PREM10D04996

Hon. Mike Rann MP
Premier of South Australia

Mr John Feil
Executive Director
National Competition Council
Level 9,128 Exhibition Street
MELBOURNE VIC 3000

Dear Mr Feil

I am writing in accordance with section 44M of the *Trade Practices Act 1974* (Cth) to request that the National Competition Council recommend to the Commonwealth Minister that the South Australian ports access regime be declared an effective access regime.

This submission is also made in accordance with the Competition and Infrastructure Reform Agreement implementation plan. Following the February 2006 Council of Australian Governments agreement, South Australia commenced the process of amending its legislation to enhance regulatory outcomes for nationally significant ports and rail networks.

The South Australian *Maritime Services (Access) Act 2000* (the MSA Act) established the price and access regulation of proclaimed ports in this State, with monitoring and control the responsibility of the Essential Services Commission of South Australia (ESCOSA). The Act was intended to:

- provide access to maritime services on fair and commercial terms
- facilitate competitive markets in the provision of maritime services
- protect the interests of users of essential maritime services by ensuring that regulated prices are fair and reasonable for the industry concerned; and
- ensure disputes about access are dealt with efficiently.

The MSA Act aims to ensure access to regulated services on fair commercial terms through a negotiate-arbitrate access regime. This level of access regulation is intended to strike the right balance between promoting competition and facilitating timely investment in port facilities.

Further information about the access regime is set out on the website of the South Australian Department for Transport, Energy and Infrastructure at www.dtei.sa.gov.au/ data/assets/pdf file/0005/44870/int29D.PDF and on the ESCOSA website at http://www.escosa.sa.gov.au/ports-overview.aspx .

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To assist in your consideration of this matter, I have enclosed the information required by regulation 6B of the Trade Practices Regulations 1974 (Cth).

Should you have any questions in relation to this request, the contact officer in the Department for Transport, Energy and Infrastructure is Ms Christine Bierbaum who can be contacted on telephone (08) 8463 6239.

Yours sincerely

MIKE RANN
Premier

10/6/2010

Government of South Australia

Certification of the South Australian Ports Access Regime

Submission to the National Competition Council

October 2010

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Application and Contact Details

This application is made under section 44M(2) of the Trade Practices Act 1974(Cth) (**TPA**) and the following supporting information is submitted for the National Competition Council's (**NCC**) consideration in accordance with Regulation 6B of the Trade Practices Regulations 1974 (Cth).

Applicant

The application is made on behalf of the State of South Australia.

Responsible Minister

The Responsible Minister for South Australia concerning this application is the Hon Mike Rann MP, Premier.

Contact Officer

The Contact officer for South Australia for matters relating to this application is:

Ms Christine Bierbaum
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Background

In 2000 the South Australian Parliament passed the *South Australian Ports (Disposal of Maritime Assets) Act 2000; the Maritime Services (Access) Act 2000*, and the *Harbors and Navigation (Control of Harbors) Amendment Act 2000*. These Acts established the legislative framework for the privatisation of the South Australian Ports Corporation and the subsequent port access and management regime.

The Maritime Services (Access) Act 2000 (MSA Act) established the price and access regulation to be applied to the previously State Government owned ports, with ongoing monitoring and control of these aspects being the responsibility of South Australia's independent economic regulator, the Essential Services Commission of South Australia (ESCOSA).

In February 2006 the Council of Australian Governments (COAG) signed the Competition and Infrastructure Reform Agreement (CIRA), aimed at achieving a simpler and more consistent national approach to the economic regulation of significant infrastructure.

In April 2007 the COAG agreed CIRA implementation plan committed South Australia to reviewing the ports access regime and amending it to ensure it is consistent with the principles of the CIRA followed by seeking certification under the *Trade Practices Act 1974* (TPA).

A review of ports pricing and access was conducted by ESCOSA in 2007 to determine CIRA compatible amendments required.

ESCOSA concluded that the ports access regime is generally consistent with the relevant CIRA principles, although it identified some areas where greater consistency could be brought about and where some general improvements to the access regime could be made.

The *Maritime Services (Access)(Miscellaneous) Amendment Act 2009* based on ESCOSA's recommendations was passed by Parliament in May and proclaimed to commence on 1 November 2009.

As the South Australian ports and facilities are a crucial gateway for and service the needs of importers and exporters and trade related industries and having completed the process necessary to ensure that the State ports access regime is consistent with the CIRA, South Australia is now seeking certification of the access regime.

Overview of the South Australian Ports Access Regime

The South Australian access regime is embodied in the MSA Act, which was assented to on 14 December 2000 (see Attachment 1). The Act came into operation on 31 October 2001.

The MSA Act aims to ensure access to regulated services on fair commercial terms through a negotiate-arbitrate access regime. This light-handed form of access regulation is intended to strike the right balance between promoting competition and facilitating timely investment in port facilities.

The MSA Act defines three categories of services: maritime services, regulated services and essential maritime services. Regulated services and essential maritime services are subject to the access regime. Essential maritime services are, in addition, subject to price regulation.

The access regime prescribed by the MSA Act applies to those persons (regulated operators) who carry on a business of providing maritime services at a proclaimed port that are declared by proclamation to be regulated services. Under the access regime a regulated operator must provide regulated services on terms agreed between the operator and the customer, or if agreement is not reached, on an award determined by arbitration.

The Governor may, by proclamation, declare those ports listed in section 5 of the MSA Act to be subject to the access regime. The section provides that other ports may also be declared by regulation to be subject to the access regime. For example ESCOSA recommended that the government revoke coverage of the access regime applied to the port at Ardrossan due to the nature of the operations at this port (long term contract in place with the sole user and no existing coverage over the bulk loader). If, following the removal of Ardrossan, access is sought, a proclamation can bring the port back under the Act.

“Maritime Services” are services provided on a commercial basis such as: allowing for access of vessels, pilotage, providing berths and loading and unloading facilities and storage of goods. It does not include towage, bunkering, provisioning of vessels or waste removal.

“Essential Maritime Industries” are a subset of “Maritime Services” and are to be regulated industries under the South Australian *Essential Services Commission Act 2002* and subject to pricing regulation.

“Essential Maritime Industry” is defined to mean an industry which provides an Essential Maritime Service(s) at a proclaimed port.

“Essential Maritime Industries” are subject to a pricing determination made by the Minister. The determination is administered by ESCOSA and from 2009 operates for a period of five years.

In accordance with section 5 of the MSA Act the following ports were proclaimed on 25 October 2001 to be subject to the requirements of the MSA Act:

- Port Adelaide
- Port Giles
- Wallaroo
- Port Pirie
- Port Lincoln
- Thevenard
- Ardrossan.

The first six above named Flinders Ports Pty Ltd ("Flinders Ports") operated ports remain the proclaimed ports under the MSA Act. Ardrossan was removed from the coverage of the Access Regime following ESCOSA's 2007 review.

The MSA Act was enacted to:

- provide access to maritime services on fair commercial terms;
- facilitate competitive markets in the provision of maritime services;
- 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 industry concerned; and
- ensure disputes about access are dealt with efficiently.

Part 1, section 3 of the MSA Act sets out the objectives of the legislation, namely:

- to provide access to maritime services on fair commercial terms
- to facilitate competitive markets in the provision of maritime services through the promotion of the economically efficient use and operation of, and investment in, those services
- to protect the interests of users of essential maritime services by ensuring that regulated prices are fair and reasonable having regard to the level of competition in, and efficiency of, the regulated industry
- to ensure that disputes about access are subject to an appropriate dispute resolution process.

Structure of the ports access regime

The MSA Act establishes an access regime which contains the following main components:

- Part 2, Division 1 provides that essential maritime industries are to be subject to a first pricing determination by the Minister for five years
- Part 2, Division 2 places an obligation on the providers of pilotage services to keep a schedule of current charges and to notify ESCOSA of any changes to those charges
- Part 2, Division 3 places an obligation upon ESCOSA to keep maritime industries under review with a view to determining whether regulation is required under the *Essential Services Commission Act 2002*
- Part 3, Division 1 provides that those persons who carry on a business of providing proclaimed regulated maritime services will be subject to the access regime (regulated operators)
- Part 3, Division 2 outlines the basis of access on fair commercial terms, that is, access either by agreement between the parties or on fair commercial terms determined through arbitration
- Part 3, Division 3 establishes the process by which a person who is seeking access, the proponent, may make a proposal to a regulated operator to gain access, and provides that disputes may be referred to ESCOSA
- Part 3, Division 4 provides that ESCOSA must attempt to settle access disputes, in the first instance, by conciliation
- Part 3, Division 5 provides that where conciliation has not resolved the dispute, or if the dispute is not resolved within 6 months after the referral of the dispute to ESCOSA, the dispute is to be referred to arbitration
- Part 3, Division 6 prescribes who may be a party to arbitration and who may represent those parties, and enables ESCOSA to participate in the proceedings
- Part 3, Division 7 prescribes the conduct of the arbitration and the powers of the arbitrator

- Part 3, Division 8 outlines the formal requirements of awards made as a result of the arbitration process
- Part 3, Division 9 provides for the enforcement of awards
- Part 3, Division 10 outlines the right to appeal to the Supreme Court from an award, or a decision not to make an award, on a question of law, and provides for the distribution of costs of the arbitration between the parties
- Part 3, Division 11 requires regulated operators to segregate their accounts with respect to regulated services
- Part 3, Division 12 establishes a five year cycle of review by ESCOSA which must, within the last year of each cycle, conduct a review of the industries subject to Part 3 of the MSA Act to determine whether this Part should continue to apply to those industries
- Part 4 deals with various miscellaneous matters including a prohibition against any person hindering another entitled person's access to maritime service, the power to vary or revoke proclamations made under the MSA Act, transitional provisions, and the power to make regulations under the MSA Act.

Services covered by the Access Regime

As indicated above, maritime services are:

- providing or allowing for access of vessels to a proclaimed port;
- a pilotage service facilitating access to a proclaimed port;
- providing berths for vessels at a proclaimed port;
- providing port facilities for loading or unloading vessels at a proclaimed port;
- providing for the storage of goods at a proclaimed port; and
- providing access to land in connection with the provision of services of any of the kinds mentioned above.

Pursuant to section 10 of the MSA Act, maritime services falling within the scope of the access regime were proclaimed on 25 October 2001. These regulated services are:

- channels;
- common user berths (identified in the proclamation);
- bulk handling facilities as defined in the *South Australian Ports (Bulk Handling Facilities) Act 1996* but only in relation to conveyer belts (ie not including storage areas);
- berths adjacent to bulk handling facilities; and
- land providing access to maritime services.

Following ESCOSA's 2007 review the Outer Harbor bulk loader was also brought under the MSA Act by proclamation (29 October 2009).

Pricing Determination by the Minister

Section 6 of the MSA Act provides that essential maritime industries are regulated industries for the purposes of the *Essential Services Commission Act 2002* and establishes the current pricing determination period ending 30 October 2012 - and thereafter for five year periods.

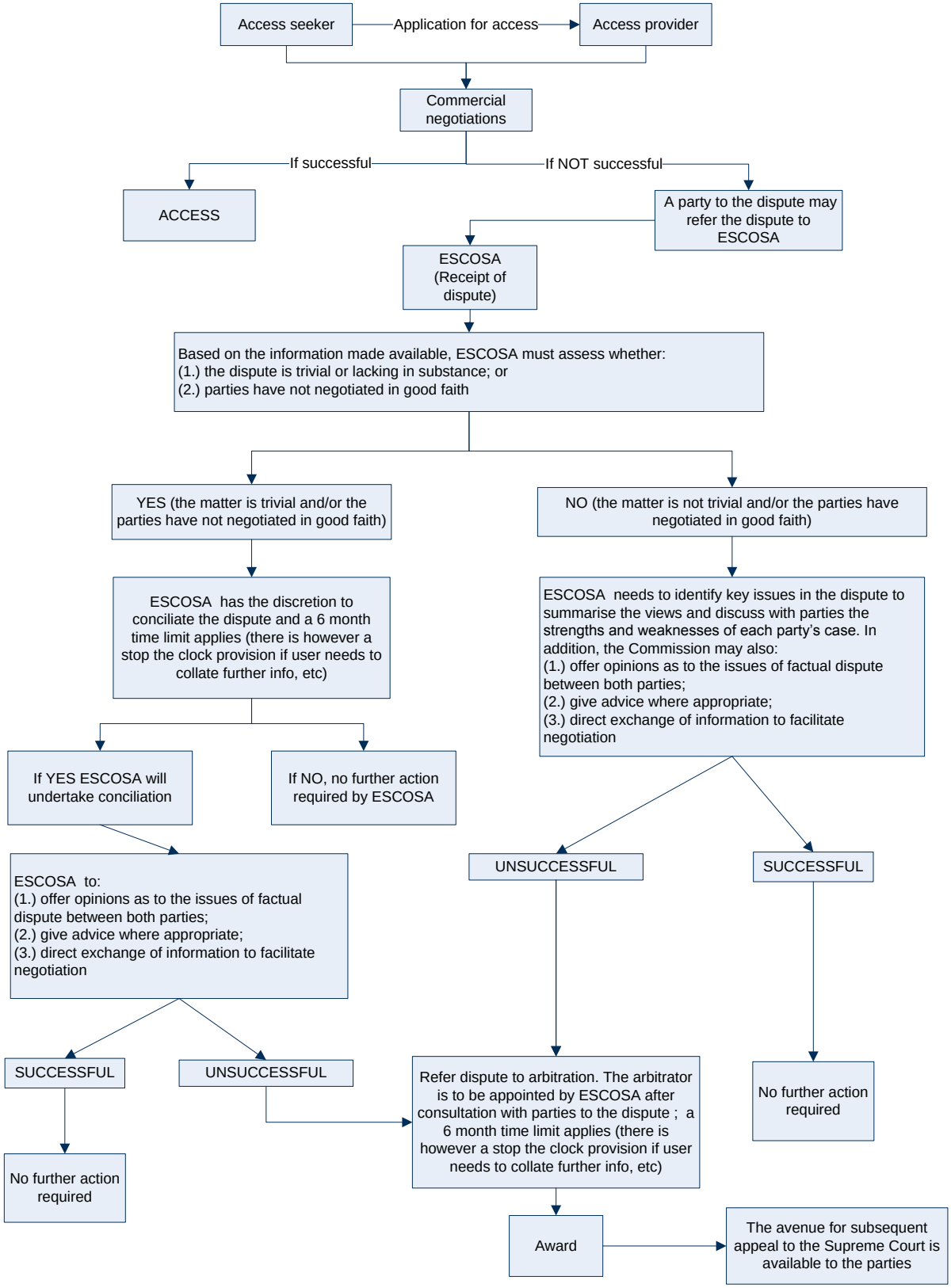
The MSA Act aims to ensure access to regulated services on fair commercial terms through a negotiate-arbitrate access regime. This light-handed form of access regulation is intended to strike the right balance between promoting competition and facilitating timely investment in port facilities. The price review conducted by ESCOSA recommended the maintenance of this negotiate-arbitrate regime, as ESCOSA found that port users were able to negotiate their own contract terms and conditions under this access model and that users were actively negotiating prices with Flinders Ports below the publicly listed prices.

As ESCOSA identified in their *2009 Ports Price Monitoring Report* (November 2009)[1], this light-handed form of regulation can be escalated if required, with ESCOSA recommending a more prescriptive form of price regulation if it deems it is warranted.

The diagram below details how the access regime operates in South Australia.

[1] Available at http://www.escosa.sa.gov.au/library/091125-2009PortsPriceMonitoringReport.pdf

OPERATION OF STATE ACCESS REGIME FOR SOUTH AUSTRALIAN PORTS



South Australian Ports

The access regime covers the six main commercial ports which are currently operated by Flinders Ports. The map provided below identifies these as well as the remaining sea ports of South Australia. The port of Ardrossan, as explained previously, was removed from coverage.

Port Adelaide is South Australia's largest port facility and is the only port capable of handling significant volumes of containers. Whilst the port accounts for the

majority of the cargos handled in South Australia, it is still considered to be small compared to other major Australian ports. In 2008/09 the volume of overseas container trade that passed through the Port Adelaide Container Terminal was 3,048,727 tonnes which represents 5.44% of Australia's overseas container trade volume.[2] The overseas bulk cargo throughput in Adelaide in 2008/09 was 6,407,570 tonnes, which is about 1% of the national overseas bulk trade[3].

The ten main commercial ports operating in South Australia (as shown on the map above) are key contributors to South Australia's economic prosperity, providing an essential interface between land and maritime transport.

Although situated in different locations, it is important to note that these ports do not exist in isolation, but conjoin to form vital transfer points in the State's overall transport system.

Since the privatisation of the ports in 2001, Flinders Ports operates seven of these ports.

The following six ports operated by Flinders Ports are subject to the port access regime:

- Port Adelaide,
- Thevenard,
- Port Lincoln,
- Wallaroo,
- Port Giles, and
- Port Pirie.

Flinders Ports was responsible for handling 67 per cent of the total tonnage of cargo through the South Australian ports in 2008/09, with the total tonnage handled through Flinders Ports' ports reaching 14.8 million in the 2008/09 year[4].

The port at Klein Point is also operated by Flinders Ports, but it is not a proclaimed port under the access regime because it has no common user berths and it is dedicated to the shipping of limestone to Port Adelaide by a single user.

The ports at Port Stanvac, Whyalla and Port Bonython are also not proclaimed ports.

Port Stanvac has been decommissioned, but when it was in operation provided feed stocks for the Mobil Oil Refinery.

The ports at Whyalla and Port Bonython were established and operate under Indentures supported by State Acts of Parliament. They have historically been, and are currently, single user ports integrated with production facilities for iron ore and liquid fuels respectively, servicing the needs of the owners/operators. Whyalla (One Steel) is used to ship iron ore and Port Bonython (SANTOS) is used to ship liquid hydrocarbons.

[2] From Ports Australia at www.portsaustralia.com.au/tradestats accessed 4/5/10.
[3] ibid
[4] ibid

The ports at Penneshaw, Kingscote and Cape Jervis are not covered by the access regime, as these ports primarily provide passenger transport facilities and intrastate cargo services rather than services for international cargo shipping.

2007 ESCOSA Review

The most recent review of ports pricing and access was conducted by ESCOSA in 2007[5]. The review of pricing concluded that while there is potential for market power to be exercised by port operators, there was no evidence to suggest that port operators were exercising such power. ESCOSA therefore recommended that the current light-handed form of price regulation (price monitoring) be maintained.

In terms of access, ESCOSA found that port users were able to negotiate their own contract terms and conditions under the negotiate-arbitrate access model and that users were actively negotiating prices with Flinders Ports South Australia below the publicly listed prices.

ESCOSA concluded that the ports access regime is generally consistent with the relevant CIRA principles, although it identified some areas where greater consistency could be brought about and where some general improvements to the access regime could be made.

ESCOSA also recommended that Ardrossan be removed from the access regime as this was a privately owned and operated single commodity port with little potential to require additional port access in the near future. The owners of Ardrossan voluntarily placed the port under the access regime in February 2002.

ESCOSA also identified various procedural improvements that could be introduced into the negotiate-arbitrate framework.

In response to ESCOSA's 2007 review the South Australian Government aproved amendments to the MSA Act. The *Maritime Services (Access) (Miscellaneous) Amendment Act 2009* received royal assent in June 2009 and was proclaimed in October 2009 to commence 1 November 2009. The following amendments were made to achieve consistency of the legislation with the specific clauses of the CIRA :

- the objects clause in section 3 of the MSA Act to include specific mention of "the promotion of the economically efficient use and operation, of, and investment in, those services" consistent with clause 2.4 of the CIRA;

- the Interpretation clause of the MSA Act and section 43 to amend time periods for price regulation, such that triennial cycles are replaced by a (successive) prescribed period of five years to reduce regulatory costs and uncertainty to the port operators, provide a suitable timeframe to examine outcomes over a period and provide consistency with the regulation of other infrastructure businesses;

[5] Available at http://www.escosa.sa.gov.au/projects/24/2007-ports-pricing-and-access-review.aspx

- to provide greater certainty to business and to reduce the time and costs associated with settling access disputes, insert a provision into the MSA Act to reflect clause 2.6 of the CIRA, to ensure regulatory decisions under the access regime are made within six months;

- to introduce consistency between the principles listed in clause 2.4(b) of the CIRA and the principles to be taken into account by an arbitrator under section 32 of the MSA Act, the following provisions have been added to section 32 of the MSA Act:

    - "that access prices should allow multi-part pricing and price discrimination when it aids efficiency;

    - that prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

    - provide incentives to reduce costs or otherwise improve productivity."; and

- arbitration requirements to amend section 18- *Power to refer dispute to arbitration*, and insertion of section 30A to provide a 6 month time limit for arbitration; pricing principles to be taken into account by the arbitrator, in line with clause 2.6 of the CIRA.

In addition, on 29 October 2009 two changes in the coverage of the access regime were made through proclamation[6]:

- the new bulk loader at Port Adelaide Outer Harbor was included under the access regime to achieve consistency in the coverage of bulk loaders; and

- the access regime coverage applied at Ardrossan was revoked due to the nature of the operations at this port (long term contract in place with the sole user).

[6] Government Gazette 29/10/2009, page 4985

Analysis of Clause 6 of the Competition Principles Agreement (CPA) principles

This section addresses the consistency of the South Australian port access regime with each of the principles in clause 6 of the CPA which are relevant to an assessment of the "effectiveness" of an access regime under Part IIIA of the TPA. It is submitted that the access regime should be certified as effective because it:

- complies with clauses 6(2) and 6(3) of the CPA
- incorporates the principles set out in clause 6(4) and 6(5) of the CPA.

In this regard it is noted that section 44DA of the TPA requires the NCC to treat each relevant principle of the CPA as having the status of a guideline rather than a binding rule.

Each of these matters is discussed below.

Clause 6(2)

> *The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:*
>
> *(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or*
>
> (b) *substantial difficulties arise from the facility being situated in more than one jurisdiction.*

Clause 6(2)(a)

The South Australian ports and facilities the subject of the South Australian port access regime are a crucial gateway for, and service the needs of importers & exporters. These ports and facilities are located entirely within South Australia, and the MSA Act applies only to ports and facilities that are located entirely within South Australia.

South Australian ports account for a small share of national port activity.There is limited interstate demand for South Australian ports services, meaning that the issue of influence beyond the borders of South Australia does not arise.

Because the South Australian port access regime has no impact beyond the boundary of South Australia and does not create any interstate inefficiencies, no issue can arise under clause 6(2)(a) of the CPA.

Clause 6(2)(b)

The South Australian port access regime only applies to maritime facilities which are entirely located in South Australia and are part of a port proclaimed pursuant to section 5 of the MSA Act as part of the regime. Accordingly the question of whether substantial difficulties arise from facilities being situated in more than one jurisdiction does not arise.

Clause 6(3)

For a State or Territory access regime to conform to the principles set out in this clause, it should:

(a) apply to services provided by means of significant infrastructure facilities where:

(i) it would not be economically feasible to duplicate the facility

(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market

(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist

(b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

Section 10 of the MSA Act provides that a person will be subject to the access regime if the person carries on a business of providing proclaimed maritime services at a proclaimed port.

"Maritime service" is defined as a service provided on a commercial basis of any of the following kinds:

- providing or allowing for access of vessels to a proclaimed port;
- a pilotage service facilitating access to a proclaimed port;
- providing berths for vessels at a proclaimed port;
- providing port facilities for loading or unloading vessels at a proclaimed port;
- providing for the storage of goods at a proclaimed port; and
- providing access to land in connection with the provision of services of any of the kinds mentioned above.

The infrastructure facilities by which all of these marine services are provided comprise shipping channels, berths, loading and unloading facilities, and associated land.

Clause 6(3)(a) Significant infrastructure facility

The ports are significant to the local economies which they service. An overview of the services provided by each of the six separate ports illustrates their importance to regional economies and to the State as a whole.

Port Adelaide

Port Adelaide accounts for the majority of the cargos handled in South Australia and handles close to 1,000 ship visits per year carrying general and containerised cargo.

The principal commodities handled at Port Adelaide include grain, limestone, petroleum products, soda ash, motor vehicles, containers, scrap metal, fertiliser, chemicals, iron, mineral sands and livestock. In 2008/09 a total of 9.7 million tonnes of cargo was shipped through the port. This represented 7.8% of total cargo throughput at Australia's five major ports.[7]

Total container movements at Port Adelaide have grown from 189,391 TEUs in 2006 to 267,438 TEUs in 2008/2009[8], representing 4.7% of container movements in the five major Australian container ports. The level of TEUs has grown strongly, but it still a low number relative to the other major Australian ports. This further emphasises that Port Adelaide, whilst being the biggest and sole container facility for South Australia, does not have a significant impact on other national ports.

To capitalise on the strong growth in container trade, Flinders Ports has undertaken a number of initiatives to improve Port Adelaide's competitiveness in the international freight movement and logistics market. The purpose of these initiatives is to allow goods to be continually delivered in the most cost efficient and effective manner, and to ensure that the port remains competitive. The initiatives undertaken by Flinders Ports include the following:

- completion of a $45 million channel-deepening project at Outer Harbor in 2007 jointly funded by the South Australian Government to enable larger-sized vessels to enter the port without having to rely on tidal assistance; and
- committing $21 million to extend and strengthen existing container berths to assist the development and growth in the export of some of South Australia's main exports.

[7] From Ports Australia at www.portsaustralia.com.au/tradestats accessed 4/5/10.
[8] ibid

Other Port Adelaide facilities include:

- over 20 berths, ranging from 120 metres to 320 metres in length;
- 4 cranes;
- motor vehicle roll-on facilities;
- car terminal;
- various specialised berths.

Thevenard is the most remote of the Flinders Ports facilities, located on the west coast of South Australia, some 793 kilometres from Adelaide by road. Major export cargoes handled through the port include gypsum, grains, seeds and salt exports, and fertiliser imports.

Port Lincoln is situated on a natural deep water harbour which is used frequently for topping up loads on large bulk grain carriers destined overseas from shallower ports in South Australia and Victoria. Kirton Point, which is within the port boundaries, is a dedicated oil terminal.

Port Pirie is the location of one of the world's largest smelters, operated by NyrStar. Commodities handled through the port of Port Pirie include large quantities of zinc, lead, and other ores as well as imports of raw materials.

Wallaroo is situated on the eastern side of Spencer Gulf, 158 kilometres by road from Adelaide. Key commodities are fertiliser imports and grain exports.

Port Giles was established in 1970 to export grain from the lower section of the Yorke Peninsula. It remains dedicated to this purpose, exporting 327 000 tonnes of grain in 2008/09.

The ports provide crucial support to the State's agricultural industry, to certain other local commodity industries and to the local communities which service the ports.

The table below outlines the level of throughput at South Australian ports, under the access regime from 2004/05 to 2008/09.

Throughput at South Australian ports from 2004/05 to 2008/09 ('000 Tonnes)[9]

Load Port	Financial Year				
	2004/05	2005/06	2006/07	2007/08	2008/09
Adelaide	9,897	9,969	10,094	10,297	9,720
Port Giles	469	647	189	331	326
Port Lincoln	1,569	1,776	1,214	1,076	1,435
Port Pirie	827	767	536	568	711
Thevenard	1,784	1,938	1,808	2,058	1,999
Wallaroo	526	462	332	316	587
TOTAL	**15,072**	**15,559**	**14,173**	**14,646**	**14,778**

South Australia submits that the Flinders Ports owned commercial ports infrastructure facilities are significant, and that accordingly clause 6(3)(a) of the CPA is in part satisfied.

[9] ibid

Clause 6(3)(a)(i) Economic feasibility of duplicating South Australian Flinders Ports infrastructure facilities

It will generally not be economically feasible to duplicate an infrastructure facility where a single infrastructure facility can meet market demand at less cost than two or more facilities. The following is a discussion of those maritime services covered by the access regime (i.e. those proclaimed as regulated services) in terms of the economical feasibility of duplication.

- *"Providing or allowing for access of vessels to a proclaimed port by means of channels"*

The NCC has previously considered whether it would be economically viable to replicate shipping channels and decided that Australian shipping channels were "natural monopolies" and fulfilled the requirement of Clause 6(3)(a)(i) of the CPA[10].

South Australia therefore submits that channel services meet the requirement of clause 6(3)(a)(i) of the CPA.

- *Common user berths ("providing berths for vessels at proclaimed ports"); and bulk handling facilities ("providing of port facilities for loading and unloading vessels at a proclaimed port")*

Berth services are provided by means of wharves and jetties, which are also essential to the loading and unloading of shipping. A major feature of berths is their position in proximity to deep water and other infrastructure such as road and rail transport, cargo storage facilities and so on.

For obvious reasons, Flinders Ports' jetties and wharves are located in the prime, if not the only feasible, location in relation to the shipping channels and to other shipping related facilities and services on-shore. This factor, as well as the extremely high cost of building wharves and jetties and dredging berth boxes, means that it is likely to be uneconomic for new entrants to duplicate the existing infrastructure.

To ensure ongoing access to port loading and unloading facilities on fair commercial terms only the "common user" berths were proclaimed as subject to the access regime, since it is considered that those berths which are dedicated to a single entity or commodity under an existing agreement present little prospect of, or need for, competition. This is so, particularly in light of the current spare capacity for the servicing of shipping at the common user berths.

Regional ports cater for only a limited range of commodities which are generally produced in the local vicinity of the port. Due to the relative isolation of the regional ports and relatively small volumes handled, a competitor who wished to duplicate berth and loading facilities would be likely to find it difficult to establish

[10] See NCC, "Application for Certification of the Victorian Access Regime for Commercial Shipping Channels; Reasons for Decision", 12 May 1997 at 6.

the suitably long term market for the transport of local commodities necessary to justify the investment in infrastructure.

Regional ports in South Australia have a relatively low number of vessel visits compared with Port Adelaide. This fact also indicates that it would not be economically feasible for a competitor to seek to duplicate existing port infrastructure.

The following table provides an overview of the type, and the level of use of, the berths at the relevant Flinders Ports' ports[11].

PORT	BERTH	Type	Total Visits 2009-2010
PORT ADELAIDE	Inner Harbour 18 Berth	Common	50
	Inner Harbour 19 Berth	Common	4
	Inner Harbour 20 Berth	Common	49
	Inner Harbour 27 Berth	Grain	41
	Inner Harbour 29 Berth	Common	42
	Inner Harbour H Berth	Cement/Clinker	35
	Inner Harbour K Berth	Limestone	256
	Inner Harbour M Berth	Oil	148
	Outer Harbour 1 Berth	Common	4
	Outer Harbour 2 Berth	Passenger Common	92
	Outer Harbour 3 Berth	Motor Vehicle	1
	Outer Harbour 4 Berth	Motor Vehicle	50
	Outer Harbour 6 Berth	Container	117
	Outer Harbour 7 Berth	Container	118
	Outer Harbour 8 Berth	Grain	16
	Osborne 1 Berth	Common	19
	Osborne Penrice Berth	Soda Ash	13
PORT LINCOLN	11 Berth	Oil	12
	4 Berth	Grain	28
	5 Berth	Grain	29
	6 Berth	Fertiliser	12
PORT GILES	1 Berth	Grain	11
PORT PIRIE	5 Berth	Common	1
	6 Berth	Ore	21
	9 Berth	Lead & Coal	1
	10 Berth	Common	45
THEVENARD	1N Berth	Common	61
	1S Berth	Common	40
WALLAROO	1N Berth	Common	4

[11] Flinders Ports data

PORT	BERTH	Type	Total Visits 2009-2010
	1S Berth	Fertiliser	1
	2N Berth	Grain	20
KLEIN PT	1 Berth	Limestone	22

As shown above, Wallaroo, Port Pirie, Port Lincoln, Port Giles and Port Adelaide all have grain berths. The access regime covers bulk handling facilities and the associated berths so as to ensure there's no break in the supply chain (lack of access to the facilities via the berths could provide a "choke point" between the conveyor belt and the ship). The definition of maritime service, i.e. those services to which the access regime applies as regulated services, includes pilotage, facilities for the storage of goods, etc.

It is submitted that, in relation to all of the above proclaimed maritime services, duplication of the service by a prospective service provider would generally not be economically feasible. The application of the access regime to the regulated maritime services is to be reviewed by ESCOSA in October 2012 - and thereafter every five years.

Clause 6(3)(a)(ii) Effective competition

The South Australian shipping channels, ports and associated maritime services represent a vital link in the export and import of goods out of, and into, South Australia. Freedom to negotiate access to the channels and port facilities is therefore vital to permit competition in downstream and upstream markets.

South Australia submits that its ports shipping channels and associated berth and cargo facilities require an access regime to facilitate competition. Section 3 of the MSA Act contains an object clause that does discuss facilitating competitive markets in the provision maritime services.

The South Australian access regime provides a mechanism based on the "negotiate, conciliate and arbitrate" model that is designed to facilitate both access to facilities and a process of negotiation between parties on fair commercial terms.

Clause 6(3)(a)(iii) The safe use of proclaimed ports

Flinders Ports is required to provide for the safe commercial operation of channels and general port facilities through Port Operating Agreements (POA) established under provisions of the *South Australian Harbors and Navigation Act 1993* (the HN Act).

Pursuant to Part 5 of the HN Act, the Minister for Transport has the control and management of all harbours in South Australia.

The Minister has conferred on the owner of the various State port infrastructures the right to carry on the business of operating the ports. The control and

management of the port (predominantly the watered areas) has been assigned to Flinders Ports using the provision of the HN Act related to Port Operating Agreements. The oversight role has been placed with the Minister for Transport and is administered through the Department for Transport, Energy and Infrastructure.

Relevant to port safety, and in accordance with subsection 28B(2) of the HN Act, the POA require the port operator (Flinders Ports) to:

- have appropriate resources (including appropriate emergency contingency plans and trained staff and equipment to carry the plans into action)
- maintain port waters to a navigable standard, to provide and maintain navigation aids and to direct and control vessel movements in port waters; and
- maintain and make available to the users of the port navigational charts and other information relating to the safe operations of the port.

The requirements of the POA place responsibility on the port operator (Flinders Ports) for the safe operation of vessels in port waters.

The HN Act also provides:

- that the port operator has power to appoint a Port Management Officer, who may exercise a range of specified legislative powers to ensure the safe operation of the port; and
- an enforcement regime to deal with a port operator's non compliance with the requirements of a POA.

The use of the POA is a strong and flexible means by which the powers and responsibilities of the port operator with regard to port safety may be identified and implemented. The POA also prescribes a regime of monitoring and reporting put in place to ensure that Flinders Ports meets these requirements.

South Australia submits that safe access to the port facilities will be ensured through the operation of the HN Act and the POA for each of Flinders Port six ports subject to the access regime.

Clause 6(3)(b) Incorporation of principles referred to in CPA clause 6(4)

Clause 6(3)(b) of the CPA specifically requires that all of the principles referred to in clause 6(4) be incorporated in an access regime. It is noted in this regard, however, that such principles are not binding rules, but are simply guidelines for use in assessing whether an access regime is effective. The principles set out in clause 6(4) of the CPA and the extent to which they are addressed in the South Australian port access regime are discussed below.

Clause 6(4)(a)-(c)

A State or Territory access regime should incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.
(b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.
(c) Any right to negotiate access should provide for an enforcement process.

Clause 6(4)(a) Agreed access

The SA ports access regime encourages third party access through commercial negotiation to the maximum extent possible, in accordance with clause 6(4)(a) of the CPA.

Section 11 of the MSA Act provides that a regulated operator must provide access to regulated services by agreement with the customer on fair commercial terms. However, a term regarding price is *deemed* to be a fair commercial term if it concerns a service subject to a pricing determination under the *Essential Services Commission Act 2002*, and the term is consistent with the pricing determination.

Negotiation under the access regime must occur as follows:

- section 13 of the MSA Act permits a proponent to put a written access proposal to the regulated operator. (If the access proposal requires an addition or extension to port infrastructure facilities, the access proposal may include a proposal for that addition or extension)
- section 14 requires the regulated operator and the proponent (and any interested third party) to negotiate in good faith with a view to reaching agreement on the access proposal.

Moreover, the access regime places no restrictions upon the ability of the parties to seek resolution of their disputes through avenues which they can agree upon (such as mediation or conciliation).

Clause 6(4)(b) Right to negotiated access

Part 3 Division 3 of the MSA Act establishes the right for persons to negotiate access, either on terms agreed with the operator, or on fair commercial terms determined by enforceable arbitration. To the extent that commercial arrangements cannot be otherwise agreed in relation to any aspect of access to a port facility, Part 3, Division 4 and Division 5, of the MSA Act contain a dispute resolution process which can be invoked by either party requesting that ESCOSA

settle the dispute through conciliation or failing that, refer an “access dispute” to arbitration.

In this regard section 15 of the MSA Act provides that:

- an access dispute exists if, within 30 days after the proposal is made, the regulated operator, the proponent and any interested third parties have not agreed on terms for the provision of the proposed service; and
- a party to the dispute may refer the dispute to ESCOSA.

On receiving the request, ESCOSA:

- must, in the first instance, attempt to settle the dispute by conciliation; and
- may, if the dispute is not resolved by conciliation, after reasonable attempts at conciliation by ESCOSA, or if the dispute is not resolved within 6 months after the referral of the dispute to ESCOSA under section 16, ESCOSA may refer the dispute to arbitration.

ESCOSA is not obliged to attempt to settle the dispute by conciliation or refer it to arbitration if the subject matter of the dispute is trivial, misconceived or lacking in substance, or if the person seeking arbitration has not negotiated in good faith, or if the Commission is satisfied that there are good reasons why the dispute should not be referred to arbitration.

In making a decision, the arbitrator must take into account the matters set out in section 32 of the MSA Act. These matters are consistent with those listed in clause 6(4)(i) of the CPA .

Clause 6(4)(c) Enforcement

An arbitrator’s award is enforceable as if it were a contract between the parties to the award. A proponent may within 7 days after the making of the award elect not to be bound by the award. If the proponent does so, the award is rescinded and the proponent is precluded from making another access proposal for 2 years (unless ESCOSA authorises otherwise).

The ability to terminate or vary an award is set out in section 36 of the MSA Act.

An award may be terminated or varied by agreement between all parties to the award. If a material change in circumstances occurs, a party to an award may propose termination or variation of the award.

The provisions of Part 3 of the MSA Act also apply to a dispute arising from a proposal to vary an award.

In addition, a party to arbitration may appeal to the Supreme Court, from a decision regarding an award, or a decision not to make an award, on a question of law.

The access regime provides for the enforcement by the Supreme Court of awards made pursuant to arbitration.

Under Part 3, Division 9 of the MSA Act, the Supreme Court may grant an injunction:

- restraining a person from contravening an award; or
- requiring a person to comply with an award.

The Supreme Court may also order the payment of compensation to persons who have suffered loss or damage as a result of a contravention of an award. Further, section 37 of the MSA Act makes it clear that an award is enforceable as if it were a contract between the parties to the award.

Clause 6(4)(d)

Any right to negotiated access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

The right to negotiate access came into effect when the *Maritime Services (Access) Act 2000* was proclaimed and came into effect on 31 October 2001.

Section 43 of the MSA Act as amended provides that Part 3 of the Act (which contains the provisions establishing the access regime) is subject to a five yearly cycle. ESCOSA must, within the last year of each five yearly cycle, conduct a review of the maritime industries subject to the access regime to determine whether the access regime should continue to apply to those industries and to what extent.

Sub-section 43(7) of the MSA Act provides that Part 3 (which contains the right to negotiated access) expires at the end of a cycle unless the ESCOSA has conducted a review and recommended its continuing operation.

Existing awards are enforceable as if they were contracts, and will thus be unaffected by a change in the access regime, as will any commercially negotiated access arrangements.

Clause 6(4)(e)

The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

Section 14 of the MSA Act imposes an obligation on the regulated operator to negotiate in good faith. In particular, section 14 expressly requires the regulated operator to endeavour to accommodate as far as practicable the proponent's reasonable requirements in relation to access and (under section 12) to provide an intending proponent with information reasonably requested, including:

- the extent to which the regulated operator's port facilities subject to the access regime are currently being utilised;
- technical requirements that have to be complied with by persons for whom the operator provides regulated services;
- the rules with which the intending proponent would be required to comply; or
- the information about the price of regulated services provided by the operator that is required to be provided under the guidelines issued by ESCOSA.

This duty is supported by sections 14 and 15 of the of the MSA Act, which in practice would entitle the proponent to refer an access dispute to ESCOSA for arbitration if the regulated operator refuses or fails to enter into good faith negotiations with the proponent within 30 days after the receipt of the access proposal.

The dispute resolution procedures also ensure that the regulated operator uses all reasonable endeavours to accommodate the requirements of the proponent.

Clause 6(4)(f)

Access to a service or persons seeking access need not be on exactly the same terms and conditions.

The access regime as established by the MSA Act provides the flexibility for the parties to negotiate their own arrangements for access. Failing agreement between the regulated operator and the customer, access on fair commercial terms may be determined by arbitration. In both cases, different terms and conditions may result for different users.

There are no constraints on the terms and conditions that might be arrived at but, in the case of arbitrated awards, the arbitrator must take into account the principles set out in section 32 of the MSA Act.

However, these matters do not preclude the making of awards on different terms and conditions for different users.

Clause 6(4)(g)

Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

The access regime as established by the MSA Act provides a process that encourages parties to negotiate and reach agreement upon terms and conditions of access. This includes the parties resorting to their own chosen dispute resolution process if they wish.

In the event that the parties cannot agree on terms and conditions for access, they can rely on the processes afforded by the access regime, including a dispute resolution process which involves potentially two bodies: ESCOSA and an arbitrator (or arbitrators).

ESCOSA, as the industry regulator, must in the first instance attempt to resolve an access dispute by conciliation.

If the dispute is not resolved by conciliation, or is not resolved within 6 months after the referral, section 18 of the MSA Act provides that ESCOSA refer the dispute to arbitration. This amendment regarding the six month time limit was made to the MSA Act to ensure that the acess regime is compliant with section 2.6 of the CIRA.

The arbitrator is to be a person selected by ESCOSA after consultation with the parties to the dispute. ESCOSA's own independence, together with the right of the parties to consult with it in choosing an arbitrator should ensure that the arbitrator appointed is sufficiently independent. The arbitrator has the power to resolve the dispute through making a binding award. The parties and the industry regulator must be provided with the arbitrator's reasons for making an award.

The procedures to be followed when conducting an arbitration are contained in Division 7 of Part 3 of the MSA Act. In summary:

- arbitrations are to be conducted in private, unless the parties otherwise agree (section 24);
- the parties to the arbitration may appear in person or may be represented by others (section 21); and
- the arbitrator:
    - is not bound by technicalities, legal forms or rules of evidence (subsection 25(1)(a))
    - may inform him or herself of any matter relevant to the dispute in any way the arbitrator thinks appropriate (subsection 25(1)(b))

- must act as speedily as a proper consideration of a dispute allows (section 23).

Division 8 Awards introduces a six month time limit for arbitration in section 30A.

Section 41 of the MSA Act provides that the costs of arbitration are to be borne by the parties in equal proportions, unless the arbitrator decides otherwise. However, if the proponent terminates arbitration or elects not to be bound by an award, the entire cost of arbitration is to be borne by the proponent.

Clause 6(4)(h)

The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

Decisions of Industry Regulator

ESCOSA as the industry regulator may resolve disputes through conciliation. If a dispute is resolved in that way, the parties effectively reach agreement on a commercial basis and may enforce the agreement contractually.

The MSA Act makes no provision for appeal against decisions of the industry regulator concerning access disputes, i.e. whether a dispute exists and whether a dispute should be referred to an arbitrator. Common law administrative law principles may, however, apply.

Decisions of Arbitrator

Section 37 of the MSA Act provides that arbitrated awards are enforceable as if they were a contract between the parties, and therefore contractual remedies are available. Sections 38 and 39 of the Act provide that injunctive remedies and orders for compensation are also available from the Supreme Court in relation to contravention of, or non-compliance with, awards. Section 40 provides that an award or a decision of an arbitrator cannot be called into question except by appeal to the Supreme Court on a matter of law. This is consistent with the *Commercial Arbitration Act 1986,* (CAA Act). “The decisions of a dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved” which applies (by virtue of section 19) to arbitrations under the MSA Act to the extent that the CAA Act is not inconsistent with the MSA Act.

There are no other existing legislative rights of appeal against a decision of the arbitrator, since the MSA Act creates new rights in relation to negotiated access to maritime services.

Clause 6(4)(i)

In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i) the owner's legitimate business interest and investment in the facility;
(ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;
(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;
(iv) the interests of all persons holding contracts for the use of the facility;
(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;
(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;
(vii) the economically efficient operation of the facility; and
(viii) the benefit to the public from having competitive markets.

All of the above matters are present in section 32(1)(a)-(h) of the MSA Act as principles which the dispute resolution body, namely, the arbitrator, should take into account in making an award.

Clause 6(4)(j)

The owner may be required to extend, or to permit extension of the facility that is used to provide a service if necessary but this would be subject to:

(i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
(ii) the owner's legitimate business interests in the facility being protected; and
(iii) the terms of access for the third party taking into account the cost borne by the parties for the extension and economic benefits to the parties arising from the extension.

Sub-section 33(2) of the MSA Act specifically provides that an award may require the regulated operator to extend port facilities under the operator's control. This decision has to take into consideration the technical and economic feasibility of the extension whilst maintaining a safe and reliable operation of the port, the protection of the operator's legitimate business interests in the port, and the costs and economic benefits to the parties as a result of the extension.Therefore this requirement is subject to the same criteria as outlined in clause 6(4)(j) of the CPA.

Clause 6(4)(k)

If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

The MSA Act does not preclude parties who negotiate their own access arrangements from determining what may constitute a material change in their particular circumstances and incorporating provisions to this effect in their access contracts.

Section 36 of the MSA Act sets out the process for the termination or variation of an award.

Pursuant to subsection 36(3) of the MSA Act, if a material change in circumstances occurs, a party to an award may propose termination or variation of the award, and if a proposal for termination or variation results in a dispute, the dispute resolution provisions in Part 3 of the Act will apply.

Clause 6(4)(l)

The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

Section 33 of the MSA Act specifies that an award handed down by the arbitrator may vary the rights of other customers of the operator under existing contracts or awards if:

- those customers will continue to be able to meet their reasonably anticipated requirements measured at the time when the dispute was notified to the Commission;
- the terms of the award provide appropriate compensation for any loss or damage suffered by those customers as a result of the variation of their rights.

Clause 6(4)(m)

The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

Pursuant to section 44 of the MSA Act, a person must not prevent or hinder a person who is entitled to a maritime service from access to that service. Contravention of the provision carries a maximum penalty of $20,000.

Clause 6(4)(n)

Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

Part 3, Division 11 of the MSA Act requires the segregation of accounts and records relating to the provision of regulated services. Pursuant to section 42 of the MSA Act, the regulated operator must keep the accounts for regulated services separate from the accounts and records relating to other aspects of the operator's business. Furthermore, if regulated services are provided at different ports, separate accounts must be kept for each port. Accounts and records must upon request be made available to ESCOSA.

Clause 6(4)(o)

The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

Section 27 of the MSA Act provides that where an arbitrator has reason to believe that a person (which would include the regulated operator) is in a position to give information or to produce documents relevant to the arbitration, the arbitrator may by written notice require the delivery of that information. The arbitrator may require the production of written statements, specific documents or copies of specific documents, or may also require a person to appear before the arbitrator to give evidence.

Failure to comply with the requirements of section 27 incurs a maximum penalty of $20,000. However, a person is not required to give information if it is:

- subject to legal professional privilege or would tend to incriminate the person of an offence; or
- the person provides written notice to the arbitrator of the grounds of an objection to the provision of the information or documentary material; or

- if appearing before the arbitrator to give evidence, the person makes an oral statement of the grounds of an objection.

Pursuant to section 28 of the MSA Act a person who gives the arbitrator information, or produces documents, may ask the arbitrator to keep the information confidential. The arbitrator may impose conditions limiting access to, or disclosure of, the information or documentary material. A contravention of a confidentiality condition may incur a maximum penalty of $75,000.

Clause 6(4)(p)

Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspects of access and a single forum for enforcement of access arrangements.

The *South Australian Ports (Bulk Handling Facilities) Act 1996* provided for the sale of bulk handling facilities and for third party access, but those access provisions have been specifically removed by the MSA Act.

Access to bulk handling facilities is now covered by the provision in the MSA Act for access to the maritime service of "providing port facilities for loading or unloading vessels at a proclaimed port".

There are no other access regimes applying to maritime services in South Australia.

Clause 6.5

A State, Territory or Commonwealth access regime should incorporate the following principles:

(a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

(b) Regulated access prices should be set so as to:

(i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved

(ii) allow multi-part pricing and price discrimination when it aids efficiency

(iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher

(iv) provide incentives to reduce costs or otherwise improve productivity.

(c) Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:

(i) may request new information where it considers that it would be assisted by the introduction of such information

(ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker

(iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.

Clause 6.5 (a)

Section 3(b) of the MSA Act discusses facilitating competitive markets in the provision of maritime services through the promotion of the economically efficient use and operation of, and investment in, those services.

Clause 6.5 (b)

While uniformity of regulation is desirable, consistency of regulation where contexts are similar should be the desired outcome. Under the ports access regime, ESCOSA does not set prices for regulated port services. Rather, the South Australian ports access regime is underpinned by a negotiate-arbitrate regulatory framework. ESCOSA monitoring of prices for Essential Maritime Services is undertaken pursuant to the MSA Act.

ESCOSA's 2004 conclusion[12] to adopt price monitoring rather than a price cap regulation which existed prior to November 2004, followed an extensive review, which examined questions of market power, the extent of competition and the costs and benefits of regulation. The form of regulation was chosen to reflect the circumstances of the industry. ESCOSA's 2007 review recommended a continuation of this regime.

ESCOSA's finding was that the MSA Act is consistent with clause 2.3 and 2.4 of the CIRA, since the MSA Act facilitates consideration of price monitoring in the manner of clause 2.3 and as demonstrated by ESCOSA's 2004 and 2007 reviews.

The price monitoring regime allows port operators to set their own port prices, taking into account the possibility of more heavy-handed form of price regulation, if an ESCOSA pricing review decides/recommends it is appropriate.

In both its 2007 Ports Price Determination[13] and its 2009 Ports Price Monitoring Report[14] ESCOSA concluded that there is no justification for introducing more heavy-handed price regulation than currently existed. It found that the major benefit from price monitoring was that it provided transparency to access seekers through publication of the price list.

Whilst the pricing principle at 6(5)(b)(i) is not expressly included in the MSA Act, sections 25(3) to (5) of the *Essential Services Commission Act 2002* allows ESCOSA to make price determinations for regulated industries having regard to the cost of supplying access to the service, as well as the costs involved in complying with the relevant legislation or regulatory requirements and a return on assets in the regulated industry.

In the final report to the 2007 review ESCOSA states that on the basis that the principles listed in clause 2.4(b) of the CIRA are reflected in the principles to be taken into account by an arbitrator under section 32 of the MSA Act, there are no principles within the two sets that are in conflict. The principles set out in section 32 of the MSA Act ask that an arbitrator take into account (among others) the costs to an operator of providing the service, economic value to the operator of any additional investment, interests of all persons holding contracts, the economically efficient operation of any relevant port facility, benefit to the public of having competitive markets and pricing principles.

Section 32(2) of the MSA Act allows for multi-part pricing and price discrimination when it aids efficiency, that a vertically integrated operator is not to set terms and conditions that advantage it over downstream operators, except to the extent that the cost of providing access to others would be higher, and prices for access to the port facilities should provide incentives to reduce costs or improve productivity. These pricing principles are consistent with those listed in clause 6.5(b)(ii) to (iv).

[12] 2003 Ports Price review available at http://www.escosa.sa.gov.au/library/031028-PortsPriceReview-FinalSummary.pdf
[13] 2007 available at http://www.escosa.sa.gov.au/library/071016-PortsPriceDetermination_2007-FinalDetermination.pdf
[14] 2009 Available at http://www.escosa.sa.gov.au/library/091125-2009PortsPriceMonitoringReport.pdf

Clause 6.5 (c)

Section 40 of the MSA Act provides for an appeal on a question of law, and does not provide for a merits review.

Additional matters

Sub-section 44DA(2) of the CPA provides that an effective access regime may contain additional matters that are not inconsistent with the principles of the CPA.

The SA maritime access regime does not contain any additional matters which are inconsistent with the principles of the CPA.

Duration of certification

Under section 44M(5) of the TPA, when the NCC makes a recommendation to the Commonwealth Minister that a decision on the certification of an access regime be made, the NCC must also recommend the period for which any certification should be in force.

South Australia submits that certainty for maritime industries and those seeking access to marine facilities should be an important consideration in setting the duration of the certification sought. It is also worth noting that the maritime access regime established by the MSA Act, requires ESCOSA to review it and the industries subject to the access regime every five years. ESCOSA must, following such review, make a recommendation as to whether the access regime should continue to apply to those industries.

It is requested that the NCC recommend to the Commonwealth Treasurer that the South Australian maritime access regime be certified for at least ten years (provided it remains unchanged), or for a longer period deemed appropriate by the NCC.

Conclusion

The South Australian ports access regime has been put in place to promote competition in the delivery of port services and encourage timely and efficient investment in, and use of port facilities and infrastructure. It aims to ensure that the State's ports operate efficiently and competitively to support trade and economic growth.

South Australia requests that the NCC make a recommendation to the Commonwealth Minister that the South Australian ports access regime be certified as an "effective" access regime under Part IIIA of the *Trade Practices Act 1974* (TPA) for a period of at least 10 years or longer as deemed appropriate by the NCC.

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Attachment 1- Relevant Legislation

Legislation supporting the South Australian Ports Access Regime

- *Maritime Services (Access) Act 2000*
- *Maritime Services (Access) Regulations 2001*
- *Essential Services Commission Act 2002*
- *Essential Services Commission Regulations 2004*