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By email: sapc@sa.gov.au

Christine Bierbaum
Inquiry Lead
Inquiry into reform of South Australia's regulatory framework

South Australian Productivity Commission
GPO Box 2343
Adelaide South Australia 5001
AUSTRALIA

Dear Ms Bierbaum

South Australian Productivity Commission's inquiry into reform of South Australian regulatory framework – submission by Qube Ports Pty Ltd

We act for Qube Ports Pty Ltd (**Qube Ports**).

I refer to:

- the South Australian Productivity Commission (the '**Commission**') inquiry into reform of the South Australian regulatory framework (the '**Inquiry**'); and
- the issues paper published by the Commission on 31 March 2021 (the '**Issues Paper**').

This submission is made on behalf of Qube Ports. Qube Ports welcomes the opportunity to participate in the Inquiry and to contribute a submission in response to a number of the issues raised by the Issues Paper.

A. Qube Ports

Qube Ports is a major integrated port solutions provider with bulk and general handling facilities in over 40 Australian, New Zealand and South East Asian. Qube Ports typically operates from open access, common user port facilities across Australia and the region.

In Australia, Qube Ports' operations consist of on-wharf and port precinct facilities in all Australian capital city ports and both dry bulk materials and general cargo facilities in a further 24 regional port locations. Qube Ports provides port and facility development, vessel management, warehouse and distribution, stevedoring services, and cargo handling for general cargo and dry bulk commodities for both import and export supply chains.

Qube Ports has operated at the Port of Adelaide since 2006 and the business has over 150 years of Australian port services experience. Prior to 2006, it had operated in South Australia as P&O Ports Limited.

Qube Ports is a subsidiary of Qube Holdings Limited (**Qube Holdings**), which is Australia's largest integrated provider of import and export logistics services and is comprised of three operating divisions: Qube Ports, Qube Bulk and Qube Logistics. Qube Holdings operates all three divisions in South Australia.

B. Qube Ports submission to the National Competition Council

On 22 January 2021, the South Australian Government applied to have the South Australian ports access regime "certified" under Part IIIA of the *Competition and Consumer Act 2010* (**CCA**). An access regime will be certified if it is found to be 'effective' by the relevant Commonwealth Minister (the Treasurer), on the recommendation of the National Competition Council (the '**NCC**').

The South Australian ports regime was first certified in 2010.

On 26 February 2021, Qube Ports made a submission to the NCC that strongly opposed re-certification of the regime (the '**NCC Submission**'). Qube Ports considers that many of the issues raised in the NCC Submission are informative to the Inquiry and will assist your analysis and review of the current access regime governing South Australia's privatised port infrastructure. Although this submission is directed towards the regulation of South Australian ports, Qube Ports submits that the issues raised may be of wider assistance in the Commission's review of regulations and the South Australian regulatory framework and approach, as a whole.

Qube Ports has therefore attached (as **Attachment B**) a copy of the NCC Submission and will draw out, and expand upon, relevant issues raised in this submission.

C. Qube Ports submission

The Commission's Issues Paper requested information in response to, among other things, the following questions:

- *What may be considered to be best practice or better practice for each stage of the regulatory life-cycle (from design and development through to implementation and ex-post review)? Please provide examples from SA or other jurisdictions (information request 1(a)).*
- *Are there specific examples of ineffective or inefficient regulations (information request 2.1(i))?*
- *Are regulations in SA subjected to sufficiently rigorous and frequent ex-post evaluations (information request 2.2(c))?*
- *Do regulators have the right capabilities to administer and enforce regulations effectively (information request 3.3(c))?*
- *What action is required to develop a regulatory system that is more adaptable, agile and future oriented (information request 4(d))?*

Qube Ports considers that the NCC Submission contains information relevant to each of the above questions. Below, Qube Ports has drawn out information relevant to the above questions.

We also provide short form responses to each question, drawing on this material, in **Attachment A**.

<u>An investment and competition crisis is emerging within the South Australian port supply chain caused by poor and outdated access regulation</u>

Over the last decade, the South Australian ports access regime under the *Maritime Services (Access) Act 2000* (SA) (the '**Act**') has been shown to be a clear example of failure by a state government to effectively regulate privatised port infrastructure.

The Flinders Group is the monopoly owner of six private port facilities in South Australia (with port activities handled by the entity, Flinders Ports). Since 2011, the Flinders Group has significantly expanded its operations into related downstream and contestable market activities at those ports (including stevedoring, container management and storage, warehousing and logistics (across all freight types)). These activities are managed by related entities, Flinders Logistics (est. 2012) and Flinders Warehousing and Distribution (est. 2019). Qube Ports is not aware of any separation of internal reporting lines or management responsibility within the Flinders Group and, to the contrary, understands from its direct engagement with Flinders Group staff that there is both sharing of operational roles and disclosure of sensitive information between Flinders Ports and related downstream entities.

Over the last decade, Flinders Ports has therefore grown to become the most vertically integrated private port operator in Australia. The anti-competitive effects of this are now being felt throughout the port supply chain in South Australia.[1] Despite this, the South Australian ports access regime has not materially changed, having only been amended once in the last 12 years,[2] and does not address in any meaningful way the vertical integration within the Flinders Group.

This is now impacting directly upon competition and investment by firms looking to enter or operate in the South Australian market.

<u>The South Australian approach to port access regulation</u>

Third party access to maritime services is governed by Parts 3 and s44 of the Act. Those parts comprise 34 provisions and run for only approximately 12 pages.

The Access Provisions do the following:

(a) set up a short-form negotiation and dispute resolution process to govern disputes about new terms of access sought at a South Australian port, and which refers such disputes to be determined by an independent arbitrator (not the state regulator, ESCOSA);

(b) provide some high-level principles required to be applied by the arbitrator largely copy principles taken from the COAG Competition Principles Agreement, signed in 1995 (the '**CPA'**); and

(c) establish some very limited and high-level obligations on Flinders Ports to maintain separate regulatory accounts (s 42) and a general prohibition on hindering access (s 44) – both taken again directly from the CPA principles without any detail or application in the context of the South Australian market or its structure.

[1] Further detail on the background to the Flinders Ports access regime and the material changes that have occurred over the last 10 years is in sections 2 and 3 of the NCC Submission (**Attachment B**).

[2] The amendment was to section 43(3) of the 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.

The Access Regime does not seek in any way to address the incentives or ability to discriminate created by the vertical integration of Flinders Ports.

The regime has nothing to say about the operating structure of Flinders Ports or about establishing day-to-day operational or commercial standards of behaviour. For example, there is no requirement in the Act for a facility operator to provide access to services on an open and non-discriminatory basis or to ring fence regulated operations from contestable staff and activities.

ESCOSA has reviewed the regime twice – but its methodology is not fit for purpose

The Act provides a mechanism for periodic review of the access regime (under s 43).

ESCOSA has reviewed the access regime on a number of occasions and twice in the last decade in 2012 and 2017.[3] The next review is due to occur next year (2022).

In both cases, ESCOSA failed to test adequately the effectiveness of the port access regime for two principal reasons:

1 The nature of the statutory framework under the Act unhelpfully limits the recommendation that can be made by ESCOSA to the Minister to a binary choice of whether to keep the regime, or to lose it entirely.

2 ESCOSA has, in past reviews, adopted a methodology for assessing the effectiveness of the regime which has failed to ask the right questions as a matter of economics, competition policy and commercial reality.

ESCOSA's methodology in the 2017 assessment was based on a 'structure-conduct-performance' paradigm (**SCP**). ESCOSA looked at whether, based on the conduct and performance of Flinders Ports, there was evidence of market power being exercised that justified a change in the regime.

Whilst this method is useful in 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 take into account 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 were identified by the Australian Competition Tribunal in *Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2*. As the Tribunal observed in that matter, the static SCP paradigm has been critiqued by numerous economists in favour of more dynamic forms of market analysis.[4] Notably, while a form of SCP was applied by the Tribunal in this case, it was not the

[3] ESCOSA's 2012 Ports Access and Pricing Review, available at: https://www.escosa.sa.gov.au/projects-andpublications/projects/ports/ports-pricing-and-access-review-2012; and ESCOSA's 2017 Ports Access and Pricing Review, available at: https://www.escosa.sa.gov.au/projects-and-publications/projects/ports/ports-pricing-and-access-review-2017.

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

method applied by the ACCC (and indeed we are not aware of the ACCC or other Australian regulators routinely adopting this method).

The limitations of SCP identified by the Tribunal in *Chime* are particularly important here as the increasing vertical integration of Flinders Ports means that the risk of strategic behaviour and "feedback loops" is particularly acute. Increasing vertical integration means that Flinders Ports has the ability and incentive to act in ways that will degrade the conditions for competition over time and, potentially, alter the structure of markets for key maritime services. 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.

Moreover, this is not a case which calls for an *ex post* analysis of whether market power *has been* exercised. Instead, the focus of ESCOSA's assessment ought to be on ensuring that the access regime *prevents* anti-competitive behaviour and thereby *facilitates* competition going forward. If it is left to a future review to detect the actual occurrence of anti-competitive behaviour, it will be too late – the harm to competition will have already been done.

Beyond these general constraints of the SCP paradigm, Qube submits that the methodology historically used by ESCOSA is also limited because:

- it fails to allow ESCOSA to consider, or adequately address, the *potential* for Flinders Ports to engage in anti-competitive behaviour – indeed, ESCOSA itself acknowledges in the report that the SA Ports Regime is "*intended to protect the interests of port users from the potential exercise of market power by port operators*";[5]

- the level of analysis is limited and focused on price outcomes, which are also not transparently communicated to the market (particularly with respect to cross subsidisation and resource allocation). For example:

  - the benchmarking of ports charges against other Australian ports fails to consider other forms of discriminatory conduct, cross-subsidisation and cross-allocation, which may also give rise to discriminatory pricing;

  - the analysis of Flinders Ports' regulatory accounts is not transparent and appears not to consider the benefits that might have accrued to Flinders Logistics or Flinders Warehousing as a consequence of their position as vertically integrated downstream competitors; and

  - commercial information provided by Flinders Ports is directed at negotiations over port charges, which does not appear to consider other relevant commercial information that might overlap with their commercial entities,

- there is no analysis of the increasing market share of Flinders Ports in related and contestable vertical markets;

- reliance on the absence of any access or pricing disputes in the prescribed period is an erroneous measure of the effectiveness of a regime as it does not take into account the possibility that the dispute mechanism itself may be unduly limited in scope. The dispute mechanism under the SA Ports Regime is narrowly focused around disputes arising from

[5] 2017 Ports Access and Pricing Review, page 1, available at: https://www.escosa.sa.gov.au/ArticleDocuments/1026/20170911-2017PortsAccessAndPricingReview-Final.pdf.aspx?Embed=Y.

negotiation of access terms, and does address the potential for disputes to arise concerning the behaviour of vertically integrated operators;

- ESCOSA takes as a guiding and primary principle whether regulation of pricing and access at the South Australian ports is necessary at all or whether the market would operate more efficiently absent regulation, which is an inappropriately simplistic approach in a context where critical infrastructure of national importance is being operated by a vertically integrated monopolist.

For these various reasons, while the Act provides a mechanism for review of the South Australian port access review, the scope and operation of the review mechanism has failed to deliver reform needed to reflect the changing structure and competitive dynamics of the market.

Simply, the statutory review mechanism has been shown not to work.

Best practice approach to the regulation of vertically integrated monopolies

The issue of access regulation and privatised infrastructure is of national importance. ACCC Chairman Rod Sims, amongst others, has been outspoken regarding the economic risks associated with inadequate regulation of privatised port assets.[6]

Within this policy context, the South Australian ports access regime is uniquely poor and outdated, 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.

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.

Examples of regimes that address vertical integration include:

- **Queensland state access regimes governing all major below-rail networks and the Dalrymple Bay Coal Terminal** – these regimes comprise both legislation, under the *Queensland Competition Authority Act 1997*, coupled with mandatory access undertakings overseen and enforced by the state regulator, the QCA.

- **Ring-fencing and non-discrimination rules applicable to electricity distribution network service providers**. These are set out in detailed, Ring Fencing Guidelines published by the Australian Energy Regulator in late 2016 and enforceable under provisions of the National Electricity Law.

- **Access and non-discrimination obligations applied to automotive terminal operators (Australian Amalgamated Terminals Pty Ltd (AAT) and Melbourne International RoRo & Auto Terminal Pty Ltd (MIRRAT) at East Coast ports.** These apply under s87B undertakings required by the ACCC (under s50 of the CCA) as part of MIRRAT and AAT, respectively, acquiring ownership of these automotive terminals.

- **Structural separation and equivalence obligations applicable to Telstra.** These were historically imposed on Telstra (prior to the rollout of the National Broadband Network) in

[6] 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.

relation to its fixed line network under a combination of Part XIC of the CCA and a detailed Structural Separation Undertaking, required to be put in place by Telstra – both of which were overseen and enforced by the ACCC.

An overview of these access regimes, together with a description of their features directed at responding to the competition risks associated with vertical integration, is set out at **Attachment C**.

While each of the regimes set out in Attachment C operates in a different context (port terminals – coal and automotive), below rail, electricity networks and telecommunications), in addressing the competition concerns raised by vertical integration, they share a number of common attributes:

- 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.

By contrast to this best practice model for addressing vertical integration – the South Australian port access regime fails to meaningfully address *any* of the above requirements.[7]

The 'on the ground' commercial experience of Qube Ports and other stakeholders at South Australian ports provide practical case studies in how poor state-regulated access has led to anti-competitive outcomes. Qube has provided some examples at Appendix A to the NCC Submission.

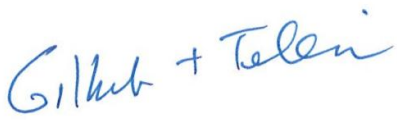
Engagement with the Commission

Qube Ports is concerned that urgent and substantial reform of port access regulation within South Australia is needed, if further harm to investment and competition is to be avoided.

[7] Further detail on the inadequacy of the regime to provide for each of the basic best practice elements is detailed in sections 5.2 to 5.7 of the NCC Submission (**Attachment B**).

To that end, Qube Ports welcomes further engagement with the Commission on the issues raised in this submission. We would be pleased to meet with, or to provide further information to, the Commission if doing so would assist the Inquiry.

Yours faithfully
Gilbert + Tobin



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Attachment A Specific responses to Commission questions

1. ***What may be considered to be best practice or better practice for each stage of the regulatory life-cycle (from design and development through to implementation and ex-post review)? Please provide examples from SA or other jurisdictions (information request 1(a)).***

   In relation to the South Australian port access regime, the review process must apply a methodology that reflects and responds to changes in market structure. In this case, in undertaking its review, ESCOSA adopts a dated and 'static' review methodology that has failed to identify or respond to the market concerns raised by the high degree of vertical integration of the privatised operator of South Australian ports, Flinders Ports.

   Any review must also have regard to best practice regulatory models in other jurisdictions. Again, there has been a failure to engage with, or adopt, the well-understood attributes of an access regime that addresses vertical integration. Examples of such regimes are in Attachment B.

   See more detail at pages 6 – 6 and Attachment C of this submission and sections 5.2 to 5.7 of NCC Submission (Attachment B).

2. ***Are there specific examples of ineffective or inefficient regulations (information request 2.1(i))?***

   The South Australian port access regime, in Part 3 and s 44 of the *Maritime Services (Access) Act 2000* is an example of uniquely ineffective and poor state regulation.

   It has abjectly failed to respond to, or address, the adverse impact on investment and competition in the South Australian port supply chain resulting from the growing vertical integration of Flinders Ports (the privatised operator of six South Australian ports).

3. ***Are regulations in SA subjected to sufficiently rigorous and frequent ex-post evaluations (information request 2.2(c))?***

   No. The ESCOSA reviews of the Act have failed to adequately or robustly address the concerns associated with vertical integration. This is partially a result of the poorly framed statutory scope of the review, and partly due to poor methodological choices by ESCOSA.

   See more detail at pages 4 to 6 of this submission.

4. ***Do regulators have the right capabilities to administer and enforce regulations effectively (information request 3.3(c))?***

   The current South Australian port access regime gives very limited enforcement or oversight functions to ESCOSA. At present, ESCOSA does not even directly resolve access disputes under the South Australian regime – these are referred to independent arbitration.

   The capability and resources of the state regulator, ESCOSA, to regulate and enforce a workable port access regime is therefore uncertain. This can only be properly judged once the regime has been strengthened and ESCOSA given a more direct and relevant role in the process.

5. ***What action is required to develop a regulatory system that is more adaptable, agile and future oriented (information request 4(d))?***

Qube submits that fundamental and 'drains up' reform of South Australia's port access regime is urgently required to address the issue of vertical integration held by Flinders Ports. This will require legislative reform.

In the meantime, Qube opposes certification of the current regime. Qube considers it vital that in the absence of meaningful or effective state regulation, stakeholders in South Australian continue to have access to oversight by the ACCC under the Commonwealth access regime in Part IIIA of the CCA.

See generally Qube's NCC Submission at **Attachment B**.

Attachment B – NCC Submission

Attachment C – examples of best practice regulation of vertically integrated monopoly assets

Queensland rail access regime

The Queensland rail access regime is substantial and comprehensive and comprises:[8]

(a) the Queensland Competition Authority Act 1997 (Qld) (**QCA Act**));

(b) 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;

(c) an access undertaking accepted by the QCA from Queensland Rail Limited, which operates certain other freight and passenger routes; and

(d) various other legislative provisions dealing with rail safety.

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;[9]
- 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;[10]
- an access provider cannot disclose information given by the access seeker during negotiations, without their consent;[11]
- parties can obtain relief to remedy certain conduct (such as hindering of access) or contraventions of an access agreement;[12]
- 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.

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.

[8] The Queensland Government application for recertification at page 4.

[9] QCA Act, ss 100(2), 168C.

[10] Section 104(2) and (3).

[11] Section 101(6).

[12] Sections 152–3.

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).

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:[13]

> *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.*

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*'.[14]

DBCT access regime

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.

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

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

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

undertaking provides substantial protections for existing access holders (periodically reviewing their infrastructure charges) as well as access seekers.

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.

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

(a) 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;

(b) requiring the operator to disclose relevant past arbitration outcomes to other users or access seekers;

(c) facilitating collective negotiations of terms of access;

(d) providing certainty up front about some key elements of the price (such as costs associated with remediation); and

(e) providing for principles governing disputes.

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.

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.

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.*

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:[15]

- 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.

Other relevant regulatory examples

AER Ring Fencing Guidelines

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.

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.

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

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.[16]

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

[16] Available from the ACCC s87B undertakings register.

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

- 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.

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

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'.

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.

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.

National Competition Council

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SUBMISSION COVER SHEET

Application for certification of the South Australian ports access regime

Please complete and submit this form along with your submission by 26 February 2021 by email to info@ncc.gov.au.

Individual/Company/ Organisation:	Qube Ports Pty Ltd				
Address:	Level 27, 45 Clarence Street				
Suburb/town:	Sydney	**State:**	NSW	**Postcode:**	2000
Position/title:	General Manager Commercial				
Telephone:	02 9005 1100	**Fax:**	02 9005 1101		
Email address:	Dean.wells@qube.com.au				

Declaration

I declare that, to the best of my knowledge and belief, the information provided in the submission is true, correct and complete, that complete copies of supporting materials or evidence have been provided and/or clearly identified, and that all estimates are identified as such and are the best estimates of the underlying facts and that all the opinions expressed are sincere.

	General Manager Commercial
Signature of authorised person	**Office held/title/position**
Dean Thomas Wells	26 February 2021
(Print) Name of authorised person	**Date**

Note: If the submitting party is a corporation or organisation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the submitting party, this fact must be stated.

Confidential information

Please indicate if your submission:

- ☐ contains NO confidential material
- ☑ contains SOME confidential material (in which case please provide two copies of the submission – one with all of the confidential information removed and this copy with the confidential information clearly identified and marked)

Submission to National Competition Council on the application for certification of the South Australian Ports Access Regime

Qube Ports Pty Ltd

26 February 2021

Contents

1 Executive Summary

Qube strongly opposes recertification

1 The South Australian Government (**SA Government**) has filed an application under section 44NA(2) of the CCA with the National Competition Council (**NCC**) for an extension of the certification of the South Australian Ports access regime for a period of 10 years on the basis that the SA Government submits that it is an "effective access regime" having regard to the principles in section 44M of the *Competition and Consumer Act 2010* (**CCA**).

2 Qube Ports Pty Ltd (**Qube**) is a subsidiary of Qube Holdings Limited (**Qube Holdings**), which is the largest integrated provider of import and export logistics services. 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 Qube welcomes this opportunity to participate in the NCC's consultation process.

4 Qube strongly opposes the SA Government's application. The South Australian port access regime, as set out in Part 3 of the *Maritime Services (Access) Act 2000 (SA)* (**MSA Act**), is a quintessential example of failure by a state government to adequately regulate privatised port infrastructure. The South Australian port access regime, on its terms and based on the day to day commercial experiences of port stakeholders such as Qube over the last decade, has proven to be one of worst and ***least*** effective in Australia.

5 All available evidence demonstrates that it fails to satisfy either the objective of Part IIIA or the principles in section 44M of the CCA. The terms of the regime are also inconsistent with the minimum requirements for an effective access regime identified by the NCC in its Certification Guidelines.

6 Qube notes that the South Australian ports access regime has not materially changed in a decade. This is despite substantial changes in the scope of the activities of Flinders Ports, the South Australian port supply chain, and market expectations of port access requirements since the NCC last looked at the regime in 2011.

7 Since 2011, the Flinders Group has significantly expanded its operations into related (and contestable) market activities, as well as further integrating its own internal reporting and lines of responsibility. Flinders Group now operates the following downstream business divisions, operating in contestable markets:

- Flinders Logistics (commenced operations in 2012), which provides downstream logistics and stevedoring services, focussing on mineral resources and oil and gas sectors in Australia.
- Flinders Warehousing and Distribution (established in 2019), which is a subsidiary of Flinders Logistics and provides warehousing and distribution services.
- Flinders Adelaide Container Terminal (commenced operations in 2012), which is the only container terminal facility in South Australia and provides both stevedoring and terminal management services to international shipping lines.

8 The Flinders Group is, simply, the most diversified and vertically integrated port operator in Australia.

9 Remarkably, however, Flinders Group itself operates with a highly integrated internal structure (including shared responsibilities across monopoly and contestable activities) and in a manner unconstrained by the MSA Act and in the absence of any ring fencing or regulated confidentiality requirements.

10 The South Australian port access regime, as set out in the MSA Act:

- does not require or provide for open and non-discriminatory access to South Australian ports;
- fails to provide any form of structural or functional ring fencing of staff or roles – and therefore fails to address the ability and incentive of the Flinders Group to favour its own downstream operations over those of competitors;
- offers no level of protection for competitively sensitive information obtained by Flinders Ports through its operation of all South Australian 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-price issues; and
- does not establish any operational or service performance standards or reporting, or otherwise regulate the non-discriminatory provision of services at South Australian ports.

11 The regime is, frankly, inadequate and does not meet even the most basic requirements of an "effective access regime", having regard to the clause 6 principles set out in the CPA or the objects in section 44A of Part IIIA of the CCA. [1]

12 Qube's day to day commercial experience when seeking to compete with the Flinders Group, and to operate within South Australian ports, provides direct evidence of the failure of the regime to protect and promote competition in the South Australian port supply chain. Those experiences are detailed in **Confidential Appendix A** to this submission.

13 Whilst the state regulator, ESCOSA, has undertaken two reviews of the regime (in 2012 and 2017), it has abjectly failed to address or even acknowledge the creeping vertical expansion within Flinders Group's business activities and within its organisational structure. This "regulatory capture" is now leading to significant and adverse outcomes for competition in South Australian ports.

14 Qube submits that substantive amendments would be required to the MSA Act in order for it to meet the basic requirements of an "effective access regime", having regard to the clause 6 principles set out in the CPA or the objects in section 44A of Part IIIA of the CCA.

15 Absent those amendments, the NCC does not have any reasonable basis to recommend to the Commonwealth Minister any recertification of the South Australian port access regime.

[1] Section 44M(4)(aa) of the CCA.

Confidentiality

16 This submission contains information that is confidential to Qube Ports Pty Ltd. All of this confidential information is contained in **Confidential Appendix A**.

17 Qube would also welcome the opportunity to meet with the NCC to discuss its concerns and to share its experiences with the many and substantial inadequacies of the South Australian port access regime.

2 Background to the Flinders Ports access regime

2.1 Qube Ports

18 This submission is made by Qube Ports Pty Ltd (**Qube**).

19 Qube is a subsidiary of Qube Holdings Limited (**Qube Holdings**), which is Australia's largest integrated provider of import and export logistics services and is comprised of three operating divisions: Qube Ports, Qube Bulk and Qube Logistics. It has been publicly listed on the Australian Securities Exchange since 2011. Qube operates the ports and logistics divisions in South Australia.

20 **Qube Ports** is a major integrated port solutions provider in Australia with bulk and general handling facilities in over 40 Australian, New Zealand and South East Asian ports.[2] In Australia, its operations consist of on-wharf and port precinct facilities in all Australian capital city ports and both dry bulk materials and general cargo facilities in a further 24 regional port locations. Qube Ports provides port and facility development, vessel management, warehouse and distribution, stevedoring services, and cargo handling for general cargo and dry bulk commodities for both import and export supply chains.[3]

21 **Qube Logistics** operates across 48 sites nationally, covering over 210 hectares. Qube Logistics provides complete logistics services incorporating road and rail transport, warehousing and distribution, container parks and related services, intermodal logistics hubs including rail terminals and global services incorporating procurement, freight forwarding, import and export services.[4]

22 Qube Holdings was formed by a group of senior executives from two Australian stevedores, Patrick Corporation Limited (**Patrick**) and P&O Ports. There were various entities and transactions which preceded the formation of Qube Holdings. At a very high-level, two of Dubai Port World (**DP World**)'s logistics businesses in Australia (namely, its P&O Automotive and General Stevedoring (**POAGS**) and P&O Trans Australia (**POTA**) businesses) became Qube Logistics Limited and subsequently Qube Holdings in September 2011. As a consequence of the history of Qube Holdings' predecessors, many of the Qube Holdings personnel and management team have been involved in the business which is now Qube Holdings from well before its formation, through former roles with POAGS and POTA.

23 Qube's extensive history and experience in logistics and stevedoring services across a range of ports in Australia means that it is well positioned to understand the potential

[2] For a link to an interactive map of Qube's port and logistics service locations, please see: https://qube.com.au/about/locations/.

[3] Qube Holdings website, Qube Ports, available at: https://qube.com.au/ports/.

[4] Qube Holdings website, Qube Logistics, available at: https://qube.com.au/logistics/.

competitive impacts a vertically integrated and privatised port authority can have on the provision of downstream services at ports.

24 Most recently, Qube settled substantial litigation under section 46 of the CCA which Qube had brought against the Port of Newcastle and arising from conduct related to access to bulk stevedoring infrastructure at that port.[5]

25 Relevantly, for the purpose of the current application, Qube has operated at the Port of Adelaide since 2006 and the business has over 150 years of Australian port services experience. Prior to 2006, it had operated in South Australia as P&O Ports Limited.

2.2 History of the access regime

26 The history of the Flinders Group and the timing of its incremental vertical integration into downstream markets at the South Australian ports is relevant to the NCC's consideration of the SA Government's request for re-certification of Flinders Ports.

27 Flinders Ports Limited (**Flinders Ports**) was established in 2001 and formed part of the acquisition of seven ports by the Flinders Ports consortium.[6] As part of this ports privatisation by the SA Government, in addition to the port infrastructure, 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.

28 Of these ports, Port Adelaide is the most significant and accounts for the majority of cargo handled in South Australia.[7]

Figure 1 – Flinders Ports operations in South Australia[8]

[5] The case was *Qube Ports Pty Ltd v Port of Newcastle Operations Pty Limited* NSD1905/2019. The case file is available at: https://www.comcourts.gov.au/file/Federal/P/NSD1905/2019/actions.

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

[7] According to the SA Government's application for the extension of certification (Table 3, p.20), in 2019/20 Port Adelaide had an annual throughput of 13,338,000 tonnes, which comprised 68% of all throughput at proclaimed South Australian Ports in that year.

[8] Map extracted from Flinders Port's website at: https://www.flindersports.com.au/about/overview/.

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, and comprised of the *South Australian Ports (Disposal of Maritime Assets) Act 2000*; the *Maritime Services (Access) Act 2000* (**MSA Act**); and the *Harbors and Navigation (Control of Harbors) Amendment Act 2000*.

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, the Essential Services Commission of South Australia (**ESCOSA**).

31 In April 2007, the Council of Australian Governments (**COAG**) amended the *Competition Principles Agreement* (**CPA**) with an aim to achieve a simpler and more consistent national approach to the economic regulation of significant infrastructure in Australia.[9] The agreed implementation plan committed the South Australian Government to review the ports access regime and amend it to ensure compliance with the CPA principles, after which it would seek certification under the *Trade Practices Act 1974* (**TPA**) (now the CCA).

32 Consistent with COAG's requirements, ESCOSA conducted a review of ports pricing and access in 2007 to determine CPA compliance, which resulted in the *Maritime Services (Access) (Miscellaneous) Amendment Act 2009* being passed enacting ESCOSA's recommendations from the review,[10] and on 10 October 2020, the Premier of South Australia made an application under section 44M(2) of the TPA for certification of the South Australian Ports access regime.[11]

33 On 10 March 2011, the NCC recommended to the Treasurer that the South Australian Ports access regime be certified for a period of 10 years.[12] A decision was made by the Parliamentary Secretary to the Treasurer to certify the access regime on 9 May 2011.[13]

34 Since its certification in 2011, the MSA Act has been reviewed by ESCOSA twice (2012 and 2017), with ESOCA determining in each instance that the access regime, in its then current form, was adequate and should continue for a further five years.[14] As a consequence, the MSA Act has only been amended once in ten years and that amendment was not substantive.[15]

2.3 Competition in the South Australian port supply chain

35 The South Australian ports see a diversity of freight imported and exported on a daily basis, including grains and seeds, limestone, petroleum products, motor vehicles, metals

[9] Competition Principles Agreement (amended 13 April 2007), available at: https://www.coag.gov.au/about-coag/agreements/competition-principles-agreement.

[10] ESCOSA's Ports Pricing and Access Review 2007, released 12 February 2007, available at: https://www.escosa.sa.gov.au/projects-and-publications/projects/ports/ports-pricing-and-access-review-2007.

[11] South Australian Government's application for certification of the South Australian ports access regime dated 22 January 2021, available at: https://ncc.gov.au/application/application_for_certification_of_the_south_australian_ports_access_regime/1.

[12] Final recommendation by the NCC dated 10 March 2011, available at: https://ncc.gov.au/application/application_for_certification_of_the_south_australian_ports_access_regime/5.

[13] Decision on effectiveness of access regime under section 44N, dated 9 May 2011, available at: https://ncc.gov.au/images/uploads/CEPoSaMD-001.pdf.

[14] ESCOSA's 2012 Ports Access and Pricing Review, available at: https://www.escosa.sa.gov.au/projects-and-publications/projects/ports/ports-pricing-and-access-review-2012; and ESCOSA's 2017 Ports Access and Pricing Review, available at: https://www.escosa.sa.gov.au/projects-and-publications/projects/ports/ports-pricing-and-access-review-2017.

[15] The 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.

and scrap metal, cement and cement clinker, fertilisers, agricultural commodities, iron-ore, iron and steel, general cargo, mineral sands, mineral concentrates and containers.

36 Competition for the provision of downstream services to the companies importing and exporting freight involves a variety of service providers, including at least the following:

- **Qube**, which provides logistics and stevedoring services at Port Adelaide and Port Lincoln, and bulk cargo handling at Whyalla;[16]
- **Flinders Logistics**, which provides logistics and stevedoring services at Port Adelaide; and coal, lead concentrate and acids loading, and logistics and stevedoring services at Point Pirie;[17]
- **Linx Cargo Care Group**, which provides logistics and stevedoring services at Port Adelaide;[18]
- **Viterra Wharf Services**, which provides grain loading services at Port Adelaide, Port Lincoln, Port Giles and Wallaroo; and grain and mineral sands loading at Thevenard;[19]
- **Stevens Bulk Services**, which provides equipment and bulk cargo handling at Port Adelaide;[20]
- **Adelaide Brighton Cement**, which provides limestone loading services at Klein Port.[21]

37 Of the South Australian ports, Port Adelaide accounts for the majority of throughput and sees the most competition for the provision of downstream services. Each of the above downstream service providers (except for Adelaide Brighton Cement) competes fiercely for work from customers importing and exporting from the port. These providers compete for access to a limited number of common user berths - berths 18-20 and also berth 29.[22]

38 Qube understands that Flinders Logistics share of the market has grown quickly once it entered this vertically related market.

3 Material changes since certification in 2011

39 Qube submits that the relevant market environment, and commercial context, has changed substantially since the NCC last considered the adequacy of the South Australian ports access regime in 2011.

40 Since that time, 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. The anti-competitive effects of this are now being felt throughout the port supply chain in South Australia.

[16] Further information on Qube Holdings Group website, available at: https://qube.com.au/.
[17] Further information on Flinders Logistics website, available at: https://www.flinderslogistics.com.au/.
[18] Further information on Linx Cargo Care Group website, available at: https://linxcc.com.au/.
[19] Further information on Viterra Wharf Services website, available at: https://viterra.com.au/.
[20] Further information on Stevens Bulk Services website, available at: http://www.stevensbulk.com.au/.
[21] Further information on Adelaide Brighton Cement website, available at: http://www.adelaidebrighton.com.au/.
[22] Qube and Linx also operate out of berths 2-4. Viterra only operates out of berths 7-8 and 27.

41 Unfortunately, the industry recognises that the South Australian ports access regime, and ESCOSA as its regulator, have proven inadequate to regulate or respond to these developments.

42 Relevant developments for the NCC to consider include:

- 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;
- 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;
- the impact that Flinders Group's vertically integrated operations are having on day to day competition in markets, including stevedoring, container services and logistics (amongst others); and
- 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.

43 Each of these is discussed below.

44 Against this backdrop of change (both within South Australia and nationally), the state regulator, ESCOSA, has conducted two reviews of the South Australian port access regime (in 2012 and 2017) but has failed on either occasion to address the impacts of creeping integration within the South Australian ports supply chain. As a consequence, the regime has remained virtually untouched over the last decade.

45 It is therefore critical that competitors in port-related markets in South Australia obtain access to declaration under Part IIIA of the CCA in order to give them scope to seek robust oversight of access terms by the ACCC. As the NCC is aware, while the effectiveness of Part IIIA has been criticised at times in relation to non-vertically integrated ports, Part IIIA should be suited to addressing the kind of immediate and substantial anti-competitive outcomes being experienced by Qube and others at South Australian ports as a result of the integration of the Flinders Group and which is simply not addressed by the South Australian ports access regime or ESCOSA.

3.1 Vertical expansion and integration of Flinders Group since 2011

46 Since 2011, following the initial certification process undertaken by the NCC, 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.[23]

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.[24]

- **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.[25]

47 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.[26]

48 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.

49 At the same time, 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.

3.2 ESCOSA reviews cannot be expected to deliver necessary reform

50 The fact that increased vertical integration of the Flinders Group could occur over the last decade without any controls across the supply chain and internally, raises serious questions about whether the access regime was ***ever*** fit of purpose or effective.

51 In any event, given current market circumstances, the regime is clearly inadequate and for the reasons set out in section 5 below, Qube submits that the MSA Act is certainly not an "effective access regime".

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

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

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

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

52 Since its certification in 2011, the MSA Act has been reviewed by ESCOSA twice (2012 and 2017), with ESOCA determining in each instance that the regime, in its current form, was adequate and should continue for a further five years.[27] As a consequence, the MSA Act has only been amended once in ten years and that amendment was not substantive.[28]

53 Qube submits that ESCOSA's periodic review of the regime has failed to address the creeping vertical expansion within Flinders Group's business activities, and within its own organisational structure. Unfortunately, it appears that the regulator in this case has been "captured" by the interests of Flinders Group.

3.3 The failure and inadequacy of state regulation of privatised ports in Australia

54 ACCC Chairman, Rod Sims, amongst others, has been outspoken regarding the inadequacy of state regulation of privatised port assets. As recently as 21 October 2020, Mr Sims speaking at the National Press Club stated:[29]

> *"… 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).

55 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.[30]

56 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 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.[31]

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

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[27] ESCOSA's 2012 Ports Access and Pricing Review, available at: https://www.escosa.sa.gov.au/projects-and-publications/projects/ports/ports-pricing-and-access-review-2012; and ESCOSA's 2017 Ports Access and Pricing Review, available at: https://www.escosa.sa.gov.au/projects-and-publications/projects/ports/ports-pricing-and-access-review-2017.

[28] The 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.

[29] 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.

[30] 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.

[31] 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.

- 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; [32]

- 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; [33]

- 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;[34] and

- 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.[35]

58 The practical experiences of Qube and other stakeholders at South Australian ports provide further practical case studies in how poor state regulated port access leads to anti-competitive outcomes. These are discussed further at **Confidential Appendix A**.

59 Qube submits that the NCC's review of the certification application, and any assessment of the CPA principles, must have regard to regulatory experience over the last decade at privatised Australian ports and the important lessons that this history offers of the need to ensure a certified port regime provides real, transparent and effective protection against discriminatory conduct – backed by robust ring fencing, audit, reporting and price and non-price oversight and dispute processes.

60 Indeed, at the same time as the NCC is considering the application by the SA Government for recertification of the MSA Act, the NCC is also considering a certification application for the access regime applicable under the QCA Act to the Dalrymple Bay Coal Terminal (**DBCT**). [36] While DBCT is ***not*** vertically integrated (unlike Flinders Group), its access undertaking (and standard access agreement) together run to several hundred pages and provide substantial protections for access seekers and access holders. The comparison between the DBCT regime and the 11-page South Australian ports access regime set out in Part 3 of the MSA Act (most of which is taken up with procedural issues) could not be more stark.

[32] 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.

[33] 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.

[34] 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.

[35] 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.

[36] See https://ncc.gov.au/index.php/application/application-for-certification-of-the-dalrymple-bay-coal-terminal-access-regime.

4 Requirements for re-certification of the current access regime

61 Re-certification requires the NCC to make a recommendation to the Commonwealth Minister that the South Australian Ports access regime is an "effective access regime".[37]

62 The CCA does not define an "effective access regime", but directs the NCC to assess whether the regime is an effective regime by having regard to:

- the clause 6 principles set out in the CPA;[38] and
- the objects set out in section 44A of Part IIIA of the CCA.[39]

63 During the course of its assessment, the NCC is required to treat each of the clause 6 principles as having the status of a guideline rather than a binding rule.[40]

64 The application must demonstrate how each of the clause 6 principles is addressed in relation to the services covered by the access regime and how the access regime promotes the objects of Part IIIA. The NCC Certification Guidelines state that supporting evidence should be provided wherever possible.[41] Qube submits that the SA Government's application fails to provide sufficient evidence in support of certification. In many instances, the SA Government relies almost solely on the fact that the NCC has previously been satisfied that the access regime complies with the clause 6 requirements, without providing evidence of the effectiveness of the operation of the regime over the past 10 years, nor any acknowledgement that any substantial changes have occurred in the market that might impact upon the NCC's assessment.

65 Accordingly, Qube sets out in detail in section 4.6 what it submits is necessary in order for the NCC to recommend that the South Australian ports access regime be considered an "effective access regime".

4.1 Object of Part IIIA

66 Section 44AA provides that the objects of Part IIIA are to:

> *"(a) 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; and*
>
> *(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry"* (emphasis added).

67 This section is mirrored in clause 6(5)(a) of the CPA, which requires that access regimes incorporate object clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.[42]

68 Both the objects of Part IIIA and clause 6(5)(a) of the CPA provide a clear overarching guiding principle to assessing the requirements of an access regime. The effectiveness

[37] Sections 44NA(4) and (5) of the CCA.
[38] Section 44M(4) of the CCA.
[39] Section 44M(4)(aa) of the CCA.
[40] Section 44DA of the CCA.
[41] NCC Certification Guidelines at paragraph 2.3, available at: https://ncc.gov.au/images/uploads/Certification_Guide_2017.pdf.
[42] Clause 6(5)(a) of the CPA.

of that regime must be measured against its adequacy in promoting effective competition in upstream or downstream markets.

4.2 CPA clause 6(4)(m): Hindering access

> *A State or Territory access regime should incorporate the following principles … [t]he owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.*

69 Clause 6(4)(m) requires that an effective access regime prohibits conduct for the purpose of hindering access. This principle applies both to existing users and facility owners.[43] The NCC Certification Guidelines state:[44]

> *"In the case of vertically integrated service providers, access may be hindered where the service provider unfairly provides favourable terms of access to an affiliated entity. For example, a vertically integrated rail track operator that provides track priority and the most favourable track use timetabling to its own above track operator may effectively hinder access to the rail track by other above track operators. An access regime that does not prevent such conduct would be inconsistent with clause 6(4)(m)."*

70 The NCC Certification Guidelines recognise that, where vertical integration issues arise, ringfencing provisions may need to be supported by competitive neutrality provisions to assure access seekers that the service provider will not discriminate against them.[45]

71 The NCC Certification Guidelines goes on the state:[46]

> *"Concerns can arise because certain participants enjoy advantages (cost or otherwise) over others for reasons not related to competitive behaviour. If the advantages favour less efficient businesses it can lead to resource allocation distortions. Competitive neutrality refers to policies aimed at removing such distortions. In the context of access, competitive neutrality typically refers to neutralising competitive advantages enjoyed by a particular infrastructure user because it is affiliated with the infrastructure owner. This process can be distinguished from the competitive neutrality principles set out in clause 3 of the CPA, which relate to competitive advantages arising from public ownership of significant businesses.*
>
> *Prohibition of anti competitive price discrimination between affiliated users and third party access seekers operating in the same market is an example of the application of competitive neutrality in an access regime. In the Queensland rail access regime, for example, there are express prohibitions on unfair differentiation, both during access negotiations and in the provision of access for users of declared services. (The provider of the rail network services subject to the Queensland rail access regime also provides rail haulage services in competition with access seekers.) Together with other mechanisms in the regime, this provides an appropriate level of comfort that a vertically integrated service provider will be prevented from treating its related businesses more favourable than those of its competitors."*

[43] NCC Certification Guidelines at paragraph 5.68.

[44] NCC Certification Guidelines at paragraph 5.69.

[45] NCC Certification Guidelines at paragraph 5.70.

[46] NCC Certification Guidelines at paragraphs 5.70 and 5.71.

72 It is clear that, in circumstances where the access provider is vertically integrated in downstream services, mere inclusion of a provision that mirrors the requirement under clause 6(4)(m) of the CPA will not be sufficient to constrain the access provider's behaviour in a meaningful way, and that a more interventionist approach will be required in order to prevent discrimination by the access provider against third parties.

73 Qube submits that, in the context of the increased vertical integration of Flinders Ports (described in section 3.1), the NCC should not find that the current access regime meets the principle in clause 6(4)(m) unless the prohibition on conduct is properly supported by more specific and concrete provisions. This is discussed in more detail below.[47]

4.3 CPA clause 6(4)(n): Accounting arrangements

> *A State or Territory access regime should incorporate the following principles … [s]eparate accounting arrangements should be required for the elements of a business which are covered by the access regime.*

74 Under clause 6(4)(n), an effective access regime should impose separate accounting arrangements on service providers for the elements of the business covered by the regime.[48] That is, facility owners must make available financial information that focuses exclusively on the elements of their business subject to the regime.[49]

75 The NCC Certification Guidelines state:[50]

> *"The availability of relevant accounting information is necessary for access seekers and regulatory bodies (including dispute resolution bodies) to assess the terms and conditions of access. Separate accounting al so helps to address the potential for anti competitive behaviour such as using cross subsidies between covered and uncovered services as a means for disguising monopoly pricing."*

76 The NCC states that, to satisfy clause 6(4)(n), an effective access regime should include provisions that require a facility owner to at least:[51]

- maintain a separate set of accounts for each service that is the subject of an access regime;
- maintain a separate consolidated set of accounts for all of the activities undertaken by the facility owner; and
- allocate any costs that are shared across multiple services in an appropriate manner.

77 However, the NCC also recognises that, in certain circumstances, accounting separation alone may not be adequate to deter anti-competitive behaviour and that additional ring-fencing measures may be required.

78 The NCC Certification Guidelines state:[52]

[47] Section 44 of the MSA Act mirrors clause 6(4)(m).
[48] NCC Certification Guidelines at paragraph 5.72.
[49] NCC Certification Guidelines at paragraph 5.72.
[50] NCC Certification Guidelines at paragraph 5.73.
[51] NCC Certification Guidelines at paragraph 5.74.
[52] NCC Certification Guidelines at paragraphs 5.75 to 5.77.

"Vertical integration creates opportunities for transfer pricing and preferential treatment of affiliate businesses over third parties. Ring 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.

Ring fencing involves identifying and isolating all aspects of a business that could permit an integrated entity to engage in anti competitive behaviour designed to eliminate competitors or deter potential competitors from entering the market. This includes activities, assets, costs and revenues relating to the monopoly element (or area of the business not subject to strong competitive pressures) of an integrated entity. It also includes potential incentives or practices of a non accounting nature that may result in anti competitive behaviour.

Apart from segregating access related functions from other functions ring fencing arrangements should also include measures to:

- *protect confidential information disclosed by an access seeker to the facility owner from improper use and disclosure to affiliated bodies, and*
- *establish staffing arrangements between the facility owner and affiliated bodies that avoid conflicts of interest."*

79 In the presence of entrenched vertical integration (as is the case with Flinders Ports), accounting separation alone is not sufficient to constrain the access provider's behaviour in a meaningful way, and detailed, transparent and enforceable ring-fencing arrangements are required.[53]

4.4 Clause 6(4)(a)-(c): Negotiated access

A State or Territory access regime should incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

(b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.

(c) Any right to negotiate access should provide for an enforcement process.

80 Clauses 6(4)(a)-(c) establishes negotiated access as the basis for determining the terms and conditions of access. However, the NCC recognises that some regulatory intervention may be warranted to ensure an environment conducive of effective negotiations:[54]

"In some circumstances access seekers may have insufficient information and bargaining power to negotiate with large service providers. Therefore an effective access regime should appropriately address information asymmetries to enable access seekers to enter into meaningful access negotiations. This involves striking a balance between obliging the service provider to disclose sufficient information

[53] Section 44 of the MSA Act mirrors clause 6(4)(m).

[54] NCC Certification Guidelines at paragraphs 5.2 and 5.3.

for the access seeker to make informed decisions, while ensuring that the disclosure requirements are not unduly onerous.

Having regard to the objects of Part IIIA, clauses 6(4)(a)-(c), 6(4)(i) and 6(5) can be seen as operating together to require an effective access regime to encourage access outcomes that mirror, as closely as possible, those that would be derived in an effectively competitive market. The Council considers that for an access regime to encourage efficient access outcomes, it must incorporate regulatory processes that are transparent and consultative and are undertaken by a regulatory body that is independent and has the resources it needs to be effective."

81 In circumstances where the access provider is vertically integrated, there is a greater need for access regulation to include sufficient measures to address the ability and commercial incentives of the vertically integrated operator to favour its own downstream entities in order to create an environment conducive of meaningful and balanced access negotiations.

82 Qube therefore submits that, where a vertically integrated operator is involved, additional intervention is necessary to meet the requirements under clauses(4)(a)-(c).

4.5 Clause 6(4)(f): Access on different terms

> *A State or Territory access regime should incorporate the following principles … [a]ccess to a service for persons seeking access need not be on exactly the same terms and conditions.*

83 An access regime will be consistent with this clause if it provides for access to be provided on different terms and conditions to different users.[55] However, in addition to this requirement, the NCC Certification Guidelines state in relation to this clause that:[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" (emphasis added).

84 Qube submits that clause(4)(f) requires more than simply permitting an access provider to supply access on different terms and conditions. Compliance with clause 4(f) requires the NCC to consider whether the access regime also contains effective mechanisms to ensure competitive neutrality in the treatment of related entities.

4.6 Requirements of an effective access regime

85 The South Australian ports access regime does little more than mirror the generalised language of the CPA principles. If that, of itself, was adequate to ensure an access

[55] NCC Certification Guidelines at paragraph 5.8.

[56] NCC Certification Guidelines at paragraph 5.9.

regime was effective there would have been no need for the CCA to provide for the NCC to consider the issue and make a recommendation to the Minister.

86 The mere inclusion within the South Australian ports access regime of a provision that mirrors the wording of each of the clause 6(4) principles is therefore not a sufficient basis for the NCC to conclude that the principles has been met for the purposes of regarding the access regime as effective under section 44M. Rather, for an access regime to be found to be effective, the CPA principles need to be reflected in a regime with a structure and concrete processes that enable it to be ***effective***.

87 Simply, the regime needs to work – and, in the case of an application for re-certification, there should be evidence that the regime has been shown to work.

88 Qube submits that for the NCC to recommend that a regime is effective, it needs to be satisfied that the manner in which the South Australian ports access regime is framed and applied the CPA principles achieves the objective of:

> "*promot[ing] the efficient use and operation of, and investment in, significant infrastructure to promote competition in activities in upstream and downstream markets that rely on the use of the infrastructure*."[57]

89 The NCC ought to have regard to:

- the nature of the various South Australian port facilities covered by the regime and any related supply chain and/or markets;
- the degree of vertical integration across the activities of the operator - i.e. the extent to which the operator supplies services in related and contestable markets (and the degree to which this provides an opportunity to leverage market power associated with control of a bottleneck asset);
- the operational structure of the operator; and
- in the case of re-certification, any evidence of the past failure of the access regime to adequately constrain the ability of the operator to engage in anticompetitive conduct.

90 As discussed in section 3.1, since 2011, a key feature that has developed in the competitive environment in which the South Australian Ports access regime is to operate is the fact that the regulated port operator, Flinders Ports, is now a fully vertically integrated business competing aggressively in downstream markets, including the market for the general and bulk handling of cargo at Port Adelaide, South Australia's most significant port.

91 In the absence of effective constraint, Flinders Ports has both the ability and incentive to engage in conduct that favours its related downstream services to the detriment of other downstream service providers. The ability and incentives for a vertically integrated operator to act in such a way, and the anticompetitive impact of such actions, are well recognised by competition regulators and have become increasingly more observable at privatised ports across Australian in recent times (see section 3.3).

92 It is clear from the principles described in sections 4.1 to 4.5, that in order for the South Australian Ports access regime to be an effective access regime for the purposes of section 44M of the CCA, it must include sufficient measures to address the ability and

[57] NCC Certification Guidelines, paragraph 3.4, available at: https://ncc.gov.au/images/uploads/Certification_Guide_2017.pdf.

commercial incentives of the vertically integrated operator, Flinders Ports, to engage in anti-competitive conduct in downstream markets.

93 For the reasons set out in section 5, the current access regime lacks these measures. Qube submits that, in the current circumstances of a vertically integrated port authority, the requirements of clauses 6(5)(a), 6(4)(n), 6(4)(m), 6(4)(f) and 6(4)(a)-(c) require at least the measures described in section 5, below.

5 The SA port access regime is one of the *least* effective in Australia

5.1 What is required for the South Australian ports access regime to be effective?

94 An effective ports access regime in South Australia must be framed to reflect and respond to both:

- the extensive monopoly control held by Flinders Group across different monopoly facilities within South Australia (i.e. operation of all of the six South Australian ports and their various and diverse operations); and
- the extremely high degree of vertical integration across activities of the Flinders Group, which extend across almost all aspects of the port supply chain and are more diverse and integrated than any other private port operator in Australia.

95 At a minimum, this requires an effective regime to provide for the following:

- a clear requirement for open and non-discriminatory provision of services, which is overseen appropriately by a regulator and is enforceable directly by port users (and which needs to be defined in detailed and concrete terms in relation to the various services and markets across which Flinders Group operates);
- non-discrimination must extend across different berths and ports, so that berthing priority, capital investment and day to day operations cannot operate in a manner that allows priority to Flinders Group over competitors;
- public and non-discriminatory berth allocation rules at all South Australian ports;
- clear, transparent and appropriately enforceable ring fencing of monopoly port operations from contestable activities – with appropriate mechanisms to protect the security and confidentiality of competitively sensitive information and with appropriate auditing of IT security and information systems;
- appropriate structural or functional separation of Flinders Group employees – which must address 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 (overseen by the regulator) to ensure appropriate discipline around compliance with the regime by Flinders Group;
- a transparent pricing process that ensures cost-orientated and efficient pricing for monopoly services – with a clear dispute process for port users to contest port pricing which appears not to be cost-orientated or which otherwise appears to provide for cross-subsidisation;
- an accessible and robust process for non-price disputes – which can be accessed quickly and with powers to deliver clear and immediate outcomes for users;

- transparent operational standards and reporting to ensure that Flinders Group does not offer its own downstream businesses (or dedicated or prioritised berths) preferential service quality to other stevedores or other stakeholders; and

- restrictions on Flinders Group making available access to port infrastructure or land for contestable activities (e.g. container servicing etc) without undertaking a transparent and non-discriminatory process.

96 Obligations of this kind have been imposed by the ACCC on terminal operators with narrower and less integrated operations than Flinders Group (e.g. VICT and AAT).[58] However, the regime in Part 3 of the MSA Act fails to meet even one of these basic elements and is, simply, one of the most inadequate in Australia.

97 Simply, the South Australian ports access regime is inadequate in relation to each of the above requirements.

5.2 Open and non-discriminatory access – generally and with specific reference to activities, ports and berths

98 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.

99 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.

100 Although Flinders Ports has enacted berth scheduling and priority rules in relation to each of the regulated ports, the MSA Act itself does not address nor regulate 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).[59]

101 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.

102 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 **Confidential Appendix A**.

5.3 Structural or functional ring fencing

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

104 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

[58] 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.

[59] See footnote 58; also see Dalrymple Bay Coal Terminal access undertaking, available at: https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2017-access-undertaking-process/.

accounts therefore do not provide any transparency to users regarding cross subsidisation or the efficiency or cost-orientation of pricing for monopoly services.

105 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.

106 The NCC Certification Guidelines rightly identify that functional and organisational separation may be required in circumstances of vertical integration, along with measures to "*establish staffing arrangements between the facility owner and affiliated bodies that avoid conflicts of interest*."[60]

107 These simply do not exist in South Australia.

108 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 **Confidential Appendix A**.

5.4 Information security

109 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.

110 The NCC Certification Guidelines state expressly in relation to clause 6(4)(n) that, along with measures to ensure functional separation of the downstream and regulated upstream businesses, the access regime may require additional measures to "*protect confidential information disclosed by an access seeker to the facility owner from improper use and disclosure to affiliated bodies*."[61]

111 Once again, this failure 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 **Confidential Appendix A**.

5.5 Audit and reporting

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

113 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.

114 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

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

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

the requirements for price information that Flinders Ports is required to provide access seekers under the MSA Act.[62] ESCOSA designed the guidelines to oblige Flinders Ports to provide price information to access seekers that:[63]

- 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.

115 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:[64]

- a statement of the regulated services that the Flinders Ports provides in each Proclaimed Port;
- the then current price list (as required under the most recent Ports Price Determination) for those regulated services that are also Essential Maritime Services;[65]
- the then current schedule of pilotage charges if the Regulated Operator supplies pilotage services;[66]
- 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.

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

117 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:[67]

[62] 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.

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

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

[65] 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.

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

[67] 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.

*"**2.1 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.

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).

118 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;[68] 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.[69]

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

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

119 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.[70]

120 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.

121 **Confidential Annexure 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.

5.6 Price dispute mechanism

122 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.

123 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.

124 As discussed in sections 4.3 and 4.5, 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."*[71]
>
> *…*
>
> *"[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."*[72]

125 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.

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[70] 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.*"

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

[72] NCC Certification Guidelines at paragraph 5.9.

126 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.

127 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.

128 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.

129 The fact that there have been no arbitrations under the MSA Act is not a sign of success, but of failure.[73] 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:

- 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.

130 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.

5.7 Operational performance standards and reporting

131 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.

132 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.

6 Conclusion

133 The South Australian port access regime is, both objectively and in our opinion, one of the least effective in Australia.

134 The South Australian port access regime is inadequate and ineffective. It has not changed materially in a decade. This is despite substantial changes in the port supply

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

chain, including the Flinders Group operating all ports in the state and it being the most vertically integrated port operator in the country.

135 In South Australia, the Flinders Group:

- operates seven separate ports handling a diverse range of freight types including bulk, container, general cargo, RoRo and liquid cargoes; and
- is the most vertically integrated of Australian private port operators and has expanded over the last decade to include stevedoring, container management and storage, warehousing and logistics (across all freight types),

136 The practical and commercial experience of Qube (and, it is assumed, other port stakeholders) provide real world evidence of the failure of the South Australian port access regime to prevent anti-competitive outcomes.

137 The MSA Act does not meet the basic requirements of an "effective access regime", having regard to the clause 6 principles set out in the CPA or the objects in section 44A of Part IIIA of the CCA.[74]

138 Amongst other things, the MSA Act:

- does not require or provide for open and non-discriminatory access to South Australian ports;
- fails to provide any form of structural or functional ring fencing of staff or roles – and therefore fails to address the ability and incentive for the Flinders Group to favour its own downstream operations over those of competitors;
- offers no level of protection for competitively sensitive information obtained by Flinders Ports through its operation of all South Australian 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-price issues; and
- does not establish any operational or service performance standards or reporting, or otherwise regulate the non-discriminatory provision of services at South Australian ports.

139 Simply, as well as failing to meet the statutory standards, the regime does not comply with even the most basic requirements of the NCC Certification Guidelines.

140 Qube's day to day commercial experience when seeking to compete and operate within South Australian ports, provides direct evidence of the material impact of these failings on competition in the South Australian port supply chain.

141 ESCOSA's periodic review of the regime (in 2012 and 2017) has entirely failed to address the creeping vertical expansion within Flinders Group's business activities and within its own organisational structure. It appears that the regulator in this case has been "captured" by the interests of Flinders Group and the processes within the South Australia port access regime are simply inadequate to respond to the concerns identified.

[74] Section 44M(4)(aa) of the CCA.

142 It is therefore critical that competitors, such as Qube, in port-related markets in South Australia have access to declaration under Part IIIA of the CCA to seek robust oversight of access terms by the ACCC. As the NCC is aware, while the effectiveness of Part IIIA has been criticised at times in relation to non-vertically integrated ports, Part IIIA should be suited to addressing the kind of immediate and substantial anti-competitive outcomes being experienced by Qube and others at South Australian ports as a result of the integration of the Flinders Group and which is simply not addressed by the South Australian ports access regime or ESCOSA.

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

Qube offers the following confidential examples of activities by Flinders Ports (and other parts of the Flinders Group) that highlight the inadequacy of the current access regime:

1.1 Staff sharing across monopoly and contestable activities

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.

For example, Qube understands that:

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

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

The Flinders Ports commercial team (Michael Simms and Sally Sloan), who Qube negotiate lease agreements and stevedoring licence agreements through, are actively looking to secure stevedoring work for Flinders Logistics.

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

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

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.

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:[75]

> *"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."*

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

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.

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 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.

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

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).

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.

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

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.[76]

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.

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)

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.

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

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

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.

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

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".[77]

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.

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.

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

[77] 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.