



Ports



Issues Paper

2017 Ports Pricing and Access Review

September 2016

Request for submissions

The Essential Services Commission (**Commission**) invites written submissions on this Issues Paper. Written comments should be provided by **18 November 2016**.

It is the Commission's policy to make all submissions publicly available via its website (www.escosa.sa.gov.au), except where a submission either wholly or partly contains confidential or commercially sensitive information provided on a confidential basis and appropriate prior notice has been given.

The Commission may also exercise its discretion not to publish any submission based on length or content (for example containing material that is defamatory, offensive or in breach of any law).

Responses to this Issues Paper should be directed to: **2017 Ports Pricing and Access Review**

It is preferred that submissions are sent electronically to: **escosa@escosa.sa.gov.au**

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The Commission must review the South Australian ports pricing and access regimes by 30 October 2017.

The purpose of this Issues Paper is to gather evidence and views from people and organisations with an interest in South Australian ports and maritime industries.

Submissions and responses addressing the matters raised in this Issues Paper, or any other matters relevant to the review, are due by **Friday, 18 November 2016**.

Overview

The Maritime Services (Access) Act 2000 (**MSA Act**) requires the Commission to review the South Australian ports pricing and access regimes every five years. The Commission's 2017 Ports Pricing and Access Review (**Review**) is being conducted to meet this requirement.

The Review will consider the following questions:

- ▶ Should the ports access regime (**Access Regime**) continue for a further five-year period from 31 October 2017?
- ▶ Should the ports price regulation regime (**Pricing Regime**) for Essential Maritime Services (**EMS**) continue for a further five-year period from 31 October 2017? If it is to continue, what form of price regulation should be adopted?
- ▶ If the regimes are to continue, are there any areas where they can be improved to better promote competition in related markets or make regulation more effective and efficient generally?

Legislative framework

For the purpose of the Review, the relevant legislation is the MSA Act and the Essential Services Commission Act 2002 (**ESC Act**).

Maritime Services (Access) Act 2000

The MSA Act establishes the South Australian ports access and pricing regimes. That Act

requires the Commission to review those regimes within the last year of each prescribed period; the current period ends 30 October 2017.

Ports Access Regime

The Access Regime is established under Part 3 of the MSA Act. It provides a framework for the negotiation of access to regulated services, which are declared by proclamation, and dispute resolution where access disputes arise and cannot be otherwise resolved between parties. The Access Regime has been certified as an effective state-based access regime pursuant to Part III of the Competition and Consumer Act 2010 (Cth) for a period of ten years (expiring 2021).

Section 43 of the MSA Act specifies that the Commission must, within the last year of each regulatory period, conduct a review of the industries which are presently subject to the Access Regime. Based on this review, the Commission must make a recommendation to the South Australian Government on the ongoing applicability of the Access Regime. If the government determines that the Access Regime should continue, a regulation must be made extending the period of its operation accordingly.

If, however, the Commission recommends that ongoing access regulation is not necessary, and a regulation is not made, then the Access Regime will expire.

Ports Pricing Regime

The Pricing Regime applies to EMS and Pilotage Services charges. An explanation of these services is included in the 'Scope of this review' section of this Issues Paper. The current regime allows port operators to set prices for those services, but it does so in the context of having the Commission monitoring those prices and publicly reporting on them.

These current pricing arrangements for EMS expires on 30 October 2017 and the Commission can, pursuant to section 6 of the MSA Act, use its powers under the ESC Act¹ to make a decision (called a price determination) to change these arrangements, in accordance with requirements set out in Part 3 of the ESC Act. The review will therefore consider whether or not price regulation

¹ Section 25.

should continue for a further five-year period. If it is to continue, it will consider the form of price regulation to be adopted.

Essential Services Commission Act

In carrying out this Review the Commission will be performing a function under the ESC Act. Section 6 of the ESC Act states that the Commission must:

(a) Have as its primary objective protection of the long term interests of South Australian consumers with respect to the price quality and reliability of essential services; and

(b) At the same time, have regard to the need to:

(i) Promote competitive and fair market conduct;

(ii) Prevent misuse of monopoly or market power;

(iii) Facilitate entry into relevant markets;

(iv) Promote economic efficiency;

(v) Ensure consumers benefit from competition and efficiency;

(vi) Facilitate maintenance of the financial viability of regulated industries and the incentive for long term investment; and

(vii) Promote consistency in regulation with other jurisdictions.

The ESC Act² also specifies the range of regulatory approaches that the Commission can choose from in the making of a price determination, ranging from those that are not determinative in nature (for example, price monitoring), to those that are considered more prescriptive (for example, price setting).

Scope of this review

The Commission is the pricing and access regulator for the following six commercial ports in South Australia.

1. Port Adelaide
2. Port Giles

3. Wallaroo
4. Port Pirie
5. Port Lincoln, and
6. Thevenard

While all of the above ports are operated by Flinders Ports Pty Ltd, some regulated services (for example, bulk loader services) are provided by Viterra Operations Ltd. At this time, the Commission does not have a role in relation to other ports.

The decision on which ports should be subject to the pricing and access regimes is, primarily, a matter for the South Australian Government.

Infrastructure services covered by the regimes are generally considered to be natural monopoly services that are critical to the functioning of upstream and downstream competitive markets (for example, shipping, logistics, import/export markets). Pricing and access regulation is intended to prevent misuse of market power by infrastructure service providers and promote competition in those related markets.

Maritime services falling within the scope of the Access Regime include:

- ▶ channels
- ▶ common user berths
- ▶ bulk handling facilities
- ▶ berths adjacent to bulk handling facilities
- ▶ land providing access to maritime services, and
- ▶ The Outer Harbor bulk loader at Port Adelaide.

Pursuant to section 4 of the MSA Act, EMS are defined as maritime services providing:

- ▶ or allowing for access of vessels to a proclaimed port
- ▶ ports facilities for loading or unloading vessels at a proclaimed port, or
- ▶ berths for vessels at a proclaimed port.

² Section 25(3)

Although the provision of Pilotage Services is not an EMS, its charges are subject to a similar form of price regulation, as specified in section 8 of the MSA Act.

The Pricing Regime requires the operator of a proclaimed port to maintain a schedule of Pilotage Service charges and provide the Commission with a current schedule and notice of any proposed changes to these charges.

How will the Commission conduct the review?

The provisions of the MSA Act require, at least, that the scope of the review recommend whether the regimes in their current form should continue to apply or not.

In undertaking this Review, the Commission will seek to determine whether or not there is sufficient justification to retain access and price regulation for South Australian ports. The Commission will examine if market or regulatory environments have changed since the time of the previous review, or are likely to change during the next five-year period, to determine the appropriateness of regulation.

If the Commission recommends ongoing price regulation is necessary, it will seek to determine what form of price regulation is appropriate. A key focus for the Commission will be determining if any price increase is adequately justified and is not as a consequence of market power being misused by ports operators.

The Commission will give close consideration to the views of stakeholders and their experiences with the regimes and expectations for the future.

Guiding principles and approach

The Commission will make all its decisions based on a 'first principles' perspective. Primary among those is whether regulation is necessary at all. Regulation should only be imposed where it can be clearly demonstrated that it is able to achieve outcomes more efficiently than would be achieved by alternatives, hence, options will include removing regulation.

The Commission will adopt an outcomes and risk-based approach. An outcomes-based approach means focusing on what a well-functioning market

would deliver. It does not focus on prescribing business inputs or outputs. Rather, it seeks to establish broad principles against which suppliers' conduct can be judged.

A risk-based approach to regulation promotes evidence-based solutions that focus on prioritising effort to achieve the most important regulatory outcomes. It can improve productivity and efficiency. However, it does not seek to eliminate all risks. Rather, it uses a risk assessment methodology to identify risks in meeting regulatory outcomes and develop appropriate risk-mitigation strategies.

Stakeholder input

The Commission is seeking feedback from all stakeholders with an interest in the regulated ports sector. This includes port and port facilities operators, transport and supply chain companies, other industry participants, policy makers and academics. Stakeholders will have several opportunities to provide input into the review process.

This Issues Paper is the first opportunity for stakeholders to raise matters that are important to them and to provide the Commission with responses to key questions. In addition to requesting written submissions, the Commission will meet with key stakeholders during the review to ensure that it has a wide range of views and evidence to inform its considerations.

Issues

While not seeking to limit the issues that can be raised by stakeholders, the Commission would be assisted by receiving advice on the following matters.

Is regulation necessary?

South Australia has a state-based Access Regime. A key question for the coming review will be to test the evidence to justify its continuation. Since the commencement of the access regime, the Commission has not been referred any access disputes for conciliation/arbitration. The Commission is mindful that this does not necessarily indicate that there is no evidence of misuse of market power, or that there is no need for the access regime to continue.

Q1: Is there any evidence of misuse of market power by providers of regulated port infrastructure services?

Q2: Is there evidence of the Access Regime promoting greater competition in related maritime markets?

Regulation should only be imposed where it can be clearly demonstrated that it is able to achieve outcomes more efficiently than would be achieved by alternatives (including no regulation), bringing the greatest net benefit to the community.

Q3: Has economic regulation been successful? How should this success be measured?

Q4: For those parties that have negotiated access, did the presence of the Access Regime facilitate commercial negotiations?

Q5: What are the benefits of retaining regulation? What are the risks (if any) if it was to expire?

Q6: What are the current costs of the pricing and access regimes (for example, costs of compliance and administration)?

Q7: Are there alternative approaches to achieving the intent of the regimes that are appropriate at this time?

The Commission will need to understand the impacts of any recent changes in the market or possible changes in the near future that may impact on the Commission's review of the need for continued regulation.

Q8: Are there any key industry developments in the foreseeable future that may impact the need for, or type of, regulation?

Improving regulation

The ports industry may have evolved since the 2012 Ports Pricing and Access Review and, if the Commission determines regulation is still required, it is important that the regimes are still suitable. To this end the Commission will consider improvements and alternatives to the current pricing and access regimes.

An example of industry change is the level of transport industry consolidation, such as port

operators becoming integrated logistics providers, which has occurred both globally and nationally.

Q9: Are any changes to the regimes required to ensure they are suitable and flexible enough to cover trends and changes in the industry?

There are different regulatory access regimes across the transport supply chain. There may be a case for increased consistency between them.

Q10: Is there a need for more regulatory consistency and/or clarity across the supply chain and transport modes?

There is ports-related infrastructure which is not covered by the regime (for example, bulk storage facilities at the port). If those infrastructure services that are not regulated are essential to the overall transport supply chain, and it is not economic to have competing suppliers of those services, there may be a case for regulation of those services. Likewise, if competitive pressures exist on infrastructure services that are currently regulated, there may be a case for removing those services from the regime.

Q11: Is the level and type of infrastructure covered by the regimes suitable, having regard to the level of competition for the infrastructure services? Should there be inclusions or exclusions?

Other issues

The Access Regime has been certified as an effective state-based access regime by the responsible Commonwealth Minister. This certification is due to expire in 2021, which is within the five-year period in scope of this review. While a decision to seek re-certification is a State and Commonwealth Government matter, and is considered to be outside the scope of this review, the effort required to undertake re-certification may be a relevant factor to consider when weighing up the costs and benefits of the various regulatory options relevant to this review.

Additionally, the Commission welcomes stakeholder comment on any other issues relevant to this review.

Q12: What other issues are relevant to the decision to continue, or discontinue, regulation?

Next steps

Following consideration of the issues raised through the consultation period, the Commission will release a Draft Report. Following that report will be a second consultation period which will contribute to the Final Report.

The key timeframes for the upcoming stages of this review are provided below.

Stage	Timing
Draft Report released	April 2017
Public consultation	April - June 2017
Final Report released	September 2017
Applies from	31 October 2017

Further information

Any queries relating to this consultation should be directed to:

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