PORTS ACCESS REVIEW

FINAL REPORT

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ESSENTIAL SERVICES COMMISSION
OF SOUTH AUSTRALIA

SUMMARY

The Essential Services Commission of South Australia (the Commission) has completed its review of the services covered by the Ports Access Regime as required under Section 43 of the *Maritime Services (Access) Act 2000* (the MSA Act). As a result of the review:

> **The Commission recommends that Part 3 of the MSA Act (the Ports Access Regime) should continue in operation for a further three years.**

The effect of this recommendation is to allow the Ports Access Regime to continue in operation from 1 November 2004 up to and including 31 October 2007. However, continuation will only occur if the South Australian Government makes a regulation extending its operation.

The Commission has also drawn some conclusions about the Ports Access Regime from its review. From these, the Commission suggests that the South Australian Government consider:

- removing doubt over coverage by amending the wording of proclaimed Regulated Services to better align them with the definitions used in the MSA Act, by:
  - removing the words "by means of channels" as appear in Clause 2(a) of the current proclamation; and
  - replacing the word "harbourage" as appears in Clause 2(c) of the current proclamation with the word "berths".

Further, the Commission's role in the Ports Access Regime arises at nominated points only. Disagreements may arise at other points without clear recourse to the Commission. This could delay resolution of access disputes. The Commission therefore suggests that the South Australian Government consider amending the MSA Act, making a regulation under Section 47 of the MSA Act, or a proclamation under Sections 47 and 45(2) of the MSA Act, conferring relevant regime compliance responsibilities upon the Commission.

The Commission has also determined that it could improve the performance of the Ports Access Regime by preparing and publishing a guide to the regime to better inform stakeholders.

The Port Access Regime

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

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

Only the above services, in the above ports, have been the subject of this review. This review was not about whether additional services should be proclaimed.

Link to Price Regulation

Some Regulated Services (access of vessels to ports and berth use) are also Essential Maritime Services, which means that they are subject to price regulation under Part 2 of the MSA Act. The Commission finished a review of price regulation of Essential Maritime Services in 2003 and concluded, amongst other things, that it would apply price monitoring to Essential Maritime Services – subject to the Ports Access Regime continuing. Provided the South Australian Government makes a regulation continuing the Ports Access Regime, the Commission will move to implement price monitoring of Essential Maritime Services.

The review of price regulation also concluded that cargo services (providing port facilities for loading or unloading vessels) at grain berths should become a Regulated Service, if the Ports Access Regime continued. This will involve an addition to the proclaimed list. Cargo services for grain were not examined in this review as they are not currently Regulated Services.

1. INTRODUCTION

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.

The Ports Access Regime was designed to run initially for three years – a triennial cycle. The first triennial cycle began on 31 October 2001 and ends on 31 October 2004. Section 43 of the MSA Act obliges the Essential Services Commission of South Australia (the Commission) to review the Ports Access Regime to determine whether it should continue for a further three years. The Commission has now completed that review.

More specifically, the Commission was obliged to review each service within the current set of Regulated Services to determine whether they warrant regulation of the type provided by the Ports Access Regime – 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 after 31 October 2004 (this would mean that the Ports Access Regime would no longer exist).

The Commission began the review in December 2003, with the release of a Discussion Paper "*Ports Access Review: Discussion Paper*", which is available on the Commission website at: www.escosa.sa.gov.au. The Commission received seven submissions on the Discussion Paper. These are listed in Appendix A and are available on the website.

In conducting this review the Commission has had regard to the objectives of both the MSA Act and the *Essential Services Commission Act 2002* (the ESC Act), as they apply. Indeed, the Commission has reached its recommendation by determining which of the two possible recommendations would best meet the objectives. The objectives are discussed in Appendix B.

In the course of the review the Commission has also reached several ancillary conclusions, which would improve the operation of the Ports Access Regime. These are presented in this report and, where applicable, the Commission provides:

- ▲ suggestions for consideration by the South Australian Government; and/or
- ▲ proposals for action the Commission could undertake itself.

1.1 Ports Price Review issues

The Commission completed a review of price regulation of Essential Maritime Services in 2003[1]. In that review the Commission concluded that it would move to a system of price monitoring of Essential Maritime Services, subject to certain of those services (the Essential Maritime Services that are also Regulated Services) being subject to a negotiate/arbitrate access regime. The review noted that the Ports Access Regime provided such a model. Hence the Commission concluded that regulation of the type provided by the Ports Access Regime was appropriate for those Regulated Services that are also Essential Maritime Services.

The Commission also concluded that cargo services (providing port facilities for loading or unloading vessels) at grain berths should become a Regulated Service, if the Ports Access Regime continued. This will involve an addition to the list of Regulated Services. Cargo services for grain were not examined in this review as they are not currently Regulated Services.

As the criteria for the two reviews are essentially the same, the Commission adopted an initial position that the Ports Access Regime should continue, at least for those Regulated Services that are also Essential Maritime Services. However, the Commission still welcomed, and received, comment on the application of the Ports Access Regime to these services.

1.2 Regime certification issues

The Ports Access Regime is established under South Australian legislation and the Commission 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 the Commission 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 the Commission has conducted in this review, although there are some similarities. Therefore, it cannot be assumed that the Ports Access Regime is certifiable merely because the Commission might have recommended that it continue.

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[1] Essential Services Commission of South Australia, *Ports Price Review: Final Report*, November 2003.

1.3 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 presents the Commission's assessment and its recommendation regarding continuation of the Ports Access Regime.

Chapter 4 presents other conclusions that the Commission has reached, and suggested actions deriving from those conclusions.

Chapter 5 sets out the next steps in respect of the Ports Access Regime.

Appendix A lists the submissions received.

Appendix B explains how the Commission's recommendation and conclusions meet the relevant legislative objectives for the review.

2. THE PORTS ACCESS REGIME

2.1 Regulated Services

The Ports Access Regime applies to 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.

In accordance with Section 43 of the MSA Act only the above ports and services were the subject of this review. The Commission did not consider coverage of additional services.

The South Australian Government may remove, amend or add Regulated Services by proclamation – although only maritime services (as defined under the MSA Act) are able to be proclaimed as Regulated Services.

2.2 How the regime works

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.

2.2.1 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 (expected 1 November 2004) this link will no longer have effect as the Commission will no longer be regulating those prices (under price monitoring the Commission will only be regulating conditions relating to prices).

2.2.2 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 the Commission guidelines (the Commission'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 it is not obliged to charge.

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 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.

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 the Commission.

2.2.3 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.

2.2.4 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.

2.2.5 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. The Commission may also participate in an arbitration, calling evidence and making representations on the matters in the arbitration.

2.2.6 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 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.

2.2.7 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.

An Award must:

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

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

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

2.2.8 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.

2.2.9 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. The arbitrator will decide how to define costs – it could include a party's internal costs.

2.2.10 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. The Commission Ports Industry Guideline No. 2 is currently in place in this respect.

3. CONTINUATION?

In the Discussion Paper the Commission stated that it would recommend that the Ports Access Regime continue if it decided that it should continue to apply to at least one Regulated Service. To enable it to form a view the Commission developed a set of assessment criteria that derived from the relevant legislative objectives. The criteria were:

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? [2]
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?

These criteria were developed to reflect the fact that the Commission is to assess specifically whether the Ports Access Regime should continue. The Ports Access Regime is a pricing principles form of regulation, based on a negotiate/arbitrate model. As the Commission explained in the Discussion Paper, this particular form of regulation is suited 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. It also means that observed dispute/activity levels under the regime can be a poor guide to its effectiveness (an absence of disputes could mean the regime is unnecessary, or that it is operating effectively).

The criteria used here are similar to those used in the Ports Price Review. However, on this occasion the Commission is not selecting a form of regulation from among many. It is simply assessing the services covered to determine whether they are of a nature that warrants regulation of the type provided by the Ports Access Regime. In each case the Commission reaches a conclusion to that question. The conclusions then form the basis for the recommendation that the Commission makes.

[2] 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)*.

3.1 Essential Maritime Services

The Commission decided in its recently completed review of ports price regulation that those Essential Maritime Services that are also Regulated Services and therefore already subject to the Ports Access Regime should continue to be so.

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; and
  - berths adjacent to the covered shiploaders.

The assessment criteria from the Ports Price Review were consistent with those used for this review, hence the Commission's initial position in this review was that the above services should continue to be subject to the Ports Access Regime. However, the Commission welcomed and received comment from interested parties on this position.

Most submissions supported continued coverage of these services, either specifically or as part of their general view on the Ports Access Regime.

Flinders Ports recognised that the Ports Access Regime could provide a safety net for customers, but also stated a preference that the price monitoring to be applied to Essential Maritime Services not be over-ridden by access regulation for those particular services. A particular concern was raised in respect of the Commission's proposed extension of coverage to cargo services for grain, which is not the subject of this review.

Similarly, AusBulk suggested that the ability to use the access regime be curtailed where a service was already subject to price monitoring.

The Commission recognises these concerns and agrees that it is undesirable to unnecessarily overlay regulation. However, the additional safety net provided by the Ports Access Regime applies to only a subset of Essential Maritime Services – specifically those with greater market power concerns associated with them. Hence the safety net is applied only where relevant and the application of the "safety net" was a deliberate strategy from the Ports Price Review.

The assessment of the relevant Essential Maritime Services against the criteria is set out fully in the Commission's Final Report on the Ports Price Review. The Commission received no additional information to cause it to alter that conclusion for this review.

Conclusion 1

The current Regulated Services that are also Essential Maritime Services warrant remaining subject to the form of regulation provided by the Ports Access Regime.

3.2 Pilotage

Pilotage involves the provision of an experienced and specifically qualified seafarer (a marine pilot) on board a vessel to direct[3] 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.

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 (though many still use a pilot); 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.

[3] While the pilot directs the vessel, the master (the ship's captain) remains responsible for the vessel.

Because the number of mariners in Australia is declining, the sourcing of pilots through traditional channels (ex-seafarers) has become a significant issue for pilotage 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.

The Commission's assessment of pilotage against each of the criteria is presented below.

3.2.1 Does the structure of the market for the Regulated Services suggest market power could exist?

For most vessels pilotage is a mandatory service – the vessel cannot use the port without using the pilotage service – and hence displays bottleneck characteristics. Flinders Ports is currently the sole provider of pilotage services at each of the proclaimed ports.

Flinders Ports is also the sole provider of pilotage services to the Port of Ardrossan, which is a potential competitor to Flinders Ports' own ports. However, AusBulk could elect to appoint an alternative pilotage provider (assuming a feasible alternative were available).

Hence market structure suggests that market power could exist in the provision of pilotage services. However, there may be some scope for competitive entry (see 3.2.4 below).

3.2.2 Is market power being misused or is the potential there for it to be misused?

Misuse of market power refers not merely to the existence of market power but more particularly to its use by a service provider in a fashion that involves a sustained, and possibly deliberate, over-pricing and/or under or discriminatory provision of services. While there may be a variety of different reasons for a service provider to engage in such behaviour, it is the outcome of that behaviour that is of most concern to the Commission, especially:

- negative effects on economic efficiency; and
- discriminatory provision.

Misuse of market power would be best evidenced by behaviour such as:

- pricing above competitive levels;
- earning excessive returns;

- ▲ providing poor or discriminatory service levels; or
- ▲ over-investing in service provision.

The Commission was presented with no specific suggestion from port users that Flinders Ports had been misusing market power in relation to pilotage.

The Commission benchmarked pilotage costs at ports around Australia (see Table 3.1) and South Australian pilotage costs appear comparable to or better than charges elsewhere. This observation takes account of the difference in pilotage tasks between ports, recognising that pilotage costs will depend upon the number of vessels visiting a port, and the length of the pilotage task (the distance the vessel needs to be piloted).

TABLE 3.1 COMPARATIVE PILOTAGE CHARGES

"Notional" Handymax of 28,500 GT

Port	Approximate Number of Ships Requiring Pilotage in 2003	Approximate Length of Pilotage in N.M. to Bulk Berth	Total Pilotage Cost GST Exclusive $A	Comments
Port Adelaide - Inner Harbour	452	8.5	3,146.00	As per Flinders Ports tariff
Port Adelaide - Outer Harbour	463	3.5	3,146.00	As per Flinders Ports tariff
Port Lincoln	85	3.0	3,036.00	As per Flinders Ports tariff
Wallaroo	18	3.0	3,036.00	As per Flinders Ports tariff
Thevenard	98	3.5	3,036.00	As per Flinders Ports tariff
Geelong	720	46.0	7,134.00	As per Port Philip Sea Pilots latest tariff
Melbourne	1,925	45.0	7,134.00	As per Port Philip Sea Pilots latest tariff
Port Botany	1,260	4.5	4,534.09	$0.0875/GT + $165.00 - GST inclusive
Newcastle	1,275	4.5	4,632.55	Ballast Voyage $0.0542/GT Loaded Voyage $0.1084/GT - all GST inclusive
Brisbane	2,146	44.0	8,348.00	First 10,000 GT $0.218/GT, 10,000 to 20,000 GT $0.128/GT and 20,000 to 30,000 GT $0.84/GT - GST inclusive
Bundaberg	28	7.0	5,168.00	First 20,000 GT $0.102/GT over 20,000 to 40,000 GT $0.064/GT - GST inclusive
Gladstone	832	23.0	4,542.73	First 20,000 GT $0.099/GT over 20,000 to 40,000 GT $0.061/GT - GST inclusive
Mackay	154	2.0	3,133.00	$1,723.15 "in" and $1,723.16 "out" - GST inclusive
Kwinana	725	25.5	4,560.00	$2,280.00 "in" and $2,280.00 "out" - GST exclusive
Esperance	130	10.0	3,400.00	GST exclusive - includes use of lines launch

Flinders Ports maintains a schedule of pilotage charges, as it is required to do under Section 8 of the MSA Act. The charges are differentiated by task type and vessel size, and are separated between Port Adelaide and regional ports. Such a charge structure include some concordance with pilotage cost drivers (noting that an unduly complex charge structure would not be desirable). It does not suggest a discriminatory intent.

Perhaps a greater question arises as to whether misuse might arise if pilotage were no longer subject to the Ports Access Regime. Flinders Ports has suggested not, arguing that the regulation applied to Essential Maritime Services would have sufficient flow-on effect on pilotage to make the misuse of market power (if it did exist) unlikely.

Flinders Ports noted the close relationship between pilotage and Essential Maritime Services (legislative definitions aside, pilotage would usually be considered an essential port service). Certainly any use of pilotage as a surrogate for the misuse of market power in Essential Maritime Services would be treated as a significant issue in the Commission's subsequent (2006/07) review of the price regulation applying to Essential Maritime Services. However, this would not address such behaviour at the time it arises.

From a legislative perspective pilotage is not an Essential Maritime Service and this assessment must recognise that fact. Pilotage is a necessary service, it displays bottleneck characteristics, there is only one provider and it is closely related to Essential Maritime Services. Therefore, there would be scope for the misuse of any market power that might arise in relation to pilotage – coincident and related to the scope for misuse arising from the provision of Essential Maritime Services.

3.2.3 Do customers have alternative sources?

There are no readily available alternative pilotage providers in South Australia. However, there are a number of pilotage providers around Australia. A shipper or port operator could elect to engage any of these to provide pilotage services to their vessels.

To proceed with this option would require significant effort, as alternative pilotage service providers would need to have their pilots licensed for South Australian ports, and made available to pilot in South Australia. The scale of commitment that this would require is discussed in 3.2.4 below.

A shipper could instead move their cargoes through interstate ports. As the Commission explained in the Ports Price Review, the scope for this action varies depending upon the shipper, their location and their cargo. However, pilotage accounts for a very small part of total port costs[4] and it is unlikely that a shipper would take such action in response to pilotage services alone (unless they were being withheld entirely).

Some shippers may be able to use pilotage exemptions as a form of alternative, if they were able to contract regular calls by particular vessels and masters (who would then seek an exemption). In theory, larger bulk commodity shippers may have volumes to pursue this option (of course, not if they make *fob* sales), although the Commission understands it would be largely impractical given the nature of international commercial vessel chartering and crewing.

3.2.4 Is competitive entry possible?

Flinders Ports does not control the qualification and licensing of pilots for South Australia: that is a Transport SA responsibility under the *Harbors and Navigation Act 1993*. Indeed, the Port Operating Agreements (between Flinders Ports and the Minister for Transport) under which Flinders Ports operate their ports provide that they must allow for the training

[4] The Commission's analysis in the Ports Price Review included pilotage costs amongst other ports costs. For the notional vessels and cargoes modelled pilotage amounted to around $8 per vehicle, one half cent per case of wine, 12 cents per tonne of gypsum and 27 cents per tonne of grain (panamax case).

of new pilots, even where they are not their own employees. This provision seeks to ensure that Flinders Ports cannot limit entry by hindering the qualification process.

Flinders Ports would have a legitimate interest, of course, in the nature of any new entrant, in so far as the duties of pilots can have a significant effect on port operations and infrastructure. The Commission also understands that recent and likely future developments in port security will also require Flinders Ports to have some input into, control, or at least knowledge of, persons operating within their port boundaries. However, none of these matters precludes the possibility of entry. As Flinders Ports submitted:

Flinders Ports would propose there is no impediment stopping anyone who thinks they could do the job more efficiently from entering the market. (Flinders Ports, sub, p.12)

While entry may be possible in a legal and practical sense, the likelihood of competitive entry is less clear from the perspective of commercial feasibility.

Flinders Ports' pilotage "business" operates across the geographic spread of its ports. It also provides services to the ports at Ardrossan, Whyalla and Bonython. Its pilots and associated infrastructure are spread geographically to service all of the ports collectively. However, it is notable that no individual port is serviced solely by separate, dedicated pilots and associated infrastructure, as vessel numbers and call patterns do not warrant such arrangements. A targeted pilotage resource sharing system with backup provided by pilot resources in each region appears to be the most effective arrangement at this time.

The efficiency and common sense of such an arrangement also suggests that competitive entry would be difficult as any new entrant would not be able to match such a service without gaining a spread of new business. However, pilotage services do not involve substantial capital costs, and it might be possible for a small operation to provide niche services. The attractiveness of such a service might reflect the quality and timeliness of service rather than price.

The only shippers likely to be able to provide a spread of business would be South Australia's two major grain exporters, AWB and ABB Grain. Neither indicated a desire to do so in their submissions. ABB Grain noted:

ABB is reconciled to continuance of Flinders Ports being the only player providing pilotage services within South Australia; certainly for the foreseeable future. (ABB Grain, sub, p.4)

The other possibility would be for AusBulk to engage its own provider at Ardrossan. The proximity of that port to Port Adelaide means that at current levels of usage, the sourcing

of pilotage services from Flinders Ports would be a more effective option[5]. Further, Ardrossan does not compete, at present, for cargoes with Flinders Ports.

Overall, the Commission believes that there is some limited scope for competitive entry in the provision of pilotage services. The likelihood of entry occurring in the proclaimed ports is low, but the threat would provide some ongoing discipline on Flinders Ports.

3.2.5 Does the answer vary between proclaimed ports and between the goods being moved?

The ability to seek an alternative pilotage provider does not vary between port specifically, except to the extent that Port Adelaide may be more likely to offer more traffic and hence more opportunity for a new entrant compared to any regional port.

There would also be little variation between cargo types. Vessel numbers and size would be more likely determinants of the potential to encourage competitive entry.

To the extent that any such variation did exist, it would be difficult to separate pilotage regulation by cargo type given that pilotage services are vessel specific, not cargo specific in nature (unlike berth or cargo services).

3.2.6 Are the above Regulated Services of sufficient importance to the South Australian economy to warrant economic efficiency concerns?

Pilotage services in proclaimed ports are not a substantial business activity in themselves from a statewide perspective, generating just a few million dollars in revenue each year.

Pilotage charges are also a small proportion of total port charges, meaning that their level is unlikely to alter the behaviour of port users. This indicates that overall economic efficiency concerns (in terms of decisions made by shippers to use a port) arising from pilotage alone would be minor.

3.2.7 Is the Ports Access Regime appropriate – is it able to fix the above matters or will it impose excessive additional costs and risks?

Pilotage is not an Essential Maritime Services and therefore will not be subject to the price monitoring that will apply to those services. However, Section 8 of the MSA Act applies a price notification regime to pilotage. This requires the service provider to make available price lists for pilotage services and to notify the Commission of any changes to those lists.

[5] AusBulk has proposed an upgrade to Ardrossan to return it to loading and shipping grain, which would involve additional calls.

However, there is no approval required, nor is there provision for regulatory intervention. The main effect of Section 8 is to establish some pricing transparency.

It is unlikely, though not impossible, that an access dispute would arise in respect of pilotage alone (Ardrossan aside). More likely a dispute would include pilotage in a bundle of disputed services (pilotage, access to the port and berths). On its own, pilotage would warrant only light handed regulation at most. The Ports Access Regime provides this by only having regulatory intervention occur in the case of disputes.

Further, the omission of pilotage from the Ports Access Regime could leave an opening for the misuse of market power in Essential Maritime Services through pilotage service charges, which would undermine the effect of covering those Regulated Services that are also Essential Maritime Services.

Conclusion 2

Pilotage warrants remaining subject to the form of regulation provided by the Ports Access Regime.

3.3 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 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 these shiploaders collectively, although the one at Thevenard handles mainly gypsum, with smaller volumes of grain and salt.

Shiploaders are vital for loading bulk cargoes. 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.

The Commission's assessment of the covered shiploaders (the six identified above) against each of the criteria is presented below.

3.3.1 Does the structure of the market for the Regulated Services suggest market power could exist?

When loading dry bulk commodities, the services of a shiploader are required. In South Australia this is most notably the case for grains, salt, gypsum and other minerals. At present, these services are supplied by AusBulk, the owner of the six regulated shiploaders listed above, as well as the unregulated shiploader at Ardrossan. Hence, at present, exporters of these bulk commodities are likely to have only one feasible service provider available to them in South Australia.

AusBulk is also the predominant provider of grain storage and handling facilities in South Australia, particularly at or near port facilities. The close affiliation between shiploaders and grain handling and storage facilities reinforces their sole provider position.

AusBulk is also a grain marketer and exporter in its own right in respect of some grains, although not in respect of wheat or barley exports (which constitute more than 90 per cent of exports). This means that AusBulk may compete in other markets with some of its own shiploader service customers.

The sole, integrated provider structure suggests that market power could exist in the provision of shiploader services. However, there may be some scope for competitive entry or other alternatives in this service (see 3.3.4 below).

3.3.2 Is market power being misused or is the potential there for it to be misused?

As discussed in 3.2.2 above, the misuse of market power refers to its use by a service provider in a fashion that involves a sustained, and possibly deliberate, over-pricing and/or under – or discriminatory – provision of services.

The Commission was presented with no specific suggestion from port users that AusBulk is, or had been, misusing market power in relation to its shiploaders.

ABB Grain noted in its submission (p.6) that it had pursued a "judicial judgement" against AusBulk in relation to pricing. However, the Commission understands that this related to AusBulk charges to ABB Grain more generally, not just in respect of shiploaders. The matter was resolved, and did not involve a dispute under the Ports Access Regime or the previous BHF Act access regime.

AusBulk provides its shiploader services to a variety of customers, both for grain and other bulk commodities. The charges levied to those customers are set under contract. It is allowable for charges to vary, for example, between customer, commodity type and shiploader, although they need not do so.

Price variations could be an indicator of discriminatory pricing practices, which may reflect the misuse of market power. However, they could also reflect differences in the scale, pattern and quality of service required, as well as differences in the cost of loading different commodity types.

The Commission considered the confidential operational and financial information that it has collected so far in respect of the shiploaders under Ports Industry Guideline No. 2. Analysis of this information provided no clear indicator of the misuse of market power.

As AusBulk noted in its submission (p.2), no disputes have arisen in respect of shiploaders under the Ports Access Regime or the previous BHF Act access regime. However, the greater question arises as to whether misuse might arise if shiploaders were no longer subject to the Ports Access Regime. A conclusion on this matter requires consideration of alternatives and competitive entry, which are discussed below.

3.3.3 Do customers have alternative sources?

There are some existing alternative options available for shiploader users in some cases. As the Commission discussed in its Ports Price Review, some grain from the border areas could be moved through Victorian ports. Of course, this option is not feasible for most South Australian grain, but the threat of some lost volume could be used in negotiations for shiploader (and port) services.

Another alternative is for grain to be sold domestically, hence bypassing ports and shiploaders entirely. While some grain is sold domestically and there has been significant growth in domestic feedlot demand, the domestic market would not be a feasible option for the vast volumes of South Australian grain exports.

Such alternatives are essentially not possible for the salt and gypsum shipped from Thevenard due to their isolation. As the Commission demonstrated in its Ports Price Review, gypsum is a low margin bulk commodity and any significant misuse of market

power by the shiploader service provider is likely to be met with production closure and the loss of all volume – indeed, this could provide the customer with considerable countervailing power.

3.3.4 Is competitive entry possible?

The Commission understands that the cost of a new or relocated, second-hand shiploader is in the order of one to several tens of millions of dollars – depending upon the configuration and capacity sought. These costs are not so high as to instantly dismiss the possibility of competitive entry. Indeed, a new shiploader is to be constructed at Port Adelaide's Outer Harbour, as part of the development of the new grain terminal, and a new terminal, with shiploader, was constructed by grain interests (including AWB and AusBulk) at the Port of Melbourne.

However, the cost of the shiploader itself is not the only consideration when assessing the scope for competitive entry. There are additional, significant issues that limit the possibility of competitive entry, in particular:

- some regional ports operate a single jetty, with the shiploader constructed coincident with the jetty (though not always structurally dependent on the jetty). In such cases it would be almost impossible to construct an alternate shiploader without also constructing an alternate jetty (and associated works). This limits the number of feasible sites for a new shiploader;
- a shiploader will be located and associated with storage and/or handling facilities, meaning that the investment required for competitive entry would scale up accordingly, and the number of feasible sites would fall further;
- if existing port space is limited or unavailable, the next option would involve the construction of a new port, adding further costs and further limiting entry as few suitable locations are available, if any; and
- some customers would not have sufficient volumes to warrant the construction of a new competing shiploader (although the two major grain exporters may have sufficient volume), let alone new storage facilities or a new port.

On the latter points, AWB and ABB Grain had explored the possibility of developing Port Stanvac as a grain terminal, and the AWB was considering Myponie Point on the Yorke Peninsula. Neither project has proceeded.

AusBulk itself is considering an upgrade at Ardrossan[6] to increase the size of vessels capable of berthing and loading there. If this were to proceed, grain exports may

[6] See footnote 5 above.

recommence from Ardrossan, perhaps at the expense of volumes at other Yorke Peninsula ports.

The Commission has formed the view that while competitive entry may be possible, it is unlikely to occur. However, the threat of entry may provide a weak ceiling on the potential misuse of market power. The Commission also notes that the discussion here has mirrored much of its discussion about competitive entry in its Ports Price Review, as many of the issues are the same.

3.3.5 Does the answer vary between proclaimed ports and between the goods being moved?

The ability to seek an alternative provider of shiploader services does not vary between proclaimed ports as AusBulk is the only provider in each port.

The scope for competitive entry varies between ports, in so far as the configuration of Port Adelaide and Port Pirie would at least provide potential space for new shiploader service providers. However, the low probability of new entry (other than that already announced for Outer Harbour) means that this variation is not significant.

The potential for alternative or competitive entry varies between grains and other commodities – in so far as the two major grain exporters control significant volumes that may support the use of interstate alternatives or competitive entry to some degree.

Gypsum and salt are currently moved from Thevenard. The remote location and single jetty make alternatives or competitive entry unlikely.

3.3.6 Are the above Regulated Services of sufficient importance to the South Australian economy to warrant economic efficiency concerns?

Shiploading services in proclaimed ports are not a substantial business activity in themselves from a statewide perspective, generating only a few million dollars in revenue each year.

Shiploading charges are also a small proportion of total handling and port charges, meaning that their level is unlikely to alter the consumption choices of users. This indicates that overall economic efficiency concerns (in terms of decisions made by commodity exporters to use a port) arising from shiploading services alone are minor.

The significance of shiploading services arise more from their bottleneck position in the supply chain for South Australia's significant grain and bulk commodity exports.

3.3.7 Is the Ports Access Regime appropriate – is it able to fix the above matters or will it impose excessive additional costs and risks?

It is possible that an access dispute could arise in respect of shiploading services. However, such a dispute might form part of a larger grievance about handling and storage charges overall, which goes well beyond the scope of maritime services and therefore well beyond the scope of the Ports Access Regime.

The bottleneck position and market structure for shiploading services provide some concern over the potential for the misuse of market power. However, the small efficiency effects mean that only light handed regulation would be warranted. The Ports Access Regime provides this by providing a general incentive to avoid any such misuse but only having regulatory intervention occur in the case of disputes.

Conclusion 3

The covered shiploaders warrant remaining subject to the form of regulation provided by the Ports Access Regime.

3.4 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. Indeed, access to a shiploader is likely to be possible only with associated physical access to deliver a cargo onto the belts. 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.

As access to land arises only in respect of enabling access to the other services, the Commission's conclusion on land follows from the previous assessments.

Conclusion 4

Land "in connection with" the other Regulated Services warrants remaining subject to the form of regulation provided by the Ports Access Regime. Land in this case is only that necessary to make possible access to the other Regulated Services.

3.5 The Commission's Recommendation

The Commission has concluded that the services covered by the Ports Access Regime warrant the form of regulation that the regime provides. Therefore:

> ***The Commission recommends that Part 3 of the* Maritime Services (Access) Act 2000 *should continue in operation for a further triennial cycle.***

The further triennial cycle will be from 1 November 2004 up to and including 31 October 2007.

In accordance with Section 43(7) of the MSA Act, continuation of Part 3 requires the Commission to have made the above recommendation, and requires a regulation to have been made extending its operation accordingly.

In accordance with the MSA Act, if the Ports Access Regime continues then the Commission will be obliged to conduct another review in the third year of the next triennial cycle. The Commission intends that it will conduct that subsequent review at the same time as its next review of price regulation, such that they occur as one process.

4. OTHER CONCLUSIONS

The primary task for the Commission in this review has been to reach a recommendation on continuation of the Ports Access Regime. However, in the course of the review the Commission examined a number of aspects of the regime and has drawn some additional conclusions on these. The Commission also invited comment on such matters in its Discussion Paper.

As a result of these conclusions the Commission includes here some suggestions for improvement for consideration by the South Australian Government, and has proposed action that it could take itself to improve the regime.

4.1 Regulated Services

The MSA Act regulates both Essential Maritime Services and Regulated Services. Essential Maritime Services are defined in the Act, whereas Regulated Services are defined in a proclamation. Both are subsets of maritime services, which are also defined in the MSA Act.

Although the definitions in the current proclamation of Regulated Services are roughly similar to those for maritime services, there are some important differences. Most notably, Clause 2(c) of the proclamation uses the word “harbourage”, whereas the MSA Act uses the term “berths”.

To this point the Commission has interpreted harbourage as having the same intended meaning as berths, but recognises that this need not be so. The term harbourage is not defined in the MSA Act, nor is it used in the related *Harbors and Navigation Act 1993*. It also does not appear to be a term used widely among port businesses in South Australia.

Harbourage refers to a place of shelter, which is not necessarily the same as a berth. Consequently harbourage may be limited to the provision of a safe anchorage. A berth more directly implies the presence of berthing structures, most probably adjacent to cargo handling facilities. Proclaiming harbourage therefore makes little sense in the context of the practicalities of port use. This anomaly could be corrected by replacing harbourage with the term “berths” as is used in the definition of maritime services and Essential Maritime Services.

Conclusion 5

The term “harbourage” could give rise to unintended difficulties with the Ports Access Regime.

Suggestion

That the South Australian Government consider replacing the word “harbourage” as appears in Clause 2(c) of the current proclamation with the word “berths”.

The current proclamation also adds the words “by means of channels” in Clause 2(a):

providing, or allowing for, access of vessels to the port by means of channels.

The definition for maritime services includes only the words:

providing or allowing for access of vessels to a proclaimed port (s.4 MSA Act).

The additional words "by means of channels" qualify this service unnecessarily, since a channel is merely "a waterway regularly used as a course for vessels moving through a harbor" [7] as set out, for example, in Clause 8 of the *Harbors and Navigation Regulations 1994*. A vessel accessing a proclaimed port would need to use such a waterway in any case.

Conclusion 6

The words "by means of channels" are unnecessary.

Suggestion

That the South Australian Government consider removing the words "by means of channels" as appear in Clause 2(a) of the current proclamation.

The Commission notes that in the Ports Price Review it recommended the inclusion of cargo services for grain (providing port facilities for loading and unloading vessels at relevant grain berths) as a Regulated Service. This will require a new proclamation, thereby providing an opportunity to make the above changes.

4.2 Regime administration

The Commission's role in the Ports Access Regime arises in specifically nominated points in Part 3 of the MSA Act. There remain some areas of the regime in which disagreement between the parties may arise, without clear recourse to the Commission. For example, questions of the reasonableness of costs for information and notices arise under sub-sections 12(2) and 13(7) of the MSA Act without any clear direction as to how these might be resolved.

In such cases the parties would need to seek resolution through the Minister and/or the Supreme Court, which could delay the ultimate resolution of the underlying access dispute. The South Australian Government could elect to avoid such delays, and the need for it to apply its own resources to the administration of the regime, by conferring on the Commission the function of enforcing compliance on these specific matters (either by amending the MSA Act accordingly or by using Sections 47 and 45 of the MSA Act). A more general obligation could also be considered, along the lines of that contained in Clause 6 of the AustralAsia Railway

[7] A 'channel' is not limited to a dredged or constructed channel.

(Third Party Access) Code, which requires the Commission "to monitor and enforce compliance with the Code".

Conclusion 7

Current administrative responsibilities within the Ports Access Regime could delay the ultimate resolution of disputes and draw government resources into the administration of the regime.

Suggestion

That the South Australian Government consider amending the MSA Act, making a regulation under Section 47 of the MSA Act or making a proclamation under Section 47 and 45(2) of the MSA Act, conferring Ports Access Regime compliance responsibilities upon the Commission.

4.3 A Guide to the regime

AusBulk and Flinders Ports raised some process issues and uncertainties that exist in respect of the Ports Access Regime. For example, Flinders Ports sought some guidance on how the Commission would "evaluate the initial merit of any dispute lodged" (Sub, p.6), and AusBulk discussed issues of cost allocation, dispute termination, circumstances that should impact whether or how awards are made, etc.

Some of the submission discussions proposed changes to the core character of the Ports Access Regime. For example, AusBulk (Sub, p.3) suggested some limitations be placed upon the ability of existing customers to enter disputes. This goes to the core of the Ports Access Regime and this would be a significant change to the nature of the Ports Access Regime. Proposing changes of this type is well beyond the Commission's charter for this review, and therefore it has not suggested such changes.

However, the submissions also raised issues of uncertainty as to how the regime might work in practice. A negotiate/arbitrate access regime will always involve some uncertainty because it is designed to deal with case specific disputes. However, there are areas and processes within the regime where it should be possible for the Commission to provide guidance on what might be expected, what matters might be relevant and how certain tasks will be undertaken.

A guide to the regime would assist in this respect. An appropriate model for such a guide may be the guidelines published recently by the Victorian Essential Services Commission in respect of the Grain Handling and Storage Access Regime[8] that it administers in that state.

[8] Essential Services Commission (Victoria) 2004, *Grain Handling and Storage Access Regime, Guidelines*, ESC, Melbourne.

Conclusion 8

Effective operation of the Ports Access Regime requires stakeholders to be better informed about the implications of taking or responding to actions under the regime.

Suggestion

The Commission could improve the performance of the Ports Access Regime by preparing and publishing a guide to the regime to better inform stakeholders.

In addition to producing a guide, the Commission will need to revisit the existing Ports Industry Guidelines and will amend these if necessary to reflect the new regulatory regime. The Commission will consult with industry stakeholders on these changes.

5. NEXT STEPS

The release of this Final Report denotes the completion of the Ports Access Review in accordance with the obligations under Section 43 of the MSA Act.

However, the Final Report does not mark the end of activity on this matter. The Commission will forward this report to the Minister, who, under Section 43(6) of the MSA Act, must have copies of the report laid before both Houses of Parliament and must have the Commission's recommendation published in the Gazette.

The South Australian Government, if it agrees with the recommendation, will then need to make a regulation extending the Ports Access Regime for a further three years. If it accepts the Commission's conclusions and suggestions, the government will also need to make a new proclamation of Regulated Services (which would be required to add cargo services for grain as per the Ports Price Review). A new proclamation should take effect as of 1 November 2004.

After the above steps have been completed the Commission will be able to implement the outcomes of its earlier Ports Price Review by making a new price determination, also taking effect as of 1 November 2004.

In addition, the Commission will review the existing Ports Industry Guidelines with a view to amending them to reflect the changed regulatory regime, and will develop a guide to the Ports Access Regime as proposed in this paper.

APPENDIX A: SUBMISSIONS

The Commission received seven submissions to the Discussion Paper.

1. Flinders Ports
2. AusBulk Ltd
3. Shipping Australia Limited
4. AWB Limited
5. ABB Grain Ltd
6. South Australian Freight Council Inc
7. South Australian Government

Copies of the submissions are available on the Commission's website: www.escosa.sa.gov.au.

APPENDIX B: LEGISLATIVE OBJECTIVES

The Commission's recommendation and conclusions have been developed to achieve the relevant legislative objectives. These are, firstly, the objectives in the MSA Act, and, secondly, those in the ESC Act (to the extent that they are consistent with the MSA Act objectives).

A.1 Maritime Services (Access) Act

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 whether it should continue. If the services covered were provided in a suitably competitive environment, then the Commission would not have recommended continuation.

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.

The Ports Access Regime applies only to services where there is a facilitation role required due to market power concerns.

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.

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 Commission has made some suggestions that will improve the appropriateness of the dispute resolution process.

A.2 Essential Services Commission Act

The objectives in the ESC Act apply to the Commission'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.

The Commission 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 the Commission 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[9] over the longer term (the next few years or even decades). This includes the need to ensure 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.

This primary objective has required the Commission 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, for example, force short-term, but unsustainable, price reductions.

[9] Note that the Act refers to essential services, as the objective applies to the full range of services regulated by the Commission, but in this instance it is Regulated Services.

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 reliability of Regulated Services impacts on primary producers, even though they may not be the people first invoiced for the services. This requires the Commission to consider Regulated Services in their broader context, including the effects on indirect 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 would change the long term outlook for port services were it to work to dissuade port operators of the merits of otherwise rational investments.

The Commission has recommended the continuation of the Ports Access Regime because it can facilitate the protection of the long term interests of consumers with respect to the price, quality and reliability of Regulated Services.

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.

The Commission has examined the level of competition and the type of conduct seen in the markets for Regulated Services and has determined that there are market power concerns that the Ports Access Regime can address.

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 could apply where effective competition cannot be achieved and monopoly or market power exists and is being exercised, or has the potential to be exercised.

The Commission has investigated market power in the markets for Regulated Services and has determined that there are concerns that warrant the continuation of the Ports Access Regime. This has involved considering 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).

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 the Commission needs to take care that 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. By its nature, the dispute resolution process offered by the Ports Access Regime can facilitate entry into related markets.

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. 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. Access regulation may help to overcome this situation.

The Commission has determined that applying the Ports Access Regime to Regulated Services will not unduly distort efficiency, and will indeed avoid likely potential distortions.

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. The Ports Access Regime provides a mechanism which allows port customers to share in efficiency benefits, and therefore encourages the distribution and sharing of benefits.

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 that incentive remains for appropriate long term investment.

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 the Commission were required to select a form of regulation. In this review the Commission could only recommend either that the Ports Access Regime continue or not continue – not whether another form of regulation should apply.