

2012 Ports Pricing and Access Review

Issues Paper

Flinders Ports Response
March 2012



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1.0 Introduction

The Essential Services Commission of South Australia (ESCOSA) has sought responses to its 2012 Ports Price and Access Review Issues Paper. The review to be undertaken by ESCOSA, is to consider the ongoing need for regulation of port access and pricing.

In undertaking the review ESCOSA has noted that there are a number of distinct elements to the review process:

- The ongoing applicability of the access regime, should it continue and if so, are there any other industries that ought to be subject to the regime.
- Should price regulation of certain port services continue? If it is to continue, what form of price regulation should be adopted?

ESCOSA in its 2007 review process considered that there was the potential for misuse of market power in the provision of Regulated Services, albeit that there was no evidence of actual misuse of market power.

The findings made within the report led ESCOSA to the conclusion that it was appropriate for the access regime to continue, but that only light-handed regulation would be necessary to protect port users from the potential for misuse of market power. ESCOSA also took the view that price regulation should continue in the form of a price monitoring regime, which would provide port operators and users the ability to negotiate commercial arrangements.

Flinders Ports submitted detailed papers as part of the previous review process undertaken and expressed the following views:

1.1 Access Regime:

Flinders Ports' position was that:

- The Ports Access Regime provided a "safety net" for any genuinely aggrieved customer and hence it provided a mechanism to resolve disputes to ensure that the overall objectives of the Act were achieved.
- The Access Regime needed to recognize the long term time frame associated with port investment.
- The retention/inclusion of other Regulated but not Essential Maritime Services within the Regime did not add any significant value to the achievement of the objectives of the MSA Act.

1.2 Port Pricing:

In relation to Price Regulation, Flinders Ports highlighted that it needed flexibility in recovering its total costs across ports, cargoes and services. It also noted that it needed to be able to respond in commercial terms to proposals from its customers and to negotiate price/volume/service packages that meet the needs of both parties.

In its submission Flinders Ports concluded that:

- It does not have market power, i.e. the ability to operate independently of market constraints, in any part of its activities
- To the contrary, Flinders Ports' faces, at the least, competitive tension, indirect competition and countervailing power and, in some areas, strong direct competition.
- The nature of its customers and other market conditions ensures that market power will not become reality.
- Flinders Ports pricing practices – and willingness to enter into pricing negotiations ensures satisfactory outcomes without the need for regulation.
- No evidence of abuse of market power has been presented; nor of economic cost's arising from the existence of market power.

The 2007 submission concluded that Flinders Ports:

- Supported the retention of the Access Regime on the basis of the same light-handed approach that had been in existence since 2004.
- Proposed that pricing regulation was not required but if retained, should be retained in its current form.

Flinders Ports would propose that many of the comments made and the position adopted within the previously submitted responses relating to both the Access Regime and Port Pricing are still valid today and supported by a further five years of activity.

ESCOSA is requested to consider this paper as an extension of the previous papers submitted and consider the issues discussed in those papers in making its determination on the future direction of port regulation.

Flinders Ports would also note that the 2007 submission also raised two further points to consider:

1 - Certification of the Regime.

The ESCOSA Issues Paper notes the achievement of the certification of the Access Regime, which was finalized on the 9th May 2011.

Flinders Ports notes that this obligation had been with the State since 2001 and it has for some time supported the need for the certification process to be finalised. Flinders Ports welcomes the outcome achieved and the clarity it now provides in relation to dealing with access issues should they arise.

2 - That the Price Monitoring Report be critically reviewed and restructured.

Flinders Ports raised a number of issues associated with the appropriateness of the report and the conclusions drawn from the comparisons undertaken between the various ports highlighted in the report.

Flinders Ports notes the introduction of the new ports price monitoring approach whereby ESCOSA monitors trends in prices of Essential Maritime Services. As ESCOSA notes this approach enables a review to be undertaken of any increase in prices above the “normal” expected level to be undertaken and reviewed.

Flinders Ports has participated in a number of reviews conducted by ESCOSA associated with changes to rates over the current regulatory period and notes that no concerns have been raised with the Commission associated with these changes.

This paper provides Flinders Ports’ response to the 2012 Ports Pricing and Access Review and has been divided into the key areas raised within the ESCOSA Issues Paper:

1. Regulation of Ports 2007 to 2012
2. Key Issues
3. Issues relating to the effectiveness of the Ports Access Regime

Within each of these areas Flinders Ports comments on the issues raised by ESCOSA.

The conclusions reached by Flinders Ports are then outlined in the final section of the paper.

In summary these are that Flinders Ports:

1. Questions the need to retain the Access Regime.
2. Does not propose that any additional industry sectors be added to the Regime.
3. Proposes that pricing regulation is not required but if retained would adopt the position that the price monitoring regime should be maintained in its current form.

2.0 Regulation of Ports 2007 – 2012

2.1 2007 Ports Access Review

ESCOSA has highlighted its findings from the previous Access Review undertaken in which it considers that “there was the potential for misuse of market power in the provision of Regulated Services” and that it was appropriate to retain the safety net provided by access regulation.

ESCOSA qualified this position by indicating that there was no evidence of actual misuse of market power.

ESCOSA noted in its previous report two potential issues that were considered could impact on the regime and which therefore supported the continuation of the regime. These issues were:

1. The uncertainty associated with the deregulation of the barley and wheat exporting industries.
2. The significant expansion of the minerals sector.

In relation to the later ESCOSA suggested that the regime provided the necessary incentive (associated with the threat of the negotiate/arbitrate process) to ensure that commercial negotiations achieved the desired outcomes associated with providing the specific infrastructure requirements of the expansion in this trade.

Flinders Ports takes the view that while the “perception” may exist that Flinders Ports has the potential to misuse market power the “reality” is that the existing competitive market forces effectively provide a mechanism of “self regulation”. This is evident through the process of negotiation that Flinders Ports undertakes with all customers in determining the most appropriate package of pricing and services.

The emerging mining industry growth and the deregulation of the grain industry have both progressed over the past five years since the 2007 report.

Flinders Ports has over this period continued to provide access and port services to the grain industry as it has undertaken in the past. In addition this period has seen the commencement of a number of new mining industry exporters commence operation through the existing ports operated by Flinders Ports. During this period mineral related exporters and potential exporters have also chosen for different reasons (not related to access or price) to pursue alternative port options.

The experience over the period are consistent with the position previously expressed by Flinders Ports that it operates in a market that is both mature and sophisticated and one where users have alternative options or sufficient underlying commercial strength to ensure that appropriate access / pricing outcomes are achieved.

These outcomes support the view that whilst the Regulatory Regime provides a “safety net”, in effect it has not been required given the underlying maturity and commercial pressure inherent in the market.

2.2 2007 Ports Price Review

The conclusions reached by ESCOSA in its 2007 review, after having regard to a number of factors, was that the light handed price monitoring regime should continue. This it was concluded by ESCOSA, provided the flexibility for port operators and users to negotiate commercial arrangements, but indicated that it would examine alternative approaches to reporting ports prices in the subsequent regulatory period.

This position was supported by Flinders Ports at the time. Flinders Ports qualified this support by emphasising the view that the competitive market forces provided an effective mechanism to ensure all parties behaved in a responsible commercial manner but accepted the “safety net” provision provided by the Access Regime.

2.3 The Commission’s Observations

The Commission makes a number of observations about the regulatory regime during the current regulatory period.

These were in summary:

- No particular areas of concern were identified in the instances where both Essential Maritime Services and Pilotage Services charges were increased at slightly higher than CPI increases over the period.
- No concerns over increases in port charges and pricing disputes had been raised with the Commission.
- No evidence was found of misuse of market power in the provision of Regulated Services.

The Commission notes that it believes that the best possible commercial outcomes are reached when negotiations are conducted in good faith, with open and transparent information exchange between the parties.

Flinders Ports would support this view.

The Commission seeks the view of stakeholders on outcomes/effectiveness of the ports pricing and access regimes over the 2007 – 2012 regulatory period.

Over this period there has been substantial growth in a range of trade sectors utilising the ports owned and operated by Flinders Ports.

In most cases this growth has come as a result of an effective and commercially based negotiation process which has resulted in significant capital investment being undertaken underpinned by appropriate pricing and access agreements being executed.

Flinders Ports has, over this period, increased charges generally in line with CPI with the exception of several instances where larger rate increases have been applied. In each of these cases industry was consulted and the rates subject to independent review by ESCOSA.

Over the period to date ESCOSA notes that there is no evidence that would suggest that market power has been misused in the provision of Regulated Services.

Flinders Ports is of the view that these outcomes are the result of the effectiveness of the market that Flinders Ports and its customers work within and the competitive pressures that exist within that market.

3.0 Key Issues

3.1 Industry Developments

3.1.1 Access Undertaking

ESCOSA has raised the following question:

What are the possible implications for the ports access regimes as a result of Viterra's approved Access Undertaking?

Flinders Ports notes the approved Access Undertaking applicable to the Viterra operations with the ports operated by Flinders Ports.

Flinders Ports provided a submission on the matter as part of the consultation process undertaken by the ACCC. The submission highlighted a number of issues including:

- That the Viterra operations covered by the undertaking are conducted largely at ports operated by Flinders Ports.
- Flinders Ports conducts a number of services required by port users utilizing the Viterra operations at these ports and a range of these services fall within the scope of the Maritime Services (Access) Act 2000 (SA) and the associated regulatory regime in place.
- That the undertaking needs to operate "in sync" with the existing certified regime that operates with the ports.

Flinders Ports outlined to the ACCC that as port operator, Flinders Ports operates through its port management system on a "first come first served" basis and hence this rule needed to be preserved and not contradicted by any provisions outlined within the undertaking.

In summary Flinders Ports is of the view that the undertaking in effect needs to work "in sync" with the role and responsibility that Flinders Ports has in managing and operating its ports and ensuring compliance with its own obligations under the MSA Act.

3.1.2 Containers

ESCOSA raise two key questions:

How has competition between ports for container volume developed?

To what extent does Flinders Ports hold market power in providing container facilities?

Flinders Ports strongly disagrees with the position taken by ESCOSA in its Issues Paper where it stated that in effect there is no direct competition within Port Adelaide for container facilities.

It is irrelevant to the issue of direct competition within the container market that there exists only one shipping related container facility located within Port Adelaide

The market for the container trade is very broad. Flinders Ports competes not only with other Australian ports like Melbourne and Fremantle for those shipping services that operate within this trade sector, but with other ports within the region and around the globe.

As outlined in our previous papers, almost all major container services now operate on a fixed day weekly port call schedule. This requires that the total round trip (i.e. involving all ports called in the specific service rotation) for each individual vessel operating within that service must be completed within a strictly defined time period. Therefore the number of ports at which the ship within the service can call within that period is strictly limited. The decision to therefore call at Port Adelaide implies a decision not to call at other ports (either in Australia or other countries such as Malaysia or New Zealand) and vice versa. In making these port call scheduling decisions a vessel operator will consider a number of factor including, container volume levels (i.e. the number of container exchanges) available at the port and the costs (including port charges) associated with the particular port call.

In addition the Port of Melbourne continues to market itself in South Australia. Container intermodal rail yards operate in several locations within or in proximity to Port Adelaide and hence the rail network between Adelaide and Melbourne continues to be utilized by the shippers and service providers operating within this port to impact on the container volumes in Port Adelaide.

Studies undertaken as part of the economic justification for the deepening of the Port Adelaide outer channel indicated that at the time some 70 – 80,000 containers (TEU's) associated with South Australia arrive from or leave for Melbourne via rail. To put this in context, this figure accounts for some 35% of the South Australian market. While this figure has decreased over the past two years, the extent of South Australian container trade being “transshipped” through Melbourne is still significant.

The reality of the existing situation is that Flinders Ports faces competition in relation to attracting shipping services to call Adelaide and for container importers and exporters to utilise Adelaide as their preferred port of loading/discharge. Container importers and exporters therefore have viable and existing alternatives and this market pressure continues to ensure that Flinders Ports cannot and does not have market power in providing container port facilities.

3.1.3 Minerals

ESCOSA raises the following question in relation to the Mining industry in South Australia:

Is the existing ports access regime capable of dealing with developments in the South Australian resources industry?

South Australia has experienced a large increase in mining related activity during the existing regulatory regime period.

Over this period the State has seen:

- Commencement of Iron Ore exports through Port Adelaide using an innovative loading process and involving a logistics model, incorporating a number of services providers, from mine site to the port.
- Expansion of the Minerals Sand export trade through both Port Adelaide and Thevenard again involving a number of service providers in the transport, storage and loading of the product.
- Commencement of the export of Copper Concentrates and other metal based products through Port Adelaide and the continued export of these produces through Port Pirie.
- An announcement by One Steel of the major upgrade of its export facilities and capability in relation to the export of iron ore product from the port of Whyalla and the acquisition of Western Plains Resources which was expected to be serviced though the Flinders Ports facilities at Port Pirie.
- Continued access by exporters to markets through the Port of Darwin through the use of the Darwin rail link.
- The announcement of a number of proposed port developments associated with a range of products (although mainly iron ore) at locations such as ‘Lucky Bay’ (Ironclad), ‘Sheep Hill’ (Centrex) and ‘Myponie Point’ (the Braemar Group).
- The State announced that the Spencer Gulf Portlink consortium (of which Flinders Ports is a key member) as the successful proponent for the Port Bonython future iron ore export port facility.

While the timing of these development vary and are subject to a range of environmental, engineering, economic and funding studies, it is likely that we will see some if not all of them progressing over the next several years.

As indicated above Flinders Ports has been involved in discussions over the period with a range of mining industry exporters and potential exporters to determine the requirements of the industry in relation to both access to and the facilities and service required at the various ports being considered by the industry.

It is Flinders Ports’ view that while the ports are well positioned to support the shipping/port service requirements of these trades to various degree, additional investment on specific infrastructure (storage, loading and integrated logistics services) will be required to support the specific requirements of and the anticipated growth in this industry sector.

Flinders Ports is currently in discussion to varying levels with a number of entities associated with the Mining Industry to ensure that the development of the required infrastructure not only meets the Industry needs but is also economically justifiable.

The process undertaken to date supports the position adopted by Flinders Ports that the port operator and its customer are in the best position to resolve the issue of the port services/pricing package moving forward.

The process followed by Flinders Ports involves the assessment of the customer needs through the development of operating, logistics and infrastructure requirement plans. Financial modeling is then undertaken, incorporating all aspects of the port users overall requirements, the associated capital cost (if applicable), volume expectations, time frames and risks associated with the trade. Initial pricing models are then developed and presented to the customer for discussion and negotiation. Once agreed the arrangements are formalised to provide on-going certainty to both parties.

To date this business model has resulted in the formal agreement of a number of Port Infrastructure/Services/Access/Pricing arrangements and the commencement of new trades through the ports.

As stated the rail link to Darwin is ideally positioned to provide an alternative transport/port solution to a number of mining interests located in the north of the State. In addition rail links to other ports such as Geelong and Portland also provide alternative options.

In addition competition / competitive pressure is also experienced in South Australia with mining companies discussing the potential option of utilizing the non-regulated ports in South Australia of Whyalla and the existing Port Bonython facility as well as the new port developments at Sheep Hill (Port Spencer), Lucky Bay and potentially Myponie Point.

The competitive process and these potential alternative options again highlight the fact that there are a number of countervailing pressures on Flinders Ports' ability to exercise "market power" in negotiating new pricing/access arrangement with potential new Mining Industry port users.

3.2 Market power

ESCOSA highlights a number of factors within its Issues Paper that may limit the ability of a port operator to misuse market power, including:

- The extent of competition for port services through the existence of alternatives.
- Low barriers to entry or the threat of new entry if prices are set above competitive levels.
- The extent of countervailing bargaining power.
- The extent to which port charges comprise the total cargo value.

The Issues Paper notes that the assessment of market power was a central theme to previous ports pricing and access reviews and is fundamental to the question as to whether or not continued regulation is necessary.

As previously stated Flinders Ports is subject to a number of "competitive pressures" and these combined with an objective of long term financial stability ensures that Flinders Port behaves in a responsible commercial manner when dealing with customers.

The following highlights a number of relevant factors which link to the key areas identified by ESCOSA that may deter the misuse of market power:

Existence of alternatives:

Other ports such as Darwin, Whyalla, Ardrossan, Port Bonython, Portland and Geelong – which provide alternative ports solutions through rail or road links.

Barriers to entry:

Use of tug/barge operations (low capital cost option) for the export of various products through other port locations.

Bargaining Power:

As indicated Flinders Ports has successfully negotiated a number of pricing/access arrangements for a range of products and users without any issues being raised.

Cargo Value:

Flinders Ports is aware of the various cost components associated with the transport, storage and handling of cargo to and through the ports. Flinders Ports would contend that as part of the overall port logistics cost chain there are significant drivers to ensure that each part is cost competitive to ensure that the overall solution can work for a specific cargo product.

As indicated by ESCOSA there have been no disputes notified over the current regulatory period. During this time Flinders Ports has been involved in a number of pricing discussions with customers and each has been resolved through the commercial negotiation process.

Flinders Ports seeks to achieve sustainable returns for its shareholders and hence it is in the interest of the organisation to ensure that it takes into account a number of factors when determining an appropriate pricing model for use of a port facility. These factors include, capital investment made or additional capital required, level of services required and the impact on operating costs, the volume of trade and the associated shipping activity and the period over which the provision of services is required.

It must also be identified that regulation or the threat of regulation has to be considered and “built into” the overall “risk alpha” when assessing the long term viability of infrastructure projects.

An appropriate review of these factors with each specific customer enables a long term pricing strategy to be developed and subsequently agreed with customers.

Flinders Ports contends that it does not exercise Market Power and that the countervailing pressures that have been identified are real and ensure that the pricing outcomes determined through the negotiation process are fair and reasonable to each party.

3.2.1 Price Monitoring of Ports Charges

ESCOSA raises two questions:

Has the Commission's present form of price regulation (i.e. price monitoring) been appropriate and effective in deterring market power from being misused?

How do prices compare relative to other comparable ports in Australia having regard to factors such as economies of scale and longer-term ports infrastructure requirements?

Flinders Ports has responded elsewhere in this paper on the initial question raised by ESCSA above.

In relation to the comparison of prices relative to other comparable ports Flinders Ports take the view (as previously expressed) that port pricing is a complex issue. Ports generally are fixed cost operations with high levels of capital investment and relatively fixed operating costs. Revenue on the other hand is variable and influenced by a number of economic and seasonal influences with the predominant driving factor being the volume of cargo handled through the port.

Simple economics dictates that cost (capital and operating) divided by volume will determine the rate per unit that is needed to ensure revenue is raised to a level that recovers those costs.

Hence the fact that a comparison is often undertaken on a single service charge or voyage cost at a specific berth fails to recognise that the level of overall port costs required to be recovered from a given cargo charge will be influenced by what other trades and volumes are being handled by that port.

Using ports as an example of this issue. Comparing the port charges at a location like Port Lincoln which has a substantial berth facility with a high investment cost but used with volumes up to 2.9m tonnes (of which grain was some 2.6m tonnes) per annum and vessels calls in the order of 128 per year with a port like Newcastle which handles some 114.0m tonnes (of which grain exports totaled some 1.6m tonnes) of cargo and recorded some 1,640 vessel calls in 2010/11 - does not provide a reasonable basis for the comparison of single commodity rates.

In addition the comparison of port charges alone does not also take into account the offsetting land transport and other savings achieved, particularly in the case of the grain industry in South Australia, as a result of the large number of ports operated by Flinders Ports in the State. The more ports the lower the transport costs to the ports.

Therefore as previously expressed, Flinders Ports would make the point that undertaking a comparison of pricing between ports is fraught with danger and will lead to incorrect conclusions being drawn.

3.2.2 Commercial Negotiations

ESCOSA raises a number of questions to address:

Is it still the case that there is the potential for misuse of market power, or is there evidence of actual misuse of market power in the provision of Regulated Services and Essential Maritime Services?

To what extent have commercial negotiations over access to ports facilities been successful?

To what extent are negotiated prices different to the reference prices and how should this be taken into account in this Review?

Flinders Ports would respond to the issues raised by ESCOSA by stating that over the existing regulatory review period:

No evidence has been presented that would suggest that market power has been misused in the provision of Regulated Services.

The Commissions annual monitoring of Essential Maritime Services charges has not revealed any areas of concern.

During this period we have seen:

- Unprecedented growth in the export of mining related products through the existing ports.
- Continued growth in the container trade and the advent of additional container shipping services now calling directly at Port Adelaide.
- General cargoes generally increase through all ports and a range of seasonal outcomes associated with the grain export program with some period of drought affected harvests followed by two substantial crop outcomes.

In addition the State's trading sectors which utilise the ports has been through one of the toughest global economic periods in modern history.

Throughout this period Flinders Ports has negotiated a number of key trading outcomes with a range of port users which has not only supported the growth achieved but underpinned a significant investment in port and port related infrastructure.

Flinders Ports would argue strongly that the competitive environment in the South Australian ports sector is not only strong but promotes the long term economic development of industry and the State as a whole.

3.2.3 Costs and Benefits of Regulation

ECSOSA questions:

Is there a net benefit associated with retaining the current negotiate-arbitrate ports access regime?

Is there a net benefit associated with retaining price regulation (or any form) for the ports price regime?

As indicated previously Flinders Ports accepts that the Access Regime provides a “safety net” to any genuinely aggrieved customer.

The cost of regulation to Flinders Ports is not unsubstantial given the requirements that the regimes place on the organization through the preparation of annual Regulatory Accounts, the quarterly reporting obligations and the additional resources consumed addressing issues raised through the current price monitoring reporting process.

Flinders Ports questions whether there is a real net benefit with the current regime and ask ESCOSA to examine critically this issue when considering the future regulatory environment proposed. In addition the continued threat of a changing regulation model as indicated also needs to be considered when assessing long term projects and priced in to some degree.

3.3 Other Factors

ESCOSA raises a number of general questions to address:

Have there been any developments over the current regulatory period that should be taken into account by the Commission when reviewing the need for continued regulation?

Are there likely to be any developments over the next regulatory period that should be also taken into account by the Commission?

Are there any region or cargo specific issues that are relevant to this Review?

Are there any other factors that the Commission should have regard to when reviewing the need for continued regulation?

The overall trade volumes experienced over the existing regulatory period reflect the mature nature of the industry in South Australia. Trade volumes, across all ports operated by Flinders Ports, have over the period since 2007 fluctuated from year to year.

During this period however there have been four key trends:

- fluctuating grain volumes associated with the variable seasonal conditions experienced
- growth in the container trade as a result of additional container services and shippers being attracted to direct calls to Port Adelaide

- emerging new trades such as minerals sands, iron ore and other minerals products
- relatively minor changes in the other mature trade sectors utilizing the ports

Ship call numbers across the seven ports have also fluctuated largely in line with cargo volume changes although the advent of bigger vessels now calling with the availability of deeper drafts for the grain and container related has had some impact over the period.

The overall picture reflected over the current regulatory period is that the existing market is a stable one and this in many ways is reflective of the outcomes experienced and reported by ESCOSA over this period.

As Flinders Ports has stated previously, it needs flexibility in recovering its total costs across ports, cargoes and services. It therefore needs to be able to respond in commercial terms to proposals from its customers and to negotiate price/volume/service packages that meet the needs of both parties.

Flinders Ports therefore contends that the existing port services / pricing model adopted by the organisation, which has matured and developed over time in an environment of competitive tension, has served port customers well. Flinders Ports view is that this model will continue to apply to both the existing customer base and potential new entrants (such as the mining industry), with the same positive outcomes.

As such it is recommended that ESCOSA critically review the outcomes achieved over the existing regulatory review period and that these outcomes be used as significant driving factors in the determination of the pricing and access regime proposed for the next three years.

It is also noted that during this regulatory period the Port of Brisbane was privatised with no regulatory framework in place.

In addition it is understood that the Essential Services Commission of Victoria also completed its Price Monitoring Determination for Victorian Ports in 2010. The outcome of this process implies that the ports of Hastings, Geelong and Portland are no longer regulated.

ESCOSA is recommended to also consider these factors when reviewing the need for continued regulation.

4.0 Issues relating to the effectiveness of the Ports Access Regime

4.1 Coverage

ESCOSA questions:

Are there any ports or maritime services to which coverage of the access regime should be extended or revoked? If so what are the arguments for doing so?

Flinders Ports would argue that, based on the experiences encountered over the current regulatory period, the current scope of the regime supports its key “safety net” role and function.

As previously stated the key argument for retaining the access regime is to provide a “safety net” for port users. As indicated there has been no evidence of any access disputes over the entire period of regulation since the privatisation of the ports in 2001. Flinders Ports would therefore take the view that:

- there is no evidence to suggest that the regime should be extended, and
- therefore, any extension to the coverage of the regime on the basis that it would not add any additional value to the overall effectiveness of the regime itself.

4.2 Negotiation

4.2.1 Basis of Access

ESCOSA asks:

Have there been any instances whereby an access seeker and access provider have encountered difficulties in negotiating access to port infrastructure, due to the current regulatory framework? If so, what are the impediments?

Is the negotiate process set out in Part 3 of the MSA Act adequate for facilitating commercial negotiation of access? If not, how can the process be improved?

Flinders Ports is not aware of any access seeker having encountered any issues associated with negotiating access to port infrastructure.

Flinders Ports would make reference to the proven track record achieved over the past regulatory period in successfully negotiating and finalising a number of pricing and access arrangements with port users. These outcome it should be noted have been

undertaken during a period where the ports were dealing with both severe economic downturn and the need to support emerging news trades and port users.

Flinders Ports is of the view that there are no existing impediments that would prevent parties, through the normal negotiation process, from achieving appropriate pricing and access arrangements.

Flinders Ports would note that the Part 3 process as set out in the MSA Act would seem to provide an appropriate way to deal with a dispute issue should it arise. It makes sense that the process commences with conciliation and the aim of resolving the differences in reasonable and commercial manner.

The process also provides the Commission with some criteria to evaluate a dispute prior to then choosing to escalate it or not. Again this step enables an independent assessment to be made of whether a dispute does in fact have substance and that the approach both parties have made to resolve the matter has been in “good faith”.

Flinders Ports would propose that if regulation is to be retained the process be retained in its current form, with the view that it be reviewed once it has been more formally “tested”.

4.2.2 Negotiation of Access

ESCOSA questions:

Are the information requirements set out in Part 3 of the MSA Act and Guideline No. 1 adequate for facilitating the negotiation of access? Do access seekers need additional information in order to make informed decision about obtaining access?

Flinders Ports has reviewed the process and would conclude that the Commission has the power/ authority to gather all relevant information, noting the confidentiality provisions outlined to conduct a proper and thorough review.

4.3 Dispute Resolution

ESCOSA asks:

Do stakeholders consider that there would be a benefit from incorporating into the MSA Act an informal resolution process similar to the one outlined in Section 12 (B) of the ARTPA Act?

Is the conciliation/arbitration process set out in Part 3 of the MSA Act adequate for resolving access disputes? If the process is not considered to be sufficient, how can the process be improved?

Flinders Ports would suggest that the existing process would, subject to being formally tested through a dispute arising, seem adequate.

It should be noted that the parties involved in such a dispute would invariably be mature commercial enterprises and have had a range of experience in negotiating settlements through good faith negotiations, conciliation/mediation process and possibly even through both enforced arbitration or court proceeding.

The process as outlined in Part 3 provides an appropriate set of guidelines and steps that the Commission can apply to ensure that an appropriate outcome is reached in line with the over-riding principles of the MSA Act.

It is also noted that should a party feel aggrieved after the process is concluded the Act does not preclude an appeal mechanism through the normal legal process.

5.0 Issues relating to the form of Price Regulation

5.1 Form of Price Regulation

ESCOSA in its Issues paper outlines the various forms of Price Regulation that could be available assuming that price regulation continues.

ESCOSA has listed a number of outcome measures which it has used as a base to assess the success or otherwise of the current regime. Flinders Ports provides the following comments of these measures:

- **Change in Published Prices**

To date the changes made have been relatively consistent with CPI increases with some exception in relation to specific cargo charges (in certain years only) and Pilotage.

Flinders Ports has demonstrated a fair and reasonable approach to its price increases over the period being reviewed and where additional increases above CPI have been applied these have been supported by increasing costs and the extension of services required to be delivered.

- **Negotiated Outcomes**

Flinders Ports, like any commercial enterprise adopts a degree of flexibility in relation to its pricing policy and generally rewards long-term customers based on the extent of use of the facilities and services provided.

These agreements are confidential between the port operator and its customers and would expect that ESCOSA respects that confidentiality.

It should be noted however that a large number of existing agreements have been reviewed and revised during the current regulatory period and each has been settled to the mutual satisfaction of each party.

- **Annual Profitability**

Flinders Ports argues that this is not a truly effective measure to be applied in assessing whether the form of regulation is appropriate. Given the relatively fixed cost nature of the port business, the seasonal fluctuations experienced with certain cargo trades could lead to inappropriate short term conclusions being reached from an analysis of this measure

Therefore while annual returns may be of interest to a regulator it should only be used as an indicative guide and not as a leading indicator.

- **Compliance Costs**

Under the existing regulatory arrangements compliance costs are considered reasonable. However Flinders Ports stresses that as regulatory costs are passed through to the end customer ESCOSA needs to consider this as a factor when determining its future model.

- **Number of Disputes**

Flinders Ports takes the position that this is the ultimate indicator of how effective the existing relationship is between the port operator and its customers.

Flinders Ports view is that the fact that there have been no disputes identified is the result of the pricing approach adopted by Flinders Ports (which by its nature adopts a long term horizon) and in response to the commercial pressures placed on it by its customers.

- **Number of Access Seekers**

As indicated, the port industry has been largely regarded at a high level of maturity within the state and hence the level of new Access Seekers has in the past been low.

Given the emergence of the mining industry this has changed to a degree over the past several years. As outlined Flinders Ports has worked with a number of new access seekers over this period and successfully negotiate outcomes which included not only access and pricing agreement but also the development of additional infrastructure and provision of a wide range of services.

These outcomes support the view taken by Flinders Ports that the existing approach adopted by Flinders Ports provides potential port users with an appropriate mechanism to negotiate both a service and pricing package that meets their needs.

The outcomes experienced over the current regulatory period only further enhances Flinders Ports long held view that is if pricing regulation is to continue then the only form of regulation that should be adopted is a light handed one.

6.0 Summary

The objects of the MSA Act are to ensure:

- maritime services are provided on fair commercial term, and
- competitive markets are facilitated in the provision of maritime service; and
- that interests of users of essential maritime services are protected by ensuring that regulated prices are fair and reasonable having regard to the level of competition in, and efficiency of, the regulated industry; and
- that disputes about access are subject to an appropriate resolution process.

How has regulation supported these objects over the existing regulatory period?

The past several years has seen a number of upgrades to port facilities within the seven ports operated by Flinders Ports. Flinders Ports continues to plan for the future and further capital expansion of port and related facilities is proposed over the next few years.

During this period trade volumes have generally been maintained at a consistent level, with grain levels impacted by seasonal conditions, containers volume growth showing a steady increase and while general other trades have maintained minimum levels of growth, the emerging mineral trade sector has emerged as a growth sector.

Flinders Ports over this period has engaged in pricing discussions with its customers through the annual process of advising of the increase in the scheduled rates to be applied in addition to the negotiation of new or the renewal of existing specific pricing packages.

As outlined in the ESCOSA Issues Paper during this period there has been no Access or Pricing disputes raised with ESCOSA.

Flinders Ports argues that this outcome reflects the working of a truly competitive market where the long term objectives of the port operator and the countervailing market pressures exercised by port users generate the appropriate level of competitive tension to ensure that a “win win” outcome is achieved.

Has regulation provided that “big stick” threat in the background to ensure that this process is maintained and the outcomes achieved fair and reasonable?

Flinders Ports takes the position that it does not.

In summary therefore Flinders Ports:

1. Requests that ESCOSA consider the removal of the Access Regime regulation.
2. If it is to be retained, does not support the extension of the regime beyond its existing scope.
3. Proposes that pricing regulation is not required but if it is to be retained, would adopt the position in that the price monitoring regime should be retained in its current form.