

20 July 2012

Essential Services Commission of SA
GPO Box 2605
Adelaide SA 5001

Attn: Mr Peter Lim

Re: 2012 Ports Pricing and Access Review

I refer to the 2012 Ports Pricing and Access Review – Draft Report dated June 2012 (Draft Report) and make the following further submissions on behalf of Flinders Ports Pty Ltd.

Overview:

Flinders Ports notes that the Commission concludes within the Draft Report that:

1. The current form of price regulation (price monitoring) is appropriate and should be maintained for a further five-year period; and
2. The current form of access regulation (negotiate-arbitrate) should continue for a further five-year regulatory period.

In reaching these conclusions it is noted that the Commission has formed the view that:

1. In relation to pricing regulation the market for Essential Maritime Service suggest that although there is the potential for market power to exist. However the Commission has further concluded that there is no evidence to indicate that such power is being exercised inappropriately.

The Commission has identified four key outcomes to support this view:

- (a) Regulatory account provided by Flinders Ports indicate that excessive profits are not being derived,
- (b) Benchmarking studies indicate that increases in charges are not any greater than that which has occurred in other (largely non-regulated) ports
- (c) Prices movement of regulated maritime services have been consistent with CPI increases except where special circumstances have existed, and
- (d) Evidence provided indicates that port users have been successful in achieving pricing outcomes below the listed price schedule.

2. In relation to access regulation the Commission has reported:
 - (a) No access disputes have been raised over the previous five year period.
 - (b) Stakeholders generally support the continuation of the regime in its current form.

The Draft Report however does not appear to consider or make reference to the fact that the market within which Flinders Ports operates is one which is commercially mature and involves port users that are sophisticated commercial entities. These entities usually operate across different regions (largely with no regulatory regimes in place) and are experienced in commercial negotiations.

For these reasons Flinders Ports takes the view that the continuation of the access and price regulation regimes is not required.

This view is supported by the outcomes achieved over the existing regulatory period (as measured by the new trades now utilising the ports and the growth achieved within the wide range of previously existing trades) with no disputes having been identified during this same period.

In relation to the specific Draft Report Conclusions, Flinders Ports makes the following observations:

Price Regulation:

The Commission makes a number of conclusions within the draft report to support the continuation of price regulation. The following provides comments on each of the conclusions

Draft Conclusion (3.3.1):

- **The structure for the market of Essential Maritime Services suggests that there is the potential for market power to exist.**

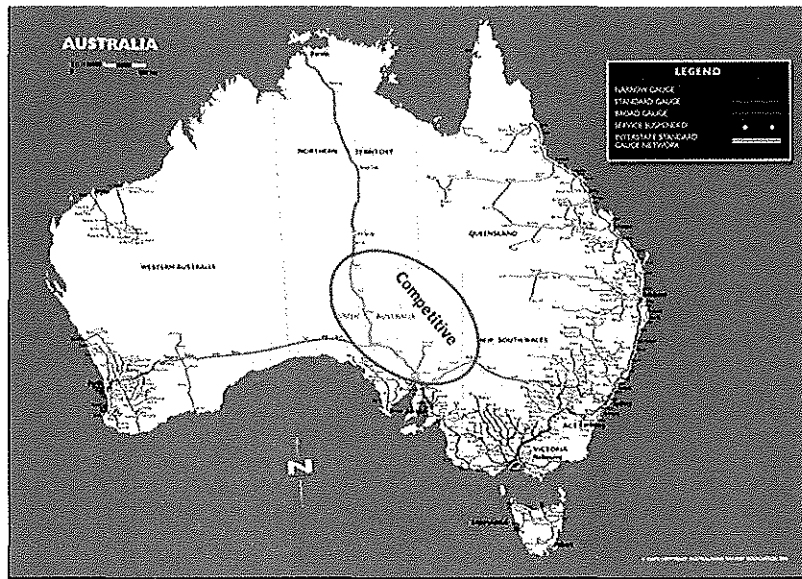
Flinders Ports Response:

The Draft Report states that:

1. there is little potential for the misuse of market power for containerised cargo largely as a result of the fact that as there are “credible alternatives to using the container services”, the ability of a port operator to extract monopoly rents is reduced.
2. Eyre Peninsula grain growers have little choice but to use Port Lincoln and Thevenard.
3. any uplift in mining development could give rise to concerns over future market power.

Flinders Ports submits that the “credible alternatives” argument that applies to the container industry is equally applicable to the mining industry.

Rail is a key factor in the mine to port logistics chain. The following diagram highlights the area where a large percentage of mining development in South Australia is underway and the proximity of this region to the Interstate Standard Gauge Rail Network. This highlights that once product is “on rail” the options for a suitable port solution are increased. Therefore the competitive pressure between the cost of rail and the applicable port charges provides a level of “commercial tension” to negotiating arrangements between port users and the port operator.



The Draft Report states that Flinders Ports is best able to account for specific infrastructure requirements and circumstances of the resources industry. However, the reality is that there are a several alternate port options currently available or being utilised by the mining sector in South Australia, including:

- Whyalla – currently being used to export some 6 million tonnes of iron ore with development underway to expand this capacity.
- Darwin – which has been and continues to be utilised by a number of mining sector entities.
- Geelong / Port Kembla – both these ports are viable options for mines located to the North / East (Broken Hill and Mallee regions of the state) given the rail links already in place.
- Ardrossan – currently being used and provides additional option for future development.

None of the above ports are subject to any form of regulation.

In addition (as noted in the Draft Report) a number of mining entities are actively pursuing alternative new port developments as a result of a number of factors (proximity to mine site, lack of existing rail, etc.). These include:

- Centrex – Port Spencer (previously referred to as “Sheep Hill”) on the Eyre Peninsula,
- Iron Clad – Lucky Bay on the Eyre Peninsula, and
- The Braemar Alliance – Myponie Point, located on the Yorke Peninsula.

These available and potential options provide a substantial commercial leverage to the mining industry in negotiating suitable port export solutions and hence act to prevent market power being improperly exercised.

Relevantly the Port Spencer development is being proposed as a combined iron ore / grain facility. Hence the future prospect of grain being diverted to this port development by grain exporters places a degree of commercial leverage “on the table” that will in effect further minimise the threat of market power being exercised in relation to the existing grain export trade in Eyre Peninsula region.

Flinders Ports is of the view that, the alternative port currently available provide competitive options to the services offered by Flinders Ports across all of the trade sectors highlighted by the Commission. These factors operate to diminish “market power”.

Draft Conclusion (3.3.2):

- **There is no evidence to suggest that port operators are earning excessive profits.**

Flinders Ports Response:

Flinders Ports agrees with the Draft Conclusion which also supports the view outlined by Flinders Ports that the maturity of the market within which Flinders Ports operates, the level of commercial pressure applied by port users and the availability of alternative options are adequate deterrents to any potential misuse of market power.

Draft Conclusion (3.3.3 / 3.3.4):

- **There is no evidence that Essential Maritime Services charges over the current regulatory period are indicative of market power being exercise**

Flinders Ports Response:

Flinders Ports' agrees with the Draft Conclusion and also notes the benchmarking study undertaken and particularly recognition of the key factors identified in the GHD Final Report associated with;

1. Economies of scale
2. Geographical disadvantage
3. Ownership

These factors have been raised by Flinders Ports in relation to previous pricing reviews and the GHD report supports the views of Flinders Ports.

The Commission notes that there is no evidence to suggest that market power is being improperly exercised.

Flinders Ports supports the draft conclusion that a more intrusive form of price regulation is not necessary. There is no evidence to support any other conclusion being reached.

The evidence gathered over the past five year regulatory period is consistent with the outcomes that have been reported since the regime commenced in 2001. While it could be argued that regulation has therefore been effective over the entire period there is an equally strong case, supported by the fact that no disputes have arisen over this extended period, to the position put by Flinders Ports that the outcome is more a product of the maturity of the market than of the regime itself.

Draft Conclusion (3.3.5):

- **Port operators and port users have been active in negotiating commercial arrangements over the regulatory period.**

Flinders Ports Response:

Flinders Ports agrees with the Draft Conclusion which supports the view that outcomes achieved in negotiating commercial arrangements between port operators and port users are a reflection of the following key factors:

- the port market is mature,
- port users are commercially sophisticated and
- the availability of alternative options ensures a degree of commercial leverage.

In addition the requirement to undertake long term port development provides a commercial imperative to negotiate and reach a mutually agreed position between port user and the port operator.

All these factors are consistent with a commercially astute market operating in a manner which provides an acceptable outcome for both parties and one which enables the trade to be sustained over the long term.

Flinders Ports firmly believes that this process would continue with or without regulation.

Draft Conclusion (3.4.1):

- **There is no evidence to suggest that a more intrusive form of price regulation is required.**

Flinders Ports Response:

Flinders Ports agrees with the Draft Conclusion.

Draft Conclusion (3.4.2):

- **Should stakeholders believe that an alternative price monitoring approach is preferable, the Commission invites stakeholders to provide information to substantiate their positions.**
- **The Commission invites stakeholders to comment on the appropriateness of continuing with the current approach of monitoring ports charges against movements in CPI.**

Flinders Ports Response:

Flinders Ports view is that price regulation should be discontinued, however if it is to remain than the price monitoring approach should be retained.

To the extent that price regulation continues, Flinders Ports notes that the use of the Consumer Price Index (CPI) as a base for reviewing and monitoring port charges has been in place since the inception of the regulatory framework. To date Flinders Ports is not aware of any major dispute to this index as a base from which to review the increases to charges applied.

The costs of operating a port are largely fixed and relate to three key areas:

- Labour,
- Materials (both general and specific industry related components (construction / building))

- Operations (fuel, power, etc.).

If an alternative to CPI was to be considered then a “blended” index approach would be favoured by Flinders Ports. This position is subject of course to a review of the original structure of the index and the on-going process of monitoring the applicability of the index components and the relevant ratio’s to be applied.

Access Regulation:

Draft Conclusion (4.3):

- **Access regulation should continue to apply for those Regulated Services that are Essential Maritime Services.**

Flinders Ports Response:

The Draft Report reflects the Commission’s view that the ports access regime plays a very important role in addressing concern over market power being misused as it provides an additional safety net in the form of a formal dispute resolution process.

The Draft Report also states that a certified State based regime provides a number of significant advantages over the other options for third-party access. These include, a greater level of regulatory certainty, promotion of commercial outcomes in the first instance (safety net provision) and a cost effective process for dealing with any dispute.

As a result of these factors the Draft Report reflects the view that the benefit derived from ongoing access regulation outweighs the costs given the potential for misuse of market power.

Flinders Ports would not necessarily disagree with the overall thrust of these general comments it remains of the view that the access regime is not required as there are existing commercial imperatives, both short and long term, that provide an effective mechanism to ensure appropriate access arrangements are negotiated between port users and Flinders Ports.

The Draft Report focusses on maritime services subject to access regulation but not price regulation. These are:

1. Pilotage,
2. Bulk Loaders at the various ports, and
3. Land.

Flinders Ports’ comments are generally related to Pilotage and Land and related to the key Draft Conclusions.

Draft Conclusions (4.3.1, 4.3.2, 4.3.3):

- **The structures of the markets for Regulated Services that are not Essential Maritime Services suggest that there is the potential for market power to exist.**
- **The access regime provided for under Part 3 of the MSA Act should continue.**

Flinders Ports Response:

As a general observation, Flinders Ports again notes that the potential for market power to exist does not appear to be a relevant consideration. The issue is whether such market power has been or may be misused. There is no evidence to support any past misuse and strong evidence of the existence of appropriate commercial pressure to prevent such misuse.

Pilotage

At the port of Whyalla a private pilotage service is operating in direct competition to the services provided by Flinders Ports. The Department of Transport has licenced these pilots and it is understood requires the same standard of training and expertise as applies to Flinders Ports.

While the view expressed by the Commission is correct in relation to the existing provision of pilotage services at proclaimed ports. This instance provides tangible evidence that the opportunity exists for other parties to enter into this market and provide specialist services at various port locations.

Land

In relation to Land, the Commission notes that “access to land is clearly limited to land necessary to enable meaningful access to other Regulated Services. These Regulated Services are defined as:

- Channels;
- Common User Berths;
- Bulk handling facilities as defined in the South Australian Ports (bulk Handling Facilities) Act 1996, but only in relation to conveyor belts (i.e. storage areas not included);
- Berths adjacent to bulk handling facilities;
- Land providing access to maritime services; and
- The Outer Harbor bulk loader at Port Adelaide.

“Maritime Services’ are in turn defined as services providing:

- Or allowing for access of vessels to a proclaimed port; or
- Ports facilities for loading and unloading at a proclaimed port; or
- Berths for vessels at a proclaimed port.

The Commission notes that the range of port services covered by Essential Maritime Services as defined in the MSA Act include maritime services relating to the provision of: navigation aids, harbor control (but not pilotage or towage), channels, berths, wharves, cargo loading and unloading (marshalling) areas (but not loading and unloading itself), jetties, berth pockets, fenders, mooring structures, mooring and unmooring and provisioning connections (but not provisioning).

These services are covered by three charges applied by the port operator:

1. Navigation Services charge
2. Harbour Services and Mooring charge, and
3. Cargo Service charge.

The issue of access to land within the port boundary is one associated with the requirement to provide access to an extent that allows for the loading and unloading of cargo and is provided by

way of an area which enables the appropriate marshalling of this cargo. The Cargo Service charge contemplates this service, is applied to the port user (not the stevedore) on the basis of the volume of cargo exported/imported and provides a return to the port operator for making this area available.

As:

1. the existing access regime is associated with and limited to the land area necessary to enable meaningful access to the other “Regulated Services”; and
2. there is no evidence of misuse of market power gaining access to land in connection with the provision of other Regulated Services.

Access to the marshalling area is a fundamental component of ensuring the efficient movement of cargo through the port. Hence it is not in the best interest of the port operator to restrict access although it is incumbent on the port operator to ensure that any right of access is managed appropriately.

Flinders Ports believes therefore that access regulation is not necessary.

Access Regime – Areas for General Improvement

Coverage (5.2)

The Draft Report raises a number of issues associated with the general coverage of the access regime.

Flinders Ports comments as follows:

Rail Facilities:

The Commission has highlighted three key points in its draft report dealing with the issue of rail facilities located at Berth 29. These are:

Draft Conclusions (5.2.2)

- **The rail siding at Inner Harbour Berth 29 is subject to access regulation under the South Australian rail access regime, set out under Parts 3 to 8 of the ROA Act.**
- **The Commission considers that there should be no impediments to ports users accessing information in respect to individual cost components of a bundled service.**
- **There are no persuasive arguments to suggest that the provision of loading and unloading services at the intermodal rail facility at Berth 29 should be subject to access regulation.**

Flinders Ports Response:

Rail Siding:

Flinders Ports does not agree with the Draft Conclusion that the rail siding at Inner Harbor Berth 29 is subject to access regulation under the South Australian rail access regime. It is Flinders Port’s view that the facility is a “freight terminal” and hence exempt.

Clause 1 of the proclamation by the Governor under section 7 of Railways (Operations and Access) Act 1997 ("Act") relating to application of access regime (Gazette 7.5.1998 p2116, copy attached), declares that all of the provisions of the access regime under the Act apply to any railway services associated with the provision (or the provision and operation) of any railway infrastructure by any operator.

However, clause 2 of the proclamation determines that Clause 1 does not apply to a freight terminals.

A "freight terminal" is defined (in the proclamation) as "an area set aside for transferring goods to a train from another transport service (including another service provided by train), or from a train to another transport service (including another service provided by train), whether or not the goods are held, kept or stored at the terminal for a period of time pending transfer to the train or to the other transport service."

It is Flinders Ports' view that the Berth 29 Rail Siding falls within this definition of a "Freight Terminal" and hence is not subject to access regulation.

Price Transparency:

Flinders Ports has invested substantial capital into the new rail intermodal facility. This development has been undertaken on land that previously was available to other potential service providers. Whilst Flinders Ports has an incentive to attract sufficient activity through the facility to support the investment made, it also has the right to protect its investment from use by "free-riding" downstream competitors.

Given the availability of nearby alternative options (which existed prior to Flinders Ports' development at Berth 29) available to port users it is in the interest of Flinders Ports to develop and provide a pricing structure for the facility that achieves a balance between increasing volume levels through the facility and satisfactory financial returns having regard to the investment made in the facility.

Loading / Unloading:

Flinders Ports agrees with the Draft Conclusion that there are no persuasive arguments to suggest that the provision of loading and unloading services at the intermodal rail facility at Berth 29 should be subject to access regulation. This Draft Conclusion is strongly supported by a number of factors:

- there are a number of alternative rail intermodal operations located adjacent or near to the Berth 29 facilities developed by Flinders Ports,
- the loading/unloading operation conducted at these facilities is undertaken by a single operator, and
- other cargo transport options are available.

Storage and handling facilities

Draft Conclusions (5.2.3)

- **There are no persuasive arguments to suggest that the provision of non-grain at-ports storage facilities should be subject to access regulation.**

Flinders Ports Response:

Flinders Ports agrees with the Draft Conclusion.

The existing access regime applies to the access of land at ports for the purpose of the marshalling of cargo.

The original access regime applied to specific land leased to the port operator as part of the privatisation of the ports. Access to these land holdings was included in the regime to provide a level certainty that exporters/importers at the time could continue to ensure that marshalling areas would not be restricted or used to the advantage of the port operator.

Additional land has been acquired by Flinders Ports over time as it has become available (including to competitors or port users) and on an “arm’s length”, market rate basis. In some cases this land is subject to encumbrances to it to protect the long term position of the State should the port operating licences revert back to State control.

Flinders Ports sees no reason why any additional land acquired post the commencement of the regime should now be under consideration to be included within it. This is particularly the case when the initial right to access the regulated ports (berths) has not been impacted by any subsequent decision made by the port operator to acquire additional land holding for its own commercial purposes.

It is also noted that further land parcels are currently and readily available to third party port users or service providers for the longer term storage of cargo.

Flinders Ports therefore strongly objects to any consideration that the regime be extended to cover additional land areas not directly required for the marshalling of cargo.

New Ports

Draft Conclusion (5.2.5)

- **Any consideration to expand the access regime to cover new ports is a separate matter that will be dealt with on a case-by-case basis by the South Australian Government.**

Flinders Ports Response:

While outside the scope of the 2012 review, Flinders Ports would note that it is important that the Commission monitor the development of additional new ports and the impact that these development have on the South Australian ports market. As mentioned there are a number of viable “non-regulated” port alternatives already in existence and the development of additional ports further diminishes the likelihood of any “potential for market power to exist” and hence the need for a regulated environment.

Draft Conclusion (5.3)

- **There are no impediments to negotiating access to ports infrastructure, due to the current regulatory framework.**
- **The negotiate process set out in Part 3 of the MSA Act is adequate for facilitating commercial negotiation of access**
- **The Information requirements set out under Part 3 of the MSA Act and Guideline No. 1 are adequate for facilitating the negotiation of access.**

Flinders Ports Response:

There have been no access disputes over the 11 years that the regulatory regimes have been in place in South Australia. Flinders Ports submits that this is primarily due to the commercial maturity of the South Australian ports market, the sophistication of the port users and the availability of alternative options. The absence of any port user availing itself of the regulatory “safety net” process supports our position.

The negotiation process is one that is a normal commercial undertaking and one that is well understood by port users and the port operator. This process works for both parties and to date has been successful in achieving a wide range of acceptable outcome.

Draft Conclusion (5.4)

- **The conciliation/arbitration process set out in Part 3 of the MSA Act is adequate for resolving access disputes.**

Flinders Ports Response:

Whilst never “tested” Flinders Ports notes that the methodology and approach applied is consistent with what would be regarded as an appropriate commercial process to resolving any disputes.

Draft Conclusions (Others (5.5))

- **There is no evidence to suggest that Flinders Ports is disadvantaging competition through the use of operational processes and procedures**
- **There is no evidence to suggest a more intrusive form of ring-fencing arrangement is required.**

Flinders Ports Response:

Flinders Ports strongly supports the Draft Conclusions.

This position is supported by:

- (a) the fact that no actual misuse of market power has occurred over some 11 years of experience under the current regime, reflected by the fact that no disputes have arisen and at the same time trade volumes have expanded across the regulated ports, and
- (b) no pricing disputes have arisen and there is clear evidence that port users and port operators have successfully negotiated arrangements that provide acceptable outcomes for the parties involved.

Summary:

Flinders Ports notes that :

1. No evidence has been provided to suggest that Flinders Ports has misused any market power it may have.
2. Over the past five years the ports in South Australia have recorded significant growth and capital investment, with price increases largely in line with CPI and with no evidence of excessive profits being generated.
3. The outcomes achieved over the past 11 years indicate that the parties involved in the ports industry are mature and sophisticated commercial enterprises that bring both a large degree of commercial leverage and capability to the negotiating table.

In light of the above, Flinders Ports continues to question the on-going need for price regulation and to a large degree the retention of the access regime.

Flinders Ports strongly supports the view that there is no evidence to justify the expansion of the regime.

Flinders Ports welcomes the opportunity to make this submission on the Draft Report and would be happy to further discuss any matters raised in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Stewart Lammin', written over a circular stamp or seal.

Stewart Lammin
General Manager

**RAILWAYS (OPERATIONS AND ACCESS) ACT 1997
SECTION 3: APPLICATION OF THE ACCESS REGIME**

Proclamation by The Governor

(L.S.) E. J. NEAL

PURSUANT to section 7 of the Railways (Operations and Access) Act 1997 and with the advice and consent of the Executive Council, I—

1 Declare that all of the provisions of the access regime under that Act, other than section 21, apply to any railway services associated with the provision for the provision and operation of any railway infrastructure by any operator.

2 Determine that clause 1 does not apply to or in relation to—

- (a) services associated with the Interstate Mainline Track as defined by the Railways Agreement set out in the schedule to the Non-Metropolitan Railways (Transfer) Act 1997 (as that Agreement is amended from time to time), including associated crossing and passing loops, but not including infrastructure that is declared to be accessible under clause 3; or
- (b) services associated with the main trunk from Victoria Square (Adelaide) to Glenelg; or
- (c) services associated with any track in Eyre Peninsula owned by BHP (or a subsidiary of BHP); or
- (d) services associated with the Leigh Creek Line; or
- (e) freight terminals; or
- (f) private sidings; or
- (g) services established on a non-profit basis—
 - (i) for heritage value or assessment; or
 - (ii) to provide services to tourists.

3 Determine that the following infrastructure is declared to be accessible (despite clause 2(f)):

- (a) buildings, installations and equipment for—
 - (i) the embarkation and disembarkation of passengers; or
 - (ii) the loading and unloading of goods, other than buildings, installations and equipment served as a freight terminal; and
- (b) railway yards and sidings (including associated track structures, supports, lines, posts and signals); and
- (c) railway infrastructure owned and maintained by TransAdelaide (or a subsidiary of TransAdelaide) for the purposes of prioritising services associated with the Interstate Mainline Track.

In this proclamation—

- “BHP” means Broken Hill Proprietary Company Limited;
- “freight terminal” means an area set aside for transferring goods to a train from another transport service (including another service provided by train), or from a train to another transport service (including another service provided by train), whether or not the goods are sold, kept or stored at the terminal for a period of time pending transfer to the train or to the other transport service;
- “Leigh Creek Line” means the rail corridors specified in schedule 3 of the Railways Agreement set out in the schedule to the Non-Metropolitan Railways (Transfer) Act 1997 (or in any other relevant instrument modifying or varying any such schedule);
- “private siding” means a private siding within the meaning of the Rail Safety Act 1996 that is used or maintained to provide access to an area that is used (or predominantly used) by the person who owns and maintains the siding (or any other person) for a purpose other than transport purposes.

Given under my hand and the Public Seal of South Australia, at Adelaide, 7 May 1998.

By command,

R. G. KERR, for Premier

DT 1685/97 CS

**PUBLIC SECTOR MANAGEMENT ACT 1993 SECTION 7:
TRANSFER OF EMPLOYEES TO DEPARTMENT OF
EDUCATION, TRAINING AND EMPLOYMENT**

Proclamation by The Governor

(L.S.) E. J. NEAL

PURSUANT to section 7 of the Public Sector Management Act 1993 and with the advice and consent of the Executive Council, I—

(a) transfer those employees of the Department of the Premier and Cabinet described in the schedule to the Department of Education, Training and Employment;

(b) declare that this proclamation will take effect on 1 July 1998.

SCHEDULE

All employees in the Youth Training Team in the Office for the Coordinator for Public Employment, other than those employees who are responsible for the Certificate and Non-Certificate Recruitment Program.

Given under my hand and the Public Seal of South Australia, at Adelaide, 7 May 1998.

By command,

R. G. KERR, for Premier

GOPE 298 CS

Department of the Premier and Cabinet
Adelaide, 7 May 1998

HIS Excellency the Governor in Executive Council has been pleased to appoint the undersigned to the Public and Environmental Health Council, pursuant to the provisions of the Public and Environmental Health Act 1987:

Presiding Member: (from 7 May 1998 until 24 January 1999)

Irene Jeffrey Dadds

Member: (from 7 May 1998 until 8 May 2001)

David Robinson
John William Anthony Veitch
John Alfred Cagley

Deputy Member: (from 7 May 1998 until 6 May 2001)

Clara Ann Irving
Cathryn Gail Isheter
Neil Trevor Palmer

By command,

R. G. KERR, for Premier

MHS 036024/94CS

Department of the Premier and Cabinet
Adelaide, 7 May 1998

HIS Excellency the Governor in Executive Council has been pleased to appoint the undersigned to the National War Centre Board, pursuant to the provisions of the National War Centre Act 1993:

Chairman: (from 21 May 1998 until 20 May 2000)

Richard Hugh Allen

Member: (from 21 May 1998 until 20 May 2000)

Brian John Cross
Philip Leslie Laffin
Christopher Macken Pheffer
Donald Ross McWilliam
George William Mackay
Perry Richard O'Connor
Ian John Pennington
Ian William Quinn
Anabel Shears-Cox
Margaret Lehmann
John William Lamb
Walter John Cleland Harvey