Submission to the Essential Services Commission of South Australia on the ports pricing and access review 2022

Qube Ports Pty Ltd

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Contents

1 Executive summary

1.1 This review is important because the Access Regime is in need of a major overhaul

1 Qube Ports Pty Ltd (**Qube**) welcomes this opportunity to participate in ESCOSA's review of the South Australian ports access regime (**Access Regime**).

2 Qube is a subsidiary of Qube Holdings Limited (**Qube Holdings**), which is the largest integrated provider of import and export logistics services in Australia. Qube operates across all aspects of the port supply chain and has been active at South Australian ports since 2006 (and, prior to that time, had operated in South Australia as P&O Ports Limited).

3 ESCOSA's review is important. The Access Regime is now more than two decades old and has been shown to be outdated and inadequate.

4 Previous reviews (undertaken in 2012 and 2017) have failed to address concerns raised by stakeholders about the adequacy and effectiveness of the Access Regime. After recent public criticism of the Access Regime by stevedores and the National Competition Council (in the certification process), ESCOSA must not again allow this opportunity for reform to pass. Indeed, the Premier of South Australia noted to the NCC that the ESCOSA review provided an *"ideal opportunity"* for a thorough consideration of the concerns raised by Qube and others before the NCC.

5 Over the two decades since inception of the Access Regime, South Australia has become the most tightly and vertically integrated port supply chain in the country – dominated by a single private operator, Flinders Group, that operates across all parts of the supply chain in both monopolistic and contestable markets.

6 While regulatory practice in other states, port terminals and industry sectors evolved over the last decade to respond to and address vertical integration with a range of specific regulatory measures, the South Australian regulatory regime stood still. The South Australian Productivity Commission accepted that there has been insufficient review and reform of the South Australian port access regime, "*which has failed to reflect the changing structure and competitive dynamics of the market.*"[1]

7 To make matters worse, in the first access dispute brought by a stevedore under the regime in its two decades of operation, ESCOSA determined that the Access Regime did not apply to regulate access to port land and berths by stevedores. Despite the vertical integration of Flinders as port owner, stevedore and landside logistics provider – ESCOSA determined that the Access Regime existed only to protect shipping lines.

8 As interpreted by ESCOSA, the Access Regime offers the wrong solution to the wrong problem to benefit the wrong stakeholder. It must either be substantially amended, or it should be allowed to lapse, so that work can be undertaken on a new, modernised regime that is fit for purpose to ensure the promotion of competition and investment in South Australian port supply chains.

[1] South Australian Productivity Commission, Draft Report, *Inquiry into reform of South Australia's Regulatory Framework*, at page 127, available at: https://www.sapc.sa.gov.au/inquiries/inquiries/south-australias-regulatory-framework/draft-report.

1.2 An Access Regime focused on the wrong stakeholder

9 ESCOSA's view is that the Access Regime does not apply to access to berths, port land and other facilities required by stevedores such as Qube in order to provide competitive stevedoring services at South Australian ports.

10 On this view, the scope of the Access Regime is essentially limited to services provided to vessel owners (i.e., major international shipping lines) – and it provides no assistance to other port users.[2]

11 The absurdity of this situation is obvious:

(a) Shipping lines are typically global operators, with substantial bargaining power and which have no need for a negotiate/arbitrate regime governing non-regulated port access charges.

(b) Flinders Group has no vertical relationship with shipping services but is tightly integrated across port and landside activities – where the Access Regime has now been said by ESCOSA not to apply.

12 This fundamental flaw in the Access Regime, as it has been applied by ESCOSA, was acknowledged by the NCC:[3]

> *… the Access Regime may not be accessible to businesses that operate in dependent markets and compete with entities related to the port operators. In circumstances where the range of regulated services under the Access Regime may not adequately cover those services which businesses are reliant on to compete with providers of infrastructure services in dependent markets, the Council recommends that ESCOSA consider whether the range of regulated services under the access regimes remains appropriate as part of its next review.*

13 Flinders Group in its submissions to the NCC repeatedly trumpeted the fact that the Access Regime did not apply to stevedores (or any other landside operators) in support of certification. In effect, Flinders Group argues that vertical integration concerns should be ignored by the NCC because the regime does not benefit landside competitors of Flinders Group because they do not acquire *"regulated services"* under the Access Regime.[4] This is a remarkable submission that serves only to highlight the fundamental failure of the Access Regime itself.

1.3 The Access Regime is the wrong solution addressing the wrong problem

14 Unfortunately, merely addressing the scope of the Access Regime to ensure that it applies to landside service providers will deliver no meaningful improvement, unless the substance of the Access Regime is also overhauled.

15 In its current form, the Access Regime is outdated. It offers a 'light-touch' negotiate/arbitrate regime that has remained substantially unchanged since it was introduced shortly after the Hilmer reforms of the mid-1990s.

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[2] The only exception being a narrow reference to vertically integrated bulk loading infrastructure operated by Viterra.

[3] NCC final recommendation, p. 120, available at: https://ncc.gov.au/images/uploads/SA_Ports_-_FINAL_-_NCC_Final_Recommendation_-_29_September_2021.pdf.

[4] Flinders Ports, Response to Draft Recommendation of the National Competition Council, states (at page 4):

> *Yet the vertical integration concerns raised by the Qube Submission and the Qube Response and considered in the Draft Recommendation are all premised on this fundamental misconception. They have all erroneously assumed that Qube is an access seeker under the SA Ports Access Regime and that Qube acquires "regulated services" under the MSA Act.*

16 This means that, even where it applies, the Access Regime does nothing to address the risk of harm to competition arising from vertical integration. It therefore fails to achieve one of the central economic objects of access regulation, which is to promote investment and competition in dependent markets.

17 Some of the major shortcomings of the Access Regime (noted also by the NCC) include that it:

- does not require or provide for open and non-discriminatory access to South Australian Ports;
- fails to provide any form of ring fencing of staff or roles for the regulated Flinders Group entity and the other entities to which it may provide services in competition with other market participants;
- offers no protection for competitively sensitive information obtained by Flinders Ports through its operation as the regulated operator of the proclaimed ports;
- does not provide any meaningful public or independent audit or reporting mechanisms to ensure non-discrimination;
- does not provide a workable dispute resolution process in relation to discriminatory pricing and non-pricing issues; and
- does not establish any operational or service performance standards or reporting, or otherwise regulate the non-discriminatory provision of services at the South Australian ports.

18 All of these form features of modern, sophisticated port access regimes in other states or have been required by the ACCC (on a port or national basis) through undertakings where port terminal operations are found to involve a level of vertical integration.

1.4 A way forward

19 Qube does not see any benefit in the Access Regime continuing to apply in its current form. It offers nothing of value to firms such as Qube seeking to invest or compete in the South Australian port supply chain.

20 Qube has previously written to ESCOSA regarding the appropriate methodologies to be employed in this review. A copy of that letter is enclosed with this submission at **Appendix E**. In past reviews, ESCOSA adopted a conservative *"structure-conduct-performance"* (**SCP**) model as the basis for assessment. While Qube does not object to SCP as *one tool* to assess the effectiveness of the Access Regime, it cannot not reliably used by a modern regulator as the *sole* means of assessing an access regime's effectiveness.

21 Qube submits that ESCOSA should supplement its traditional and static SCP analysis with other modern conceptual tools better suited to testing the Access Regime's response to Flinders Ports' vertical integration.

22 We also urge ESCOSA to draw upon current Australian regulatory best practice. A range of Australian state regulators, and the ACCC, have developed and applied tools to address the same concerns facing the South Australian port sector. This review presents an opportunity to bring the Access Regime in line with best regulatory practice.

23 At a minimum, the current 'negotiate/arbitrate' framework in the *Maritime Services (Access) Act 2000* (**MSA Act**) must be replaced with the following:

(a) The object clause must be replaced – and the definitions of 'maritime services' and 'regulated services' replaced.

(b) The scope of the Access Regime must be broadened to ensure that ***all port users*** that are dependent on access to port land and facilities (either quayside or landside) to compete in related markets have access to the regime.

(c) The negotiate / arbitrate model must be replaced with a framework that establishes clear and well-defined standards of conduct and with a right for users to bring price and non-price disputes to ESCOSA for timely resolution.

(d) The regime must be backed by fit for purpose audit, reporting, publication and enforcement powers for ESCOSA.

24 In relation to implementation, the new and codified standards of conduct could be specified in the MSA Act or, as an alternative, the MSA Act could require any port operator to have and maintain an access undertaking approved by ESCOSA and directly enforceable by port users.[5] ESCOSA could then require appropriate and port-specific standards and obligations under an undertaking. Any undertaking would be subject to a periodic review by ESCOSA.

25 Qube looks forward to engaging constructively with ESCOSA throughout the course of this review.

[5] This is the approach adopted in relation to ARTC's operation of the Hunter Valley Coal Network and the Interstate Network, both of which are subject to voluntary Part IIIA access undertakings – in place due to obligations under the Transport Administration Act 1988 (NSW).

In Queensland, obligations to put in place access undertakings or deeds has been a feature of a number of Government leases and concessions for port and rail buyers.

2 Background to this review

26 Over the two decades since inception of the Access Regime, there have been significant changes to the structure of the ports sector in South Australia. These changes mean that an access regime that may have been appropriate at the turn of the century may no longer be adequate to address contemporary risks to competition and economic efficiency in dependent markets.

27 Relevant developments in the South Australian ports sector include:

(a) The rapid and substantial expansion in activities by the Flinders Group since 2011, to a point where they are now involved in almost all aspects of the port supply chain in South Australia on a tightly integrated commercial basis.

(b) The absence of any meaningful structural or functional separation of role and activities within Flinders Group – and, to the contrary, the recent trend within Flinders Group to increase the level of integration across monopoly and contestable activities.

(c) The impact that Flinders Group's vertically integrated operations has been shown to have on day to day competition in markets, including stevedoring, container services and logistics (amongst others).

(d) The history and wider experience of anti-competitive conduct by privatised port operators over the last decade, and the absence of effective state-based regulation, which has been publicly acknowledged by the ACCC and has resulted in Qube itself taking substantial private litigation under section 46 of the CCA in the Port of Newcastle.

28 Each of these developments is discussed below.

2.1 History of the Access Regime

29 The legislative framework for the privatisation of the South Australian Ports Corporation and the subsequent port access and management regime was passed by the South Australian Parliament in 2000.[6]

30 The MSA Act established the price and access regulation to be applied to the previously State Government owned ports, with ongoing monitoring and control of these aspects being the responsibility of South Australia's independent economic regulator, ESCOSA.

31 Shortly after the MSA Act was passed, Flinders Ports Limited (**Flinders Ports**) was established.[7] Flinders Ports acquired a 99-year land lease and port operating licence for Port Adelaide and six regional ports – Port Lincoln, Port Giles, Klein Point, Thevenard, Wallaroo and Point Pirie.

32 The South Australian Government has applied successfully on two occasions to have the Access Regime certified under Part IIIA of the *Competition and Consumer Act 2010* (**CCA**) – in 2011 and 2021.

[6] This comprised of the *South Australian Ports (Disposal of Maritime Assets) Act 2000*; the MSA Act; and the *Harbors and Navigation (Control of Harbors) Amendment Act 2000*.

[7] Flinders Ports became part of the Flinders Port Holdings Group in 2007.

33 Between March 2011 and September 2021, no substantive amendments were made to the Access Regime (as set out in the MSA Act).[8]

34 In making its recommendation to the responsible minister in 2021, the NCC cautioned:

> *The Council has previously certified the South Australian ports access regime for the period from 9 May 2011 to 9 May 2021. The terms of the regime have not changed significantly since it was certified by the Council in 2011, but the level of vertical integration by the port operators into dependent markets has increased significantly over this period* (emphasis added).[9]

35 Qube agrees with this observation. Over the last decade, the single private operator of all South Australian ports (Flinders Group) has become the most vertically integrated port supply chain operator in Australia – and has structured itself commercially in a highly integrated fashion.

36 The anti-competitive effects of this vertical integration are now being felt throughout the port supply chain in South Australia and are affecting investment confidence and competition.

2.2 Rapid vertical expansion and integration of Flinders Group since 2011

37 Since 2011, the Flinders Group has significantly expanded its operations into related (and contestable) market activities, as well as further integrating its own reporting and lines of responsibility, as follows:

- **Flinders Logistics commenced operations in 2012**

  Flinders Logistics is Flinders Group's downstream logistics and stevedoring subsidiary, which provides logistics and stevedoring services, focussing on mineral resources and oil and gas sectors in Australia.

  Services include bulk exports / imports, container services, equipment investment, general cargo exports / imports, multi-modal logistics operations, storage and warehousing, and supply chain consultancy.[10]

  Flinders Logistics has grown its presence in downstream services at the South Australian Ports and is now one of the largest providers of logistics and stevedoring services at the South Australian ports.

- **Flinders Adelaide Container Terminal commenced operations in 2012**

  Flinders Adelaide Contained Terminal is the only container terminal facility in South Australia. This subsidiary provides both stevedoring and terminal management services to international shipping lines. In 2012, Flinders Group acquired 60% of Adelaide Container Terminal from DP World – so that Flinders Group now wholly owns and operates the terminal.[11]

[8] The only amendment was to section 43(3) of the MSA Act, enacted under the *Statutes Amendment and Repeal (Simplify) Act 2019*. The amendment altered the requirement for ESCOSA to notify the public of its periodic review in a newspaper, replacing the requirement with a requirement to notify the public of its periodic review in a manner and form determined by the Commission to be the most appropriate in the circumstances.

[9] NCC final recommendation dated 29 September 2021, p. 5, available at: https://ncc.gov.au/application/application-for-certification-of-the-south-australian-ports-access-regime/5.

[10] Flinders Logistics website, available at: https://www.flinderslogistics.com.au/about/overview/.

[11] Flinders Adelaide Container Terminal website, available at: https://www.flindersadelaidecontainerterminal.com.au/.

- **Flinders Warehousing and Distribution was established in 2019**

  Flinders Logistics significantly increased its downstream presence in 2019 with the establishment of a further subsidiary supplying warehousing and distribution services, Flinders Warehousing and Distribution. This subsidiary offers services such as container pack / unpack, storage, distribution and additional supply chain services.[12]

38 Qube understands that the Flinders Group therefore comprises three divisions: Flinders Ports, Flinders Logistics (of which Flinders Warehousing and Distribution is a subsidiary) and Flinders Adelaide Container Terminal and competes across almost all dimensions of the port supply chain in South Australia.[13]

39 This makes Flinders Group the most diverse and vertically integrated operator of any privatised port in Australia – operating across terminals, empty container servicing and storage, stevedoring (bulk, container and other), warehousing, and logistics.

40 Flinders does not hide its use of this integrated position, conceding to the NCC:[14]

> *From time to time, FLOG or FWD may seek to bundle the services it provides to customers with "regulated services" that the customer requires from Flinders Ports. This is often a result of a customer requesting a single price and single point of contact.*

41 Qube understands that there has also been a consolidation of reporting lines and responsibilities within Flinders Group, such that individual employees represent the interests of (and it might be expected are remunerated based on the performance of) both Flinders Ports in its capacity as port owner and operator and Flinders Logistics, in its capacity as a competitive service provider in downstream markets.[15]

2.3 Evidence shows the adverse impact of Flinders Ports' increased vertical integration on the South Australian ports supply chain

42 There is ample evidence that Flinders Ports is exercising its market power as the regulated operator in favour of its own competing services.

43 The evidence before ESCOSA (referred to above in section 3, **Appendices A**, **C** and **D**, and summarised below) includes:

- In 2012, Qube participated in a competitive tender for the loading of mineral sands from Berth 18 at Port Adelaide, in which Qube was hamstrung by being required to negotiate with Flinders Ports over the terms of access to the shed to be used (in competition with Flinders' own stevedoring business). Ultimately, Flinders Ports both delayed and increased the cost to Qube of using Berth 18 making Qube's solution uneconomical as a competitive alternative to Flinders Ports' own solution, and Flinders Ports ultimately won the tender. Qube provided details of this tender to ESCOSA as part of its 2012 Ports Pricing and Access review.[16]

- Also in 2012, Flinders Ports refused to allow Qube to place a second mobile harbour crane of its own at Berth 28 in order to facilitate potential work for Hillgrove

[12] Flinders Warehousing & Distribution website, available at: https://www.flindersfwd.com.au/about/.

[13] Flinders Port Holdings Group website, available at: https://www.flindersfwd.com.au/about/.

[14] Flinders Ports, Response to Linx Submission Dated 19 August 2021 and Notice issued by the NCC to Flinders Ports dated 24 August 2021, at page 7.

[15] Further details of this can be found in **Appendix A** to this submission.

[16] See **Appendix C** to this submission. This conduct was also raised in the context of the NCC's certification – see Qube's RFI response to the NCC, Attachment A, pages 23-31; Attachment B, pages 41-42.

Resources in relation to copper and crystal mining. Shortly after, in December 2013, Flinders Ports allowed Flinders Logistics to place the second crane at Berth 28 and Flinders Logistics picked up both of the Hillgrove Resources contracts.[17]

- Asciano raised similar concerns with ESCOSA in its ports review in 2012.[18]
- During 2013 and 2014, Qube participated in a tender for a customer, Nyrstar, at Port Pirie, which it ultimately lost to Flinders Logistics due to its position as the port operator, including through apparent bundled pricing or discounted pricing for other non-stevedoring services provided as the operator. There was also evidence of the customer obtaining operational benefits (i.e., an ability to use one tug instead of two). Qube provided details of this tender to the ACCC in 2014, and to ESCOSA as part of its 2017 Ports Pricing and Access Review.[19]
- Qube also expressed similar concerns in relation to a tender for work for customer, Perilya, which was acquired by Flinders Logistics and resulted in the exit of Qube from providing stevedoring services at Port Pirie.[20] Remarkably, shortly after winning the contract from Qube, Flinders Logistics offered contracts of employment to all of the Qube stevedoring workers at the port.
- In **Appendix A** to this submission, Qube has provided concrete examples of customer poaching, operational preference for Flinders Ports' berth and customers over other common user berths, misuse of commercially sensitive information held by Flinders Ports, and apparent bundled pricing and concerns of cross-subsidisation.[21]

44 As discussed in section 3.2 below, LINX has also provided information in the context of the NCC's certification process that it lost contracts to Flinders Logistics in circumstances where, to the best of LINX's information, Flinders Logistics either:

- has been able to provide a solution not available to be offered by LINX because of arrangements as between Flinders Logistics and Flinders Ports including preferential berthing arrangements, preferred equipment; or
- has been able to offer a price to the end customer that is not viable for LINX, not because of any inefficiency on the part of LINX but because of the structure or charging mechanisms adopted by Flinders Ports including the installation of equipment particularly suited to the operations of Flinders related operations and imposing non-cost reflective charges on parties who use different equipment.

45 Qube wrote to ESCOSA on 22 November 2016 as part of the 2017 Ports Pricing and Access Review stating:[22]

[17] See **Appendix D** to this submission. This conduct was also raised in the context of the NCC's certification – see Qube's RFI response to the NCC, Attachment B p.43; Attachment C, pp. 61, 64-67.

[18] Asciano's submissions included:
(1) submission dated 23 March 2012, available at: https://www.escosa.sa.gov.au/ArticleDocuments/683/120327-2012_PortsPricing_AccessReviewIssuAsciano.pdf.aspx?Embed=Y; and
(2) submission on the draft decision dated 20 July 2012, available at: https://www.escosa.sa.gov.au/ArticleDocuments/685/120720-2012_PortsPricing_AccessReviewDrafAsciano.pdf.aspx?Embed=Y.

[19] See **Appendix D** to this submission. This conduct was also raised in the context of the NCC's certification – see Qube's RFI response to the NCC, Attachment B, pages 33-48.

[20] See **Appendix D** to this submission. This conduct was also raised in the context of the NCC's certification – see Qube's RFI response to the NCC, Attachment B, pages 33-48.

[21] See **Appendix A** to this submission. This conduct was also raised in the context of the NCC's certification – see Qube's NCC Submission, Annexure A, section 1.1-1.7.

[22] See **Appendix D** to this submission. This conduct was also raised in the context of the NCC's certification – see Qube's RFI response to the NCC, Attachment C, page 49.

"Our growth in South Australia has been severely curtailed by Flinders Ports ability to link infrastructure ownership to operating activities to the point that we no longer invest in the South Australian market, contrasted to the rest of Australia where our invested capital runs into many hundreds of millions of dollars. South Australia is the only jurisdiction that allows such extreme vertical integration to occur without any regulatory oversight and the resulting lack of competition in the defined markets is self-evident. We have scaled down our activities in SA while expanding with double digit annual growth over the past 10 years in every other state of Australia."

46 Qube can further confirm that the focus of its investment in South Australia has changed. Qube continues to invest in South Australia but focuses typically on mobile equipment that can be redeployed in different locations or moved interstate. This is because its ability to invest in substantial and long-term competitive leases and stevedoring infrastructure is constrained by the commercial risk created by Flinders Ports' vertically integrated control over the land and, ultimately, the master development plan for South Australian port precincts (including, at times, having approval rights over development in areas where it is not the lessee, but which are subject to its master planning processes).

47 In circumstances where the conduct of Flinders Ports has led Qube, a leading national stevedore, to exit operations in at least one South Australian port (Port Pirie) and to reduce or refocus investment in South Australian ports, relative to other opportunities, the damage occurring to competition in South Australian ports is evident and material.

2.4 The recognised need for appropriate regulation of privatised ports in Australia

48 Qube is not opposed to privatisation of ports (there is no doubt it can provide strong commercial incentives to deliver cost reduction and efficiency), provided however that the private owners are appropriately regulated.

49 ACCC Chairman, Rod Sims, amongst others, has been outspoken regarding the inadequacy of state regulation of privatised port assets. On 21 October 2020, Mr Sims speaking at the National Press Club stated:[23]

"… More concerning, however, is that there is currently no or little regulation of monopoly privately-owned ports. When these were government-owned political pressure on Ministers kept prices reasonable. But the ports were sold, usually with no control over their pricing in order to maximise the proceeds of sale. The resulting unfettered market power of some ports is costing our nation dearly" (emphasis added).

50 These concerns are not isolated. The failure of state regulation of ports has been noted by a national coalition of peak transport and logistics groups, who have called on the State and Federal Governments to act on concerns of the monopoly powers of privately-owned ports.[24]

51 State regulators themselves acknowledge the concern – and accept that the potential for anti-competitive outcomes associated with the exercise of port operators' market power is neither fanciful nor theoretical. On 14 October 2020, the Victorian Essential Services Commission (**ESC**) released its final report on the Port of Melbourne market rent inquiry 2020, which recognised the failure in the regulation of the Port of Melbourne following privatisation finding that the Port of Melbourne has power in setting and reviewing rents

[23] ACCC Speech by Rod Sims, 'Tackling market power in the COVID-19 era, given at the National Press Conference in Canberra on 21 October 2020, available at: https://www.accc.gov.au/speech/tackling-market-power-in-the-covid-19-era.

[24] Australian Trucking Association press release, Transport and Logistics Groups support ACCC concerns on monopoly of privately owned ports, dated 23 October 2020, available at: https://www.truck.net.au/media/media-releases/transport-and-logistics-groups-support-accc-concerns-monopoly-privately-owned.

and that while its power is not unconstrained, the Port of Melbourne retains a significant degree of control in relation to setting and reviewing rents and that it had acted to use that market power.[25]

52 Other experiences over the last decade further underscore the challenges that have been identified with privatised port operations and market power:

- The ACCC has, on two occasions (2015 and 2016) required the privatised operators of automotive and 'roll on, roll off (**RoRo**)' port terminals to provide the ACCC with court enforceable s87B undertakings included extensive provisions relating to open access, ring fencing mechanisms, dispute resolution (for both price and non-price disputes) and compliance oversight through regular audits. [26]

- In December 2018, the ACCC instituted proceedings against NSW Ports Operations Hold Co Pty Ltd (**NSW Ports**) and its subsidiaries for making agreements with the State of New South Wales as part of the privatisation of those ports that the ACCC alleges had an anti-competitive purpose and effect.[27]

- On 19 November 2019, Qube instituted private proceedings against the Port of Newcastle (**PON**), for alleged misuse of market power associated with the vertically integrated operation of, and access to, bulk stevedoring berths at that port.[28]

- On 9 December 2019, the ACCC instituted proceedings in the Federal Court against Tasmanian Ports Corporation Pty Ltd (**TasPorts**) for alleged misuse of market power. The ACCC alleges that TasPorts, which owns all but one port in Northern Tasmania, sought to stop a new entrant, Engage Marine Tasmania Pty Ltd (**Engage Marine**), from competing effectively with TasPorts' marine pilotage and towage businesses, with the purpose, effect and likely effect of substantially lessening competition.[29]

53 Qube submits that ESCOSA's review of the Access Regime must have regard to regulatory experience over the last decade at privatised Australian ports.

54 History has taught us that any modern port access regime must provide real, transparent and effective protection against discriminatory conduct – backed by robust ring fencing, audit, reporting and price and non-price oversight and dispute processes.

55 Qube sets out in **Annexure B** examples of contemporary Australian access regimes that properly address the issue of actual or potential vertical integration.

[25] Essential Services Commission, Final Report, Port of Melbourne market rent inquiry 2020, released on 14 October 2020, available at: https://www.esc.vic.gov.au/transport/port-melbourne/port-melbourne-reviews/port-melbourne-market-rent-inquiry-2020.

[26] ACCC Media release, 'ACCC will not oppose VQIRT's proposed acquisition of lease to operate automotive terminal at Port of Fremantle', dated 2 April 2015, available at: https://www.accc.gov.au/media-release/accc-will-not-oppose-vqirt%E2%80%99s-proposed-acquisition-of-lease-to-operate-automotive-terminal-at-port-of-fremantle; ACCC Announcement, 'ACCC will not oppose Qube acquisition of AAT', dated 26 November 2016, available at: https://www.accc.gov.au/media-release/accc-will-not-oppose-qube-acquisition-of-aat.

[27] ACCC Announcement, 'ACCC takes action against NSW Ports', dated 10 December 2018, available at: https://www.accc.gov.au/media-release/accc-takes-action-against-nsw-ports.

[28] AFR Article, 'Newcastle's port faces rare monopoly lawsuit, available at: https://www.afr.com/companies/infrastructure/newcastle-s-port-faces-rare-monopoly-lawsuit-20191124-p53dl9.

[29] ACCC Announcement, Action against TasPorts for alleged misuse of market power, dated 9 December 2019, available at: https://www.accc.gov.au/media-release/action-against-tasports-for-alleged-misuse-of-market-power.

3 The inadequacy of the Access Regime has been long recognised within and outside South Australia

56 There is now broad recognition of the problems that beset the Access Regime, with multiple stakeholders expressing strong concerns.

3.1 ESCOSA 2012 and 2017 reviews

2012 ESCOSA Review

57 In 2012, Asciano made two submissions to ESOCSA,[30] each raising concerns that there was a need for an additional regulatory focus on ring-fencing, and submitting:

- Flinders Ports are now supplying monopoly services to companies such as Patrick, while also competing with Patrick for business in port logistic and stevedoring activities. Given this vertical expansion, Patrick strongly submits to ESCOSA that issues of vertical separation and ring-fencing be considered in the continuing regulatory regime;
- Third party access is only viable when the monopoly providing access deals with all parties, including related parties, equally. Any dealings between related parties must be at arms length on conditions which are no more favourable than the conditions offered to unrelated third parties;
- Patrick's recent experience is that Flinders Ports are using operational processes and procedures, such as environmental controls, licencing and government approval issues, to disadvantage unrelated parties using Flinders Ports' facilities as competitors or potential competitors to Flinders Ports;
- The South Australian ports access regime currently only applies accounting separation to Flinders ports. Accounting separation is focused on collecting data rather than preventing the misuse of monopoly power per se; it does not apply any structural separation or legal separation;
- Under the current industry structure and regulation Flinders Ports has the potential to gain an advantage over its competitors by using its position as a monopoly provider of services to its competitors. Typically where monopoly infrastructure is subject to third part access regulation and the owner of the infrastructure also competes with other users of the infrastructure then strong ring-fencing and separation regimes are in place; and
- The current industry structure is, in itself, reason to warrant a stronger ring-fencing regime. Asciano notes that strong ring-fencing regimes have been implemented in electricity, gas and rail markets where monopoly infrastructure owners also compete with users of monopoly infrastructure. These regimes are implemented to provide a level of confidence to users of the monopoly services that they can continue to operate in the market and make longer term investment decisions with a degree of confidence that they will not be disadvantaged by the actions of a monopoly supplier and competitor.

[30] Asciano's submissions included:
(1) submission dated 23 March 2012, available at: https://www.escosa.sa.gov.au/ArticleDocuments/683/120327-2012_PortsPricing_AccessReviewIssuAsciano.pdf.aspx?Embed=Y; and
(2) submission on the draft decision dated 20 July 2012, available at: https://www.escosa.sa.gov.au/ArticleDocuments/685/120720-2012_PortsPricing_AccessReviewDrafAsciano.pdf.aspx?Embed=Y.

58 In 2012, Qube wrote to ESCOSA as part of the statutory ports access and pricing review to express concerns over the failure of the Access Regime to address vertical integration. Qube identified the following issues:

- the regime needs to ensure the proper use and protection of confidential information held by vertically integrated port operators by virtue of their role as port operator;
- the regime must cover a broader list of maritime services including the provision of storage facilities at proclaimed ports; and
- the arbitration and enforcement provisions under the current access regime need to be strengthened to incentivise parties to behave fairly and commercially and allow quick and commercial resolution where issues arise.

59 Qube also referred to, and supported, Asciano's public submission to ESCOSA and provided commercial examples of conduct by Flinders Ports. A copy of this correspondence appears at **Appendix C** to this submission.

2017 ESCOSA Review

60 Qube engaged again with ESCOSA as part of its 2017 ports pricing and access review.

61 Qube highlighted that its growth in South Australia had continued to be severely curtailed by Flinders Ports' ability to link infrastructure ownership to operating activities to the point that this had significantly impacted Qube's investment appetite in relation to the South Australian market. By contrast, it continues to invest hundreds of millions of dollars at other open access, common user Australian ports.

62 Qube provided ESCOSA with documents and case studies that had been provided to the ACCC in 2014 and that demonstrated the practical impact on competition in relevant downstream markets. A copy of this correspondence appears at **Appendix D** to this submission.

3.2 Concerns were again raised by Qube and LINX during the recent NCC certification process

63 Qube raised significant concerns over the adequacy of the Access Regime in the context of the South Australian Government's application for re-certification of the Access Regime.[31] The concerns raised by Qube are discussed in detail in section 4 and in **Appendices A, C** and **D** to this submission and so are not repeated here.

64 In that same context, LINX submitted that the Access Regime, in its current form, fails to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets. LINX stated its concern about its ability to compete effectively with the vertically integrated Flinders Logistics as the current Access Regime does not sufficiently address the discrimination which could arise in the circumstances of a vertically integrated monopoly port services and access provider.

[31] Qube submitted the following documents to the NCC as part of this process:
(1) submission on the application for certification, dated 26 February 2021, available at: https://ncc.gov.au/images/uploads/Confidential_-_Qube_Ports_submission_to_NCC_%2826.02.21%29_.pdf;
(2) response to NCC information request, dated 24 May 2021, available at: https://ncc.gov.au/images/uploads/Qube_-_Response_to_information_request_-_24_May_2021.pdf; and
(3) submission on the NCC's draft recommendation, dated 16 July 2021: https://ncc.gov.au/images/uploads/Qube_submission_in_response_to_NCC_draft_recommendation_-_16_July_2021.pdf.

65 LINX provided further examples of experience at South Australian ports, which included:

- that the Flinders Group has extended into markets providing services in competition with other users of the relevant ports;
- since Flinders Logistics and Flinders Warehousing and Distribution have commenced operations, LINX has lost contracts to Flinders Logistics in circumstances where, to the best of LINX's information, Flinders Logistics either:
  - has been able to provide a solution not available to be offered by LINX because of arrangements as between Flinders Logistics and Flinders Ports including preferential berthing arrangements, preferred equipment; or
  - has been able to offer a price to the end customer that is not viable for LINX, not because of any inefficiency on the part of LINX but because of the structure or charging mechanisms adopted by Flinders Ports including the installation of equipment particularly suited to the operations of Flinders related operations and imposing non-cost reflective charges on parties who use different equipment, and
- there is currently no transparency provided by way of the Access Regime on how Flinders Ports charges or provides access to equipment or services to its other related entities (namely Flinders Logistics and Flinders Warehousing and Distribution).

3.3 The NCC agreed that there was a need for a thorough review

66 In making its final recommendation for certification of the Access Regime, the NCC acknowledged the concerns of industry about the adequacy of the Access Regime to regulate the increased vertical integration of the Flinders Group.

> *That said, a finding that the Access Regime is effective as it applies to those services the subject of the regime is not a wholesale endorsement of the regime, nor is it a finding that the regime could not be improved. In this respect, the Council recommends that ESCOSA give careful consideration to whether the Access Regime and other associated government policies require amendment and improvement to better deal with Flinders Ports' increased vertical integration into dependent markets when it next conducts a review of it in 2022. In particular, the Council considers ESCOSA should consider whether improvements could be made to the Access Regime by:*
>
> - *considering whether the range of regulated services covered by the Access Regime should be expanded*
> - *introducing ring-fencing provisions and safeguards around the handling of confidential information for regulated services*
> - *prescribing a timeframe in which preliminary information should be provided to enable access seekers to prepare proposals and providing a mechanism for review of any charge imposed by the operator for the supply of such information.*
>
> *Further, the Council considers much of the concern raised by certain users of the proclaimed ports (i.e. Qube and LINX) relates to concerns that the regime does not go far enough to actively promote better outcomes consistent with the objects of Part IIIA of the CCA. In particular, they consider the Access Regime should apply*

to more services; and be more prescriptive in how it regulates providers of regulated services at the proclaimed ports.[32]

3.4 SA Government, Productivity Commission and industry bodies

67 In the context of the NCC certification process, the Premier of South Australia acknowledged the need for ESCOSA to conduct a thorough review of the Access Regime as part of its 2022 ports access and pricing review, stating:

> *I acknowledge that the Council has suggested a number of improvements to the regime, namely in relation to the following aspects:*
>
> – *that the regime could be strengthened by adding a timeframe to the obligation on a regulated operator to provide information to a potential access seeker; and*
>
> – *potential avenues to strengthen ring-fencing and confidentiality provisions for vertically integrated operators beyond the existing protections.*
>
> *A structural feature of the South Australian ports access regime is the requirement for a five-yearly review by the Essential Services Commission of South Australia (ESCOSA) into the effectiveness of the regime. I note that the Council has suggested these issues should be further considered by ESCOSA in its next review of the South Australian ports access regime, due to be completed in 2022. I support this approach, and consider that ESCOSA's forthcoming review of the regime will provide an ideal opportunity for thorough consideration of these issues.*[33]

68 The inadequacy of the Access Regime was also noted by the South Australian Productivity Commission in its recent Draft Report on its inquiry into reform of South Australia's regulatory framework.[34]

> *Section 43 of the Maritime Services (Access) Act 2000 provides a mechanism for periodic review of the South Australian port access regime, which has failed to reflect the changing structure and competitive dynamics of the market.*[35]

69 The South Australian Freight Council (**SAFC**), a peak industry body for the South Australian ports, recently acknowledged that ESCOSA's review needs to be more thorough than its prior reviews of the Access Regime:

> *In light of new information raised in the Qube complaint and in subsequent submissions including the response to the NCC's Notices, SAFC also supports these recommendations [by the NCC] to ESCOSA. It is clear that now significant allegations have been raised publicly that this review should be more*

[32] NCC final recommendation dated 29 September 2021, pp. 7-8, available at: https://ncc.gov.au/application/application-for-certification-of-the-south-australian-ports-access-regime/5.

[33] Letter from the Premier of South Australia to the NCC dated 20 July 2021, available at: https://ncc.gov.au/images/uploads/PREM_-_fB226078_-_Letter_to_Ms_Julie-Anne_Schafer.pdf.

[34] Published in August 2021 and available at: https://www.sapc.sa.gov.au/inquiries/inquiries/south-australias-regulatory-framework/documents/South-Australias-Regulatory-Framework-Inquiry-Draft-Report.pdf.

[35] Productivity Commission Draft Report on its inquiry into reform of South Australia's regulatory framework, released August 2021, p.127, available at: https://www.sapc.sa.gov.au/inquiries/inquiries/south-australias-regulatory-framework/documents/South-Australias-Regulatory-Framework-Inquiry-Draft-Report.pdf.

comprehensive than previous reviews undertaken in a 'no complaints, no issues raised' environment.[36]

4 Deficiencies in the Access Regime

70 There are at least three fundamental problems with the Access Regime:

(a) First, as interpreted by ESCOSA, the Access Regime is absurdly narrow in scope and provides a negotiate / arbitrate framework that is available only to global shipping lines and consortia. Unsurprisingly, they don't need it and haven't bothered to try to use it.

(b) Second, the Access Regime is a relic of the original negotiate/arbitrate regimes from the mid-1990s. This means that the MSA Act provides a mechanism only for access seekers to seek resolution of disputes about the terms of access when they first approach Flinders. The regime is not designed to provide ongoing discipline in relation to the behaviour or activities of Flinders.

(c) Third, the substance of the Access Regime is outdated and ineffective. It offers no meaningful protection against discriminatory or anti-competitive conduct by Flinders.

71 If the MSA Act is to be retained, it must be fundamentally overhauled:

(a) The object clause must be replaced – and the definitions of 'maritime services' and 'regulated services' replaced.

(b) The scope of the Access Regime must be broadened to ensure that ***all markets*** that are dependent on access to port land and facilities (either quayside or landside) have access to the regime.

(c) The negotiate / arbitrate model must be replaced with a framework that establishes clear and well-defined standards of conduct and with a right for users to bring price and non-price disputes to ESCOSA for resolution.

(d) The regime must be backed by fit for purpose audit, reporting, publication and enforcement powers for ESCOSA.

72 An alternative approach may be to include in the MSA Act an obligation for any port operator to have and maintain an access undertaking approved by ESCOSA, and enforceable by port users.[37] The MSA Act could then specify minimum requirements for any such undertaking.

4.1 Objectives and scope

73 Despite Qube being a major user of South Australian ports, our experience has been that the Access Regime is of no assistance in constraining the exercise of monopoly power or addressing the risk of economic harm from Flinders' vertical integration.

[36] SAFC submission on the NCC draft recommendation, dated 5 July 2021, available at: https://ncc.gov.au/images/uploads/SAFC_Submission_-_recert_of_SA_Ports_access_regime_Draft_Report_July_2021.pdf.

[37] This is the approach adopted in relation to ARTC's operation of the Hunter Valley Coal Network and the Interstate Network, both of which are subject to voluntary Part IIIA access undertakings – in place due to obligations under the Transport Administration Act 1988 (NSW).

In Queensland, obligations to put in place access undertakings or deeds has been a feature of a number of Government leases and concessions for port and rail buyers.

74 ESCOSA refused to accept a dispute raised by Qube under the Access Regime on the basis that obtaining access to land and common user berths within South Australia did not constitute a 'regulated service' and so was not addressed. ESCOSA concluded:[38]

> *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.*

75 On this narrow reading, the Access Regime is essentially limited to shipping lines (that have entered into a Vessel Port Use Contract with Flinders). The Access Regime does not apply to regulate access to common user and other berths and port land within South Australia, used for loading and unloading such vessels.

76 At least part of the difficulty is that the objectives of the MSA Act are framed by reference only to 'maritime services'. While the concept of a maritime service anticipates access to, and use of, landside facilities (i.e., it includes providing port facilities for loading or unloading vessels at a proclaimed port), ESCOSA has taken a narrow view that this only applies where the contractual relationship is directly with a shipping line.

77 The objects also refer, rather clumsily, to facilitating competitive markets in the provision of maritime services (s.3(b)). Evidently, most maritime services are monopoly services. Access to maritime services should therefore be regulated to promote competition *in related markets*, for which maritime services are a key, bottleneck input.

78 Qube submits that any revamp of the Access Regime requires an overhaul of both:

(a) the objects clause; and

(b) the scope of "*regulated services*".

[38] ESCOSA, Letter to Qube and Flinders Ports Pty Limited, 9 September 2021.

In both cases, this must ensure that access to land and facilities used by stevedores to load and unload vessels (including lay down areas, amenities, security etc) are subject to the regime.

79 This deficiency in the Access Regime was noted by the NCC in its final recommendation on certification. The NCC noted that:

> *… the Access Regime may not be accessible to businesses that operate in dependent markets and compete with entities related to the port operators. In circumstances where the range of regulated services under the Access Regime may not adequately cover those services which businesses are reliant on to compete with providers of infrastructure services in dependent markets, the Council recommends that ESCOSA consider whether the range of regulated services under the access regimes remains appropriate as part of its next review.*[39]

80 The NCC has noted that, whilst the range of services that are regulated under the Access Regime is narrower than those that will fall within the definition of Maritime Services under the MSA Act, it is possible for Maritime Services to become regulated services under the Access Regime through subsequent proclamation (under sections 10 and 45 of the MSA Act).

81 ESCOSA therefore has the ability, under s 45, to fix this issue at any time through recommending to the Minister an appropriate variation to the current proclamation.

82 As well as the scope of the proclamation and the objects in section 13, the substance of the MSA Act needs to be overhauled to bring it into line with modern regulatory practice in addressing vertically integrated monopolists like Flinders Group.

83 Unless the MSA Act contains clear and well-framed obligations, any right of dispute is meaningless for users because there are no articulated standards to enforce.

4.2 Open and non-discriminatory access

84 There is no requirement in the MSA Act for Flinders Ports to supply access to services on an open or non-discriminatory basis. The closest that the regime comes to this standard is a repeated reference to provision of access on "*fair commercial terms*" – which is, itself, a general, inadequate and undefined standard.

85 The approach taken by the MSA Act is unlikely to be appropriate even in the case of a wholly independent port operator but is inadequate in the case of a port operator with the degree of vertical integration across contestable markets held by Flinders Group.

86 Although Flinders Ports has enacted berth scheduling and priority rules in relation to each of the regulated ports, the MSA Act itself does neither addresses nor regulates berth scheduling and priority – despite the fact that this is a critical aspect of any functional port access regime (see, for example, the VICT and AAT undertakings, and the Terminal Regulations applicable at Dalrymple Bay Coal Terminal).[40]

87 To be effective, any access regime must directly and clearly address the risk of anti-competitive discrimination in both general and specific terms. The MSA Act does neither.

[39] NCC final recommendation, p. 120, available at: https://ncc.gov.au/images/uploads/SA_Ports_-_FINAL_-_NCC_Final_Recommendation_-_29_September_2021.pdf.

[40] See Dalrymple Bay Coal Terminal access undertaking, available at: https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2017-access-undertaking-process/.

88 It should also be noted that, in the context of the certification of the Access Regime, the NCC has stated that it:

> *… considers that the vertically integrated nature of Flinders Ports does lead to a heightened risk of preferential or discriminatory conduct occurring that benefits entities related to the access provider.*[41]

89 The NCC went on to state:

> *LINX has suggested that the Access Regime could be improved by introducing a strengthened non-discrimination mechanism, and sets out specific amendments that could be made to the MSA Act in order to achieve this (see pages 4 and 5 of LINX's submission responding to the draft recommendation). The Council considers that, while the Access regime is an effective access regime under the CCA in its current form, the amendments suggested by LINX illustrate reforms that could significantly reduce the risk of discrimination or preferential treatment of related entities in circumstances where access to services must be sought from a vertically integrated access provider.*[42]

90 With the absence of such provisions, it is little surprise in this context, that Flinders Group have repeatedly engaged over recent years in conduct that is discriminatory and demonstrates a wilful indifference to concerns raised by Qube in this regard, as a downstream competitor - see **Appendix A** to this submission.

4.3 Structural or functional ring fencing

91 There is no requirement in the MSA Act for any kind of structural or functional ring fencing of Flinders Group staff or operations.

92 At most, the regime provides at a high and inadequate level for 'segregation of accounts' related to the provision of regulated services and for different ports. These are limited only to financial accounts and are only required to be produced to ESCOSA. These accounts therefore do not provide any transparency to users regarding cross subsidisation or the efficiency or cost-orientation of pricing for monopoly services.

93 There is no requirement for Flinders Group to ring fence staff, functions or roles between regulated and contestable activities. For example, the regime does not deal with:

- conflicts of interest at an employee, CEO or board level;
- restraints on shared roles, secondments and lines of reporting;
- remuneration or incentives within the Flinders Group, and which incentivise discriminatory conduct and cross-subsidisation.

94 The NCC has rightly identified the importance of the, currently absent, ring-fencing provisions, and the need to reform the Access Regime:

> *Ring fencing provisions are a potent means of addressing the risk of transfer pricing and preferential treatment that can arise where a facility owner is vertically integrated. However, other than requiring separate accounts, none of the Clause 6 Principles require ring fencing expressly. The Council considers that the omission*

[41] NCC final recommendation, p. 53, available at: https://ncc.gov.au/images/uploads/SA_Ports_-_FINAL_-_NCC_Final_Recommendation_-_29_September_2021.pdf.

[42] NCC final recommendation, p. 114, available at: https://ncc.gov.au/images/uploads/SA_Ports_-_FINAL_-_NCC_Final_Recommendation_-_29_September_2021.pdf.

of ring fencing provisions in and of itself would not render an access regime ineffective. Inclusion of appropriately designed ring fencing requirements that apply to services regulated by the Access Regime may, however, further improve a regime that is otherwise effective within the meaning of s 44M(4)(a) of the CCA.[43]

95 See also the discussion on ring-fencing by the NCC in relation to the protection of confidential information, below.

96 In the absence of such provisions, it is again little surprise, therefore, in this context, that Flinders Group have increased the level of integration across their business activities and have led to serious and anti-competitive outcomes - see **Appendix A** to this submission.

4.4 Protection of commercially sensitive information

97 No workable access regime in Australia would fail to address ring fencing of commercially sensitive information. However, there is no provision dealing with information security and ring fencing in the South Australian port access regime. Other than in the context of information disclosed during arbitration process, there is, in fact, not a single reference to confidentiality in the MSA Act.

98 The NCC has also acknowledged the absence of provisions that expressly protect confidential/commercially sensitive information and advocated for the need for reform:

> *The Council also notes that the MSA Act does not contain provisions that expressly protect confidential information disclosed by an access seeker to the facility owner from improper use and disclosure to affiliated bodies, or establish staffing arrangements between the facility owner and affiliated bodies that avoid conflicts of interest.*
>
> *As a result of the factors outlined above, the Council accepts there is some risk that an integrated entity, such as Flinders Ports, could engage in conduct that could eliminate competitors or deter potential competitors from entering related markets under the Access Regime.*
>
> *…*
>
> *The Council considers that the risk of confidential and/or commercially sensitive information obtained by Flinders Ports' employees being passed on and/or used by other businesses in the Flinders Group may represent a concern that is difficult to remedy via arbitration of an access dispute.*[44]
>
> *…*
>
> *The Council considers that the omission of stronger ring fencing provisions applying to regulated services in the MSA Act means there is a real risk of misuse of confidential information and business plans that an access seeker may make known to Flinders Ports during negotiations for access to its services. Provisions allowing for the arbitration of disputes and awards appear may not be adequately equipped to address the risk of commercially sensitive business plans of an access seeker being brought to the attention of Flinders' staff who work across both its ports and downstream operations. To this end, the Council considers that it would be desirable for South Australia to consider introducing ring fencing and*

[43] NCC final recommendation, p. 111, available at: https://ncc.gov.au/images/uploads/SA_Ports_-_FINAL_-_NCC_Final_Recommendation_-_29_September_2021.pdf.

[44] NCC final recommendation, p. 115, available at: https://ncc.gov.au/images/uploads/SA_Ports_-_FINAL_-_NCC_Final_Recommendation_-_29_September_2021.pdf.

confidentiality provisions aimed at mitigating the risk of misuse of confidential information to the MSA Act in the future and would encourage ESCOSA to consider recommending such reforms as part of its upcoming Ports Access and Pricing review.[45]

…

The Council considers that the risks of misuse of confidential information by Flinders Ports and discriminatory or preferential treatment favouring its related entities could be addressed by reforms to the MSA Act introducing ring-fencing and confidentiality requirements for regulated services. As noted, the Council recommends that ESCOSA consider recommending such reforms.[46]

99 Once again, the failure to include express protections of commercially sensitive information has been shown to give rise to sharing of Qube's competitively sensitive information within Flinders Group, in order to benefit the competitive activities of Flinders - see **Appendix A** to this submission.

4.5 Audit and reporting

100 There is no meaningful audit or reporting mechanism under the South Australia port access regime.

101 Amongst other things, users of South Australian ports do not have any confidence that Flinders Ports provides non-discriminatory pricing to its downstream stevedoring and logistics operations.

102 At most, the MSA Act sets out a process for access seekers to request information from Flinders Ports as part of a request for access. ESCOSA has developed a guideline on the requirements for price information that Flinders Ports is required to provide access seekers under the MSA Act.[47] ESCOSA designed the guidelines to oblige Flinders Ports to provide price information to access seekers that:[48]

- facilitates the negotiation of access on fair commercial terms;
- informs access seekers of their right to price information under the Ports Access Regime;
- is available in a timely manner; and
- is detailed, to a practical degree.

103 This price information is provided to the access seeker in the form of a price information kit. According to the Guideline, this price information kit must contain:[49]

- a statement of the regulated services that the Flinders Ports provides in each Proclaimed Port;

[45] NCC final recommendation, p. 115, available at: https://ncc.gov.au/images/uploads/SA_Ports_-_FINAL_-_NCC_Final_Recommendation_-_29_September_2021.pdf.

[46] NCC final recommendation, p. 120, available at: https://ncc.gov.au/images/uploads/SA_Ports_-_FINAL_-_NCC_Final_Recommendation_-_29_September_2021.pdf.

[47] ESCOSA Port Industry Guideline no.1, Access Price Information, dated May 2010, available at: https://www.escosa.sa.gov.au/ArticleDocuments/226/100324-PortsGuidelineNo1-AccessPriceInformation.pdf.aspx?Embed=Y.

[48] ESCOSA Port Industry Guideline no.1 at paragraph 3.1.1.

[49] ESCOSA Port Industry Guideline no.1 at paragraph 3.2.2.

- the then current price list (as required under the most recent Ports Price Determination) for those regulated services that are also Essential Maritime Services;[50]

- the then current schedule of pilotage charges if the Regulated Operator supplies pilotage services;[51]

- a statement as to the Regulated Operator's general pricing policies for any other Regulated Services, including indicative price ranges where appropriate; and

- a statement informing the access seeker that if their requests involve new capital investments then the price information provided may require adjustment to reflect those additional capital costs and noting that both parties will need to discuss such requests further in good faith.

104 None of the above provides an alternative to a robust and independent audit and reporting framework in relation to pricing of monopoly services.

105 Moreover, the regime expressly allows for Flinders Ports to engage in price discrimination without any controls on Flinders Ports to prevent it from offering preferential prices and terms to its own related entities. ESCOSA's current price determination sets out additional requirements on Flinders Ports in relation to publication of prices and reporting requirements, as follows:[52]

> *"**2.1 Published Prices***
>
> *2.1 .1 For the term of this price determination, a regulated service provider must set and publish on its website, in a prominent and readily accessible position, a comprehensive list of its prices for the provision of essential maritime services for each financial year, prior to the commencement of that year.*
>
> *2.1.2 A regulated service provider must publish on its website any changes to its list of prices set in accordance with clause 2.1.1 within two business days of those prices being changed.*
>
> *2.1.3 A regulated service provider and a customer may reach agreement for the provision of essential maritime services at a price that differs from the prices set or published in accordance with clauses 2.1 .1 or 2.1.2* (emphasis added).
>
> *…*
>
> ***2.3 Reporting Requirements***
>
> *2.3.1 A regulated service provider must provide the Commission with a copy of its list of prices, as set and/or published in accordance with clauses 2.1.1 or 2.1.2, within 10 business days of that list being set and/or published.*

[50] The current price determination was made on 31 October 2017 and is effective to 30 October 2022. This is available at: https://www.escosa.sa.gov.au/ArticleDocuments/1139/20171009-Ports-AccessAndPricingReview-PriceDetermination2017-2022.pdf.aspx?Embed=Y.

[51] The current schedule of Pilotage Charges (effective from 1 July 2020) is available at: https://www.flindersports.com.au/ports-facilities/port-charges/.

[52] ESCOSA Price determination dated 31 October 2017, available at: https://www.escosa.sa.gov.au/ArticleDocuments/1139/20171009-Ports-AccessAndPricingReview-PriceDetermination2017-2022.pdf.aspx?Embed=Y.

2.3.2 A regulated service provider must inform and give relevant details to the Commission of any agreements reached under clause 2.1 .3 during each financial year of the period, no later than three months after the end of that financial year.

2.3.3 A regulated service provider must make available to the Commission any information relating to prices that is reasonably requested by the Commission.

2.3.4 A regulated service provider must provide to the Commission, at the Commission's request, reasons for any increase in prices." (emphasis added).

106 Whilst the guidelines appear to equip ESCOSA with the means to access information that might enable it to identify instances of potential price discrimination by Flinders Ports, this process is ex-post and does not prevent Flinders Ports from engaging in such practice. Further, only few obligations set out under the Guidelines have the force of law and attract consequences for non-compliance. For example:

- failure to maintain a schedule of current pilotage charges and provide, at the request of a member of the public, a copy of the current schedule of charges attracts a penalty of $2,500 under the MSA Act;[53] and
- failure to provide ESCOSA with a copy of the proposed new schedule of pilotage charges and a description of the changes and the reasons for those changes attracts a penalty of $2,500 under the MSA Act.[54]

107 Importantly, there is no consequence under the MSA Act for non-compliance with the requirements to provide information relating to any agreements reached between Flinders Ports and access seekers during the financial year – and there is no prohibition on price discrimination, in any event.[55]

108 Simply put, there is nothing in the MSA Act that provides any transparency over the terms and conditions on which Flinders Ports provides access to monopoly services to its related entities, nor any express prohibition that would prevent Flinders Ports from favouring its own downstream entities when setting prices.

109 **Appendix A** sets out further practical examples of how this inadequate framework has permitted Flinders Ports to favour its own operations through non-transparent bundling of services.

4.6 Price dispute mechanism

110 It is well recognised that vertical integration of a privately-owned monopoly infrastructure owner presents a risk that the monopoly owner will seek to leverage its market power by engaging in bundling of services, or cross-subsidization of services, to advantage its downstream business. This risk is heightened in circumstances where there is a lack of transparency around the processes by which prices are set.

111 In response to this risk, and the highly integrated nature of the Flinders Group, the South Australian ports access regime does not meaningfully address pricing at all.

[53] Section 8(1) of the MSA Act.

[54] Section 8(2) of the MSA Act.

[55] See also section 9 of the MSA Act, which states that "*[a] standard issued by the Commission … is for guidance of those engaged in maritime industries and does not have the force of law.*"

112 The NCC Certification Guidelines recognises that, in the context of vertical integration, there is a need to include provisions in an access regime that prevent (as opposed to simply detect ex-post) price discrimination:

> *"[v]ertical integration creates opportunities for transfer pricing and preferential treatment of affiliate businesses over third parties" … and that "[r]ing fencing arrangements may be required in some industries, particularly those where a facility owner operates, or has interests in, the same markets as those in which third party access seekers participate."*[56]
>
> *…*
>
> *"[U]nder an effective access regime, a service provider cannot unfairly discriminate between access seekers. An effective access regime must also include provisions consistent with clauses 6(5)(b)(ii) and (iii). Accordingly, in the event of an access dispute resulting in regulated prices, price discrimination will only be allowed where it promotes efficiency (clause 6(5)(b)(ii)) and a vertically integrated service provider will not be able to set terms and conditions of access that favour its own downstream operations (clause 6(5)(b)(iii)). Further, an effective regime must also be consistent with clause 6(4)(m), so that a service provider is prevented from hindering access to the service by imposing unreasonable or discriminatory terms of access."*[57]

113 There is simply no requirement to set pricing or monopoly services at South Australian ports that are cost-orientated and efficient. Moreover, there is no transparency over the costs incurred by Flinders Ports.

114 Approximately half of the MSA Act is devoted to establishing a dispute resolution process for access seekers to resolve disputes on the terms of access. However, this process is focussed entirely on disputes over an access seekers' pricing and terms of access and does nothing to resolve disputes in response to discriminatory pricing by Flinders Ports in favour of related entities, where this impedes competition in related markets.

115 Qube is therefore required to compete in South Australia with *"bundled"* pricing that Qube suspects involves significant cross-subsidisation from tariffs paid by Qube for monopoly port services.

116 An effective price dispute process requires, at least:

- up-front clarity and transparency around pricing principles – with principles that address vertical integration an associated discriminatory pricing risks;
- a process for the provision of information to access seekers without the need to trigger a dispute; and
- quick and timely resolution of disputes.

117 The fact that there have been no arbitrations under the MSA Act is not a sign of success, but of failure.[58] The discretion to refer a dispute to arbitration lies with ESCOSA. Section 18(2) of the MSA Act states that ESCOSA need not refer a dispute to arbitration if, in its opinion:

[56] NCC Certification Guidelines at paragraphs 5.75 to 5.77.

[57] NCC Certification Guidelines at paragraph 5.9.

[58] South Australian Government's application for re-certification, dated 22 January 2021, section 7.1.2.

- the subject-matter of the dispute is trivial, misconceived or lacking in substance; or
- the parties have not negotiated in good faith; or
- there are other good reasons why the dispute should not be referred to arbitration.

118 There is nothing in the MSA Act that states what may comprise *"good reasons"* not to refer a dispute to arbitration. The fact that there have been no arbitrations may reflect a tendency of the regulator not to refer the disputes to arbitration. In these circumstances, parties are left with little or no option but to settle the dispute.

4.7 Operational performance standards and reporting

119 The MSA Act does not provide for any minimum operational standards – or any reporting of the relative performance of Flinders Ports in providing services to its own downstream operations (e.g., Flinders Logistics) relative to competitors.

120 The MSA Act similarly does not address operational reporting to the ESCOSA, customers or any other independent body to enable third parties to assess the non-discriminatory provision of services at South Australian ports.

5 Comments on ESCOSA methodology for this review

5.1 Background

121 Qube wrote to ESCOSA on 25 June 2021 setting out detailed observations regarding the methodology used to undertake past reviews of the Access Regime and concerns regarding the approach adopted this year. A copy of this letter appears at **Appendix E** to this submission.

122 In summary, Qube makes the following submission regarding ESCOSA's past reviews:

(a) In its 2012 and 2017 reviews, ESCOSA's stated methodology has been to apply a 'structure-conduct-performance' paradigm (**SCP**), seeking to address the following questions:

- Does the structure of the market create the potential to exercise market power for the providers of Regulated Services, EMS and Pilotage services?
- Based on the conduct and performance of those providers, is there evidence of market power being exercised?

(b) In relation to the first question, ESCOSA has been prepared to accept that the monopoly position of Flinders Ports creates the potential for it to exercise market power and that this is unlikely to change over the medium term.[59] However, ESCOSA found in answering the second methodological question that there has been no evidence of port operators exercising such market power.

(c) In reaching this view, ESCOSA's methodology has focused on testing conduct based on a largely 'one-dimensional' assessment of whether port charges for regulated services were being set at a level which indicated an exercise of market power (in particular, monopoly pricing).

[59] 2017 Ports Access and Pricing Review, page 2 and 16.

(d) The evidence assessed by ESCOSA, in this regard, appears limited to:

- benchmarking of ports charges with other Australian ports, conducted by GHD Pty Ltd (GHD) for ESCOSA;
- an analysis of Flinders Ports' regulatory accounts;
- commercial information provided by Flinders Ports and Viterra concerning negotiations with port users;
- the absence of any access or pricing disputes in the current prescribed period; and
- submissions made by stakeholders.

(e) While ESCOSA acknowledged that both Flinders Ports and Viterra were vertically integrated operators, and that this created incentives for anti-competitive behaviour, the methodology used by ESCOSA applied in its reviews did not address these risks.

(f) Rather, the methodology used examined only unilateral price effects (i.e., excessive or monopoly pricing for regulated services) – and not the anti-competitive risks associated with vertical conduct, both price and non-price.

123 Qube wishes to make three principal observations in response to this prior experience with ESCOSA port reviews:

- **First**, reliance on the SCP paradigm is dated and does not reflect regulatory best practice – particularly in the context of the South Australian port markets, where the approach has failed to evolve to recognise the dynamic competition risks associated with vertical integration.
- **Second**, the methodology used to test market conduct (based almost wholly on the pricing for regulated services) is one-dimensional and inadequate.
- **Third**, the evidence used to test market conduct is extremely limited, failed to acknowledge concerns raised by stakeholders, and did not consider or investigate other readily available market evidence relevant to any robust assessment of market power.

124 Each will be addressed briefly below.

5.2 Limitations of the SCP paradigm in assessing regulation of vertically integrated markets

125 Whilst the SCP methodology can be useful in undertaking a static assessment of whether market power is being (or has historically been) exercised, the SCP has well known limitations, including:

- its static nature;
- the directional focus (structure to conduct to performance), which fails to account for the potential for a feedback loop where structure and conduct might affect one another in different ways; and
- the failure of the SCP to consider inter-firm rivalries and strategic behaviours (especially with respect to entry deterrence and barriers to expansion).

126 These limitations are well known and were identified by the Australian Competition Tribunal in *Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2* (**Chime Case**). The Tribunal observed that the static SCP paradigm has been critiqued by numerous economists in favour of more dynamic forms of market analysis.[60] Notably, while a form of SCP was applied by the Tribunal in this case, it was not the method applied by the ACCC (and indeed we are not aware of the ACCC or any other Australian regulators routinely adopting this method).

127 The limitations of SCP identified by the Tribunal in the Chime Case are particularly important in relation to the SA Ports Regime. The increasing vertical integration of Flinders Ports means that the risk of strategic behaviour and "feedback loops" is acute. Flinders Ports has the strong, and growing, ability and incentive to act in ways that undermine the conditions for competition over time.

128 A static SCP assessment is likely to miss this risk of competitive conditions being degraded in future as a result of the increasing vertical integration of Flinders Ports.

129 Moreover, Qube submits that the MSA Act does not call for ESCOSA to undertake an *ex post* analysis of whether market power *has been exercised*. That would reflect an exercise in closing the regulatory gate only after there is evidence that the horse has already bolted. The focus of any review under s 43 of the Act should be on testing whether the regime does enough to *guard against and mitigate* anti-competitive behaviour and thereby facilitate competition in related markets in the future.[61]

130 A methodology that appears, at least in practice, to require users to establish actual misuse of vertical power by Flinders Ports would do little more than duplicate s 46 of the CCA.

5.3 Flawed reliance on reference pricing as the primary test of any competitive effects of market power

131 ESCOSA relies heavily on an analysis of prices for regulated services as the primary test of whether the SA Ports Regime is effective.

132 In describing its approach to assessing the pricing regime under the Act, ESCOSA states:[62]

> ***Intended outcome: fair and reasonable prices***
>
> *The Commission has assessed this outcome by considering the following:*
>
> – *the extent to which customers are entering into commercial agreements to use Maritime Services*
>
> – *where agreements are being entered into, whether or not the commercially negotiated charges are below those in the published pricing schedule, and*
>
> – *whether or not port operators have been earning excessive profits.*

133 Whilst Qube does not dispute that pricing for regulated services is a relevant consideration in assessing the effectiveness of the Access Regime, focusing on this as

[60] *Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2*, [25]-[28].

[61] ESCOSA has acknowledged this objective, acknowledging that the regime is "*intended to protect the interests of port users from the potential exercise of market power by port operators*" – see 2017 Ports Access and Pricing Review, page 1.

[62] 2017 Ports Access and Pricing Review, page 31.

the primary criterion fails to adequately test the conduct of Flinders Ports, including because:

- First, and most evidently, the approach adopted by ESCOSA is limited to assessing pricing conduct and does not assess the significant competition risks associated with non-price conduct – such as internal sharing of confidential and sensitive information of downstream competitors, operational discrimination, staff sharing etc.

- Second, the focus of the price analysis appears to be on the potential for Flinders Ports to earn excessive profits from regulated services (i.e., monopoly pricing) and not the risk of discrimination in its pricing conduct to favour downstream related entities.[63]

- Third, while ESCOSA looked at evidence (provided by Flinders Ports) of *"successfully"* negotiated, non-standard pricing with port customers, this does not appear to involve any meaningful analysis of whether pricing with other related Flinders entities involved discrimination, bundling or cross subsidies. Indeed, there appears to be limited, if any, robust and transparent testing by ESCOSA of pricing conduct within the Flinders Group, including any imputation analysis of bundled services involve cross-subsidies or predatory bundling conduct, and whether discounts applied to related entities are non-discriminatory.

- Similarly, the review by ESCOSA of Flinders Ports' regulatory accounts appears limited to testing for excessive profits.

134 This approach contrasts sharply with economic analysis typically used, in other contexts, to test pricing conduct by operators in vertically integrated markets containing market power.

135 For example, when Telstra's fixed-line operations were vertically integrated (i.e., prior to rollout of the NBN and Telstra's structural separation), the ACCC closely monitored and regulated not just the overall *level* of Telstra's pricing, but also its relative pricing and service levels between different layers of the supply chain. The economic tools deployed by the ACCC included public reporting of Telstra's regulatory accounts an associated imputation testing, to identify any potential price squeeze issues.

136 The imputation testing framework sought to identify whether headroom existed between Telstra's retail prices and the access charges it imposed on access seekers sufficient to allow access seekers to compete at the retail level.[64] This is consistent with longstanding economic approaches to assessing and identifying margin squeeze, discriminatory and predatory bundling and foreclosure conduct, in Australia and overseas.

5.4 Limitations in the evidence reviewed

137 Finally, the narrow ambit of the methodology used by ESCOSA in 2012 and 2017 also meant that it failed to have regard to a range of relevant and important market evidence. For example:

- the evidence and concerns raised by Qube and others, as part of the review process, regarding discriminatory conduct by Flinders Ports – which were raised in confidential submissions in both 2012 and 2017, but appear not to have informed

[63] 2017 Ports Access and Pricing Review, pages 32-35.

[64] See, for example: ACCC, Imputation Testing and Non-price Terms and Conditions Report Relating to the Accounting Separation of Telstra for the December Quarter 2009, March 2010.

ESCOSA's approach (these are discussed in sections section 3, 2.3 and **Appendices C** and **D** to this submission);

- public announcements and other evidence of growing vertical integration by and within Flinders Ports, including evidence regarding the corporate and organisational structure of the Flinders Group;

- information to explore or test the robustness of any voluntary ring-fencing measures (including information protocols or staff separation), internal structure charges, remuneration incentives, customer and marketing materials etc; and

- analysis of market dynamics – including customer switching and market share growth by Flinders entities in related and contestable vertical markets;

138 Finally, to the extent that ESCOSA appears to have relied upon the absence of any access or pricing dispute under the Access Regime as a measure of the effectiveness of the regime – this is misplaced. The dispute mechanism under the Access Regime is narrowly focused around disputes arising from negotiation of access terms and does address the potential for disputes to arise concerning the behaviour of vertically integrated operators. It is also now apparent that it is a dispute process only available to shipping lines – which are substantial global players with bargaining power and which have little need for such a regime in their dealings with Flinders.

139 The NCC acknowledged that the absence of a dispute tells ESCOSA nothing regarding the existence, or use, of market power:

> *… the Council considers that parties may not have raised an access dispute to address their concerns if they felt they could not be adequately be addressed via arbitration. The Council considers that the absence of access disputes notified to ESCOSA does not necessarily demonstrate that market power is not being misused.*[65]

5.5 A suggested approach to ESCOSA's 2022 review

140 Qube submits that ESCOSA should adopt a more robust approach to assessing the adequacy of the Access Regime, for the purpose of undertaking its 2022 review.

141 Whilst Qube does not object to the SCP method being used by ESCOSA as *one tool* to assess the effectiveness of the Access Regime, it should not rely upon SCP analysis as the *sole* means of assessing the regime's effectiveness. Rather ESCOSA should supplement its traditional and static SCP analysis with modern conceptual tools better suited to testing the Access Regime's response to the most evident competition policy risk currently affecting the South Australian ports sector: Flinders Ports' vertical integration.

142 In undertaking its 2022 Ports Review, Qube invites ESCOSA to consider the following adjustments to its methodology:

- Any review should test whether the scope, structure and practical operation of the Access Regime is adequate in the circumstances. This may include, for example:

  – Is the approach to regulation still the most appropriate – i.e., is a model based around a negotiate/arbitrate process for a narrow set of 'regulated services' the most appropriate means of addressing the risk of

[65] NCC Final recommendation, dated 29 September 2021, p. 112, available at: https://ncc.gov.au/images/uploads/SA_Ports_-_FINAL_-_NCC_Final_Recommendation_-_29_September_2021.pdf.

discrimination, misuse of market information and foreclosure caused by the vertically integrated nature of Flinders Ports?

- Is it appropriate that it benefits only access seekers, and does not provide any process for existing access holders?

- Is the referral of disputes to an arbitrator appropriate, given the nature of the disputes that may be raised (and the nature of the complaints that have been received by ESCOSA over the last decade regarding Flinders Ports' conduct)?

- Does the regime provide adequate regulatory transparency and oversight of price and non-price performance to stakeholders, including port users that compete with Flinders Ports in downstream markets?

- ESCOSA should adopt a methodology that tests the extent to which the Access Regime addresses and mitigates the incentive and ability that Flinders Ports holds (as a vertically integrated, monopoly operator) to:

  - directly or indirectly raise its rivals' costs – including through cross subsidisation, bundling, price discrimination;

  - discriminate in the operation of infrastructure, to the practical benefit of its own downstream entities; and

  - disclose and use confidential or competitively sensitive information obtained through its role as port operator to benefit contestable businesses.

- ESCOSA should have regard to all relevant evidence. This should not be limited to a 'desktop review' of pricing for prescribed services and Flinders Ports' regulated accounts. ESCOSA should use the review to properly and transparently investigate and assess:

  - developments in relevant downstream or related markets over the relevant period where Flinders Ports (or its related entities) operates – including the extent and nature of vertically integrated activities and the nature of the interaction between those activities and port operations;

  - the commercial and organisational structure of the Flinders Group – including reporting lines, remuneration structures etc and the incentives that this creates for anti-competitive and discriminatory behaviour;

  - what, if any, protections exist for competitively sensitive information of port users to be made available to staff or business units within the Flinders Group; and

  - what level of transparent reporting and oversight exists over non-price conduct, including the scope for operational discrimination in favour of Flinders Ports' related and contestable business activities.

- ESCOSA must properly engage with all complaints, even if confidential. It must be recognised that many stakeholders will be reliant upon Flinders Ports and that complaints will, at times, only be made on a confidential basis.

- ESCOSA should canvass best practice regulatory models for addressing vertical integration in regulatory models governing monopoly infrastructure, including regulatory experience in ports (AAT and MIRRAT s87B undertakings, DBCT access undertaking), telecommunications (Telstra Structural Separation

Undertaking), below rail infrastructure (Aurizon UT5 access undertaking) and energy markets (AER Ringfencing Guidelines), amongst others.

143 ESCOSA should avoid conclusions that are not supported by evidence or which ask the wrong statutory question. For example:

- The absence of access disputes may not reflect the effectiveness of the Access Regime, so much as it provides evidence of the ineffectiveness and inadequacy of the dispute process itself.
- The statutory review mechanism should ultimately operate to restrain a vertically integrated port operator from having the ability to use market power to engage in conduct that distorts or diminishes competition in related markets. It cannot be the case that evidence of actual misuse of market power is required to be established.
- Levels of investment by Flinders Ports may say little about the effectiveness of the regime – but may point instead to the excess monopoly returns available to the operator, as well as its capacity to generate supra-normal profits in related markets (through discriminatory or preferential conduct).

144 ESCOSA therefore needs to approach sceptically – and to appropriately test with evidence – the arguments for *"light touch"* regulation that have been repeatedly raised by Flinders Ports in previous reviews.

6 Conclusions

145 The issue of access regulation and privatised infrastructure is of national importance.

146 Within this policy context, the South Australian ports access regime is outdated and inadequate, particularly when taking into account the high degree of vertical integration that has been permitted to develop over the last decade within the South Australian port supply chain.

147 By contrast, the Commonwealth, other states and the ACCC itself have developed and implemented best practice measures to address the risks to investment and competition associated with monopoly assets becoming controlled by vertically integrated firms.

148 While each of these regimes operate in a different context, in addressing the competition concerns raised by vertical integration, they share a number of common attributes:

- they have objects and scope that target any services supplied by a monopolist to downstream competitors in dependent markets;
- a clear requirement for open and non-discriminatory provision of services, which is overseen appropriately and is enforceable directly by users (and which needs to be defined in detailed and concrete terms in relation to the various services and markets involved – e.g., in the case of ports, with specific rules around berth prioritisation, cargo hold times and costs etc);
- clear, transparent and appropriately enforceable ring fencing of monopoly business activities from contestable activities;
- appropriate mechanisms to protect the security and confidentiality of competitively sensitive information and with appropriate auditing of those systems;

- appropriate structural or functional separation of staff, addressing both the risk of shared roles, as well as remuneration structures which provide incentives for staff to discriminate;

- a public and independent audit and reporting process to ensure appropriate discipline around compliance;

- a transparent pricing process that ensures cost-orientated and efficient pricing for monopoly services – with a clear dispute process for users to contest port pricing which appears not to be cost-orientated or which otherwise appears to provide for cross-subsidisation; and

- an accessible and robust process for non-price disputes.

149 By contrast to this best practice model for addressing vertical integration, the Access Regime fails to meaningfully address ***any*** of the above requirements.

150 The 'on the ground' commercial experience of Qube and other stakeholders at South Australian ports provide practical case studies in how an inadequate regulatory regime can permit anti-competitive outcomes.

151 Qube therefore supports a fundamental overhaul of the MSA Act to bring it into line with contemporary regulatory standards. Absent such reform, the Access Regime will continue to be of little practical utility to users such as Qube.

152 Qube considers that if the Access Regime cannot be substantially amended, it should be allowed to lapse, so that work can be undertaken on a new, modernised regime that is fit for purpose to ensure the promotion of competition and investment in South Australian port supply chains.

Appendix A – Qube's practical experiences with the inadequacy of the South Australian ports access regime

1.1 Staff sharing across monopoly and contestable activities

1 Qube has been informed by a Flinders Port representative of a change in management structure that removes any separation between Flinders Ports and Flinders Logistics.

2 For example, Qube understands that:

- the Stevedoring Operations Manager at Flinders Logistics now reports to the General Manager of Finders Ports; and
- Port services, such as the Mooring teams, now report to the Stevedoring Operations Manager at Flinders Logistics.

1.2 Misuse of commercially sensitive information and leveraging by Flinders of its position as port operator

3 The Flinders Ports commercial team, who Qube negotiate lease agreements and stevedoring licence agreements through, are actively looking to secure stevedoring work for Flinders Logistics.

4 For example, Qube recently held a meeting with a number of customers in which it invited a Flinders Ports commercial representative to attend. Immediately following the meeting, one of Qube's customers was approached by the Flinders Ports representative in the car park, who said words to the effect *"it will be good if Flinders Logistics can do your stevedoring work"*. The customer notified the conversation with Qube and identified the conversation as a clear conflict of interest.

1.3 Discrimination in the provision of access to South Australian port infrastructure

5 Access to common user births is typically decided on a "*first in, first serviced*" basis.

6 Typically, however, ports are able to determine (at their complete discretion) whether certain customers or operators should be afforded priority access at berths, and the conditions for that priority access. Similarly, Flinders Ports is able to enact Port Rules that provide berthing priority to certain vessels.

7 Flinders Ports has enacted rules in relation to priority access at berth 29 which are particularly vague with no clear basis for the conditions which apply to that priority:[66]

> *"To maximise port efficiency if there is likely to be a conflict between two vessels wanting berth 29, preference will be given to vessels that require facilities only available at berth 29 and nowhere else (eg loader, crane etc). Hence fertiliser vessels, livestock vessels and breakbulk vessels which can be handled at other berths will need to berth elsewhere if a clash / conflict exists or is likely to occur."*

8 In Qube's experience, this rule has had the effect of prioritising Flinders Ports' downstream customers over those of other downstream providers without any clear efficiency basis is to warrant the priority berthing.

9 Qube's customers primarily operate from common user berths 18 to 20. However, vessels will often also require access to berth 29 during peak periods, when berths 18 to

[66] Rule 1.5.2.5 of the Port Rules for Port of Adelaide.

20 are at capacity. While Qube's customers can use berth 29, given the various priority arrangements at this berth, Qube's customers are often denied access to this common user berth on the basis that a priority vessel is due to berth within the next 48 hours.

10 As a result, at peak times, Qube's customers can often be required to wait up to 10 days in order to berth while berth 29 is underutilised. Flinders Logistics customers (i.e. those where Flinders provides the stevedoring) are seldom, if ever, required to wait.

1.4 Discriminatory capital expenditure and investment

11 Qube's experience has been that Flinders Ports prioritises infrastructure spending in those areas and berths in which its downstream services primarily operate (e.g., the services provided at berth 29, where Flinders Logistics' customers tend to have priority access).

12 Whilst Qube understands that some of the infrastructure at berth 29 may be funded and owned by end customers, there is no visibility over the source of funding for what appears to be substantial infrastructure spending at berth 29.

13 Infrastructure spending at other, common user berths and PCC berths has been overlooked or has not been similarly prioritised.

1.5 Access to superior warehousing facilities

14 Flinders Warehousing and Distribution has taken over a lease on a warehouse located in the Outer Harbour at Port of Adelaide, next to the Flinders container terminal. The warehouse is owned by MTAA Super, which currently holds a 20.81% interest in Flinders Ports Holdings Group.[67]

15 At this warehouse, Flinders Warehousing and Distribution has been able to open the "back door" from the container terminal to the warehouse, meaning that containers are able to be taken directly from a ship to the warehouse using reach stackers. This same access is not available to other service providers who have warehouses at Port Adelaide, who instead are required to hire trucks in order to transport containers from the ship to the warehouse, increasing cost to the customer.

16 Qube is concerned that there is no visibility over the terms by which Flinders is entering these commercial arrangements (e.g., a lease) with parties that have an interest in the Flinders Group.

1.6 No protection against disclosure of commercially sensitive Qube information within Flinders Group (i.e. to a competitor, Flinders Logistics)

17 The lack of any meaningful functional separation or ring fencing within Flinders Group means there are no apparent constraints on the disclosure of commercially sensitive information between Flinders Ports and Flinders Logistics.

18 In Qube's experience, it is not uncommon for a representative of Flinders Ports to attend meetings with Qube customers to help Qube deal with questions related to port services and infrastructure. In situations where there is only one customer present, Qube may be discussing commercially sensitive information about the terms and conditions of the provision of services to Qube customers.

19 Qube has previously raised this concern with a Flinders Ports representative. The Flinders Ports representative conceded that commercially sensitive information provided

[67] Flinders Ports Holdings Group website, Shareholders, available at: flindersportholdings.com.au/about/shareholders/.

by Qube may be accessible and used by other divisions of Flinders Group, including Flinders Logistics. However, perhaps more concerningly, the Flinders Ports representative then stated that if Qube wanted to do anything about that, it would need to complain to the ACCC – inferring that:

- the Flinders Ports representative did not intend to seek to take any action to rectify the issue; and
- the existing South Australian port access regime offered no protection to Qube from this kind of anti-competitive behaviour.

1.7 Bundling and cross-subsidisation of contestable services

20 Qube understands that mooring services are 'packaged' into the Flinders Ports services charges. The current Port Charges effective June 2020 to July 2021 state that the Harbour Service Charges for ships at Port Adelaide and the other ports "includes mooring".68

21 As such, it is impossible for Qube to attempt to secure mooring work in circumstances where clients are already paying for mooring as part of the port services charge.

22 More generally, Qube has no transparency over the terms which Flinders Ports provides services to its own related entities – and has no way to test whether pricing charged by Flinders Ports for access to monopoly berth infrastructure is efficient or cost-orientated. There is no meaningful transparency or any dispute process.

23 Qube is concerned that Flinders Ports is engaging in bundling of services and cross-subsidisation across its monopoly and contestable activities.

[68] Flinders Ports Port Charges, effective 1 July 2020, page 4, available at: https://www.flindersports.com.au/wp-content/uploads/Port-Charges-from-1-July-2020-to-30-June-2021_Version2_update-1022021.pdf.

Appendix B – examples of best practice regulation of vertically integrated monopoly assets

1.1 Queensland rail access regime

1 The Queensland rail access regime is substantial and comprehensive and comprises:[69]

- the Queensland Competition Authority Act 1997 (Qld) (**QCA Act**));
- an access undertaking accepted by the QCA from Aurizon Network Pty Limited, which is a vertically-integrated operator of the below rail network comprising the Central Queensland Coal Network;
- an access undertaking accepted by the QCA from Queensland Rail Limited, which operates certain other freight and passenger routes; and
- various other legislative provisions dealing with rail safety.

2 The QCA Act expressly provides that:

- in the course of negotiations and providing access to a service, an access provider must not unfairly differentiate between access seekers, in a way which has a material adverse affect on their ability to compete with other access seekers;[70]
- an access provider cannot hinder access (similar to the Access Regime), though under the QCA Act this expressly includes circumstances where the access provider provides, or proposes to provide, access to itself (or a related body corporate) on more favourable terms than the terms on which it provides access to a competitor;[71]
- an access provider cannot disclose information given by the access seeker during negotiations, without their consent;[72]
- parties can obtain relief to remedy certain conduct (such as hindering of access) or contraventions of an access agreement;[73]
- the QCA has extensive powers to seek information, investigate and enforce breaches of the access regime – including any failure to comply with an access undertaking in place under the QCA Act.

3 In addition to the obligations in the QCA Act, specific requirements for ring fencing, functional separation and restrictions on use of confidential information are set out in access undertakings approved by the QCA – and, under the QCA Act, the regulator has powers to mandate such terms.

4 A mandatory access undertaking submitted by Aurizon and accepted by the QCA in 2017 (UT5) deals extensively with ring fencing and non-discrimination issues (as well as reporting and compliance processes).

[69] The Queensland Government application for recertification at page 4.
[70] QCA Act, ss 100(2), 168C.
[71] Section 104(2) and (3).
[72] Section 101(6).
[73] Sections 152–3.

5 In a recent re-certification application made to the NCC by the Queensland Government in respect of the Queensland rail access regime, the Queensland Government summarises the UT5 provisions well:[74]

> *Ring fencing provisions under UT5 Part 3 of UT5 details a number of ring fencing measures relating to organisational structure, accounting and confidentiality arrangements. Specifically, the provisions of Part 3 ensure that access provided by Aurizon Network is managed and supplied independently from other members of the Aurizon Group who compete in upstream and downstream markets that depend on access to the service utilising the rail infrastructure.*
>
> *Clause 3.8 of UT5 requires Aurizon Network to develop financial statements that separately identify Aurizon Network's business in respect of the supply of the declared services from other business conducted by the group. Clause 3.9 of UT5 requires that Aurizon Network must be governed and managed independently from other Aurizon entities, subject to certain exemptions, including that Aurizon Network may report to the board of Aurizon Holdings as required for the purposes of good corporate governance practices and as required or compelled by any law.*
>
> *Section D of Part 3 of UT5 also ensures that confidential information is not subject to unauthorised disclosure or use by setting out the appropriate treatment of confidential information by Aurizon Network. To further ensure independence, the provisions also restrict the movement of relevant staff within the Aurizon Group so as to help ensure compliance with the ring fencing obligations. Clause 3.5 prohibits employees of Aurizon Network who are involved in the provision of below-rail services to perform work for any Aurizon entity other than Aurizon Network or undertake any work at the direction of a related operator.*
>
> *A complaints process for the investigation of potential breaches of Part 3 is also provided for in Section E of Part 3 of UT5.*

6 The NCC has previously considered that the Queensland access regime, in combination with the role and powers of the QCA, '*provide an appropriate level of comfort that a vertically integrated service provider will be prevented from treating its related businesses more favourably than those of its competitors*'.[75]

1.2 DBCT access regime

7 The other Queensland access regime currently before the NCC governs access to the Dalrymple Bay Coal Terminal (DBCT). This regime, and associated access undertaking, also contains substantial and detailed provisions addressing the risk of discrimination. This regulation of discrimination is the case despite the fact that the operator of DBCT is not vertically integrated.

8 The QCA has very recently finalised its process to accept a new access undertaking in respect of DBCT. Amongst other things, the new undertaking marks a shift from 'ex ante' price regulation by the QCA, first introduced in the early 2000s, to a negotiate/arbitrate model. However, in doing so, the undertaking provides substantial protections for existing access holders (periodically reviewing their infrastructure charges) as well as access seekers.

[74] Queensland Government recertification application – at page 78-79.

[75] NCC, *Final Recommendation: Application for certification of the Queensland Rail Access Regime*, [5.57]: https://ncc.gov.au/images/uploads/CERaQldFR-001.pdf.

9 The DBCT undertaking has had, for many years, detailed rules governing non-discriminatory operation of the port, queuing and prioritisation of requests for access, management of expansion processes (and pricing) as well as minimum service elements.

10 Amendments required by the QCA as part of the recent approval process, in order to facilitate a fair and workable negotiate/arbitrate model, included:

- requiring the operator to disclose detailed cost and price information (with an explanation of methodology used) to inform parties in relation to any negotiation or price dispute;
- requiring the operator to disclose relevant past arbitration outcomes to other users or access seekers;
- facilitating collective negotiations of terms of access;
- providing certainty up front about some key elements of the price (such as costs associated with remediation); and
- providing for principles governing disputes.

11 This highlights the importance of effectively governing any negotiation and dispute process to avoid unfair or discriminatory outcomes – even in circumstances where vertical integration is not present or is limited.

12 While the operator of DBCT is not currently vertically integrated, the DBCT access regime was amended in 2015 to introduce ring fencing provisions in response to:

- the introduction by DBCT of a downstream 'capacity trading business' in 2012, that had introduced an element of vertical integration into the operator's business (the operator no longer provides this service); and
- more directly – significant, "red light" objections that had been expressed by the ACCC in response to a proposal by the owner of DBCT (Brookfield) to acquire the assets of Asciano (which included the above rail operator, Pacific National) and which were based on concerns regarding the incentive and ability that control of the port may provide to discriminate in favour of above rail haulage operations servicing the port.

13 The concerns expressed by the ACCC at the time in relation to vertical integration that would have been caused by the transaction within the port supply chain were expressed as follows:

> *The ACCC is concerned that the vertical integration of Brookfield's Dalrymple Bay Coal Terminal (**DBCT**) with Asciano's Pacific National above rail business would lead to a substantial lessening of competition in the relevant markets in which above rail service providers compete to haul coal to DBCT. This is based on the ACCC's preliminary view that, post-acquisition, Brookfield would have the ability and incentive to foreclose competitors of Pacific National that haul coal to DBCT and will have access to sensitive commercial information of those competitors.*

14 The operator of DBCT proposed amendments to the DBCT access undertaking to directly respond to and address these vertical integration concerns. The draft access undertaking included the following:[76]

[76] DBCT Management, DBCT Access Undertaking – draft access undertaking re: segregation, 9 October 2015.

- commitments to maintain the independence of the DBCT operator from the vertically integrated owner (i.e. a commitment to retain as the operating company a user-controlled entity);

- strong non-discrimination requirements – in relation to the interaction of DBCT with rail haulage operators (being the market in which the issue of vertical integration arose);

- compliance, complaint handling and audit requirements in relation to the ring-fencing arrangements;

- provisions limiting scope for the owner of DBCT to modify the relevant terminal operating regulations in a manner that may preference Pacific National.

1.3 Other relevant regulatory examples

(a) AER Ring Fencing Guidelines

15 The AER Ring Fencing Guidelines were established in 2016 under clause 6.17.2 of the National Electricity Rules in order to address the potential anti-competitive effects associated with electricity distribution network services providers also participating in downstream contestable markets.

16 The legally binding Guidelines variously provide for:

- structural requirements that require any contestable activities to be undertaken through a separate corporate entity;

- accounting separation together with explicit cost allocation and cross subsidy rules;

- functional and staff separation rules – including explicit obligations regarding non-discriminatory provision of monopoly infrastructure services (i.e. distribution network services);

- obligations regarding separate branding of the monopoly and contestable businesses (and associated restrictions preventing cross promotion); and

- confidentiality and information security rules;

- information and compliance reporting requirements – including requiring the publication of a register providing public information in relation to any exceptions made for a service provider.

(b) Australian Amalgamated Terminals Pty Ltd (**AAT**) and Melbourne International RoRo & Auto Terminal Pty Ltd (**MIRRAT**) s87B undertakings

17 The ACCC has required both of the major automatic port terminal operators to enter into s87B undertakings as part of their approval of relevant acquisitions over the last decade because of concerns held by the ACCC regarding vertical integration between port terminal and other activities.77

18 Both the AAT and MIRRAT undertakings are in a similar form and provide for:

[77] Available from the ACCC s87B undertakings register.

- a structural obligation that prevents the terminal operator from engaging in contestable downstream activities (i.e. these must be undertaken through a separate entity)

- strong and explicit commitments to open and non-discriminatory provision of services – including specific requirements to publish non-discriminatory berthing protocols for the relevant automotive terminals with a public process for amendment;

- confidentiality and information security rules as well as staff separation rules;

- minimum training requirements regarding the obligations under each undertaking;

- strong compliance and reporting obligations – including through the appointment of an independent auditor and associated annual compliance reporting (as well as obligations to self-report compliance breaches);

- a price dispute resolution process that provides an annual dispute right under which the expert must assess whether any tariff increases proposed by AAT or MIRRAT comply with cost-based (i.e. building block) requirements; and

- a non-price dispute process.

(c) Part IXC of the Competition and Consumer Act and Telstra's Structural Separation Undertaking

19 Prior to the rollout of the National Broadband Network (which addressed historical vertical integration in relation to Telstra's control of its fixed line network), Telstra was required to put in place a detailed 'Structural Separation Undertaking'.

20 This regime included rules addressing:

- functional separation rules requiring the establishment of a separated and ring fenced wholesale business unit, for supplying wholesale products;

- detailed staff separation rules, including rules governing remuneration of separated staff (to avoid the risk of incentives to discriminate);

- obligations regarding open, non-discriminatory and equivalent supply of services as between Telstra's own business and wholesale customers – including explicit service quality rules and requirements in relation to particular operational issues (such as B2B systems and access to Telstra's exchange buildings and other physical infrastructure such as ducts);

- detailed information security rules;

- quarterly reporting on metrics to test equivalence of supply in products – in addition to detailed information and reporting obligations to the ACCC;

- an accelerated dispute resolution process for dealing with disputes related to discrimination or equivalence concerns.

21 The SSU operated alongside the wider rules in Part XIC of the Competition and Consumer Act, which themselves also provide for setting of prices for regulated services by the ACCC and detailed 'standard access obligations' that require equivalence in the technical and operational quality of services declared by the ACCC as required to be provided to wholesale customers to overcome vertical integration and foreclosure risks.

Appendix C – Qube's correspondence with ESCOSA in relation to the 2012 review

From: Tanya Boyle **On Behalf Of** Michael Sousa
Sent: Thursday, 13 September 2012 9:53 AM
To: 'Peter.Lim@escosa.sa.gov.au'
Subject: Correspondence from Qube Ports

Good Morning,

Please find attached correspondence from Michael Sousa.

Kind Regards,

Tanya Boyle
Executive Assistant

T: +61 2 9005 1110 F: +61 2 9005 1101 E: tanya.boyle@qube.com.au W: qube.com.au

ZERO HARM

13 September 2012

QUBE PORTS Pty Ltd
ABN 46 123 021 492

Level 22, 44 Market Street
Sydney
NSW 2000

T: +61 2 9005 1100
F: +61 2 9005 1101

qube.com.au

Peter Lim
Contact Officer
2012 Ports Pricing and Access Review
Essential Services Commission of South Australia
GPO Box 2605
Adelaide SA 5001

By email: Peter.Lim@escosa.sa.gov.au

Private and confidential

Dear Mr Lim,

PORTS – CONCERNS OVER THE ADEQUACY OF THE CURRENT PRICING AND ACCESS REGIME

Overview of concerns

Qube Ports and Bulk (**Qube**) understands that the Essential Services Commission of South Australia (**ESCOSA**) is currently conducting a review of Port Pricing and Access in South Australia.

Whilst Qube understands that the final report of that review is due 28 September 2012, Qube has concerns over the adequacy of the current pricing and access regime and believes it is in the public interest for ESCOSA to consider these concerns prior to publishing its final report. Qube's interactions and experience with Flinders Ports are directly relevant to ESCOSA's review and Qube is more than happy to arrange a meeting to provide further details and information.

Qube is a competitor to Flinders Ports in the provision of stevedoring services as well as an access seeker of the port facilities required to provide those services. In South Australia, where Flinders Ports owns the port infrastructure, the land lease and the port operating licence for Port Adelaide, Port Lincoln, Port Pirie, Port Giles, Klein Point, Thevenard and Wallaroo and is increasingly venturing into the provision of stevedoring and logistics services in competition with access seekers it is important that there are adequate protections in place to allow fair and commercial interactions with access seekers that foster competition in port services.

Qube has concerns about the sufficiency of the current port pricing and access regime in South Australia. Qube submits that the port access regime under the *Maritime Services (Access) Act 2000* (**MSA Act**), needs to be amended to appropriately regulate vertically integrated port operators such as Flinders Ports who are not only monopoly providers of port services and facilities but also competitors with users reliant on those port services and facilities. In particular, the following issues need to be addressed:

(a) the current access regime needs to ensure the proper use and protection of confidential information held by vertically integrated port operators by virtue of their role as port operator;

(b) the current access regime needs to be expanded to cover a broader list of maritime services including the provision of storage facilities at proclaimed ports. Further clarity is also required around the services that fit under the "loading or unloading vessels by means of port facilities"; and

(c) the arbitration and enforcement provisions under the current access regime need to be strengthened to incentivise parties to behave fairly and commercially and allow quick and commercial resolution where issues arise.

Current commercial example

As an illustration of Qube's concerns, Qube is currently in the process of negotiating with Flinders Ports a lease of the Berth 18 shed at Port Adelaide for the purpose of loading out mineral sands onto ships for export on behalf of Murray Zircon. Flinders Ports in conjunction with SinoTrans was a competitor in the tender for this work.

In the negotiation of the lease, Qube was required to provide Flinders Ports with detailed information on how the services would be provided. The service tendered for by Flinders Ports required commencement (ie, receival of material) by mid October and the negotiation process has been delayed with slow response times and uncommercial terms.

Without the proper protections there is a potential for Flinders Ports to use its position as Port manager to favour its own competing businesses and undermine the capacity of Qube and other access seekers to provide competitive port services. This is of particular concern where, there is time pressure on the ability to win commercial contracts and a competitor for those contracts has the ability to delay the approval process or procedure for required port facilities to gain an unfair competitive advantage. Qube notes that:

- Flinders Ports has in the past refused to allow Qube to operate from Berth 29, while at the same time competing for business against Qube with its own operations at Berth 29.

- The approach of Flinders Ports in the negotiation of the lease of the shed at Berth 18 is delaying and increasing the cost of Qube using Berth 18 as a competitive alternative to Flinders Ports, either as a bulk solution through Berth 29 or by raising the costs of bulk storage and handling and thereby favouring a container logistics solution, and the business interests of Flinders Ports as the sole container terminal operator at Port Adelaide.

- SinoTrans (in conjunction with Flinders Ports) is actively seeking to provide services to Murray Zircon in competition with Qube. Qube is particularly concerned to have received feedback that SinoTrans has advised Murray Zircon that Flinders Ports will never allow Qube to lease or use the Berth 18 shed for this business.

- Qube wrote to the CEO of Flinders Ports expressing its concerns and noting the commercial timeline required for commencement of services to Murray Zircon two weeks ago and has received no response. We have attached this correspondence for your reference.

In light of the commercial background noted above, Qube is concerned that shortcomings in the current access regime may provide Flinders Ports with an unfair advantage in carrying out the part of its business that competes with providers that have no choice but to come to Flinders Ports for access to required facilities. Further information on amendments to the current regime to address these concerns (ie, stronger ring fencing and a more effective confidentiality regime, regulation of all relevant marine services and effective resolution of issues through arbitration and appropriate enforcement mechanisms) is provided below.

As noted above, Qube is also more than happy to meet with ESCOSA and provide further information about its experience and interactions with Flinders Ports when convenient.

Ring fencing and the protection of confidential information

The expansion of Flinders Ports into a vertically integrated port operator that competes with users of its facilities requires greater protection and controls than are currently provided for under the MSA Act.

In this regard, Qube supports Asciano's submission[1] that the vertically integrated nature of Flinders Ports provides substantial scope for the potential misuse of market power. It may be able to use information obtained by virtue of its position as Port manager to disadvantage unrelated third parties who compete with Flinders Ports in the use of Flinders Ports' facilities and the provision of particular services. For example, information on how a port facility will be operated, for whom and when are all relevant to providing access to port facilities. However, such information is also particularly advantageous to a competing provider of port related services. It allows:

- an estimation of the cost of the service being provided (especially when Flinders Ports will determine the components of the service cost that relate to use of its facilities);
- knowledge of the customer and its requirements (including timing); and
- the ability to use that knowledge to cut out the access seeker by hindering access such that the customer requirements or timing cannot be met, or going to the customer directly with a slightly lower price or an additional service element that it can provide as Port manager or knows the access seeker cannot or is not providing.

The provision of access to port facilities involves certain operating processes and procedures, such as environmental controls, licensing and government approvals that the access seeker has little control or visibility over. In situations where the Port manager is aware of tight commercial timeframes being crucial to securing or keeping the contract it is imperative that appropriate ring-fencing and an effective confidentiality regime be in place to avoid the potential for procedural delay or other misuse of confidential information by Flinders Ports in order to gain competitive advantage.

As noted in ESCOSA's draft report released in June 2012, the objectives of ring-fencing are to facilitate competition in markets where services are provided by a vertically integrated operator by ensuring, amongst other things, commercially sensitive information acquired by the vertically integrated operator in relation to a non-contestable activity is not used for the benefit of the operator's contestable activities. Qube submits that current ring-fencing provisions in the MSA Act are insufficient.

As it stands, the accounting separation provisions in clause 42 of the MSA Act do not provide any protection against the use of confidential information by Flinders Ports to benefit its contestable activities. Qube is concerned that Flinders Ports is in a position to leverage confidential information, that port users such as Qube have no choice but to provide, to gain an unfair advantage in the tendering process for work such as stevedoring. Accordingly, Qube submits that stronger ring fencing is required such that it applies not only in relation to accounting records but also in relation to confidentiality and information sharing between the contestable and non-contestable business activities of Flinders Ports.

Scope of services covered under the current port access regime

We note that currently the prescribed port access regime applies only to 'regulated services' as defined in the MSA Act.

As mentioned above, Qube is currently seeking access to port facilities provided by Flinders Ports at Port Adelaide for the purpose of loading vessels at the port. The port facilities sought by Qube constitute a shed that is to be used as a temporary place of rest for materials that will be loaded onto vessels. With the entry of Flinders Ports into the provision of competing stevedoring services the access regime needs to cover all maritime services relevant to the provision of stevedoring services. For example, loading and unloading vessels by means of port facilities including facilities where product may be rested prior/ post loading and unloading and providing access to land in connection with those facilities.

A narrow definition of 'regulated services' which does not properly cover services related to the provision of stevedoring (or the activities that Flinders Ports is vertically integrated in) hinders economic efficiency and provides opportunity for misuse of market power. For example, at the time of privatisation, the presence of conveyer belt technology at a port facility as a determinative factor in the application of the access regime for loading and unloading vessels may have adequately addressed

[1] Asciano, Asciano's submission to the 2012 Ports Pricing and Access Review – Issues Paper, 23 March 2012, p.3.

relevant competition and access concerns. However, with the move of Flinders Ports into the provision of services in competition with bulk service providers this is no longer the case and should be reconsidered.

Qube notes ESCOSA's position that access regulation of land is provided in order to give practical effect to the rights of access to other regulated services[2]. Land access and ancillary use of port facilities is necessary to enable meaningful access to other regulated services. For example, port facilities such as temporary storage areas or resting points in the loading and unloading process and appropriate access to port premises are necessary to facilitate efficient and practical access to bulk loading facilities.

Accordingly, Qube submits that in the interests of promoting the objectives of *the Essential Services Commission Act 2002 (SA)*[3], the services captured under the access regime should include any ancillary services that are necessary to give practical and commercial effect to rights of access to regulated services.

We take it that facilities for resting materials or dry bulk cargo in the loading/unloading process (such as the shed at Berth 18) are covered by the access regime. Such facilities are necessary to achieve practical and economic access to bulk handling facilities. Whilst longer term storage may be available offsite at nearby storage facilities, the facilities used for the resting of dry bulk cargo in the loading and unloading process need to be onsite to ensure efficient transfer of cargo onto vessels and access to them is required to allow competition in the provision of bulk handling services.

Qube submits that the definitions of 'maritime services' and 'regulated services' should be reconciled to provide clarity and certainty to port users about the scope of the access regime. For services that are not covered under the regime it would be useful to have clear explanations as to why those services fall outside the access regime particularly in circumstances where the Port manager is also a competitor.

Arbitration and enforcement mechanisms

The dispute resolution and enforcement mechanisms under the current access regime are insufficient. The mechanisms are not:

- available in all relevant circumstances (eg, due to a narrow definition or interpretation of 'regulated services');
- commercially viable due to commercial timelines; or
- effective (eg, where penalties awarded are too low or too slow).

The MSA Act provides for a 'conciliation then arbitration' dispute resolution process. Qube submits that the current dispute resolution process alone fails to promote economic and commercial efficiency and provides scope for misuse of market power. The process may not currently cover all relevant services and does not incentivise port operators to resolve matters in a manner that is timely and cost effective. Accordingly, Qube is concerned that under the current access regime the MSA Act's objective in relation to the provision of appropriate dispute resolution process is not being met[4].

The 'conciliation then arbitration' process may take up to 12 months to resolve and any awards granted by the arbitrator can only be enforced through an application to the Supreme Court. Such a process is protracted, costly and unfeasible for port users who need to resolve issues expeditiously in order to retain key customers and contracts. Port users will not be in a position to provide competitive services if port operators are able to use the dispute resolution process to unreasonably delay access to port services. Similarly, the dispute resolution process will not be effective if the cost and time involved mean the process is not practical or commercial. As a result, Qube is concerned that the dispute resolution process alone does not provide the right incentives for access to South Australian ports and maritime services on fair and commercial terms.

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[2] ESCOSA, 2012 Ports Pricing and access review draft report, June 2012, p 37.

[3] See section 6 of the *Essential Services Commission Act 2002 (SA).*

[4] Section 3(d) of the ESA Act states that the objectives of the ESA Act are, among others, to ensure that disputes about access are subject to an appropriate dispute resolution process.

In addition to the dispute resolution process, current penalties for port operators who contravene the act are ineffective in deterring anti-competitive behaviour. Under section 44 of the MSA Act, the maximum penalty for a person who prevents or hinders a person who is entitled to a maritime service from access to that service is $20,000. Such a penalty will do very little to deter vertically integrated port operators such as Flinders Ports from discriminating against competitors in contestable markets, especially given the size of relevant contracts and the time required for a penalty to be awarded.

Qube is concerned that under the current regime the enforcement mechanisms are too slow and too low to be effective and provide the right incentives to foster fair and commercial access.

Qube submits that a two tiered penalty regime is necessary to facilitate quick and cost effective enforcement such that any hindering of access can be deterred or counteracted before the business is lost and the access is no longer required:

- the first tier of the penalty regime should involve an administrative framework under which ESCOSA as the market regulator would have power to quickly issue infringement penalties of up to $20,000 for parties who breach their obligations under Part 3 of the MSA Act;

- the second tier should involve larger penalties for more serious breaches which would be administered and enforced by the court.

We note that the National Gas Law as set out in the Schedule to the *National Gas (South Australia) Act 2008* for instance incorporates an infringement penalty regime whereby the Australian Energy Regulator may serve a person with an infringement notice where it has reason to believe that the person has breached a civil penalty provision. The maximum penalty under an infringement notice is $4,000 for a natural person and $20,000 for a body corporate[5]. Identical provisions can also be found under Part 6 of the *National Electricity (NSW) Law.*

Qube understands that in order for such a penalty regime to be effective, the current obligations imposed on both port operators and users under Part 3 of the MSA Act may need to be amended such that they are more objective and measurable. Qube submits that more objective and measurable obligations will not only provide for better policing of the access regime but will also promote clarity, certainty and consistency. Qube believes that this will in turn promote competitive and fair commercial conduct and provide incentives for long term investment in essential services.

Please let us know when you have had a chance to review and consider this information. If you have any questions in relation to any of the information provided please contact Michael Sousa, (Director of Ports, Qube Ports Division) on (02) 9005 1134 or 0401 719 944.

Yours sincerely,

Michael Sousa
Director
Qube Ports
Michael.sousa@qube.com.au

[5] See Part 7 of the Schedule to the *National Gas (South Australia) Act 2008*.

QUBE PORTS Pty Ltd
ABN 46 123 021 492

Level 22, 44 Market Street
Sydney
NSW 2000

T: +61 2 9005 1100
F: +61 2 9005 1101

qube.com.au

29 August 2012

Private and Confidential

By email

Mr Vincent Tremaine
Chief Executive Officer
Flinders Ports S.A.
296 St Vincent Street
Port Adelaide SA 5015

Email: tremaine.vincent@flindersports.com.au

Dear Vincent,

Concerns Regarding the Negotiation of a Licence and Lease for the Berth 18 Shed

I refer to the meeting on 14 August 2012 between our team (Dean Wells, Steve Egel and Tony Smith), Leon Cholsh (Flinders Ports Corporate Counsel) and Sally Sloan (Flinders Ports Property Administrator), regarding the Terms Sheet for the lease of the Berth 18 shed.

You will be aware that we initially approached Flinders Ports about the opportunity to lease the shed at Berth 18 on 23 April 2012. As Flinders Ports will be aware, the lease was required for storing and exporting heavy mineral concentrate (**HMC**), in particular, mineral sands for Murray Zircon Pty Ltd.

I understand that Flinders Ports, together with SinoTrans, was a competing tenderer for the Murray Zircon business and that SinoTrans is continuing to communicate with Murray Zircon about this work. Accordingly, you will be aware that Murray Zircon is seeking to start shipping as soon as possible.

The shed at common user Berth 18 is currently unused and, while it requires investment, we would expect that Flinders Ports would welcome the opportunity to increase business through the port, which will be facilitated through the lease of the Berth 18 shed to Qube Ports.

I am writing to you because I am concerned that:

- the negotiation process for the lease has become unduly protracted in circumstances where we understand Flinders Ports is fully aware of the clients proposed commencement date and requirements;
- the lease terms proposed by Flinders Ports are not commercial, fair or reasonable; and

- the approach of Flinders Ports to these commercial negotiations has the real prospect of undermining competition from other port services suppliers.

In relation to the delayed and protracted negotiations, Qube has had to repeatedly request lease terms from Flinders Ports, including several update requests by email and phone which were not responded to. We did not receive the Terms Sheet for the lease until 30 July 2012 – two months after the initial discussion with Flinders Ports about the lease opportunity for the unused shed. Flinders Ports has told us that before use of the shed can occur, a comprehensive inspection and floor survey will need to be undertaken as a baseline prior to the lease. Qube is still not sure whether the inspection and floor survey have been carried out and whether that will further delay the negotiations.

Flinders Ports is fully aware of the time pressure on Qube to have the lease and licence in place so that the client's anticipated shipping timeline and requirements are met.

In relation to the uncommercial terms in the Terms Sheet, extraordinary clauses and monetary amounts that have been required in addition to the standard underlease. These clauses and amounts do not reflect the commercial risks of leasing the shed to Qube for use to export HMC, or the appropriate allocation of risk between Qube and Flinders Ports. These clauses were discussed in the meeting on 14 August 2012. Some of the specific provisions that Qube consider to be commercially unjustifiable, onerous and unreasonable include:

- a bank guarantee of $500,000;
- environmental management plans as a condition precedent to the lease that meet "FP's satisfaction", an additional standard which is unclear and unnecessary on top of the EPA requirements that Qube would have to meet in order to obtain the required licence to operate the shed for the export of HMC;
- double the public liability insurance listed in the standard underlease terms; and
- a berth baseline report commissioned, at Qube's cost, to determine the state of the berth prior to the lease of the shed. Qube is not leasing the common user berth and does not think such a survey is actually its responsibility. The extent of the area that is expected to be covered under this report is also unclear.

As you will know from the fact that Flinders Ports competed for this work, storing and handling of the Murray Zircon mineral sands involves very low or only theoretical radiation risk. Relevantly, it is the responsibility of the EPA to consider these risks and the operational requirements to mitigate or manage such risks. Qube has actively worked with the EPA to address this issue.

The EPA conducted a site inspection of Berth 18 on 27 June 2012 and concluded that Berth 18 was a suitable facility for the storage and handling of HMC provided that the exposure risks are adequately managed. Qube would require a licence to operate the shed for the export of HMC and as part of the legal obligations under that licence would have to comply with an EPA approved Radiation Management Plan. In this context, the additional clauses and monetary amounts in the Terms Sheet are not proportionate to the risk of the proposal (particularly when the additional clauses and monetary amounts are considered in combination). In fact, in the follow up email to the 14 August meeting, though Qube feels it unnecessary, it agreed to provide the bank guarantee or bond of $500,000.

Furthermore, I note that despite Flinders Ports being aware of the clients proposed commencement date for shipping (16 October), the Terms Sheet presented to Qube at the 14 August meeting had a commencement date after the required first haul date (1 November).

As the sole lessee and manager of Port Adelaide, Flinders Ports has the responsibility to ensure that leases for land and facilities are available to port service providers (included under the *Maritime Services (Access) Act 2000*), such as Qube Ports, to maximise use of the port, both for the

development of the existing trades utilising the ports and attracting new business.

Flinders Ports has said publicly that it is particularly looking to develop all its ports to offer a competitive supply chain solution to the mining industry to ensure that mining cargoes are provided with suitable facilities in the right locations. Qube welcomes this, provided that the development of a competitive supply chain is not to the sole benefit of the Flinders Ports' ports services business, but is equally supported for all competing port service providers.

Qube Ports is concerned that the approach of Flinders Ports will undermine effective competition between bulk port services suppliers. In particular, I note that:

- Flinders Ports has in the past refused to allow Qube to operate from Berth 29, while at the same time competing for business against Qube with its own operations at Berth 29; and
- is delaying and increasing the cost of Qube using Berth 18 as a competitive alternative to Flinders Ports, either as a bulk solution through Berth 29 or by raising the costs of bulk storage and handling and thereby favouring a container logistics solution, and its business interests as the sole container terminal operator at Port Adelaide.

Qube understands that SinoTrans (in conjunction with Flinders Ports) is actively seeking to provide services to Murray Zircon in competition with Qube. Qube is particularly concerned to have received feedback that SinoTrans has advised Murray Zircon that Flinders Ports will never allow Qube to lease or use the Berth 18 shed for this business.

Given that Flinders Ports is a competitor to Qube and other port service providers, it is particularly important that it conducts its commercial negotiations with competitors on a normal and timely commercial basis, to avoid any suggestion that it is using its position as the Port Manager to favour its own competing business. Qube is concerned that Flinders Ports would not face such a delayed process to finalise use of the shed facilities or impose the same conditions on itself if it were seeking to stockpile and export HMC and the uncommercial terms being sought, combined with the delay, have the potential to undermine Qube's capacity to provide competitive port services.

We received correspondence from Sally Sloan on 23 August 2012 that the Underlease and Stevedoring Licence should be available for our review early this week.

Qube expects these negotiations will now be quickly brought to a sensible commercial resolution.

I will be on leave until 25 September. However, if you would like to discuss this matter, I can be reached via email. Alternatively, in my absence, please contact Michael Sousa (Director of Ports, Qube Ports Division) on (02) 9005 1134 or 0401 719944, michael.sousa@qube.com.au.

Yours sincerely,

P.P. Don Smithwick
Managing Director

Tanya Boyle

From: Michael Sousa
Sent: Thursday, 13 September 2012 9:46 AM
To: Tanya Boyle
Subject: FW: Negotiations of a Licence and Lease for the Berth 18 Shed
Attachments: 1693_001.pdf

Importance: High

Michael Sousa
Director

T: +61 2 9005 1134 M: +61 401 719 944 F: +61 2 9005 1101 E: Michael.Sousa@qube.com.au W: qube.com.au

ZERO HARM

From: Michael Sousa
Sent: Tuesday, 11 September 2012 5:00 PM
To: 'tremaine.vincent@flindersports.com.au'
Subject: Negotiations of a Licence and Lease for the Berth 18 Shed
Importance: High

Dear Vincent,

The attached letter was emailed to you on 29 August 2012 seeking your intervention into this process due to the fact that it seems to be dragging out and potentially costing Qube Ports the securing of a substantial contract.

As we have not heard from the Port in relation to this letter or in fact the shed lease I am obliged to further write to you.

The contract requirements commence mid October 2012 and hence we require that this issue be dealt with in the utmost urgency.

Can you please confirm that this is being appropriately dealt with by Flinders Ports.

I am available to discuss should you require.

Yours sincerely,

Michael Sousa
Director

T: +61 2 9005 1134 M: +61 401 719 944 F: +61 2 9005 1101 E: Michael.Sousa@qube.com.au W: qube.com.au

Appendix D – Qube's correspondence with ESCOSA in relation to the 2017 review

From: David Knight
Sent: Tuesday, 22 November 2016 10:40 AM
To: Ashley.Harbutt@escosa.sa.gov.au; stuart.peevor@escosa.sa.gov.au
Cc: Michael Sousa <Michael.Sousa@Qube.com.au>; William Hara <william.hara@qube.com.au>
Subject: FW: Essential Services Commission - 2017 Ports Pricing and Access Review

Dear Sirs,

Thank you for the opportunity to provide this submission. Qube, through various iterations (including P&O Ports, POAGS and currently Qube Ports and Bulk/Logistics, Mackenzie Intermodal) has been operating in South Australia for many decades in the fields of General, Automotive and Bulk Stevedores, Container Logistics and Warehousing. Our growth in South Australia has been severely curtailed by Flinders Ports ability to link infrastructure ownership to operating activities to the point that we no longer invest in the South Australian market, contrasted to the rest of Australia where our invested capital runs into many hundreds of millions of dollars. South Australia is the only jurisdiction that allows such extreme vertical integration to occur without any regulatory oversight and the resulting lack of competition in the defined markets is self-evident. We have scaled down our activities in SA while expanding with double digit annual growth over the past 10 years in every other state of Australia.

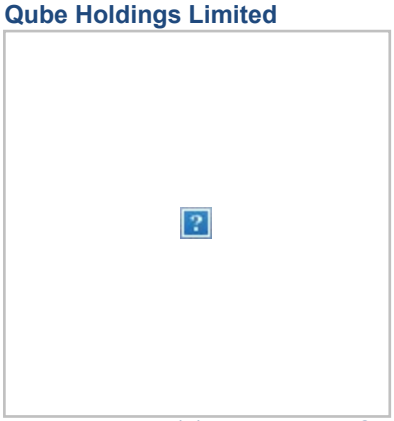
The attached documents detail some case studies and previous submissions which we believe will be helpful in identifying real life examples of Flinders Ports ability and actions in using infrastructure ownership to leverage advantage in operating businesses to the disadvantage of competitors and

ultimately the state of South Australia.

Vertical Integration is in itself not a bad thing and can deliver significant benefits to economies, users and all stakeholders; however when used as a tool to sustain a monopoly as is the case with Flinders Ports it stymies investment, innovation and competition. Qube is involved in a number of vertically integrated businesses and would strongly suggest that the commission review the AAT and MIRAT regulatory approvals to assess their suitability for the market in South Australia. The key to a satisfactory outcome is open access, pricing and capacity expansion ahead of demand.

Should you require any additional information or clarification please contact the undersigned.

Regards,
David Knight | Director – Business Development
Qube Holdings Limited



Direct Tel: +61 (0) 2 9080 1904 Switch: +61 (0) 2 9080 1900 Fax: +61 (0) 2 9080 1999 Mobile 0419 011101
david.knight@qube.com.au
Level 27, 45 Clarence Street, Sydney, NSW, 2000
www.qube.com.au

From: Harbutt, Ashley (ESCOSA) [mailto:Ashley.Harbutt@escosa.sa.gov.au]
Sent: Friday, 7 October 2016 12:35 PM
Subject: Essential Services Commission - 2017 Ports Pricing and Access Review

Good afternoon,

The Maritime Services (Access) Act 2000 requires the Essential Services Commission to review the South Australian ports pricing and access regimes every five years. The Commission's 2017 Ports Pricing and Access Review is being conducted to meet this requirement.

The Review will consider if the ports pricing regime and access regimes should continue for a further five-year period.

The Commission has initiated its Review with the release of an Issues Paper. The purpose of the Issues Paper is to gather evidence and views from people and organisations with an interest in South

Australian ports and maritime industries. The Issues Paper is the first opportunity for stakeholders to raise matters that are important to them and to provide the Commission with responses to key questions.

The Commission is seeking feedback from all stakeholders with an interest in the regulated ports sector of South Australia. Submissions and responses addressing the matters raised in the Issues Paper, or any other matters relevant to the review, are due by Friday, 18 November 2016.

Further information can be found on the Commission's website:

http://www.escosa.sa.gov.au/

or by contacting:

Stuart Peevor
Manager Pricing and Access

Phone: (08) 8463 4318
stuart.peevor@escosa.sa.gov.au

Regards,
Ashley Harbutt
Regulatory Analyst

Essential Services Commission of SA
Level 1, 151 Pirie Street Adelaide SA 5000
GPO Box 2605 Adelaide SA 5001
Phone: (08) 8463 4353
ashley.harbutt@escosa.sa.gov.au | www.escosa.sa.gov.au

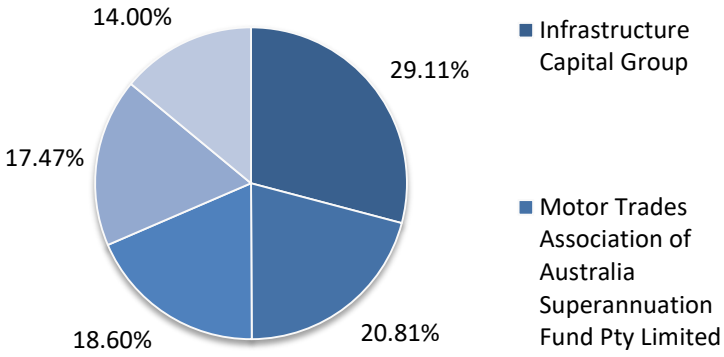
If you would like to keep up to date with the Commission's activities you can subscribe to our Latest News and the *Essential Update* Newsletter.

BACKGROUND INFORMATION AND CASE STUDIES OF QUBE'S INTERACTIONS WITH FLINDERS PORTS

FLINDERS PORT HOLDINGS AND SUBSIDIARIES

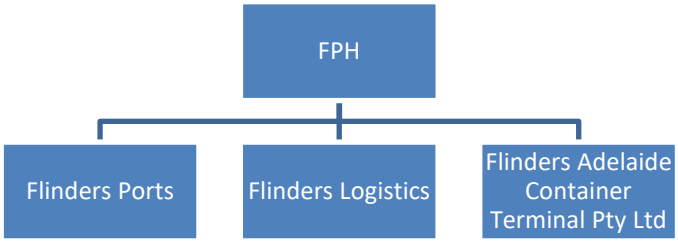
Flinders Port Holdings Pty Ltd (**FPH**) is the holding company for the group's ports, port management, logistics, container terminal, property, and Spencer Gulf Marine Services businesses.

FPH is owned by various superannuation and investment funds.



Source: http://www.flindersports.com.au/aboutus1.html - site last updated 30 December 2013

Flinders Ports, Flinders Logistics and Flinders Adelaide Container Terminal are all wholly owned subsidiaries of FPH.



Flinders Ports Pty Ltd was the successful bidder in the privatisation of South Australia's ports in November 2001 and is responsible for the development, management and operation of seven ports in South Australia (including the allocation and use of land, the provision of stevedoring licences and equipment hire).

In the privatisation, Flinders Ports acquired:

- the plant and equipment assets (landside port infrastructure) of the South Australian Port Corporation; and

- a 99 year land lease and port operating licence for Port Adelaide, Port Lincoln, Port Pirie, Port Giles, Klein Point, Thevenard and Wallaroo.

On 17 June 2008, Flinders Ports obtained leasehold rights and estates in fee simple from the South Australian Government for further land located at Outer Harbor, Inner Harbour, and Osborne.

Flinders Ports has been increasingly venturing into the provision of stevedoring and logistics services in competition with access seekers. Through Flinders Logistics Pty Ltd, Flinders Ports competes with other logistics providers and stevedores that require use of or access to the Flinders Ports' infrastructure to do business.

According to the Flinders Logistics website services provided by Flinders Logistics can be provided in all States and include:

- Supply chain advisory services providing expertise in economic and innovative supply chain options that meet client needs;

- Sourcing innovative solutions through research and development with key stakeholders;

- Lead logistics contractor, establishing transport, storage and port stevedoring services;

- Provision of stevedoring and material handling equipment and labour[1];

- Rail terminal operations; and

- Container repairs and maintenance.

Through Flinders Adelaide Container Terminal Pty Ltd, Flinders Ports is the sole container stevedoring service provider at the Port Adelaide container terminal (the only container terminal in South Australia).[2]

As a result, Flinders Ports plays the dual role of Port operator and allocator of the required inputs for the supply of stevedoring services (eg, land and licenses for containerised and non-containerised stevedoring services) whilst at the same time competing to maintain its market share as the sole container stevedoring service provider in South Australia and competing to increase its market share in the provision of stevedoring services generally.[3]

[1] Including the physical loading and unloading of vessels, rotaboxes and other equipment.

[2] On 2 July 2012, Flinders Ports announced that it had acquired 60 per cent of the Adelaide Container Terminal business from DP World South Australia. Three years prior, Flinders Ports had acquired a 40 per cent stake in the business. The full ownership of the Flinders Adelaide Container Terminal by Flinders Ports took effect immediately.

[3] Port Adelaide in the only Australian port at which the Port operator/manager has an ownership interest in the container stevedoring business (let alone a 100% ownership interest).

CASE STUDY 1: THE NYRSTAR AND PERILYA TENDERS AT PORT PIRIE

Overview

As described in more detail below, QPB is concerned that Flinders Logistics was able to win the Nyrstar tender due to the position of Flinders Ports as Port operator rather than on the basis of a competitive bid for stevedoring services alone. QPB is also concerned that a similar situation might occur in relation to the Perilya tender. This tender will be decided shortly.

Having lost the Nyrstar contract to Flinders Logistics, QPB will cease all operations in Port Pirie if it is unsuccessful in relation to the Perilya tender.

Port Pirie is located 223 km north of Adelaide. The principal commodities handled at Port Pirie are Grains & Seeds, Mineral concentrates, Coal, Smelter outputs: zinc & lead, and General Cargo.

Port Pirie has two key stevedoring contracts: Nyrstar and Perilya. All other stevedoring work relates to spot or one-off cargo handling tasks. QPB was contracted to provide stevedoring and maintenance services for both Nyrstar and Perilya and had a workforce employed on a full time basis to service those contracts. Unless stevedoring services are being provided to both Nyrstar and Perilya there is insufficient revenue to employ a full time workforce.

According to the port statistics available on the Flinders Ports website,[4] 2013 bulk and break bulk product movements through Port Pirie were as follows.

			Calendar Year 2013			
			IMPORT		EXPORT	
Port	Pack Class	Reporting Group	Tonnes	Units	Tonnes	Units
Port Pirie	BREAK BULK	Chemicals/Acids	40	40	-	-
		General Cargo	385	385	-	-
	BULK	Coal	76,209	-	-	-
		Concentrates	225,721	-	195,714	-
		Paragoethite	127,469	-	-	-

The majority of the products imported or exported through Port Pirie are imported or exported by Nyrstar and Perilya. For the 2013 calendar year, Nyrstar was responsible for all bulk imports. All bulk exports were by Perilya and Nyrstar. Perilya was responsible for over 90% of the exports which consisted of mainly lead and zinc concentrates and Nyrstar exported the balance.

Flinders Logistics has just won the tender for the provision of stevedoring services to Nyrstar from June this year and a decision in relation to the provision of stevedoring services to Perilya is expected to be made in the next 2 weeks.

Nyrstar operations and commitment to Port Pirie

Nyrstar is an integrated mining and metals business with market leading positions in zinc and lead, and growing positions in other base and precious metals. Nyrstar has mining, smelting, and other operations located in Europe, the Americas, China and Australia. In Australia, Nyrstar operates a primary zinc smelter in Hobart and a primary lead smelter at Port Pirie. The Nyrstar smelter operation

[4] http://www.flindersports.com.au/portstatistics3.html

at Port Pirie has multi-metal recovery capabilities, with the flexibility to process a wide range of lead-containing feedstocks and smelting industry by-products to produce refined lead, silver, zinc, copper and gold.

Port Pirie is a major manufacturing centre for South Australia, and is the State's fourth largest urban area. The smelter supports key infrastructure servicing Port Pirie, such as the port facilities, which rely on Nyrstar's continuing presence in Port Pirie for their ongoing operation. The Port Pirie operation incorporates a lead smelter and refinery, a precious metals refinery and a copper plant. The Port Pirie smelter has been in constant operation for 125 years. There is an adjacent dedicated port facility where concentrates are received, with final products dispatched by road and rail.

Port Pirie is one of the world's largest primary lead smelting facilities and the third largest silver producer, which allows it to generate significant economies of scale. In 2013, the facility produced 179,000 tonnes of lead metal; 30,000 tonnes of zinc metal; 4,100 tonnes of copper cathode; 17,918,000 troy ounces of silver; 65,800 troy ounces of gold; and 54,300 tonnes of sulphuric acid.

Nyrstar has recently announced that it has signed a binding agreement with the South Australian Government and EFIC[5], Australia's export credit agency, for the final funding and support package for the redevelopment of the Port Pirie smelter into an advanced metals recovery and refining facility.

The funding and support package requires a direct contribution from Nyrstar of AUD103[4] million; structured investment to third party financiers benefiting from a AAA credit rated guarantee from EFIC, supported by a back-to-back guarantee from the South Australian Government (ca. AUD 291[5] million); and the forward sale of future silver production (ca. AUD 120 million). In addition, the South Australian parliament passed legislation in 2013 giving Nyrstar regulatory certainty in relation to the Redevelopment. The legislation has been proclaimed and is now operational.[6]

Nyrstar's Port Pirie operations are expected to have the capacity to produce a range of metals yearly including ca. 250,000 tonnes of refined lead; ca. 40,000 tonnes of zinc in fume; ca. 7,000 tonnes of copper in matte; and ca. 25.0 million troy ounces of silver dore, containing ca. 100,000 troy ounces of gold.[7]

The Nyrstar tender

From 1 November 2010 to 30 April 2014, QPB provided stevedoring and maintenance services to Nyrstar at Port Pirie with an extension of the contract for transition purposes until 31 May 2014.

These services involved the provision of labour and equipment to:

- discharge from cargo ships domestic and overseas bulk lead and zinc concentrates, coke, coal and residual concentrate products from the Nyrstar processing plant at Risdon, Hobart and load export products such as lead concentrate from the Nyrstar Port Pirie smelter onto cargo ships using Nyrstar's dedicated port facility, conveyor and gantry crane;

- operate/drive the gantry crane and perform maintenance services; and

- clean/wash the berth and facilities.

Nyrstar lease the land and berth for its storage, loading and discharge operations directly from Flinders Ports and own the hopper and conveyor system and the gantry crane.

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[5] Export Finance and Insurance Corporation.

[6] http://www.nyrstar.com/investors/en/news/Pages/1786253.aspx.

[7] Nyrstar proceeds with Port Pirie Redevelopment – Funding and support package with Government finalised: http://www.nyrstar.com/investors/en/news/Pages/1786253.aspx

QPB provided the required mobile equipment including front-end loaders, a skid steer loader, an excavator, fork-lifts and a gear trailer. QPB also made additions to the infrastructure at Berth 8 to provide stevedoring amenities such as a shower block and locker room for staff working on the Nyrstar contract.

Originally, Nyrstar's contract with QPB was due to expire on 31 October 2013. On 25 July 2013, Nyrstar invited parties to tender for the provision of wharf management or stevedoring services. Patrick, Toll, Flinders Logistics and QPB all tendered.[8]

On 22 January 2014, Nyrstar informed QPB that the final evaluation of the tender would be based on the information and tonnage rates submitted for the provision of stevedoring services (including wharf cleaning activities) over a five year period. Nyrstar would provide maintenance services in-house.

During the tender process, price was a key issue for Nyrstar. All external ancillary labour and expenditures required GM approval. QPB's tender did not seek a tariff increase. When QPB was told their bid was unsuccessful QPB asked if the decision was made on a financial basis (ie, lower tariffs) and offered to freeze tariffs for a three year period.

Flinders Logistics won the tender.

For Flinders Logistics to have won the tender they must have:

(a) tendered a lower tariff than QPB for the provision of stevedoring services; or

(b) lowered the overall cost of Nyrstar's operations by bundled the provision of stevedoring services from Flinders Logistics with discounted prices for the other services Nyrstar requires and can only acquire from Flinders Ports (eg, discounted wharfage, harbour dues, pilotage charges, tugs and lease fees) or providing better payment terms or other benefits in relation to the services provided by Flinders Ports.

In feedback following the tender process, Nyrstar told QPB that QPB's rates for stevedoring services were cheaper than those of Flinders Logistics. Other feedback also noted that QPB's workforce was of higher quality and that Nyrstar was happy with the services QPB had provided.

If QPB's tendered pricing was cheaper and Nyrstar was happy with QPB's services, Flinders Logistics must have been able to offer Nyrstar savings in relation to their overall usage of Port Pirie despite Flinders Logistics' higher stevedoring prices.

QPB understands that in the last couple of weeks Nyrstar has gained a pilot exemption and is now only required by Flinders Ports to use one tug instead of two to guide one of its vessels into the Berth. This would be a large cost saving for Nyrstar.

The Nyrstar contract was an important part of the QPB business and QPB had invested significant time, people and capital since buying the business off Tasports. There are economies of scale in having both the Nyrstar and Perilya contracts. QPB used the same workforce to service both clients and is able to employ its workers on a full-time basis. Following the loss of the Nyrstar contract, QPB will have to reorganise its workforce to service Perilya and is considering a number of options (including hiring all workers on a casual basis or flying workers in from other ports). Flinders Logistics will have a similar problem with its workforce for the Nyrstar contract.

[8] Representatives from Patrick, Flinders Logistics and Toll were present at the site visit scheduled as part of the request for tenders on 31 July 2013.

Flinders Logistics' rationale for providing stevedoring services at Port Pirie

Flinders Port's vertical integration does not enable Flinders Logistics to provide Nyrstar a better stevedoring service than QPB. The stevedoring task for Nyrstar is labour intensive. Nyrstar owns the key infrastructure (ie, the hopper and conveyor and the gantry crane) and Nyrstar leases the land directly. Unlike QPB, Flinders Logistics did not have the required skilled labour available and would have to pay QPB the residual value for QPB's additional Berth 8 infrastructure and staff amenities an additional cost of approx. $149, 520.

Flinders Logistics is likely not making a profit from providing stevedoring services to Nyrstar. Assuming stevedoring was bundled with other services, Flinders Ports will also make less from port access arrangement and operation charges than it could have.

QPB believes that Flinders Logistics' aggressive tendering was a way to build its market share, portfolio and reputation for future tenders. Essentially, Flinders Logistics/Flinders Ports is buying its way into the business by reducing its potential port access arrangement and operation revenue. QPB is aware of Flinders Logistics tendering for stevedoring at other ports such as Darwin. Its website notes that its services are available in all States. Flinders Logistics is also bidding for the Perilya contract. If QPB is unsuccessful in the Perilya tender, QPB will exit Port Pirie.

Perilya

Perilya Limited is an Australian base metals mining and exploration company operating the Zinc, Lead and Silver mine in Broken Hill, New South Wales and also the Cerro de Maimón Copper, Gold and Silver mine in the Dominican Republic. Perilya's operations also include the Flinders Project in South Australia and the Mount Oxide Project in Queensland.

Perilya has 100 per cent ownership of the Beltana high grade zinc oxide mine, as part of the Flinders Project, near Leigh Creek in South Australia. The Beltana mine is the first phase of the Flinders Project, located 520 kilometres north of Adelaide in the Flinders Ranges, and involves direct shipment of high grade zinc oxide ore through Port Pirie to smelters in Asia.

Since September 2008, Perilya's mining operations at Broken Hill have been limited to the Company's Southern Operations underground mine. Southern Operations produces two products: zinc concentrate and lead concentrate. Ore mined is crushed underground and hoisted to the surface to be treated in the concentrator. After completion of the treatment process, lead and zinc concentrates are railed from Southern Operations to the Company's bulk loading facility at Port Pirie for export.

The Perilya tender

From 1 January 2011 to 31 December 2013, QPB provided stevedoring and maintenance services to Perilya at Port Pirie with an extension of the contract for transition purposes until 7 June 2014.

These services involved the provision of labour and equipment to:

- load domestic bulk lead and zinc concentrate products from the Perilya processing plant at Broken Hill on to cargo ships for export at Perilya's dedicated bulk loading facility using a fixed ship loader;

- operate/drive the ship loader and mobile machinery and perform maintenance services; and

- clean/wash the berth and facilities.

The Perilya operations use the Berth 6 export facility at Port Pirie which is leased by Nyrstar directly from Flinders Ports and sub-leased to Perilya.

QPB provided the required mobile equipment including front-end loaders, a skid steer loader, an excavator, fork-lifts and a gear trailer. QPB also made additions to the Berth 6 infrastructure to provide stevedoring amenities such as a shower block and locker room for staff.

Perilya has requested tenders for stevedoring services (excluding maintenance) and a decision on the stevedoring provider is to be made shortly. Flinders Logistics is tendering for this contract and QPB is concerned that, similar to the Nyrstar contract, Flinders Logistics will be able to use the position of Flinders Ports as Port operator to win the tender without necessarily providing better or cheaper stevedoring services but instead through its unique ability to provide a lower overall cost to Perilya for its export operations.

CASE STUDY 2: MURRAY ZIRCON CONTRACT AT PORT ADELAIDE

Overview

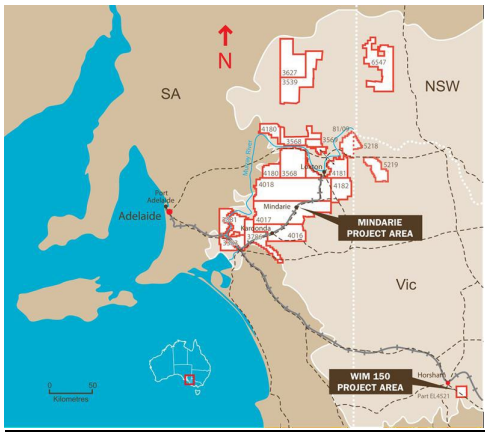
Qube is concerned that Flinders Ports has the ability to undermine effective competition in the provision of bulk port services by using operational processes and procedures to delay or increase the cost of bulk solutions offered by its competitors, favouring either its own bulk solutions or it business interests as the sole container terminal operator in South Australia.

In the Murray Zircon tender described further below, QPB experienced an unduly protracted lease negotiation with uncommercial and unreasonable lease requirements making its bulk solution uneconomical. Ultimately, the client, who initially wanted a bulk solution, ended up using a container solution.

Murray Zircon

Murray Zircon Pty Ltd (MZ) is a mining company focusing on Heavy Mineral Sands based in the Murray Basin. The Company's prime asset is the Mindarie Mineral Sands Project, located 150km east of Adelaide in the Mallee region of South Australia. It involves the mining of eight mineral sands strandlines located in nine separate Mineral Leases and two Exploration Licenses. MZ produce heavy mineral concentrate (HMC) which is then separated to produce zircon, ilmenite, rutile and so on.

MZ also holds an exploration tenement portfolio covering over 11,000 km² within the Murray Basin.



The HMC is loaded onto B-double trucks for transport to Port Adelaide (approx. 200km away) where it is loaded into standard shipping containers for export to China. When it reaches China, the HMC is processed further to separate the individual heavy minerals (eg, zircon, ilmenite, rutile).[9]

Initially, MZ planned to stockpile the HMC at Port Adelaide and bulk ship it to China for processing.[10]

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[9] Minerals Sands Report – Issue 217 November 2013, p12-14. Available at http://www.murrayzircon.com.au/index.php/news/media-coverage/

Murray Zircon contract

From 2011, Qube was in discussions with MZ for the provision of storage, handling and bulk shipping services at Port Adelaide. To provide these services QPB went to Flinders Ports to lease an unused shed at Berth 18 to stockpile the HMC as envisaged by MZ. Without this lease QPB would be unable to meet MZ's requirements.

Flinders Ports/Logistics in conjunction with Sinotrans (China's largest shipping and logistics company) was also competing for the provision of storage, handling and bulk shipping services to MZ.

In the negotiation for the lease QPB was required to provide Flinders Ports (a competing bidder) with detailed information on how they intended to provide the services to MZ. Flinders Ports delayed negotiations and requested commercially unviable terms knowing the time pressure on QPB to have the lease and stevedoring licence in place so that MZ's anticipated shipping and timeline requirements could be met. This increased the cost of QPB services and made it unviable as an alternative to the joint Flinders Ports/Sinotrans bid.

For example, QPB had to repeatedly request lease terms from Flinders Ports including several requests for updates by email and phone which were not responded to. QPB did not receive the Terms Sheet for the lease until 30 July 2012 – two months after the initial discussion with Flinders Ports about the lease opportunity for the unused shed. The Terms Sheet that was presented to QPB at a meeting with Flinders Ports on 14 August 2012 had a commencement date starting after MZ's required the required first haul date. As a bidder for the services to MZ Flinders Ports was well aware of MZ's required commencement date.

Furthermore, the Terms Sheet included certain clauses in addition to the standard underlease which were onerous and unreasonable and did not reflect industry practice or the commercial risks involved. For example, QPB was required to commission a berth baseline report at its cost to determine the state of the berth prior to the lease if the shed. QPB was not leasing the common user berth and such a survey would normally be the responsibility of the Port operator. QPB has never had such a lease requirement in other port in Australia. The extent of the area required to be covered by the survey was also unclear. The inclusion of such unclear and uncommercial terms further delayed negotiation and undermined QPB's chances of being able to offer the required services to MZ.

QPB also received feedback from MZ that according to Sinotrans Flinders Ports would never allow QPB to lease or use the shed for this business.

Flinders Ports delayed and increased the cost of QPB using Berth 18 as a competitive alternative to the bulk solution of Flinders Ports/Flinders Logistics/ Sinotrans and in the end QPB did not lease the Berth 18 shed. Flinders Ports/Flinders Logistics/ Sinotrans did not win the tender either. However, the actions of Flinders Ports also increased the cost of bulk storage and handling favouring a container logistics solution and the business interests of Flinders Ports as the sole container terminal operator at Port Adelaide and in South Australia. As a result, MZ decided to ship the product by container rather than by bulk as initially planned. Qube Logistics provide the container packing, handling and haulage services from the mine to the Adelaide Container terminal and Flinders Logistics provide the container stevedoring services at the container terminal.

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[10] MINDARIE MINERAL SANDS PROJECT South Australia, Australia-China Resources Symposium, Adelaide, South Australia, 11 July 2012, Eddy Wu, CEO, Murray Zircon Pty Ltd

Examples highlighting operational and information use concerns

As noted in previous interactions with the ACCC regarding MIRRAT's bid for the operation of the automotive terminal at Webb Dock West, it is impossible to detect, monitor and enforce the myriad of ways that a vertically integrated Port asset operator is able to discriminate between users in the day-to-day running of the Port asset and operationally advantage its own operations. For example, the allocation of investment funds towards the Port Adelaide container terminal and Berth 29 where the operations of Flinders Logistics are centred when other berths and areas used by competitors require investment, maintenance and repair.

Given the increasing move by Flinders Logistics into the provision of stevedoring and other services, Qube is concerned about the information they are being asked to operate at the Port.

For example, in relation to a potential contract Qube recently asked Flinders Logistics to provide a quote for the use of their Mobile Harbour Crane at 29 Berth Port Adelaide. Flinders Logistics wanted to know detailed information about the client, the contract and the volume of product before providing a quote.

The provision of such confidential information is not required to provide a quote or rate for the hire of this type of equipment. Nor is it industry practice. In other Ports, Qube has hired similar equipment from the Port authority or from another provider such as Patricks without ever being required to provide such information before being provided with a quote. A hire price or rate for the equipment is simply provided on a time basis. As a result, QPB decided not to lease the crane.

If port users lack confidence in how their confidential information or information on potential business opportunities will be used by a Port operator that is also a competitor future competition will be compromised.

Another example, which illustrates the difficult position port users and access seekers are in when trying to operate and develop business opportunities at vertically integrated privatised ports relates to a suggestion by Qube to operate two cranes at Berth 29 at Port Adelaide.

QPB saw the potential to increase bulk export opportunities through Berth 29 by operating two cranes at the Berth. In the short term, it wished to tender for the provision of services to Hillgrove Resources in relation to copper and Cristal Mining in relation to mineral sands. Flinders Logistics ended up winning both these contracts.

In March 2012, QPB met with Flinders Ports to discuss opportunities to develop bulk exports through the facility and applied to Flinders Ports to relocate an existing Gottwald harbour mobile crane to Berth 29. At Port Adelaide all the land surrounding Berth 29 is leased and operated by Flinders Logistics so unless Flinders Ports allowed the second crane to be kept at Berth 29 pursuing these bulk opportunities would also require the expense of a lease of land from Flinders Logistics to store the equipment.

Although the Gottwald harbour mobile crane would stay on the Berth it is a mobile crane which can be wheeled back and forth across the loading/unloading area as required and there is enough space on the Berth to operate the two cranes without stopping other competitors from using the space. At the Port of Darwin, two cranes are operated at East Arm Berth - one owned by Patricks and one owned by QPB. The space available at Berth 29 and on the wharf apron is relatively similar to that at East Arm Berth in Darwin.

Throughout the discussion QPB pointed out the advantages and business opportunities that could arise from operating two cranes at the Berth.

Flinders Ports wrote back denying QPB the ability to place a second crane at the berth.

In December 2013, Flinders Ports/Logistics placed a second mobile harbour crane of its own at the facility without any discussion or acknowledgment of this development to QPB allowing Flinders Ports the ability to take advantage of the potential business opportunities outlined by QPB.

Similar complaints have been made by other access seekers - Asciano's submissions to ESCOSA

In ESCOSA 's 2012 Ports Pricing and Access Review, Asciano raised similar issues in relation to competition with Flinders Ports and ESCOSA recognised that the vertically integrated nature of Flinders Ports may give rise to the potential for it to engage in anti-competitive behaviour by using regulated profits to cross-subsidise its other contestable activities.

Asciano's submissions to that review noted that:

- Flinders Ports currently have a monopoly position and that an ongoing deterrent to the potential misuse of this market power is required.

- Flinders Ports are no longer just the landholder, but are now competing in the provision of additional operational activities such as port logistics and stevedoring. As such Flinders Ports are supplying monopoly services to port users while also competing with those users for business in port logistic and stevedoring activities. It was noted that at the time Asciano was seeking access to certain services from Flinders Ports to retain its key customer in South Australia, Flinders Ports were bidding for the work from that customer and Patrick believed that Flinders Ports were using operational processes and procedures, such as environmental controls, licensing and government approval issues, to disadvantage unrelated third parties using Flinders Ports' facilities as competitors or potential competitors to Flinders Ports/Logistics.

- Third party access is only viable when the monopoly providing that access deals with all parties (including related parties) equally.

- The South Australian ports pricing and access regime should be strengthened with regulatory provisions relating to ring fencing and vertical separation as Flinders Ports move into contestable activities and competes directly with users of Flinders Ports services and should address:

  - the potential for margin squeeze, cross subsidy and cost shifting by Flinders Ports;

  - the need for stronger separation of functions including different Flinders Ports entities engaging in monopoly and contestable port services, where these entities operate on an arms-length basis

  - the need for an explicit prohibition of preferential treatment or discrimination between operators in the contestable ports services

  - the need for a strengthening of ESCOSA's ability and powers in regard to monitoring, the regime and detection of breaches and enforcement of remedies including an annual audit of regulatory compliance.

    - Typically where monopoly infrastructure is subject to third party access regulation and the owner of the infrastructure also competes with other users of the infrastructure then stronger ring fencing and separation regimes are in place (eg, electricity, gas and rail). Stronger regimes were put in place in those industries, not because of an actual misuse of market power, but to increase confidence of users in being able to forecast to the longer term.

    - The choice to strengthen the regime should be based on principles of good economic regulatory practice rather than on a requirement for a party to produce evidence of misuse of market power.

POAGS Pty Ltd
ABN 46 123 021 492
Level 22, 44 Market St **SYDNEY NSW 2000**
T |+61 2 9005 1100
F |+61 2 9005 1101
poags.com.au

2 March 2012

Stewart Lammin
PO Box 19
Port Adelaide
South Australia 5015

Berth 29

Dear Stewart,

Commercial in Confidence

Thank you to Andrew and yourself for taking the time to meet with me yesterday to discuss opportunities on Berth 29. As discussed we would like explore the opportunity to work together and further develop bulk exports through the facility.

POAGS formally apply to Flinders Ports to relocate an existing Gottwald harbour mobile crane (details attached) to Berth 29 to service a client that has sufficient volume to make it viable for us to do so. Please advise if you require further information on the crane specifications to approve the relocation. The client requires rail services that our sister company will be providing and hence we would be interested in access the new common user rail siding at the back of Berth 29.

As advised to me during the meeting, access to servicing our company's trains at berth 29 is restricted to Flinders Ports Logistics. Although we would prefer to operate this function ourselves I would request that you provide POAGS with a comprehensive published tariff list of fees and charges that would be applicable to use the site un loading heavy containers inbound and back loading outbound wagons with empty containers. Also ancillary charges envisaged and crane hire charges. I would appreciate these costs as soon as possible as we are keen to move forward with our client.

I understand we and two other parties have submitted rates to operate your crane and we see significant advantages to having two cranes in operation on any vessel operating at the berth and would like to utilise Flinders crane in addition to ours.

The principle advantage we see in operating two cranes include

1. Attracting higher volume customers to the port.
2. Provides higher level of confidence to exporters on capability of the facility to handle their product.
3. Significantly reduce the risk of demurrage to the end user as a result of single crane failure.
4. Increased the skills of operators and maintainers through higher equipment utilisation and cost reductions.
5. Reduction in berth utilisation through higher loading rate.

Given our intent in relocating a similar crane on the same berth it would appear advantages that both parties work together to promote bulk minerals through the berth by utilising both cranes and share equipment to effectively increase loading speeds and hence capacity through the berth and reduce costs.

Potentially a joint venture would seem logical to promote the growth of the facility. There are a few models to review this but one would potentially be we share the forklift cranes in a AAT type model and POAGS provides the shore side labour and Flinders provide the rail side labour but am open to alternative suggestions.

I have attached the crane specification for your review and as can be seen based on the assumption that a 32m beam vessel plus 10 m set off on the wharf to 42m the crane has a capacity 44t which with our light weight Rotabox (6t) gives the crane the ability to reach the far side with 38 t heavy boxes.

I look forward to discussing this opportunity with you further and receiving the information from you directly on the rail access and process for approval for relocating the crane to Berth 29.

Yours sincerely

Antony Perkins
Director Bulk Logistics

Attachments

1. Gottwald Specifications

Flinders Ports
SOUTH AUSTRALIA

296 St Vincent Street Port Adelaide South Australia 5015
P.O. Box 19 Port Adelaide South Australia 5015
Tel +61 8 8447 0611 Fax +61 8 8447 0606

29 February 2012

Antony Perkins
Director Bulk Logistics
POAGS Pty Ltd
Level 22
44 Market Street
SYDNEY NSW 2000

Dear Antony

Re: Berth 29

With reference to your letter dated 2nd December 2011 and your request to relocate a Gottwald Harbour Crane to Berth 29 and utilise the Flinders Ports rail at Berth 29.

Flinders Ports can confirm that the rail track into Berth 29 is common user infrastructure and POAG's trains will have access to the rail. I can also confirm that there is a single operator of the facility and Flinders Ports Logistics will provide the operations to service the trains.

Regarding your request for the placement of a 2nd harbour crane to be located at Berth 29, Flinders Ports has, broadly, considered four issues:

- operational matters, such as how the facility would be likely to operate with or without the POAGS crane being located at Berth 29;
- capacity issues for Berth 29, in particular given existing infrastructure and likely future activity;
- whether or not the placement of the crane is in the best interests of the Port as a whole; and
- whether or not viable alternatives are available to POAGS to service its client(s) either at Berth 29 or elsewhere.

Flinders Ports is of the view that any additional infrastructure or major plant including cranes located within the facility will be owned and operated by Flinders Ports. There are a range of operational, capacity and future development reasons for this. This approach supports our view that to ensure high levels of efficient operation at the berth additional equipment positioned at Berth 29 is best managed and maintained through a single entity arrangement. In this case, that entity is already in place and operating.

As you are aware, Patrick already operates a mobile loader at the berth and this equipment has been located within the facility for some years. Flinders Ports is required to manage its arrangements with Patrick in relation to this loader in accordance with an agreement that has been in place for some time.

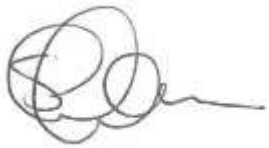
Additionally, it is not currently part of Flinders Ports' business model to form strategic or joint venture partnerships with other organisations. This includes for the ownership or placement of port infrastructure. Our experiences with previous or existing joint venture models has led Flinders Ports to the conclusion that the interests of users of the port facilities are best served by a single entity owning and operating the infrastructure, plant and equipment under a common user access model. We are therefore not prepared to consider any joint venture arrangement with POAGS associated with cargo handling/loading operations at Berth 29.

I would also point out that the available land area at the berth is progressively being developed for cargo storage and other related requirements. As such it is our view that “reserving” additional land areas for the related storage and wash-down facility, as would be required for this additional crane, is not the best use of this area.

Consistent with how Berth 29 is being made available to other users, Flinders Ports is happy to provide POAGS access to the existing Flinders Ports harbour crane located at Berth 29 to service its clients. Flinders Ports Logistics will supply POAGS with a comprehensive tariff, available to all users that will specify the fees and charges associated with use of the crane.

In addition, Flinders Ports is happy to discuss the option of providing access at other suitable berths at Port Adelaide to enable POAGS to service its existing customer base if required.

Yours sincerely



Stewart Lammin
General Manager Business Development

Subject: RE: Confidential information provided by Qube

From: Peevor, Stuart (ESCOSA) <Stuart.Peevor@escosa.sa.gov.au>
Sent: Tuesday, 3 January 2017 2:45 PM
To: Michael Sousa <Michael.Sousa@Qube.com.au>
Cc: Harbutt, Ashley (ESCOSA) <Ashley.Harbutt@escosa.sa.gov.au>
Subject: RE: Confidential information provided by Qube

Thanks Michael. We understand.

Stuart Peevor
MANAGER, PRICING AND ACCESS

Level 1, 151 Pirie Street Adelaide SA 5000
GPO Box 2605 Adelaide SA 5001
(08) 8463 4318 | 0433 616 630
stuart.peevor@escosa.sa.gov.au | www.escosa.sa.gov.au

From: Michael Sousa [mailto:Michael.Sousa@Qube.com.au]
Sent: Tuesday, 3 January 2017 12:51 PM
To: Peevor, Stuart (ESCOSA) <Stuart.Peevor@escosa.sa.gov.au>
Cc: Harbutt, Ashley (ESCOSA) <Ashley.Harbutt@escosa.sa.gov.au>
Subject: Re: Confidential information provided by Qube

Stuart,

Sorry about this.

Yes we have no concern in this information being shared on a confidential basis, I.e. We don't want it published due to concerns of retribution from Flinders Ports.

Regards

Michael Sousa
Director
Qube Ports
Ph: 02 9005 1134
Mb: 0401 719 944
Email: Michael.sousa@qube.com.au

On 3 Jan 2017, at 12:09 PM, Peevor, Stuart (ESCOSA) <Stuart.Peevor@escosa.sa.gov.au> wrote:

> Thanks for this Michael, and a Happy New Year to you.
>
> You haven't yet indicated whether or not Qube permits us to share the information that you provided to us with the Department of Planning, Transport and Infrastructure. Can you please let me know as soon as you can?

Kind regards

Stuart Peevor
MANAGER, PRICING AND ACCESS

<image001.jpg>

Level 1, 151 Pirie Street Adelaide SA 5000
GPO Box 2605 Adelaide SA 5001
(08) 8463 4318 | 0433 616 630
stuart.peevor@escosa.sa.gov.au | www.escosa.sa.gov.au

From: Michael Sousa [mailto:Michael.Sousa@Qube.com.au]
Sent: Thursday, 29 December 2016 11:57 AM
To: Peevor, Stuart (ESCOSA) <Stuart.Peevor@escosa.sa.gov.au>
Cc: Harbutt, Ashley (ESCOSA) <Ashley.Harbutt@escosa.sa.gov.au>
Subject: RE: Confidential information provided by Qube

Stuart,

Thanks for your email.

Attached is the document as discussed.

Regards

Michael Sousa
Director
Qube Ports
Ph:02 9005 1134
Mb: 0401 719 944
Email: Michael.sousa@qube.com.au

From: Peevor, Stuart (ESCOSA) [mailto:Stuart.Peevor@escosa.sa.gov.au]
Sent: Friday, 23 December 2016 12:00 PM
To: Michael Sousa <Michael.Sousa@Qube.com.au>
Cc: Harbutt, Ashley (ESCOSA) <Ashley.Harbutt@escosa.sa.gov.au>
Subject: Confidential information provided by Qube

Hi Michael

Thank you, David and Steve for taking the time to talk with us earlier this week.

As discussed, this email is seeking your permission for us to share the information that you provided to us, and the information you will send us as part of the October 2016 case study, with the Department of Planning, Transport and Infrastructure. This will, of course, be on a confidential basis.

Could you please reply to this email, indicating whether or not you permit us to do this.

Kind regards

Stuart Peevor
MANAGER, PRICING AND ACCESS

Level 1, 151 Pirie Street Adelaide SA 5000
GPO Box 2605 Adelaide SA 5001
(08) 8463 4318 | 0433 616 630
stuart.peevor@escosa.sa.gov.au | www.escosa.sa.gov.au

Appendix E – Qube's correspondence with ESCOSA regarding review methodology

Partner Simon Muys
Contact Simon Muys
T +61 3 8656 3312
smuys@gtlaw.com.au
Our ref SJM:SJM:1045124

L 25, 101 Collins Street
Melbourne VIC 3000 AUS
GPO Box 90 Melbourne VIC 3001
T +61 3 8656 3300 **F** +61 3 8656 3400
www.gtlaw.com.au

25 June 2021

By email: Adam.Wilson2@sa.gov.au

Adam Wilson
Chief Executive Officer
Essential Services Commission of South Australia
Level 1 / 151 Pirie Street
Adelaide SA 5000

Copies

Mark.Caputo.sa.gov.au

Dear Adam

ESCOSA Ports Pricing and Access Review 2022

We refer to:

- Qube Ports Pty Ltd's (**Qube's**) engagement with ESCOSA in relation to the application (**Application**) by the South Australian Government seeking recertification of the South Australian statutory port access framework (the **SA Ports Regime**); and

- the ports pricing and access review (the **2022 Ports Review**) required to be conducted by ESCOSA under section 43 of the *Maritime Services (Access) Act 2001* (the '**Act**') during the course of 2022.

The Application has, rightly, focused national policy attention on the SA Ports Regime.

Qube, and other stakeholders, have repeatedly expressed concerns with the SA Ports Regime over the last decade. During the ESCOSA ports reviews in 2012 and 2017, such concerns were provided by Qube on a confidential basis. However, given the acute level of concern and damage occurring to competition in the South Australian port supply chain, Qube has determined to publicly advocate for reform, including submitting strongly that the National Competition Council (**NCC**) (and Federal Treasurer) reject the Application on the basis that the SA Ports Regime is not an effective access regime for the purpose of Part IIIA of the *Competition and Consumer Act 2010* (**CCA**).

Irrespective of the outcome of the Application process, the SA Ports Regime will continue to operate. Accordingly, the 2022 Ports Review remains a critical opportunity to address an outdated and inadequate framework.

Qube respectfully submits that the ESCOSA reviews in 2012 and 2017 failed to test adequately the effectiveness of the SA Ports Regime. In part, this was due to the methodology used by ESCOSA, which does not reflect contemporary regulatory practice and which failed to ask the right questions of the SA Ports Regime as a matter of economics, competition policy and commercial reality.

We therefore welcome this opportunity to engage with ESCOSA and invite it to revisit and consult upon a new and more appropriate methodology for assessing the SA Ports Regime before commencing the 2022 Ports Review.

In the **Annexure** to this letter, we set out:

- commercial context that will shape the next Review and that makes policy reform of the SA Ports Regime particularly urgent in terms of protecting and promoting workable competition within the South Australian port supply chain, for the benefit of shippers and South Australian consumers;

- several critical observations regarding the methodology previously adopted by ESCOSA in past reviews; and

- recommendations for improvements to ESCOSA's approach, which are necessary to better reflect the market structure in South Australia as well as good regulatory practice. The improvements identified are also consistent, we submit, with achieving the pro-competitive objects of the Act.

In respectfully providing these observations on a new methodology for the 2022 Ports Review, Qube makes no secret of its view that the SA Ports Regime is badly broken and must be urgently and substantially overhauled. This is needed both to align the regulatory framework with modern regulatory practice and, more importantly, to protect and promote competition in the South Australian port supply chain.

Qube therefore welcomes the opportunity to raise its concerns and looks forward to working with ESCOSA to modernise the framework, commencing with the 2022 Ports Review.

Qube consents to publication of this letter and Annexure.

Yours sincerely

Gilbert + Tobin

Simon Muys
Partner
+61 8656 3312
smuys@gtlaw.com.au

Geoff Petersen
Special Counsel
+61 2 9263 4388
gpetersen@gtlaw.com.au

Annexure

Observations re ESCOSA approach and methodology in 2012 and 2017 ports reviews

Commercial and market context

Over the past decade, Flinders Ports (itself, or through related entities) (together the **Flinders Group**) has expanded to operate and compete in several contestable market activities within the South Australian port supply chain, including stevedoring, container management and storage, warehousing and logistics (across all freight types).

Recent expansions to the scope of Flinders Group activities include:

- in 2012, Flinders Group expanded its operations into:
  - downstream logistics and stevedoring services through its subsidiary **Flinders Logistics**[1], which provides logistics and stevedoring services, focussing on mineral resources and oil and gas sectors, and has grown its presence at the South Australian Ports to now be one of the largest providers of these services;[2];
  - downstream container terminal management services through its subsidiary **Flinders Adelaide Container Terminal**, which provides stevedoring and terminal management services to international shipping lines;[3] and
- in 2019, Flinders Logistics significantly increased its downstream presence with the establishment of a subsidiary supplying warehousing and distribution services, **Flinders Warehousing and Distribution**, which offers services such as container pack / unpack, storage, distribution and additional supply chain services.[4]

Vertical integration creates a well-understood incentive and ability for Flinders Ports to provide preferable treatment to its own downstream entities.[5]

Qube has seen these incentives manifest in various ways, as set out in some detail in correspondence provided by Qube to the NCC, in the context of the Application.

---

[1] Flinders Logistics website, available at: https://www.flinderslogistics.com.au/about/overview/.

[2] Qube has been informed by a Flinders Port representative of a recent change in management structure that removes any separation between Flinders Ports and Flinders Logistics.

[3] Flinders Adelaide Container Terminal website, available at: https://www.flindersadelaidecontainerterminal.com.au/.

[4] Flinders Warehousing & Distribution website, available at: https://www.flindersfwd.com.au/about/.

[5] For example, the competition policy concern associated with vertical integration in the context of a port was canvassed by the ACCC in its assessment of the Brookfield / Asciano transaction – and which ultimately led to the ACCC opposing the deal. See the Statement of Issues, Brookfield consortium – proposed acquisition of Asciano Limited, 15 October 2015. Similar issues were explored by the ACCC and the Federal Court in the context of the Aurizon sale of the Acacia Ridge intermodal rail terminal to Pacific National (Statement of Issues, Pacific National / Linfox – Proposed acquisition of intermodal assets of Aurizon, 15 March 2018).

While, over the last 10 years, Flinders Ports has grown to become the most vertically integrated port operator in Australia – the SA Ports Regime remains largely unchanged. The framework, which pre-dates vertical integration emerging with the South Australian port supply chain, is not well designed to address it and accordingly has provided no meaningful transparency or regulatory constraint on Flinders Ports' ability to favour its related entities and/or discriminate against unrelated entities.

Current ESCOSA methodology for assessing market power

Under its 2012 and 2017 reviews, ESCOSA's stated methodology has been structured around the following two questions:

1 Does the *structure* of the market create the potential to exercise market power for the providers of Regulated Services, EMS and Pilotage services?

2 Based on the *conduct* and *performance* of those providers, is there evidence of market power being exercised?

In taking this approach, ESCOSA is applying a traditional 'structure-conduct-performance' (**SCP**) paradigm.

In relation to the first question, ESCOSA has been prepared to accept that the monopoly position of Flinders Ports creates the potential for it to exercise market power and that this is unlikely to change over the medium term.[6] However, ESCOSA found in answering the second question that there has been no actual evidence of Flinders Ports exercising such market power.

In reaching this view, ESCOSA's methodology has focused on testing the conduct of Flinders Ports principally based on an assessment of whether port charges for regulated services appeared to be set at an excessive level which indicated an exercise of market power.

The evidence assessed by ESCOSA, in this regard, involved:

- benchmarking of ports charges with other Australian ports, conducted by GHD Pty Ltd (GHD) for ESCOSA;
- an analysis of Flinders Ports' regulatory accounts;
- commercial information provided by Flinders Ports and Viterra concerning negotiations with port users;
- the absence of any access or pricing disputes in the current prescribed period; and
- submissions made by stakeholders.

Based on this material, ESCOSA determined that:

> *Even if the potential to exercise market power is present, the nature of the Access and Pricing Regimes will depend on the risks to consumers of market power actually being exercised. If there is no evidence of the exercise of market power, it would be difficult for the Commission to*

[6] 2017 Ports Access and Pricing Review, page 2 and 16.

recommend further consumer protections than those already afforded under the regimes. Such evidence includes the extent to which users are able to reach negotiated outcomes, evidence of profits earned by the regulated companies and the efficiency of prices charged, which may be informed by benchmarking and analysis of price trends.[7]

While ESCOSA acknowledged that Flinders Ports was a vertically integrated operator, and that this created incentives for anti-competitive behaviour, the methodology used by ESCOSA did not directly address these risks or test for discriminatory conduct. Rather, the methodology was focused on unilateral price effects (i.e. excessive or monopoly pricing for regulated services) – and not the anti-competitive risks associated with vertical conduct.

Ultimately, this undue focus on testing unilateral pricing conduct, through a static SCP model, and not the potential vertical effects created by leverage of market power into related markets, presents the single most significant methodological flaw in ESCOSA's approach. The 2012 and 2017 port reviews failed to properly ask the famous and pragmatic question identified by the late Professor Maureen Brunt as the most important for a competition or sectoral regulator, "what is really going on here"?[8]

Observations in response to the ESCOSA methodology

Qube makes three observations in response to the ESCOSA methodology:

- First, as already noted, the methodology used to test market conduct (based on a limited assessment of pricing for regulated services) is inadequate, in that it does not address the anti-competitive harm most likely to arise – discriminatory (or predatory) cross-subsidies, bundling or other leveraging of price.

- Second, such singular reliance on the SCP paradigm is dated and does not reflect regulatory best practice – particularly in the context of the South Australian port markets, where the approach has failed to evolve to recognise the dynamic competition risks associated with vertical integration.

- Third, the evidence used to test market conduct was limited, failed to acknowledge concerns raised by stakeholders, and does not consider or investigate other readily available market evidence relevant to a robust assessment of market power and conduct.

Each will be addressed briefly below.

Limitations of the SCP paradigm in assessing regulation of vertically integrated markets

Whilst the SCP methodology can be useful in undertaking a static assessment of whether market power is being (or has historically been) exercised, the SCP has well known limitations, including:

- its static nature;

[7] 2017 Ports Access and Pricing Review, page 5.

[8] P Williams and G Woodridge, *Antitrust Merger policy: Lessons from the Australian Experience*. Paper prepared for the National Bureau of Economic Research Twelfth Annual East Asian Seminar on Economics, Held at the Hong Kong University of Science and Technology, June 28-30 2001. Available at https://users.nber.org/~confer/2001/ease/williams.pdf.

- the directional focus (structure to conduct to performance), which fails to account for the potential for a feedback loop where structure and conduct might affect one another in different ways; and

- the failure of the SCP to consider inter-firm rivalries and strategic behaviours (especially with respect to entry deterrence and barriers to expansion).

These limitations are well known and were identified by the Australian Competition Tribunal in *Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2*. The Tribunal observed that the static SCP paradigm has been critiqued by numerous economists in favour of more dynamic forms of market analysis.[9] Notably, while a form of SCP was applied by the Tribunal in this case, it was not the method applied by the ACCC (and indeed we are not aware of the ACCC or any other Australian regulators routinely adopting this method).

The limitations of SCP identified by the Tribunal in *Chime* are particularly important in relation to the SA Ports Regime. The increasing vertical integration of Flinders Ports means that the risk of strategic behaviour and "feedback loops" is acute. Flinders Ports has the strong, and growing, ability and incentive to act in ways that undermine the conditions for competition over time.

A static SCP assessment is likely to fail to adequately respond to the risk of competitive conditions being degraded in the future as a result of the increasing vertical integration of Flinders Ports.

Moreover, the Act does not call for ESCOSA to undertake an *ex post* analysis of whether market power *has been exercised*. That would reflect an exercise in closing the regulatory gate only after there is evidence that the horse has bolted. The focus of any review under s 43 of the Act should be on testing whether the regime does enough to *guard against and mitigate* future anti-competitive behaviour and thereby facilitate competition and investment confidence by competitors and entrants in related markets.[10]

A methodology that appears, at least in practice, to require users to establish actual misuse of vertical power by Flinders Ports would do little more than duplicate s 46 of the Competition and Consumer Act 2010 (**CCA**).

Reliance on reference pricing as the primary test of competitive effects

Each of the 2012 and 2017 port reviews relied heavily on an analysis of prices for regulated services as the test for whether the SA Ports Regime is effective.

In describing its approach to assessing the pricing regime under the Act, ESCOSA states:[11]

> ***Intended outcome: fair and reasonable prices***
>
> *The Commission has assessed this outcome by considering the following:*

[9] *Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2*, [25]-[28].

[10] ESCOSA has acknowledged this objective, acknowledging that the regime is "*intended to protect the interests of port users from the potential exercise of market power by port operators*" – see 2017 Ports Access and Pricing Review, page 1.

[11] 2017 Ports Access and Pricing Review, page 31.

- *the extent to which customers are entering into commercial agreements to use Maritime Services*

- *where agreements are being entered into, whether or not the commercially negotiated charges are below those in the published pricing schedule, and*

- *whether or not port operators have been earning excessive profits.*

Evidently, pricing for regulated services may be a relevant consideration in assessing the overall operation of the SA Ports Regime, it is not an adequately tool to draw safe conclusions about the effectiveness of the framework.

Amongst other things, this is because:

- A methodology that focusses, almost exclusively, on pricing conduct does not respond to the significant competition risks associated with non-price conduct – such as internal sharing of confidential and sensitive information of downstream competitors, operational discrimination, staff sharing etc.

- Second, the focus of ESCOSA's price analysis is the risk of excessive profits from regulated services (i.e. monopoly pricing) and not the risk of discrimination in its pricing conduct to favour downstream related entities or to otherwise foreclose or damage competition.[12]

- Third, while ESCOSA looked at evidence (provided by Flinders Ports) of "successfully" negotiated, non-standard pricing with port customers, this does not appear to involve any meaningful analysis of whether pricing with other related Flinders entities involved discrimination, bundling or cross subsidies. Indeed, there appears to be limited, if any, robust and transparent testing by ESCOSA of pricing conduct within the Flinders Group, including any imputation analysis of bundled services involve cross-subsidies or predatory bundling conduct, and whether discounts applied to related entities are non-discriminatory.

- Similarly, the review by ESCOSA of Flinders Ports' regulatory accounts appears limited to testing for excessive profits.

This approach contrasts with economic analysis typically applied by regulators, in other contexts, to test pricing conduct by operators in vertically integrated markets containing market power.

For example, prior to the rollout of the NBN and structural separation of Telstra, the ACCC closely monitored and regulated not just the overall *level* of Telstra's pricing, but also its relative pricing and service levels between different layers of the supply chain – precisely to respond to the competition risk arising from vertical integration. The economic tools deployed by the ACCC included public reporting of Telstra's regulatory accounts an associated imputation testing, to identify any potential price squeeze issues.

The imputation testing framework sought to identify whether headroom existed between Telstra's retail prices and the access charges it imposed on access seekers sufficient to allow access seekers to compete at the retail level.[13] This is consistent with longstanding economic approaches to assessing

[12] 2017 Ports Access and Pricing Review, pages 32-35.

[13] See, for example: ACCC, Imputation Testing and Non-price Terms and Conditions Report Relating to the Accounting Separation of Telstra for the December Quarter 2009, March 2010.

and identifying margin squeeze, discriminatory and predatory bundling and foreclosure conduct, in Australia and overseas.

Limitations in evidence

The narrow methodology applied by ESCOSA in 2012 and 2017 also resulted in it failing to have regard to a range of relevant and important market evidence.

For example:

- evidence and concerns raised by Qube in confidential submissions with ESOCSA as part of the review process, regarding discriminatory conduct by Flinders Ports, appears not to have informed ESCOSA's approach or findings (and, indeed, ESCOSA found that no evidence existed of such conduct);

- no reference was made to public announcements and other evidence of growing vertical integration by and within Flinders Ports, including evidence regarding the corporate and organisational structure of the Flinders Group;

- ESCOSA does not appear to have sought information to explore or test the robustness of any ring-fencing measures (including information protocols or staff separation), internal structure charges, remuneration incentives, customer and marketing materials; and

- the reviews do not contain any analysis of market dynamics in related markets that may indicate anti-competitive leveraging of market power – including an analysis of reasons for customer switching in related and contestable vertical markets.

Finally, to the extent that ESCOSA appears to have relied upon the absence of any access or pricing disputes under the SA Ports Regime as a measure of the effectiveness of the regime – this is clearly misplaced. The absence of disputes says much about the inadequacy of the regime, and not its effectiveness. The dispute mechanism under the SA Ports Regime is narrowly focused around disputes arising from negotiation of access terms by access seekers and does address the potential for disputes to arise concerning conduct of vertically integrated operators in the performance of its obligations.

Moreover, in recent times, Flinders Ports has publicly contended that it does not appear that the SA Ports Regime applies to stevedores at all.[14] Whilst this argument is rejected by Qube, the mere fact that Flinders Ports feels that it is able to make such a submission demonstrates the inadequacy and uncertainty that underpins the operation of the SA Ports Regime and the need for urgent and substantive reform.

If the SA Ports Regime does not provide stevedores with a certain and clear right to obtain non-discriminatory and fair access to 'common user' berths at ports in South Australia, what is the regime really designed to achieve?

[14] Flinders Ports response to NCC information request, 26 May 2021, at [125].

A way forward: ESCOSA 2022 Ports Review

Qube submits that ESCOSA should adopt modern and robust methodology for the purpose of undertaking its 2022 Ports Review.

Whilst Qube does not object to the SCP method being used by ESCOSA as a tool to inform its views about the effectiveness of the SA Ports Regime, it should avoid relying upon SCP analysis as the *sole or even primary* means of assessing the regime's effectiveness. ESCOSA should ensure that the 2022 Ports Review adopts conceptual tools better suited to testing the SA Ports Regime's response to the most evident competition policy risk currently affecting the South Australian ports sector: Flinders Ports' vertical integration. The 2022 Ports Review needs to recognise and investigate "what is really going on here".

In undertaking its 2022 Ports Review, Qube therefore invites ESCOSA to consider the following adjustments to its methodology:

(a) Any review should test whether the scope, structure and practical operation of the SA Ports Regime is adequate in the circumstances. This may include, for example:

  (i) Asking whether the underlying approach to regulation remains appropriate – i.e. is a model based around a negotiate/arbitrate process for a narrow set of 'regulated services' the most appropriate means of addressing the risk of discrimination, misuse of market information and foreclosure caused by the vertically integrated nature of Flinders Ports?

  (ii) Is it appropriate that the regime benefits only access *seekers*, and does not provide any process for existing access holders?

  (iii) Is the referral of disputes to an arbitrator appropriate, given the nature of the disputes that may be raised (and the nature of the complaints that have been received by ESCOSA over the last decade regarding Flinders Ports' conduct)?

  (iv) Does the regime provide adequate regulatory transparency and oversight of price and non-price performance to stakeholders, including port users that compete with Flinders Ports in downstream markets?

(b) ESCOSA should adopt a methodology that is not limited to an analysis of excessive pricing, but tests the extent to which the SA Ports Regime addresses and mitigates the incentive and ability that Flinders Ports holds (as a vertically integrated, monopoly operator) to:

  (i) directly or indirectly raise its rivals' costs – including through cross subsidisation, bundling, price discrimination;

  (ii) discriminate in the operation of infrastructure, to the practical benefit of its own downstream entities; and

  (iii) disclose and use confidential or competitively sensitive information obtained through its role as port operator to benefit contestable businesses.

(c) ESCOSA should have regard to all relevant evidence. This should not be limited to a 'desktop review' of pricing for prescribed services or Flinders Ports' regulated accounts. ESCOSA should use the review to properly and transparently investigate and assess:

(i) developments in relevant downstream or related markets over the relevant period where Flinders Ports (or its related entities) operates – including the extent and nature of vertically integrated activities and the nature of the interaction between those activities and port operations;

(ii) the commercial and organisational structure of the Flinders Group – including reporting lines, remuneration structures etc and the incentives that this creates for anti-competitive and discriminatory behaviour;

(iii) what, if any, protections exist for competitively sensitive information of port users to be made available to staff or business units within the Flinders Group;

(iv) what level of transparent reporting and oversight exists over non-price conduct, including the scope for operational discrimination in favour of Flinders Ports' related and contestable business activities.

(d) ESCOSA should engage with all complaints, even if confidential. It must be recognised that many stakeholders will be reliant upon Flinders Ports and that complaints will, at times, only be made on a confidential basis.

(e) ESCOSA should canvass best practice regulatory models for addressing vertical integration in regulatory models governing monopoly infrastructure, including regulatory experience in ports (AAT and MIRRAT s87B undertakings[15], DBCT access undertaking[16]), telecommunications (Telstra Structural Separation Undertaking[17]), below rail infrastructure (Aurizon UT5 access undertaking[18]) and energy markets (AER Ringfencing Guidelines[19]; gas pipeline ring fencing provisions of the National Gas Rules[20]), amongst others.

ESCOSA should be slow to adopt conclusions that are not supported by evidence or which ask the wrong statutory question. For example:

(a) The absence of access disputes may not reflect the effectiveness of the SA Ports Regime, so much as it provides evidence of the ineffectiveness and inadequacy of the dispute process itself.

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[15] Melbourne International RoRo & Auto Terminal Pty Ltd s87B undertaking, 27 March 2014; and Australian Amalgamated Terminals Pty Ltd s87B undertaking, 23 November 2016.

[16] The issue of vertical integration at DBCT was addressed in a draft amending access undertaking (DAAU) submitted by DBCT Management Pty Ltd dated October 2015, and available here: https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2010-access-undertaking/october-2015-ring-fencing-daau/

[17] Telstra Structural Separation Undertaking, 27 February 2012 (see https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/telstras-structural-separation-undertaking/telstras-ssu)

[18] Aurizon Network 2017 Access Undertaking (UT5), as at 17 December 2020 (see file:///C:/Users/smuys/Downloads/UT5%20Access%20Undertaking%20-%20QCA%20Approved%20December%202020%20(7).pdf)

[19] The first AER Ring Fencing Guidelines were published on 30 November 2016. A current updated draft of the guidelines (version 3) and associated explanatory document are currently being consulted upon by the AER, available here: https://www.aer.gov.au/networks-pipelines/guidelines-schemes-models-reviews/electricity-ring-fencing-guideline-review

[20] See Chapter 4, part 2 of the National Gas Law.

(b) The statutory review mechanism should ultimately operate to restrain a vertically integrated port operator from having the ability to use market power to engage in conduct that distorts or diminishes competition in related markets. It cannot be the case that evidence of actual misuse of market power is required to be established.

(c) Levels of investment claimed by Flinders Ports as evidence in support of "light touch" regulation may say little about the effectiveness of the regime – but point instead to the capacity that investments offer it to generate supra-normal profits in related markets (through discriminatory or preferential conduct etc).