



**Submission of the  
New Zealand Council of Trade Unions  
Te Kauae Kaimahi**

to the

**Productivity Commission**  
on its

**Draft Report on its International Freight  
Transport Services Inquiry**

P O Box 6645  
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### **1. Introduction**

- 1.1. This submission is made on behalf of the 39 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 350,000 members, the CTU is the largest democratic organisation in New Zealand.
- 1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.
- 1.3. The NZCTU welcomes the opportunity to make this submission in response to the draft report circulated by the Commission. Our submission does not cover all questions asked in the report, but focuses on those aspects we consider particularly require comment. We naturally have a focus on the issues around employment, and have already communicated to the Commission our concerns about how this has been covered.

### **2. Alleged separability of efficiency from other components of wellbeing**

- 2.1. The Commission defends its narrow focus on “efficiency” and exclusion of wider concerns about social wellbeing on pp.14 – 15 and rejects the argument put by the NZCTU that negative social consequences of economic restructuring belong analytically together with the direct restructuring changes. The separability argument upon which the Commission relies in its draft report (bottom paragraph on p.14) is by now familiar from the long

series of structural reforms that have been imposed on the New Zealand economy in the name of “efficiency”, often with devastating consequences for social capital and political cohesion.

- 2.2. By arguing the separability of “efficiency” from other social goals, New Zealand restructuring advocates have been able to push the case for cost-cutting and promotion of “business” interests, while abdicating from any responsibility for the collateral damage resulting from their policies. Those who have waited over the past two decades for the promised separate remedial policy interventions to repair the damage wrought by structural “reform” to “distributional outcomes, social and procedural justice, equality of opportunity, and individual rights and freedoms” (draft report p.14) have been sadly disappointed.
- 2.3. Such has been the extent of policy capture by the interests driving the single-minded case for “efficiency” that successive governments have simply allowed the social costs to lie where they fall. In practice that has meant rising inequality, growing deprivation of disadvantaged groups, and the dismantling of agencies such as unions which serve to provide countervailing power to citizens against abuses of corporate power.
- 2.4. By repeating timeworn slogans while failing systematically to identify the areas in which collateral social damage is likely to flow from changes such as casualisation of port labour, asset privatisation, changes to port governance to make profit the pre-eminent goal, and use of s.44 of the Commerce Act to attack unionised labour, the Commission has, in our submission, walked away from its ostensible mandate to focus on “the wellbeing of New Zealanders” and has instead allied itself with the most reactionary elements in the business community. The result is more a political document than an economic analysis, and while this may well coincide with the outcomes the present Government seeks, it represents a missed opportunity to establish the Commission as a professionally-detached analytical agency providing genuinely disinterested advice based on economic analysis of international standard.

- 2.5. There is, we would argue, a serious inconsistency between the Commission's argument on p.16 that "an efficiency approach will take account of harmful effects of freight transport on the environment and of other market failures", and its assertion on p.14 that the social costs of pursuing "efficiency" lie outside the scope of its analysis. This issue clouds the Commission's vision when it comes to deal with the question of pursuit of multiple objectives by councils on p.144.
- 2.6. The Local Government Act requires councils to perform the task of balancing commercial objectives against other social priorities. The Commission on p.145 translates "multiple" into "unclear" and from this proceeds to argue for a "firewall" between commercial and other objectives.
- 2.7. The rhetoric of the argument is familiar but not persuasive: it is entirely possible for multiple objectives to be clearly held, and systematically pursued, on the basis of an explicit weighting of the various elements, and government is above all the arena where that balancing act is developed as an art. The Commission's arguments for single-minded profit orientation by port management might well, if adopted, simplify the task of the port managers by enabling them to shrug off any accountability for non-profit outcomes of the ports' activities. However, at the same time the task of councils would be rendered substantially more difficult because of the greater difficulty of achieving proper balance amongst competing objectives by regulatory means in the presence of a firewall cutting directly across areas for which councils will be held democratically accountable (and managers will not).
- 2.8. The same weak logic appears in the report summary, p.xxii, where the Commission says [our emphasis added]:

Difficulties in resolving multiple objectives in publicly-owned firms *can* contribute to problems in areas such as operational efficiency, labour relations and investment planning. To avoid such problems, it is important that port companies have a [single] clearly defined purpose and that there are ownership and governance models that best suit that

purpose. Effective governance of organisation is central to their ability to make value maximising decisions.

- 2.9. The Commission’s research has not thrown up any fully-documented, verifiable cases where the “difficulties” have actually contributed to specific problems; saying that they “can” do so is not a substitute for substantive analysis. Nor would it follow, if the hypothesised “difficulties-problems” link were substantiated, that the best response is to erect a firewall around port companies rather than to target the issue directly by improving the quality of decision-making by those balancing the multiple objectives.
- 2.10. The multiplicity of objectives that is the root issue does not go away when the firewall is erected; it simply becomes more intractable when part of the institutional landscape has been surrendered to commercial managers with no responsibility for social outcomes. The third sentence of the paragraph reproduced above points precisely towards targeting the basic issue – not towards the Commission’s proposed remedy.
- 2.11. The “value” to be maximised by council decision-making is not reducible to profit alone, and effective oversight of port company behaviour is central to keeping that behaviour consistent with the wider objectives of their owners. Privatisation does not remove the potential for conflict; it simply empowers port management further in obstructing council requirements and regulations that restrict profit-taking within socially acceptable limits.
- 2.12. In a later section (Chapter 9 section 9.5 Table 9.8 p.132) the Commission makes the claim that “elimination of non-commercial objectives” would be a solution both to the so-called “investors’ dilemma” and to problems with “rationalisation”. This table is buried in a lengthy and largely tendentious exposition of the Commission’s views regarding a wide range of planning models. In the discussion of the “investors’ dilemma” on page 120, no basis whatever is found for the suggestion that a prisoners’ dilemma game can be satisfactorily solved by abandoning non-commercial objectives; on the contrary, the dilemma arises in economic theory precisely because of the single-minded pursuit of individual advantage, and one familiar solution to the

dilemma is to suggest that players adopt other objectives (such as maintenance of trust and goodwill with the other player, or establishment of a longer-term cooperative reputation).

- 2.13. Neither the theoretical treatment on p.120, nor the summary paragraph in Table 9.1 on p.124, nor the recommendation on p.132, nor the further paragraph on the “dilemma” on p.136, display either deep knowledge of game theory or logical coherence. In particular, the Commission’s theoretical prediction of under-investment rather than over-investment by ports faced with the threat of losing market share flies directly in the face of the experience of the past two decades. If the Commission intends to venture into this area of economics it would be well advised to employ or hire the appropriate skills.

### **3. Quantitative productivity measurement**

- 3.1. The draft report is confusing where it should be rigorously clear on comparative measures of productivity at the ports. The material on pp.36-39 consists of a variety of statistical measures which the Commission has elected to quote but not analyse with any statistical rigour. Thus three measures of container freight performance (Table 3.4 and Figure 3.6) are treated as if they provide conclusive evidence of the superiority of Tauranga, notwithstanding that before drawing such strong conclusions the data should have been analysed including statistical controls for the obvious key differences in port layout, scale and asset stock.
- 3.2. Without embarking on painstaking analytics, Tauranga clearly benefits from less congestion because of its greater acreage per container (first column of Table 3.5), and also appears to carry far more excess capacity than most ports as measured by its low “asset utilisation rate” (third column of Table 3.5), though in each case more analysis would be needed than the Commission provides.
- 3.3. To give another example, regarding the crane rate: Tauranga’s practice is to unload containers and temporarily stow them in the container terminal rather than move them immediately to the marshalling areas or elsewhere. They are

moved once the ship's loading has been completed. This raises the crane rate at the expense of double handling of containers. Other ports move the containers out of the terminal as they are unloaded. Port of Auckland management for example have rejected this practice because of the cost of double-handling when the beneficial effect on crane rates has been pointed out by unions. We do not know whether one practice is better than the other in terms of overall productivity. Tauranga's practice may benefit shipping companies at the cost of higher port charges. It does lead to misleading judgements as to Tauranga's overall container productivity to the extent they are based on crane rate.

- 3.4. There is nothing presented to show Tauranga's relative performance on non-container trades, notwithstanding that sweeping overall statements about the superiority of one or another port cannot be meaningful without explicitly accounting for those trades.
- 3.5. The Commission has reproduced without comment (Table 3.5) a set of figures which show Lyttelton achieving 46% asset utilisation against Tauranga's 17%; this probably relates to the fact that Lyttelton has specialised in bulk coal handling, but the reader of the Commission's report will find no way to balance the various measures. On our reading of what the Commission has produced there is no clear basis for proclaiming a "winner" among the ports; the elevation of Tauranga as a role model seem more a matter of a predetermined belief than an outcome of rigorous, statistically valid, economic analysis of the evidence.

#### **4. Shipping freight rates**

- 4.1. In Chapter 4, pages 55-57, the Commission reports truly startling differences between Auckland and Sydney in sea freight charges. "Overall, Auckland routes were more expensive than Sydney routes by between 7% and 87%" is the Commission's summary (p.55); but this hugely understates the size of the anomaly revealed in Tables 4.2 and 4.3. In all cases, Auckland's port costs (whether origin or destination) are 43% to 53% below Sydney's, while the

seafreight costs are shown as between 25% and 500% higher on the Auckland routes than on the Sydney routes.

- 4.2. Having presented these data, the Commission kicks for touch by asking for feedback on whether the figures are representative of general experience. No hypotheses are advanced as to the possible causes of the discrepancies. We strongly suggest that the Commission should pursue a serious inquiry into the industry practices behind the different freight rates.
- 4.3. The lengthy discussion of competition exemptions and possible anti-competitive practices in Chapter 11 rests primarily on third-party material from submissions and commentary and provides no obvious answer to the question of how the differences in Tables 4.2 and 4.3 arose. The facts that carriers have no problem with the removal of their statutory exemption (pp.182-183) and that the Commission itself believes the exemption has no significant effect at present (F11.4 on p.189) leave the question hanging. We understand that the Commission is doing further work on this area, and there is a clear need for greater focus on how accurate the figures in those two Chapter 4 tables are, and to what extent they indicate that cost savings onshore in New Zealand ports (the lower destination costs in Auckland relative to Sydney) have been washed out as profit-taking by international carriers. If that is the case, the Commission may inadvertently have identified a negative externality of previous restructuring in the ports, which would have to be taken into account before advocating more of the same.
- 4.4. The tables also provide an approximate comparison of relative port charges. Ports of Auckland (which we have been informed is the port at the Auckland end) appears to have charges to exporters and importers about half those of Sydney, two-thirds those of Long Beach, and comparable to those in Singapore and (remarkably) Shanghai.
- 4.5. Further evidence for the relativity with Australia and the US is found in the New Zealand Shippers Council 2010 report “The Question of Bigger Ships” (p. 81). It showed a similar picture for another type of port charge – the port dues that ships pay, which “tend to be a fixed rate for different-sized ships”.

In their modelling they used average port dues of US\$25,000 per ship for South East Asian ports (NZ\$35,000 at an average 2010 NZ\$/US\$ exchange rate of 0.72), US\$32,000 for Australian ports (NZ\$44,000) and NZ\$20,000 at New Zealand ports. New Zealand port charges therefore appear to be roughly half the charges in Australia and SE Asia.

- 4.6. It appears that the shipping companies are simply pocketing increased profits from remarkably lower New Zealand port dues rather than passing them on to New Zealand importers and exporters.
- 4.7. The draft report on p.189 alludes to the possibility of such an outcome as being “in theory … an issue”, and notes (p.190) that simply removing Commerce Act exemptions is unlikely to have much effect. But since the Commission has ruled out (p.121) any attempt to organise countervailing power other than via voluntary alliances or mergers, its policy recommendations effectively leave the shipping companies free to behave as they wish.
- 4.8. The *prima facie* conclusion from the information on pages 55-57 is that the primary problem in freight charges lies with the charges made by the shipping companies, and that relatively small gains can be made by improving New Zealand port efficiency. It does not justify major and questionably effective changes in port governance and ownership, and employment legislation. Yet little effort was apparent in investigating the shipping companies.

## 5. Financial performance and EVA

- 5.1. The Commission’s EVA analysis on pp.42-44 is basically worthless in a study of productivity. “Economic Value Added” is a trademarked brand that enjoyed brief popularity in business circles as a measurement of company performance, and a means of aligning management incentives with those of shareholders in relation to investment decision-making<sup>1</sup>. The “value added” concept in EVA is not the economist’s concept of value added, which would

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<sup>1</sup> Rogerson, W.P., “Intertemporal Cost Allocation and Managerial Investment Incentives: A Theory Explaining the Use of Economic Value Added as a Performance Measure”, *Journal of Political Economy* 105(4): 770-795, August 1997.

include the value added by employees; in EVA the compensation of employees is counted as a cost, not a productive contribution. That is, an increase in labour productivity will increase EVA only if it is not fully passed through to wage increases.

- 5.2. The Commission acknowledges (p.42) that “rates of return are sensitive to asset valuations and these can be difficult and controversial to establish”, but it then proceeds without further ado to accept negative EVA results which, it says, indicate that “returns were less than the cost of capital over the period”. The problems with asset valuation, however, are fundamental and seem to have escaped the Commission’s notice.
- 5.3. EVA was developed in the context of US GAAP (Generally Accepted Accounting Principles) under which assets are carried on a company’s books at historic cost and revaluations are not permitted. This means that the asset values recorded in a company’s “capital” in the denominator of the EVA ratio are anchored to actual investment expenditures undertaken over the course of the company’s history, so that the flow of current earnings secured by shareholders is related to past capital commitments, and can meaningfully be compared with the alternative flow of income that might have been secured by committing the same funds over the same period of history to alternative investment opportunities.
- 5.4. New Zealand’s GAAP differs starkly from that in the US with regard to asset revaluations, which are allowed under NZ IFRS and its predecessors. Under NZ IFRS companies are given the option of recording the value of fixed assets at either “cost” or “fair value”. The “cost” option is designed to allow New Zealand balance sheets to be presented in a way that is consistent with US GAAP; the “fair value” option enables companies to write up the value of assets to what is estimated to be their market value. Thus port companies are able to carry their land at the market price of real estate in their area, regardless of the fact that the land is committed and zoned for port purposes; and are also able to assign to fixed specific assets a value based on current replacement cost rather than actual cost in the past, notwithstanding that the actual economic value of fixed specific assets is their scrap value and any

valuation assigned above that level is purely arbitrary from an economic (as distinct from accounting) point of view<sup>2</sup>.

- 5.5. As one New Zealand commentator has noted, the fair-value model will be chosen over the cost model “if the intention is to present results in a less favourable light”<sup>3</sup>, for the obvious reason that the denominator in all rate-of-return calculations is thereby inflated.
- 5.6. The draft report gives the reader no warning of the consequences of the use of NZ IFRS 2007 reporting standards for asset valuations in ports’ balance sheets, and it does not seem that the Commission took the trouble to inspect port annual reports and balance sheets to establish how much of the reported “capital” in the denominator of the rates of return reported in Table 3.8 consisted of revaluations rather than actual investment undertaken. The procedure adopted by the Productivity Commission in its use of the EVA model on pp.42-43 has the effect, whether intended or unintended, of driving down the apparent performance of port companies by
  - minimising the numerator (NOPAT) via backing-out of “impairments, revaluations, one-off gains/losses and amortisation” (footnote 22 p.42), while
  - utilising as denominator “average net operating capital” which is a book entry that under New Zealand GAAP is inflated far above actual past investment costs by the inclusion of cumulative revaluations net of depreciation.
- 5.7. In short, the EVA model is not fit for purpose in an accounting environment that allows so-called “fair-value” revaluation of non-current assets. The ports listed in Tables 3.8 and 3.10 have all booked massive revaluations over the years covered, relating mostly to claimed capital gains on port land, and bearing no relation to productivity in the economic sense<sup>4</sup>. In giving

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<sup>2</sup> Coase, R., “Business Organisation and the Accountant”, in Buchanan, J.N. and Thirlby, G.F. (eds) *LSE Essays on Cost*, Weidenfeld and Nicholson, London, 1973; Kahn, A.E., *The Economics of Regulation*, second edition, MIT Press 1988, p.43 fn 55.

<sup>3</sup> Wong, N., *Accounting for Asset Revaluations in New Zealand Under International Financial Reporting Standards*, October 2006, p.5.

<sup>4</sup> Reference to the Port of Tauranga’s 2011 *Annual Report* p.33 shows that of total equity of \$700.3 million, \$585.4 million or 84% is revaluation reserves, and it is probable that those reserves do not

credence to the resulting economically meaningless numbers in those tables the Commission does both itself and the public a serious disservice.

Accounting shortcuts misused out of context, especially when applied to operations whose capital value reflects the ports' self-declared success as large property speculators, is no substitute for serious work on the production function for the sector, a matter to which the Commission has apparently directed no research effort.

- 5.8. In any case, analysis of profits is meaningless without an adequate analysis of the competitive state of the industry – among other features, the monopoly status of ports in some respects, and the market dominance of the shipping companies making ports price-takers in other respects. Low profits could indicate dominance by shipping companies; high profits could indicate port use of monopoly status. On their own, profit levels provide no indication as to the efficiency of the operation. Urging port companies to raise their profits could well rebound on port users and on employees without solving problems of productivity. Neither does it take into account the multiple objectives that communities may have for ports, as we have already discussed.

## 6. Planning and coordination

- 6.1. Chapter 9 on "investment coordination and planning" opens with a series of anti-planning generalisations that evidently represent the Commission's prior views rather than the result of any rigorous analysis of the role and relevance of planning in the specific circumstances of the freight transport chain.

Included in the list of points on p.114 are to be found:

- "Government should be wary of calls for it to assume the normal commercial risks of other parties" (third bullet on p.114). The CTU is not

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include all revaluations since the port was corporatised. Note 12 to the financial statements (pp.54-57) shows the book value of Group fixed assets as \$852.4 million under the "fair value" model compared with \$192.4 under the "cost" model. Revaluations of land and wharves account for the great bulk of the port's equity and have nothing whatever to do with actual commitment of costly capital; the use of expressions such as "recovering their cost of capital" (in the Commission's F3.6 on p.44) is inappropriate. Ports of Auckland's 2011 financial statements show (note 15 p.24) landholdings making up \$260.1 million or 43% of the total fixed assets of \$604.2 million; "investment properties" are valued at another \$59.7 million (p.4). The investment properties are revalued annually and the port land and other fixed assets every three years; "the determination of value for these assets has a significant impact on the total asset value reported" (notes, p.17).

aware of any submission to the Commission having made such a call, which makes the relevance of the point entirely mysterious. The CTU in its submission was clear in calling the Government to provide coordination and countervailing power in the face of strategic holdup of ports by major shipping lines; how this might be translated into “Government assuming the normal commercial risks of other parties” is not clear to us.

- “Coordination failures *may* [emphasis added] be exacerbated by the multiple objectives associated with public ownership”, and “*may* [emphasis added] be better addressed through governance and ownership changes...” (fourth bullet). Alternatively they may not, in both cases; and in any case it is not a solution to say that if the multiple objectives were dropped the coordination failures might diminish. The need is not for empty generalities but for specifics, in a sector where multiplicity of objectives will remain a basic reality – and not only in publicly-owned entities.

6.2. The Commission’s Table 9.1 on page 124 purports to show how coordination failures are attributable to public ownership but in fact the material in the table turns out to have very little to do with public ownership per se. Mostly the comments are about multiplicity of objectives or existence of non-commercial objectives. Multiplicity of public objectives does not go away if ownership is changed from public to private; all that happens is that the burden of achieving socially-appropriate balance amongst objectives is shifted from the direct exercise of ownership rights to greater reliance on regulation to check socially undesirable profit-driven behaviour.

6.3. Further, if eliminating multiple objectives is really of prime importance, it can be done by corporatisation, with no need to drop public ownership; the SOE Act 1986 provides ample examples. The Commission seems more intent on making a rhetorical case against public ownership than in providing rigorous analysis.

#### 6.4. **Countervailing power**

6.5. The NZCTU notes with regret the Commission’s refusal on p.121 to engage in consideration of countervailing power as a reason for strategic coordination

of the port sector under Government auspices. The Commission's proposed alternatives – “removal of exemptions for non-competitive behaviour by shipping lines..., direct regulation of prices terms and conditions (..under Part 4 of the Commerce Act 1986) and alliances or mergers between ports or between shippers” – are entirely unconvincing.

- 6.6. The Commission has not conducted even the pretence of a comparative evaluation of the effectiveness, costs and benefits of the four options before rejecting the fourth (our proposal) out of hand. With the key reason for acting strategically ruled out, the rudderless impression given by the rest of the chapter is perhaps only to be expected.
- 6.7. On page 134 the Commission reproduces material from the Shippers' Council on the cost savings associated with large vessels. There is no question that substantial economies of scale are available to the owners of ships; but there is a substantial question about how much of the gains from those economies are likely to be passed through to New Zealand producers and shippers once New Zealand ports have been induced to invest in dredging and berthing infrastructure to accommodate them. The market power of shipping lines vis-à-vis ports is the fundamental issue, and the evidence on shipping costs on pp.55-57 of the draft report strongly suggests (as this submission has already noted) that unless some means can be found to countervail the exercise of that market power, the likely outcome would be simply that the New Zealand economy is burdened with the costs while the overseas ship owners reap the gains from larger ships.
- 6.8. Here as elsewhere in the report the Commission simply fails to grasp the nettle of anti-competitive conduct by the shipping lines. Nobody is suggesting that the issue is an easy one to solve, but ignoring it is certainly not a solution. The need for strategic coordination to enable countervailing power to be wielded was central to the CTU submission and is reiterated here.

## **7. Employment**

- 7.1. The analytical weaknesses of the Commission’s work come most dramatically into view in its Chapter 6 on employment relations at ports. The successful “capture” of the Commission (or at least of the consultant it employed to prepare this chapter) by extremist anti-union submitters – most notably the stevedoring company ISO – means that instead of analytical detachment and balance the report exhibits only a zealous desire to promote casualisation of labour and weaken CTU-affiliated unions.
- 7.2. The behaviour of the consultant, and the resulting chapter, is unprofessional and does the Commission no credit. The consultant arranged a meeting with a CTU representative who made it clear it was not to be a substantive discussion on the allegations and was to be followed up by meetings with the relevant unions. The consultant promised to follow up with the unions in the next 1-2 weeks but failed to do so. The report (p.76) and Overview (p. xxiv) state that the Commission (i.e. the consultant) conducted “ten focused engagement meetings on the issue of labour practices at New Zealand ports. It held individual meetings with senior representatives from six port companies, the Council of Trade Unions, ISO Limited, Business New Zealand and Trans-Tasman Resources.” As described above this is a misrepresentation of the meeting with the CTU which mainly discussed a literature review the consultant was undertaking and the CTU’s long involvement in encouraging productivity in the workplace. The “engagement meetings” were heavily biased towards employers with no substantive engagement with the unions against whom allegations have been made, let alone putting specific allegations for response. This is a fundamental breach of fair process.
- 7.3. At the meeting with the CTU the consultant was asked about the nature of allegations about work practices and only the ISO submission was mentioned. The draft report contains a collection of allegations that go well beyond that, many of which are so unspecific that they are impossible to respond to. It is difficult to see the relevance of many of the allegations to the inquiry. They amount to gossip and smack more of anti-union hysteria than

an open-minded inquiry. The chapter describes them as “subtle and anecdotal” and concedes “there are invariably two sides to every story” (p.76) but then proceeds to draw conclusions based on them as if they were hard evidence and as if they were a balanced view. If such allegations are to be admitted by the Commission – let alone published without any opportunity for those accused to respond – then its inquiries will become a discredited playground for prejudice.

- 7.4. Different approaches to productivity, to which the CTU has devoted considerable time and effort in conjunction with Business New Zealand and other employers, including training over 1,000 workers in workplace productivity methodologies, were discussed with the consultant and publications provided. They were given a dismissive and shallow paragraph in the report (p.78) and no further consideration. This suggests that the Commission is not willing to consider any approaches to productivity other than the draconian and ultimately unsustainable policies adopted in the late 1980s and 1990s, praised throughout the report. They included privatisation, deregulation, high unemployment and attacks on labour rights resulting in major losses in working conditions, wages falling in real terms for several years, and wages falling dramatically behind productivity increases for the entire period. This was the period when New Zealand’s income inequality rose the fastest of any OECD nation, with falling wages being a major contributor along with cuts in welfare benefits and other support for those out of work.
- 7.5. We strongly urge the Commission, if it wishes to establish credibility as an independent, respected and authoritative source of expertise on productivity, to take a much broader approach which includes
  - 7.5.1. High performance workplaces as described in the union publications provided, and for which there is considerable expertise in the Partnership Resource Centre in the Department of Labour.

- 7.5.2. Recognition that employees respond to trust, fair treatment, a degree of autonomy in their work and fair wage increases by increasing their effort and innovation, and thus productivity.
- 7.5.3. Recognition that higher wages and stronger employment protection can drive productivity increases. When accompanied by effective active labour market policies the economy can come closer to an ideal of strong productivity growth and strong wage growth instead of the low income, low investment, poor productivity growth model we now have.
- 7.6. A series of labour practices at ports identified on pp.79-80 cry out for proper analysis that evaluates costs and benefits of each; instead the Commission has lumped them all together as “specific work practices that may be restrictive”, with the word ‘restrictive’ carrying clear pejorative overtones. Upon inspection, the bulk of the list consists of commonsense arrangements that ought to be found in any well-arranged workplace. These arrangements seem to be potentially “restrictive” only in the sense that they are apt to cut across the anti-union and profit-driven political projects of certain extremist, and by no means representative, individuals and companies in the port sector.
- 7.7. In section 6.2 the Commission summarises two well-known features of port operation: fluctuations in demand that are only partly predictable and which require labour to be flexibly available as needed; and the arrival of containerisation which reduced the use of casual labour and required more skilled labour to operate the machinery. The collective agreements in force at most New Zealand ports are built around these requirements for flexibility and skill. No evidence produced by the Commission demonstrates failure to cope with both key requirements under the terms of those collective agreements. Consequently no need to overturn the established practice and drive labour relations back towards greater casualisation has been shown. Simply stating there is a connection is not proof that it occurs, let alone quantification of the effect to determine whether it is material.

- 7.8. Yet the Commission proceeds to put forward sweeping changes - including revision of s.44(1) of the Commerce Act, which would amount to a general country-wide assault on all union organisation and activity. Since nothing substantive in the draft report points to a need for any such draconian action by Government, the most charitable interpretation is that the Commission has allowed itself to be used as stalking-horse for an anti-union political and ideological agenda. The NZCTU urges the Commission to refrain from generalised anti-union recommendations and to confine its attention more closely and seriously to the sector-specific issues around employment of labour at the ports.
- 7.9. In its summary of changes over the past two decades in Chapter 6, the Commission fails to distinguish between the effects of containerisation and the effects of labour-market restructuring. The first has raised the importance of skill and coordination; the second has worked towards casualisation. The two trends have sometimes worked together, and sometimes conflicted.
- 7.10. The report states (p.77) that “with the introduction of bulk material handling methods and containerisation, more permanent labour arrangements could be introduced. While a broad generalisation, where thousands once laboured, only a relatively small number of more skilled individuals are now required to operate the machinery committed to cargo movement on and off ships.”
- 7.11. There is no attempt to reconcile the two forces – greater skills and bulk handling bringing more permanent labour arrangements, vs casualisation brought about by deregulated and restructured labour markets – yet these assertions are at the heart of the attacks on work practices in the report.
- 7.12. Disentangling the two processes is analytically challenging but important as a preliminary to any set of recommendations for further change. In Figures 3.4 and 3.5 (pp.34-35) the sharp rise in labour productivity in New Zealand 1985-1994 did not represent a sustainable trend but a one-off shift associated with containerisation and the large-scale sacking of workers in the railways (which lost an estimated 18,000 jobs in a sector with total

employment of around 70,000), accompanied by short-sighted labour practices enabled and encouraged by the Employment Contracts Act.

- 7.13. Further, as Statistics New Zealand point out, it is not safe to interpret productivity trends without taking into account business cycles: “year-by-year comparisons can be problematic, due to issues such as the variation of capacity utilisation over cycle”<sup>5</sup>. They identify the following business cycles over this period, for which we tabulate productivity increases:

Business Cycle	Labour productivity Increase over cycle	Labour productivity Increase per year
1978-82	7.7%	1.9%
1982-85	14.4%	4.6%
1985-90	34.6%	6.1%
1990-97	49.5%	5.9%
1997-2000	9.0%	2.9%
2000-06	3.6%	0.6%

- 7.14. This clearly shows a sharp rise in labour productivity in the sector in the early 1980's (March years 1982-85), several years before the ECA 2001, and before the radical deregulatory programmes that began in 1984 had taken hold. At the other end of the period, the relevant business cycle is that from 2000 to 2006. Over this cycle, productivity in Transport and Storage rose by 3.6% or 0.6% per year. The periods chosen for the draft report's Figure 3.5 therefore give a misleading picture of falling productivity. The relatively low increase in productivity for this period may simply reflect that the enormous increases (in international terms) that had already occurred left few further gains to be easily made. The other four countries with which New Zealand is compared in Figure 3.5 all underwent less radical policy changes in the New Zealand business cycles 1985-1997, and consequently exhibit more steady and sustained productivity growth. No evidence produced by the Commission suggests any gains to be had from a further political boom-bust cycle in relation to labour relations.

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<sup>5</sup> Productivity Statistics: Sources and Methods (Sixth edition), Statistics New Zealand, March 2010, p.37.

- 7.15. The term “restrictive practices” appears repeatedly throughout Chapter 6, with obviously pejorative connotations. The term is defined on p.78 as [emphasis added] “work practices which cause a port to operate less productively or at a higher cost than is *possible and reasonable* and which are not of themselves *necessary* for the health, safety and wellbeing of the workers”. The two tests specified in this definition are both heavily loaded to favour advocates of casualisation. “Possible and reasonable” is a vague expression open to wide differences of opinion; while “necessary” is an extremely narrow test designed to make it difficult to defend any specific way of safeguarding health, safety and wellbeing. An alternative framing might have run “higher cost than necessary, subject to the constraint of ensuring the health, safety and wellbeing of the workers”.
- 7.16. In any case, the criterion of “wellbeing” in the definition is thereafter ignored in the analysis – a crucial omission. Wellbeing is invoked only when attacking the governance of unions (p.84), which can only be viewed as cynical and hypocritical, especially given the Commission’s dismissal at the outset of any consideration of wellbeing other than via economic efficiency. It is impossible to understand the need for improved working conditions without wider considerations of wellbeing.
- 7.17. The effect of the Commission’s use of language is to broaden the range of practices that are liable to be listed as “restrictive” by opening the way for management to dictate its own view of the fuzzy “possible and reasonable” while enforcing a minimalist interpretation of what is “necessary” for health and safety. The workplace culture resulting from this general orientation is very far removed from the “shared aspirations and cultural values” held up as an ideal on p.83.
- 7.18. It is part of the progress of society that workers should be able to expect improving working conditions, either by legislated minima or as a result of negotiation with employers. It is unreasonable for the Productivity Commission to allow itself to be used to unravel these employment agreements which have been made in the give and take of bargaining. The fact that other workers have for whatever reason (including lack of other

work) accepted inferior conditions does not make negotiated conditions “restrictive”. The reason for recognition in domestic and international law of the right to collective bargaining is that the unequal bargaining power between employees and employers necessitates it in order to negotiate fair wages and working conditions. Competitive individual bargaining or the creation of competing unions associated (in their rules and in employer statements) with a single employer which maintains a hostile attitude to staff joining the main port unions, can and does undermine that position and strengthens the imbalance towards the employer. It does not justify poor working conditions.

- 7.19. The underlying implication of the discussion of work practices listed on pages 78-79 is that those of the stevedoring companies ISO and ISL (which we assume are those listed on p.80-81) are not only a model for good practice but have a material impact on productivity. We dispute that they constitute good practice for the reasons given above and discussed below. But the implication that they have a material impact on productivity is crucial. If the impact is minor or less, then the whole discussion is one of attacking working conditions for its own sake.
- 7.20. The argument centres on the comparison between Port of Tauranga and other ports. Considerable space is given to asserting the superiority of work practices at Tauranga, especially the competition with stevedoring/marshalling companies whose practices and competitive situation give rise to much greater uncertainty and casualisation of work for workers. It is repeatedly asserted that this is a principal reason for the port being the best in the industry on many indicators (though its lead status is not as clear as assumed, as we have discussed above). This assertion is made with no evidence provided to draw the connection other than that of perceptions of shippers and similar.
- 7.21. In fact the basis for describing Tauranga as the most productive port is based entirely on a comparison of container operations. Yet ISO has no involvement in the container port (Sulphur Point) at Tauranga. Its only involvement is to truck empty containers to and from Sulphur Point. Its work

is overwhelmingly in conventional cargo, bulk and break-bulk. ISL's only involvement in containers (which has only been for 2-3 years) is to provide about 10 percent (6) of the Straddle drivers, no crane drivers, and about half of the on-board labour which has little effect on the productivity measures used for comparison between ports. The bulk of the workforce , and particularly the workforce most crucial for measured productivity, is provided by the Port itself or C3, under collective agreements negotiated with CTU-affiliated unions.

- 7.22. Therefore Tauranga's container operations have achieved a strong performance under better working conditions which are "materially different" (in the words of the report) from those of ISO and ISL. It is therefore completely invalid to attribute productivity performance to the working conditions under which ISO and ISL workers labour.
- 7.23. In all other container ports, workers are hired under the terms of the collective agreements negotiated with the CTU-affiliated RMTU and MUNZ.
- 7.24. We submit that if the Productivity Commission persists with this invalid line of argument it will be seen as an attack on working conditions for its own sake.
- 7.25. Indeed, the list of potentially restrictive practices produced on pp.78-80 turns out to be the sort of undigested ragbag of allegations that one might hear from anti-union management at businesses luncheons and cocktail parties – not a well-judged selection of practices that fail, e.g., simple tests of reasonableness. As the Commission concedes later (p.81) "by and large, collective agreements... do not codify restrictive work practices". Taking a couple of items from the list on p.79, "practices that limit tasks that may be assigned to workers designated as 'casual' or 'part-time'" (p79) are often basic commonsense to protect the regular workforce from being exposed to unnecessary danger of injury or death from the operation of complex machinery by unskilled casuals. "Restricting shift lengths" and other practices that seek to avoid exhausted workers putting themselves and others at risk are especially important in the case of casual workers, who will often have

completed a full shift on a completely unrelated job in another industry before starting work at the port.

- 7.26. We comment on the list on p.78-80 as follows. The headings are those of the report, and reflect its loaded language without accepting its validity.

**Limiting work hours, limiting shift length, and inflexible scheduling of rostered days off**

- 7.27. The word “inflexible” is a loaded term, taking one viewpoint in the two sides that the Commission has already acknowledges exists.
- 7.28. It is stated that these increase costs. That is not rigorously established, but the real question if they do is by how much: do they increase costs significantly, to the extent that it is a barrier to port operations? The evidence is that they do not: Tauranga has greater productivity under such arrangements; Port of Auckland has charges that are half those in Australia and in some instances those of South East Asia.
- 7.29. We know of no ports where “office hours” is a current practice. Restricting shift length to “periods shorter than general practice for ports internationally” is an extraordinary definition of “restrictive”, comparing New Zealand to some of the worst working conditions in the world.
- 7.30. Long shift lengths can lead to fatigue which heightens the risk of mistakes and accidents. So do irregular shift patterns and other factors (see for example “Shift weary”, *Safeguard*, November/December 2011, p. 23).
- 7.31. Long shifts and irregular or unpredictable working hours or days off make it very difficult for workers to maintain family life, security of income, and a satisfactory social life other than work. Short notice for being called in is particularly disruptive, and for part time or casual workers also makes it very difficult to find and hold other jobs to bring their income to an acceptable level. High levels of casualisation and part time work are resisted for these reasons. Guaranteed minimum hours are a compromise between complete casualisation and less flexible arrangements.

7.32. “Requiring a fixed proportion of the workforce is rostered off on Saturday and Sunday” is presumably referring to agreements where workers are entitled to a minimum number of weekends off. Ports of Auckland workers for example get only one weekend in three. With good roster schedules, this should not be a major impediment to port operations but it is important to workers to enable them to maintain some kind of normality in their family life, sports and other recreation.

### **Work extending practices**

- 7.33. As has already been noted, the workforce levels in ports has been greatly reduced over the last thirty or so years. So “requiring more workers to be employed than are reasonably needed to perform a given job” seems an anachronism. There are occasions when permanent employees have little to do, such as in ports with highly seasonal cargos (such as Napier), or when there is a quiet time that does not fully occupy permanent staff with minimum hours guaranteed, but this is true in many industries. Seasonal ports tend to retain very small numbers of permanent staff, with large numbers of casual staff hired during the season. It is rare for permanent staff, whether part time or full time, to receive less work than their minimum hours. The guaranteed hours for staff are very varied, with typical arrangements being 40 hours a week (full time) or 24 hours (part time) but can include 2 to 4 12 hour days over varied lengths of week, and many other arrangements. Port employees are typically fully occupied in marshalling and other activities when a ship is not in port, and part time and casual employment is more common in stevedoring companies which only have work when a ship is in port.
- 7.34. This indicates an inefficiency in use of labour, skills and experience: an integrated port employing staff for all its operations has more flexibility to make use of labour when a ship is not available for loading, whereas fragmentation of operations increases the likelihood of the problem described.
- 7.35. These arrangements are a compromise between full casualisation, which leaves workers in unacceptably insecure positions and discourages skill

acquisition and commitment to the port's viability on the one hand, and guaranteed full time hours, which is the standard in most jobs in New Zealand despite increased casualisation, on the other. Just as investors are always said to need certainty, working people and their dependants need it even more so because of their limited ability to ride out the financial ups and downs of life. It is unreasonable to expect workers to be entirely at the beck and call of their employer.

- 7.36. We are not aware of practices that create time-consuming procedures.
- 7.37. Circumstances where "a gang has to be paid for a full shift even if it does not work the full time and cannot be moved to a different vessel or different work" can be one aspect of guaranteed hours, but occurs relatively rarely and is part of the balance between employer convenience and uncertain work hours and income for workers. Workers not unreasonably want it made worth their while to work rather than being called out for just an hour or two of work.

### **Work-sharing arrangements**

- 7.38. It is unclear what is being referred to here. Containerisation has led to much greater specialisation. Specialist roles such as crane and straddle drivers are sought-after positions. Employers are resistant to change in positions where it requires retraining (such as moving from straddles to cranes). In some ports, employers require job rotation. Most ports have some variation on the "Skilled General Hand" who is trained in a number of areas and is expected to cover peaks or absences in a wide variety of areas. There is an irony in describing this as a restrictive practice as in the past and in many other industries, employers have described unwillingness to work in multiple roles as a restrictive practice.

### **Restrictions on output**

- 7.39. There is a concern that double lifts of full containers on equipment not designed for this are a safety risk.

## **Job definition, demarcation and assignment rules**

- 7.40. Our comments on “work-sharing arrangements” apply.
- 7.41. Job definitions are determined by the employer and differ between employers.
- 7.42. There is concern regarding casuals without sufficient skills or experience taking on jobs that compromise their own and their fellow employees’ safety. There are many situations in ports in which workers must work in close cooperation and depend on each other for their safety. This depends on trust in others skills, experience and judgement which is cannot exist with casuals who are rarely worked with.

## **Barriers to access to jobs**

- 7.43. Some employer practices form a barrier to movement within the sector. Crane and straddle drivers require both equipment specific skills and knowledge of a port’s Standard Operating Procedures. Some port employers provide employees with certification on reaching the required skill levels, others do not. There is no industry recognised qualification, or if there is, it is not widely used. There are varying procedures to train workers in the local SOP, some formal, some informal. While intercompany movements do occur, and there is steady stream of skilled workers to Australia, workers applying for positions at other ports may find barriers for a number of reasons including: different brands of equipment; employers not recognising their skill levels; and employers requiring retraining in their SOP. Some of the reasons are understandable, but some appear to be attempts by employers to reduce the mobility of skilled employees to reduce their training costs. This is not helpful for the development of skills and productivity in the sector, and making it an attractive career.
- 7.44. Entry of new employees is largely a skill-based issue. Some employers are reducing their demand for casuals because it is difficult to find enough casuals with the right skills and they do not consider it worth training them.

- 7.45. This indicates that a sector based on increasing proportions of casual staff would lower its skill levels and lose workers with a commitment to the long term viability and health of the sector.
- 7.46. Port workers are justifiably concerned to ensure they have reasonable job security. Proportions of casuals and part timers in the workforce are matters covered in collective employment negotiations but are at risk of ballooning if the work is contracted out and deunionised. Approximately a quarter of port staff covered by CTU affiliated unions are casual employees. As already mentioned, employment arrangements in the ports are always a compromise between flexibility for the employer and security and quality of life for workers. Increasing casualisation would be strongly resisted. It is clear that good productivity rates can be achieved without it.
- 7.47. Again, it is difficult to respond to generalised assertions like “cultures that may reduce or impair workforce diversity … at the expense of women”. Being a heavy, physically demanding job, the sector has historically been male dominated, but the number of women is increasing with some employed as crane drivers and doing lashing work. They are still heavily outnumbered by men, but the CTU-affiliated unions take employment equity very seriously and would welcome initiatives to improve the balance. In the end it is an employer hiring decision, and it is up to employers to increase the attraction of port jobs to women.
- 7.48. “Pressure on new employees to join the union” is basically just the right to organise collectively, protected by the law of the land. Indeed, the fact that the Commission equates “pressure to join the union” with “a de facto closed shop” and a restrictive practice, encapsulates what is wrong with the entire chapter. Unions, in the Commission’s mind, are apparently incompatible with productivity and not “necessary” to secure workers wellbeing.
- 7.49. Some employers in the ports such as the contractors with their own unions are known to refuse employment to members of CTU-affiliated unions, creating barriers to workers exercising their freedom of association.

### **Slow uptake of practices compatible with a workplace safety culture**

- 7.50. We agree that a few employers have not been sufficiently supportive of a workplace safety culture in this high risk sector, though many are very good. Important aspects include that employers properly resource and support health and safety committees and representatives, and give them sufficient training and time to do their job. At Tauranga for example, where there have been 3 deaths since 2010, the observation of workers is that for contractors ISL and ISO, high productivity rates are the main focus because they are important in order to win further work, and insufficient attention is paid to safety considerations.
- 7.51. Health and safety is regarded by CTU-affiliated unions as a core employment issue, and is a part of collective employment agreements. The RMTU for example employs a dedicated staff member to work on Health and Safety, founded the annual Workers' Memorial Day to remember workers who have died, been injured or made ill while at work, and successfully campaigned for an inquiry into the safety practices at TranzRail as a result of its appalling safety record during the 1990s. However workplace culture is very dependent on supportive management which does not always exist. Incentive payments and competition based on throughput can work against safety procedures, as has been seen in evidence in the inquiry into the Pike River tragedy regarding the effect of staff bonuses relating to production. Cost cutting such as dispensing with hatchmen, who play an important safety role, can increase risks.
- 7.52. In general we are concerned that the Health and Safety in Employment regime leaves far too much to the discretion and judgement of employers. The requirement embedded in the HSE Act 1992 to take only “all practicable steps” to ensure health and safety means that employers are heavily reliant on undertaking risk assessments. The severity of a hazard is often worked out according to a numerical matrix which puts a figure on a serious injury or fatality. From there a determination is made as to whether the hazard is low, medium or high risk. This relies on judgements of costs and risks which most employers do not have the expertise and experience to make, and in any

case involve in effect a quantification of the “cost” of a death or serious injury which we find morally (as well as practically) unacceptable. Again, these issues are coming to the fore in the Pike River inquiry.

- 7.53. To the extent that the legislation also puts responsibility on individual employees, it puts them in an invidious situation where by pointing out or resisting unsafe situations and practices they may come into conflict with their employer, risking their employment relationship, and sometimes in conflict with financial or managerial pressure such as to achieve productivity targets, work long hours, work with underskilled fellow workers, or in a short staffed situation. The regime depends on effective union representation which is demonstrably independent of the employer in order to ensure employees’ concerns are raised and acted on.
- 7.54. The Health and Safety in Employment Act therefore needs to be clearer and more prescriptive health and safety standards relating to dangerous industries need to be introduced. As it stands, employees cannot be confident that their employer’s judgement that protections are adequate is not coloured by its interest in cost reduction and throughput. There are especial problems in the context of hazardous worksites that are shared with contractors. Such arrangements bring lack of clarity as to who is responsible for health and safety.
- 7.55. Some Collective Employment Agreements allow testing for drug and alcohol testing, but this is a practice that is invasive of people’s privacy and it is understandable that there will be differing views on the issue. It is not justifiable if there has been no significant problem of drug and alcohol use in a work site, so any blanket statement regarding “resistance” to testing is not helpful.

### **Competition-limiting practices**

- 7.56. Once again, loaded language (“more flexible and innovative contracting arrangements”) skews the question away from the real issue. No evidence has been presented that so-called “externalisation” – a euphemism for contracting out – has led to improved productivity. The “more flexible and

innovative contracting arrangements” are not detailed, but judging by the working conditions in ISO and ISL are likely to entail increased casualisation, shorter notice of work, loss of overtime and penalty rates and of common pay rates in general, longer shifts, and lack of recognition for skills and experience other than being offered more work.

- 7.57. From the point of view of a port, such contracting out may confer an advantage in lower costs, but it is at the expense of the workers involved. In addition, as industrial relations expert Stephen Blumenfeld has explained (we understand this has been made available to the Commission), contracting out leads to loss of commitment by the workforce because of lack of job security, tensions between permanent staff of the port and contract workers, and loss of productivity because there are less incentives for the employer to train the “peripheralised” workforce.
- 7.58. From the port’s point of view, the employees of the contractor are no longer people whose skills and experience they have some direct commitment to, but simply costs. Even if a contractor were initially to have a commitment to training and good working conditions, it is made very difficult to carry out because competitive tendering forces them to cut costs and the irregular but constantly insecure cycle of loss of contracts in one place, hopefully winning them elsewhere (perhaps with a different set of workers) discourages and disincentivises long term thinking, especially with regard to the workers involved. This can certainly be an effective cost-cutting tactic in the short run but is a recipe for loss of skills, experience, productivity and commitment by workers in the longer run.
- 7.59. In this situation, in effect no employer has a long term commitment to the development of the workforce coupled with the ability to implement the required development.
- 7.60. In the meantime, it undermines the pay and working conditions of port staff and others the contractor competes with. It is deliberately used by employers in some instances (such as in the current Ports of Auckland dispute) to break those conditions and to force employees out of effective unions.

- 7.61. Competition on the basis of worsening pay and working conditions is a transfer of income from employee to employer, not an improvement in efficiency or productivity. It exemplifies the unbalanced employment situations which employment law and international conventions on rights at work, unions and collective bargaining were created to combat. In fact contracting out is used all too often as a means to avoid and undermine these social protections.
- 7.62. We come back to the Tauranga example. It is not the degrading of working conditions through highly competitive contracting out that has made the container port more efficient. It is still predominantly worked by employers of CTU-affiliated unions. Clearly it is possible to improve productivity under their working conditions and practices.
- 7.63. Some ports have achieved similar changes in work practices to Tauranga without contracting out. Lyttelton Port Company for example is quoted (p.85) as being happy with its productivity development and union relationships in a relatively highly unionised port. In addition, the comparison with Australia, where contracting out of services is almost universal in container ports, shows that New Zealand ports (not only Tauranga) have similar or better productivity and significantly lower costs. Auckland costs are about half those Sydney in the case studies on p.56 of the report for example.
- 7.64. The best measure of labour productivity is acknowledged in the draft report to be the “vessel rate”. Tauranga and Auckland have very similar rates, suggesting that technology, equipment, port layout, ship and cargo types are much more important factors than contracting out. We have also given an example of how different operating practices can significantly affect the statistics – that of Tauranga’s practice to unload containers and temporarily stow them in the container terminal rather than move them immediately to the marshalling areas or elsewhere. This raises the crane rate at the expense of double handling of containers.
- 7.65. Australian container ports contract out but have lower vessel rates than New Zealand. On the whole, according to the Ministry of Transport’s analysis,

“Container productivity at New Zealand ports” (October 2011), “the container productivity of New Zealand ports appears at least comparable with, and in some cases better than, Australian and other international ports.” The New Zealand average ship and vessel rates are better than Australia and the crane rates very similar. Of the ports the MOT compares, all of the ports in New Zealand but Napier (which uses different crane technology) have similar or better ship and vessel rates than all Australian ports other than Melbourne.

- 7.66. Instead of disruptive and ultimately unsustainable restructuring which will reduce the wellbeing of thousands of port workers and force them into a low-trust, confrontational environment, it would be much more effective to focus on building the relationships within a stable port workforce. The Commission could work positively with employers and workers to create an environment where workers see the benefits of increasing productivity in both the ongoing viability of the ports and their own improving pay and conditions.

### **Prevalence**

- 7.67. ISL and ISO who are attempting to break into the container market in Tauranga, Auckland and elsewhere exhibit many of the characteristics of contractors described above, judging by the list of their conditions of work on p. 80-81. Their attitude towards skills and experience appears to be to not reward staff with higher pay but with longer working hours. Though it may raise workers' income levels in the short run, it is no encouragement to them to develop their skills and experience in the long run. The report asserts that those contractors appear to have more permanent employees than elsewhere in the ports, with around two-thirds being permanent. In fact MUNZ and RMTU membership is split in the same proportions. But it is not clear whether ISO and ISL “permanents” have regular or guaranteed hours of work or are in fact just permanently on a roster for casual work; and if they have guaranteed hours of work just what they are. For example, in a former subsidiary of ISO, Mainland Stevedoring Ltd, permanent workers were

guaranteed only 72 hours work a month<sup>6</sup>. The subsidiary was formed in 2000 and had similar work arrangements to ISO, including hiring its workers from New Zealand Associates Limited (NZAL).

- 7.68. Both ISO and ISL have unions with whom they associate themselves. While we are aware that these unions are registered with the Department of Labour which feels that they meet the requirement of the Employment Relations Act to be at arm's length from their employer, academic observers writing not long after their formation, commented that "the Registrar of Unions can register any incorporated society whose officers merely feel that it meets these requirements... Furthermore, 'arm's length' is not defined, so that even if a union meets the criteria of s.14(1), it may still be a quiescent instrument of employer will legally sheltered by the registration provisions of the ERA."<sup>7</sup> They go on to comment (p.520):

"On the New Zealand waterfront, the ERA has enabled new unions to emerge, as representatives of employees working for companies that have been at the forefront of efforts to casualise and de-unionise employment. What we see are not formerly unorganised workers taking advantage of organising provisions, but rather, vehemently anti-union employers seeking the legitimacy of employing unionised workers, so as to challenge further an established union... The institutional 'shells' created under the ERA, labeled 'unions', may house qualitatively different types of labour organisations."

- 7.69. There is a strong impression among CTU-affiliated union members that this assessment is correct. If so, the Commission cannot rely on the working conditions that it reports for those contractors to be those negotiated between by a union with full independence from the employer and to represent a fair balance of bargaining power.

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<sup>6</sup> "Contradictory rights and unintended consequences: the early impact of the Employment Relations Act on the New Zealand waterfront", by Michael Barry and James Reveley, *Journal of Industrial Relations*, Vol. 44, No. 4, December 2002, 508-224, p.515.

<sup>7</sup> Barry and Reveley, p.516.

7.70. ISL notes on its web site that “ISL’s staff decided to form their own union, the Surfside Employees’ Association, more than nine years ago”. It is most unusual for an employer to advertise membership of a union in such a way, especially given that ISL has a reputation of refusing to employ members of the RMTU or MUNZ. The Surfside Employees’ Association (which describes its coverage to the Department of Labour as “Cultural & Recreational Services”) is open only to stevedores employed by ISL. It was incorporated in 2000, the year the ERA was passed, and first registered days after the ERA came into force. Similarly, ISO notes in its submission that “we engage more than 400 personnel under contract with their employer New Zealand Associates Limited (NZAL), who are members of the independent Amalgamated Stevedores Union (ASU), a registered union since 2000 under the Employment Relations Act.” ISO clearly regrets the repeal of the ECA and its replacement with the ERA. The creation of the ASU, whose membership rules make it clear that it will be exceptional to have membership other than from employees of NZAL, also within days of the ERA coming into force, cannot be coincidental. It is not clear why contractor ISO “engages” its workers under contract to NZAL, but such structures further reduce confidence that contracting relationships are likely to benefit workers in the sector. ASU’s financial accounts suggest that it has no staff, until 2010 (when it had a \$4,708.76 legal expense and paid \$1,262.39 in rent for the first time) had no significant expenses, and has membership fees that are of the order of \$10 a year, implying that it is very reliant on the good will of the employer for its operations.

### **Reasons why work practices persist**

- 7.71. This section in the report is headed “Reasons why restrictive work practices persist”. We do not agree that they are necessarily “restrictive”.
- 7.72. The section begins by acknowledging that current work practices emerge from willing agreements between employers and employees. To be more precise, they emerge from collective bargaining for the great majority of port employees.

- 7.73. However the section then proceeds on the assumption that the work practices are undesirable and therefore should be changed – and would be changed if a number of elements of employment law and management and employee attitudes were changed. The Commission apparently could find little in the way of “inflexible” or “restrictive” work practices in collective agreements and therefore assumes that they all exist in uncodified practices.
- 7.74. Yet, it has not established that these are undesirable practices, nor that they have a marked effect on productivity. We have pointed out numerous other causes of lower productivity in ports and the much higher relative costs in sea freight.
- 7.75. It ascribes their continuance largely to threat of union action, unions taking a different view to management of the success of a port operation, entrenched confrontational cultures, support in law for “customary arrangements”, and “perceptions” of uncertainty as to the effect of s. 44(1)(f) of the Commerce Act. In a leap of logic that is difficult to follow, in the end it concludes that it is “ultimately the Employment Court’s decisions” that are responsible. There is much in this description we disagree with – principally its assumption that tougher management is required and that unions present a problem. No evidence has been presented to justify the statements.
- 7.76. The simple fact is however that these arrangements are, as described above, the result of negotiated compromises between management and workers (through their unions). They are a compromise between the full flexibility of casualisation, which is ultimately destructive of the wellbeing of workers and bad for the long term development of the sector, and the full security of employment and certainty of work that employees would like. To describe them as “restrictive” and then look for ways to undo these negotiated agreements by considering changes to the Employment Court and Commerce Act, is to completely misunderstand the reasons for the work practices – unless of course the Commission wishes to be reckless with the wellbeing of port workers.

- 7.77. The report in its Finding 6.2 also throws in “weak governance arrangements for the ports and unions”. It is not at all clear where that has come from. On p.84 the Commission records that it had “heard concerns about the governance of unions” from some unnamed source. If there was substance to any such concerns the Commission’s immediate reaction ought to have been to put the allegations to the unions concerned for comment, and to seek to reach an impartial judgment on the accuracy of otherwise of the allegations. Instead the Commission has given currency to the unspecific and undocumented claims of an anonymous source, and in the process given the impression of instinctive hostility to unions as a matter of general principle. It is not even clear how this gossip is relevant to the inquiry.
- 7.78. The proposals for unions risk trespassing on the independence from government and employers which is guaranteed under international ILO conventions 87 and 98. Unions would oppose any further government involvement in the selection of officials and internal union decision making.
- 7.79. The report writes about conflicts of interest without providing examples or quantifying how widespread the problem is. There are no grounds presented for the systemic change that is proposed.
- 7.80. The CTU initially supported the legislation for secret ballots on the grounds that it was current practice, but proposed subsequent amendments to the legislation had the effect of hamstringing legal union actions. We are therefore very wary of any such proposals.
- 7.81. Regarding changes recommended for the ports themselves, many seem to be aimed at harsher attitudes towards employees and unions (e.g. p.143, 144, 151). This impression should be corrected in the final report if it is wrong, but it is consistent in a number of parts of the report.
- 7.82. Similarly, the discussion regarding the Employment Court’s supposed record of upholding undocumented practices – is based on perceptions which are ill-informed. The record is very mixed.

- 7.83. To conclude the submission on this chapter of the report, the quality of this material is not a basis on which the Productivity Commission can build a reputation for either economic literacy or professional detachment. It is based largely on assertion, overweight in employer views, giving exceptional space to one of the most extreme protagonists, ISO, and little hard evidence.
- 7.84. The question is therefore why the Commission has felt it necessary to mount a general attack on legislative provisions covering unions including governance, the Commerce Act, and the Employment Court. Despite conceding that “There is no need for a wholesale change to the current employment relations framework because evidence suggests that the current framework work wells at some ports,” the report then goes ahead to recommend generic change.
- 7.85. A productive alternative would be to make a real attempt to understand the issues, identify which – if any – employer or employee practices are in reality impacting on productivity to an appreciable extent, take into account the broader wellbeing considerations the Commission’s own definition of restrictive practice and its statutory purpose demand, and put into place support to enable parties to work through the remaining problems (for example by using the Partnership Resource Centre in the Department of Labour). As we noted at the outset of this section, there are many different approaches the Commission could take to raising productivity, rather than digging back into the confrontational trenches which end up with attacks on the wellbeing of workers in the sector.

## **8. Conclusion**

- 8.1. We thank the Commission for the opportunity to make this submission. We have outlined many concerns about both the depth and quality of the analysis in the draft report, and the apparent attitudes that are revealed, particularly with regard to the multiple objectives of ports, and with regard to employment issues.
- 8.2. We believe there are constructive ways to address productivity issues which are beneficial to good employment relations and decent pay and working

conditions and which, much more than in the past, recognise the importance of employee participation in workplace productivity development. We have outlined some constructive approaches to raising productivity and hope that the Commission develops a greater range of approaches in the future that can earn the support and respect such long term changes require.

- 8.3. As it stands, we believe the draft report neither focuses on the most important problems in sea freight, which lie with the sea leg of the journey, nor takes an approach that will be sustainable and win the respect and support of all parties with an interest in these matters.