

STATEMENT OF REASONS – DECISION ON THE EFFECTIVENESS OF THE SOUTH AUSTRALIAN PORTS ACCESS REGIME

Competition and Consumer Act 2010 (Cth), section 44N

BACKGROUND

The certification of State and Territory access regimes

- Under Part IIIA of the *Competition and Consumer Act 2010 (Cth) (CCA)*, if a State or Territory that is a party to the Competition Principles Agreement (CPA) has established a regime for access to a service or a proposed service, the responsible Minister for the State or Territory may apply to the National Competition Council (NCC), asking the NCC to recommend that the Commonwealth Minister decide that the regime is an effective access regime (subsections 44M(1) and (2) of the CCA).
- The NCC must recommend to the Commonwealth Minister that he or she decide that the access regime is either an effective access regime for the service, or not an effective access regime for the service.

Ministerial decision on effectiveness of access regime

- Section 44N of the CCA provides that on receiving a recommendation from the NCC in relation to the effectiveness of an access regime, the Commonwealth Minister must decide that the access regime is or is not an effective access regime for the service.
- Further, in making a decision, subsection 44N(2) requires that the Commonwealth Minister apply the relevant principles in the CPA, treating those principles as guidelines rather than binding rules, and must have regard to the objects of Part IIIA of the CCA and not consider any other matters.
- The Minister's decision must specify the period for which it is in force (subsection 44N(3)).

HISTORY OF THE APPLICATION

- On 10 October 2010 the South Australian Premier, the Hon Mike Rann MP, applied to the NCC under section 44M of the *Trade Practices Act 1974 (Cth)*¹ for a recommendation that the South Australian Ports Access Regime (SAPAR) be certified effective.
 - The NCC published the notice of application, invited submissions and received four submissions in response.
- On 13 January 2011, the NCC released a draft recommendation that the SAPAR be certified as effective for a period of 10 years.

¹ The application was made under the *Trade Practices Act 1974 (Cth)*, which was renamed the *Competition and Consumer Act 2010* on 1 January 2011.

- The NCC invited submissions and received one submission in response.
- On 10 March 2011, I received a recommendation from the NCC that I certify the SAPAR as an effective access regime under Part IIIA of the CCA for a period of 10 years.

OVERVIEW OF THE SAPAR

- The SAPAR applies to six proclaimed ports in South Australia.
 - These ports are:
 - : Port Adelaide;
 - : Port Giles;
 - : Wallaroo;
 - : Port Pirie;
 - : Port Lincoln; and
 - : Thevenard.
 - The ports are operated by Flinders Ports Pty Ltd.
- The SAPAR is established by the *Maritime Services (Access) Act 2000* (SA) ('the MSAA').
- Broadly, the MSAA establishes a framework for price and access regulation for ports previously owned by the State Government. It aims to ensure access to maritime services is available on fair commercial terms, through a negotiate-arbitrate access regime.
 - Under the MSAA, regulated operators in ports covered by the Regime must provide services on terms agreed between the operator and the customer. If agreement is not reached, the arbitrator may set the terms and conditions of access.
- The SAPAR applies to maritime services, regulated services and essential maritime services, as defined under the MSAA.
 - Essential maritime services, such as providing berths or facilities for loading and unloading, are subject to light-handed price regulation.
- The Essential Services Commission of South Australia (ESCOSA), an independent regulator, provides ongoing monitoring and control of these arrangements.
 - The ESCOSA is established by the *Essential Services Commission Act 2002* (SA) (ESCA).

DECISION

- I have considered each of the relevant principles from the CPA, as well as the objects of Part IIIA of the CCA, in assessing the SAPAR.
- The NCC considers – and I agree – that the SAPAR addresses all the relevant principles set out in the CPA, and accords with the objects of Part IIIA. I have therefore decided that all relevant matters for certification of the SAPAR as an effective access regime are satisfied.
- My decision to certify the SAPAR as an effective access regime is to apply for a period of 10 years.
- My consideration of the NCC’s final recommendation, and my conclusions on that recommendation, are described below. In making my decision I have drawn on the findings of the NCC.

CONSIDERATION OF THE SAPAR AGAINST THE RELEVANT CPA PRINCIPLES

- The NCC analyses a regime’s incorporation of the guiding CPA principles by considering the principles in five categories, as follows:
 - the scope of the access regime – 6(3)(a), 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); and
 - efficiency promoting terms and conditions of access – 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b).
- This approach assisted me to form a view on whether the relevant CPA principles are incorporated in the SAPAR.

Scope of the access regime – 6(3)(a), 6(4)(d)

- The CPA principles in 6(3)(a), 6(4)(d) deal with the scope of an effective access regime. It should:
 - apply to services provided by significant infrastructure facilities that are not economically feasible to duplicate, where access is necessary to permit effective competition and can be provided safely at a reasonable cost; and
 - provide for periodic review of the need for access regulation to apply to a particular service.
- I consider the scope of the SAPAR is consistent with CPA principles.

- It applies to services provided by way of significant infrastructure facilities, being port infrastructure. This infrastructure is likely to exhibit natural monopoly characteristics, and it is unlikely to be economically feasible to duplicate it.
- The ESCOSA must review ports and services subject to the MSAA every five years. As part of this review, the ESCOSA must determine whether the MSAA should continue to apply to these ports, or if its coverage should be expanded.
- Under subsection 43(7) of the MSAA, the right to negotiate access expires at the end of five years, unless the ESCOSA has conducted its scheduled review and recommended that this right should continue for a further five years.
- This constitutes an effective mechanism for reviewing the need for access regulation.
- I note that the NCC considers the SAPAR satisfies clauses 6(3)(a) and 6(4)(d).

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

- The CPA indicates that an effective access regime will adequately provide for treatment of issues which may arise when a facility is subject to multiple access regimes. The NCC may determine a State or Territory regime to be ineffective if substantial difficulties arise from the regime being in one or more jurisdictions.
- I consider the SAPAR deals with interstate issues in a manner consistent with CPA principles.
 - The SAPAR applies only to services provided by infrastructure that is located in South Australia. The SAPAR ensures a seamless process, as it is the only access regime applying to maritime services in South Australia.
 - The South Australian Government notes that there is limited interstate demand for the port services, so the prospect of and potential for influence beyond the borders of South Australia is likely to be limited.
 - I note that the NCC considers the SAPAR satisfies clauses 6(2) and 6(4)(p).

Negotiation framework – 6(4)(a)–(c), (e), (f), (g)–(i), (m), (n), (o)

- The CPA indicates an effective regime will provide for a negotiation framework, allowing parties to negotiate access to significant infrastructure facilities while being able to resort to an independent body to resolve the dispute, with binding outcomes, should commercial agreement not be possible.
- The CPA also sets out a number of features that should be included within a negotiation framework for the regime to be considered effective including:
 - a requirement upon the service provider to make reasonable endeavours to accommodate the requirements of access seekers;
 - recognition that access need not be on exactly the same terms and conditions;

- certain price and non-price terms and conditions of access that the dispute resolution body should take into account in deciding the terms and conditions of access;
 - provision for the dispute resolution body or relevant authority to have access to financial information relating to the service and requiring separate accounting arrangements for elements of a business covered by the access regime; and
 - the prohibition of conduct with the purpose of hindering access.
- I consider that the negotiation framework provided by the SAPAR is consistent with CPA principles.
 - The MSAA encourages parties to enter into commercial negotiations, and parties are required to negotiate in good faith. Arbitration by the ESCOSA is available if agreement cannot be reached within 30 days of an access seeker’s making a proposal to a regulated operator. This is a strong incentive to negotiate.
 - : The ESCOSA is an independent economic regulator with investigative and information gathering powers.
 - : Subsection 32(1) of the MSAA sets out factors that the arbitrator should take into account in deciding the terms of an arbitration award. Arbitration awards may entail different terms and conditions for different access seekers.
 - Section 14 of the MSAA requires the regulated operator to negotiate in good faith and to endeavour to accommodate the access seeker’s reasonable requirements. Access seekers may refer a dispute to ESCOSA if the operator fails to enter into good faith negotiations within 30 days of receiving an access proposal.
 - : Section 12 of the MSAA requires the regulated operator to provide preliminary information to assist access seekers.
 - Section 44 of the MSAA provides that it is an offence to prevent or hinder access to a maritime service. These provisions apply to existing users and facility owners.
 - Section 42 of the MSAA provides that regulated operators must also keep the accounts for regulated services separate from the accounts for other parts of their business.
 - : Where regulated operators provide services at different ports, they must also keep separate accounts for each port.
 - I note that the NCC considers the SAPAR satisfies clauses 6(4)(a)–(c), (e), (f), (g)–(i), (m), (n) and (o).

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

- CPA clauses 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o) and 6(5)(c) provide guidance on the principles which should be contained in an effective access regime in relation to dispute resolution.
- An effective access regime should reasonably incorporate:
 - a dispute resolution procedure, providing for an independent body to resolve the dispute, with binding outcomes, should commercial agreement not be possible;
 - certain price and non-price terms and conditions of access that the dispute resolution body should take into account in deciding the terms and conditions of access;
 - an ability for the dispute resolution body to determine whether the access provider should extend or permit extensions of the service, subject to certain requirements;
 - the capacity for a party to an access determination to apply for the determination to be set aside or modified on account of a material change in circumstances;
 - provision for the dispute resolution body to have access to financial information relating to the service; and
 - where merits review of a decision is provided, the review should be limited to information submitted to the original decision maker.
- I consider that the dispute resolution framework provided by the SAPAR is consistent with CPA principles.
 - As I have noted, the SAPAR encourages commercial negotiation, and provides for conciliation and binding arbitration where agreement cannot be reached.
 - The NCC considers – and I agree – that the ESCOSA is sufficiently resourced and vested with appropriate powers under the MSAA and the ESCA to carry out its duties, including in relation to dispute resolution, in an independent and objective manner.
 - The decisions of ESCOSA in an arbitration award bind both parties.
 - : Section 37 of the MSAA provides that arbitration awards are enforceable as if they are a contract between the parties, so that contractual remedies are available. Injunctive remedies and orders for compensation are also available in relation to contravention of, or non-compliance with, an award.
 - : Section 40 of the MSAA provides for appeals to the Supreme Court of South Australia on questions of law. Section 19 of the MSAA preserves the operation of the *Commercial Arbitration Act 1986* (SA), including (*prima facie*) judicial review under section 38 of the latter Act.

- Subsection 32(1) of the MSAA prescribes the principles in paragraph 6(4)(i) of the CPA as matters an arbitrator should take into account in deciding on the terms of an award.
- An arbitration award may require a regulated operator to extend, or permit extension of, port facilities under its control.
 - : The award must also address specific criteria to ensure that such an extension would: be feasible, be safe, protect the operator’s legitimate business interests, and provide that terms of access would take account of the costs and benefits to both parties of the extension.
- Parties may negotiate their own access arrangements. They may propose termination or variation of an arbitration award if there is a material change in circumstances, and they may agree provisions as to what constitutes a material change in circumstances.
- Arbitration awards may only vary the contractual rights of other customers or the operator if:
 - : those customers will still be able to meet their reasonably anticipated requirements; and
 - : the terms of the award provide for appropriate compensation as a result of varying their rights.
- The SAPAR does not provide for merits review. However, arbitration awards made by the ESCOSA may be subject to judicial review in the Supreme Court of South Australia.
 - : The CPA does not require an effective access regime to include merits review. Rather, it provides that where merits review of decisions is provided, the review should be limited primarily to information before the decision maker (clause 6(5)(c)).
- I note that the NCC considers the SAPAR satisfies clauses 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o) and 6(5)(c).

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

- A fundamental premise of any effective access regime is that it promotes efficient use of and investment in significant infrastructure facilities. This is reflected in the objects of Part IIIA of the CCA and in clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b) of the CPA.
- An effective access regime should reasonably incorporate:
 - a negotiation framework, allowing parties to negotiate access to significant infrastructure facilities while being able to resort to an independent body to resolve the dispute, with binding outcomes, should commercial agreement not be possible;

- a requirement upon the service provider to make reasonable endeavours to accommodate the requirements of access seekers;
 - recognition that access need not be on exactly the same terms and conditions for each access seeker;
 - certain price and non-price terms and conditions of access that the dispute resolution body should take into account in deciding the terms and conditions of access;
 - the capacity for a party to an access determination to apply for the determination to be set aside or modified on account of a material change in circumstances;
 - require separate accounting for elements of a business covered by the access regime;
 - 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; and
 - pricing principles that require regulated access prices to be set so as to cover costs, allow price discrimination when it aids efficiency, not allow discrimination by a vertically integrated firm unless justified by the cost of providing access, provide a return on investment that is commensurate with the risks involved and provide incentives to reduce costs or improve productivity.
- I consider the SAPAR reasonably incorporates efficiency promoting terms and conditions of access, consistent with CPA principles.
 - As I noted previously, section 14 of the MSAA requires the regulated operator to endeavour to accommodate the access seeker’s reasonable requirements, and section 12 requires the operator to provide preliminary information to assist access seekers.
 - As I have noted, arbitration awards may provide different terms and conditions for different access seekers. The ESCOSA is required to take pricing principles into account in deciding the terms of an arbitration award.
 - The NCC considers – and I agree – that the SAPAR provides a reasonable balance between meeting the interests of access seekers and regulated operators, and has features that assist an access seeker in negotiating access.
 - I note that the NCC considers the SAPAR satisfies clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b).

CONSIDERATION OF THE SAPAR AGAINST THE OBJECTS OF PART IIIA

- In considering whether an access regime is an effective access regime, I must have regard to the objects of Part IIIA of the CCA.

- Section 44AA of the CCA provides that the objects of Part IIIA are:
 - to 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
 - to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.
- I consider the SAPAR accords with the objects of Part IIIA.
 - The objects of the SAPAR (while not determinative of this question) are set out in section 3 of the MSAA, and substantially reflect the first limb of the objects of Part IIIA. These objects inform ESCOSA’s application of the SAPAR.
 - I have already concluded that the SAPAR provides for efficiency in promoting terms and conditions of access. I am satisfied that the SAPAR accords with the first limb of the objects of Part IIIA.
 - The SAPAR provides for consistent access regulation of ports in South Australia, with the coverage of ports subject to regular review. Moreover, I have concluded that the SAPAR applies the relevant principles for nationally-consistent access regulation in the CPA, and is therefore consistent with the National Access Regime and other certified access regimes. I am satisfied that the SAPAR accords with the second limb of the objects of Part IIIA.
 - I note that the NCC considers that certification of the SAPAR would promote both limbs of the objects of Part IIIA.

DURATION OF CERTIFICATION

- Having reached the decision that the SAPAR is an effective access regime, I must specify the period for which the certification will be in force.
 - The period of certification may be extended, but there is no provision in the CCA for a certification to be revoked.
- The South Australian Government sought certification for a period of at least 10 years.
- The period of certification needs to balance the need for regulatory certainty and stability with the likelihood of change in the market environment.
 - The NCC notes that there are two reviews scheduled to be completed by ESCOSA during the proposed 10-year period, and that either or both of these reviews may lead to modification of the SAPAR.
 - Noting that there is the possibility of a change in regulation over the coming period, the NCC considers that a certification duration of 10 years would be appropriate.

- I agree with the NCC's assessment. I am of the view that a certification duration of 10 years is appropriate.



The Hon David Bradbury MP

Parliamentary Secretary to the Treasurer

Dated: *9th may* 2011