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Northern Territory Government
Department of the Chief Minister and the Honourable Adam Giles
Floor 14, NT House, 22 Mitchell Street
Darwin GPO Box 4396
Darwin, NT 0801, Australia
Attention: Ms Haley Richards, Director Economic Development

19 January 2015

Subject: Comments to Port of Darwin Bill 2014 and Ports Management Bill 2014

Dear Haley,

We thank the Northern Territory Government for the opportunity to make comment on the proposed Darwin Bill 2014 and the Ports Management Bill 2014. We have not made comment on each Bill separately but instead have taken a more holistic approach. As we see it, the two Bills are related. We have formed our views in part based on existing Darwin Port regulations and how certain regulations are currently applied and enforced. This, in our view is important when attempting to ascertain how the proposed legislation may apply to Port Melville. Port Melville is intended to be managed as a for profit corporation as opposed to a government corporation.

We have also carefully reviewed similar legislation in Australia, particularly New South Wales and specifically Sydney Harbour, Botany Bay, Newcastle and Port Kembla. The differences between the Darwin Bills and NSW legislations are significant. We have made an effort to describe these differences. In our opinion, the NT legislation does not appear to be well thought out. We do not argue that NT government has the rights and obligation to the public to protect the environment and keep people safe. In our view, we are obligated through existing state and federal regulations. We have many years of experience at both successfully developing and operating a number of maritime businesses. Historically, industry is much more efficient at managing businesses in general and maritime businesses more specifically such as ports and supply bases than governments have been able to achieve.

In recent years a significant number of countries including Australia have implemented policies aimed at reforming their port industry. In the belief that it will improve efficiency and reduce the heavy financial burden placed upon governments that attempt to support such a capital-intensive industry, privatization has often formed an important strand of such policies. A key claim in favour of privatization is that the transfer of ownership from public to private hands will ultimately lead to an improvement in economic efficiency and, hence, financial and operational performance. It has been found in most cases that privatization is only a partial cure for what ails the world's ports and that, if implemented in isolation; it simply cannot deliver the much-needed panacea for the industry's woes.

As an island nation, Australia is heavily dependent on its ports. Ports are essential infrastructure, acting as a gateway connecting domestic and international markets. However, the resources boom has highlighted significant bottlenecks in the supply chain. Port regulation has at times been criticised for impeding port development and investment. There are concerns that the level of investment in port infrastructure in Australia is insufficient to sustain the increase in trade likely to be seen in the future.

Australia port reform initiatives have taken on a variety of forms, from out-right sale and transfer of ownership, to the sale of particular assets of infrastructure or services, or to long-term lease arrangements; or in some cases state governments, unable to relinquish control, have opted for corporatization or commercialization strategies. Reform is driven by the belief that ownership impacts on efficiency and efficiency is perceived to suffer if governments either retain ownership or direct control. As a result a major aim of reform is to either remove or distance governments from day to day port operations. The sale of ports removes government control outright and privatized ports are subject to identical regulatory constraints as any company in the private sector. But corporatization strategies are such that government ownership is retained and ports have been transformed into statutory state owned corporations.

A decade after port reform was initiated in Australia it is becoming clear that objectives of corporatisation are not being realised. For example, political intervention persists, which thwarts commercial benefits being realised. The problem of political interference per se is not so much the problem but rather it is a product of the model of corporatisation set in place and is imbedded in legislation. Effectiveness of this strategy requires legislation to be such that port corporations are free to operate like their private sector counterparts. To date this has not occurred and some serious impediments are emerging which are embedded in legislation and which, rather than reduce, have indeed, increased government control.

The proposed restructuring of Darwin Port is accompanied by some potential pitfalls. These include that the legislative framework of the programme is driven by political rather than professional concerns, and the port authority's dual role as a regulator and as an operator is against the principles of separation of port administration (regulatory functions) and business management recently adopted worldwide. These pitfalls can impede the achievement of the objectives, including directing port authorities towards becoming independent commercially oriented entities. It therefore seems appropriate to review port regulation.

Port Planning

Ports and airports are critical infrastructure for the movement of goods around the nation and internationally. The Darwin Port Corporation is implementing the East Arm Wharf Facilities Masterplan 2030, which is part of a multi-million dollar infrastructure program to upgrade the port's existing facilities to accommodate the projected trade and vessel demands for the next 20 years (Darwin Port Corporation 2010). This is also reflected in the Territory 2030 action to double the number of international shipping links by 2025 and the Greater Darwin Region Land Use Plan Towards 2030 consultation paper in consideration of land for industry and retail and bulky goods land supply. Darwin's proposed Marine Industrial Park is estimated to cost \$1.2B. Port growth projections are significantly larger than the action item discussed in Territory 2030 and the draft plan makes no specific mention of how it will cope with this extensive increase in trade volumes.

Private investment is being sought from Asia and elsewhere. The Port of Darwin has earned an international reputation for inefficiency and high cost. Currently the port functions more as a government monopoly than a corporation. The labour environment is most concerning. New Port Management Bills do not help. This coupled with the uncertainty around recent global oil prices is driving increased fear into the market. Capital is drying up and likely to continue to do so until global oil prices return to a more normal and sustainable level.

New Legislation - Port of Darwin Bill 2014 And Ports Management Bill 2014

The introduction Port of Darwin Bill 2014 and Ports Management Bill provides unfettered authority to the Chief Minister to enact a gazette that will enforce the jurisdiction of this act over the designated port. This jurisdiction includes at the least a) pricing control, b) potential for assignment of assets to the crown, c) potential for assignment of operations to the crown, d) imposition of licences for stevedores, e) imposition of licences for pilots, f) imposition of licences for operations and f) authority to impose executive control over the business of Port Melville and other private ports.

The degree of gravity is not expressed in the Bill, further, there is no rights to appeal which renders legislative control held by the Chief Minister in charge at any time, unfettered other than by High Court review. The legislation would bind the Crown and essentially trump current Commonwealth Laws. The Chief Minister would have the discretion to exercise this control at any time including:

Fixing the prices for all port services including:

- a) berthing, towing, mooring, docking or moving of vessels that are entering, using or leaving the port, or
- b) the loading, unloading or transshipment of cargo; or
- c) the embarking or disembarking of passengers; or
- d) the lighterage, sorting, weighing, warehousing, storing or handling of cargo

In addition the Chief Minister may determine the boundaries of the port and at any time, he could:

- a) declare or revoke the entity designated as the port operator
- b) impose standards that may be Australian or any other generally accepted relevant international standards. By law we must comply with Australian standards. How can we be compelled to comply with Nigerian, Russian, Chinese or PNG standards?
- c) impose civil and criminal penalties. Against what and to what degree?
- d) take control of the port, close port waters
- e) prohibit the erection of structures including any jetty, wharf or pontoon structure. This new authority is given to the regional harbourmaster.
- f) direct people to enter any land including Aboriginal Land and to transport goods through or over it without a permit

The Chief Minister at his sole discretion can grant, renew, suspend or terminate:

- a) the port operator
- b) the pilotage company
- c) the stevedoring company
- d) declare himself as the port authority

As the port authority the Chief Minister may without limitation:

- a) fix charges for services including wharfage, port dues, and services. Clearly a form of price fixing.
- b) appoint an agent to collect the charges
- c) establish regulatory oversight for charges
- d) instruct that all payments go to the government.

The Chief Minister or his agents cannot be civilly or criminally held liable for any acts or omissions. But they can hold the port operator civilly and/or criminally liable for:

- a) obstructing a government officer
- b) providing misleading information
- c) failing to provide confidential information
- d) failing to provide reports, plans or information of any kind the government may request at any time whether commercially sensitive or not
- e) Penalize us if we block access to competitors

Conclusions:

- 1) NT Government claims that there is no intention of naming Port Melville at this time but advise that there are no guarantees that this could not occur in the future. The NT Government says that this would only occur following a negotiation. Whether the NT Government intends to name Port Melville or not at this time is not the issue. The Legislation would allow the Chief Minister and/or his successors to do so whenever they choose. We cannot warranty to our investors, business partners and clients that the NT government will not impose sanctions at some future time.
 - a) The legislation gives the NT the right to confiscate dangerous goods. How do we warrant to to our international fuel supplier that their fuel could not be confiscated by the government? We are in advanced discussion with the US Navy and Marine Corp for storage of fuels and ammunitions. How do we warrant to the US military that their cargoes are safe with us?
 - b) We are in the process of securing a loan with the US EXIM Bank for \$170M as finance for additional port development. It is unlikely that we can secure this loan so long as our current agreements with the TIWI can be superseded by the NT Government at any time.
 - a) In terms of damages, we could find ourselves facing a loss of revenues and profits in the billions.

- b) We believe that this legislation will significantly decentivize further investment in the Territory. It is anti-competitive. The NT Government has already agreed to exclusionary arrangements with one of our competitors (ASCO) at the Darwin Marine Supply Base as set out in Ports Management Bill.
 - c) The Bill clearly restricts outputs, gives preferential treatment to one contractor over another, can trump our existing agreements with the TIWI and recognition by the Commonwealth naming us as the sole and exclusive port operator.
 - d) Allows the Chief Minister to demand commercially sensitive and/or any other critical information from us at any time. The information would be accessible to others under the Freedom of Information Act. This could be used to signal prices to our competitors such as ASCO.
- 3) The legislation provides an exemption for the Chief Minister and his nominees from any civil and criminal penalties? It is our belief that this legislation should be subject to a competition test. The rules proposed either separately or in whole and either vertical or horizontal by virtue of using transaction companies as a vehicle substantially lessen competition. This legislation allows the NT government to simply trump Commonwealth protections guarding against restrictive trade practices? We feel that this legislation could constitute an abuse of power. Particularly if that power restricts trade, reduces competition by unfairly giving exclusions to a preferred company over our company and giving a regulatory advantage to another company (ASCO) over us.
- 4) Another option the Legislation affords to the NT Government is the ability to simply regulate us out of business through fixing prices or establishing onerous inspection, safety or reporting requirements. As a relatively small operator, we cannot afford to absorb the incremental cost of a large administrative staff for the sole purpose of addressing these types of issues. A good example of this is the fact that it took 18 administrators in NT Government to manage 3,500 ship calls at the port of Darwin last year. Our Pilotage contractor managed 3,800 ship calls at Port of Dampier last year with two administrators. We handled approximately 5,000 vessel landings annually at Port Barrow in 2010, 2011 and 2012 with 4 pilots and two administrators.
- 5) Other costs for services that under the Legislation would likely increase are:
- a) Stevedoring
 - b) Mooring and unmooring
 - c) Berthing and unberthing
 - d) Reporting
 - e) AQIS
- 6) The flow on cost effects would likely spill onto the Plantation operations. It would not take much of a port cost increase to break the financial viability of the Plantation. All Port costs are factored in at very favorable rates for the TIWI. Many jobs would be jeopardized. We currently train and employ our own stevedores of which are nearly all indigenous. We have a national employment agreement covering all marine operations in place and approved by the federal government. The Port Legislation can impede our successes in this area. Look at the governments level of success compared to ours regarding indigenous jobs.

Similar State Port Legislation

The NT Government claims that these two Port Bills are consistent with other State Port Legislation in Australia. However this is not the case. NSW implemented legislation governing the following ports:

- a) Sydney Harbour
- b) Botany Bay
- c) Newcastle
- d) Port Kembla

The primary difference between the NT Legislation and the NSW Legislation is that NT Legislation provides no separation of powers, as follows:

- 1) There is no appeal mechanism
- 2) There is no independent arbitrator
- 3) There is no separation of power between the administrative powers of the ports and the ability to create policy. Imagine if the 'communist party' took control of the executive, more realistic, the Green Party.
- 4) The pricing mechanism control is by direct inference, NSW legislation allows for the courts to decide:
 - a) as to degree and
 - b) as to guilt and
 - c) remedy if there is failure. This is the proper separation of power.
- 5) the NSW legislation prescribes processes for the request of information and allows for a request for review. It is not an arbitrary process as proposed by the NT Port Bills.

The NSW stated principal objectives of each Port Corporation are:

- 1) To be a successful business and, to this end:
 - a) to operate at least as efficiently as any comparable businesses, and
 - b) to maximise the net worth of the State's investment in the Port Corporation, and
 - c) to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate these when able to do so, and
 - d) to promote and facilitate trade through its port facilities
 - e) to ensure that its port safety functions are carried out properly
 - f) to promote and facilitate a competitive commercial environment in port operations
 - g) to improve productivity and efficiency in its ports and the port-related supply chain

The NSW stated functions of port corporations are:

- 1) The principal functions of each Port Corporation are:
 - (a) to establish, manage and operate port facilities and services in its ports, and
 - (b) to exercise the port safety functions for which it is licensed in accordance with its operating licence, and
 - (c) to facilitate and co-ordinate improvements in the efficiency of the port-related supply chain.
- 2) A Port Corporation may:
 - a) provide facilities or services that are ancillary or incidental to its principal functions, and
 - b) conduct any business (whether or not related to its principal functions) that it considers will further its objectives.

NSW legislation does not limit the functions of a Port Corporation except that the corporation is subject to the provisions of the *State Owned Corporations Act 1989*, the marine legislation and any other Act or law.

Summary

If this legislation was on the table when Ezion was considering the Port Melville Project, it is highly unlikely Ezion would have been able to secure board approval for a \$200M investment. The financial risk would be considered too great. We have contacted clients about this. They are unwilling to consider a warranty from us that the NT government would not use their power to unfairly compromise Port Melville. Evidence of such a potential eventuality is actually contained within the proposed legislation, specifically the carve out for the Darwin Marine Supply Base operated by ASCO. If this was a private arrangement it would not be allowed. It would be against the law.

The argument promoted by the NT Government is that there is public utility that requires to be managed and it is quite proper for this government to hold a position of authority in regard to that function. Examples cited are in the event of a cyclone or evidence of heinous pricing policies of the privateer. Whilst this argument is objectively true, this Bill manages the balance between protecting public good against government crowding out investment. This Bill for example, provides the Minister at a standard silent, assignment to the crown of operations and assets of the port. It provides the crown with the ability to impose pricing authority, again the gravity of

action leading to and the standard of controls after imposition, are silent. The Bill's authority in 3rd party control provides a potential elasticity of potential outcomes that is not economic.

Since the Hawke Keating era Australian public policy, apolitically, has been open market and encouraged foreign investment. This legislation does not accord with these notions. This legislation provides unfettered power to the Chief Minister of the Northern Territory who is by role, the owner of the Port of Darwin, an asset whose operations are presently up for sale or lease by treaty. This legislation in a very present sense is crowding out private investment and is a barrier to proper notions of an open market society. Furthermore, there may be evidence of unfairness that equity would seek to review. An example is that the Bill provides environmental concern as a tool for Crown intervention albeit that the environmental office in the Northern Territory reports to the representative of the Crown. There are concerns about jurisprudence.

These Bills establish conflict. The following questions arise:

- 1) Does this legislation legally impose its will over the rights of the Tiwi Land Council?
- 2) What of the conflict between the obligations of Territorial control in this legislation vs Federal authority?
- 3) Is the Territorial authority valid?
- 4) Is the legislation actually designed to protect a government monopoly and a tool to provide assurance to foreign investment into Darwin Port?

Representatives from the Northern Territory government have agreed that that much of this Bill merely reflects obligations found elsewhere in federal authority. The Bill actually does more than that, it formalises Territorial control over the management of these rights. Again, the elasticity of answers as to matters of 3rd party authority is not economic. The Bills potentially impose processes that would require a very large bureaucratic organization structure to support it. Again, uneconomic. The Bills provide no right to appeal. This is a high court challenge waiting to happen which unfairly prejudices the port operator into the costly role as a plaintiff.

Recommendations:

In our opinion, now is not the time to be establishing additional government controls while trying to attract private investment and in light of the recent downturn on the oil and gas industry driven by the dramatic drop in global oil prices. We recommend that NT Government delay enactment of the Port Bills for one year to accomplish the following actions:

- NT Government staff review of similar legislation recognizing government run corporations are historically inefficient and unprofitable
- Invite industry group leaders to identify bottlenecks within the existing port regulatory framework and to make recommendations to government on how to improve efficiencies and profitability of Darwin Port
- Establish a working group with equal representation between private and public sector interests to develop a framework that promotes and protects all parties, the environment and safe operations of the ports
- Establish a working group to develop practical rules to lift onerous restrictions that restrict trade and competition. There is a significant amount of maritime trade that intentionally by-pass Darwin due lack of infra-structure, port costs and inefficiencies.
- Establish a working group to explore funding options to maximise opportunities for the Territory. There are relative non-traditional sources of finance that appear to be off the NT radar.

Respectfully Yours,



Captain Larry G. Johnson, CEO
Teras Australia
Ezion Offshore Logistic Hub TIWI
Top End Marine Supply Base