2007 PORTS PRICING AND ACCESS REVIEW

FINAL REPORT

September 2007

The Essential Services Commission of South Australia
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GLOSSARY OF TERMS

ABB GRAIN	ABB Grain Ltd
ACCC	Australian Competition and Consumer Commission
AGEA	Australian Grain Exporters Association
AUSBULK	AusBulk Pty Ltd
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
NBCG	National Bulk Commodities Group Inc.
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 2007 Ports Pricing and Access Review, as required under the *Maritime Services (Access) Act 2000* (MSA Act). It has also finalised its Inquiry into whether or not the ports access regime is consistent with certain principles specified in the Competition and Infrastructure Reform Agreement (CIRA), entered into by the Council of Australian Governments (COAG) in February 2006.

The review has concluded that:

- price regulation of Essential Maritime Services should continue beyond 30 October 2007 for at least another three year period. The Commission recommends the continuation of a price monitoring form of regulation;
- the ports access regime should continue beyond 30 October 2007 for at least another three year period;
- coverage of the access regime should be extended to the new bulk loader at Port Adelaide (Outer Harbor) and be removed from the port at Ardrossan; and
- the ports access regime is generally consistent with the relevant CIRA principles, although the Commission has identified some areas where greater consistency could be brought about, and where some other general improvements to the access regime could be made.

Ports Price Review

This Final Report confirms the draft conclusions reached in the Commission's Draft Report (released for public comment in June 2007); that there exists the potential for market power to be exercised by port operators but that there is no evidence to suggest that port operators are exercising such market power. The Commission has reached this conclusion after having regard to:

- the Regulatory Accounts of Flinders Ports and ABB Grain, which indicate they have not been earning excessive profits;
- price changes throughout the triennial cycle, which have not increased sharply and have been broadly consistent with CPI movements; and
- benchmarking analysis conducted by Meyrick and Associates, which shows that South Australian port prices are at the higher end of the range of prices in place at other comparable Australian ports, but that the rate of increase in prices over the period has not been any greater than at other ports.

Having reached this conclusion, the Commission recommends that the current light-handed form of price regulation (price monitoring) be maintained. Submissions to the Commission's Draft Report supported this proposal. The price monitoring regime will allow port operators to set their own port prices, but such action will be constrained by the threat of re-regulation. The Commission believes that this regime will minimise regulatory costs and maximise the benefits of regulation for all port stakeholders.

Ports Access Review

Similarly, the Commission has confirmed its conclusions from the Draft Report, that the ports access regime should continue beyond 30 October 2007, for at least another 3-year period. The Commission has reached this final decision having regard to submissions to the Draft Report, which supported the extension of the access regime.

In terms of coverage of the access regime, the Commission has concluded that greater consistency in the regulation of bulk loaders could be brought about by extending access regulation to the new bulk loader at Outer Harbor. It has also recommended that the access regime be revoked at the port at Ardrossan, given that there is only one main user at the port, with established long term arrangements in place, and little potential for additional port access in the near future.

As a result of the Commission's Inquiry into the consistency of the ports access regime with the CIRA, the Commission recommends amendments to the MSA Act in three areas. 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 three years to five years.

In the Draft Report, the Commission sought comment on whether or not the ports access regime should be extended to cover at-port grain storage and bulk handling facilities. The appropriateness of such action depends on the potential for, or actual, misuse of market power by the provider of these facilities, and benefits of imposing regulation on them.

Having considered comments on this issue raised in submissions to the Draft Report, the Commission has concluded that there is a prima facie case for regulating access to at-port grain storage and bulk handling facilities given the existence of market power, but that it is appropriate for any regulatory scheme to be considered in a broader context by the State

Government, having regard to the whole of the grain supply chain. The current ports access review is necessarily limited to at-port services and many of the services envisaged here extend well beyond the port boundary.

1 INTRODUCTION

The Commission has conducted 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 has considered the following questions:

- Should the ports access regime expire on 30 October 2007, or should it continue for a further three 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 three year period? If it is to continue, what form of price regulation should be adopted?

As part of the review, the Commission has also conducted 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, directed 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, and to recommend changes that could improve the effectiveness of the access regime.[1]

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

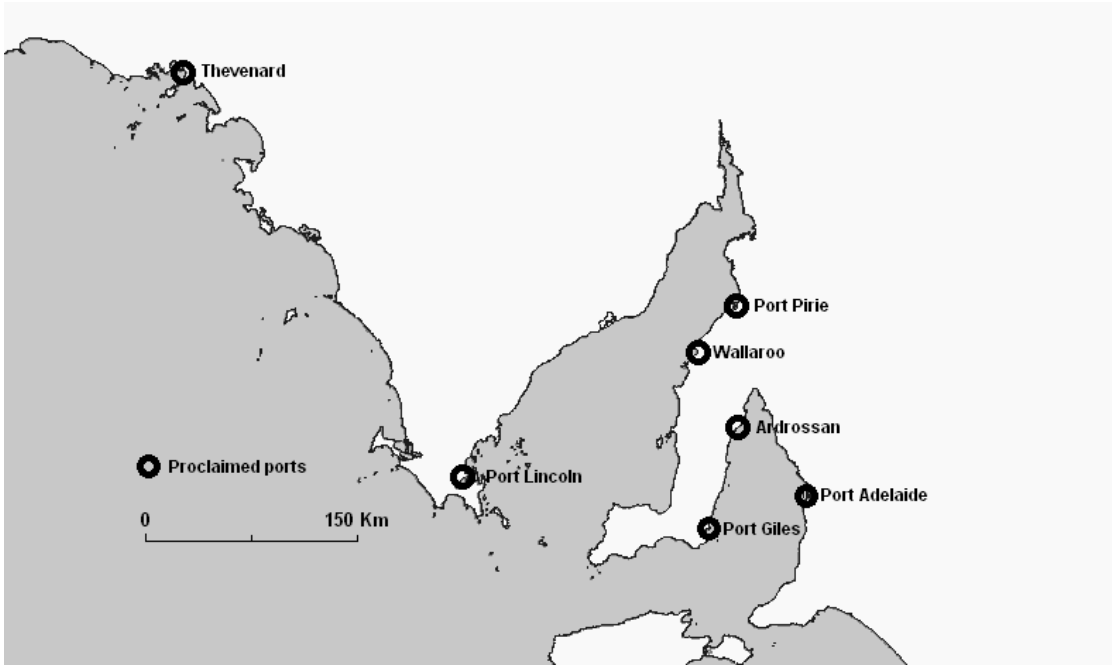
There are seven Proclaimed Ports in South Australia:

- ▲ 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.[2]

The seven Proclaimed Ports are represented in Figure 1 below.

Figure 1. Proclaimed Ports in South Australia



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

[2] 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.

- Navigational aids;
- Harbour control (but not pilotage[3] 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.[4] The current list of Regulated Services covers (in summary form):

- providing access of vessels to all proclaimed ports;

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[3] 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.

[4] 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

- 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 eight submissions to the Issues Paper from the following parties:

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

Following the consideration of these submissions, the Commission released its Draft Report on the Review and Inquiry in June 2007. The Commission received four submissions to the Draft Report from the following parties:[5]

[5] Submissions to the Draft Report and 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

- ABB Grain Ltd;
- Australian Grain Exporters Association;
- National Bulk Commodities Group Inc
- South Australian Farmers Federation

The above submissions have provided an important input into the Commission's Final Report. Discussion of the Commission's consideration of these submissions is set out in subsequent chapters.

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"[6], which are regulated industries for the purposes of the ESC Act.[7] 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.

A decision to extend price regulation beyond 30 October 2007 will require the Commission to make a further price determination. In doing so, the Commission 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*

6 See Regulation 3 of the *Essential Services Commission Regulations 2004*

7 Section 6 (1) *Maritime Services Access Act 2000* (SA)

(i) Promote competitive and fair market conduct;

(ii) Prevent misuse of monopoly or market power;

(iii) Facilitate entry into relevant markets;

(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.

Any further Price Determination made by the Commission will take effect from 31 October 2007 and can expire no later than 30 October 2010 – the three-year maximum being set in regulations.[8]

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 is required to make a decision as to the regime's continuation prior to 30 October 2007.

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.

Upon completion of the review, the Commission must forward a report to the Minister responsible for the MSA Act (currently the Minister for Infrastructure). The report is to set out the conclusions reached as a result of the review and, in particular, recommend either that the access regime should continue in operation for a further triennial cycle or that it should expire at the end of the existing cycle.[9] If it is determined that the access regime should continue, a regulation must be made extending the period of its operation accordingly.[10]

If a regulation to extend the access regime is so made, then a further review of access regulation under the MSA Act will occur before 30 October 2010.

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 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 has based its inquiry, seek to establish a simpler and consistent national approach to economic regulation of significant infrastructure. The relevant provisions from clause 2 of the

8 Section 3(2) ESC Regulations 2004

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

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

CIRA to which the Commission has had 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. In determining whether or not the pricing and access regimes should continue, the Commission 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. Submissions to the Draft Report did not raise any concerns with these criteria.

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.[11] 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

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

cycle.[12] Following this recommendation, a regulation was made under the MSA Act to enable the access regime to continue.[13]

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? [14]
- 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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[12] 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).

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

[14] 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.[15] 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[16] 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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[15] 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).

[16] 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.[17]

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

2 SHOULD PRICE REGULATION CONTINUE?

The Commission's review of the pricing regime under the MSA Act has considered the following question:

- Should price regulation of Essential Maritime Services expire on 31 October 2007 or should it continue for a further three year period? If it is to continue, what form of price regulation should be adopted?

In determining whether or not price regulation should continue, the current regulatory regime has been assessed against the following criteria (as 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 final conclusions on the key questions: should price regulation continue, and if so, in what form?

2.1 Operation of the Price Regulation Regime

The 2004 Ports Price Determination established 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, Regulation 3 of the *Essential Services Commission Regulations 2004* enables the Commission to issue a further price determination for Essential Maritime Services.

Price monitoring as a form of price regulation was introduced following the first Ports Price Review (2003). The 2004 Ports Price Determination required 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 business days of the change. The port 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 enabled the Commission to monitor and report on port prices and related matters. In this respect the Commission has produced annual price monitoring reports.

2.2 Summary of Draft Report

The Draft Report set out the Commission's preliminary views on whether or not price regulation should continue. The draft conclusions reached were based on an examination of the established assessment criteria developed in the Draft Report and Issues Paper. A summary of the draft conclusions are provided below.

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

The Commission's Draft Report concluded that the structure of the market for Essential Maritime Services suggests that there is the potential for market power to exist. The Commission considered that the greatest potential for market power was in relation to the export of grain produced on the Eyre Peninsula. Here, Flinders Ports faces no direct competition with farmers having little or no choice but to export via Port Lincoln or Thevenard.

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

Despite port operators having the potential to exercise market power, the Commission found no clear evidence that they have misused this power. The Commission reached this draft conclusion having regard to:

- Financial and operational information provided by Flinders Ports and AusBulk, which did not indicate that either were earning excessive returns from the provision of Essential Maritime Services, nor were there any abnormal trends that were of concern to the Commission;
- Movements in published prices during the current regulatory period, up to 2006/07. These movements have generally been in line with the change in CPI, with the exception of the introduction of a channel-deepening levy in 2006. This levy is charged against all grain and container vessels calling at Port Adelaide and provides a contribution towards the cost of the channel deepening at Outer Harbor. The deepening of the Outer Harbor channel has enabled larger vessels to enter the port without having to rely on tidal assistance;
- Benchmarking of port prices, as conducted by Meyrick and Associates on behalf of the Commission. This benchmarking analysis suggests that South Australian ports are generally more expensive compared to non-South Australian ports, but that greater economies of scale in other ports are likely to contribute to this difference rather than the exercise of market power. Interestingly, the analysis indicated that the difference in prices between SA ports and non-SA ports was lower for dry bulk cargoes (including grain), than it was for other cargoes. Despite the Commission's concerns that the greatest

potential for market power existed in relation to grain exports, the Commission observed that port charges for grain had not increased for many years[18]; and

- Information provided by Flinders Ports regarding its negotiated contracts with users. This information suggests that port users have been successful in negotiating contracts below the published prices. The Commission also noted that it had not been notified of any pricing disputes during the current regulatory period.

2.2.3 Will regulation produce a net benefit?

Based on the above findings, the Commission concluded that there was no justification for introducing more heavy-handed price regulation than currently existed. It argued that the major benefit from price monitoring was that it provided transparency to access seekers through publication of the price list. While price monitoring is considered a relatively light-handed form of price regulation, the Commission acknowledged that it did impose some compliance costs on the port operators. However, the Commission concluded that these costs were outweighed by the benefits that price monitoring provides to port users and prospective port users.

Consistent with its recommendations on changes to the access regime (as discussed in Chapter 5 of this Final Report), the Commission proposed that the pricing regime could be improved by extending it from a three year regulatory period, to a five year regulatory period, which would provide greater regulatory certainty to port operators while reducing compliance costs, and would be more consistent with regulatory regimes applying in other infrastructure industries.

2.3 Submissions to Draft Report

Submissions to the Draft Report unanimously supported the proposal to continue with the price monitoring form of regulation beyond 30 October 2007. While not providing a formal submission to the Draft Report, Flinders Ports has also advised the Commission of its support for the continuation of the current form of pricing and access regimes.

The submission from the Australian Grain Exporters Association (AGEA) argued that, given the transition towards full deregulation of barley exporting, and the possibility of changes in wheat exporting arrangements, there is a:

> *greater emphasis on the need for the Commission's Ports Pricing and Ports Access regimes to be functioning in a manner that will ensure that the South Australian farmer and their industry receives the full benefit and protection of an efficient and competitive system.*[19]

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[18] Subsequent to the release of the Draft Report, Flinders Ports published its 2007/08 port charges, which includes an increase in its grain cargo services charge from $1.50 per tonne to $1.65 per tonne. This price change is discussed in more detail in Section 2.4.

[19] AGEA submission to Draft Report, page 2 of unnumbered submission.

In addition, the submission from the National Bulk Commodities Group Inc. (NBCG) argued that:

> *Those charges which show the greatest price variance, berth hire and wharfage charges should be monitored more closely and analysed more thoroughly to understand port pricing outcomes.*[20]

2.4 Commission Consideration

Given that stakeholders making submissions to the Draft Report were unanimously in favour of the continuation of the current light-handed price monitoring regime, the Commission has no reason to deviate from this position in this Final Report.[21]

The Commission notes the comment made by AGEA regarding changes in the barley and wheat exporting industries, and agrees that price monitoring over the next regulatory period will be important in providing a high degree of transparency in port pricing, which will benefit all grain exporters.

In response to the comment made by NBCG, and in reference to views put to the Commission by Flinders Ports, the Commission acknowledges the inherent limitations in price benchmarking, and the importance of attempting to understand the reasons for differences in prices between ports. As highlighted by the Meyrick and Associates study published with the Draft Report, there are likely to be a number of factors that drive different pricing outcomes, with many of these factors being difficult to quantify and unrelated to questions of market power.

The Commission will be reviewing its approach to reporting port prices during the subsequent regulatory period, and will examine alternative approaches to that used during the current period, to ensure that meaningful conclusions can be drawn.

The Commission also notes that, since the release of the Draft Report, Flinders Ports has published its list of 2007/08 port prices.[22] The latest prices reveal a 10% increase in the grain cargo service charge, from $1.50 to $1.65 per tonne. While this represents a significant increase from the previous year, the Commission observes that the charge had remained at $1.50 per tonne for a number of years, and that the increase is less than the change in CPI over the period for which the charge stayed constant. Therefore, the price increase cannot be seen to represent an exercise of market power.

[20] NBCG submission to Draft Report, page 2 of unnumbered submission.

[21] For the avoidance of doubt, price regulation does not apply to the Ausbulk bulk-loaders that are, or will be, covered by the access regime.

[22] Available on the Flinders Ports website (www.flindersports.com.au).

Final Report Conclusion

The Commission's Final Conclusion is to continue the current price monitoring form of price regulation for the following 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.

Consistent with its conclusion on the length of the regulatory period for the access regime, the Commission recommends that the three year cycle for price regulation should be extended to five years, to provide greater certainty to stakeholders and greater consistency with other infrastructure regulatory regimes.

3 SHOULD THE ACCESS REGIME CONTINUE?

The Commission has considered whether or not the ports access regime should continue for a further three year period from 31 October 2007.

3.1 Summary of Draft Report

The Commission's approach in the Draft Report was to only consider making significant changes to the access regime where there was evidence that such changes were warranted based on the operation of the regime over the current triennial cycle, or based on any expected changes in the environment during the next triennial cycle.

In this regard, the Commission's review focussed on two potential issues that may impact on the access regime in the near future:

- The deregulation of barley exporting in SA, which commenced from July 2007, and the potential deregulation of wheat exporting; and
- Expansion of the minerals sector in SA.

3.1.1 Grain exporting

The Commission acknowledged the possibility of an increased number of grain exporters, following the deregulation of barley exporting and potential changes to wheat exporting. 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 power 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 to 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.

The Commission's draft conclusion was that the deregulation of barley exporting and the potential deregulation of wheat exporting are more likely to support an argument for continuation of the access regime than for its expiry. However, the Commission also expressed the view that the impact of these changes on the ports access regime is somewhat uncertain.

3.1.2 Minerals exporting

In relation to the current expansion of the minerals sector in SA, the Commission's draft conclusion was that the incentives for commercial negotiation created by the access regime provided an effective framework for identifying the specific infrastructure requirements to meet the minerals expansion.

The Commission's view was that the significant potential expansion of the minerals sector provided further justification for continuing the ports access regime. While additional investment is likely to be necessary to respond to increased demands on port infrastructure, the Commission saw no reason to believe that the current regime would 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 are most likely to lead to optimal outcomes.

3.2 Assessment against Criteria

In determining whether or not the access regime should continue, the Commission used the same assessment criteria as applied to the price regulation question. It did this on the basis that the Commission was required to have regard to the same ESC Act objectives in both cases and because the factors that are important in considering the need for ongoing regulation, whether price or access regulation, were generally the same.

For those services that are both Regulated Services (ie. subject to access regulation) and Essential Maritime Services (ie. subject to price regulation), the Commission's consideration of the continuation of access and price regulation produced the same draft conclusions, given that it was based on the same assessment criteria. That is, the Commission's draft conclusion was that there is the potential for the exercise of market power in the provision of these services, but that there is no evidence of misuse of market power.

The Commission considered it appropriate to retain the safety net provided by the access regime, in addition to retaining price monitoring, for those Essential Maritime Services that are also Regulated Services.

The Commission's focus in the Draft Report centred on the Regulated Services that are not Essential Maritime Services (pilotage and access to land).

3.2.1 Pilotage

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.

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.[23]

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

On the basis of this conclusion, the Commission proposed the continuation of the current negotiate-arbitrate form of access regulation. This provides a light-handed regime as it only imposes regulatory intervention in the event of a dispute.

3.2.2 Access to Land

Since access to land is provided for under the MSA Act in order to provide meaningful access to other Regulated Services, the Commission's draft conclusions on questions of market power in providing access to land were consistent with its draft conclusions for the other services, ie. that market power exists.

However, the Commission did not have any evidence of the misuse of market power in providing access to land and, therefore, proposed that the light-handed negotiate-arbitrate form of access regulation continue.

3.3 Submissions to Draft Report

Submissions to the Draft Report generally supported the continuation of the access regime. Submissions commented specifically on certain aspects of the access regime that could be improved, and these suggestions are discussed in Section 5 of this Report.

3.4 Commission Consideration

Having regard to submissions to the Draft Report, which supported the Commission's draft conclusions, the Commission sees no reason to change its view in this Final Report, that the access regime should continue beyond 30 October 2007.

Final Report Conclusion

The access regime provided for under Part 3 of the MSA Act should continue beyond 30 October 2007.

[23] Refer Chapter 4 of Meyrick and Associates, *Benchmarking of Port Prices in Australia*, April 2007 (available on the Commission's website at http://www.escosa.sa.gov.au/webdata/resources/files/070427-D-MeyrickPortsBenchmarkingAust.pdf).

4 CONSISTENCY OF THE ACCESS REGIME WITH CIRA

Pursuant to section 35(1) of the ESC Act, the Acting Treasurer 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 was 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.[24]

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.

4.1 Summary of Draft Report

The Commission 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.

4.1.1 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 therefore focussed 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 therefore proceeded to examine the more specific requirements under clause 2.

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

4.1.2 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 observed 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.*

The Commission's draft finding was that the MSA Act requirement is consistent with the principle specified in clause 2.2 of the CIRA.

4.1.3 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.*

The Commission's view was that the present form of price regulation 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. However, the Commission's current review recommends a continuation of this regime.

The Commission's draft finding was that the MSA Act is consistent with clause 2.3 of the CIRA, 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.

4.1.4 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's draft view was that these objects are broadly consistent with those set out in clause 2.4(a) of the CIRA. It noted 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 efficient use of, operation and investment in, significant infrastructure.

To make this link more explicit, the Commission suggested 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 noted 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 concluded that there are no principles within the two sets that are in conflict. However, to introduce consistency between the two sets, the Commission recommended 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.

4.1.5 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's Draft Report noted 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.

Therefore, the Commission's draft recommendation was that the Government seek to amend the MSA Act to include a provision which reflects clause 2.6.

4.1.6 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.*

The Commission recommended that the Government commence the certification process at the earliest opportunity following necessary amendments to the MSA Act. This requires an application for certification to be made by the State Government to the National Competition Council (NCC).

4.2 Submissions to Draft Report

Submissions to the Draft Report did not comment on the proposed amendments to the MSA Act to bring about greater consistency with clause 2 of the CIRA.

Flinders Ports has, however, advised the Commission that it supports the proposed amendments.

4.3 Commission consideration

Given that no objections were raised in response to its proposed amendments, the Commission sees no reason to depart from its draft conclusions on this Inquiry. Therefore, the final recommendation is that the Government consider amending the MSA Act as follows:

Final Report Conclusions

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

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

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

The Commission recommends that the Government consider inserting a provision into the MSA Act to reflect clause 2.6 of the CIRA.

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

5 OTHER AREAS FOR IMPROVEMENT

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

In its Draft Report, the Commission identified a number of areas where the access regime could be improved.

5.1 Coverage Issues

5.1.1 Summary of Draft Report

Ardrossan

Application of the access regime to the port at Ardrossan was 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 was that coverage of the access regime to Ardrossan be revoked. It suggested that the Government retain the ability to proclaim Ardrossan, 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 recommended that the port at Ardrossan not be subject to price monitoring. The Commission acknowledged 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 was 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 recommended 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 expressed its view 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 Commission noted the submission from the SA Government to the Issues Paper, which supported this view.

The Commission recommended 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 recommended 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 extending the coverage of the access regime to include 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.*[25]

The Commission also noted 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.*[26]

The Commission's Draft Report observed 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 contended that there are a number of feasible alternatives for at-port

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

[26] *Report by the SA Barley Marketing Working Group*, December 2006, p55 (available on the Commission's website at http://www.escosa.sa.gov.au/webdata/resources/files/061222-D-2006BarleyMarketingWorkingGroupReport.pdf).

storage in relation to some cargoes (eg. containerised cargoes), but it may be more limited for others (eg. grain).[27]

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 considered the submission from the SA Government and the report of the SA Barley Marketing Working Group and concluded that, while there may be an argument for extending coverage of the access regime to these facilities, the Commission saw merit in considering this issue as part of a broader review of regulation across the entire grain supply chain. While not suggesting that the entire grain supply chain needs regulating, the Commission believed that a decision on at-port grain storage and handling must be made in the context of the entire grain supply chain. It noted that the Commission's consideration of this issue is necessarily limited to services provided at the port and 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 sought comments from 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 produce a net benefit?

5.1.2 Submissions to Draft Report

Ardrossan

The ABB Grain submission to the Draft Report supported the proposal to revoke coverage of the access regime to Ardrossan as there is only one main user at the port, with established long term arrangements in place.

In contrast, the AGEA submission supported the retention of Ardrossan as a proclaimed port. No arguments were presented in support of this view.

No other submissions commented directly on this issue.

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

Bulk Loaders

In relation to the bulk loader at Outer Harbor, ABB Grain argued that extending coverage of the access regime to this facility was unnecessary, but it nevertheless appreciated:

> *the Commission's desire for consistency and would be prepared to cooperate with the extension to Outer Harbor if the Government chose to adopt the Commission's recommendation.*[28]

The only other comment from submissions on this matter came from AGEA, which supported the proposal to cover the new loader.

Storage and Handling Facilities

In response to its question regarding coverage of at-port grain storage and bulk handling facilities, the Commission received a number of responses.

The ABB Grain submission expressed concern over the Commission's suggestion that the issue be considered as part of a broader review of regulation across the entire grain supply chain, arguing that the returns from its grain storage and handling business are moderate, and that such regulation would potentially undermine the value delivered by its integrated supply chain solution.

ABB Grain also argued that it is subject to competition in the South-East from the port of Portland, and to potential competition from new ports (citing proposals for new grain ports at Myponie Point and Port Stanvac).

It also noted that:

> *The ACCC expected that the barley market would be deregulated in South Australia within the medium term and accordingly obtained an undertaking from ABB that it would not discriminate between traders as to the terms and conditions of access to the SA port terminals. However the ACCC fixed the time of the undertaking to expire in 2009, recognizing that special protection was unnecessary once the fledgling market for the accumulation of barley was established. If traders had concerns beyond 2009 about ABB's abuse of its market power in storage and handling, they would have recourse under s46 of the Trade Practices Act.*[29]

The AGEA submission supported the coverage of the grain storage and bulk handling facilities, expressing concern over possible anti-competitive consequences arising from the activities of a monopoly grain storage and handling provider that is also a licensed barley exporter. It noted that, while this possibility exists, there is no evidence that it has occurred.

Similarly, the South Australian Farmers Federation (SAFF) submission discussed the limited alternatives to the facilities already established and operated by ABB Grain, and the potential for misuse of market power (eg. through unfair pricing

[28] ABB Grain submission to Draft Report, page 2 of unnumbered submission.

[29] ABB Grain submission to Draft Report, page 5 of unnumbered submission.

structures and lack of transparency in management of the shipping stem at port). SAFF concluded that:

> *A light form of regulation that is provided through the Commission could assist the industry in identifying any costs or benefits that might exist, and could be important information for a broader review of the entire grain supply chain.*[30]

5.1.3 Commission Consideration

Ardrossan

The Commission has not been presented with any additional arguments to suggest that it should depart from its draft conclusion on the coverage of Ardrossan. Given the nature of the operations at the Ardrossan port, the Commission continues to see little merit in applying access regulation to it. It therefore recommends that the Government revoke coverage of the access regime applied to Ardrossan, but that the ability for it to be proclaimed in the future be retained, in the event that access requests arise in the future. As a consequence, the Commission also recommends that Ardrossan not be subject to price monitoring.

Bulk Loaders

Notwithstanding its argument that coverage of the new bulk loader at Outer Harbor is not warranted, the Commission notes that ABB Grain appears to accept the need for consistent regulatory arrangements between bulk loaders.

The Commission therefore confirms its draft view, that coverage of the access regime should be extended to the new bulk loader at Outer Harbor.

Storage and Handling Facilities

As acknowledged in the Draft Report, the Commission accepts that there is some potential for access seekers to bypass at-port storage facilities, but that there are practical difficulties in doing so. Given that the at-port grain silos already exist, it is likely that it would not be efficient to duplicate this infrastructure. The significant barriers to physical interconnection create market power for the operator of these facilities, as suggested by AGEA and SAFF. However, the Commission agrees with ABB Grain that there is no evidence of misuse of market power.

The Commission notes ABB Grain's comments regarding its undertaking to the Australian Competition and Consumer Commission (ACCC) that it will not unfairly or unreasonably deny access to, or discriminate between, barley traders.[31] This undertaking was entered into on 20 September 2004 following the ACCC's consideration of the proposed merger between ABB Grain and Ausbulk. As it is

[30] SAFF submission to Draft Report, page 2 of unnumbered submission.

[31] A copy of this undertaking is available on the ACCC website (www.accc.gov.au).

due to expire on 20 September 2009, part way through the subsequent regulatory period, the Commission cannot conclude that access regulation of storage and handling facilities is unnecessary purely as a result of the existence of the undertaking. In addition, section 5.1 of the undertaking provides the opportunity for it to be reviewed if the barley single desk is removed, partially removed or otherwise altered. Since barley exporting has now been deregulated, the existence of the undertaking, even in the short-term, is uncertain.

While the Commission believes that a prima facie case for access regulation of grain storage and bulk handling facilities exists, it retains the view that the current ports access review is necessarily limited to at-port facilities, and that the facilities in question are not just at-port facilities. For this reason, the question of whether or not these facilities should be subject to access regulation is best left to a broader review, having regard to the entire grain supply chain.

Final Report Conclusion

The Commission recommends that the Government address 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 recommends that the Government consider the question of whether or not grain storage and bulk handling facilities should be subject to access regulation as part of a broader review, having regard to the entire grain supply chain.

5.2 Changes to Negotiate-Arbitrate Process

5.2.1 Summary of Draft Report

In the Draft Report, the Commission considered whether or not it should recommend any changes to the negotiate-arbitrate process set out in Part 3 of the MSA Act, by comparing the MSA Act access regime with other legislative access regimes,[32] and through considering information and guidance on access regimes provided by the NCC, the Productivity Commission (PC), and the ACCC. Further, the Commission paid particular attention to the principles set out in Clause 2 of the CIRA, which is concerned with third party access to services provided by means of significant infrastructure facilities.

[32] 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).

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 identified 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 considered the appropriateness of the Commission acting as arbitrator under Part 3 of the MSA Act.[33] In neither the *AustraliaAsia Railway (Third Party) Code*[34] 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 saw considerable merit in fully separating the two roles of arbitrator and regulator, thus avoiding perceptions of conflict that might arise. Accordingly, it recommended that this power be removed and a clause similar to that provided in clause 16 of the *AustraliaAsia Railway (Third Party) Code* be included.

Application of Commercial Arbitration Act 1986

The Commission questioned the necessity for 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 did not see the value that section 19 brings to the MSA Act. It believed that it serves mainly to add an extra layer of legislative complexity to the arbitration process. The Commission therefore recommended its removal.

Advice and directions

Thirdly, the Commission noted 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].*[35]

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

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33 Section 18 MSA Act 2000 (SA)

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

35 Clause 12B(1)

its, "AustralAsia Railway Access Regime – Final Recommendation, February 2000", commented 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 suggested 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 noted that the appeals division of the MSA Act (Division 10) does not provide guidance 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*,[36] the *Railways (Operations and Access) Act*,[37] and the Commonwealth *Trade Practices Act*[38] 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 recommended 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 suggested that provision 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 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 noted 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.

5.2.2 Submissions to Draft Report

Submissions to the Draft Report did not comment directly on these draft recommendations.

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36 Clause 37(4)

37 Section 56(4)

38 Section 44ZS

5.2.3 Commission Consideration

As there were no views expressed in submissions on the Commission's proposed amendments, the Commission sees no reason to change the positions put forward in the Draft Report.

Final 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.

5.3 Length of Regulatory Period

5.3.1 Summary of Draft Report

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

The Commission saw merit in extending the regulatory period for the access regime and price regulation regime from three years to five years. It believed that this would 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.

5.3.2 Submissions to Draft Report

The NBCG submission supported the extension of the regulatory period for the pricing and access regimes from three years to five years. This was consistent with the views put by the South Australian Freight Council Inc. (SAFC) and Flinders Ports in response to the Commission's Issues Paper.

5.3.3 Commission Consideration

Having regard to submissions to the Commission's Issues Paper and Draft Report, in which a number of stakeholders supported the move to a five year regulatory period, the Commission confirms its draft conclusion on this matter.

Final Report Conclusion

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

5.4 Planning and Investment

The Commission notes that the NBCG submission to the Draft Report, commented on the need for greater attention to be given to planning of infrastructure development needs. It raised concerns over the capacity of SA ports to handle larger ships, particularly at Port Adelaide, Wallaroo, Thevenard and Port Pirie.

The Commission agrees that effective planning of infrastructure needs is critical to the future growth of the South Australian economy. The Draft Report commented on the ability of the access regime to meet future expansions in the mineral sector, and in that regard, concluded that the incentives for commercial negotiation created by the access regime provide an effective framework for identifying the specific infrastructure requirements.

The Commission understands that Flinders Ports has developed a “Master Plan” for Port Adelaide, and would encourage it to further develop this plan by incorporating other ports. It notes, however, that for ports with low throughput, investment is largely dependent on the port operator securing volumes and that the commercial reality is that Flinders Ports will need assurance over future volumes before it can commit to building additional capacity. For this reason, the Commission believes that a regime that encourages commercial negotiation between prospective users and the port operator is vital in facilitating future investment.

6 IMPLEMENTATION

The Commission has recommended that the pricing and access regimes continue beyond 30 October 2007.

To give effect to the pricing regime, the Commission must make a price determination under Part 3 of the ESC Act and pursuant to the Essential Services Commission Regulations 2004. The Commission has developed a Draft Price Determination, which accompanies this report. The Commission intends to issue a Final Price Determination prior to 30 October 2007.

In order for the access regime to continue, the SA Government must accept the Commission's recommendation for it to continue and make the requisite Regulation under the Maritime Services Access Act 2000 prior to 30 October 2007.

The Commission intends to review its ports regulatory guidelines to reflect the outcomes of this review and to identify any other changes considered appropriate. The Commission will consult with the relevant stakeholders during this review.

It also intends to review its approach to price monitoring under the Ports Price Determination in early 2008, taking into account comments made as part of this review.

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 summarised 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 seven 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 seven days. However, if a proponent chooses this course, then they are precluded from making a similar proposal for two 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.