Australian Competition & Consumer Commission

**18 June 2008**

# Statement of Issues — Flinders Ports Pty Ltd - proposed joint venture of DP World (SA) Pty Ltd

1. Outlined below is the Statement of Issues released by the Australian Competition and Consumer Commission **(ACCC)** in relation to the proposed joint venture between Flinders Ports Pty Ltd and of DP World (SA) Pty Ltd **(proposed joint venture)**.

2. A Statement of Issues published by the ACCC is not a final decision about a proposed acquisition or joint venture, but provides the ACCC's preliminary views, drawing attention to particular issues of varying degrees of competition concern, as well as identifying the lines of further inquiry that the ACCC wishes to undertake.

3. In line with the ACCC's *Merger Review Process Guidelines* (available on the ACCC's website at www.accc.gov.au) the ACCC has established a secondary timeline for further consideration of the issues. The ACCC anticipates completing further market inquiries by **2 July 2008** and anticipates making a final decision on **16 July 2008**. However, the anticipated timeline can change in line with the *Merger Review Process Guidelines*. To keep abreast of possible changes in relation to timing and to find relevant documents, market participants should visit the Informal Mergers Clearances Register on the ACCC's website at www.accc.gov.au via the link titled *Flinders Ports Pty Ltd – proposed joint venture with DP World (SA) Pty Ltd.*

4. A Statement of Issues provides an opportunity for all interested parties (including customers, competitors, shareholders and other stakeholders) to ascertain and consider the primary issues identified by the ACCC. It is also intended to provide the merger parties and other interested parties with the basis for making further submissions should they consider it necessary.

## Background

5. On 24 April 2008 the ACCC commenced its review under the Merger Review Process Guidelines.

# The parties

### Flinders Ports Pty Ltd

6. Flinders Ports Pty Ltd (**Flinders Ports**) is the port manager of Port of Adelaide (**Port Adelaide**) and six other regional ports in South Australia under a 99 year lease and licence acquired in 2001. Flinders Ports is responsible for the development, management and operation of those ports.

7. It is the ACCC's understanding that Flinders Ports currently controls much of the available land that surrounds the container terminal located at Outer Harbor in the Port of Adelaide (**Container Terminal**).

8. On 17 June 2008, Flinders Ports obtained leasehold rights and estates in fee simple from the South Australian Government for further land located at Outer Harbor, Inner Harbour, and Osborne. Attachment 1 of this Statement of Issues provides a map showing Flinders Ports' land holdings.

### DP World (SA) Pty Ltd

9. DP World (SA) Pty Ltd (**DPWSA**) is a subsidiary of DP World. In Australia, DP World is the owner, operator and manager of container terminals in Brisbane, Sydney, Melbourne, Adelaide and Fremantle together with automotive and general stevedoring and landside logistics operations in each state.

10. DP World owns 50% of P&O Trans Australia (**POTA**), which operates a landside port service logistics business, servicing import and export marine container services in Brisbane, Sydney, Melbourne, Perth and Adelaide. POTA's activities include port containerised transport, empty and full container parks, container freight stations, landbridge rail services, rail terminals and incidental warehousing and local distribution.

11. DP World Adelaide Pty Ltd (**DPWA**) is a subsidiary of DPWSA and is the incumbent stevedoring operator of the Container Terminal.

# The transaction

12. Flinders Ports proposes to enter into a joint venture with DPWSA for the operation of the stevedoring facility at the Container Terminal.

13. The proposed joint venture would enable Flinders Ports and DPWSA to become shareholders in a new entity that would be granted a long term right to conduct container stevedoring at the Container Terminal.

14. The parties to the joint venture state that this transaction would enable Flinders Ports and DPWSA to jointly undertake significant investment into the Container Terminal.

## Areas of overlap and market definition

15. In 2001, Flinders Ports acquired landside port infrastructure and a 99 year lease and licence to operate Port Adelaide and six regional ports in South Australia: Port Lincoln, Port Pirie, Port Giles, Klein Point, Thevenard and Wallaroo.

16. Flinders Ports is responsible for the development, management and operation of the ports. Flinders Ports currently outsources some of these roles, including the container stevedoring operation at Outer Harbor.

17. DPWA holds an operating agreement to operate the Container Terminal at Port Adelaide and hence provide stevedoring and related services. This agreement is due to expire in 2009 although DPWA can exercise an option to extend the agreement to 2014.

18. The proposed joint venture involves the establishment of a company (**joint venture company**) that will ultimately obtain a licence to operate the Container Terminal.[1] Under the proposed joint venture, Flinders Ports and DPWSA will each acquire a share of the joint venture company.

19. Through its share in the joint venture company, Flinders Ports would in effect be vertically integrating into container stevedoring, and together with DPWSA, would potentially be competing with parties to lease land that is suitable for container stevedoring and other port-related activities at Port Adelaide, assuming there is scope for a second stevedore in the future.

20. The ACCC considers that the relevant markets are likely to be:

    - the supply of container stevedoring services at Port Adelaide; and
    - the supply of landside logistics at Port Adelaide.

## Market inquiries

21. On 28 April 2008 the ACCC commenced market inquiries regarding the proposed acquisition. A range of interested parties provided responses, including other suppliers of stevedoring services, shipping companies and associations, freight forwarders and transport carriers.

## Industry background

22. The supply of container stevedoring services largely involves lifting container boxes onto and off ships; however, stevedores are increasingly moving into ancillary services including storage, maintenance, the repositioning of containers and intermodal facilities.

23. In Australia, stevedores typically lease berth space from the relevant port authority under exclusive and long term arrangements. The stevedores will then

[1] The Adelaide Container Terminal is understood to comprise Outer Harbor Berths 6 and 7 at Port Adelaide.

undertake necessary investments for container-handling equipment such as container cranes, straddle carriers and hardstand space.

24. In 2006–07, the Container Terminal achieved a volume throughput of around 219,000 TEUs and Australian ports had a total throughput of about 5.5 million TEUs.[2]

25. The ACCC understands that shipping lines will generally enter into arrangements with a stevedore for the stevedoring of the shipping vessel, and shippers and freight forwarders will enter into arrangements with shipping lines for the import and/or export of containers.

26. Freight is generally loaded or unloaded at a port terminal by transport carriers who will arrange with the stevedore times during which it can enter into the terminal.

27. The role of the stevedoring operator appears to be evolving in the transport logistics chain as stevedores are expanding their operations into related services. There seem to be two main areas where change is happening:

- services which facilitate the interface with stevedoring and land transport; and
- services bringing about a more effective coordination of stevedoring with road and rail transport.

## Statement of issues

28. For the purposes of this Statement of Issues, the issues in this matter are regarded as ‘issues that may raise concerns’.

### Issues that may raise concerns

***Potential for the joint venture to increase barriers to entry for a third party stevedore at Port Adelaide***

29. The proposed joint venture may increase barriers to entry for container stevedoring at Port Adelaide, as Flinders Ports would have dual roles as port manager, and joint owner and operator of the incumbent stevedore at the Container Terminal.

30. Flinders Ports would therefore be the lessor of and co-owner of a company that would be granted a long term licence for stevedoring at the Container Terminal. In this scenario, Flinders Ports may face commercial incentives which may have the result of substantially lessening competition for the supply of container stevedoring.

31. The acquisition of permits such as land leases and licences for land at a port are necessary inputs for entry into container stevedoring. The ACCC is considering

[2] ACCC, *ACCC Container stevedoring—monitoring report no. 9*, October 2007, p 49

whether, instead of these inputs being made available to potential stevedores on a competitive, arms-length basis, the proposed joint venture might provide Flinders Ports with an incentive to ensure that the joint venture company obtains the relevant licences and leases to develop available space at Port Adelaide for the expansion of its own stevedoring or other port-related operations.

32. The proposed joint venture could increase barriers to entry for parties who seek to acquire land leases and stevedoring licences from Flinders Ports to establish a container terminal and stevedoring operations, potentially resulting in a substantial lessening of competition in the market for the supply of container stevedoring at Port Adelaide. In considering this issue, the ACCC will have regard to two key issues:

- whether there is scope for a second stevedore to viably enter this market; and
- constraints upon the joint venture entity from acting in a manner that provides the joint venture company with an unfair competitive advantage in acquiring relevant land leases and stevedoring licences.

*Likelihood of entry by a third party stevedore*

33. The ACCC understands that Port Adelaide handled approximately 225,000 TEU (Twenty-foot Equivalent Unit) of container traffic in 2007. Market inquiries have suggested that the minimum total volume of container traffic that would be required to justify the necessary capital investment in a second terminal on a greenfields site is approximately 550,000 TEU per annum.

34. In a report published in 2005, the Bureau of Transport and Regional Economics forecast total containerised trade volumes at Port Adelaide to increase by an average 5.3 per cent a year to 475,000 TEUs in 2024-25.[3] However, data published by the BTRE more recently indicates that total TEU at Port Adelaide for financial year 2006-07 was 219,000, representing growth rate of approximately 15% on the previous year.[4] This follows growth of 11% for the 2005-06 year.

35. These recent figures suggest that throughput at Port Adelaide will grow to levels beyond the forecast the BTRE made in 2004-05.

*Potential constraints upon the joint venture entity*

36. The ACCC recognises that Flinders Ports, as port manager, may have other objectives for the operation of the port that could mitigate any incentives that could lead to competition concerns, such as encouraging throughput through Port Adelaide by promoting competitive processes for stevedoring entry and operations. Various port charges levied by Flinders Ports are subject to price monitoring, which is administered by the Essential Services Commission of

[3] Bureau of Transport and Regional Economics, *Container and ship movements through Australian ports, 2004-05 to 2024-05, Working paper 65, p61*
[4] Bureau of Infrastructure Transport and Regional Economics, *Waterline 43*, January 2008, p43

South Australia (ESCOSA). Under the ESCOSA monitoring regime, Flinders Ports is able to set its own prices. Similarly, charges levied for stevedoring services at Port Adelaide are not regulated but are subject to monitoring by the ACCC.

37. In their separate roles as port manager and stevedore, Flinders Ports and DPWA can be described as monopolists over their respective roles at Port Adelaide, whilst being vertically related.

38. In this scenario, each monopolist is likely to set a price margin for its respective services having regard only to its own profit drivers, such as price/volume trade-offs.[5] Although these decisions are made independently, they can impact the vertically related party's profits. For example, the port charges levied by Flinders Ports may affect DPWA's costs and profits as a stevedore at the port. Meanwhile, the prices set by DPWA could impact upon the Port's throughput and Flinders Ports' revenue.

39. The ACCC considers that under the joint venture, decisions are likely to be made to enhance the commercial interests of the joint venture as a whole. This would contrast with the present situation where decisions are made by Flinders Ports and DPWA independently. Whilst the joint venture company may remain a monopolist with respect to port management and stevedoring, the joint venture could result in a monopoly price margin being levied upon port users only once, instead of twice. For example, where stevedoring prices were previously set having regard only to DPWA's profits, this margin may be removed so that future prices encourage greater port throughput.

40. Hence, it is possible that the joint venture may lead to lower prices overall than in the absence of the joint venture. However, the ACCC seeks further comment on this issue.

41. Other constraints may include:

- performance criteria managed by the Port Adelaide Container Terminal Monitoring Panel against which the container stevedore's performance is measured;
- competition for container stevedoring from other ports, such as other ports in South Australia, Melbourne, and Fremantle, or any other relevant ports;
- alternative land that could be developed for container stevedoring purposes; and
- other governance arrangements such as legislative or other obligations upon Flinders Ports concerning its use of the land.

[5] For Flinders Ports, its level of pricing freedom may be subject to a concern that price increases beyond a certain level or rate may trigger, in the medium term, a more prescriptive form of price regulation.

42. **The ACCC seeks further comment on:**

- the likelihood of viable entry by a second stevedore at Port Adelaide, having regard to the growth of container throughput, and the likely timing of potential entry;
- whether it is necessary for the second stevedore to lease land within Port Adelaide and proximate to Outer Harbor to be viable;
- the existence and availability of other land that could be developed for container stevedoring purposes;
- the existence of constraints such as legislative or other obligations upon Flinders Ports concerning its use of the land;
- Flinders Ports' incentives as port manager currently, and the role of regulation in constraining Flinders Ports' pricing;
- whether the joint venture is likely to change Flinders Ports' incentives and if so, how; and
- the existence and effectiveness of substitutes for container stevedoring from other ports.

***The proposed joint venture may increase barriers to acquisition of land and reduce competition in the market for landside logistics at Port Adelaide***

43. Concerns have been raised by market participants concerning the likely effect on competition for landside logistics that may result from the joint venture.

44. Two issues have arisen through the ACCC's market inquiries regarding how the proposed joint venture might affect competition for the supply of landside logistics from the container terminal:

    i. the joint venture company will provide DP World's landside logistics operator with access to land at or near the Container Terminal; and

    ii. the joint venture company will have incentives to treat DP World's landside logistics operator (POTA) on favourable terms.

45. A concern raised by market participants, particularly those that compete against POTA, is that the joint venture company will have incentives to provide access to POTA to terminal space at or near the Container Terminal, either on terms that are favourable, or through a process that is not competitive. Market participants have raised a concern that this situation would allow POTA to compete with other landside logistics operators on more favourable terms than others, resulting in a substantial lessening of competition in the market for landside logistics at Port Adelaide.

46. Market participants have also submitted that POTA already receives preferential landside treatment from DPWA, and that there are few if any avenues for recourse.

47. As noted earlier in this Statement of Issues, it is proposed that the joint venture company would be a new company established for the purpose of operating the container terminal, and that Flinders Ports would not hold a financial interest in POTA. Therefore, it is not clear that Flinders Ports would have an incentive to favour POTA in the allocation of land. However, DPWA does own 50% of POTA and may have the ability and incentives to assist its downstream subsidiary commercially through the joint venture.

48. With regard to landside logistics competition, the ACCC seeks comments from market participants on:

- the extent of land that is available and suitable for landside logistics purposes at Port Adelaide;
- whether landside logistics operators other than POTA are likely to contest the acquisition of any such land;
- the role of Flinders Ports in upholding legislative access arrangements or other safeguards for the efficient operation of landside logistics at the Port.

***The proposed joint venture may substantially lessen competition for the operation of the container terminal at Port Adelaide***

49. The ACCC is considering whether the proposed joint venture would remove any competitive constraint upon DPWA's price and service levels, arising from the possibility that it might be replaced via a competitive process for allocating the right to be the single stevedore at Port Adelaide.

50. The ACCC's investigation to date suggests that although Flinders Ports outsources the container stevedoring operation at Outer Harbor, it may have the option of carrying out this function itself. However, the ACCC wishes to explore the extent that Flinders Ports would be likely to do so, or could use a competitive process for allocating the stevedoring licence.

51. Therefore, the ACCC seeks further information on the following issues:

- the necessary capital investment that would need to be undertaken by an alternate stevedore, if it were to replace DPWA as the incumbent stevedore at Port Adelaide, and the timing of that investment;
- the risks and benefits associated with replacing the incumbent stevedore with another; and
- the likelihood that Flinders Ports, in the absence of the proposed joint venture, might vertically integrate to replace DPWA as stevedore.

## ACCC's future steps

52. The ACCC will finalise its view on this matter after it considers market responses invited by this Statement of Issues.

53. The ACCC now seeks submissions from market participants on each of the issues identified in this Statement of Issues and on any other issue that may be relevant to the ACCC's assessment of this matter.

54. Submissions are to be received by the ACCC no later than **2 July 2008**. The ACCC will consider the submissions received from the market and the merger parties in light of the issues identified above and will, in conjunction with information and submissions already provided by the parties, come to a final view as to the appropriate course of action to take to resolve any competition concerns that remain.

55. The ACCC intends to publicly announce its final view by **16 July 2008**. However the anticipated timeline may change in line with the *Merger Review Process Guidelines*. A public Competition Assessment for the purpose of explaining the ACCC’s final view may be published following the ACCC's public announcement.

**Attachment 1** **Flinders Ports existing and new land holdings at Port Adelaide**

**Key**:

- Arrows indicate leasehold rights and estates in fee simple acquired by Flinders Ports on 17 June 2008 at Inner Harbour, Outer Harbor and Osborne.
- Pale pink and blue coloured areas denote leases and estates in fee simple already held by Flinders Ports prior to 17 June 2008.