Certification of the South Australian Ports Access Regime

Application for the extension of certification under section 44NA of the *Competition and Consumer Act 2010* (Cth)

Government of South Australia

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1. Application and contact details

This application is made under section 44NA(2) of the *Competition and Consumer Act 2010* (Cth) and the following supporting information is submitted for the National Competition Council's (NCC) consideration in accordance with Regulation 6B of the Competition and Consumer Regulations 2010.

1.1 Applicant

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

1.2 Responsible Minister

The Responsible Minister for South Australia concerning this application is the Hon Steven Marshall MP, Premier of South Australia.

1.3 Responsible Minister's address for delivery of documents

The Honourable Steven Marshall MP
Premier of South Australia
GPO Box 2343
ADELAIDE SA 5001

Email: premier@sa.gov.au

1.4 Contact officer

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

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2. Glossary

2017 Guide to Certification/ Certification Guide	NCC (2017), Certification of State and Territory Access Regimes – A guide to Certification under Part IIIA of the *Competition and Consumer Act 2010* (Cth)
ACCC	Australian Competition and Consumer Commission
Access Regime/ SA Ports Access Regime	the South Australian ports access regime established by the *Maritime Services (Access) Act 2000* (SA)
CC Act	*Competition and Consumer Act 2010* (Cth)
CPA	Competition Principles Agreement
Code of Conduct/Code	Port Terminal Access (Bulk Wheat) Code of Conduct
ESC Act	*Essential Services Commission Act 2002* (SA)
ESCOSA	Essential Services Commission of South Australia
Flinders Ports	Flinders Ports Pty Ltd
HN Act	*Harbors and Navigation Act 1993* (SA)
MSA Act	*Maritime Services (Access) Act 2000* (SA)
NCC	National Competition Council
POA	Port Operating Agreement(s)
Supreme Court	Supreme Court of South Australia
Viterra	Viterra Operations Pty Ltd

3. Background

The South Australian Ports Access Regime ('SA Ports Access Regime') is established under the *Maritime Services (Access) Act 2000* (SA) (MSA Act).[1] The Access Regime is currently certified as an effective regime under section 44N of the *Competition and Consumer Act 2010* (Cth) (CC Act).[2] The certification has been in force for 10 years and is due to expire on 8 May 2021.

3.1 *Maritime Services (Access) Act 2000*

The MSA Act commenced on 31 October 2001. The objects of the MSA Act are:[3]

(a) to provide access to maritime services on fair commercial terms;

(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 disputes about access are subject to an appropriate dispute resolution process.

Monitoring and enforcing compliance of the SA Ports Access Regime is the responsibility of South Australia's independent economic regulator, the Essential Services Commission of South Australia (ESCOSA).

3.2 Request for certification

The purpose of certification is to provide regulatory certainty for port stakeholders and, in so doing, exemption from declaration under Part IIIA of the CC Act. Once a State or Territory access regime is certified as effective, access to relevant services is exclusively governed by that regime and the declaration and access undertaking provisions of Part IIIA are unavailable.

The SA Ports Access Regime has now been established for nearly 20 years, and has been certified as an effective access regime under the CC Act for the past 10 years. The Regime has been highly successful in promoting negotiated access to regulated maritime services and supporting continued investment in South Australia's port facilities. The Regime remains fully compliant with the objects of Part IIIA of the CC Act and the principles established in clause 6 of the Competition Principles Agreement (CPA), and is subject an independent review by ESCOSA every five years in order to ensure that the regulation remains appropriate.

The purpose of the application is to request that the NCC recommend to the Commonwealth Minister that the certification of the SA Ports access Regime be extended for a period of 10 years.

3.3 Structure of this application

In considering whether to recommend that an access regime be certified as effective, the NCC:

- is to be guided by the principles established in clause 6 of the CPA;
- must treat each relevant principle of clause 6 of the CPA as having the status of a guideline rather than a binding rule;
- must have regard to the objects of Part IIIA; and

[1] A copy of the MSA Act is available here.

[2] The Hon. David Bradbury MP, Parliamentary Secretary to the Treasurer, 9 May 2011. A copy of the decision is available here.

[3] See section 3 of the MSA Act.

- is not permitted to consider any other matters.

This application has been prepared with regard to the NCC's advice in its 2017 Guide to Certification[4], which identifies how the NCC will assess the access regime in terms of these matters. In this Guide, the NCC grouped the principles sets out in clause 6 of the Competition Principles Agreement into five broader categories. This application has adopted this approach, and is structured as follows:

Table 1 Structure of application

Section	Issues addressed
1	Application and Applicant details as per regulation 6B
2	Glossary
3	Background
4	South Australian Ports Access Regime
5	NCC Category 1 Scope of the SA Ports Access Regime - 6(3), 6(4)(d)
6	NCC Category 2 Treatment of interstate issues - 6(2), 6(4)(p)
7	NCC Category 3 Negotiation framework - 6(4)(a)-(c), (e), (f), (g)-(i), (m), (n), (o)
8	NCC Category 4 Dispute resolution - 6(4)(a)-(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c)
9	NCC Category 5 Efficiency promoting terms and conditions of access - 6(4)(a)-(c), (e), (f), (i), (k), (n), 6(5)(a) and (b)
10	Objects of Part IIIA in s 44AA of the CC Act
11	Duration of certification
12	References
Attachment A	Relevant legislation

[4] NCC (2017), Certification Guide, p.17

4. The South Australian Ports Access Regime

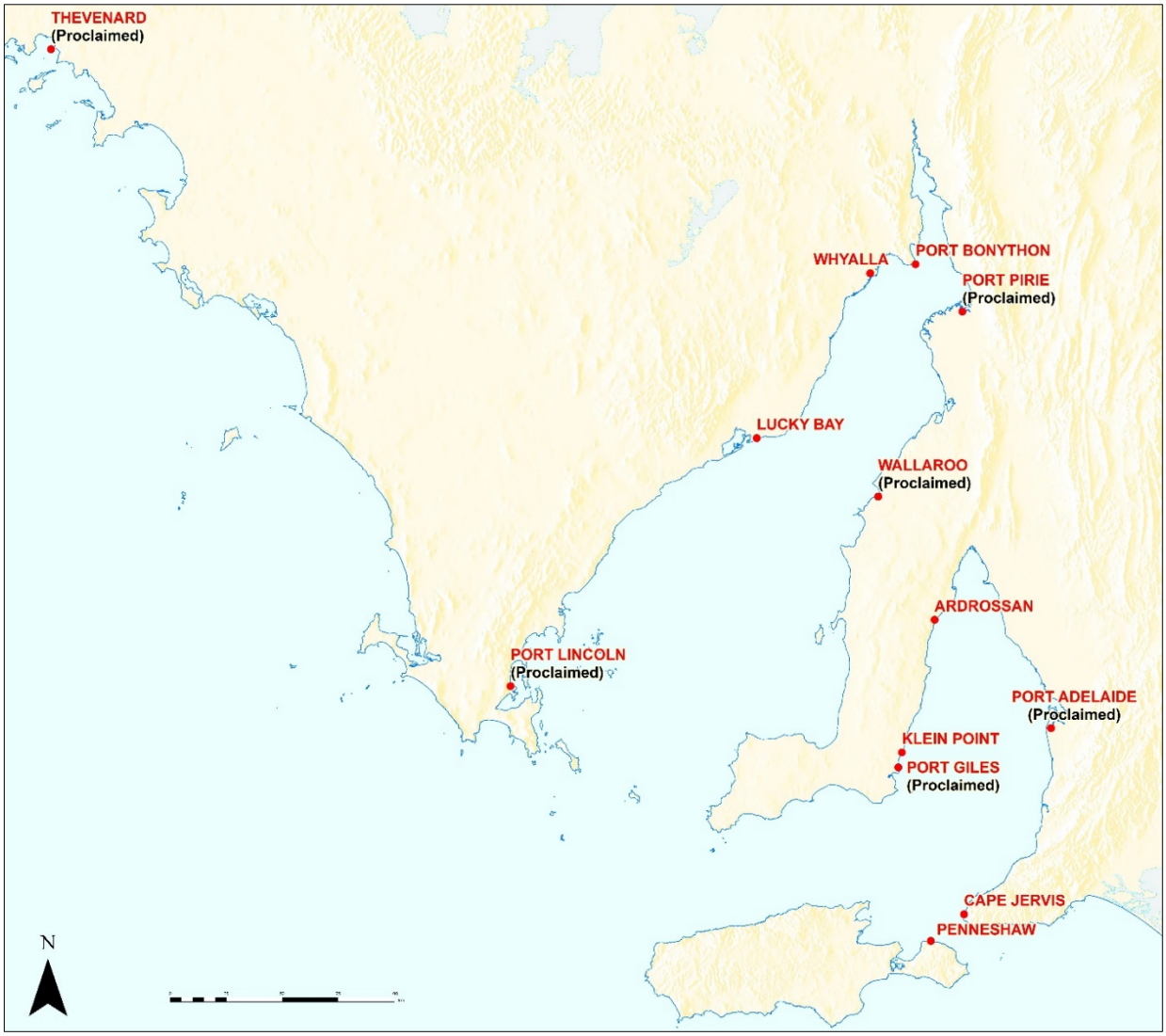
The SA Ports Access Regime is intended to balance objectives of promoting competition and facilitating timely investment in port facilities.

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

4.1 South Australian ports

The map below identifies the location of South Australia's seaports.

Figure 1 Map of South Australian ports



Source: SA Government (2020)

4.1.1 Proclaimed ports covered by the access regime

The Governor may, by proclamation, declare those ports listed in section 5 of the MSA Act to be subject to the access regime. The section provides that other ports may also be declared by regulation to be subject to the access regime. The ports proclaimed under the MSA Act[5] and subject to the Regime are the six main commercial ports, all of which operate as common user ports:

- Port Adelaide
- Port Giles
- Wallaroo
- Port Pirie
- Port Lincoln, and
- Thevenard.[6]

Further details on each of the proclaimed ports is presented at section 5.1.2 .

While all of the above ports are operated by Flinders Ports Pty Ltd (Flinders Ports), some regulated bulk handling services are provided by Viterra (Viterra Operations Pty Ltd) at its grain port terminal facilities at Port Adelaide, Port Giles, Wallaroo, Port Lincoln and Thevenard.[7]

4.1.2 Other South Australian Ports

There are a number of other commercial ports that are not proclaimed under the SA Ports Access Regime. These are:

- **Ardrossan:** was previously proclaimed and covered by the Regime, but its coverage was removed following the 2007 ESCOSA Review[8] 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.
- **Klein Point:** the port at Klein Point is operated by Flinders Ports, but it is not a proclaimed port under the access regime because it has no common user berths and it is dedicated to the shipping of limestone to Port Adelaide by a single user.
- **Whyalla, Port Bonython:** these were established and operate under indentures supported by Acts of State Parliament. They have historically been single user ports integrated with production facilities for iron ore and liquid fuels respectively. Whyalla (One Steel) is used to ship iron ore, steelmaking inputs and copper concentrate on a regular basis and steel products and other commodities on an ad hoc basis. Port Bonython (Santos) is used to ship liquid hydrocarbons and in more recent years, import of diesel fuel (IOR Terminals).
- **Penneshaw and Cape Jervis:** provide passenger transport facilities and intrastate cargo services.
- **Lucky Bay:** this is a single user transhipment based port, operated by T-Ports which commenced bulk grain export operations in March 2020 on a limited basis.[9]

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5 Maritime Services (Access) Act 2000 sections 5 and 10: Ports and Services to which the Act applies – Proclamation by the Governor, 25 October 2001 (SA Government Gazette 25 October 2001, p 4686) and Maritime Services (Access) Variation Proclamation 2009 (SA Government Gazette 29 October 2009, p 4985).

6 When the MSA Act was first enacted, the port of Ardrossan was listed in section 5. It was removed from the coverage of the Regime following a review in 2007 by ESCOSA.

7 ESCOSA (2017), Ports Access and Pricing Review – Final Report, September 2017, page 9.

8 Maritime Services (Access) Variation Proclamation 2009 (SA Government Gazette 29 October 2009, p 4985).

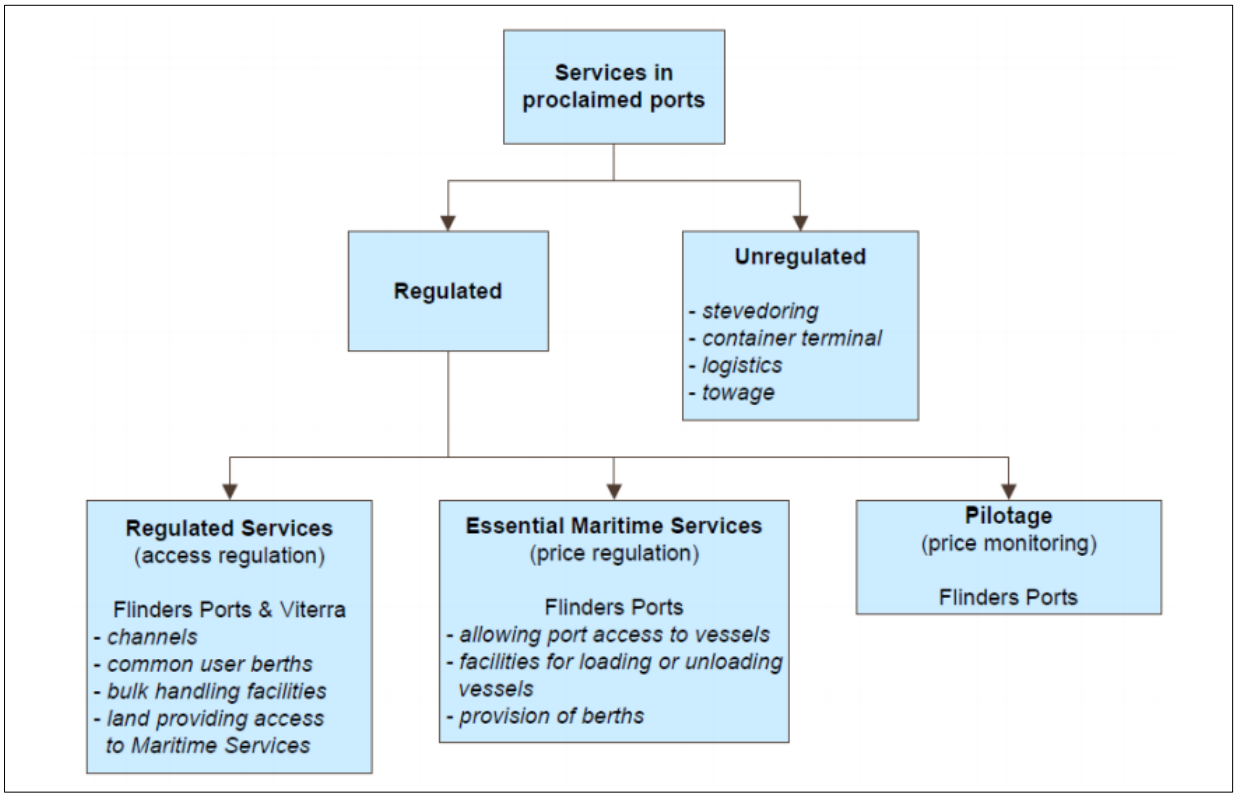
9 The first transshipment vessel arrived into Lucky Bay in mid-March 2020, followed by a wet commissioning of the port. By June 2020 five vessels had been loaded at the port. See here.

A number of these other ports, being Whyalla, Port Bonython, Penneshaw, Cape Jervis and Lucky Bay, are not classified as ports for the purpose of the South Australian *Harbors and Navigation Act 1993* (HN Act).

4.2 Services covered by the Access Regime

The MSA Act allows for the regulation of 'maritime services' for all proclaimed ports. Within those services are 'regulated services' which are subject to access regulation and 'essential maritime services' (EMS) and 'pilotage services' (pilotage) which are subject to price regulation (Pricing Regime). Other maritime services are provided on a commercial basis. The services covered by the Access Regime are illustrated in the figure below.

Figure 2 Scope of services prescribed in the MSA Act



Source: ESCOSA (2017), Ports Access and Pricing Review – Final Report, September 2017, p 8

Maritime services

Maritime services are defined by section 4 of the MSA Act as:

(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 do not include any of the following:

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

(h) a bunkering service provided at a proclaimed port

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

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

Regulated services

Pursuant to section 10 of the MSA Act, maritime services that have been proclaimed and are thereby regulated services falling within the scope of the Regime are:

- channels
- common user berths (identified in the proclamation)
- bulk handling facilities as defined in the *South Australian Ports (Bulk Handling Facilities) Act 1996* but only in relation to conveyor belts (ie not including storage areas)
- berths adjacent to bulk handling facilities
- land providing access to maritime services, and
- the Outer Harbor bulk loader at Port Adelaide.[10]

Essential maritime services

An essential maritime industry is an industry providing an essential maritime service(s). An essential maritime service consists of:

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

A summary of the services prescribed in the MSA Act is set out below.

4.3 Structure of the Access Regime

The structure of the regime as prescribed in the MSA Act is set out below.

[10] Maritime Services (Access) Act 2000 sections 5 and 10: Ports and Services to which the Act applies – Proclamation by the Governor, 25 October 2001 (SA Government Gazette 25 October 2001, p 4686) and Maritime Services (Access) Variation Proclamation 2009 (SA Government Gazette 29 October 2009, p 4985).

Table 2 Structure of South Australian Ports Access Regime

Part	Division	Description
Part 2	Division 1	provides that essential maritime industries are regulated industries for the purposes of the *Essential Services Commission Act 2002*
Part 2	Division 2	places an obligation on the providers of pilotage services to keep a schedule of current charges and to notify ESCOSA of any changes to those charges
Part 2	Division 3	places an obligation upon ESCOSA to keep maritime industries under review with a view to determining whether regulation is required under the *Essential Services Commission Act 2002*
Part 3	Division 1	provides that those persons who carry on a business of providing proclaimed regulated maritime services will be subject to the access regime (regulated operators)
Part 3	Division 2	outlines the basis of access to regulated maritime services on fair commercial terms, that is, access either by agreement between the parties or on fair commercial terms determined through arbitration
Part 3	Division 3	establishes the process by which a person who is seeking access, the proponent, may make a proposal to a regulated operator to gain access, and provides that disputes may be referred to ESCOSA
Part 3	Division 4	provides that ESCOSA must attempt to settle access disputes, in the first instance, by conciliation
Part 4	Division 5	provides that where conciliation has not resolved the dispute, or if the dispute is not resolved within 6 months after the referral of the dispute to ESCOSA, the dispute is to be referred to arbitration
Part 3	Division 6	prescribes who may be a party to arbitration and who may represent those parties, and enables ESCOSA to participate in the proceedings
Part 3	Division 7	prescribes the conduct of the arbitration and the powers of the arbitrator
Part 3	Division 8	outlines the formal requirements of awards made as a result of the arbitration process
Part 3	Division 9	provides for the enforcement of awards
Part 3	Division 10	outlines the right to appeal to the Supreme Court of South Australia from an award, or a decision not to make an award, on a question of law, and provides for the distribution of costs of the arbitration between the parties
Part 3	Division 11	requires regulated operators to segregate their accounts with respect to regulated services
Part 3	Division 12	establishes a five-year cycle of review by ESCOSA which must, within the last year of each cycle, conduct a review of the industries subject to Part 3 of the MSA Act to determine whether this Part should continue to apply to those industries
Part 4		deals with various miscellaneous matters including a prohibition against any person hindering another entitled person's access to maritime service, the power to vary or revoke proclamations made under the MSA Act, transitional provisions, and the power to make regulations under the MSA Act.

Source: SA Government (2010), South Australian Ports Access Regime – Submission to the National Competition Council, October 2010, pp 7-8.

4.4 Operation of the Access Regime

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. It is predicated on three key aspects:

1. access on fair commercial terms;
2. negotiation on access;
3. resolving access disputes.

These key elements are discussed briefly below.

4.4.1 Access on fair commercial terms

The Access Regime establishes that an operator must provide regulated services on terms agreed between the operator and the customer, including as to price, or, if they do not agree, on fair commercial terms determined by arbitration under the MSA Act. A price will be regarded as a fair commercial term if it is regulated by a pricing determination under the ESC Act and the term is consistent with that determination.

4.4.2 Negotiation on access

The MSA Act sets out the information that an access seeker may include in a written proposal to the access provider, for obtaining access or materially varying an existing access contract. 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.

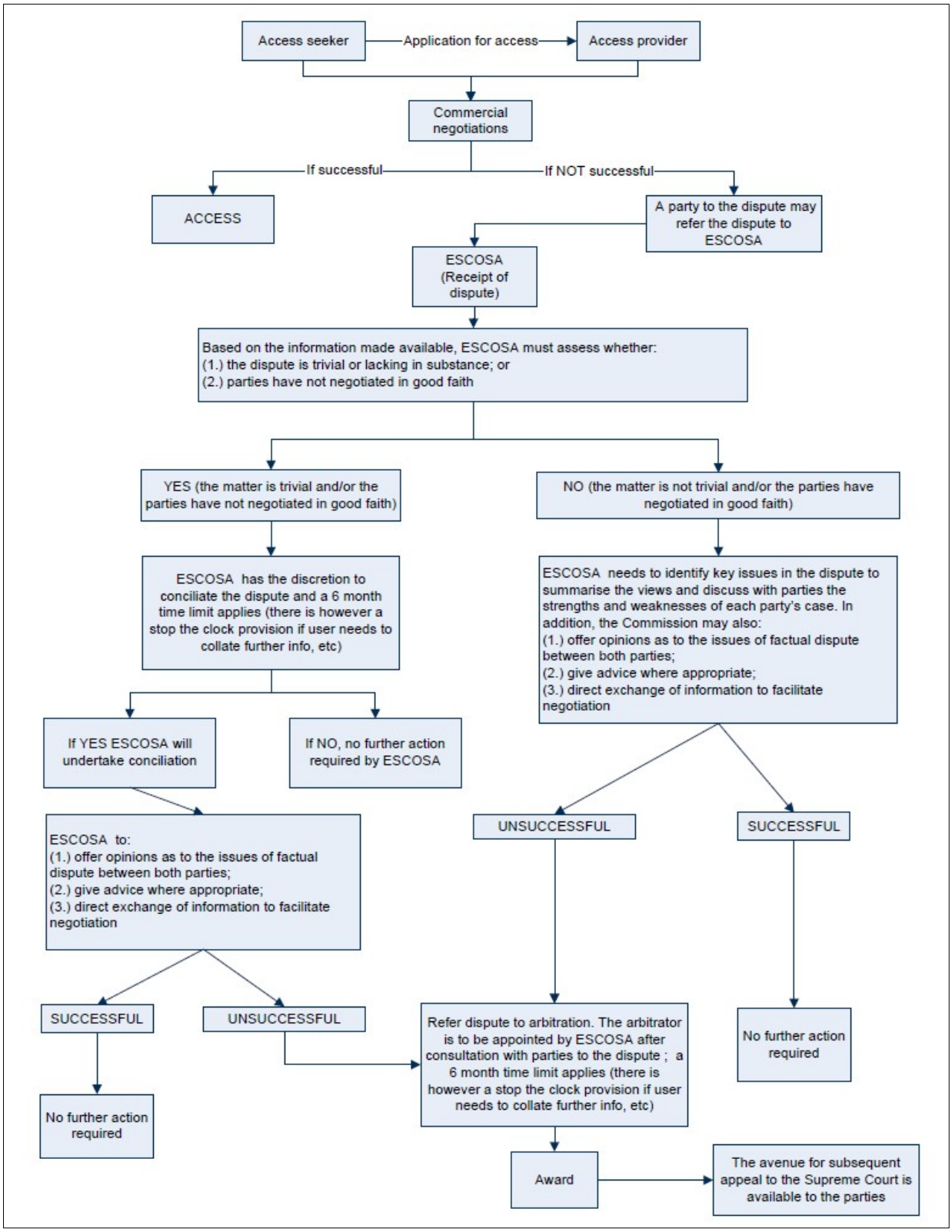
The access provider is required to negotiate in good faith with the access seeker, as are any other interested third parties affected by the proposal

4.4.3 Resolving access disputes

A dispute exists if the operator, the access seeker and any interested third parties have not agreed on terms for the provision of the proposed service within 30 days. In the event of a dispute, any party can refer the matter to ESCOSA. ESCOSA may first attempt to conciliate the dispute and, if unsuccessful, may appoint and refer the dispute to an arbitrator. An arbitrator may make a binding access award.

The diagram below summarises how the Access Regime operates in South Australia.

Figure 3 Operation of the Access Regime for South Australian ports



Source: SA Government (2010), South Australian Ports Access Regime – Submission to the National Competition Council, October 2010, p 10.

4.5 Pricing Regime

Within the SA Ports Access Regime, essential maritime services are also subject to price regulation. This is achieved through section 6 of the MSA Act, which provides that essential maritime industries are regulated industries for the purposes of the *Essential Services Commission Act 2002* (SA) (ESC Act), which provides for the Minister to make a pricing determination for a 'prescribed period'. The 'prescribed period' is currently the period from 31 October 2017 to 30 October 2022[11], and thereafter in five-year periods.

The 2017 pricing determination requires that:

- The provider of an essential maritime service (i.e. a regulated service provider) must publish their prices on their website; and
- ESCOSA may monitor and publish reports on matters relating to these prices on an annual basis.[12]

This light-handed form of price regulation is intended to strike the right balance between promoting competition and facilitating timely investment in port facilities.

Section 25(3) of the ESC Act specifies the range of price regulation approaches that are available when making a price determination. These can range from those that are not determinative in nature (for example, price monitoring) to those that are considered more prescriptive (for example, price setting).[13] This therefore provides scope for ESCOSA to recommend a more prescriptive form of price regulation if it deems it is warranted.

4.6 ESCOSA's role

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

- 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);
- it conducts annual price monitoring of essential maritime services and pilotage services, in accordance with the current price determination; and
- it facilitates resolution of access disputes.

4.6.1 Review of Access and Pricing Regimes

Section 43 of the MSA Act provides that ESCOSA must, within the last year of each prescribed period, conduct a review of the essential maritime industries subject to the South Australia ports access regime to determine whether the regime should continue to apply to those industries. ESCOSA has conducted two five-yearly reviews (in 2012 and 2017) of the ports pricing and access regime during the period of the current certification.[14]

As part of these regular five-yearly reviews, ESCOSA considers a number of matters as part of assessing the ongoing need and effective of the access and pricing regimes. For instance, it examines:

- whether the structure of the market creates the potential to exercise market power for the providers of regulated services, essential maritime services and pilotage services; and

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11 ESCOSA (2017), Ports price determination: 2017 – 2022. A copy is available here.

12 ESCOSA (2017), Ports price determination: 2017 – 2022.

13 ESCOSA (2017), Ports Access and Pricing Review – Final Report, September 2017, p 37

14 For completeness, ESCOSA has reviewed the ports access regime in 2004 and 2007, which was prior to the regime being certified as effective pursuant to Part IIIA. A copy of all of ESCOSA's reviews are available on its website.

- based on the conduct and performance of those providers, whether there is evidence of market power being exercised.

As part of its review role, ESCOSA also considers alternatives to the existing Access and Pricing Regimes and weighs up the costs and benefits of the existing regimes against those alternatives. Furthermore, ESCOSA also considers ways that the Access and Pricing Regimes could be improved to make regulation more effective and efficient.

The most recent review of the ports Pricing and Access Regimes was conducted by ESCOSA in 2017.[15] ESCOSA concluded that both Regimes should continue in their current forms for another five years (i.e. to 30 October 2022). In reaching this conclusion, ESCOSA noted that:

- while there is the potential for market power to be exercised by port operators, there was no evidence that port operators were exercising such market power;
- on this basis, and in assessing the costs of benefits of the Access and Pricing Regimes, on balance, there would be no net benefit in ceasing the regimes and moving towards alternatives at this time.

This recommendation was accepted by the then Minister for Transport and Infrastructure and the Maritime Services (Access) Variation Regulations 2017 were made to extend the operation of the access regime for a period of five years commencing on 31 October 2017.

Aspects of ESCOSA's analysis that led to these conclusions are referred to, where relevant, throughout this application.

4.6.2 Annual price monitoring

In accordance with the 2017 pricing determination, ESCOSA publishes an annual ports price monitoring report, which comments on factors underpinning price movements to provide users with information on published ports prices at regulated ports in South Australia. The most recent price monitoring report was issued in October 2020. Among the key message of the report was that prices set by Flinders Ports for essential maritime services (other than channel levies) and pilotage services increased by between 2.5 and 3.6 percent during 2020-21.[16]

4.6.3 Dispute resolution

In the event of a dispute, any party can refer the matter to ESCOSA. ESCOSA may first attempt to conciliate the dispute and, if unsuccessful, may appoint and refer the dispute to an arbitrator.

[15] ESCOSA (2017), 2017 Ports Access and Pricing Review – Final Report, September 2017, p.32. A copy of the report is available here.

[16] ESCOSA (2020), 2020 Ports Price Monitoring Report. A copy of the report can be found here.

5. Scope of the SA Ports Access Regime – cl 6(3)(a) and 6(4)(d)

The NCC's Certification Guide identifies that the CPA clauses that it considers in its assessment of the scope of an access regime are clause 6(3)(a) and clause 6(4)(d)). South Australia submits the SA Ports Access Regime reflects these principles, as set out in this section.

5.1 Clause 6(3)(a)

> *6(3) For a State or Territory access regime to conform to the principles set out in this clause, it should:*
>
> *(a) apply to services provided by means of significant infrastructure facilities where:*
>
> *(i) it would not be economically feasible to duplicate the facility;*
>
> *(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and*
>
> *(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist;*

5.1.1 Relevant provisions of the SA Ports Access Regime

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

Maritime services that have been proclaimed and are, therefore, regulated services are:

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

The proclaimed ports are:

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

While all of the above ports are operated by Flinders Ports, some regulated bulk loader services are provided by Viterra.

5.1.2 Effectiveness in in reflecting clause 6(3)(a) - significant infrastructure facilities

The NCC's 2017 Guide to Certification identifies that it will approach this issue by considering whether a facility is significant in terms of its size and importance to the economy of the state or

territory or, if applicable, the regional or national economy.[17] An overview of the services provided by each of the six currently proclaimed ports illustrates their importance to their respective regional economies and to the State as a whole.

Port Adelaide

Port Adelaide accounts for the majority of cargos handled in South Australia. In 2019-20, the port processed 1,195 vessel visits, carrying bulk, breakbulk and containerised cargo.[18] This represents 66% of total vessel movements across all of Flinders Ports operations for 2019-20.[19]

In 2019-20, a total of 13 million tonnes of cargo was shipped through the port.[20]

The principal bulk commodities handled at Port Adelaide include cement/clinker, chemicals/acids, fertilisers, general cargo, grain, iron ore, limestone, mineral sands, petroleum and gas, sulphur and soda ash. Breakbulk commodities comprise motor vehicles, general/project cargo, iron and steel and scrap metal.

Total container movements at Port Adelaide have grown from 267,438 TEUs in 2008-09 to 323,000 TEUs in 2019-20.[21]

The level of container traffic has grown strongly, but it is still a relatively small throughput port relative to the other major Australian container ports. Based on the Australian Competition and Consumer Commission's container stevedoring monitoring report, the number of TEUs processed through Adelaide accounted for around 6% of national TEU volumes in 2019-20.[22]

Flinders Ports have undertaken a series of investments to improve Port Adelaide's efficiency and competitiveness in international freight and logistics movements, including:

- Outer Harbor Channel Widening Project
  - In 2019, Flinders Ports completed an $80 million project to widen the Outer Harbor shipping channel and swing basin to maintain competitiveness with other capital city ports. The larger vessels are more economical and container line owners were looking to place these larger vessels on the Australian trade route to increase vessel capacity and productivity.
  - Previously, the Outer Harbor could only accommodate vessels up to a maximum width of 42.2 metres with operational restrictions in place. The Outer Harbor Channel Widening Project now enables the Outer Harbor port precinct to accommodate container ships, bulk ships and cruise ships with a maximum width of 49 metres, without operational restrictions.
- Passenger Terminal Upgrade
  - In 2018, Flinders Ports opened its newly refurbished Passenger Terminal at Outer Harbor to support the increasing use of Port Adelaide by cruise vessels. The Passenger Terminal had been in operation for 45 years and was refurbished, renewing the foyer area, replacing escalators, outer stars and lifts, as well as adding additional back-up power generation.

[17] NCC (2017), Certification Guide, p 26.

[18] Based on information supplied by Flinders Ports.

[19] Based on information supplied by Flinders Ports. There were 1,795 vessel visits across Flinders Port's ports (Port Adelaide, Klein Point, Port Giles, Port Lincoln, Port Pirie, Thevenard and Wallaroo).

[20] Based on information supplied by Flinders Ports.

[21] Based on information supplied by Flinders Ports.

[22] ACCC (2020), Container stevedoring monitoring report 2019-20, 4 November 2020. See 2019-20 Report supplementary tables (excel file).

- Port Adelaide Industrial Precinct
  - In 2011, Flinders Ports undertook a project developing rail and associated hardstand infrastructure and ancillary works adjacent to Inner Harbour Berth 29, to enhance the logistical operations of the South Australian mining industry. The estimated capital expenditure for this project was $10 million.
- Port Adelaide Bulk Handling Precinct
  - In 2012, Flinders Ports undertook a $12 million project establishing a 7,200m2 Sulphur Storage Facility and associated civil infrastructure for BHP.
- Outer Harbor Fuel Berth
  - The new liquid fuel import facility located at Outer Harbor in Port Adelaide officially opened in April 2014. This $25 million facility ensured security of supply of fuel needs for metropolitan Adelaide, previously solely dependent on Flinders Ports' M-berth facility.

Other Port Adelaide facilities include:

- Over 20 berths, ranging from 120 metres to 320 metres in length;
- 2 mobile harbour cranes;
- Motor vehicle roll-on roll-off facilities;
- Motor vehicle terminal;
- Container terminal with 3 container cranes;
- Various specialised berths; and
- Passenger terminal.

Other proclaimed ports

Thevenard is the most remote of the Flinders Ports facilities, located on the west coast of South Australia. Major export cargoes handled at the port include gypsum, grains, mineral sands, seeds and salt exports and fertiliser imports.

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

Port Pirie is the location of one of the world's largest lead smelters, operated by Nyrstar. Commodities handled through the port of Port Pirie include mineral concentrates, mineral by-products, chemicals/acids and coal.

Wallaroo is situated on the eastern side of Spencer Gulf, 158 kilometres by road from Adelaide. It operates a dedicated grain facility.

Port Giles was established in 1970 to export grain from the lower section of the Yorke Peninsula and remains dedicated to this purpose.

Throughput at South Australian ports

The table below shows the level of throughput at the proclaimed ports between 2015-16 and 2019-20.

Table 3 Throughput at South Australian ports from 2015-16 to 2019-20 ('000 tonnes)

Load Port	2015-16	2016-17	2017-18	2018-19	2019-20
Port Adelaide	13,921	16,144	16,209	13,230	13,338
Port Giles	599	861	743	383	445
Port Lincoln	2,473	2,738	2,064	1,628	2,009
Port Pirie	722	673	770	987	895
Thevenard	3,031	3,208	2,308	3,030	2,782
Wallaroo	581	769	623	175	213
TOTAL	**21,327**	**24,393**	**22,717**	**19,433**	**19,682**

Note: Klein Point volume also shown within Port Adelaide volumes as represents Adbri limestone volumes

Source: Based on information supplied by Flinders Ports

Conclusion

The NCC has previously accepted that each of the ports to which the SA Ports Access Regime currently applies comprise significant infrastructure facilities, having regard to the size of the ports and their importance to the South Australian economy.[23] The average annual throughput at each of these ports has increased since the NCC made this previous assessment.[24]

South Australia therefore submits that each of the Flinders Ports owned commercial ports infrastructure facilities remain significant to both their regional economies, and to the state economy overall, and that accordingly clause 6(3)(a) of the CPA is in part satisfied.

5.1.3 Effectiveness in in reflecting clause 6(3)(a)(i) - economic feasibility of duplicating proclaimed port infrastructure facilities

The NCC's 2017 Guide to Certification identifies that it will interpret this clause as being concerned with the waste of Australian society's resources associated with the duplication of facilities that exhibit natural monopoly characteristics; that is, where a single facility could meet all likely demand for a service at lesser cost than two or more facilities. In other words, it will assess whether it is economically feasible to duplicate facilities by adopting a natural monopoly test.[25]

The following is a discussion of those maritime services covered by the access regime (i.e. those proclaimed as regulated services) in terms of whether they exhibit natural monopoly characteristics, and therefore the economic feasibility of their duplication.

Channels ("providing or allowing for access of vessels to a proclaimed port by means of channels")

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

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[23] NCC (2011), South Australian Ports Access Regime; Application for certification as an effective access regime – Final Recommendation, March 2011, p 18.

[24] This is based on a comparison of average annual throughput volumes listed in Table 3 compared with the average annual throughput volumes listed on p 20 of the South Australian Government's October 2010 application to the NCC.

[25] NCC (2017), Certification Guide, p 26.

The characteristics of port assets that the NCC has previously identified that lend themselves to being 'natural monopolies' included those assets that require large up-front investments however their variable operating costs are relatively small, which acts as a barrier to investment in competing facilities. In Australia, this barrier is accented by its low volume of vessel traffic, relative to overseas ports, and the consequent excess in channel capacity prevalent in a number of Australian ports.[26]

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

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

For obvious reasons, 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 high cost of building wharves and jetties and dredging berth boxes, means that it is likely that the cost of meeting demand for the service will be lower through using the existing infrastructure rather than through duplicating it.

To ensure ongoing access to port loading and unloading facilities on fair commercial terms only the "common user" berths were proclaimed as subject to the access regime, since it is considered that those berths which are dedicated to a single entity or commodity under an existing agreement present little prospect of, or need for, competition. This is so, particularly in light of the current spare capacity for the servicing of shipping at the common user berths, as indicated in Table 4.

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.

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

Table 4 Type of berth facilities at each proclaimed port

Port	Berth	Type	Total Vessel Visits (year ended 30 June 2020)
Port Adelaide	Inner Harbour (H&K)	Cement / Limestone	341
	Inner Harbour (Berth 27)	Grain	10
	Inner Harbour (Berth 29)	Common	51
	Inner Harbour (Berths 18-20)	Common	104
	Inner Harbour (Oil Berths)	Oil	96
	Osborne	Common	28
	Inner Harbour (Berth 25)	Common	1
	Outer Harbor (Berths 6 & 7)	Containers	368
	Outer Harbor (Berths 1-4)	Common/Cruise/Motor Vehicles	177

[26] NCC (1997), Application for Certification of the Victorian Access Regime for Commercial Shipping Channels – Reasons for Decision, 12 May 1997, p 6. Recent NCC assessments of the characteristics of ports are broadly consistent with this earlier view.

Port	Berth	Type	Total Vessel Visits (year ended 30 June 2020)
	Outer Harbor (Berth 8)	Grain	19
	Penrice	Soda Ash / Common	0
Port Giles	All Berths	Grain	16
Port Lincoln	All Berths	Common	98
Port Pirie	All Berths	Common	76
Thevenard	All Berths	Common	102
Wallaroo	All Berths	Grain	13

Source: Supplied by Finders Ports

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).

Conclusion

The NCC has previously accepted that each of the ports to which the SA Ports Access Regime currently applies are likely to exhibit natural monopoly characteristics and are unlikely to be economically feasible to duplicate.[27] South Australia submits that this remains the case, and that the proclaimed maritime services continue to meet the requirement of clause 6(3)(a)(i) of the CPA.

5.1.4 Effectiveness in in reflecting clause 6(3)(a)(ii) – necessary to permit competition

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

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.

The NCC has previously accepted that access to the regulated services covered by the SA Ports Access Regime is likely to be necessary to permit effective competition in dependent markets.[28]

Since the SA Ports Access Regime was first certified in 2010, there has been a range of new port proposals announced. In summary, new development proposals include:[29]

- Port Spencer (Peninsula Ports) – potential development of a deep-water wharf grain export facility.
- Port Augusta (Port Augusta Operations) – potential development of a transhipment based iron ore export facility is planned.

[27] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 18.

[28] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 18.

[29] This information is based on the new port proposals listed in ESCOSA's 2017 Review as well as published information on planning developments at PlanSA. See ESCOSA (2017), Ports Access and Pricing Review – Final Report, September 2017, p 15.

- Cape Hardy (Iron Road and EPBCH) – potential development of a deep water wharf facility for export of grain; with the possibility of additional use for iron ore and potential hydrogen/liquid ammonia exports.
- Smith Bay (KI Plantation Timbers) – potential development of a deep water wharf for timber logs/wood chip exports.
- Wallaroo (T-Ports) – potential development relates of a transhipment grain export facility.

Reflecting these potential port developments, in its reviews of the Access Regimes (which are discussed in more detail in section 5.2), ESCOSA has actively considered the emergence of new port facilities and whether these developments create sufficient alternate port opportunities to reduce the market power of the existing facilities as access to those facilities is no longer necessary to permit competition in dependent markets.

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.[30]

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.[31] In doing so, it noted that:

- There are a number of proposals to construct additional port terminal facilities on the Eyre Peninsula. These proposals remain uncertain and generally have a number of barriers to overcome before entering the market and commencing operations.[32] The Port Spencer and Cape Hardy proposals are still in the process of raising capital and/or receiving various forms of government approval.[33]
- T-Ports has proposed building a port terminal facility at Wallaroo and that, according to the ACCC, this facility would compete most closely with Viterra's Wallaroo facility. However, the ACCC also noted that it generally does not consider the threat of competition to be effective as actual competition.[34] It also noted that T-Ports are still seeking relevant government approval and raising capital for this proposed development.
- Given the recent commencement of T-Ports Lucky Bay facility, the ACCC concluded that while it was reasonable to expect that this facility will compete for grain within certain parts of the catchment areas of Port Lincoln and, to a lesser extent, Thevenard, it is not yet clear to whether T-Ports offers a viable competitive alternative for the export of grain from different regions of the Eyre Peninsula. The ACCC intends to closely observe how the introduction of T-Port's Lucky Bay facility alters the competitive landscape of the Eyre Peninsula.[35]

The ACCC concluded that the extent of inter-port competition faced by existing ports was limited and/or uncertain at this point in time.

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

31 ACCC (2020), 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 Harbor, Port Lincoln, Wallaroo, Port Giles, Thevenard, 6 October 2020. A copy can be found here.

32 ACCC (2020), Draft Determinations – Viterra Operations Pty Ltd – Exemption assessments of port terminal services, p 174.

33 ACCC (2020), Draft Determinations – Viterra Operations Pty Ltd – Exemption assessments of port terminal services, pp 145-150.

34 ACCC (2020), Draft Determinations – Viterra Operations Pty Ltd – Exemption assessments of port terminal services, pp 116, 169.

35 ACCC (2020), Draft Determinations – Viterra Operations Pty Ltd – Exemption assessments of port terminal services, p 89.

Conclusion

South Australia acknowledges that new port developments have the potential to provide a competitive alternate for some users of existing regulated port facilities, meaning that access to the regulated services may in future not be necessary for all users in order for them to compete in dependent markets. However, consistent with the ACCC's assessment, the impact of T-Ports Lucky Bay facility on the competitive landscape is not yet clear, and other proposed developments do not yet provide an alternate port solution at this time.

On this basis, South Australia submits that access to the regulated services covered by the SA Ports Access Regime remains necessary to permit effective competition in dependent markets.

The progress of new port developments and their impact on competition in dependent markets should they proceed to commencement and operation, is a key issue that will continue to be monitored and assessed in future ESCOSA reviews. This provides a well-established, structured approach to considering whether adjustments should be made to the scope of regulation as a result of any changes that might ultimately take place in the port services market.

5.1.5 Effectiveness in reflecting clause 6(3)(a)(iii) – safe use of facilities and public interest

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 HN Act.

Pursuant to Part 5 of the HN Act, the Minister for Infrastructure and Transport has the control and management of all harbours in South Australia. The Minister has conferred on the owner of the various State port infrastructures the right to carry on the business of operating the ports.

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

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

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

The HN Act also provides:

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

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

In addition, all providers of regulated port services are required to comply with the obligations of the *Work Health and Safety Act 2012* (SA).

Conclusion

The NCC has previously accepted that access to the regulated services covered by the SA Ports Access Regime can be provided safely.[36] The framework for the safe operation channels and general port facilities is unchanged since the NCC's previous assessment. South Australia submits that it remains the case that access to the regulated services can be provided safely.

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

Clause 6(3)(b) of the CPA specifically requires that all of the principles referred to in clause 6(4) be incorporated in an access regime.

Clause 6(4)(d) states:

> *6(4) (d) Any right to negotiated access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.*

5.2.1 Relevant provisions of the SA Ports Access Regime

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

Section 43 of the MSA Act provides that Part 3 of the Act (which contains the provisions establishing the access regime) is subject to a 5-yearly cycle. ESCOSA must, within the last year of each 5-yearly cycle, conduct a review of the maritime industries subject to the access regime to determine whether the access regime should continue to apply to those industries and to what extent.

Upon completing its review, ESCOSA is to provide a report on the review to the appropriate Minister in the South Australian Government recommending whether the Regime should continue to apply to those industries. The Minister must have copies of the report laid before both Houses of Parliament and must have ESCOSA's recommendation published in the South Australian Government Gazette.

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

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

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

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

[36] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 18.

5.2.2 Effectiveness in reflecting relevant CPA clause

The requirement for ESCOSA to review scope of the Access Regime at five-yearly intervals provides a structural mechanism within the SA Ports 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 SA Ports Access Regime was certified in 2010, ESCOSA has conducted 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:[37]

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?

In its 2017 review, ESCOSA concluded that, although there is the potential for market power to be exercised by port operators, there is no evidence to suggest that port operators are exercising such market power. On the basis of the evidence available to the it at that time, ESCOSA recommended that the current Access Regime should continue for a further five years.[38] ESCOSA's next review is due to be completed in 2022.

The NCC has previously accepted that the SA Ports Access Regime contains adequate mechanisms for reviewing the right to negotiate access whilst ensuring that existing contractual rights under an access agreement or award are preserved, and that it therefore satisfies clause 6(4)(d) of the CPA.[39] South Australia submits that this remains the case.

[37] ESCOSA (2017), 2017 Ports Access and Pricing Review – Final Report, September 2017, p 2.

[38] ESCOSA (2017), 2017 Ports Access and Pricing Review – Final Report, September 2017, p 1.

[39] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 19.

6. Interstate issues

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

South Australia submits the SA Ports Access Regime reflects these principles, as set out in this section.

6.1 Clause 6(2)

> *6(2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:*
>
> *(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or*
>
> *(b) substantial difficulties arise from the facility being situated in more than one jurisdiction.*

6.1.1 Relevant provisions of the access regime

The services and facilities covered by the Access Regime are described in section 5.1.1.

6.1.2 Effectiveness in reflecting relevant CPA clause

The South Australian ports and facilities the subject of the SA Ports Access Regime are a crucial gateway for, and service the needs of importers and exporters. These ports and facilities are located entirely within South Australia, and the MSA Act applies only to ports and facilities that are located entirely within South Australia.

South Australian ports account for a relatively small share of national port activity, with limited interstate demand for South Australian ports services, meaning that the issue of influence beyond the borders of South Australia does not arise. Due to the fact that the SA Ports Access Regime has little impact beyond the boundary of South Australia and does not create any interstate inefficiencies, no issues of concern arise under clause 6(2)(a) of the CPA.

The SA Ports Access Regime only applies to maritime facilities which are entirely located in South Australia and are part of a port proclaimed pursuant to section 5 of the MSA Act as part of the Regime. Accordingly, the question of whether substantial difficulties arise from facilities being situated in more than one jurisdiction, as contemplated in clause 6(2)(b), also does not arise.

Reflecting this, the NCC has previously been satisfied that the SA Ports Access Regime complies with clause 6(2) of the CPA.[40] South Australia submits that this remains the case.

[40] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 19.

6.2 Clause 6(4)(p)

> *6(4) A State or Territory access regime should incorporate the following principles:*
>
> *(p) where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.*

6.2.1 Effectiveness in reflecting relevant CPA clause

There are no other state based access regimes applying to any of the regulated maritime services in South Australia.

South Australia notes that Viterra's supply of bulk grain services is also subject to the regulatory framework under the Port Terminal Access (Bulk Wheat) Code of Conduct. The Code is a mandatory code under the CC Act 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.

On 2 July 2019, Viterra applied to the ACCC for its SA terminals to be exempt from the Code of Conduct.[41] On 6 October 2020, the ACCC recommended as part of its Draft Determination that the Port Adelaide Inner Harbor and Outer Harbor facilities be exempted, but not the regional facilities.[42]

While not a state-based access regime, and therefore not directly relevant to Clause 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 it market power is not removed by being subject to the Code.[43] ESCOSA did not identify it had 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.[44] 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 SA Ports Access Regime satisfies clause 6(4)(p) of the CPA.

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41 A copy of Viterra's exemption application is available on the ACCC's website.

42 ACCC (2020), Draft Determinations – Viterra Operations Pty Ltd – Exemption assessments of port terminal services.

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

44 See Department of Agriculture and Water Resources (2018), Review of the wheat port access code of conduct, Canberra. A copy is available here.

7. Negotiation framework

The NCC's Certification Guide identifies the CPA clauses that it considers in its assessment of the negotiation framework as clause 6(4)(a)-(c), (e), (f), (g), (h), (i), (m), (n). South Australia submits the SA Ports Access Regime reflects these principles, as set out in this section.

7.1 Clause 6(4)(a)-(c): negotiated access

> *6(4) A State or Territory access regime should incorporate the following principles:*
>
> *(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.*
>
> *(b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.*
>
> *(c) Any right to negotiate access should provide for an enforcement process.*

7.1.1 Relevant provisions of the access regime

Clause 6(4)(a): Agreed access

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

Section 11 of the MSA Act provides that a regulated operator must provide access to regulated services by agreement with the customer on fair commercial terms.

Negotiation under the access regime must occur as follows:

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

As discussed further below, in the event of a dispute arising, a party may refer this to ESCOSA, however, ESCOSA is not obliged to intervene if, amongst other things, the person seeking arbitration has not negotiated in good faith. This places further emphasis on the primacy of the commercial negotiation between the parties.

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

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

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

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

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

On receiving the request, ESCOSA:

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

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

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

Clause 6(4)(c): Enforcement

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

The ability to terminate or vary an award is set out in section 36 of the MSA Act. An award may be terminated or varied by agreement between all parties to the award. If a material change in circumstances occurs, a party to an award may propose termination or variation of the award. The provisions of Part 3 of the MSA Act also apply to a dispute arising from a proposal to vary an award.

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

The access regime provides for the enforcement by the Supreme Court of awards made pursuant to arbitration. Under Part 3, Division 9 of the MSA Act, the Supreme Court may grant an injunction:

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

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

7.1.2 Effectiveness in reflecting relevant CPA clause

The SA Ports Access Regime clearly recognises the primacy of commercial negotiations by:

- adopting a negotiate/conciliate/arbitrate model which facilitates the commercial negotiation of access agreements between regulated operators and access seekers;
- including a dispute resolution process if a dispute arises between the parties; and

- including credible enforcement mechanisms through civil penalties and relief in the Supreme Court.

The effectiveness of the Regime's reliance on commercial negotiation to agree terms of access is demonstrated by the fact that, for the period of the 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.

Reflecting this, the NCC has previously been satisfied that the SA Ports Access Regime complies with clause 6(4)(a)-(c) of the CPA.[45] South Australia submits that this remains the case.

7.2 Clause 6(4)(e): reasonable endeavours

> *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.*

7.2.1 Relevant provisions of the SA Ports Access Regime

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

- the extent to which the regulated operator's port facilities subject to the access regime are currently being utilised;
- technical requirements that have to be complied with by persons for whom the operator provides regulated services; and
- the rules with which the intending proponent would be required to comply.

The operator must also provide information about the price of regulated services provided by the operator that is required to be provided under the guidelines issued by ESCOSA.

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

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

7.2.2 Effectiveness in reflecting relevant CPA clause

The SA Ports Access Regime places an express provision on the owner of the facility to negotiate in good faith and also to provide information to a potential access seeker. The NCC has previously been satisfied that the SA Ports Access Regime complies with clause 6(4)(e) of the CPA. South Australia submits that this remains the case.

[45] NCC (2011), South Australian Ports Access Regime –Final Recommendation, p 22.

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

> *6(4) (f) Access to a service or persons seeking access need not be on exactly the same terms and conditions.*

7.3.1 Relevant provisions of the SA Ports Access Regime

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

There are no constraints on the terms and conditions that might be arrived at by agreement between the parties; but in the case of arbitrated awards, the arbitrator must take into account the principles set out in section 32(1) of the MSA Act. These reflect the factors in clause 6(4)(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 upstream or downstream 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.

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

7.3.2 Effectiveness in reflecting relevant CPA clause

South Australia considers that the SA Ports Access Regime complies with clause 6(4)(f) because it provides flexibility for parties to negotiate individually with recourse available to conciliation by ESCOSA, and subsequent arbitration if necessary, in the event of a dispute. As envisaged with negotiated access, arbitration awards may include different terms and conditions for different access seekers.

The NCC has previously been satisfied that the SA Ports Access Regime complies with clause 6(4)(f) of the CPA.[46] South Australia submits that this remains the case.

[46] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 25.

7.4 Clause 6(4)(g), (h), (i): dispute resolution

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

The SA Ports Access Regime has procedures for independent dispute resolution and enforcement mechanisms. These are discussed in sections 8.2, 8.3 and 8.4 of this application.

7.5 Clause 6(4)(m): hindering access

> *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.*

7.5.1 Relevant provisions of the SA Ports Access Regime

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

7.5.2 Effectiveness in reflecting relevant CPA clause

The SA Ports Access Regime includes an express prohibition on preventing or hindering access, with an accompanying financial penalty. The NCC has previously been satisfied that this complies with clause 6(4)(m) of the CPA.[47] South Australia submits that this remains the case.

7.6 Clause 6(4)(n): separate accounting

> *6(4) (n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.*

7.6.1 Relevant provisions of the SA Ports Access Regime

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

7.6.2 Effectiveness in reflecting relevant CPA clause

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

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.[48]

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47 NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 25.

48 ESCOSA (2017), 2017 Ports Access and Pricing Review – Final Report, September 2017, p 35.

The NCC has previously been satisfied that the SA Ports Access Regime complies with Clause 6(4)(n) of the CPA.[49] South Australia submits that this remains the case.

[49] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 25.

8. Dispute resolution

The NCC's Certification Guide identifies the CPA clauses that it considers in its assessment of the dispute resolution framework as clause 6(4)(a)-(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c). South Australia submits the SA Ports Access Regime reflects these principles, as set out in this section.

8.1 Clauses 6(4)(a)-(c): dispute resolution

8.1.1. Relevant provisions of the SA Ports Access Regime

The provisions of the SA Ports Access Regime that are relevant to clause 6(4)(a)-(c) are described in section 7.1.1.

8.1.2. Effectiveness in reflecting relevant CPA clause

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

No disputes have arisen that have required the arbitration provisions of the access regime to be invoked during the period of the current certification. While this means that the practical application of the dispute resolution provisions remain untested, the NCC has previously been satisfied that the SA Ports Access Regime complies with clause 6(4)(a)-(c) of the CPA by providing for an effective recourse to dispute resolution.[50] South Australia submits that this remains the case.

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

> *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.*

8.2.1. Relevant provisions of the SA Ports Access Regime

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

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

ESCOSA, as the industry regulator, must in the first instance attempt to resolve an access dispute by conciliation. If the dispute is not resolved by conciliation, or is not resolved within six months after the referral, section 18 of the MSA Act provides that ESCOSA refer the dispute to arbitration.

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

[50] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 22.

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

- arbitrations are to be conducted in private, unless the parties otherwise agree (s 24);
- the parties to the arbitration may appear in person or may be represented by others (section 21); and
- the arbitrator:
  - is not bound by technicalities, legal forms or rules of evidence (s 25(1)(a))
  - may inform themself of any matter relevant to the dispute in any way the arbitrator thinks appropriate (s 25(1)(b))
  - must act as speedily as a proper consideration of a dispute allows (s 23).

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

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

8.2.2. Effectiveness in reflecting relevant CPA clause

South Australia considers that the SA Ports Access Regime achieves the objectives of clause 6(4)(g) of the CPA by providing for the appointment by ESCOSA of an independent arbitrator, in consultation with the parties. The costs of the arbitration are to be borne in equal proportions by the parties unless the arbitrator determines otherwise, or the proponent terminates the arbitrator process or elects not to be bound by the arbitration award. The NCC has previously been satisfied that these arrangements comply with clause 6(4)(g) of the CPA.[51] South Australia submits that this remains the case.

8.3 Clause 6(4)(h): binding decisions

> *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.*

8.3.1. Relevant provisions of the SA Ports Access Regime

Decisions of ESCOSA

ESCOSA's role in making decisions about disputes is limited. ESCOSA may resolve disputes through conciliation, but this does not involve any decisions being made by ESCOSA, rather it is a mechanism to assist the parties to reach agreement on a commercial basis. The MSA Act makes no provision for appeal against other decisions of ESCOSA concerning access disputes, i.e. whether a dispute exists and whether a dispute should be referred to an arbitrator. These decisions 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.

[51] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 29.

Decisions of Arbitrator

Section 37 of the MSA Act provides that arbitrated awards are enforceable as if they were a contract between the parties, and therefore contractual remedies are available. Sections 38 and 39 of the Act provide that injunctive remedies and orders for compensation are also available from the Supreme Court in relation to contravention of, or non-compliance with, awards. Section 40 provides that an award or a decision of an arbitrator cannot be called into question except by appeal to the Supreme Court on a matter of law.

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

8.3.2. Effectiveness in reflecting relevant CPA clause

South Australia submits that the SA Ports Access Regime satisfies clause 6(4)(h) of the CPA by providing for binding dispute resolution with rights of appeal to the Supreme Court and judicial review by the Supreme Court of any decision by ESCOSA. The NCC has previously been satisfied that these arrangements comply with clause 6(4)(h) of the CPA.[52] South Australia submits that this remains the case.

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

> *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 the use of the facility;*
>
> *(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;*
>
> *(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;*
>
> *(vii) the economically efficient operation of the facility; and*
>
> *(viii) the benefit to the public from having competitive markets.*

8.4.1. Relevant provisions of the SA Ports Access Regime

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

8.4.2. Effectiveness in reflecting relevant CPA clause

The NCC has previously been satisfied that the SA Ports Access Regime complies with clause 6(4)(i) of the CPA.[53] South Australia submits that this remains the case.

[52] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 31.

[53] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 32.

8.5 Clause 6(4)(j): facility extension

> *6(4) (j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:*
>
> *(i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;*
>
> *(ii) the owner's legitimate business interests in the facility being protected; and*
>
> *(iii) the terms of access for the third party taking into account the cost borne by the parties for the extension and economic benefits to the parties arising from the extension.*

8.5.1. Relevant provisions of the SA Ports Access Regime

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

8.5.2. Effectiveness in reflecting relevant CPA clause

The NCC has previously been satisfied that the SA Ports Access Regime complies with clause 6(4)(j) of the CPA.[54] South Australia submits that this remains the case.

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

> *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.*

8.6.1. Relevant provisions of the SA Ports Access Regime

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

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

8.6.2. Effectiveness in reflecting relevant CPA clause

The NCC has previously been satisfied that the SA Ports Access Regime complies with clause 6(4)(k) of the CPA.[55] South Australia submits that this remains the case.

[54] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 32.

[55] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 33.

8.7 Clause 6(4)(l): compensation

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.*

8.7.1. Relevant provisions of the SA Ports Access Regime

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.

8.7.2. Effectiveness in reflecting relevant CPA clause

The NCC has previously been satisfied that the SA Ports Access Regime complies with clause 6(4)(l) of the CPA.[56] South Australia submits that this remains the case.

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

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.*

8.8.1. Relevant provisions of the SA Ports Access Regime

As described in section 7.6, Part 3, Division 11 of the MSA Act requires the segregation of accounts and records relating to the provision of regulated services.

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

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

- subject to legal professional privilege or would tend to incriminate the person of an offence; or
- the person provides written notice to the arbitrator of the grounds of an objection to the provision of the information or documentary material; or
- if appearing before the arbitrator to give evidence, the person makes an oral statement of the grounds of an objection.

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

[56] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 3.

8.8.2. Effectiveness in reflecting relevant CPA clause

The NCC has previously been satisfied that the SA Ports Access Regime complies with clause 6(4)(o) of the CPA.[57] South Australia submits that this remains the case.

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

> *6(5) (c) Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:*
>
> *(i) may request new information where it considers that it would be assisted by the introduction of such information;*
>
> *(ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and*
>
> *(iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.*

Merits review of arbitration outcomes or regulatory decisions is not a mandatory requirement under the clause 6 principles. Section 40 of the MSA Act provides for an appeal on a question of law, and does not provide for a merits review. As a result, the requirements of clause 6(5)(c) are not relevant to the SA Ports Access Regime.

[57] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 35.

9. Efficiency promoting terms and conditions of access

The NCC's Certification Guide identifies the CPA clauses that it considers in its assessment of efficiency promoting terms and conditions as clause 6(4)(a)-(c), (e), (f), (i), (k), (n), 6(5)(a) and (b). South Australia submits the SA Ports Access Regime reflects these principles, as set out in this section.

9.1 Clause 6(4)(a)-(c), (e), (f), (i), (k), (n)

9.1.1 Relevant provisions of the SA Ports Access Regime

The provisions of the SA Ports Access Regime that are relevant to these clauses are described previously in sections 7 and 8, in particular:

- the provisions relevant to clause 6(4)(a)-(c) are described in section 7.1.1
- the provisions relevant to clause 6(4)(e) are described in section 7.2.1
- the provisions relevant to clause 6(4)(f) are described in section 7.3.1
- the provisions relevant to clause 6(4)(i) are described in section 8.4.1
- the provisions relevant to clause 6(4)(k) are described in section 8.6.1
- the provisions relevant to clause 6(4)(n) are described in section 7.6.1

9.1.2 Effectiveness in reflecting relevant CPA clause

As was discussed in the earlier sections, the MSA Act satisfactorily incorporates provisions in relation to each of the clauses that the NCC identifies as relevant to promoting efficiency:

- it incorporates the principles in clause 6(4)(a)-(c), by establishing a framework for parties to reach commercial agreement on access terms and conditions, with provision for conciliation by ESCOSA and arbitration where agreement cannot be reached. The MSA Act provides a framework in Divisions 4—8 of Part 3 for such dispute resolution to occur which includes provision as to the timeliness of such processes;
- The MSA Act also satisfactorily incorporates the principles in clause 6(4)(e) of the CPA by requiring the operator to negotiate with an access seeker in good faith and on the basis that the reasonable requirements of the access seeker are to be accommodated as far as practicable, as per section 14(1) of the MSA Act;
- the Regime provides the flexibility for parties to negotiate their own access arrangements and that any arbitration award is constrained only by the principles prescribed in s 32 of the MSA Act (which reflect the principles in clause 6(4)(i));
- accordingly, access to a port service need not be on exactly the same terms and conditions for all users such that it is consistent with clause 6(4)(f) of the CPA;
- the Regime allows for a party to an arbitration award to propose termination or variation of the award if there is a material change in circumstances (s 36(3) of the MSA Act). This is consistent with clause 6(4)(k) of the CPA; and
- the Regime requires a regulated operator to keep separate books of account and other records for regulated services and in compliance with guidelines issued by ESCOSA. These provisions satisfy clause 6(4)(n).

The NCC has previously found that the SA Ports Access Regime complies with the efficiency promoting clauses of the CPA[58]. South Australia submits that this remains the case.

[58] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 39.

9.2 Clause 6(5)(a)

> *6(5) A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin Railway) should incorporate the following principles:*
>
> *(a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.*

9.2.1 Relevant provisions of the SA Ports Access Regime

As is discussed in section 10.1 below, section 3 of the MSA Act incorporates stated objects for the SA Ports 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.

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

9.2.2 Effectiveness in reflecting relevant CPA clause

The NCC has previously been satisfied that the objects clause in section 3 of the MSA Act satisfies clause 6(5)(a) of the CPA.[59] South Australia submits that this remains the case.

9.3 Clause 6(5)(b)

> *6(5) A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin Railway) should incorporate the following principles:*
>
> *(b) Regulated access prices should be set so as to:*
>
> *(i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;*
>
> *(ii) allow multi-part pricing and price discrimination when it aids efficiency;*
>
> *(iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and*
>
> *(iv) provide incentives to reduce costs or otherwise improve productivity.*

9.3.1 Relevant provisions of the SA Ports Access Regime

Under the SA Ports Access Regime, ESCOSA does not set prices for regulated port services. Rather, the 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.

[59] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 39.

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.

These pricing principles mirror those listed in clause 6(5)(b)(ii) to (iv).

Whilst 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 ESC Act. 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 clause 6(5)(b)(i).

9.3.2 Effectiveness in reflecting relevant CPA clause

The CPA does not require an effective access regime to provide for regulated service prices, but where a regime does it should have regard to the pricing principles in clause 6(5)(b) of the CPA. As noted in the discussion above, where ESCOSA makes price determinations for regulated industries (such as essential maritime services), it is required, in essence, to take into account each of the elements of clause 6(5)(b)(i)- (iv), pursuant to section 25(3)-(5) of the ESC Act and section 32(2) of the MSA Act.

Reflecting this, the NCC has previously found that the SA Port Access Regime complies with clause 6(5)(b) of the CPA.[60] South Australia submits that this remains the case.

[60] NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 40.

10. Objects of Part IIIA

In making a decision on certification, the Minister must have regard to the objects of Part IIIA (section 44N(2)(aa) of the CC Act).

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

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

South Australia submits the SA Ports Access Regime is consistent with the objects of Part IIIA, as set out in this section.

10.1 Efficiency object

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.

As well as aligning the broad objectives of the SA Ports Access Regime with those of Part IIIA, importantly the Regime's objects also inform and guide ESCOSA's application and enforcement of the SA Ports Access Regime and any arbitration conducted under the Regime. The NCC 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.[61]

Further, as set out above in section 9, the SA Ports Access Regime effectively provides for efficiency promoting terms and conditions of access, ensuring that the operation of the regime reflects its stated objects.

[61] NCC (2017), Certification Guide, p 48.

The success of the SA Ports 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;[62]
- 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 section 5.1.2 of this application, 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.[63]

The NCC has previously stated that it considers the SA Ports Access Regime to be consistent with the first limb of the objects of Part IIIA.[64] The SA Ports Access Regime remains unchanged since that assessment, and South Australia submits that it remains consistent with the first limb of the objects of Part IIIA.

10.2 Consistency object

The second limb of the objects of Part IIIA is concerned with whether the Regime provides a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

Access to South Australian ports is either regulated under the Regime or unregulated: there is no other regulatory arrangement for South Australian ports and none proposed by the South Australian Government. Of the 11 trading ports in South Australia, at present six are proclaimed and subject to the 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 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. This assessment was originally made for Klein Point, Whyalla and Port Bonython at the commencement of the regime, with Ardrossan removed from the regime following the 2007 ESCOSA review. Other port facilities in SA are either limited to providing passenger transport facilities and intrastate cargo services (Penneshaw and Cape Jervis).

62 ESCOSA (2017), 2017 Ports Access and Pricing Review – Final Report, September 2017, p 2.

63 ESCOSA (2017), 2017 Ports Access and Pricing Review – Final Report, September 2017, p 20.

64 NCC (2011), South Australian Ports Access Regime – Final Recommendation, p 42

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 SA Ports Access Regime would apply. There is no requirement for new or amended legislation in order to maintain consistency in 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.

The NCC has previously assessed the SA Ports Access Regime to be in accord with the second limb of the objects of Part IIIA.[65] In its 2017 review, ESCOSA identified two possible improvements to the Regime:[66]

- ESCOSA recommended an examination of the alignment of the services in the scope of the Regime in order to increase the clarity of the Regime and ensure that the scope of port infrastructure included in the Regime continued to reflect the demands of current supply chains;
- ESCOSA recommended examining opportunities to better integrate transport infrastructure access regimes. In particular, this related to considering the opportunity for improved consistency in the access processes applicable to ports and rail infrastructure, reflecting that some access seekers may require access to multiple modes of transport.

While no changes to the Regime have yet been made in response to these recommendations, these do not indicate an existing lack of consistency of access regulation within the ports industry. The treatment of ports and rail as separate industries, with separate access regimes, is consistent with the approach that is adopted in other jurisdictions, such as Queensland where separate certified access regimes are applied to port (coal terminal) and rail assets.

Further, ESCOSA's recommendations demonstrate that potential improvements to the SA Ports Access Regime, including opportunities to improve consistency between related industries (in this case ports and rail), are under active ongoing consideration. Renewed certification of the SA Ports Access Regime will support the South Australian Government's continued efforts in this regard.

South Australia submits that the SA Ports Access Regime remains consistent with the second limb of the objects of Part IIIA.

South Australia notes that the NCC has, in some of its past certification work, considered whether there is benefit gained by the application of localised versions of Part IIIA that do not appear to add refinement or certainty to the generally applicable national scheme for access regulation in Part IIIA.[67] The NCC has previously concluded that, where a state or territory regime appears to be largely a localised version of Part IIIA there would appear to be little benefit (and indeed a lessening of regulatory consistency through unnecessary duplication) in applying that state or territory regime in preference to relying on the national access regime in Part IIIA.

In this case, when compared to the national access regime in Part IIIA, the SA Ports Access Regime is distinguishable because it is a self-contained regime that addresses the needs and expectations of the SA Ports industry, with the scheduled five-yearly reviews providing a structured means for the regime to adjust in the event of changing market circumstances. The Regime provides for price regulation of essential maritime services by ESCOSA (in its current light form or a full form of

[65] NCC (2011), South Australian Ports Access Regime – Final Recommendation p 43.

[66] ESCOSA (2017), 2017 Ports Access and Pricing Review – Final Report, September 2017, p 3.

[67] NCC (2009), Application for certification of the NSW Water Industry Infrastructure Access Regime – Final Recommendation, 11 May 2009, p 6

regulation if ESCOSA determines that appropriate) and a two-step dispute resolution process of conciliation by ESCOSA and subsequent arbitration if necessary. The NCC has previously assessed that these additions enhance what is available to access seekers under the general provisions of Part IIIA. South Australia submits that this remains the case.

11. Duration of certification

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

The South Australian Government submits that certainty for maritime industries and those seeking access to marine facilities should be an important consideration in setting the duration of the certification sought. It is requested that the NCC recommend to the Commonwealth Minister that the South Australian port access regime be certified for 10 years. This proposed term recognises the long lead times associated with port investment, and is considered to be appropriate for promoting investments in ports facilities in South Australia. The existence of the five-yearly ESCOSA reviews of the Access and Pricing Regimes will ensure the continued appropriateness of the application of the access regime over this period.

South Australia notes that a certification term of 10 years is consistent with NCC practice for other regimes, including:

- the South Australian rail access regime (certified for 10 years in July 2011)[68]
- the South Australian water infrastructure access regime (certified for 10 years in May 2017)[69]
- the Queensland rail access regime (certified for 10 years in January 2011)[70]
- the Dalrymple Bay Coal Terminal access regime (certified for 10 years in July 2011)[71]
- the NSW water infrastructure access regime (certified for 10 years in April 2020)[72]

[68] Commonwealth of Australia (2011), Decision on Effectiveness of Access Regime Under Section 44N – South Australian Rail Access Regime. See here for a copy of the decision.

[69] Commonwealth of Australia (2017), Decision on Effectiveness of Access Regime Under Section 44N – South Australian Water Access Regime. See here for a copy of the decision.

[70] Commonwealth of Australia (2011), Decision on Effectiveness of Access Regime Under Section 44N – Queensland Rail Access Regime. See here for a copy of the decision.

[71] Commonwealth of Australia (2011), Decision on Effectiveness of Access Regime Under Section 44N – Dalrymple Bay Coal Terminal Access Regime. See here for a copy of the decision.

[72] Commonwealth of Australia (2020), Ministerial Statement, The Hon. Michael Sukkar MP, Assistant Treasurer, NSW water infrastructure access regime, 2 April 2020. See here for a copy of the statement and here for further information.

12. References

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Commonwealth of Australia (2011), Decision on Effectiveness of Access Regime Under Section 44N – Queensland Rail Access Regime

Commonwealth of Australia (2011), Decision on Effectiveness of Access Regime Under Section 44N – Dalrymple Bay Coal Terminal Access Regime

Commonwealth of Australia (2017), Decision on Effectiveness of Access Regime Under Section 44N – South Australian Water Access Regime

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ESCOSA (2017), Ports Access and Pricing Review – Final Report, September 2017.

ESCOSA (2017), Ports price determination: 2017 – 2022.

ESCOSA (2020), 2020 Ports Price Monitoring Report.

NCC (1997), Application for Certification of the Victorian Access Regime for Commercial Shipping Channels – Reasons for Decision, 12 May 1997.

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NCC (2011), South Australian Ports Access Regime; Application for certification as an effective access regime – Final Recommendation, March 2011.

NCC (2017), Certification of State and Territory Access Regimes – A guide to Certification under Part IIIA of the *Competition and Consumer Act 2010* (Cth), December 2017.

SA Government (2010), South Australian Ports Access Regime – Submission to the National Competition Council, October 2010.

A. Relevant legislation

Legislation supporting the South Australian Ports Access Regime:

- *Maritime Services (Access) Act 2000*
- Maritime Services (Access) Regulations 2012
- *Essential Services Commission Act 2002*
- Essential Services Commission Regulations 2019