ESCOSA ports pricing and access review 2022

Gypsum Resources Australia Submission

1 February 2022

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1 Executive Summary

Gypsum Resources Australia (**GRA**) welcomes this review of the ports pricing and access regime.

The access regime in the *Maritime Services (Access) Act 2000* (**MSA Act**) is now more than two decades old and in need of a refresh. GRA considers that this review presents an important opportunity to update the regime in order to bring it into line with current regulatory best practice.

GRA relies on the MSA Act regime to ensure access to essential port infrastructure on fair commercial terms. The Port of Thevenard represents a critical bottleneck in GRA's supply chain – and one that is controlled by monopoly service providers. A well-functioning access regime is key to providing certainty around access and constraining the exercise of monopoly power.

GRA has recently had first-hand experience navigating the access regime, from the access proposal stage through to arbitration. Although GRA ultimately obtained a satisfactory outcome in the arbitration, our experience has exposed flaws in the access regime. It took more than two years and significant resources to resolve GRA's request for renewal of its access arrangements. It is a process that GRA does not wish to repeat every time it seeks a renewal of its port access arrangements.

Based on this recent experience, GRA considers that the key shortcomings in the access regime include:

1 **Lack of effective mechanisms to address information asymmetry**. From the outset of negotiations, GRA was at a significant disadvantage due to information asymmetry. This was not addressed until well into the arbitration phase, when the access provider could be compelled to produce relevant information.

2 **Uncertainty around process and timeframes for negotiation**. The MSA Act does not impose clear obligations on the access provider to submit a proposal in response to an access request, provide information in support of its proposal or respond to information requests. There are also no timeframes around any of these process steps. This creates a high degree of uncertainty for access seekers around the time required for negotiation of access arrangements. Where an access seeker faces commercial imperatives to finalise access arrangements within a certain period, this uncertainty and absence of any statutory timeframes can create additional leverage for the access provider in negotiations.

3 **Limited powers for ESCOSA**. ESCOSA has very limited powers under the access regime to address any issues that may arise in the negotiation process. For example, there are no express powers for ESCOSA to direct parties to provide information or respond to proposals.

4 **Absence of any clear pricing guidance**. The access regime provides little guidance for parties around how prices and other terms and conditions will be determined in an arbitration, creating uncertainty and scope for wide divergence in negotiating positions.

As a result of these shortcomings, there is a high risk that the current framework will lead to inefficient outcomes. Information asymmetry and uncertainty around process, timeframes and outcome is likely to deter many access seekers. GRA has been prepared to devote significant time and resources to pursuing fair terms of access through the arbitration process, but we expect that not all access seekers would have the means or inclination to do the same – indeed, we are not aware of any other party taking this path over the past two decades. If access seekers are deterred from using the negotiate / arbitrate process, there is a high risk that monopoly power will go unchecked.

Over the past two decades, the design of access regimes has evolved to address some of the issues identified above. Many access regimes now include stronger information disclosure obligations, greater clarity around the negotiation process (including timeframes) and increased powers for the regulator to monitor and intervene where necessary.

This submission includes proposals for improvements to the MSA Act regime to bring it into line with current best practice, as summarised in the table below. This includes replacing the price monitoring framework with a more comprehensive regime for information disclosure and reporting, clearer rules around the negotiation process, guidance for parties on price and non-price matters (including minimum service standards) and an enhanced role for ESCOSA. These proposals are modelled on other Australian access regimes that have recently been reviewed, amended or introduced – including the light-handed regime that applies to certain gas pipelines (Part 23 of the National Gas Rules) and the recently updated negotiate / arbitrate regime for the Dalrymple Bay Coal Terminal (**DBCT**).

Issue	Proposed solution
Information asymmetry	• Regulated service providers would be required to publish information around service availability, standard terms of access and the cost of providing access. • Information would need to be published in accordance with standards specified by ESCOSA. These standards would specify methods for reporting of financial information and rules for allocation of costs. • ESCOSA would periodically undertake a public review of the published information to ensure compliance with its standards.
Uncertainty around negotiation process and timeframes	• MSA Act should include a clear process for access providers to respond to access requests and engage in negotiations. • Access providers would be required to provide a proposal for access within 20 business days of receiving a request. Proposals would need to specify the price and other terms on which the service provider offers to provide access. • Where a party receives a request for information during the negotiation process, it would need to respond within 15 business days.
Limited powers for ESCOSA	• ESCOSA should have powers to intervene in negotiations for regulated services under the ports access regime, including to give directions regarding provision of information and make rulings on contested matters. • ESCOSA should have powers to monitor compliance with the information disclosure obligations and rules around the negotiation process, as well as any directions that it makes. • GRA also considers that ESCOSA should conduct any arbitrations and publish relevant details of its determinations.
Absence of clear pricing guidance	• The MSA Act should include a clearer set of pricing principles. This should include a clear articulation of the well-accepted principle that the price for an access service should reflect the cost of providing that service, including a reasonable return on invested capital. • Provision should also be made for ESCOSA to issue guidance around minimum service standards.

GRA looks forward to engaging with ESCOSA throughout the review around improvements to the access regime. We would be happy to meet with ESCOSA to discuss any of the proposals set out in this submission.

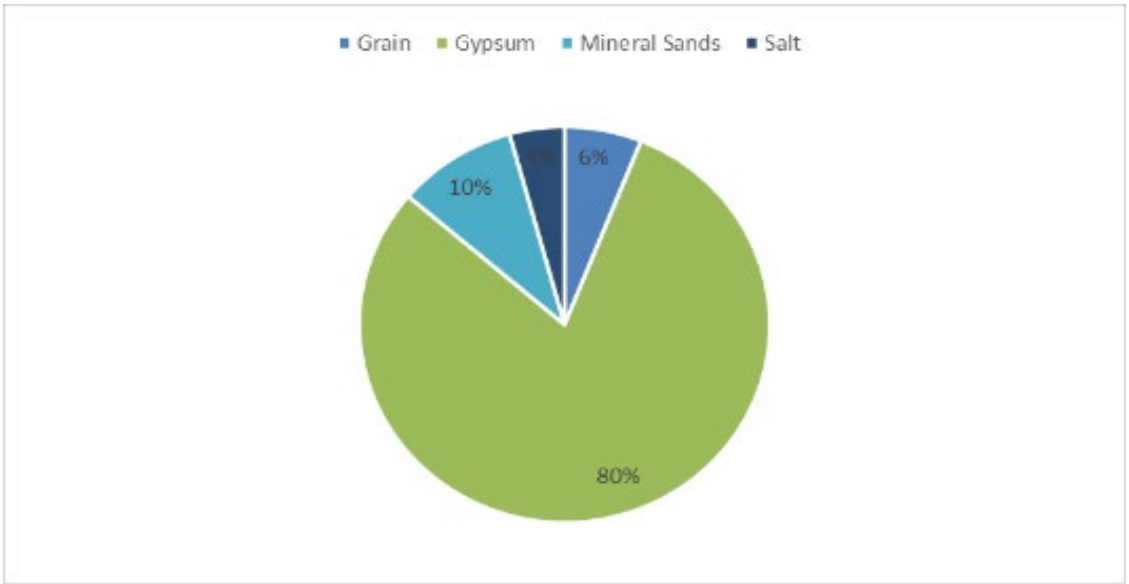
2 Background and context

2.1 GRA's credentials

GRA is Australia's largest supplier of industrial gypsum for use in plasterboard and cement production. GRA employs some 75 people directly in its mining and administration groups whilst employing an estimated further 40 direct contractors (rail, stevedoring, and trucking). GRA is a 50/50 Joint Venture between leading Australian building material companies CSR and USG-BORAL.

GRA is the largest user of the Port of Thevenard and typically moves approximately 2 million tonnes of gypsum through Thevenard each year. For example, in calendar year 2020, GRA accounted for approximately 80% of Thevenard throughput, by tonnage (1,936,191 tonnes of gypsum).

Figure 1: Throughput by product at Thevenard CY2020



Source: Flinders Ports.

2.2 A well-functioning access regime is critical to our business

GRA's business is focused around logistics. Gypsum is a low value product, which is mined close to the Port of Thevenard. For GRA's gypsum to be competitive, it is vital that its logistics and handling arrangements are efficient.

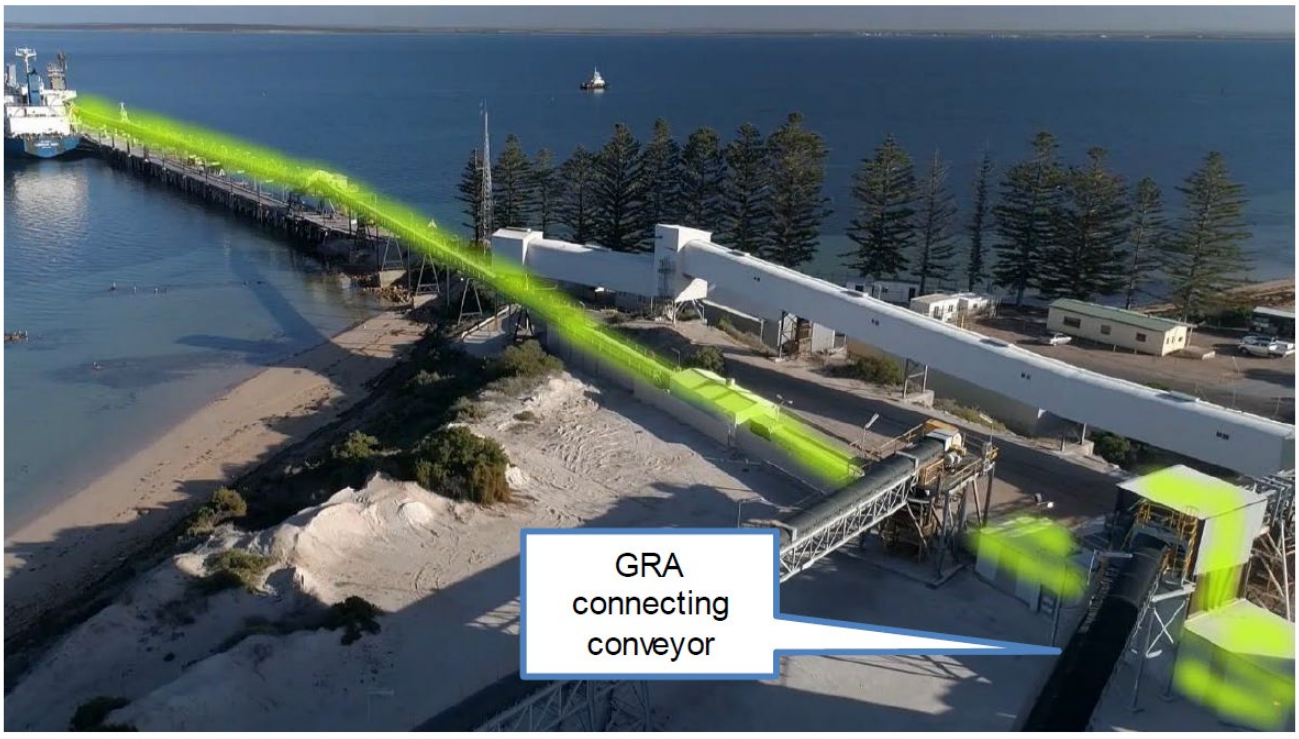
The Port of Thevenard represents a critical bottleneck in GRA's logistics chain. The remoteness of GRA's mining operations and high cost of land transport to other ports mean that GRA has no economic alternative for transporting gypsum to its customers, other than to use the bulk handing facilities and other port infrastructure at Thevenard. The bulk handling facilities at Thevenard are controlled by a vertically integrated monopoly service provider (Viterra), while the wharf, channels and other port infrastructure are controlled by the monopoly port landlord (Flinders Ports).

GRA has made substantial sunk investments in complimentary infrastructure at the Port of Thevenard – including train unloading facilities, a conveyor to transfer gypsum from the rail line to GRA's stockpiles (GRA leases land at Thevenard for stockpiling), and a separate conveyor to transfer gypsum from the stockpiles to the main conveyor belt (see Figure 2 and Figure 3 below) – creating a risk of 'hold-up' by the monopoly access providers.

A well-functioning access regime is therefore critical to the viability of our business. We rely on the access regime to provide certainty around access rights and constrain the exercise of monopoly power.

Figure 2: GRA stockpile area at the Port of Thevenard

Figure 3: GRA connecting conveyor infrastructure



2.3 GRA's recent experience with the access regime

GRA has recently had first-hand experience attempting to negotiate terms of access for monopoly loading services at the Port of Thevenard, before seeking recourse to arbitration under the MSA Act. Although GRA is a long-term user of the loading facilities at Thevenard, its access agreements are for a finite term. GRA needs to periodically renew and renegotiate the terms of access each time its agreement approaches expiry.

A summary of GRA's recent experience is set out in the confidential attachment to this submission. Our experience provides a stark illustration of what economists refer to as the "hold-up problem".[1] At least during the negotiation phase, there was little that GRA or ESCOSA could do to address this risk of hold up – partly because the access provider could not be compelled to provide a substantiated proposal or respond to requests for information in a timely manner.

Although GRA ultimately obtained a satisfactory outcome in the arbitration, our experience has exposed shortcomings in the regime. It took more than two years and significant resources – including legal / expert / arbitrator costs and diversion of internal resources – to resolve GRA's request for renewal of its access arrangements. It is a process that GRA does not wish to repeat every time it seeks a renewal of its port access arrangements.

Given how critical port access is to our business, GRA has been prepared to devote significant time and resources to pursuing fair terms of access. However we expect that not all access seekers would have the means or inclination to do the same, and nor should they have to. The access regime should promote efficiency in both process and outcome.

This submission provides some proposals for improvements to the regime.

3 Assessment of the current access and pricing regime

ESCOSA has asked whether the access regime provides "*an appropriate framework for market participants to negotiate competitive and efficient outcomes*"?

GRA considers that a negotiate / arbitrate framework is broadly appropriate. The access regime should encourage the operator and customer to reach agreement on access terms in the first instance, with arbitration available as a 'back-stop' to resolve disputes.

However our recent experience has highlighted material deficiencies in the design of the MSA Act negotiate / arbitrate framework which limit its effectiveness. Our experience has been that the MSA Act framework does not facilitate or encourage effective negotiations, because it does not effectively address information asymmetry or the risk of hold-up. If negotiations cannot be effective, parties tend to be driven towards a costly and adversarial arbitration process, rather than seeing this as a back-stop or last resort.

As a result of these deficiencies, there is a high risk that the current framework will lead to inefficient outcomes. For parties that are prepared to proceed through to arbitration, the process of negotiating (or renewing) access arrangements is likely to be expensive and time-consuming. However perhaps more concerning is the likelihood that many parties will be deterred from utilising the access regime and will instead simply accept the monopolist's terms of access. Faced with high process costs, uncertainty around timeframes, and limited guidance around potential arbitration outcomes, some parties may feel compelled to accept terms of access that do not reflect those that would prevail in a competitive market (e.g. monopoly prices and/or inefficient operating practices).

Some of the key deficiencies in the current framework are discussed below.

[1] For example: Daryl Biggar, 'Is Protecting Sunk Investments by Consumers a Key Rationale for Natural Monopoly Regulation?'

3.1 Information asymmetry

Information asymmetry is a well known barrier to effective negotiations. Much of the information that is necessary for effective negotiations around price and service levels – including information relating to the cost of supply; asset value, age and condition; projected capital expenditure requirements; and operational and technical requirements for service delivery – will be held by the service provider. If access seekers don't have access to this information, negotiations are unlikely to lead to a fair or efficient outcome.

The MSA Act does little to address information asymmetry.

Section 12 allows access seekers to request certain information prior to submitting an access proposal, but this is largely focused around rules and technical requirements that the access seeker would need to comply with in using the facility. The only price-related information that may be requested under section 12 is in the form of regulatory accounts, which are themselves of limited utility – in particular:

- under ESCOSA's current guidelines, these accounts are not required to include key information relevant to a price negotiation, such as asset values and forecast costs / volumes; and
- there is no requirement for the service provider to explain or justify its underlying assumptions and methodologies for cost allocation, etc.

Once parties are into the negotiation phase, there is no formal process for an access seeker to obtain information relating to a service provider's proposal, nor is there any obligation on the service provider to provide information in support of its proposed terms of access. An access seeker can only request information and hope that the access provider will respond to its request.

GRA's experience has been that service providers are reluctant to provide information voluntarily or in response to informal requests during the negotiation phase. In our experience it is not until the arbitration phase, when service providers can be compelled to produce information[2], that information asymmetry is addressed.

The position under the MSA Act may be contrasted with other Australian access regimes, including the National Gas Rules (**NGR**) and DBCT regime. As discussed in section 4.1 below, these other regimes include requirements for the service provider to provide information in support of its proposals, as well as formal mechanisms for the access seeker to request additional information.

GRA considers that formal mechanisms – like those in the NGR and DBCT frameworks – are needed to compel the production of information during negotiations. In section 4.1 below, we propose amendments to the MSA Act to include formal mechanisms to address information asymmetry.

3.2 Uncertainty around timeframes

The MSA Act does not impose timeframes around the provision of access proposals or provision of information during negotiations. This creates a high degree of uncertainty around the timeframe for negotiation of access arrangements and provides scope for access providers to slow down the negotiation process by delaying provision of information and proposals.

Where an access seeker faces commercial imperatives to finalise access arrangements within a certain timeframe (e.g. if current arrangements are approaching expiry), this uncertainty and absence of any statutory timeframes can create additional leverage for the access provider in negotiations. Access providers may be able to put pressure on the access seeker to agree uncommercial terms, by 'running down the clock'.

[2] MSA Act, s 26(1)(b), s 27.

Again, the lack of procedural rules in the MSA Act may be contrasted with other access regimes, including the NGR and DBCT regimes:

- Under the DBCT undertaking, the service provider must provide an 'Indicative Access Proposal' as soon as practicable and in any event within 20 business days following receipt of an Access Application.[3] This Indicative Access Proposal needs to be accompanied by a substantial amount of information relating to the cost of supply.[4]

- Under Part 23 of the NGR, a service provider must make an access offer within 20 business days of receiving an access request (unless it is required to carry out further technical investigations in relation to the access request, in which case a longer timeframe applies).[5] Where the service provider receives a request for information relating to its access offer, it must comply with the request within 15 business days.[6]

GRA considers that similar procedural rules should be included in the MSA Act. Our experience has been that, even where an access seeker initiates negotiations early, this process can become protracted and unproductive if the access provider is able to delay the provision of information. In the absence of clear procedural rules, access seekers face a high degree of uncertainty around the timeframe for securing access arrangements.

3.3 Limited scope for ESCOSA to intervene

ESCOSA's powers under the MSA Act are too limited. Where negotiations break down due to a failure by one party to provide a proposal and/or supporting information, ESCOSA is unable to address this – ESCOSA does not have the power to direct parties to take steps such as making an access offer or providing supporting information. There is also no provision for ESCOSA to provide guidance to parties during negotiations on key matters of principle, such as appropriate pricing methodologies.

GRA considers that this a major deficiency in the access regime. Where negotiations concern *regulated* services, the regulator should have a greater role in overseeing negotiations and intervening where necessary to ensure they are effective. Where parties fail to comply with their obligations, ESCOSA should be empowered to take enforcement action.

GRA also considers that ESCOSA should have a role in the arbitration of access disputes. In most access regimes for regulated services, the regulator will arbitrate access disputes – this is the case under the national access regime (where the ACCC is the arbitrator)[7], the Queensland access regime (where the QCA is the arbitrator)[8], the NSW water and rail access regimes (where IPART may act as the arbitrator)[9], and the regime for regulated gas pipelines (where the AER is the dispute resolution body)[10]. GRA considers that it would be appropriate for ESCOSA to arbitrate access disputes under the MSA Act, given that it has the technical expertise in economic regulation and the resources necessary to analyse information relating to the cost of supply and pricing.

[3] DBCT Access Undertaking, section 5.5(a).

[4] See Schedule H of the DBCT Access Undertaking.

[5] NGR, rule 560(2).

[6] NGR, rule 562(3).

[7] CCA, s 44V.

[8] QCA Act, s 117.

[9] Under Part 4A of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), where a dispute is referred to IPART for arbitration, IPART may act as arbitrator to hear and determine the dispute. This applies to disputes referred to IPART under the NSW rail access regime (Part 6 of the NSW Rail Access Undertaking) and disputes arising under the water infrastructure access regime (*Water Industry Competition Act 2006* (NSW), s 40).

[10] Under the National Gas Law, the AER is the 'dispute resolution body' for Chapter 6 access disputes relating to 'scheme pipelines' (i.e. those pipelines that are covered and subject to either 'full' or 'light' regulation).

3.4 Limited guidance around price methodology and non-price matters

There is very little guidance for parties around how prices and other terms and conditions will be determined in an arbitration under the MSA Act. This creates uncertainty and scope for wide divergence in negotiating positions.

Section 32 states that an arbitrator "*should take into account*" certain principles in deciding on the terms of an award. However section 32 is simply an adaptation of the relevant clause of the Competition Principles Agreement (**CPA**).[11] As the recent High Court decision in *Port of Newcastle v Glencore* demonstrates, there is considerable scope for argument around the proper interpretation and application of these CPA principles.[12]

Beyond these high-level principles, there is very little to guide parties in negotiations around the terms of access. There is no published guidance from ESCOSA, nor is there any precedent available from past arbitrations, since these arbitrations are conducted in private.

In GRA's experience, negotiations can be hampered by a lack of clear guidance. In the absence of 'guide posts' for negotiations, parties may adopt widely divergent views on key matters of principle. With no mechanism to resolve these points of principle during negotiations (e.g. no scope for ESCOSA to make a ruling on matters of principle), there is a high likelihood that negotiations will fail and parties will be pushed into a costly and adversarial arbitration process.

4 Proposed improvements

4.1 Replace the price monitoring framework with a more comprehensive regime for information disclosure and reporting

GRA considers that the current price monitoring framework does little to aid negotiations or constrain the exercise of monopoly power. In our view, the monitoring regime should be replaced, or at least supplemented, with a fit-for-purpose information disclosure framework which addresses the problem of information asymmetry.

Over the past two decades, measures have been developed in other access regimes to address information asymmetry. These include:

1 **Obligations to periodically publish information**. In some negotiate / arbitrate regimes, service providers are required to publish information relevant to pricing and service availability periodically (usually annually). For example, gas pipeline operators subject to 'light handed' regulation under Part 23 of the NGR are required to annually publish a range of financial information (including asset values derived by applying an AER-determined methodology) and service availability information.[13]

2 **Obligations to provide information with an access proposal**. Under the DBCT access undertaking, the service provider is required to provide a substantial amount of information with an 'Indicative Access Proposal' or where charges are to be reviewed under an existing access agreement. This includes information relating to the forecast capital base, forecast expenditure, forecast remediation costs, operating expenditure and the cost of capital.[14]

[11] Competition Principles Agreement – 11 April 1995 (as amended to 13 April 2017), cl 6(4)(i).

[12] *Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39. This case focused on interpretation of the requirement in Part IIIA of the CCA that the ACCC (as arbitrator of access disputes under Part IIIA) take into account "the value to the provider of extensions (including expansions of capacity and expansions of geographical reach) whose cost is borne by someone else" (CCA, s 44X(1)(e)). The High Court noted (at [117]) that this requirement was adapted from cl 6(4)(i)(iii) of the CPA, which is also reflected in s 32(1)(c) of the MSA Act.

[13] NGR Rule 555; AER Financial Reporting Guideline for Non-Scheme Pipelines, December 2017.

[14] DBCT Access Undertaking, section 5.5(d)(7), section 11.5(b) and Schedule H.

3 **Obligations to respond to requests for information during negotiations**. In addition to regular disclosure obligations noted above, Part 23 of the NGR also includes an obligation on service providers to provide "access offer information" if this is requested during negotiations.[15] "Access offer information" includes:[16]

   (a) information about the method used to determine the price in an access offer and the inputs used in the calculation of the price; and

   (b) information regarding the costs associated with the provision of a pipeline service sought by a prospective user.

   Substantial civil penalties can apply where a service provider fails to comply with a request to provide access offer information.[17]

GRA considers that similar measures should be incorporated into the ports access regime.

A new framework for periodic publication of information could potentially leverage off the existing requirements for regulated operators to prepare and maintain accounts (section 42 of the MSA Act). However in order to be effective, this existing framework would need to be amended in the following ways:

1 The range of information covered by the regulatory accounts should be reviewed and expanded to cover all information that it is likely to be relevant to access negotiations. One clear omission from the information that operators are currently required to record in their regulatory accounts is the value of assets used in the provision of regulated services. Asset values are likely to be relevant to any price negotiation and should therefore be reported periodically by regulated operators, based on methodologies determined by ESCOSA.

2 ESCOSA's guidelines should similarly be reviewed and expanded to cover methods for asset valuation and cost allocation.

3 Regulated operators should be required to *publish* their regulatory accounts, not just maintain them for inspection by ESCOSA. Regulated operators should also be required to disclose the basis of preparation of their regulatory accounts, and demonstrate that this is in accordance with the methodologies prescribed by ESCOSA (including methodologies for asset valuation and cost allocation).

4 ESCOSA should periodically review the disclosures made by regulated operators for compliance with its guidelines. This review should be a public process, in which all stakeholders have an opportunity to understand and scrutinise the basis of preparation of the regulatory accounts.

These recommendations are consistent with current regulatory best practice. As noted above, under Part 23 of the NGR, gas pipeline operators are required to periodically publish financial and operational information in accordance with AER guidelines.[18] The AER guidelines include prescribed methodologies for asset valuation (the 'recovered capital method') and cost allocation.[19] The AER

[15] NGR, rule 562(2) and (3).

[16] NGR, rule 549.

[17] Rule 562(3) is classified as a "tier 1 civil penalty provision", attracting penalties up to $10 million per breach.

[18] For example, information disclosure for the Moomba to Adelaide Pipeline System can be found here: https://epicenergy.com.au/moomba-to-adelaide-pipeline-system/

[19] AER, Financial Reporting Guideline for Non-Scheme Pipelines, December 2017; AER, Financial Reporting Guideline for Light Regulation Pipeline Services, October 2019.

monitors compliance by pipeline operators with the reporting and publication requirements, and the ACCC has also reviewed the operators' disclosures.[20]

Recommendation 1: Information disclosure by regulated operators

- Regulated operators should be required to publish information around service availability, standard terms of access and certain financial information specified by ESCOSA.
- Information would need to be published in accordance with standards specified by ESCOSA. These standards would specify, among other things, methods for reporting of financial information (including asset values) and rules for allocation of costs.
- ESCOSA would periodically undertake a public review of the published information to ensure compliance with its standards.

4.2 Negotiation process

Regulatory frameworks have also evolved over the past two decades to address the risk of hold-up and delay in the negotiation process. Again, the NGR and DBCT frameworks are recent examples of where frameworks have been developed or amended with this risk in mind. These frameworks include clear procedural rules for the negotiation process, including timeframes for provision of proposals and information by the access provider.

Relevant provisions of the QCA-approved framework for DBCT include:

1 **Pre-application information disclosure**. Prior to submitting an access application, an access seeker may request certain information from the operator relating to the cost of supply, including information relating to the value of the capital base, depreciation, capital expenditure and the cost of capital.[21] Where it receives a request, the operator must provide the requested information within **10 business days**.[22]

2 **Provision of access proposal**. Upon receipt of an access application, the operator must provide an 'indicative access proposal', setting out the proposed terms and conditions of access and other information for the purpose of informing negotiations. This proposal must be provided as soon as practicable and in any event within **20 business days** following receipt of the application (or, if additional information has been requested in relation to the application, within 20 business days of receiving that additional information). Further detailed cost information (including forecast costs, capital base values and demand) must be provided with the proposal.[23] The operator may seek additional time to provide its proposal if needed, but any request for additional time may be disputed by the access seeker, with any such dispute to be resolved by the regulator.[24]

3 **Negotiations**. If the access seeker wishes to progress negotiations, it must notify the operator within 30 business days and then initiate negotiations within 10 business days.

Similar procedural rules reside in Part 23 of the NGR, including timeframes for provision of access offers (usually 20 business days) and for responding to requests for information (15 business days).

[20] ACCC, Gas Inquiry 2017-2020: Interim Report, July 2019, section 6.3.

[21] The cost information that may be requested prior to submitting an access application is listed in Schedule G of the DBCT Access Undertaking.

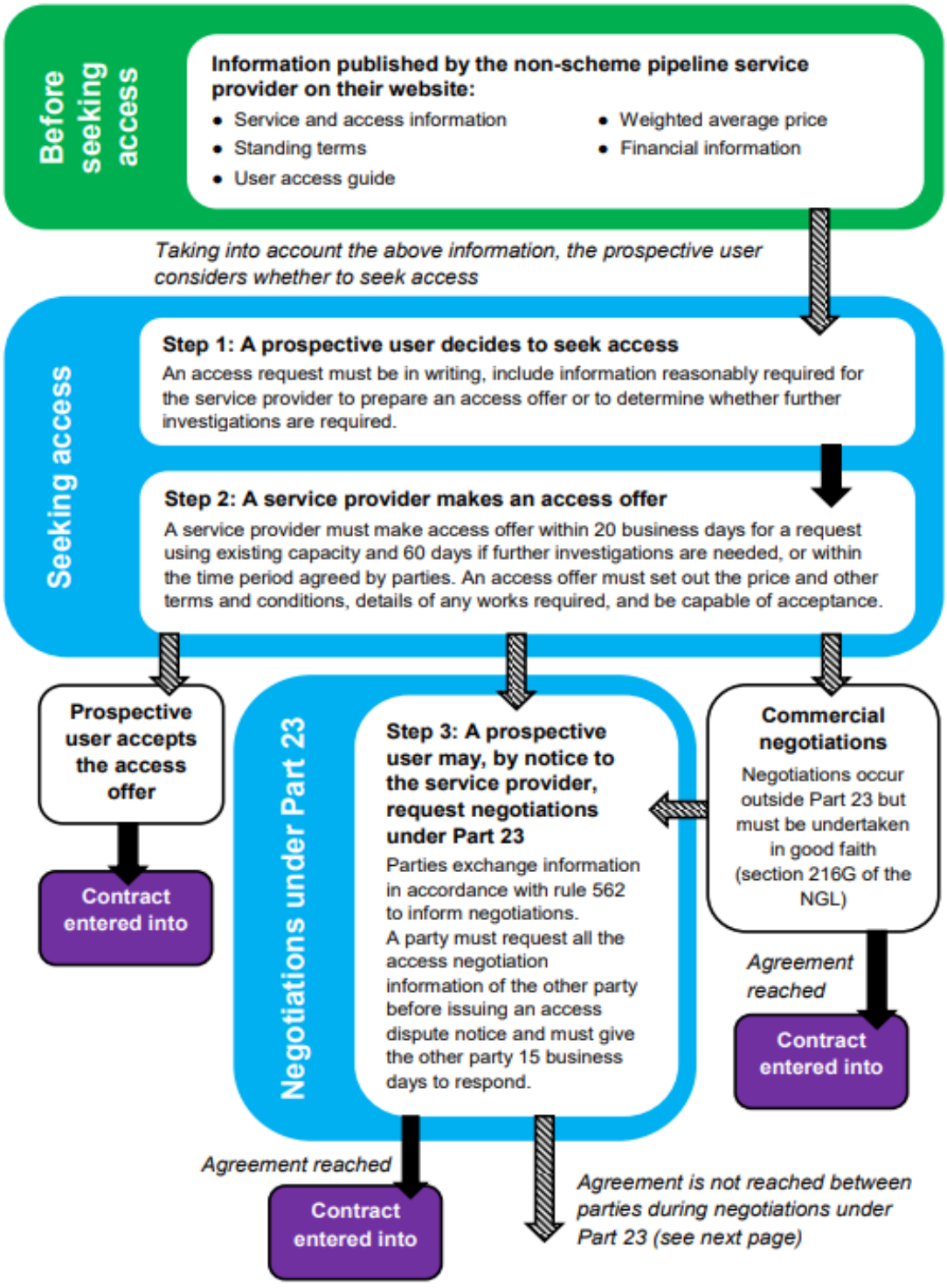
[22] DBCT Access Undertaking, cl 5.2(c).

[23] DBCT Access Undertaking, cl 5.5 and Schedule H.

[24] DBCT Access Undertaking, cl 5.5(c).

Part 23 also includes an 'access information standard' which applies to all information provided with an access offer or during negotiations.[25] Civil penalties apply for failing to comply with the access information standard or the other procedural rules. Figure 1 below, which is reproduced from an AER guidance document, summarises some of the key procedural rules.

Figure 4: Negotiation process under Part 23 of the National Gas Rules



Source: Australian Energy Regulator.

[25] NGR, rule 551.

GRA considers that the ports access regime should include similar procedural rules for negotiations. Ideally, these procedural rules would be included in the MSA Act itself. Alternatively, the MSA Act could confer powers on ESCOSA to issue binding guidelines for the access negotiation process, and these guidelines would specify the relevant timeframes, information standards and other procedural rules.

Recommendation 2: Negotiation process rules

- MSA Act should include a clear process for access providers to respond to access requests and engage in negotiations.
- Access providers would be required to provide a proposal for access within 20 business days of receiving a request. The proposal would need to specify the price and other terms and conditions on which the service provider offers to provide access.
- Where a party receives a request for information during the negotiation process, it would need to respond within 15 business days.

4.3 Role of ESCOSA

GRA considers that ESCOSA's powers under the MSA Act should be expanded. ESCOSA should be able to intervene where negotiations are breaking down, either due to a failure by one party to provide information or due to disagreement on key matters of principle.

These types of powers exist in other access regimes. For example, under the Queensland access regime, an access provider or access seeker may ask the QCA for advice or directions regarding the statutory obligations on access providers to give information to access seekers during the negotiation process.[26] The QCA can also make 'rulings' about how it intends to treat a matter relating to access to a declared service for the purpose of making an arbitration determination.[27] These rulings can address, among other things, how the QCA would approach the cost of capital and/or valuation of assets when arbitrating an access dispute.[28]

GRA would propose the following powers for ESCOSA to intervene in negotiations for regulated services under the ports access regime:

1 ESCOSA would be able to issue directions to parties regarding the provision of information during negotiations. These directions could address the types of information that must be provided, timeframes, and confidentiality. ESCOSA would be able to make directions on application of either party.

2 ESCOSA would have powers to monitor compliance with the information disclosure obligations and rules around the negotiation process, as well as any directions that it makes. ESCOSA would be able to issue infringement notices and impose penalties for non-compliance.

3 ESCOSA would be able to make rulings in relation to contested matters, indicating how these matters would be approached in an arbitration determination. ESCOSA would be able to make a ruling on application of either party, if it considers it appropriate to do so.

GRA also considers that ESCOSA should arbitrate any access disputes. Access disputes will often concern highly technical matters of economic regulation – such as the appropriate rate of return, asset

[26] QCA Act, s 101(5).
[27] QCA Act, Part 5, Division 7.
[28] Explanatory Notes to the Queensland Competition Authority Bill 2008.

valuation and cost allocation. In some cases, large amounts of technical expert and factual evidence will be involved. GRA considers that ESCOSA is the body that is best placed to resolve these disputes, given its expertise in economic regulation and investigative resources. Moreover, if ESCOSA were to arbitrate access disputes, a body of regulatory precedent could be built up over time, providing guidance to parties to any future access disputes. As noted above, in most other access regimes – including the national access regime and the Queensland and NSW regimes – the regulator is given this role.

Recommendation 3: ESCOSA powers

- ESCOSA should have powers to intervene in negotiations for regulated services under the ports access regime, including to give directions regarding provision of information and make ruling on contested matters.
- ESCOSA should have powers to monitor compliance with the information disclosure obligations and rules around the negotiation process, as well as any directions that it makes. ESCOSA would be able to issue infringement notices and impose penalties for non-compliance.
- GRA also considers that ESCOSA should conduct any arbitrations and publish relevant details of its determinations.

4.4 Guidance around price methodologies and minimum service levels

GRA considers that clearer guidance should be provided for negotiations around price and non-price terms of access.

GRA recognises that there should be flexibility for parties to negotiate terms of access which best accommodate their commercial circumstances. However at the same time, it is important that parties are given 'guide posts' for their negotiations, in the form of basic principles for determining the terms of access for regulated services.

The MSA Act currently just provides that regulated services are to be provided on terms agreed between the operator and the customer, or if they do not agree, on "fair commercial terms" determined by arbitration.[29] There is limited guidance in the MSA Act on how parties to a negotiation should arrive at "fair commercial terms" for a monopoly service.

Over the past two decades, a body of regulatory precedent and practice has developed around pricing for regulated access services. It is now widely accepted by Australian regulators that access prices for regulated monopoly infrastructure should reflect the efficient cost of service provision, including an appropriate return on capital reflecting the risk borne by the service provider. In many cases, cost-based methods for determining access prices (usually a "building block method") are codified in legislation, regulations, rules or Ministerial orders.[30] In other cases, cost-based methods are either committed to by service providers or adopted by regulators as a matter of practice.[31]

GRA considers that this widely accepted principle should now be codified in the ports access regime, to provide guidance for parties negotiating access prices for regulated services.

[29] MSA Act, s 11.

[30] For example: National Electricity Rules, Chapter 6 and 6A; National Gas Rules, Part 9; Port of Melbourne Pricing Order.

[31] For example, in its recent price determination for Melbourne Water, the Essential Services Commission states: "*similar to other state and national regulators, our economic regulatory approach: … uses the building block method to estimate a water corporation's revenue requirement*".

This could potentially be done in a number of ways, including:

1 A new pricing principle for regulated services could be included in section 11 of the MSA. This new principle could potentially be modelled on rule 569(3)(a) of the NGR, as follows:

> *The price for access to a regulated service should reflect the cost of providing that service, including a commercial rate of return that is commensurate with the prevailing conditions in the market for funds and reflects the risks the service provider faces in providing the regulated service.*

2 ESCOSA could issue pricing guidelines for regulated services, which could specify a cost-based methodology and provide guidance on key parameters (e.g. rate of return and cost allocation). The MSA Act could be amended to require access prices for regulated services to be consistent with these published guidelines, unless parties agree to depart from the guidelines. GRA notes that the ACCC has issued guidelines for access undertakings submitted under Part IIIA of the CCA, which include guidance on pricing matters.[32]

GRA considers that provision should also be made for ESCOSA to specify minimum service standards for regulated services. These could include, for example, minimum plant availability requirements (or maximum shutdown periods) and capacity allocation principles.

Recommendation 4: Guidance for commercial negotiations

- The MSA Act should include a clearer set of pricing principles. This should include a clear articulation of the well-accepted principle that the price for an access service should reflect the cost of providing that service, including a reasonable return on invested capital.
- Provision should also be made for ESCOSA to issue guidance around minimum service standards.

[32] ACCC, Part IIIA access undertaking guidelines, August 2016. See section 4.6 of the guideline, which refers to cost-based methods, including the building block method.

Confidential Attachment: GRA's recent experience