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Dr Kerry Schott AO  
Chair and non-executive director  
Moorebank Intermodal Company  
Suite 2, Level 9, 1 O'Connell Street  
SYDNEY, NSW 2000

Dear Dr Schott, *Kerry*

**Moorebank Intermodal Company industry consultation - Submissions to draft  
Moorebank IMEX Terminal Access Protocol**

The Australian Competition and Consumer Commission (ACCC) welcomes this opportunity to make a submission in response to the draft *Moorebank IMEX Terminal Access Protocol (Draft Access Protocol)* for the Moorebank Logistics Park Import-Export (IMEX) Terminal (Moorebank IMEX Terminal).

The attached document sets out the views of the ACCC regarding the importance of the Moorebank Intermodal Terminal (MIT) and Draft Access Protocol. In the context of the Sydney Intermodal Terminal Alliance (SIMTA) operating MIT under a 99-year lease, the ACCC continues to maintain that a contractual approach to open access is flawed and will simply not achieve the objective of open access. This is deeply troubling given the key role that MIT is expected to play. Indeed, many of the objectives behind MIT's construction will not be achieved unless there is open access.

Furthermore, the ACCC raises the following specific concerns with the proposed access protocol:

- the open and non-discriminatory obligations only apply to a limited set of services provided by SIMTA
- there is limited transparency and clarity on pricing arrangements, including how they will be set, reviewed, and escalated, as well as processes around the introduction of new fees and fee structures
- the dispute resolution mechanism is limited to only covering non-price terms for a narrow set of services, and does not appear to provide for binding resolution of disputes (for example, arbitration)
- there is no robust and independent auditing process to ensure compliance with the access protocols
- the review mechanism is limited and ineffective.

This submission will be made public on the ACCC's website.

If you would like to discuss this letter, please contact Kristopher Morey, Acting Director, Regulated Access & Pricing on (03) 9290 1948 or [kristopher.morey@acc.gov.au](mailto:kristopher.morey@acc.gov.au).

Yours sincerely

Rod Sims  
Chair

## **The *Competition Principles Agreement* and the ACCC's role in infrastructure regulation under the *Competition and Consumer Act 2010* (Cth)**

The ACCC is an independent Australian Government statutory authority whose role is to enforce the *Competition and Consumer Act 2010* (CCA) and a range of additional legislation. The ACCC's objectives are to:

- maintain and promote competition
- protect the interest and safety of consumers and support fair trading in markets affecting consumers and small business
- promote the economically efficient operation of, use of, and investment in infrastructure; and identify market failure.

The ACCC has an important role in relation to significant infrastructure facilities under Part IIIA of the CCA, which sets out the 'National Access Regime'. The National Access Regime is designed to facilitate third party open access to services delivered by facilities of national significance. These facilities may become subject to economic regulation by the ACCC if certain statutory criteria are met.<sup>1</sup>

The objects of the National Access Regime are to:<sup>2</sup>

- 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
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

The National Access Regime was enacted in response to recommendations made by the Hilmer Committee in its report published in August 1993,<sup>3</sup> and clause 6(1) of the *Competition Principles Agreement* (CPA) agreed to by the Council of Australian Governments (COAG) at its meeting on 25 February 1994. Importantly, clause 6 of the CPA, and the subsequent *Competition and Infrastructure Reform Agreement* (CIRA) agreed to by COAG at its meeting on 10 February 2006, sets out the principles underpinning the national approach to the economic regulation of significant infrastructure that COAG has committed to.

### **National importance of Moorebank Intermodal Terminal**

MIT will be a nationally significant infrastructure facility, which will have an essential role in facilitating Australia's trade with the rest of the world. This is noted by SIMTA, which states that MIT:<sup>4</sup>

*...is a vital piece of infrastructure for NSW [New South Wales] that will transform the way containerised freight moves through Port Botany and delivery a faster, simpler, and more cost-effective service.*

MIT will be Australia's largest intermodal logistic precinct with an expected capacity of up to 1.05 million twenty foot equivalent units a year for IMEX and another 500 000 a year for interstate freight.<sup>5</sup> MIT will be significantly bigger in capacity and scale than any of the existing intermodal terminals in Sydney, and so will be a key facility as volumes grow. The

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<sup>1</sup> *Competition and Consumer Act 2010* (Cth), s 44CA.

<sup>2</sup> *Competition and Consumer Act 2010* (Cth), s 44AA.

<sup>3</sup> Fred Hilmer (Chair), Mark Rayner and Geoff Taperell, *National Competition Policy – Report by the Independent Committee of Inquiry*, 25 August 1993, Australian Government Publishing Service, Canberra.

<sup>4</sup> <https://simta.com.au/>, accessed 12 July 2019.

<sup>5</sup> <http://www.micl.com.au/the-project1>, accessed 12 July 2019.

ACCC notes that Qube Holdings already controls a significant portion of intermodal terminal capacity in Sydney, although the other major terminals are of a lesser capacity to MIT.

Strategically located in southwest Sydney, MIT will have direct access to major road corridors and the Southern Sydney Freight Line. This will enable cost efficient rail shuttle services between Port Botany and nearby industrial and commercial sites. It will also have access to the interstate rail network, enabling the transport of freight between Sydney and regional NSW and other state capitals. MIT will have significant economies of scope and scale (through co-located freight operations and warehousing and automation plans) that will be difficult to replicate by competing intermodal terminals. As such, MIT will also play an important role in facilitating trade moving through Port Botany and interstate.

Over the coming decades, there will be increasing demand for intermodal facilities in Sydney from increased container movements at Port Botany. As SIMTA notes:<sup>6</sup>

*The NSW Long Term Transport Masterplan shows that the volume of freight moved onto the NSW transport network is expected to almost treble in the coming decades. Network capacity and performance must develop ahead of this demand. The existing intermodal terminals which service Port Botany do not have sufficient capacity to meet the forecast freight task.*

Further to this, a key objective of the NSW Government's Freight and Ports Plan 2018–23 is increasing the share of freight transported by rail.<sup>7</sup> This would be assisted with the completion of duplication the remaining 2.9 kilometres of the Port Botany rail line currently underway, which aims to increase the rail share of freight to Port Botany from 20 to 40 per cent.<sup>8</sup>

Given the prominence and likely growth of MIT, the ACCC is primarily concerned with the potential misuse of market power by SIMTA (or future operators of MIT) over the long term. In particular, the ACCC notes the agreement between the Moorebank Intermodal Company (MIC) and SIMTA states that SIMTA has the right to operate MIT for 99 years.<sup>9</sup> As the ACCC understands, the term of the proposed contractual open access regime would replicate the agreement between MIC and SIMTA. As such, consideration needs to be given to the impacts over both the short and the long term.

For example, the ACCC notes that Qube Holdings (which wholly owns SIMTA) has significant interests in road transport services, above-rail haulage services, other intermodal terminals in Sydney, empty container parks and a stevedoring terminal at Port Botany. In the future, if there are significant capacity constraints at other intermodal facilities in Sydney and an absence of appropriate access regulation, SIMTA could have both the ability and incentive to misuse its market power over the 99-year term of its lease. This could involve charging higher prices or deprioritising schedules of access seekers not purchasing a bundle of Qube Holdings' services. This would be to the detriment of current and future access seekers, not promote the efficient use of the infrastructure facility, and negatively affect Australian consumers and producers.

In such a circumstance, an appropriate and robust access regime is essential to promote effective competition in upstream and downstream markets. This would promote an

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<sup>6</sup> <https://simta.com.au/the-project/>, accessed 12 July 2019.

<sup>7</sup> NSW Government, *NSW Freight and Ports Plan 2018-2023*, September 2018, <https://www.transport.nsw.gov.au/projects/strategy/nsw-freight-and-ports-plan>, p. 51.

<sup>8</sup> <https://minister.infrastructure.gov.au/mccormack/interview/press-conference-prime-minister-deputy-prime-minister-and-minister-urban-infrastructure-and-cities>, accessed 12 July 2019.

<sup>9</sup> ANAO, *Delivery of the Moorebank Intermodal Terminal*, 19 December 2019, <https://www.anao.gov.au/work/performance-audit/delivery-moorebank-intermodal-terminal>, p. 18.

environment for upstream and downstream markets where efficient investment and expenditure can be undertaken, ultimately positively affecting the efficiency and productivity of the Australian economy.

### **Contractual approach to open access for the Moorebank IMEX Terminal is flawed**

The ACCC believes the contractual approach adopted by MIC and SIMTA to facilitate open and non-discriminatory access at the Moorebank IMEX Terminal simply will not be effective, and is flawed. The ACCC is of this view for four main reasons.

First, a contractual approach will not involve a robust assessment of a proposed open access regime against a clear and objective set of criteria by an independent party. Ensuring that the assessment process is robust is critical for providing sufficient clarity and certainty for potential access seekers.

Second, a contractual approach will not provide an effective means of monitoring the infrastructure facility operator's compliance with its open access obligations, or provide an experienced and well-resourced independent party with the ability to actively enforce those obligations in the event of a breach. Any proposed open access regime, regardless of how strict the obligations imposed on the infrastructure facility operator are, will be rendered ineffectual if there are inadequate and unworkable monitoring and compliance mechanisms in place. Active monitoring and enforcement of an open access regime is critical because a vertically integrated infrastructure facility operator has strong profit maximising incentives to engage in discriminatory and anti-competitive behaviour against its rivals. Furthermore, the ACCC cannot see how effective and accessible private enforcement of open and non-discriminatory obligations under any contractual arrangement between the infrastructure facility operator and access seeker will occur.

Third, a contractual approach is unlikely to provide for a transparent and public review process such that it continues to be fit-for-purpose over the long term. A review mechanism in any proposed open access regime needs to set out that an infrastructure facility operator is required to periodically undertake a transparent and public consultation process involving an independent party. Adopting a contractual approach raises the risks of a review being limited in scope and conducted in a closed and private manner, thereby being ineffective in serving the long-term interests of access seekers by appropriately responding to changes in industry circumstances.

Fourth, any consultation process undertaken in developing and reviewing an open access regime, subject to reasonable privacy and confidentiality considerations, should involve stakeholder submissions being made publicly available, together with a public response by the operator of the infrastructure facility to those submissions. The infrastructure facility operator must demonstrate how it has had regard to stakeholder submissions, and give sufficient comfort to existing and potential access seekers that robust processes and mechanism are in place to take into account stakeholder submissions.

The National Access Regime provides an approach that addresses these issues with the contractual approach. One of the ways the National Access Regime facilitates third party open access is through the access undertaking provisions. Under these provisions, an infrastructure operator would submit to the ACCC a voluntary access undertaking that sets out their proposed terms and conditions of access.<sup>10</sup> The ACCC may accept a voluntary access undertaking if it considers it appropriate to do so having regard to matters such as

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<sup>10</sup> *Competition and Consumer Act 2010* (Cth), s 44ZZA(1).

the objects of Part IIIA, legitimate business interests of the service provider, the public interest, and interests of persons who might want to access the service.<sup>11</sup>

The ACCC's experience has been that voluntary access undertakings submitted under Part IIIA can be an effective approach to facilitate open and non-discriminatory access, unlike the contractual approach adopted by MIC and SIMTA. This is because access undertakings under Part IIIA are robustly assessed in a public process for by an independent regulator with a clear set of criteria for assessment, providing greater assurance that open and non-discriminatory access at the infrastructure facility will be achieved. The ACCC notes this process is separate from the declaration and arbitration process set out in Part IIIA of the CCA.<sup>12</sup>

Importantly, the access undertaking provisions under Part IIIA also provides the ACCC a significant degree of flexibility to take into account the particular characteristics of an industry. For example, a voluntary access undertaking does not necessarily need to incorporate ex-ante price regulation. The ACCC approved such a flexible approach in wheat export undertakings that operated under Part IIIA prior to the commencement of the *Port Terminal Access (Bulk Wheat) Code of Conduct* on 30 September 2014.<sup>13</sup> In particular, the wheat export undertakings contained obligations prohibiting discriminatory conduct and did not require ex-ante price regulation. This flexible approach significantly reduced the upfront regulatory impost involved in setting regulated access charges, such as valuation of assets, determining an appropriate rate of return, developing forecasts for demand, capital and operating expenditure, and constructing a financial model that implements an appropriate access pricing methodology.

Given the flexibility in relation to voluntary access undertakings under Part IIIA, it allows the ACCC to design a fit-for-purpose open access framework through a robust and public consultation process. For facilities like the Moorebank IMEX Terminal, it is imperative that any proposed open access arrangement considers the long-term interests of all terminal users. This is particularly important in the context of a 99-year lease for SIMTA, which is a wholly owned subsidiary of the vertically integrated Qube Holdings, to operate the terminal. An appropriate regime needs stringent monitoring and enforcement by a well-resourced and experienced regulator, and a process for periodic review and revision.

The ACCC's preferred approach to ensuring effective open access at the Moorebank IMEX Terminal is for the Terminal Operator to submit a voluntary access undertaking under Part IIIA rather than the flawed contractual approach that has been adopted. The ACCC's concerns and the flaws of the approach are borne out in a number of specific issues that the ACCC has identified with the Draft Access Protocol.

### **Specific concerns with the draft Moorebank IMEX Terminal Access Protocol**

Further to the ACCC's general views set out above in relation to a contractual approach to ensuring open access at the Moorebank IMEX Terminal, the ACCC has identified a number of issues with the Draft Access Protocol that further undermines its effectiveness.

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<sup>11</sup> *Competition and Consumer Act 2010* (Cth), s 44ZZA(3).

<sup>12</sup> *Competition and Consumer Act 2010* (Cth), s 44CA.

<sup>13</sup> For example, see the Co-operative Bulk Handling's 24 September 2009 wheat export undertaking accepted by the ACCC: <https://www.accc.gov.au/public-registers/access-to-services-registers/s-44zzc1-access-undertaking-co-operative-bulk-handling-limited>.

## **Narrow scope of the open and non-discrimination obligations**

The open and non-discrimination obligations under clause 2.2 of the Draft Access Protocol only apply to Reference and Ancillary Services, which are themselves defined under clause 5. Reference Services are limited to the rail terminal access service, rail terminal loading and unloading service, and truck terminal access. Ancillary Services are then defined as those that are 'not Reference Services', which does not provide sufficient clarity to access seekers. Services explicitly excluded are the internal transfer vehicle service, port shuttle services and refuelling service.

There is no explanation or supporting justification on why the open access obligations only apply to Reference and Ancillary Services. The ACCC is of the view that the Terminal Operator should detail and justify how the omitted services are not monopoly services, and thus should be excluded from open access obligations under the Draft Access Protocol.

For any access protocol to be effective, it is necessary that all relevant services be subject to open and non-discriminatory obligations. Otherwise, there will be nothing to prevent the Terminal Operator from engaging in self-preferential treatment for a number of services when providing access to its own related businesses.

## **Insufficient transparency and clarity on pricing arrangements**

Clause 7 on 'Pricing' provides limited transparency and clarity on pricing arrangements at the Moorebank IMEX Terminal. The ACCC considers the Draft Access Protocol should provide more transparency and clarity on how prices are set, reviewed, and escalated by the Terminal Operator, as well as processes around the introduction of new fees and fee structures.

Pricing transparency and certainty is necessary to facilitate efficient use of and investment in the Moorebank IMEX Terminal, and competition in related markets. For example, when the Port of Melbourne was privatised in 2016, price increases were fixed at the Consumer Price Index for many fees and prices for port users for the first 15 years of the 50-year lease.<sup>14</sup> This outcome secured a degree of future pricing certainty for users of the Port of Melbourne.

## **Limited and unclear dispute resolution mechanism**

The dispute resolution process under clause 15 does not apply to disputes in relation to prices, including prices set for Reference Services. The Terminal Operator is only obligated to provide Reference Services at published prices as per clause 15.1. This is a notable omission in the Draft Access Protocol.

Pricing dispute resolution processes have been incorporated into Part IIIA access undertakings such as the wheat undertakings discussed above, as well as a number of enforceable undertakings given to the ACCC under section 87B of the CCA in the context of merger matters. For example, the section 87B undertakings given by Melbourne International RoRo & Automotive Terminal (**MIRRAT**) in 2014 and Australian Amalgamated Terminals (**AAT**) in 2015 both provide for the resolution of pricing disputes in relation to 'Reference Tariffs'.<sup>15</sup> However, the ACCC generally considers that merger remedies such as

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<sup>14</sup> <https://www.accc.gov.au/media-release/accc-will-not-oppose-proposals-for-port-of-melbourne-lease>, accessed 12 July 2019.

<sup>15</sup> For MIRRAT, see: <https://www.accc.gov.au/system/files/public-registers/undertaking/1161199-1-Undertaking.pdf>. For AAT, see <https://www.accc.gov.au/system/files/public-registers/documents/D15%2B52633.pdf>.

section 87B undertakings are not a substitute to effective access regulation, and does not adequately address underlying monopoly pricing concerns.<sup>16</sup>

Critically, there are no clear provisions in the draft *Moorebank IMEX Terminal Access Protocol* that make Independent Expert determinations binding and court enforceable (like arbitral determinations made by arbitrators are). Instead, clause 15.5(c) states that the Terminal Operator:

*...must take all necessary steps within its power to ensure that the Independent Expert's decision is fulfilled or otherwise given effect to, including by enforcing the Operator's contractual rights against third parties.*

Irrespective of what form an access arrangement takes, the ACCC is of the view that a robust dispute resolution process is critical. This is because it provides incentives for infrastructure operators to offer reasonable terms and conditions of access in order to avoid the process of dispute resolution (such as arbitration). It therefore improves the balance for negotiation between infrastructure operators and users.

### **No robust and independent auditing to ensure compliance**

There is no robust and independent auditing process to ensure the Terminal Operator's compliance with the Draft Access Protocol. In particular, clause 16 sets out high level reporting obligations on the Terminal Operator, which are unrelated to ensuring compliance.

The ACCC considers the absence of a compliance process by an independent auditor in the Draft Access Protocol is inappropriate. Ultimately, its exclusion does not ensure that the Terminal Operator complies with its own obligations of open and non-discriminatory access for third party access seekers to the Moorebank IMEX Terminal. Ensuring open and non-discriminatory access requires a robust and independent compliance process for monitoring and enforcement of the Terminal Operator's obligations. For example, the appointment of an independent auditor for compliance and monitoring purposes is a key requirement for any infrastructure and access-related enforceable undertaking that is accepted by the ACCC under section 87B of the CCA in the context of mergers assessments.<sup>17</sup>

### **Proposed review mechanism is limited and unlikely to be effective**

Clause 4.2(a) sets out that the Terminal Operator will undertake a review no more than two years after the commencement of operations at the Moorebank IMEX Terminal and at least once every five years thereafter. Clause 4.2(b) states that the Terminal Operator will consult with access seekers, potential access seekers, and MIC. Clause 4.2(c) then provides that any amendments will remain subject to SIMTA '*complying with any amendment process required by its commercial arrangements with MIC*'.

The ACCC considers that this review mechanism is limited and is unlikely to be effective in serving the long-term interests of access seekers by continuing to provide a fit for purpose open access framework that responds to changes in industry circumstances. The ACCC believes the review mechanism needs to set out that the Terminal Operator is required to undertake a public and transparent consultation process. For example, any amendments being subject to '*commercial arrangements with MIC*' as per clause 4.2(c) demonstrates a lack of transparency. In addition, the Terminal Operator should publish all submissions received, including its response to each submission. Finally, there should be a variation

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<sup>16</sup> <https://www.accc.gov.au/media-release/accc-will-not-oppose-aat%E2%80%99s-proposed-acquisition-of-the-lease-to-operate-the-automotive-terminal-at-port-of-fremantle>, accessed 12 July 2019.

<sup>17</sup> For example, see clause 9 of the 2015 undertaking given by Australian Amalgamated Terminals Pty Ltd to the ACCC: <https://www.accc.gov.au/system/files/public-registers/documents/D15%2B52633.pdf>.

clause that ensures the Draft Access Protocol can be amended to ensure the access seekers' long-term interests are served, as well as for the efficient operation, use of and investment in the Moorebank IMEX Terminal by the Terminal Operator. An independent third party should preferably undertake or oversee this process.