

National Competition Council

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Australia

GPO Box 250 Melbourne 3001 Australia

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Website: www.ncc.gov.au



24 August 2021

By email

CC:

Flinders Ports Pty Ltd
The Premier of South Australia
Viterra Operations Pty Ltd, and

Dear interested party,

Re: Notice 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 *Maritime Services (Access) Act 2000* (SA) (the **Access Regime**).

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

On 2 July 2021, the Council issued its Draft Recommendation regarding the Access Regime and invited written submissions on the Draft Recommendation from interested parties. Submissions closed on Friday 16 July 2021. In response to the Draft Recommendation, a submission was received from LINX Cargo Care Group Pty Limited (**LINX**) articulating concerns with the Access Regime and describing past instances in which it considers discriminatory conduct motivated by vertical integration, or investment decisions adversely impacting competition in a downstream market, has occurred. On 5 August 2021 the Council sent a request for information to LINX to further explore these issues and received a response from LINX on 19 August 2021.

The matters raised by LINX concern Flinders Ports Pty Ltd (**Flinders Ports**) and its related entity, Flinders Logistics Pty Ltd (**Flinders Logistics**), and may be relevant to the Council's decision whether to recommend that the Access Regime be re-certified.

The Council considers that Flinders Ports may be able to provide information that would assist in the Council's assessment of the matters raised by LINX. Accordingly, the Council has issued the attached notice under section 44NAA of the CCA to Flinders Ports. This notice requests that Flinders Ports give the Council certain information, being information the Council considers may be relevant to deciding what recommendation to make. The Council requests that Flinders Ports provides the information requested by **5pm EST Tuesday 7 September 2021**.

In accordance with section 44NAA(2) of the CCA, a copy of this letter and the enclosed notice will be provided to the applicant, service providers and published on the Council website at www.ncc.gov.au.

The Council is seeking information from Flinders Ports on a narrow set of issues and is not inviting further submissions on matters arising from the alleged facts or more broadly relating to the application or submissions provided to date. The period for submissions on the application and the Council's Draft Recommendation have ended.

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

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

The National Competition Council (**Council**) requests that Flinders Ports Pty Ltd (**Flinders Ports**) give to the Council information in response to the questions below by **5pm EST Tuesday 7 September 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 (**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.

However, 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.

Information requested

LINX Cargo Care Group Pty Limited (**LINX**) provided a submission to the Council on 16 July 2021 (**LINX's Submission**) which states at paragraph 9:

Since Flinders Logistics and Flinders Warehousing and Distribution have commenced operations, LINX has lost contracts to Flinders Logistics in circumstances where, to the best of LINX's information, Flinders Logistics either:

(a) has been able to provide a solution not available to be offered by LINX because of arrangements as between Flinders Logistics and Flinders Ports including preferential berthing arrangements, preferred equipment; or

(b) has been able to offer a price to the end customer that is not viable for LINX, not because of any inefficiency on the part of LINX but because of the structure or charging mechanisms adopted by Flinders Ports including the installation of equipment particularly suited to the operations of Flinders related operations and imposing non-cost reflective charges on parties who use different equipment.

The Council sought information from LINX in relation to these claims on 5 August 2021 and received a response from LINX on 19 August 2021 (**LINX's Response**).

LINX's Responses states:

LINX considers that one of the reasons it lost [Bemax/Cristal Mining as potential customers] was that it was not able to continue to be price competitive due to additional port costs that were levied on LINX which may not have been levied on Flinders Logistics who won the work. For example, LINX was required to pay a belt fee of \$1.10 per tonne for using its own ship loader and charged storage for products to be held in bunkers. LINX has no visibility on whether Flinders Logistics were charged these additional costs by Flinders Ports. However, we understand from discussions with Flinders Ports that Flinders Logistics are not charged an additional fee for loading using their rotainer crane.

And

Up until 2020, LINX also held a specific licence for Berth 29 (known as the Berth 29 Working Port Apron Licence Agreement) which had a volume-based licence fee of \$1.10 per tonne for all product stevedored using LINX's own ship loader at Berth 29. LINX is currently not utilising its shiploader asset at Berth 29 as it has not been able to win work to load product using its ship loader as presumably the cost to customers to perform this work is too high with the \$1.10 belt fee.

...

Flinders Logistics performs the same stevedoring work at Berth 29 utilising rotainer cranes and it is not understood by LINX whether Flinders Logistics is similarly charged a per tonnage rate for utilising its own equipment as LINX has been. However, we understand from discussions with Flinders Ports that Flinders Logistics are not charged an additional fee for loading using their rotainer crane however have not basis to confirm this.

Please provide the following information:

- (a) Please confirm whether the 2015 Bemax/Cristal Mining contracts referred to by LINX were indeed won by Flinders Logistics Pty Ltd (**Flinders Logistics**).
- (b) Does Flinders Ports charge Flinders Logistics a per tonnage fee for utilising its own equipment, such as its rotainer crane, and if it does, at what rate?
- (c) Does Flinders Ports charge Flinders Logistics storage fees, and if it does, at what rate?

LINX's Response states:

Flinders Port provides priority berthing at Berth 29 to those operators with specialised equipment located at that berth for commodities requiring that specialised equipment for loading. LINX understood this priority berthing protocol to mean that both Flinders Logistics and LINX were provided priority berthing against other operators where the loading of the commodities required the use of that specialised equipment (i.e. if loading of grain required the use of the LINX's ship loader at Berth 29 and another vessel was calling which had break bulk that could be loaded at a different berth, LINX would be given priority access to Berth 29). In circumstances where both LINX and Flinders had a vessel calling at the same or similar time, LINX understood the priority berthing protocol to mean that the vessel due to arrive first would be allowed to be unloaded first.

However, when LINX commenced grain loading operation at Berth 29 using its ship loader, LINX were required by Flinders Port to agree that if a Flinders Logistics worked vessel arrived within three days of a LINX worked vessel, that the LINX worked vessel would have to wait at anchorage to ensure it was not occupying the berth so as to allow immediate access for the Flinders Logistics vessel to load. Additionally, on one occasion in 2016, LINX were working a grain vessel and Flinders Port required LINX to cease loading and vacate the berth to allow for Flinders Logistics worked vessel to load. Only after the Flinders Logistics worked vessel was loaded and had sailed was the LINX worked vessel able to come back to berth and re-commence loading.

Please provide the following information:

- (d) What circumstances led Flinders Ports to ask LINX to vacate the vessel it was working to accommodate a vessel to be worked by Flinders Logistics in 2016?
- (e) How are berthing arrangements at proclaimed ports determined?
- (f) If the berthing arrangements may require a landed ship to be immediately vacated to allow immediate access for an incoming vessel to be worked by Flinders Logistics, please explain on what basis this can occur? And, are there equivalent provisions that would require a landed vessel being worked by Flinders Logistics to cease loading/unloading and vacate to allow a vessel to be worked by a competing business to immediately load/unload?

LINX's Response states:

LINX's concern regarding preferential equipment being provided by Flinders Port to its vertically integrated related entities is around the ability to bundle and to utilise port assets at a discount or on preferential terms (i.e. access and availability). LINX does not have any insight into what bundled services Flinders Port and Flinders Logistics can offer when a customer utilises Flinders Logistics. LINX has no visibility on the price charged by Flinders Port to Flinders Logistics for access to port owned equipment, rail lines or storage services. Due to vertical integration and in the absence of non-discriminatory provisions in the current access regime, Flinders Port would be incentivised to offer Flinders Logistics better terms to access port equipment and services resulting in the ability for Flinders Logistics to offer a much more competitive offer than its competitors could by virtue of its vertical integration with the port.

Please provide the following information:

- (g) Does Flinders Ports bundle its services with services offered by Flinders Logistics or Flinders Warehousing & Distribution Pty Ltd? And, if it does, please identify which of the bundled services (if any) are 'regulated services' as defined by the *Maritime Services (Access) Act 2000 (SA)*?
- (h) If the answer to question (g) is yes, is a discount offered for these bundles, compared to buying the services separately, and are businesses in downstream markets that are not a part of the Flinders group able to provide their own services in a bundle with services offered by Flinders Ports with equivalent discount arrangements?

Dated: 24 August 2021