NATIONAL
COMPETITION
COUNCIL

South Australian Ports Access Regime

Final recommendation

29 September 2021

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Abbreviations and defined terms

Abbreviation	Description
Access Regime	The South Australian ports access regime, as described in Section 4, below.
Application	Application of 22 January 2021 by the Premier of South Australia, the Hon Steven Marshall MP for a recommendation that the South Australian Ports Access Regime be certified.
Bulk Wheat Code	*Port Terminal Access (Bulk Wheat) Code of Conduct.*
Certified	A 'certified' access regime is a regime for which a decision is in force under s 44N of the CCA that the regime is an effective access regime (including as result of an extension under s 44NB)
CCA	*Competition and Consumer Act 2010* (Cth).
Clause 6 Principles	The principles set out in cls 6(2)-6(5) of the CPA.
Commonwealth Minister	The Commonwealth Minister responsible for making a decision to extend the certification of an access regime under s 44NB of the *Competition and Consumer Act 2010* (Cth).
Council	National Competition Council
CPA	Competition Principles Agreement, as amended on 13 April 2007.
ESCA	*Essential Services Commission Act 2002* (SA).
ESCOSA	Essential Services Commission of South Australia.
Exempt Services	Viterra's port terminal services operating from the Port Adelaide Inner Harbour and Port Adelaide Outer Harbour facilities (which have been exempt from the Bulk Wheat Code).
Flinders Group	Flinders Port Holdings Pty Ltd, Flinders Adelaide Container Terminal Pty Ltd, Flinders Logistics Pty Ltd, Flinders Ports Pty Ltd and Flinders Warehousing & Distribution Pty Ltd.
Flinders Logistics	Flinders Logistics Pty Ltd.
Flinders Ports	Flinders Ports Pty Ltd.
Flinders Warehousing & Distribution	Flinders Warehousing & Distribution Pty Ltd.

HN Act	*Harbors and Navigation Act 1993 (SA).*
LINX	LINX Cargo Care Pty Limited.
Part IIIA	Part IIIA of the *Competition and Consumer Act 2010* (Cth).
Qube	Qube Ports Pty Ltd.
Minister	The Commonwealth Minister
MSA Act	*Maritime Services (Access) Act 2000 (SA).*
POA	*Port Operating Agreements established under the Harbors and Navigation Act 1993 (SA).*
SAFC	South Australian Freight Council.
The Tribunal	the Australian Competition Tribunal.
Viterra	Viterra Operations Pty Ltd.

Executive Summary

On 22 January 2021, the South Australian Government applied to the National Competition Council (**Council**), under s 44NA(2) of the *Competition and Consumer Act 2010 (Cth)* (**CCA**), for a recommendation to extend the certification of the South Australian ports access regime.

The Council has previously certified the South Australian ports access regime for the period from 9 May 2011 to 9 May 2021. The terms of the regime have not changed significantly since it was certified by the Council in 2011, but the level of vertical integration by the port operators into dependent markets has increased significantly over this period.

The access regime, for which certification is sought, is embodied in the Maritime Services (Access) Act 2000 (SA) (**MSA Act**). The South Australian Ports Access Regime as prescribed by the MSA Act (**Access Regime**) applies to "regulated operators" who carry on a business of providing maritime services that have been declared by proclamation to be regulated services at a proclaimed port.[1] Under the Access Regime, a regulated port 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. The Essential Services Commission of South Australia (**ESCOSA**) has certain roles under the Access Regime and conducts a review of the regime every five years. Such reviews are significant, because they can result in ESCOSA recommending that particular maritime services be added or removed from the scope of those services covered by the Access Regime. The reviews may also result in ESCOSA making recommendations to amend provisions that affect the operation of the Access Regime. ESCOSA's next review of the Access Regime is due in 2022.

The Council's Task

Following receipt of an application for certification of a state-based access regime, the Council must assess whether it is an effective access regime within the meaning of the CCA. At the completion of its assessment, the Council must make a recommendation to a relevant Commonwealth Minister (**Minister**) setting out whether it is satisfied (or not) that the access regime is effective. Following receipt of a recommendation, the Commonwealth Minister is required to make a decision within 60 days whether the regime is effective or not. In this instance, the relevant Minister is the Treasurer, the Hon Josh Frydenberg.

The consequence of the Minister deciding that a state based access regime is an effective access regime is that the service(s) the subject of the access regime cannot:

- be declared under Part IIIA of the CCA and thereby become subject to the general Commonwealth access regime set out in division 3 of that Part of the CCA
- be the subject of an access undertaking accepted by the Australian Competition and Consumer Commission (**ACCC**).

[1] The Access Regime is described in detail in Section 4.

In deciding what recommendation the Council should make, the Council must under s 44M(4) of the CCA:

- assess whether the access regime is an effective access regime by applying the relevant principles set out in cl 6 of the *Competition Principles Agreement*, as amended on 13 April 2007 (**Clause 6 Principles**),
- have regard to the objects of Part IIIA of the CCA
- not consider any other matters.

Importantly, the Council notes that the test for whether an access regime is effective:

- is not a consideration of whether the regime the subject of an application for certification is ideal, or is as good as other regimes adopted by other states or territories for other infrastructure services
- is not an assessment of whether all policy measures (including those additional to the regime itself) taken by a state or territory government to regulate infrastructure services covered by the regime are optimal or fully comprehensive.

Further, in assessing whether an access regime applies the Clause 6 Principles in accordance with s 44M(4) of the CCA, the statutory regime makes clear that:

- the Council must apply these principles as guidelines rather than binding rules
- the Commonwealth Parliament, and the parties to the CPA, intended that states and territories would be granted latitude in designing access regimes that are effective within the meaning of Part IIIA of the CCA.

The Council's consideration of the Access Regime

To assist in its consideration of what recommendation to make in relation to the application for certification by the South Australian Government, the Council has sought submissions from interested parties immediately following receipt of the application and in response to a draft recommendation issued on 2 July 2021. The Council has also issued a number of information requests using its powers under s 44NAA of the CCA seeking further information regarding alleged conduct by a service provider.

Throughout the course of its consideration of this matter, the Council has received submissions arguing both for and against certification of the Access Regime. Those arguing against certification of the regime have expressed concerns that Flinders Ports is vertically integrated into a number of dependent markets in which they compete; and that Flinders Ports is acting in ways that favour it in dependent markets. They argue the Access Regime is not effective because it is unable to prevent such conduct occurring. Of particular concern to them, they note the access regime:

- does not contain so-called "ring-fencing" provisions that separate Flinders Ports activities from the activities of its related entities that compete in dependent markets
- does not contain adequate protections to prevent Flinders Ports using confidential information it may acquire when providing users with access to its services to its competitive advantage when competing against these users in dependent markets.

The Council also notes that during the course of its consideration of the application for certification by South Australian Government, one user of ports operated by Flinders Ports (i.e. Qube) sought to raise with ESCOSA an access dispute in relation to the terms and conditions of access to a particular service. However, consistent with the views of Flinders Ports, ESCOSA decided that the service the subject of dispute between the parties is not one that is presently subject to regulation under the Access Regime.

The Council's findings

As noted above, ESCOSA undertakes a review of the Access Regime every five years. At the completion of this review, ESCOSA makes recommendations to the South Australian Government on what maritime services should be the subject of regulation under the Access Regime. The South Australian Government will then, following these recommendations, decide what services should be "proclaimed" under the MSA Act. Those services proclaimed under the MSA Act are then subject to either access regulation or price regulation in accordance with a series of provisions contained in the MSA Act.

Based on its consideration of this matter, the Council finds that having applied the Clause 6 Principles and having regard to the objects of Part IIIA of the CCA, the Access Regime is effective as it applies to the proclaimed services under the MSA Act.

That said, a finding that the Access Regime is effective as it applies to those services the subject of the regime is not a wholesale endorsement of the regime, nor is it a finding that the regime could not be improved. In this respect, the Council recommends that ESCOSA give careful consideration to whether the Access Regime and other associated government policies require amendment and improvement to better deal with Flinders Ports' increased vertical integration into dependent markets when it next conducts a review of it in 2022. In particular, the Council considers ESCOSA should consider whether improvements could be made to the Access Regime by:

- considering whether the range of regulated services covered by the Access Regime should be expanded
- introducing ring-fencing provisions and safeguards around the handling of confidential information for regulated services
- prescribing a timeframe in which preliminary information should be provided to enable access seekers to prepare proposals and providing a mechanism for review of any charge imposed by the operator for the supply of such information.

Further, the Council considers much of the concern raised by certain users of the proclaimed ports (i.e. Qube and LINX) relates to concerns that the regime does not go far enough to actively promote better outcomes consistent with the objects of Part IIIA of the CCA. In particular, they consider the Access Regime should apply to more services; and be more prescriptive in how it regulates providers of regulated services at the proclaimed ports.

The Council considers that the scope of the Access Regime is a matter for the South Australian Government to decide, following recommendations from ESCOSA. However, the Council notes that:

- where a service is not proclaimed under the MSA Act, it is open to parties to seek to lodge an application for declaration of the service under Part IIIA of the CCA
- the Access Regime is relatively limited in the ways in which new services can be added to the scope of the regime. Many regimes have mechanisms that allow interested parties to lodge applications for new services to be subject to access regulation (e.g. a process that allows for declaration of new services). The Access Regime in this instance does not appear to include such a mechanism. That said, s 45 of the MSA Act does enable ESCOSA to recommend to the South Australian Government that the proclamation setting out the services regulated under the Access Regime be varied or revoked. The Council considers regard should be given to whether the Access Regime can be improved by making it clearer how (if at all) a new service could be proclaimed under the regime during the periods in between ESCOSA's five yearly reviews of the regime, including by way of outlining how parties might apply to ESCOSA for it to consider recommending varying or revoking the proclamation.

Finally, the Council notes that a number of potentially serious allegations have been made by Qube and LINX throughout the course of its consideration of the application regarding conduct by Flinders Ports to competitively favour the operations of its related entities in dependent markets. The Council observes that:

- despite having sought extensive information from Qube and LINX (and providing opportunities for Flinders Ports to respond to these allegations), the Council was not provided with persuasive evidence or sufficient information to reach a conclusion that these allegations actually occurred

- certification of an access regime does not convey an exemption for conduct that would otherwise be in breach of Part IV of the CCA. If Qube and LINX maintain their concerns in relation to Flinders Ports' conduct, they are able to refer these matters to the ACCC.

The Council's Recommendation

Having regard to the objects of Part IIIA, and having assessed the Access Regime by applying the relevant Clause 6 Principles, the Council recommends that the SA Ports Access Regime is effective with respect to those services that are proclaimed under the regime.

The Council recommends that certification of the Access Regime be extended by a period of ten years until 9 May 2031.

1 Recommendation

1.1 The Council's view is that the South Australian Ports access regime meets the requirements for certification and is therefore an effective access regime. The Council recommends that the Commonwealth Minister certifies the Access Regime as effective and extend certification for a period of 10 years, that is, until 9 May 2031.

1.2 The Council's reasons for its recommendation are set out in Sections 5 and 6 of this report.

2 Application to extend certification of the South Australian ports access regime

The application and public consultation

2.1 On 22 January 2021, the South Australian Government applied to the Council, under s 44NA(2) of the CCA, for a recommendation to extend the certification of the Access Regime.

2.2 The previous certification period for the Access Regime runs from 9 May 2011 to 9 May 2021. The proposed extension is for a ten year period. The service, as identified in the South Australian Government's application, remains the same as that certified in 2011, that is, as it is set out in the MSA Act.

2.3 The Council invited interested parties (via a notice on its website and through an advertisement published in *The Australian* newspaper on 4 February 2021) to make initial written submissions on the application by 26 February 2021. Flinders Ports Pty Ltd (**Flinders Ports**), the South Australian Freight Council (**SAFC**) and Qube Ports Pty Ltd (**Qube**) made submissions. Flinders Ports and the SAFC support re-certification of the Access Regime, while Qube opposes re-certification.

2.4 On 10 May 2021 the Council issued two notices under s 44NAA of the CCA requesting information from Flinders Ports and Qube, respectively. In addition to the queries raised in the two notices, the Council provided a set of general questions. Interested parties were invited to respond to any of the questions raised in the two notices and/or the general questions. Flinders Ports, SAFC and Qube provided responses. The South Australian Government wrote to the Council advising that it did not intend to provide a response to the 10 May 2021 information requests.

2.5 On 2 June 2021 Viterra provided a late submission to the Council supporting re-certification of the Access Regime.

2.6 The Council then published its draft recommendation on the Application to extend the certification of the Access Regime on 2 July 2021. The Council's draft recommendation to the Commonwealth Minister was that the Access Regime be extended for a period of 10 years, until 9 May 2031.

2.7 The Council invited written submissions on the draft recommendation from interested parties with submissions due Friday 16 July 2021. Flinders Ports, LINX Cargo Care Pty Limited (**LINX**), Qube, the SAFC and the South Australian Government made submissions.

2.8 On 5 August 2021, the Council issued a notice under s 44NAA of the CCA requesting information from LINX relating to its submission commenting on the

Council's draft recommendation. LINX provided a response to the information request on 19 August 2021.

2.9 On 24 August 2021, the Council issued a further notice under s 44NAA of the CCA requesting information from Flinders Ports relating to information provided by LINX. Flinders Ports provided a response to the information request on 7 September 2021.

2.10 The Council considered all submissions in developing its recommendation and copies of the application and submissions are available on the Council's website.

The infrastructure covered by the Access Regime

2.11 The Access Regime, for which certification is sought, is embodied in the MSA Act. The MSA Act commenced on 31 October 2001 and can be found at http://www.legislation.sa.gov.au.

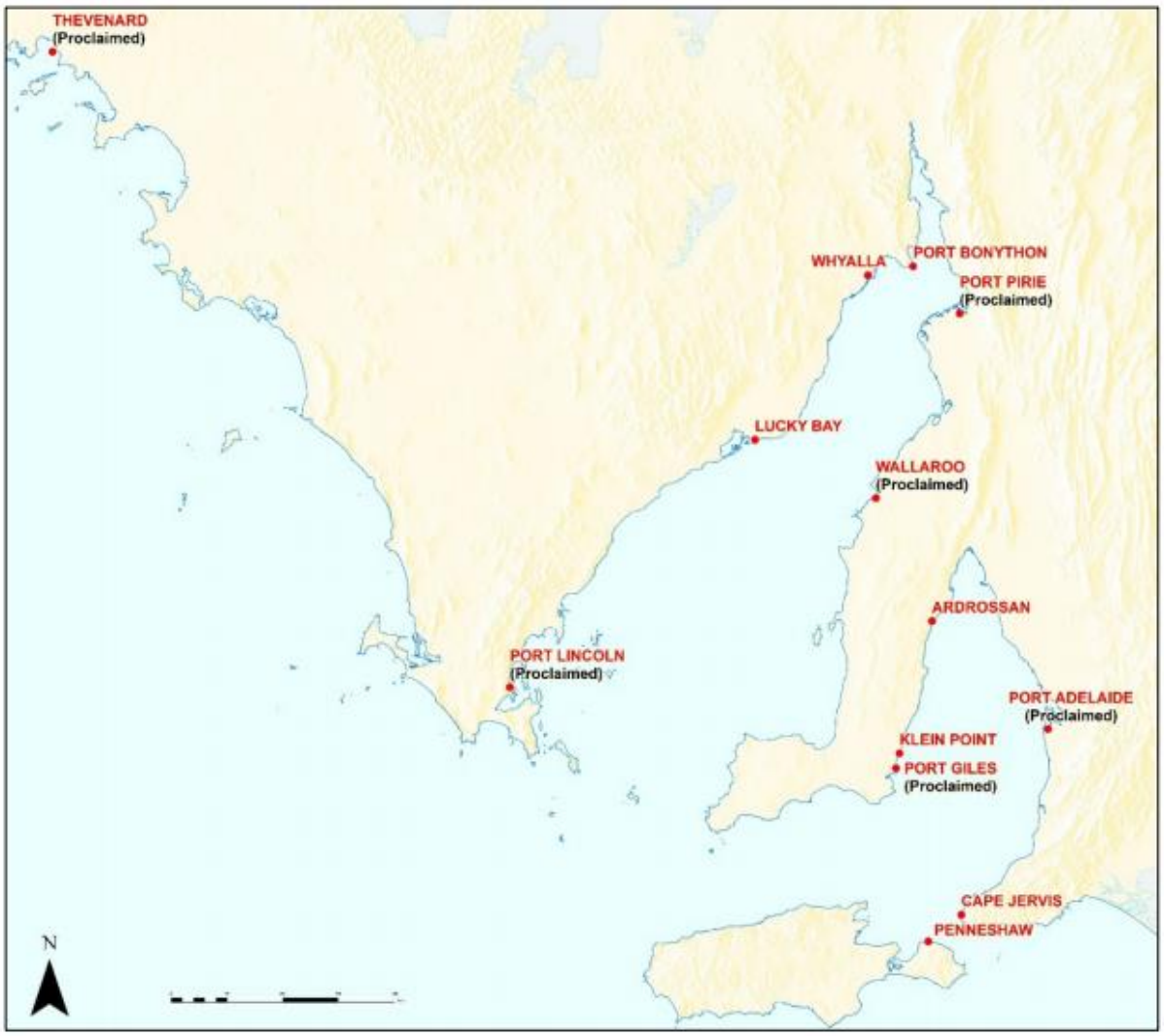
2.12 The Access Regime as prescribed by the MSA Act applies to 'regulated operators' who carry on a business of providing maritime services that have been declared by proclamation to be regulated services at a proclaimed port. Under the Access Regime a regulated operator must provide regulated services on terms agreed between the operator and the customer, or if agreement is not reached, on an award determined by an arbitrator.

2.13 The Governor of South Australia may, by proclamation, declare those ports listed in s 5 of the MSA Act to be subject to the Regime. Section 5 also provides that other ports may be declared by regulation to be subject to the Access Regime. There are currently six ports that have been proclaimed by the Governor, and as such are subject to the Access Regime. They are those at:

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

2.14 Figure 1 below shows South Australia's seaports and identifies which have been proclaimed under the MSA Act.

Figure 1: Map of South Australian Ports



Source: South Australian Government (2020)

2.15 Each of the six proclaimed ports are operated by Flinders Ports Pty Ltd (**Flinders Ports**). Viterra Operations Pty Ltd (**Viterra**) operates some regulated bulk loader services (being the grain handling facilities at Port Adelaide, Port Giles, Wallaroo, Port Lincoln and Thevenard).

Timeline for this certification inquiry

2.16 The Council is required under Part IIIA of the CCA to make a recommendation on an application by the end of a 'consideration period' of 180 days after the application was received.[2]

[2] *CCA,* s 44NC(2).

2.17 The 180 day application consideration period does not include time periods agreed by the Council, applicant and service provider; or the time period the Council specified in an information request to a person under s 44NAA of the CCA.[3] However, these 'clock-stopping' periods cannot exceed 60 days.[4]

2.18 As noted at 2.4, above, on 10 May 2021 the Council issued two notices under s 44NAA of the CCA. These notices provided a period of 14 days for Flinders Ports and Qube to provide their responses to the information requests (responses were sought by 24 May 2021).

2.19 On 4 August 2021, the Council President wrote to the Treasurer to notify him of the Council's decision under s 44NC(7) of the CCA, to extend the consideration period for the SA Ports access regime certification application by a further 28 days. This notice had the effect of extending the Council's consideration period to issue its Final Recommendation to the Treasurer to 1 September 2021, unless circumstances arise which "stop the clock" on the consideration period under s 44NC(3).

2.20 As noted at 2.6 and 2.8 above, on 5 August 2021 and 24 August 2021, the Council issued two further notices under s 44NAA of the CCA. These notices each provided a period of 14 days for their recipients to provide a response to the information request.

2.21 As a result of the notices issued under ss 44NC(7) and 44NAA of the CCA, the consideration period for this assessment has been extended to 29 September 2021.

3 *CCA*, s 44NC(3) and (5).

4 *CCA*, s 44NC(4)(b).

3 Overview of the legislative framework - certification

The history and purpose of the certification regime

3.1 At the 25 February 1994 meeting of the Council of Australian Governments, all Australian governments agreed to the principles for a national competition policy as outlined in the report of the Hilmer committee. That agreement is embodied in the Competition Principles Agreement (**CPA**) (as amended on 13 April 2007).

3.2 Clause 6 of the CPA concerns reforms relating to third party access to significant infrastructure under which Australian governments agreed that the Commonwealth would establish a generic national third party access regime. The regime is established in Part IIIA of the CCA and provides for regulated access to infrastructure services that are declared on a case by case basis or subject to an access undertaking.

3.3 Governments also agreed that states and territories would retain the ability to regulate access to services within their jurisdiction and that the national access regime would not apply to services covered by effective state or territory regimes. An effective regime is one that conforms to the Clause 6 Principles. These principles are not applied as binding rules but rather in the nature of a guideline for assessing the effectiveness of a regime.

What does a regime being effective mean?

3.4 Where the Minister decides that a state access regime is an effective access regime for the service or the proposed service, this means that a service subject to the regime cannot:

- be declared under Part IIIA and thereby become subject to the general access regime in division 3 of that Part[5]
- be the subject of an access undertaking accepted by the Australian Competition and Consumer Commission (ACCC).[6]

3.5 This is intended to provide access seekers, infrastructure operators, developers and other parties with certainty about how access will be regulated.

What is the process for deciding whether an access regime is effective?

3.6 The certification process only applies to a state or territory that is a party to the Competition Principles Agreement.[7]

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5 *CCA,* s 44F(1)(a).

6 *CCA*, s 44ZZA(3AA).

7 *CCA*, s 44M(1).

3.7 The responsible minister in the state or territory may make a written application to the Council asking the Council to recommend that the Commonwealth Minister decide that a regime for access to a service or a proposed service is an effective access regime.

3.8 Upon receipt of an application for certification, the Council commences a public consultation process by publishing the application in a national newspaper and on its website; and invites interested parties to make submissions. As noted above, where the Council seeks public submissions on an application, it must provide at least 14 days after the notice is given to receive submissions.[8]

3.9 After considering submissions, the Council publishes a draft recommendation, including the reasons for its proposed recommendation, and invites interested parties to make further submissions.

3.10 The Council must make a recommendation to the Commonwealth Minister that he or she should decide that the access regime is either effective or not effective for the service or the proposed service [9] and, if effective, how long that certification should be in force. [10]

3.11 As mentioned earlier, the Council must make its decision within 180 days, subject to certain 'clock-stopping' provisions (set out at s 44NC(3) of the CCA and noted in Section 2, above). In certain circumstances, the Council may extend this 180 day decision-making time period.[11]

3.12 The Council must inform the applicant and the service provider when it has provided its final recommendation to the Commonwealth Minister.

3.13 After receiving the Council's recommendation, the Commonwealth Minister must decide whether the regime is or is not an effective access regime and the period for which certification will be in force.[12] The Minister must also publish his or her reasons for the decision.

3.14 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.

3.15 If the Commonwealth Minister does not publish his or her decision on a recommendation within the period starting at the start of the day the recommendation is received from the Council, and ending at the end of 60 days

8 *CCA*, s 44NE(2).

9 *CCA*, s 44M(3).

10 *CCA*, s 44M(5).

11 *CCA*, s 44NC(7).

12 *CCA*, s 44N(3).

after that day, the Commonwealth Minister is taken to have made a decision in accordance with the recommendation of the Council and to have published that decision.[13]

3.16 The applicant for certification can apply to the Australian Competition Tribunal (**the Tribunal**) for a review of the Commonwealth Minister's decision.[14] The application for review must be made within 21 days after the publication of the Commonwealth Minister's decision.[15]

3.17 The Tribunal may affirm, vary or reverse the original decision and the Tribunal's decision is taken to be the decision of the Commonwealth Minister. The Tribunal must make a decision within 180 days of the application for review being made, although this period can be extended.[16]

What does the decision-maker have to consider when deciding whether a regime is effective?

3.18 The Council, in deciding what recommendation it should make to the Commonwealth Minister, must assess whether the access regime is an effective access regime in accordance with s 44M(4) of the CCA. This specifies that the Council must:

(a) assess whether the access regime is an effective access regime by applying the relevant principles set out in the CPA.[17] However, each of these relevant principles have the status of a guideline rather than a binding rule.[18]

(b) have regard to the objects of Part IIIA[19]

(c) must not consider other matters (although the regime itself may contain additional matters that are not inconsistent with the CPA).[20]

3.19 The objects of Part IIIA are:

(a) 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

(b) to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

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13 *CCA*, s 44NB(3A)(a).

14 *CCA*, s 44O(1).

15 *CCA*, s 44O(2).

16 *CCA,* s 44ZZOA.

17 *CCA*, s 44NA(4) and s 44M(4)(a).

18 *CCA,* s 44DA(1).

19 *CCA*, s 44NA(4) and s 44M(4)(aa).

20 *CCA*, s 44NA(4) and s 44M(4)(b).

3.20 As noted above at paragraph 3.18, in assessing whether an access regime applies the Clause 6 Principles, the Council must apply those principles as guidelines rather than binding rules. The Explanatory Memorandum for the Bill which inserted this provision[21] states that "[t]here has been to date some uncertainty as to how strictly the Council and the relevant Minister must apply [the Clause 6 Principles]", and the new provision "clarifies the situation by providing" that the principles "[have] the status of a guideline rather than a binding rule."[22]

3.21 The Council assesses the Access Regime against each of the Clause 6 Principles individually in Section 5. In assessing whether an access regime satisfies the Clause 6 Principles, and interpreting the certification scheme as a whole, the Council takes into account the following statement in clause 6(3) of the CPA:

> There may be a range of approaches available to a State or Territory Party to incorporate each [clause 6] principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle […], the regime can be taken to have reasonably incorporated that principle.

3.22 The Council also takes into account the following statement from the Revised Explanatory Memorandum to the *Trade Practices Amendment (National Access Regime) Bill 2005*:

> Part IIIA provides a framework to guide, rather than prescribe, the requirements of state and territory access regimes, and that the design and operation of state and territory access regimes is a matter for each jurisdiction.[23]

3.23 These foregoing considerations support the view that the Commonwealth Parliament, and the parties to the CPA, intended that states and territories would be granted latitude in designing access regimes that are "effective access regimes" within the meaning of Part IIIA of the CCA.

The role of the objects of Part IIIA in the Council's decision

3.24 There has been some contention between stakeholders regarding the correct interpretation and application of the legal provisions described in paragraphs 3.18 and 3.19 above. Dispute has arisen in particular regarding the role of the objects of Part IIIA in the Council's assessment.

3.25 Under s 44M(4)(a) of the CCA, the Council "must … assess whether the access regime is an effective access regime by applying the relevant principles set out in

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21 Section 44DA was inserted by the *Gas Pipelines Access (Commonwealth) Act 1998* (Cth).

22 Explanatory Memorandum for the Gas Pipelines Access (Commonwealth) Bill 1998 at paragraph 162.

23 Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2005,* p 18 [1.8].

the [CPA]". Under s 44M(4)(aa) of the CCA the Council "must have regard to the objects of [Part IIIA]". The direction to the Council to have regard to the objects of Part IIIA in s 44M(4)(aa) is separate from the direction in s 44M(4)(a) as to how the Council must assess whether an access regime is an effective access regime within the meaning of Part IIIA of the CCA. This could be interpreted as requiring the Council to assess effectiveness by applying the Clause 6 Principles only, such that the objects of Part IIIA do not form part of the assessment whether an access regime is an effective access regime within the meaning of the CCA.

3.26 However, the Council considers it is appropriate to have regard to the objects of Part IIIA in considering all aspects of its recommendation, including its assessment whether an access regime is an effective access regime. To the extent a literal reading of s 44M(4) may not require the Council to have regard to the objects of Part IIIA in assessing the effectiveness of access regimes, the Council considers this would be an unreasonable result. Parliamentary comments on the introduction of the objects clause indicate that it was intended that decision makers have regard to it when making decisions.[24] Having regard to the objects of Part IIIA in considering all aspects of the Council's recommendation will further those objects. The Council considers this interpretation is preferable under relevant provisions of the *Acts Interpretation Act*.[25]

3.27 Having regard to s 44M(4)(aa) of the CCA, therefore, the Council considers it may recommend that the Commonwealth Minister decide that an access regime is not an effective access regime where it considers that certification of the access regime would fail to promote, or be contrary to, the objects of Part IIIA. This may be the case where the Council considers that certifying the regime would promote inefficient operation of, use of and investment in infrastructure, adversely affecting competition in related markets, and where certification would not encourage a consistent approach to access regulation.

3.28 Overall, therefore, the Council balances a number of considerations in having regard to the objects of Part IIIA of the CCA. In this application some stakeholders submit that the Council ought to recommend that, having regard to the objects of

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[24] The objects clause in s 44AA, and s 44M(4)(aa), were inserted by the *Trade Practices Amendment (National Access Regime) Act 2006*. The Revised Explanatory Memorandum for the Trade Practices Amendment (National Access Regime) Bill 2006 states at paragraph 4.4 that "[t]he Bill requires decision makers under Part IIIA to have regard to the objects clause when making their respective decisions."

[25] Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides "In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation." Section 15AB permits consideration of material not forming part of the Act that is capable of assisting in the ascertainment of its meaning (such as Parliamentary Explanatory Memoranda) when interpreting the Act, when a provision is obscure or ambiguous, or its ordinary meaning leads to a result that is unreasonable.

Part IIIA, certification not be extended. In weighing these submissions and forming its recommendation, the Council has taken into account the following matters:

(a) The degree to which certification of the Access Regime would promote, or fail to promote, the objects of Part IIIA.

(b) The fact the legislation states that the Council must assess the effectiveness of the Access Regime by applying the relevant principles in the CPA.

(c) The CPA and legislative extrinsic materials indicate that the parties to the CPA, and the Commonwealth Parliament, intended that states and territories would be granted latitude in designing and operating access regimes.

(d) In considering submissions that continuing certification of the Access Regime would lead to outcomes contrary to the objects of Part IIIA, the Council has considered the degree of certainty regarding whether such outcomes are likely to occur over the term of certification.

Submissions on the draft recommendation

3.29 Qube and LINX made submissions on the draft recommendation arguing that the Council's interpretation of the law is incorrect. Those submissions, and the Council's response to them, are summarised below.

3.30 Qube criticised statements in the draft recommendation that, where the Access Regime satisfies the Clause 6 Principles, exceptional circumstances are required in order for the Council to recommend against certification in having regard to the objects of Part IIIA.[26] Qube submits that this approach has no legal basis in s 44M of the CCA. Qube submits that this is a "novel two stage test", which places an "onus" on parties opposing certification.

3.31 The Council accepts Qube's submission that s 44M(4) of the CCA does not include a requirement for exceptional circumstances in having regard to the objects of Part IIIA. The Council has reframed its views of the role of the objects in the discussion above at paragraphs 3.25 to 3.28 above, taking into account Qube's submissions.

3.32 Qube submits that that the Council incorrectly approached the assessment whether the Access Regime applies the Clause 6 Principles. Qube submits that the Council's approach was "merely checking whether each of the Clause 6 Principles have been replicated somewhere in the Regime. This is not a genuine test by the NCC of effectiveness."[27]

3.33 The Clause 6 Principles are principles that, under the CPA, must be "incorporated" in state or territory access regimes.[28] If an access regime "replicates" a relevant

[26] Qube, submission on the Draft Recommendation, pp 3, 6.

[27] Qube, Submission on the Draft Recommendation, p 6.

[28] Competition Principles Agreement, clause 6(4).

principle required under the CPA, the Council considers that the access regime applies that principle within the meaning of the CCA. Qube does not explain why the "mere replication" of a Clause 6 Principle is not a "meaningful application" of that principle.

3.34 Qube submits that the Council must assess the current Access Regime, and not a future version of the Access Regime including potential amendments.[29] Qube made this submission noting that the Council had regard to ESCOSA's role in regularly reviewing the Access Regime, and that the Council has asked South Australia to consider improvements to the Access Regime.

3.35 The Council assessed the effectiveness of the Access Regime as it currently is. However, in assessing the likelihood of certification of the Access Regime leading to outcomes which fail to promote the objects of Part IIIA over the period of certification, the Council has taken into account the position of the South Australian Government and ESCOSA's monitoring role under the Access Regime. The Council maintains that this consideration is appropriate in assessing potential outcomes over the period of certification.

3.36 Qube generally submits that the Council gives inadequate weight to the objects of Part IIIA, and "has misconceived its statutory task."[30] Qube submits that, having proper regard to the objects of Part IIIA, the Council ought to recommend that certification be refused. However, Qube's submission does not engage with key considerations relevant to that task highlighted in the draft recommendation. Namely, the emphasis in Part IIIA given to the principles in the CPA when assessing the effectiveness of the Access Regimes, and contextual considerations in the CPA, extrinsic materials and the legislative scheme that indicate that states and territories were intended to be granted latitude in designing and operating local access regimes.

3.37 LINX submits that the Council "examin[ed] the text of the legislation in a literal way rather than by using it as a framework and [assess] the impact of the legislation on the market circumstances that exist."[31] The Council has sought to interpret its governing legislation by applying the text, taking into account the context of the text within the overall legislative scheme of Part IIIA, and having regard to Parliamentary intentions that can be gleaned from extrinsic materials. That is what the law requires.[32] The Council has applied its governing legislation as written; it does not accept that it can "use it as a framework" to apply a test from outside the words of the legislation.

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29 Qube, Submission on the Draft Recommendation, 16 July 2021, p 10.

30 Qube, Submission on the Draft Recommendation, 16 July 2021, p 6.

31 LINX, Submission on the Draft Recommendation, 16 July 2021, paragraph 12.

32 See the observations of Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commr of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; 260 ALR 1 at 46-7.

4 The South Australian Ports access regime

4.1 The Access Regime is established under the MSA Act. Section 10 of the MSA Act provides that:

> A person (a regulated operator) is subject to the access regime prescribed by this Act if the person carries on a business of providing maritime services at a proclaimed port that are declared by proclamation to be regulated services.

4.2 As noted at 2.13, there are currently six proclaimed ports, being those at: Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln, and Thevenard.[33]

4.3 'Maritime services' are defined in s 4 of the MSA Act. The MSA Act allows for the Governor to proclaim certain 'maritime services' to be 'regulated services'. A person who provides regulated services at a proclaimed port is a 'regulated operator', and is subject to the Access Regime.[34]

4.4 The MSA Act defines 'maritime service' as a service provided on a commercial basis of any of the following kinds:

(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;

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[33] While the port of Ardrossan was listed in s 5 of the MSA Act 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 MSA Act.

[34] *MSA Act*, s 10.

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

4.5 To date, the following services have been proclaimed under the MSA Act[35], and are thereby regulated under the Access Regime:

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

(b) pilotage services facilitating access to the port;

(c) providing berths for vessels at the following common user berths:

- Port Adelaide Outer Harbour berths numbers 1 to 4 (inclusive), 16 to 20 (inclusive), and 29;
- Wallaroo berths numbers 1 South and 2 South;
- Port Pirie berths numbers 5 and 7;
- Port Lincoln berths numbers 6 and 7;
- berths adjacent to the loading and unloading facilities referred to in paragraph (d);

(ca) providing port facilities for loading or unloading vessels at berths adjacent to the loading and unloading facilities referred to in paragraph (d);

(d) loading or unloading vessels by means of port facilities that –

- are bulk handling facilities as defined in the South Australian Ports (Bulk Handling Facilities) Act 1996[36]; and
- involve the use of conveyor belts;

(da) loading or unloading vessels by means of port facilities that are bulk handling facilities situated at Port Adelaide Outer Harbor berth number 8.

(e) providing access to land in connection with the provision of the above maritime services.

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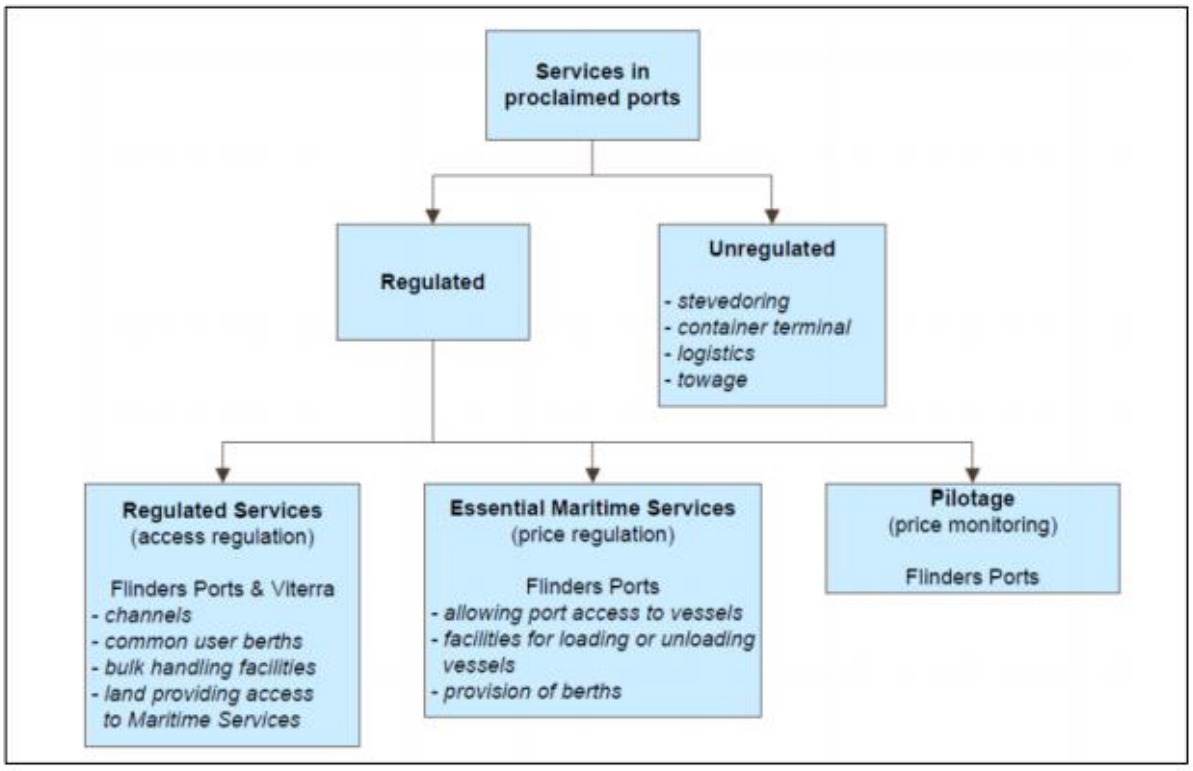
35 See Maritime Services (Access) Act 2000 Proclamation by the Governor (SA Government Gazette 25 October 2001, p 4686) and Maritime Services (Access) Variation Proclamation 2009 (SA Government Gazette 29 October 2009, p 4985).

36 The South Australian Ports (Bulk Handling Facilities) Act 1996 describes 'bulk handling facilities' as meaning the equipment designed principally for handling grain at each of the parts that are currently subject to the Access Regime and other equipment for loading or unloading commodities at a government port classified by proclamation.

4.6 These regulated services are either subject to access regulation or price regulation. Other maritime services are provided on a commercial basis. The services offered at the proclaimed ports and regulation (if any) that applies to them is summarised in Figure 2.

Figure 2: Scope of services prescribed in the MSA Act



Source: ESCOSA (2017), p 8.

Access regulation

4.7 The South Australian Government submits that the Access Regime provides a framework for the negotiation of access to regulated services and dispute resolution where access disputes arise and cannot be otherwise resolved between parties in relation to these services.

4.8 There are three key elements to the Access Regime:

(a) Access on fair commercial terms

The Access Regime establishes that an operator must provide access to regulated maritime services on fair commercial terms.[37]

[37] *MSA Act,* s 11.

(b) Negotiation on access

The access provider is required to negotiate in good faith with the access seeker, as are any other interested third parties affected by the proposal.[38] The access provider must provide copies of any access proposal to ESCOSA, and to any industry participant that may be affected by the access that is proposed.[39]

(c) Resolving access disputes

If the access seeker and any interested third parties have not agreed on terms for the provision of the proposed service within 30 days, the negotiation will be considered a dispute and any party can refer the matter to ESCOSA.[40] ESCOSA may first attempt to conciliate the dispute and, if unsuccessful, may appoint and refer the dispute to an arbitrator.[41] An arbitrator may make a binding access award.[42]

Price Regulation

4.9 The Access Regime also allows ESCOSA to subject 'essential maritime services' to price regulation by deeming them to be regulated industries for the purposes of the *Essential Services Commission Act 2002* (SA) (**ESCA)** by issuing a pricing determination to that effect.

4.10 Section 4(1) of the MSA Act defines an 'essential maritime service' as a maritime service consisting 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.

4.11 Section 6 of the MSA Act provides for ESCOSA to make a pricing determination for essential maritime services for a prescribed period (which is currently the period from 31 October 2017 to 30 October 2022).

4.12 Section 25(1) of the ESCA provides that ESCOSA may make determinations regulating prices, conditions relating to prices and price-fixing factors for goods and services in a regulated industry. ESCOSA could, if it considered it appropriate, make a price determination imposing a range of price regulation measures,

38 *MSA Act,* s 14.

39 *MSA Act,* s 13.

40 *MSA Act,* s 15.

41 *MSA Act,* Part 3 Divisions 4 and 5.

42 *MSA Act,* Part 3 Division 7.

ranging from oversight (for example, price monitoring) to more prescriptive measures (for example, price setting).[43] A regulated entity must not contravene a price determination or part of a price determination that applies to it and faces a penalty of up to $1,000,000 in the event of a contravention.[44]

4.13 The current determination (operating from 31 October 2017 to 30 October 2022) requires that:

(a) The provider of an essential maritime service (i.e. a regulated service provider) must publish their prices on their website; and

(b) ESCOSA may monitor and publish reports on matters relating to these prices on an annual basis. [45]

ESCOSA's role

4.14 ESCOSA has five key roles in relation to the regulation of South Australian ports:

(a) It monitors and enforces compliance with the MSA Act.[46]

(b) It keeps maritime industries under review with a view to determining whether regulation (or further regulation) is required.[47]

(c) it reviews the Access and Pricing Regimes every five years (and as part of the review process, is authorised to make a price determination as to the form of price regulation that should be adopted).[48]

(d) it conducts annual price monitoring of essential maritime services and pilotage services, in accordance with the current price determination;[49]

(e) it may make recommendations to the Government to vary proclamations made under the MSA Act, thereby varying the ports subject to the regime, or varying which Maritime Services are Regulated Services, and therefore subject to the Access Regime;[50] and

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43 *ESCA,* s 25(3).

44 *ESCA*, s 27.

45 ESCOSA '2017 Ports Access and Pricing Review', 11 September 2017, p 1.

46 MSA Act, s 8A.

47 MSA Act, s 9(1).

48 MSA Act, s 43.

49 ESCOSA, Ports price determination: 2017 – 2022, https://www.escosa.sa.gov.au/ArticleDocuments/1139/20171009-Ports-AccessAndPricingReview-PriceDetermination2017-2022.pdf.aspx?Embed=Y.

50 MSA Act, s 45

(f) it facilitates resolution of access disputes.[51]

Services that are not regulated under the Access Regime

4.15 The Council notes that Qube raised a potential access dispute concerning negotiations around the terms of a proposed stevedoring license with ESOCSA. Flinders Ports, however, challenged whether the services that are the subject of the dispute fall within the Access Regime. On 9 September 2021, ESCOSA reached the view that Qube was not seeking regulated services for the purposes of the MSA Act and, as such, there was not a dispute that could be referred to ESCOSA for conciliation or referral to arbitration under the MSA Act.[52]

4.16 Section 44F(1)(a) of the CCA reads:

> (1) The designated Minister, or any other person, may apply in writing to the Council asking the Council to recommend that a particular service be declared unless:
>
> (a) the service is the subject of a regime for which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB)

4.17 If the Access Regime is re-certified, the Council considers that s 44F will only have the effect of shielding the services that are regulated under the Access Regime from a subsequent declaration application while certification is in force.

4.18 The Council notes that the range of services that are regulated under the Access regime (i.e. those noted at 4.5) is narrower than those that will fall within the definition of Maritime Services under the MSA Act (i.e. those noted at 4.3). If the Access Regime is re-certified, then any Maritime Services that are not proclaimed and thereby regulated under the Access Regime would not be barred from declaration by s 44F of the CCA.

4.19 It is also possible for Maritime Services to become regulated services under the Access Regime through subsequent proclamation (under sections 10 and 45 of the MSA Act). The following process would allow this to occur.

4.20 Under s 45 of the MSA Act, ESCOSA may recommend to the South Australian Government that the proclamation setting out those services the subject of the regime be varied or revoked. This suggests, at least in principle, that there is a means by which ESCOA could recommend services be added or removed as regulated services. If the Government agrees with a recommendation from

[51] MSA Act, Part 3, Divisions 4 and 5.

[52] ESCOSA, 'Negotiations between Qube and Flinders Ports and the application of the Maritime Services (Access) Act 2000 SA' 17 September 2021, https://www.escosa.sa.gov.au/projects-and-publications/projects/ports/negotiations-between-qube-flinders-ports/negotiations-between-qube-and-flinders-ports-application .

ESCOSA, it will make a further proclamation regarding regulated services. ESCOSA could make such a recommendation as part of its five yearly review under s 43. However, ESCOSA does not appear restricted to only making recommendations during its five yearly reviews, but may make them at any time. The Council considers that this fact could be made clearer to the public. The Council considers regard should be given to whether the Access Regime can be improved by making it clearer how (if at all) a new service could be proclaimed under the regime during the periods in between ESCOSA's fiver yearly reviews of the regime, including by way of outlining how parties might apply to ESCOSA for it to consider recommending varying or revoking the proclamation.

4.21 The Council considers that it is for ESCOSA, and not the Council, to determine whether matters in dispute fall within the ambit of the Access Regime and does not propose to comment on the decision reached by ESCOSA.

4.22 The Council considers that it is important to make the following observations:

- Disputes as to whether particular services fall under a regulated access regime are common and the fact that there was a dispute about whether Qube's access dispute falls under the Access Regime is not an indication that the Access Regime is ineffective.

- The decision by ESCOSA that Qube's access dispute falls outside the Access Regime is relevant background to this and future reviews of the Access Regime by the Council.

- Because the issues that are the subject of Qube's current stevedoring license negotiations are deemed to fall outside the Access Regime, as would be the case with any other issues relating to any other services that are not covered by a certified access regime, they will be unaffected by any Certification decision. Therefore those services may be candidates for declaration under Part IIIA of the CCA.

5 Assessment

5.1 The Council's approach is to organise its consideration against the guiding Clause 6 Principles into categories as follows:

- the scope of the access regime
- the treatment of interstate issues
- the negotiation framework
- dispute resolution
- efficiency promoting terms and conditions of access
- Part IIIA Objectives.

5.2 In the Council's view, the 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 as the basis for assessing a regime's effectiveness. In making its recommendation, the Council considers each Clause 6 Principle relevant to each of the categories.

5.3 After undertaking this assessment, the Council's recommendation to the Commonwealth Minister is that the Access Regime is an effective access regime.

5.4 The Council's reasons for this assessment are set out in the tables below.

Assessment of the South Australian Ports Access Regime against the Clause 6 Principles and objects of Part IIIA of the CCA

Scope of the Access Regime

Clause 6(3)(a) places limits on the types of infrastructure that are subject to an access regime.

Clause 6(4)(d) is intended to ensure there is periodic review of the need for access regulation to apply to a particular service. An infrastructure 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.

Competition Principles Agreement Principle /Part IIIA objective	**Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?**
Clause 6(3)(a): 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.	**Application** The South Australian Government submits that the Access Regime satisfies cl 6(3)(a) for the following reasons: (a) each of the proclaimed ports is significant to the regional economy it services and to the state economy 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 1,195 vessel visits in 2019-20. 20 million tonnes of cargo was shipped through Port Adelaide in 2020-21 and total container movements at the port have grown from 267,438 TEU in 2008-09 to 323,000 TEU in 2019-20. • Thevenard – located 793 kilometres from Adelaide, with the major export cargoes including gypsum, grains, mineral sands, 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 mineral concentrates, mineral by-products, chemicals, acids and coal
- Wallaroo – handles 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:

- The Council has previously considered whether it would be economically viable to replicate shipping channels and decided that Australian shipping channels were “natural monopolies” and fulfilled the requirement of cl 6(3)(a)(i).
- The Port Adelaide 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. Each of the proclaimed regional ports has a significant amount of spare capacity in their berth and loading facilities, indicating that it will be more cost effective to meet local demand from using the existing berth and loading facilities, rather than through duplicating these facilities.
- Port Adelaide, Port Giles, Wallaroo, Port Lincoln and Thevenard all have grain berths. The access regime covers bulk handling facilities as well as the associated berths so as to ensure there is no break in the supply chain (lack of access to the facilities via the berths could provide a "choke point" between the conveyor belt and the ship).

(d) With regard to effective competition, the South Australian Government submits:

- 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. • Section 3 of the MSA Act contains an object clause that discusses facilitating competitive markets in the provision of maritime services. The proclaimed ports (and where relevant the proclaimed berths) are all common user facilities, and the regime does not extend to the use of ports and berths that are dedicated to a single entity where there is little prospect of, or need for, competition. • in its 2017 Review, ESCOSA acknowledged that inter-port competition can create a constraint on the exercise of market power. However, in considering whether there was availability of substitutes that would act as a constraint on the potential for Flinders Ports to exercise its market power, ESCOSA noted that those port developments were not in operation and therefore did not offer alternative port solutions at that time.[53] • The Australian Competition and Consumer Commission (ACCC) has also assessed the impact of new port developments involving grain export facilities on the competitive dynamics of the South Australian grain export market. The ACCC concluded in its draft determination that the extent of inter-port competition faced by existing ports was limited and/or uncertain at that point in time.[54] (e) With regard to safe use of proclaimed ports, Flinders Ports is required to provide for the safe commercial operation of channels and general port facilities through Port Operating Agreements (**POAs**) established under provisions of the *South Australian Harbors and Navigation Act 1993* (**HN Act**)**.** Relevant to port safety, and in accordance with s 28B(2) of the HN Act, the POAs require the port operator (Flinders Ports) to: • have appropriate resources (including appropriate contingency plans and trained staff and equipment to carry the plans into action) to deal with emergencies;

53 ESCOSA, 2017 Ports Access and Pricing Review – Final Report, September 2017, pp 15-17.

54 ACCC, Draft Determinations – Viterra Operations Pty Ltd – Exemption assessments of port terminal services, 6 October 2021, p 89. Availbale at: https://www.accc.gov.au/system/files/Final%20-%20Viterra%20Draft%20Determination%20v2.pdf.

- maintain port waters to a navigable standard, to provide and maintain navigation aids and to direct and control vessel movements in port waters; and
- maintain and make available to the users of the port navigational charts and other information relating to the safe operations of the port.

Bulk Wheat Code update

The Council notes that on 27 April 2021, the ACCC issued final determinations pertaining to an application from Viterra where it sought to be determined an exempt service provider of port terminal services at all six of its port terminal facilities in South Australia (**Viterra grain ports exemption assessment**). The ACCC considers Viterra faces sufficient competition to be exempt from the *Port Terminal Access (Bulk Wheat) Code of Conduct* (**Bulk Wheat Code**) at its Port Adelaide Inner Harbour and Port Adelaide Outer Harbour facilities, but currently faces limited competition at its Wallaroo and Port Giles facilities.[55] On 20 July 2021, the ACCC issued final determinations not to exempt Viterra's Port Lincoln and Thevenard facilities from the Bulk Wheat Code, noting that these facilities face limited competition.[56]

The Viterra grain ports assessment conducted by the ACCC focuses on Viterra's port terminal services at facilities that facilitate the export of wheat grain. The ACCC's Final Determination notes:

> *recent entry of competing port terminal facilities has increased the supply of capacity outside of the Viterra system. This has placed a level of competitive constraint upon Viterra. However, this competitive constraint differs by region, and the relatively recent entry of some alternate [port terminal service providers] means the constraint remains somewhat uncertain at this time.*
>
> *(*ACCC, Final Determination, page 31).

55 ACCC, Final Determinations, Viterra operations Pty Ltd Exemption assessments of port terminal services provided at the following port terminal facilities: Port Adelaide Inner Harbour, Port Adelaide Outer Harbour, Wallaroo, Port Giles, 27 April 2021, pp 3, 4. Available at: https://www.accc.gov.au/system/files/Viterra%20Final%20Determinations%20-%20IHB%2C%20OHB%2C%20Wallaroo%2C%20Port%20Giles.pdf

56 ACCC, Final Determinations, Viterra operations Pty Ltd Exemption assessments of port terminal services provided at the following port terminal facilities: Port Lincoln and Thevenard. 20 July 2021. Pp 3, 4. Available at: https://www.accc.gov.au/system/files/Viterra%20Final%20Determinations%20for%20Port%20Lincoln%20and%20Thevenard.pdf

The Council notes that a number of the port terminal services offered by Viterra and covered by the Wheat Code are also subject to the Access Regime and an increase in competition for these services may therefore be relevant to cl 6(3)(a)(ii).

Council's view

The services that are subject to the Access Regime are described by s 10 of the MSA Act and summarised in Sections 2 and 4 of this recommendation.

The Council accepts that the ports to which the 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 is mindful that Viterra's Port Adelaide Inner Harbour and Port Adelaide Outer Harbour facilities (**the Exempt Services**) are used for services other than the provision of bulk wheat and it is not clear whether the other businesses that utilise these services have viable alternative facilities that they could access. As such, the Council considers that access to the Exempt Services may no longer be necessary in order to permit effective competition in a downstream or upstream markets relating to bulk wheat, but may still be necessary in relation to other markets.

In relation to each of the services and facilities that are subject to the Access Regime and operated by Flinders Ports, the Council considers that access to the regulated services covered by the Access Regime is likely to be necessary to permit effective competition in dependent markets. The Council considers that access can be provided safely for the purposes of cl 6(3)(a)(iii).

The Council's view is that the Access Regime satisfies cl 6(3)(a).

Clause 6(4)(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.	**Application** The South Australian Government submits that the requirement for ESCOSA to review the scope of the Access Regime at five-yearly intervals provides a structural mechanism within the Access Regime for it to respond to changes in the market which may influence the scope of services or ports which are appropriately covered by the regime. Since the Access Regime was certified in 2010, ESCOSA has conducted two reviews of the access regime (in 2012 and 2017). In conducting its reviews, ESCOSA undertakes a comprehensive appraisal of the maritime industries subject to the Access Regime to assess the ongoing need and effectiveness of the access and pricing regimes, specifically addressing the following two questions: 1. Does the structure of the market create the potential to exercise market power for the providers of regulated services, EMS and pilotage services? 2. Based on the conduct and performance of those providers, is there evidence of market power being exercised? The Council has previously accepted that the Access Regime contains adequate mechanisms for reviewing the right to negotiate access while ensuring that existing contractual rights under an access agreement or award are preserved, and that it therefore satisfies cl 6(4)(d). South Australia submits that this remains the case. **Council's view** Section 43 of the MSA Act provides that Part 3 of the Act (which contains the provisions establishing the access regime) is subject to a 5-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 2022.[57]

[57] ESCOSA, Ports price determination: 2017 – 2022, 27 September 2017. Available at: https://www.escosa.sa.gov.au/ArticleDocuments/1139/20171009-Ports-AccessAndPricingReview-PriceDetermination2017-2022.pdf.aspx?Embed=Y.

	Subsection 43(7) of the MSA Act 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. 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 Access Regime should continue to apply to those industries. Access arrangements and arbitration awards are enforceable as contracts. They are unaffected by any change in the Access Regime, including those resulting from ESCOSA recommendations. The Council considers that the Access Regime contains adequate mechanisms for reviewing the right to negotiate access while ensuring that existing contractual rights under an access agreement or award are preserved. The Council's view is that the Access Regime satisfies cl 6(4)(d).

Treatment of Interstate Access Issues

Clause 6(2) establishes principles for 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.

Competition Principles Agreement Principle /Part IIIA objective	**Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?**
Clause 6(2): The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless: (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or (b) substantial difficulties arise from the facility being situated in more than one jurisdiction. Clause 6(4)(p): Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other	**Application** 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. It considers, therefore, that the principles in cls 6(2) and 6(4)(p) are satisfied. The South Australian Government submits that there are no other state-based access regimes applying to any of the regulated maritime services in South Australia, but notes that Viterra's supply of bulk grain services is also subject to the regulatory framework under the Bulk Wheat Code. The Bulk Wheat Code is a mandatory code under the CCA and is administered by the ACCC. The Code applies to all 'port terminal service providers' who provide terminal facilities capable of handling bulk wheat and commenced on 30 September 2014. As discussed above, on 2 July 2019, Viterra applied to the ACCC for its SA terminals to be exempt from the Bulk Wheat Code, initiating the Viterra grain ports exemption assessment. The draft determinations issued in the Viterra grain ports assessment indicate the ACCC is proposing that the Port Adelaide Inner Harbor and Outer Harbor facilities be exempted, but not the regional facilities.[58]

[58] ACCC, Draft Determinations, Viterra operations Pty Ltd Exemption assessments of port terminal services provided at the following port terminal facilities: Port Adelaide Inner Harbour, Port Adelaide Outer Harbour, Port Lincoln, Wallaroo, Port Giles and Thevenard. 6 October 2020, pp 4 - 6. Available at:

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.	While not a state-based access regime, and therefore not directly relevant to cl 6(4)(p), the presence of the Code of Conduct was raised in ESCOSA's 2017 Review. ESCOSA noted that the Code provides protections for customers similar to those provided by the access regime. However, it further noted that the Code only applies to wheat exporters that use Viterra's terminals, not other users. Therefore, the ability for Viterra to exercise its market power in all instances is not removed by being subject to the Code.[59] ESCOSA did not identify concerns about any potential overlap between the Code and the provisions of the access regime. In 2018, the Australian Department of Agriculture and Water Resources conducted a review of the Code of Conduct as part of a statutory requirement that the Code be reviewed within three years of commencing. The Review did not identify issues or concerns about regulatory overlap.[60] Similarly, the ACCC did not, as part of its October 2020 Draft Determination, identify issues or concerns about potential regulatory overlap when considering the merits or otherwise of not exempting Viterra's regional facilities from the Code of Conduct. Accordingly, South Australia submits that the Access Regime satisfies cl 6(4)(p). **Submissions** **Submissions responding to application** Flinders Ports submits that the services that are the subject of the Access Regime are solely provided in South Australia and it would be prudent, effective and efficient for the State regulator, ESCOSA, to continue to be responsible for overseeing the regime.[61]

https://www.accc.gov.au/system/files/Final%20-%20Viterra%20Draft%20Determination%20v2.pdf

59 ESCOSA, 2017 Ports Access and Pricing Review – Final Report, September 2017, pp20-21.

60 Department of Agriculture and Water Resources, Review of the wheat port access code of conduct, Canberra, 2018. https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/ag-food/crops/wheat/review-wheat-port-access-code-conduct-report.pdf

61 Flinders Ports, Submission to the Council dated 15 February 2021, p 2.

Viterra provided a late submission asserting that the Bulk Wheat Code does not apply equally to all port terminals which has caused significant distortions, with the costs and uncertainties of regulation borne by South Australian industry and growers. Any regulatory requirements, including under the MSA Act, should apply equally to all market participants. Viterra considers either that the Access Regime should no longer apply to Viterra's bulk loaders, or that the access regime should apply equally to the port terminal operators that have commenced operations in South Australia since the commencement of the MSA Act. [62]

Submissions responding to draft recommendation

SAFC provided a submission in which it notes and supports Viterra's request to examine what infrastructure at each port should be covered under the Access Regime (in particular, where there is double coverage under the Bulk Wheat Code).[63]

Council's view

The services and infrastructure to which the Access Regime applies are described above.

Submissions provided by Viterra and the SAFC concerning the overlap between the Access Regime and the Bulk Wheat Code are discussed in this section to the extent that they are relevant to Cls 6(2) and 6(4)(p). These issues are also relevant to the second limb of the Objects of Part IIIA and are also discussed in in that section, later in this Recommendation.

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

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

62 Viterra, Response to information request dated 10 May 2021, pp 2, 3.

63 SAFC, Submission on the Draft Recommendation, 5 July 2021, p 1.

	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 Council acknowledges the Access Regime operates exclusively within the jurisdiction of South Australia, such that the Council's view is that the Access Regime satisfies cl 6(2). The Council considers that the operation of the Bulk Wheat code is not directly relevant to its consideration of cl 6(4)(p) because it is not a state or territory based access regime. However, the Council notes that its reach extends to services that are also regulated under the Access Regime and establishes a regime for persons to seek access to the services and resolve disputes. The Code is a mandatory code under the CCA and is administered by the ACCC. The Code applies to all 'port terminal service providers' who provide port terminal facilities capable of handling bulk wheat. The regulations under the Code include: • an obligation on all port terminal operators to negotiate in good faith with wheat exporters for access to port terminal services • obligations on port terminal operators not to discriminate or hinder access in the provision of port terminal services • the ability for wheat exporters to seek mediation or binding arbitration on terms of access in the event of a dispute • an obligation to comply with 'Continuous Disclosure Rules' and publishing requirements, and • obligations relating to publishing and approval for port loading protocols for managing demand for port terminal services. In terms of consistency between the two regimes, the Council considers: • Like the Access Regime, the Bulk Wheat code provides a 'negotiate-arbitrate' framework for obtaining access to relevant regulated infrastructure, but also allows for access agreements to

	default to reference prices, which it requires service providers to publish. [64] The Council notes that, while the Bulk Wheat Code permits access agreements to default to reference pricing, it would not prevent an access seeker dissatisfied with those terms from seeking recourse under the Access Regime. • If an access dispute arises, the Bulk Wheat Code allows the parties to attempt to resolve the dispute through mediation or commence arbitration.[65] If the parties wish to have their dispute arbitrated, the Bulk Wheat code requires the parties to notify the ACCC of their intention to commence arbitration. The parties may nominate an independent arbitrator of their choosing or accept an arbitrator appointed by the Institute of Arbitrators & Mediators if agreement is not reached as to who should fulfil the role.[66] The Council notes that the equivalent provisions in the Access Regime allow the parties to notify ESCOSA, which would then attempt to resolve the dispute by conciliation and, if unsuccessful, would then appoint an arbitrator after consultation with the parties to the dispute.[67] The Council considers that the Access Regime and the Bulk Wheat Code differ in who they would have aggrieved parties notify of access disputes and does not nominate a single body to resolve disputes about access. The Council notes that it would be open to a party raising an access dispute to nominate ESCOSA to conduct conciliation or consent to an arbitrator suggested by ESCOSA, but raising access disputes under the two regimes could also result in different paths to resolution with assistance provided by different bodies. • Any access agreement reached between the service provider and exporter (whether formed by agreement or determined by an arbitrator) will operate as an agreement between the parties and the Bulk Wheat Code does not affect the right of a party to that agreement to institute legal proceedings under the agreement.[68] If arbitration is undertaken through the Access Regime then

64 Bulk Wheat Code, ss 11 and 13.

65 Bulk Wheat Code, s 14.

66 Bulk Wheat Code, ss 14, 15.

67 MSA Act, ss 15 – 30.

68 Bulk Wheat Code, ss 15, 21.

	the resulting award is enforceable as if it were a contract between the parties to the award.[69] The Council considers that the same forum will apply to enforce access arrangements reached through the Access Regime or the Bulk Wheat Code. While some services are captured by both the Access Regime and the Bulk Wheat Code, and in some aspects the two regimes are not entirely consistent, on balance, the Council does not consider that inconsistency between the Access Regime and the Bulk Wheat Code is sufficiently concerning such as to render the Access Regime ineffective. In any case, as the Bulk Wheat Code is a Commonwealth regime, it is not relevant under cl 6(4)(p). The Council's view is that the Access Regime substantially satisfies cl 6(4)(p).

69 MSA Act, s 37.

Negotiation Framework

Clauses 6(4)(a)-(c), (e)-(i) and (m)-(o) seek to ensure that an access regime provides an appropriate balance between commercial negotiation and regulatory intervention to facilitate access negotiations.

The following clauses are also relevant to the Negotiation Framework and discussed in subsequent sections:

- Clauses 6(4)(g)-(i) and 6(4)(o), discussed in the dispute resolution assessment.
- Clause 6(4)(n), discussed in the efficiency promoting terms and conditions assessment.

Competition Principles Agreement Principle /Part IIIA objective	**Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?**
Clause 6(4)(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. Clause 6(4)(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. Clause 6(4)(c): Any right to negotiate access should provide for an enforcement process.	**Application** The South Australian Government submits that the Access Regime satisfies cls 6(4)(a)-(c) through recognising the primacy of commercial negotiations by: • adopting a negotiate/conciliate/arbitrate model which facilitates the commercial negotiation of access agreements between Flinders Ports and access seekers and encourages access through commercial negotiation to the maximum extent possible • including a dispute resolution process with ESCOSA empowered to settle disputes through conciliation or failing that, referring the access dispute to arbitration, and • including credible enforcement mechanisms through civil penalties and relief in the Supreme Court of South Australia. The South Australian Government submits that the Access Regime's reliance on commercial negotiation to agree terms of access without disputes arising demonstrates its effectiveness. Since the introduction of the Access Regime, all access agreements have successfully been commercially agreed, with no disputes arising that have required the arbitration provisions of the access regime to be invoked.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	Submissions **Submission responding to draft recommendation** LINX submits that the Access Regime fails to meet the requirements of clauses 6(4)(a) and (b). It states "In order for the principles set out in clauses 6(4)(a) and (b) to be satisfied it is not sufficient simply that there be a negotiate arbitrate model, a dispute resolution process, and an enforcement mechanism. Rather, it must be the case that the [Access] Regime enables those negotiation and dispute resolution mechanisms to be effective having regard to the market conditions and circumstances applicable. In the present circumstance, that must take into account the vertically integration nature of Flinders operations".[70] **Council's view** 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. cls 6(4)(b) and (c) recognise that regulatory measures can provide an incentive to reach commercially agreed outcomes but also require that an effective access regime provides a means for dealing with situations where access providers and access seekers are unable to reach agreement. For regulated services at any of the six ports subject to the Access Regime, s 11 of the MSA Act 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 MSA Act.

[70] LINX, Submission on the Draft Recommendation, 16 July 2021, p 4.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	For a service subject to a pricing determination under the ESCA, a term regarding price is deemed to be a fair commercial term if the term is consistent with that pricing determination. The MSA Act sets out the following negotiation process: • an access seeker may put a written access proposal to the regulated operator (s 13). 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 • the regulated operator and the access seeker (and any interested third party) are required to negotiate in good faith with a view to reaching agreement on the access proposal (s 14). 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.[71] Any party to the dispute may refer it to ESCOSA for resolution. The dispute resolution process is outlined in detail in the 'Dispute Resolution Clauses' subsection of this report (below). 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.[72]

[71] MSA Act, s 15.

[72] MSA Act, s 35.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	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.[73] 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.[74] The 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,[75] and • awarding compensation for a contravention of an award.[76] The Council notes that Qube and LINX have suggested that providing a negotiate-arbitrate framework with a dispute mechanism may not be sufficient for an access regime to be effective in circumstances where an access provider is vertically-integrated. The Council has discussed a number of issues arising from vertical integration and the extent to which arbitration is an appropriate tool to address and rectify those concerns in the context of the objects of Part IIIA, below. That discussion acknowledges that some issues arising from vertical integration, such as the threat of misuse of confidential information, may not be completely addressed or alleviated through arbitration. However, the Council notes that this is not the

73 MSA Act, s 36.

74 MSA Act, s 40(1)

75 MSA Act, s 38.

76 MSA Act, s 39.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	relevant question to deciding whether Cls 6(4)(a) and (b) of the CPA have been satisfactorily incorporated in an access regime. Clauses 6(4)(a) and (b) require that: (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, and (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. Overall, the Council considers that the 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 MSA Act and the conciliate/arbitrate dispute resolution processes establish an appropriate balance between the interests of the service provider, access seeker and any interested third party. The Council considers that ESCOSA is vested with appropriate powers under both the MSA Act 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. The independence of ESCOSA, South Australia's economic regulator responsible for administering the 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 MSA Act.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	The transparency of the Access Regime's regulatory arrangements is supported by the public consultation requirements required by ESCOSA in connection with its review of the Access Regime (MSA Act s 43).[77] The Council's view is that the Access Regime satisfies cls 6(4)(a)-(c).
Clause 6(4)(e): The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.	**Application** The South Australian Government submits that the Access Regime imposes an obligation on the owner of the facility to negotiate in good faith and also to provide information to a potential access seeker. **Submissions** **Submissions responding to the draft recommendation** The South Australian Government provided a submission in response to the draft recommendation in which it acknowledges the suggestions in the draft recommendation that the Access Regime could be improved by adding a timeframe to the obligations on a regulated operator to provide information to a potential access seeker. The submission supports the Council's suggestion that these matters be considered as part of ESCOSA's upcoming review. LINX submits that the Access Regime fails to meet the requirements of Cl 6(4)(e) because there are not mechanisms which support non-discriminatory access in a market context where the conditions for the exercise of market power exist. Some pro-active mechanisms are required to ensure that Flinders Ports must "use all reasonable endeavours to accommodate the requirements of persons seeking access".

[77] 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 Access Regime with the requirements of the CIRA as part of the ESCOSA Review. Public consultation was an important element of that review.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	LINX's submission and response to the 19 August 2021 information request describe situations where it considers that Flinders Logistics Pty Ltd (**Flinders Logistics**) has faced lower fees from Flinders Ports (compared to unrelated competitors) and ships to be worked by Flinders Logistics have been given higher priority than vessels being worked by LINX. As a possible means of addressing the risk of discriminatory treatment towards access seekers that are not related to Flinders Ports, LINX has suggested that a new provision be added to the MSA Act which would read: "A regulated operator must provide regulated services on non-discriminatory terms. Such non-discriminatory terms must be non-discriminatory as between third party customers and as between the regulated operator and any related bodies corporate of the regulated operator." **Responses to August 2021 information requests** In response to the 5 August 2021 information request issued by the Council, LINX provided information to the effect that Flinders Ports discriminates in favour of Flinders Logistics by: - charging fees to its competitors which Flinders Logistics may not have to pay - providing preferential berthing arrangements which may require ships that have already arrived to vacate ports in order to enable immediate access to ports for ships to be worked by Flinders Logistics, and - bundling the cost of services to be performed by Flinders Logistics with the cost of services to be performed by Flinders Ports. In response to the 24 August 2021 information request issued by the Council, Flinders Ports provided information to the effect that: - LINX does not acquire a regulated service under the Access Regime and, accordingly, the concerns raised by LINX are not relevant to the Council's assessment and should not be taken into account

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	- While LINX may not have visibility over whether there is preferential treatment by Flinders Ports to its vertically integrated related entities, ESCOSA has visibility over the Access Regime and Flinders Ports' compliance with it. ESCOSA has continually found over the last ten years that there is no evidence of preferential treatment favouring Flinders Ports' related entities. - LINX appears to be complaining about vigorous competition. - The licensing fee charged to LINX, which LINX asserts may not be charged to Flinders Logistics, stems from historical arrangements between the parties. And, since 2019 Flinders Ports has charged a Mobile Loader Fee of $1.60 per tonne (now $1.68 per tonne) for all stevedores, including Flinders Logistics. - Flinders Ports denies that it has ever adopted any structures or charging mechanisms which provide for the installation of equipment particularly suited to the operations of its related entities. - LINX has not provided the details necessary to identify the situation in which it asserts that priority was given to a vessel to be worked by Flinders Logistics over a vessel that was being worked by LINX. As such, Flinders cannot comment on the example alluded to by LINX. However, Flinders Ports has, at all times, acted in accordance with the berthing rules – that is, it has never provided preferential berthing access to any particular stevedore including Flinders Logistics. - The berthing allocation rules do not require a ship at berth to vacate to allow immediate access for an incoming vessel to be worked by Flinders Logistics (or any other stevedore). There are some priority based rules relating to the use of specific fixed facilities located at that berth such as the shiploader, cranes and storage facilities but priority is not based upon the identity of the stevedore. - From time to time Flinders Logistics or Flinders Warehousing & Distribution Pty Ltd (**Flinders Warehousing & Distribution**) may bundle the services they provide with regulated services that

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	customers require from Flinders Logistics. The prices charged by Flinders Ports to customers for its regulated services are the same regardless of the identity of the stevedore. - LINX and other stevedores can and do bundle their own services with the regulated services that their customers require and acquire from Flinders Ports. It is a matter for each stevedore as to whether to provide that bundle of services to their customer at a discount to normal rates. **Council's assessment** The Council considers that an access regime may either incorporate cl 6(4)(e) explicitly, or through general provisions that have the same effect. LINX's submissions argue that in circumstances where there is a vertically integrated port operator some pro-active mechanisms are necessary to ensure that Flinders Port must "use all reasonable endeavours to accommodate the requirements of persons seeking access" and the Access Regime in its current form is defective. LINX has suggested that this issue could be rectified by introducing a requirement that "A regulated operator must provide regulated services on non-discriminatory terms. Such non-discriminatory terms must be non-discriminatory as between third party customers and as between the regulated operator and any related bodies corporate of the regulated operator." Flinders Ports has responded to these concerns by outlining the terms on which berthing arrangements are determined and fees are set, noting that the same set of rules apply (or are available to) all businesses and submitting that preferential terms of access are not offered to entities related to Flinders Ports. Section 14 of the MSA Act 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. Section 12 of the MSA Act 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):

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	• the extent to which the regulated operator's port facilities subject to the Access Regime are currently being utilised • technical requirements that have to be complied with by persons for whom the operator provides regulated services • the rules with which the intending proponent would be required to comply, and • information about the price of regulated services provided by the operator that is required to be provided under the guidelines issues by ESCOSA.[78] These obligations are supported by ss 14 and 15 of the MSA Act, 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. The Council considers that the mechanisms for negotiation and dispute resolution in the Access regime as it currently stands are likely to assist an access seeker in negotiating access. The Council considers that the Access Regime allows for an access seeker to propose terms that it desires, which may be equivalent to terms sought by other parties or tailored to that individual business' needs. The Access Regime requires that negotiations then progress in good faith with the access provider required to endeavour to accommodate as far as practicable the access seeker's reasonable requirements. If those negotiations do not yield a result satisfactory to the access seeker it will be open to them to refer the issue to ESCOSA and it may be resolved through arbitration. The Council does not consider that a positive anti-discrimination obligation is necessary for the Access Regime to incorporate the principle that 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. However, the Council would not see the inclusion of such a provision as likely to impede the Access Regime's

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

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	incorporation of cl 6(4)(e) and it may be a beneficial inclusion to strengthen the regime. This is discussed further in the context of cl 6(5)(b) and the objects of Part IIIA, below. As discussed in Section 3, the CPA and legislative extrinsic materials indicate that the parties to the CPA, and the Commonwealth Parliament, intended that states and territories would be granted latitude in designing and operating access regimes. There is no requirement that a positive anti-discrimination requirement must be incorporated in an access regime for it to be effective. The Council considers that the vertically integrated nature of Flinders Ports does lead to a heightened risk of preferential or discriminatory conduct occurring that benefits entities related to the access provider. However, where a service is not the subject of the regime, the Council is open to an access seeker lodging an application for declaration of the service(s). And, Access providers are still bound by Part IV of the Act, even with respect to services covered by the Access Regime. As such, the Council does not consider the Access Regime as it currently exists as deficient in achieving the principle in cl 6(4)(e). The Council does however note that while s 12 of the MSA Act provides for preliminary information to be provided to an access seeker to assist in preparing an access proposal, there is scope for improvement in how this is carried out. 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 addressing this deficiency (although the Council acknowledges that the ability to refer a dispute is expected to encourage information provision) and 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 MSA Act. The Council's view is that the Access Regime satisfies cl 6(4)(e).

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
Clause 6(4)(f): Access to a service for persons seeking access need not be on exactly the same terms and conditions.	**Application** The South Australian Government submits that the Access Regime satisfies cl 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. **Submissions** **Submission responding to application** Qube submits that cl(4)(f) requires more than simply permitting an access provider to supply access on different terms and conditions. Compliance with cl 4(f) in circumstances where an access provider is vertically integrated requires the Council to consider whether the access regime also contains effective mechanisms to ensure competitive neutrality in the treatment of related entities.[79] **Council's assessment** 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 cl 6. While the Access Regime does not expressly stipulate that access can be provided on different terms and conditions, the mechanisms in it support the commercial negotiation of individual access arrangements. Therefore, access on different terms and conditions is not precluded. While an arbitrator is required to have regard to certain specific factors in the event of an access dispute, it is not unduly constrained and

[79] Qube, Submission to the Council dated 26 February 2021, p 15.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	could, in certain circumstances, determine access on different terms and conditions for different users under the Access Regime. Further, the Access Regime provides flexibility for parties to negotiate their own arrangements for access, subject to the timing requirements specified in s 13 of the MSA Act, 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 MSA Act. These reflect the factors in cl 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. The Council considers that it is most appropriate to provide a consolidated discussion of Qube's submissions concerning the vertical integration of the service providers and impact of those issues on the effectiveness of the Access Regime. The Council has discusses the extent to which mechanisms to

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	ensure competitive neutrality in the treatment of related entities may be required for an effective access regime in the 'Part IIIA Objectives' section, below. The Council's view is that the Access Regime satisfies cl 6(4)(f).
Clause 6(4)(m): The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.	**Application** The South Australian Government submits that the Access Regime satisfies the requirements of cl 6(4)(m) by providing that it is an offence, with an accompanying financial penalty, for a person to prevent or hinder access. **Submissions** **Submission responding to application** Qube submits that the Council's Certification Guidelines recognise that, where vertical integration issues arise, ringfencing provisions may need to be supported by competitive neutrality provisions to assure access seekers that the service provider will not discriminate against them.[80] In circumstances where the access provider is vertically integrated in downstream services, mere inclusion of a provision that mirrors the requirement under cl 6(4)(m) of the CPA will not be sufficient to constrain the access provider's behaviour in a meaningful way, and that a more interventionist approach will be required in order to prevent discrimination by the access provider against third parties.[81]

80 NCC, Certification guidelines at [5.68] – [5.71].

81 Qube, Submission to the Council dated 26 February 2021, p 13.

Qube submits that, in the context of the increased vertical integration of Flinders Ports, the Council should not find that the current access regime meets the principle in cl 6(4)(m) unless the prohibition on conduct is properly supported by more specific and concrete provisions.[82]

Responses to 10 May 2021 information request

In Qube's response to the 10 May 2021 information request, it notes that the Council's Certification Guidelines acknowledged that in the case of vertically integrated service providers, access may be hindered where the service provider "unfairly provides favourable terms of access to an affiliate entity".[83] Qube supports this interpretation.

Qube repeats its view that an effective access regime must do more than re-state the CPA principle. An effective access regime, for the purpose of the Clause 6 Principles, must be demonstrated to have applied those principles in a manner that is successful and appropriate, in the market context and circumstances.

Qube notes that more prescriptive approaches have been taken to reflecting cl 6(4)(m) in the access regimes relating to Queensland Rail and the Dalrymple Bay Coal Terminal.

Council's assessment

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 Council considers that it is most appropriate to provide a consolidated discussion of the issues arising from the vertical integration of the service provider and impact of those issues on the effectiveness of the Access Regime. The Council has discussed vertical integration issues and the Access Regime's limited ring-fencing provisions in the Objects of Part IIIA Section, below.

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

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	Section 44 of the MSA Act 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. The Council's view is that the Access Regime satisfies cl 6(4)(m).

82 Qube, Submission to the Council dated 26 February 2021, p 13.

83 NCC, Certification Guidelines at [5.69]

Dispute Resolution Clause

The Clause 6 Principles below are designed to ensure the effectiveness of the dispute resolution regime while balancing the interests of all parties. The Clause 6 Principles include clauses around how the independent arbitrator is appointed and funded; what the independent arbitrator must consider when making a decision; and the information the independent arbitrator can require from access providers.

Clause 6(4)(a)-(c) discussed in the negotiation framework assessment is also relevant here. Refer to the discussion above.

Competition Principles Agreement Principle /Part IIIA objective	**Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?**
Clause 6(4)(g): Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.	**Application** The South Australian Government submits that the Access Regime achieves the objectives of cl 6(4)(g) 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, the proponent terminates the arbitrator process, or elects not to be bound by the arbitration award. **Council's assessment** 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. 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.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	The 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 Access Regime provides for the parties to share the costs of the arbitration equally unless the arbitrator determines otherwise. Dispute resolution under the Access 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 MSA Act 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) MSA Act). Section 18 of the MSA Act provides that 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 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 MSA Act (s 30A MSA Act). An arbitration award must be given to the parties to the award and ESCOSA, within 7 days

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	of it being made (s 31 MSA Act). 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) MSA Act). Section 41 of the MSA Act 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. The Council's view is that the Access Regime satisfies cl 6(4)(g).
Clause 6(4)(h): The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.	**Application** The South Australian Government submits that the Access Regime satisfies cl 6(4)(h) 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. **Council's assessment** Under the Access Regime, the outcome of an arbitration[84] is enforceable in the same manner as if it were a contract between the parties to the award. 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.

[84] Called an award or a determination.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	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. Section 37 of the MSA Act 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 MSA Act 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. 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 MSA Act). 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). 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 MSA Act. The Council's view is that the Access Regime satisfies cl 6(4)(h).

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
Clause 6(4)(i): In deciding on the terms and conditions for access, the dispute resolution body should take into account: (i) the owner's legitimate business 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.	**Application** The South Australian Government submits that the Access Regime provides for the taking account of the cl 6(4)(i) principles by an arbitrator in s 32(1)(a)–(h) of the MSA Act. **Council's assessment** The Council considers that cl 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 cl 6(5)(b) principles in considering access prices. Section 32(1) of the MSA Act prescribes each of the principles in cl 6(4)(i) as matters an arbitrator should take into account in deciding on the terms of an award. The Council's view is that the Access Regime satisfies cl 6(4)(i).

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
Clause 6(4)(j): The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to: (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility; (ii) the owner's legitimate business interests in the facility being protected, and (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.	**Application** The South Australian Government submits that the Access Regime satisfies cl 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 MSA Act that are the same as those in cl 6(4)(j). **Council's assessment** 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 cl 6(4)(j) criteria, whether the owner should be required to extend or permit extension of the facility. Section 33(2) of the MSA Act 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. The Council's view is that the Access Regime satisfies cl 6(4)(j).

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
Clause 6(4)(k): If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.	**Application** The Access Regime 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 reflecting their agreed view as to what constitutes a material change in circumstances in their access contracts. **Council's assessment** Clause 6(4)(k) provides for an access arrangement to be revoked or modified following a material change of circumstances. In respect of an arbitration award, s 36 of the MSA Act 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. If a proposal for termination or variation results in a dispute, the dispute resolution provisions in Part 3 of the MSA Act will apply (s 36(3) of the MSA Act). The Council's view is that the Access Regime satisfies cl 6(4)(k).
Clause 6(4)(l): The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.	**Application** The South Australian Government submits that Section 33 of the MSA Act specifies that an award handed down by the arbitrator may vary the rights of other customers of the operator under existing contracts or awards if: • those customers will continue to be able to meet their reasonably anticipated requirements measured at the time when the dispute was notified to ESCOSA; • 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.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	Council's assessment 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. Section 33 of the MSA Act specifies that an award handed down by the arbitrator may vary the rights of other customers of the operator under existing contracts or awards if: • those customers will continue to be able to meet their reasonably anticipated requirements measured at the time when the dispute was notified to 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. The Council's view is that the Access Regime satisfies cl 6(4)(l).
Clause 6(4)(o): The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.	**Application** The South Australian Government submits that the MSA Act requires the segregation of accounts and records relating to the provision of regulated services. **Council's assessment** Section 27 of the MSA Act 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

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	require the production of written statements, specific documents or copies thereof, or may require a person to appear before it to give evidence. Failure to comply with the requirements of s 27 of the MSA Act may incur a maximum penalty of $20,000. However, a person is not required to give information if: [85] • 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. Pursuant to s 28 of the MSA Act 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. 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. The Council's view is that the Access Regime satisfies cl 6(4)(o).

[85] MSA Act, s 27(5).

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
Clause 6(5)(c): 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: 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 should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.	**Application** The South Australian Government submits that because merits review of arbitration outcomes or regulatory decisions is not a mandatory requirement under the Clause 6 Principles and is not provided for in the Access Regime, compliance with cl 6(5)(c) is unnecessary. **Council's assessment** 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. While the Access Regime does not provide for merits review an aggrieved party may seek judicial review of an arbitration award in the Supreme Court of South Australia (see the discussion of cl 6(4)(h) in the dispute resolution assessment, above). The Council's view is that the Access Regime satisfies cl 6(5)(c).

Efficiency promoting terms and conditions of access

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

Clauses 6(4)(a)-(c),(e),(f) and (n) discussed in the negotiation framework assessment are also relevant here. Refer to the discussion above.

Clauses 6(4)(i) and 6(4)(k) discussed in the dispute resolution framework assessment are also relevant here. Refer to the discussion above.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
Clause 6(4)(n): Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.	**Application** The South Australian Government submits that the Access Regime satisfies cl 6(4)(n) by requiring separate accounting arrangements supported by requirements imposed by ESCOSA. The South Australian Government also notes that in its 2017 Review, ESCOSA noted that in 2013, it had commissioned a review of the regulatory accounts of Viterra and Flinders Ports to ensure that these provisions had been correctly applied and the desired outcomes achieved. ESCOSA noted that the commissioned review identified no areas of concern.[86] **Submissions** **Submission responding to application** Qube submits that in certain circumstances, accounting separation alone may not be adequate to deter anti-competitive behaviour and additional ring-fencing measures may be required. In the presence of entrenched vertical integration (as is the case with Flinders Ports), accounting separation alone is not

[86] ESCOSA, 2017 Ports Access and Pricing Review – Final Report, September 2017, p 35.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	sufficient to constrain the access provider's behaviour in a meaningful way, and detailed, transparent and enforceable ring-fencing arrangements are required.[87] **Council's assessment** 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. To satisfy cl 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. In Qube's submission, to properly apply cl 6(4)(n), the Access Regime needs to include ring-fencing provisions, given vertical integration of the Flinders Group. Clause 6(4)(n) makes no reference to ring fencing. The absence of ring fencing provisions in an access regime may be relevant to the question of whether certification promotes the objects of Part IIIA. 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.

[87] Qube, Submission to the Council dated 26 February 2021, pp 12, 13.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	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. 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. 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. The Council accepts that the Access Regime imposes a requirement on Flinders Ports to maintain separate accounting arrangements for the elements of its business covered by the Regime. Should current industry arrangements (including the ownership of the proclaimed ports) change, consideration as to the adequacy of the current arrangements may be necessary. The Council considers that it is most appropriate to provide a consolidated discussion of Qube's submissions concerning the vertical integration of the service providers and impact of those issues on the effectiveness of the Access Regime. The Council has discussed issues relating to vertical integration and the manner in which it is addressed by the Access Regime in the 'Objects of Part IIIA' Section, below. The Council's view is that Access Regime satisfies cl 6(4)(n).

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
Clause 6(5)(a)-(b): 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	**Application** The South Australian Government submits that s 3 of the MSA Act incorporates stated objects for the Access Regime that substantially reflect the first limb of the objects of Part IIIA, aimed at the economically efficient operation, use of and investment in the infrastructure by which services are provided, with the effect of promoting competition in downstream markets. The South Australian Government submits that under the Access Regime, ESCOSA does not set prices for regulated port services. Rather, the Access Regime is underpinned by a negotiate-arbitrate regulatory framework. ESCOSA's monitoring of prices for essential maritime services is undertaken pursuant to the MSA Act. Section 32(2) of the MSA Act specifies pricing principles relating to the price of access to a service. These pricing principles mirror those listed in cls 6(5)(b)(ii) to (iv). While the pricing principle at 6(5)(b)(i) is not expressly included in the MSA Act, in the event that, in a future pricing determination, ESCOSA assesses that a more heavy handed form of pricing regulation is appropriate, this would need to comply with the provisions of Part 3 of the ESCA. This permits ESCOSA to make price determinations for regulated industries having regard to the cost of supplying access to the service, as well as the costs involved in complying with the relevant legislation or regulatory requirements and a return on assets in the regulated industry. These requirements have the effect of ensuring a price determination will also comply with cl 6(5)(b)(i). **Submissions** **Submission responding to application** Qube submits that both the objects of Part IIIA and cl 6(5)(a) of the CPA provide a clear overarching guiding principle for assessing the requirements of an access regime. The effectiveness of that regime must be measured against its adequacy in promoting effective competition in upstream or downstream

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
(iv) provide incentives to reduce costs or otherwise improve productivity.	markets and the Access Regime requires further measures to effectively address issues arising from the vertical integration of the service provers.[88] **Submissions responding to draft determination** LINX submits that, "contrary to clause 6(5)(a) of the Competition Principles Agreement, [the Access Regime] fails to enable outcomes that achieve the objective of efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets, so promoting competition". LINX's submission and response to the 19 August 2021 information request describe situations where it considers that Flinders Logistics Pty Ltd (**Flinders Logistics**) has faced lower fees from Flinders Ports (compared to unrelated competitors) and ships to be worked by Flinders Logistics have been given higher priority than vessels being worked by LINX. As a possible means of addressing the risk of discriminatory treatment towards access seekers that are not related to Flinders Ports, LINX has suggested that a new provision be added to the MSA Act which would read: "A regulated operator must provide regulated services on non-discriminatory terms. Such non-discriminatory terms must be non-discriminatory as between third party customers and as between the regulated operator and any related bodies corporate of the regulated operator." **Responses to August 2021 information requests** In response to the 5 August 2021 information request issued by the Council, LINX provided information to the effect that Flinders Ports discriminates in favour of Flinders Logistics by: - charging fees to its competitors which Flinders Logistics may not have to pay, and

[88] Qube, Submission to the Council dated 26 February 2021, p 11.

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	- bundling the cost of services to be performed by Flinders Logistics with the cost of services to be performed by Flinders Ports. In response to the 24 August 2021 information request issued by the Council, Flinders Ports provided information to the effect that: - LINX does not acquire a regulated service under the Access Regime and, accordingly, the concerns raised by LINX are not relevant to the Council's assessment and should not be taken into account - While LINX may not have visibility over whether there is preferential treatment by Flinders Ports to its vertically integrated related entities, ESCOSA has visibility over the Access Regime and Flinders Ports' compliance with it. ESCOSA has continually found over the last ten years that there is no evidence of preferential treatment favouring Flinders Ports' related entities. - LINX appears to be complaining about vigorous competition. - The licensing fee charged to LINX, which LINX asserts may not be charged to Flinders Logistics, stems from historical arrangements between the parties. And, since 2019 Flinders Ports has charged a Mobile Loader Fee of $1.60 per tonne (now $1.68 per tonne) for all stevedores, including Flinders Logistics. - Flinders Ports denies that it has ever adopted any structures or charging mechanisms which provide for the installation of equipment particularly suited to the operations of its related entities. - From time to time Flinders Logistics or Flinders Warehousing & Distribution Pty Ltd (**Flinders Warehousing & Distribution**) may bundle the services they provide with regulated services that

customers require from Flinders Logistics. The prices charged by Flinders Ports to customers for its regulated services are the same regardless of the identity of the stevedore.

- LINX and other stevedores can and do bundle their own services with the regulated services that their customers require and acquire from Flinders Ports. It is a matter for each stevedore as to whether to provide that bundle of services to their customer at a discount to normal rates.

Council's assessment

The Council considers that it is most appropriate to provide a consolidated discussion of Qube's submissions concerning the vertical integration of the service providers and impact of those issues on the effectiveness of the Access Regime. The Council has discussed issues relating to vertical integration and the manner in which it is addressed by the Access Regime in the 'Objects of Part IIIA' Section, below.

LINX's submission (summarised above) is discussed in this section to the extent that it is relevant to Cl 6(5)(a). The issues raised by LINX are also relevant to the first limb of the Objects of Part IIIA and are also discussed in in that section, later in this Recommendation.

LINX's submission does not explain why it considers the Access Regime fails to satisfy Cl 6(5)(a), except that it does not achieve the first limb of the objects of Part IIIA. As discussed at 3.33, Clause 6 Principles are principles that, under the CPA, must be "incorporated" in state or territory access regimes.[89] If an access regime "replicates" a relevant principle required under the CPA, the Council considers that the access regime applies that principle within the meaning of the CCA. Clause 6(5)(a) calls for the inclusion of an appropriate objects clause in the Access Regime, and the council considers that restating the first limb of the objects of Part IIIA will be sufficient to satisfy that requirement.

Clause 6(5)(a) is directly reflected in the objects clause of the MSA Act at s 3(b), and is so satisfied. However, for completeness and as discussed below in the context of the Objects of Part IIIA, the Council considers that evidence of entities in the Flinders Group experiencing growth in contested markets, and competitors losing contracts to these entities ,is not of itself evidence that the competitive process is not working. The Council also notes that the level of investment in the proclaimed ports and the number of

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	competitors in stevedoring markets appear to have increased since the introduction of the Access Regime. The Clause 6 Principles do not require an effective access regime to provide for regulated service prices, but where an access regime does it should have regard to the pricing principles in cl 6(5)(b) of the CPA. As noted 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 cls 6(5)(b)(i)-(iv), pursuant to ss 25(3)-(5) of the ESCA and s 32(2) of the MSA Act. Section 32(2) of the MSA Act specifies pricing principles relating to the price of access to a service. These are: (a) that access prices should allow multi-part pricing and price discrimination when it aids efficiency; (b) that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others would be higher; and (c) that access prices should provide incentives to reduce costs or improve productivity. The pricing principles in cl 6(5)(b)(ii)-(iv) are explicitly included in s 32(2) of the MSA Act (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. In the event that an access dispute is referred to arbitration, an arbitrator must take into account a number of factors that relate to the efficiency of access prices. These include:

[89] Competition Principles Agreement, clause 6(4).

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	• the operator's legitimate business interest and investment in the port or port facilities • the economic value to the operator of any additional investment that the proponent or the operator has agreed to undertake • the operational and technical requirements necessary for the safe and reliable provision of the service • the economically efficient operation of any relevant port facility • the benefit to the public from having competitive markets • that access prices should allow multi-part pricing and price discrimination when it aids efficiency • that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others would be higher, and • that access prices should provide incentives to reduce costs or otherwise improve productivity. The Council notes that LINX has raised concerns that discriminatory pricing practices may have been adopted by Flinders Ports that favour its related entities. The Council provided LINX with an opportunity to provide information substantiating this concern through its 24 august 2021 request for information, but was not provided with persuasive evidence or sufficient information to reach a conclusion that this allegation has in fact occurred. Conversely, Flinders Ports have explained their charging arrangements and affirmed that they have not and do not engage in discriminatory pricing practices. While the Council considers that the Access regime as it currently stands adequately reflects the principles in cl 6(5)(b), including subclause (iii), this element of the regime could be strengthened. The Council notes Qube's suggestion that a positive anti-discrimination provision to be added to the Access Regime and it's

Competition Principles Agreement Principle /Part IIIA objective	Does the SA Ports access regime meet the relevant CPA Principle/Part IIIA objective?
	proposed wording to achieve this and considers that it would be desirable for ESCOSA to consider incorporating such provisions as part of their next review of the Access Regime. The Council's view is that the Access Regime satisfies cls 6(5)(a)-(b).

Part IIIA Objectives

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
(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	**Structure of this subsection**

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Application The South Australian Government submits that the first limb of the Part IIIA objects clause focuses on the economically efficient operation, use of and investment in the infrastructure by which services are provided, with the effect of promoting competition in downstream markets. The stated objects of the Access Regime are set out in section 3 of the MSA Act, and 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. These objects, in particular object (b), substantially reflect the first limb of the objects of Part IIIA. Importantly, the Regime's objects also inform and guide ESCOSA's application and enforcement of the Access Regime and any arbitration conducted under the Regime. The Council has previously identified the benefits of a clear statement of objectives as not only promoting consistency in decision making, but also reducing the opportunity for dispute and misunderstanding, which in turn saves time and reduces the cost of regulation.[90] Further (as discussed against the relevant Clause 6 Principles, above) the South Australian Government submits that the Access Regime effectively provides for efficiency promoting terms and conditions of access, ensuring that the operation of the regime reflects its stated objects.

90 NCC, Certification Guide, p 48.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	The South Australian Government considers that the success of the Access Regime in facilitating efficiency can be seen from outcomes that have been achieved over the current certification period. In particular: - ESCOSA's reviews of the Access Regime have confirmed that, while there is potential for market power to be exercised by port operators, there is no evidence to suggest that port operators are exercising market power;[91] - the Regime has been successful in facilitating commercial negotiation of access arrangements, with no disputes being referred to arbitration over the entire life of the regime; - the Regime has provided a stable regulatory environment, and has promoted stakeholder confidence in the consistency and reasonableness of regulatory outcomes, with the effect of promoting significant and sustained investment in port facilities in South Australia. Significant investments relating to regulated services undertaken by Flinders Ports at Port Adelaide alone were described in the context of cl 6(3)(a), above, and include the $80 million Outer Harbor Channel Widening project, the Passenger Terminal upgrade, a $10 million investment in the Port Adelaide industrial precinct, a $12 million investment in a bulk handling precinct and a new $25 million Outer Harbor fuel berth. ESCOSA's 2017 review also noted that Viterra has made significant investment in its port terminal infrastructure and in operational improvements affecting bulk loading facilities at its port terminals.

91 ESCOSA, 2017 Ports Access and Pricing Review – Final Report, September 2017, p 2 and p 20

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Submissions **Submissions responding to application** *Concerning vertical integration –* Qube submits that the Access Regime does not effectively address vertical integration. Qube is concerned that the Flinders Group has expanded its operations into related and contestable markets in recent years; and that it is now the most diversified and vertically integrated port operator in Australia. In particular, Qube submits that since the Access Regime was certified in 2011, the Flinders Group has begun operating: - Flinders Logistics, which provides downstream logistics and stevedoring services, focussing on mineral resources, oil and gas - Flinders Warehousing & Distribution, which provides warehousing and distribution services - Flinders Adelaide Container Terminal Pty Ltd is the only container terminal facility in South Australia and provides both stevedoring and terminal management services to international shipping lines.[92] Qube submits that the Access Regime has not adapted in response to the expansion of the Flinders Group and is no longer an effective access regime. In particular, Qube submits that the Access Regime: - Does not require or provide for open and non-discriminatory access to South Australian Ports - Fails to provide any form of ring fencing of staff or roles for Flinders between its operations

92 Qube, Submission to the Council dated 26 February2021, pp 7, 8.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- Offers no protection for competitively sensitive information obtained by Flinders Ports through its operation of all SA Ports - Does not provide any meaningful public or independent audit or reporting mechanisms to ensure non-discrimination - Does not provide a workable dispute resolution process in relation to discriminatory pricing and non-pricing issues - Does not establish any operational or service performance standards or reporting, or otherwise regulate the non-discriminatory provision of services at SA Ports.[93] These concerns have also been noted against particular Clause 6 Principles which they are also (potentially) relevant to, above. Qube's submission also contains an annexure that describes instances where Flinders Ports may have obtained unfair benefits for its vertical interests in downstream markets. Qube makes the following claims in the annexure: - Qube has been informed that there is no separation between the management of Flinders Ports and Flinders Logistics and staff from one business may report to individuals that are managers at the other - There may be misuse of commercially sensitive information and leveraging by Flinders of its position as port operator. For example, the Flinders Ports commercial team, who Qube negotiate lease agreements though, are actively looking to secure stevedoring work for Flinders Logistics

[93] Qube, Submission to the Council dated 26 February2021, p 24.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- Flinders Ports can enact Port Rules to provide priority access to berths (rather than first in, first serviced). Qube submits that this mechanism has allowed Flinders Ports to prioritise access for customers of downstream services provided by the Flinders Group - Flinders Ports prioritises spending on services that benefit its downstream services - Superior warehousing facilities have been provided to Flinders Warehousing and Distribution. A warehouse next to the Flinders container terminal owned by MTAA Super (which holds a 21% interest in Flinders Port Holdings Pty Ltd) awarded the lease to Flinders Warehousing and Distribution. Other service providers have warehouses at Port Adelaide, and need to hire trucks in order to transport containers from the ship to the warehouse, increasing cost to the customer - There is no protection against disclosure of commercially sensitive Qube information within the Flinders Group. Qube is particularly concerned that there are no apparent constraints on the disclosure of commercially sensitive information between Flinders Ports and Flinders Logistics. Qube notes that representatives of Flinders Ports occasionally attend meetings with Qube and its customers where commercially sensitive matters may be discussed - Flinders Ports bundles and cross-subsidises contestable services. Qube understands that mooring services are packaged into the Flinders Ports services charges, which prevents it from competing for mooring services.[94] Qube submits that in the absence of effective constraint, Flinders Ports has both the ability and incentive to engage in conduct that favours its related downstream services to the detriment of other downstream service providers. The ability and incentives for a vertically integrated operator to act in such a way, and the anticompetitive impact of such actions, are well recognised by competition regulators. In order for the Access Regime to be an effective access regime for the purposes of section 44M of the CCA, it must include sufficient

[94] Qube, Submission to the Council dated 26 February 2021, Appendix A, pp 26 – 28.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	measures to address the ability and commercial incentives of the vertically integrated operator, Flinders Ports, to engage in anti-competitive conduct in downstream markets.[95] *Other submissions -* Flinders Ports submits: - ESCOSA has conducted regular reviews into the effectiveness and continuation of the Access Regime by way of regular reviews into the effectiveness and continuation of annual price monitoring and five-yearly reviews of the Access Regime (in 2012 and 2017). Such reviews have been comprehensive, have properly understood the local circumstances in which stakeholders operate and have resulted in findings that the Access Regime should continue to apply. [96] - Maintaining the current regulatory framework will provide certainty and preserve its confidence in continuing to invest in key projects in South Australia. Continued investment by infrastructure owners, such as Flinders Ports, will likely have a flow-on impact as a catalyst for further investment across the supply chain in key South Australian industries such as mining and agriculture.[97] - ESCOSA has not since the inception of the Access Regime found any evidence of Flinders Ports exercising market power.[98] SAFC submits that in every 5 year review of the Access Regime conducted by ESCOSA, it and ESCOSA have recommended that the Access Regime be retained due to the lack of evidence of any anti-competitive conduct, but noted the potential for it to occur. Where there has never been an acknowledged use or abuse

95 Qube, Submission to the Council dated 26 February 2021, p 16.

96 Flinders Ports, Submission to the Council dated 15 February 2021, p 2.

97 Flinders Ports, Submission to the Council dated 15 February 2021, p 2.

98 Flinders Ports, Submission to the Council dated 15 February 2021, p 2.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	of market power, competition controls should be as light-handed as possible – discouraging the dominant player from changing their approach without imposing stringent controls or significant regulatory cost. SAFC considers the Access Regime achieves this balance and should be re-certified.[99] Qube submits that the mere inclusion within the Access Regime of provisions that mirror the wording of each of the cl 6(4) principles is not a sufficient basis for the Council to conclude that the principles have been met for the purposes of regarding the access regime as effective under section 44M. Rather, for an access regime to be found to be effective, the Clause 6 Principles need to be reflected in a regime with a structure and concrete processes that enable it to be effective.[100] Qube submits that for the Council to recommend that a regime is effective, it needs to be satisfied that the manner in which the Access Regime is framed and has been applied ensures the Clause 6 Principles achieves the objective of: "promot[ing] the efficient use and operation of, and investment in, significant infrastructure to promote competition in activities in upstream and downstream markets that rely on the use of the infrastructure."[101] **Responses to 10 May 2021 information requests** As noted at paragraph 2.4, on 10 May 2021, the Council issued information requests under s 44NAA of the CCA to Flinders and Qube regarding vertical integration concerns raised by Qube, and also invited submissions from all interested parties on issues arising from these concerns. The purpose of the information requests was to (a) obtain further information and clarification from Flinders and Qube regarding the factual allegations made by Qube, and (b) allow submissions from all interested parties regarding Qube's submissions that the

99 SAFC, Submission to the Council dated 11 February 2021, p 1.

100 Qube, Submission to the Council dated 26 February 2021, pp 12, 13.

101 NCC, Certification Guidelines, paragraph 3.4, available at: https://ncc.gov.au/images/uploads/Certification_Guide_2017.pdf. Qube's submission to the Council dated 26 February 2021 p 16.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Access Regime does not deal with the vertical integration of Flinders Ports, and how this ought to affect the Council's assessment. The information requests are available on the NCC website.[102] Responses to the 10 May 2021 information requests were provided by Flinders Ports, Qube and Viterra. Submissions relevant to vertical integration issues and the first limb of the objects of Part IIIA are summarised below. *SAFC -* In response to the 10 May 2021 information requests issued by the Council, SAFC submits: - Qube has never participated in any review of the Access Regime conducted by ESCOSA, never raised an access dispute under the Access Regime and SAFC is not aware of Qube having brought the issues it has raised with the Council to the attention of other statutory bodies. SAFC considers that Qube's concerns should be explored, but the appropriate forum to do so is though the Access Regime in the first instance so that any substantive failings of the Access Regime could then be considered and addressed by ESCOSA in its 2022 review of the regime.[103] - The Access Regime clearly addresses the risk of vertically integrated facility operators providing preferential treatment to related businesses through s 32(2) of the MSA Act.[104] - Qube's submission makes no allegation of Flinders Ports using confidential information obtained from access seekers to gain a competitive advantage and has not suggested misuse of information in the context of seeking access. As such, the possible misuse of commercially sensitive information

102 The 10 May 2021 information requests are available at: https://ncc.gov.au/images/uploads/Request_for_Information_-_SA_Ports_Access_Regime_-_10_May_2021.pdf.

103 SAFC, Response to Information Request dated 20 May 2021, p 1.

104 SAFC, Response to Information Request dated 20 May 2021, p 2.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	by Flinders Ports is not an Access Regime issue and should have no bearing on the re-certification process. [105] - An arbitrator appointed to settle an access dispute would have the power to address the risk of vertically integrated facility operators providing preferential treatment to related businesses by virtue of s 32(2) of the MSA Act. An arbitrator also has the power to prevent providers of regulated services from using confidential information obtained from access seekers to give a competitive advantage to related entities in upstream or downstream markets under s 29 of the MSA Act. A condition imposed by the arbitrator could contain requirements to restrict information sharing within the provider or across related entities of a provider. [106] - There is a legitimate question as to whether ESCOSA is required to address the risk of misuse of confidential information or has specific powers enabling it to do so under the Access Regime. However these powers could be conferred on ESCOSA through legislative means. [107] - SAFC considers that ESCOSA is an experienced regulator in good standing and would likely consider the risk of vertically integrated operators providing preferential treatment to related businesses and take measures to reduce or eliminate this risk if an access dispute is brought to its attention. [108] *Qube* In response to the 10 May 2021 information requests issued by the Council, Qube submits: - The risk of a vertically integrated facility operator providing preferential treatment to related businesses, or using confidential information obtained from access seekers to obtain competitive advantages, is highly relevant to the Council's assessment of whether the regime is effective. An

105 SAFC, Response to Information Request dated 20 May 2021, p 2.

106 SAFC, Response to Information Request dated 20 May 2021, p 3.

107 SAFC, Response to Information Request dated 20 May 2021, p 3.

108 SAFC, Response to Information Request dated 20 May 2021, p 4.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	access regime which operates in the context of a tightly vertically integrated market, such as the markets for port services in South Australia, must properly address these issues in order to be found effective. - The principles applicable to certification under s 44M of the CCA must be construed and applied in a manner that is sensible and consistent with the objects of Part IIIA and the operation of the wider regime, including the scope and operation of the declaration criteria. It would be inconsistent with the structure and logic of Part IIIA to interpret s 44M as permitting an access regime to be certified without addressing the competition concerns raised by vertical integration. [109] - The Council has acknowledged in the Certification Guidelines that the structure and logic of Part IIIA and the mandatory factors in s 44M(4) require vertical integration to be addressed in appropriate cases in order for a regime to be found effective.[110] - The link between the effectiveness of an access regime and promotion of competition in related markets is explicit in cl 6(3), which focuses on significant infrastructure facilities where access to the service is necessary in order to permit effective competition in a downstream or upstream market. Certification of an access regime that does not squarely address these risks will harm competition, by undermining the conditions for competition in related markets, and would therefore fail to facilitate the object in both cl 6(3) and s 44AA(a).[111] - The Access Regime does not impose discipline on the day-to-day behaviour of Flinders Ports, as a vertically integrated operator. Third party access to maritime services is governed by Parts 3 and s 44 of the MSA Act, which - set up a short-form negotiation and dispute resolution process to govern disputes about new terms of access sought at South Australian ports, and which refers such disputes to be determined by an independent arbitrator

109 Qube, Response to Information Request dated 24 May 2021, pp 12-16.

110 NCC, Certification Guidelines, pages 43 – 44.

111 Qube, Response to Information Request dated 24 May 2021, pp 13-16.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- outline the principles to be considered by the arbitrator by replicating the Clause 6 Principles, and - impose a requirement to maintain separate regulatory accounts (s 42) and a general prohibition on hindering access (s 44) – both taken again directly from the Clause 6 Principles without any detail or application in the context of the South Australian market or its structure. The Access Regime does not seek to address the incentives or ability to discriminate created by the vertical integration of Flinders Ports. The regime does not address the operating structure of Flinders Ports or establish any day-to-day operational or commercial standards of behaviour. For example, there is no requirement in the MSA Act for a facility operator to provide access to services on an open and non-discriminatory basis or to ring fence regulated operations from contestable staff and activities.[112] - In contrast with the Access Regime, other Australian access regimes (such as the Queensland rail access regime, Dalrymple Bay Coal Terminal (DBCT) access regime) and regulatory arrangements (such as the AER Ring Fencing guidelines and undertakings under the CCA) have been more prescriptive in implementing measures to either prevent vertical integration or address the incentives it creates for discrimination.[113] The Council previously considered that the Queensland access regime in combination with the role and powers of the QCA 'provide an appropriate level of comfort that a vertically integrated service provider will be prevented from treating its related businesses more favourably than those of its competitors'.[114] - Each of the access frameworks referred to in the previous point address competition concerns raised by vertical integration in different contexts (e.g. port terminals, rail, electricity networks and telecommunication) but share the following common attributes:

112 Qube, Response to Information Request dated 24 May 2021, pp 2, 3.

113 Qube, Response to Information Request dated 24 May 2021, pp 3 – 8.

114 NCC, Final Recommendation: Application for certification of the Queensland Rail Access Regime (22 November 2010) at [5.57]: https://ncc.gov.au/images/uploads/CERaQldFR-001.pdf.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- a clear requirement for open and non-discriminatory provision of services, which is overseen appropriately and is enforceable directly by users (and which needs to be defined in detailed and concrete terms in relation to the various services and markets involved – e.g. in the case of ports, with specific rules around berth prioritisation, cargo hold times and costs etc) - clear, transparent and appropriately enforceable ring fencing of monopoly business activities from contestable activities - appropriate mechanisms to protect the security and confidentiality of competitively sensitive information and with appropriate auditing of those systems - appropriate structural or functional separation of staff, addressing both the risk of shared roles, as well as remuneration structures which provide incentives for staff to discriminate - a public and independent audit and reporting process to ensure appropriate discipline around compliance - a transparent pricing process that ensures cost-orientated and efficient pricing for monopoly services – with a clear dispute process for users to contest port pricing which appears not to be cost-orientated or which otherwise appears to provide for cross-subsidisation, and - an accessible and robust process for non-price disputes.[115] - The requirement to maintain separate accounts in the MSA Act (and associated ESCOSA guideline) does not address the risk of substantive discrimination or preferential treatment. Section 42 of the MSA Act requires operators to prepare and keep separate accounts, but the use that can be made of those accounts is limited (an operator is only required to produce the accounts if ESCOSA requests them). Outside of a formal information request or arbitration, access seekers are unable to view an operator's account. As such, the separate accounting requirements in the MSA Act might make it easier for ESCOSA to detect cross-subsidisation, but will not allow for detection of price discrimination or preferential treatment (which is a separate issue).[116]

115 Qube, Response to Information Request dated 24 May 2021, pp 7, 8.

116 Qube, Response to Information Request dated 24 May 2021, p 9.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- In the absence of terms in the Access Regime addressing vertical integration issues in a manner that Qube considers adequate, it has sought to have terms addressing the matters outlined in point - (i.e. non-discrimination, ring fencing and confidentiality requirements) included in a new stevedore license. Flinders Ports has expressly rejected Qube's request to include these terms and Qube raised this as an access dispute with ESCOSA on 17 May 2021.[117] - Qube has also raised concerns in relation to the inadequacy of the Access Regime, and sought redress in relation to specific conduct by Flinders Ports, on a number of occasions over the last decade. This has involved concerns being raised with ESCOSA (on a confidential basis, as part of its 2012 and 2017 reviews of the Access Regime) and the ACCC (lodging a formal complaint on a confidential basis).[118] - Clause 6(4)(m) requires an effective access regime to prevent Flinders Ports from hindering access. In order to achieve this, the Access Regime must do more than re-state the CPA principle. An effective access regime for the purpose of the Clause 6 Principles must be demonstrated to have applied those principles in a manner that is successful and appropriate in the market context and circumstances.[119] - The first object of Part IIIA is to ensure that infrastructure of economic significance is operated, and used, efficiently in order to promote competition in related markets. An access regime that does not squarely address the risk of preferential or discriminatory treatment and does not protect access seekers' confidential information cannot be said to adequately address the structural problems posed by vertical integration – and therefore fails to promote or permit effective competition in upstream and downstream markets. To be effective, an access regime must apply the Clause 6 Principles and not just copy them.[120]

117 Qube, Response to Information Request dated 24 May 2021, pp 20, 21.

118 Qube, Response to Information Request dated 24 May 2021, pp 19, 20.

119 Qube, Response to Information Request dated 24 May 2021, p 16.

120 Qube, Response to Information Request dated 24 May 2021, p 13 – 16.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Flinders Ports In response to the 10 May 2021 information requests issued by the Council, Flinders Ports submits: - The matters that Qube raised in the annexure to its submission (describing instances where Flinders Ports may have been influenced by its vertical interests) and that were the subject of the s 44NAA notice issued to Qube by the Council are not relevant to the Council's assessment of the Access Regime and must not be taken into account.[121] - The Council is not required to measure whether the Access Regime has adequately promoted effective competition in upstream or downstream markets. Rather, to apply the test correctly, the Council must have regard to the objects of Part IIIA (and the relevant Clause 6 Principles) in assessing whether to certify a state or territory access regime. Applying the correct test, the Access Regime clearly and expressly accords with the objects of Part IIIA of the CCA.[122] - Section 3 of the MSA Act clearly and expressly incorporates the objects of Part IIIA and there is clear evidence that the Access Regime has promoted the economically efficient operation of, use of and investment in the infrastructure by which regulated services are provided and has thereby promoted effective competition in upstream or downstream markets.[123] - The allegations made by Qube in the annexures to its submission are not supported by evidence and are not true in all respects.[124] - No complaints have been made by any other third party about the failure by Flinders Ports to provide access to the regulated services or charging excessive prices for the regulated services.[125]

121 Flinders Ports, Response to Information Request dated 26 May 2021, p 10 – 13

122 Flinders Ports, Response to Information Request dated 26 May 2021, p 13 - 21

123 Flinders Ports, Response to Information Request dated 26 May 2021, p 17 - 19

124 Flinders Ports, Response to Information Request dated 26 May 2021, p 34 – 39.

125 Flinders Ports, Response to Information Request dated 26 May 2021, p 36.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- ESCOSA's reviews of the Access Regime have found no evidence of any of the allegations made by Qube, any breach of the Access Regime or any misuse of power.[126] - There have been no other regulatory or legal matters relating to the allegations made by Qube.[127] - Qube is the only interested party that has provided a submission opposing re-certification of the Access Regime.[128] - There is strong evidence and data of investments in infrastructure by Flinders Ports and consequent increase in innovation and downstream competition.[129] *Viterra -* In response to the 10 May 2021 information requests issued by the Council, Viterra submits: - The Access Regime is effective and balances the interests of infrastructure owners and users through a principles-based framework for the negotiation of access to regulated services. If an access dispute arises, and cannot otherwise by resolved through negotiations, the Access Regime provides for mediation and binding arbitration.[130] - The most efficient market outcomes are achieved by allowing parties to reach commercial outcomes and regulation should not intrude on the opportunity for such negotiations. The MSA Act strikes an appropriate balance between the rights of infrastructure owners and users.[131]

126 Flinders Ports, Response to Information Request dated 26 May 2021, p 30 – 33.

127 Covering letter to Flinders Ports' response to Information Request dated 26 May 2021.

128 Covering letter to Flinders Ports' response to Information Request dated 26 May 2021.

129 Flinders Ports, Response to Information Request dated 26 May 2021, pp 16 – 19.

130 Viterra, Response to Information Request dated 2 June 2021, p 1.

131 Viterra, Response to Information Request dated 2 June 2021, p 2

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?

	- Viterra is not aware of any evidence to suggest that the Access Regime is not working as intended, or that parties are not able to achieve commercially negotiated outcomes, or obtain resolution of any disputes that they choose to raise under the Access Regime.[132]
	
	Submissions responding to draft recommendation
	
	Flinders Ports
	
	In response to the draft recommendation issued on 2 July 2021, Flinders Ports submits:
	
	- Vertical integration concerns are relevant to the Council's assessment, but only insofar as:
	  - the infrastructure owner provides the services that are the subject of the access regime to its upstream or downstream entity as well as a third party access seeker, and
	  - as a result of acquiring those services the infrastructure owner's upstream or downstream entity and the third party access seeker compete in an upstream or downstream market.[133]
	- Flinders submits that Flinders Ports does not provide Qube or its own upstream or downstream entity with any 'regulated service' under the MSA Act or the Access Regime, and Qube does not compete with an upstream or downstream entity related to Flinders Ports as a result of acquiring any 'regulated service' under the MSA Act or Access Regime.[134]
	- The Council's approach to applying the objects of Part IIIA is flawed and inconsistent with past decisions. Flinders Ports takes issue with the Council's suggestion that it can only reject re-certification "where it is satisfied that certification would **hinder** the objects of Part IIIA". Flinders

132 Viterra, Response to Information Request dated 2 June 2021, p 2.

133 Flinders Ports, Submission on the Draft Recommendation, 16 July 2021, p 4.

134 Flinders Ports, Submission on the Draft Recommendation, 16 July 2021, p 4.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?

	submits that the word 'hinder' sets the bar too low and should be replaced with 'be contrary to'.[135]
	- The draft recommendation appears to make a merits assessment of the SA Ports Access Regime. However, the Council has previously said that its certification assessment does not involve an assessment of the merits of an access regime in the 2017 Certification decision for the South Australian Water Access Regime.[136]
	- Entities in the Flinders Group do not obtain a competitive advantage in relevant markets because none of the entities related to Flinders Ports own or operate vessels and therefore do not access shipping channels or berths, or acquire pilotage services.[137]
	- Evidence demonstrates ongoing investments and vigorous promotion of competition in markets in which related entities operate.[138]
	- Flinders Ports has no ability or incentive to discriminate against downstream rivals because:
	  - It has established and continues to comply with port rules and berthing practices which ensure non-discriminatory and fair and equal access to all access seekers, and it has no intention of changing these practices.
	  - The Proclaimed Ports are not generally capacity constrained.

135 Flinders Ports, Submission on the Draft Recommendation, 16 July 2021, pp 8, 9.

136 Flinders Ports, Submission on the Draft Recommendation, 16 July 2021, p 9.

137 Flinders Ports, Submission on the Draft Recommendation, 16 July 2021, p 11.

138 Flinders Ports, Submission on the Draft Recommendation, 16 July 2021, pp 11, 12.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?

	- Flinders Ports cannot favour shippers whose cargo is to be stevedored by any particular entity because this would result in significant demurrage costs[139] and be contrary to the berthing protocols in the Port Rules.[140]
	
	- The Council's concerns about discriminatory terms of access and misuse of confidential information are purely theoretical and are not supported by evidence.[141]
	- In response to Qube's submissions before the draft recommendation was issued, Flinders Ports submits:
	  - Comparing the Access Regime to other regulatory regimes is irrelevant to the test for certification.
	  - Qube makes a number of factual errors and irrelevant statements.
	  - There is real doubt as to whether Qube's 'access dispute' is valid because the services provided under the stevedoring license do not constitute regulated services under the MSA Act.[142]
	
	SAFC
	
	In response to the draft recommendation issued on 2 July 2021, SAFC provided a submission stating that it:
	
	- Supports the draft recommendation's finding that the Access Regime meets the requirements for re-certification.

139 Demurrage costs are a fee paid to shipowners where there are delays in loading or unloading vessels.

140 Flinders Ports, Submission on the Draft Recommendation, 16 July 2021, p 12.

141 Flinders Ports, Submission on the Draft Recommendation, 16 July 2021, p 11.

142 Flinders Ports, Submission on the Draft Recommendation, 16 July 2021, pp 14 - 21.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?

	- Notes the Council has made suggestions for ESCOSA's next review, including in relation to the possible inclusion of ring fencing and confidentiality provisions in the Access Regime. SAFC supports these recommendations.[143]
	
	Qube
	
	In response to the draft recommendation issued on 2 July 2021, Qube submits:
	
	- The Access Regime has resulted in real and substantiated harm to competition and Qube has provided ESCOSA, the ACCC and the Council with examples of discriminatory conduct by Flinders Ports.[144]
	
	- The Council has before it clear evidence that Flinders Ports has the economic incentive and ability to act in a manner that distorts and undermines competition, and substantial evidence of it having done so over a number of years. In particular:
	
	  - Flinders is vertically integrated in dependant markets. The Access Regime lacks adequate ring fencing provisions. And, customer poaching, operational discrimination and breaches of confidentiality are commonplace and have been documented.
	
	  - Market experience demonstrates that Flinders Ports has taken advantage of its monopoly and vertically integrated position, which is reflected by the rapid growth of Flinders in contestable South Australian port markets.
	
	  - Qube has exited entirely from stevedoring operations at Port Pirie because of the conduct of Flinders Ports. Flinders Ports has since employed Qube's previous staff to undertake its own stevedoring operations at the port.

143 SAFC, Submission on the Draft Recommendation, 5 July 2021, p 1.

144 Qube, Submission on the Draft Recommendation, 16 July 2021, p 2.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- Qube has altered its investment approach in South Australia, compared with other Australian ports, in response to the real commercial risks presented by Flinders Ports and the lack of effective regulatory oversight or access to a meaningful and timely arbitration mechanism.[145] - There is no evidence before the Council of the Access Regime being effectively used or promoting market entry or competition. No access disputes have been resolved and Flinders Ports is challenging ESCOSA's jurisdiction to hear the access dispute raised by Qube.[146] - Qube accepts that if Flinders Ports is correct, and the Access Regime does not apply to access provided to stevedores to berths and landside infrastructure, it follows that such access services would not be affected by certification and would remain potentially subject to Part IIIA.[147] - The draft recommendation relies on a dangerous and impermissible approach to applying section 44M of the CCA: - The draft recommendation applied a novel and misconceived "two stage" test (i.e. apply the Clause 6 Principles and then apply the objects of Part IIIA) that is inconsistent with section 44M. Qube is concerned that this approach sets an inappropriately high bar for refusing certification. - The draft recommendation reduces the Council's assessment of the Clause 6 Principles to a "tick the box" exercise – merely checking whether each of the Clause 6 Principles have been replicated somewhere in the Access Regime. This is not a genuine test by the Council of effectiveness.

145 Qube, Submission on the Draft Recommendation, 16 July 2021, p 2.

146 Qube, Submission on the Draft Recommendation, 16 July 2021, p 3.

147 Qube, Submission on the Draft Recommendation, 16 July 2021, p 3.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- Even if the Clause 6 Principles are all "satisfied" this does not create a presumption in favour of certification which can only be displaced in "exceptional circumstances". There is nothing in the text of section 44M to marginalise the role of the objects clause in this way. The requirement to "have regard to" the objects of Part IIIA means that the Council must take the objects into account and give weight to them as a fundamental element in making its recommendation.[148] - The objects of Part IIIA focus on promoting effective competition, which means "creating the conditions or environment for improving competition from what it would be otherwise". In a certification context, a key question is whether an access regime is effective in creating or maintaining the conditions for improvements in competition.[149] - The draft recommendation is focused on the Access Regime as it may be in the future, if ESCOSA and the South Australian government choose to amend the MSA Act, and not the Access Regime as it stands today.[150] - Qube argues that the Council should not require evidence of actual damage to competition to find that an access regime is not effective. Other provisions in the CCA, such as s 46, operate in response to past anti-competitive conduct. Part IIIA, and therefore certification, operate on a forward-looking basis.[151]

148 Qube, Submission on the Draft Recommendation, 16 July 2021, pp 3 - 6.

149 Qube, Submission on the Draft Recommendation, 16 July 2021, p 10.

150 Qube, Submission on the Draft Recommendation, 16 July 2021, pp 10, 11.

151 Qube, Submission on the Draft Recommendation, 16 July 2021, p 10.

LINX

In response to the draft recommendation issued on 2 July 2021, LINX submits the activities of the Flinders Group have extended into related markets providing services in competition with other users of the relevant ports since the Access Regime was introduced. From the perspective of LINX:

- Flinders Logistics provides downstream logistics and stevedoring services, focussing on mineral resources, bulk cargo import/export, oil and gas in competition with LINX and other providers, and

- Flinders Warehousing & Distribution provides warehousing and distribution services in competition with LINX and other providers.[152]

- Since Flinders Logistics and Warehousing have commenced operations, LINX has lost contracts to Flinders Logistics in circumstances where, to the best of LINX's information, Flinders Logistics either:

    - has been able to provide a solution not available to be offered by LINX because of arrangements as between Flinders Logistics and Flinders Ports including preferential berthing arrangements, preferred equipment; or

    - has been able to offer a price to the end customer that is not viable for LINX, not because of any inefficiency on the part of LINX but because of the structure or charging mechanisms adopted by Flinders Ports including the installation of equipment particularly suited to the operations of Flinders related operations and imposing non-cost reflective charges on parties who use different equipment.[153]

- There is currently no transparency provided through the Access Regime on how Flinders Ports charges or provides access to equipment or services to its other related entities. As such, LINX does not have concrete information that it can use to establish its concerns in the previous point by way of formal evidence. However, evidence that misuse of market power has already occurred should not be required to establish the need for appropriate non-discrimination provisions in an access regime. Competitors in related markets do not have access to this information and that is the reason why detailed ring fencing and accounting separation arrangements should be put in place. The relevant information sits in the hands of Flinders Logistics and Flinders Ports and it is naive to

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	think that a competing service provider in the position of LINX would be able to access or provide such information.[154] - The draft recommendation misconstrues the role of the Access Regime by treating it as remedial in nature. Access regimes are pro-active legislative mechanisms designed to ensure that there are mechanisms in place to create the conditions for effective competition in dependant markets. The Council has mistakenly focused on whether there is evidence of an exercise of market power and then determines the Access Regime is adequate as-is. Instead, the Council should ensure that the minimum conditions necessary for effective competition in this type of vertically integrated structure are contained in the Access Regime.[155] - The Access Regime is not effective because: - It fails to promote the objects of Part IIIA in that it fails to provide a structure which limits or restricts the ability of Flinders Ports to use its ownership and operation of the monopoly infrastructure and services to its advantage in downstream competitive markets. Meeting the objectives of the Competition Principles Agreement is not assessed by determining whether the same objectives appear in the relevant legislation, but by testing whether the operative provisions of the Access Regime achieve that objective. - Contrary to clause 6(5)(a) of the Competition Principles Agreement, it fails to enable outcomes that achieve the objective of efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets, so promoting competition.

152 LINX, Submission on the Draft Recommendation, 16 July 2021, p 1.

153 LINX, Submission on the Draft Recommendation, 16 July 2021, p 2.

154 LINX, Submission on the Draft Recommendation, 16 July 2021, p 2.

155 LINX, Submission on the Draft Recommendation, 16 July 2021, p 2.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- It fails to meet the requirements of clauses 6(4)(a) and (b) of the Competition Principles Agreement. In order for the principles set out in clauses 6(4)(a) and (b) to be satisfied it is not sufficient simply that there be a negotiate arbitrate model, a dispute resolution process, and an enforcement mechanism. Rather, it must be the case that the Access Regime enables those negotiation and dispute resolution mechanisms to be effective having regard to the market conditions and circumstances applicable. In the present circumstance, that must take into account the vertically integration nature of Flinders operations. - It fails to meet the requirements of clause 6(4)(e) because there are not mechanisms which support non-discriminatory access in a market context where the conditions for the exercise of market power exist. Some pro-active mechanisms are required to ensure that Flinders Port must "use all reasonable endeavours to accommodate the requirements of persons seeking access".[156] - LINX submits that the substantial shortcomings of the Access Regime could be rectified by introducing effective non-discrimination provisions supported by a meaningful audit and reporting mechanism. This could operate as follows: - Amend s 11 of the MSA Act by inserting a new sub-s (1A) in the following terms, "A regulated operator must provide regulated services on non-discriminatory terms. Such non-discriminatory terms must be non-discriminatory as between third party customers and as between the regulated operator and any related bodies corporate of the regulated operator." - Add a new subsection 13(8) to section 13 of the MSA Act in the following terms, "The regulated operator must not disclose any information received from the proponent to any person who has any responsibilities for activities which compete with those of the proponent." And

156 LINX, Submission on the Draft Recommendation, 16 July 2021, pp 3, 4.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- Support these amendments by introducing appropriate audit and reporting obligations of the type that exist in other access regimes such as the Queensland Rail Access Regime.[157] *South Australian Government* The South Australian Government provided a submission in response to the draft recommendation in which it acknowledges the suggestions in the draft recommendation that the Access Regime could be improved by introducing stronger ring-fencing and confidentiality provisions for vertically integrated operators beyond the existing protections. The submission supports the Council's suggestion that these matters be considered as part of ESCOSA's upcoming review.[158] **Responses to the August 2021 information requests** As noted at paragraphs 2.8 and 2.9, on 5 and 24 August 2021 the Council issued information requests under s 44NAA of the CCA to LINX and Flinders Ports, respectively. The purpose of the information requests was to obtain further information and clarification from LINX and Flinders Ports regarding allegations and concerns raised by LINX. The information requests are available on the Council website.[159] Responses to the information requests were provided by LINX and Flinders Ports. Submissions relevant to vertical integration issues and the first limb of the objects of Part IIIA are summarised below.

157 LINX, Submission on the Draft Recommendation, 16 July 2021, pp 4, 5.

158 Premier of South Australia's submission on the Draft Recommendation, 20 July 2021.

159 The 5 August 2021 information request is available at: https://ncc.gov.au/images/uploads/Request_for_Information_-_SA_Ports_Access_Regime_-_5_August_2021%2812593383.1%29_.pdf; and the 24 August 2021 information request is available at: https://ncc.gov.au/images/uploads/SA_Ports_Access_Regime_-_Request_for_Information_-_24_August_2021.pdf .

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	LINX - In response to the 5 August 2021 information request issued by the Council, LINX provided information to the effect that Flinders Ports discriminates in favour of Flinders Logistics by: - charging fees to its competitors which Flinders Logistics may not have to pay - providing preferential berthing arrangements which may require ships that have already arrived to vacate ports in order to enable immediate access to ports for ships to be worked by Flinders Logistics, and - bundling the cost of services to be performed by Flinders Logistics with the cost of services to be performed by Flinders Ports. [160] *Flinders Ports -* In response to the 24 August 2021 information request issued by the Council, Flinders Ports provided information to the effect that: - LINX does not acquire a regulated service under the Access Regime and, accordingly, the concerns raised by LINX are not relevant to the council's assessment and should not be taken into account.[161] - While LINX may not have visibility over whether there is preferential treatment by Flinders Ports to its vertically integrated related entities, ESCOSA has visibility over the Access Regime and Flinders

160 LINX, Response to the 19 August 2021 Information Request, pp 2 - 4.

161 Flinders Ports, Response to the Information Request dated 24 August 2021, p 1.

	Ports' compliance with it. ESCOSA has continually found over the last ten years that there is no evidence of preferential treatment favouring Flinders Ports' related entities.[162] - LINX appears to be complaining about vigorous competition.[163] - The licensing fee charged to LINX, which LINX asserts may not be charged to Flinders Logistics, stems from historical arrangements between the parties. And, since 2019 Flinders Ports has charged a Mobile Loader Fee of $1.60 per tonne (now $1.68 per tonne) for all stevedores, including Flinders Logistics.[164] - Flinders Ports denies that it has ever adopted any structures or charging mechanisms which provide for the installation of equipment particularly suited to the operations of its related entities.[165] - LINX has not provided the details necessary to identify the situation in which it asserts that priority was given to a vessel to be worked by Flinders Logistics over a vessel that was being worked by LINX. As such, Flinders cannot comment on the example alluded to by LINX. However, Flinders Ports has, at all times, acted in accordance with the berthing rules – that is, it has never provided preferential berthing access to any particular stevedore including Flinders Logistics.[166] - The berthing allocation rules do not require a ship at berth to vacate to allow immediate access for an incoming vessel to be worked by Flinders Logistics (or any other stevedore). There are some priority based rules relating to the use of specific fixed facilities located at that berth such as the shiploader, cranes and storage facilities but priority is not based upon the identity of the stevedore.[167] - From time to time Flinders Logistics or Flinders Warehousing and Distribution may bundle the services they provide with regulated services that customers require from Flinders Logistics. The prices charged by Flinders Ports to customers for its regulated services are the same regardless of the identity of the stevedore.[168] - LINX and other stevedores can and do bundle their own services with the regulated services that their customers require and acquire from Flinders Ports. It is a matter for each stevedore as to whether to provide that bundle of services to their customer at a discount to normal rates.[169]

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Council's assessment In forming a view whether to recommend re-certification of the Access Regime, the Council must determine whether the Access Regime conforms to the Clause 6 Principles (which are to be treated as guidelines) and must have regard to the objects of Part IIIA of the CCA. The manner in which the Council undertakes this task has been set out in paragraphs 3.18 to 3.37 of this report. In particular, the role of the objects of Part IIIA in the Council's decision is discussed in detail at paragraphs 3.24 to 3.37. Qube's submissions articulate a view that both the MSA Act, and ESCOSA as its regulator, have proven inadequate to regulate or respond to the increased vertical integration that has developed in the Flinders Group. In particular, Qube focuses on the lack of ring fencing provisions in the MSA Act as a weakness of the Access Regime and argues that the Access Regime must apply the Clause 6 Principles and not just copy them. At the heart of Qube's submissions are concerns that the extent of vertical integration in the Flinders Group, coupled with less prescriptive requirements in the Access Regime addressing that vertical integration (as compared to other access regimes and undertakings), render the regime ineffective.

162 Flinders Ports, Response to the Information Request dated 24 August 2021, pp 1, 2.

163 Flinders Ports, Response to the Information Request dated 24 August 2021, p 2.

164 Flinders Ports, Response to the Information Request dated 24 August 2021, p 4.

165 Flinders Ports, Response to the Information Request dated 24 August 2021, p 4.

166 Flinders Ports, Response to the Information Request dated 24 August 2021, p 5.

167 Flinders Ports, Response to the Information Request dated 24 August 2021, p 5.

168 Flinders Ports, Response to the Information Request dated 24 August 2021, p 7.

169 Flinders Ports, Response to the Information Request dated 24 August 2021, p 7.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Similarly, LINX submits that the Access Regime fails to provide a structure which limits or restricts the ability of Flinders Ports to use its ownership and operation of the monopoly infrastructure to its advantage in dependent markets. Both Qube and LINX submit that they have been the subject of discriminatory practices on the part of Flinders Ports which has adversely impacted them in markets where they compete with businesses related to Flinders Ports (e.g. Flinders Warehousing and Distribution, and Flinders Logistics). The Council does not accept Flinders Ports' submissions that it must not consider the matters that have been raised by Qube and LINX concerning its vertical integration in deciding what recommendation to make pursuant to s 44M(4) of the CCA. These matters include, (a) whether the Access Regime addresses the risk of vertically integrated service providers giving preferential treatment to related parties, or using confidential information to obtain competitive advantage, and (b) the extent to which ESCOSA, or the arbitrator of an access dispute, can prevent or respond to these risks.[170] Section 44M(4)(aa) provides that: "In deciding what recommendation to make, the Council must have regard to the objects of this Part". Therefore, the Council must have regard to the fact that the objects of Part IIIA include to promote economically efficient operation and use of, and investment in infrastructure, thereby promoting effective competition in upstream and downstream markets.[171] A wide range of matters are relevant to the considerations encompassed by these objects. The Council considers that questions regarding whether service providers are using their control of regulated infrastructure to obtain unfair competitive advantages in related markets, whether competition in related markets is thereby inhibited, and whether existing regulatory arrangements are able to address these matters, are relevant to the objects of Part IIIA.

170 See https://ncc.gov.au/images/uploads/Request_for_Information_-_SA_Ports_Access_Regime_-_10_May_2021.pdf for the text of question 1 of the 10 May 2021 information requests.

171 The objects of Part IIIA are set out in s 44AA, which is extracted on page 11 above. The objects of Part IIIA also include providing a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Paragraph 3.28 of this report summarises a number of matters that the Council considers in in having regard to the objects of Part IIIA of the CCA. In this application some stakeholders submit that the Council ought to recommend that, having regard to the objects of Part IIIA, certification not be extended. A decision that the Access Regime is effective under Part IIIA has the effect of shielding the infrastructure and services the subject of that regime from regulatory intervention under Part IIIA. To this end, the Council will have regard to how the regulated infrastructure and services would otherwise be treated, and the impact of potential declaration, if the services were to be regulated under Part IIIA of the CCA. The Council notes that Qube raised a potential access dispute concerning negotiations around the terms of a proposed stevedoring license with ESOCSA and Flinders Ports challenged whether the services that are the subject of the dispute fall within the Access Regime. On 9 September 2021, ESCOSA reached the view that Qube was not seeking regulated services for the purposes of the MSA Act and, as such, there was not a dispute that could be referred to ESCOSA for conciliation or referral to arbitration under the MSA Act. The Council has discussed the relevance of disputes as to whether particular services fall under a regulated access regime and the roles of ESCOSA and itself at paragraphs 4.21 and 4.22. The Council has no further comment on the decision reached by ESCOSA. Qube and LINX have also suggested that the Council's draft recommendation appears to examine the effectiveness of the Access Regime on the assumption that it will be reformed moving forward. The Council notes that this is not the case and the Council's assessment of the Access Regime is an examination of the regime as it stands today. Any areas of potential improvement identified by the Council in the draft recommendation and this final recommendation are intended as illustrations of areas where improvements may be possible. To be clear, they are not intended as pre-requisites to certification or that the Access Regime would otherwise be ineffective unless such reforms are implemented.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Vertical Integration issues Qube and LINX have provided submissions to the effect that the commercial incentives of Flinders Ports, as a port operator with related entities operating in upstream or downstream markets, is likely to (or may already) operate in a manner contrary to the objects of Part IIIA; and that this is not prevented or adequately addressed by the Access Regime. The Council considers it appropriate to examine these concerns and come to a conclusion on the degree to which certification of the Access Regime would promote, or fail to promote, the objects of Part IIIA in the context of these concerns. *(a) Preliminary comments -* The Council's analysis of vertical integration issues proceeds based on the assessment that Flinders Ports currently operates in a downstream or dependent market of the regulated services, or that Flinders Ports is likely to operate in such a market during the term of the certification. (If the Council's assessment is wrong in this respect, it would not affect the outcome of this recommendation, given the Council ultimately concludes that concerns regarding related dependent markets do not support the refusal of certification.) As such, Flinders Ports is likely to face instances where it must determine terms of access to regulated services for vessel and cargo owners that may then choose to do business with entities in the Flinders Group or its competitors and this could influence the terms on which Flinders Ports might grant access, pass on or act on information that is confidential or otherwise discriminate in the way that it provides the regulated services. On this basis, we consider that Flinders Ports' vertical interests are relevant to the Council's assessment. The Council considers that there are at least two significant ways in which the vertical integration concerns raised by Qube and LINX could result in adverse market outcomes. This would be the case if vertical integration enabled Flinders Ports to engage in: - discrimination or preferential treatment of related entities, and/or - misuse of confidential information by the Port Operator acquired as a result of its role as a provider of access that might then be used to gain an unfair competitive advantage in dependent markets. Either of these outcomes has the potential to inhibit the ability of a user of relevant services to compete on its merits in upstream or dependent markets. Similarly, investment decisions by Flinders Ports may be skewed to provide benefits to particular related businesses, rather than in ways that would otherwise be efficient and

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	enable users of relevant infrastructure services to compete on their merits in dependent markets occurring in areas where they would yield the greatest benefit. If infrastructure is used in this way, it is likely that businesses that compete with entities related to Flinders Ports in upstream or downstream markets would be hampered in their attempts to compete effectively with those related entities. One regulatory tool that can assist in ensuring providers of a service treat all users (including arms of their business that operate in dependent markets) in a non-discriminatory way is ring fencing. This involves identifying and isolating all aspects of a business that could permit an integrated entity to engage in behaviour designed to eliminate competitors or deter potential competitors from entering the market. This includes activities, assets, costs and revenues relating to those elements of a business that are not subject to strong competitive pressures within a vertically-integrated entity. It also includes potential incentives or practices of a non-accounting nature that may result in inefficient behaviour. Ring fencing provisions are a potent means of addressing the risk of transfer pricing and preferential treatment that can arise where a facility owner is vertically integrated. However, other than requiring separate accounts, none of the Clause 6 Principles require ring fencing expressly. The Council considers that the omission of ring fencing provisions in and of itself would not render an access regime ineffective. Inclusion of appropriately designed ring fencing requirements that apply to services regulated by the Access Regime may, however, further improve a regime that is otherwise effective within the meaning of s 44M(4)(a) of the CCA. The MSA Act only implements one ring fencing measure, s 42, which requires that separate accounts be kept by a regulated port operator relating to the provision of regulated services separately from accounts and records related to other aspects of the business or businesses carried on by the operator. The Council also notes that the MSA Act does not contain provisions that expressly protect confidential information disclosed by an access seeker to the facility owner from improper use and disclosure to affiliated bodies, or establish staffing arrangements between the facility owner and affiliated bodies that avoid conflicts of interest.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	As a result of the factors outlined above, the Council accepts there is some risk that an integrated entity, such as Flinders Ports, could engage in conduct that could eliminate competitors or deter potential competitors from entering related markets under the Access Regime. However, as noted, the Council considers that the omission of ring fencing provisions does not, of itself, render an access regime ineffective under Part IIIA of the CCA. *(b) <u>Evaluation</u>* (i) *Discrimination or preferential treatment of related entities* The Council notes that SAFC and ESCOSA acknowledge that there is potential for market power to be exercised by port operators regulated by the Access Regime, but had not previously been persuaded by the evidence made available during previous reviews of the Access Regime to suggest that port operators are exercising market power. In contrast, Qube and LINX have submitted to the Council that they have already fallen victim to discriminatory treatment by Flinders Ports. It is unclear to the Council whether meaningful conclusions can be drawn from the lack of matters referred to arbitration and the fact only one access dispute has been raised. Because ESCOSA conducts a review of the Access Regime every five years that examines whether there has been a misuse of market power and can recommend reform, there may be value in interested parties raising access disputes with ESCOSA even if they do not expect arbitration to fully address their concerns. However, the Council considers that parties may not have raised an access dispute to address their concerns if they felt they could not be adequately be addressed via arbitration. The Council considers that the absence of access disputes notified to ESCOSA does not necessarily demonstrate that market power is not being misused. The Council notes that ESCOSA has previously reached a similar conclusion, noting in its 2017 Ports Access and Pricing Review that the absence of access disputes is not itself evidence that market power is not being exercised.[172]

[172] ESCOSA, 2017 Ports Access and Pricing Review – Final Report, September 2017, p 21.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	The Council notes that the evidence provided to it in the course of its consideration of the application that might suggest Flinders Ports has been providing preferential treatment to its related businesses has been strongly contested. Similarly, while LINX has alluded to instances where vessels to be worked by Flinders Logistics have been given berthing priority over vessels to worked by LINX, it did not provide sufficiently detailed particulars of the instance in which it alleged this occurred in its 19 August 2021 response to the information request issued by the Council, nor did it provide persuasive or sufficient evidence substantiating these concerns.[173] These allegations were denied by Flinders Ports. The Council is not satisfied that Flinders Ports may have acted in a manner which provides preferential treatment to its related entities or discriminated against their competitors. In the event that Flinders Ports did seek to provide preferential treatment to a related entity, it is open to a user of regulated services at the proclaimed ports to seek arbitration of an access dispute. In arbitrating any access dispute, an independent arbitrator would be required to have regard to the principles in s 32 of the MSA Act, which include: - the interests of all persons holding contracts for use of any relevant port facility - firm and binding contractual obligations of the operator or other persons (or both) already using any relevant port facility - the economically efficient operation of any relevant port facility - the benefit to the public from having competitive markets, and - that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others would be higher.

[173] LINX, response to 5 August 2021 Information Request, 19 August 2021, https://ncc.gov.au/images/uploads/LINX_Cargo_Care_-_Response_to_Information_Request_19_August_2021.pdf

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	To the extent that no access disputes have been notified until recently, the effectiveness of the Access Regime in dealing with disputes arising from discrimination or preferential treatment of related entities on the part of the access provider has not been tested at this point in time. The Council notes that ESCOSA has visibility over the operation of the Access Regime and Flinders Ports' compliance with it. As noted above, ESCOSA's 2017 Ports Access and Pricing Review identified that both Flinders Ports and Viterra continue to have the potential to exercise market power, but ESCOSA had not found any evidence of this market power being exercised over the period of 2012 to 2017. And, from the evidence available, on balance, ESCOSA found it is unlikely that the potential to exercise market power will change substantially over the period from 2017 to 2022.[174] The Council is comforted that ESCOSA is alive to the risk that the access providers have the potential to exercise market power and trusts that this issue will again be examined in its upcoming Ports Access and Pricing Review. The Council notes that SAFC and the South Australian Government have endorsed the Council's suggestion in the draft recommendation that ESCOSA consider these issues. LINX has suggested that the Access Regime could be improved by introducing a strengthened non-discrimination mechanism, and sets out specific amendments that could be made to the MSA Act in order to achieve this (see pages 4 and 5 of LINX's submission responding to the draft recommendation).[175] The Council considers that, while the Access regime is an effective access regime under the CCA in its current form, the amendments suggested by LINX illustrate reforms that could significantly reduce the risk of discrimination or preferential treatment of related entities in circumstances where access to services must be sought from a vertically integrated access provider.

174 ESCOSA, 2017 Ports Access and Pricing Review – Final Report, September 2017, p 16.

175 LINX, Response to the Draft Recommendation, 16 July 2021.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	(ii) *Misuse of confidential information* The Council considers that the risk of confidential and/or commercially sensitive information obtained by Flinders Ports' employees being passed on and/or used by other businesses in the Flinders Group may represent a concern that is difficult to remedy via arbitration of an access dispute. If employees of Flinders Ports glean insights into the operations and businesses that compete with its related entities in downstream markets, this information could be used to seize opportunities that might otherwise have been taken by its rivals. It is not clear to the council that an award from arbitration will always constitute an adequate response to these situations and a mechanism that places structural limitations on the Flinders Group, as ring fencing provisions would do, may be more appropriate. The Council considers that the omission of stronger ring fencing provisions applying to regulated services in the MSA Act means there is a real risk of misuse of confidential information and business plans that an access seeker may make known to Flinders Ports during negotiations for access to its services. Provisions allowing for the arbitration of disputes and awards appear may not be adequately equipped to address the risk of commercially sensitive business plans of an access seeker being brought to the attention of Flinders' staff who work across both its ports and downstream operations. To this end, the Council considers that it would be desirable for South Australia to consider introducing ring fencing and confidentiality provisions aimed at mitigating the risk of misuse of confidential information to the MSA Act in the future and would encourage ESCOSA to consider recommending such reforms as part of its upcoming Ports Access and Pricing review. The Council notes that SAFC and the South Australian Government have endorsed the Council's suggestion in the draft recommendation that ESCOSA consider these issues. While the Council considers the Access Regime is presently effective within the meaning of s 44M(4)(a) of the CCA, it encourages ESCOSA to consider improving it by introducing appropriate provisions to protect the confidential information of users of services the subject of the regime with a view to reducing the risk of misuse of confidential information.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	(c) *Impact* in upstream and downstream markets Qube has submitted that an access regime that does not adequately address the risk of preferential or discriminatory treatment and does not protect access seekers' confidential information cannot be said to adequately address the structural problems posed by vertical integration, and therefore fails to promote or permit effective competition in upstream and downstream markets.[176] Qube's submission describes a number of circumstances in which it considers there to have been discriminatory or preferential treatment of related entities by Flinders Ports or a risk of misuse of confidential information. Neither Qube's submission responding to the application or its response to the 10 May 2021 information request suggested that there has been a contraction in competition in upstream or downstream markets. Qube's submission responding to the application states: *Competition for the provision of downstream services to the companies importing and exporting freight involves a variety of service providers, including at least the following: [Qube, Flinders Logistics, Linx Cargo Care Group, Viterra Wharf Services, Stephens Bulk Services and Adelaide Brighton Cement].* *Of the South Australian ports, Port Adelaide accounts for the majority of throughput and sees the most competition for the provision of downstream services. Each of the above downstream service providers (except for Adelaide Brighton Cement) competes fiercely for work from customers importing and exporting from the port. These providers compete for access to a limited number of common user berths…* *Qube understands that Flinders Logistics share of the market has grown quickly once it entered this vertically related market.* [177] Qube's submission responding to the draft recommendation states that the growth of businesses related to Flinders Ports in contested South Australian markets related to the Proclaimed Ports evidences the advantage it has obtained through its monopoly position. Qube also submits that it has exited from stevedoring at Port

176 Qube, Response to the Information Request dated 24 May 2021, p 15.

177 Qube, Submission to the Council dated 26 February 2021, p 6.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Pirie and altered its investment approach in South Australia (favouring mobile investments) because of perceived fears of future anti-competitive conduct by Flinders Ports. LINX's submission responding to the draft recommendation also raises concerns that the activities of Flinders Ports have contributed to difficulties LINX has faced in competing with Flinders Logistics and Flinders Warehousing and Distribution. Flinders Ports submits that there is clear evidence that the SA Ports Access Regime has promoted the economically efficient operation of, use of and investment in the infrastructure by which regulated services are provided and has thereby promoted effective competition in upstream or downstream markets. In support of this assertion it submits: - Prior to privatisation of the seven South Australian ports in 2001, there was little or no significant or new investment in the infrastructure providing the regulated services or other assets that would increase throughput through the regulated port facilities operated by the South Australian Government. Since the commencement of the Access Regime, Flinders Ports has made a number of significant investments (over $250m in value) at the Proclaimed Ports for the benefit of third party access seekers. - In 2012, Flinders Logistics commenced stevedoring operations in competition with Asciano (Patrick, later Linx), Qube and SA Shipwright, as a new entrant, offering innovative and new solutions to customers. Over the last 3 years, Flinders Logistics' stevedoring volumes at the Proclaimed Ports have decreased by over 30% while Qube's have increased by approximately 24%. Linx's volumes have increased by 22%, and SA Shipwright's have increased by over 430%. - The fact that Qube recognises there are a "variety of service providers" that compete "fiercely" strongly supports the view that the Access Regime is achieving the very objects of Part IIIA which Qube refutes.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	- ESCOSA's 2017 review found that the prices charged by Flinders Ports were comparatively lower than other privately-owned ports.[178] Flinders Ports' response to the draft recommendation also says that it would not have the ability or incentive to discriminate against downstream rivals because the proclaimed ports are not generally capacity constrained, it is bound by port rules, and would face demurrage costs if it were to cause delays. Flinders Ports also challenges the factual basis of Qube's examples/allegations of discriminatory conduct. The Council notes that Qube's examples of discriminatory or preferential treatment of related entities by Flinders Ports and possible misuse of confidential information have been disputed on a factual basis and arise outside of the context of seeking access to a regulated service. Flinders Ports has also raised arguments that the Council should not consider issues relating to vertical integration in response to the examples of discriminatory practices raised by LINX. The Council considers that evidence of entities in the Flinders Group growing in contested markets and competitors losing contracts to these entities is not of itself evidence that the competitive process is not working. These events may in fact demonstrate an increase in competition in these markets. In any event, the Council was not provided with persuasive evidence or sufficient information to establish the behaviour by Flinders Ports that has been suggested. However, these allegations relate to serious matters which, if proven, would be concerning to the Council. That said, the Council is not an investigative or law enforcement agency and the parties may wish to consider referring their concerns to the ACCC for consideration in the context of Part IV of the CCA. The Council also notes that the level of investment in the proclaimed ports and number of competitors in stevedoring markets appear to have increased since the introduction of the Access Regime.

178 ESCOSA, 2017 Ports Access and Pricing Review – Final Report, September 2017, p 33.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Impact of certification In considering the degree to which certification of the Access Regime would promote, or fail to promote, the objects of Part IIIA, the Council considers that there is value in examining how future outcomes might differ if certification is granted versus if it is refused. Certification of the Access Regime would mean that the regulated services provided at proclaimed ports would not be candidates for declaration under Part IIIA of the CCA while the certification operates. If the Access Regime is not certified, then services covered by the Access Regime may be the subject of a declaration application under Part IIIA. Declaration of a service under Part IIIA of the CCA results in the service becoming subject to the access regime in Division 3 of that Part. The regime requires service providers to negotiate with access seekers and provides recourse to arbitration of disputes by the ACCC if negotiation is unsuccessful. The Council notes that the access regime in Part IIIA of the CCA is not significantly different from the Access Regime in the MSA Act. In particular, it does not provide for ring fencing or confidentiality requirements in the provision of regulated services of the kind which Qube and LINX have submitted should be included in the MSA Act, and whose omission is cited as a key reason for refusing certification. Therefore, the Council does not consider that the potential for declaration is likely to confer any material improvement in the standard of protection offered to access seekers against vertically integrated port operators that is relevant to the first object of Part IIIA. Certification would not impart protections against misuse of market power by the port operator beyond those that would be present under the MSA Act in the absence of certification. **Conclusion** The Council considers that there is some risk of confidential information obtained by Flinders Ports being misused for the benefit of related businesses in the Flinders Group. This risk is mitigated by provision for ESCOSA to monitor the operation of the MSA Act and access to the regulated services, with arbitration and recommendations for reform available to address issues that might arise. The Council considers that these mechanisms go some way to ameliorating risks arising from vertical integration of the access provider.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	The Council was not provided with persuasive or sufficient evidence to reach a conclusion regarding the accuracy of allegations raised by Qube and LINX against Flinders Ports in relation to whether it has used control over access to services at its ports to lessen competition in dependent markets. That said, the Council is not an investigative body and there are limits to how much evidence it can acquire in the course of a time-limited consideration of whether to recommend certification of an access regime. Further, certification of an access regime does not convey an exemption for conduct that would otherwise be in breach of Part IV of the CCA. If Qube and LINX maintain their concerns in relation to Flinders Ports' conduct, they are able to refer these matters to the ACCC for its consideration against Part IV of the CCA. The Council also notes ESCOSA reviews the Access Regime regularly, and has noted the risks arising from Flinders' vertical integration. ESCOSA has previously concluded that competition in related markets remains healthy. The Council is comforted by ESCOSA's attention to this matter, expects it will continue to monitor these risks, and recommends that it give careful consideration to whether the Access Regime and other associated government policies require amendment and improvement to better deal with Flinders Ports' increased vertical integration into dependent markets including as part of its forthcoming review of the Access Regime. The Council considers that the risks of misuse of confidential information by Flinders Ports and discriminatory or preferential treatment favouring its related entities could be addressed by reforms to the MSA Act introducing ring-fencing and confidentiality requirements for regulated services. As noted, the Council recommends that ESCOSA consider recommending such reforms. SAFC and the South Australian Government have acknowledged that this is would constitute an appropriate forum for the desirability of such reforms to be more thoroughly explored and have endorsed this approach. The Council also notes that the Access Regime may not be accessible to businesses that operate in dependent markets and compete with entities related to the port operators. In circumstances where the range of regulated services under the Access Regime may not adequately cover those services which businesses are reliant on to compete with providers of infrastructure services in dependent markets, the Council recommends that ESCOSA consider whether the range of regulated services under the access regimes remains appropriate as part of its next review.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	The Council considers that certification of the Access Regime is likely to bolster confidence in it, with the effect of promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided. Conversely, the Council does not consider that the vertical integration issues that have been raised would be better addressed if certification of the Access Regime is withheld. As discussed in Section 3, the CPA and legislative extrinsic materials indicate that the parties to the CPA, and the Commonwealth Parliament, intended that states and territories would be granted latitude in designing and operating access regimes. The Access Regime applies the Clause 6 Principles. For the reasons discussed above, the Council is not persuaded by the arguments of Qube or LINX that, due to the need to have regard to the objects of Part IIIA, certification should be refused. Further, the Council accepts that the stated objects of the Access Regime in s 3(b) of the MSA Act substantially reflect the first limb of the objects of Part IIIA of the CCA, 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. The Council also notes its conclusion that each of the Clause 6 Principles relating to 'efficiency promoting terms and conditions' (discussed above) are satisfied by the Access Regime. Accordingly, the Council's view is that the intent and operation of the Access Regime as a whole, guided by its stated object or objects, being the four limbs to s 3 of the MSA Act, is such that it accords with the objects of Part IIIA. As well as aligning the broad objectives of the Access Regime with those of Part IIIA of the CCA, the Access Regime's objects also inform and guide ESCOSA's application and enforcement of the Access Regime and any arbitration conducted under the regime. The Council's view is the Access Regime satisfies the first limb of the objects of Part IIIA (s 44AA(a) of the CCA).

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.	**Application** The South Australian Government submits that access to South Australian ports is either regulated under the Access Regime or unregulated; there is no other regulatory arrangement for South Australian ports and none proposed by the South Australian Government. Of the 11 trading ports in South Australia, six are currently proclaimed and subject to the Access Regime. The proclaimed ports are the six main multi-user commercial ports in South Australia. The ports for which access is regulated under the Regime are similar in the respect that they are all multi-user ports in which access to the service facilitates competition in related markets. Therefore, these may reasonably be expected to be the subject of an access request, in which case the provisions of the Access Regime would apply. The remaining trading ports have historically been single user ports, where it was considered that there was little or no potential for access to be required in order to permit competition in a dependent market. 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 (for example this could include a new port development such as Lucky Bay). Were ESCOSA to recommend that access regulation apply to a facility/service not covered, then, subject to the necessary proclamations being made, the form of regulation set out in the Access Regime would apply. There is no requirement for new or amended legislation in order to maintain consistency in the application of access regulation to the SA ports industry, and ESCOSA's demonstrated practice is to adopt a consistent approach to what is regulated and should be regulated under the Regime. **Submissions** **Responses to 10 May 2021 information request** Qube submits that the second limb of the objects of Part IIIA recognises the value of consistency in the approach to access regulation across a sector. To the extent that vertical integration has been dealt with in other state regimes, including those certified under Part IIIA, these provide an appropriate template for how

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	an effective access regime ought to address such risks, with the common features of such regimes identified by Qube in the context of the first limb of the objects of Part IIIA. In response to the 10 May 2021 information request, Viterra submits that the Bulk Wheat Code does not apply equally to all port terminals which has caused significant distortions, with their costs and uncertainties of regulation borne by South Australian industry and growers. Any regulatory requirements, including under the MSA Act should apply equally to all market participants. Viterra considers either that the Access Regime should no longer apply to Viterra's bulk loaders, or that the access regime applies equally to the port terminal operators that have commenced operations in South Australia since the commencement of the MSA Act. [179] **Submission responding to draft recommendation** In response to the draft recommendation issued on 2 July 2021, SAFC provided a submission stating that it: (a) Supports the draft recommendation's finding that the Access Regime meets the requirements for re-certification. (b) Notes the Council has made suggestions for ESCOSA's next review, including in relation to consistency in port coverage under the Access Regime. SAFC supports these recommendations. (c) Notes and supports Viterra's request to examine what infrastructure at each port should be covered under the regime (particularly where there is double coverage because of the Bulk Wheat Port Code).[180]

179 Viterra, Response to the Information Request dated 2 June 2021, pp 2, 3.

180 SAFC, Submission on the Draft Recommendation, 5 July 2021, p 1.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	Council's assessment In considering the second limb of the objects of Part IIIA, the Council is concerned with whether the Access Regime provides a framework and guiding principles to encourage a consistent approach to port access regulation. Access to South Australian ports is either regulated under the Access 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[181] • 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.

[181] ESCOSA Report, p 6.

Part IIIA objective	How does the SA Ports access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?
	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 Access Regime is unregulated. If certification is refused, services presently regulated under the MSA Act would become open to declaration applications, and potential regulation, under Part IIIA. This could create uncertainty regarding which regulatory regime will apply. Therefore, certification provides investors, infrastructure owners, operators and users with confidence as to the regulatory regime that will apply to a service. The Council considers that the confidence provided by certification of the Access Regime would provide and encourage a consistent approach to access regulation for regulated port services, thus furthering the second object of Part IIIA (s 44AA(b) of the CCA). 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 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. The Council's view is the Access Regime satisfies the second limb of the objects of Part IIIA (s 44AA(b) of the CCA).

6 Duration of certification extension

6.1 In making a recommendation to the Commonwealth Minister on the extension of the certification of an access regime, the Council must recommend an extension period (s 44NA(5) of the CCA).

Application and submissions

6.2 The applicant seeks an extension period of 10 years. It submits that this period is appropriate, arguing that it is justified by:[182]

- The need for certainty for maritime industries and those seeking access to marine facilities,
- The long lead times associated with port investment, and the need to promote such investments
- The fact that ESCOSA conducts five-yearly reviews of the Access Regime
- Consistency with the periods recommended by the Council in a number of other certification matters.

6.3 In response to the draft recommendation:

a) SAFC provided a submission expressing support for the Council's draft recommendation for a 10 year extension, but noted that if the Council recommended a 12 year extension, the future re-certification process would be moved to after ESCOSA's review process. The SAFC submits that this would allow the Council to judge an up-to-date regime rather than one about to undergo review.[183]

b) Qube submits damage to competition in South Australia has already occurred and the ten year re-certification period proposed in the draft recommendation is more than long enough for further and irreparable damage to be inflicted on competition in port-related markets in South Australia.[184]

c) The South Australian Government provided a submission welcoming the Council's proposal to recommend re-certification of the Access Regime for 10 years.[185]

d) Flinders Ports' submission encourages the Council to recommend re-certification of the Access Regime for 10 years.[186]

182 South Australian Government, application for re-certification dated 22 January 2021, p 48.

183 SAFC, Submission on the Draft Recommendation, 5 July 2021, pp 1, 2.

184 Qube, Submission on the Draft Recommendation, 16 July 2021, p 10.

185 Premier of South Australia, Submission on the Draft Recommendation, 20 July 2021.

186 Flinders Ports, Submission on the Draft Recommendation, 16 July 202, p 3.

Council's assessment

6.4 In considering the duration of a certification, the Council considers the need for infrastructure investors, service providers and users to have stability and certainty in the regulatory environment. It also considers the potential for changes in market conditions.

6.5 Having considered the submissions from SAFC, Qube and the South Australian Government, the Council remains of the view that an extension period of 10 years, as requested by the applicant, is appropriate for the following reasons.

6.6 First, a certification period exceeding ten years is not appropriate. The Council should have the opportunity to periodically review the effectiveness of the Access Regime in regulating third-party access, particularly in promoting effective competition in the port-related markets in South Australia. Given its assessment of the Access Regime, the Council considers that a longer certification period, and thus a delayed opportunity to review the Access Regime, could result in harm to competition if issues were to arise in these markets.

6.7 Second, ESCOSA's five-yearly reviews and the re-certification of the Access Regime are separate and independent processes. The Council must assess whether to recommend re-certification, including the duration of the extension period, by reference to the Access Regime in its current state (rather than based on theoretical outcomes of ESCOSA's five-yearly reviews which ultimately may or may not be implemented). In any case, where the Access Regime is no longer effective due to substantial changes to the regime, the Council may recommend to the Commonwealth Minister under s 44NBA of the CCA to revoke certification of the regime.

6.8 Third, a certification period less than the ten years proposed in the draft recommendation is not appropriate in circumstances where the Council remains of the view that the Access Regime is presently an effective access regime; and where a shorter period would risk introducing some uncertainty regarding the ongoing operation of the regime.

6.9 Accordingly, the Council's recommendation is that the Access Regime be extended for a period of 10 years, that is, until 9 May 2031.