VITERRA THE AGRICULTURE NETWORK

Essential Services Commission of South Australia
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1 February 2022

Attn: Mr Mark Caputo

Dear Sir

2022 Ports Pricing and Access Review

Viterra welcomes the opportunity to make a submission in response to the Ports Pricing and Access Review 2022.

Viterra operates six bulk grain 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).

Viterra is dedicated to connecting South Australian grain growers from the farm gate to end user customers, domestically and overseas. Our focus is on maintaining and investing in long term, sustainable infrastructure that benefits South Australian growers.

In this regard, Viterra provides a valuable service to growers and the grain industry, and our business contributes significantly to South Australia's economic success and wellbeing, with a focus on regional South Australia. In the past 12 months, Viterra has spent $978 million helping South Australian growers get their grain to market, with $738m paid to growers for their grain and $240m spent on maintaining and operating Viterra's grain supply chain in South Australia.

It is also worth noting that Viterra adapts to changing circumstances within the industry and during the 21/22 harvest it would seem that Viterra was the only storage and handling provider in the State that adjusted its practices to handle the introduction of GM canola into its storage system.

Changes within the industry since the Last Ports Pricing and Access Review in 2017
When the MSA was introduced, Viterra was the only operator of grain export ports in South Australia. Since the last Ports Pricing and Access Review in 2017, we have seen five new grain port operators export grain from South Australia, and 11 ports utilised, with three more ports proposed (and one of those three currently being constructed by T-Ports at Wallaroo). Viterra is therefore

now only one of six port operators who have facilitated the export of grain from South Australia since the last access review.

Should the MSA be retained?

The MSA was introduced in part to ensure that exporters had access to port capacity. However, South Australia now has numerous port operators and ports, with export capacity significantly exceeding the average export task. Any concern as to access to port capacity that might have existed at the introduction of the MSA no longer exists.

It has been argued that the MSA negotiate-arbitrate regime encourages the settlement of commercial disputes; however, that assumes an environment in which disputes are commonplace, when that is not the case. Further, there is already a significant incentive for Viterra to allow access and negotiate commercial agreements with access seekers. This is because:

1. there is significant competition amongst grain ports in South Australia and exporters have a number of other port options if Viterra does not negotiate a mutually beneficial commercial outcome;
2. the economic report prepared by independent experts Charles River Associates and provided to the ACCC during Viterra's recent exemption application under the Mandatory Port Code made it clear that Viterra is incentivised on economic grounds to encourage access to its facilities; and
3. there are low barriers to the development and expansion of port terminal services, as evidenced by the significant entry of new grain port terminal operators that has occurred, and continues to occur, in South Australia.

While we would support the retention of the MSA, we would therefore do so at the lowest level of oversight relevant to any remaining justification for its continuance and for all grain ports in South Australia.

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.

The Commission 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.

Access regimes are typically limited to facilities that exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically. Access regimes are, in broad terms, intended

to replicate outcomes that would occur if a facility's service was provided in a competitive market. Once access can be provided by a number of providers, who compete with each other, the economic rationale for imposing restrictive requirements on a service provider diminishes (or falls away entirely) and regulatory instruments should be applied in the most light-handed manner possible.

There is no evidence of any use of market power or market failure in relation to the provision of Maritime Services in South Australia. After its detailed review of the South Australian bulk grain export supply chain (published in January 2019), ESCOSA found that there was no evidence of Viterra using any market power to disadvantage competition, and that Viterra was an efficient and well managed business that was receptive to customer needs and pursuing innovation. Viterra has continued to operate its supply chain with only modest increases in price, coinciding with significant investment in infrastructure and operational improvements. Importantly, and as noted above, since the Access Regime was introduced, a number of new operators of export ports have commenced operations in South Australia. These operators compete with Viterra for the provision of services.

In these circumstances and to the extent that the Access Regime is to be maintained, Viterra considers that there is no case for extending the scope of the services covered or introducing any form of heavier-handed access or pricing regulation.

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 are best able to reflect market conditions. The lack of any disputes in relation to Viterra's capacity allocation system demonstrates the success of commercial negotiations in the grain industry.

There is a need for regulatory consistency

Given the significant changes within the industry since the last Ports Access and Pricing Review, and the excess shipping capacity and number of alternative ports available in South Australia, there is a significant question over how the regulation is currently applied In South Australia.

Currently, only six of the 11 ports in South Australia are "proclaimed" ports under the Access Regime. A further two (non-Viterra) ports are likely to be "on-line" within the next 1-2 years (and, in the absence of proclamation, will not be regulated under the Access Regime).

Our view is that any regulatory regime should be applied equally to all grain ports. The risks of further regulation and/or the asymmetrical application of regulation are significant. It is well understood that market outcomes are vulnerable to distortion if regulation is burdensome, results in uncertainty, or is applied unequally. If only the Viterra ports are subject to the Access Regime, then Viterra will be subject to increased regulatory costs that do not apply to its competitors (as will Viterra's customers who are indirectly exposed to those costs).

Strong consideration should be given to creating a level playing field for all grain ports in South Australia either by making all grain ports in South Australia proclaimed ports for the purpose of the Access Regime or, in the alternative, removing the proclaimed status from all grain ports. Ports should only then be proclaimed if evidence of access issues occur. This will reduce unnecessary regulatory costs and increase efficiencies, benefitting the South Australian grain industry as a whole. It would also produce consistency across all ports making it easier for exporters to do business in South Australia.

There is no requirement for ring-fencing

The NCC has suggested that it would be desirable for ESCOSA to consider introducing ring fencing and confidentiality provisions aimed at mitigating the risk of misuse of information.

The introduction of ring-fencing within the grain industry has been considered by both the Productivity Commission in its review of bulk wheat marketing arrangement in 2010 and the ACCC in its assessment of Viterra's initial access undertaking in 2009. Both the Productivity Commission and the ACCC found that there was no need for ring fencing of information.

At that time there was no evidence that there was any likely misuse of confidential information amongst vertically integrated port operators and in reviewing the NCC findings there is still no evidence of any concerns.

Information ring fencing arrangements are costly and unnecessary. In particular, where there is no need for separation (no demonstrated problem and no clear benefits), there is no justification for imposing these costs on port operators and the grain industry generally.

To the extent that there are legitimate concerns in relation to specific anti-competitive downstream discrimination, these can be dealt with on an individual basis under section 46 of the Competition and Consumer Act 2010 (Cth), rather than through legislative amendments that will unnecessarily increase costs on an ongoing basis for all market participants.

The confidentiality of information between port operator and customer should be managed through confidentiality provisions in commercial agreements and reinforced with employees via the business' Code of Conduct.

Yours sincerely

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