



# PORTS ACCESS REVIEW

## DISCUSSION PAPER

**15 December 2003**

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## **REQUEST FOR SUBMISSIONS**

The Essential Services Commission of SA (ESCOSA) invites written submissions from interested parties in relation to the issues raised in this paper. Written comments should be provided by **4 February 2004**. It is highly desirable for an electronic copy of the submission to accompany any written submission.

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

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

Responses to this paper should be directed to:

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### **Public Information about ESCOSA's activities**

Information about the role and activities of ESCOSA, including copies of latest reports and submissions can be found on the ESCOSA website at [www.escosa.sa.gov.au](http://www.escosa.sa.gov.au).



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## SUMMARY

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The Essential Services Commission of South Australia (ESCOSA) is undertaking a review of the services covered by the Ports Access Regime, with a view to recommending whether the Ports Access Regime should continue for a further three years from 31 October 2004, or not.

To reach a recommendation ESCOSA will examine whether the services covered by the Ports Access Regime, known as Regulated Services, warrant this type of regulation. If they do then ESCOSA will recommend that the regime should continue.

ESCOSA invites interested parties to consider the issues raised in this Discussion Paper and provide their views in written submissions to the review.

### The Port Access Regime

The Ports Access Regime is a state access regime established under Part 3 of the *Maritime Services (Access) Act 2000* (the MSA Act). It provides a framework for the negotiation of access to particular port services, known as Regulated Services, and provides for conciliation and arbitration to occur where access disputes arise and cannot be otherwise resolved between the parties. The regime is not certified under Part IIIA of the *Trade Practices Act 1974* (Cwlth).

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

- ▲ access of vessels to all the proclaimed ports;
- ▲ pilotage at all proclaimed ports;
- ▲ harbourage (berthing) 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; and
  - ▲ berths adjacent to the shiploaders referred to below;
- ▲ the AusBulk owned shiploaders at Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln and Thevenard (but not at Ardrossan); and
- ▲ access to land in connection with the above services.

The proclaimed ports are:

▲ Port Adelaide	▲ Port Pirie	▲ Thevenard
▲ Port Giles	▲ Port Lincoln	▲ Ardrossan
▲ Wallaroo		



The first six ports are operated by Flinders Ports Pty Ltd. The port at Ardrossan is operated by AusBulk Ltd.

Only the above ports and services are the subject of this review.

### **The issues**

Section 43 of the MSA Act obliges ESCOSA to conduct this review. In accordance with Section 43, ESCOSA must recommend either:

- ▲ that Part 3 of the MSA Act (the Ports Access Regime) should continue in operation for a further three years; or
- ▲ that Part 3 should expire as of 31 October 2004 (the regime would no longer exist).

ESCOSA may also draw other conclusions from the review – which may include whether some of the current list of Regulated Services should not be covered by the Ports Access Regime. ESCOSA will report its recommendation and any conclusions in a report to the South Australian government. That report will also be made public.

The Ports Access Regime will only continue if ESCOSA recommends so, and if the South Australian government makes a regulation to that effect under the MSA Act. The South Australian government is not bound to accept ESCOSA's recommendation.

### **Price regulation linkages**

ESCOSA will reach its recommendation by examining each of the services involved against the assessment criteria set out in the Discussion Paper.

Some Regulated Services (access of vessels to port & berthing) are also Essential Maritime Services. ESCOSA has recently finished a similar assessment of price regulation of Essential Maritime Services<sup>1</sup> and concluded, amongst other things, that the Ports Access Regime should continue to apply to the Essential Maritime Services that are also Regulated Services. ESCOSA also concluded that cargo services (providing port facilities for loading or unloading vessels) at grain berths should become a Regulated Service.

ESCOSA still welcomes comment on the application of the Ports Access Regime to such services, but its focus in this review will be on the services not yet examined – pilotage at all seven proclaimed ports, the six AusBulk Ltd shiploaders, and land used in connection with each of the services.

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<sup>1</sup> ESCOSA (2003) *Ports Price Review: Final Report*, November 2003.

## 1. INTRODUCTION

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The Ports Access Regime is established under Part 3 of the *Maritime Services (Access) Act 2000* (the MSA Act). It provides a framework for the negotiation of access to particular port services, known as Regulated Services, and provides for conciliation and arbitration to occur where access disputes arise and cannot be otherwise resolved between the parties.

Section 43 of the MSA Act obliges ESCOSA to review the current set of Regulated Services with a view to recommending either:

- ▲ that Part 3 of the MSA Act (the Ports Access Regime) should continue in operation for a further three years; or
- ▲ that Part 3 should expire as of 31 October 2004 (this would mean that the Ports Access Regime would no longer exist).

In conducting this review ESCOSA must have regard to the objectives of both the MSA Act and the *Essential Services Commission Act 2002* (the ESC Act).

ESCOSA will recommend that the Ports Access Regime continues if it decides that it should continue to apply to at least one Regulated Service. To reach such a decision ESCOSA has developed a set of assessment criteria that derives from the relevant legislative objectives. These criteria are set out in this report and relate mainly to market power questions surrounding Regulated Services.

If there are some Regulated Services to which the Ports Access Regime should not apply, ESCOSA would recommend that the regime continue, but advise the South Australian government that it could remove certain services from the list of Regulated Services.

### 1.1 Regulated Services

A maritime service becomes a Regulated Service by proclamation. The current list of Regulated Services, as set out in a 25 October 2001 proclamation in the *South Australian Government Gazette* (page 4686), is:

- ▲ providing, or allowing for, access of vessels to the port by means of channels;
- ▲ pilotage services facilitating access to the port;
- ▲ providing harbourage for vessels at the following common user berths—
  - ▲ Port Adelaide Outer Harbour berths numbers 1 to 4 (inclusive), 16 to 20 (inclusive), and 29;
  - ▲ Wallaroo berths numbers 1 South and 2 South;
  - ▲ Port Pirie berths numbers 5 and 7;
  - ▲ Port Lincoln berths numbers 6 and 7;



- ▲ berths adjacent to the loading and unloading facilities referred to in the point below;
- ▲ loading or unloading vessels by means of port facilities that–
  - ▲ are bulk handling facilities as defined in the *South Australian Ports (Bulk Handling Facilities) Act 1996*; and
  - ▲ involve the use of conveyor belts;
- ▲ providing access to land in connection with the provision of the above maritime services.

The Proclaimed Ports are:

▲ Port Adelaide	▲ Port Pirie	▲ Thevenard
▲ Port Giles	▲ Port Lincoln	▲ Ardrossan
▲ Wallaroo		

The first six ports are operated by Flinders Ports Pty Ltd. The port at Ardrossan is operated by AusBulk Ltd.

Only the above ports and services are the subject of this review. ESCOSA is not considering whether additional services should be covered. In any case, only maritime services, as defined under the MSA Act, are able to be proclaimed as Regulated Services.

ESCOSA invites interested parties to consider the issues raised in this Discussion Paper and provide their views in written submissions to the review.

## **1.2 Ports Price Review issues**

The recently completed review of price regulation of Essential Maritime Services<sup>2</sup> included reference to the Ports Access Regime – in effect concluding that regulation of the type provided by the Ports Access Regime was appropriate for those Regulated Services that are also Essential Maritime Services, and that some new services (certain cargo services) be added to the Ports Access Regime.

As the criteria for the two reviews are essentially the same (see Chapter 3), ESCOSA has adopted an initial position that the Ports Access Regime should continue, at least for those Regulated Services that are also Essential Maritime Services.

ESCOSA still welcomes comment on the application of the Ports Access Regime to these services, but the focus of the review will be on the services not yet examined – pilotage, the six covered shiploaders, and land used in connection with each of the services.

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<sup>2</sup> ESCOSA (2003) *Ports Price Review: Final Report*, November 2003.

### **1.3 Regime certification issues**

The Ports Access Regime is established under South Australian legislation and ESCOSA administers its responsibilities under the legislation accordingly. At the time of the ports sale process the South Australian government had sought certification of the Ports Access Regime as an effective regime under Part IIIA of the Commonwealth *Trade Practices Act 1974*. The application was later withdrawn.

Certification ensures that the services covered by the regime cannot be otherwise declared under Part IIIA of the Trade Practices Act. Certification, or non-certification, does not affect the way ESCOSA administers the regime.

Certification requires an assessment of the regime by the National Competition Council against the criteria set out in Clause 6 of the Competition Principles Agreement (one of the agreements that forms the National Competition Policy). That assessment is not the same as that which ESCOSA will conduct in this review, although there are some similarities. Therefore, it cannot be assumed that the Ports Access Regime is certifiable merely because ESCOSA might have recommended that it continue.

### **1.4 Structure of this Report**

The remainder of this report is set out as follows.

Chapter 2 describes how the Ports Access Regime works.

Chapter 3 derives ESCOSA's assessment criteria for this review and sets out some of the specific issues it will need to consider.

Chapter 4 sets out the next steps for this review.



## **2. HOW THE PORTS ACCESS REGIME WORKS**

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The Ports Access Regime is laid out in detail in Part 3 (Sections 10 to 43) of the MSA Act. The following is a summary of each stage of the regime. However, interested parties should look to Part 3 itself for the definitive description of each stage.

### **2.1 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 (a 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, once price monitoring applies to Essential Maritime Services, from 31 October 2004, this link will no longer have effect as ESCOSA will no longer be regulating prices.

### **2.2 Negotiation of access (Division 3)**

The access process begins by allowing a party that is considering seeking access (an intending proponent) to request and receive preliminary information from the regulated operator. This allows the intending proponent to determine whether to pursue access.

A regulated operator must provide an intending proponent with information about:

- ▲ current utilisation levels of relevant facilities;
- ▲ technical requirements of use;
- ▲ rules of use (eg. safety); and
- ▲ price information required to be provided under ESCOSA guidelines (ESCOSA's Ports Industry Guideline No. 1 is in place in this respect).

A regulated operator may set a 'reasonable' charge for the supply of the above information, though is not obliged to do so.

If an intending proponent decides to seek access (then becoming a proponent), it must make a written proposal to the regulated operator setting out its proposed terms and conditions. The proposal may include requests for:



- ▲ modifications to port facilities on land occupied by the regulated operator to provide the services; or
- ▲ establishment of new facilities on land occupied by the regulated operator.

The regulated operator can request further information from the proponent so that it may determine what further information it needs to supply the proponent.

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

- ▲ give written notice of the proposal to ESCOSA;
- ▲ 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.

As the number of affected third parties may be large or uncertain, the regulated operator may choose to inform them by notice in a newspaper circulating generally in South Australia. The notice must contain the name and address of the proponent and the regulated operator, and a description of the general nature of the proposal. 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 ESCOSA.

### **2.3 Conciliation (Division 4)**

Conciliation is the first stage of direct intervention. When a Dispute is referred to ESCOSA, it must first seek to resolve it by conciliation, unless:

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

ESCOSA may choose to call voluntary or compulsory conferences as part of the conciliation process.

## **2.4 Reference of Dispute to Arbitration (Division 5)**

If conciliation fails, or if ESCOSA decides it is unlikely to succeed, ESCOSA may refer the Dispute to arbitration, unless:

- ▲ 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.

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

## **2.5 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. ESCOSA may also participate in an arbitration, calling evidence and making representations on the matters in the arbitration.

## **2.6 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 expeditious powers for the arbitrator to make the collection of evidence quick and relevant, leaving out or altering some legal 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, for example, 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 either of the parties 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:

- ▲ 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.

ESCOSA can make representations on a termination.

## **2.7 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.

The items above encapsulate the need to balance the various interests.

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 of the parties and ESCOSA.

An Award may affect the existing legal rights of other port facility customers. This is acceptable under the access regime, so long as those customers' needs can continue to be met or they are compensated for the impact.

The parties to an Award may change it by agreement between all the parties to the Award. A variation could include terms and conditions, or may extend its duration.

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

## **2.8 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.

## **2.9 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.



## **2.10 Regulatory accounts**

Section 42 of the MSA Act requires a Regulated Operator to keep separate accounts and records pertaining to its Regulated Services at each port – so-called Regulatory Accounts. ESCOSA’s Ports Industry Guideline No. 2 is currently in place in this respect.

## **2.11 Other design features**

While this is a review of the services subject to the Ports Access Regime, ESCOSA recognises that issues relating to the design of the regime may arise. If any unusual or difficult features of the regime come to light, then ESCOSA will bring these to the attention of the South Australian government, which may wish to consider changes.

**Interested parties are welcome to comment on Ports Access Regime design issues.**

### **3. SHOULD THE PORTS ACCESS REGIME CONTINUE?**

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Whether the Ports Access Regime should continue or not depends on whether applying regulation of this type to Regulated Services will achieve the relevant legislative objectives of the MSA and ESC Acts. ESCOSA has developed a set of assessment criteria that encapsulate those objectives and which will help it to reach its decision.

#### **3.1 The form of regulation**

The Ports Access Regime is a negotiate/arbitrate variant of the pricing principles approach to economic regulation. The regime focuses on providing regulatory support to commercial negotiations between service providers and users. Unlike some other forms of regulation, it does not seek to impose regulator determined outcomes across the board. Rather, regulatory intervention (arbitration) occurs only where parties cannot agree on an outcome. In arbitrating a dispute between the parties, the arbitrator must follow established pricing principles (see the Chapter 2 discussion on Division 8) to ensure that fair commercial terms are reached.

This form of regulation is normally applied to situations with:

- ▲ significant, but not overwhelming, market power concerns; and
- ▲ fewer, larger market participants (enabling separate negotiations to occur).

Ideally, a negotiate/arbitrate model is never activated: the threat of arbitration should itself encourage the parties to resolve most disputes. This tends to make it a lower cost regime to administer – so long as disputes are few.

However, this is not a free form of price regulation. A regulator needs to collect some detailed information on an ongoing basis in order to administer a regime of this type – in particular to ensure that any dispute can be processed quickly.

A downside of this model is that the dispute process takes time and can be costly. Thus it is not so applicable in time sensitive situations or where many disputes occur. If many disputes arise the total cost of the regulatory system will rise (it may turn out, for example, to have been more efficient to have had the regulator set prices / price controls from the beginning, or to have not regulated at all).

As ESCOSA concluded in its review of the price regulation of Essential Maritime Services<sup>3</sup>, the ports industry is a candidate for this form of regulation as there are some, albeit varied, market

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<sup>3</sup> ESCOSA (2003) *Ports Price Review: Final Report*, November 2003.



power concerns and the port operators and customers tend to be significant businesses, well capable of conducting their own commercial negotiations.

### **3.2 The assessment task**

ESCOSA decided in its recently completed review of ports price regulation that those Essential Maritime Services that are already subject to the Ports Access Regime should continue to be so, and that additional services (certain cargo services at grain berths) should also be covered.

The services that are both Regulated Services and Essential Maritime Services are:

- ▲ providing, or allowing for, access of vessels to the port by means of channels;
- ▲ providing harbourage for vessels at the following common user berths–
  - ▲ Port Adelaide Outer Harbour berths numbers 1 to 4 (inclusive), 16 to 20 (inclusive), and 29;
  - ▲ Wallaroo berths numbers 1 South and 2 South;
  - ▲ Port Pirie berths numbers 5 and 7;
  - ▲ Port Lincoln berths numbers 6 and 7;
  - ▲ berths adjacent to the covered shiploaders; and
- ▲ providing access to land in connection with the provision of the above maritime services.

ESCOSA's initial position in this review is therefore that the Ports Access Regime should continue, for the above services at least. However, ESCOSA still welcomes comment from interested parties on this initial position.

**Interested parties are invited to comment on ESCOSA's initial position that the Ports Access Regime should continue for those Regulated Services that are also Essential Maritime Services.**

Consequently, the focus of this review will be on whether the Ports Access Regime should continue to apply for those services that are Regulated Services, but not Essential Maritime Services. That is:

- ▲ pilotage services facilitating access to the port;
- ▲ loading or unloading vessels by means of port facilities that–
  - ▲ are bulk handling facilities as defined in the *South Australian Ports (Bulk Handling Facilities) Act 1996*; and
  - ▲ involve the use of conveyor belts; and
- ▲ providing access to land in connection with the provision of the above maritime services.

In short, the assessment task for ESCOSA is to examine the case for regulating pilotage at all seven proclaimed ports, the AusBulk Ltd shiploaders (bulk handling facilities) at the six ports operated by Flinders Ports Pty Ltd.<sup>4</sup>, and land used in connection with each of the services.

### **3.3 The assessment criteria**

To make these assessments ESCOSA will utilise the following criteria:

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

The derivation of these criteria is discussed in Appendix A. Suffice it to say that these are essentially the same criteria as applied in the review of price regulation – modified to reflect the particulars of this review. The reason for the similarity is that they are based on an equivalent set of legislative objectives.

### **3.4 Pilotage**

Pilotage involves the provision of an experienced and specifically qualified seafarer (a marine pilot) on board a vessel to direct<sup>6</sup> that vessel into, and out of, a port.

Pilotage at each of the seven proclaimed ports is compulsory for most visiting vessels, and Flinders Ports is, at present, the only supplier of pilotage services at these ports.

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<sup>4</sup> The Ardrossan shiploader is not included as it is not defined in the South Australian Ports (Bulk Handling Facilities) Act.

<sup>5</sup> 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*.

<sup>6</sup> While the pilot directs the vessel, the master (the ship's captain) remains responsible for the vessel.



Exemptions from compulsory pilotage can occur, for example:

- ▲ where the vessel master has a valid pilotage exemption certificate for the particular port and length of vessel commanded (often sought by very frequent port visitors);
- ▲ for naval vessels; or
- ▲ for vessels under 35m in length overall.

The objective of an efficient pilotage service is to provide a visiting vessel with a level of local knowledge, which assists the vessel and its master in terms of:

- ▲ the safe navigation and berthing/unberthing of the vessel (and its crew and cargo);
- ▲ the safety of other vessels in the port and people working on those vessels;
- ▲ the protection of port infrastructure; and
- ▲ the prevention of environmental damage to the port's foreshores and community assets.

While South Australia's marine pilots are employed by Flinders Ports, their professional duty of care can extend beyond the commercial concerns of their employer (although long term commercial concerns should be aligned). For example, a pilot is expected to make impartial decisions about:

- ▲ adherence to port rules regarding ship entry/sailing priority;
- ▲ the number of tugs used to conform to the master's requirements and/or port rules; and
- ▲ enforcement of underkeel clearances.

Pilots are experienced mariners who have been trained in:

- ▲ handling ships of a prescribed length; and
- ▲ understanding the geographical limitations of the port where the services are provided.

Because the number of mariners in Australia is declining, the sourcing of pilots through traditional channels (ex-seafarers) has become a significant issue for pilot providers. The industry is exploring alternative training pathways to provide an ongoing supply of suitably qualified pilots.

For the purposes of the Ports Access Regime, a pilotage service also includes the delivery and collection of the pilot. Pilots are customarily transferred by pilot launch, with a skilled, two person crew – although helicopter delivery may also become widespread to better manage time sensitivity. Hence the major assets of a pilotage business (other than the pilots themselves) include pilot launches, berths for those launches, trained pilot launch crews and each pilot's communication and GPS equipment.

To reach a conclusion on pilotage, ESCOSA will examine pilotage services and make an assessment against the seven criteria listed earlier. Interested parties are therefore encouraged to use those criteria as a framework for their submissions.

Some specific matters that ESCOSA may consider in this context are:

- ▲ the impact of sole provision of pilotage by Flinders Ports, including at its potential competitor port at Ardrossan;
- ▲ the effect of the legislative provisions applying to pilotage under the *Harbors and Navigation Act 1993* (administered by Transport SA); and
- ▲ the effect of the price notification regime applying to pilotage under Part 2 of the MSA Act.

**Interested parties are invited to comment on the need for the regulation of pilotage under the Ports Access Regime – in particular addressing the seven assessment criteria.**

### **3.5 Shiploaders**

The proclamation of Regulated Services refers to bulk handling facilities as defined in the *South Australian Ports (Bulk Handling Facilities) Act 1996* (BHF Act) and which involve the use of conveyor belts. The targets of this proclamation are six shiploaders now owned and operated by AusBulk Ltd at:

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

While the proclamation uses the term “bulk handling facilities”, AusBulk Ltd refers to them as BLPs (bulk loading plant) and others in the industry refer to them as shiploaders. The term shiploader is used here.

Prior to the introduction of the MSA Act, these shiploaders were already subject to a negotiate/arbitrate access regime under the BHF Act. This was instituted by the purchase of the shiploaders from the South Australian government by South Australian Co-operative Bulk Handling Limited (now AusBulk Ltd). No access disputes arose under that regime.

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

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

Some shiploaders will also be bypassable, in two ways:

- ▲ by erecting an alternate shiploader, possible for example at a port such as Port Adelaide or Port Pirie where a shiploader could be constructed at a number of different berths (indeed, a new shiploader is to be constructed at Outer Harbour), though unlikely to be possible at single jetty ports dominated by an existing shiploader; or
- ▲ by using an alternate port, although as ESCOSA discussed in its review of price regulation of Essential Maritime Services, port options tend to be more limited for commodity cargoes – which are more likely to use shiploaders.

The issue of access to land arises in relation to access to shiploaders. As they tend to have been constructed with, or near to, storage facilities, any additional use of a shiploader is likely to be possible only with associated physical access to deliver a cargo onto the belts.

To reach a conclusion on shiploaders, ESCOSA will examine the services they offer and make an assessment against the seven criteria listed earlier. Interested parties are therefore encouraged to use those criteria as a framework for their submissions.

**Interested parties are invited to comment on the need for the regulation of shiploaders under the Ports Access Regime – in particular addressing the seven assessment criteria.**

### **3.6 Land**

The proclamation of Regulated Services includes “access to land in connection with” the other Regulated Services. The purpose of this inclusion is to ensure that access to a Regulated Service is possible in a practical sense. For example, there would be little point in a proponent achieving access on fair commercial terms to a shiploader if they were unable to physically cross land to deliver their cargo onto that shiploader.

Access to land is clearly limited to land necessary to make possible other access. It might, for example, include some limited marshalling space to enable the use of a shiploader. However, it would not include land for ancillary activities, such as the construction of receivals and storage facilities, unless it could be shown that such use of land were necessary for other access, rather than merely being desirable.

The land able to be accessed is not specifically limited to land within the boundaries of a proclaimed port. The only test is that use of the land is necessary for other access as described above. Hence, the land in question could be owned or controlled by parties other than a port operator (or the owner of a shiploader). This might include other government entities, such as the Land Management Corporation or local governments, or private owners. This aspect of the Ports Access Regime can only be managed on a case by case basis.

**Interested parties are invited to comment on the need for the regulation of access to land under the Ports Access Regime – in particular addressing the seven assessment criteria.**

## 4. NEXT STEPS

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The release of this Discussion Paper marks the beginning of the Ports Access Review.

ESCOSA will consider written submissions made in response to this paper. Submissions are due **4 February 2004** (see page iii for details). ESCOSA will then consider the information in submissions, and from its own investigations throughout that period and publish its recommendation, and any associated conclusions, in March 2004.

ESCOSA does not envisage publishing a Draft Report on this review, noting that many of the issues have already been examined in the recently concluded Ports Price Review. However, should any relevant and contentious issues arise, ESCOSA may release an interim report seeking additional comment.

The Final Report, to be released in March 2004, will contain ESCOSA's recommendation on whether Part 3 of the MSA Act (the Ports Access Regime) should continue in operation for a further triennial cycle or not. That report will be forwarded to the Minister (for Infrastructure) in accordance with Section 43(5) of the MSA Act.

However, the Final Report will not necessarily mark the end of activity on this matter. In particular, if Part 3 is to continue then the Minister will need to make a regulation extending the period of its operation prior to 31 October 2004. If the Minister does not make such a regulation, then the Ports Access Regime will cease to exist from 31 October 2004.



## **APPENDIX A: LEGISLATIVE OBJECTIVES**

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### **4.1 Maritime Services (Access) Act**

#### **4.1.1 Provide access to maritime services on fair commercial terms**

This objective is specific to the Ports Access Regime. The key element is that the regime should result in fair commercial terms being reached, either through arbitration, or by the parties reaching such terms before arbitration. Fair commercial terms can be interpreted as being any terms into which well informed commercial parties would freely choose to enter, in the presence of a workably competitive market.

The Ports Access Regime allows parties to enter into an agreement on their preferred terms at any time. However, it also provides an arbitration pathway that tests whether fair commercial terms are being offered and provides a resolution if they are not.

For the purposes of this review this objective has little practical effect as it goes more to the design of the Ports Access Regime itself rather than the question of which services it should cover. However, if the services covered are already provided in a competitive environment, then it could be concluded that the regime is unnecessary for them.

#### **4.1.2 Facilitate competitive markets in the provision of Maritime Services**

This objective applies to the MSA Act generally, the Ports Access Regime being only one part. One implication of this objective is that, at the very least, the Ports Access Regime should not, by its action or existence, hinder the development of competitive markets.

The Ports Access Regime does not limit the ability of other providers to enter and offer maritime services – any such limitations derive from elsewhere. However, the regime serves to provide a disincentive to the misuse of market power, thereby facilitating competitive markets, because misuse would be likely to trigger a dispute.

For the purposes of this review this objective requires ESCOSA to ensure that the Ports Access Regime applies only to situations where there is a facilitation role required. If services were already competitive then there would be no need to apply the Ports Access Regime to them.

#### **4.1.3 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**

This objective is specific to price regulation of Essential Maritime Services, which occurs under price regulation in Part 2 of the MSA Act.



#### **4.1.4 Ensure that disputes about access are subject to an appropriate dispute resolution process**

This objective applies to the Ports Access Regime, but as with the first objective above, it goes more to the design of the regime itself. The key issue here is what dispute resolution process is appropriate – which should be judged against the need to meet the legislative objectives above.

## **4.2 Essential Services Commission Act**

The objectives in the ESC Act apply to ESCOSA's role more generally, not just to ports. However, the following discussion focuses on the implications of each objective for the regulation of Regulated Services.

### **4.2.1 ESCOSA must have as its primary objective the protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of Regulated Services**

The primary objective of the ESC Act requires ESCOSA to look beyond the short-term interests of port customers (which might presumably be the lowest possible price) and consider instead how regulation might impact on prices, quality and reliability of Regulated Services<sup>7</sup> over the longer term (the next few years or even decades). This includes the need to ensure that they:

- ▲ continue to be available;
- ▲ are delivered efficiently;
- ▲ are delivered to appropriate standards; and
- ▲ keep up with changes in demand, technology and preferences over time.

Therefore ESCOSA will need to consider whether there are problems with the price, quality and reliability of Regulated Services (and determine whether those problems can be solved by the Ports Access Regime). In addition, this primary objective requires ESCOSA to ensure that regulation will not have a negative impact on consumers in terms of price, quality and reliability in the long term. The focus on long-term interests ensures that regulation does not force short-term, but unsustainable, price reductions.

This objective also identifies the group "South Australian consumers". This means, in the first instance, South Australian consumers of Regulated Services. However, it also has a broader extension and includes the interests of indirect customers. For example, the price, quality and

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<sup>7</sup> Note that the Act refers to essential services, as the objective applies to the full range of services regulated by ESCOSA, but in this instance it is Regulated Services.

reliability of Regulated Services impacts on primary producers, even though they may not be the people first invoiced for the services. This requires ESCOSA to consider Regulated Services in their broader context, including the effects on indirect consumers and final consumers.

The Ports Access Regime is a relatively flexible form of regulation, in that it allows different outcomes that reflect different customers and their needs. Furthermore, the principles that an arbitrator must take into account capture the essence of ensuring long term sustainability. However, the regime, like any regime, is not costless and if applied unnecessarily it could change the long term outlook for port services were it to work to dissuade port operators of the merits of otherwise rational investments.

For the purposes of this review this objective requires ESCOSA to ensure that the Ports Access Regime applies to services where there are doubts over the long term price, quality and reliability of supply.

#### **4.2.2 Have regard to the need to promote competitive and fair market conduct**

Promoting competitive and fair market conduct says that regulation should seek to:

- ▲ encourage competitive conduct by avoiding excessive price outcomes (while leaving room for competition to evolve) or predatory pricing;
- ▲ encourage fair conduct by improving price transparency and having an informed market; and
- ▲ have regulated prices and conditions reflect those that would arise in a competitive market.

This requires that ESCOSA examine the level of competition and the type of conduct seen in the markets for Regulated Services to determine whether the Ports Access Regime is able to, or needs to, promote these.

#### **4.2.3 Have regard to the need to prevent misuse of monopoly or market power**

This objective focuses on avoiding the downside or costs of monopoly, and is one of the most basic premises for regulation. That is, that regulation apply where effective competition cannot be achieved and monopoly or market power exists and is being exercised, or has the potential to be exercised.

This suggests that ESCOSA should investigate monopoly or market power in the market for Regulated Services to determine whether there are problems that warrant the Ports Access Regime. The investigation would include looking at both:

- ▲ whether monopoly or market power exists; and
- ▲ whether it is being exercised or has the potential to be exercised (on a forward looking basis).

#### **4.2.4 Have regard to the need to facilitate entry into relevant markets**

Some of the objectives above have dealt with promoting competitive markets. One means of achieving this is to facilitate entry into relevant markets. This can work in two ways.

First, this can include facilitating entry into markets for Regulated Services. The entry of additional providers of at least some services may help to place competitive pressures on those services, which can reduce prices and/or help to maintain or raise standards. If there are such possibilities, then ESCOSA needs to take care that price regulation does not stifle such entry.

Second, this can include entry into related markets. For example, the Ports Access Regime may facilitate the emergence of new port users and therefore encourage growth in exporting and importing industries. ESCOSA will need to determine whether such entry might occur and whether it might be facilitated by the Ports Access Regime.

#### **4.2.5 Have regard to the need to promote economic efficiency**

Economic efficiency is a complex concept that looks at the broad dynamics of markets, economies, businesses and consumers, and the way economic resources are allocated. Efficiency means an economy using the right mix of resources, producing the right goods and services and keeping this up over time.

At a business or service level, economic efficiency means producing the right services (or goods) at the right time, using the right mix of inputs, such that the prices charged can be “efficient prices” based on “efficient costs”.

Economic efficiency, in its purest sense and ignoring externalities, is generally encouraged when competitive markets operate without unnecessary restrictions or interventions. This is because competition can discourage poor investments, over-investment, cost padding and poor service. Price regulation would be unnecessary in such situations and may introduce distorted decisions that reduce efficiency.

However, markets can sometimes fail to produce these efficient outcomes. One of the key causes of such “market failure” is the presence of monopoly or market power, which can result in costs and prices moving away from efficient levels. Price regulation may help to overcome this situation.

A loss of efficiency can be damaging to an economy, but the costs are not always easy to observe. ESCOSA therefore needs to be sure that applying the Ports Access Regime to Regulated Services would not unduly distort efficiency. This means being confident that price regulation will fix distortions, rather than create them, thereby mimicking a competitive market. This commonly means looking to incentive based regulation, which provides competitive-type

signals to the regulated business to perform. It also means considering the cost of price regulation, because administering and complying with price regulation itself uses resources.

#### **4.2.6 Have regard to the need to ensure consumers benefit from competition and efficiency**

This objective requires that the benefits of competitive and efficient markets flow through to customers and are not captured by service providers. This means that if the Ports Access Regime is used, it should encourage the distribution and sharing of benefits.

#### **4.2.7 Have regard to the need to facilitate maintenance of the financial viability of regulated industries and the incentive for long term investment**

The first part of this objective applies to regulated industries. Regulated Services are not a regulated industry under the ESC Act and hence this does not apply to the Ports Access Regime. The second part requires that regulation allow for a return on investment that provides incentive for continued long term investment in Regulated Services.

The principles that an arbitrator must take into account in the Ports Access Regime capture the essence of ensuring long term that incentive remains for appropriate long term investment.

#### **4.2.8 Have regard to the need to promote consistency in regulation with other jurisdictions**

This objective seeks to avoid the emergence of varying and disjointed regulatory systems across Australia (and beyond). It is not a call for foolish consistency, but rather seeks to streamline regulation where possible, appropriate and allowable in law. This can be important for the businesses involved in regulated industries as it can be confusing to comply with different systems in different states (and countries).

This objective would have more application if ESCOSA were required to select a form of regulation. In this review ESCOSA will only recommend either that the Ports Access Regime continue or not continue – not whether another form of regulation should apply.

### **4.3 Key issues**

Based on the objectives discussion above, the key issues for this review are:

- ▲ monopoly and market power in Regulated Services;
- ▲ the competitiveness of Regulated Services;
- ▲ whether these threaten:
  - ▲ the long term interests of South Australian consumers;
  - ▲ efficiency;



- ▲ market entry;
- ▲ the viability and availability of Regulated Services; and
- ▲ whether the Ports Access Regime is able to address these issues.

Based on these issues, ESCOSA has decided that the following criteria will be relevant to determining whether the Ports Access Regime should continue:

1. Does the structure of the market for the Regulated Services suggest market power could exist?
2. Is market power being misused or is the potential there for it to be misused?<sup>8</sup>
3. Do customers have alternative sources?
4. Is competitive entry possible?
5. Does the answer vary between proclaimed ports and between the goods being moved?
6. Are the above Regulated Services of sufficient importance to the South Australian economy to warrant economic efficiency concerns?
7. Is the Ports Access Regime appropriate – is it able to fix the above matters or will it impose excessive additional costs and risks?

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<sup>8</sup> 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*.