The Hon Patrick Conlon MP
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Mr Adam Wilson
Acting Chief Executive Officer
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Dear Mr Wilson

Thank you for your recent letter seeking comments on the *2012 Ports Pricing and Access Review Issues Paper*.

Please find enclosed South Australia's whole of government submission to the issues paper. If you require any further information on this submission, please contact Mr Peter Hollister, Director Marine and Logistics Policy, Department of Planning, Transport and Infrastructure, on telephone (08) 8303 0981 or at peter.hollister@sa.gov.au.

I look forward to receiving a copy of the draft report in due course.

Yours sincerely

HON PATRICK CONLON MP
MINISTER FOR TRANSPORT AND INFRASTRUCTURE

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SOUTH AUSTRALIAN GOVERNMENT'S SUBMISSION
2012 PORTS PRICING AND ACCESS REVIEW

Introduction/Summary

A competitive market for the provision of port services is a crucial enabler supporting South Australian industry. Productive and efficient port services are a key factor facilitating South Australian exporters and importers to be globally competitive. As a result, the South Australian Government takes a strong interest in the ports and shipping sector.

The *Maritime Services (Access) Act 2000* (the MSA Act) and associated regulations are the principal state-based legislative mechanisms for ensuring that port pricing and access to port services are reasonable, and based on fair commercial principles.

The South Australian Government is of the view that where access is required for port services, the application of the MSA Act offers a number of key benefits to both access seekers and infrastructure owners by:

- encouraging commercial negotiations with respect to ports access and pricing
- ensuring that access disputes are resolved in a timely fashion; and
- resolving uncertainty in terms of potential coverage by the Commonwealth's *Competition and Consumer Act 2010* (CC Act).

Importantly, the MSA Act ensures that the above is achieved in a manner which minimises compliance costs for port operators.

Over the next 10 years, demand for port services in South Australia is expected to increase significantly, particularly in the bulk trades as the mineral and resources sector progresses a number of projects across the state. To facilitate this growth, port capacity will need to be developed. It is important that the ports pricing and access regimes facilitate – rather than impede – such developments.

Responses to issues raised in Discussion Paper

Chapter 3: Regulation of ports 2007-2012

The Commission invites the views of stakeholders on outcomes/effectiveness of the ports pricing and access regimes over the 2007 – 2012 regulatory period.

The South Australian Government is not aware of any significant disputes in regards to ports pricing or access in South Australia.

The presence of the pricing and access regimes, and the potential for intervention by ESCOSA in the instance of a dispute, may in and of itself encourage the commercial resolution of access and pricing issues. For those ports and services not covered by the MSA Act, the potential for such ports to be declared under the access provisions of the CC Act may also encourage commercial resolution of access arrangements.

The South Australian Government notes ESCOSA's findings that Flinders Ports' charges have generally risen in line with Consumer Price Index, except for a rise in 2008/09 which ESCOSA attributes to the recovery of costs associated with infrastructure improvements at the Adelaide Container Terminal.

Chapter 4: Issues relating to whether or not regulation should continue

What are the possible implications for the ports access regimes as a result of Viterra's approved Access Undertaking? (4.1.1)

The ACCC approved Access Undertaking contains 'anti-overlap' provisions, to ensure it does not include aspects of state based access regimes. The Undertaking only governs the export of bulk wheat, not other grains or containerised grains.

How has competition between ports for container volumes developed? To what extent does Flinders Ports hold market power in providing container facilities? (4.1.2)

Flinders Ports plays a dual role as both port operator of the Port of Adelaide, and co-owner of DP World Adelaide (the operator of the Adelaide Container Terminal). Although a shareholder in the DP World Adelaide joint venture, Flinders Ports has no direct involvement in the day-to-day management of the Adelaide Container Terminal.

Flinders Ports has generally taken an active approach in its role as port manager in developing port infrastructure to facilitate trade at the Container Terminal; including:

- extension of Berths 7 and 8 at the Adelaide Container Terminal
- the provision of additional hardstand areas to accommodate the IMX containerised ore operations; and
- development of a rotating spreader and cradle that allows open top bulk containers to be lifted with a Portainer crane and to dump their load directly into a bulk ship's hold.

In considering competition issues, it is important to note that container port operators and stevedores compete with each other for cargo and ship calls.

In terms of competition for cargo, while the Adelaide Container Terminal is the only dedicated container terminal in South Australia, it shares a contestable cargo hinterland with the Port of Melbourne.

The Draft South Australian Containerised Origin/Destination Study notes that in 2009, 125 000 international import/export containers destined for/originating in South Australia were shipped via the Port of Melbourne. The report also notes that there has recently been a decline in demand for the land-bridge to/from Melbourne, with current estimates suggesting that volumes have fallen around 40%. This decline is reflective of a range of industry factors (many of which are beyond the control of port operators), rather than a structural change to the competitive position of the Port of Melbourne vis a vis Adelaide.

The respective market share between the Adelaide facility and Melbourne facilities is subject to fluctuations, which are the result of a range of factors, many of which are beyond the control of port operators and stevedores. Perhaps the clearest demonstration that competition exists in the South Australian container market for cargo is the fact that the Port of Melbourne maintains an office in Adelaide.

In terms of attracting ship calls, Flinders Ports and DP World are restricted in competing globally with other ports due to relatively smaller volumes of cargo compared to other ports both within Australia and globally.

Is the existing ports access regime capable of dealing with developments in the South Australian resources industry? (4.1.3)

The expected expansion of the minerals and resources sector poses a challenge for the ports sector in South Australia. The *2011 Resources and Energy Infrastructure Demand Study* recently released by the Resources and Energy Sector Infrastructure Council (RESIC) highlights that by 2021, outbound cargo from this sector could increase by between 120 and 160 million tonnes p.a. This is in contrast to the total annual export volume of around 20 million tonnes p.a. The growth in the minerals and resources sector, combined with the natural growth expected in other bulk cargoes, suggests that port capacity will need to increase substantially.

The report also suggests that ports will need the capability to handle larger (panamax and capsize) vessels.

Given the scale of increases in the sea freight task, it is unlikely that expansion/re-development of South Australia's existing ports will be able to accommodate this growth. As a result, there is likely to be a combination of capacity development at existing ports as well as development of 'Greenfields' port developments.

To accommodate substantial growth in cargo volumes, it is important that regulatory arrangements facilitate investment in port facilities. The South Australian Government is of the view that the pricing and access regimes established in the MSA Act are an important part of the regulatory environment applying to existing ports as well as ports to be developed in the future, as they:

- provide a framework to facilitate access to port facilities on fair commercial terms; and
- encourage the private sector to resolve access issues through commercial negotiation.

Importantly, as the regime established in the MSA Act is certified by Commonwealth, facilities and services proclaimed under this Act are not capable of being declared under Part IIIA of the CC Act. Under the CC Act, an access seeker may apply for the National Competition Council to declare a service at any time.

As such, the South Australian Government has formed the view that the access regime established by the MSA Act provides the greatest level of regulatory certainty to access providers and access seekers. This assists in promoting new investment in ports infrastructure and investment in upstream and downstream markets.

Market Power (section 4.2):

In addition to the factors specified in section 4.2 of the issues paper, the following should also be taken into account when considering the relative bargaining power of port operators and port users:

- **Switching Costs** – the bargaining power of port users is constrained in instances where they have high fixed investments at ports and/or land freight corridors to ports. This is particularly the case in the bulk commodity sectors.
- **Port Capacity and Demand** – an imbalance between port capacity and demand for port services impacts on the relative bargaining power between port service providers and users. Where port capacity exceeds demand, port operators will generally cause rival port operators to aggressively compete for market share. Where demand for port services exceeds port capacity, the bargaining power of port users can be reduced. The latter is expected to be the case if the development of the minerals and resources sector is not accompanied by commensurate developments in port capacity.
- **Potential for global substitutes** – Over the past decade, ports have become increasingly integrated into supply chains, and end users of products are sourcing products on a global basis. The threat posed by international competition is therefore a threat common to both port users and port operators.

Has the Commission's present form of price regulation (i.e. price monitoring) been appropriate and effective in deterring market power from being misused? (4.2.1)

The South Australian Government supports the present form of price regulation (price monitoring), as it provides a mechanism for detecting potential misuse of market power, whilst imposing minimal compliance costs on port operators.

Is it still the case that there is the potential for misuse of market power, or is there evidence of actual misuse of market power in the provision of Regulated Services and Essential Maritime Services? (4.2.2)

The South Australian Government is not aware of any instances of misuse of market power by port operators in South Australia. As noted earlier if volumes increase as expected, without commensurate increases in port capacity, then the potential for port service providers to use their market power will be exacerbated.

Is there a net benefit associated with retaining the current negotiate arbitrate ports access regime? (4.3); and

Is there a net benefit associated with retaining price regulation (of any form) for the ports price regime? (4.3)

Efficient third party access to port infrastructure provides a number of benefits, including:

- minimising duplication of port infrastructure
- limiting the extent to which market power can be exercised by port operators; and
- promoting competition in up stream and down stream markets.

The benefits arising from third party access regimes are hard to quantify as they depend on a range of future economic and commercial scenarios which are not yet clear (e.g. actual growth of demand and port capacity).

With respect to access, coverage of a facility under the access provisions of the MSA Act results in greater certainty of access arrangements for access seekers and providers than would be the case under the Commonwealth's access provisions[1].

These benefits are offset by costs (as outlined in section 4.3 of the issues paper). Thus, it is important to ensure that access arrangements in place are commensurate with the risk of a port operator or infrastructure owner exercising market power to extract un-economic returns from the market.

In this context, ESCOSA's current approach to ports pricing and access appears to strike a balance between the need to ensure potential benefits are realised, without imposing undue compliance costs on port operators.

The South Australian Government seeks ESCOSA to provide detail in its draft final report on the nature of benefits and costs accruing to access seekers and port operators/infrastructure owners arising from the ports pricing and access regimes established under the MSA Act.

Are there likely to be any developments over the next regulatory period that should also be taken into account by the Commission? (4.4)

As outlined earlier, cargo volumes moving through South Australia's ports are expected to increase significantly over the next 10 years. It is likely that this demand will be met by a combination of developing capacity at existing ports and the development of new 'greenfields' ports, though the location and timing of such developments are not yet known. It is important that the access and pricing regimes provide the flexibility to accommodate these circumstances during the next regulatory period.

In addition, greenfields multi-user port developments may be constructed and operated by companies with interests up-stream or down-stream from the operations of the port. In such instances, it is important that the pricing and access regime (if it is applied to such port services) ensures that market power is not resulting in a lessening of competitive forces in up-stream or down-stream markets.

Chapter 5: Issues relating to the effectiveness of the Ports Access Regime

Are there any ports or maritime services to which coverage of the access regime should be extended or revoked? If so, what are the arguments for doing so? (5.1)

The South Australian Government notes that an extension of the regimes can be made at any time. Consideration would be given to altering the coverage of the regimes, including the proclamation of new multi-user ports (and existing single-user ports which may seek to become multi-user ports) under the MSA Act, should circumstances require. This will be determined on a case by case basis.

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[1] Except in instances where an infrastructure owners voluntarily submit access undertakings to the Australian Competition and Consumer Commission (ACCC) as per the *Competition and Consumer Act 2010*