2007 PORTS PRICING AND ACCESS REVIEW

DRAFT REPORT

June 2007

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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 **2 July 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
ACCC	Australian Competition and Consumer Commission
AUSBULK	AusBulk Pty 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
FLINDERS PORTS	Flinders Ports Pty Ltd
MSA ACT	Maritime Services (Access) Act 2000
MEYRICK AND ASSOCIATES	Meyrick Consulting Group Pty Ltd
NCC	National Competition Council
PC	Productivity Commission
REGULATED SERVICES	Services defined by proclamation under section 4 of the MSA Act and subject to the Ports Access Regime
SAFC	South Australian Freight Council Inc.
SAFF	South Australian Farmers Federation

SUMMARY

The Essential Services Commission of South Australia (the Commission) has completed its Draft Report in the 2007 Ports Pricing and Access Review, as required under the *Maritime Services (Access) Act 2000* (MSA Act). The MSA Act defines the services that are subject to price regulation in the price regime as Essential Maritime Services, and Regulated Services as those that are subject to the access regime. These services are detailed in chapter 1.

The review is considering 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 review began with the release of an Issues Paper in February 2007. Eight submissions were received in response. These submissions are available on the Commission's website at www.escosa.sa.gov.au.

This Draft Report sets out the Commission's draft views on the continuation of the ports pricing and access regimes. The Pricing Regime is discussed in Section 2 and the Access Regime is discussed in Section 3. The regimes are being assessed concurrently since the regimes complement each other and because such an approach is more efficient.

The Commission is required to have regard to its objectives under the *Essential Services Commission Act 2002* (ESC Act) in conducting the price and access reviews and Inquiry under Part 7 of the ESC Act. In determining whether the price and access regimes should continue, the Commission has established some assessment criteria based on these objectives as set out below:

- Is there the potential for the port operator to exercise market power?
- Is there any evidence of misuse of market power by the port operator?
- Will regulation produce a net benefit?

Ports Price Review

The Draft Report has concluded that within the pricing regime there exists the potential for market power to be exercised by port operators. However, there is no evidence to suggest that port operators are exercising such market power. The Commission has reached this conclusion after analysing the Regulatory Accounts of Flinders Ports and ABB Grain, which indicate they have not been earning excessive profits. Additionally, prices throughout the triennial cycle have not increased sharply and have been broadly consistent with CPI movements. The Commission also concluded that port operators are complying with the requirement to post their price lists and notify the Commission of any price changes within the period.

In order to improve the current form of price regulation (price monitoring) the Commission engaged Meyrick and Associates to conduct a more thorough ports price benchmarking analysis. The results of the study supported the conclusions found in the Commission's ports price monitoring reports that South Australian ports remain more expensive than non- South Australian ports for both groups of commodities, dry bulk (including grain) and other cargoes.

The Commission has concluded that the current form of price regulation is appropriate and should be maintained. There have been no access disputes to indicate that negotiations are not being successful and that a more heavy-handed form of price regulation is required. A light-handed form of price regulation is preferable, in order to minimise the costs and maximise the benefits of regulation for all port stakeholders. The Commission's preference is to continue with the current form of light-handed regulation (price monitoring) as it will continue to allow port operators to set their own port prices constrained by the threat of re-regulation.

The Commission is proposing to continue with the current form of price regulation, i.e. price monitoring, for a further three-year regulatory period.

Ports Access Review

Similarly, the Commission has reached the conclusion in this Draft Report that the ports access regime should continue for a further three-year period. Since many of the services subject to price regulation are also subject to the access regime, the Commission's conclusion on continuation of regulation is the same. In relation to those services that fall within the access regime but are not price regulated (the provision of pilotage, bulk loading facilities and land), the Commission has also concluded that the access regime should continue.

The Commission has conducted an Inquiry into whether the ports access regime is consistent with certain principles specified under clause 2 of the Competition and Infrastructure Reform Agreement (CIRA), entered into by the Council of Australian

Governments (COAG) in February 2006. The Inquiry was referred by the Acting Treasurer for the Commission in January 2007. The Commission has identified three areas where greater consistency could be Achieved. These relate to the objects of the MSA Act, the pricing principles to be used by an arbitrator, and the introduction of timeframes for decision making by the regulator.

The Commission has also identified the following areas where the access regime could be improved:

- Greater consistency should apply to the coverage of the access regime to ports capable of handling bulk cargoes, and to the associated bulk facilities within these ports;
- There are various procedural improvements that could be introduced into the negotiate-arbitrate framework; and
- The length of the regulatory period for the price and access regimes could be extended from 3 years to 5 years.

The Commission requests comments from interested parties on this Draft Report by 2 July 2007. The Commission will consider submissions to the Draft Report in developing a Final Report, to be released by September 2007.

1 INTRODUCTION

The Commission is conducting a review of the ongoing need for regulation of ports access and pricing in South Australia. The ports access and pricing regimes are contained in the *Maritime Services (Access) Act 2000* (MSA Act). The review is considering 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, can it 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?

As part of the review, the Commission is also conducting an Inquiry under Part 7 of the *Essential Services Commission Act 2002* (ESC Act) into the ports access regime. The terms of reference for this Inquiry, as set by the Acting 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 2006[1], and to recommend changes that could improve the effectiveness of the access regime.[2]

1.1 Services that are the subject of this Review

The MSA Act contains a regulatory framework for specified port services, referred to as Maritime Services. A subset of Maritime Services, defined as Essential Maritime Services, is subject to price regulation (Part 2 of the MSA Act). A similar, and sometimes overlapping, set of services, the proclaimed Regulated Services, is subject to regulation under the ports access regime (Part 3 of the MSA Act). These services are set out below.

1.1.1 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.

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.

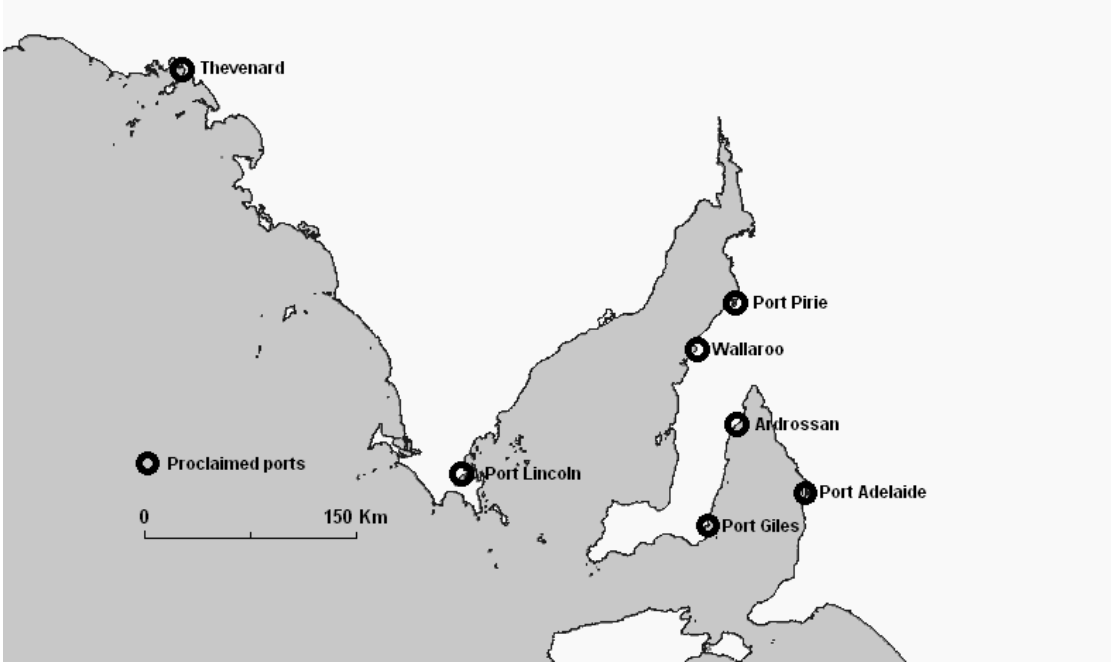
There are seven Proclaimed Ports in South Australia:

- Port Adelaide;
- Port Giles;
- Wallaroo;
- Port Pirie;
- Port Lincoln;
- Thevenard; and
- Ardrossan.

Flinders Ports Pty Ltd (Flinders Ports) operates the first six ports. AusBulk Ltd (AusBulk) operates the port at Ardrossan.[3]

The seven Proclaimed Ports are represented in Figure 1 below.

Figure 1. Proclaimed Ports in South Australia



[3] AusBulk Ltd is a fully owned subsidiary of ABB Grain Ltd. AusBulk Ltd remains the regulated operator for the purposes of port price and access regulation.

While it is not practical to identify a definitive list of the actual services included in Essential Maritime Services, it broadly includes:

- Navigational aids;
- Harbour control (but not pilotage[4] or towage);
- Channels;
- Berths;
- Wharves;
- Cargo loading and unloading (marshalling) areas (but not loading or unloading itself as this is typically a stevedoring activity);
- Jetties;
- Berth pockets;
- Fenders;
- Mooring structures;
- Mooring and unmooring; and
- Provisioning connections (but not provisioning).

At present, three sets of port charges cover these Essential Maritime Services:

- Navigation Services Charge;
- Harbour Services and Mooring Charge; and
- Cargo Services Charge (including the new Channel Levy at Port Adelaide).

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.

1.1.2 Regulated Services

Part 3 of the MSA Act provides a framework for the negotiation of access to Regulated Services. It also provides for conciliation and arbitration to occur for disputes over access to Regulated Services that cannot be otherwise resolved between the parties. The framework provided for under Part 3 of the MSA Act is summarised in Appendix 2.

A Maritime Service becomes a Regulated Service by proclamation[5]. The current list of Regulated Services covers (in summary form):

[4] 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.

- providing access of vessels to all proclaimed ports;
- providing pilotage at all proclaimed ports;
- providing access to common user 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;
- providing port facilities (e.g. wharves) for loading or unloading vessels at the berths adjacent to the AusBulk shiploaders below;
- loading by the AusBulk owned shiploaders at Port Adelaide (berth 27 Inner Harbor), Port Giles, Wallaroo, Port Pirie, Port Lincoln and Thevenard (but not at Ardrossan); and
- access to land in connection with the above services.

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

1.2 Process for the Review and Inquiry

The Commission's review of the Ports Pricing and Access Regime and associated Inquiry commenced in February 2007 with the release of an Issues Paper for public consultation. The Issues Paper identified some of the Commission's key questions relating to the continuation of the pricing and access regimes. The Commission received 8 submissions to the Issues Paper from the following parties[6]:

- ABB Grain Ltd;
- Flinders Ports;
- Minister for Transport/Minister for Infrastructure;
- Minister for Regional Development;
- Shipping Australia;
- South Australian Farmers Federation;
- South Australian Freight Council Inc; and
- Zinifex Port Pirie Pty Ltd

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[5] These proclamations can be found in the South Australian Government Gazette at http://www.governmentgazette.sa.gov.au/2001/october/2001_141.pdf and http://www.governmentgazette.sa.gov.au/2004/august/2004_077.pdf

[6] Submissions to the Issues Paper can be found on the Commission's website at: http://www.escosa.sa.gov.au/site/page.cfm?u=95&t=submissionsXList&xlistId=53

The Commission appreciates the efforts made by all parties making submissions to the Issues Paper and acknowledges the valuable input that the submissions have provided into the development of this Draft Report. The submissions were considered to be particularly important given the Commission's approach to this Review, which relies substantially on the experiences and expectations of stakeholders.

1.3 Legal requirements for the Review and Inquiry

1.3.1 Ports Price Review

The Ports Price Review is concerned only with "essential maritime industries"[7], which are regulated industries for the purposes of the ESC Act.[8] Thus, in regulating these industries, the Commission has access to the price regulation powers available under Part 3 of the ESC Act.

Further, section 9 of the MSA Act requires the Commission to keep maritime industries under review with a view to determining if regulation (or further regulation) is required. Given that the current Ports Price Determination expires on 30 October 2007, the Commission needs to determine whether or not price regulation should continue beyond that time, and if so, in what form.

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. Section 6 states that:

> *6 (1) In performing the Commission's functions, the Commission must:*
>
> *(a) Have as its primary objective protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services; and*
>
> *(b) At the same time, have regard to the need to*
>
> *(i) Promote competitive and fair market conduct;*
>
> *(ii) Prevent misuse of monopoly or market power;*
>
> *(iii) Facilitate entry into relevant markets;*

7 See Regulation 3 of the ESC Regulations 2004

8 Section6 (1) MSA Act 2000 (SA)

(iv) *Promote economic efficiency;*

(v) *Ensure consumers benefit from competition and efficiency;*

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

(vii) *Promote consistency in regulation with other jurisdictions.*

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:

(a) *The particular circumstances of the regulated industry and the goods and services for which the determination is being made;*

(b) *The costs of making, producing or supplying the goods or services;*

(c) *The costs of complying with laws or regulatory requirements;*

(d) *The return on assets in the regulated industry;*

(e) *Any relevant interstate and international benchmarks for prices, costs and return on assets in comparable industries;*

(f) *The financial implications of the determination;*

(g) *Any factors specified by a relevant industry Act or by regulation under this Act; and*

(h) *Any other factors that the Commission considers relevant.*

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

(a) *Wherever possible the costs of regulation do not exceed the benefits; and*

(b) *The decision takes into account and clearly articulates any trade-off between costs and service standards.*

Section 25 (3) of the ESC Act addresses the type of price regulation that the Commission may apply. 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:

(a) *Fixing a price or the rate of increase or decrease in a price;*

(b) *Fixing a maximum price or maximum rate of increase or minimum rate of decrease in a maximum price;*

(c) *Fixing an average price for specified goods or services or an average rate of increase or decrease in an average price;*

(d) *Specifying pricing policies or principles;*

(e) *Specifying an amount determined by reference to a general price index, the cost of production, a rate of return on assets employed or any other specified factor;*

(f) *Specifying an amount determined by reference to quantity, location period or other specified factor relevant to the supply of goods or services;*

(g) *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*

(h) *Monitoring the price levels of specified goods or services.*

In the event that a Price Determination is made, it will take effect from 31 October 2007 and can expire no later than 30 October 2010 – the three-year maximum being set in regulations.[9]

1.3.2 Access Regime Review

The ports access regime operates on a triennial (three year) cycle. The current triennial cycle commenced on 31 October 2004 and expires on 30 October 2007. Section 43(2) of the MSA Act requires the Commission, within the last year of each triennial cycle, to 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 Commission must, prior to 30 October 2007, make a decision as to the regime's continuation.

In conducting the review of the ports access regime, the Commission must have regard to the objectives of the ESC Act, which were listed in the previous section.

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.[10] If it is determined that the access regime should continue, a regulation must be made extending the period of its operation accordingly.[11]

In the event that the Commission decides that the regime should continue, and a regulation is so made, then a further review will occur before 30 October 2010. If, however, the determination of the Commission is that the regime should not continue, or a regulation is not so made, then the access regime will expire.

1.3.3 Ports Access Regime Inquiry

On 25 January 2007, the Acting Treasurer directed the Commission to conduct an Inquiry into the Ports Access Regime pursuant to section 35(1) of the ESC Act. 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

9 Section 3(2) ESC Regulations 2004

10 Section 43(5) MSA Act 2000 (SA)

11 Section 43(7) MSA Act 2000 (SA)

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);
- 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.

1.4 Criteria for determining continuation of price and access regimes

The Commission is required to have regard to its various objectives as set out above in conducting the price and access reviews, and the Inquiry. To determine whether or not the pricing and access regimes should continue, the Commission has established the following assessment criteria, based on a distillation of the objectives. Noting that none of the objectives have changed since the previous ports price and access reviews, the criteria below are consistent with those used in the earlier reviews.

The criteria are:

1. Is there the potential for the port operator to exercise market power?

   The Commission is required, under section 6(b)(ii) of the ESC Act to have regard to the need to prevent misuse of monopoly or market power. To do this, the Commission needs to ascertain if market power exists and whether or not there is the potential for it to be exercised by the port operator.

2. Is there any evidence of misuse of market power by the port operator?

   Misuse of market power is detrimental to the long-term interests of port users, and to the SA economy more generally, as it can lead to economically inefficient outcomes.

Where there is evidence that a port operator has misused market power, for example by extracting monopoly rents or underproviding service/service quality, then there is a strong argument for regulation, where regulation constrains the misuse of market power and provides for greater economic efficiency. This criterion is, in essence, backward looking, but it is relevant as it helps provide, in combination with the first criterion, an informed view of the potential for misuse going forward.

3. Will regulation produce a net benefit?

   How "heavy-handed" the regulation should be depends on the likelihood and potential consequences of misuse of market power. If no such evidence of misuse exists, or if the consequences of misuse are small, then there is an argument for lighter-handed regulation, or perhaps even no regulation. The scope of regulation will depend on the efficiency benefits it can produce by constraining the misuse of market power and on the direct costs it imposes on the regulated business.

   The Commission must also ensure that consumers are able to share in any such efficiency benefits, as opposed to allowing the benefits to be captured entirely by the regulated business.[12] Regulation would not be considered effective if it provided incentives for the regulated business to achieve efficiencies, but did not pass on any of the benefits to consumers.

In practice, the Commission has adopted an incremental approach to considering these criteria, such that it would only consider changes as being necessary where:

- there is evidence that the current pricing or access regimes could be improved based on experiences of stakeholders during the current regulatory period; and/or
- the market or regulatory environment has changed since the previous Review or is expected to change in the near future.

In part, this incremental approach reflects the fact that the current arrangements have been in place for only two and a half years.

1.5 Regulation of Ports: 2004 – 2007

1.5.1 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

[12] As required by ESC Act, section 6(1)(b)(v).

cycle.[13] Following this recommendation, a regulation was made under the MSA Act to enable the access regime to continue.[14]

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:

- Does the structure of the market for the Regulated Services suggest market power could exist?
- Is market power being misused or is there potential for it to be misused? [15]
- Do customers have alternative sources?
- Is competitive entry possible?
- Does the answer vary between proclaimed ports and between the goods being moved?
- Are the above Regulated Services of sufficient importance to the South Australian economy to warrant economic efficiency concerns?
- 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 was 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, 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

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13 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).

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

15 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)*.

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.

1.5.2 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.[16] 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 services[17] at grain berths.

The Commission also recommended continuation of an existing requirement on port operators preventing them from increasing prices associated with the provision

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[16] 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).

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

of an Excluded Asset (being the Port Giles, Wallaroo and Outer Harbor 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.[18]

[18] Essential Services Commission of SA, 2004 *Ports Price Determination: Final Price Determination*, November 2004.

2 SHOULD PRICE REGULATION CONTINUE?

The Commission must consider the following question:

- Should price regulation of certain port services expire on 31 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?

In order for the Commission to determine whether or not price regulation should continue, the current regulatory regime has been assessed against the criteria set out in Chapter 1:

- Is there the potential for the port operator to exercise market power?
- Is there any evidence of misuse of market power by the port operator?
- Will regulation produce a net benefit?

This Chapter sets out and describes the current pricing regime and the Commission's draft conclusions on the key questions: should price regulation continue, and if so, in what form?

In practice, the Commission's approach to this review is to only consider departing from the current form of price regulation where there is evidence to suggest that an alternative approach is warranted based on the experience of stakeholders, or if the environment is likely to change such that the current approach may no longer be appropriate for the next three-year period.

The Commission invites comment on the draft conclusions presented, and will take any comments into account before publishing its Final Report in September 2007.

2.1 Operation of the Price Regulation Regime

The 2004 Ports Price Determination establishes a system of price monitoring for Essential Maritime Services. The ports price determination expires on 30 October 2007 and the Commission must determine if it is warranted to make another price determination for the next regulatory period. The MSA Act is silent on any legislative requirements for the Commission to conduct a Price Review. However, section 9 establishes a general obligation on the Commission to continue reviewing the MSA Act. Furthermore, the ESC Act contains a Regulation that enables the Commission to issue a further price determination for services subject to price regulation.

Price monitoring as a form of price regulation was introduced following the first Ports Price Review (2003). The 2004 Ports Price Determination requires a port operator to post listed prices for Essential Maritime Services on its website and notify the Commission of any changes to published prices within 10 days of the change. The ports operator is able to reach agreement with port users for the provision of Essential Maritime Services at a price that is different to the listed price, and the port operator must notify the Commission of any such negotiated price within 20 days of the agreement being reached. The emphasis of this approach is on achieving a basic level of price transparency.

The 2004 Ports Price Determination also notes that the Commission will monitor and report on port prices and related matters. In this respect the Commission has produced annual price monitoring reports.

2.2 Assessment against criteria

2.2.1 Is there the potential for port operators to exercise market power?

Market power can variously allow, and give incentive to, a service provider to raise prices, withdraw services, reduce service standards and/or otherwise act in a discriminatory manner. The effect of this can be to reduce economic welfare (it may also have undesirable distributional effects). Market power in ports results from ports displaying natural monopoly characteristics, as it is largely uneconomic to duplicate ports and related infrastructure in close surrounds of those already existing. In addition, ports can be described as 'bottleneck' facilities to the extent that they are an essential link in the transport supply chain and cannot be readily bypassed. This is more likely to be the case for certain cargoes and regions than others.

The 2003 Ports Price Review found that there existed the potential for market power in the provision of Essential Maritime Services but that there was no evidence to suggest it had been misused. In the Issues Paper, the Commission again asked stakeholders to comment on the level of market power held by port operators in the context of any structural changes in the industry.

Consistent with the previous review, the Commission recognises that the potential for the exercise of market power by a port operator may vary between cargoes – given that the position of the port depends on the overall nature of the supply chain for each product handled. This adds a degree of complexity given that some ports, such as Port Adelaide, handle a multiplicity of cargo types.

For many mixed cargoes there are alternatives, either through sourcing domestic products or markets, or using supply chains that involve other ports. Accordingly, in the previous review the Commission noted that market power concerns were limited in some cases. However, there remain some areas of particular concern and/or significance in South Australia.

Eyre Peninsula

The 2003 Price Review concluded that market power concerns were likely to be greatest in relation to grain produced on the Eyre Peninsula, given that there is no significant domestic market for grain and because grain exporters have little or no choice but to use Port Lincoln (or Thevenard), both of which are owned by Flinders Ports. This situation has not changed for Eyre Peninsula grain.

Containers

There are no other significant port based container services in South Australia other than at Port Adelaide. However, for many exporters and importers it is feasible (and indeed common) to transport containers by rail or road to or from interstate ports, including Melbourne and Fremantle. Flinders Ports indicated in their submission as a justification for the deepening of the Port Adelaide outer channel that:

> *"currently some 70-80,000 containers (TEU) associated with South Australia arrive from or leave for Melbourne via rail. This amounts to some 35% of the South Australian market. "*[19]

Further, to the extent that there might be some part of the container trade that is tied to Port Adelaide, it is very difficult for a port operator (as opposed to a container terminal operator) to effectively identify and price discriminate between containers. The industry norm is for generally flat rate container charges, with any volume rebates or discounts offered to the shipping lines (based on container numbers) rather than to the shippers themselves. South Australia is no different in this respect. This leaves Flinders Ports with little effective scope to exercise market power in relation to containers.

Flinders Ports highlighted this in its submission concluding 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."*[20]

Flinders Ports went on to say:

> *"the reality therefore is that container importers and exporters have viable and existing alternatives and this market pressure continues to ensure that Flinders Ports cannot and does not exercise market power in providing container port facilities."*[21]

The Commission agrees that interstate ports and other transport modes continue to provide significant competition to Port Adelaide for the provision of container services. There is little potential for the misuse of market power for containerised cargo.

Grain Deregulation

Submissions noted the uncertainty as to the deregulation and new structure of the barley and wheat exporting markets, with the possible removal of the respective single desks. Under a deregulated market, there will be the potential for a greater number of smaller exporters seeking access and contract negotiation. This would tend to make more complex the access requirements for this industry. Submissions supported the Commission's view that changes to the barley and wheat marketing arrangements will require the Commission to look at

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19 Flinders Ports Submission pg 12. This can be found on the Commission's website at http://www.escosa.sa.gov.au/webdata/resources/files/070411-Sub-PortsPricingAccessReviewIssuesPaper-FlindersPorts.pdf

20 Ibid pg 12.

21 Ibid page 13

the issues surrounding pricing and access of ports. In its submission to the Issues Paper, the South Australian Farmers Federation (SAFF) commented on this issue, observing that:

> *"The South Australian grain industry is heavily reliant on the export pathways, particularly in regions such as the Eyre Peninsula where there is no strong domestic demand for grain. It is therefore imperative that the grains industry has an efficient and cost effective value chain to ensure that growers can remain competitive in the global market".*[22]

SAFF also commented that a more competitive market for bulk wheat exports would require:

> *"A regulatory mechanism to ensure that fair and equitable access to critical grain infrastructure, particularly at port, for new entrants in the export industry is provided."*[23]

Flinders Ports support continued existence of "the same approach as currently adopted to the negotiation of pricing and service packages"[24].

Since the Issues Paper was released the arrangements for barley marketing in South Australia have become known. Pursuant to the recent *Barley Act 2007*, the Commission will soon be issuing licences to new entrants for the purposes of barley exporting. As such, the prospect of more complex commercial arrangements between barley exporters and handlers is likely to come to fruition i.e. through deregulation over the 3 year transitional period.

Mining

Significant prospects are emerging in the South Australian mining industry that have the potential to place great demands on infrastructure over the medium to long term. This includes demands on port infrastructure, especially at regional ports. While the public focus is often on large developments, such as the expansion of Olympic Dam, the many smaller possible minerals projects are of equal interest to the Commission as the consumption of existing spare capacity and demand for expansion is often more complex to manage where it involves multiple users. This makes the prospect of access disputes and market power concerns more likely.

Flinders Ports indicated in its submission to the Issues Paper that it has begun negotiating with mining companies and that the current pricing regime, which openly encourages direct negotiations between the port operator and port user, is successful. It argued that:

> *The "port operator and its customer are in the best position to resolve the issue of port services/pricing packages moving forward."*[25]

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22 SAFF submission to the Issues Paper, page 1 of unnumbered document. This can be found on the Commission's website at http://www.escosa.sa.gov.au/webdata/resources/files/070411-Sub-PortsPricingAccessReviewIssuesPaper-SAFF.pdf

23 Ibid, page 1 of unnumbered document.

24 Flinders Ports submission, pg 11

25 Flinders Ports submission page 13

Going forward, the Commission agrees that such a model is appropriate to address further mineral developments. Flinders Ports acknowledges that future investment in storage and handling will be required in order to facilitate these developments.

The current known developments in the mining industry are yet to have any major impact on the level of or potential for market power in relation to ports and it is therefore difficult to draw any conclusions at this time. However, it is clear to the Commission that they should increase the potential for the exercise of market power going forward. The Commission will therefore monitor these issues as the industry develops.

Conclusion

The 2003 Price Review concluded that there is the potential for the port operator to exercise market power. In assessing the industry in the period since the first Price Review the Commission has concluded that there have been no major structural changes to suggest that the level of or potential for the exercise of market power has increased or decreased. The recent developments in the mining industry and the changes in the wheat marketing and exporting arrangements have yet to impact on the market. The Commission acknowledges that these will most certainly be issues addressed in the next Price Review but few conclusions can be drawn at this stage. The potential to exercise market power still exists, as it did two years ago.

Draft Report Conclusion

The structure of the market for Essential Maritime Services suggests that there is the potential for market power to exist.

2.2.2 Is there any evidence of misuse of market power by port operators?

The Commission has determined that there continues to be the potential to exercise market power in relation to some significant cargoes and is now interested in evidence to suggest this has been demonstrated. The 2003 Price Review concluded that there was the potential for market power to be misused but that such behaviour had not been exhibited.

The Commission found no clear evidence that port operators have misused market power. Evidence considered by the Commission is discussed below.

Indicators of the exercise of Market Power

Given the conclusion that there is the potential for the exercise of market power by port operators, the Commission is interested in evidence that would suggest

this has occurred. The degree of pricing transparency that currently exists in the market indicates that port users are able to access price lists that port operators are required to make publicly available. Pricing transparency can be an indicator of market power in that it can provide insight into the level of prices relative to other ports and any overall price movements. Posted prices may indicate that port operators are potentially earning above normal profits and misusing market power. This can be applied to grain producers on the Eyre Peninsula, who may exhibit more inelastic demand. As these port users have little or no other choice but to use the ports in this region they are more likely to not have the capability to change their demand for port services. In this case, the port operator is likely to be able to increase port prices without any reaction from the port user. If the price increases only slightly the port user is unable to change its level of demand for port services. The opposite is true for ports not on the Eyre Peninsula as there are other ports in closer proximity that allow port users to have more elastic demand and make the decision to use another port. A port user with relatively elastic demand is able to change its level of demand and responsiveness to any price increase.

The Commission has not previously sought to measure market power through the ability of a port operator to sustain pricing above marginal cost but has relied on been given a good indication of possible market power through analysing price trends and benchmarking analyses. The Commission makes mention of the listed price for port services as negotiated prices are confidential and cannot be referred to in this Review.

The misuse of market power by port operators can be indicated by:

- Excessive returns or costs charged by port operators for Essential Maritime Services:
  - Have excessive profits been generated from the provision of Essential Maritime Services?
  - Are prices indicative of the exercise of market power?
- Are port users actively using the negotiate/arbitrate model to negotiate contracts?

Are port operators earning excessive returns?

The Commission has examined the financial and operational information provided by Flinders Ports and AusBulk, in accordance with the MSA Act. Financial information consists of profit and loss statements in respect of Regulated Services, which are reported to the Commission in accordance with Ports Industry Guideline No. 2.[26] The information is reported primarily for the

[26] Refer Ports Industry Guideline 2: Regulatory Accounts, March 2005, available at http://www.escosa.sa.gov.au/webdata/resources/files/050303-D-PortsGuideline2-RegulatoryAccounts.pdf.

purposes of providing relevant information to an arbitrator in the even of an access dispute. However, the Commission is also able to use this information as part of the Ports Access Review.

The information reported pursuant to this Guideline is confidential and cannot be reported in this Draft Report. The Commission has analysed this information and found no clear evidence to suggest that Flinders Ports or AusBulk have earned excessive returns. Regulatory accounts provided by the port operators contain, among other information, figures reflecting total revenue and reported expenditure. At this stage there are no abnormal trends that are of concern to the Commission. These regulatory accounts will continue to be collected and monitored in the next regulatory period. This analysis gives the Commission some comfort that a more intrusive form of price regulation is not necessary.

Draft Report Conclusion

There is no evidence to suggest that port operators are earning excessive profits.

2.2.3 Are prices indicative of market power being exercised?

In conducting the ports price monitoring reports the Commission is interested in quantitative and qualitative indicators of port competitiveness. These reports assist the Commission in assessing whether or not Flinders Ports or AusBulk are acting in a way that suggests market power is being exercised. The price monitoring reports enable the Commission to undertake a comparison of port charges in comparable ports around Australia[27].

Despite the possible existence of market power the price monitoring reports have not indicated any significant variation in prices for Essential Maritime Services over the triennial cycle. There has been little movement in published prices charged by port operators and prices have typically increased by CPI. The only exception to this statement is the introduction of a channel-deepening levy by Flinders Ports. 2006 saw the introduction of a channel-deepening levy charged against all grain and container vessels calling at Port Adelaide that markedly increased the total cost of calling at the port. The channel deepening has allowed larger vessels to call at the port and not have to rely on tidal assistance to enter. Flinders Ports claim that this charge is not part of the regulatory environment and should not be included as an Essential Maritime Service. Contrary to this view, the services provided by the deepened channel are Essential Maritime Services under the *Maritime Services (Access) Act 2000* as this service is associated with the provision of access of vessels at a proclaimed port.

[27] Price Monitoring reports are available on the Commission's website at http://www.escosa.sa.gov.au/site/page.cfm?u=95&c=1469

The ports price monitoring report is a simple comparison of port prices around Australia. These reports are not intended to be a thorough benchmarking exercise and do not attempt to explain the key drivers of port prices. Submissions received in response to the Issues Paper, whilst addressing a range of issues, did not raise an issue with the price lists provided by Flinders Ports and ABB Grain. A number of submissions commented on the form of price monitoring reports, noting improvements could be made in order to make more meaningful conclusions.

In its submission to the Issues Paper, the South Australian Government commented on this issue, observing that:

> *"Further information is required to provide the context to explain these price differences. Future reports should, at a minimum, include detail on the total volume port calls and, if possible, some indication of the size of vessels utilising the nominated ports".*[28]

Flinders Ports recommended the price monitoring reports be:

> *"critically reviewed and the contents restructured to ensure that a more meaningful analysis of port pricing outcomes across the proposed benchmarking group of ports and products be considered."*[29]

The Commission acknowledges the limitations of the current price monitoring reports and engaged Meyrick and Associates to undertake a more thorough ports price benchmarking exercise that took into consideration additional factors that influence the price of calling at a port[30].

2.2.4 Benchmarking of Port Prices in Australia

The benchmarking analysis extended the range of ports and commodities relative to those considered in the Commission's ports price monitoring reports. Commodities including grain and other dry bulk cargoes, liquid bulks, containers, cars and livestock were all benchmarked against comparable ports around Australia. Meyrick and Associates developed an index of prices across all proclaimed ports and cargoes, following the process outlined in Figure 2.1. A consolidated index was created as a single indicator of how the overall level of prices in SA ports compared with the overall level of prices in interstate ports. Separate indicators were then constructed to compare (a) the level of prices in SA and interstate ports for the cargoes generally considered to be 'captive' (grain and bulk minerals) and (b) the level of prices in SA and interstate ports for other cargoes.

This index recognised the large fixed costs associated with port infrastructure and removed any cost allocation issues involved in the ports industry. The report also

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[28] Submission from SA Government to Issues Paper, page 2 of unnumbered document. This can be found on the Commission's website at http://www.escosa.sa.gov.au/webdata/resources/files/070411-Sub-PortsPricingAccessReviewIssuesPaper-MinEnergy.pdf

[29] Flinders Ports Submission to Ports Price and Access Review Issues Paper, page 8.

[30] Benchmarking of Port Prices in Australia, April 2007. A copy of this Report is available on the Commission's website at http://www.escosa.sa.gov.au/webdata/resources/files/070427-D-MeyrickPortsBenchmarkingAust.pdf

highlighted the difficulties in quantitatively accounting for the numerous factors that influence port prices, many of which are unrelated to questions of market power. The results indicated that South Australian ports are still more expensive than non-South Australian ports for both groups of commodities, dry bulk (including grain) and other cargoes. These results are detailed in Table 2.1.

Figure 2.1 Meyrick and Associates Index process

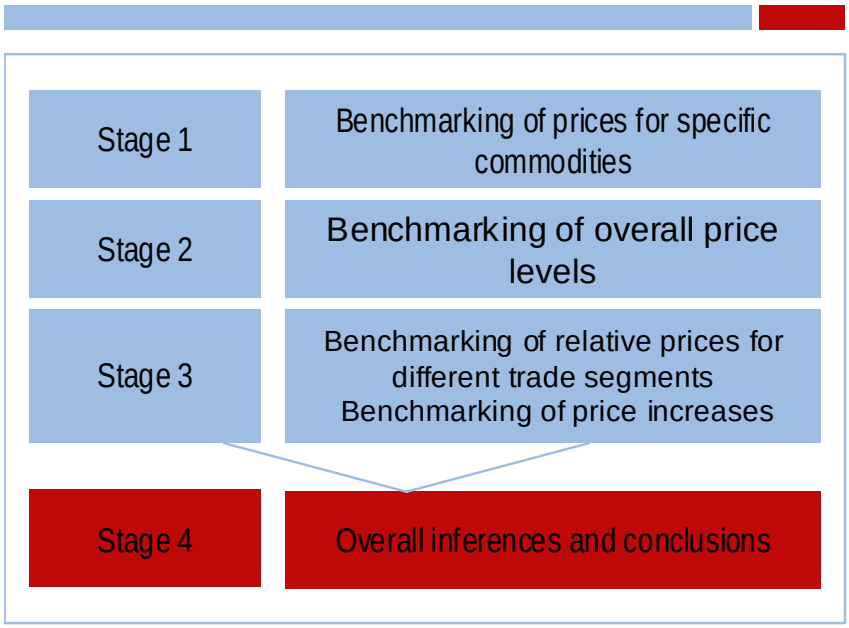

Table 2.1 Comparison of results of analyses using 2006/07 and 2000/01 prices

WEIGHTED AVERAGE PORT COSTS – ESSENTIAL MARITIME SERVICES (EMS) CHARGES 2006/07			
	NON SA PORTS	SA PORTS	DIFFERENCE
MEAN (GEOMETRIC)	$2.40	$2.81	17.2%
WEIGHTED AVERAGE PORT COSTS - EMS CHARGES 2000/01			
	NON SA PORTS	SA PORTS	DIFFERENCE
MEAN (GEOMETRIC)	$2.14	$2.49	16.7%

One reason for this points to the apparent size of South Australian ports compared to larger ports in Melbourne and Sydney. South Australian ports on average are small relative to comparator ports, and are therefore unable to take advantage of the benefits that come from economies of scale. While the South Australian ports are more expensive in comparison to other ports, the rate of increase in prices over the period has not been any greater than other ports. The South Australian port charges lie within the range covered by those ports.

Although there is the greatest potential for misuse of market power on the Eyre Peninsula for grain producers, the greatest difference between SA and non-SA port prices is in respect of 'other cargo' rather than dry bulk. These results are shown in

Table 2.2. The difference between dry bulk prices in SA and non-SA ports in 2006/07 was 7% whilst the difference in port prices for 'other cargo' was 28.8%.

Table 2.2 Comparison of results of analyses between cargo groups

WEIGHTED AVERAGE PORT COSTS - EMS CHARGES 2006/07			
	NON SA PORTS	SA PORTS	DIFFERENCE
DRY BULK (INCLUDING GRAIN)	$2.23	$2.39	7.0%
OTHER CARGOES	$2.70	$3.47	28.8%

While these results might seem counter intuitive, the Commission notes that grain prices have remained largely unchanged for many years. Even though there is the potential for Flinders Ports to exercise market power, there is no evidence to suggest that it has. However, prices remain relatively high for general dry bulk cargo, liquid bulk, containers, cars and livestock.

There have been no access disputes in this regulatory period. This further indicates the current form of price regulation has been effective. There is no evidence to indicate that the current regulatory regime is ineffective and that a more heavy-handed form of approach is required. Price movements have generally reflected CPI increases and apart from the Port Adelaide channel-deepening levy there have been no price movements out of the ordinary.

Draft Report Conclusion

There is no evidence to suggest that prices charged by Flinders Ports and ABB Grain indicate market power being exercised.

2.2.5 Are port users actively negotiating prices?

Having published reference prices is an important starting point for port users to negotiate individual contracts. Port users are able to negotiate their own contract terms and conditions under the negotiate/arbitrate regulatory model. The Commission has not been notified of any pricing disputes, and based on the submissions to the Issues Paper the regime appears to be successful in encouraging commercial negotiations. In addition, the Commission has received information from Flinders Ports regarding its negotiated contracts with users. In accordance with the Price Determination, Flinders Ports must report to the Commission any such outcomes. As discussed in the following section the Commission expects port customers and port operators to negotiate port prices and service standards. On the basis of this information provided it is clear that pricing negotiations are ongoing. Such contracts are negotiated on a confidential basis and details cannot be divulged in this Draft Report. The Commission has

reviewed this information and it is evident that port users are actively negotiating with Flinders Ports prices below the listed price list.[31]

Draft Report Conclusion

Regulated operators and their customers have the freedom to negotiate commercial arrangements amongst themselves and have been actively doing so in the current regulatory period.

Whilst there is the potential for market power to exist and be exercised, there is no evidence to suggest that market power has been misused in the current regulatory period.

2.2.6 Will price regulation produce a net benefit?

The above conclusions suggest that no additional degree of price regulation beyond that already applying is appropriate. However, the Commission continues to conclude that while the potential remains for port operators to exercise market power, a limited degree of price regulation is necessary.

The key benefit of the current pricing regime is that it provides transparency to access seekers and potential port users through publication of the price list.

Port operators are required to publish their price lists and formally notify the Commission of changes during the regulatory period. They are also required to submit to the Commission financial statements and operational data on an annual and quarterly basis. The 2004 Ports Price Determination states:

> *2.1 This determination requires a regulated service provider to set and publish on a readily accessible part of its website a comprehensive list of prices for the provision of essential maritime services for the period in which this determination has effect.*
>
> *2.2 A regulated service provider must provide a copy of the list of prices to the Commission within 10 business days of the list of prices being set and published.*
>
> *2.3 A regulated service provider and a customer may reach agreement for the provision of essential maritime services at a price that differs from the price published in accordance with clauses 2.1 – 2.2.*

This approach provides a relatively low cost form of intervention whilst effectively targeting the desired transparency.

In respect of compliance costs Flinders Ports submitted that:

> the *"cost of regulation to Flinders Ports is not unsubstantial given the requirements that the regimes place on the organisation through the preparation of Regulatory Accounts, the quarterly reporting obligations and the additional resources consumed addressing issues raised through the current price monitoring reporting process."*[32]

[31] These prices often include volume rebates or other discounts.

[32] Flinders Ports Submission p 10

The Commission acknowledges that price monitoring does impose some cost on the port operator, but that this cost is not significant and it is more than offset by the benefits it provides to port users and prospective port users.

Indeed the majority of the costs identified by Flinders Ports relate to the provisions of the ports access regime. The costs and benefits of that regulation are dealt with further in section 3 of this Draft Report.

While the costs associated with the price-monitoring regime are minimal, the three-year review cycle does impose some periodic costs of engagement, for the Commission, port operators and interested parties. While the costs of conducting and engaging in a consultative process should not necessarily drive decisions about the need for regulation, the appropriate length of a regulatory period is discussed later in this report.

The Commission believes that it is not appropriate to cease price regulation, as the potential for port operators to exercise their market power still exists. A heavy-handed form of regulation is also not appropriate, as the costs would far outweigh any benefits.

Conclusion

The Commission believes it is appropriate to continue with price monitoring as the form of regulation. There is no evidence to suggest that an alternative form is required, as provided by s.25 (3) of the ESC Act. Submissions in response to the Issues Paper supported the continuation of price monitoring as the form of price regulation. Price monitoring has the benefit of providing pricing transparency which itself helps to avoid the potential exercise of market power. All port users are able to access port prices across all vessels and products and it limits the scope for price discrimination. Price monitoring ultimately involves minimal costs and does not involve port operators incurring large costs in order to generate a benefit.

The South Australian Government submission supports the continuation of the price monitoring approach, stating that it:

> *"believes this approach should continue, as it has a low compliance cost for the port operator and provides pricing transparency for users of the port."*[33]

Furthermore, Zinifex indicated support for price monitoring in its submission, observing that:

> *Price monitoring is the most appropriate course of action in order to balance the needs of all port users and the port operator*[34]*.*

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33 SA Government submission page 5 of unnumbered document.

34 Zinifex Submission to Issues Paper, page 1, Received 19/03/2007. This submission is available on the Commission website at http://www.escosa.sa.gov.au/webdata/resources/files/070411-Sub-PortsPricingAccessReviewIssuesPaper-Zinifex.pdf

Draft Report Conclusion

The Commission's Draft Conclusion is to continue the current price monitoring form of price regulation for the following 3-year regulatory period. This will involve the requirement for port operators to publicly make available price lists and notify the Commission of any price changes. It will also allow the Commission to publish annual price monitoring reports.

Whilst there are costs associate with price monitoring, it is a light handed form of regulation, which produces benefits that outweigh the costs given the potential for misuse of market power.

2.2.7 Excluded Assets

The Commission's Draft Decision is to renew the Ports Price Determination for another three-year period as stated above. To this effect the obligation in clause 2.4 of the 2004 Price Determination will remain unchanged. Clause 2.4 states:

> *2.4 A* regulated service provider *is not entitled to make or publish a price increase to recover the construction and/or ongoing maintenance costs of an excluded asset.*

Excluded assets were established under the initial agreement between Flinders Ports and the South Australian Government (being the Port Giles, Wallaroo and Outer Harbor assets established or extended as per the ports sale). The effect of this clause was to ensure Flinders Ports do not recoup the costs of these investments by raising prices in order to cover the cost as the State Government has already funded them. Were a regulated operator to do so, it would be in breach of the Price Determination, which is an offence as set out in Section 27 of the Essential Service Act 2002.

2.3 Areas for general improvement of price regulation regime

2.3.1 Regulatory review period

As discussed in section 3 of this paper, the Commission sees merit in amending the access regime regulatory period from 3 years to 5 years. As a consequence, it would also be desirable for the price regulation review period to change from 3 years to five years. The Commission's reasoning for this proposed changed is discussed in section 4.7.3.

Draft Report Conclusion

The Commission observes that a 3-year cycle is too limited in its scope for review and the Government should consider moving the review period to a 5-year cycle.

3 SHOULD THE ACCESS REGIME CONTINUE?

The Commission is required to consider whether or not the ports access regime should continue for a further 3-year period from 31 October 2007.

3.1 Issues for Review

As discussed in section 1.2, the Commission's approach to the review of the access regime is to only consider making significant changes to the regime where there is evidence that such changes are warranted based on the operation of the regime over the current triennial cycle, or based on any expected changes in environment during the next triennial cycle.

In this regard, the Commission highlighted in the Issues Paper two potential issues that may impact on the access regime in the near future:

- The potential deregulation of barley marketing and wheat marketing (of which the former has since been deregulated in SA); and
- Expansion of the minerals sector in SA.

The Commission sought submissions on these issues, and any other issues that were considered to provide justification for changing the current access regime.

3.1.1 Grain exporting

The Issues Paper raised the possibility of an increased number of grain exporters, following the potential deregulation of barley marketing and wheat marketing.

While the Federal Government is still finalising its position on the deregulation of wheat exporting, the SA Parliament has recently enacted legislation to remove the barley single desk in SA. This is likely to lead to an increased number of barley exporters seeking access to facilities at proclaimed ports.

An increase in the number of grain exporters is likely to have an impact on the degree of market power held by the port operators. With the volume of wheat or barley exports being spread amongst a number of exporters, the countervailing bargaining of any one exporter is likely to be lower relative to an exporter having exclusive rights over the export of all wheat or barley. For example, whereas there is currently the potential for ABB to divert significant volumes of barley from the south-east of the state through to Victorian ports, and can use this bypass threat in negotiating with Flinders Ports, smaller operators may not export sufficient volumes to pose the same sort of threat to the port operator.

In its submission to the Issues Paper, ABB Grain commented on this issue, observing that:

> *The increased number of exporters will potentially decrease the grain industry's ability to negotiate cheaper services from Flinders Ports. In the past however there has been no differentiation*

between Flinders Ports' customers as far as we are aware hence ABB believes that the loss of either single desk will cause no real change to rate negotiations.[35]

Both SAFF and the SA Government argued that the continuation of the access regime was important under a deregulated grain exporting market. The SA Government submission stated that:

Potential changes to single desk arrangements for the marketing of bulk grain exports, add further to the case for the access regime to continue.[36]

The Commission agrees that the deregulation of barley marketing and the potential deregulation of wheat marketing is more likely to support an argument for continuation of the access regime than for its expiry. A secondary question concerns possible modifications to the regime given the changes to grain single desks.

Submissions to the Issues Paper did not suggest that there were any specific aspects of the access regime that should be modified in response to deregulation of grain exporting. The Commission notes that the Ausbulk owned port of Ardrossan is capable of handling grain, but that draught restrictions at the port have meant that grain has not been exported from Ardrossan for some time. It is therefore unlikely for there to be any anti-competitive consequences of ABB Grain, as owner of the Ardrossan port operator, also being a participant in a deregulated barley exporting market.

The Commission's draft position is that, at this stage, the impact of deregulation of barley exporting and the potential deregulation of wheat exporting on the ports access regime is somewhat uncertain, but is likely to support the continuation of the access regime. Therefore, the Commission's consideration of the regime against the assessment criteria will bear this in mind.

3.1.2 Minerals exporting

The Issues Paper discussed the current expansion of the minerals sector in SA, and queried the possible impact of this expansion on port access.

In response to this question, Flinders Ports discussed the capacity of its ports to deal with an expansion in the minerals sector:

It is Flinders Ports' view that while the ports are well positioned to support the shipping/port service requirements of these [mineral] trades, some level of investment on specific infrastructure (storage, loading and integrated logistics services) will be required to support the specific requirements of this industry sector.[37]

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35 Submission from ABB Grain to Issues Paper, p 1 of unnumbered document.

36 Submission from SA Government to Issues Paper, p 1 of unnumbered document.

37 Submission from Flinders Ports to Issues Paper, page 13.

Flinders Ports noted that:

> *discussions held to date support the position adopted by Flinders Ports in relation to the overall regulatory framework which is that the port operator and its customer are in the best position to resolve the issue of the port services/pricing package moving forward.*[38]

The Commission agrees with Flinders Ports that the incentives for commercial negotiation created by the access regime provide an effective framework for identifying the specific infrastructure requirements to meet the minerals expansion.

The submission from the SAFC added that:

> *There is evidence to suggest that the ports industry in South Australia will react positively to market signals emanating from the expanded mining industry… [however] the existing ports access regime may need to be expanded to ensure that sufficient capacity is provided, particularly at some strategic regional ports, closest to mining developments.*
>
> *Furthermore, 2 ports on Eyre Peninsula (Port Bonython and Whyalla) which are not subject to the regimes are operated exclusively by SANTOS (on behalf of the Cooper Basin Joint Venture Partners) and OneSteel respectively, effectively limiting access.*

The Commission notes the SAFC's argument for the expansion of the access regime to cover ports at Port Bonython and Whyalla, but observes that it is outside the scope of this review to consider whether the SA Government should proclaim new ports as being covered by the access regime. While the Commission is considering areas for improvements to the regime, including whether or not coverage should extend to certain services that are currently non-Regulated Services, the proclamation of new ports is entirely a matter for Government.

The Commission is aware of several new and expanded mining developments that are likely to have an impact on the ports access regime. However, the extent to which these developments will impact on ports access, particularly within the next triennial cycle, is not certain.

It is the Commission's view that the significant potential expansion of the minerals sector provides further justification for continuing the ports access regime. While additional investment is likely to be necessary to respond to increased demands on port infrastructure, there is no reason to believe that the current regime will not facilitate this response. It is in the interests of both Flinders Ports and minerals exporters for this investment to occur and commercial negotiations between the parties is most likely to lead to optimal outcomes.

The Commission therefore will proceed with its assessment of the access regime on the basis that expansion of the mining sector does not in itself suggest that the regime should expire, rather it is more likely to support its continuation.

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[38] *Ibid*, page 13

3.2 Assessment against Criteria

In determining whether or not the access regime should continue, the Commission has used the same assessment criteria as applied to the price regulation question. It is appropriate to use the same criteria as the Commission must have regard to the same ESC Act objectives in both cases and the factors that are important in considering the need for ongoing regulation, whether price or access regulation, are generally the same.

However, it is important to highlight the differences between the services that are covered by the access regime (Regulated Services) and those that are subject to price regulation (Essential Maritime Services), as it is possible for different conclusions to be drawn in relation to different services.

As discussed in Section 1, the services that are subject to the access regime are largely the same as those that are subject to price regulation. However, there are some important differences:

- Only common user berths at proclaimed ports are covered by the access regime whereas all berths are subject to price regulation;
- The provision of pilotage at a proclaimed port is subject to the access regime but is not an Essential Maritime Service and is therefore not price regulated. However, section 8 of the MSA Act does require a provider of pilotage services at a proclaimed port to notify the public of its current pilotage prices and notify the Commission before changing any pilotage prices. Effectively, section 8 provides for a form of price monitoring for pilotage which is similar to the scheme developed by the Commission for Essential Maritime Services;
- Only the Ausbulk operated shiploaders (bulk loaders) at Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln and Thevenard are covered by the access regime. The bulk loader at Ardrossan and the new bulk loader under construction at Outer Harbor are not covered. [All bulk loaders at proclaimed ports are defined as Essential Maritime Services and are subject to price regulation]; and
- The provision of land in connection with the provision of Regulated Services is itself covered by the access regime, but is not defined as an Essential Maritime Service.

In respect of those services that are both Regulated Services and Essential Maritime Services, the Commission's consideration of the continuation of access and price regulation produces the same conclusions, given that it is based on the same assessment criteria. That is, the Commission has concluded that there is the potential for the exercise of market power in the provision of Essential Maritime Services, but that there is no evidence of misuse of market power, suggesting that a light-handed form of regulation is appropriate.

However, the Commission has observed that the potential for misuse of market power is greatest in relation to grain services. The current ports access regime is intended to address this concern, by providing grain users with an additional safety net in the form of an arbitration arrangement. In this review, the Commission must consider whether it is

appropriate to remove this safety net and rely purely on price monitoring for those Essential Maritime Services that are also Regulated Services.

The Commission notes that submissions to the Issues Paper were generally supportive of the continuation of the access regime. In addition, as discussed in section 3.1.1, changes to the grain exporting market provide further justification for the continuation of the access regime, given its application to grain services. Therefore, for those Essential Maritime Services that are also Regulated Services, the Commission believes that the continuation of the access regime is appropriate.

Draft Report Conclusion

The access regime should continue for those Regulated Services that are also Essential Maritime Services.

Given this conclusion, the Commission's focus in this chapter will be those services that are subject to the access regime but are not price regulated. These are:

- Pilotage;
- Bulk loaders at Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln and Thevenard; and
- Land.

3.2.1 Is there the potential for the port operator to exercise market power?

Having concluded during the 2004 Ports Access Review that there is the potential for the exercise of market power, the Commission is considering whether there have been any changes in the market over the current regulatory period, or are likely to be any changes over the coming period, which might suggest that the answer to this question has changed. As discussed above, the Commission has formed the view that the deregulation of grain marketing and expansion of the minerals sector, are more likely to support an argument for the continuation of the regime than for its expiry. Are there other changes that might impact on the potential for the port operator to exercise market power, particularly in relation to those Regulated Services that are not Essential Maritime Services?

Pilotage

Pilotage involves the provision of an experienced and qualified seafarer (a marine pilot) on board a vessel to direct that vessel into, and out of, a port. Pilotage at each of the seven proclaimed ports is compulsory for most visiting vessels. However, in some circumstances exemptions from compulsory pilotage can occur.

Flinders Ports is, at present, the only supplier of pilotage services at the proclaimed ports, including the Ausbulk owned port at Ardrossan. The Commission notes that AusBulk could elect to appoint an alternative pilotage provider if one existed.

The Commission observed during the 2004 Ports Access Review that there is the potential for competitive entry for the provision of pilotage services, but nevertheless concluded that market power existed on the basis that pilotage is generally compulsory and is provided solely by Flinders Ports. This is still the case and, therefore, the Commission's view on this matter has not changed.

Bulk Loading Facilities

Provision of Bulk Loading Facilities at proclaimed ports (other than at Ardrossan) are Regulated Services under the MSA Act. The facilities are essential for the export of dry bulk commodities and are presently only provided by AusBulk. This situation has not changed during the current regulatory period.

The Commission sees no reason to change the conclusion reached during the previous access review that, given the bottleneck characteristics of these facilities and given that there is only one provider of them, there is the potential for the misuse of market power.

Land

The inclusion of land within the definition of Regulated Services is provided in order to give practical effect to the rights to access of other Regulated Services. For example, access to a bulk loading facility can only be achieved if access is also granted in relation to the land that must be crossed in order to deliver cargo to the facility. Access to land that is not a necessary part of achieving access to the facility would not be covered by the access regime.

As was concluded by the Commission during the previous review of the access regime, since access to land is provided for under the MSA Act in order to provide meaningful access to other Regulated Services, the same conclusions on questions of market power must apply to land as they do to the other services.

Draft Report Conclusion

The structure of the market for Regulated Services suggests that there is the potential for market power to exist.

3.2.2 Is there any evidence of misuse of market power by the port operator?

The Commission has focused on the extent to which there is any evidence over the current regulatory period of misuse of market power, particularly in respect of the Regulated Services that are not Essential Maritime Services. Misuse of market power can be evidenced through pricing outcomes or through the level of service/service quality.

The Commission makes the general observation that submissions to the Issues Paper did not identify any specific evidence of misuse of market power and indicated that the negotiation process was generally working well. It notes, however, that some submissions have raised suggestions that maintenance of port facilities may need to be improved in certain areas.

Submissions from Shipping Australia[39] and Zinifex[40] both indicated concerns with the quality of certain port infrastructure. The Commission has held further discussions with both parties in relation to these concerns.

The Commission's view on any concerns over the level of maintenance and service quality is that the negotiate-arbitrate model for access recognises that negotiations between users and the operator are most likely to achieve optimal allocation of resources and for the efficient provision of port services. However, where a user believes that this has not occurred, the regime provides a mechanism for dispute resolution and arbitration. The Commission notes that the concept of efficient provision of port services encompasses both price and output (in terms of the level of port services provided and the quality of service provided). Here, the level of investment in port infrastructure is important in providing for the efficient delivery of port services into the future.

The Commission has the power to set service standards for the provision of Maritime Services.[41] The MSA Act does not limit the type and scope of service standards that can be developed for these services. Service standards could encompass the availability of facilities and reliability of services provided. However, any service standards imposed by the Commission would not be enforceable by law, unless they were promulgated by regulation.[42]

It is the Commission's view that there are inherent difficulties in determining the service standards that best meet the requirements of different port users who have different preferences for services. The Commission believes that, in the context of the maintenance issues raised by Shipping Australia and Zinifex, the determination of optimal service standards is best left to negotiations between port users and port

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39 Shipping Australia submission to Issues Paper, pp3-4.

40 Zinifex submission to Issues Paper, p2.

41 Pursuant to section 9(2) of the MSA Act.

42 Pursuant to sections 9(3) and 9(4) of the MSA Act.

operators. Here, differences between users and their preferences for price and quality can be taken into account.

In relation to service standards that may be developed to drive new investment in capacity at the port, the Commission has a similar view. The Commission would expect the negotiation framework under the access regime to allow port users the opportunity to discuss future requirements and is more likely to lead to a better understanding by the port operator of investment needs rather than by having service levels specified by a regulator. However, the Commission welcomes comments from stakeholders on this draft conclusion.

Draft Report Conclusion

The Commission would prefer service quality issues to be left as a subject of negotiation between port users and port operators. It proposes not to develop service standards relating to the provision of Maritime Services.

Pilotage

The previous Ports Access Review concluded that, while there was potential for the misuse of market power in the provision of pilotage services, there was no evidence to suggest market power had actually been misused. Benchmarking of pilotage prices at the time suggested that South Australian pilotage prices were comparable to or less than the charges at other Australian ports.

As part of the price benchmarking analysis conducted by Meyrick and Associates, pilotage charges were examined in addition to charges for Essential Maritime Services. The analysis found that SA pilotage charges continue to be in line with charges at comparable ports.[43]

The Commission therefore believes that there continues to be no evidence of misuse of market power in the provision of pilotage services.

Bulk Loading Facilities

As was the case during the previous regulatory period, during the current regulatory period there have been no access disputes in relation to the regulated bulk loading facilities.

In addition, analysis of the financial and operational performance data reported to the Commission during the current period does not suggest there has been any misuse of market power.

[43] Refer Chapter 4 of Meyrick and Associates, *Benchmarking of Port Prices in Australia*, April 2007.

Therefore, while there is the potential for misuse of market power in providing bulk loading facilities, the Commission does not have any evidence indicating actual misuse.

Land

There have been no access disputes in relation to gaining access to land in connection with the provision of other Regulated Services. The Commission would expect any evidence of misuse of market power in the provision of access to land to be linked to evidence of misuse for these other services. The Commission is not aware of any such evidence.

Draft Report Conclusion

There is no evidence to suggest that port operators are misusing market power in the provision of Regulated Services.

3.2.3 Will regulation produce a net benefit?

The Commission has reached the draft decision that, in relation to the provision of Regulated Services, including those services that are not Essential Maritime Services, there is the potential for the misuse of market power, but that there is no evidence of any actual misuse. In this circumstance, the Commission believes that a light-handed form of regulation is appropriate. The current negotiate-arbitrate form of access regulation provides such a light-handed regime as it only imposes regulatory intervention in the event of a dispute.

The Commission acknowledges that the access regime does impose some regulatory costs. For example, it requires the port operator to provide certain information to prospective access seekers and to the Commission. However, as submitted by Flinders Ports, the access regime does provide a safety net to users and potential users. Submissions to the Issues Paper generally supported the continuation of the access regime and the Commission's draft decision is to recommend its continuation.

Draft Report Conclusion

The access regime provided for under Part 3 of the MSA Act should continue.

4 CONSISTENCY OF THE ACCESS REGIME WITH CIRA

Pursuant to section 35(1) of the ESC Act, the Acting Treasurer has directed the Commission to undertake an Inquiry into the consistency of the ports access regime with certain parts of clause 2 of the CIRA. The Commission has been asked to provide advice on any amendments to the ports access regime that would be needed to comply with the relevant CIRA clauses. These clauses were discussed in section 1.3.3 of this paper, and are contained in the Inquiry Terms of Reference provided in Appendix 1.

Clause 2 of the CIRA concerns the economic regulation of "significant infrastructure". This is defined by COAG as:

> *infrastructure, including ports and export related infrastructure, that falls within the scope of subclause 6(3)(a) of the Competition Principles Agreement or Part IIIA of the Trade Practices Act 1974.*

COAG has determined that the South Australian ports access regime is a regime for services provided by means of "significant infrastructure" facilities, and is therefore subject to the requirements of clause 2 of the CIRA.[44]

The SA Government has committed to reviewing the ports access regime in 2007, and to implement the consistent principles by 2008. It is also required to apply for certification of the access regime before the end of 2010.

The Commission has considered whether or not the ports access regime, as it currently stands, is consistent with the relevant requirements of clause 2 of the CIRA. The Commission's draft findings are discussed below.

4.1 Clause 2.1

Clause 2.1 states that:

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

Clause 2.1 provides an overarching principle, and must be read in conjunction with the subsequent provisions of Clause 2, which provide more specific requirements for access regimes. The Commission proposes to focus on clauses 2.2, 2.3, 2.4, 2.6 and 2.7 of the CIRA, on the basis that the intent of the CIRA is for Parties to adopt these specific requirements as a means of achieving a simpler, more consistent national approach to economic regulation of significant infrastructure.

The Commission has therefore proceeded to examine the more specific requirements under clause 2.

[44] Refer COAG Communique, 13 April 2007 (available at www.coag.gov.au/meetings/130407/#communique)

4.2 Clause 2.2

Clause 2.2 specifies that:

> *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.*

The Commission observes that section 11(1) of the MSA Act provides that:

> *A regulated operator must provide regulated services on terms—*
>
> *(a) agreed between the operator and the customer; or*
>
> *(b) if they do not agree, on fair commercial terms determined by arbitration under this Act.*

This MSA Act requirement is consistent with the principle specified in clause 2.2 of the CIRA.

Draft Report Conclusion

The Commission's draft finding is that the ports access regime is consistent with clause 2.2.

4.3 Clause 2.3

Clause 2.3 specifies that:

> *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.*

As discussed in chapter 1, the ports access regime and pricing regime operate under separate parts of the MSA Act. It is possible for the access regime to operate largely independently of the price regulation regime.

The present form of price regulation implemented by the Commission is consistent with the price monitoring approach encouraged under clause 2.3 of the CIRA. This form of regulation results from the Commission's 2004 ports price determination made under Part 3 of the ESC Act. Price monitoring is not a requirement of the access regime nor of the MSA Act more generally.

The Commission's 2004 conclusion to adopt price monitoring followed an extensive review, which examined questions of market power, the extent of competition and the costs and benefits of regulation. The form of regulation was chosen to reflect the circumstances of the industry. If circumstances were to change, a different form of price regulation may be warranted. As outlined in Section 2 of this Draft Report, the Commission's current review recommends a continuation of this regime.

The Commission believes that consistency with clause 2.3 of the CIRA is achieved since the MSA Act facilitates consideration of price monitoring in the manner of clause 2.3 and as demonstrated by the Commission's 2004 and 2007 reviews.

Draft Report Conclusion

The MSA Act is consistent with clause 2.3.

4.4 Clause 2.4

Clause 2.4 of the CIRA states:

> *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.*

In relation to 2.4(a), section 3 of the MSA Act does contain an objects clause, the objects being:

> a) *To provide access to maritime services on fair commercial terms;*
> b) *To facilitate competitive markets in the provision of maritime services;*
> c) *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*
> d) *To ensure that disputes about access are subject to an appropriate dispute resolution process.*

The Commission believes that these objects are broadly consistent with those set out in clause 2.4(a) of the CIRA. It notes that the concept of economic efficiency is given greater prominence in clause 2.4(a) of the CIRA than it is in section 3 of the MSA Act, where regulated prices are to be fair and reasonable having regard to efficiency. However, section 3(b) of the MSA Act does discuss facilitating competitive markets in the provision

of maritime services, which the CIRA states is the objective of promoting efficiency use, operations and investment in significant infrastructure.

To make this link more explicit, the Commission suggests that the following additional object be inserted into section 3:

> *To promote the economically efficient use of, operation and investment in, maritime services.*

Clause 2.4(b) of the CIRA concerns the principles by which regulated prices are set. The Commission notes that it does not set prices for regulated port services as such; rather, it monitors prices for Essential Maritime Services. In addition, the MSA Act contains certain pricing principles that an arbitrator should take into account in determining any award relating to an access dispute. Section 32 of the MSA Act provides that:

> *In deciding on the terms of an award, the arbitrator should take into account-*
>
> *(a) the operator's legitimate business interest and investment in the port or port facilities; and*
>
> *(b) the costs to the operator of providing the service (including the costs of any necessary modification to, or extension of, a port facility) but not costs associated with losses arising from increased competition in upstream or downstream markets; and*
>
> *(c) the economic value to the operator of any additional investment that the proponent or the operator has agreed to undertake; and*
>
> *(d) the interests of all persons holding contracts for use of any relevant port facility; and*
>
> *(e) firm and binding contractual obligations of the operator or other persons (or both) already using any relevant port facility; and*
>
> *(f) the operational and technical requirements necessary for the safe and reliable provision of the service; and*
>
> *(g) the economically efficient operation of any relevant port facility; and*
>
> *(h) the benefit to the public from having competitive markets.*

On the basis that the principles listed in clause 2.4(b) of the CIRA are intended to be reflected in the principles to be taken into account by an arbitrator under section 32 of the MSA Act, the Commission believes that there are no principles within the two sets that are in conflict. However, to introduce consistency between the two sets, the Commission recommends that the Government consider the addition of the following provisions to section 32 of the MSA Act:

> *(i) allow multi-part pricing and price discrimination when it aids efficiency;*
>
> *(j) 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*
>
> *(k) provide incentives to reduce costs or otherwise improve productivity*

Clause 2.4(c) of the CIRA concerns the information to be made available to a merits review, if such a review is provided for. Section 40 of the MSA Act provides for an appeal

on a question of law, and does not provide for a merits review. Therefore, this CIRA principle is not relevant to the ports access regime.

Draft Report Conclusion

The Commission recommends that the Government consider amending Section 3(b) of the MSA Act to provide the following object:

(b) To facilitate competitive markets in the provision of maritime services, by promoting the economically efficient use of, operation and investment in, maritime services.

The Commission also recommends that the Government consider the addition of the following provisions to section 32 of the MSA Act:

(i) allow multi-part pricing and price discrimination when it aids efficiency;

(j) 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

(k) provide incentives to reduce costs or otherwise improve productivity

4.5 Clause 2.6

Clause 2.6 of the CIRA states that:

> *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.*

The MSA Act does not provide for any time limits in relation to regulatory decisions made by the regulator under the Part 3 access regime. A provision similar to that set out in clause 2.6 of the CIRA would need to be inserted into the MSA Act to introduce consistency with the CIRA. Section 44XA(1) of the *Trade Practices Act 1974 (Cth)* provides an example of the type of provision that is needed. The Commission notes that

the South Australian Government drew attention to the significant merit in providing time certainty to the process of resolving access disputes in its submission to the Commission's 2007 Ports Pricing and Access Review Issues Paper.

Draft Report Conclusion

The Commission recommends that the Government insert a provision into the MSA Act to reflect clause 2.6.

4.6 Clause 2.7

Clause 2.7 of the CIRA states that:

> *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.*

Flinders Ports' submission to the Issues Paper supported certification of the ports access regime, commenting that:

> *This process is required to add a degree of certainty in relation to responsibility for the regulation of ports in South Australia.*[45]

The Commission understands that there are no impediments for the access regime being submitted to the NCC for certification.

Draft Report Conclusion

The Commission recommends that the Government commence the certification process at the earliest opportunity following necessary amendments to the MSA Act

4.7 Areas for general improvement of regime

The Terms of Reference for the inquiry into the ports access regime direct the Commission to "provide advice on any other changes to the access regime that may improve its overall effectiveness."

The Commission provides the following draft recommendations on general areas for improvement of the regime, having regard to comments raised in submissions to the Issues Paper and the Commission's experience with the regime.

[45] Flinders Ports' submission to Issues Paper, p 5

4.7.1 Coverage Issues

Ardrossan

Application of the access regime to the port at Ardrossan is not considered by the Commission to be effective. Given the operations at Ardrossan, whereby there is one major port user with a long-term agreement with the port operator, Ausbulk, and little potential for other port access in the near future, the access regime is unlikely to have any real effect. In addition, in the event that access was sought by another user, the regime does not extend to the bulk loading facilities at Ardrossan, which would form an essential component of gaining effective access to the port facilities.

The Commission's draft recommendation is that coverage of the access regime to Ardrossan be revoked. It suggests that Ardrossan remain as a proclaimed port, in the event that access requests arise in the future, but that it not be subject to the access regime. As a logical consequence, the Commission also recommends that it not be subject to price monitoring. The Commission acknowledges that any access issues are more likely to arise in relation to pilotage services (provided by Flinders Ports) and that it may be desirable to continue with coverage of the access regime to pilotage services only at the port. However, this issue is not considered to be significant enough to warrant the continuation of the regime to all Regulated Services at Ardrossan.

If it were decided that the access regime should continue to apply to Ardrossan, the Commission would recommend that the bulk loading facilities at the port be brought within the list of Regulated Services, in order to provide for effective access to the port.

Bulk Loaders

The Commission believes that coverage of the access regime to bulk loaders at proclaimed ports is currently applied inconsistently. The bulk loader being constructed at Outer Harbor at Port Adelaide is not covered under the access regime, despite it operating within the same catchment as other bulk loaders at non-Eyre Peninsula grain ports. The submission from the SA Government also recognises this inconsistency and recommends:

> *A more simplified and consistent approach to third party access by extending the coverage of the access regime to the new grain terminal.*[46]

In contrast, the submission from ABB Grain did not support the application of the access regime to the new Outer Harbor bulk loader on the basis that, unlike the other SA bulk loaders, it is not being transferred from public to private ownership and is being privately funded. The Commission notes that access regulation is

[46] Submission from SA Government to Issues Paper, p 4 of unnumbered document

not necessarily linked to privatisation of public assets, and that the primary justification for regulation relates to questions of market power, not ownership.

The Commission agrees that there is inconsistency in the regulation of bulk loaders, and recommends that the Government address this inconsistency by either:

- Bringing the new bulk loader at Outer Harbor into the definition of Regulated Services; or
- Removing all bulk loaders at proclaimed ports that are not on the Eyre Peninsula from the set of Regulated Services.

The Commission recommends the first option, on the basis that there is still the potential for misuse of market access in the provision of these bulk loader facilities. Coverage of the bulk loader at Outer Harbor could be brought about through proclamation.

Storage and Handling Facilities

In relation to the coverage of the access regime to storage and bulk handling facilities, the SA Government submission to the Issues Paper suggested that:

> *If monitoring identifies access issues at the bulk handling facilities, further consideration may need to be given to facilitating third party access to handling and storage facilities.*[47]

The Commission also notes that the SA Barley Marketing Working Group's report into the deregulation of barley marketing also supported the extension of the access regime to these services:

> *Consultation revealed that the ESCOSA already performs a role in regulating access and pricing for the port. However, the working group believes this will need to be expanded with deregulation in the barley industry to include regulation of the grain loading facilities, and possibly storage at port, in terms of price and access to third parties.*[48]

The Commission observes that, while the provision of at-port storage facilities is not defined as a Regulated Service, it is captured within the definition of Maritime Services and could therefore be brought within the scope of the access regime by proclamation. The appropriateness of such action depends on the potential for, or actual misuse of, market power by the provider of storage services and the costs and benefits of imposing regulation on storage. The Commission would contend that there are a number of feasible alternatives for at-port storage in relation to some cargoes (eg. containerised cargoes), but it may be more limited for others (eg. grain).[49]

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47 Submission from SA Government to Issues Paper, p 4 of unnumbered document.

48 *Report by the SA Barley Marketing Working Group*, December 2006, p55

49 The Commission notes that interconnection of new storage facilities to loading belts at the port is theoretically feasible, but practically difficult.

The extent to which bulk handling services fall within the definition of Maritime Services under the MSA Act is somewhat unclear. An amendment to the MSA Act may be needed if the full set of bulk handling services were to be brought into the access regime.

The Commission has considered the submission from the SA Government and the report of the SA Barley Marketing Working Group, which supports the extension of the access regime to storage and handling facilities. While there may be an argument for extending coverage to these facilities, the Commission sees merit in considering this issue as part of a broader review of regulation across the entire grain supply chain. It notes that the Commission's consideration of this issue is necessarily limited to services provided at the port. The Commission also notes that, in relation to regulation of grain handling services, in Victoria there is a grain handling access regime that exists separately to the Victorian ports access regime.

The Commission's review of the ports access regime is attempting to ensure that access regulation is applied consistently to all essential port infrastructure required by importers and exporters of bulk products, particularly grain exporters, in order to provide for effective access. This is particularly important in an environment where the grain export market is being deregulated.

The Commission would welcome comments from other stakeholders on whether or not access regulation should apply to grain storage and bulk handling facilities, having regard to the following questions:

- Are there other alternatives to using these facilities?
- Is there the potential for the misuse of market power in providing storage and bulk handling services?
- Will regulation of access to these services will produce a net benefit?

<u>Draft Report Conclusion</u>

The Commission recommends that the Government address the above inconsistencies in the coverage of the access regime by:

- *Removing coverage at the port of Ardrossan; and*
- *Extending coverage to the bulk loader being constructed at Outer Harbor;*

The Commission also requests comment on whether or not access regulation should apply to at-port grain storage and bulk handling facilities.

4.7.2 Changes to the Negotiate-Arbitrate process

In order to determine whether or not it should recommend any changes to the negotiate-arbitrate process set out in Part 3 of the MSA Act, the Commission has compared the MSA Act access regime with other legislative access regimes,[50] and has also considered information and guidance on access regimes provided by the National Competition Council (NCC), the Productivity Commission (PC), and the Australian Competition and Consumer Commission (ACCC). Further, the Commission has paid particular attention to the principles set out in Clause 2 of the Competition and Infrastructure Reform Agreement (CIRA), which is concerned with third party access to services provided by means of significant infrastructure facilities.

In general, the Commission found the access regime set out in Part 3 of the MSA Act to be consistent with other State and Commonwealth access regimes indicating that it is compliant with what is generally considered to be Australian "good practice" in the drafting of legislative third party access regimes. However, the Commission believes that there are some changes to Part 3 of the MSA Act which would increase its clarity and effectiveness and which would ensure compliance with Clause 2 of the CIRA.

Commission as arbitrator

The Commission believes that it may be appropriate for the ability of the Commission to act as arbitrator under Part 3 of the MSA Act to be removed.[51] In neither the *AustraliaAsia Railway (Third Party) Code*[52] nor the *Railways (Operations and Access) Act 1997 (SA),* is the Commission given the power to act as the arbitrator in a dispute; instead, both Acts require only that the Commission appoint an external arbitrator in consultation (and if possible, in agreement with) the parties to the dispute. The Commission sees considerable merit in fully separating the two roles of arbitrator and regulator, thus avoiding perceptions of conflict that might arise. Accordingly, this power should be removed and a clause similar to that provided in clause 16 of the *AustraliaAsia Railway (Third Party) Code* inserted instead.

Application of Commercial Arbitration Act 1986

The Commission is concerned as to the necessity of section 19 of the MSA Act, which states that "the Commercial Arbitration Act 1986 applies to an arbitration under this Act to the extent that it may operate consistently with the provisions of this Act". Neither the *AustraliaAsia Railway (Third Party) Code* nor the *Railways (Operations and Access) Act* contain such a provision. The Commission does not

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50 Including the *Railways (Operations & Access) Act 1997* (SA), the *AustralAsia Railway (Third Party Access) Act 1999* (SA), the *Queensland Competition Authority Act 1997*, and the *Trade Practices Act 1974* (Cth).

51 Section 18 MSA Act 2000 (SA)

52 Schedule to the *AustralAsia Railway (Third Party) Act 1999 (SA)*

see the value that section 19 brings to the MSA Act. It believes that it serves mainly to add an extra layer of legislative complexity to the arbitration process. The Commission therefore recommends its removal.

Advice and directions

Thirdly, the Commission notes that that the *AustraliaAsia Railway (Third Party) Code* contains a provision that:

> *An access seeker, the access provider or any other respondent to an access proposal may request the regulator to consider and, if appropriate, to give advice or directions with respect to any matter that has arisen in connection with the operation of this [access regime] in order to facilitate the conduct of negotiations under this [access regime].*[53]

Compliance with directions given by the regulator is enforceable by means of a $10,000 penalty. The MSA Act contains no such provision. Given that the NCC in its, "AustralAsia Railway Access Regime – Final Recommendation, February 2000", comments that the effect of this provision is to make low cost dispute resolution easily accessible for negotiation matters, and to provide a further option to conciliation and arbitration, the Commission believes that there would be merit in considering the inclusion of such an "advice and directions " provision in the MSA Act.

Non-suspension of awards

The Commission notes that the appeals division of the MSA Act (Division 10) does not provide as to what happens to an award when an appeal to the Supreme Court on a question of law occurs – is the award suspended or does it continue until the Supreme Court makes its determination? The *AustraliaAsia Railway (Third Party) Code*,[54] the *Railways (Operations and Access) Act*,[55] and the Commonwealth *Trade Practices Act*[56] each provide that when an award or decision is under review that award or decision is not suspended unless the appeals body specifically decides that it is. The Commission recommends that similar provision be made in the MSA Act.

Time limit for decisions

In order to ensure that the MSA Act access regime is compliant with the principles set out in clause 2 of the CIRA, in particular clause 2.6, the Commission believes that provision must be made in the Act requiring the Commission to make any regulatory decisions under the MSA Act access regime within six months, providing that the Commission has been given sufficient information to make the decision. Provision should be made for the suspension of

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53 Clause 12B(1)

54 Clause 37(4)

55 Section 56(4)

56 Section 44ZS

the six month time limit on grounds such as requests for further information and consultation periods during which the Commission seeks submissions from third parties or the community. Section 44XA(1) of the *Trade Practices Act 1974 (Cth)* provides an example of the type of provision that is needed. The Commission notes that the South Australian Government drew attention to the significant merit in providing time certainty to the process of resolving access disputes in its submission to the Commission's 2007 Ports Pricing and Access Review Issues Paper.

Draft Report Conclusion

The Commission recommends that the Government consider the above amendments to the negotiate-arbitrate process set out in Part 3 of the MSA Act.

4.7.3 Length of regulatory period

The MSA Act currently provides for a 3-year period between access reviews. Price regulation also operates under a 3-year cycle.

In response to the Issues Paper, the SAFC submission argued that the regulatory period should run for 5 years and not 3 years. SAFC expressed concern with:

> *"the repetitive nature of these reviews and recommended the next regime should remain in place for a minimum 5-year period before conduct of the next review."*[57]

Flinders Ports supported this view, stating that it would:

> *"encourage ESCOSA to consider a longer period (5 year period) between future review processes. This will reduce the administrative burden on all interested port stakeholders."*[58]

The Commission sees merit in extending the regulatory period for the access regime and price regulation regime from 3 years to 5 years. It believes that this will reduce regulatory costs and uncertainty to the port operators, provide a suitable timeframe to examine outcomes over a period, and provide consistency with the regulation of other infrastructure businesses.

Draft Report Conclusion

The Commission recommends that the Government consider amending the MSA Act to provide for a 5-year regulatory period for the access regime.

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[57] SAFC submission to the Issues Paper, pg 6 or unnumbered document. This can be found on the Commission's website at http://www.escosa.sa.gov.au/webdata/resources/files/070412-Sub-PortsPricingAccessReviewIssuesPaper-SAFC.pdf

[58] Flinders Ports submission to Issues Paper, pg 10

5 NEXT STEPS

The Commission invites comments on the conclusions reached in this Draft Report. Submissions to the Draft Report are to be provided by **2 July 2007**.

Following consultation of the Draft Report, the Commission intends to release a Final Report in September 2007. If the Final Report concludes that price regulation of Essential Maritime Services should continue, the Commission will issue a Draft Price Determination at the same time as releasing the Final Report. A Final Price Determination, if required, is expected to be made 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

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: OPERATION OF THE ACCESS REGIME

The access regime set out in Part 3 of the MSA Act operates under a negotiate-arbitrate framework. The regime is summarized as follows:

Basis of access (Division 2 of Part 3 of the MSA Act)

Access is to occur on fair commercial terms, which covers both the price and non-price arrangements for the use of Regulated Services. This means that a regulated operator (port operator) is to provide Regulated Services on terms:

- agreed to between the regulated operator and the customer; or
- as determined by arbitration.

Where the price of a Regulated Service is already regulated under an ESC Act price determination, then that price is to be regarded as a fair commercial term. This covers those Regulated Services that are also Essential Maritime Services. However, under price monitoring of Essential Maritime Services, this link does not have any effect as the Commission is not regulating those prices (under price monitoring the Commission will only be regulating conditions relating to prices).

Negotiation of access (Division 3)

Division 3 sets out the information that a regulated operator must provide to a person that is considering seeking an access request.

It also requires an access seeker to make a written proposal to the regulated operator setting out its proposed terms and conditions.

Once the proposal (or amended proposal) is lodged, the regulated operator has one month to:

- give written notice of the proposal to the Commission;
- give written notice to any other person whose rights would be affected by the proposal (an affected third party);
- advise the proponent of the name and address of any affected third party; and
- advise the proponent of its preliminary response to the proposal, including whether:
  - it would be prepared to provide the services, and on what terms and conditions; and
  - any facilities changes required and the acceptability and terms and conditions of those changes.

If an affected third party indicates its interest in the negotiations, it becomes an interested third party. At this stage, the preference is for the parties to use the

information available to reach a commercial agreement. The parties must negotiate in good faith on the basis that the proponent's reasonable requirements are to be accommodated as far as practicable. However, if no agreement is reached within 30 days of the proposal being lodged, then a Dispute exists, and thereafter any party may refer the Dispute to the Commission.

Conciliation (Division 4)

Conciliation is the first stage of direct intervention. When a Dispute is referred to the Commission, it must first seek to resolve it by conciliation, unless, in the Commission's view:

- the subject matter is trivial, misconceived or lacking in substance; or
- the parties have not negotiated in good faith.

The Commission may choose to call voluntary or compulsory conferences.

Reference of Dispute to Arbitration (Division 5)

If conciliation fails, or if the Commission decides it is unlikely to succeed, the Commission may refer the Dispute to arbitration, unless, in the Commission's view:

- the subject matter is trivial, misconceived or lacking in substance;
- the parties have not negotiated in good faith; or
- there are other good reasons why it should not.

The Commission will select the arbitrator after consultation with the various parties. The Commission may elect to act as the arbitrator. The *Commercial Arbitration Act 1986* applies to a ports access arbitration, to the extent that it may operate consistently with the MSA Act.

Parties to Arbitration (Division 6)

The parties to an arbitration are the proponent, the regulated operator and any interested third parties. The arbitrator may also join additional parties whose interests are materially affected. Parties may elect to be represented by a lawyer, or another representative if the arbitrator so permits. The Commission may also participate in an arbitration, calling evidence and making representations on the matters in the arbitration.

Conduct of Arbitration (Division 7)

The arbitrator is obliged to act expeditiously, meaning that the process should be as quick as possible given the need to conduct the arbitration properly. The MSA Act provides a range of powers for the arbitrator to make the collection of evidence quick and relevant, leaving out or altering some procedural strictures that are unnecessary for an access arbitration. For example:

- the power to obtain information in writing, by telephone, video link or measures other than oral evidence;
- the power to sit at any time or place; and
- the power to refer a matter to an expert for report, and accept the expert's report in evidence.

The arbitrator may also conduct two or more arbitrations on related matters together. This might arise where the access proposal involves services from more than one regulated operator.

The arbitrator has various powers to obtain information relevant to the arbitration from any party to the arbitration or from other people. Any information collected can be kept confidential in whole or in part. Confidentiality must be requested and will be determined by the arbitrator.

Proceedings must be conducted in private unless all parties agree to public proceedings. To ensure the maintenance of commercial confidentiality, the arbitrator is entitled to determine who should attend any private hearing.

While the proceedings may be private, the arbitrator may publish the outcome of an arbitration if they consider it to be in the public interest. The arbitrator may engage a lawyer for advice on conduct and drafting an award. A proponent may elect to terminate an arbitration at any time before an outcome – terminating the Dispute and withdrawing the proposal. An early withdrawal does not preclude the proponent from pursuing a similar proposal at another time.

The arbitrator may also elect to terminate an arbitration if, in the arbitrator's view:

- the subject matter is trivial, misconceived or lacking in substance;
- the proponent has not engaged in negotiation in good faith; or
- an existing contract or award should apply.

The Commission can make representations on a termination.

Awards (Division 8)

The outcome of an arbitration is known as an Award. An Award contains the terms and conditions upon which access may occur. It should take into account:

- the regulated operator's legitimate business interest and investment in the port or port facilities;
- the costs to the operator of providing the service (including the costs of any necessary modification to, or extension of, a port facility) but not costs associated with losses arising from increased competition in upstream or downstream markets;

- the economic value to the operator of any additional investment that the proponent or the operator has agreed to undertake;
- the interests of all parties holding contracts for use of any relevant port facility;
- firm and binding contractual obligations of the operator or other persons (or both) already using any relevant port facility;
- the operational and technical requirements necessary for the safe and reliable provision of the service;
- the economically efficient operation of any relevant port facility; and
- the benefit to the public from having competitive markets.

An Award must:

- be in writing;
- set out its reasoning; and
- specify the period for which it remains in force.

Once an Award is made, the arbitrator must give a copy to each party and the Commission. An Award may affect the existing legal rights of other port facility customers. This is allowable so long as those customers' needs can continue to be met or they are compensated. The parties to an Award may change it by agreement between all the parties to the Award. A variation could include terms and conditions, or may extend its duration.

A proponent may choose to withdraw from an Award up to 7 days after its making (or longer if the Commission so permits), by notice in writing to the Commission. In this case the Commission must notify the regulated operator and other parties within 7 days. However, if a proponent chooses this course, then they are precluded from making a similar proposal for 2 years from the date of notice – unless the regulated operator or the Commission agrees.

Enforcement of Awards (Division 9)

An Award is binding on the parties to it in the same way as a contract. As a result, the parties to an Award may seek injunctive remedies and compensation through the Supreme Court.

Appeals and Costs (Division 10)

There is provision for appeal to the Supreme Court in respect of an Award (or a decision to not make an Award) on questions of law only. The Supreme Court may:

- vary the Award or decision;
- revoke the Award or decision;
- make an Award or decision that should have been made;

- remit the matter to the arbitrator for further or re-consideration; and
- make incidental and ancillary orders.

The costs of an arbitration are to be borne by the parties either:

- in proportions decided by the arbitrator (for example if one party had not negotiated in good faith, the arbitrator may award costs against that party); or in the absence of that
- in equal proportions.

If a proponent terminates an arbitration or withdraws from an Award, they are liable for all costs. The arbitrator will decide how to define costs – it could include a party's internal costs.