28 March 2012

Mr Peter Lim
Essential Services Commission of SA
GPO Box 2605
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Dear Sir

2012 Ports Pricing and Access Review

We refer to the Commission's invitation for submissions contained in the 2012 Ports Pricing and Access Review Issues Paper (**Issues Paper**) published February 2012.

We set out below our submission to the respective issues set out in Parts 4 and 5 of the Issues Paper.

EXECUTIVE SUMMARY AND CONCLUSION

Viterra Limited (**Viterra**) provides port terminal access to third party exporters that meet the requirements of Australia's competition law and current wheat marketing arrangements. This is done in a manner that ensures fair and open access to all exporters.

Viterra requires regulatory certainty to operate its business and derive a reasonable return from its significant and ongoing investment in South Australia. It also requires flexibility to operate its port terminal facilities effectively and, as such believe the revised undertaking approved by the ACCC and the current regulatory oversight by ESCOSA strikes the right balance between the interests of growers, exporters and access seekers and Viterra's legitimate business interests as the infrastructure owner.

Viterra considers that the Objects set out in Section 3 of the *Maritime Services (Access) Act 2000* (the **Act**) are being appropriately met by the regulatory framework set out in the Act.

In particular the negotiate/arbitrate framework under Part 3 of the Act provides a non discriminatory, clear and transparent process for access seekers.

The key features of the access regime under the Act include:

(a) the provision by Viterra of preliminary information to an access seeker under section 12 as to the extent to which Viterra's facilities are currently being utilised and the technical requirements and rules with which an access seeker must comply;

(b) price information for Essential Maritime Services under section12 (1)(b) and Viterra's published price list as part of its Price Information Kit pursuant to Ports Industry Guideline No 1 Access Price Information (**Guideline No.1**);

(c) the obligation to negotiate access in good faith and the requirement to meet the proponents (access seekers) reasonable requirements as far as practicable (section14); and

(d) dispute resolution – the ability of the party to refer a dispute to the Commission (section 15), the Commission to conciliate that dispute (section 16) and require the parties to attend compulsory conferences if necessary (section 17), and ultimately refer the dispute to arbitration if it is not resolved (section 18). The provisions of the *Commercial Arbitration Act 1986* apply thereafter and Divisions 6 and 7 of the Act include rules regulating the conduct of the arbitration.

There has been a significant increase in the number of clients using the ship loaders (or bulk loading plant) for grain and non grain commodities, from 5 to 19 clients during the regulatory period.

The Commission will be aware that no access disputes have arisen in respect of the ship loaders which have gone to formal conciliation under the Act. The parties have successfully negotiated commercial outcomes without the need to refer to arbitration.

In addition, access to services for the export of bulk wheat are regulated through the Access Undertaking provided by Viterra to the Australian Competition and Consumer Commission under Part IIIA of the Competition and Consumer Act 2011(**Access Undertaking**). That undertaking applies to six ports in South Australia and after nine months of consultation with both regulators and the broader industry was accepted by the ACCC on 29 September 2011.

As an outcome of the approval process, Viterra will introduce new initiatives to improve services to exporters, including an auction system for capacity allocation from mid 2012. Further, since 1 October 2011 Viterra has already implemented new measures for information disclosure and flexibility for exporters in transferring shipping slots.

Any potential market power Viterra may have over access to its port infrastructure is constrained by the Access Undertaking and the access regime under Part 3 of the Act. Any marker power Viterra has is therefore perceived rather than real.

In terms of price monitoring of Essential Maritime Services under Section 6 of the Act, Viterra supports the continuation of "light-handed regulation" by the Commission. In our view the Commission's findings in the 2007 Ports Pricing and Access Review Final Report are still true today, namely;

> *" that there is no justification for more heavy-handed price regulation than currently existed.....the major benefit from pricing monitoring was that it provided transparency to access seekers through publication of the price list".(p.22)*

Viterra publishes on its website a price list as part of its Price Information Kit which has been well received in the market place and has operated without imposing undue regulatory cost on Viterra. The publication of prices enables the Commission to monitor price movements and compare pricing with other Australian ports.

Viterra provides regulatory accounts to ESCOSA in accordance with section 42 of the Act and Port Industry Guideline No.2. By providing ESCOSA with separate accounts and records pertaining to the provision of regulated services at each port, the Commission is well placed to assess whether Viterra is earning extensive returns from the provision of Essential Maritime Services on a continuing basis.

In our view the Ports Access Regime should continue for a further period of 5 years from 31 October 2012 without amendment.

Furthermore, price regulation should also continue for a further 5 year period on the same basis.

We now turn to the issues raised by the Commission adopting the respective numbering from the Issues Paper.

4.1.1 What are the possible implications for the ports access regimes as a result of Viterra's approved Access Undertaking?

The Access Undertaking was the subject of extensive consultation with industry, clients and other stakeholders in respect to the continuation of the Undertaking for a further period of 3 years from 30 September 2011 and included a number of changes to the method for allocating port capacity and port terminal services.

Whilst the Access Undertaking was specific to the requirements of the W*heat Export Marketing Act 2008* (Cth), Viterra applies the Access Undertaking principles to all grains, not just wheat. This extends to managing demand and determining priorities at port for all grain customers.

Furthermore, Viterra does not see any inconsistency or unnecessary duplication arising out of the access regime contained in Part 3 of the Act.

In our view, further regulation is not required, bearing in mind that the cost of regulation is ultimately borne by users.

4.1.2 How has competition between ports for container volumes developed?

To what extent does Flinders Ports hold market power in providing container facilities?

No submission.

4.1.3 Is the existing ports access regime capable of dealing with developments in the South Australian resources industry?

During the regulatory period Viterra has successfully negotiated access arrangements to its bulk loading plant at the ports of Thevenard and Ardrossan for Gypsum Resources Australia, Iluka Resources, Adelaide Brighton Cement and Cheetham Salt.

Viterra recently entered into a long term agreement commencing 1 July 2010 to provide bulk loader services to a client at Thevenard.

The matter was dealt with under the provisions of the Part 3 of the Act, including referring the matter to the Commission for conciliation. Conciliation was not necessary, as the parties ultimately agreed commercial terms.

Viterra provides access to the bulk loader at Thevenard for the export of mineral sands, having spent in excess of $1.6 million to improve the conveyor belt. Approximately 500,000 tonnes per annum of mineral sands is put through the bulk loader.

In 2008, Viterra also negotiated a long term contract for bulk loading services with a client at Ardrossan and Thevenard. This agreement was entered into on commercial terms between the parties without reference to conciliation or dispute resolution.

In 2009, Viterra negotiated with a client to export a commodity not previously exported from Ardrossan because of an emergency relating to damage at another port facility (not Viterra's). Commercial terms were agreed between the parties and Viterra successfully performed services for the client whilst repairs were made to the other port facility (over a 3 month period).

Viterra submits that the negotiate/arbitrate framework under the Act is appropriate to deal with the expanding resources sector in South Australia.

It is in the interests of both Viterra and mineral exporters for this investment to occur and commercial negotiations between the parties within the framework of the Act are most likely to lead to optimal outcomes.

Access seekers are also able to negotiate improvements to plant, equipment and storage facilities to address their particular needs. An intending proponent advises Viterra of their requirements for new capital investment and Viterra will adjust its price to reflect those additional capital costs. This is discussed and negotiated between the parties in good faith in accordance with Guideline Number 1 and Viterra's Price Information Kit.

We have had and continue to have discussions with potential resource companies in relation to access at our bulk loading plants in South Australia. It should be noted that some resource entities require substantially different facilities and port sizes to the services offered by our bulk loading plants and the size of the adjoining ports. Where services are capable of being provided by the existing infrastructure (or modifying the existing infrastructure as contemplated above) then the existing ports access regime is capable of dealing with the developments in the South Australian resources industry. It should be noted that the Spencer Gulf Port Link has recently been granted major project status by the state government and notably the port infrastructure and deep water are aligned to the requirements of the resource entities requiring services. Other resource entities have also proposed other solutions for the export of resources from South Australia.

4.2 Has the Commission's present form of price regulation (i.e. price monitoring) been appropriate and effective in deterring market power from being used?

How do prices compare relative to other comparable ports in Australia having regard to factors such as economies of scale and longer-term ports infrastructure requirement?

Dealing with the second question first, Viterra is unable to comment on how prices compare relative to other ports in Australia and note that the Commission will undertake a price benchmarking study as part of its review.

Viterra has not had any disputes referred to the Commission for formal conciliation and/or referral to arbitration. Whilst last year a dispute was referred to the Commission under section 15 of the Act, the matter did not proceed to conciliation (section 16) and the matter was resolved between the parties. The success and continued appropriateness of the access framework is demonstrated by the fact that no access seeker sought to commence any formal dispute resolution process.

This clearly evidences that there has not been any misuse of market power by Viterra, assuming market power exists. It is in Viterra's commercial interests to maximise access to, and throughput of commodities at its bulk loading plant and ports.

In addition, Viterra has had no formal access disputes under the previous or current Access Undertaking provided to the ACCC. This evidences a workable access framework, both at the State and Commonwealth level, as well as Viterra's commitment to complying with its legal obligations.

As there is no evidence of misuse of market power, no changes to the regulatory framework are required. Indeed, further regulation will simply increase compliance costs on Viterra's business which must ultimately be borne by users.

As the Commission has observed, prices for Essential Maritime Services have generally increased in line with the consumer price index. Light-handed regulation serves to confer lower costs on the regulated business and, in turn, delivers benefits to users of those services.

4.2.2 ***Is it still the case that there is the potential for misuse of market power, or is there evidence of actual misuse of market power in the provision of Regulated Services and Essential Maritime Services.***

Viterra is committed to the access regime contained in Part 3 of the Act. Viterra welcomes access seekers and is committed to increasing volumes through the bulk loader to mitigate its significant fixed investment costs. Viterra engages with its customers to deliver commercial outcomes.

In our view, there is no evidence of actual or potential misuse of market power. There are sufficient protections for access seekers under the access regime such that they can obtain access in a timely and cost efficient manner without discrimination. The Act balances the rights of access seekers and access providers. Any further development of the access regime is unnecessary and will only result increased costs of regulation for minimal (if any) benefit.

Viterra has not recieved any complaints in relation to the pricing of Essential Maritime Services and the Price Information Kit provides all users and potential users of those services with sufficient price information and confidence that they will be able to access these services on commercial terms.

To what extent have commercial negotiations over access to port facilities been successful?

Please refer to our submission under 4.1.3 above

To what extent are negotiated prices different to the reference prices and how should this be taken into account in this review?

Reference prices are contained on Viterra's website through the Price Information Kit and are expressed as a range. Viterra negotiates reference prices to suit the particular requirements of individual customers. However, as a rule, those prices are within the indicative price band.

For clarity, reference prices are not those referred to in the Access Undertaking.

We agree with the Commissions' assertion that the ability of port users to actively negotiate prices on a case by case basis indicates that there is no misuse of market power (if any).

4.3 ***Is there a net benefit associated with retaining the current negotiate-arbitrate ports access regime?***

Is there a net benefit associated with retaining price regulation (of any form) for the ports price regime?

We submit that the Commission has correctly identified in its Issues Paper the real costs borne by regulated businesses in complying with the regulatory regime. Viterra has a dedicated staff of 10 people in its Commercial and Compliance section that attend to the requirements of the Act, compliance with Codes and Guidelines and the Access Undertaking.

Viterra's compliance costs are substantial and Viterra believes there is no justification for any higher level of regulation. Any further regulatory impost would ultimately be borne by South Australian industry and would dissipate any net benefit in retaining the current negotiate-arbitrate regime and price monitoring.

In seeking to achieve competitive outcomes and prevent monopoly pricing, there is a fine line between the benefits and costs of the current approach. Viterra considers that maintaining the current framework, which is operating efficiently, is the best outcome in the circumstances. The balance between constraining the potential use of market power and the direct costs it imposes on regulated business has been appropriately struck and no changes to the regulatory regime are required.

4.4 ***Other factors***

Have there been any developments over the current regulatory period that should be taken into account by the Commission when reviewing the need for continued regulation?

Are there likely to be any developments over the next regulatory period that should also be taken into account by the Commission?

Viterra has extended its Access Undertaking with the ACCC for a further 3 year term expiring September 2014.

In addition, industry is working on a National Code of Conduct for port access.

Are there any region or cargo specific issues that are relevant to this Review?

No submission.

Are there other factors that the Commission should have regard to when reviewing the need for continued regulation?

In the 2010-11 marketing year almost 8 million tonnes of grain was shipped from Viterra's port terminals. This constitutes a new all time record for annual grain exports shipped through South Australian Ports. To put this in context, the average annual grain export task from South Australia over the past 10 years is 4.3 million tonnes. Given this performance, we view regulation greater than the existing regime, is unnecessary

5.1 ***Are there any ports or maritime services to which coverage of the access regime should be extended or revoked? If so, what are the arguments for doing so?***

Viterra submits that the access regime has been appropriately struck both with respect to Viterra's rights and the rights of access seekers as well as the number of ports that are covered by the regime.

Without evidence or suggestion of any misuse of market power by Viterra or any other port operator there is no case for extending coverage of the regime.

Similarly Viterra is of the view that the coverage of services which are Regulated Services does not need to be extended.

5.2 ***Have there been any instances whereby an access seeker and access provider have encountered difficulties in negotiating access to port infrastructure, due to the current regulatory framework? If so, what were the impediments?***

Viterra submits that the access regime embodied in the current regulatory framework is effective in negotiating access arrangements between Viterra and access seekers. The current regulatory framework is appropriate and achieves the objectives set out in Section 3 of the Act.

The Commission is aware of a protracted negotiation between Viterra and an access seeker in relation to the price of access and access terms for the bulk loader at Thevenard. However the Commission is also aware that the matter was ultimately successfully negotiated and access arrangements for a term of 7 years were concluded.

Much of the negotiations in this matter were to do with the parties understanding each others' requirements over the lengthy term of the new agreement. Their negotiation resulted in a commercial outcome satisfactory to both parties whilst the potential for regulatory involvement by the Commission was present but not exercised.

Is the negotiation process set out in Part 3 of the MSA Act adequate for facilitating commercial negotiation of access? If not, how can the process be improved?

For the reasons already given, Viterra is of the view that the process set out in Part 3 is appropriate as evidenced by the lack reference to conciliation and arbitration. Viterra is of the view that no changes are necessary.

5.2.2 ***Are the information requirements set out under Part 3 of the MSAA and Guideline No 1 adequate for facilitating the negotiation of access? Do access seekers need additional information in order to make informed decision about obtaining access?***

Viterra submits that the information provided under Guideline No 1 is more than adequate for access seekers and no access seekers have raised issues with Viterra in relation to the scope or quality of information provided.

Furthermore the Guideline does not restrict Viterra from providing additional information sought by an access seeker if that information will assist the parties in negotiating an access agreement.

It is in Viterra's interest to grow its business and increase both the number of clients and volumes put through the bulk loader. To that end Viterra is committed to providing all information reasonably necessary to see that a mutually beneficial commercial agreement is concluded.

Ultimately the ability for access seekers to seek conciliation and arbitration works to encourage the parties to mutually disclose all necessary information to conclude an access agreement.

5.3 ***Do stakeholders consider that there would be a benefit from incorporating into the MSAA an informal resolution process similar to the one outlined in s12(B) of the ARTPA Act?***

Is the conciliation/arbitration process set out in Part 3 of the MSAA adequate for resolving access disputes? If the process is not considered to be sufficient how can the process be improved?

In Viterra's view the conciliation and arbitration process set out in Part 3 of the Act is adequate and effective in resolving disputes. Viterra had one experience already reported in this submission that evidences the success of this framework.

Whilst expanding the framework to include an informal resolution process similar to the one in s 12(B) of the ARTPA Act may be of assistance, there is no regulatory need in our opinion to expand or add to the current framework.

In Viterra's view, the threat of formal conciliation and/or arbitration is sufficient to incentivise the parties to resolve their dispute. No further regulatory involvement is necessary.

Yours sincerely

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