NATIONAL
COMPETITION
COUNCIL

South Australian Ports Access Regime

Application for certification as an effective access regime – section 44M of the *Trade Practices Act 1974* (Cth)

Final Recommendation

10 March 2011

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Abbreviations and defined terms

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
CIRA	Competition and Infrastructure Reform Agreement
clause 6 principles	The principles set out in clauses 6(2)-6(5) of the Competition Principles Agreement, see Appendix A
COAG	Council of Australian Governments
conciliation	Settlement of a dispute by reference to ESCOSA
Council	National Competition Council
CPA	Competition Principles Agreement
essential maritime services	The services prescribed in s 6 of the MSAA
ESCA	*Essential Services Commission Act 2002* (SA)
ESCOSA	The Essential Services Commission of South Australia
ESCOSA Review	The Essential Services Commission of South Australia, 2007 Ports Pricing and Access Review, Final Report, September 2007
Executive Council	The Premier and Ministers of the Government of South Australia
FP1	The submission by Flinders Ports dated 22 November 2010
maritime services	The services prescribed by s 4 of the MSAA
MSAA	*Maritime Services (Access) Act 2000* (SA)
NBCG	National Bulk Commodities Group Inc
NBCG1	The submission by NBCG dated 9 November 2010
PA1	The submission by Ports Australia dated 23 November 2010
Part IIIA	Part IIIA of the *Australian Competition and Consumer Act 2010* (Cth)
regulated services	Those maritime services that have been proclaimed pursuant to s 10 of the MSAA
SAG1	The South Australian Government's application for a recommendation for certification of the SA Ports Access Regime received 15 October 2010
SAL	Shipping Australia Limited
SAL1	The submission by Shipping Australia Limited dated 3 November 2010
SA Ports Access Regime/Regime	The regime contained in Part 3 of the MSAA

Abbreviation	Description
TPA	*Trade Practices Act 1974* (Cth)

1 Recommendation

1.1 In accordance with s 44M of the *Trade Practices Act 1974* (Cth) (**TPA**),[1] the Council has considered whether it should recommend that the South Australian Ports Access Regime (as described in chapter 3) (**SA Ports Access Regime**) be certified as an effective access regime.

1.2 The Council's view is that the SA Ports Access Regime meets the requirements for certification. The Council recommends that the Commonwealth Minister certify the SA Ports Access Regime as effective for a period of 10 years.

1.3 The Council's reasons for its recommendation are set out in this report.

[1] See paragraph 2.8 below regarding the renaming of the TPA.

2 The certification application and public consultation

The application and public consultation

2.1 On 15 October 2010 the Council received an application from the Premier of South Australia, the Hon Mike Rann MP, for a recommendation pursuant to s 44M(2) of the TPA that the SA Ports Access Regime be certified as an effective access regime (**SAG1**).

2.2 The Council gave public notice of the application in 'The Australian' newspaper on 20 October 2010 and published the application and related documents on its website (www.ncc.gov.au). The Council invited interested parties to make initial written submissions in response to the application. The period for submissions closed on 22 November 2010 and submissions were received from:

- Shipping Australia Ltd, dated 3 November 2010 (**SAL1**)
- National Bulk Commodities Group Inc, dated 9 November 2010 (**NBCG1**)
- Flinders Ports Pty Ltd, dated 22 November 2010 (**FP1**)
- Ports Australia, dated 23 November 2010 (**PA1**)

2.3 The Council considered all submissions on the application in developing its draft recommendation, including that by Ports Australia. Ports Australia provided its submission after the closing date for submissions but in sufficient time for the submission to be published on the same day as those received by the closing date.

2.4 The Council published its draft recommendation on 13 January 2011. The draft recommendation indicated that the Council proposed to recommend that the Regime be certified as an effective access regime for a period of 10 years.

2.5 The Council invited interested parties to make written submissions in response to the draft recommendation by 18 February 2011. One submission was received from Shipping Australia Ltd (email dated 16 February 2011) (**SAL2**).

2.6 The Council considered all submissions received in making this final recommendation. All supported the Regime being certified as effective. However, some submissions on the application raised concerns in respect of the pricing or cost of maritime services, the exclusion of towage services from the operation of the Regime and the price monitoring arrangements. While these matters do not fall for consideration under the Competition Principles Agreement (**CPA**), to the extent that they are relevant to the matters the Council and the Commonwealth Minister must consider in an application for certification the Council had regard to them as noted in this report.

2.7 Copies of the application and submissions are available on the Council's website.

Renaming of the Trade Practices Act

2.8 The *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (Cth)[2] renamed the TPA the *Competition and Consumer Act 2010* (Cth) with effect from 1 January 2011. As the application was made under the TPA prior to its name change, this recommendation refers throughout to the TPA. References in this recommendation to the TPA or Part IIIA should be read as the legislation that was in effect on 15 October 2010 (the day on which the Council received the application), unless otherwise noted.

[2] No. 103, 2010

3 The SA Ports Access Regime

3.1 The SA Ports Access Regime for which certification is sought is embodied in the *Maritime Services (Access) Act 2000* (SA) (**MSAA**). The MSAA commenced on 31 October 2001. A copy of the MSAA can be found at http://www.legislation.sa.gov.au.

3.2 The MSAA 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.

3.3 The SA Ports Access Regime applies to regulated operators who, at a proclaimed port, carry on a business of providing maritime services that have been declared by proclamation to be regulated services. Under the 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 an arbitrator.

3.4 The Governor of South Australia may, by proclamation, declare those ports listed in s 5 of the MSAA to be subject to the Regime. Section 5 also provides that other ports may be declared by regulation to be subject to the Regime. The ports currently proclaimed under the MSAA and subject to the Regime are:

- Port Adelaide
- Port Giles
- Wallaroo
- Port Pirie
- Port Lincoln, and
- Thevenard.[3]

All of these ports are operated by Flinders Ports Pty Ltd—the regulated operator.

3.5 The MSAA defines three categories of services:

(a) maritime services

(b) regulated services, and

(c) essential maritime services.

[3] While the port of Ardrossan was listed in s 5 of the MSAA when it was enacted, it was removed from the coverage of the Regime following the 2007 review by the Essential Services Commission of South Australia. Regulation of Ardrossan could be reinstated by proclamation under regulation in accordance with s 5 of the MSAA.

Regulated services and essential maritime services are subject to the Regime. Essential maritime services are also subject to price regulation.

3.6 Maritime services are prescribed by s 4 of the MSAA to be:

(a) providing or allowing for access of vessels to a proclaimed port

(b) a pilotage service facilitating access to a proclaimed port

(c) providing berths for vessels at a proclaimed port

(d) providing port facilities for loading or unloading vessels at a proclaimed port

(e) providing for the storage of goods at a proclaimed port

(f) providing access to land in connection with the provision of services of any of the kinds mentioned above,

but does not include any of the following:

(g) a towage service for facilitating access to a proclaimed port

(h) a bunkering service provided at a proclaimed port

(i) a service for the provisioning of vessels (including the supply of electricity and water) within a proclaimed port, and

(j) a service for the removal of waste from vessels at a proclaimed port,

(**maritime services**).

3.7 Pursuant to s 10 of the MSAA, maritime services that have been proclaimed and are thereby regulated services falling within the scope of the Regime are:

- channels
- common user berths
- bulk handling facilities as defined in the *South Australian Ports (Bulk Handling Facilities) Act 1996* but only in relation to conveyor belts (ie not including storage areas)
- berths adjacent to bulk handling facilities
- land providing access to maritime services, and
- the Outer Harbor bulk loader at Port Adelaide,

(**regulated services**).

3.8 Section 6 of the MSAA provides that essential maritime industries are regulated industries for the purposes of the *Essential Services Commission Act 2002* (SA) (**ESCA**) and establishes the current pricing determination 'prescribed period' ending 30 October 2012, and thereafter in five year periods. An essential maritime industry is an industry providing an essential maritime service(s). An essential maritime service consists of:

(a) providing or allowing for access of vessels to a proclaimed port, or

(b) providing port facilities for loading or unloading vessels at a proclaimed port, or

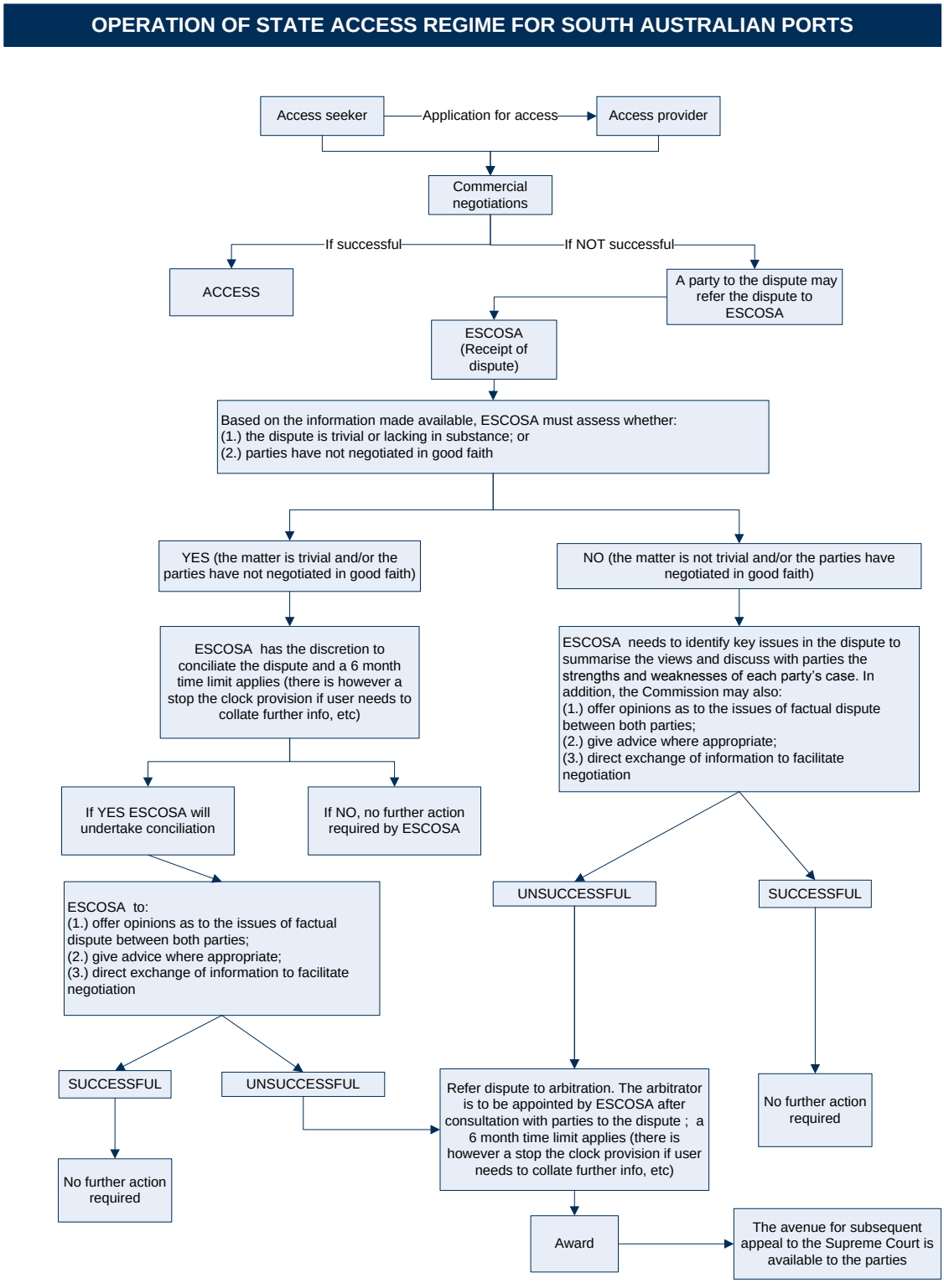
(c) providing berths for vessels at a proclaimed port,

(**essential maritime services**).

3.9 The Essential Services Commission of South Australia (**ESCOSA**) is South Australia's independent regulator responsible for administering the SA Ports Access Regime and regulating the six proclaimed ports.

3.10 Section 43 of the MSAA provides that ESCOSA must within the last year of each prescribed period conduct a review of the industries subject to the SA Ports Access Regime to determine whether the Regime should continue to apply to those industries. In its most recent review of ports pricing and access conducted in 2007 (**ESCOSA Review**), ESCOSA concluded that while there was the potential for port operators to exercise market power there was no evidence to suggest that this was in fact occurring. Accordingly, ESCOSA recommended that, in respect of the regulation of essential maritime services, that price monitoring, being a light-handed form of price regulation, be maintained and that the SA Ports Access Regime, with some changes to its coverage, continue to apply for a further period (of five years).

Access under the SA Ports Access Regime



Source: Government of South Australia, Certification of the South Australian Ports Access Regime, Submission to the National Competition Council, October 2010, p 10.

4 Certifying an access regime

4.1 States and territories may establish their own regimes for access to services and for regulating the prices and other terms and conditions for such access. A state or territory that is a party to the CPA may apply to the Council for a recommendation to the Commonwealth Minister that an access regime be certified as an 'effective access regime'.

4.2 Where a state or territory regime is certified, that regime will govern regulation of access to the services to which it applies and those services cannot be declared under the provisions of the national access regime in Part IIIA of the TPA or subject to an access undertaking to the Australian Competition and Consumer Commission (**ACCC**).

4.3 To obtain certification the responsible Minister—the Premier of a state or Chief Minister of a territory— may apply, in writing, to the Council asking the Council to recommend that the Commonwealth Minister certify an access regime as effective. The requirements for application to the Council are prescribed in regulation 6B of the *Trade Practices Regulations 1974* (Cth). The Council encourages applicants to support their application with explanations and evidence demonstrating how each of the clause 6 principles in the CPA is satisfied and how the regime has regard to the objects set out in s 44AA of Part IIIA of the TPA.

The Council's approach to considering an application for certification

4.4 Section 44M(4) of the TPA requires the Council,[4] in deciding whether to recommend that a regime be certified as effective, to:

- assess whether the access regime is an 'effective access regime' by applying the relevant principles set out in the CPA
- have regard to the objects of Part IIIA of the TPA (in s 44AA), and
- not consider any other matters (s 44M(4)(b) of the TPA).

4.5 The relevant principles are set out in clauses 6(2)–6(5) of the CPA (**clause 6 principles**).[5] There are 23 such principles, a number of which have several elements. An effective access regime must satisfactorily address each of the clause 6 principles.

4.6 The Council's consideration of whether the clause 6 principles are satisfied is subject to several other requirements:

- section 44DA(1) of the TPA provides that the Council must treat each principle as having the "status of a guideline rather than a binding rule"

[4] Parallel requirements to those applying to the Council in making its recommendation, apply to the Commonwealth Minister in deciding whether to certify an access regime as effective.

[5] The clause 6 principles are reproduced at appendix A.

- section 44DA(2) provides that an effective access regime may contain additional matters that are not inconsistent with the clause 6 principles
- clause 6(3)(b) of the CPA requires that in order to conform with the clause 6 principles an access regime must "reasonably incorporate" each of the principles in clause 6(4) of the CPA. Clause 6(3) also acknowledges that "there may be a range of approaches available to a State or Territory Party to incorporate each principle". The clause goes on to note that:

  > Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated the principle for the purposes of paragraph (b).

- clause 6(3A) of the CPA provides that in assessing whether an access regime is an effective access regime the assessing body:

  > (a) should, as required by the Trade Practices Act 1974, and subject to section 44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under the access regime; and
  >
  > (b) should recognise that, as provided by subsection 44DA(2) of the Trade Practices Act 1974, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement.

4.7 In making its recommendation the Council must also have regard to the objects of Part IIIA of the TPA. The objects of Part IIIA have two limbs. The first is concerned with the economically efficient operation and use of, and investment in, infrastructure to promote effective competition in upstream and downstream markets. Together with a number of more specific requirements set out in various of the clause 6 principles, this object is directed to ensuring a certifiable access regime balances the interest of access seekers and asset owners/service providers in a way that advances the national interest. The second limb is the provision of a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

4.8 In its Guide to Certification (NCC 2010a), and in a number of recommendations on applications for certification of state access regimes (see for example NCC 2009c, at 4.7), the Council has indicated its view that certification requires assessment only that the particular regime satisfactorily addresses the clause 6 principles and accords with the objects of Part IIIA.

4.9 A failure to secure certification of a particular access regime does not affect the enforceability or operation of a state or territory access regime. Indeed, the SA Ports Access Regime has been in existence since 2001 and has to date been the subject of two reviews by ESCOSA. Certification does, however, remove the potential for a

service(s) to be declared under Part IIIA of the TPA and is likely to provide greater certainty to asset owners/service providers and access seekers.[6]

Structure of this recommendation

4.10 In assessing the application for certification, the Council has organised its consideration of the SA Ports Access Regime against the guiding clause 6 principles and the objects of Part IIIA of the TPA into six categories:

- the scope of the access regime–6(3), 6(4)(d)
- the treatment of interstate issues–6(2), 6(4)(p)
- the negotiation framework–6(4)(a)–(c), (e), (f), (g)-(i), (m), (n), (o)
- dispute resolution–6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c)
- efficiency promoting terms and conditions of access–6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b)
- the objects of Part IIIA in s 44AA of the TPA.

4.11 The Council considers that these categories provide a logical framework for analysis, and help to clarify how a regime addresses the necessary elements of an effective access regime. The categories do not however replace the clause 6 principles and the objects of Part IIIA as the basis for assessing a regime's effectiveness. The Council considers each clause 6 principle relevant to each of the categories, and, as required by clause 6(3A)(a) of the CPA, only the relevant clause 6 principles.

4.12 When the Council recommends the Commonwealth Minister make a decision to certify an access regime as effective, it must also recommend the duration for which the decision should be in force.

4.13 The Council's assessment of the SA Ports Access Regime against the clause 6 principles and objects of Part IIIA of the TPA is set out in chapters 5 and 6. The Council's recommendation on the duration of any certification is set out in chapter 7.

[6] Section 44H(4)(e)(ii) of the TPA provides that the designated Minister cannot declare a service if access to the service is already the subject of an effective access regime under s 44N of the TPA.

5 Assessment against the clause 6 principles and objects of Part IIIA of the TPA

The scope of the SA Ports Access Regime (clauses 6(3)(a) and 6(4)(d))

5.1 CPA clause 6(3)(a) requires that for a regime to be certified as effective its application be limited to a narrow range of infrastructure services—those that are provided by significant infrastructure that are not economically feasible to duplicate—and where access to the services removes barriers to competition in upstream and downstream markets. Access should be available only where any safety issues can be addressed at a reasonable cost.

5.2 CPA clause 6(4)(d) is intended to ensure there is periodic review of the need for access regulation to apply to a particular service. A facility might at the present time not be economically feasible to duplicate (so warranting access regulation) but this situation may change over time removing the need for access regulation. The review provision in clause 6(4)(d) relates to the point in time of the decision to make a particular service subject to a regime. The clause could be satisfied by way of provision for the review of coverage declarations.

The SA Ports Access Regime

Services subject to the SA Ports Access Regime

5.3 Section 10 of the MSAA 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 services that have been proclaimed and are, therefore, regulated services are:

- channels
- common user berths
- bulk handling facilities as defined in the South Australian Ports (Bulk Handling Facilities) Act 1996 but only in relation to conveyor belts (ie not including storage areas)
- berths adjacent to bulk handling facilities
- land providing access to maritime services, and
- the Outer Harbor bulk loader at Port Adelaide.

5.4 As identified earlier, the proclaimed ports are:

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

- Thevenard.

5.5 The only other port that may at present be brought within the application of the MSAA is Ardrossan. For Ardrossan to be regulated under the Regime the Governor of South Australia must proclaim Ardrossan as being subject to the MSAA and should this occur, services at Ardrossan may again be the subject of regulation under the MSAA.[7]

5.6 Under the Regime, ESCOSA must conduct a review of the ports and services subject to the MSAA, every five years, and determine whether the MSAA should continue to apply to those ports and/or expand its coverage (s 43 MSAA). Upon completing its review, ESCOSA is to provide a report on the review to the appropriate Minister in the South Australian Government recommending whether the Regime should continue to apply to those industries. The Minister must have copies of the report laid before both Houses of Parliament and must have ESCOSA's recommendation published in the South Australian Government Gazette.

5.7 In undertaking this review, s 43 of the MSAA requires ESCOSA to give reasonable notice of the review by way of notice in a South Australian newspaper and invite written submissions on the matters under review. ESCOSA must consider such submissions and other submissions made in the course of other forms of public consultation it undertakes in connection with the review.

5.8 The SA Ports Access Regime expires at the end of each prescribed five year period, unless:

- ESCOSA has, in its report of its review conducted during the prescribed period, recommended that it should continue in operation for a further prescribed period, and
- a regulation has been made extending the period of the Regime's operation accordingly (s 43(7) MSAA).

5.9 The recommendations of ESCOSA are implemented by the Governor of South Australian declaring ports/services (a variation) or removing ports/services (a revocation) from coverage of the Regime by proclamation. This process occurs on the recommendation of ESCOSA, and ordinarily with the advice and consent of the Executive Council.

5.10 ESCOSA has to date undertaken two reviews of the SA Ports Access Regime and is due to commence its next review during the year preceding 30 October 2012 and thereafter at successive five year periods.

Application and submissions

5.11 The South Australian Government submits that the SA Ports Access Regime satisfies clause 6(3)(a) of the CPA for the following reasons:

[7] Ardrossan is declared for the purposes of s 5(1)(g) pursuant to Regulation 4 of the *Maritime Services (Access) Regulations 2001* (SA).

(a) each of the proclaimed ports is significant to the local economy it services and to the state as a whole. The ports provide crucial support to the South Australian agricultural industry, to certain other local commodity industries and to the local communities that service the ports.

(b) the six ports, owned and operated by Flinders Ports, are significant infrastructure facilities:

- Port Adelaide—accounts for the majority of the cargo handled in South Australia, handling close to 1000 ship visits per year. In 2008-09, 9.7 million tonnes of cargo was shipped through Port Adelaide and total container movements at the port is growing
- Thevenard—located 793 kilometres from Adelaide, with the major export cargoes including gypsum, grains, seeds and salt and the major imports being fertiliser products
- Port Lincoln—used by large bulk grain carriers destined for overseas and also features a dedicated oil terminal
- Port Pirie—handles exports of zinc, lead and other ores as well as imports of raw materials
- Wallaroo—handles fertiliser imports and grain exports, and
- Port Giles—a dedicated grain export facility.

(c) With regard to the economic feasibility of duplicating these ports, the South Australian Government submits:

- based on earlier findings of the Council that Australian shipping channels are natural monopolies (see NCC 1997 at p 6), the channel services meet the requirements of clause 6(3)(a)(i) of the CPA
- 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
- the 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 the suitable long term market for the transport of local commodities necessary to justify the investment in infrastructure. The regional ports also have a relatively low number of vessel visits compared with Port Adelaide which is a further indication that it would not be economically feasible for a competitor to seek to duplicate the existing port infrastructure.

(d) With regard to effective competition, the South Australian Government submits that the 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 upstream and downstream markets. South Australia's ports, shipping channels and associated berth and cargo facilities require an access regime to facilitate competition.

(e) Safe use of proclaimed ports is possible because Flinders Ports is required to provide for the safe commercial operation of channels and general port facilities through port operating agreements established under provisions of the *South Australian Harbors and Navigation Act 1993.*

The Council's assessment

5.12 The Council accepts that the ports to which the SA Ports Access Regime applies comprise significant infrastructure facilities, having regard to the size of the ports and their importance to the South Australian economy. Such ports are likely to exhibit natural monopoly characteristics and are unlikely to be economically feasible to duplicate. The Council agrees that access to the regulated services covered by the SA Ports Access Regime is likely to be necessary to permit effective competition in dependent markets and that access can be provided safely. The Council considers that the SA Ports Access Regime satisfactorily addresses clause 6(3)(a).

Review of the right to negotiate access (clause 6(4)(d))

The SA Ports Access Regime

5.13 Section 43 of the MSAA provides that the Regime is subject to a five yearly cycle pursuant to which ESCOSA must, within the last year of each five-year period, 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. The current prescribed period ends on 30 October 2012.

5.14 Subsection 43(7) of the MSAA provides that the right to negotiate access expires at the end of the five-year period unless ESCOSA has conducted its review and recommended in its report that it should continue in operation for a further prescribed period of five years. A regulation then has to be made and proclaimed extending the period of its operation.

5.15 Existing arbitration awards are enforceable as if they were contracts and are thus unaffected by any change in the Regime, as is any access arrangement that results from commercial negotiation.

Application and submissions

5.16 The South Australian Government submits that the SA Ports Access Regime satisfies clause 6(4)(d) because it provides for expiration of the right to negotiated access in s 43 of the MSAA.

The Council's assessment

5.17 The Council considers that the SA Ports Access Regime contains adequate mechanisms for reviewing the right to negotiate access whilst ensuring that existing contractual rights under an access agreement or award are preserved. The SA Ports Access Regime therefore satisfies clause 6(4)(d) of the CPA.

Treatment of interstate issues (clauses 6(2), 6(4)(p))

5.18 Clause 6(2) establishes principles for the treatment of a service(s) provided by a facility with an influence beyond a jurisdictional boundary or where there are difficulties because the facility providing the service that is subject to a regime is located in more than one jurisdiction. Clause 6(4)(p) is aimed at ensuring there is a single seamless process for obtaining access to a service, so promoting timely and efficient outcomes.

The SA Ports Access Regime

5.19 The SA Ports Access Regime is the only access regime that applies to maritime services in South Australia. The infrastructure that the Regime affects and the services to which it applies are located entirely within South Australia.

Application and submissions

5.20 The South Australian Government submits that there are no interstate issues as the services the Regime applies to and the subject infrastructure are wholly situated within South Australia. There is limited interstate demand for South Australian port services so the prospect of and potential for influence beyond the borders of South Australia is unlikely to arise.

5.21 It considers therefore, that the principles in clauses 6(2) and 6(4)(p) of the CPA are satisfied.

The Council's assessment

5.22 The Council acknowledges that as the SA Ports Access Regime operates exclusively within the jurisdiction of South Australia and as no other access regime applies to the subject infrastructure and services, there is no prospect for conflict to arise. The SA Ports Access Regime satisfies clauses 6(2) and 6(4)(p).

The negotiation framework (CPA clauses 6(4)(a)–(c), (e), (f), (g), (h), (i), (m), (n), (o))

Clauses 6(4)(a)–(c): negotiated access

5.23 Clauses 6(4)(a)–(c) seek to ensure that an access regime provides an appropriate balance between commercial negotiation and regulatory intervention to facilitate access negotiations. Clause 6(4)(a) requires that an effective access regime allows parties to try to reach mutually beneficial agreements through commercial negotiation. Clauses 6(4)(b) and (c) recognise that regulatory measures can provide an incentive to reach commercially agreed outcomes but also require that an effective regime provides a means for dealing with situations where access providers and access seekers are unable to reach agreement.

5.24 In some circumstances access seekers may have insufficient information and bargaining power to negotiate with large incumbent service providers. Therefore an effective access regime should appropriately address information asymmetries, so that access seekers can enter into meaningful access negotiations. This involves a balance between obliging the service provider to disclose sufficient information so that the access seeker can make informed decisions, while ensuring that the disclosure requirements are not overly onerous.

The SA Ports Access Regime

5.25 For regulated services at any of the six ports subject to the Regime, s 11 of the MSAA provides that a regulated operator must provide access to the regulated services by agreement with the customer or on fair commercial terms that are determined by arbitration under the MSAA.

5.26 A term regarding price is deemed to be a fair commercial term if it concerns a service subject to a pricing determination under the ESCA and the term is consistent with that pricing determination.

5.27 The MSAA provides that the negotiation process occurs as follows:

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

5.28 Section 15 of the MSAA provides that if, within 30 days of an access seeker making a proposal to the operator, the operator, the proponent and any interested third parties have not agreed on terms for the provision of the proposed service then a dispute

exists. Any party to the dispute may refer it to ESCOSA for resolution. The dispute resolution process is outlined in detail in paragraphs 5.71-5.124 of this report.

5.29 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 an arbitration award is made elect not to be bound by the award. If the proponent does so, the award is rescinded. In this situation, the access seeker/proponent is then precluded from making another access proposal for two years, unless the port owner/operator agrees otherwise or authorisation permitting the making of an access proposal is obtained from ESCOSA (s 35 of the MSAA).

5.30 An award may also be terminated or varied if agreed to by all parties to the award. If a material change in circumstances occurs, a party to an award may propose that the award be terminated or varied (s 36 of the MSAA).

5.31 Appeals to the Supreme Court of South Australia are also available on a question of law in connection with a decision regarding an arbitration award or a decision not to make an award (s 40(1) of the MSAA).

5.32 The independence of ESCOSA, South Australia's economic regulator responsible for administering the SA Ports Access Regime and regulating the six proclaimed ports, is protected under s 7 of the ESCA. Furthermore, ESCOSA has investigative and information gathering powers to enable it to carry out its functions under the MSAA.

5.33 The transparency of the SA Ports Access Regime's regulatory arrangements is supported by the public consultation requirements required by ESCOSA in connection with its review of the Regime (s 43 MSAA).[8]

5.34 The SA Ports Access Regime provides an enforcement mechanism for the hindering of access, being the imposition of a maximum penalty of $20 000 where a person prevents or hinders a person who is entitled to a maritime service from access to that service. It also allows a party to obtain relief through the Supreme Court of South Australia to remedy certain conduct, such as:

- injunctive relief to restrain a person from contravening an award or requiring a person to comply with an award (s 38 MSAA), and
- awarding compensation for a contravention of an award (s 39 MSAA).

Application and submissions

5.35 The South Australian Government submits that the SA Ports Access Regime satisfies clauses 6(4)(a)-(c) of the CPA through recognising the primacy of commercial negotiations by:

[8] Public consultation requirements also exist in relation to an inquiry undertaken by ESCOSA pursuant to Part 7 of the ESCA. Such an inquiry was undertaken into compliance of the Regime with the requirements of the CIRA as part of the ESCOSA Review. Public consultation was an important element of that review.

- adopting a negotiate/conciliate/arbitrate model which facilitates the commercial negotiation of access agreements between Flinders Ports and access seekers
- including a dispute resolution process if a dispute arises between the parties, and
- including credible enforcement mechanisms through civil penalties and relief in the Supreme Court of South Australia.

The 2007 ESCOSA Review

5.36 In its most recent review of the Regime, ESCOSA considered among other things the consistency of the Regime with certain parts of clause 2 of the Competition and Infrastructure Reform Agreement (**CIRA**). In this regard, ESCOSA considered whether the Regime was consistent with clause 2.2 of the CIRA, that is in similar terms to clause 6(4)(a), being that:

> Clause 2.2, CIRA
>
> The parties agree in the first instance terms and conditions for third party access to services provided by means of significant infrastructure facilities should be on the basis of terms and conditions commercially agreed between the access seeker and the operator of the infrastructure.

5.37 ESCOSA observed that the requirement in s 11(1) of the MSAA providing that a regulated operator must provide regulated services on terms agreed between the operator and the access seeker is consistent with clause 2.2 of the CIRA.

The Council's assessment

5.38 The Council accepts that the SA Ports Access Regime encourages parties to enter into commercial negotiations to reach agreement on the terms and conditions of access. The Council considers that the negotiation provisions under the MSAA and the conciliate/arbitrate dispute resolution processes establish an appropriate balance between the interests of the service provider (Flinders Ports), an access seeker and any interested third party.

5.39 The Council considers that ESCOSA is sufficiently resourced and vested with appropriate powers under both the MSAA and the ESCA to undertake its duties in an independent and objective manner. In respect of dispute resolution, the respective roles of ESCOSA in conciliation and the arbitrator in arbitrating access disputes means that commercial negotiations are supported by credible dispute resolutions mechanisms.

5.40 The SA Ports Access Regime satisfies clauses 6(4)(a)-(c).

Clause 6(4)(e): reasonable endeavours

5.41 Clause 6(4)(e) requires that an effective access regime provides for a service provider to use all reasonable endeavours to facilitate the requirements of access seekers. The

Council considers that an access regime may either incorporate clause 6(4)(e) explicitly, or through general provisions that have the same effect.

The SA Ports Access Regime

5.42 Section 14 of the MSAA imposes an obligation on the regulated operator to negotiate in good faith and to endeavour to accommodate as far as practicable the access seeker's reasonable requirements.

5.43 Furthermore, s 12 of the MSAA requires a regulated operator to provide the following preliminary information reasonably requested by an intending access seeker, to assist that access seeker in preparing an access proposal (although no timeframe is prescribed for the provision of such material):

- the extent to which the regulated operator's port facilities subject to the 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, and
- information about the price of regulated services provided by the operator that is required to be provided under the guidelines issues by ESCOSA.[9]

5.44 These obligations are supported by ss 14 and 15 of the MSAA, which entitle the access seeker to refer a dispute to ESCOSA if the regulated operator refuses or fails to enter into good faith negotiations within 30 days of receipt of the access proposal.

Application and submissions

5.45 The South Australian Government submits that the SA Ports Access Regime imposes an obligation on the owner of the facility (at present, Flinders Ports) to negotiate in good faith and also to provide information to a potential access seeker.

The Council's assessment

5.46 The Council considers that there is a reasonable balance between the interests of an access seeker and the regulated operator and that the mechanisms for negotiation and dispute resolution are likely to assist an access seeker in negotiating access. The ability to refer a dispute to ESCOSA within 30 days may promote meaningful and timely access negotiations in order to avoid recourse to the dispute resolution process.

5.47 While preliminary information is to be made available to an intending access seeker, no prescription exists as to the time within which the regulated operator must provide this information. The negotiation framework would be strengthened by

[9] ESCOSA, Ports Industry Guideline No. 1, Access Price Information, May 2010 refers.

addressing this deficiency (although the Council acknowledges that the ability to refer a dispute is expected to encourage information provision) and also by providing a mechanism for review of any charge imposed by the operator for the supply of such information as permitted under s 12(2) of the MSAA.

5.48 The SA Ports Access Regime satisfies clause 6(4)(e).

Clause 6(4)(f): access need not be on exactly the same terms

5.49 Clause 6(4)(f) requires that an effective access regime should allow for access to be provided on different terms and conditions to different users. An access regime should not limit the scope for commercial negotiation, which is consistent with the principles of commercial negotiation enshrined in clause 6 of the CPA.

The SA Ports Access Regime

5.50 The Regime provides the flexibility for parties to negotiate their own arrangements for access, subject to the timing requirements specified in s 13 of the MSAA, with recourse to conciliation and arbitration in the event of disputes. Other than in respect of the price of essential maritime services, there are no constraints on the terms and conditions that may be arrived at. However if arbitration of a dispute occurs, the arbitrator must take into account the principles in s 32 of the MSAA. These reflect the factors in clause 6(5)(i) and provide for consideration of principles concerning efficient pricing, as follows:

(a) the operator's legitimate business interest and investment in the port or port facilities

(b) the costs to the operator of providing the service, but not costs associated with losses arising from increased competition in dependent markets

(c) the economic value to the operator of any additional investment that the proponent or the operator has agreed to undertake

(d) the interest of all persons holding contracts for use of any relevant port facility

(e) firm and binding contractual obligations of the operator or other persons already using any relevant port facility

(f) the operational and technical requirements necessary for the safe and reliable provision of the service

(g) the economically efficient operation of any relevant port facility

(h) the benefit to the public from having competitive markets, and

(i) the pricing principles.

Application and submissions

5.51 The South Australian Government submits that the SA Ports Access Regime complies with clause 6(4)(f) because it provides flexibility for parties to negotiate individually with recourse available to conciliation by ESCOSA, and subsequent arbitration if

necessary, in the event of a dispute. As envisaged with negotiated access, arbitration awards may include different terms and conditions for different access seekers.

The Council's assessment

5.52 While, the SA Ports Access Regime does not expressly stipulate that access can be provided on different terms and conditions, the mechanisms in the Regime support the commercial negotiation of individual access arrangements, and access on different terms and conditions is not precluded. While arbitration in the event of a dispute is required to have regard to certain factors it is not unduly constrained and could be expected to result in access on different terms and conditions.

5.53 The SA Ports Access Regime satisfies clause 6(4)(f).

Clauses 6(4)(g), (h), (i): dispute resolution

5.54 An important element of the negotiation framework in an effective access regime is the requirement that if commercial negotiations and/or agreements between service providers and access seekers break down, then there are appropriate dispute resolution procedures in place. The decisions of the dispute resolution body must bind the parties and be enforceable.

5.55 The Council has considered the SA Ports Access Regime's procedures for independent dispute resolution and enforcement mechanisms in paragraphs 5.71-5.124. For the reasons expressed there, the Council's view is that these procedures adequately support the negotiation framework.

5.56 The SA Ports Access Regime satisfies clauses 6(4)(g), (h) and (i).

Clause 6(4)(m): hindering access

5.57 Clause 6(4)(m) requires that an effective access regime prohibit conduct for the purpose of hindering access. This principle applies both to existing users (to address the risk of problems such as hoarding) and facility owners.

The SA Ports Access Regime

5.58 Section 44 of the MSAA provides that a person must not prevent or hinder a person who is entitled to a maritime service from access to that service. Contravention carries a maximum penalty of $20 000.

Application and submissions

5.59 The South Australian Government submits that the SA Ports Access Regime satisfies the requirements of clause 6(4)(m) by providing that it is an offence, with an accompanying financial penalty, for a person to prevent or hinder access.

The Council's view

5.60 The Council is satisfied that the Regime provides adequately for a situation where access is prevented or hindered.

5.61 The SA Ports Access Regime satisfies clause 6(4)(m).

Clause 6(4)(n): separate accounting

5.62 Clause 6(4)(n) requires that an effective access regime should impose separate accounting arrangements on service providers for the elements of the business covered by the regime. That is, facility owners must make available financial information that focuses exclusively on the elements of their business subject to the regime. The availability of relevant accounting information is necessary for access seekers and regulatory bodies (including dispute resolution bodies) to assess the terms and conditions of access.

5.63 To satisfy clause 6(4)(n), the Council considers that an effective access regime should include provisions that require a service provider to at least:

- maintain a separate set of accounts for each service that is the subject of an access regime
- maintain a separate consolidated set of accounts for all of the activities undertaken by the service provider, and
- allocate any costs that are shared across multiple services in an appropriate manner.

The SA Ports Access Regime

5.64 Section 42 of the MSAA provides that a regulated operator must keep the accounts for regulated services separate from the accounts and records relating to other aspects of the operator's business.

5.65 Where regulated services are provided at different ports, separate accounts must be kept for each port. As the Regime applies at present only to ports operated by Flinders Ports, it requires Flinders Ports to keep separate accounts for each of the six proclaimed ports for the regulated services and for other aspects of its business at the subject ports.

5.66 Accounts and records must be prepared and maintained in accordance with guidelines issued by ESCOSA. Upon request, accounts and records must be made available to ESCOSA.

5.67 The Regime does not impose any further ring fencing requirements on Flinders Ports, nor provide for mechanisms or processes governing the use of any confidential information disclosed by an access seeker to the operator nor means to address any perceived conflicts of interest with the existing or future staffing arrangements at the ports operator.

Application and submissions

5.68 The South Australian Government submits that the SA Ports Access Regime satisfies the clause 6(4)(n) principle by requiring separate accounting arrangements supported by requirements imposed by ESCOSA.

The Council's assessment

5.69 The Council accepts that the SA Ports Access Regime imposes a requirement on Flinders Ports to maintain separate accounting arrangements for the elements of its business covered by the Regime. This requirement is the minimum necessary to satisfy clause 6(4)(n). Should current industry arrangements (including the ownership of the proclaimed ports) change, consideration as to the adequacy of the current arrangements may be necessary.

5.70 The SA Ports Access Regime satisfies clause 6(4)(n).

Dispute resolution (clauses 6(4)(a) – (c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c))

Clauses 6(4)(a)–(c): dispute resolution

5.71 Clause 6(4)(a) establishes commercial negotiation as a cornerstone in determining access outcomes, while clauses 6(4)(b) and (c) complement and underpin the principle in clause 6(4)(a). They recognise that regulatory measures can provide a means for dealing with situations where access providers and access seekers are unable to reach agreement through private commercial negotiations and that an effective access regime should establish an independent and credible dispute resolution procedure.

5.72 In this way, the negotiation framework established by clauses 6(4)(a)-(c) is supported by the requirements for a dispute resolution procedure set out in clauses 6(4)(g)-(l), 6(4)(o) and 6(5)(c) of the CPA.

The SA Ports Access Regime

5.73 The SA Ports Access Regime is intended to apply as a safety net in cases where an alternative to commercial negotiations between a third party access seeker and Flinders Ports is required. In this way, the SA Ports Access Regime encourages access to be achieved through parties negotiating commercial arrangements that suit their particular needs and circumstances.

The Council's assessment

5.74 The SA Ports Access Regime establishes the right for parties to negotiate access for services, with conciliation by ESCOSA and subsequent independent arbitration available where agreement cannot be reached.

5.75 The SA Ports Access Regime satisfies clauses 6(4)(a)-(c).

Clause 6(4)(g): independent dispute resolution

5.76 The clause 6 principles recognise the need for an independent arbitration mechanism to complement and encourage genuine negotiations. Clause 6(4)(g) requires an effective access regime to contain a mechanism to ensure that parties to a dispute

have recourse to an independent dispute resolution body. The arbitration framework should be designed to produce credible and consistent outcomes so promoting confidence among the parties.

5.77 Clause 6(4)(g) also provides that an effective access regime should require the parties to a dispute to fund some or all of the costs of having an independent body resolve the dispute. At the same time, the costs of arbitration should not deter parties from seeking access.

5.78 The Council's past work in certification has raised the question of the balance between possible compromise of an arbitrator's independence if it also acts as the access regime regulator on the one hand, and the value in an arbitrator being able to draw on past experience in relation to an access dispute, on the other. The Council is not opposed in principle to the same body having both roles, though it recognises the potential for issues of conflict to arise and the need for governments to consider the inclusion of safeguards.

5.79 The Council has considered in its previous certification work that it is likely to be in the public interest if arbitration determinations on access disputes are published (with appropriate treatment of confidential material), so that greater certainty may be given about the arbitrator's likely approach to resolving disputes. In turn, this may encourage parties to resolve disputes themselves without arbitration.

The SA Ports Access Regime

5.80 Part 3 Divisions 5-9 of the MSAA provide for arbitration under the Regime. However, while the MSAA expressly provides for conciliation by ESCOSA and subsequent arbitration if a dispute is not resolved by conciliation parties are free to choose their own dispute resolution processes if they wish. Disputing parties would do so by not referring a dispute to ESCOSA, as exists under s 15(2) of the MSAA, but instead reaching agreement to employ some other means of dispute resolution.

5.81 Dispute resolution under the Regime potentially involves two stages. In the first instance, a dispute is referred to ESCOSA to resolve by conciliation. If the dispute is not resolved through conciliation, or is not resolved within 6 months of being referred to ESCOSA for resolution, s 18 of the MSAA provides that ESCOSA may refer the dispute to arbitration. ESCOSA is not obliged to refer a matter to arbitration if in ESCOSA's opinion:

(a) the subject matter of the dispute is trivial, misconceived or lacking in substance, or

(b) the parties have not negotiated in good faith, or

(c) there are other good reasons why the dispute should not be referred to arbitration (s 18(2) MSAA).

5.82 ESCOSA will appoint the arbitrator after consultation with the parties to the dispute. The arbitrator must be a person (or persons) who:

(a) is independent of the parties to the dispute, and

(b) is not subject to any control or direction of the South Australian Government in any capacity, and

(c) is properly qualified to act in the resolution of the dispute, and

(d) has no direct or indirect interest in the outcome of the dispute (s 18(3) MSAA).

5.83 The standard period for an arbitrator to make an award is six months from the date on which the dispute is referred. However, scope exists to extend this standard period if the arbitrator exercises any of the powers relating to the provision of information or documents to the arbitrator in s 27 of the MSAA (s 30A MSAA). An arbitration award must be given to the parties to the award and ESCOSA, within 7 days of it being made (s 31 MSAA). If the arbitrator considers it in the public interest to do so, the arbitrator may give public notice of the outcome of an arbitration (s 24(5) MSAA).

5.84 Section 41 of the MSAA provides that the costs of arbitration are to be borne by the parties equally, unless the arbitrator determines otherwise. However, if a proponent terminates an arbitration or elects not to be bound by an award, the proponent must bear the full costs of the arbitration.

Application and submissions

5.85 The South Australian Government submits that the SA Ports Access Regime achieves the objectives of clause 6(4)(g) of the CPA by providing for the appointment by ESCOSA of an independent arbitrator, in consultation with the parties. The costs of the arbitration are to be borne in equal proportions by the parties unless the arbitrator determines otherwise or the proponent terminates the arbitrator process or elects not to be bound by the arbitration award.

The Council's assessment

5.86 The SA Ports Access Regime provides for conciliation by ESCOSA and the appointment of an independent arbitrator to resolve a dispute(s) where the parties to the dispute do not agree to resolve the dispute by other means. The Regime provides for the parties to share the costs of the arbitration equally unless the arbitrator determines otherwise.

5.87 The Council considers that the arbitration provisions under the SA Ports Access Regime satisfy clause 6(4)(g).

Clause 6(4)(h): binding decisions

5.88 Clause 6(4)(h) provides that an effective access regime should have credible enforcement arrangements to ensure an arbitrator's decision is binding and effective. The regime should give effect to the enforcement process through legislative provisions, with appropriate sanctions and remedies for non-compliance.

5.89 State or territory access regimes may allow for appeal of the decision of a dispute resolution body. To satisfy clause 6(4)(h), the ultimate decision of the appeal body must also bind the parties.

5.90 To satisfy clause 6(4)(h), an effective regime should not diminish any existing rights for appeal of an arbitrator's decision. This does not require the insertion of new appeal provisions.

The SA Ports Access Regime

5.91 At first instance, parties may seek to have a dispute resolved through conciliation by ESCOSA. A successful conciliation will effectively result in a commercial agreement and parties should ensure that the agreement is documented as a contract that can then be enforced contractually if necessary.

5.92 Section 37 of the MSAA provides that arbitrated awards are enforceable as if they are a contract between the parties and therefore contractual remedies are available. Sections 38 and 39 of the MSAA provide that injunctive remedies and orders for compensation are also available from the Supreme Court of South Australia in relation to a contravention of, or non-compliance with an award.

5.93 An arbitrated award or a decision by an arbitrator not to make an award may be appealed to the Supreme Court of South Australia on a question of law (s 40 MSAA). An award or decision not to make an award is not otherwise subject to challenge or capable of being called into question. On an appeal, the Supreme Court may exercise one or more of the following powers:

- vary or revoke the award or decision
- make an award or decision that should have been made in the first instance
- remit the matter to the arbitrator for further consideration or re-consideration
- make incidental or ancillary orders (including orders for costs).

5.94 Other decisions made by ESCOSA in its capacity as the industry regulator–such as determining whether a dispute exists and whether it should be referred to arbitration–may be subject to judicial review in accordance with the *Supreme Court Act 1935* (SA). The decision of the Supreme Court is binding on the parties, subject to any further appeal rights. There is no recourse to merits review of such decisions under the MSAA.

Application and submissions

5.95 The South Australian Government submits that the SA Ports Access Regime satisfies clause 6(4)(h) of the CPA by providing for binding dispute resolution with rights of appeal to the Supreme Court of South Australia and judicial review by the Supreme Court of any decision by ESCOSA.

The Council's assessment

5.96 Under the SA Ports Access Regime, the outcome of an arbitration[10] is enforceable in the same manner as a judgment or Court order. One of the advantages of the Regime's arbitration process is that it allows parties to appoint an arbitrator who has specialist technical expertise and experience in the subject matter of the dispute. Thus an arbitration process can provide a specialist forum thereby facilitating more efficient and effective dispute resolution.

5.97 While there is no provision for merits review of ESCOSA's or an arbitrator's decisions, existing rights of appeal, in the nature of judicial review in the Supreme Court of South Australia, are preserved. That is, a party may appeal an ESCOSA decision or an arbitrator's award or decision on a question of law arising out of that decision or award. This is not dissimilar to the avenues of appeal from a Court judgment/order, in the sense that appeals from a Court judgment/order usually only have some prospect of success if the appeal is based on an error of law, rather than on a finding of fact. In other words, to the extent that grounds for appeal may only be based on a question of law arising out of a decision, it is unlikely that a party aggrieved by an arbitrator's determination would be at a material disadvantage were the decision instead made by a trial judge in Court.

5.98 The SA Ports Access Regime satisfies clause 6(4)(h).

Clause 6(4)(i): principles for dispute resolution

5.99 The Council considers that clause 6(4)(i) applies to any body responsible for determining the terms and conditions of access—that is, both arbitrators and regulators. Clause 6(4)(i) covers both price and non price terms and conditions of access. Where relevant, the dispute resolution body should also be obliged to take account of the clause 6(5)(b) principles in considering access prices.

The SA Ports Access Regime

5.100 Section 32(1) of the MSAA prescribes each of the principles in clause 6(4)(i) as matters an arbitrator should take into account in deciding on the terms of an award.

Application and submissions

5.101 The South Australian Government submits that the SA Ports Access Regime provides for the taking account of the clause 6(4)(i) principles by an arbitrator in s 32(1) of the MSAA.

The Council's assessment

5.102 The SA Ports Access Regime does not require ESCOSA to have regard to the clause 6(4)(i) principles in any conciliation of a dispute. While it would be preferable for ESCOSA to have such regard, as conciliation is largely a further step available to assist

[10] Called an award or a determination.

the dispute parties to reach commercial agreement with the involvement and assistance of ESCOSA, it is reasonable for this process to be conducted without regard to specific requirements. The fact that the clause 6(4)(i) principles are to be taken into account by the arbitrator, being the dispute resolution body whose decisions are binding on the parties, is sufficient for the purpose of complying with clause 6(4)(i).

5.103 The SA Ports Access Regime satisfies clause 6(4)(i) of the CPA.

Clause 6(4)(j): facility extension

5.104 In some situations, the needs of an access seeker can be met only by an extension of the facility's geographic range or an expansion of its capacity. These matters should be subject, in the first instance, to negotiation between the parties. When parties cannot reach an agreement, however, the arbitrator should be empowered to determine, subject to the clause 6(4)(j) criteria, whether the owner should be required to extend or permit extension of the facility.

The SA Ports Access Regime

5.105 Section 33(2) of the MSAA provides that an award may require the regulated operator to extend, or permit the extension of, port facilities under the operator's control provided:

(a) the extension is technically and economically feasible and consistent with the safe and reliable operation of the facilities, and

(b) the operator's legitimate business interests in the port facilities are protected, and

(c) the terms on which the service is to be provided to the access seeker take into account the costs and economic benefits to the parties of the extension.

Application and submissions

5.106 The South Australian Government submits that the SA Ports Access Regime satisfies clause 6(4)(j) because it provides that an award may require extension of port facilities having regard to the specific criteria in s 33(2) of the MSAA that are the same as those in clause 6(4)(j).

The Council's assessment

5.107 The SA Ports Access Regime satisfies clause 6(4)(j).

Clause 6(4)(k): a material change in circumstances

5.108 Clause 6(4)(k) provides for an access arrangement to be revoked or modified following a material change of circumstances. The Council considers that this clause should not be interpreted in a way that would compromise the certainty of contractual arrangements. Once an agreement is signed—whether through commercial negotiation, conciliation or following arbitration—it should govern the

relationship between the parties. An appropriate way in which to address a material change of circumstances might be for the parties to identify in the agreement any factors that would warrant the contract being reconsidered in the future.

5.109 To satisfy this clause, an access regime could provide for parties to use an arbitrator to resolve disputes over what constitutes a material change in circumstances. This provision would allow for circumstances where commercial negotiations fail to achieve agreement.

The SA Ports Access Regime

5.110 The SA Ports Access Regime relevantly provides that parties negotiating their own access arrangements are not precluded from determining what may constitute a material change in their particular circumstances and incorporating provisions to this effect in their access contracts.

5.111 In respect of an arbitration award, s 36 of the MSAA sets out the process for its termination or variation. 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 MSAA will apply (s 36(3) of the MSAA).

Application and submissions

5.112 The South Australian Government submits that the SA Ports Access Regime satisfies clause 6(4)(k) by providing mechanisms to deal with a material change in circumstances.

The Council's assessment

5.113 The SA Ports Access Regime satisfies clause 6(4)(k).

Clause 6(4)(l): compensation

5.114 Clause 6(4)(l) provides that a dispute resolution body should only impede a person's existing right to use a facility when it has considered the case for compensating that person. The Council does not interpret this to mean that an access regime need allow a dispute resolution body to impede existing rights. However, where a dispute resolution body can do this, it must also be empowered to consider and, if appropriate, determine compensation.

The SA Ports Access Regime

5.115 Section 33 of the MSAA 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 ESCOSA, and

- 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.

Application and submissions

5.116 The South Australian Government submits that the SA Ports Access Regime satisfies clause 6(4)(l) by permitting an arbitrator to vary the rights of other users if the arbitrator has considered those users reasonably anticipated requirements and compensation.

The Council's assessment

5.117 The SA Ports Access Regime satisfies clause 6(4)(l).

Clause 6(4)(o): access to financial information

5.118 An effective access regime should provide the dispute resolution body and other relevant bodies (for example, regulators and appeal bodies) with the right to inspect all financial documents pertaining to the service. This principle seeks to ensure that the dispute resolution body and other relevant bodies have access to all information necessary to properly assess and settle any issues relating to third party access.

The SA Ports Access Regime

5.119 Section 27 of the MSAA provides that where an arbitrator has reason to believe that a person (including 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 delivery of that information. The arbitrator may require the production of written statements, specific documents or copies thereof, or may require a person to appear before it to give evidence.

5.120 Failure to comply with the requirements of s 27 of the MSAA may incur a maximum penalty of $20 000. However, a person is not required to give information if: [11]

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

5.121 Pursuant to s 28 of the MSAA an information provider may seek to do so confidentially. 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.

[11] Section 27(5) of the MSAA.

5.122 Section 29 of the ESCA establishes the information gathering powers of ESCOSA. By written notice ESCOSA may require a person to give information that ESCOSA reasonably requires for the performance of its functions. This includes its price monitoring functions in respect of the essential maritime services. Failure to comply may incur a maximum penalty of $20 000 or imprisonment for 2 years.

Application and submissions

5.123 The South Australian Government submits that the SA Ports Access Regime satisfies clause 6(4)(o) by providing for information gathering, document production and appearance before the arbitrator for the giving of evidence relevant to the dispute. Failure to comply with such a request made under s 27 of the MSAA may attract a financial penalty.

The Council's assessment

5.124 The SA Ports Access Regime satisfies clause 6(4)(o).

Clause 6(5)(c): merits reviews of arbitration determinations

5.125 Clause 6(5)(c) recognises that an important element of an access regime is the independent review of access decisions. Clause 6(5)(c) provides that where merits review is provided, the review should be limited to information submitted to the original decision-maker.

The SA Ports Access Regime

5.126 The SA Ports Access Regime does not provide for merits review although an aggrieved party may seek judicial review of an arbitration award in the Supreme Court of South Australia (see the discussion at paragraph 5.97 above).

Application and submissions

5.127 The South Australian Government submits that because merits review is not provided for the SA Ports Access Regime compliance with clause 6(5)(c) is unnecessary.

The Council's assessment

Merits review of arbitration determinations

5.128 As the SA Ports Access Regime does not provide for merits review of an arbitration determination, the Council has not considered the Regime's mechanisms for dispute resolution against clause 6(5)(c) of the CPA. It appears to the Council that, despite the clause 6 principles as expressed recognising that a procedure for independent review of decisions is desirable, the wording of clause 6(5)(c) contemplates that an access regime may not provide for merits review.

5.129 Arbitrations will generally focus on resolving a particular matter(s) in an access arrangement that is a source of disagreement between the parties. Given the nature of the decision in an arbitration determination and the fact that parties' rights to

judicial review are preserved (s 40 of the MSAA), the Council's view is that the benefit in providing for merits review of arbitration determinations is not clearly established.

Merits review of decisions of the regulator

5.130 The SA Ports Access Regime does not provide for merits review of ESCOSA's regulatory decisions. In the Council's previous certification recommendations, the Council has expressed the view that providing for appropriate review of the decisions of regulators is good regulatory practice. As envisaged by the CPA, such review does not need to allow for a 'second bite of the cherry' and can be tailored to allow for redress of decision making errors (such as where it can be established that there is an error of law or a finding of fact was not open to a decision maker).

5.131 An appropriate level of merits review does not require a general reconsideration of the initial decision or de novo re-determination. In relation to the reviewable regulatory decisions under the National Gas Law for example, applications to the Australian Competition Tribunal for merits review may only be made on the grounds of an error in the regulator's finding of facts, or that the exercise of the relevant regulator's discretion was incorrect or unreasonable, or that the occasion for exercising the discretion did not arise. In the Council's view this limited merits review appropriately balances the need for oversight of regulatory decision making and reduces scope for unacceptable delay.

5.132 Merits review of arbitration outcomes or regulatory decisions is not a mandatory requirement under the clause 6 principles. The Council considers that certification of the SA Ports Access Regime should occur despite the absence of merits review of arbitration determinations and of ESCOSA's regulatory decisions. As noted previously, the absence of merits review does not affect the preservation of judicial review.

Efficiency promoting terms and conditions of access (clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b))

5.133 An effective access regime must enable outcomes that enhance the objective of efficient use of and investment in significant bottleneck infrastructure, so promoting competition. An effective regime needs to:

- incorporate an objects clause that provides a clear statement that the purpose of regulating third party access is to promote economic efficiency in the operation, use and investment in infrastructure thereby promoting competition in upstream and downstream markets (clause 6(5)(a))
- provide a robust framework for negotiating agreements and resolving disputes: a right to negotiate access supported by binding dispute resolution (clauses 6(4)(a)-(c), (g) and (h)), an obligation on the service provider to negotiate in good faith (clause 6(4)(e)), and availability of required information (clauses 6(4)(n) and (o))

- provide an entitlement to revoke or modify an access agreement where there has been a material change in circumstances (clause 6(4)(k))
- enable efficient access terms and conditions while providing considerable discretion and flexibility in setting prices (clauses 6(4)(f) and 6(4)(i) specify the considerations/factors that a dispute resolution body should take into account when determining access terms and the pricing principles in clause 6(5)(b)), and
- require that regulated access prices be set to cover costs, provide a return on investment that is commensurate with the risks involved and provide incentives to reduce costs or otherwise improve productivity.

The SA Ports Access Regime

5.134 The SA Ports Access Regime includes an objects clause in s 3 of the MSAA

> The objects of this Act are—
>
> (a) to provide access to maritime services on fair commercial terms; and
>
> (b) 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; and
>
> (c) to protect the interests of users of essential maritime services by ensuring that regulated prices are fair and reasonable having regard to the level of competition in, and efficiency of, the regulated industry; and
>
> (d) to ensure that disputes about access are subject to an appropriate dispute resolution process.

5.135 The SA Ports Access Regime is underpinned by a negotiate/arbitrate framework, with ESCOSA monitoring prices for essential maritime services pursuant to s 6 of the MSAA and in accordance with the current 2007 Ports Price Determination. (At present ESCOSA does not set the prices of regulated port services though this is potentially available.) In the 2007 Ports Pricing Review, ESCOSA concluded:

> ... that there was no justification for introducing more heavy-handed price regulation than currently existed. ... the major benefit from price monitoring was that it provided transparency to access seekers through publication of the price list. While price monitoring s considered a relatively light-handed form of price regulation, the Commission acknowledged that it did impose some compliance costs on the port operators. However, ... these costs were outweighed by the benefits that price monitoring provides to port users and prospective port users. (ESCOSA 2007(b), p 22)

5.136 The price-monitoring regime allows port operators to set their own prices for port services taking into account the possibility of more heavy-handed price regulation if an ESCOSA pricing review decides that it is appropriate. The next ports pricing review is to occur in 2011-12.

5.137 The pricing principle in clause 6(5)(b)(i) is not expressly included in the MSAA/Regime. However, ss 25(3)-(5) of the ESCA provides for ESCOSA to make price determinations for regulated industries (which captures the essential maritime services) having regard to the costs 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, all of which are elements of clause 6(5)(b)(i) (see also paragraph 5.50 above).

5.138 The principles in clause 6(5)(b), (ii)-(iv), are reproduced in s 32(2) of the MSAA as the pricing principles to be taken into account by an arbitrator in resolving an access dispute. In addition, s 32(1) of the MSAA places a range of obligations on an arbitrator in determining an award that might be described as broadly requiring the arbitrator to address the 'efficient pricing' obligations in clause 6(5)(b)(i).

Application and submissions

5.139 The South Australian Government submits that the inclusion of the objects clause in s 3 of the MSAA satisfies the requirement of clause 6(5)(a) of the CPA.

5.140 In addition, the South Australian Government submits that clause 6(5)(b)(ii)-(iv) of the CPA is satisfied by the pricing principles set out in s 32(2) of the MSAA and that while clause 6(5)(b)(i) is not included in the MSAA the clause is incorporated in essence by the requirement in the ESCA that where ESCOSA makes price determinations it must have regard to, amongst other things, the costs of supplying the service, the service provider's return on assets, the costs of complying with law or regulatory requirements and the financial implications of the price determination.

5.141 National Bulk Commodities Group Inc (**NBCG**) submits that towage is neither an essential or regulated service under the MSAA and that it should be included as an essential maritime service so that it is subject to (at least) price monitoring. NBCG states that it has identified studies showing towage to be the highest charge faced by a ship operator at Port Giles and the second highest charge at the other five proclaimed ports in South Australia. Were towage included as an essential maritime service it would be the subject of (at least) price monitoring by ESCOSA. NBCG submits this would provide competitive tension in the South Australian towage market (NBCG1).

5.142 Shipping Australia Limited (**SAL**) questions the findings of the ESCOSA Review that port users are able to negotiate prices with Flinders Ports below the publicly listed prices. With respect to pilotage charges, SAL expresses concern at the extent of the price increases for pilotage in the last 3 years. Pilotage is not an essential maritime service subject to price monitoring by ESCOSA. However, a pilot is required to keep a schedule of current charges and notify ESCOSA of changes to those charges. SAL supports ongoing price monitoring by ESCOSA to protect the interests of users (SAL1).

5.143 Both Flinders Ports and Ports Australia were supportive of certification of the Regime. Flinders Ports submits that certification would provide greater certainty to access seekers, users and providers of maritime services and reduce administrative and

compliance costs from regulation under only one access regime. Flinders Ports also notes that the Regime, which has been in operation since 2001, has supported the work it has done to develop and upgrade the ports it operates (FP1). Ports Australia submits that the Regime is simple and transparent and delivers fairness to the various parties involved (PA1).

The Council's assessment

5.144 The ESCOSA Review recommended that the objects of the MSAA be amended to include the additional object of promoting the *"economically efficient use or, operation and investment in, maritime services"*. With this amendment the ESCOSA Review considered that the objects of the Regime would be consistent with the requirements of clause 2.4(a) of the CIRA (which reflect clause 6(5)(a) of the CPA). The South Australian Government has since amended the MSAA to take account of this in s 3(b) of the MSAA.

5.145 The Council considers that the objects clause in s 3 of the MSAA Act satisfies clause 6(5)(a).

5.146 The SA Ports Access Regime satisfactorily incorporates the principles in clauses 6(4)(a)-(c),(g) and (h) of the CPA by establishing a framework for parties to reach commercial agreement on access terms and conditions, with provision for conciliation by ESCOSA and arbitration where agreement cannot be reached. The MSAA Act provides a framework in Divisions 4—8 of Part 3 for such dispute resolution to occur which includes provision as to the timeliness of such processes.

5.147 The SA Ports Access Regime satisfactorily incorporates the principles in clauses 6(4)(e) of the CPA by requiring the operator to negotiate with an access seeker in good faith and on the basis that the reasonable requirements of the access seeker are to be accommodated as far as practicable, s 14(1) of the MSAA.

5.148 While not an explicit requirement of the SA Ports Access Regime, the Council acknowledges that the Regime provides the flexibility for parties to negotiate their own access arrangements and that any arbitration award is constrained only by the principles prescribed in s 32 of the MSAA (which reflect the principles in clause 6(4)(i)). Accordingly, access to a port service need not be on exactly the same terms and conditions for all users. Clause 6(4)(f) of the CPA appears to be broadly satisfied.

5.149 The SA Ports Access Regime allows for a party to an arbitration award to propose termination or variation of the award if there is a material change in circumstances (s 36(3) of the MSAA). This satisfies clause 6(4)(k) of the CPA.

5.150 The SA Ports Access Regime implements ring fencing arrangements by requiring a regulated operator to keep separate books of account and other records for regulated services and in compliance with guidelines issued by ESCOSA. An arbitrator may require the production of these records, should access otherwise be precluded, via its information gathering powers in s 27 of the MSAA. These provisions satisfy clauses 6(4)(n) and (o) of the CPA.

5.151 Essential maritime services are subject to price monitoring[12] by ESCOSA and with the current arrangement to next be reviewed by ESCOSA in 2011-12.

5.152 The CPA does not require an effective access regime to provide for regulated service prices, but where a regime does it should have regard to the pricing principles in clause 6(5)(b) of the CPA. As noted at paragraph 5.137 above, where ESCOSA makes price determinations for regulated industries (such as essential maritime services), it is required, in essence, to take into account each of the elements of clause 6(5)(b)(i)-(iv), pursuant to ss 25(3)-(5) of the ESCA and s32(2) of the MSAA.

5.153 The pricing principles in CPA clause 6(5)(b)(ii)-(iv) are explicitly included in s 32(2) of the MSAA (as principles to be taken into account by an arbitrator). Therefore an arbitrator must take account of the principles of allowing for multi-part pricing and price discrimination when efficient, to not allow a related service provider to set terms and conditions that discriminate in favour of its downstream operations (except where the cost of providing access is higher), and to provide incentives to reduce costs or otherwise improve productivity in making an arbitration award.

5.154 Furthermore, arbitrated outcomes under the Regime satisfactorily address the requirement of the CPA to take efficient pricing into account (clause 6(5)(b)(i)) because s 32(1) of the MSAA specifies principles that reflect the concept of efficient pricing and these are principles that an arbitrator should take into account in deciding on the terms of an award (see also paragraph 5.50 above).

5.155 The Council notes the concerns raised by NBCG and SAL. However, the CPA does not require a regime to include price regulation nor does it require specific services to be subject to such price regulation. ESCOSA is required by s 43 of the MSAA to review the Regime, including its coverage and pricing, at five yearly intervals. The Council considers the matters raised by NBCG and SAL are more appropriately positioned to be considered in the next review by ESCOSA.

5.156 The Council considers that the SA Ports Access Regime broadly satisfactorily incorporates efficiency promoting terms and conditions of access in accordance with clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b) of the CPA.

[12] A light-handed form of price regulation.

6 Assessment against the objects of Part IIIA of the TPA

6.1 The Council in recommending on the certification of an access regime and the Minister in making a decision on certification must have regard to the objects of Part IIIA (ss 44M(4)(aa) and 44N(2)(aa) of the TPA).

6.2 The objects of Part IIIA are set out in s 44AA, and provide that:

> The objects of this Part are to:
>
> (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
>
> (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

6.3 In considering whether a regime has regard to the objects of Part IIIA of the TPA, the Council does not solely consider the objects clause in the legislation that enables the regime. Rather, the Council considers whether the intent and operation of a regime as a whole, guided by its stated object or objects, accords with the objects of Part IIIA. The Council also takes account of the means of regulation (if any) of any other services in the industry to which a regime is relevant that are not covered by the regime. This consideration is in order to address the Part IIIA object that a regime provides a framework for consistent access regulation in each industry.

The SA Ports Access Regime

6.4 The objects clause in s 3 of the MSAA states that the objects of the MSAA (and thereby the Regime) are:

> a) to provide access to maritime services on fair commercial terms; and
>
> b) 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; and
>
> c) to protect the interests of users of essential maritime services by ensuring that regulated prices are fair and reasonable having regard to the level of competition in, and efficiency of, the regulated industry; and
>
> d) to ensure that disputes about access are subject to an appropriate dispute resolution process.

Application and submissions

6.5 Neither the South Australian Government in its application or the interested parties in submissions comment explicitly on the SA Ports Access Regime's regard to the objects of Part IIIA of the TPA. Nonetheless the application contains information that (indirectly) addresses the requirement to have regard to the objects of Part IIIA.

The Council's assessment

6.6 The Council accepts that the stated objects of the SA Ports Access Regime in s 3(b) of the MSAA substantially reflect the first limb of the objects of Part IIIA of the TPA, being to promote the economically efficient use and operation of and investment in maritime services with the commensurate effect of facilitating competition in dependent markets. Moreover, as evidenced by the discussion in paragraphs 5.133–5.156 that concludes that the Regime satisfactorily provides for efficiency in promoting terms and conditions of access, the Council considers that the intent and operation of the Regime as a whole, guided by its stated object or objects, being the four limbs to s 3 of the MSAA, is such that it accords with the objects of Part IIIA.

6.7 As well as aligning the broad objectives of the SA Ports Access Regime with those of Part IIIA, importantly the Regime's objects also inform and guide ESCOSA's application and enforcement of the SA Ports Access Regime and any arbitration conducted under the Regime.

6.8 In the Council's view, the SA Ports Access Regime accords with the first limb of the objects of Part IIIA (s 44AA(a) of the TPA).

6.9 In considering the second limb of the objects of Part IIIA, the Council is concerned with whether the Regime provides a framework and guiding principles to encourage a consistent approach to port access regulation.

6.10 Access to South Australian ports is either regulated under the Regime or unregulated: there is no other regulatory arrangement for South Australian ports and none proposed by the South Australian Government. Of the 14 ports in South Australia, at present six are proclaimed and subject to the Regime. The proclaimed ports are the six main commercial ports in South Australia. Of the remaining (unregulated) ports:

- Ardossan was previously proclaimed and covered by the Regime, but its coverage was removed following the ESCOSA Review because there was only one main user at that port, with established long term arrangements giving little potential for additional port access in the near future[13]
- Klein Point has no common user berths and is dedicated to the shipping of limestone to Port Adelaide by a single user
- Port Stanvac has been decommissioned
- Whyalla and Port Bonython are (and have historically been) single user ports integrated with production facilities for iron ore and liquid fuels that service the needs of the owners/operators—Whyalla for One Steel and Port Bonython for Santos, and
- Penneshaw, Kingscote and Cape Jervis provide passenger transport facilities and intrastate cargo services.

[13] ESCOSA Report, p 6.

6.11 The ports for which access is regulated under the Regime have similar specifications and uses, and may reasonably be expected to be the subject of an access request, in which case the provisions of the Regime would apply. Access to the South Australian ports not at present subject to the Regime is unregulated.

6.12 ESCOSA's five yearly reviews provide the opportunity for the coverage of the Regime to be reassessed and, if appropriate, existing facilities/services removed (as occurred with Ardrossan) and new facilities/services included. Were ESCOSA to recommend that access regulation apply to a facility/service not covered, then, subject to the necessary legislative amendments, the form of regulation set out in the SA Ports Access Regime would apply. The Council considers it is reasonable to expect that ESCOSA will adopt a consistent approach to what is regulated and should be regulated under the Regime.

6.13 For the reasons in paragraphs 6.10-6.126.15 the Council considers that the Regime accords with the second limb of the objects of Part IIIA (s 44AA(b) of the TPA).

6.14 The Council is satisfied therefore that certification of the Regime would promote both limbs of the objects of Part IIIA of the TPA.

6.15 The Council has in some of its past certification work considered whether there is benefit gained by the application of localised versions of Part IIIA that do not appear to add refinement or certainty to the generally applicable national scheme for access regulation in Part IIIA of the TPA (see NCC 2009c). Where a state or territory regime appears to be largely a localised version of Part IIIA there would appear to be little benefit (and indeed a lessening of regulatory consistency through unnecessary duplication) in applying that state or territory regime in preference to relying on the national access regime in Part IIIA.

6.16 In this case, when compared to the national access regime in Part IIIA, the SA Ports Access Regime is distinguishable from the national access regime because the Regime provides for price regulation of essential maritime services by ESCOSA (in its current light form or a full form of regulation if ESCOSA determines that appropriate) and a two step dispute resolution process of conciliation by ESCOSA and subsequent arbitration if necessary. The Council considers these additions enhance what is available to access seekers under the general provisions of Part IIIA of the TPA.

7 The duration of certification

7.1 When recommending to the Commonwealth Minister on the certification of an access regime, the Council must also recommend on the period that any certification should remain in force (s 44(M)(5) of the TPA).

7.2 A certification remains in force for the duration specified in the Commonwealth Minister's decision unless the relevant state or territory ceases to be a party to the CPA. There is no mechanism in the TPA for revocation or early termination of a certification.

7.3 Where an access regime has been certified as an effective access regime, in considering any application for declaration of a service to which the regime applies the Council is bound to follow that certification and must not recommend declaration, unless it believes there have been substantial modifications to the access regime or the clause 6 principles since the regime was certified. Similarly a decision making Minister may not declare a service that is subject to a certified state or territory regime unless he or she considers there have been substantial modifications to the access regime or the clause 6 principles since the regime was certified.

Application and submissions

7.4 The South Australian Government seeks certification for a period of at least 10 years.

7.5 Flinders Ports suggests that a longer period for certification should be considered given the long term nature of the infrastructure being developed and the direct relationship that pricing (and the level of certainty of the pricing structure put in place) has with the type of port infrastructure development being undertaken (FP1).

7.6 Ports Australia submits that certification should be for a minimum of 10 years and preferably longer to provide regulatory certainty because that is necessary to instil the confidence to encourage and support the types of investments required by port corporations and other port service providers (PA1).

The Council's assessment

7.7 In considering the duration of a certification, the Council considers the need for infrastructure owners/service providers and users to have stability and certainty in the regulatory environment, on the one hand, with the recognition that there may be changes in the market environment and the fact that there is no mechanism in the TPA for revocation of a certification,[14] on the other. Where relevant, the Council also considers other factors such as whether a regime is proposed as a transitional measure or is being introduced in the early stages of industry reform and whether

[14] A service that is subject to a certified state or territory access regime may nevertheless be declared under Part IIIA where the Council believes there have been substantial modifications to the access regime or the relevant principles in the CPA since the regime was certified.

there are other relevant regulatory proposals such as for the development of a national access regime for an industry.

7.8 Infrastructure Australia and the National Transport Commission have developed a National Ports Strategy (IA&NTC 2010) which is currently before the Council of Australian Governments (**COAG**). One of the actions proposed under the strategy involves achieving consistency in legislation and regulation. Should the strategy be endorsed by COAG and implemented there may be implications for the Regime. At the time of this recommendation however, COAG's consideration of the strategy and its implementation is not sufficiently advanced to enable the Council to give consideration to any such implications.

7.9 A consideration for the Council in recommending on the duration of any certification for this Regime is the requirement for ESCOSA to review the continued operation and coverage of the Regime, as well as ports pricing. ESCOSA is due to report on the next review on or before 30 October 2012, with reporting on the subsequent review due five years thereafter.

7.10 The Council notes that two reviews are scheduled to be completed by ESCOSA should the Regime be certified for a 10 year period. It is conceivable that either or both of these reviews may lead to the modification or even the expiry of the Regime. Considering that there is no mechanism to revoke a certification in the TPA, and having regard to the certification period sought by the applicant, the Council considers that a 10 year certification period as sought by the South Australian Government is appropriate.

Appendix A — The clause 6 principles

—extract from the Competition Principles Agreement

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.

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; and

(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; and

(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).

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

6(3A) In assessing whether a State or Territory access regime is an effective access regime under the *Trade Practices Act 1974*, the assessing body:

(a) should, as required by the *Trade Practices Act 1974*, and subject to section 44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under that access regime; and

(b) should recognise that, as provided by subsection 44DA(2) of the *Trade Practices Act 1974*, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement.

6(4) 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.

(d) Any right to negotiate 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.

(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.

(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

(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.

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

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

  (i) the owner's legitimate business interests 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 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.

(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 costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

(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.

(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.

(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.

(n) Separate accounting arrangements should be required for the elements of a business

which are covered by the access regime.

(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.

(p) Where more than one State or Territory 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 aspect of access and a single forum for enforcement of access arrangements.

6(5) A State, Territory or Commonwealth access regime (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) 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; and

(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; and

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

Appendix B — Information taken into account by the Council

Author	Date	Title	Confidentiality
Applications and submissions			
Flinders Ports Pty Ltd	22 November 2010	Submission re Application for Certification of South Australian Ports Access Regime (**FP1**)	No
Government of South Australia	15 October 2010	Certification of the South Australian Ports Access Regime, Submission to the National Competition Council, October 2010	No
National Bulk Commodities Group Inc	9 November 2010	Submission re Application for Certification of South Australian Ports Access Regime (**NBCG1**)	No
Ports Australia	23 November 2010	Submission re Application for Certification of South Australian Ports Access Regime (**PA1**)	No
Shipping Australia Ltd	3 November 2010	Submission re Application for Certification of South Australian Ports Access Regime (**SAL1**)	No
Shipping Australia Ltd	16 February 2011	Email from Llew Russell AM, Chief Executive Officer, Shipping Australia Ltd (**SAL2**)	No
References			
COAG (Council of Australian Governments)	1995	*Competition Principles Agreement*, as amended 13 April 2007.	
ESCOSA	2007a	2007 *Ports Pricing and Access Review, Final Report*, September 2007	
ESCOSA	2007	Ports Pricing Determination	
IA&NTC (Infrastructure Australia & National Transport Commission)	2010	*National Ports Strategy – Infrastructure for an economically, socially and environmentally sustainable future, December 2010*	
NCC	1997	*Application for Certification of the Victorian Access Regime for Commercial Shipping Channels: Reasons for Decision*	
NCC	2010a	*Certification of State and Territory Access Regimes, A guide to Certification under Part IIIA of the Trade Practices Act 1974 (Cth).*	
NCC	2009c	*NSW Water Industry Access Regime - Final Recommendation.*	
PC (Productivity Commission)	2001	*Review of the National Access Regime, Inquiry Report, Report No 17, 28 September 2001*	

Author	Date	Title	Confidentiality
Acts and other instruments			
		Competition Policy Reform Bill 1995 (Cth), Explanatory Memorandum.	
		Essential Services Commission Act 2002 (SA).	
		Maritime Services (Access) Act 2000 (SA).	
		Supreme Court Act 1935 (SA).	
		Trade Practices Act 1974 (Cth) (**TPA**) (renamed *Competition and Consumer Act 2010* (Cth) with effect 1 January 2011).	
		Trade Practices Amendment (Infrastructure Access) Act 2010 (Cth).	
		Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth).	

Appendix C – Chronology

Date	Event
15 October 2010	Application received by the Council
20 October 2010	Notice of the application published in *The Australian* and on the Council's website, inviting submissions in response to the application. Interested parties notified.
22 November 2010	Closing date for submissions on the application
13 January 2011	Draft recommendation released
18 February 2011	Closing date for submissions on the draft recommendation
10 March 2011	Final recommendation provided by the Council to the Commonwealth Minister