

SOUTH AUSTRALIA

**SOUTH AUSTRALIAN PORTS (BULK HANDLING FACILITIES) ACT
1996**

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SCHEDULE

Amendment of South Australian Ports Corporation Act 1994

SOUTH AUSTRALIAN PORTS (BULK HANDLING FACILITIES) ACT 1996

being

South Australian Ports (Bulk Handling Facilities) Act 1996 No. 94 of 1996
[Assented to 12 December 1996]¹

¹ Came into operation (except Part 3 and ss. 41 & 42) 31 July 1997: *Gaz.* 31 July 1997, p. 236; Part 3 and ss. 41 & 42 came into operation 11 September 1997: *Gaz.* 11 September 1997, p. 704.

N.B. The amendments effected to this Act by the *Maritime Services (Access) Act 2000* have not been brought into operation.

An Act to authorise the sale of bulk handling facilities at South Australian ports; to provide for access to bulk handling facilities on fair commercial terms; to amend the South Australian Ports Corporation Act 1994; and for other purposes.

The Parliament of South Australia enacts as follows:

**PART 1
PRELIMINARY**

Short title

1. This Act may be cited as the *South Australian Ports (Bulk Handling Facilities) Act 1996*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Interpretation

3. In this Act, unless the contrary intention appears—

"**bulk handling facilities**" means—

- (a) the equipment designed principally for handling grain installed at the following government ports:
 - (i) Port Adelaide;
 - (ii) Port Giles;
 - (iii) Wallaroo;
 - (iv) Port Pirie;
 - (v) Port Lincoln;
 - (vi) Thevenard,including that equipment as modified from time to time and equipment installed in substitution for that equipment; or
- (b) other equipment for loading or unloading commodities at a government port classified by proclamation as bulk handling facilities to which this Act applies;

"**bulk handling service**" means the service of loading or unloading commodities by means of bulk handling facilities;

"**commodity**" means—

- (a) primary produce; or
- (b) minerals, petroleum, natural gas, or other products of the mining industry; or
- (c) manufactured goods;

"**Corporation**" means the South Australian Ports Corporation;

"**government port**" means a port vested in the Corporation under the *South Australian Ports Corporation Act 1994*;

"**land**" includes—

- (a) a subsurface stratum (which may terminate at a particular subsurface level or extend downwards without defined limit);
- (b) a stratum of airspace (which may terminate at a specified level or extend upwards without defined limit);

"**operator**", of bulk handling facilities, means the person who carries on the business of loading or unloading commodities by means of the facilities and includes—

- (a) the owner of the facilities;
- (b) a person who carries on the business of loading or unloading commodities by means of the facilities through the agency of someone else;
- (c) a person entitled to carry on the business of loading or unloading commodities by means of the facilities.

PART 2
SALE OF BULK HANDLING FACILITIES

Sale of bulk handling facilities

4. (1) The Treasurer may by agreement (a **sale agreement**) with another (the **purchaser**) transfer title to the Corporations's bulk handling facilities to the purchaser.

- There may be two or more agreements relating to different bulk handling facilities with the same purchaser or with different purchasers.

(2) A sale agreement—

- (a) vests title to bulk handling facilities to which the agreement relates in the purchaser in accordance with its terms; and
- (b) discharges those bulk handling facilities from any trust or other interest in favour of the Crown (except to the extent that any such interest may be expressly preserved under the terms of the agreement).

(3) A transfer of title under this section operates by force of this Act and despite the provisions of any other law or instrument.

(4) A sale agreement may require the purchaser to indemnify the Corporation against specified liabilities or liabilities of a specified class.

(5) The Treasurer—

- (a) may apply the net proceeds of a sale under this section in discharging or recouping outstanding liabilities of the Corporation; and
- (b) must pay the balance to the *Asset Management Task Force Operating Account* at the Treasury to be used for the purpose of retiring State debt.

Statutory easement

5. (1) On the sale of bulk handling facilities, an easement (a **statutory easement**) arises over subjacent and adjacent land entitling the owner of the bulk handling facilities—

- (a) to support for the bulk handling facilities; and
- (b) to have access to the relevant land (through agents and employees) reasonably required for operating, maintaining, repairing, modifying, removing or replacing the bulk handling facilities.

(2) A person exercising rights under the statutory easement must take reasonable steps—

- (a) to minimise damage to land or other property from work or activities carried out in the exercise of rights conferred by the statutory easement; and
- (b) to avoid unnecessary interference with land or other property, or the use or enjoyment of land or other property, from the exercise of rights under the statutory easement.

(3) The owner of land affected by the statutory easement may, by agreement with the owner of the bulk handling facilities, execute an instrument—

- (a) conferring an easement that operates to the exclusion of the statutory easement so far as it affects that land; or
- (b) discharging the land from the statutory easement,

and on registration of the instrument under the *Real Property Act 1886* or the *Registration of Deeds Act 1935* the land is discharged from the statutory easement.

(4) In this section, **adjacent land** in relation to bulk handling facilities includes land declared by proclamation to be adjacent to the relevant facilities.

Registrar-General to note statutory easement

6. (1) The Registrar-General must, on application by the Treasurer, note the statutory easement on each certificate of title, or Crown lease, affected by the easement.

(2) An application under this section—

- (a) need not include a plan of the statutory easement; but
- (b) must include a schedule of all certificates of title and Crown leases affected by the statutory easement.

(3) The Registrar-General is entitled to act on the basis of information included in the application and is not obliged to do anything to verify the accuracy of that information.

Leases and other rights in relation to land

7. (1) The Treasurer may, in connection with the sale of bulk handling facilities—

- (a) sell land of the Corporation to the purchaser; or
- (b) lease land of the Corporation to the purchaser; or
- (c) grant other rights over or in respect of land of the Corporation,

on terms the Treasurer thinks fit.

(2) In exercising powers under subsection (1) the Treasurer is taken to be acting as agent of the Corporation.

(3) An apparently genuine document purporting to be an instrument executed by the Treasurer as agent of the Corporation must, in the absence of proof to the contrary, be accepted by any court or administrative official as an instrument duly executed under this section.

(4) The powers of the Treasurer under this section are not limited by section 10(3) of the *South Australian Ports Corporation Act 1994*.¹

¹ This provides that the "Corporation cannot sell, lease or otherwise dispose of any land, or any interest in land, except with the approval of the Minister".

**PART 3
CUSTOMER ACCESS TO BULK HANDLING FACILITIES**

DIVISION 1—BASIS OF CUSTOMER ACCESS

Access on fair commercial terms

- 8.** (1) The operator of bulk handling facilities must provide bulk handling services on terms—
- (a) agreed between the operator and the customer; or
 - (b) if they do not agree, on fair commercial terms determined by arbitration under this Act.
- (2) However, the operator is not obliged to provide a bulk handling service for a customer if the commodities for which the service is sought—
- (a) are toxic; or
 - (b) cannot be safely handled by means of the bulk handling facilities; or
 - (c) are incompatible with the use of the bulk handling facilities for the loading or unloading of grain.
- (3) The terms and conditions on which a bulk handling service is to be provided may vary from customer to customer.

DIVISION 2—DISPUTES ABOUT TERMS OF ACCESS

Proposal for access

- 9.** (1) A person who wants a bulk handling service (the **proponent**) may make a written proposal to the operator of bulk handling facilities setting out proposed terms and conditions for the provision of the bulk handling service.
- (2) A proposal may provide for—
- (a) the modification of the bulk handling facilities for the purpose of providing the relevant service; or
 - (b) the establishment of additional bulk handling facilities on land occupied by the operator for the purpose of providing the relevant service.
- (3) If the proposal affects the rights of any other person who is entitled to a bulk handling service under a contract or award (an **interested third party**), the operator must give the interested third party a copy of the proposal.

Duty to negotiate in good faith

- 10.** The operator and any interested third parties must negotiate with the proponent in good faith and on the basis that the proponent's reasonable requirements are to be accommodated as far as practicable.

Existence of dispute

- 11.** If, within 30 days after the proposal is made, the operator, the proponent and any interested third parties have not agreed on terms for the provision of the proposed service, a dispute exists.

DIVISION 3—REFERENCE OF DISPUTE TO ARBITRATION**Power of parties to refer dispute to arbitration**

12. (1) Within 60 days after a dispute arises, the proponent and the respondents to the proposal may jointly appoint an arbitrator and refer the dispute to arbitration.

(2) The operator must give the Minister written notice of the appointment of an arbitrator under this section.

Maximum penalty: \$500.

Minister's power to refer dispute to arbitration

13. (1) If the parties cannot agree on the appointment of an arbitrator, or have not done so 60 days after the dispute arises, the Minister must, at the request of the proponent or a respondent, appoint an arbitrator and refer the dispute to arbitration.

(2) A request must be made within 90 days after the dispute arises.

(3) The arbitrator must be a person who is properly qualified to act in the resolution of the dispute and has no direct or indirect interest in the outcome of the dispute.

Appointment of fresh arbitrator

14. If for some reason an arbitrator does not complete an arbitration—

- (a) the parties may at the request of the Minister or a party to the arbitration jointly make a fresh appointment; or
- (b) if the parties fail to make an appointment within a reasonable period (which must be at least 30 days) allowed in the request, the Minister may make a fresh appointment.

Application of Commercial Arbitration Act 1986

15. The *Commercial Arbitration Act 1986* applies to an arbitration under this Act to the extent that it may operate consistently with the provisions of this Act.

DIVISION 4—PARTIES AND REPRESENTATION**Parties to the arbitration**

16. The parties to the arbitration are—

- (a) the proponent, the operator and any interested third parties; and
- (b) any other person whose interests may be materially affected by the outcome of the arbitration and who is joined as a party to the arbitration by the arbitrator.

Representation

17. A party to an arbitration may be represented by a lawyer or, by leave of the arbitrator, another representative.

Minister's right to participate

18. (1) The Minister may participate in arbitration proceedings under this Act.

(2) If the Minister participates, the Minister may call evidence and make representations on the questions subject to the arbitration.

DIVISION 5—CONDUCT OF ARBITRATION

Arbitrator's duty to act expeditiously

19. An arbitrator must proceed with the arbitration as quickly as the proper investigation of the dispute, and the proper consideration of all matters relevant to the fair determination of the dispute, allow.

Hearings to be in private

20. (1) Arbitration proceedings must be conducted in private unless all parties agree to have the proceedings conducted in public.

(2) An arbitrator may give directions about who may be present at arbitration proceedings conducted in private.

(3) In giving directions under subsection (2), the arbitrator must have regard to the wishes of the parties and the need for commercial confidentiality.

(4) A person must comply with a direction under subsection (2).

Maximum penalty: \$15 000.

Procedure on arbitration

21. (1) An arbitrator—

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) may obtain information on matters relevant to the dispute in any way the arbitrator thinks appropriate.

Example—

The arbitrator may, for example, conduct proceedings by—

- telephone; or
- closed circuit television; or
- other means of communicating at a distance.

(2) An arbitrator may require the presentation of evidence or argument in writing and may decide matters on which the arbitrator will hear oral evidence or argument.

Procedural powers of arbitrator

22. (1) An arbitrator may—

- (a) give procedural directions;
- (b) make orders requiring—
 - (i) the delivery of documents clarifying the issues between the parties;
 - (ii) the discovery and inspection of documents;
- (c) sit at any time or place;

- (d) adjourn the arbitration proceedings from time to time and from place to place;
- (e) refer a matter to an expert for report, and accept the expert's report in evidence;
- (f) do anything else necessary for the expeditious hearing and determination of the dispute.

(2) An arbitrator may hear two or more proceedings relating to the same bulk handling facilities together.

(3) An arbitrator may proceed with arbitration proceedings in the absence of a party if the party has been given at least 14 days notice of the proceedings.

(4) An arbitrator may engage a lawyer to provide advice on the conduct of the arbitration and to assist the arbitrator in drafting the award.

Power to obtain information and documents

23. (1) If an arbitrator has reason to believe that a person is in a position to give information or to produce documents, that may be relevant to the dispute, the arbitrator may, by written notice—

- (a) require the person within a period stated in the notice—
 - (i) to give the arbitrator a written statement of specified information; or
 - (ii) to produce to the arbitrator specified documents or copies of specified documents; or
- (b) require the person to appear before the arbitrator at a specified time and place to give evidence.

(2) A written statement must, if the arbitrator so requires, be verified by statutory declaration of the person providing the information or, if the person is a body corporate, an appropriate officer of the body corporate.

(3) If documents are produced to an arbitrator, the arbitrator may—

- (a) take possession of, make copies of, and take extracts from, the documents; and
- (b) keep the documents for as long as is necessary for the purposes of the arbitration.

(4) A person must—

- (a) comply with a requirement of the arbitrator under subsection (1) or (2); and
- (b) if the person is required to appear as a witness before the arbitrator—comply with further requirements to make an oath or affirmation, or to answer questions.

Maximum penalty: \$15 000.

(5) However, a person need not give information or produce a document if—

- (a) the information or the contents of the document are the subject of legal professional privilege, or would tend to incriminate the person of an offence; and

- (b) the person objects to giving the information or producing the document by giving written notice of the ground of the objection to the arbitrator or, if the person is appearing as a witness before the arbitrator, by an oral statement of the ground of objection.

Confidentiality of information

24. (1) A person who gives the arbitrator information, or produces documents, may ask the arbitrator to keep the information or the contents of the documents confidential.

(2) The arbitrator may, after considering representations from the parties, impose conditions limiting access to, or disclosure of, the information or documentary material.

(3) A person must not contravene a condition imposed under subsection (2).

Maximum penalty: \$60 000.

Proponent's right to terminate the arbitration before an award is made

25. (1) The proponent may terminate the arbitration before an award is made.

(2) The arbitration is terminated under this section by giving notice of termination to—

- (a) the Minister; and
(b) the arbitrator; and
(c) the other parties to the arbitration.

Arbitrator's power to terminate arbitration

26. (1) An arbitrator may at any time terminate an arbitration without making an award if the arbitrator is satisfied—

- (a) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
(b) the proponent has not engaged in negotiations in good faith; or
(c) the terms and conditions on which the bulk handling service is to be provided should continue to be governed by an existing contract or award.

(2) Before terminating an arbitration under this section, the arbitrator must give the Minister an opportunity to make representations on the matter.

DIVISION 6—AWARDS

Formal requirements related to awards

27. (1) An award must—

- (a) be in writing; and
(b) set out the reasons on which it is based; and
(c) specify the period for which it remains in force.

- (2) The arbitrator must, within 7 days after an award is made, give a copy of the award to—
- (a) the Minister; and
 - (b) the parties to the award.

Principles to be taken into account by arbitrator

28. In deciding on the terms of an award, the arbitrator should take into account—

- (a) the operator's legitimate business interest and investment in the facility; and
- (b) the costs to the operator of providing the service, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets; and
- (c) the economic value to the operator of any additional investment that the proponent or the operator has agreed to undertake; and
- (d) the interests of all persons holding contracts for use of the facility; and
- (e) firm and binding contractual obligations of the operator or other persons (or both) already using the facility; and
- (f) the operational and technical requirements necessary for the safe and reliable operation of the facility; and
- (g) the economically efficient operation of the facility; and
- (h) the benefit to the public from having competitive markets.

Incidental legal effect of awards

29. (1) An award may vary the rights of other customers of the operator under existing contracts or awards if—

- (a) those customers will continue to be able to meet their reasonably anticipated requirements measured at the time when the dispute was notified to the Minister; and
- (b) the terms of the award provide appropriate compensation for loss or damage (if any) suffered by those customers as a result of the variation of their rights.

(2) An award may require the operator to extend, or permit the extension of, the bulk handling facilities if—

- (a) the extension is technically and economically feasible and consistent with the safe and reliable operation of the facilities; and
- (b) the operator's legitimate business interests in the bulk handling facilities are protected; and
- (c) the terms on which the service is to be provided to the proponent take into account the costs and the economic benefits of the extension.

(3) An award cannot, unless the operator consents, require the operator to bear any of the cost of extending the bulk handling facilities or maintaining extensions to the bulk handling facilities.

Consent awards

30. If—

- (a) the parties to an arbitration consent to a proposed award; and
- (b) the arbitrator is satisfied that the award is appropriate in the circumstances,

the arbitrator may make an award in the terms proposed.

Proponent's option to withdraw from award

31. (1) A proponent may, within 7 days after the making of an award or such further time as the Minister may allow, elect not to be bound by the award by giving written notice of the election to the Minister.

(2) The Minister must, within 7 days after receiving a notice of election under subsection (1), notify the operator and the other parties to the arbitration.

(3) If the proponent elects not to be bound by an award—

- (a) the award is rescinded; and
- (b) the proponent is precluded from making another proposal for 12 months from the date the notice of election was given unless the Minister authorises a further proposal within that period.

(4) An authorisation under subsection (3)(b) may be given on conditions the Minister considers appropriate.

Termination or variation of award

32. (1) An award may be terminated or varied by agreement between all parties to the award.

(2) A variation may include an extension of the period for which the award remains in force.

(3) If a material change in circumstances occurs, a party to an award may propose termination or variation of the award.

(4) The provisions of this Part about an access proposal and the arbitration of a dispute arising from an access proposal apply with necessary modifications to a proposal made under this section or a dispute arising out of such a proposal.

DIVISION 7—ENFORCEMENT OF AWARD

Contractual remedies

33. An award is enforceable as if it were a contract between the parties to the award.

Injunctive remedies

34. (1) The Supreme Court may grant an injunction—

- (a) restraining a person from contravening an award; or

(b) requiring a person to comply with an award.

(2) The power of the Court to grant an injunction restraining a contravention of an award may be exercised—

(a) whether or not the defendant has previously contravened the relevant provision of the award; and

(b) whether or not there is imminent danger of substantial damage to any person.

(3) The power of the Court to grant an injunction requiring compliance with an award may be exercised—

(a) whether or not the defendant has previously failed to comply with the relevant provision of the award; and

(b) whether or not there is imminent danger of substantial damage to any person.

(4) The Court may grant an interim injunction under this section.

(5) An application for an injunction under this section may be made by—

(a) the Minister; or

(b) a person with a proper interest in whether the relevant provision is complied with.

(6) The Court may grant an injunction by consent without inquiring into the merits of the application.

(7) If the Minister makes an application for an injunction, the Court cannot require the Minister or any other person to give an undertaking about damages as a condition of granting the injunction.

(8) The Court may, on application by the Minister or an interested party, discharge or vary an injunction.

Compensation

35. (1) If a person contravenes an award, the Supreme Court may, on application by the Minister or an interested person, order compensation of persons who have suffered loss or damage as a result of the contravention.

(2) An order may be made under this section against the person who contravened the provision and others involved in the contravention.

(3) A person is **involved in the contravention** of an award if the person—

(a) aided, abetted, counselled or procured the contravention; or

(b) induced the contravention through threats or promises or in some other way; or

(c) was knowingly concerned in, or a party to, the contravention; or

- (d) conspired with others to contravene the award.

DIVISION 8—APPEALS AND COSTS

Appeal from award on question of law

36. (1) An appeal lies to the Supreme Court from an award, or a decision not to make an award, on a question of law.

(2) On an appeal, the Court may exercise one or more of the following powers:

- (a) vary the award or decision;
- (b) revoke the award or decision;
- (c) make an award or decision that should have been made in the first instance;
- (d) remit the matter to the arbitrator for further consideration or re-consideration;
- (e) make incidental or ancillary orders (including orders for costs).

(3) An award or decision of an arbitrator cannot be challenged or called in question except by appeal under this section.

Costs

37. (1) The costs of an arbitration are to be borne by the parties in proportions decided by the arbitrator, and in the absence of a decision by the arbitrator, in equal proportions.

Example—

If the arbitrator were of the opinion that a party had failed to comply with the duty to negotiate in good faith, the arbitrator could order that party to bear the costs of the arbitration in their entirety.

(2) However, if a proponent terminates an arbitration or elects not to be bound by an award, the proponent must bear the costs in their entirety.

(3) The costs of an arbitration are recoverable as a debt.

DIVISION 9—EXPIRY OF PART

Expiry of Part

38. (1) This Part expires 10 years after its commencement.

(2) However, the Minister must review the operation of this Part within one year before it is due to expire and, if on the review the Minister is satisfied that its continued operation is justified, the Governor may, by proclamation, postpone the expiry of this Part for a period (or a further period) not exceeding 10 years.

(3) Despite the expiry of this Part—

- (a) a contract or award made under this Part continues in force; and
- (b) this Part continues to govern the termination or variation of such a contract or award.

PART 4
MISCELLANEOUS

Bulk handling facilities to be regarded as chattels

39. Bulk handling facilities are chattels and capable of being acquired, owned, dealt with and disposed of as such (despite the extent of their affixation to land).

Interaction between this Act and other Acts

40. (1) A transaction under this Act is not subject to the *Land and Business (Sale and Conveyancing) Act 1994*.

(2) A transaction under this Act is not subject to the *Retail Shop Leases Act 1995*.

(3) No consent, approval or authorisation is required under Part 4 of the *Development Act 1993* for a transaction under Part 2 of this Act.

(4) An application under section 223ld of the *Real Property Act 1886* for the division of land in consequence of a transfer or lease under this Act need not be accompanied by a certificate from the Development Assessment Commission.¹

¹ See section 223ld(3)(c) of the *Real Property Act 1886*.

Hindering access

41. A person must not prevent or hinder a person who is entitled to a bulk handling service from access to that service.

Maximum penalty: \$15 000.

Accounts and records of bulk handling service

42. (1) The operator of bulk handling facilities must keep accounts and records of the business of providing a bulk handling service by means of the facilities separately from accounts and records of any other business.

(2) If the operator operates 2 or more bulk handling facilities, separate accounts and records must be kept for each of the facilities.

(3) The accounts and records must be kept in a way that gives—

(a) a comprehensive view of the operator's legal and equitable rights and obligations in relation to each of the bulk handling facilities and its operation; and

(b) a true and fair view of—

(i) income and expenditure derived from, or relating to, each of the bulk handling facilities; and

(ii) assets and liabilities of the operator's business so far as they relate to each of the bulk handling facilities.

Regulations and proclamations

43. (1) The Governor may make regulations and proclamations for the purposes of this Act.

(2) The Governor may, by subsequent proclamation, vary or revoke a proclamation made under this Act.

Exception—

The proclamation fixing the commencement date of this Act cannot be varied or revoked after that date.

(3) A regulation may prescribe a fine (not exceeding \$2 000) for contravention of the regulation.

SCHEDULE*Amendment of South Australian Ports Corporation Act 1994*

The *South Australian Ports Corporation Act 1994* is amended as follows:

Section 4—

Insert—

"land" includes—

- (a) a subsurface stratum (which may terminate at a particular subsurface level or extend downwards without defined limit);
- (b) a stratum of airspace (which may terminate at a specified level or extend upwards without defined limit);

Section 22(2)—

Omit, insert—

(2) For the purpose of facilitating the operation of a port, or the conduct of activities at a port, the Governor may, by proclamation—

- (a) resume land held by a council or other public authority as a reserve, street, road or for other public purposes; and
- (b) vest the land in the Corporation.

Section 22(7)—

Omit, insert—

(7) The Registrar-General must, on application by the Corporation—

- (a) if land vested in the Corporation under this Act has been brought under the *Real Property Act 1886*—register the Corporation as the proprietor of the land; or
- (b) if land vested in the Corporation under this Act has not been brought under the *Real Property Act 1886*—bring the land under the provisions of that Act and register the Corporation as the proprietor.

(8) The Corporation must provide the Registrar-General with surveys and plans of land that is to be brought under the *Real Property Act 1886* that the Registrar-General may reasonably require.