



Public Competition Assessment

24 September 2008

Flinders Ports Pty Ltd - proposed joint venture with DP World (SA) Pty Ltd

Introduction

1. On 10 September 2008, the Australian Competition and Consumer Commission (**ACCC**) announced its decision not to oppose the proposed joint venture between Flinders Ports Holdings Pty Ltd (**Flinders Ports**) and DP World (SA) Pty Ltd (**DPWSA**) (**proposed joint venture**), subject to section 87B undertakings accepted by the ACCC on 9 September 2008. The ACCC was of the view that the proposed acquisition, in conjunction with the undertakings, would be unlikely to have the effect of substantially lessening competition in the markets for the supply of container stevedoring services, and the supply of landside logistics at Port Adelaide in contravention of section 50 of the *Trade Practices Act 1974* (the **Act**).
2. The ACCC formed its view on the basis of the information provided by the joint venture parties and information arising from its market inquiries. This Public Competition Assessment outlines the basis on which the ACCC has reached its decision on the proposed acquisition, subject to confidentiality considerations.

Public Competition Assessment

3. To provide an enhanced level of transparency and procedural fairness in its decision making process, the ACCC issues a Public Competition Assessment for all transaction proposals where:
 - a merger is opposed;
 - a merger is subject to enforceable undertakings;
 - the merger parties seek such disclosure; or
 - a merger is not opposed but raises important issues that the ACCC considers should be made public.
4. This Public Competition Assessment has been issued because the proposed joint venture between Flinders Ports and DPWSA is subject to a court enforceable undertaking. Flinders Ports' undertaking is provided with this Statement of Issues at **Attachment 2**.

5. By issuing Public Competition Assessments, the ACCC aims to provide the public with a better understanding of the ACCC's analysis of various markets and the associated merger and competition issues. It also alerts the public to the circumstances where the ACCC's assessment of the competition conditions in particular markets is changing, or likely to change, because of developments.
6. Each Public Competition Assessment is specific to the particular transaction under review by the ACCC. While some transaction proposals may involve the same or related markets, it should not be assumed that the analysis and decision outlined in one Public Competition Assessment will be conclusive of the ACCC's view in respect of other transaction proposals, as each matter will be considered on its own merits.
7. Many of the ACCC's decisions will involve consideration of both non-confidential and confidential information provided by the merger parties and market participants. In order to maintain the confidentiality of particular information, Public Competition Assessments do not contain any confidential information or its sources. While the ACCC aims to provide an appropriately detailed explanation of the basis for the ACCC decision, where this is not possible, maintaining confidentiality will be the ACCC's paramount concern, and accordingly a Public Competition Assessment may not definitively explain all issues and the ACCC's analysis of such issues.

The parties

Joint venture party: Flinders Ports Pty Ltd

8. Flinders Ports is the operator of seven ports within South Australia: Adelaide, Port Lincoln, Port Pirie, Klein Point, Port Giles, Thevenard and Wallaroo (the **Ports**).
9. Following privatisation of the Ports by the South Australian government in 2001, Flinders Ports was granted a 99 year land lease and licence to manage and operate the Ports in South Australia, and is responsible for the development, management and operation of those ports.
10. Flinders Ports is the port manager of the container terminal located at Outer Harbor in Port Adelaide (**Container Terminal**), which is the terminal relevant to this matter. The six other ports operated by Flinders Ports primarily consist of bulk and general terminals, and do not have container stevedoring facilities.

Joint venture party: DP World (SA) Pty Ltd

11. DPWSA is a subsidiary of DP World – the owner, operator and manager of container terminals and other port infrastructure worldwide. In Australia, a separate company, DP World Australia Pty Ltd (**DPW Australia**) owns, operates and manages container terminals in Brisbane, Sydney, Melbourne, and Fremantle.

12. DP World Adelaide Pty Ltd (DPWA) is a subsidiary of DPWSA (and Linerbulk). It operates the Container Terminal, including the provision of stevedoring and other related services, pursuant to an Operating Agreement with Flinders Ports which runs until 30 April 2014. It is the sole provider of these services at the Container Terminal.
13. DPW Australia 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.¹ POTA's activities include services involving port containerised transport, container parks, container freight stations, landbridge rail services, rail terminals and incidental warehousing and local distribution.

The proposed transaction

14. Flinders Ports proposes to enter into a joint venture with DPWSA for the operation of the stevedoring facility at the Container Terminal.
15. The proposed joint venture would enable Flinders Ports and DPWSA to become shareholders in an entity called Adelaide Container Terminals (ACT), which would be granted a right to conduct container stevedoring at the Container Terminal until 30 April 2039. ACT is presently a wholly-owned subsidiary of Flinders Ports, of which DPWSA will acquire 60% of the shares.
16. 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. ACT will then acquire the business of DPWA.

Areas of overlap

17. 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 the Container Terminal.
18. Through its share in ACT, Flinders Ports would in effect be vertically integrating into container stevedoring, and together with the incumbent stevedore DPWA, would potentially be competing with parties to lease land that is suitable for container stevedoring and to undertake other port-related activities at Port Adelaide. The ACCC investigated whether such vertical integration was likely to have a significant impact on competition.
19. The ACCC also investigated whether, through the proposed joint venture Flinders Ports would have any interest or changed incentives with regard to the management of the port for landside logistics, given that DP World related entities have an interest in POTA, which operates at Port Adelaide in competition with other landside logistics operators.

¹ KFM Diversified Logistics Investments 5 Pty Ltd owns the remaining 50 per cent of POTA.

Timing

20. The following table outlines the timeline of key events in this matter.

Date	Event
24-Apr-2008	ACCC commenced review under the Merger Review Process Guidelines.
28-Apr-2008	Market inquiries commenced.
16-May-2008	Closing date for submissions from interested parties.
30-May-2008	ACCC awaiting further information from Flinders Ports. ACCC timeline suspended.
10-Jun-2008	ACCC received further information from Flinders Ports. ACCC timeline recommenced.
18-Jun-2008	ACCC published a Statement of Issues outlining preliminary competition concerns.
18-Jun-2008	Former proposed date for announcement of ACCC's findings of 18 June 2008, amended to allow for receipt of responses to Statement of Issues.
02-Jul-2008	Closing date for submissions relating to Statement of Issues.
11-Jul-2008	ACCC requested further information from Flinders Ports. ACCC timeline suspended.
16-Jul-2008	Former proposed date for announcement of ACCC's findings of 16 July 2008 amended to allow for further market inquiries.
21-Jul-2008	ACCC received further information from Flinders Ports. ACCC timeline recommenced.
30-Jul-2008	Former proposed date for announcement of ACCC's findings of 30 July 2008 amended to allow for further inquiries.
14-Aug-2008	Draft s87B undertaking proffered by Flinders Ports. ACCC commenced market inquiries.
14-Aug-2008	Former proposed date for announcement of ACCC's findings of 13 August amended to 3 September 2008 to allow for consultation on proposed draft s87B undertaking.
04-Sep-2008	Former proposed date for announcement of ACCC's findings of 3 September 2008, amended to 10 September 2008 pending receipt of documents from Flinders Ports.
09-Sep-2008	s87B undertaking accepted by ACCC. ACCC announced it would not oppose the proposed acquisition.

Market inquiries

21. The ACCC conducted market inquiries with a range of industry participants, including other suppliers of stevedoring services, shipping companies and associations, freight forwarders and transport carriers, other regulatory agencies and other interested parties. Submissions were sought in relation to the substantive competition issues and proposed undertakings.

Statement of Issues

22. The ACCC published its Statement of Issues on 18 June 2008 identifying a number of potential issues of competition concern, including:

- the potential for the proposed joint venture to increase barriers to entry for a third party container stevedore at Port Adelaide; and

- the potential for the proposed joint venture to reduce competition and increase barriers to entry in the market for the supply of landside logistics at Port Adelaide.
23. The ACCC sought further submissions from interested parties regarding the matters raised in the Statement of Issues. The Statement of Issues is available on the ACCC's website at www.accc.gov.au/statementsofissues.

With/without test

24. In assessing a merger pursuant to section 50 of the Act, the ACCC must consider the effects of the transaction by comparing the likely future state of competition if the transaction proceeds (the “with” position) to the likely future state of competition if the transaction does not proceed (the “without” position or counterfactual).
25. Currently DPWA is the monopoly provider of container stevedoring services at Port Adelaide pursuant to an Operating Agreement between Flinders Ports and DPWA until 2014.
26. The future “with” position is that Flinders Ports and DPWSA will acquire, respectively, 40% and 60% interests in ACT. ACT will then obtain a licence to operate the Container Terminal upon completion of the proposed transaction until 30 April 2039.
27. The ACCC conducted its analysis based on the counterfactual that:
- Flinders Ports would continue to outsource the container stevedoring function to DPWA or another party;
 - there is a prospect of new entry in container stevedoring within the timeframe of the joint venture; and
 - Flinders Ports would remain the independent manager of Port Adelaide.
28. That is, Flinders Ports would not have any commercial interest in container stevedoring as well as its port management function. In the counterfactual, during the term of the joint venture with DPWSA, Flinders Ports would have no incentive to impede or deter entry by a new container stevedore at Port Adelaide when new entry becomes viable.

Market definition

29. For the purposes of assessing the proposed joint venture, the ACCC considered the key relevant market to be the supply of container stevedoring services at Port Adelaide. The ACCC also considered the competitive effects of the proposed joint venture in the following markets:
- the supply of landside logistics services at Port Adelaide (not conclusively defined); and

- the allocation of an exclusive licence to conduct container stevedoring at Port Adelaide.

Market One: the supply of container stevedoring services at Port Adelaide

Product dimension

30. The primary activities of the proposed joint venture would be the operation of the Container Terminal and the provision of container stevedoring and related services (together, **container stevedoring**). The ACCC found that this was the scope of the product dimension of one of the relevant markets for the purposes of this matter. The ACCC concluded that container stevedoring is distinct from general and bulk stevedoring services, which involve substantial differences in the properties of the cargo stevedored and the equipment required to conduct the services.

Geographic dimension

31. In the course of its inquiries, the ACCC noted that there is a proportion of container freight exported from and imported to South Australia which enters or exits Australia via the Port of Melbourne. There has also been a volume of South Australian import container traffic being moved via land from Fremantle.
32. Therefore, the ACCC considered whether container stevedoring services supplied at ports such as Melbourne and Fremantle, would be substitutes for the container stevedoring services supplied at Port Adelaide.
33. The ACCC's inquiries revealed that demand for container stevedoring services at Port Adelaide is underpinned by South-Australian import and export customers' demand for a direct shipping connection between Adelaide and an international trade destination. Transshipment between Adelaide, Melbourne, and Fremantle appears to occur when trade routes do not enter into Adelaide and containers are transhipped to connect with the shipping line.
34. Market participants indicated that rather than the port and stevedoring charges that shipping lines would incur upon arrival at Port Adelaide, the inclusion of Port Adelaide in shipping lines' trade routes is largely dependent upon the volume of container cargo originating or terminating there, relative to the costs (predominantly fuel) of having a ship travel to Adelaide, often in addition to other ports.
35. For shipping lines, the additional fuel costs associated with travelling the extra shipping distance to Adelaide is a primary consideration. The ACCC's inquiries indicated that shipping lines will stop at Port Melbourne and tranship to Adelaide by road or rail in circumstances where the volume of cargo to be delivered or collected from Port Adelaide is too low relative to the shipping costs.

36. The ACCC's market inquiries suggest that there may be a marginal increase in transshipment if the Adelaide port charges were to increase, but this would not cause most shipping lines to cease calling at Port Adelaide if cargo volumes were sufficient. Indeed, market participants indicated that unless Flinders Ports were to increase its port charges substantially (above a 5-10 per cent price increase), and the stevedore also sought to increase its charges substantially by more than 5-10 per cent, the shipping lines are likely to continue to call at Port Adelaide.
37. Market participants also indicated that in general, the cost of transporting containerised freight between Adelaide and the Port of Melbourne via road or rail is too high, and the transport times too long, to make the Port of Melbourne a substitute for exporting or importing the majority of freight which needs to originate or terminate at Port Adelaide.
38. Having regard to this information, the ACCC considered that shipping lines consider the ports of Adelaide and Melbourne as interchangeable only at certain times, and that container traffic at Port Adelaide is generally characterised by demand for cargo that originates or terminates in Adelaide. At this point, the relevant field of competition in container stevedoring is within that port. Hence, container stevedoring services at Port Melbourne are unlikely to be substitutes for these services supplied at Port Adelaide.
39. Therefore, the ACCC concluded that the relevant geographic dimension for the supply of container stevedoring services is within Port Adelaide

Competition analysis

40. The ACCC considered whether the proposed joint venture would increase barriers to entry for a third party stevedore at Port Adelaide, and accordingly if it would be likely to result in a substantial lessening of competition in the market for the supply of container stevedoring services at Port Adelaide.
41. In particular, it considered:
 - whether container traffic would be likely to grow sufficiently to support the development of a new container terminal, and thus a third party stevedore, and whether this was likely to occur within the timeframe in which the joint venture is proposed to operate;
 - whether entry was likely to occur at another port in South Australia;
 - whether suitable land was likely to be available at Port Adelaide; and
 - whether the proposed joint venture is likely to significantly impact on the ability and incentive of Flinders Port to impede or encourage entry.

Container traffic growth

42. Market participants generally took the view that Port Adelaide does not currently have sufficient container volume to support two viable stevedores, but that it most likely would in the timeframe in which the joint venture is proposed to operate.
43. As noted in the Statement of Issues, 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. The ACCC also investigated further submissions which suggested that 600,000 TEUs per year was a more realistic threshold for new entry at Port Adelaide.
44. The ACCC found that while market inquiries provided a roughly consistent view of the traffic volumes needed to support the development of a second container terminal at Port Adelaide, inconsistent views were given as to when container volumes would reach these threshold levels.
45. For instance, inquiries with market participants revealed a number of forecasts of container traffic growth, with underlying growth rates ranging between 4 and 9 per cent per year above 2007 levels.
46. In a report published in 2005, the Bureau of Infrastructure, Transport and Regional Economics (BITRE) 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 from 2006.² The ACCC also had regard to a forecast which adopted a 6 per cent growth rate on 2007 levels, resulting in projected TEU of just over 700,000 in 2025.
47. Data published by the BITRE more recently indicates that total TEU at Port Adelaide for financial year 2006-07 was 219,000, representing an actual growth rate of approximately 15% on the previous year, following an actual growth rate of 11% for the 2005-06 year.³ These recent figures suggest that throughput at Port Adelaide is likely to grow to levels beyond the levels forecast by BTRE in 2004-05.
48. The ACCC considered that even having regard to the more conservative forecasts, total container traffic was likely to reach the requisite threshold levels within the 30-year period of the proposed joint venture.

Potential for new entry in other South Australian ports

49. The ACCC investigated whether a new container stevedore were likely to enter into another port in South Australia.

² Bureau of Transport and Regional Economics, *Container and ship movements through Australian ports, 2004-05 to 2024-05, Working paper 65, p61*

³ Bureau of Infrastructure Transport and Regional Economics, *Waterline 43*, January 2008, p43

50. While the ACCC considers this is technically possible, it does not appear likely or profitable given the substantial investment that is required to establish a container terminal and container stevedoring facilities, particularly in circumstances where bulk and general cargo is the main business of these ports.
51. Therefore, the remainder of this competition analysis focuses upon the likelihood of new entry and competition at Port Adelaide.

Availability of suitable land at Port Adelaide

52. Market inquiries indicated that it is necessary for a prospective container stevedore to have access to land which is situated along the waterfront, and proximate to key infrastructure, including a sufficiently dredged shipping channel. It must also be sufficiently proximate to road and rail infrastructure to connect with landside transport and logistics services.
53. The ACCC investigated the availability of land and possible greenfield sites that a new container stevedore could develop. Market inquiries indicated that substantial additional investment in bay dredging and road infrastructure would be required to establish a terminal anywhere other than Outer Harbor, to allow the passage of container ships and access roads from the terminal to major infrastructure.
54. The depth to which a port's shipping channel has been dredged is an important factor contributing to the suitability of a site for a container terminal. The ACCC understands that the shipping channel at Outer Harbor has been dredged to a depth of 14.2m to allow for the larger shipping vessels expected to enter into Australian trade routes. This dredging occurred up to Pelican Point where the depth of the shipping channel reduces to 9.3m into Inner Harbour.
55. The ACCC's inquiries revealed that existing container terminals in Australia range in size between approximately 500-950 metres berth length, and 140-300 metres depth. The ACCC understands that the larger berth lengths, such as 650-700 metres, enable at least two average-sized vessels to berth simultaneously.
56. The ACCC understands that the dimensions of the existing Container Terminal are approximately 675 metres along the waterline, and 280 metres deep.
57. Flinders Ports holds leases over land along the Port Adelaide river waterline as depicted in **Attachment 1**. The ACCC understands that the areas marked 'A' and 'E' comprise 720 x 300 metres, and 480 x 230 metres respectively. The dimensions of the existing Container Terminal (area marked 'B') are approximately 675 x 280 metres.
58. The ACCC's inquiries indicated that to develop a second container terminal at Outer Harbor, it would be necessary to lease land from Flinders Ports.

Ability and incentive of Flinders Ports to foreclose new entry

59. Given that Flinders Ports holds a long term lease over land suitable for the development of a second container terminal, as well as responsibility for selecting subsequent users of that land, the ACCC took the view that with or without the proposed joint venture, Flinders Ports has the ability to impede or encourage the entry of a third party stevedore at Port Adelaide.
60. The ACCC then examined the likely impact of the proposed joint venture on whether Flinders Ports would have an incentive to impede or encourage such entry.
61. The ACCC considered that the commercial objective of Flinders Ports, as port manager, would be to increase port throughput by attracting additional shipping services to Port Adelaide. The ACCC investigated the possibility that this might constrain the joint venture from engaging in conduct that would impede or deter new entry.
62. The ACCC examined forecasts of TEU throughput throughout the life of the proposed joint venture, and confidential information provided to it. The ACCC found that Flinders Ports' incentives to increase volume throughput at Port Adelaide would coincide with its incentives as 40 per cent shareholder of ACT to capture the increased container traffic.
63. The ACCC considered that despite Flinders Ports' incentives and commercial objectives resulting from its role as port manager, it would be in the proposed joint venture's commercial interest to maintain its position as monopoly container stevedore at Port Adelaide. Therefore the ACCC concluded that Flinders Ports would be likely to have an incentive to manage the allocation of the necessary inputs for container stevedoring to favour to the joint venture.
64. On the basis of the factors outlined above, the ACCC concluded that the proposed joint venture arrangement would be likely to increase barriers to entry for a second container terminal operator. The ACCC considered that Flinders Ports would have the incentive to act more favourably to the joint venture entity and may impede potential competitors' access to land that is necessary to develop a container terminal.
65. The ACCC recognises that the prospect of a second operator entering into Port Adelaide is not immediate. However, the ACCC is concerned that circumstances surrounding Port Adelaide may change sufficiently such that it becomes economically viable for Port Adelaide to support two container stevedores and that these changed circumstances are likely to occur before the expiration of the joint venture arrangement.
66. To address the ACCC's concerns in relation to this market, Flinders Port offered a section 87B undertaking. The ACCC accepted this undertaking and decided that it would not oppose the proposed joint venture. The undertaking is discussed from paragraph **84**.

Market Two: the supply of landside logistics services at Port Adelaide

Background

67. 'Landside logistics' is a term used to describe a range of activities and services focused on transport and storage of containerised freight to and from ports for onward delivery to customers. The facilities operated and services conducted by landside logistics operators at Port Adelaide include:
- transport of containerised freight to and from the port, operation of container parks and warehouses both on and off the port premises;
 - container packing and unpacking;
 - road and/or rail links to depots for onward trucking to customers;
 - rail and truck terminals; and
 - freight forwarding services.
68. Landside logistics operators require access to container terminals in order to collect and drop-off containerised freight at particular times. That freight is then subsequently either loaded or unloaded onto a ship by the container stevedore. Landside logistics operators must therefore deal with the stevedore to organise access to the terminal for the delivery of containers.
69. Market participants raised concerns that the proposed joint venture would affect competition in the downstream market for the supply of landside logistics at the Container Terminal. The ACCC received submissions which argued that as a result of the joint venture, Flinders Ports would have an incentive to reduce the discipline it exerts over DPWSA with respect to access provided to landside users. Other submissions claimed that Flinders Ports would obtain an incentive to favour POTA more directly, such as by engaging in discriminatory conduct itself.
70. In light of these submissions, the ACCC investigated the extent to which Flinders Ports would have an incentive to provide or allow preferential access to relevant landside facilities at Port Adelaide to POTA, at the expense of other landside logistics operators.
71. However, the ACCC considered that it was not necessary to reach a conclusive view on market definition with regard to the downstream market.

Competition analysis

72. The ACCC investigated whether as port manager, Flinders Ports would have the incentive to foreclose competition from POTA's rivals, increase barriers to entry in the supply of landside logistics at Port Adelaide, or otherwise distort the dynamics of competition in this market.

73. Neither Flinders Ports, nor the joint venture company ACT, owns a commercial interest in POTA. Furthermore, Flinders Ports does not participate in the market for the supply of landside logistics currently, nor will it acquire an interest in POTA as part of the proposed joint venture. Furthermore, DPWSA, DPWA and POTA are already related entities irrespective of the proposed joint venture.
74. Notwithstanding the fact that as a result of the proposed joint venture Flinders Ports would have no commercial interest in POTA or any landside logistics business, the ACCC considered whether, because of its commercial relationship with a related entity of DP World Australia, it would be likely to reduce the level of discipline it exerts over the terms of access provided to landside logistics operators.
75. The ACCC's inquiries revealed that as the incumbent container stevedore, DPWA is responsible for arranging the schedule for transport operators who require access to the Container Terminal, not Flinders Ports. Indeed, the ACCC understands that Flinders Ports' role in ensuring equal access to the port is predominantly an informal one, whereby Flinders Ports assists in mediating disputes between port users from time to time.
76. The ACCC understands that the Container Terminal is subject to State Government performance monitoring via the Container Terminal Monitoring Panel, which has representatives of a range of landside logistics stakeholders. These stakeholders primarily consist of various South Australian road and transport industry bodies, and individual importers and exporters.
77. In light of this information, the ACCC considered that the proposed joint venture was unlikely of itself, to result in POTA gaining a competitive advantage in the landside logistics market, nor increase the likelihood of this occurring. The ACCC also considered that the proposed joint venture was unlikely to provide Flinders Ports with the incentive to alter its own conduct as port manager in order to undermine any competitive constraint provided by participants in the market for landside logistics.
78. Therefore, the ACCC concluded that the proposed joint venture was unlikely to result in a substantial lessening of competition in the market for the supply of landside logistics.

Market three: allocation of an exclusive licence to conduct container stevedoring at Port Adelaide

Market definition

79. A container stevedoring licence at Port Adelaide can only be allocated by Flinders Ports as it is the sole lessee and manager of the port.
80. As noted above, there is a question as to whether entry by another container stevedore is viable at Port Adelaide during the term of the proposed joint venture, as opposed to this function remaining a monopoly service. As outlined above, the ACCC concluded that new entry is likely at Port Adelaide.

81. While there is some conjecture about the likely timing of new entry, it is recognised that this may not occur for some time. The ACCC subsequently examined whether there is potential for a competitive process to be held for the allocation of a licence to be the sole operator of the Container Terminal in the interim period.
82. Therefore, the ACCC considered that the relevant product dimension was the supply or allocation of an exclusive licence to conduct container stevedoring at Port Adelaide.

Competition analysis

83. The ACCC understands that most port managers tend not to invite competitors to bid for the leases that incumbents hold when they expire or are nearing the end of their term. The ACCC is not aware of any new information arising from its investigation of the proposed joint venture that would suggest otherwise with regard to Port Adelaide.

Undertaking

84. To address the ACCC's concerns in relation to the market for the supply of container stevedoring services at Port Adelaide, Flinders Ports offered a section 87B undertaking which was accepted by the ACCC. The key provisions of the undertaking are that Flinders Ports will:
 - notify the ACCC of any allocations of certain Relevant Land at Port Adelaide, and licences for container stevedoring at Port Adelaide.⁴ The ACCC would subsequently review any such allocation to any third party (including the Joint Venture); and
 - delay settlement of any allocations of land or container stevedoring licences notified to the ACCC pursuant to the undertaking, until the ACCC has concluded a review and confirmed the outcome to Flinders Ports;
 - provide a written report to the ACCC every six months regarding approaches made to Flinders Ports by interested third parties who have sought allocations of Relevant Land or a container stevedoring licence from Flinders Ports.
85. A key aspect of the undertaking is the definition of Relevant Land, which underpins Flinders Ports' notification obligations.
86. The undertaking defines Relevant Land as follows:

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:

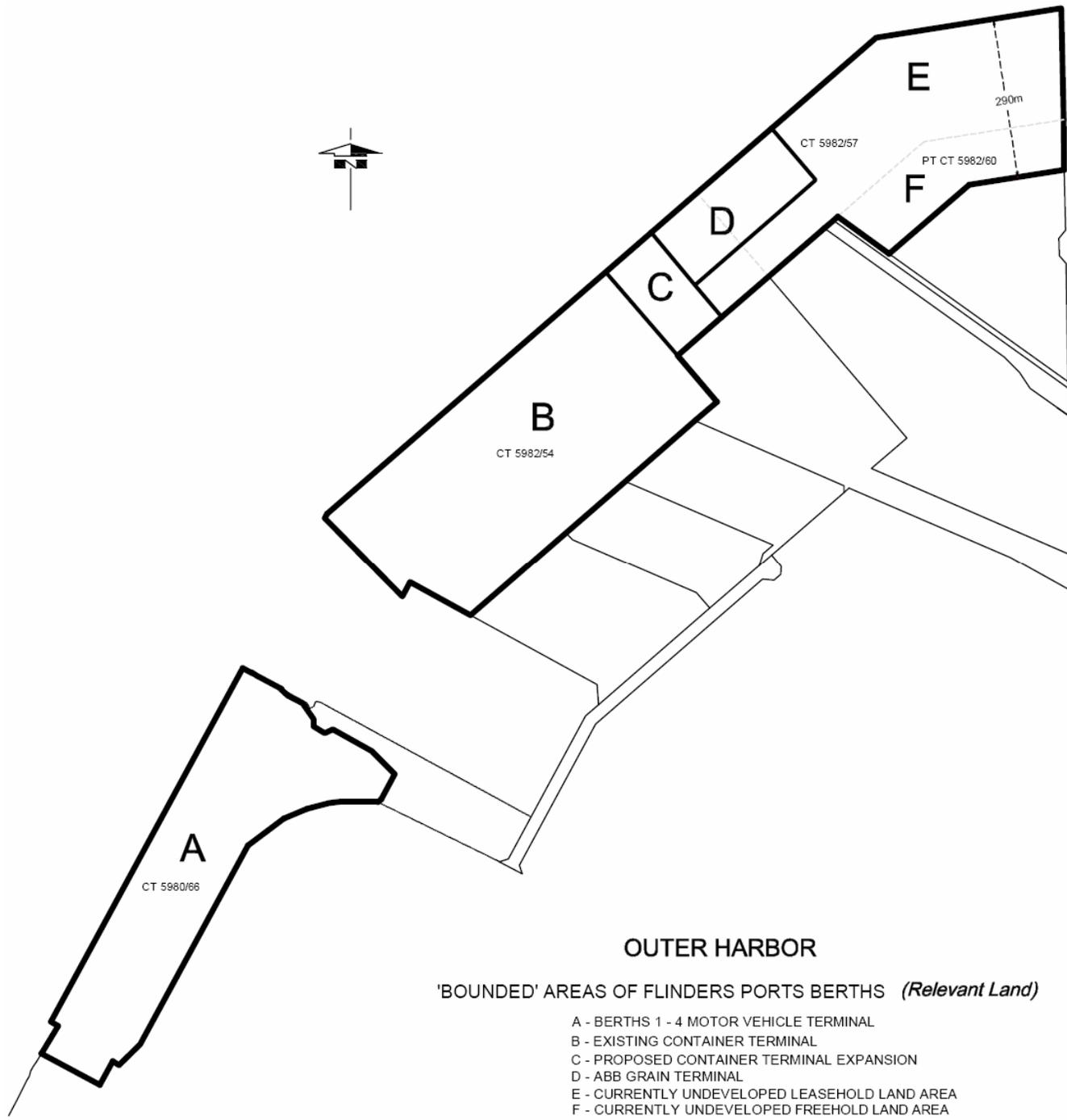
⁴ Second Licence is defined in the undertaking as meaning a licence granted by Flinders Ports for the operation of a second container terminal at Port Adelaide.

- ‘A’ is the whole of the land comprised in certificate of title reference 5980/66;
 - ‘B’, ‘C’, ‘D’ (in part) and ‘E’ (in part) is the whole of the land comprised in certificate of title reference 5982/54;
 - ‘D’ (in part) and ‘E’ (in part) together constitute the whole of the land comprised in certificate of title reference 5980/57; and
 - ‘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.
87. Areas A to F reflect the boundaries of leasehold land held by Flinders Ports which is also likely to be the land most suitable at Port Adelaide for the development of a container terminal.
88. Although there is land within Flinders Ports’ control extending further back than 200 metres or the depth of land subject to the land titles as identified above and in the undertaking, the ACCC considered that this definition of Relevant Land was adequately inclusive of the land which is most likely to be required by a prospective developer of a second container stevedore.
89. The ACCC is satisfied that the undertaking adequately addresses the competition concerns outlined above. The ACCC considers that the undertaking ensures that:
- the process used by Flinders Ports to allocate the necessary inputs for container stevedoring is transparent, and subject to review by the ACCC;
 - prospective new entrants are not deterred from seeking entry by the commercial relationship between Flinders Ports and DPWSA, which would be the incumbent stevedore post-transaction.
90. Therefore, the ACCC decided to accept the undertaking offered by Flinders Ports, and decided that it would not oppose the proposed joint venture.

Conclusion

91. On the basis of the above, including taking into account the undertaking, the ACCC formed the view that the proposed joint venture between Flinders Ports and DPWSA would not be likely to result in a substantial lessening of competition in the markets for the supply of container stevedoring services, landside logistics, and the allocation of an exclusive licence to conduct container stevedoring at Port Adelaide, in contravention of section 50 of the Act.

Attachment 1 Relevant Land at Port Adelaide



Attachment 2 Flinders Ports section 87B undertaking

From following page

Section 87B Undertaking

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

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

MinterEllison

L A W Y E R S

Details

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

- 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

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

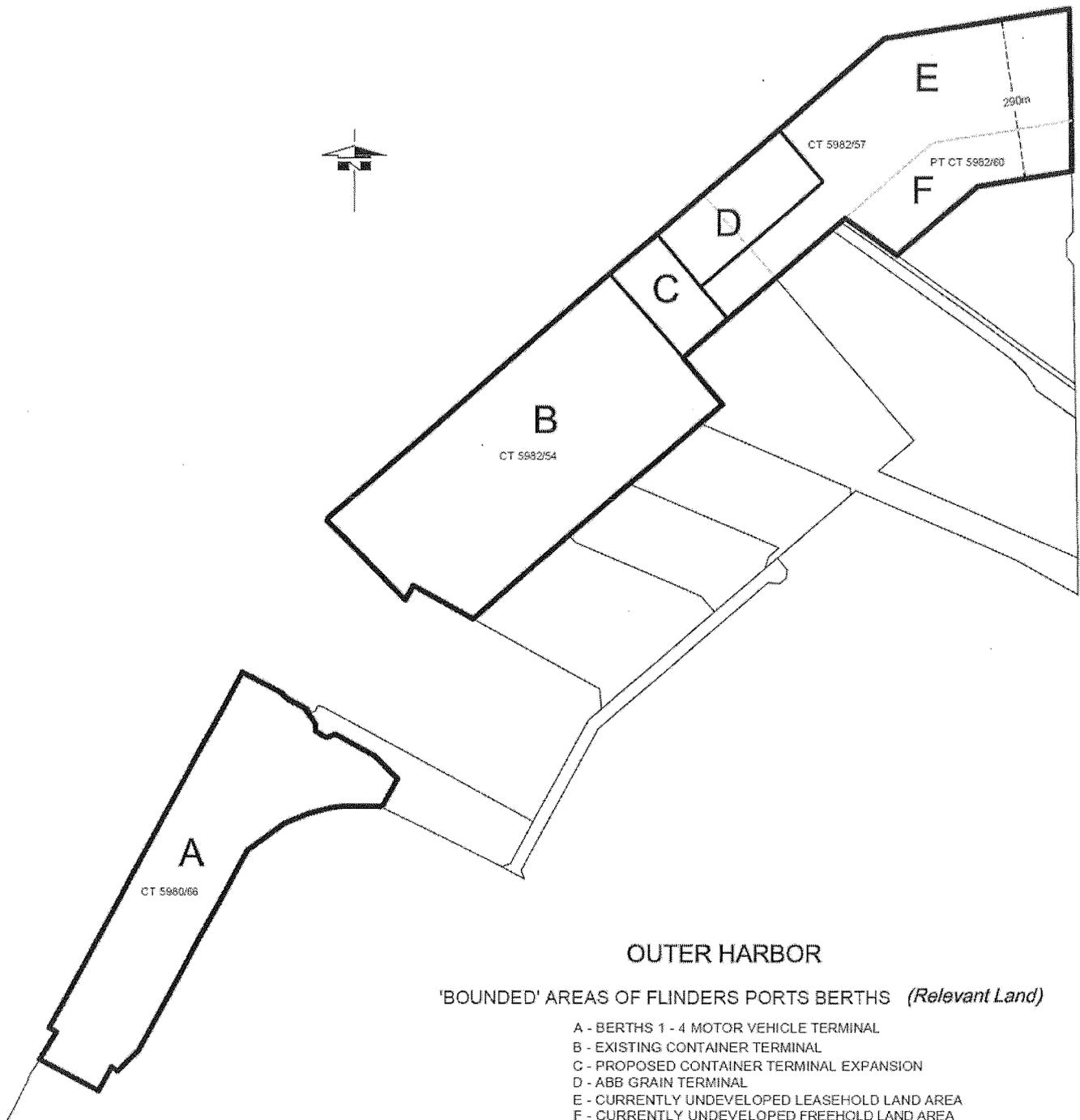
(b) Any notice or communication to Flinders Ports pursuant to this Undertaking must be sent to:

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.

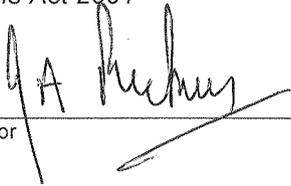
Schedule 1 - Relevant Land



Signing page

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)

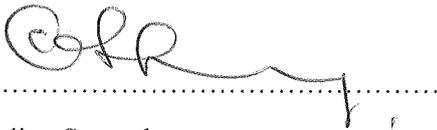


Signature of director/company secretary
(Please delete as applicable)

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


.....

Graeme Julian Samuel

Chairman

9th September 2008
.....

Date