

National Competition Council

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10 May 2021

By email

CC: Flinders Ports Pty Ltd
Qube Ports Pty Ltd
The Premier of South Australia
Viterra Operations Pty Ltd, and
The South Australian Freight Council

Dear interested party,

Re: Notices under s. 44NAA of the Competition and Consumer Act 2010

The National Competition Council (**Council**) is assessing an application under Section 44NA of the Competition and Consumer Act 2010 (**CCA**) by the Premier of South Australia, the Hon Stephen Marshall MP on behalf of the state of South Australia for re-certification of the South Australian ports access regime (the **Access Regime**).

The Council must make a recommendation to the Commonwealth Minister as to whether the Access Regime should be re-certified.

On 26 February 2021, Qube Ports Pty Ltd (**Qube Ports**) lodged a submission in response to the application for certification (**Qube Submission**). A copy of this submission is attached to this letter. In that submission, Qube Ports raised a number of matters that may be relevant to the Council's decision whether to recommend that the Access Regime be re-certified.

The Council considers that Qube Ports and Flinders Ports Pty Ltd (**Flinders Ports**) may be able to provide information that would assist in the Council's assessment of the matters raised in Qube Ports' submission. Accordingly, the Council has issued the attached notices under section 44NAA of the CCA to Qube Ports and to Flinders Ports. These Notices request that Qube Ports and Flinders Ports respectively give the Council certain information, being information the Council considers may be relevant to deciding what recommendation to make. The Council requests that Qube Ports and Flinders Ports provide the information requested by **5pm EST Friday 24 May 2021**.

The matters raised in the Qube Submission give rise to more general questions regarding the impacts on competition that may arise from the vertical integration of Flinders Ports with other entities in the Flinders Group¹ operating in downstream markets, and the relevance of those matters to the effectiveness of the Access Regime.

¹ In this letter '**Flinders Group**' includes Flinders Port Holdings Pty Ltd, Flinders Ports Pty Ltd, Flinders Logistics Pty Ltd, Flinders Adelaide Container Terminal Pty Ltd, Flinders Warehousing & Distribution Pty Ltd

In addition to the section 44NAA notices to Qube Ports and Flinders Ports, Annexure A to this letter sets out these general questions. The Council would be interested to receive submissions on these questions from all interested parties, and in particular Qube Ports, Flinders Ports and the Premier of South Australia.

In accordance with section 44NAA(2) of the CCA, a copy of this letter and the enclosed notices will be provided to the applicant, the other service provider (Viterra Operations Pty Ltd, **Viterra**) and published on the Council website at www.ncc.gov.au.

If you have any queries in relation to this letter, please contact Richard York on 03 9290 1993.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Julie-Anne Schafer', written over a light grey rectangular background.

Julie-Anne Schafer
President
National Competition Council

ANNEXURE A: ISSUES FOR COMMENT BY INTERESTED PARTIES

Note: This Annexure is not part of an information request under section 44NAA(1).

The matters the subject of the information requests to Qube Ports and Flinders Ports, respectively, and the Qube Submission, give rise to additional questions of a more general nature, on which the Council invites comments from all interested parties.

The questions for general comment are as follows.

Question 1: Vertical integration and effectiveness of the Access Regime

The Qube Submission states at paragraph 9 that:

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.

- (a) Does the Access Regime address the risk of vertically integrated facility operators providing preferential treatment to related businesses, or using confidential information obtained from access seekers to obtain competitive advantages in upstream or downstream markets?
- (b) Does the Essential Services Commission of South Australia (ESCOSA) or an arbitrator of an access dispute under the Access Regime have the ability to:
 - (i) address the risk of vertically integrated facility operators providing preferential treatment to related businesses, or
 - (ii) prevent providers of regulated services from using confidential information obtained from access seekers to give a competitive advantage to related entities in upstream or downstream markets?
- (c) Are these considerations relevant to the decision the Council must make in accordance with section 44M(4) of the CCA as to whether to recommend to the Commonwealth Minister that the Access Regime is an effective access regime, and if so how?

Any response to these questions provided by interested parties must be submitted to the Council by **5pm EST on Friday 24 May 2021**.

Noting that parties have visibility over all of the information being sought and an opportunity to comment, the Council will not provide an opportunity for interested parties to comment on the responses received from other interested parties until after it has issued its Draft Recommendation.

NOTICE UNDER SECTION 44NAA(1) OF THE COMPETITION AND CONSUMER ACT 2010 TO QUBE PORTS PTY LTD

The National Competition Council (**the Council**) requests that Qube Ports Pty Ltd (**Qube Ports**) give to the Council information in response to the questions below by **5pm EST on Friday 24 May 2021**.

The Council considers the information requested may be relevant to deciding what recommendation to make in relation to the application by the Premier of South Australia for extension of the certification of the South Australian ports access regime.

Any information provided in the response that is confidential must be clearly identified as such and reasons given in support of the claim of confidentiality. Where applicable, a public version of any confidential response, in which confidential information has been redacted, should be provided along with the confidential version.

The Council strongly encourages that the response to this Notice be made publicly available. The Council may be unable to give weight to information that it is unable to test through a public process.

Question 1

Appendix A to the Qube Submission recounts situations where Qube Ports believes it and other access seekers have been competitively disadvantaged in dependant markets as a result of conduct by Flinders Ports when seeking to gain access to the proclaimed services (**Qube's Concerns**). The Council understands that Qube Ports has not raised an access dispute with the Essential Services Commission of South Australia (**ESCOSA**).

- (a) Has Qube Ports ever sought redress for Qube's Concerns under the Access Regime? If so, please provide details.
- (b) Please provide reasons explaining why Qube Ports has not raised an access dispute with ESCOSA.

Dated: 10 May 2021

NOTICE UNDER SECTION 44NAA(1) OF THE COMPETITION AND CONSUMER ACT 2010 TO FLINDERS PORTS PTY LTD

The National Competition Council (**the Council**) requests that Flinders Ports Pty Ltd (**Flinders Ports**) give to the Council information in response to the questions below by **5pm EST on Friday 24 May 2021**.

The Council considers the information requested may be relevant to deciding what recommendation to make in relation to the application by the Premier of South Australia for extension of the certification of the South Australian ports access regime.

Any information provided in the response that is confidential must be clearly identified as such and reasons given in support of the claim of confidentiality. Where applicable, a public version of any confidential response, in which confidential information has been redacted, should be provided along with the confidential version.

The Council strongly encourages that the response to this Notice be made publicly available. The Council may be unable to give weight to information that it is unable to test through a public process.

Question 1: Vertical integration

Section 1.1 of Appendix A to the Qube Submission sets out Qube Ports' understanding that there is staff that work across both the monopoly and contestable activities of the Flinders Group. Qube Ports states that it has been informed of a 'change in management structure that removes any separation between Flinders Ports and Flinders Logistics'. Qube Ports further states that it understands Danny Sloan (Stevedoring Operations Manager at Flinders Logistics) now reports to Carl Kavina (General Manager of Flinders Ports), and that 'Port services, such as the Mooring teams, now report to Danny Sloan'.

Section 1.2 of Appendix A to the Qube Submission states that Flinders Ports' 'commercial team' (Michael Simms and Sally Sloan) 'are looking to secure stevedoring work for Flinders Logistics', and gives an example of an alleged situation in which a Flinders Ports representative approached a customer of Qube Ports in a carpark and said word to the effect "it will be good if Flinders Logistics can do your stevedoring work".

Section 1.6 of Appendix A of the Qube Submission states there are no apparent constraints on the disclosure of commercially sensitive Qube Ports information by Flinders Ports to Flinders Logistics.

- (a) Are Qube Ports' assertions and understandings outlined above true? Please give details.
- (b) Is there a separation policy or practice that requires staff and management within the Flinders Group to separate the regulated monopoly activities of Flinders Ports from the downstream contestable activities of Flinders Logistics, and Flinders Warehousing & Distribution?
- (c) Are any measures in place to prevent confidential or commercially sensitive information obtained from access seekers by staff of Flinders Ports from being used by its related bodies corporate to obtain a competitive advantage in contestable markets?
- (d) Is Qube Ports correct that there has been a 'change in management structure' as described? If so, please give details of this change.

Question 2: Discriminatory access

Section 1.3 of Appendix A to the Qube Submission asserts that Flinders Ports provides berthing priority in favour of its downstream customers. Qube Ports states the Port Rules regulating priority access to berth 29 are vague and have ‘the effect of prioritising Flinders Ports’ downstream customers ... without any clear basis ... to warrant the priority berthing’.

Section 1.4 of Appendix A to the Qube Submission states that, in its experience, Flinders Ports prioritises infrastructure spending in those areas and berths in which its downstream customers primarily operate.

- (a) What measures does Flinders Ports have in place to ensure it does not discriminate in of its customers and related companies in providing access to regulated port services, or in prioritising infrastructure spending?
- (b) Please detail how competing access requests are evaluated by Flinders Ports (particularly where they receive competing requests from a related entity and a third party)?
- (c) Please respond to the specific assertions in section 1.3 of Appendix A of the Qube Submission.
- (d) Please respond to the specific comments in section 1.4 of Appendix A of the Qube Submission.

Question 3: Bundling and cross-subsidisation of contestable services

Section 1.7 of Appendix A to the Qube Submission states 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”.²

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

- a) Does Flinders Ports bundle fees for providing contestable services with the fees charged for access to regulated port services?
- b) If so, please explain how such bundling impacts the capability for other businesses to compete for the related services.

Dated: 10 May 2021

² Flinders Ports Port Charges, effective 1 July 2020, page 4, available at: https://www.flindersports.com.au/wpcontent/uploads/Port-Charges-from-1-July-2020-to-30-June-2021_Version2_update-1022021.pdf