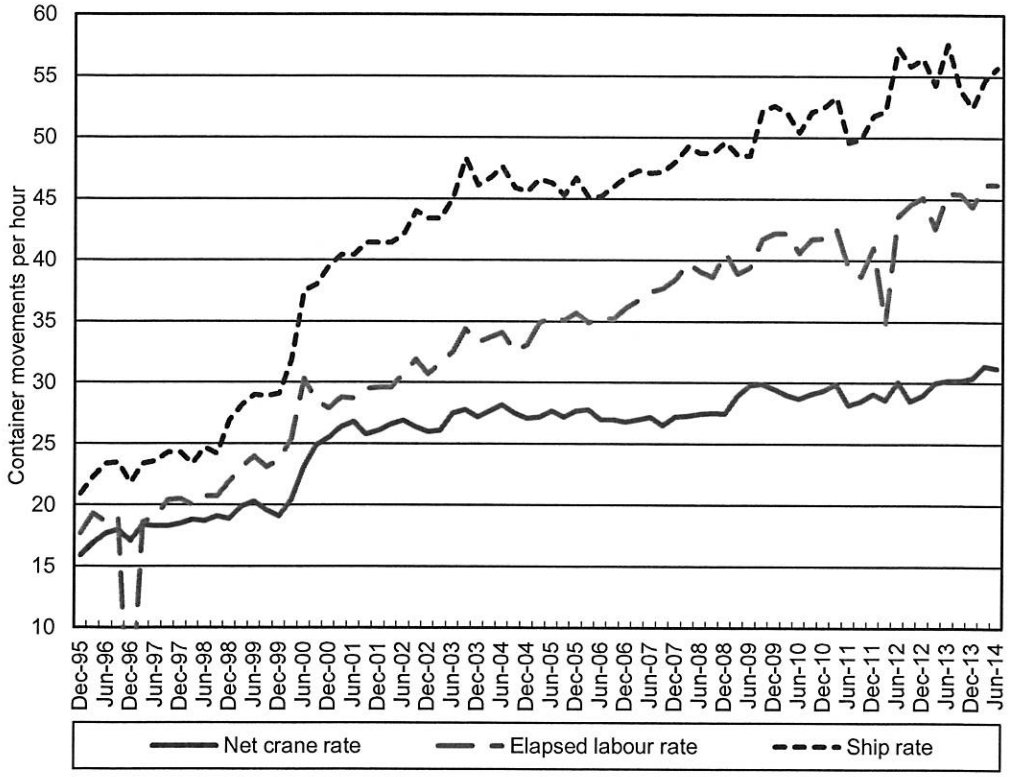
- Elapsed labour rate – this is a broad indicator of labour productivity and measures the number of containers/TEUs exchanged for the period of time that labour is aboard the ship.[104]

- Ship rate – this reflects the productivity of labour and capital while the ship is being worked by measuring the number of containers/TEUs exchanged based on crane intensity as well as the time taken by labour to work a ship.[105]

These indicators measure the productivity of capital and labour that are allocated to working ships. They therefore do not measure amounts of spare capacity – the amount of labour and capital that is available but not actively working a ship.

Quayside productivity trends measuring containers per hour and TEUs per hour are shown in figures 2.4 and 2.5 respectively.

Figure 2.4: Productivity indicators (containers/hour), quarterly five-port average, Dec 1995 to Jun 2014



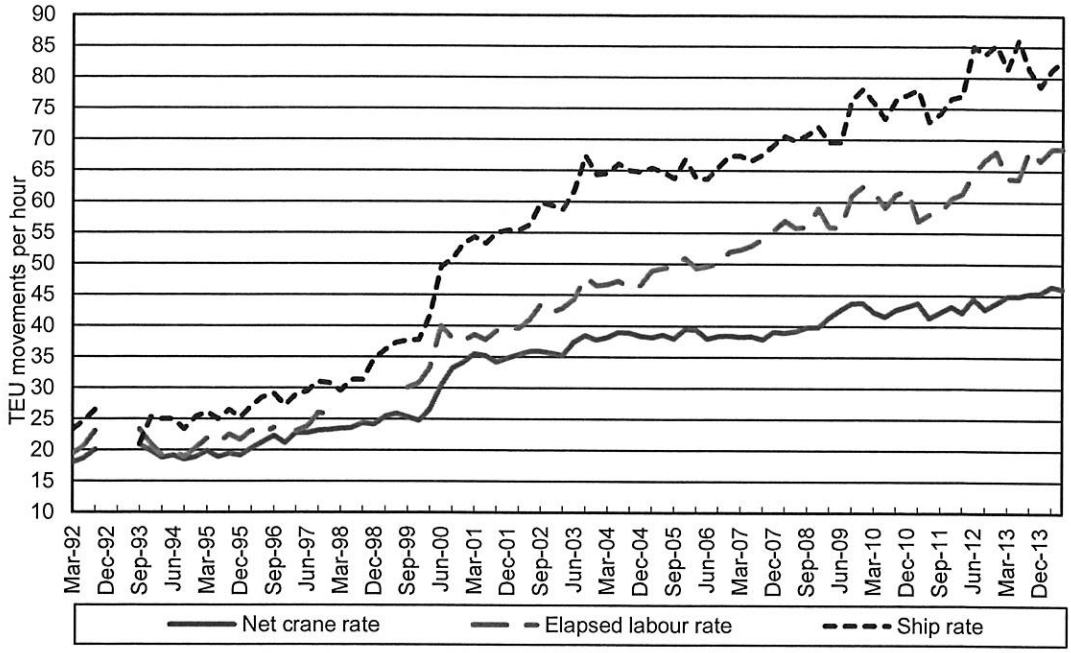
Source: BITRE, *Waterline* (2013–14 from forthcoming publication no 55), 'Averages for ports of Brisbane, Sydney, Melbourne, Adelaide and Fremantle'.

Note: Data in the above chart has been revised for the March and June quarters of 2012–13 and therefore differs from what was reported in the ACCC's 2012–13 container stevedoring monitoring report (CSMR).

104 The elapsed labour rate is computed as the number of containers handled divided by the elapsed labour time. The elapsed labour time is the elapsed time between labour first boarding the ship and labour last leaving the ship, less any time when the labour has not worked for whatever reasons including non-operational delays. See BITRE, *Waterline*, issue no. 54.

105 The ship rate is calculated by multiplying the net crane rate by crane intensity. Crane intensity is defined as the total number of allocated crane hours divided by the elapsed time from labour first boarding the ship to labour last leaving the ship. See BITRE *Waterline* publications.

Figure 2.5: Productivity indicators (TEUs/hour), quarterly five-port average, Mar 1992 to Jun 2014



Source: BITRE, *Waterline* (2013–14 from forthcoming publication no 55), 'Averages for ports of Brisbane, Sydney, Melbourne, Adelaide and Fremantle'.

Note: Data in the above chart has been revised for the March and June quarters of 2012–13 and therefore differs from what was reported in the ACCC's 2012–13 CSMR.

Movements in the key productivity indicators shown in figures 2.4 and 2.5 show that:

- The five-port average annualised **net crane rate**, measured in terms of containers per hour, increased in 2013–14 compared to the previous year, by 4.6 per cent. Measured on the basis of TEUs per hour it increased by 4.0 per cent. This measure of productivity has been improving consistently over time.

- The five-port average **elapsed labour rate** measured on the basis of containers and TEUs per hour, also increased in 2013–14. These measures declined by around 2-3 per cent in the December 2013 quarter, but despite that, over 2013–14 this measure was at its highest level since the ACCC's monitoring began. The decline in the measure coincided with allegations of industrial action at Patrick's Fremantle terminal.[106] The Fair Work Commission issued an order in December 2013 for industrial action to stop, not occur and not be organised.[107] This measure of productivity has improved over the period since the ACCC's monitoring commenced, partly due to EBAs since 1998 allowing greater flexibility in the deployment of labour.

- The five-port average **ship rate**, in contrast to the elapsed labour rate and the average net crane rate, was on average lower in 2013–14 when compared to 2012–13.

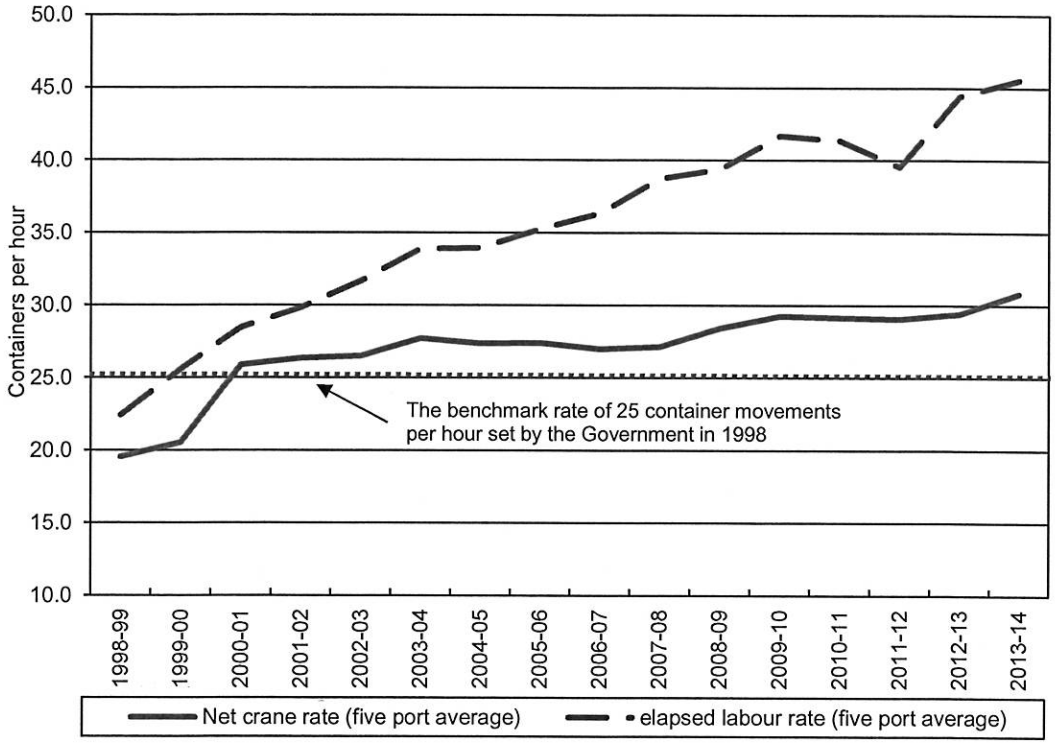
106 [2013] FWC 9547, Fair Work Commission, Single member decision, 19 December 2013, Patrick Stevedores Holdings Pty Limited v Maritime Union of Australia, Application for an order to stop industrial action.

107 [2013] FWC 9547. Appeal against decision [2013] FWC 9547 of Commissioner Cambridge at Sydney on 19 December 2013 in matter number C2013/7531.

ACCC observations about long-term quayside stevedoring productivity

Australian stevedoring productivity levels, in terms of both labour intensity and capital intensity, have vastly improved since the waterfront reforms of 1998 (figure 2.6).

Figure 2.6: Net crane rate and elapsed labour rate (containers/hour), annual five-port average, 1998-99 to 2013-14



Source: BITRE, *Waterline* (2013–14 from forthcoming publication no 55), 'Averages for ports of Brisbane, Sydney, Melbourne, Adelaide and Fremantle', converted to annual average by the ACCC.

Note: Data in the above chart has been revised for 2012–13 and therefore differs from what was reported in the ACCC's 2012–13 CSMR.

In 1998–99, the average elapsed labour rate was 22.4 containers per hour. In 2013–14, this had increased to 45.6. There was some deterioration in the elapsed labour rate during 2011–12 which coincided with industrial action during EBA negotiations affecting some terminals, but since then the elapsed labour rate has continued to increase in 2012–13 and 2013–14.

Figure 2.6 also shows the five-port average net crane rate has generally increased since 1998-99. There have been a number of 'step-ups' in crane productivity – the biggest one occurred in 2000–01, but other smaller increases occurred in 1999-00, 2003–04, 2008–09, 2009–10, and in the current monitoring period. The monitoring program shows that the incumbent stevedores have invested in new equipment and undertaken productivity-enhancing initiatives since the commencement of the ACCC's monitoring program. A significant increment of new investment occurred in 2004–05 with capital replacement and over 2012–13 and 2013–14 with investment in new terminals and automation.

During the four-year period of 2009–10 to 2012–13 the five-port average net crane rate plateaued (in year-average terms) at just below 30 containers per hour. However, in 2013–14, the five-port average net crane rate increased from 29.4 to 30.8, suggesting that the

implementation of new equipment and reconfiguration of existing terminals is beginning to drive further improvements in quayside productivity.

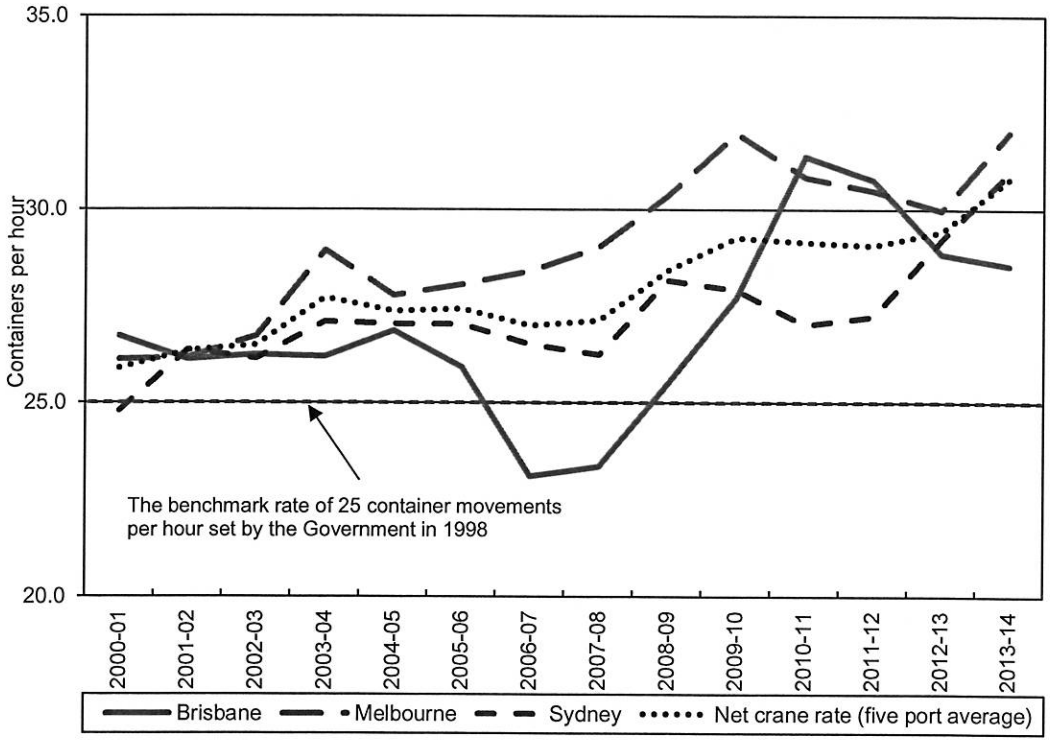
The improvement in quayside productivity can also potentially be explained by the move away from the long-held duopoly in Australian stevedoring. As outlined in section 1.3, new entry in Brisbane, Sydney (and soon Melbourne) has delivered increased capacity, and promoted competitive rivalry between container stevedores. This is likely to have in turn increased pressure on prices, productivity and service levels provided by container stevedores.

Competition for the supply of stevedoring services is expected to increase as new terminal operators (such as HPA in Sydney and Brisbane) capture greater market share. This is expected to drive further improvements in productivity.

Sustained improvement in capital productivity is expected with increased competition

Disaggregating net crane rates at container ports demonstrates the levels of productivity at each port. Figure 2.7 below shows trends in the net crane rate (expressed as containers per hour in year average terms) for each of the three largest container ports and the five-port average between 2000–01 and 2013–14.

Figure 2.7: Net crane rates (containers per hour) – Melbourne, Sydney, Brisbane and five-port average, 2000-01 to 2013-14



Source: BITRE, *Waterline*, forthcoming publication no. 55. Year average data has been calculated by the ACCC based on quarterly data available in *Waterline*.

Note: Data in the above chart has been revised for 2012–13 and 2011–12 and therefore differs from what was reported in the ACCC's 2012–13 and 2011–12 CSMRs.

Key observations from Figure 2.7 are:

On an individual port basis:

- *Melbourne*—Of the three largest container ports, Melbourne has generally recorded the highest net crane rates. However, between 2010–11 and 2012–13, average net crane rates declined. In 2013–14, average annual net crane rates at Melbourne improved significantly when compared to the previous year, from 30.0 to 32.0.

- *Sydney*—Productivity levels have historically been below the five-port average since 2000-01. This suggests that the gains associated with increased capital productivity following waterfront reforms and capital investment did not materialise at Sydney to the same extent that they did for other ports. However, over the last two years, average annual net crane rates at Sydney have increased significantly from 27.2 in 2011–12 to 31.0 in 2013–14.

    - This may be in part due to the commissioning of new cranes and equipment at the port.

    - The improvement may also be an early indication that the emergence of HPA as the third terminal operator in Sydney is driving stevedores to offer a more efficient quayside service.

    - Patrick's decision to introduce automation to its Port Botany facility (expected to be implemented in the third quarter of 2014–15) is also significant as it is expected to further improve productivity once the technology is embedded.[108]

- *Brisbane*—The largest improvement in productivity levels of any of the largest container ports in Australia occurred in Brisbane after Patrick's introduction of Autostrad technology in 2005–06. While capital productivity temporarily fell below the benchmark rate throughout 2006–07 and 2007–08 as the technology took some time to be embedded, there were significant gains in productivity levels between 2007–08 and 2010–11.

    - However, over the last two years net crane rates in Brisbane have been below the five-port average. DP World has implemented a mode change to a semi-automated operation in Brisbane in 2014, which DP World expects will drive further improvements in productivity in Brisbane.[109]

    - The emergence of HPA as the third terminal operator in Brisbane should drive further productivity improvements by all players.

Actions taken by the stevedores to improve crane intensity rates remain important to providing a more productive quayside service.

2.4.2 Productivity in landside stevedoring services

The BITRE publishes a range of landside performance indicators. There are three groups of indicators published; (1) indicators of the size of the landside task at port terminals; (2) performance indicators and (3) indicators of activity in VBS.

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[108] This is based on Patrick's experience in Brisbane, in relation to the introduction of its Autostrad technology in 2005–06.

[109] Port of Brisbane, Media Release, '*Port of Brisbane achieves full stevedoring automation*', http://www.portbris.com.au/news-media/item/?release=/News-and-Media/Port-of-Brisbane-achieves-full-stevedoring-automat, 16 April 2014.