

1 February 2022

Submissions — South Australian Ports Pricing and Access Review
ESCOSA
GPO Box 2605
Adelaide SA 5001

Via electronic submission



Dear Sir / Madam

RE: South Australian Ports Pricing and Access Review

On behalf of the South Australian Freight Council's (SAFC) Executive Committee and Membership I thank you for the opportunity to make a submission on the 2022 South Australian Ports Pricing and Access Review.

As you may be aware, SAFC is the State's peak, multi-modal freight and logistics industry group that advises all levels of government on industry related issues. SAFC represents road, rail, sea and air freight modes and operations, freight services users and assists the industry on issues relating to freight logistics across all modes.

SAFC has submitted to ESCOSA on each of its previous five yearly reviews of the port access and pricing regime in 2007, 2012, and 2017. On each occasion SAFC has submitted that whilst there is some potential for the misuse of market power there is no evidence of it occurring, and therefore the current light-handed regime should continue unchanged.

SAFC has also participated in the recent NCC recertification process, and notes that the NCC found that the *'SA Ports Access Regime meets the requirements for certification and is therefore an effective access regime'*.

However, the NCC process did identify some previously unrevealed disquiet with elements of the regime given changes to Flinders Ports internal structure and business activity areas over the intervening period, including enhanced vertical integration. On this basis, the NCC made a number of recommendations to ESCOSA that should be explored through this review process.

Consistent with our submissions to the NCC; SAFC still supports retention of the access regime on the basis that there is potential for misuse of market power, but no substantiated evidence of it occurring. However, given changes to Flinders Ports business structure and operations; including the development of Flinders Warehousing and Distribution (FWD) and Flinders Logistics (FLOG), SAFC believes that a fuller review with investigation of additional elements such as information ring fencing and confidentiality provisions should occur rather than a simple retain/remove decision.

SAFC further supports retention of the regime on the basis that removal would make the regulated services eligible to be declared under Part IIIA of the Competition and Consumer Act 2010 (Cth), removing local jurisdiction in determining the best regulatory regime to cover port access and pricing issues and placing the ACCC in the position of regulator. SAFC's observance of other member issues under the ACCC's remit suggests that this would be severely negative outcome both for our membership and the South Australian industry due to extreme timeframes for decision making by the ACCC (often taking several years to complete).

Current Key Elements of the Regime & ESCOSA's Role

The current Access Regime has three key elements/principles:

1. Access on fair commercial terms
2. Negotiation in good faith
3. Dispute resolution procedures, moving from conciliation through to arbitration.

SAFC supports the retention of these three elements as the backbone of the regime. They clearly outline the Government and Regulator's expectations in regards to port access, and provide an escalating procedure for dispute resolution in the event it is required. This meets industry's desire for a light-handed regime, but with the option for parties to engage the regulator in a dispute process if agreement cannot otherwise be achieved. This keeps the costs of regulation to industry low, while maintaining a level playing field.

ESCOSA has five key roles in relation to the regulation of South Australian ports:

1. It monitors and enforces compliance with the MSA Act. (s8A)
2. It keeps maritime industries under review with a view to determining whether regulation (or further regulation) is required. (s9(1))
3. it reviews the Access and Pricing Regimes every five years (and as part of the review process, is authorised to make a price determination as to the form of price regulation that should be adopted). (s43)
4. it conducts annual price monitoring of essential maritime services and pilotage services, in accordance with the current price determination;¹ and
5. it facilitates resolution of access disputes. (Part 3, Divisions 4 &5)

SAFC supports ESCOSA retaining the above key roles in regards to the regulation of ports in SA.

¹ <https://www.escosa.sa.gov.au/ArticleDocuments/1139/20171009-Ports-AccessAndPricingReview-PriceDetermination2017-2022.pdf.aspx?Embed=Y>

Scope of Regulated Services

SAFC notes the 'proposed dispute' between Flinders Ports and Qube² that ultimately was rejected by ESCOSA on the basis that it did not meet the definition of 'regulated services' under the MSA Act.

SAFC makes no recommendation to the Commission at this stage as to whether the scope of regulated services should change; but notes that the fact that a dispute was rejected on the basis that certain services were not deemed to be included in the regime suggests that the scope of regulated services should be examined by ESCOSA with industry input as part of this review.

NCC Findings and Recommendations to ESCOSA

Whilst the NCC found that the regime satisfied the required principles for recertification, it also accepted '*submissions that the regime may not address the risk that service providers may misuse confidential information and favour related entities*'³.

Misuse of Confidential Information

In its final report, the NCC stated that '*The Council considers that the omission of stronger ring fencing provisions applying to regulated services in the MSA Act means there is a real risk of misuse of confidential information and business plans that an access seeker may make known to Flinders Ports during negotiations for access to its services.... **To this end, the Council considers that it would be desirable for South Australia to consider introducing ring fencing and confidentiality provisions aimed at mitigating the risk of misuse of confidential information** to the MSA Act in the future and would encourage ESCOSA to consider recommending such reforms as part of its upcoming Ports Access and Pricing review*'⁴.

In reviewing all the information and submissions made to the NCC during this process, it is clear that information ring fencing would provide port access seekers with considerable comfort that their information is being used appropriately and only for the purposes for which it was provided to the port operator. It also appears (*prima facie*) to be a (relatively) low cost imposition on Flinders Ports – however SAFC requests that Flinders Ports (and any other potentially affected party such as Viterra) is given the opportunity to make separate submissions to ESCOSA on the potential cost of any information ring fencing provisions ESCOSA may consider.

On this basis, SAFC supports investigation of additional information ring fencing provisions in this review, with stakeholders being given the opportunity to comment on potential amendments to the MSA Act in ESCOSA's draft report (or potentially before in an additional information seeking step).

² September 2021 – see <https://www.escosa.sa.gov.au/ArticleDocuments/21758/20210817-Ports-Proposed-MSAAct-dispute-betweenQube-FlindersPorts-letter.pdf.aspx?Embed=Y>

³ South Australian Ports Access Regime – Draft Recommendation; National Competition Council, 2 July 2021, page 12

⁴ South Australian Ports Access Regime – Final Recommendation; National Competition Council, September 2021, page 115

Consistency in Port Coverage

Not all South Australian Ports are covered under the regime, however – as noted by the NCC – ‘*The ports for which access is regulated under the Regime have similar specifications and uses, and may reasonably be expected to be the subject of an access request*⁵’. The NCC further noted it ‘*considers it is reasonable to expect that ESCOSA will adopt a consistent approach to what is regulated and should be regulated under the Regime*⁶’.

SAFC is generally comfortable with the ports that are currently covered by the regime. We believe that ESCOSA has adopted a consistent approach to which ports are regulated, and note that industry has an opportunity in each 5 yearly review to request modifications to this list – which has resulted in changes in the past.

However, we also note the NCC’s suggestions that the regime could be expanded to include a provision for industry to apply to have a new service or port covered under the regime⁷. On the surface, this seems laudable – however we are concerned that it could be used by industry members to seek to have their competitors’ operations more heavily regulated. Even when ultimately unsuccessful, this can result in costs for the business and time lost that could otherwise have been directed to more profitable activities.

Should such a provision be recommended by ESCOSA, it should contain sub-provisions whereby applications can be refused if they appear vexatious or designed to harm a competitor.

There is also a legitimate question as to what grain loading infrastructure and what grain ports should continue to be covered, given the expansion of grain ports in SA over the previous 5 years, and the continued majority coverage of the Port Wheat Code of Conduct. This could be explored further by the Commission.

Timeframes

The NCC suggests that ESCOSA should consider ‘*prescribing a timeframe in which preliminary information should be provided to enable access seekers to prepare proposals and providing a mechanism for review of any charge imposed by the operator for the supply of such information*⁸’.

SAFC sees no issue with acceding to this recommendation, and notes that any timeframe should be set with industry input.

Price Regulation

Price regulation (in the form of price monitoring) applies to prices associated with Essential Maritime Services (EMS): cargo services, harbour services, navigational services and channel levies. In addition, the MSA Act also establishes a separate price monitoring regime for pilotage services.

⁵ South Australian Ports Access Regime – Final Recommendation; National Competition Council, September 2021, page 125

⁶ *ibid*

⁷ South Australian Ports Access Regime – Final Recommendation; National Competition Council, September 2021, page 8

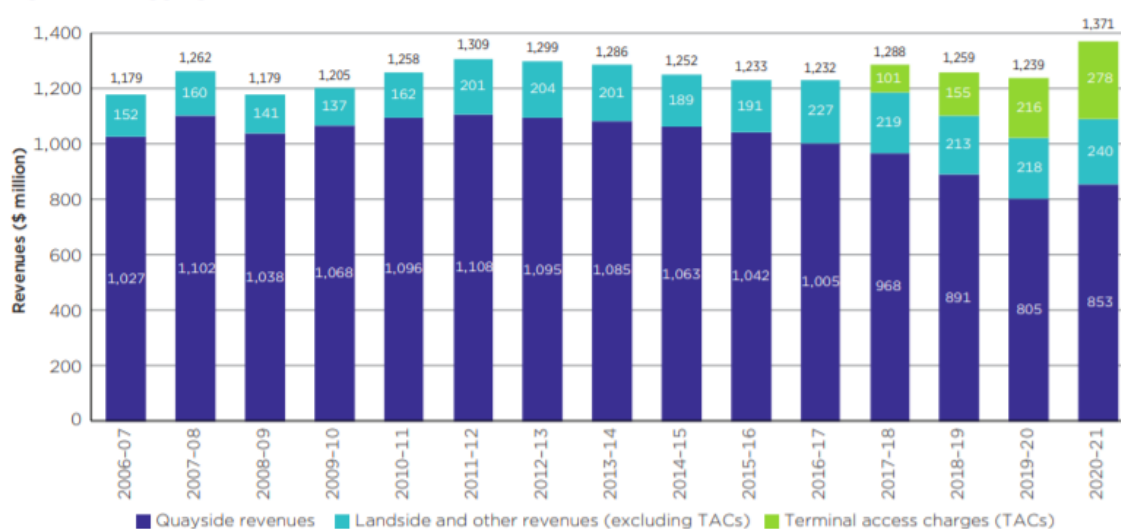
⁸ South Australian Ports Access Regime – Final Recommendation; National Competition Council, September 2021, page 12

SAFC is generally comfortable with the current price monitoring of EMS undertaken by ESCOSA. It is light handed, which is appropriate (and preferable) where industry has not generally indicated there are issues that need more direct intervention.

There is a legitimate question as to whether Terminal Access Charges (TACs – formerly known as ‘Infrastructure Charges’) should be added to the ongoing price monitoring undertaken by ESCOSA.

These relatively new charges have been added nationally by all container terminal operators, and form an ever-growing percentage of port revenue. The table below is from the ACCC’s 2020/21 Container Stevedoring Monitoring Report⁹.

Figure 5.3: Aggregate revenue for Patrick, DP World and FACT: 2006-07 to 2020-21



Source: ACCC analysis of information received from stevedores as part of the monitoring regime.
 Note: Real values in 2020-21 dollars.

We note two important points in relation to TACs:

1. the ACCC found that at current TAC levels, stevedores are not earning excessive returns¹⁰.
2. Flinders Ports has consistently charged lower TACs than its interstate competitors, but FPH TACs have increased substantially over recent years.

Flinders Adelaide Container Terminal (FACT) have just announced that ‘From April 1 2022 a TAC of \$79.50 ex GST will be applied to full export containers and a TAC of \$112.50 ex GST will be applied to full import containers’¹¹.

SAFC considers FACT’s reasons for increasing these charges to be reasonable, particularly in the current COVID driven environment. We support the preferable treatment of exporters

⁹ ACCC Port Price Monitoring Report 2020/21, pg 49
<https://www.accc.gov.au/system/files/Container%20stevedoring%20monitoring%20report%202020-21.pdf>

¹⁰ ACCC Port Price Monitoring Report 2020/21, pg 48
<https://www.accc.gov.au/system/files/Container%20stevedoring%20monitoring%20report%202020-21.pdf>

¹¹ Notice of Intention of changes to charges at Flinders Adelaide Container Terminal, 24 January 2022

by charging a higher amount for imports; supporting SA's exporters in the current challenging economic conditions and hope to see this treatment continue in the future.

While the ACCC monitors changes in TACs on a national basis, it does not generally look in depth at individual ports, or the effect on local industries. Given the ever-growing portion of revenue that TACs represent for natural-monopoly container terminal operators and their significant impact on exporters, it seems that some form of price monitoring should be applied to these charges. From a specifically South Australian viewpoint, ESCOSA seems best placed to take on this role.

We understand that the current Ports Access and Price Regime does not cover container terminals, and therefore ESCOSA or the Government may be uncomfortable in introducing this aspect into the current scheme. Such TAC price monitoring could also be undertaken via a separate scheme if so desired.

On behalf of SAFC, I would like to again thank ESCOSA for the opportunity to provide a submission into this important review. Should you wish to discuss any element of this submission further, please feel free to contact me on (08) 8447 0664 or via email knapp.evan@safreightcouncil.com.au.

Yours Sincerely,



Evan Knapp
Executive Officer, SA Freight Council.