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Dear Mr Cooper/Mr Muys

RE: Negotiations between Qube Ports Pty Ltd and Flinders Ports Pty Limited and the application of the *Maritime Services (Access) Act 2000 (SA)*

I refer to the submissions lodged by Qube Ports Pty Ltd (**Qube**) and Flinders Ports Pty Limited (**Flinders Ports**) relating to the ongoing negotiations between the parties in respect of the terms of a proposed stevedoring licence (**licence**) and the application of the *Maritime Services (Access) Act 2000 (SA)* (**MSA Act**) in relation to that matter.

The Commission has carefully considered all submissions made by the parties and undertaken its own enquiries and analysis of the relevant provisions of the MSA Act to determine what (if any) of the services sought by Qube are '*regulated services*' for the purposes of the MSA Act. In determining that matter, it has also reached a position on whether there is a '*dispute*' that can be conciliated or referred to arbitration by the Commission under that Act.

For the reasons outlined below, the Commission has determined that:

1. Qube is not seeking access to '*regulated services*', as defined under the MSA Act, pursuant to the licence.
2. In light of the foregoing, there is not an access '*dispute*' that can be referred to the Commission for conciliation or referral to arbitration under the MSA Act.

Regulated services

Section 4(1) of the MSA Act provides that '*regulated services*' are services declared by proclamation to be such services under section 10.

As the parties are aware, the relevant proclamation (as variously amended) declares the following services to be '*regulated services*':

- (a) *providing, or allowing for, access of vessels to the port;*
- (b) *pilotage services facilitating access to the port;*
- (c) *providing berths for vessels at the following common user berths—*
 - (i) *Port Adelaide Outer Harbour berths numbers 1 to 4 (inclusive), 16 to 20 (inclusive), and 29;*
 - (ii) *Wallaroo berths numbers 1 South and 2 South;*
 - (iii) *Port Pirie berths numbers 5 and 7;*
 - (iv) *Port Lincoln berths numbers 6 and 7;*
 - (v) *berths adjacent to the loading and unloading facilities referred to in paragraph (d);*
- (ca) *providing port facilities for loading or unloading vessels at berths adjacent to the loading and unloading facilities referred to in paragraph (d);*
- (d) *loading or unloading vessels by means of port facilities that—*
 - (i) *are bulk handling facilities as defined in the South Australian Ports (Bulk Handling Facilities) Act 1996; and*
 - (ii) *involve the use of conveyor belts;*
- (da) *loading or unloading vessels by means of port facilities that are bulk handling facilities situated at Port Adelaide Outer Harbor berth number 8;*
- (e) *providing access to land in connection with the provision of the above maritime services.*

It is also noted that both parties agree with the description of the services to which Qube is seeking access, which have been described by Flinders Ports as:

- (a) the right to enter certain portions of land next to vessels that have berthed at relevant port facilities operated by Flinders Ports, and
- (b) the right to use those portions of land to undertake stevedoring operations.¹

Clause 2(c) of the proclamation

Clause 2(c) specifies that the provision of berths for vessels at the common user berths listed is a regulated service.

¹ Qube's submission dated 8 July 2021 at [18].

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Based on submissions, the Commission is not persuaded that Qube requires the provision of berths for vessels at common user berths. Instead, it appears to require access to land *next to* customer vessels to provide stevedoring services to those vessels. Accordingly, it is Qube's customers that seek the provision of berths from Flinders Ports. Further, item 7 of the schedule of the licence outlines that Qube will provide stevedoring services for customer vessels which have entered the relevant port under a "Vessel Port Use Contract." Such a contract is defined in the licence to be a contract under Flinders Ports' standard terms and conditions (use of ports, facilities and services by vessels) between the licensor (which is Flinders Ports) and a customer. This further supports the position that it is Qube's customers (not Qube) that are seeking the regulated services specified in clause 2(c).

It is also noted that section 13 of the MSA Act provides that '*A person who wants a regulated service (the proponent) may make a written proposal to a regulated operator setting out proposed terms and conditions for the provision of the maritime service.*' The Commission is of the view that this provision should be interpreted such that a person (or entity) seeking a regulated service is the one that effectively requires and will use the service. An interpretation that extends this provision to cover third parties who wish to access land to provide alternative commercial services (such as stevedoring) to vessels requiring regulated services at proclaimed ports is not supported by the textual construction of this provision.

Accordingly, based on the foregoing, it is the Commission's position that Qube is not seeking '*regulated services*' for the purposes of clause 2(c) of the proclamation.

Clause 2(e) of the proclamation

Clause 2(e) specifies that providing access to land in connection with the provision of the maritime services listed in the proclamation is a regulated service.

The Commission does not consider that a general right to access land at a proclaimed port to undertake any type of commercial service is a '*regulated service*' by virtue of clause 2(e). It is the Commission's position that access to land constitutes a regulated service in limited circumstances. Specifically, it constitutes a regulated service when access to land is required by a person (or entity) in connection with obtaining/utilising another regulated service that is provided to that person (or entity) pursuant to any of clauses 2(a) – (da) of the proclamation. The inclusion of the word "above" in clause 2(e) is clearly intended to ensure that access to land is only a regulated service insofar as it relates to one of the other limbs of the definition.

Further, and in the absence of any submissions to the contrary, the Commission has formed the view that Qube is not seeking any other '*regulated service*' (ie a service other than that specified in clause 2(c) of the proclamation) under the licence, which would enliven the application of clause 2(e) of the proclamation.

Accordingly, it is the Commission's position that Qube is not seeking a '*regulated service*' for the purposes of clause 2(e) of the proclamation.

Jurisdiction of the Commission to conciliate, or refer to arbitration, a dispute under the MSA Act

Pursuant to section 15 of the MSA Act, a dispute exists if, within 30 days of the making of an access proposal for regulated services, the access seeker, service operator and any interested third parties

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have not agreed on terms for the provision of the proposed access. Any party to a dispute may refer the dispute to the Commission.

Where a dispute regarding access to regulated services is referred to the Commission, it has powers and responsibilities to undertake conciliation and/or to refer disputes to arbitration under sections 16 -18 of the MSA Act.

The Commission does not have general powers to conciliate or arbitrate *any* commercial dispute that may arise in connection with services at proclaimed ports. These powers are limited to matters where a '*regulated service*' is sought, a valid access proposal has been made and a dispute between the parties is referred to the Commission pursuant to clause 15 of the MSA Act.

Given the Commission's position that Qube is not seeking a '*regulated service*' under the MSA Act, it follows that it does not have power or jurisdiction under that Act to act on the dispute between the parties (as set out in Qube's application) regarding the terms of the licence.

Upcoming ports review

Notwithstanding the position of the Commission as outlined above, it is noted that there are future opportunities for the parties to engage with the Commission on related matters. In particular, I note the separate review to be conducted by the Commission under section 43 of the MSA Act. Pursuant to that review, the Commission must determine whether the access regime under Part 3 of the MSA Act should continue to apply to the industries subject to it, and make recommendations to the Minister in that regard. Should the Commission recommend that Part 3 continue to apply, a regulation must be made by the Government extending the period of its operation by 30 October 2022.

Public notice of this review will be announced in the coming months. The review will allow opportunities for all interested stakeholders to consult with the Commission and make submissions. I note that some parties have already provided correspondence to the Commission in relation to methodologies to be considered as part of the upcoming review.

Should you wish to discuss the matters outlined above, please do not hesitate to contact Mr Mark Caputo, Manager, Economics, on (08) 8463 4320 or via email at mark.caputo@sa.gov.au.

Yours sincerely



Adam Wilson

Chief Executive Officer

Letter will only be sent electronically