

20 May 2021

Submissions — South Australian Ports Access Regime
National Competition Council
GPO Box 250
Melbourne VIC 3001

info@ncc.gov.au



Dear Sir / Madam

RE: South Australian Ports Access Regime – Notices under s. 44NAA of the Competition and Consumer Act 2010

On behalf of the South Australian Freight Council's (SAFC) Executive Committee and Membership I thank you for the opportunity to make a submission in regards to the Notices issued by the NCC to Flinders Ports and Qube Ports, regarding the recertification of the SA Ports Access Regime under section 44NA of the Competition and Consumer Act 2010.

As you may be aware, SAFC is the State's peak, multi-modal freight and logistics industry group that advises all levels of government on industry related issues. SAFC represents road, rail, sea and air freight modes and operations, freight services users and assists the industry on issues relating to freight logistics across all modes.

For probity reasons, we would like to declare at the outset that Flinders Ports Holdings is a member of SAFC, as is Viterra (another organisation copied into the information request). Qube Ports and its related entities have not chosen to take up SAFC membership. In preparing this response, SAFC has not consulted with Flinders Ports, and has excluded Flinders Ports representatives and directly associated persons/entities from any and all oversight of this response.

SAFC was surprised by the lengthy, if not always accurate¹ Qube submission – particularly given that Qube has never participated in any review of the SA Ports Access Regime by ESCOSA, never raised any dispute under the access regime, and never brought the supposedly long-term issues to the attention of the Port Adelaide Container Monitoring Panel² or any other statutory body that we are aware of.

Alternatively, SAFC has participated in every 5 year review of the scheme by ESCOSA since it was instituted in 2001. In each instance, we have recommended that the scheme be retained due to the lack of evidence of any anti-competitive conduct, but the potential for it to occur. In each case, ESCOSA has made a similar assessment. SAFC also holds the Chair of the Port Adelaide Container Monitoring Panel, and has since it was instituted by the port sale legislation over 20 years ago³.

¹ For example, Qube states that Flinders Ports is SA's sole port operator on three separate occasions (sections 40, 94, 134) – however there are **four** other operators in the state.

² The Port Adelaide Container Monitoring Panel is established under the South Australian Ports (Disposal of Maritime Assets) Act 2000, s20 - 25

³ See above

SAFC has responded to this information request on the basis of the need to find the right competitive supply chain outcome for South Australia. In essence, we find the Qube submission to be long on claims, but short on evidence to back those claims. We acknowledge that Qube's concerns should be explored, but believe that this is not the appropriate structure. Rather, they should first be tested through the provisions in the Access Regime; with any substantiated failings of the Access Regime to then be examined through the regular Access Regime reviews undertaken by ESCOSA. We note that the next scheduled review of the regime is in 2022 (just 7 months away).

In relation to the **Issues for Comment by Interested Parties:**

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?

The Access regime clearly addresses the risk of vertically integrated facility operators providing preferential treatment to related businesses. s32(2) of the MSA states:

(2) *The pricing principles relating to the price of access to a service are as follows:*

(a) that access prices should allow multi-part pricing and price discrimination when it aids efficiency;

(b) that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others would be higher;

(c) that access prices should provide incentives to reduce costs or otherwise improve productivity

The Qube submission includes no allegations of Flinders Ports *'using confidential information **obtained from access seekers** to obtain competitive advantages in upstream or downstream markets'* (emphasis added).

It does contain (unsubstantiated & unproven) allegations of misuse of commercially sensitive information, but not in the context of seeking access. As such, this is not an Access Regime related issue and should have no bearing on the re-certification process. SAFC also has difficulty in understanding why Qube provided Flinders Ports access to such commercially sensitive information, given that it was not required to do so for access purposes.

Importantly, it must be recognised that the Access Regime is not the only constraint or control upon Flinders Ports in this area. The South Australian Ports (Disposal of Maritime Assets) Act 2000 establishes a Port Adelaide Container Terminal Monitoring Panel which is charged with setting performance objectives and monitoring the performance of the Terminal. These measures can (and do) include both landside and quayside measures.

Should the Panel issue the Terminal with two notices of non-performance, their rights to possession and control of the terminal may be terminated by the Minister⁴.

There is no constraint on the Panel to examining the performance of the terminal in relation to related entities vs non-related entities. It has not done so in the past, as neither Qube or any other entity has raised concerns of this nature with the Panel.

(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?**

An Arbitrator plainly has the power to '*address the risk of vertically integrated facility operators providing preferential treatment to related businesses*' – this is clearly provided under s32(2) of the MSA (quoted above).

An Arbitrator also has the power to '*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*'. This is provided under the MSA s28:

- (1) A person who gives the arbitrator information, or produces documents, may ask the arbitrator to keep the information or the contents of the documents confidential.
- (2) The arbitrator may, after considering representations from the parties, **impose conditions limiting access to, or disclosure of, the information or documentary material.**
- (3) A person must not contravene a condition imposed under subsection (2).

Maximum penalty: \$75 000.

A condition imposed by the Arbitrator could clearly contain requirements to restrict information sharing within a provider or across related entities of a provider.

Also relevant are the provisions of s24, where an Arbitrator can: direct that hearings are in private (1); determine who may be present (2); and must have regard for the need for commercial confidentiality (3).

There is a legitimate question as to whether ESCOSA is required to address these risks, or has specific powers under the Access Regime to prevent providers of regulated services from using confidential information improperly. We note that these powers could exist and be conferred on ESCOSA through its establishing acts/regulations or other means.

⁴ South Australian Ports (Disposal of Maritime Assets) Act 2000, s25(2)

However, it should also be recognised that:

- ESCOSA is an experienced regulator in good standing with the broad transport and logistics industry;
- That ESCOSA would no doubt consider the risk of vertically integrated operators providing preferential treatment to related businesses and take measures to reduce or eliminate this risk where an access dispute is brought to its attention; and
- Similarly take measures to prevent providers of regulated services from inappropriately using confidential information for competitive advantage.

Given that these concerns are now being raised (critically) for the first time, SAFC considers that ESCOSA's powers in relation to these matters should be part of the 2022 review of the Access Regime; but should not hinder the re-certification of the regime by the NCC.

In other words, the State Government, ESCOSA and the South Australian logistics community should be provided with the opportunity to resolve the issue first through the statutory review process, before the issue of non-certification is raised. The proper process should be followed, without skipping important steps that could resolve the issue in South Australia, and without the need for escalation to Commonwealth bodies.

(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?

In our opinion, they are not.

Qube have never participated in the access regime by raising a dispute, nor have they made a submission to the periodic reviews of the regime.

As such, Qube has never tested the regime – and therefore can provide no direct, substantiated evidence of failings. It has not made suggestions for alteration to the regime through the avenues provided in the regime for it to do so.

It has failed to take part in the process, and then complained about the process.

Based on the lack of disputes under the regime, and the results of the last two regime reviews by ESCOSA, the NCC should have no hesitation in recommending to the Commonwealth Minister that the regime be re-certified as effective. Qube will then have the opportunity to argue for modification to the regime to address their concerns as part of the scheduled scheme review in 2022.

Other comments:

Qube's motives for making this submission may not be as transparent as they appear. SAFC understands that Qube may have made offers to Flinders Ports to purchase the related entities (Flinders Logistics and Flinders Warehousing & Distribution) that it is targeting in its submission, and these offers have been rejected. This has not been disclosed to the NCC in the Qube submission.

The Information request issued by the NCC has not provided SAFC with the ability to do a 'deep dive' into each statement and claim made by Qube. Many are, in our opinion, misleading or demonstrably false.

In just one example, Qube contends on page 7 of its submission:

'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.'

Qube does not speak for the transport and logistics industry in South Australia.

Qube provides no evidence that these are the thoughts of the South Australian transport and logistics industry. Rather, the evidence from submissions to the regular 5 yearly reviews of the Access Regime indicates the **exact opposite**.

It's allegations against ESCOSA - that it is inadequate, or (in other sections) suffers from 'regulatory capture' - are unsubstantiated and insulting.

This is just one example of misleading or demonstrably false information provided by Qube to the NCC. We would be happy to provide a section by section analysis of these if required/requested by the NCC.

Conclusions:

In an environment where there has never been a substantiated use/abuse of market power, the ideal competition controls are as light-handed as possible – offering a disincentive for the dominant player to change their approach, without imposing stringent controls or significant regulatory cost.

We believe the current SA regime meets the requisite legislative requirements, and therefore should be re-certified by the NCC. We note that the SA Government is the proponent of the application, and is therefore of the same opinion as ESCOSA and SAFC. Given this convergence of views from local stakeholders, we urge the NCC to recommend recertification of the regime for a further 10 years. We further note that the scheme will be reviewed in 2022, offering the opportunity for regulatory change to address any concerns that may have arisen over the past 4 years.

We further believe that Qube has not acted in a proper manner by raising its issues through the recertification process, rather than through the access processes in the regime and regular scheme reviews – processes it complains about, but has never sought to use or test.

Should you wish to discuss any element of this submission further, please feel free to contact me on (08) 8447 0664 or via email knapp.evan@safreightcouncil.com.au.

Yours Sincerely,



Evan Knapp
Executive Officer, SA Freight Council.