



22 November 2016

Essential Services Commission of South Australia  
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**Email: [escosa@escosa.sa.gov.au](mailto:escosa@escosa.sa.gov.au)**

Attn: Mr Stuart Peevor

Dear Sir

### **2017 Ports Pricing and Access Review**

Viterra welcomes the opportunity to make a submission in response to the 2017 Ports Pricing and Access Review Issues Paper published by the Commission in September 2016 (**Issues Paper**).

Viterra operates six bulk grain port terminal facilities in South Australia. The bulk handling facilities at Port Adelaide, Port Giles, Wallaroo, Port Lincoln and Thevenard, and the bulk loader at Outer Harbor are Maritime Services for the purposes of the *Maritime Services (Access) Act 2000 (MSA)*.

#### **1. Changes in the industry since 2012**

There have been a number of significant changes in the grains industry since the Commission's previous review in 2012. These changes include:

- the introduction of a new mandatory Code of Conduct in September 2014, which now regulates access to port terminal services for the export of bulk wheat;
- the commissioning of two new port terminals at Port Adelaide, operated by Patrick and JKI, for the export of bulk grains; and
- Viterra's introduction of long term agreements in 2016 to replace the previous auction system for allocating port terminal capacity. With the introduction of long term agreements, both Viterra and exporters now have significantly greater long term certainty.

We have set out further information in relation to each of these developments below.

#### ***Introduction of the Code***

On 30 September 2014, the previous "access test" and requirement for Viterra to have an ACCC-approved access undertaking was replaced with a new regulatory framework under the *Port Terminal Access (Bulk Wheat) Code of Conduct (Code)*.

The Code is a mandatory Code under the *Competition and Consumer Act 2010 (CCA)*, and is administered by the ACCC.

The Code applies to all "port terminal service providers" who provide port terminal facilities capable of handling bulk wheat. However, the ACCC can exempt certain port terminal service providers from the



operation of Parts 3-6 of the Code if it considers that exemption is appropriate having regard to the matters set out in section 5(3) of the Code.

The Minister can also exempt a cooperative from the operation of Parts 3-6 of the Code if the Minister is satisfied of the matters in section 5(1) of the Code.

The Minister has exercised this power to exempt all grain export port terminals operated by CBH in Western Australia, and the ACCC has exercised its power to exempt 11 port terminals nationally.

Details of these exemptions are set out in Table 1 below.

**Table 1: Exemptions from the Code**

Operator	Port Terminal	State	ACCC or Minister
Patrick Stevedoring	Port Adelaide	SA	ACCC
Graincorp	Carrington terminal at the Port of Newcastle	NSW	ACCC
Newcastle Agri Terminal	Carrington terminal at the Port of Newcastle	NSW	ACCC
Qube Holdings Limited	Berth 3 Kooragang at the Port of Newcastle	NSW	ACCC
Quattro	Berth 104, Port Kembla	NSW	ACCC
Graincorp	Berth 103, Port Kembla	NSW	ACCC
Emerald	Melbourne port terminal	VIC	ACCC
Graincorp	Geelong port terminal	VIC	ACCC
Graincorp	Port of Brisbane	QLD	ACCC
Queensland Bulk Terminals	Port of Brisbane	QLD	ACCC
WA Plantation Resources	Bunbury port terminal	WA	ACCC
CBH	Albany port terminal	WA	Minister
CBH	Esperance port terminal	WA	Minister
CBH	Geraldton port terminal	WA	Minister
CBH	Kwinana port terminal	WA	Minister



As a result of these exemptions, the only port terminal service providers that are required to comply with the more onerous requirements contained in Parts 3-6 of the Code are:

- Viterra in respect of its port terminals at Port Adelaide (Outer Harbor and Inner Harbour), Port Lincoln, Port Giles, Wallaroo and Thevenard; and
- Graincorp in respect of its port terminals at Portland in Victoria and Mackay and Gladstone in Queensland.

Parts 3-6 of the Code – which do not apply to 15 of the port terminals with which Viterra competes nationally – require Viterra to:

- obtain the ACCC's approval for any changes to the capacity allocation system set out in its Port Loading Protocols. This requirement and approval process resulted in an approximate two and a half year process for Viterra to introduce long term agreements for the benefit of the South Australian industry;
- provide access to all exporters who meet minimum prudential requirements and enter into an access agreement;
- comply with a mandatory negotiation process in relation to any access agreement, including mediation or arbitration of those terms;
- publish standard terms of access and reference prices, and comply with mandatory procedures relating to the variation of those terms and prices;
- ensure that it does not discriminate in favour of its own trading operations;
- publish information about expected port capacity, performance indicators and stock; and
- retain records relating to access agreements, disputes and shipments by exporters.

Given the exemptions that have been granted in the past two years, the “national” Code has a clearly disproportionate focus and impact on port terminals in South Australia. The “de-regulatory” intentions underpinning the move from ACCC access undertakings to a mandatory Code have also resulted in “de-regulation” for only some port terminal operators.

### ***Introduction of new export port terminals in South Australia***

Since the Commission undertook its last review in 2012, the following two new grain export terminals have commenced operations in South Australia:

- the port terminal at Berth 29 at Port Adelaide operated by Patrick, which Viterra understands has the capacity to export approximately 650,000 tonnes of bulk grain each year; and
- the port terminal at Osborne at Port Adelaide operated by JK International (who is not currently compliant with the Code), which Viterra understands has the capacity to export approximately 975,000 tonnes of bulk grain each year

Patrick's port terminal at Berth 29 is the subject of an ACCC exemption. The status of JKI's facility is unclear.



In addition, Free Eyre Ltd and Sea Transport Corp have announced their intention to build a bulk commodity export terminal at Lucky Bay on the upper east coast of the Eyre Peninsula in South Australia, and are also considering a second facility to be built in Wallaroo that would receive, store and export grain and fertiliser.<sup>1</sup> It is understood that this port terminal will be ready to export at some time in 2017.

There is also a current proposal to develop a new deep water port facility at Port Spencer on the southern end of the Eyre Peninsula, 70km north east of Port Lincoln. It is proposed that this development would comprise wharf / jetty structures, storage buildings and facilities (for ore and grain), and a road transport and rail access corridor.

This level of new investment in competing port terminal facilities represents a significant development in the South Australian industry.

As set out above, none of these capacity developments are subject to the same level of regulation as Viterra's port terminals.

### ***Introduction of long term agreements***

On 3 December 2015, the ACCC approved Viterra's proposal to introduce long term agreements for access to its port terminals in South Australia.

The introduction of long term agreements brought Viterra broadly into line with both the Eastern States (where GrainCorp introduced long term agreements in 2013, before the commencement of the Code) and Western Australia (where CBH introduced long term agreements in 2015, after the Minister granted an exemption from the Code).

Viterra's key purpose in introducing long term agreements was to provide greater certainty, both for itself as infrastructure owner and in response to requests from exporter customers who wanted long term agreements so they could better plan longer-term export programs and obtain a greater ability to build long term relationships with overseas customers and growers. Viterra also considered that the introduction of long term agreements would:

- provide a greater ability to align booked capacity more closely with supply chain planning; and
- secure commitments in relation to the acquisition and exporting of South Australian grain and therefore facilitate more efficient investment in, and expansion of, supply chain infrastructure.

The introduction of long term agreements replaced the previous auction system. Viterra introduced the auction system in 2012 specifically in response to requests from exporters and feedback from the ACCC. Despite their strong initial calls for the auction system, by 2015 the auction system did not have the support of any exporters. The ACCC also appeared to accept that there were significant challenges with the system. In Viterra's view, these challenges included that the auction system:

- required large amounts of industry funds to be tied up in the auction rebate pool for periods of more than a year;
- involved an inherent disconnect between exporters' requirements for physically executing grain through the South Australian export supply chain and the arbitrage opportunities provided by the payment of auction rebates. This often resulted in exporters making bookings

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<sup>1</sup> [http://www.world-grain.com/articles/news\\_home/World\\_Grain\\_News/2016/10/New\\_grain\\_handling\\_facility\\_pl.aspx?ID=%7BD907ADCC-77FE-476D-A168-9AD6F0A3E30F%7D](http://www.world-grain.com/articles/news_home/World_Grain_News/2016/10/New_grain_handling_facility_pl.aspx?ID=%7BD907ADCC-77FE-476D-A168-9AD6F0A3E30F%7D)



in order to maximise rebate payments (or hedge against exposure through the booking of other Slots), rather than based on their genuine export requirements, which did not result in any long term benefits to growers or any increase in grain exports;

- the rebate methodology resulted in significant operational inefficiencies incentivising otherwise irrational behaviour (for example, there were incidences of exporters using a slot to only partially load a vessel, then moving the vessel out to anchor before returning that vessel to the port terminal in a later slot to complete the load, as this would enable that exporter to use both booked slots and – hence – receive a higher rebate); and
- was rigid and inflexible, and significantly limited the ability for Viterra and clients to enter into commercial negotiations which could lead to increased grain exports from South Australia, reduce costs and realise operational efficiencies.

In response to these issues – and having regard to the objectives set out above – Viterra consulted extensively with all exporter clients and the ACCC to design and introduce a system for allocating both long term and short term capacity at its South Australian port terminals.

After approximately 18 months of consultation with the ACCC and industry participants, Viterra submitted its formal application to vary the capacity allocation system in its Port Loading Protocols to the ACCC on 12 March 2015.

In general, the new capacity allocation system involves:

- an opportunity for exporters to apply for capacity and enter into a long term agreements in respect of the 2016/2017, 2017/2018 and 2018/2019 seasons;
- a transparent and non-discriminatory process for Viterra to allocate long term capacity, based primarily on commercial negotiations if necessary in relation to over-subscribed Slots;
- Viterra reserving at least 500,000 tonnes of short term capacity each quarter, spread across each port terminal, to enable further bookings including by smaller exporters or new entrants; and
- an ability for all exporters to trade and/or move bookings.

The ACCC's Guidelines state that the ACCC will aim to assess and decide whether to approve any changes to a capacity allocation system within 12 weeks. However, in this case, the ACCC's actual decision-making process took nearly nine months.

During this period, Viterra had to push back the start of its long term capacity allocations from 1 October 2015 to 1 October 2016. The resulting commercial uncertainty, and availability of long term contracts in Western Australia and the Eastern States also resulted in exporters committing to acquire capacity (and grain from growers) in those other States ahead of making significant commitments in South Australia.

Following the ACCC's approval of the long term capacity allocation system on 3 December 2015, Viterra released 5.2 million tonnes of long term capacity for booking for each of the 2016/17, 2017/18 and 2018/19 seasons. Following completion of the allocation process for long term capacity, Viterra



released 4.14 million tonnes of short term capacity<sup>2</sup> for booking on a first-in-first-served basis in respect of the 2016/2017 season.

This has resulted in multiple exporters:

- committing to a significant amount of long term capacity for 2016 to 2019; and
- booking a further 1.14 Mt of short term capacity for the 2016/2017 season.

Viterra has received positive feedback from a number of exporters in relation to the new system, in particular in relation to the ease and simplicity of booking.

Unless the ACCC issues an Objection Notice by 1 February 2017 (which the ACCC is currently considering), Viterra will be able to offer further long term capacity for the 2019/2020 and 2020/2021 seasons.

## **2. No use of market power**

The period since the Commission's last review has been characterised by:

- reasonable prices for regulated services;
- significant investment in supply chain infrastructure and operational improvements;
- the continued provision of open access to a range of exporters, including the provision of long term certainty of access under new long term agreements; and
- continued increases in output, with the tonnes of grain exported from Viterra's port terminals continuing to exceed the 10 year average;

These factors are clearly inconsistent with any suggestion of a use of market power, or need for intrusive regulation to address any market failure.

### ***Reasonable prices and returns***

As the Commission is aware from information provided to it, Viterra's price increases for regulated services have been modest since 2012. In addition, its rates of return over this period have been reasonable, indicating that it is not achieving monopoly returns.

The main reasons for the increases in prices at various port terminals relate to increases in energy and labour costs, and maintenance requirements.

### ***Significant investment in infrastructure and operational improvements***

Viterra has also, during the same period, made a number of significant investments in its port terminal infrastructure and in operational improvements affecting bulk loading facilities at its port terminals. These investments include:

- recladding the bulk loading facilities at Port Giles, Wallaroo, Thevenard and Port Adelaide;

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<sup>2</sup> This included capacity that had not been allocated during the long term capacity allocation process.



- upgrading the electrical switch rooms at Port Adelaide and Thevenard (a multi-million dollar project);
- replacing the trestle legs on the bulk loading facility at Wallaroo;
- installing a belt and replacing the dust plant for the bulk loading facility at Port Lincoln;
- installing a 40 metre weighbridge at Port Giles; and
- installing a cable reeler gearbox for the bulk loading facility at Thevenard.

***Continued provision of open access***

Since 2012, Viterra has allocated more than 29 million tonnes of port terminal capacity for grain – via auction, long term capacity and first-in-first-served short term capacity – to 26 exporters.

Details of this capacity and the number of exporters are set out in Table 2 below.

**Table 2 – Capacity allocation 2012-2016**

	<b>Booked tonnes</b>	<b>Number of exporters</b>
1 October 2012 – 30 September 2013	5,684,333	12
1 October 2013 – 30 September 2014	6,401,933	16
1 October 2014 – 30 September 2015	5,768,424	18
1 October 2015 – 30 September 2016	5,018,992	14
1 October 2016 – 30 September 2017	4,607,392 to date	11 to date

During this period, Viterra has not received any formal dispute notifications under its Port Loading Protocols in relation to the allocation of capacity at its port terminals (and has, in fact, received positive feedback about the new long term capacity arrangements). There have also not been any access disputes referred to the Commission for conciliation or arbitration under the MSA.

***Continued increases in shipping***

Table 3 below sets out details of the volumes of grain and other commodities exported from Viterra’s port terminals for the period 1 January 2012 to 31 October 2016.

**Table 3 - Exports from Viterra operated port terminals in South Australia (tonnes)**

<b>Year</b>	<b>Grain</b>	<b>Salt / Gypsum / mineral sands</b>	<b>Total</b>
2012	5,856,506	2,486,674	8,343,180
2013	6,593,377	2,652,660	9,246,037





Year	Grain	Salt / Gypsum / mineral sands	Total
2014	5,876,928	2,814,236	8,691,164
2015	6,596,952	3,022,161	9,619,113
2016 (10 months only)	4,168,349	2,674,258	6,842,607

This compares to a 10 year average of approximately 7.5 million tonnes.

### 3. No need for any increase in the scope or extent of regulation

In carrying out its review, the Commission is performing a function under the *Essential Services Commission Act 2002 (ESC Act)*. Section 6 of the ESC Act requires the Commission to have as its primary objective the protection of long term interests of South Australian consumers with respect to the price, quality and reliability of essential services.

It must also have regard to the need to facilitate maintenance of the financial viability of regulated industries and the incentive for long term investment, promote economic efficiency, and ensure consumers benefit from competition and efficiency.

Viterra does not consider that there is evidence of any use of market power or market failure. Viterra has implemented only modest increases in price, coinciding with significant new investment in infrastructure and operational improvements, increased bookings by a range of customers, and increased output at its port terminals.

The introduction of long term agreements has also provided both Viterra and exporters with greater certainty in planning longer-term export programs and facilitated long term investment decision-making. Exporters are able to build long term relationships with overseas customers and Viterra is able to align booked capacity more closely with supply chain planning and has greater certainty for the purposes of investment in, and the expansion of, infrastructure.

To the extent that the MSA access and pricing regulatory regime is maintained, Viterra considers that the scope and extent of any regulation is appropriate and should not be increased, and that there is no case for extending the scope of the services covered or introducing any form of heavier-handed access or pricing regulation.

Further, any regime should be applied equally to all port operators and owners. The risks of further regulation and/or the asymmetrical application of regulation are significant. Market outcomes are vulnerable to distortion (to the disadvantage of South Australian port terminal operators and to South Australian growers) if regulation is burdensome, results in uncertainty, or is applied unequally.

Viterra considers that the most efficient outcomes in markets are achieved through the opportunity to reach commercial outcomes. Commercial negotiations are able to take into account the interests of both parties and best able to reflect market conditions. The lack of any disputes in relation to Viterra's capacity allocation system and under the MSA indicates the success of commercial negotiations in this industry.

Regulation should not intrude on the opportunity to negotiate successfully commercial outcomes. At present, the MSA seeks to balance the rights of access seekers and access providers by ensuring that commercially negotiated outcomes are afforded primacy.





If the Commission has any questions, we would be pleased to assist.

Yours sincerely

A handwritten signature in black ink that reads 'Damian Fitzgerald'.

Damian Fitzgerald  
General Counsel