

4th February 2004

Mr. Lew Owens
Chairperson
Essential Services Commission of South Australia
GPO Box 2605
Adelaide SA 5001

Dear Mr. Owens

PORTS ACCESS REVIEW

On 15th December 2003 the Essential Services Commission of South Australia ("ESCOSA") released the Ports Access Review discussion paper. AusBulk Limited ("AusBulk") offers the following comments to that discussion paper.

Consistent with past submissions to ESCOSA, AusBulk has reviewed the discussion paper from the perspective of a Regulated Operator and as a user of Maritime Services.

AusBulk approach to continued operation of a Ports Access Regime

AusBulk believes that a Ports Access Regime should remain in place and broadly endorses ESCOSA's proposals and believes, as stated in the discussion paper, that the scope of application should be limited to:

- Essential Maritime Services; and
- Specific Maritime Services and associated land.

AusBulk does not believe that a public benefit would arise from applying the Ports Access Regime to any additional maritime activities or assets.

It is AusBulk's view that a Ports Access Regime assists in addressing concerns about issues relating to abuse of market power, without excessive additional costs or risk. The existence of an access regime and the implied threat of conciliation, arbitration and Awards should provide a discipline on Regulated Operators and Proponents alike to seek to conclude access arrangements on terms through commercial negotiation.

While AusBulk supports the continuation of a Ports Access Regime, it wishes to propose some changes to improve efficiency of access arrangements and to more equitably address instances where Proponents do not act in good faith.

Operations of existing access arrangements

AusBulk notes that the shiploaders have been subject to an access regime since they were acquired by AusBulk in 1997.

In the period of ownership of the shiploaders, AusBulk has been able to reach commercially negotiated outcomes for parties seeking access. No party has needed to seek recourse to conciliation and arbitration processes. This period has for example included investment and redevelopment of shiploaders to meet customer requirements, such as the redevelopment of the assets at Thevenard.

Assessment criteria

In addition to the criteria ESCOSA provided, on which its decision on whether to regulate access to services will be made, AusBulk also considered:

- a preference of having certainty of process to resolve access disputes, should they arise. The presence of such process is often sufficient to ensure that Proponents and Regulated Operators adopt commercial approaches to negotiations; and,
- preference for structural and process solutions to concerns about market power.

Limitations on making Awards

Regulated Operators do have existing customers, to which service commitments have been made or can be reasonably expected to be met in the ordinary course of business. The obligation of a Regulated Operator to meet a service request of a Proponent should be able to be constrained by these existing arrangements or practices. Any process of arbitration should explicitly consider such arrangements prior to making an Award.

The service request of a Proponent may require the Regulated Operator to undertake capital works to effect the service. Due to the nature of maritime assets, often the capital cost may have to be depreciated and recovered over a long time frame. By contrast, the Proponent may only be willing to commit to the Regulated Operator either for a shorter period of time, or for a variable

use of the assets. In such events, the Regulated Operator could carry a significant degree of investment risk associated with establishing assets to meet the needs of the Proponent. The ability to make an Award should be constrained in the event the risk faced by the Regulated Operator is material when compared with the return from the service advocated by the Proponent.

Exclusions to arbitration

AusBulk does have some concerns that the conciliation, arbitration and Award processes have the potential to be exploited by Proponents as an indirect means to achieve price regulation on existing Maritime Services. AusBulk believes that the ability of a Proponent to seek an Award with respect to service pricing of an existing Maritime Service should be curtailed where:

- the Regulated Operator is currently or has in the past provided those services to the Proponent, or where those services have been accessible on declared terms to any prospective Proponent;
- no material change in the service has been proposed by the Regulated Operator to those provided in the past to the Proponent or other service users; and,
- the Maritime Service is subject to ongoing price monitoring by ESCOSA.

Denial or termination of arbitration

The Ports Access Regime provides three circumstances where ESCOSA may elect not to refer a dispute to arbitration, or where an Arbitrator may elect to terminate arbitration.

The Ports Access Regime does not place an obligation on a Proponent to reasonably examine service alternatives to the service proposition in dispute. AusBulk believes that there should be some duty on the Proponent to legitimately examine alternative services, to the extent they may be possible, before moving to arbitration. Accordingly AusBulk proposes that the events on which arbitration may be declined by ESCOSA or terminated by the Arbitrator be expanded to include events where:

- the Proponent has failed to identify, examine and analyse alternative services to the service in dispute; or
- where alternative services to the proposed service could be accessed or developed by the Regulated Operator.

Withdrawing from an Award

As the Access Regime is currently drafted, a Proponent may withdraw from an Award up to 7 days after the determination of an Award by the Arbitrator. The only penalty imposed is that the Proponent is then precluded from making a similar proposal within two years. By contrast, the Regulated Operator is not accorded the same right.

AusBulk believes that a Proponent effectively has a free option to walk away from an adverse Award, and would rationally do so if the Award does not align with their claims. To discourage this type of activity, AusBulk believes that if a Proponent withdraws from an Award, the Proponent should then be liable to meet not only all the costs of the Arbitrator, but also the costs incurred by the Regulated Operator in participating in and complying with the arbitration process.

Access to land

It is possible that for a Proponent to gain access to a shiploader, a device of some type may be needed to be built to position grain onto the shipping conveyor. This may require access to land for the device, and a working area for trucks to discharge grain into such device.

AusBulk believes that the Ports Access Regime should only consider provision of the minimum area of land to construct and operate a device to access the shipping conveyor at some point along its length. The Proponent may choose to supply bulk commodities from other areas beyond the port boundary, which is a matter for the consideration of the Proponent alone. While it may be possible to optimise the operations of the Proponent by provision of large parcels of land for the construction of port based storage facilities, this should not be a consideration for arbitration. Consideration of access should be limited to the basic configuration required to make loading onto the shipping conveyor.

AusBulk looks forward to progressing and concluding these issues with ESCOSA.

Yours sincerely,

Michael Nicolai
Deputy Chief Executive