

5 July 2022

Essential Services Commission of South Australia
GPO Box 2605
Adelaide SA 5001

Attention: Julia Oakley and Mark Caputo

By email: escosa@escosa.sa.gov.au
Julia.Oakley@sa.gov.au
Mark.Caputo@sa.gov.au

Dear Julia and Mark

2022 Ports Access Regime and Price Determination Review: Stage one

Thank you for providing us with the opportunity to respond to the Draft Report of ESCOSA (**Report**) in relation to the *2022 Ports Access Regime and Price Determination Review: Stage one (Review)*.

Defined terms in this submission are the same as those used in Flinders Ports' submission to ESCOSA dated 14 February 2022 (**Submission**).

Flinders Ports makes these submissions on the basis that, in carrying on the business of providing maritime services, it provides Regulated Services at the Proclaimed Ports.

Flinders Ports does not propose to make detailed responses to Parts 4 and 5 of the Report or third party submissions on the same issues on the basis that these matters will be the subject of Stage two of the Review.

A. Executive Summary

1. Flinders Ports repeats its position that there is real doubt as to whether access and pricing regulation is necessary in relation to the Proclaimed Ports.
2. To the extent that ESCOSA determines such regulation is required, Flinders Ports agrees that the SA Ports Access Regime should continue to apply to Regulated Services for a further five years (for the reasons outlined in the Report).
3. Subject to issues of relevance, consistency and confidentiality, Flinders Ports does not oppose ESCOSA's proposal in relation to the SA Ports Pricing Regime.
4. The Review should not be used as a forum for parties to make unsupported or unsubstantiated assertions about general conduct (including concerns about vertical integration) that is already appropriately addressed by general competition laws.

B. There is real doubt that access and pricing regulation is necessary

Overview

5. As stated in the Submission, it is well established that access regulation should only apply to services if all of the following circumstances are satisfied:
 - a) the services are provided by “essential facilities” or natural monopoly infrastructure (i.e. facilities that cannot be economically duplicated resulting in the owner having unconstrained and enduring market power);
 - b) access to the services provided by these facilities would materially promote competition in upstream or downstream markets;
 - c) the facilities are of economic or national significance; and
 - d) access would promote the public interest.
6. In addition, access and pricing regulation is only necessary to ensure the infrastructure owner does not enjoy monopoly profits and to otherwise promote investment and competition in related markets.

The Proclaimed Ports are no longer “essential facilities”

7. The current economics and market dynamics are fundamentally different to when the Proclaimed Ports were privatised in 2001. This does not appear to be addressed by ESCOSA in the Report.
8. As set out in Annexures A, B and C to the Submission, there are a number of actual and potential substitutes that compete or are likely to compete with the Regulated Services provided by Flinders Ports.
9. In addition:
 - a) on 17 May 2022, Peninsula Ports announced it had secured Aria Commodities as its principal funding partner going forward for Port Spencer. Peninsula Ports has described this development as taking *‘the final step towards building a new port ... on Eyre Peninsula...’*¹
 - b) on 2 June 2022, the South Australian Government announced that it will be providing \$30 million in funding for Port Bonython. Total investment in this project to date for the development of landside hydrogen infrastructure, including Commonwealth and private sector funding, is now estimated at \$140 million and is projected to reach \$593 million over 4 years.²
10. Flinders Ports considers that the development of Port Spencer by Peninsula Ports represents a particularly strong competitive threat to its existing operations at Port Lincoln and will likely also compete vigorously with T-Ports’ port at Lucky Bay.

¹ Peninsula Ports, ‘Peninsula Ports Secures Funding to Ensure Grain Exports Will Go Ahead at Port Spencer’, 17 May 2022 <https://peninsulaports.com.au/2022/05/17/peninsula-ports-secures-funding-to-ensure-grain-exports-will-go-ahead-at-port-spencer/>.

² Government of South Australia, ‘State Budget 2022-23’, <https://www.statebudget.sa.gov.au/our-budget/jobs-and-economy/hydrogen>.

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11. ESCOSA itself has made a number of findings in the Report that are consistent with the proposition that Flinders Ports faces strong competition from a number of intrastate and external sources:
- a) there have been several port entrants in the grain sector in recent years, notably T-Ports' current operations at Lucky Bay and forthcoming operations at Wallaroo;³
 - b) several prospective ports including Cape Hardy, Port Playford and Port Spencer are considered to be credible competitive threats;⁴
 - c) there is evidence of interstate competition for port services, including:
 - i) competition between Port Adelaide and the Port of Melbourne for containerised freight;⁵ and
 - ii) Flinders Ports' successful attraction of OZ Minerals' mineral output from the Port of Darwin;⁶
 - d) there is evidence of substitution between ports and other modes of transport for containerised freight;⁷ and
 - e) T-Ports' Lucky Bay port facility presents a credible competitive threat to Flinders Ports' facilities at Port Lincoln.⁸

There is no evidence of Flinders Ports exercising market power

12. Other than unfounded and unsupported assertions by third parties, no evidence has been provided that suggests Flinders Ports has the ability or incentive to exercise market power without access or pricing regulation.
13. Users of the Regulated Services are sophisticated global shipping companies that compete in global shipping markets and exert countervailing power against Flinders Ports.
14. In addition, Flinders Ports does not enjoy and has not enjoyed any excessive profits from the provision of Regulated Services. Previous price benchmarking analysis and price increase trends demonstrate that increases in prices for Essential Maritime Services are consistent with increases in prices at other Australian ports and have been in line with CPI or are based on actual costs – this is likely to be the case with or without access or pricing regulation.
15. None of the customers of Regulated Services has complained about Flinders Ports exercising market power. There have been no disputes under the SA Ports Access Regime with Flinders Ports and none of the customers has provided a submission in response to the Report.

³ Report, page 22.

⁴ Report, page 22.

⁵ Report, page 23.

⁶ Report, page 25.

⁷ Report, page 24.

⁸ Report, page 27.

Investment in infrastructure is not due to access regulation

16. ESCOSA has stated in the Report that access regulation has not reduced the incentive on Flinders Ports to invest in infrastructure in light of its recent and proposed investments.⁹ With respect, it is Flinders Ports' view that this somewhat misses the point.
17. Those investments have been made (and will continue to be made) regardless of access regulation. Indeed, some of the investments relate to infrastructure facilities that do not provide Regulated Services and most are not solely funded by prices charged for Essential Maritime Services.
18. None of the customers of Regulated Services has complained about Flinders Ports' lack of incentive to invest or that investments will be reduced without access or pricing regulation.

There is no evidence that competition would be reduced without access regulation

19. No evidence has been presented that competition in shipping or other port related markets would be reduced without access or pricing regulation.
20. On the contrary, upstream and downstream markets appear workably and even "fiercely" competitive and will continue to be so with or without access and pricing regulation.
21. There have been no disputes under the SA Ports Access Regime with Flinders Ports and none of the customers of Regulated Services has provided a submission in response to the Report.

C. If access regulation is required, the SA Ports Access Regime should continue

22. To the extent that ESCOSA determines such regulation is required, Flinders Ports agrees that the SA Ports Access Regime should continue to apply to Regulated Services for a further five years (for the reasons outlined in the Report).

D. Flinders Ports does not oppose ESCOSA's proposal for the SA Ports Pricing Regime

23. Flinders Ports does not oppose ESCOSA's proposal in relation to the SA Ports Pricing Regime subject to the following:
 - a) any information requested by ESCOSA from Flinders Ports in relation to pricing appropriately relates to the services that are the subject of the SA Ports Pricing Regime;
 - b) the proposed Price Determination and Actual Performance Reporting is to be consistent with the existing regulatory accounts and associated process that has been in place since the regime was established; and
 - c) any publication by ESCOSA of information obtained from Flinders Ports is not confidential or commercially sensitive to Flinders Ports.

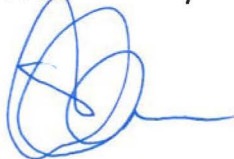
⁹ Report, page 35.

E. The parameters of the Review

24. There have been a few submissions made by stakeholders:
- a) who do not acquire Regulated Services or Essential Maritime Services;
 - b) that do not relate to Regulated Services, Essential Maritime Services or any other service that could be described as exhibiting natural monopoly characteristics;
 - c) that contain unsupported and unsubstantiated claims; and
 - d) that are more appropriately addressed by general competition law.
25. While Flinders Ports understands that ESCOSA intends to explore some of these issues under Stage two of the Review, Flinders Ports considers that the Review should not be used as a forum for parties to make unsupported or unsubstantiated assertions about general conduct (including concerns about vertical integration) that is already appropriately addressed by general competition laws.
26. In particular, vertical integration concerns only raise potential access and pricing regulation issues where:
- a) The infrastructure owner operates a natural monopoly facility;
 - b) The services provided by the facility are acquired by downstream customers including the infrastructure owner;
 - c) The vertical integration relates to the provision of those services.
27. Many of the submissions raising these concerns (and the NCC and ESCOSA's consideration of them to date) are misplaced because the relevant services that are the subject of the complaints and consideration do not satisfy the requirements of paragraphs 26(a) and (c) above.
28. Flinders Ports encourages ESCOSA to consider these issues in conducting the Review.

Please do not hesitate to contact me if you have any queries or require further information.

Yours sincerely



Stewart Lammin

Chief Executive Officer