



2004 PORTS PRICE DETERMINATION FINAL PRICE DETERMINATION

November 2004

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GLOSSARY OF TERMS

BHF ACT	<i>South Australian Ports (Bulk Handling Facilities) Act 1996</i>
COMMISSION	The Essential Services Commission of South Australia, as established under the ESC Act
CPI	Consumer Price Index (a measure of inflation)
EXCLUDED ASSETS	Assets established or extended by Flinders Ports Pty Ltd pursuant to its purchase agreement with the South Australian Government, covering: <ul style="list-style-type: none"> ▪ dredging and wharf upgrade at Port Giles to accommodate panamax vessels; ▪ wharf upgrade at Wallaroo to allow partial loading of panamax vessels; and ▪ dredging and new wharf construction at Outer Harbour, Port Adelaide, for panamax bulk grain vessels.
ESSENTIAL MARITIME SERVICES	Services defined under section 4 of the MSA Act and subject to price regulation
ESC ACT	<i>Essential Services Commission Act 2002</i>
FPD	Minister for Government Enterprises' First Pricing Determination (under section 6 of the MSA Act)
GT	Gross Tonnage – a measure of vessel carrying capacity
H&N ACT	<i>Harbors and Navigation Act 1993</i>
MARITIME SERVICES	The full suite of services subject to regulation or potential regulation by the Commission and defined under section 4 of the MSA Act
MSA ACT	<i>Maritime Services (Access) Act 2000</i>
POA	Port Operating Agreement (under section 28 of the H&N Act) between a Port Operator and the Minister for Transport
PORT OPERATOR	A person authorised by a POA to operate a port
PORTS ACCESS REGIME	The access regime set out in Part 3 of the MSA Act
PPD	This Ports Price Determination
REGULATED OPERATOR	A person (typically a Port Operator) covered by the Ports Access Regime
REGULATED SERVICES	Services defined by proclamation under section 4 of the MSA Act and subject to the Ports Access Regime
REGULATED SERVICE PROVIDER	A person (typically a Port Operator) who carries on a business of providing Essential Maritime Services at a proclaimed port – hence covered by the PPD

SUMMARY

The Essential Services Commission of South Australia (the Commission) is assigned regulatory obligations and powers in respect of ports through the *Maritime Services (Access) Act 2000* (the MSA Act), the *Essential Services Commission Act 2002* (the ESC Act) and the *Essential Services Commission Regulations 2004* (the ESC Regulations) made under the ESC Act.

The Commission makes this price determination in accordance with those obligations and powers. Specifically, the Commission makes this price determination under Sections 25 and 26 of the ESC Act, and Regulation 3 of the ESC Regulations.

This price determination establishes price monitoring as the form of regulation to apply to Essential Maritime Services from its date of commencement up to and including 30 October 2007.

The introduction of price monitoring, replacing the price caps established under the First Pricing Determination in 2001, is in accordance with the conclusions reached by the Commission in its *Ports Price Review – Final Report*.

That review was conducted in accordance with Section 7 of the MSA Act. It commenced in November 2002 and was completed in November 2003. The Commission considered whether Essential Maritime Services should continue to be subject to price regulation and, if so, the appropriate form of the regulation.

As was set out in the *Ports Price Review – Final Report*, the Commission concluded that price regulation of Essential Maritime Services should continue and that the form of regulation should be price monitoring, accompanied by negotiate/arbitrate access arrangements in relation to certain services (especially at grain berths). The latter part is achieved by continuing the Ports Access Regime (as set out in Part 3 of the MSA Act) and extending its coverage to include cargo services¹ at grain berths.

The Commission will conduct and complete a further review of the price regulation of Essential Maritime Services prior to 30 October 2007, with a view to determining whether Essential Maritime Services should continue to be subject to price regulation (beyond 30 October 2007) and, if so, the appropriate form of the regulation. The Commission intends to coordinate this further review with its separate obligation, under Section 43 of the MSA Act, to conduct a review of the need to continue the Ports Access Regime beyond 30 October 2007.

¹ The service of providing port facilities (as defined in the MSA Act) for loading and unloading vessels at a proclaimed port.

PART A: STATEMENT OF REASONS

1 INTRODUCTION

The Essential Services Commission of South Australia (the Commission) is assigned regulatory obligations and powers in respect of ports through the *Maritime Services (Access) Act 2000* (the MSA Act), the *Essential Services Commission Act 2002* (the ESC Act) and the *Essential Services Commission Regulations 2004* (the ESC Regulations) under the ESC Act.

The Commission makes this price determination in accordance with those obligations and powers. Specifically, the Commission makes this price determination under Sections 25 and 26 of the ESC Act, and Regulation 3 of the ESC Regulations. This paper sets out the requirements for a price determination as required under the ESC Act.

This price determination revokes and replaces the First Pricing Determination (FPD), which has been in effect since 31 October 2001, and instead establishes price monitoring as the form of regulation to apply to Essential Maritime Services. This determination takes effect on the date on which notice of its making is published in the *South Australian Government Gazette* and continues up to and including 30 October 2007.

1.1 Initial Regulation

From 31 October 2001 until the date of effect of this price determination, prices for Essential Maritime Services have been subject to price caps established under the FPD. Those price caps were subject to annual CPI adjustments, except for the price cap for the grain cargo service charge, which was fixed.

The two entities regulated under the FPD, and now under this price determination, are:

- ▲ Flinders Ports Pty Ltd; and
- ▲ ABB Grain Ltd (see Chapter 4 on the AusBulk Ltd / ABB Grain Ltd merger).

As is set out in Part B, entities regulated under this price determination are entitled “regulated service providers”. This term distinguishes entities regulated herein from those covered by the separate Ports Access Regime, which are known as “regulated operators”.

In accordance with Section 6(4) of the MSA Act, the FPD could not be varied or revoked during the initial period of price regulation, being the first three years of its operation. That initial period ended as of 31 October 2004. Hence the Commission has been able to vary or revoke the FPD since that date. The Commission can vary or revoke a price determination by making a subsequent price determination, as set out in Section 26(8) of the MSA Act.



1.2 Review

The introduction of price monitoring, replacing the price caps established under the FPD in 2001, is in accordance with the conclusions reached by the Commission in its *Ports Price Review – Final Report*, which can be found on the ports publications section of the Commission website at: www.escosa.sa.gov.au

That review was conducted in accordance with Section 7 of the MSA Act. It commenced in November 2002 and was completed in November 2003. In accordance with Section 7(1) of the MSA Act the Commission considered whether Essential Maritime Services should continue to be subject to price regulation and, if so, the appropriate form of the regulation.

As was set out in the *Ports Price Review – Final Report*, the Commission concluded that price regulation of Essential Maritime Services should continue and that the form of regulation should be price monitoring, accompanied by negotiate/arbitrate access arrangements in relation to certain services (especially at grain berths). The latter part is achieved by continuing the Ports Access Regime (as set out in Part 3 of the MSA Act) and extending its coverage to include cargo services² at grain berths.

1.3 Subsequent developments

Subsequent to the completion of the review, the Commission has completed a separate review of the Ports Access Regime, recommending that it continue for a further three years. The Commission's *Ports Access Review – Final Report*, was released in April 2004 and is available from the ports publications section of the Commission website at: www.escosa.sa.gov.au.

The South Australian Government has since made a regulation under the MSA Act continuing the Ports Access Regime. The Government also made a proclamation under the MSA Act extending the regime's coverage to include cargo services at grain berths.

The South Australian Government has also made regulations under the ESC Act (the ESC Regulations) enabling the Commission to make a price determination for Essential Maritime Services.

1.4 This price determination

This price determination establishes a system of price monitoring for Essential Maritime Services. The system is set out in Part B of the determination.

Section 25(3) of the ESC Act allows that a price determination may regulate:

- ▲ prices;

² The service of providing port facilities (as defined in the MSA Act) for loading and unloading vessels at a proclaimed port.

- ▲ conditions relating to prices; or
- ▲ price fixing factors.

The establishment of price monitoring means that in this price determination the Commission is regulating “conditions relating to prices” for Essential Maritime Services.

1.5 Further review

The Commission will conduct and complete a further review of the price regulation of Essential Maritime Services prior to 30 October 2007, with a view to determining whether Essential Maritime Services should continue to be subject to price regulation (beyond 30 October 2007) and, if so, the appropriate form of the regulation. The Commission intends to coordinate this further review with its separate obligation, under Section 43 of the MSA Act, to conduct a review of the need to continue the Ports Access Regime beyond 30 October 2007.

1.6 Structure of this paper

Part A of this determination contains the statement of reasons for making the determination and a summary of information on which the determination is based.

Chapter 1 contains this introduction.

Chapter 2 describes the process adopted for the Ports Price Review.

Chapter 3 sets out the conclusions of the Ports Price Review.

Chapter 4 describes additional and subsequent information that has arisen since the Ports Price Review.

Chapter 5 sets out the Commission’s assessment of this price determination against the relevant legislative objectives.

Part B of this determination contains the instrument of the price determination.

2 PORTS PRICE REVIEW: PROCESS

Since 31 October 2001 the prices of Essential Maritime Services have been regulated by the First Pricing Determination (FPD), issued by the Minister for Government Enterprises under Section 6 of the MSA Act.

The FPD has no fixed expiry date, but in accordance with Section 6(4) of the MSA Act it may be varied or revoked from 31 October 2004. The Commission can only vary or revoke a price determination by issuing a subsequent price determination – hence this price determination.

In general, the Commission would only make a price determination after conducting a process of thorough review and consultation, as occurred in the case of the price determination applying to the Retail Market Administrator in the gas industry.

In this case, the Commission has already conducted such a process – the Ports Price Review, which was completed in November 2003. That review, required under Section 7 of the MSA Act, required the Commission to consult on and consider the need for and form of price regulation of Essential Maritime Services. The clear purpose of that review was for the Commission to determine the requirements for this price determination.

The process for the Ports Price Review was as follows:

- ▲ The Terms of Reference were as set out in Section 7(1) of the MSA Act, being to “conduct a review of the industries subject to the pricing determination [the FPD] to determine whether essential maritime services should continue to be subject to price regulation, and, if so, the appropriate form of the regulation” *[parenthesis added]*.
- ▲ On 29 August 2002 the Commission released an *Open Letter* announcing that it would undertake the Ports Price Review (and the separate but related Ports Access Review), setting out the timelines for the reviews, and inviting registrations of interest.
- ▲ On 29 November 2002 the Commission released the *Ports Price Review Discussion Paper No.1 – Should Price Regulation Continue?* and invited submissions on the need for the price regulation of Essential Maritime Services and the form of price regulation that might apply. This paper focused more on the need for price regulation.
- ▲ The Commission received 7 submissions to this paper:
 - Shipping Australia Ltd;
 - AusBulk Ltd;
 - ABB Grain Ltd;
 - Department of Transport and Urban Planning;
 - AWB Limited;



- Dale Cole & Associates Pty Ltd; and
- Flinders Ports Pty Ltd.
- ▲ On 5 May 2003 the Commission released the *Ports Price Review – Progress Report* and invited submissions on the need for the price regulation of Essential Maritime Services and the form of price regulation that might apply. This report focused more on the form of price regulation that might apply.
- ▲ The Commission received 6 submissions to this report:
 - Port Pirie Regional Development Board Inc;
 - AusBulk Ltd;
 - ABB Grain Ltd;
 - AWB Limited;
 - Flinders Ports Pty Ltd; and
 - Perilya Broken Hill Limited (confidential submission).
- ▲ On 5 August 2003 the Commission released the *Ports Price Review – Draft Report* and invited submissions on the Commission’s draft conclusions on the need for the price regulation of Essential Maritime Services and the form of price regulation that might apply.

The Commission received 8 submissions to this report:

 - Port Pirie Regional Development Board Inc;
 - AusBulk Ltd;
 - ABB Grain Ltd;
 - AWB Limited;
 - Flinders Ports Pty Ltd;
 - Pasmaico Port Pirie Smelter;
 - South Australian Government; and
 - South Australian Freight Council Inc.
- ▲ On 3 November 2003 the Commission released the *Ports Price Review – Final Report*. The Commission concluded that Essential Maritime Services should be subject to price regulation and that the most appropriate form of price regulation was prices monitoring – subject to the Ports Access Regime continuing, with certain modifications.

The reports and submissions (non confidential) referred to above are available from the ports publications section of the Commission website at: www.escosa.sa.gov.au.

3 PORTS PRICE REVIEW: CONCLUSIONS

The following sets out the summary and conclusions from the Commission's *Ports Price Review – Final Report*.

3.1 Summary

The Commission has drawn its final conclusions in its review of price regulation of Essential Maritime Services in Proclaimed Ports, as is required under the MSA Act.

The Essential Maritime Services to which price regulation applies at Proclaimed Ports are (mostly) the basic infrastructure services a ship operator or cargo importer/exporter (consignee / shipper) needs when using a port, such as channels, navigational aids, berths and wharves, but they exclude pilotage, towage and stevedoring. They are defined in the MSA Act as:

- ▲ providing or allowing for access of vessels to a proclaimed port; or
- ▲ providing port facilities for loading or unloading vessels at a proclaimed port; or
- ▲ providing berths for vessels at a proclaimed port.

The first and third definitions relate to shipping services charged to the ship operator; the second relates to cargo services charged to the shipper.

There are seven Proclaimed Ports, as listed below.

Port Adelaide	Port Lincoln
Port Giles	Thevenard
Wallaroo	Ardrossan
Port Pirie	

Flinders Ports Pty Ltd controls the first six ports. ABB Grain Ltd (noting the recent merger – see Chapter 4) controls the port at Ardrossan. These two companies are the “regulated service providers” for the purposes of this price determination. Price regulation began on 31 October 2001, following privatisation of the first six ports³, which were formerly owned by the SA Ports Corporation.

The first stage of the review process looked at whether price regulation should continue. Based on criteria derived directly from the legislative objectives, the Commission concluded that there are sufficient grounds to continue price regulation of Essential Maritime Services, but noted that the grounds vary between services, cargoes and even customers. The Commission's key concerns surround bulk grain cargoes, as these tend to have fewer or no viable alternatives.

³ An additional port, Klein Point, was also sold but it is not a Proclaimed Port.



While the Commission has identified the potential for regulated service providers to misuse market power in a way that deprives port customers of sharing in the benefits of efficiencies in port operations, it has also recognised that Essential Maritime Services generally form only a small proportion of costs in the context of supply chains and cargo values. Accordingly, while Essential Maritime Services may present a potential opportunity for the exercise of market power, the Commission has formed the view that the effects on economic efficiency of any misuse in this area would be limited. The Commission has also recognised that many port customers have reached commercial agreements for port use with their regulated service providers, involving a variety of price and service combinations. The Commission wishes to encourage such activity.

The second stage of the review process looked at which form of price regulation should apply. An appropriate form is one that addresses the concerns identified in the first stage.

The Commission has concluded that price monitoring would be most appropriate for Essential Maritime Services. This will focus on removing the incentive for regulated service providers to earn excess profits from that subset of customers over which they may be able to exercise market power without applying undue regulation in other areas, and without unduly hindering the striking of commercial agreements between the parties.

3.2 A New Form of Ports Price Regulation

The new form of price regulation for Essential Maritime Services will involve two parts:

1. price monitoring of Essential Maritime Services for a three year period; and
2. negotiate/arbitrate arrangements in relation to grain berths⁴ – achieved by extending the existing Ports Access Regime to cover cargo services at these berths.

Price monitoring allows regulated service providers and their customers the freedom to negotiate commercial agreements, while the threat of re-regulation provides an ongoing deterrent against the misuse of market power by regulated service providers.

The extension of the negotiate/arbitrate model of the Ports Access Regime provides ongoing regulatory support to commercial negotiations in the areas subject to the Commission's greatest market power concerns (note that a negotiate/arbitrate model serves to facilitate access on fair commercial terms – it does not exist to hand out access).

The Commission is establishing price monitoring on the basis of a three-year review cycle, aligning it with the Ports Access Regime cycle. This new form of price regulation was dependent upon the Ports Access Regime continuing for a further three years beyond 31 October 2004, which the government has now done by making the appropriate regulation (see Chapter 4).

⁴ Actually berths *adjacent* to certain bulk loaders – some of which are used for more than grain.

3.3 Implementation

With the Ports Access Regime continued and coverage extended to the (cargo) service of “providing port facilities for loading or unloading vessels” at the grain berths identified in that regime, the Commission can make a new price determination replacing the FPD, setting out a price monitoring regime across the full suite of Essential Maritime Services:

- ▲ allowing regulated service providers to set their own prices for Essential Maritime Services from 31 October 2004 (or shortly thereafter) up to and including 30 October 2007;
- ▲ obliging regulated service providers to post a comprehensive (in coverage, not necessarily in size) price list (of their own design) for Essential Maritime Services throughout that period;
- ▲ allowing regulated service providers and their customers to enter commercial arrangements involving price/service levels and structures that differ from the posted price list if both parties agree, or, for example, if the service demanded requires additional investment;
- ▲ obliging regulated service providers to inform the Commission of the posted prices, any changes as may occur to them from time to time, and (on a confidential basis) in summary form, any other prices at which Essential Maritime Services are provided;
- ▲ allowing the Commission to monitor and report on Essential Maritime Services prices and associated performance through that period, including benchmarking against other relevant ports as appropriate; and
- ▲ having the Commission conduct a subsequent review to determine whether price regulation is warranted beyond 30 October 2007, and if so, in what form (the review would begin in 2006).

If the subsequent review found that the regulated service providers had been, for example, misusing market power, then the Commission would be able to introduce new price regulation of any form from 31 October 2007. This provides a strong incentive for regulated service providers to steer clear of misusing market power.

In line with the enduring requirements of the FPD, the new price determination also states that a regulated service provider is not entitled to make or publish a price increase to recover the construction and/or ongoing maintenance costs of an Excluded Asset (being the Port Giles, Wallaroo and Outer Harbour assets established or extended as per the ports sale agreement). Breaching this would be a contravention of the price determination.

The Commission will continue to collect financial and operational performance data from the regulated service providers throughout the period under the two existing Ports Industry Guidelines, which may be amended to reflect the new form of price regulation.

The Commission may publish summary performance reports periodically to inform port customers and the community about the performance of the regulated service providers.



The Commission expects to develop and include benchmark measures in these reports that would allow some comparison with ports elsewhere, and will work in collaboration with the regulated service providers, port customers, and others, in developing these reports.

3.4 Subsequent Review

Under the new form of price regulation, the Commission will conduct a subsequent review of price regulation of Essential Maritime Services. In that review the Commission will determine whether price regulation should continue from 31 October 2007, and if so, in what form. The Commission expects that the review will begin in late 2006.

The Commission expects that key criteria for that review will involve observations of the actual behaviour of the regulated service providers under the price monitoring regime. In particular:

- ▲ the timing and frequency of changes to the posted price list;
- ▲ the degree of transparency displayed;
- ▲ the incidence and outcome of disputes under the Ports Access Regime;
- ▲ successful negotiations;
- ▲ trends in service quality;
- ▲ price changes – in absolute terms and relative to other ports (noting, for example, that the Commission does not necessarily accept CPI as an appropriate basis for ongoing price rises);
- ▲ revenue / volume growth;
- ▲ levels of, and changes in, financial performance; and
- ▲ pricing patterns at regional ports – noting that some regional port users face ongoing cost and service pressures. The Commission will review the price and service performance at regional ports closely as this will have a major bearing on the conclusions of the subsequent review.

While the review will look at (then) past behaviour, the Commission expects that it will also consider whether other structural changes affect the outlook and hence, for example, the ongoing potential for misuse of market power. Upgrades at Ardrossan and other ports, rail infrastructure improvements that increase effective Victorian port competition, new port developments, and so on are examples of the type of structural developments that the Commission expects it will consider.

These comments are provided for guidance. However, the Commission will not limit its future self in terms of what specific issues the subsequent review may cover.

3.5 *Transitional arrangements*

The Commission is aware that some port customers have contracts involving discounts or rebates linked directly to the prices established under the First Pricing Determination. The Commission required each regulated service provider to write to each of these contracted customers by the end of November 2003, to alert them to this change. This was to ensure that those customers had advance notice of the change in regulation (almost one year), and hence an opportunity to renegotiate/restructure their contracts. (This notification has occurred as required.)

4 ADDITIONAL AND SUBSEQUENT INFORMATION

Since the completion of the Ports Price Review in November 2003 a number of developments have occurred that are of relevance to the making of this price determination. These are discussed below.

4.1 Ports Access Regime extension

Subsequent to the completion of the Ports Price Review, the Commission completed a separate review of the Ports Access Regime, recommending that it continue for a further three years. The Commission's *Ports Access Review – Final Report*, was released in April 2004 and is available from the ports publications section of the Commission website at: www.escosa.sa.gov.au.

The South Australian Government has since made a regulation under the MSA Act continuing the Ports Access Regime. The Government also made a proclamation under the MSA Act extending the regime's coverage to include cargo services at grain berths. Specifically this involved the proclamation of:

“providing port facilities for loading or unloading vessels at berths adjacent to the loading and unloading facilities referred to in paragraph (d)” [these being the six covered ABB Grain Ltd shiploaders]

Together, these developments satisfied the Commission's requirements for the implementation of price monitoring of Essential Maritime Services.

4.2 Regulatory developments

The South Australian Government has also made regulations under the ESC Act (the ESC Regulations) enabling the Commission to make a price determination for Essential Maritime Services – overcoming the silence of the MSA Act on this power.

The government gave Flinders Ports and ABB Grain opportunity to comment on the making of the regulation and both supported this (Flinders Ports made it clear that it was of the understanding that the Commission would only make a price determination giving effect to the recommendations of its *Ports Price Review – Final Report*).

The making of the ESC Regulations, specifically Regulation 3, enables the Commission to make this price determination.

4.3 Grain Merger

On 27 September 2004 ABB Grain Ltd, AusBulk Ltd and United Grower Holdings merged to form a new entity called ABB Grain Ltd.

The merger received Australian Competition and Consumer Commission (ACCC) approval subject to ABB Grain Ltd giving an undertaking relating to access to their port-



sited storage, handling and associated facilities. The undertaking is given under Section 87B of the *Trade Practices Act 1974* (Cwlth) in order to receive Section 50 merger clearance from the ACCC.

There is some minor overlap between the undertaking and the Ports Access Regime, although the two are not inconsistent.

The merger has internalised the customer-provider relationship between AusBulk Ltd and ABB Grain Ltd (the immediate post-merger structure has AusBulk Ltd as a wholly owned subsidiary of ABB Grain Ltd). However, this does not affect the position of Flinders Ports Pty Ltd. The merger has not led the Commission to alter its conclusions on price regulation.

5 ASSESSMENT AGAINST LEGISLATIVE OBJECTIVES

In making this price determination the Commission is required to comply with the relevant provisions of the ESC Act. This means:

- ▲ satisfying the relevant legislative objectives in Section 6 of the ESC Act;
- ▲ having regard to the factors set out in Section 25 (4) of the ESC Act; and
- ▲ satisfying the matters set out in Section 25 (5) of the ESC Act.

5.1 Section 6 factors

5.1.1 ESCOSA must have as its primary objective the protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential 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 an the Commission decision might impact on price, quality and reliability of Essential Maritime Services⁵ in the longer term (the next few years or even decades). This includes the need to ensure that they:

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

The focus on long-term interests ensures that the consumer protection aspect of price regulation is not used to force short-term, but unsustainable, price reductions.

Price monitoring supports the long-term delivery of Essential Maritime Services, as it provides incentives for the regulated service providers to continue to invest in and provide those services. However, the threat of re-regulation also ensures that the regulated service providers do not use their position to deliver inefficient, outdated, poor or excessively priced services.

⁵ 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 Essential Maritime Services.

5.1.2 Have regard to the need to promote competitive and fair market conduct

Promoting competitive and fair market conduct requires that price 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 levels of competition and conduct in the market for Essential Maritime Services and concluded that there is significant competitive behaviour in some areas, but less so in others. The purpose of price monitoring is to provide an incentive for regulated service providers to act in a competitive manner in those areas with less competitive pressure.

5.1.3 Have regard to the need to prevent misuse of monopoly or market power

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

The Commission has concluded that there are some areas in which there is potential for the misuse of monopoly or market power – although there is some uncertainty over the degree to which any misuse might occur. Price monitoring is designed to reduce this potential. The extension of the Ports Access Regime further mitigates against this.

5.1.4 Have regard to the need to facilitate entry into relevant markets

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

The Commission has noted in its *Ports Price Review – Final Report* that entry into Essential Maritime Services in existing ports is unlikely, with the possible exception of mooring services. Price regulation of any form is unlikely to overcome this situation.

As Essential Maritime Services are such a small component of most supply chain costs, price regulation of them in any form is unlikely to have more than a marginal

effect on port throughput. Hence related market entry is also unlikely to be impacted – at the very least, price monitoring is unlikely to hinder entry into related markets.

5.1.5 Have regard to the need to promote economic efficiency

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

The Commission has shown that the efficiency effects of Essential Maritime Services prices are minor. However, there would be some efficiency costs associated with the misuse of market power. By providing a disincentive for such behaviour, price monitoring will promote economic efficiency.

5.1.6 Have regard to the need to ensure consumers benefit from competition and efficiency

This objective requires that the benefits of competitive and efficient markets flow through to customers and are not captured solely by regulated service providers. This means that if price regulation is used, it should be designed to encourage the distribution and sharing of benefits.

This is a key consideration in the case of Essential Maritime Services, for while the efficiency costs may be small, the exercise of market power in Essential Maritime Services could result in consumers missing out on the benefits of port efficiencies.

Price monitoring provides a disincentive to engage in such practices where market power exists, and hence will assist in ensuring that customers can benefit from efficiency gains.

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

This requires that price regulation should not squeeze prices so far as to threaten the financial viability of the provider of Essential Maritime Services. Further, it recognises the need for an appropriate return on investment if the industry is to continue to invest in its operations and deliver services to customers over time.

As a light handed form of regulation, price monitoring provides considerable freedom to regulated service providers to price in a manner that will maintain viability and investment levels.

5.1.8 Have regard to the need to promote consistency in regulation with other jurisdictions

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

In Australia, only Victoria and Queensland other than South Australia apply economic regulation to ports. Queensland applies an access negotiation system to private ports, akin to the Ports Access Regime. Victoria has applied a more stringent form of price regulation, although a recent review of those arrangements has proposed a move to a form of regulation along the lines of that set out in this price determination.

Other jurisdictions apply no economic regulation, but ports are subject to various degrees of government control. Thus it is difficult to identify any form of price regulation as achieving consistency.

5.2 Section 25(4) factors

5.2.1 Have regard to the particular circumstances of the regulated industry and the goods and services for which the determination is being made

This objective requires the Commission to consider any circumstances relating to the regulated industry that are relevant in making this price determination. The Commission has had regard to these circumstances by conducting the Ports Price Review, which involved a detailed examination of the ports industry, and the specific subset of that industry in which Essential Maritime Services are provided. The Commission also assessed the interaction between the provision of Essential Maritime Services and the ports use decisions of port customers.

5.2.2 Have regard to the costs of making, producing or supplying the goods or services

In selecting price monitoring, the Commission has adopted a form of price regulation that ensures that a regulated service provider will be able to fairly price such that they can recover the cost of providing Essential Maritime Services.

5.2.3 Have regard to the costs of complying with laws or regulatory requirements

This objective requires the Commission to consider any particular costs that a regulated service provider will incur in fulfilling any relevant legal requirements. For regulated service providers this would include compliance with this price determination and with the MSA Act, including the Ports Access Regime.

In selecting price monitoring, the Commission has adopted a form of price regulation that ensures that a regulated service provider will be able to fairly price such that they can recover the cost of complying with these requirements.

5.2.4 Have regard to the return on assets in the regulated industry

This objective requires the Commission to consider the rate of return that a regulated service provider business is receiving on its investment through its pricing. An unreasonably low return on assets would discourage future investment, and vice versa for high returns. This is likely to lead to a reduction in service and could potentially threaten the financial viability of the business over the longer term.

Under price monitoring, it is not appropriate for the Commission to set a benchmark rate of return – this would lead to *de facto* price fixing by the Commission. Rather, the review to be conducted by the Commission in 2006/2007 will be able to consider the return being generated by regulated service providers as part of any decision to re-regulate.

5.2.5 Have regard to any relevant interstate and international benchmarks for prices, costs and return on assets in comparable industries

In the Ports Price Review, the Commission conducted detailed comparisons of the prices of Essential Maritime Services between South Australia and similar ports elsewhere in Australia. The result of that analysis showed that prices in South Australia were comparable to other jurisdictions, particularly when taking into account the differences between the various ports. That analysis was a significant factor in the Commission's decision to adopt price monitoring.

5.2.6 Have regard to the financial implications of the determination

This requires the Commission to consider the financial impact of its price determinations. This includes the financial implications for the regulated service providers and/or their customers.

The financial implications for a regulated service provider of a price determination includes consideration of the ability for the business to generate finance. This was a consideration of the Commission in deciding to adopt price monitoring, in that it

would not place an undue limitation upon the capacity of the regulated service providers.

The financial implications of a price determination for customers of a regulated service provider relates to an assessment of the customer impact of that decision. In this price determination, the Commission has considered both the impact on port users and South Australian consumers more generally. The Commission formed the view that price monitoring was appropriate as long as certain classes of customers had the Ports Access Regime available to them – including grain customers. The continuance and extension of the Ports Access Regime addressed this concern.

5.2.7 Have regard to any factors specified by a relevant industry regulation Act or by regulation under this Act

The Commission acknowledged the intent in the FPD that the treatment of excluded assets under price regulation be continued. The Commission has included this in Part B of this price determination.

In undertaking the Ports Price Review the Commission also had regard to the following relevant objects of the MSA Act.

S.3(b) – facilitate competitive markets in the provision of Maritime Services

This applies to the MSA Act generally, of which the price regulation of Essential Maritime Services (which are Maritime Services) is only one part. The main message is to avoid “over regulation”, which stifles competitive markets.

Price monitoring has a very low risk of stifling competitive markets because it allows regulated service providers and their customers to seek out their own preferred arrangements for the supply of Essential Maritime Services.

S.3(c) – 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 is specific to price regulation of Essential Maritime Services and identifies the need for regulated prices to be “fair and reasonable”. It also identifies competition and efficiency as key considerations. This objective goes to the heart of the selection of an appropriate form of regulation. The Commission is adopting price monitoring because it provides an incentive for regulated service providers to avoid misusing market power, and to share the benefits of efficiencies achieved, but recognises the various competitive pressures that they are under already.

5.2.8 Have regard to any other factors that the Commission considers relevant

The Commission has considered all issues that it considers relevant in making this price determination. These factors include the industry and market characteristics considered by the Commission during and subsequent to the Ports Price Review.

5.3 Section 25(5) factors

5.3.1 To ensure, wherever possible, that in making a price determination the costs of regulation do not exceed the benefits

Different forms of regulation impose different administrative and compliance costs upon the regulator and regulated entities. Generally, the costs of regulation increase as the form of regulation becomes more intrusive (or complex). This factor requires the Commission to ensure that the regulatory costs do not exceed any benefit from that regulation.

This factor was given specific consideration in the Ports Price Review, with the Commission noting that the total market for Essential Maritime Services is around \$40 million annually, and that only around half of this gives rise to any significant market power concerns. It is therefore not appropriate to incur significant costs in regulating Essential Maritime Services.

A reason for choosing to apply price monitoring is the relatively low costs attached to this form of regulation relative to more intrusive forms of regulation. However, price monitoring is not a free form of price regulation. For example, the monitoring aspect clearly signals the need to generate, collect and analyse relevant information within this form of regulation.

5.3.2 The decision takes into account and clearly articulates any trade-off between costs and service standards

This factor highlights the regulatory bargain that exists in any form of regulation. It describes the relationship between the service level supplied by the regulated business and the price it charges.

The trade-off refers to the dynamics of this price and service level relationship. Costs incurred by a regulated business will usually increase as the service level it is required to provide increases (and vice versa for lower service levels).

The service standards that providers of Essential Maritime Services are required to meet are predominantly set by customer demand, legislated safety requirements and international maritime norms. The Commission has not imposed additional service standards as an outcome of this price determination.

PART B: PRICE DETERMINATION



PRICE DETERMINATION

This Price Determination in relation to ***Essential Maritime Services***

was made by the Commission on 5 November 2004

pursuant to Part 3 of the *Essential Services Commission Act 2002* and the *Essential Services Commission Regulations 2004*.

Affix Commission Common Seal Here

1. ***Preliminary***

Authority

- 1.1 This price ***determination*** is made pursuant to the powers of the ***Commission*** under Part 3 of the *Essential Services Commission Act 2002* and the *Essential Services Commission Regulations 2004*.

Period of Operation

- 1.2 This ***determination*** has effect from the date on which notice of its making is published in the *South Australian Government Gazette*, up to and including 30 October 2007.

Purpose and Application

- 1.3 This ***determination*** regulates conditions relating to prices for ***essential maritime services*** provided by a ***regulated service provider*** during the period starting on the date on which notice of its making is published in the *South Australian Government Gazette*, up to and including 30 October 2007.
- 1.4 This ***determination*** binds a ***regulated service provider*** operating at a ***proclaimed port***.

Revocation of First Pricing Determination

- 1.5 This ***determination*** revokes and replaces the first pricing determination made by the Minister for Government Enterprises pursuant to section 6(2) of the *Maritime Services (Access) Act 2000* and which took effect from 31 October 2001.

Interpretation

- 1.6 Words appearing in bold like ***this*** are defined in Appendix 1 of this ***determination***.
- 1.7 This ***determination*** must be interpreted in accordance with the rules set out in Appendix 2.

2. **Price Determination**

Published Prices

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

Excluded Assets

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

Price Monitoring

- 2.5 The **Commission** may, during the period of this determination:
- 2.5.1 monitor the prices charged for the provision of **essential maritime services** by a **regulated service provider**;
- 2.5.2 publish reports on prices charged for **essential maritime services** by a **regulated service provider**; and
- 2.5.3 monitor and publish reports on matters relating to prices charged for **essential maritime services** by a **regulated service provider**.

Reporting Requirements

- 2.6 A **regulated service provider** must inform the **Commission** of any changes to its published prices by providing a copy of the changed list of prices to the **Commission** within 10 **business days** of the changed list of prices being set and published.
- 2.7 A **regulated service provider** must inform, and give relevant details to, the **Commission** of any agreement reached under clause 2.3 within 20 **business days** of the agreement being reached.
- 2.8 A **regulated service provider** must make available to the **Commission** any information relating to prices that is reasonably requested by the **Commission**.

Appendix 1 – Definitions

“Commission” means the Essential Services Commission, a body corporate established pursuant to section 4 of the *Essential Services Commission Act 2002*.

“business day” means a day on which banks are open for general banking business in Adelaide, other than a Saturday, or a Sunday.

“determination” means this price determination made by the Commission pursuant to Part 3 of the *Essential Services Commission Act 2002* and Regulation 3 of the *Essential Service Commission Regulations 2004*.

“essential maritime services” has the same meaning as is given to that term in the *Maritime Services (Access) Act 2000*.

“excluded asset” means the assets established or extended by a **regulated service provider** pursuant to binding commitments in the Capital Expenditure and Maintenance Deeds for Port Adelaide, Port Giles and Port of Wallaroo:

- (a) channel dredging and upgrade of the wharf facilities at Port Giles to accommodate panamax vessels;
- (b) upgrade of the wharf facilities at Wallaroo to accommodate the partial loading of panamax vessels; and
- (c) dredging of the Outer Harbour channel to accommodate panamax bulk grain vessels, dredging of a new berth pocket and development of a new 300 metre grain wharf.

“proclaimed port” has the same meaning as is given to that term in the *Maritime Services (Access) Act 2000*.

“regulated service provider” means a person who carries on a business of providing essential maritime services at a proclaimed port.

Appendix 2 – Rules of Interpretation

In this determination, unless the context otherwise requires:

1. Headings and footnotes are for convenience or information only and do not affect the interpretation of this price determination.
2. Words importing the singular include the plural and vice versa.
3. An expression importing a natural person includes any company, partnership, trust, joint venture, association, corporation or other body corporate and any governmental agency and vice versa.
4. A reference to a clause or appendix is to a clause or appendix of this price determination.
5. A reference to any statute includes all statutes varying, consolidating, re-enacting, extending or replacing them and a reference to a statute includes all regulations, proclamations, ordinances, by-laws and determinations issued under that statute.
6. A reference to a document or a provision of a document includes an amendment or supplement to, or replacement of or novation of, that document or that provision of that document.
7. A reference to a person includes that person's executors, administrators, successors, substitutes (including, without limitation, persons taking by novation) and permitted assigns.
8. Other parts of speech and grammatical forms of a word or phrase defined in this price determination have a corresponding meaning.