



PORT ACCESS REVIEW

Discussion Paper

**Flinders Ports' Response
February 2004**

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1. Introduction

ESCOSA has called for submissions in relation to its review of the services covered by the Ports access Regime with the view to recommending whether the Ports Access Regime should continue for a further three years from 31 October 2004.

The Maritime Services (Access) Act 2000 (MSA Act) provides a framework for the negotiation of access to particular port services and provides a mechanism for the resolution of any access disputes that may arise and cannot be otherwise resolved between the parties.

The Regulated Services currently covered under this regime include:

- Providing, or allowing for, access of vessels to a port by means of channels,
- Pilotage services facilitating access to the port
- Providing harbourage for vessels at the following common user berths;
 - 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 ship loaders referred to below;
- Loading and 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
- Provide access to land in connection with the provision of the above maritime services.

The review now proposed by ESCOSA covers the services noted above at the seven proclaimed ports within the State, being Port Adelaide, Port Pirie, Thevenard, Port Giles, Port Lincoln, Ardrossan and Wallaroo.

Section 43 of the MSA Act obliges ESCOSA to conduct this review, and in accordance with this section, ESCOSA must recommend either:

- that Part 3 of the MSA Act (the Ports Access Regime) should continue for a further three years: or

- that Part 3 should expire as of 31 October 2004 (the regime would no longer exist).

It is noted that ESCOSA has recently completed its assessment of price regulation of Essential Maritime Services and concluded, amongst other things, that the Ports Access Regime should continue to apply to the Essential Maritime Services that are also Regulated Services. It is also noted that ESCOSA concluded that should the Ports Access Regime continue it would propose that 'providing Port facilities for loading and unloading vessels at a proclaimed port' (ie related to the Cargo Services charge) at grain berths should become a Regulated Service.

ESCOSA has sought comments on the application of the Ports Access Regime to such services and it particularly wishes to focus on those services not yet examined;

- Pilotage at all proclaimed ports,
- The six Ausbulk shiploaders, and
- Land used in connection with each of the services.

The Flinders Ports response to the ESCOSA Discussion Paper follows the structure of the ESCOSA paper.

Hence the response provides comments and discusses issues on those areas raised by ESCOSA;

- Ports Access Regime Design
- Continuation of the Access Regime
- Assessment Criteria
- Pilotage
- Shiploaders
- Land Conclusions

2. Summary Comments

In its response to the Ports Pricing Review Draft Report, Flinders Ports supported the proposal by ESCOSA to adopt a light handed price monitoring approach to Price Regulation. In its submission to ESCOSA, Flinders Ports proposed that should such an approach be adopted, the Ports Access Regime provided a 'safety net' for aggrieved customers.

Hence the view of Flinders Ports is that an effective Ports Access Regime is an important component in ensuring that the overall objectives of the MSA Act can be achieved. Further to this Flinders Ports would propose that the extent of services captured by the Regime should be limited to those that support the achievement of these same objectives.

Flinders Ports would propose therefore that the current level of Pricing and Access Regulation associated with existing Essential Maritime Services, due to the level of inter-relationship between the services provided within a proclaimed port, is adequate to ensure that the objectives of the MSA Act can be achieved. The additional benefit of the retention of the other regulated services within the Ports Access Regime in achieving these objectives is questionable. Hence Flinders Ports would support the proposal that the Port Access Regime no longer apply to those services.

3. Port Access Regime Design

The objects of the MSA Act are to provide access:

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

The Access Regime therefore encourages the regulated operator to provide Regulated Services on terms agreed between the regulated operator and the customer. If these terms cannot be derived through this process then the Access Regime provides a mechanism to establish terms through arbitration.

In previous submissions made to ESCOSA, Flinders Ports has highlighted its approach to customer pricing arrangements. These arrangements are negotiated with individual customers and are designed to respond to customers' specific business needs, to encourage them to increase the volumes that they ship through Flinders Ports and to reward them for these greater returns.

Flinders Ports therefore behaves in the manner contemplated by the Access Regime and hence, as also indicated previously, views the Access Regime as a "safety net" for any aggrieved customer.

In this sense the issues of concern with Flinders Ports are not primarily the Access Regime itself but the process to be followed associated with the handling of a dispute and the factors to be considered associated with any Award being made by ESCOSA.

3.1 Process

The presence of the Access Regime both provides a “safety net” on one hand and a potential “lever” on the other for customers to use in negotiation.

Flinders Ports is concerned that customers could potentially use the provisions of the Access Act to put additional “pressure” on Flinders Ports with the aim to strive for a more favourable pricing outcome than would be reasonable in the public interest. Flinders Ports has outlined in previous submissions the factors it takes into account in deriving appropriate pricing arrangements with individual customers. Flinders Ports recognises that the achievement of its goal of securing long term returns for shareholders requires the provision of high quality, reliable services to customers at reasonable prices. In this sense it is important that ESCOSA provides guidance as to how it will evaluate the initial merit of any dispute lodged with ESCOSA. Flinders Ports would propose that ESCOSA develop a set of arbitration guidelines. These, once in place and considered would deter the notification of vexatious disputes that are designed to do nothing more than inappropriately increase an access seeker’s bargaining power.

It is also important that, when reviewing any dispute, ESCOSA also take into account a range of issues associated with the provision of the Essential Maritime Services. In a previous submission Flinders Ports stated that Essential Maritime Services comprise a large number of interrelated services, some involving the use of infrastructure facilities and some (such as harbour control) of a different nature. Further to this some are shipping-related and some cargo-related. The distinction between the various component services is not a clear one and as the port operator, Flinders Ports cannot charge for each of the component services individually but must recover its total costs, including a return on capital, through its established set of service charges.

ESCOSA must also consider that a high proportion of costs are fixed, so that Flinders Ports profitability is sensitive to the current and future volume, which is in turn subject to considerable uncertainty.

In this sense it is Flinders Ports’ view that ESCOSA should ensure that it considers and balances the issues raised by a potential aggrieved customer against the overall requirements and objectives of the port operator.

It is also proposed that ESCOSA should consider that its very rationale for carrying out an arbitration is to redress possible concern about Flinders Ports’ market power. Therefore, arbitration should be strictly confined to the very few cases where market power may be a real issue; and should not be allowed to displace commercial negotiation.

3.2 Award

The discussion paper provided by ESCOSA outlines the requirements that must be taken into account in the process of making an Award. These include:

1. The regulated operator's legitimate business interest and investment in the port or port facilities.
2. 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.
3. The economic value to the operator of any additional investment that the proponent or the operator has agreed to undertake.
4. The interests of all parties holding contracts for use of any relevant port facility.
5. Firm and binding contractual obligations of the operator or other persons (or both) already using any relevant port facility.
6. The operational and technical requirements necessary for the safe and reliable provision of the service.
7. The economically efficient operation of any relevant port facility; and
8. The benefit to the public from having competitive markets.

In Flinders Ports' view the criteria outlined above does provide a reasonable base to evaluate the worth of any claim made under a dispute. While the very existence of the access regime tips the relative bargaining power somewhat towards an access seeker. In assessing these factors it is critical that a long term time frame should be considered. The provision of port infrastructure represents a significant and long term investment and as such seasonal or opportunistic trade factors which may be relevant over a short term period need to be balanced with the long term provision of sustainable port assets.

This is a critical issue in relation to the pricing component of any access dispute. By their nature the provision of Essential Maritime Services requires the port operator to accept the associated risks of the investment made in the infrastructure required. It is Flinders Ports' view that this issue should be given considerable weight in the process of examining the criteria required to be analysed as part of the determination of any Award.

4. Continuation of the Ports Access Regime

Flinders Ports notes that ESCOSA's initial position is that the Ports Access Regime should continue for those Regulated Services that are Essential Maritime Services.

This position is consistent with the view expressed by Flinders Ports that the Access Regime does provide a "safety net" for aggrieved customers under the price monitoring regulatory model.

The proposal to add additional specific services such as "certain cargo services at grain berths", needs however to be examined.

In the submission made by Flinders Ports relating to the Ports Price Review it was highlighted that a focus on isolated elements of the overall services provided would likely lead to distortionary outcomes. As previously outlined this is largely because it may lead to consideration of issues associated with one element which could then constrain Flinders Ports' commercial flexibility.

Flinders Ports would request that ESCOSA consider this issue in some depth before proceeding to extend the cover of the current Regime to accommodate specific segments or components of the services as proposed. Flinders Ports believes that the regulatory framework surrounding the Essential Maritime Services alone provides an appropriate mechanism to achieve the objective of the Act.

Flinders Ports would also stress that the continuation of the Access Regime needs to be balanced against ESCOSA's decision to favour light-handed price regulation. Flinders Ports would propose that the regime should only extend to areas where ESCOSA has real concerns about Flinders Ports exercising "market power". Flinders Ports does not agree with ESCOSA that this includes cargo handling for grain.

The light-handed treatment of the Essential Maritime Services should be left to do its job, and not be over-ridden by access regulation.

5. Consideration of Non Essential Maritime - Regulated Services

ESCOSA has also indicated that it will focus on whether the Ports Access Regime should continue to apply for those Regulated Services which are not Essential Maritime Services. These are:

- 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.

The paper provided by ESCOSA details the Assessment criteria proposed to be used to undertake this review.

5.1 Assessment Criteria

Flinders Ports notes that the following criteria will be utilised by ESCOSA in making its assessment:

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?
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 proposed assessment criteria raise a number of issues that have been raised and discussed in prior submissions made to ESCOSA.

It is noted that the assessment criteria have been derived from the review of price regulation and have been developed based on the legislative objectives outlined.

Therefore the overriding factor that should be considered is that of the additional benefit gained in achieving the objectives as set out in the Act by the retention of these services within the Access Regime.

Flinders Ports would suggest that the existing Essential Maritime Services, ie:

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

cover the key components in the overall provision of port services.

Flinders Ports would propose therefore that the scope of these Essential Maritime Services provide ESCOSA through the “control” mechanisms existing for these services within the Access Regime and Regulatory Pricing Regime with an ability to ensure the overall objectives of the Act can be achieved.

Therefore while the criteria developed by ESCOSA are supported by Flinders Ports and are consistent with previous reviews conducted by ESCOSA this over-riding issue should be considered during the review process.

In relation to the proposed review the following comments are provided on the criteria outlined:

The structure of the market for Regulated Services was discussed at length in the Flinders Ports submission on the issue of “Should Price Regulation continue?” Hence when consideration of the “market” is undertaken within the proposed review of those Regulated Services noted, the wider market concept as previously outlined, should be taken into account.

The issue of “market power” was also raised in previous submissions. Flinders Ports has previously outlined its view on this issue, highlighting a number of other factors that provide counter balancing pressures that ensure that Flinders Ports does not have a significant degree of market power in its provision of the totality of services across ports. The services provided by Flinders Ports are inter-related and hence the retention of the specific services identified by ESCOSA within the Access Regime needs to be considered in conjunction with the existing “controls” associated with those Regulated Essential Maritime Services that will be retained under the Ports Access Regime.

Flinders Ports would stress that the issues of “market” and “market power” should be viewed in the context of the overall operation of the port.

In relation to competitive entry and alternative services, again the time frame over which these concepts is considered has an influence on the conclusions reached. As previously mentioned there has been evidence of a number of proposals from other potential port service providers, to enter areas that had not previously been considered. Hence when assessing the retention of these services against these criteria ESCOSA should consider the issue on the basis of the opportunities that exist, not just the status quo situation.

Given the nature of services identified and the characteristics of the various proclaimed ports in South Australia, it is considered that the issues associated with these services are consistent between ports.

As mentioned the Regulated Services identified by the nature of inter-relationships between the services, are linked to the existing range of Essential Maritime Services covered by both the Access and Pricing Regimes. On this basis it is considered that as individual services they may not rate sufficient importance to raise economic efficiency concerns.

As a means of providing a mechanism to handle disputes the Port Access Regime does provide a “safety net”. This final criterion needs to examine whether the additional benefit gained from including these services is justified give the possible additional costs of their retention.

Flinders Ports has provided specific comments on each of the areas raised by ESCOSA within the following sections of this response.

6. Pilotage

Flinders Ports recognises that the pilotage service is an essential component of the efficient and safe operations of a port. Pilots in South Australia are recruited from a number of sources and must be both suitably qualified (with relevant Master Mariner qualifications) and licensed (to effectively operate in each port they provide the service).

Both these requirements are managed through organisations external and independent to Flinders Ports.

These factors highlight the position that the provision of Pilotage Services can be facilitated through potential other Service Providers. Through a similar process that Flinders Ports undertakes involving gaining access to the appropriately qualified staff and necessary equipment (ie dedicated vessel or use of other vessels such as tugs) there are no impediments to the establishment of an alternative pilotage service. In addition for frequent visitors to ports the master of the vessel can qualify for ‘exempt status’ which negates the need to use a pilot to enter the particular port.

In addition the pilotage function is a consequence of a user of the port facilitating access to that port. As such it could be argued that the process of securing access either through negotiation or under Award arrangements would take into account the various services provided by the port operator required by that vessel to effect its access.

Alternatively the port user, having gained access could use their own Service Provider (once established) to ensure that the entry of their vessel into a port is effected.

These issues highlight the inter-relationship between the services and supports the position adopted by Flinders Ports that the existing regimes surrounding the Essential Maritime Services provide an appropriate process to achieve the objectives outlined within the Act.

Flinders Ports would propose there is no impediment stopping anyone who thinks they could do the job more efficiently from entering the market. Therefore it is considered that the continuation of the access regime for this regulated service is not applicable.

7. Shiploaders

Flinders Ports recognises that the Shiploaders operated by Ausbulk Ltd are key facilities in the process of loading cargo at each of its proclaimed ports.

Flinders Ports also notes the observations made by ESCOSA of the potential alternatives that exist or could be facilitated.

It is also noted that no access disputes arose under the BHF Act. Like other stevedoring operations, the provision of and access to the Shiploaders is subject to commercial arrangements. In this context there would also appear to be significant incentive to ensure that access issues are addressed in an appropriate manner by those parties concerned.

Flinders Ports key concern related to the Shiploaders is that a framework exists and is maintained that promotes the continued efficient and effective operations of the shiploaders to ensure that ship loading operations can be accommodated at each of the proclaimed ports.

8. Land

A core objective of Flinders Ports is to facilitate the growth of trade volume through the ports that it operates. The provision of land to provide access for the movement of cargo to and from a vessel is an essential component of the overall services required to be delivered to ensure this objective is achieved.

Therefore it is Flinders Ports view that this service area is a consequential outcome of achieving both access to a port and the provision of port facilities for the loading (unloading of that vessel).

Hence the application of the MSA Act to this service area does not add weight to the achievement of the objectives of the MSA Act to support its retention.

9. Conclusion

Flinders Ports has supported ESCOSA's proposal to adopt a light handed form of price regulation for Essential Maritime Services.

In its previous submissions on the various questions raised by ESCOSA Flinders Ports has adopted the position that the Port Access Regime does provide an effective "safety net" for genuinely aggrieved customers. It also recognises that the Act provides mechanisms to resolve disputes to ensure that the overall objectives of the Act are achieved.

Flinders Ports therefore supports the retention of the Port Access Regime, for Essential Maritime Services.

Flinders Ports has outlined in this and other submissions the inter-relationships that exist between the various port service components. It is Flinders Ports view therefore that the current Pricing and Access Regime framework existing for the Essential Maritime Services does provide ESCOSA with the scope to ensure that the objectives of the MSA Act can be achieved.

It is therefore considered that the retention of the other Regulated but not Essential Maritime Services within the Regime does not add significant additional value to the achievement of these objectives.

It is proposed that the Ports Access Regime should therefore not continue to apply to these services.

In addition while Flinders Ports accepts ESCOSA's position in relation to cargo handling for grain it would propose that the current regulatory framework should be left to do its job and not be over-ridden by increased levels of access regulation.