



2007 PORTS PRICING AND ACCESS REVIEW ISSUES PAPER

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REQUEST FOR SUBMISSIONS

The Essential Services Commission of SA (the Commission) invites written submissions from interested parties in relation to the issues raised in this paper. Written comments should be provided by **21 March 2007**. It is highly desirable for an electronic copy of the submission to accompany any written submission.

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

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

Responses to this paper should be directed to:

2007 Ports Pricing and Access Review: Issues Paper

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Public Information about ESCOSA's activities

Information about the role and activities of the Commission, including copies of latest reports and submissions, can be found on the ESCOSA website at www.escosa.sa.gov.au.

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GLOSSARY OF TERMS

ABB GRAIN	ABB Grain Ltd
AWB	AWB Limited
CIRA	Competition and Infrastructure Reform Agreement
CoAG	Council of Australian Governments
THE COMMISSION	Essential Services Commission of SA
CPI	Consumer Price Index
ESC ACT	Essential Services Commission Act 2002
ESSENTIAL MARITIME SERVICES	Services defined under section 4 of the MSA Act and subject to price regulation
MSA ACT	Maritime Services (Access) Act 2000
NCC	National Competition Council
REGULATED SERVICES	Services defined by proclamation under section 4 of the MSA Act and subject to the Ports Access Regime

1 INTRODUCTION

This is the first in a series of papers that the Essential Services Commission of South Australia (the Commission) will be producing as part of the 2007 Ports Price and Access Review. This review will consider the ongoing need for regulation of ports access and pricing. In particular, the review will consider the following questions:

- ▲ Should the ports access regime expire on 30 October 2007, or should it continue for a further 3-year period? If it is to continue, should it expand, contract, or otherwise be improved?
- ▲ Should price regulation of certain ports services expire on 30 October 2007, or should it continue for a further 3-year period? If it is to continue, what form of price regulation should be adopted?

The Commission's review of the ports pricing and access regimes is required under the *Maritime Services (Access) Act 2000* (MSA Act). The review will also encompass a separate requirement for the Commission to conduct an inquiry into the ports access regime. The terms of reference for this inquiry, as set by the Treasurer, direct the Commission to provide a recommendation to the South Australian Government as to whether or not the ports access regime complies with certain requirements under the Competition and Infrastructure Reform Agreement (CIRA) entered into by the Council of Australian Governments (COAG) in February 2006¹, and to recommend changes that could improve the effectiveness of the access regime.²

The Commission believes that it is important to engage with stakeholders and other interested parties throughout the Ports Price and Access Review process. An important aspect of the Ports Pricing and Access Review involves observations of the actual behaviour of the regulated service providers under the current pricing and access regimes. The Commission seeks the involvement of all stakeholders in this review to ensure that a wide range of views and experiences can be considered.

This paper discusses some of the key issues that are likely to be relevant to the reviews and requests comment on these and any other relevant issues. The key issues identified by the Commission are discussed in chapter 4 of this paper. The Commission will consider comments on this Issues Paper in developing a Draft Report by June 2007. Following consultation on the Draft Report, a Final Report will be released in September 2007.

In conducting this review the Commission must meet its legislative responsibilities and carry out the review in a manner that meets the objectives of the MSA Act and *Essential Services Commission Act 2002* (ESC Act). The Commission must also comply with the

¹ The CIRA is available at http://www.coag.gov.au/meetings/100206/attachment_b_ncp_review.pdf (refer Appendix E).

² The Terms of Reference for the Inquiry are contained in Appendix 1.



terms of reference for the associated inquiry referred to it by the Treasurer pursuant to Part 7 of the ESC Act. These requirements are discussed in chapter 2 of this paper.

1.1 Ports Access Regime

The Ports Access Regime is established under Part 3 of the MSA Act. It provides a framework for the negotiation of access to particular port services, known as Regulated Services, and provides for conciliation and arbitration to occur where access disputes arise and cannot be otherwise resolved between the parties.

Determining whether or not the Ports Access Regime should continue involves consideration of the extent to which application of regulation of this type to Regulated Services will achieve the relevant objectives of the MSA and ESC Acts. Section 43 of the MSA Act obliges the Commission to review the current set of Regulated Services with a view to recommending either that Part 3 of the MSA Act should continue in operation for a further three years; or that Part 3 should expire as of 31 October 2007. This second option would mean that the Ports Access Regime would no longer exist.

1.1.1 Regulated Services

A maritime service becomes a Regulated Service by proclamation. The current list of Regulated Services covers (in summary form):

- ▲ Access of vessels to all proclaimed ports;
- ▲ Pilotage at all proclaimed ports;
- ▲ Berths at:
 - Port Adelaide berths 1 to 4, 16 to 20 and 29;
 - Wallaroo berths 1 South and 2 South;
 - Port Pirie berths 5 and 7;
 - Port Lincoln berths 6 and 7;
 - Berths adjacent to the shiploaders referred to below;
- ▲ Loading by the AusBulk³ owned shiploaders at Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln and Thevenard (but not at Ardrossan); and
- ▲ Access to land in connection with the above services.

There are seven Proclaimed Ports in South Australia:

- ▲ Port Adelaide;
- ▲ Port Giles;
- ▲ Wallaroo;

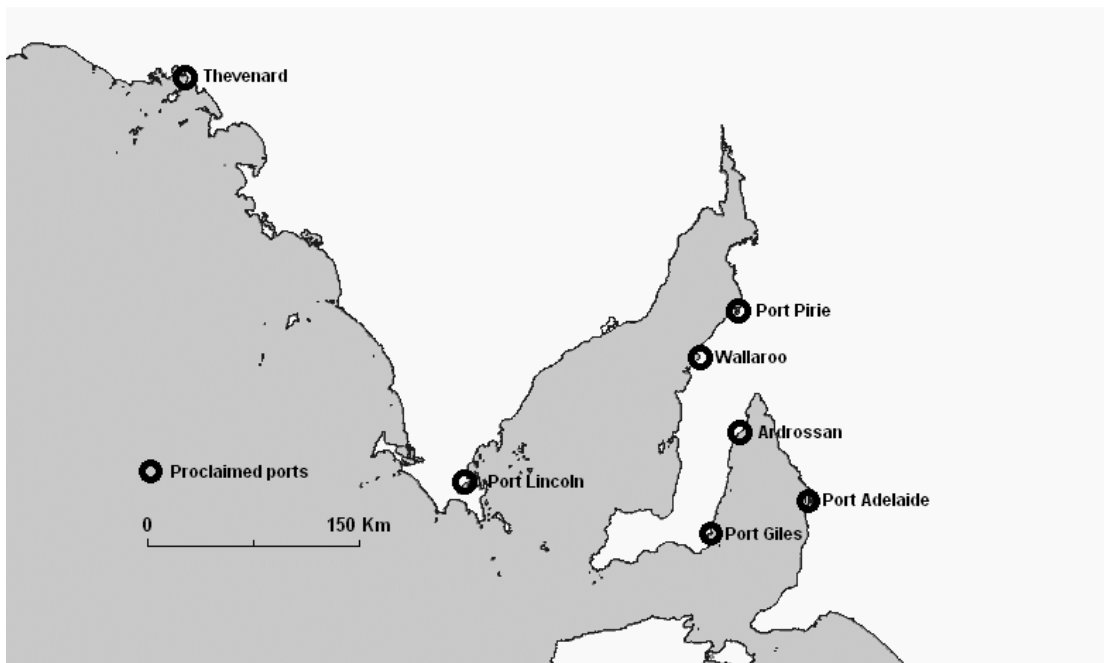
³ Ausbulk is an ABB Grain Ltd Company.

- ▲ Port Pirie;
- ▲ Port Lincoln;
- ▲ Thevenard; and
- ▲ Ardrossan.

Flinders Ports Pty Ltd operates the first six ports. AusBulk Ltd operates the port at Ardrossan.

The seven Proclaimed Ports are represented in Figure 1 below.

Figure 1. Proclaimed Ports in South Australia



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The proclamation of Regulated Services covers six bulk handling facilities, or shiploaders, now owned and operated by ABB Grain at:

- ▲ Port Adelaide (at berth 27 Inner Harbor);
- ▲ Port Giles;
- ▲ Wallaroo;
- ▲ Port Pirie;
- ▲ Port Lincoln; and

▲ Thevenard.

The current list of Regulated Services does not include the new bulk handling facility at Port Adelaide Outer Harbor.

Grain is the main commodity type handled by the shiploaders. However, they are not limited to handling grain. For example, the shiploader at Thevenard handles mainly gypsum, with smaller volumes of grain and salt moved.

Shiploaders are vital for loading some types of bulk cargo. In the case of grain, they tend to be co-located with grain storage and handling facilities, or with storage or open-air stockpiling facilities for other commodities.

1.1.2 Access Regime certification issues

The Ports Access Regime is not currently certified under Part IIIA of the Commonwealth *Trade Practices Act 1974*. Certification requires an assessment of the effectiveness of the Access Regime by the National Competition Council (NCC) against the criteria set out in clause 6 of the Competition Principles Agreement. Certification was previously sought in January 2001, but the application was withdrawn in November 2002. The SA Government has committed to the regime being successfully certified by 2010 in accordance with the February 2006 COAG agreement.

The Commission's review of the ports access regime, and the associated inquiry, will not determine if the access regime is likely to achieve certification. The inquiry into the compliance of the ports access regime with the CIRA will examine, in part, whether or not the regime is consistent with certain principles that the NCC would take into account in recommending certification. The inquiry will not consider all of the principles that the NCC must consider, and even where the same principles are being considered, the NCC may reach a different conclusion to that reached by the Commission in its inquiry.

1.2 Ports Price Regime

In conjunction with the review and inquiry into the ports access regime, the Commission will consider if price regulation is warranted beyond 30 October 2007 and, if so, what form of regulation should be applied. Price regulation occurs under Part 2 of the MSA Act. The current system of price regulation involves price monitoring. The price monitoring regime was established under the 2004 Ports Price Determination and has effect up to and including 30 October 2007.⁴ The review will consider if this price monitoring regime, or any form of price regulation, should continue beyond this date.

⁴ Refer Essential Services Commission of SA, November 2004, *2004 Ports Price Determination: Final Price Determination*, (<http://www.escosa.sa.gov.au/webdata/resources/files/041116-R-PPDFinal.pdf>)

1.2.1 Services subject to Price Regulation

The MSA Act refers to the services that are subject to price regulation as Essential Maritime Services.

Section 4 of the MSA Act defines Essential Maritime Services as consisting of:

- ▲ Providing or allowing for access of vessels to a proclaimed port; or
- ▲ Providing port facilities for loading or unloading vessels at a proclaimed port; or
- ▲ Providing berths for vessels at a proclaimed port.

Essential Maritime Services broadly include the following services:

- ▲ Navigational aids;
- ▲ Harbour control (but not pilotage⁵ or towage);
- ▲ Channels;
- ▲ Berths;
- ▲ Wharves;
- ▲ Cargo loading and unloading (marshalling) areas (but not loading or unloading itself);
- ▲ Jetties;
- ▲ Berth pockets;
- ▲ Fenders;
- ▲ Mooring structures;
- ▲ Mooring and unmooring; and
- ▲ Provisioning connections (but not provisioning)

At present three port charges cover these Essential Maritime Services;

- ▲ Navigation Services Charge;
- ▲ Harbour Services and Mooring Charge; and
- ▲ Cargo Services Charge

These three charges, in aggregate, cover the suite of Essential Maritime Services. They also correspond relatively well, though not exactly, with the three-part definition of Essential Maritime Services.

⁵ Pilotage is subject to a separate pricing regime, as specified in section 8 of the MSA Act. This regime requires the operator of the proclaimed port to maintain a schedule of pilotage charges and to provide the Commission with a current schedule, and notice of any proposed changes to pilotage charges. The Commission is not able to review the pricing arrangements for pilotage services as part of the ports pricing review, as pilotage is not an Essential Maritime Service.



In accordance with clause 2.5 of the 2004 Ports Price Determination, the Commission may elect to monitor and report on the prices charged for Essential Maritime Services. This price determination establishes price monitoring as the form of regulation to apply to Essential Maritime Services up to and including 30 October 2007.

Under the price-monitoring regime, a port operator can set its own prices. However, it does this in the context of the Commission monitoring those prices and ultimately reviewing the scope and form of regulation of Essential Maritime Services. The threat of re-regulation provides an ongoing deterrent against the misuse of market power by regulated service providers.

The Commission publishes annual reports analysing Essential Maritime Services based on comparative port costs for notional vessels loading at nominated ports throughout Australia.⁶ The purpose of these reports is to provide South Australian port customers and the community with comparative information regarding certain port costs in South Australia and at nominated Australian ports. Further analysis of trends in port charges and issues arising out of the 2006 Price Monitoring Report are discussed in Chapter 3.

⁶ These reports are available on the Commission's website at <http://www.escosa.sa.gov.au/site/page.cfm?u=95&c=1469>.

2 REQUIREMENTS FOR CONDUCTING THE REVIEW AND INQUIRY

2.1 Introduction

This chapter sets out the legislative requirements for the conduct of the 2007 Ports Pricing Review and the 2007 Ports Access Review. It also discusses the conduct of, and terms of reference for, the Inquiry into the ports access regime that the Commission has been directed to undertake by the Treasurer.

2.2 Ports Access Regime Review and Inquiry

2.2.1 Ports Access Regime Review

Section 43 of Part 3 (access to maritime services at proclaimed ports) of the MSA Act is concerned with the expiry of the Part 3 access regime. For the purposes of Section 43, the access regime works on a triennial cycle, that is, each successive period of 3 years after the commencement of Part 3 (being 31 October 2001), is a triennial cycle.⁷ Section 43(2) requires that the Commission must, within the last year of each triennial cycle, conduct a review of the industries subject to the access regime to determine if the access regime should continue to apply to those industries. The current cycle will end on 30 October 2007 and the Commission must, prior to that date, make a determination as to the regime's continuation.

In the event that the Commission determines that the regime should continue, then a further review will occur before 30 October 2010. If, however, the determination of the Commission is that the regime should not continue, then (subject to appropriate legislative provisions being effected – see further detail below) the current access regime will lapse and cannot be reviewed.

Process for the Ports Access Regime Review

Section 43 imposes several requirements on the Commission in the conduct of the review. These include the giving of notice that a review is to take place and the invitation and consideration of submissions from stakeholders.⁸

Once the Commission has completed the review, it must forward a report to the Minister responsible for the MSA Act (currently the Minister for Infrastructure). The report is to set out the conclusions reached as a result of the review and, in particular, recommend either that the access regime should continue in operation for a further triennial cycle or that it should expire at the end of the existing cycle.⁹

⁷ Section 43(1) MSA Act 2000 (SA)

⁸ Section 43(3) & (4) MSA Act 2000 (SA)

⁹ Section 43(5) MSA Act 2000 (SA)

If it is determined that the access regime should continue, a regulation must be made extending the period of its operation accordingly.¹⁰

Only the Proclaimed Ports and Regulated Services discussed in the previous chapter are the subject of the Ports Access Regime Review under the MSA Act described above. However, the Terms of Reference for the Ports Access Regime Inquiry (see section 2.2.2 below) allow the Commission to consider if the access regime could generally be improved, which may include consideration of additional services that could be brought into the list of Regulated Services.

This Issues Paper is the start of the process to decide if the access regime should continue for what will be its third triennial cycle, potentially beginning on 31 October 2007 and ending 30 October 2010.

2.2.2 Ports Access Regime Inquiry

Part 7 of the ESC Act provides for the conduct of inquiries and reports. Under section 35, the Commission must conduct an inquiry into any matter that the Minister responsible for the ESC Act (currently the Treasurer) refers to the Commission.¹¹ The Minister referring the matter may direct the Commission to inquire into a broad range of issues. Subject to any requirement or direction of the relevant minister, the Commission has a wide discretion as to how to conduct the inquiry.¹²

On 25 January 2007, the Acting Treasurer directed the Commission to conduct an inquiry into the Ports Access Regime. The terms of reference for the inquiry direct the Commission to examine and provide advice on any amendments to the regime that would be needed to comply with certain parts of clause 2 of the Competition and Infrastructure Reform Agreement (CIRA) and also to provide advice on any other changes to the access regime that may improve its overall effectiveness.

The clause 2 CIRA principles around which the Commission will be basing its inquiry, seek to establish a simpler and consistent national approach to economic regulation of significant infrastructure. The relevant provisions from clause 2 of the CIRA to which the Commission must have regard are provided in the Inquiry Terms of Reference (refer Appendix 1). In summary, these provisions set out the COAG agreed principles relating to access regimes for services provided by significant infrastructure facilities. They are as follows:

- ▲ access regimes should promote commercially agreed outcomes between the access seeker and the operator (clause 2.2);

¹⁰ Section 43(7) MSA Act 2000 (SA)

¹¹ Section 35(1) ESC Act 2002 (SA)

¹² Section 37 ESC Act 2002 (SA)

- ▲ price monitoring should be considered as a first option where price regulation is required or when scaling back from more intrusive regulation (clause 2.3);
- ▲ access regimes should have consistent regulatory principles relating to, among other things, promoting economic efficiency and effective competition in upstream and downstream markets, and the setting of regulated access prices (clause 2.4); and
- ▲ there should be a timeframe of up to six months for the making of regulatory decisions under an access regime (clause 2.6).

The CIRA requires that the above principles be incorporated into existing access regimes for services provided by means of significant infrastructure facilities as soon as practicable or as they are reviewed, provided that they are included in such regimes not later than the end of 2010.

The Commission will carefully consider Part 3 of the MSA Act, the ports access regime, in order to determine whether each of the above principles finds effect in the current legislation or whether changes need to be made. As mentioned previously, the 2004 Ports Price Determination set in place a price monitoring system for certain essential maritime services, indicating compliance with at least one of the above principles. Where changes to the legislation are required in order to achieve compliance with the CIRA principles, the Commission will seek to provide advice as to the form such changes should take.

In conducting the review, the Commission intends to consult comprehensively with industry stakeholders and to canvass and respond to submissions through reports, of which this Issues Paper is the first.

Once the Commission has completed a draft report of the review, it will make the report available to the Treasurer and the Minister for Infrastructure two weeks prior to the draft being released to the general public. On completion of the review, the Commission will forward to the Treasurer and the Minister for Infrastructure a report on the review and the conclusions reached by the Commission as a result of the review.

2.2.3 Application of the ESC Act

In conducting the two processes described above, the Commission will be performing functions under the ESC Act. Therefore, as well as the specific legislative and Terms of Reference requirements applicable in each case, the Commission will need to take into account the objectives set out in section 6 of the ESC Act.

Section 6 states that:

In performing the Commission's functions, the Commission must:

- ▲ *Have as its primary objective protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services; and*
- ▲ *At the same time, have regard to the need to:*
 - *Promote competitive and fair market conduct;*
 - *Prevent misuse of monopoly or market power;*
 - *Facilitate entry into relevant markets;*
 - *Promote economic efficiency;*
 - *Ensure consumers benefit from competition and efficiency;*
 - *Facilitate maintenance of the financial viability of regulated industries and the incentive for long term investment; and*
 - *Promote consistency in regulation with other jurisdictions.*

2.3 Ports Pricing Review

The Ports Pricing Review will consider the continuing need for price regulation of certain port services, known as Essential Maritime Services.

2.3.1 Essential Maritime Services

The Ports Pricing Review is concerned only with “essential maritime industries”¹³, which are regulated industries for the purposes of the ESC Act.¹⁴ Thus, in regulating these industries, the Commission has access to the powers it is granted under both the ESC Act and the MSA Act.

2.3.2 Previous regulation

The initial ports pricing determination, from 31 October 2001 to 30 October 2004, was made by the Minister for Government Enterprises, as required by section 6(2) of the MSA Act. The subsequent price review and price determination, which expires on 30 October 2007, was made by the Commission, in accordance with section 7 of the MSA Act, sections 25 and 26 of the ESC Act, and Regulation 3 of the ESC Regulations. A determination was made to introduce a system of price monitoring, replacing the price caps established under the initial pricing determination in 2001. The existing ports price monitoring regime is discussed in more detail in Chapter 3.

2.3.3 Requirements for the current price regulation review and potential price determination

The Commission is required, under section 9 of the MSA Act, to keep maritime industries under review with a view to determining if regulation (or further regulation) is required under the ESC Act. Given that the current Ports Price

¹³ See Regulation 3 of the ESC Regulations 2004

¹⁴ Section 6 (1) MSA Act 2000 (SA)

Determination is due to expire on 30 October 2007, the Commission needs to determine whether or not price regulation should continue beyond this point, and if so, in what form.

Section 7 of the MSA Act sets out the requirements for conducting a review of the industries subject to the initial price determination. However, these requirements apply only to the 2004 review and not to subsequent reviews that the Commission may undertake.¹⁵ Nevertheless, the Commission intends, in the interests of consistency, to follow these requirements in undertaking the current review. Therefore, in conducting the review, the Commission will publish a notice that a review is to take place and invite and consider submissions from stakeholders. On completing the review, the Commission will forward to the Minister for Infrastructure a report containing, amongst other things, the conclusions reached by the Commission as a result of the review.

If the Commission determines, at the end of the review process, that it is appropriate to make a further price determination, then it must comply with the relevant provisions of the ESC Act. Under section 25(2) of the ESC Act, the Commission may only make a price determination if authorised to do so by a relevant industry regulation Act or by a regulation under the ESC Act. The Commission is so authorised by means of Regulation 3 of the ESC Act, which grants the Commission the power to make a price determination relating to essential maritime industries, within the meaning of the MSA Act.

In undertaking the review, and in making any further price determination, the Commission will be performing a function under the ESC Act and must therefore comply with the objectives contained in section 6 of the ESC Act and described in section 2.2.3 of this Issues Paper.

In addition to having regard to these factors when making a price determination, the Commission must also have regard to the factors set out in section 25(4) of the ESC Act, namely:

- ▲ *The particular circumstances of the regulated industry and the goods and services for which the determination is being made;*
- ▲ *The costs of making, producing or supplying the goods or services;*
- ▲ *The costs of complying with laws or regulatory requirements;*
- ▲ *The return on assets in the regulated industry;*
- ▲ *Any relevant interstate and international benchmarks for prices, costs and return on assets in comparable industries;*
- ▲ *The financial implications of the determination;*
- ▲ *Any factors specified by a relevant industry Act or by regulation under this Act; and*
- ▲ *Any other factors that the Commission considers relevant.*

¹⁵ Section 7(1) MSA Act 2000 (SA)

Under section 25(5), the Commission must also ensure that in making a price determination:

- ▲ *Wherever possible the costs of regulation do not exceed the benefits; and*
- ▲ *The decision takes into account and clearly articulates any trade-off between costs and service standards.*

Section 25 (3) of the ESC Act sets out the type of price determination that the Commission may make. It states that:

A price determination may regulate prices, conditions relating to prices or price-fixing factors in a regulated industry in any manner the Commission considers appropriate, including:

- ▲ *Fixing a price or the rate of increase or decrease in a price;*
- ▲ *Fixing a maximum price or maximum rate of increase or minimum rate of decrease in a maximum price;*
- ▲ *Fixing an average price for specified goods or services or an average rate of increase or decrease in an average price;*
- ▲ *Specifying pricing policies or principles;*
- ▲ *Specifying an amount determined by reference to quantity, location period or other specified factor relevant to the supply of goods or services;*
- ▲ *Fixing a maximum average revenue, or maximum rate of increase or minimum rate of decrease in maximum average revenue, in relation to specified goods or services; and*
- ▲ *Monitoring the price levels of specified goods or services.*

Before making the price determination, the Commission will send a copy of the draft determination to the Treasurer and the Minister for Infrastructure, and to other relevant stakeholders.

The final price determination will include a summary of the information on which the determination is based and a statement of the reasons for the making of the determination.¹⁶ The Commission will send a copy of the price determination to the Treasurer, the Minister for Infrastructure and to other relevant stakeholders.¹⁷ Notice of the making of the price determination will be published in the SA Government Gazette, *The Advertiser*, and on the Commission's website.¹⁸

In the event that a Price Determination is made, it will take effect from 31 October 2007 and expire no later than 30 October 2010. A price determination made pursuant to the MSA Act has effect for three years from the date of commencement.¹⁹

¹⁶ Section 26(2) ESC Act 2002 (SA)

¹⁷ Section 26(3)(a) ESC Act 2002 (SA)

¹⁸ Section 26(4) ESC Act 2002 (SA)

¹⁹ Section 3(2) ESC Regulations 2004

2.3.4 MSA Act Objects Clause

Section 3 of the MSA Act sets out the objects of the Act. These are:

- ▲ *To provide access to maritime services on fair commercial terms;*
- ▲ *To facilitate competitive markets in the provision of maritime services;*
- ▲ *To protect the interests of users of essential maritime services by ensuring that regulated prices are fair and reasonable having regard to the level of competition in, and efficiency of, the regulated industry; and*
- ▲ *To ensure that disputes about access are subject to an appropriate dispute resolution process.*

The objects clause is a statement of intent as to how the Act should operate. It works to indicate to the Commission the intended purpose of the legislation and will thus be used by the Commission as an aid to interpreting the legislative provisions of the MSA Act. The objects clause is not a list of factors that the Commission must have regard to when exercising its functions, for example, making a price determination, unlike the objectives clause contained in section 6 of the ESC Act and referred to throughout this paper.

3 REGULATION OF PORTS: 2004 – 2007

3.1 2004 Ports Access Review

The Commission's previous Ports Access Review, conducted in 2003/04, examined whether or not the access regime established under Part 3 of the MSA Act should continue beyond 31 October 2004 for a further three-year period.

In April 2004, the Commission released its Final Report on the review, which recommended that the Ports Access Regime should continue for another triennial cycle.²⁰ Following this recommendation, a regulation was made under the MSA Act to enable the access regime to continue.²¹

In determining if the access regime should continue, the Commission sought to answer the following seven questions, which were derived from the legislative factors to which the Commission was required to have regard:

1. Does the structure of the market for the Regulated Services suggest market power could exist?
2. Is market power being misused or is there potential for it to be misused?²²
3. Do customers have alternative sources?
4. Is competitive entry possible?
5. Does the answer vary between proclaimed ports and between the goods being moved?
6. Are the above Regulated Services of sufficient importance to the South Australian economy to warrant economic efficiency concerns?
7. Is the Ports Access Regime appropriate – is it able to fix the above matters or will it impose excessive additional costs and risks?

Determining the extent to which a port operator can misuse market power is central to the question of whether or not to regulate. In the 2004 Ports Access Review, the Commission found that the services subject to the access regime, referred to under the MSA Act as Regulated Services, generally display natural monopoly characteristics with only certain services having the potential for competitive entry (pilotage and shiploading). The Commission 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. Market power was considered strongest for bulk cargoes, especially grain,

²⁰ Essential Services Commission of SA, *Ports Access Review: Final Report*, April 2004 (refer <http://www.escosa.sa.gov.au/webdata/resources/files/040121-R-PortsAccessReviewFinal.pdf>).

²¹ Refer Regulation 5 of the *Maritime Services (Access) (Port of Ardrossan) Regulations 2001*.

²² This is not necessarily the same as misuse of market power that would lead the Australian Competition and Consumer Commission to take action under the *Trade Practices Act 1974 (Cwlth)*.

where there are few feasible alternatives for users in deciding between ports or whether to use a port at all. The Commission balanced this conclusion against the view that Regulated Services were, in themselves, a small part of the South Australian economy, although they form an integral part of the importing and exporting of billions of dollars worth of cargoes annually.

These findings led the Commission 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. The negotiate/arbitrate form of access regulation provided for under Part 3 of the MSA Act was considered appropriate for these services.

As an additional finding, the Commission recommended that its role in monitoring and enforcing compliance with the MSA Act be clarified. This recommendation was addressed through the *Maritime Services (Access) (Functions of Commission) Amendment Act 2005*, which conferred on the Commission a compliance and enforcement role in the ports sector.

Some other minor amendments were made to Part 3 of the MSA Act as a result of the review, to improve its operation.

3.1.1 Operation of the Ports Access Regime

The Ports Access Regime provides a process that facilitates the negotiation of access on fair commercial terms.

This involves a potential user first approaching a port operator to find out about the services offered at the port and the rules and regulations of that port. A Regulated Operator must provide an Intending Proponent with information about:

- ▲ current utilisation levels of relevant facilities;
- ▲ technical requirements of use;
- ▲ rules of use (eg. safety); and
- ▲ price information required to be provided under the Commission guidelines (the Commission has published Ports Industry Guideline No. 1 to this effect).²³

The potential user can then use this information to determine if and how it might wish to seek access to the port's services.

The preference in the Ports Access Regime is for parties to reach their own commercial agreement on access. However, if agreement cannot be reached, then a 'dispute' exists. One of the parties to the dispute may refer it to the Commission.

²³ Essential Services Commission of SA, *Ports Guideline No. 1: Access Price Information*, January 2005 (available at <http://www.escosa.sa.gov.au/webdata/resources/files/041207-D-PortsGuideline1.pdf>).

Parties to the dispute first move into conciliation and, failing that, arbitration. The arbitrator is able to grant an Award, which contains the terms and conditions (which may include price) upon which access may occur.

3.2 2003 Ports Price Review

Prior to reaching its conclusions on the Ports Access Review, the Commission undertook a review of price regulation of Essential Maritime Services. The criteria used by the Commission for assessing if price regulation should continue were consistent with those used for assessing if the access regime should continue. The existence of market power and the potential for its misuse were important factors that were considered in both the review of price and access regulation.

The Final Report of the review found that price regulation of Essential Maritime Services at Proclaimed Ports should continue beyond 30 October 2004, for a further three years.²⁴ The reasons for this decision were similar to those relevant to the access review, where the Commission found that there was scope for the misuse of market power in providing Essential Maritime Services. However, the Commission recognised that Essential Maritime Services form a small component of the supply chain and contribute little to total cargo value. It therefore recommended a more light-handed form of regulation than the price cap regulation that existed prior to November 2004. The Commission proposed a price monitoring regime, which would provide to port operators and users the ability to negotiate commercial arrangements. The Commission monitors prices that are posted by the port operator, and there is the ongoing threat of re-regulation should there be evidence of the misuse of market power.

Similar to the conclusions reached in the access review, the Commission's major area of concern was in relation to bulk cargoes, especially grain. In addition to price monitoring, the Commission recommended that the negotiate/arbitrate access arrangements be extended to cover cargo services²⁵ at grain berths.

The Commission also recommended continuation of an existing requirement on port operators preventing them from increasing prices associated with the provision of an Excluded Asset (being the Port Giles, Wallaroo and Outer Harbour assets established or extended as part of the privatisation of the SA Ports Corporation).

A Ports Price Determination was issued in November 2004, giving effect to the new price regulation regime.

²⁴ Essential Services Commission of SA, *Ports Price Review: Final Report*, November 2003 (refer <http://www.escosa.sa.gov.au/webdata/resources/files/031031-R-PPRFinalReport.pdf>).

²⁵ The service of providing port facilities (as defined in the MSA Act) for loading and unloading vessels at a proclaimed port.

3.2.1 Ports Price Monitoring

As discussed, the 2004 Ports Price Determination established a form of price monitoring for Essential Maritime Services. In accordance with clause 2.5 of the Price Determination the Commission may during the period of the determination:

- ▲ *monitor the prices charged for the provision of essential maritime services by a regulated service provider;*
- ▲ *publish reports on prices charged for essential maritime services by a regulated service provider; and*
- ▲ *monitor and publish reports on matters relating to prices charged for essential maritime services by a regulated service provider.*

The Commission produces an annual report that compares the port costs involved in loading notional vessels at nominated Australian ports. The notional vessels represent typical vessels calling in South Australian ports, but they are not necessarily average vessels, nor are they actual vessels.

The Commission also monitors changes in published port prices. Appendix 2 sets out the published prices from 2003/04 to 2006/07²⁶.

Port charges involve a combination of cargo and ship based charges, and this combination can vary between ports. As it can be difficult to settle on a correct balance between these charges, the Commission has compared charges by bundling port costs that equate to Essential Maritime Services.

The 2006 Ports Price Monitoring Report provides a comparison for prices from 2003/04, 2005/06 and 2006/07 and allows for some short-term trend analysis of charges within a port, as well as an analysis of charges across ports.²⁷ Figure 3.1 to Figure 3.4 indicate short-term pricing trends that have emerged around Australian ports since 2003 for grain and minerals. Price Monitoring Reports that the Commission produces are not envisaged to be detailed benchmarking exercises. They are intended to provide an indication of trends in prices for Essential Maritime Services and give a snapshot of port charges around equivalent ports using a notional vessel.

Price trends from the past three price monitoring reports indicate that movements in port charges for Essential Maritime Services are generally consistent with the propensity for port operators to make only CPI adjustments to their charges each year, except where special circumstances exist, such as pricing restructures and infrastructure upgrades. The channel deepening project at Port Adelaide, that was completed in 2006, increased the total port cost at Port Adelaide in 2006. As can be seen from Figures 3.1 to 3.4, the Port of Adelaide experienced a price increase

²⁶ Readers should note that prior to 2003/04 prices for EMS were regulated under CPI price caps. Flinders Ports did not apply a full CPI increase for EMS prices in 2001/02 and 2002/03. They subsequently adjusted prices to reflect the full CPI increases at the time the 2003/04 prices were adjusted.

²⁷ Essential Services Commission of SA, *2006 Ports Price Monitoring Report*, September 2006 (available at <http://www.escosa.sa.gov.au/webdata/resources/files/060921-R-2006PortsPriceMonitoringReport.pdf>).

in 2006 for two port panamax vessels and both one port handymax and panamax vessels due to the channel deepening levy that was introduced in mid 2006. This new charge, which contributes funding towards the provision of a deeper channel to the benefit of certain users, does not make Port Adelaide the most expensive port to call at in Australia, with Geraldton being more expensive. Other issues such as port security and environmental compliance issues have all contributed to Australian ports' charges.

Prices for bulk minerals loaded at Australian ports (refer Figure 3.4) remained relatively unchanged in the past year. In comparison to other ports analysed, Port Pirie may be seen as relatively expensive, although it should be noted that Flinders Ports does not list a separate cargo services charge for mineral concentrates, and therefore the \$3.20 charge is taken from the 'All other products' category (as listed in Appendix 2). It is possible that port users are privately negotiating lower prices, but given the information that is publicly available, the \$3.20 charge is considered the most appropriate price to use in the Commission's analysis.

Looking back over the period from 2003/04 to 2006/07, charges for Essential Maritime services for grain cargoes, the area of greatest concern during the previous review, have increased by approximately 1.8% above CPI in Port Adelaide (driven largely by the channel deepening levy), but have increased by less than CPI in other SA ports.²⁸ The average annual price increases over this period, across the various notional vessels considered by the Commission, are set out in Table 3.1 and Table 3.2.

Table 3.1: Avg. Price Changes for Essential Maritime Services: grain cargo with 2 port visit

	PT. ADELAIDE AND PT. GILES		WALLAROO AND PT. LINCOLN
	INCL. PT. ADELAIDE CHANNEL DEEPENING LEVY	EXCL. PT. ADEL CHANNEL DEEPENING LEVY	
Two port grain - notional panamax	↑ 3.68% p.a.	↑ 1.27% p.a.	↑ 1.31% p.a.
Single visit grain - notional panamax	↑ 4.97% p.a.	↑ 0.38% p.a.	↑ 0.29% p.a.
Single visit grain - notional handymax	↑ 5.13% p.a.	↑ 0.51% p.a.	↑ 0.28% p.a.

Table 3.2: Avg. Price Changes for Essential Maritime Services: grain cargo with 1 port visit

	PT. ADELAIDE (INCL. CHANNEL DEEPENING LEVY)	PT. ADELAIDE (EXCL. CHANNEL DEEPENING LEVY)	PT. LINCOLN
Single visit grain - notional panamax	↑ 4.97% p.a.	↑ 0.38% p.a.	↑ 0.29% p.a.
Single visit grain - notional handymax	↑ 5.13% p.a.	↑ 0.51% p.a.	↑ 0.28% p.a.

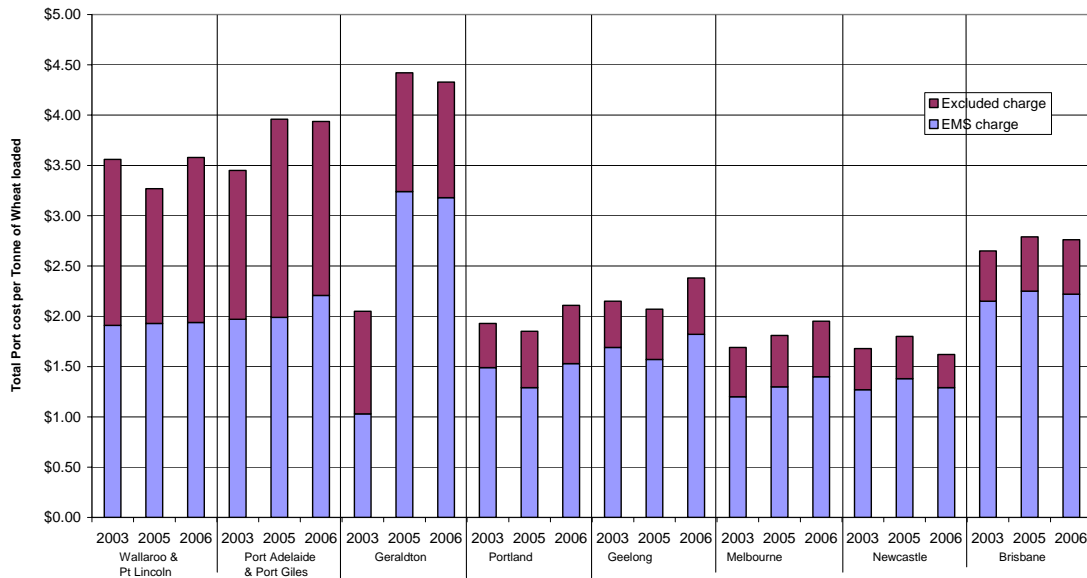
²⁸ Inflation over the period 2002/03 to 2005/06 in Adelaide averaged at 3.18% p.a. (as measured by the Jun-Jun CPI Index for Adelaide as published by the Australian Bureau of Statistics).

As shown in the above tables, the channel deepening levy at Port Adelaide has had a significant impact on charges for Essential Maritime Services. While this levy provides part funding for a one-off project, the Commission believes that it is important to consider the levy in any pricing analysis as it ultimately is reflective of the charges faced by port users, both currently and at least in the medium term future.

However, the important question for this review is whether or not the greater than CPI price increase reflects any misuse of market power by Flinders Ports.

Further analysis and figures can be found in the 2006 Ports Price Monitoring Report which is on the Commission’s website.²⁹

Figure 3.1: Two Port Grain Costs – Notional Panamax



²⁹ The 2006 Ports Price Monitoring Report can be found on the Commission’s website at <http://www.escosa.sa.gov.au/webdata/resources/files/060921-R-2006PortsPriceMonitoringReport.pdf>

Figure 3.2: One Port Grain Costs –Notional Panamax

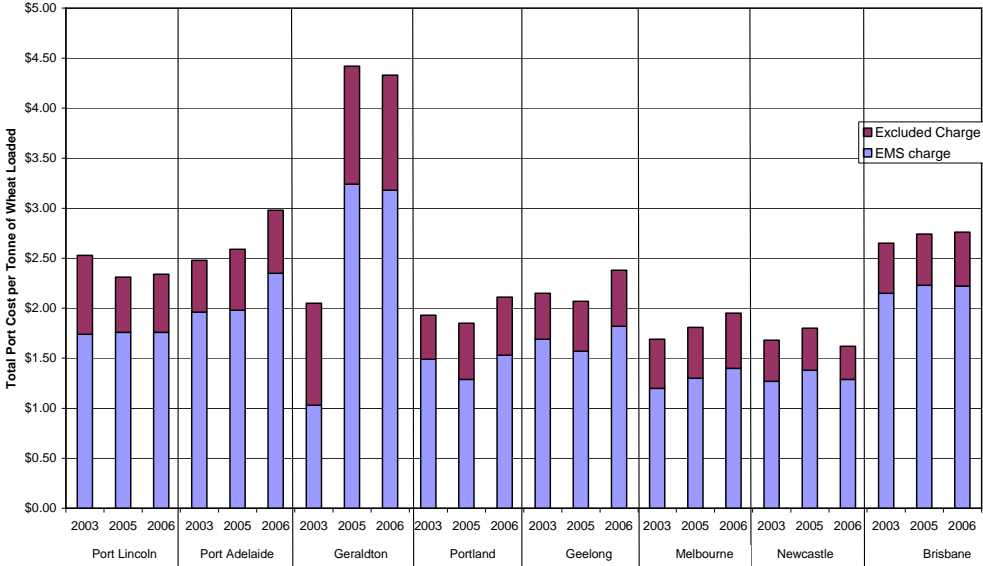


Figure 3.3: One Port Grain Costs – Notional Handymax

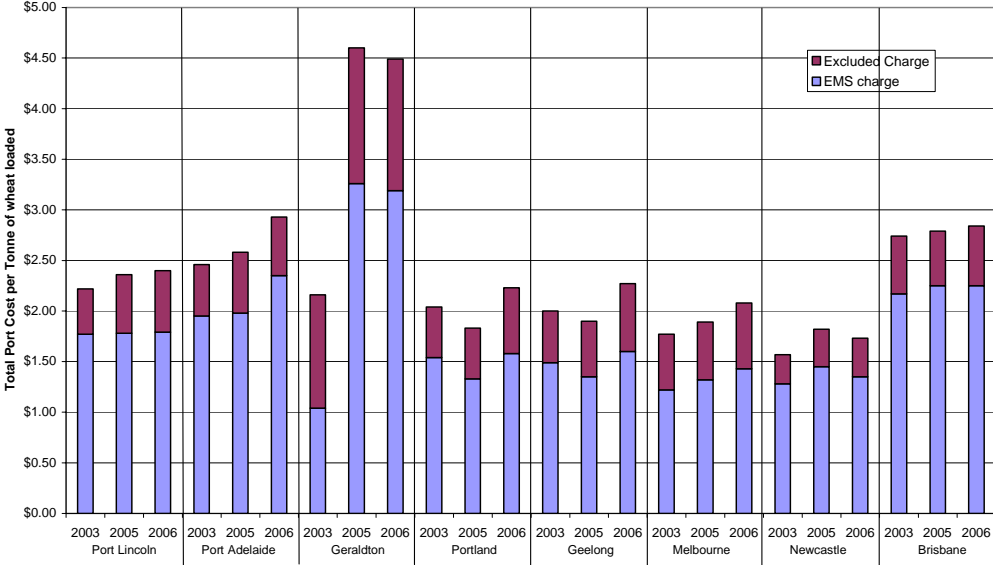
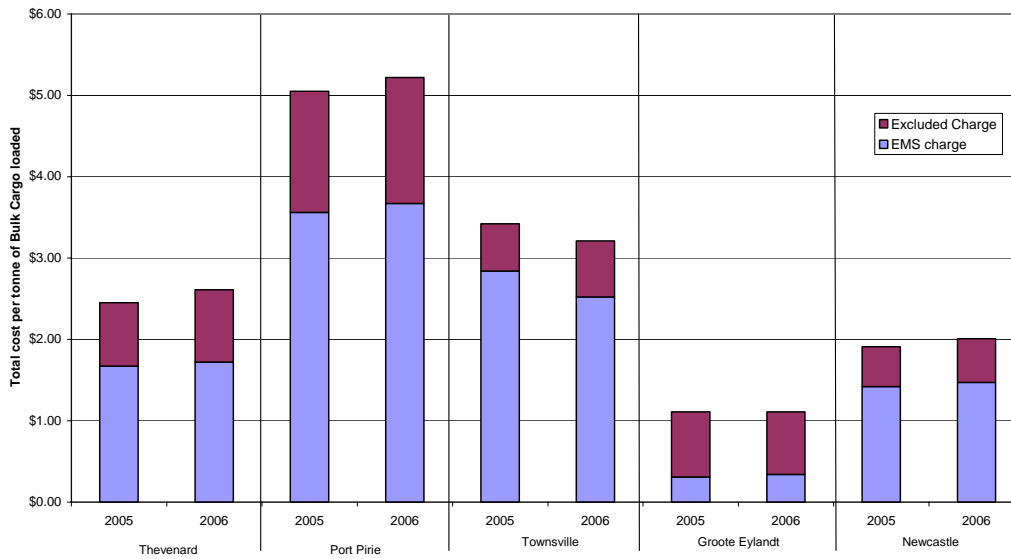


Figure 3.4: Notional Handysize Loaded with Bulk Mineral Concentrates



It should be noted that the charges included in the Commission’s ports price monitoring reports are based on published rates and it is possible for individual shippers to strike arrangements for services at non-listed prices.

The results of this type of analysis can vary due to the notional vessels selected, loading rates, time taken to complete documentation, load shares, etc. Differences such as the size of the port, total volume of cargo received and the total number of port calls will affect the average port costs, but such a comprehensive analysis has not been the focus of the Commission’s price monitoring reports given the difficulty in attempting to normalise port charges for all of these drivers. Caution should therefore be used in any comparison of charges between ports. The Commission has previously pointed out that South Australia has a large number of grain ports relative to other states, and savings in land transport costs should be taken into account under a whole of supply chain view.

4 KEY ISSUES

4.1 Review Approach

The 2004 reviews of ports access and pricing were the first such reviews conducted under the MSA Act by the Commission. The Commission's approach to the 2004 reviews involved detailed examination of market structure and market power, the extent of competition for services subject to economic regulation, the importance of such services to the economy, and the costs and benefits of various regulatory approaches. The Commission undertook significant consultation on each of these issues and considered numerous submissions before reaching its conclusions.

Rather than reviewing these issues afresh, the Commission's 2007 review of ports pricing and access will seek to determine if there is sufficient justification for changing the pricing and access regimes that currently apply. The Commission intends to review the experiences under the access regime and the price monitoring regime since November 2004. It will also examine if the market or regulatory environments have changed since the time of the previous reviews, or are likely to change during the next triennial cycle, to determine whether or not the current arrangements remain appropriate. Under this incremental approach, the Commission will give close consideration to the views of stakeholders and their experiences with the regimes and expectations for the near future.

4.2 Issues relating to whether or not regulation should continue

4.2.1 Market power

Economic regulation of port services has generally been justified on the grounds that ports exhibit natural monopoly characteristics since it is largely uneconomic to duplicate port infrastructure. Regulation is seen as an important tool in protecting the interests of parties seeking access to this essential facility.

Economic regulation attempts to address the potential for misuse of market power by port operators, where prices may be set above the socially optimal level and/or where output is produced below the socially optimal level. Regulation attempts to address this inefficiency by either facilitating the development of a more competitive market, or by constraining the ability of a firm to misuse market power, in order to achieve outcomes that are more consistent with the operation of a competitive market.

The assessment of market power was a central theme to the previous price and access reviews, and is fundamental to the question as to whether or not price and access regulation should continue. Here, it is not just a question of actual misuse of market power, but rather the potential for market power to be misused. Possible factors that may limit the ability of a port operator to misuse market power include:

- ▲ The extent of competition for port services. Where a shipper has alternatives to using a particular port service, the ability of the port operator to extract monopoly rents is reduced. These alternatives may include using other service providers within a port, using other ports, using other modes of transport, or choosing to supply to the domestic market rather than exporting;
- ▲ Even if actual competition for port services is limited, market power may still be constrained if there are low barriers to entry in the market and the port operator faces a threat of new entry if it prices above competitive levels;
- ▲ The extent to which port users have countervailing bargaining power; and
- ▲ The extent to which port charges comprise the total cargo value. Where port charges are a relatively minor component of overall value, changes in port charges are less likely to lead to changes in usage of port services relative to the situation in which port charges are a major component of total cargo value and users are more sensitive to changes in port costs.

One of the major conclusions reached in the 2004 reviews of port pricing and access, was that market power does exist for Regulated Services and Essential Maritime Services. It found that there is likely to be greater market power in relation to bulk cargoes (especially grain), and in relation to ports on the Eyre Peninsula. Grain growers rely largely on the export market as there is only a small domestic market for grain. Therefore, there are few alternatives to exporting through the port. As Flinders Ports operates the majority of grain ports, including the only two grain ports on the Eyre Peninsula, Ceduna and Port Lincoln, Flinders Ports holds a substantial degree of market power. Grain exporters around the South Australian-Victorian border are in a slightly different situation, since they have the choice of either going to Port Adelaide or by road to Geelong.

Despite the possible existence of market power, no disputes have been notified to the Commission during the current triennial cycle. In addition, price monitoring of Essential Maritime Services has not shown any significant variation in prices over the period (other than in Port Adelaide due to the channel deepening levy). Both of these observations might suggest that there has not been any misuse of market power.

The Commission is seeking comment on whether or not port users and prospective port customers have been able to successfully negotiate prices and access to port facilities on terms that are different to those published by the port operator. For example, the Commission notes that the Cargo Services Charge for grain has remained unchanged at \$1.50 for many years. The Commission would welcome comments from grain industry participants on their experiences in negotiating prices that vary from the published rate of \$1.50. The ability of port users to actively negotiate prices on a case-by-case basis with service providers may indicate that there is no misuse of market power by the port operator.

The Commission's consideration of this issue extends to bulk handling facilities at the proclaimed ports. The degree of market power held by the provider of bulk handling facilities may be constrained by the potential for competition from:

- ▲ alternate shiploaders, possible for example at a port such as Port Adelaide or Port Pirie where a shiploader could be constructed at a number of different berths (indeed, a new shiploader is being constructed at Outer Harbor by AusBulk), though unlikely to be possible at single jetty ports dominated by an existing shiploader; and
- ▲ alternate ports, although port options tend to be more limited for commodity cargoes – which are more likely to use shiploaders.

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 (which include bulk handling facilities) and Essential Maritime Services?

To what extent have negotiations for access to ports been unsuccessful?

Has the Commission's approach to price monitoring (refer section 3.2.1) been appropriate? Has it been useful?

How do prices compare relative to other comparable ports in Australia?

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

4.2.2 Costs and benefits of regulation

Even if the Commission were to conclude that there is at least the potential for a port operator to misuse market power, the Commission will still need to assess the costs and benefits of using regulation as a means of addressing market power.

For example, it may be that port services represent a relatively minor component of the overall supply chain and that any changes in port charges do not induce any real changes to port usage. If port usage is non-responsive to prices at the port, then there will be few efficiency gains from price regulation (though there may be distributional consequences).

In addition, regulation imposes costs to the regulated business and, ultimately, to consumers. If the costs of regulation outweigh any benefits from imposing it, then there is little justification for retaining it. The Commission notes that the cost of regulation is dependent on the form and scope of regulation imposed. In seeking to

determine if any access regulation should continue, the Commission will assess the costs and benefits of the current access regime (which is fixed as a negotiate/arbitrate model). In terms of price regulation, the Commission currently implements a low cost price monitoring regime, but will examine if there is a net benefit in having no price regulation relative to having any form of price regulation.

Are there net benefits associated with the current negotiate/arbitrate access regime?

Are there net benefits in retaining price regulation (of any form)?

4.2.3 Industry Developments

The Commission is interested in understanding the impact of any recent developments, or likely future developments, that may have an impact on the ports pricing and access regimes, particular where such developments have an influence on the market power of the port operator. Stakeholder comments identifying any such issues would be welcomed by the Commission.

Grain

In relation to the grain industry, there is currently some uncertainty surrounding the future of the AWB Ltd and ABB Grain single desk operations, with both arrangements under review. The outcomes of these reviews may have an impact on port access. For example, if new grain exporters were to enter the market, the control and management of grain storage and transport would be spread amongst more market participants. This could have implications for grain accumulation at export terminals where accumulation could be used for commercial purposes. In addition, the mix of port terminals that are currently chosen for exporting could change.

What are the possible implications for ports pricing and access should the AWB Ltd and ABB Grain single desks either be retained or deregulated?

Containers

There is currently no direct competition within Port Adelaide for container facilities. Competition comes from other ports, primarily Melbourne and Fremantle. The commencement of the Tarcoola-Darwin railway was intended to considerably increase the volume of containers moving from South Australia to the port of Darwin. However, container volumes transported along the railway are not sufficient to suggest that Darwin is now also a competitor to Port Adelaide. While SA has small container volumes relative to other states, the Commission understands that container volumes are increasing in South Australia.

The Commission will be seeking to understand if there have been any significant changes in container movements, or if there are likely to be any changes in the near future, that would suggest that there is sufficient competition between ports for container volumes, constraining the degree of market power held by Flinders Ports.

How has competition between ports for container volumes developed? To what extent does Flinders Ports hold market power in providing container facilities?

Minerals

The Commission is aware that there is the possibility of various new mining developments that may commence production in the near future. There are a number of proclaimed ports that have the infrastructure capable of loading minerals, although it is likely that substantial upgrades would be needed at some ports to accommodate future use for mineral exports.

Is the existing ports access regime capable of dealing with an expansion in mineral developments in South Australia?

4.2.4 Other factors

The Commission would welcome comments from stakeholders on any recent changes in the market or possible changes in the near future that may impact on the Commission's review of the need for continued price and access regulation. The Commission is interested in any views on the quality of port services, the impact of changes in volumes by cargo types, and any other region or cargo specific issues that may be relevant to this review. In addition, stakeholders may wish to comment on the further consolidation of participants within the transport industry and whether or not this has any impact on the need for economic regulation of ports.

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

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

Are there any region specific or cargo specific issues that are relevant to the review?

Are there any other factors that the Commission should have regard to in deciding if price and access regulation should continue?

4.3 Issues relating to the form of price regulation

Assuming that price regulation continues, an important issue for the Commission is the form of regulation that should apply. As discussed in the previous chapter, the Commission applied a price monitoring approach for the current regulatory period.

In its previous review, the Commission noted that a price monitoring approach would allow regulated operators and their customers the freedom to negotiate commercial agreements, while the threat of re-regulation³⁰ would provide an ongoing deterrent against the misuse of market power by regulated operators.

4.4 Forms of price regulation

The Commission's price regulation powers arise under Part 3 of the ESC Act. Specifically, under Section 25(3), the Commission may make a price determination that regulates prices, conditions relating to prices or price-fixing factors in any manner it considers appropriate. This means that there is no particular limit to the form of price regulation that might apply.

Section 25 of the ESC Act gives the Commission a very broad discretion in its choice of a form of price regulation. The examples included in the ESC Act range from very intrusive price fixing through to very light handed price monitoring. In some cases the Commission's discretion may be constrained by an industry regulation Act. For example, an industry regulation Act may require that the Commission use only a certain form of price regulation. The MSA Act (the relevant industry regulation Act here) sets no such restrictions for Essential Maritime Services.

In a broad sense the forms of price regulation available fall into several different categories (each with many variants) including:

- ▲ price or price movement control;
- ▲ revenue controls on prices;
- ▲ pricing principles based regulation;
- ▲ benchmark regulation;
- ▲ price notification; and
- ▲ price monitoring.

4.4.1 Reason to change the current form of regulation

The Commission's decision in the previous review was to implement the negotiate/arbitrate access regime while implementing a price monitoring approach under price regulation.

³⁰ That is, the subsequent introduction of tighter, more intrusive regulation.

Changes to this regime should be considered if it can be shown that the current access and price regulation has led to undesirable outcomes, and therefore, requires a different approach. To assess whether or not this is the case, a number of matters need to be considered that can assist in defining the success or otherwise of the current regime. The following outcome measures are provided as a list for discussion:

- ▲ *Change in Published Prices:* The current regime requires the Port Authority to publish its annual regulated prices. The rate of change in these prices, and the reasons for the change, will provide the Commission with useful insight into the success or otherwise of the current form of price control. Appendix 2 provides a list of the ports services and their published prices since 2003/2004.
- ▲ *Negotiated outcomes:* Under the negotiate/arbitrate model, the regulated Ports Authorities are encouraged to negotiate bi-lateral contracts with the users. A number of such contracts existed even prior to the review undertaken by the Commission in 2003. In deciding if the current regime has helped or hindered effective price regulation, the Commission intends to explore the process behind the negotiation of contracts, and in particular, changes and additions to the contracts since the last review.
- ▲ *Annual Profitability:* Another indication of whether or not the current form of regulation is appropriate, is the level of profitability of the ports authority. Increasing returns may be indicative of monopoly rents, although high returns can equally be due to seasonal effects or increasing efficiency – a desirable outcome of incentive regulation. In any case, the level of annual returns and its underlying cause should be assessed by the Commission.
- ▲ *Compliance Cost:* The cost of complying must be less than the benefits gained from regulation. This principle is at the core of the Commission's decision to use a more 'light handed' form of regulation. The main data gathered from Flinders Ports are the annual financial statements. The main requirement imposed on Flinders Ports is to publish the price list on its web site. The Commission is keen to receive some feedback on whether or not the compliance cost imposed is reasonable.
- ▲ *Number of disputes:* Another indicator of the effectiveness of the current form of regulation is a low and reduced number of access and pricing related disputes between the ports authority and its users. The reducing number of reported disputes may also be due to reasons other than a good regulatory regime. The Commission invites respondents, and in particular the users, to provide feedback on issues/difficulties they may have faced in seeking unbiased access and reasonable price movements.
- ▲ *Number of access seekers:* Finally, an increasing number of access seekers could be used as another indicator of a regulatory regime that is effective in

protecting the users welfare, while maintaining a 'light handed' form of regulation. The Commission invites comments on whether or not this measure is relevant in determining the effectiveness, or otherwise, of the current form of regulation.

These outcome measures would provide guidance to the Commission on whether or not changes to the current form of regulation are required, and if so, to what extent, i.e. does the form of regulation require some 'fine-tuning' or does it require 'wholesale' changes to address any problems identified.

The Commission invites comments on the issues addressed above, and any other issues that the stakeholder considers necessary for the Commission to address in deciding on the most appropriate form of price regulation that should apply for the next period.

4.5 Clause 2 of the CIRA

The Commission has been directed to conduct an inquiry under Part 7 of the ESC Act, into whether or not the ports access regime is consistent with certain principles set out in clause 2 of the CIRA. In particular, the Commission has been directed to consider clauses 2.1, 2.2, 2.3, 2.4 and 2.6 of the CIRA. These provisions were discussed in section 2 and are reproduced in the Inquiry Terms of Reference set out in Appendix 1.

The Commission has also been directed to provide advice on any other changes to the access regime that may improve its overall effectiveness.

The Commission would welcome comments on the extent to which the current ports pricing and access regimes comply with clauses 2.1, 2.2, 2.3, 2.4 and 2.6 of the CIRA. For example, are the regimes consistent with the clause 2.1 principle for a simpler and consistent national approach to economic regulation of port infrastructure? In addition, the clause 2.4 principles for access regimes do not appear in the ports access regime, although there may be elements of the regime that are consistent with some of these principles. Suggestions on how the regimes could be amended to produce consistency with these CIRA provisions would be welcomed.

In addition, stakeholders are encouraged to provide comment on any aspects of the ports access regime that could be improved. This may include either reducing the scope of Regulated Services or increasing the scope to cover additional services. Comments on whether or not the negotiation process that is described in sections 12 and 13 of the MSA Act match the reality of negotiation for access are also welcome.

Are there any aspects of the access and pricing regimes that are inconsistent with the CIRA clause 2 requirements (clauses 2.1, 2.2, 2.3, 2.4 and 2.6)?

If so, are there net benefits in changing the regimes to make them consistent? And what changes would need to be made?

Can the access regime be generally improved? Should it be expanded to cover additional services or should the scope of Regulated Services be reduced?

Does the negotiation process as described in sections 12 and 13 of the MSA Act accurately reflect the negotiation process in practice?



5 NEXT STEPS

The Commission welcomes comments from interested parties on the issues raised in this paper, or on any other issues that are considered relevant to the review and inquiry into the ports access regime, and the review of the ports pricing regime.

Comments in response to this paper are to be provided to the Commission by 21 March 2007.

The Commission will consider comments in developing a Draft Report by June 2007. The Commission will consult on the Draft Report before issuing a final report and Price Determination (if applicable) in October 2007.

APPENDIX 1: TERMS OF REFERENCE FOR INQUIRY INTO PORTS ACCESS REGIME

NOTICE OF REFERRAL FOR AN INQUIRY INTO THE PORTS ACCESS REGIME

FROM: Paul Holloway, Acting Treasurer
TO: Chair, The Essential Services Commission of South Australia
RE: Ports Access Regime

BACKGROUND:

1. Pursuant to section 35(1) of the *Essential Services Commission Act, 2002*, the Commission must conduct an inquiry into any matter that the Minister, by written notice, refers to the Commission. The Act is committed to the Treasurer by way of *Gazettal* notice dated 12 September 2002 (p 3383).
2. Pursuant to section 43(1) of the *Maritime Services (Access) Act, 2000*, the Commission must conduct a review to determine whether the access regime should continue beyond October 2007. The Act is committed to the Minister For Infrastructure. In late 2006, the Commission will commence a review of the industries subject to the Ports Access Regime.
3. The Competition and Infrastructure Reform Agreement (CIRA) made at the Council of Australian Governments (CoAG) is aimed at ensuring efficient and timely investment in infrastructure and effective competition in the provision of port services. It commits South Australia to implementing a simpler and more consistent national approach to economic regulation of significant infrastructure.
4. ESCOSA is directed to undertake a review of the ports access regime consistent with the terms of reference that follow.

REFERRAL:

I, PAUL HOLLOWAY, Acting Treasurer, refer to the Commission the matter described in Paragraph (a) and (b) of the Terms of Reference and subject to the Directions set out in this Notice.

TERMS OF REFERENCE:

The following are the Terms of Reference for the inquiry:

As part of the review of the Ports Access Regime which is required by section 43 (1) of the *Maritime Services Act*, the Commission is required to:

- (a) Examine and provide advice on any amendments to the ports access regime that would be needed to comply with the following sections from clause 2 of the CIRA.

"2.1 The Parties agree to establish a simpler and consistent national approach to economic regulation of significant infrastructure.

2.2 The Parties agree that, in the first instance, terms and conditions for third party access to services provided by means of significant infrastructure facilities should be on the basis of terms and conditions commercially agreed between the access seeker and the operator of the infrastructure.

- 2.3 The introduction of price monitoring for services provided by means of significant infrastructure facilities should be considered, where this would improve the level of price transparency, as a first step where price regulation may be required, or when scaling back from more intrusive regulation.
- 2.4 All third party access regimes for services provided by means of significant infrastructure facilities will include the following consistent regulatory principles.
- a. Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.
 - b. Regulated access prices should be set so as to:
 - i. generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;
 - ii. allow multi-part pricing and price discrimination when it aids efficiency;
 - iii. not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
 - iv. provide incentives to reduce costs or otherwise improve productivity.
 - c. Where merits review of regulatory decisions is provided, the review will be limited to the information submitted to the regulator.
- 2.6 The Parties agree to introduce requirements that regulators will be bound to make regulatory decisions under an access regime within six months, provided that the regulator has been given sufficient information.
- a. Regulators will have the discretion to determine when the six month time limit is suspended:
 - i. grounds for commencing time limits include when the regulator considers that sufficient information has been provided to enable the regulatory process to commence; and
 - ii. grounds for suspending time limits include requests for further information from significant infrastructure facility service providers, provided these are on reasonable grounds, and consultation periods during which the regulator seeks submissions from third parties or the community.
 - b. Where the service provider of a significant infrastructure facility has not provided the requested information, a regulator will be

- 2.3 The introduction of price monitoring for services provided by means of significant infrastructure facilities should be considered, where this would improve the level of price transparency, as a first step where price regulation may be required, or when scaling back from more intrusive regulation.
- 2.4 All third party access regimes for services provided by means of significant infrastructure facilities will include the following consistent regulatory principles.
- a. Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.
 - b. Regulated access prices should be set so as to:
 - i. generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;
 - ii. allow multi-part pricing and price discrimination when it aids efficiency;
 - iii. not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
 - iv. provide incentives to reduce costs or otherwise improve productivity.
 - c. Where merits review of regulatory decisions is provided, the review will be limited to the information submitted to the regulator.
- 2.6 The Parties agree to introduce requirements that regulators will be bound to make regulatory decisions under an access regime within six months, provided that the regulator has been given sufficient information.
- a. Regulators will have the discretion to determine when the six month time limit is suspended:
 - i. grounds for commencing time limits include when the regulator considers that sufficient information has been provided to enable the regulatory process to commence; and
 - ii. grounds for suspending time limits include requests for further information from significant infrastructure facility service providers, provided these are on reasonable grounds, and consultation periods during which the regulator seeks submissions from third parties or the community.
 - b. Where the service provider of a significant infrastructure facility has not provided the requested information, a regulator will be

permitted to make a determination on the information before it in order to satisfy six month time limits.

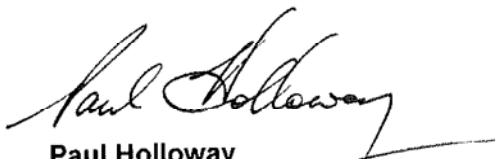
2.7 The principles in clauses 2.4 and 2.6 will be incorporated in existing access regimes for services provided by means of significant infrastructure facilities and Part IIIA of the *Trade Practices Act 1974* as soon as practicable or as they are reviewed, provided that they are included in such regimes no later than the end of 2010."

- (b) Provide advice on any other changes to the access regime that may improve its overall effectiveness.

DIRECTIONS:

I direct that:

1. In undertaking its inquiry, the Commission must preserve the confidentiality of any information, material or documentation provided by Government to enable the Commission to undertake its inquiry and stamped "Strictly Confidential".
2. A draft report of the review will be made available to the Treasurer and the Minister for Infrastructure two weeks prior to the draft being released to the general public.
3. On completing the review, the Commission must forward to the Treasurer and the Minister for Infrastructure a report on the review and the conclusions reached by the Commission as a result of the review.
4. If the Commission wishes to seek further information or guidance in relation to the conduct of this inquiry, it may contact Christine Bierbaum, Executive Director, Government Relations and Reform Office, Department for Transport, Energy & Infrastructure or James Buder, Senior Advisor – Ports & Logistics, Department for Transport, Energy & Infrastructure.



Paul Holloway
Acting Deputy Premier
Acting Treasurer

25 January 2007

APPENDIX 2: PUBLISHED PRICES FOR PORT SERVICES 2003/04 – 2006/07

	06-07 (CPI 3.11%)		05-06 (CPI 2.17%)		04-05 (CPI 2.14%)		03-04 (CPI 5.01%)	
CARGO SERVICES CHARGES (EX GST)								
Bulk Cargo		% change from prev. yr.		% change from prev. yr.		% change from prev. yr.		
Salt (\$/tonne)	\$1.32	3.13%	\$1.28	2.40%	\$1.25	3.31%	\$1.21	
Gypsum (\$/tonne)	\$1.32	3.13%	\$1.28	2.40%	\$1.25	3.31%	\$1.21	
Limestone (\$/tonne)	\$1.32	3.13%	\$1.28	2.40%	\$1.25	3.31%	\$1.21	
Dolomite (\$/tonne)	\$1.32	3.13%	\$1.28	2.40%	\$1.25	3.31%	\$1.21	
Grain (\$/tonne)	\$1.50	0.00%	\$1.50	0.00%	\$1.50	0.00%	\$1.50	
Flour (\$/tonne)	\$1.72	2.99%	\$1.67	2.45%	\$1.63	3.16%	\$1.58	
Liquids (\$/Kilolitre)	\$4.44	3.02%	\$4.31	2.13%	\$4.22	2.93%	\$4.10	
All other products (\$/tonne)	\$3.20	3.23%	\$3.10	2.31%	\$3.03	3.06%	\$2.94	
Other Non-Containerised Cargo								
Live sheep (\$/head)	\$0.2496	3.10%	\$0.2421	2.20%	\$0.2369	3.00%	\$0.23	
Live goats (\$/head)	\$0.2496	3.10%	\$0.2421	2.20%	\$0.2369	3.00%	\$0.23	
Cattle (\$/head)	\$1.74	2.96%	\$1.69	2.42%	\$1.65	3.12%	\$1.60	
Bagged Grain (\$/tonne)	\$1.72	2.99%	\$1.67	2.45%	\$1.63	3.16%	\$1.58	
Bagged Flour (\$/tonne)	\$1.72	2.99%	\$1.67	2.45%	\$1.63	3.16%	\$1.58	
All other products (\$/tonne or cubic metre, whichever is the greater)	\$3.20	3.23%	\$3.10	2.31%	\$3.03	3.06%	\$2.94	
Motor Vehicles Completely Built								
Volume <10m3 (\$/unit)	\$20.52	3.12%	\$19.90	2.21%	\$19.47	3.02%	\$18.90	
Volume 10m3 < 15m3 (\$/unit)	\$29.63	3.10%	\$28.74	2.20%	\$28.12	3.00%	\$27.30	
Volume > 15m3 (\$/unit)	\$47.86	3.10%	\$46.42	2.20%	\$45.42	2.99%	\$44.10	
Containerised Cargo								
20' Container (\$/unit)	\$57.43	3.11%	\$55.70	2.20%	\$54.50	2.83%	\$53.00	
40' Container (\$/unit)	\$104.34	3.10%	\$101.20	2.22%	\$99.00	3.13%	\$96.00	
Empty Container (\$/unit)	-		-		-		-	

Channel Levy (Ex GST)	06-07
Levies apply to Port Adelaide only	
Grain Levy Port Adelaide (\$/tonne)	\$0.36
20' Container Levy (\$/unit)	\$5.00
40' Container Levy (\$/unit)	\$10.00

HARBOR SERVICES CHARGE AND MOORING CHARGE (EX GST)	06-07 (CPI 3.11%)		05-06 (CPI 2.17%)		04-05 (CPI 2.14%)		03-04 (CPI 5.01%)	
		% change from prev. yr.		% change from prev. yr.		% change from prev. yr.		
HSC Port Adelaide (includes mooring)								
Base charge (\$ per ship visit)	\$2,962.85	3.10%	\$2,873.76	2.20%	\$2,811.90	3.00%	\$2,730.00	
Variable charge (\$ per gross registered tonne ("GRT") per hour)	\$0.0049	2.08%	\$0.0048	2.13%	\$0.0047	2.84%	\$0.004570	
HSC Other Proclaimed Ports (includes mooring)								
Base charge (\$ per ship visit)	\$2,546.91	3.10%	\$2,470.33	2.20%	\$2,417.15	3.00%	\$2,346.75	
Variable charge (\$ per GRT per hour)	\$0.0047	3.04%	\$0.0046	2.22%	\$0.0045	2.27%	\$0.0044	
State Trader (all Proclaimed Ports)								
>40 GRT and <50 GRT								
Base charge (3 month permit)	\$87.98	3.11%	\$85.33	2.20%	\$83.49	3.00%	\$81.06	
Variable charge (\$ per GRT for 3 month permit period)	-		-		-		-	
>50 GRT and <100 GRT								
Base charge (3 month permit)	\$139.15	3.10%	\$134.97	2.20%	\$132.06	3.00%	\$128.21	
Variable charge (\$ per GRT for 3 month permit period)	-		-		-		-	
>100 GRT and <200 GRT								
Base charge (3 month permit)	\$212.47	3.10%	\$206.08	2.20%	\$201.64	3.00%	\$195.77	
Variable charge (\$ per GRT for 3 month permit period)	-		-		-		-	
>200 GRT and <500 GRT								
Base charge (3 month permit)	\$212.47	3.10%	\$206.08	2.20%	\$201.64	3.00%	\$195.77	
Variable charge (\$ per GRT over 200 GRT for 3 month permit period)	\$0.6125	3.10%	\$0.5941	2.20%	\$0.5813	2.99%	\$0.5644	
>500 GRT and <1000 GRT								
Base charge (3 month permit)	\$402.16	3.10%	\$390.07	2.20%	\$381.67	3.00%	\$370.55	
Variable charge (\$ per GRT over 500 GRT for 3 month permit period)	\$3.20	3.23%	\$3.10	2.31%	\$3.03	3.06%	\$2.94	
>1000 GRT								
Base charge (3 month permit)	-		-		-		-	
Variable charge (\$ per GRT for 3 month permit period)	\$6.05	3.07%	\$5.87	2.26%	\$5.74	3.05%	\$5.57	
Fishing Industry								
>40 GRT and <50 GRT								
Base charge (3 month permit)	\$131.73	3.10%	\$127.77	2.20%	\$125.02	2.10%	\$122.45	
Variable charge (\$ per GRT for 3 month permit period)	-		-		-		-	
>50 GRT and <100 GRT								
Base charge (3 month permit)	\$208.21	3.10%	\$201.95	2.20%	\$197.60	2.10%	\$193.54	
Variable charge (\$ per GRT for 3 month permit period)	-		-		-		-	
>100 GRT and <200 GRT								
Base charge (3 month permit)	\$318.05	3.10%	\$308.49	2.20%	\$301.85	2.10%	\$295.64	
Variable charge (\$ per GRT for 3 month permit period)	-		-		-		-	
>200 GRT and <500 GRT								
Base charge (3 month permit)	\$318.05	3.10%	\$308.49	2.20%	\$301.85	2.10%	\$295.64	
Variable charge (\$ per GRT over 200 GRT for 3 month permit period)	\$0.9145	3.10%	\$0.8870	2.20%	\$0.8679	2.11%	\$0.8500	
>500 GRT and <1000 GRT								
Base charge (3 month permit)	\$602.0300	3.10%	\$583.9300	2.20%	\$571.36	2.10%	\$559.61	
Variable charge (\$ per GRT over 500 GRT for 3 month permit period)	\$4.69	3.08%	\$4.55	2.25%	\$4.45	2.06%	\$4.36	
>1000 GRT								
Base charge (3 month permit)	-		-		-		-	
Variable charge (\$ per GRT for 3 month permit period)	\$9.04	3.08%	\$8.77	2.21%	\$8.58	2.14%	\$8.40	

NAVIGATION SERVICES CHARGE (EX GST)	06-07 (CPI 3.11%)		05-06 (CPI 2.17%)		04-05 (CPI 2.14%)		03-04 (CPI 5.01%)	
		% change from prev. yr.		% change from prev. yr.		% change from prev. yr.		
1st Visit (All Proclaimed Ports)								
Base charge (\$ per ship visit)	\$945.84	3.10%	\$917.40	2.20%	\$897.65	3.00%	\$871.50	
Variable charge (\$ per GRT per visit)	\$0.1043	3.06%	\$0.1012	2.22%	\$0.0990	3.02%	\$0.0961	
2nd Visit (All Proclaimed Ports)								
Base charge (\$ per ship visit)	\$709.38	3.10%	\$688.05	2.20%	\$673.24	3.00%	\$653.63	
Variable charge (\$ per GRT per visit)	\$0.0782	3.03%	\$0.0759	2.15%	\$0.0743	3.05%	\$0.0721	
3rd Visit (All Proclaimed Ports)								
Base charge (\$ per ship visit)	\$472.92	3.10%	\$458.70	2.20%	\$448.83	3.00%	\$435.75	
Variable charge (\$ per GRT per visit)	\$0.0522	3.16%	\$0.0506	2.22%	\$0.0495	3.13%	\$0.0480	
4th Visit (All Proclaimed Ports)								
Base charge (\$ per ship visit)	\$236.46	3.10%	\$229.35	2.20%	\$224.41	3.00%	\$217.88	
Variable charge (\$ per GRT per visit)	\$0.0261	3.16%	\$0.0253	2.02%	\$0.0248	3.33%	\$0.0240	
Frequent Caller								
Base charge (\$ per 6 month period)	\$2,175.41	3.10%	\$2,110.00	2.20%	\$2,064.58	3.00%	\$2,004.45	
Variable charge (\$ per GRT per 6 month period)	\$0.2398	3.10%	\$0.2326	2.20%	\$0.2276	2.99%	\$0.2210	
State Trader								
Base charge (\$ per 6 month period)	-		-		-		-	
Variable charge (\$ per GRT per 6 month period)	\$0.3469	3.09%	\$0.3365	2.19%	\$0.3293	3.00%	\$0.3197	