

# Section 87B Undertaking

Proposed Joint Venture for the  
operation of the Port Adelaide Container  
Terminal

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Flinders Ports Holdings Pty Ltd (**Flinders Ports**)

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# Details

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Date 5 September 2008

## Parties

Name **Flinders Ports Holdings Pty Ltd** ACN 117 687 313  
Short form name **Flinders Ports**  
Notice details 296 St Vincent Street, Port Adelaide, South Australia 5015

## Background

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- A In 2001 the South Australian Government granted to Flinders Ports a 99 year land lease and licence to manage and operate seven ports in South Australia. Flinders Ports is responsible for developing, managing and operating those ports.
- B Although Flinders Ports is not obliged to outsource the performance of any aspect of port operation, Flinders Ports has until 30 April 2014 outsourced the operation of the Present Container Terminal to DPWA. DPWA is part of the DP World group, which is a global owner, operator and manager of container terminals and port infrastructure.
- C The Present Container Terminal currently requires significant financial investment to ensure that it remains a viable option for container import/export and to ensure that container traffic volumes continue to grow in South Australia. International shipping trends require efficient and up to date port operations to ensure that shipping lines service a particular destination.
- D Under the Joint Venture between DP World and Flinders Ports, ACT, which is currently a wholly-owned subsidiary of Flinders Ports but into which DP World (SA) will acquire 60% of the shares, will acquire DPWA. The Joint Venture will then operate the Present Container Terminal, and this will secure from DP World and Flinders Ports the required significant investment in the terminal.
- E Currently, the volume of container traffic throughput (both import and export) at Port Adelaide is sufficient to support only one container stevedoring operation. However, anticipated growth rates for the volume of container traffic and other factors to support the development of a second terminal at Port Adelaide may arise prior to the expiry of the licence to be granted to the Joint Venture.
- F The Commission has conducted market inquiries and has considered information provided by the parties and other industry participants. The Commission's inquiries were aimed at assessing the effect of the Joint Venture in the market for the supply of container stevedoring services at Port Adelaide, South Australia.
- G The Commission has expressed concerns about the Joint Venture. In particular it is concerned that Flinders Ports, as a party to the Joint Venture, may have an incentive and ability to discriminate in favour of the Joint Venture and raise barriers to entry for a third party to operate a second container terminal in competition with the Joint Venture.
- H Flinders Ports does not agree that the Joint Venture will be likely to substantially lessen competition. However, in order to avoid delay and to address the Commission's competition concerns, Flinders Ports has offered, without admission, to provide this Undertaking.

- I The purpose and object of this Undertaking is to address the Commission's competition concerns by promoting transparency around the granting of any interests or rights for the operation of a second container terminal at the Outer Harbor in Port Adelaide, South Australia, or the expansion of the Present Container Terminal beyond the Expansion Land.

# Agreed terms

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## 1. Defined terms & interpretation

### 1.1 Defined terms

In this Undertaking:

**Act** means the *Trade Practices Act 1974* (Cth)

**ACT** means Adelaide Container Terminal Pty Ltd ACN 126 747 886 of 296 St Vincent Street, Adelaide SA 5015 and its Related Bodies Corporate.

**Commission** means the Australian Competition and Consumer Commission.

**DPWA** means DP World Adelaide Pty Ltd ACN 004 898 828 of 6 Berth Coghlan Road, Outer Harbor SA 5018 and its Related Bodies Corporate.

**DP World** means each of DPWA, DP World (SA) and Linerbulk and its Related Bodies Corporate.

**DP World (SA)** means DP World (SA) Pty Ltd ACN 103 736 105 of 6 Berth Coghlan Road, Outer Harbor SA 5018 and its Related Bodies Corporate.

**Expansion Land** means the land presently intended to be used for expansion of the Present Container Terminal, being the area marked 'C' in the land depicted in Schedule 1 to this Undertaking.

**Flinders Ports** means each of FPH, FPPL and FPACT and its Related Bodies Corporate.

**FPH** means Flinders Ports Holdings Pty Ltd ACN 117 687 313 of 296 St Vincent Street, Adelaide SA 5015 and its Related Bodies Corporate.

**FPPL** means Flinders Ports Pty Limited ACN 097 377 172 of 296 St Vincent Street, Adelaide SA 5015 and its Related Bodies Corporate.

**FPACT** means Flinders Ports Adelaide Container Terminal Pty Ltd ACN 125 367 955 of 296 St Vincent Street, Adelaide SA 5015 and its Related Bodies Corporate.

**Joint Venture** means the joint venture between Flinders Ports and DP World for the operation of the Present Container Terminal and its Related Bodies Corporate.

**Linerbulk** means Linerbulk Shipping Pty Ltd ACN 005 842 053, 6 Berth Coghlan Road, Outer Harbour SA 5018 and its Related Bodies Corporate.

**Present Container Terminal** means the Outer Harbor Container Terminal located at Port Adelaide, South Australia, which is currently operated by DPWA and which is proposed to be operated by the Joint Venture until 30 April 2039.

**Process Guidelines** means the ACCC's *Merger review process guidelines* (July 2006), however described and as amended, supplemented or replaced from time to time.

**Related Bodies Corporate** has the meaning given to it by section 4A of the Act.

**Relevant Land** means all land owned or controlled by way of lease or licence by Flinders Ports at Outer Harbor, commencing from the Port River waterfront and extending up to a distance of 200 metres inland, but including the land depicted in the areas marked 'A', 'B', 'C', 'D', 'E' and 'F' of Schedule 1 to this Undertaking, where:

(a) 'A' is the whole of the land comprised in certificate of title reference 5980/66;

- (b) 'B', 'C', 'D' (in part) and 'E' (in part) is the whole of the land comprised in certificate of title reference 5982/54;
- (c) 'D' (in part) and 'E' (in part) together constitute the whole of the land comprised in certificate of title reference 5980/57; and
- (d) 'F' is that part of certificate of title reference 5980/60 which commences at the boundary of certificate of title reference 5980/57 and continues inland a distance of 90 metres.

**Second Licence** means a licence granted by Flinders Ports for the operation of a second container terminal at Port Adelaide.

**Termination Date** means the earlier of:

- (a) the date on which the operating licence granted to the Joint Venture is terminated for any reason or otherwise expires and the Commission confirms in writing to Flinders Ports that it no longer has competition concerns; or
- (b) the date on which the Second Licence is granted and the Commission confirms in writing to Flinders Ports that it no longer has competition concerns.

**TEUs** means Twenty-foot Equivalent Units.

## 1.2 Interpretation

In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) A reference to 'this Undertaking' includes all of the provisions of this document.
- (b) Headings are inserted for convenience only and do not affect the interpretation of this Undertaking.
- (c) A reference in this Undertaking to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Adelaide, South Australia.
- (d) If the day on which any act, matter or thing is to be done under this Undertaking is not a business day, the act, matter or thing must be done on the next business day.
- (e) A reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders.
- (k) A reference to the word 'include' or 'including' is to be construed without limitation.

- (l) A construction that would promote the purpose or object underlying the Undertaking (whether expressly stated or not) shall be preferred to a construction that would not promote that purpose or object.
- (m) Material not forming part of this Undertaking may be considered to:
  - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking.
- (n) In determining whether consideration should be given to any material in accordance with clause 1.2(m), or in considering any weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to the:
  - (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (ii) the need to ensure that the result of the Undertaking is to address the Commission's competition concerns.
- (o) The Commission may authorise the Mergers Review Committee, a member of the Commission or a member of the Commission staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the Commission may impose.
- (p) In performing its obligations under this Undertaking, Flinders Ports will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of the Undertaking.

## 2. Term of Undertaking

### 2.1 Commencement

This Undertaking comes into effect when:

- (a) the Undertaking is executed by Flinders Ports; and
- (b) the Undertaking so executed is accepted by the Commission.

### 2.2 Termination

This Undertaking terminates on the earlier of:

- (a) the Termination Date; or
- (b) the date the Commission consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the Act.

## 3. Undertaking regarding the Second Licence and the Relevant Land

### 3.1 Notification

Flinders Ports must, prior to granting any interest in the Relevant Land or awarding the Second Licence to any third party (including the Joint Venture) (the Proposed Transactions), provide the

Commission with the following information and any other information that the Commission may request to consider the grant of an interest in the Relevant Land or the award of the Second Licence in accordance with clause 3.4 of this Undertaking:

- (a) the name, address and contact details of the third party to whom the interest in the Relevant Land is to be granted and/or the Second Licence awarded;
- (b) a copy of any proposed lease or other agreement for the Relevant Land; and
- (c) a copy of any proposed licence agreement for the Second Licence.

### **3.2 Notification not required for certain allocations of land**

- (a) Flinders Ports will not be required to provide notification to the Commission under clause 3.1 of:
  - (i) any allocation of land to Flinders Ports (but excluding the Joint Venture), where the allocation relates solely to its core activities of port operations or port land and facility development (including in relation to further container terminals); or
  - (ii) the allocation of the Expansion Land to the Joint Venture for the purpose of expanding the Present Container Terminal.
- (b) For the avoidance of doubt, clause 3.2(a)(i) will not operate to exempt Flinders Ports from notifying the Commission under clause 3.1 where Flinders Ports' activities include:
  - (i) providing container stevedoring services;
  - (ii) managing and/or operating container stevedoring facilities; or
  - (iii) managing and/or operating container stevedoring terminals.

### **3.3 Notification as early as possible**

Flinders Ports will notify the Commission of its intention to grant an interest in the Relevant Land and/or award the Second Licence and provide the information required by clause 3.1 within 5 Business Days after its decision to do so.

### **3.4 Agreement to delay settlement**

- (a) Flinders Ports must not settle or otherwise conclude any transaction notified to the Commission under clause 3.1 prior to the Commission finalising its market inquiries into the Proposed Transactions referred to in clause 3.1 in accordance with the Process Guidelines, and confirming the outcome to Flinders Ports in writing.
- (b) In the event the Commission opposes the Proposed Transactions, Flinders Ports will provide the ACCC with 7 Business Days notice of its intention to settle or otherwise conclude the Proposed Transactions.

## **4. Undertaking – Notification of interested third parties**

### **4.1 Notification of interested third parties**

- (a) Flinders Ports must provide a written report to the Commission, every 6 months after the Commencement Date, which sets out the total number of third parties (but not the identity of those third parties) that have approached Flinders Ports in the previous 6 month period to request the grant of any interest in the Relevant Land or the award of the Second Licence.
- (b) Flinders Ports acknowledges that the Commission may:

- (i) make the written report provided under clause 4.1(a) of this Undertaking publicly available; and
- (ii) publish the written report provided under clause 4.1(a) of this Undertaking on its Public Section 87B Undertakings Register; and
- (iii) from time to time publicly refer to the written report provided under clause 4.1(a) of this Undertaking.

#### **4.2 Identification of interested third parties**

- (a) In addition to, and together with, the information provided every 6 months in accordance with clause 4.1, Flinders Ports must provide a written report to the Commission (on a confidential basis) which sets out:
  - (i) the identity of each third party who approached Flinders Ports in the previous 6 month period to request the grant of any interest in the Relevant Land or the award of the Second Licence, or to otherwise inquire in writing about the grant of any interest in the Relevant Land or the award of the Second Licence, and when the approach occurred;
  - (ii) a summary of the outcome of the approach including, if applicable, a general outline of the reasons as to why the approach did not result in the grant of any interest in the Relevant Land or the award of the Second Licence; and
  - (iii) a summary of the primary use or uses to which the Relevant Land has been put in the preceding 6 month period.

### **5. Information**

Notwithstanding clause 6, Flinders Ports will respond in a timely manner to any queries or requests for information made by the Commission (including a person authorised by the Commission under clause 1.2(p)) about this Undertaking.

### **6. Further information**

- (a) The Commission may direct Flinders Ports in respect of its compliance with this Undertaking to, and Flinders Ports will:
  - (i) furnish information, documents and materials to the Commission in the time and in the form requested by the Commission;
  - (ii) produce information, documents and materials to the Commission within Flinders Ports's custody, power or control in the time and in the form requested by the Commission; and/or
  - (iii) attend the Commission at a time and place appointed by the Commission to answer any questions the Commission (its Commissioners, its staff or its agents) may have.
- (b) Information furnished, documents and material produced or information given in response to the Commission's direction under clause 6(a) may be used by the Commission for any purpose consistent with the exercise of its statutory functions and powers.
- (c) Any direction made by the Commission under clause 6(a) will be notified to Company Secretary of Flinders Ports, in accordance with clause 10.1(b).
- (d) A reference to Flinders Ports in this clause 6 includes a reference to its Related Bodies Corporate.



- (e) Nothing in clause 6 requires the provision of information or documents in respect of which Flinders Ports has a claim for legal professional privilege.

## 7. Confidentiality and disclosure

- (a) Flinders Ports acknowledges that the Commission may:
  - (i) make this Undertaking publicly available; and
  - (ii) publish this Undertaking on its Public Section 87B Undertakings Register; and
  - (iii) from time to time publicly refer to this Undertaking.
- (b) The Commission may only disclose confidential information received from Flinders Ports as:
  - (i) is required by law;
  - (ii) is permitted by s155AAA of the Act;
  - (iii) is necessary for the purposes of enforcement action under section 87B of the Act;  
or
  - (iv) otherwise consented to in writing by Flinders Ports.
- (c) Nothing in this Undertaking prevents the Commission from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.

## 8. No Derogation

- (a) This Undertaking does not prevent the Commission from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by Flinders Ports of any term of this Undertaking.
- (b) Nothing in this Undertaking is intended to restrict the right of the Commission to take action under the Act for penalties or other remedies in the event that Flinders Ports does not fully implement and/or perform its obligations under this Undertaking or in any other event where the Commission decides to take action under the Act for penalties or other remedies.

## 9. Costs

Flinders Ports must pay all of its own costs incurred in relation to this Undertaking.

## 10. Notices

### 10.1 Giving Notices

- (a) Any notice or communication to the Commission pursuant to this Undertaking must be sent to:

Name:	Australian Competition and Consumer Commission
Address:	23 Marcus Clarke Street CANBERRA ACT 2602
Fax number:	(02) 6243 1212
Attention:	General Manager - Merger and Asset Sales Branch

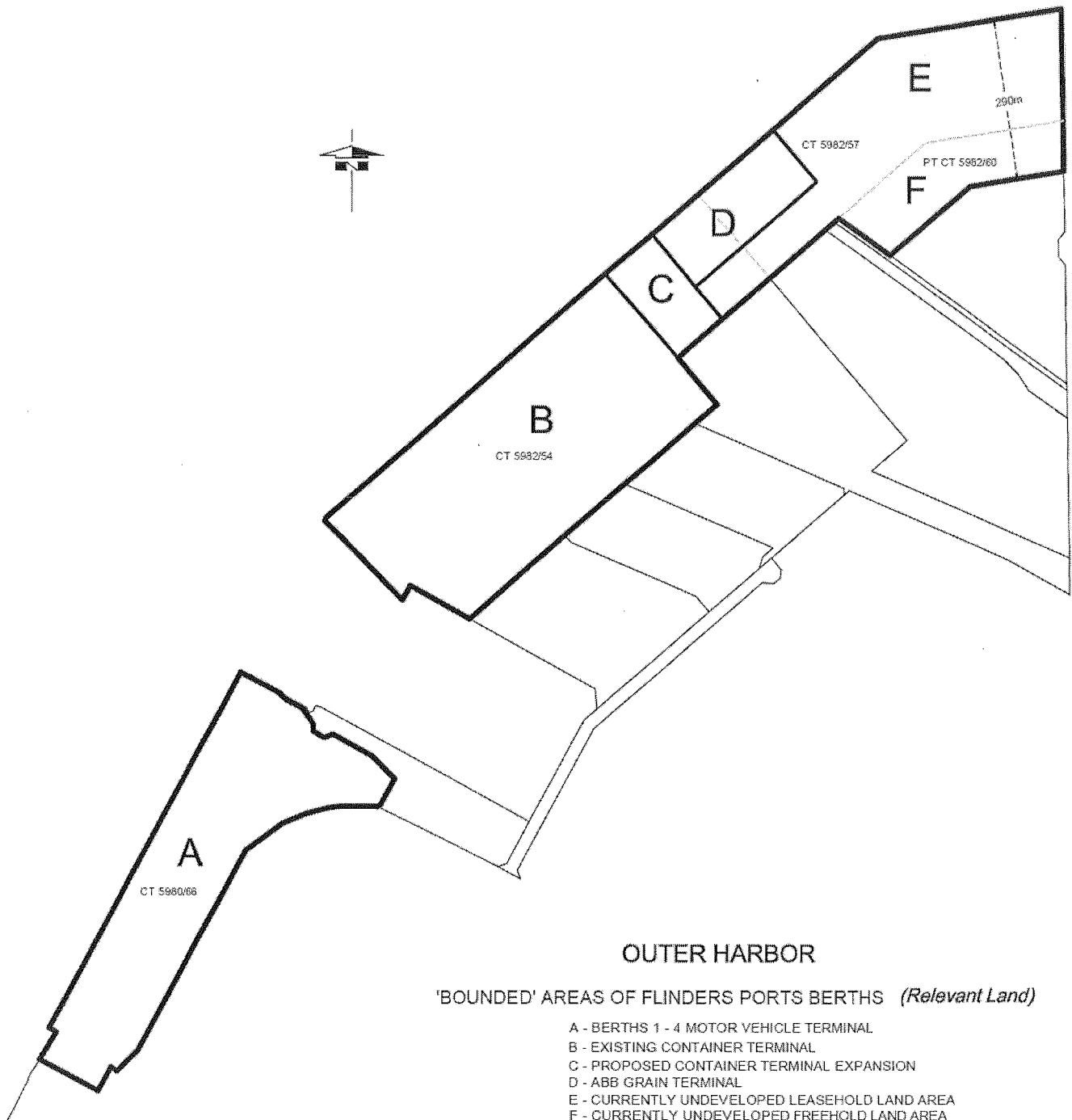
(b) Any notice or communication to Flinders Ports pursuant to this Undertaking must be sent to:

Name: Flinders Ports Pty Limited  
Address: 296 St Vincent Street  
PORT ADELAIDE SA 5015  
Fax number: (08) 8447 0606  
Attention: Company Secretary

## 10.2 Change of address or fax number

If Flinders Ports or the Commission gives the other three Business Days notice of a change to its address or fax number, any notice or communication is only given to the relevant entity if it is delivered, posted or faxed to the most recently advised address or fax number.

# Schedule 1 - Relevant Land

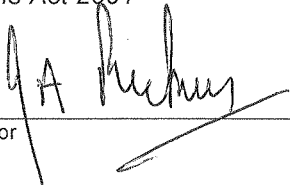


# Signing page

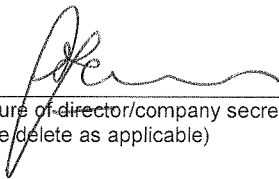
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**EXECUTED** as an Undertaking

Executed by **Flinders Ports Holdings Pty Ltd**  
ACN 117 687 313 pursuant to section 127 of  
the *Corporations Act 2001*

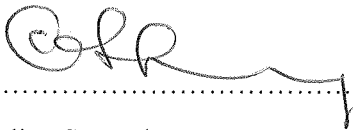
  
\_\_\_\_\_  
Signature of director

JOHN RICKUS  
\_\_\_\_\_  
Name of director (print)

  
\_\_\_\_\_  
Signature of director/company secretary  
(Please delete as applicable)

MARK TRAVERS  
\_\_\_\_\_  
Name of director/company secretary (print)

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the Trade Practices Act 1974

  
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Graeme Julian Samuel

Chairman

9<sup>th</sup> September 2008  
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Date