



Australian
Competition &
Consumer
Commission

Viterra Operations Limited

Port Terminal Services Access Undertaking

Draft Decision

11 August 2011



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Contents

Contents	iii
Glossary	v
1 Summary	1
1.1 Introduction	1
1.2 The 2009 Undertaking	4
1.3 Proposed 2011 Undertaking	5
1.4 ACCC Draft Decision	5
1.5 Conclusion	9
2 Procedural Overview	11
2.1 Viterra's Proposed 2011 Undertaking	11
2.2 Submissions from Viterra	11
2.3 Public consultation process to date	12
2.4 Indicative timeline	13
2.5 Consultation on the draft decision	14
2.6 Further information	14
3 Decision-making framework	16
3.1 <i>The Wheat Export Marketing Act 2008</i> (Cth)	16
3.2 Part IIIA Access Undertaking	16
3.3 2009 Undertaking – Decision framework	18
3.4 Proposed 2011 Undertaking	19
3.5 South Australian Regulatory Regime	19
4 Overall approach	21
4.1 Proposed 2011 Undertaking	21
4.2 General application of the publish-negotiate-arbitrate approach	22
4.3 Publication of information and ring fencing	29
4.2 Substance of the Standard Terms	32
4.3 The ACCC's role under the Proposed 2011 Undertaking	37
5 Capacity allocation method	43
5.1 The proposed allocation system	43
5.2 Experience with the 2009 Undertaking	45
5.3 Viterra and third party submissions	47
5.4 ACCC view	49
5.5 Introduction of an auction system – Viterra's Revised Draft Proposed 2011 Undertaking	61
5.6 ACCC's view on the Revised Draft Proposed 2011 Undertaking	64
6 Approach to pricing	66
6.1 Viterra's Proposed 2011 Undertaking	66
6.2 Viterra and third party submissions	68
6.3 ACCC view	68
7 Other issues	76
7.1 Direct to port access	76
7.2 Commodity Conversion in accordance with the Port Loading Protocols	81

7.3	Anti-hoarding provision.....	83
7.4	Variation of the Port Loading Protocols	84
Appendix A: Submissions		1
Appendix B: Industry Overview.....		39
Appendix C: Legislative Framework.....		54

Glossary

2009 Undertaking	Ausbulk Limited Port Terminal Services Access Undertaking, accepted 29 September 2009
ABA	Australian Bulk Alliance, the operator of the Melbourne Port Terminal.
ACCC	Australian Competition and Consumer Commission
AGEA	Australian Grain Exporters Association – representative body for exporters of Australian grain
BHC	Vertically integrated bulk handling company
CBH	Co-operative Bulk Handling Limited, a vertically integrated port terminal operator
CCA	<i>Competition and Consumer Act 2010</i> (Cth) (previously the <i>Trade Practices Act 1974</i>)
FOB	Free on board
GrainCorp	GrainCorp Operations Limited
mt	Metric tonne
PC	Productivity Commission
PLPs	Port loading protocols
Port Terminal Services	As defined by clause 4.2 of the Proposed 2011 Undertaking
Proposed 2011 Undertaking	The access undertaking received from Viterra Operations Limited on 23 December 2010
Reference Prices	The reference prices described in clause 5.2(a) or as varied in accordance with clause 5.6 in the Proposed 2011 Undertaking
Shipping Stem	Means the stem of ships nominated by exporters for loading at Viterra's port terminals as published by Viterra
Standard Port Terminal Service	A Port Terminal Service specified as such in a Port Schedule attached to the Proposed 2011 Undertaking
Standard Terms	the Standard Terms and conditions described in clause 5.1(a) of the Proposed 2011 Undertaking, or as varied by clause 5.6(e)
VFF	Victorian Farmers Federation

Viterra	Viterra Operations Limited (ABN: 88 007 556 256) – Operator of the Port Terminals in South Australia
Viterra's trading arm	Viterra Limited (ABN 59 084 962 130) – accredited exporter of bulk wheat
WEMA	<i>Wheat Exports Marketing Act 2008</i> (Cth)

1 Summary

1.1 Introduction

This Draft Decision details the Australian Competition and Consumer Commission's (ACCC's) preliminary view of the undertaking lodged by Viterra Operations Ltd (Viterra) on 23 December 2010 (Proposed 2011 Undertaking) for consideration under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA). The Proposed 2011 Undertaking relates to the provision of access to services for the export of bulk wheat at six grain terminals operated by Viterra in South Australia. These terminals are:

- Port Lincoln
- Port Adelaide Inner Harbour
- Port Adelaide Outer Harbour
- Port Giles
- Thevenard
- Wallaroo.

Viterra has submitted the Proposed 2011 Undertaking to meet the access test provisions of the *Wheat Export Marketing Act 2008* (Cth) (WEMA) required for its trading arm, Viterra Limited, to be re-accredited as a bulk wheat exporter from 1 October 2011.

The ACCC has a role in approving access undertakings for wheat exporters as part of the deregulation of the wheat industry. Access undertakings are intended to ensure that third party exporters are able to access the port terminals operated by vertically integrated port terminal operators, ensuring fair competition in the market for the export of bulk wheat.

Viterra's Proposed 2011 Undertaking is one of four wheat port terminal services access undertakings being considered by the ACCC at this time. On 22 June 2011, the ACCC released a decision to accept an access undertaking provided by GrainCorp Operations Ltd (GrainCorp). In addition to Viterra's Proposed 2011 Undertaking the ACCC is also currently considering undertakings provided by Australian Bulk Alliance (ABA) in relation to its operations at the Port of Melbourne in Victoria and Co-operative Bulk Handling Limited (CBH) in relation to its operations in Western Australia.

Viterra, GrainCorp and CBH each has in place an access undertaking accepted by the ACCC in 2009 while ABA is proposing an undertaking to the ACCC for the first time. The ACCC will consider each undertaking on its own merits and notes that, while undertakings accepted from each bulk handling company (BHC) will reflect the particular circumstances of that company, there are certain aspects of the undertakings for which the ACCC considers a consistent approach across the bulk wheat export industry is appropriate.

In considering whether to accept an undertaking the ACCC has regard to the matters set out in s. 44ZZA(3) of the CCA. These include *inter alia* the objects of Part IIIA which are to:

- (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

Viterra's Proposed 2011 Undertaking is essentially a roll forward of its 2009 Undertaking. Experience with the 2009 Undertaking suggests that a number of elements of the 2009 Undertaking did not facilitate the efficient use of Viterra's port terminal infrastructure as anticipated. However, the overall publish-negotiate-arbitrate framework appears to have worked relatively well.

The ACCC considers that there are a number of areas where amendments to the Proposed 2011 Undertaking are required.

Fundamental to the assessment of the Proposed 2011 Undertaking is the issue of capacity allocation. The operation of the 2009 Undertaking demonstrated major concerns with the first come, first served capacity allocation system. These concerns are:

- the adverse impact on competition in related markets, to the detriment of wheat growers
- the inefficient allocation of capacity
- whether capacity is allocated fairly and transparently, having regard to the intention of the WEMA.

Nominations made in March 2011 for capacity after 30 September 2011 (i.e. 2012 bookings) clearly demonstrate these concerns.

Based on the first come, first served model, the 2012 pending bookings would result in only two exporters having access to Viterra's deep sea ports during the period of peak demand of January to April 2012. As a result, growers are likely to have considerably fewer exporters competing to purchase their wheat and consequently, are likely to receive lower prices.

In terms of efficient allocation, capacity at Viterra's deep sea ports for the period January to April 2012 is not necessarily going to exporters who value it most highly, but rather to exporters who nominated more quickly. Further, Viterra's current first come first served capacity allocation system includes no mechanisms to ensure that capacity can be transferred from lower value users to higher value users or that it does not go unused during peak periods of demand.

There was also some confusion amongst exporters as to whether Viterra could accept bookings on the stem in the absence of an accepted undertaking for the period post 30 September 2011.

For these reasons, the ACCC's preliminary view is that the current system for allocating shipping slots is not appropriate going forward. It is the ACCC's preliminary view that an auction system would address its overall concerns regarding the allocation of Viterra's port terminal capacity.

Viterra has stated that the introduction of an auction system cannot reasonably commence until mid 2012, after allowing time for auction design and implementation.

Accordingly, in response to ACCC concerns, Viterra has proposed transitional arrangements to allocate capacity subject of the pending bookings for the two deep sea ports in the high demand period January to April 2012. The ACCC's view is that such transitional arrangements need to reduce the level of bookings held by Viterra to levels more consistent with last year's executed bookings. This will result in other exporters accessing the stem. The ACCC anticipates that this will likely result in greater competition amongst wheat exporters for the benefit of wheat growers.

Viterra has provided a draft revision of the Proposed 2011 Undertaking (Revised Draft) that it proposes to submit in substitution of the Proposed 2011 Undertaking. This Revised Draft includes the design and introduction of an auction system commencing mid 2012.

In addition to the issue of capacity allocation, it is the ACCC's preliminary view that differential pricing for receivals at port also raised concern during the period of the 2009 Undertaking. Specifically, concerns relate to the transparency of pricing and whether exporters have sufficient information to negotiate prices based on actual services supplied.

Finally, it is the ACCC's preliminary view that a light handed publish-negotiate-arbitrate regulatory framework remains appropriate. However, the ACCC considers that a number of additional powers and functions are required to supplement this light handed approach.

In addition to the Revised Draft, Viterra has submitted transitional arrangements under which Viterra will remove its own bookings from the stem for the two deep sea ports in the period January to April 2012 to the point where Viterra's bookings are close to the proportion of capacity it executed in 2011. Other exporters will then receive bookings in the order nominated.

The Revised Draft also includes amendments that address the other concerns raised above.

It is the ACCC's preliminary view that the Revised Draft would appropriately address the various issues.

It is important to note however that the Revised Draft does not form part of the application submitted by Viterra on 23 December 2010 pursuant to s. 44ZZA(1). Accordingly, this Draft Decision assesses the undertaking provided on that date.

The Draft Decision is therefore that the original proposed undertaking not be accepted. However, the ACCC's preliminary view is that the Revised Draft could be accepted if it were submitted for assessment pursuant to s. 44ZZA(1).

The ACCC seeks comments from stakeholders on its Draft Decision by 5.00pm on **Wednesday, 31 August 2011**. The ACCC also seeks comments on Viterra's Revised Draft, the issue of capacity management, transparency of information, and details of pricing in particular, but welcomes comments on any other aspect of the Revised Draft.

1.2 The 2009 Undertaking

1.2.1 Decision to accept Viterra's 2009 Undertaking

In its decision to accept Viterra's 2009 Undertaking, the ACCC took the view that a prescriptive regulatory approach, including ex ante price setting was not warranted, and that a less prescriptive publish-negotiate-arbitrate approach was appropriate. However, in order for the publish-negotiate-arbitrate framework to be appropriate, the ACCC took the view that it needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures.

In relation to capacity allocation arrangements the ACCC did not express a view on the efficiency of the first come, first served capacity allocation arrangements. Instead, weight was given to the legitimate business interests of AusBulk (now Viterra) in being able to run its port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation. The ACCC further noted that the non-discrimination and no-hindering access provisions were intended to constrain the ability of AusBulk (now Viterra) to exercise discretion under the port loading protocols (PLPs) in an anti-competitive manner.

In deciding to accept the 2009 Undertaking, the ACCC noted that should the light handed, publish-negotiate-arbitrate approach (supported by robust non-discrimination and no-hindering provisions) prove not to be effective, the ACCC may adopt a more prescriptive method in any future access undertaking.

1.2.2 Performance of Viterra's 2009 Undertaking

It appears that the operation of the publish-negotiate-arbitrate framework has not raised concerns with exporters, with the majority of exporters able to successfully reach agreement with Viterra regarding the terms of access.

However submissions raise concerns about the nature of information published and suggest that asymmetry in the information available to Viterra's trading arm compared with information available to third party exporters provides Viterra's trading arm with a competitive advantage. In addition, there is a concern that the limited information published by Viterra with regard to available capacity prevents exporters from planning export tasks with certainty.

A number of submissions raise concerns with Viterra's PLPs and the manner in which capacity is allocated to exporters, on a first come, first served basis. Exporters also submit that there is insufficient disincentive within the PLPs preventing Viterra's trading arm from overbooking, thereby hindering other exporters from accessing the stem.

Submissions received in relation to capacity bookings for the 2011/12 season (made pursuant to the current PLPs) raise concerns regarding the efficiency of the first come,

first served capacity allocation system, in that capacity is not being used by exporters who value it most, and there are no mechanisms to ensure that capacity does not go unused.

1.3 Proposed 2011 Undertaking

The Proposed 2011 Undertaking submitted by Viterra on 23 December 2010 provides essentially a roll-over of the 2009 Undertaking for a further period of three years. It does, however, include a number of minor changes, which are set out in Chapter 4.

The ACCC considers that the 2009 Undertakings are a relevant matter in the assessment of Viterra's Proposed 2011 Undertaking, per s. 44ZZA(3)(e).

1.4 ACCC Draft Decision

The ACCC has formed a preliminary view not to accept the Proposed 2011 Undertaking as lodged by Viterra on 23 December 2010, having regard to:

- the overall approach and specific provisions of the Proposed 2011 Undertaking
- the matters specified under s. 44ZZA(3) of the CCA, taking into account the wider context within which Viterra has submitted the Proposed 2011 Undertaking (which is detailed in the Legislative Framework set out in Appendix C to this Draft Decision).

The ACCC notes however that Viterra has addressed the ACCC's concerns in the Revised Draft. It is the ACCC's preliminary view that if the Revised Draft is submitted, the ACCC would accept the undertaking.

The ACCC notes that the matters specified under s. 44ZZA(3) of the CCA to which it must have regard when deciding whether to accept an undertaking include:

- the objects of Part IIIA of the CCA which are, in summary, to promote the economically efficient operation of, use of and investment in the infrastructure and encourage a consistent approach to access regulation in each industry
- the legitimate business interests of the access provider (i.e. Viterra)
- the public interest, including considerations related to fostering competition in related markets
- the interests of access seekers (e.g. exporters)
- any other matters that the ACCC thinks are relevant (such as the intention of the regulatory scheme set by WEMA that access to port terminal services be provided on a fair and transparent basis, and the operation of the 2009 Undertakings).

The ACCC's decision making framework is detailed further in Chapter 3. Appendix 2 sets out the full legislative framework relevant to the ACCC's decision.

1.4.1 Overall approach

The ACCC has reached a preliminary view that the overall approach to access provision as provided in the publish-negotiate-arbitrate framework of the Proposed 2011 Undertaking is appropriate and that prescriptive ex ante price regulation is not necessary in the case of Viterra's Proposed 2011 Undertaking. Further, it is the ACCC's preliminary view that it is not necessary to strengthen the publish-negotiate-arbitrate framework with ring-fencing rules for Viterra at this time, provided that Viterra provides increased transparency as to:

- available capacity at port
- stock at port information
- additional information as to pricing.

The Viterra Revised Draft inserts provisions for the publication of greater information with respect to available capacity, stocks at port and pricing. It is the ACCC's preliminary view that the publication of this additional information is both in the interests of access seekers and is likely to aid the efficient operation of the infrastructure. Further, greater transparency of information is in the public interest, including the public interest of competitive markets as it is likely to prevent Viterra's trading arm from obtaining a competitive advantage. The requirement for greater transparency is discussed further at Chapter 4.

The ACCC is also of the preliminary view that the three year term of the Proposed 2011 Undertaking is appropriate as it provides certainty to both access seekers and the service provider.

Notwithstanding its preliminary view that the overall publish-negotiate-arbitrate framework in the Proposed 2011 Undertaking is appropriate, the preliminary view of the ACCC is that there are particular aspects of the approach that are not appropriate. These are discussed below.

1.4.2 The ACCC's role under the Proposed 2011 Undertaking

The ACCC considers that the Proposed 2011 Undertaking should provide for certain powers and functions of the ACCC. These include a mechanism allowing the ACCC to object to a proposed variation of its PLP's by Viterra, a specific information gathering provision, an approval power acknowledging that decision making functions under the undertaking may be undertaken by particular Commissioners, and inclusion of an explicit reference to the ACCC's monitoring role. The ACCC considers that these powers and functions should be consistent across the Undertakings of all the port operators in order to provide a consistent approach to access regulation in the bulk wheat export industry. Additionally, these powers and functions are in the public interests as it will assist the ACCC in ensuring compliance with the Proposed 2011 Undertaking.

Viterra has addressed this issue in its Draft Revision. These issues are discussed in Chapter 4 of this Draft Decision.

1.4.3 Capacity allocation

It is the ACCC's preliminary view that the first come, first served capacity allocation model contained in the Proposed 2011 Undertaking is not appropriate. In particular the ACCC is of the preliminary view that:

- the first come, first served capacity allocation system does not efficiently allocate capacity in circumstances where there is capacity constraint because:
 - there are no mechanisms to ensure that capacity does not go unused, and
 - capacity is not allocated to exporters who value it most highly.
- there are insufficient disincentives on Viterra (either through competitive pressure or by way of a mechanism within the Proposed 2011 Undertaking) to prevent self preferential treatment
- there is insufficient flexibility in relation to the execution of capacity.

Viterra has addressed these issues in its Draft Revision by proposing:

- to allocate capacity by way of an auction from May 2012 to be introduced by way of a variation of Viterra's PLPs
- to allow for capacity to be traded and bookings moved between ports and between shipping slots and to introduce an incentive to return unwanted bookings to the shipping stem.

It is the ACCC's preliminary view that the above revisions to the Proposed 2011 Undertaking, taken together with the publication of additional information regarding available capacity discussed above, will improve the efficient use of Viterra's port terminals. In addition, these provisions provide benefits to access seekers while allowing Viterra operational flexibility to introduce an auction system that will suit its current business practices and characteristics of the South Australian market. Flexibility regarding the introduction of an auction system is in Viterra's legitimate business interests. Accordingly, it is the ACCC's preliminary view that the Revised Draft, if submitted, is likely to be appropriate.

Transitional arrangements

Viterra has submitted that it is unable to design and implement an auction system prior to 30 September 2011. In addition, Viterra submits it is required to accept nominations already received for bookings for execution after 30 September 2011 in accordance with the existing PLPs, that is, on a first come, first served basis.

In response to the ACCC's concerns regarding the nature of the bookings received in early March 2011, Viterra has provided a transition proposal to apply in relation to port terminal capacity at Port Lincoln and Port Adelaide Outer Harbour for the peak shipping period of January to April 2012.

In brief, this proposal involves Viterra removing pending bookings from Port Lincoln and Port Adelaide Outer Harbour so that Viterra's bookings will amount to 26.2 per cent of available capacity at Port Lincoln and 33.9 per cent of available capacity at Port Adelaide Outer Harbour for the period January to April 2012.

As a result of vacating or moving these pending bookings, Viterra's trading arm's proportion of the shipping stem will more closely align with the proportion of bookings it held at these two ports for the shipping period January to April 2011.

The capacity made available by removing these pending bookings will be redistributed to other exporters based on the order of priority created under the first come, first served capacity allocation system.

In addition, exporters will be able to move or trade bookings in accordance with the proposed changes to the PLPs.

Having regard to Viterra's legitimate business interests with respect to its trading arm maintaining accreditation, it is the ACCC's preliminary view that, in advance of the introduction of the auction system, these transitional arrangements offer an appropriate solution to the current situation. In addition, these arrangements are likely to provide a degree of certainty to access seekers with respect to available capacity and existing bookings, as well as the flexibility to seek to move or trade bookings to more closely align bookings with access seekers' requirements.

These issues are discussed further in Chapter 5 of this Draft Decision.

1.4.4 Approach to pricing

Each of the 2009 Undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain provisions requiring the port operator to publish reference prices for the supply of port terminal services. As the Proposed 2011 Undertakings of each of the port operators do not include ex ante pricing, the ACCC is not assessing the appropriateness of particular prices for port terminal services.

The ACCC has however considered the prices under the 2009 Undertakings in order to determine whether the publish-negotiate-arbitrate framework has been effective. The assessment of prices in this context was relevant given the concerns raised by third parties that:

- the price differentials between receivals from approved third party storage, non-approved third party storage and Viterra's own storage appears excessive, and may not reflect additional costs actually faced by Viterra
- the price differentials between receivals from Viterra and third party storage represent a deterrent to using third party storage sites
- the process for approval of third party storage is not sufficiently transparent and is open to manipulation by Viterra because it sits outside the Proposed 2011 Undertaking.

Viterra has provided information supporting its submission that the differential charges are reflective of higher costs. The ACCC has not, as part of the assessment of

the Proposed 2011 Undertaking, formed a view on whether the quantum of the differential applied by Viterra is appropriate. Rather, under the publish-negotiate-arbitrate framework, the price and non-price terms of access are negotiable and subject to arbitration.

However, the ACCC considers that, in order for the publish-negotiate-arbitrate approach to be effective, access seekers must have sufficient information to negotiate prices which are mutually acceptable (regardless of the ‘approved’ or ‘non-approved’ status of the storage provider). The ACCC considers that Viterra should provide additional detail around the terms on which access seekers may gain access to port terminal services, including grain received at the port terminal from third party sites. Where Viterra applies price differentials, it should provide sufficient transparency around the basis on which the differential is applied.

In its Revised Draft, Viterra has included an obligation on it to publish details in relation to the specific services covered by its charges and the criteria which must be satisfied in order to qualify for such charges, which would include any criteria required for approved third-party storages. The Revised Draft also notes that access seekers are able to negotiate with Viterra in relation to the prices and the application of those prices. Therefore, access seekers who are unable to negotiate receival prices applicable to grain from non-approved third party storage will be able to use the arbitration provisions in the undertaking. The increased reporting obligations in the Revised Draft will provide information to such access seekers as to the services being provided by Viterra in exchange for the prices, and should assist access seekers in negotiating charges where they consider that not all services are necessary, for example.

These matters are discussed further at Chapter 6 of the Draft Decision.

1.5 Conclusion

A summary of the amendments that the ACCC considers are required to the Proposed 2011 Undertaking is provided below at Table 1.1.

Table 1.1: List of necessary amendments to Proposed 2011 Undertaking

Key Issues and proposed amendments to the Proposed 2011 Undertaking	Draft Decision reference
<p>Publication of information on Available Capacity and Stock at Port at each of Viterra’s port terminals</p> <p>In order to address issues relating to the sharing of information between Viterra and its trading arm, the ACCC proposes that clause 10 be amended to include:</p> <ul style="list-style-type: none"> ▪ Clause 10.1(a): greater information relating to information on stocks at port ▪ Clause 10.2: greater information as to available capacity 	Pg 29
<p>ACCC role under the Proposed 2011 Undertaking</p> <p>The ACCC proposes that the Proposed 2011 Undertaking be amended to include additional powers and functions for the ACCC including:</p> <ul style="list-style-type: none"> ▪ Clause 9.4 – Objection notice (variation of PLPs) ▪ Clause 1.1(h) & (i) ACCC approval power and monitoring compliance ▪ Clause 5.7 Information gathering 	<p>Pg 37</p> <p>Pg 40</p> <p>Pg 41</p>
<p>Capacity management – first come, first served / auction system</p> <p>The ACCC considers that the first come, first served capacity allocation system is no longer appropriate as Viterra’s primary allocation method. The ACCC considers the Proposed 2011 Undertaking needs to be amended to include an auction system.</p>	Pg 61
<p>Increased transparency measures in relation to port terminal service pricing</p> <p>The ACCC considers it is appropriate to insert a provision to provide increased transparency around the specific services that are covered by the port receipt fees imposed by Viterra, including the criteria (if any) that must be satisfied in order to qualify for any charges set out in the Reference Prices.</p>	Pg 74
<p>Anti-hoarding provision</p> <p>The ACCC considers it is appropriate that the anti-hoarding provision contained in the PLPs is removed.</p>	Pg 83
<p>Variation of Port Loading Protocols</p> <p>The ACCC considers it is appropriate that the process for varying PLPs be amended to include a requirement that Viterra publish written submissions received from stakeholders.</p>	Pg 84

2 Procedural Overview

2.1 Viterra's Proposed 2011 Undertaking

Under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA) (previously the *Trade Practices Act 1974* (Cth)), the Australian Competition and Consumer Commission (ACCC) may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

The ACCC received an access undertaking (the Proposed 2011 Undertaking) from Viterra Operations Limited (Viterra) on 23 December 2010 for consideration under Division 6 of Part IIIA of the CCA.

The Proposed 2011 Undertaking relates to the provision of access to services for the export of bulk wheat at grain port terminals operated by Viterra in South Australia.

Viterra has submitted the Proposed 2011 Undertaking in accordance with legislative requirements under the *Wheat Export Marketing Act 2008* (Cth) (WEMA), further details of which are set out in Appendix C.

2.2 Submissions from Viterra

Viterra has provided the following public information in respect of the Proposed 2011 Undertaking:

- initial supporting information provided on 23 December 2010
- submission in response to third party submissions provided on 23 March 2011
- response to the ACCC's s. 44ZZBCA request for information issued on 5 April 2011, provided 11 April 2011
- response to the ACCC's s. 44ZZBCA request for information issued on 15 April 2011, provided on 5 May 2011
- Submission in relation to receivals into Viterra's port terminals dated 30 June 2011
- Submission in relation to transitional arrangements provided 28 July 2011

Viterra has also referred to information it submitted in relation to the 2009 Undertaking, provided on 16 April 2009, 3 September 2009 and 17 September 2009.

In addition, Viterra's trading arm, Viterra Limited, has responded to the ACCC's s. 44ZZBCA request for information issued 5 April 2011. The response was provided on 11 April 2011.

In addition to these submissions, in response to concerns raised by the ACCC, Viterra has also provided a Revised Draft of the Proposed 2011 Undertaking (Revised Draft) dated 1 August 2011.

2.3 Public consultation process to date

2.3.1 Issues Paper

Section 44ZZBD(1) of the CCA provides that the ACCC may invite public submissions on an access undertaking application.

The ACCC published an Issues Paper on 20 January 2011 inviting submissions on the Proposed 2011 Undertaking. The ACCC directly notified approximately 80 stakeholders, including accredited wheat exporters, grain growers, farming organisations and state regulatory bodies, of the public consultation process.

The ACCC received public submissions from the following parties in relation to the Issues Paper:

- Australian Grain Exporters Association (AGEA)
- AWB Limited (AWB)
- CBH Grain Pty Ltd (CBH)
- Elders Toepfer Grain (Elders)
- Emerald Group Australia Pty Ltd (Emerald)
- South Australian Farmers Federation (SAFF)
- Victorian Farmers Federation Grains Group (VFF)

2.3.2 Information request

As part of the assessment of the Proposed 2011 Undertaking, the ACCC examined whether the first come, first served allocation method operated by Viterra is appropriate. As part of that assessment, the ACCC considered the transitional arrangements relating to bookings made pursuant to the 2009 Undertaking for execution after the expiry of the 2009 Undertaking.

In order to obtain views from industry participants, the ACCC issued 12 notices pursuant to s. 44ZZBCA(1) of the CCA. The notices were issued to exporters who currently appear on the Viterra shipping stem:

- AWB Limited
- Bunge Agribusiness Australia Pty Ltd
- Cargill Australia Limited
- CBH Grain Pty Ltd
- Concordia Agritrading (Australia) Pty Ltd
- Elders Toepfer Grain

- Emerald Group Australia Pty Ltd
- Gavilon Grain Australia Pty Ltd
- Louis Dreyfus Commodities Australia Pty Ltd
- Pentag Nidera Pty Limited
- Plum Grove Pty Ltd
- Touton Australia Pty Limited.

The ACCC also invited any interested stakeholders who did not receive a s. 44ZZBCA(1) notice to make submissions in relation to this issue.

2.3.3 Confidentiality of information requests

To facilitate a fair and transparent process, the ACCC requested, and received, permission from parties who provided confidential submissions or responses to use information provided confidentially in a de-identified and aggregated manner. This information appears in Appendix A of this Draft Decision, and has been provided to Viterra.

2.4 Indicative timeline

Under the CCA, the ACCC must make a decision on an access undertaking application within 180 days of the day it received the application. The clock may be stopped during the 180 day period when:

- a notice is given under s. 44ZZBCA(1) requesting information in relation to the application
- a notice is published under s. 44ZZBD(1) inviting public submissions in relation to the application
- an agreement in writing between the ACCC and the provider of the service is made in relation to the application (s. 44ZZBC(4)).

The clock has thus far been stopped four times and the statutory time limit for the ACCC decision has been extended by:

- 44 days for consultation on the ACCC Issues Paper
- 17 days for the ACCC's request for information under s. 44ZZBCA
- 19 days by agreement between the ACCC and Viterra commencing on 20 June 2011
- 20 days for consultation on this Draft Decision.

The statutory time limit for the ACCC decision now expires on 2 October 2011.

2.5 Consultation on the draft decision

The ACCC invites submissions from interested parties on its Draft Decision regarding Viterra's Proposed 2011 Undertaking. Submissions must be forwarded by 5:00pm on **Wednesday, 31 August 2011** to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@acc.gov.au

Submissions are to be sent preferably by email, in Microsoft Word or other text readable document form.

2.5.1 Confidentiality of submissions

The ACCC acknowledges the need for a balance between permitting the provision to a regulator of relevant information on a confidential basis, where that information is commercially sensitive or otherwise confidential, and the need to allow parties whose legitimate interests are likely to be affected by an administrative decision the opportunity to respond to relevant material. In this regard, the ACCC notes that a party may request that the ACCC not make the whole or part of a submission available for confidentiality reasons.¹

In the current context, the ACCC considers that this balance is adequately found by giving weight to comments made in public submissions, and considering comments made in confidential submissions only where such comments are relevant, determinative of a particular issue and contribute considerations not already dealt with in a public submission.

The ACCC strongly encourages parties who intend to provide submissions on the ACCC's Draft Decision to make public submissions, whether or not they wish to make a confidential submission as well. Unless a submission is marked confidential, it will be made available to any person or organisation on request. The sections of submissions that are confidential should be clearly identified, with reasons as to why they are confidential.

2.6 Further information

The Proposed 2011 Undertaking and other relevant materials, including supporting submissions from Viterra and submissions by interested parties, are available on the ACCC's website at www.acc.gov.au by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link: [Wheat Exports: Port Terminal Services Access Undertakings](#).

¹ *Competition and Consumer Act 2010* (Cth) s. 44ZZBD.

If you have any queries in relation to the ACCC's process, or to any matters raised in this Draft Decision, please contact:

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3 Decision-making framework

This chapter of the ACCC's Draft Decision sets out the decision making framework the ACCC has applied and gives an outline of the structure of the following sections of this Draft Decision.

3.1 *The Wheat Export Marketing Act 2008(Cth)*

The *Wheat Export Marketing Act 2008* (Cth) (WEMA) requires that, in order to export bulk wheat from Australia, exporters must first be accredited by Wheat Exports Australia (WEA) as 'fit and proper'.² The WEMA also provides that parties seeking bulk wheat export accreditation that also provide 'port terminal services' must satisfy an additional 'access test'.

The access test is satisfied *inter alia* if the ACCC has accepted from a person who owns or operates a port terminal facility used to provide a port terminal service an access undertaking under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA), and that undertaking relates to the provision to accredited wheat exporters of access to port terminal service for purposes relating to the export of wheat.³

On 29 September 2009, the ACCC accepted an undertaking from the then operator of port terminals in South Australia, AusBulk Limited, for the purpose of accreditation pursuant to the WEMA. Viterra has subsequently acquired AusBulk Limited. The 2009 Undertaking is due to expire on 30 September 2011.

In order for its trading arm to maintain accreditation, Viterra must have a Part IIIA access undertaking accepted by the ACCC and for certain port services, in particular port facilities that are 'bulk handling facilities' (as defined in the *South Australian Ports (Bulk Handling facilities Act 1996* (SA)) and involve the use of conveyor belts, Viterra must also satisfy its obligations under the South Australian Port Access Regime.

Further details regarding the operation of the WEMA are in Appendix C.

3.2 Part IIIA Access Undertaking

Division 6 of Part IIIA of the CCA requires that in assessing the Proposed 2011 Undertaking the ACCC must apply the test set out in s. 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the CCA (s. 44ZZA(3)(aa)), which are to:
 - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

² *Wheat Export Marketing Act 2008* (Cth) s 24.

³ *ibid.*

- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the ‘pricing principles’ specified in s. 44ZZCA of the CCA which provide that:
 - regulated prices should be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - regulated prices should be set so as to include a return on investment commensurate with the regulatory and commercial risks involved; and
 - allow multi-part pricing and price discrimination when it aids efficiency; and
 - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
 - access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in the markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.

A key concept underpinning a number of the relevant factors listed in s. 44ZZA(3) is certainty and clarity. Sufficient certainty and clarity in relation to the terms, effect and operation of the access undertaking is important to both Viterra and access seekers so that all parties understand Viterra’s obligations and are able to enforce their rights.

It is the ACCC’s view that the regulatory scheme established by the WEMA is a matter relevant to the assessment of an access undertaking.⁴

In addition the ACCC considers that the operation of Viterra’s 2009 Undertaking is a relevant matter in the assessment of Viterra’s Proposed 2011 Undertaking, as provided for in s. 44ZZA(3)(e). Consideration of the operation of the other 2009 Undertakings in place by other BHCs is relevant to encouraging a consistent regulatory approach under the objects of Part IIIA. Through the operation of the 2009 Undertakings, the ACCC has gained insight as to the effect of the Undertakings in

⁴ Explanatory Memorandum, Wheat Export Marketing Bill 2008 (Cth), p. 32.

practice, which is relevant to the extent that the Proposed 2011 Undertaking contains common provisions to the 2009 Undertakings.

3.3 2009 Undertaking – Decision framework

Viterra's Proposed 2011 Undertaking is in many respects a roll over of its 2009 Undertaking. It is therefore appropriate that the ACCC, in considering the appropriateness of the 2011 Undertaking, return to its September 2009 Decision to Accept in order to review and consider the ongoing relevance of the framework by which it made its initial decision.

The ACCC considers the following matters (amongst others) that were relevant to the assessment of the 2009 Undertaking, continue to be of relevance for this decision:

- the objective of Part IIIA of promoting the economically efficient operation of, use of and investment in facilities by which port terminal services are provided – thereby promoting competition in the wheat export industry and the overall supply chain
- the objectives of the 'access test' embodied in the WEMA, and, in particular, the objective of ensuring that vertically integrated bulk handling companies provide fair and transparent access to their facilities to other accredited exporters
- the transitional state of the wheat export industry, which since 2009 has moved from having 23 accredited wheat exporters to 26 accredited wheat exporters
- the legitimate business interests of AusBulk (now Viterra) in being able to run its port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain
- the interests of access seekers that in so running their operations, AusBulk (now Viterra) should do so in a fair and non-discriminatory manner
- noting also that the pricing principles in s. 44ZZCA of the TPA (now CCA) provide that access price structures should not allow a vertically integrated provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher
- whether the Undertaking provides for sufficient certainty and clarity in its terms, effect and operation so that access seekers are able to understand and enforce their rights
- the object of Part IIIA to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry; and
- the public interest, including the public interest in having competition in markets (whether or not in Australia).

As noted in 2009 the factors listed above are not the actual ‘matters’ listed under s. 44ZZA(3) of the CCA,⁵ but rather fall for consideration within the scope of the relevant matters under s. 44ZZA(3).

In having regard to the objectives of the WEMA, the ACCC in its 2009 Decision to Accept specifically acknowledged Parliament’s recognition that the promotion of competition may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation⁶.

In having regard to the WEMA, the ACCC did not conduct a comprehensive market analysis in relation to each of the ports that would be subject to the 2009 Undertaking to assess whether they should be subject to access regulation. Rather, the role of the ACCC in this context was to decide whether the September 2009 Undertaking given by AusBulk (now Viterra) was appropriate. Consistent with its consideration in 2009, the ACCC considers that Parliament at the time expressed a clear intention to require port terminal operators to provide access undertakings to mitigate the potential for anti-competitive harm, and it is in that context that the ACCC must consider the appropriateness of those undertakings as provided. The ACCC has taken the same approach in its assessment of the Proposed 2011 Undertaking.

3.4 Proposed 2011 Undertaking

The Proposed 2011 Undertaking lodged by Viterra on 23 December 2010 is in essence a roll over of the 2009 Undertaking attaching the PLPs as varied in accordance with the 2009 Undertaking released on 12 November 2010.

The Proposed 2011 Undertaking does include minor changes and these are listed in Chapter 4.

In addition to the changes proposed by Viterra, the ACCC has, having regard to the operation of the 2009 Undertakings, the markets in which those undertakings operate and the relevant factors prescribed by s. 44ZZA(3), determined that some provisions of the 2009 Undertaking rolled over into the Proposed 2011 Undertaking are no longer appropriate.

3.5 South Australian Regulatory Regime

Under s. 44ZZA(3AA) of the CCA, the ACCC must not accept an undertaking provided to it under s. 44ZZA(1) if a decision of the Commonwealth Minister is in force under s. 44N of the CCA that a regime established by a State or Territory for access to the service is an effective access regime. On 9 May 2011, the Parliamentary Secretary to the Treasurer, as designated Minister, certified that the South Australian

⁵ Other than the first two matters, which the ACCC considers are relevant pursuant to section 44ZZA(3)(e) of the CCA.

⁶ ACCC, Decision to accept AusBulk Ltd Port terminal services access undertaking, 29 September 2009, pg23

Port Access Regime (SAPAR) is an effective access regime for a period of ten years under s. 44N of the CCA. The SAPAR provides for a negotiate/arbitrate framework for access to 'maritime services' at 'proclaimed ports', and a price regulation regime for 'essential maritime services' as defined under the *Maritime Services (Access) Act 2000* (SA). All ports covered by the Proposed Undertaking are "proclaimed ports" under the SAPAR.

On 26 July 2011, the Minister also certified the South Australian Rail Access Regime (SARAR) as an effective access regime under s. 44N of the CCA. The SARAR provides a negotiation-conciliation-arbitration regulation of access to railway services, including the service of providing (or providing or operating) railway infrastructure for another industry participant.

In its draft revised undertaking, Viterro has proposed drafting (refer clauses 4.1(b)(ii) and 7.6(b)(i)) to address what it considers is a potential 'overlap' issue. In short, it proposes to 'carve out' access to those services covered by the SAPAR and SARAR, and provide for the ACCC to determine whether it has jurisdiction to consider an access dispute, which would be reviewable by a Court. Unlike an arbitration determination, the decision on jurisdiction would be reviewable by a Court. The ACCC welcomes submitters' views on the potential 'overlap' issue and Viterro's proposed drafting to address it.

4 Overall approach

This chapter discusses the overall approach that Viterra has taken in its Proposed 2011 Undertaking in relation to:

- the proposed application of the publish-negotiate-arbitrate approach;
- the publication of information;
- ring-fencing; and
- the substance of the Standard Terms.

The chapter also highlights the ACCC's proposed approach to monitoring compliance under the Proposed 2011 Undertaking by way of some new functions and powers, including an information gathering provision, a mechanism allowing the ACCC to object to a proposed PLP variation by Viterra, an approval power acknowledging that decision-making functions in the undertaking may be undertaken by particular Commissioners, and inclusion of an explicit reference to the ACCC's monitoring role.

4.1 Proposed 2011 Undertaking

The Proposed 2011 Undertaking submitted by Viterra on 23 December 2010, provides essentially a roll-over of the 2009 Undertaking for a further period of 3 years. It does however include a number of minor changes to:

- establish the term of the 2011 Undertaking to start at the expiration of the 2009 Undertaking and run to 30 September 2014
- facilitate the transition from the 2009 Undertaking to the Proposed 2011 Undertaking and to ensure continuous coverage
- accommodate potential changes to the regulatory framework for exporting bulk wheat and to ensure that the Proposed 2011 Undertaking will continue to operate effectively regardless of whether or not the Productivity Commission's recent recommendations in relation to accreditation are adopted, either before or after the commencement of the Proposed 2011 Undertaking
- reflect that AusBulk Ltd (the provider of the 2009 Undertaking) is now called Viterra Operations
- provide greater clarity in relation to the process for issuing notices and other communications
- reflect changes that have been made to Viterra's PLP's, which have been made in consultation with its Clients in accordance with the process set out in the 2009 Undertaking
- provide additional information in the Port Schedules in relation to the specific Port Terminal Services provided at each Port Terminal (and in particular, information to assist access seekers by providing further information in relation to operational arrangements and capacity at those Port Terminals)

- update the Standard Terms of access agreements to ensure greater alignment with the Proposed 2011 Undertaking.

4.2 General application of the publish-negotiate-arbitrate approach

4.2.1 Viterra's Proposed 2011 Undertaking

Viterra has proposed to roll forward the publish-negotiate-arbitrate model from the 2009 Undertaking. This model provides that:

- Viterra will offer to supply the standard port terminal services to access seekers on standard **published** non-price terms and conditions (Standard Terms). In providing access to port terminal services, Viterra must not discriminate between access seekers and its own trading arm.
- Viterra must, for access to each standard port terminal service, **publish** reference prices on the Viterra website.
- Viterra will enter into **negotiations** with access seekers for the provision of access to port terminal services. Both parties must negotiate in good faith in accordance with the terms of the Proposed 2011 Undertaking. The negotiations will be finalised by the execution of an access agreement.
- Any dispute, except those in relation to executed access agreements or the PLPs, will be resolved in accordance with clause 7 of the Proposed 2011 Undertaking. Clause 7 provides a process whereby disputes may be escalated from negotiation to mediation to **arbitration**.

4.2.1.1 Publication

Under the publish-negotiate-arbitrate approach, the Proposed 2011 Undertaking provides that Viterra will publish:

- the standard price and non-price terms on which it will provide access to its port terminal services; and
- other information in relation to the operations of Viterra's port terminals, including key port information and performance indicators.

The ACCC considers that the broad approach of the obligations under the 2009 Undertaking relating to the publication of information remain appropriate having regard to s. 44ZZA(3)(c). Publication of relevant information, particularly in relation to the overall operation of the port and service standards, provides access seekers with an appropriate level of clarity and certainty in their negotiations with Viterra. However, the ACCC consider that the obligations concerning publication of information need to be strengthened in some respects. These areas are discussed later in this chapter.

The provisions contained in the Proposed 2011 Undertaking essentially rolls forward the provisions in the 2009 Undertaking but for updated dates and time periods. In

addition, Viterra has made certain changes to the Port Schedules attached to the Proposed 2011 Undertaking so that they provide greater operational information to exporters, particularly in relation to the different operational arrangements and services available at each port terminal and greater transparency in relation to how the capacity at each port terminal is calculated and operates in practice.

Publication of standard price and non-price terms

The provision at clause 5 of the Proposed 2011 Undertaking, relating to price and non-price terms, is unchanged from the provision in the 2009 Undertaking. Clause 5 of the Proposed 2011 Undertaking outlines the standard price and non-price terms and requires Viterra to provide non-discriminatory access.

Subclause 5.1 provides that Viterra will offer to supply Standard Port Terminal Services to an applicant on request at published Reference Prices on Standard Terms. An Applicant may also negotiate for access to:

- non-standard Port Terminal Services
- non-standard terms
- prices other than Reference Prices, or
- any combination of the above.

The Standard Port Terminal services are set out in Schedule 2 of the Proposed 2011 Undertaking.

The Reference Prices on which Viterra will offer to provide access are to be published each year in accordance with subclause 5.2(a) and will apply until 30 September of the following year unless varied in accordance with subclause 5.6. Where Viterra varies the Reference Prices it must provide copies of variations to the ACCC within two Business Days of publication.

The Standard Terms are set out in Schedule 3 of the Proposed 2011 Undertaking. Unless Viterra receives approval from the ACCC to vary these terms in accordance with subclause 5.6(e), these Standard Terms will apply as the 'default terms' for the term of the Proposed 2011 Undertaking. The content of the Standard Terms is discussed in section 4.4.

Publication of key service standards

Clause 11.1(a) of the Proposed 2011 Undertaking requires that Viterra will, biannually, provide the ACCC with a report containing the following information:

- tonnage loaded each month for each Port Terminal (clause 11.1(a)(vii))
- number of vessels loaded each month for each Port terminal (11.1(a)(viii))
- the average waiting time for vessels to complete loading for each month by Port Terminal. Waiting time will exclude if the vessel is not load ready (11.1(a)(ix))
- percentage of vessels that fail either AQIS or marine surveys for each month by Port Terminal (11.1(a)(x)).

Clause 11.1(b) requires that Viterra publish that report on its website within five business days of providing it to the ACCC.

Voluntary information

In addition to the information which Viterra is required to publish pursuant to the 2009 Undertaking, the ACCC notes that Viterra also published additional information on a voluntary basis. This includes:

- a capacity table on Viterra's website to provide greater clarity in relation to estimated amounts of available capacity. This is discussed in Chapter 5.
- additional shipping stem information, including commodity information for customers. The shipping stem was amended to list specific commodity types. The date and time relating to vessels names on the shipping stem was also provided.

The ACCC also notes that Viterra publishes information that is ultimately to be included in the report to the ACCC pursuant to clause 11(a) on a monthly basis (as opposed to biannually as required by the undertaking).

4.2.1.2 Negotiation

Clause 6 of the Proposed 2011 Undertaking provides that Viterra will negotiate with access seekers for the provision of access to Viterra's port terminal services in good faith in accordance with the terms of the undertaking.

Clause 6 also prescribes the process that negotiation must follow. In brief, the process requires the access seeker to make a preliminary inquiry followed by lodging a formal access application. The access seeker and Viterra then enter into a formal period of negotiation that may culminate in the execution of an access agreement.

If the parties are unable to reach agreement on the terms of the access agreement, then pursuant to clause 5.1, Viterra must offer to supply port terminal services to the access seeker on the standard non-price terms and conditions attached to the Proposed 2011 Undertaking.

The negotiation process in the Proposed 2011 Undertaking does not materially differ from the terms of the 2009 Undertaking.

4.2.1.3 Arbitration

Dispute resolution mechanisms appear in clause 7 of the Proposed 2011 Undertaking. 'Dispute' is defined by the Proposed 2011 Undertaking to exclude any disputes raised in relation to an executed access agreement or disputes raised in relation to the terms of the PLPs. Access agreements and the PLPs include internal dispute resolution procedures.

The Proposed 2011 Undertaking is a roll forward of the dispute resolution procedures as they appear in the 2009 Undertaking but for the replacement of Viterra's 'CEO' with the 'Executive Manager Grain Division'. In addition, Viterra has included some transitional provisions to ensure continual coverage between the 2009 Undertaking and the Proposed 2011 Undertaking.

In brief, the Proposed 2011 Undertaking requires parties to trigger the dispute resolution mechanism by issuing a dispute notice. The parties are then required to negotiate in good faith in an attempt to reach resolution.

If the parties are not able to reach resolution through informal negotiation, the parties may then agree to either or both informal and formal mediation. If mediation is unsuccessful, then the parties can elect to have the dispute escalated to arbitration. If a dispute is escalated to arbitration, the ACCC must be advised and may elect to arbitrate the dispute.

Clause 7 also requires that Viterra provide an annual report to the ACCC on formal disputes raised including the resolution reached. To date, no formal disputes have been raised pursuant to clause 7.

4.2.1.4 Non discrimination and no hindering access provisions

A major feature of the 2009 Undertaking was robust non-discrimination and no hindering access provisions. These provisions have been rolled forward in the Proposed 2011 Undertaking. The provisions are:

5.5 Non-discriminatory access

- (a) In providing access to Port Terminal Services, the Port Operator must not discriminate between different Applicants or users in favour of its own Trading Division, except to the extent that the cost of providing access to other Applicants or Users is higher.
- (b) During the term of this Undertaking, the ACCC may by notice in writing require the Port Operator to appoint an Auditor to provide a report in relation to the Port Operator's compliance with clause 5.5(a). If the ACCC requires the Port Operator to appoint an Auditor, the provisions set out in Schedule 4 will apply.

9.4 No hindering access

- (a) The Port Operator, or a Related Body Corporate of the Port Operator, must not engage in conduct for the purpose of preventing or hindering access to the Port Terminal Services by any other Applicant or User in the exercise of a right of access under this Undertaking.
- (b) A person may be taken to have engaged in conduct for the purpose referred to in clause 9.4(a) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This clause 9.4(b) does not limit the manner in which the purpose of a person may be established for the purpose of clause 9.4(a).

4.2.1.5 Audit provision

Clause 5.6(b) of the Proposed 2011 Undertaking provides that:

During the term of this Undertaking, the ACCC may by notice in writing require the Port Operator to appoint an Auditor to provide a report in relation to the Port Operator's compliance with clause 5.5(a). If the ACCC requires the Port Operator to appoint an Auditor, the provisions set out in Schedule 4 will apply.

Schedule 4 prescribes the manner in which an auditor is appointed (including qualifications), the scope of the audit and the limitations on the audit process.

To date, the ACCC has not directed an audit be carried out of Viterra's compliance with the non-discriminatory access provision.

4.2.2 Submissions

A summary of all Viterra's public submissions and submissions received from interested third parties in relation to the publish-negotiate-arbitrate framework and to the issue of the price differential is provided at Appendix A.

Viterra submits that the publish-negotiate-arbitrate framework appropriately balances the interests of access seekers and Viterra's legitimate business interests as the provider of the port terminal services.

Submission received from other interested parties also generally support the publish-negotiate-arbitrate model. However, a number of exporters note that the dispute resolution mechanisms have yet to be tested.

4.2.3 ACCC view

In the 2009 final decision to accept the AusBulk proposed undertaking, the ACCC took the view that the 'publish-negotiate-arbitrate' approach is appropriate as opposed to ex ante price regulation, provided that the mechanisms giving effect to the publish-negotiate-arbitrate model are robust and supported by non-discrimination obligations and appropriate transparency measures.

In taking the view that the less prescriptive 'publish-negotiate-arbitrate' approach is appropriate, the ACCC noted the specific features of the bulk wheat export industry at that time. Specifically, the ACCC noted in its final decision that:

The ACCC acknowledges that in regulating the industry during a transitional phase there is risk that regulation that is not appropriate may distort the effective development of that industry, and that the ACCC considers that this risk is particularly pertinent to the regulation of prices. That is, the ACCC is mindful of the possibility that, despite best intentions, setting regulated prices for port terminal services at the current time may unnecessarily constrain the ability of the industry to develop and effectively respond to changing circumstances that are not foreseeable at the present, and that such an outcome would not be in the public interest.⁷

The ACCC also noted the limited duration of the 2009 Undertaking and the possibility of more prescriptive regulation in the event that the 'publish-negotiate-arbitrate' model proved ineffective.

The ACCC considered that the 'publish-negotiate-arbitrate' approach adopted in the 2009 Undertaking was appropriate as it balanced the business interests of Viterra (refer s. 44ZZA(3)(a)) with the interests of access seekers (refer s. 44ZZA(3)(c)). This is because the 'publish-negotiate-arbitrate' model provides a framework within which:

⁷ ACCC, Ausbulk decision to Accept, 29 September 2009, p. 119-120.

- an appropriate level of information is provided via publication to enable access seekers to negotiate from a sufficiently informed position
- a defined process is set out for the conduct of negotiations
- parties can seek mediation or arbitration should any disputes arise during the negotiation process.

Non discriminatory access and no hindering access

In its decision to accept the 2009 Undertaking, the ACCC was of the view:

... that it is appropriate that ABB's April Undertaking includes a non-discriminatory access clause obligating it to not discriminate against access seekers in favour of its affiliated trading business.

A robust non-discriminatory access clause is an important regulatory tool that can be used to constrain the behaviour of a vertically integrated owner of a key infrastructure facility. This is because many of the benefits of access to infrastructure can be lost if measures are not put into place to control potential anti-competitive leverage onto related markets.⁸

In relation to the no hindering access provision, the ACCC took the view that such a clause is consistent with the objective of the WEMA of ensuring that vertically integrated bulk handling companies provide fair and transparent access to their facilities to other accredited exporters.

The ACCC remains of the view that it is appropriate that the non-discriminatory access and no hindering access provisions remain having regard to the public interest in having competition in the wheat trading markets (refer s. 44ZZA(3)(b)). Further, such provisions are in the interests of access seekers (s. 44ZZA(3)(c) and s. 44ZZA(3)(e)), to the extent that these provisions deter Viterra from discriminating in favour of its trading arm and enables access seekers to obtain access on a fair and transparent basis. In addition, it remains appropriate that such provisions are underpinned by the audit provision as proposed in the Proposed 2011 Undertaking as this will provide an enhanced level of transparency around Viterra's supply of port terminal services.

However, consistent with the ACCC's approach in its Decision to Accept the GrainCorp Proposed 2011 Undertaking and its ongoing assessment of the Proposed 2011 Undertakings of ABA and CBH, the ACCC considers that in order to determine if Viterra is discriminating between third party access seekers and its own trading arm, it is necessary to know what those terms of trade are. The ACCC takes the view that this is a common issue across industry and considers a consistent regulatory approach to be appropriate, consistent with s. 44AA(b) of the CCA. This is because each of the port operators will have an executed access agreement with their respective trading arms – and access to those agreements will enable the ACCC to audit each port operator's compliance with their respective non-discrimination provisions, which are key provisions underpinning each of the Proposed 2011 Undertakings. Additionally, each of the port operators' 2011 proposed undertakings contain a similar non-discrimination clause. Hence there will be a significant level of

⁸ ACCC, Ausbulk decision to Accept, 29 September 2009, p. 180.

similarity between the information required to monitor compliance across all of the port operators.

In response to this issue, Viterra has drafted a new provision in the Revised Draft requiring Viterra to provide the ACCC with a copy of the access agreement entered into with its own trading arm. The relevant provision is at clause 5.5(b), which states that:

Within five Business Days of executing an Access Agreement with its own trading business, the Port Operator must provide to the ACCC a copy of that access agreement.

The ACCC is of the preliminary view that the inclusion by Viterra of clause 5.5(b) in the Proposed 2011 Undertaking is appropriate having regard to s. 44ZZA(3)(b), (c) and (e) to the extent that it prevents Viterra from self-preferential treatment at the port and enable access seekers to obtain access on a fair and transparent basis. The ACCC considers that clause 5.5(b) will assist in preventing Viterra from discriminating in favour of its trading arm and will assist access seekers in obtaining access on non-discriminatory terms. Furthermore, the proposed provision will assist the ACCC in determining whether Viterra has complied with its non-discrimination obligations by enabling the ACCC to compare the terms and conditions of service offered to third parties, relative to what Viterra offers its own trading arm.

The ACCC notes the concerns raised by stakeholders as to potentially discriminatory or hindering conduct with regard to capacity bookings made by Viterra's trading arm and resulting difficulties faced by other exporters in obtaining access to port terminal facilities. The ACCC has considered this concern in its analysis of the appropriateness of the capacity allocation system, which is contained in Chapter 5.

The second objective of Part IIIA provided for in s. 44AA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry. In maintaining the publish–negotiate–arbitrate model across each of the bulk wheat access undertakings, it is the ACCC's preliminary view that this provides a consistent approach to access regulation in the bulk wheat export industry.

It is the ACCC's preliminary view that the publish–negotiate–arbitrate framework, as embodied in the Proposed 2011 Undertaking, supported by robust non-discrimination and no hindering access provisions is appropriate to ensure fair access to port terminal services as intended by the regulatory scheme prescribed by WEMA. In addition, it is the ACCC's preliminary view that the publish–negotiate–arbitrate model is within the legitimate business interests of Viterra and the interests of access seekers as it allows flexibility in determining the commercial relationship between the two parties.

However, there are a number of issues discussed below where the ACCC considers that, due to the particular level of market power that Viterra possesses, amendments to particular aspects of the approach are required in order to increase transparency.

There are also a number of issues where the ACCC considers amendments are required from the approach adopted in the 2009 Undertaking to the Proposed 2011

Undertaking. The relevant changes are considered appropriate having regard to various factors under s. 44ZZA(3), which are discussed below.

4.3 Publication of information and ring fencing

4.3.1 Viterra's Proposed 2011 Undertaking

Publication of port information

Clause 10 is unchanged from the 2009 Undertaking, and requires Viterra to publish information on:

- aggregate stocks of bulk wheat and non-bulk wheat grain held at each of its port terminals (on a monthly basis) (clause 10.1); and
- booking applications received for the export of bulk wheat on the shipping stem, including the name of the exporter and the volume of bulk wheat to be exported, (with the shipping stem to be updated on a daily basis, reflecting the Continuous Disclosure Rules under the WEMA) (clause 10.2).

Information Sharing between Viterra Operations and Viterra Limited

The Proposed 2011 Undertaking contains no formal mechanisms to prevent the sharing of information between Viterra and its trading arm.

The Standard Terms at Schedule 3 of the Proposed 2011 Undertaking however, contain the following provision, which is not contained in the 2009 Undertaking:

20.1 Treatment of Confidential Information

- (a) subject to clause 20.1(b), if a Party provides Confidential Information to another party either:
 - (i) during the course of negotiations in relation to this agreement; or
 - (ii) for the purpose of resolving any Dispute,

the recipient of that Confidential Information will treat that Confidential Information as confidential, the property of the provider of that information, and will use that information solely for the purpose of negotiating this Agreement or resolving any Dispute in accordance with this Agreement.

In addition to this provision, the non-discrimination provision requires that Viterra must not discriminate between different access seekers and its trading arm. Using information it obtains by virtue of being a vertically integrated port terminal operator to provide its trading arm with preferential treatment would be a breach of the Proposed 2011 Undertaking.

4.1.1 Submissions

A summary of all Viterra's public submissions and submissions received from interested third parties in relation publication of information and ring fencing provisions is provided at Appendix A.

Third party exporters raise some concerns with respect to Viterra's trading arm receiving a competitive advantage especially with regard to information as to available stock and available capacity.

4.1.2 ACCC view

In its final decision on Viterra's 2009 Undertaking, the ACCC noted that it was not necessary for ring-fencing measures to be included in the 2009 Undertaking at that time since the 2009 Undertaking contained:

- robust non-discrimination and no-hindering access clauses
- fair and transparent PLPs
- an obligation to publish certain information to deal with the potential for information about port terminal services to be used to the advantage of Viterra's trading arm⁹.

In assessing the Proposed 2011 Undertaking, the ACCC notes that no formal disputes have been raised in relation to the potential sharing of information between Viterra and its own trading arm. Having regard to Viterra's legitimate business interests, as required under s. 44ZZA(3)(a), the ACCC also acknowledges the substantial costs involved in implementing such arrangements.

An alternative to imposing formal ring-fencing mechanisms is to require greater transparency of information to all exporters in relation to both port terminal capacity and disaggregated stock quality information. Imposing a formal obligation on Viterra to make such information available to all stakeholders is likely to be an effective mechanism to prevent Viterra from obtaining any unfair competitive advantage it possesses by virtue of its vertical integration and is therefore appropriate having regard to the interests of access seekers in obtaining fair and transparent access to port terminal services (refer s. 44ZZA(3)(c) and (e)).

The ACCC considers that provided Viterra publishes sufficient information on the available capacity and stock quality at its port terminals, ring-fencing arrangements are not necessary at this point in time.

Publication of key port terminal information

The ACCC notes that the Proposed 2011 Undertaking includes greater operational information in its attached port schedules. Such information is likely to be of some assistance to exporters in planning their export tasks. However, the ACCC considers that port terminal capacity information forms a benchmark for the commencement of negotiations around port terminal access, service pricing and performance. The ACCC also considers that the publication of total available port capacity information would provide an appropriate level of clarity and certainty for access seekers.

This issue is discussed further in Chapter 5 in relation to capacity allocation.

⁹ ACCC, Decision to accept Ausbulk Port Terminal Services Access Undertaking, 29 September 2009, pg 191

Publication of stock information

The ACCC understands that Viterra previously published wheat quality information by receipt site on a voluntary basis; however, this information is now restricted.¹⁰

The Productivity Commission reported that in relation to publication of stock information:

Many in the industry thought that further detailed information on stocks (for example by grade and port zone) should also be made available.¹¹

In this regard, the PC report recognised that having access to such information, while other exporters do not, confers a commercial advantage on Viterra's vertically integrated operations:

... the Commission acknowledges that unequal access to more disaggregated stocks information confers a marketing advantage on the trading bulk handling companies and expects that greater disclosure of this information to all participants would improve the operation of the wheat market.¹²

However, the PC Report concluded that:

the cost of imposing a mandatory information disclosure requirement on the bulk handlers is expected to exceed the associated benefits. The Commission encourages the bulk handling companies to disclose more disaggregated stocks information on a voluntary basis.¹³

However, the ACCC does not consider that a formal obligation under the Proposed 2011 Undertaking to publish information on stocks at port at each of its port terminals will impose too onerous an obligation on Viterra, particularly as this is information that it is already likely to compile as a port operator.

The ACCC agrees with the PC's conclusion that possessing information as to stocks at port (which is not available to all exporters) conveys a marketing advantage to Viterra's trading arm. The ACCC considers that imposing a formal obligation under the Proposed 2011 Undertaking requiring Viterra to publish disaggregated information on stocks at port for each of its port terminals (as well as the other key port information required for publication) would be an appropriate means of reducing the opportunity for Viterra's trading arm to use information it possesses by virtue of being vertically integrated. In particular the ACCC considers that Viterra should publish information on the tonnage and type of all commodities, as well as the top three wheat grades, at each port. This level of disaggregation would provide an appropriate level of transparency to access seekers for whom access to such information would be of assistance in their business planning.

It is the ACCC's preliminary view that such a measure is in the interests of exporters seeking access to Viterra's port terminal services. In addition, by mitigating the

¹⁰ Productivity Commission, *Wheat Export Marketing Arrangements, Inquiry Report*, no. 51, 1 July 2010, p. 309.

¹¹ *ibid.*, p. 22, 294.

¹² Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 294.

¹³ *ibid.*

marketing advantage created by access to information that Viterra has and other exporters do not, this will increase competition and is therefore in the public interest.

Consistent with GrainCorp's accepted 2011 Undertaking, the ACCC's preliminary view is that it is appropriate that Viterra publish tonnage and commodity of all commodities as well as the top three wheat grades at each port.

For the reasons outlined above, the ACCC considers that it would not be appropriate to include formal ring-fencing requirements under the Proposed 2011 Undertaking so long as Viterra is formally required to publish sufficient port terminal information. This information would include information on total available capacity, including the quantum of capacity that remains available for customers, at each of its port terminals and disaggregated information on stock at port (i.e. tonnage and type of all commodities as well as the top three wheat grades at each port). In coming to this preliminary view, the ACCC has had particular regard to s. 44ZZA(3)(b), which relates to the public interest, including the public interest in having competition in markets. By requiring Viterra to make information available to all exporters, it mitigates any competitive advantage that Viterra's own trading arm may receive by virtue of access to greater information. Further access seekers will be privy to information that will assist in competing with Viterra's trading arm.

4.1.3 Viterra's Revised Draft of the Proposed 2011 Undertaking

In order to address the ACCC's concerns regarding information asymmetry, Viterra has inserted into the Revised Draft, a proposed clause to the effect that it will publish the names of the three largest grades of bulk wheat by volume held at each port. In addition, the Revised Draft includes a new clause 10.2 requiring Viterra to publish additional information regarding available capacity.

It is the ACCC's preliminary view that these clauses address the ACCC's concerns in relation to transparency of information.

4.2 Substance of the Standard Terms

4.2.1 Viterra's Proposed 2011 Undertaking

Under clause 5.1(a) of the Proposed 2011 Undertaking, Viterra is obliged to offer port terminal services to access seekers on the Standard Terms. The Standard Terms are set out at Schedule 3 of the Proposed 2011 Undertaking in the form of an indicative access agreement, which provides a clear starting point for negotiations between access seekers and Viterra. The starting point provided by the Standard Terms is critical to ensuring access seekers can effectively negotiate with Viterra. The inclusion of Standard Terms also assists in ensuring that the costs of negotiation and/or arbitration are not excessive.

The Standard Terms act as the default access agreement in the event that parties are unable to reach a negotiated agreement. The Standard Terms attached at Schedule 3 of the Proposed 2011 Undertaking have been altered from the terms attached to the 2009 Undertaking. Major changes include:

- the inclusion of definitions of 'confidential information', 'credit support', 'service year', 'Standard Terms', 'term', 'unregulated services' and 'washout price'.

- the removal of the definitions of ‘gross negligence’. The term remains in the Standard Terms but is undefined. The removal of the definition of ‘port zone’. This term does not appear in the Standard Terms.
- The removal of the definition of the phrase ‘reserve a cell’. Clause 5.8 of the Standard Terms has been redrafted to include the effect of the definition, and the ability for Viterra to impose a time limitation on any cell reservations.
- Amendments to clause 2.1 to the effect that if port terminal services are provided prior to either a concluded access agreement (on the Standard Terms) or an access application has been lodged – then those services are supplied on the Standard Terms.
- Clause 6.5 has been amended to add another ground on which Viterra can move or swap wheat, where the Client has not provided Viterra with evidence of an intention to ship or otherwise outturn bulk wheat from the port terminal facility.
- The removal of clause 7.3, which set out the Client’s obligation to outturn all bulk wheat from the port terminal facility.
- The removal of the Client’s obligation to liaise with Viterra to ensure grain commodities are loaded sequentially (clause 7.12).
- Amendment to clause 8.4 to replace ‘Security’ with ‘Credit Support’, as defined in the Proposed 2011 Undertaking. Consequential amendments to clause 8.10 to reflect the replacement and to remove the requirement for directors and/or shareholders to personally guarantee the Client’s performance.
- Clause 14.2 amended so the Client must maintain an insurance policy for the term of the agreement.
- Insertion of clause 17.2(c) which provides that where the agreement is being terminated, this will not effect Viterra’s obligation to negotiate the terms of access to the port terminal services in accordance with the undertaking.
- Insertion of new clause 20 dealing with confidentiality. Clause 20.1 provides that where one party provides confidential information to the other in the course of negotiating the access agreement or resolving any dispute, that information will be treated as confidential. The clause sets out permitted disclosure in prescribed circumstances. Clause 20.2 provides that a mediator or arbitrator to a dispute under the agreement must take all reasonable steps to protect the confidentiality of information that any party to the Dispute has identified as confidential or commercially sensitive. This requirement will set out the terms of appointment of the mediator or arbitrator.

4.2.2 Viterra and third party submissions

A summary of all Viterra’s public submissions and submissions received from interested third parties in relation to the Standard Terms is provided at Appendix A.

Submissions noted a number of issues including inter alia, the need for a despatch and demurrage system and an increase in the limits of liability accepted by Viterra.

4.2.3 ACCC view

In its Final Decisions on the 2009 Undertakings, the ACCC took the view that certain aspects of the access agreement are commercial issues to be negotiated between parties. In the Final Decision on AusBulk's 2009 Undertaking (now Viterra), the ACCC noted that:

... the Standard Terms provided under the September Indicative Access Agreement are intended to be the minimum terms and conditions of access to AusBulk's port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-Standard Terms that vary from any of those Standard Terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances. Accordingly, in this decision, the ACCC has not found it necessary to form views about whether the particular terms and conditions of the September Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers).¹⁴

The ACCC considers that while all elements of the Standard Terms are subject to negotiation between Viterra and access seekers, the Standard Terms represent the starting point for those negotiations.

In its Final Decision on the 2009 Undertakings, the ACCC stated that it was necessary for the Standard Terms to ensure the following:

- the inclusion of a robust dispute resolution process that balances the legitimate business interests of the port terminal operator with the interests of access seekers
- any ability of the port terminal operator to unilaterally vary the terms of an executed indicative access agreement is only to be exercised in appropriate circumstances
- the terms and conditions of the indicative access agreement must provide for sufficient certainty and clarity in their terms, effect and operation.¹⁵

Emerald submitted that the concept of having Standard Terms on which to negotiate an access agreement, or fall back on, was good.¹⁶ Further, AWB submitted that the process has worked well.¹⁷

The ACCC's preliminary view is that the proposed amendments to the Standard Terms do not raise any concerns.

4.2.3.1 Limitation of liability

Clause 13 of the Standard Terms deals with liability:

¹⁴ ACCC, Ausbulk decision to Accept, 29 September 2009, p. 137-38. A similar position was reflected in the Final Decisions for GrainCorp and CBH.

¹⁵ ACCC, Ausbulk decision to Accept, 29 September 2009, p. 158.

¹⁶ Emerald Group, Submission to ACCC: Viterra Proposed Port Access Undertaking, 4 March 2011, p. 4.

¹⁷ AWB Limited, Submission on the proposed Viterra Operations port terminal access undertaking, 2 March 2011, p. 7.

- Viterra is liable for damage, destruction or contamination by Viterra of a client's bulk wheat if the damage, destruction or contamination is caused by the gross negligence or wilful default of Viterra or its employees, contractors or agents (clause 13.3(a)).
- Liability is subject to a cap of \$250, 000 per event or series of related events (clause 13.3(b)). Further, if Viterra is liable to a client in relation to an event or series of events under the agreement and under another agreement between Viterra and the client, then the liability in aggregate under all agreements is capped at the greatest amount at which liability is capped under any of the agreements (clause 13.4).
- Viterra's liability for breach of implied warranties or conditions not permitted at law to be excluded is limited to the cost of resupplying the relevant service (clause 13.2).
- Viterra may, at its discretion, mitigate or satisfy any liability it has to the client for downgraded wheat by blending a sufficient quality of other wheat to upgrade the client's wheat, substitute the client's wheat or retaining the downgraded wheat and providing for a claim as part of the outturn adjustment in clause 7.13 (clause 13.5).
- Clause 13.3 sets out exclusions on Viterra's liability, which includes inter alia, accidental loss or damage and indirect or consequential loss.

CBH Grain has submitted that the liability cap placed on Viterra where it has caused the destruction of wheat is not appropriate.¹⁸ Similarly, the ACCC notes Emerald's submission where it compares the liability cap of \$250, 000 with the statement that a cargo of wheat can be valued at up to \$6 million.¹⁹

The Proposed 2011 Undertaking does not include any despatch-demurrage risk-sharing arrangements.

In relation to demurrage costs incurred by Viterra's customers for port terminal services, the ACCC notes that Viterra offers customers no guarantee for the timely delivery of grain to port through its logistics network, under procedure 8 of Viterra's Pricing Procedures and Protocols: Schedule B – Export Select and Export Standard. Viterra submits that there may be capacity constraints, factors beyond its control or other unforeseen circumstances which may delay the loading of a customer's vessel at port.

Under clause 13.3(a) of the Standard Terms, Viterra does not accept liability to compensate any customer that incurs demurrage costs as a result of any act or omission by Viterra, as port operator, unless caused by the 'gross negligence' of Viterra. This would include delays caused by Viterra accepting too many bookings on the shipping stem. This issue is discussed in Chapter 5.

¹⁸ CBH Grain, Viterra Access Undertaking for 2011 to 2014, 4 March 2011, p. 3.

¹⁹ Emerald Group, Submission to the ACCC, 4 March 2011, p. 4-5.

The ACCC is cognisant of submissions calling for the inclusion of a despatch demurrage objection and other performance based penalties on Viterra. However, consistent with the ACCC's approach in its Final Decision on the GrainCorp proposed 2011 undertaking and its ongoing assessment of the proposed 2011 undertakings of ABA and CBH, the ACCC considers liability to be a commercial issue suited to negotiation between the parties to the agreement in accordance with the publish-negotiate-arbitrate model. If parties are unable to resolve these issues, the parties may seek arbitration. Accordingly, the ACCC has not formed a view on the appropriateness of the liability provisions proposed in its Standard Terms and whether particular clauses will be acceptable to all parties.

Rather, the ACCC reiterates that access terms different to those in the Standard Terms can be negotiated between Viterra and access seekers. Where an access seeker believes that negotiation of an agreement does not occur in accordance with clause 6 of the Proposed 2011 Undertaking, the access seeker may make use of the dispute resolution provisions in clause 7 of the Proposed 2011 Undertaking. The dispute resolution regime provides for arbitration by the ACCC or a private arbitrator. Parties seeking to negotiate in relation to the liability provisions of the Standard Access Terms may avail themselves of these dispute resolution procedures.

For the reasons above, the ACCC is of the preliminary view that the limitation of liability provisions included in the Proposed 2011 Undertaking constitutes an appropriate starting point for negotiations between access seekers and Viterra.

4.2.3.2 Remaining provisions of the Standard Terms

The ACCC notes additional concerns from stakeholders include the following:

- Emerald's concern that when Viterra undertakes blending, it will only guarantee the quality of the blended parcel at the level of the lowest component of the blend;²⁰
- CBH Grain's submission that if Viterra is refusing to outturn grain on the basis of an alleged security interest, Viterra should immediately provide the full details and supporting evidence to the client;²¹
- AGEA's concerns regarding an access seekers ability to vary the Standard Terms, and specifically that such terms should not be less advantageous than those applying to the Viterra trading division.²²

The ACCC emphasises that the Standard Terms are negotiable between Viterra and access seekers. The Proposed 2011 Undertaking applies a publish-negotiate-arbitrate model by which access seekers can seek arbitration under clause 7 of the Proposed 2011 Undertaking, for disputes relating to the negotiation of access agreements.

In response to CBH Grain's concerns regarding confidential information, the ACCC notes the inclusion of new confidentiality provisions in the Standard Terms, which

²⁰ Emerald Group, above n 19.

²¹ CBH Grain, above n 18.

²² AGEA, Submission to the Public Consultation in relation to Viterra's proposed Port Terminal Services Access Undertaking, 7 March 2011, p. 4.

provide that Viterra will only disclose a third party's information under prescribed circumstances (clause 20.1).

In relation to AGEA's position that the terms of access an access seeker may negotiate with Viterra should not be less advantageous than those applying to Viterra's trading division, the ACCC refers to s. 4.4.1. In that section, the ACCC considers that Viterra should undertake to provide the ACCC with a copy of any access agreements Viterra has executed with its trading division, in order for the ACCC to be able to assess compliance with the non-discrimination obligation in this respect.

4.3 The ACCC's role under the Proposed 2011 Undertaking

The ACCC considers that the Proposed 2011 Undertaking should provide for certain powers and functions of the ACCC. These include a mechanism allowing the ACCC to object to a proposed variation by Viterra (an 'objection notice'), specific information gathering provision, an approval power acknowledging that decision making functions under the undertaking may be undertaken by particular Commissioners, and inclusion of an explicit reference to the ACCC's monitoring role. The ACCC considers that these powers and functions should be consistent across the Undertakings of all the port operators. As such, the drafting in each should follow a similar format.

4.4.1 The ACCC's role in the process for varying the PLPs

In the Final Decision to accept Viterra's 2009 Undertaking, the ACCC considered that it was appropriate for port operators to retain flexibility for varying the PLPs without ACCC input on the appropriateness of the proposed variation, noting that the variation mechanism could be strengthened in any future undertaking, if necessary.

The ACCC acknowledges that the PLPs are operational, and as such, a degree of flexibility is required to ensure operational efficiency at port having regard to s. 44ZZA(3)(a) and the legitimate business interests of Viterra. However, the wide scope of the PLPs means that significant aspects of port operations, such as capacity allocation, can be altered through a PLP variation process without the ACCC having a role. The ACCC remains of the view that port operators require sufficient flexibility to manage operations at port.

However, in certain circumstances the ACCC considers that the lack of regulatory oversight is inappropriate. These circumstances are where the proposed variation is material and gives rise to concerns under either the anti-discrimination (clause 5.5) and/or the no hindering access (clause 9.4) provisions of the Proposed 2011 Undertaking. If such concerns arise, then the ACCC suggests that it be able to object to the proposed variation.

The proposal is that the ACCC may send a written notice to the port operator outlining its concerns, with reasons. Upon receipt of the notice, or earlier, the port operator must withdraw the proposed variation. The ACCC considers it necessary to support this notice making power with an information gathering provision.

As the ACCC considers that certainty, flexibility and timeliness regarding the operation of the PLPs are of critical importance to both Viterra and access seekers, given the PLPs set out how the port operates, an approval role in respect of each proposed variation may be inappropriate. The suggested role would be specifically limited to the circumstances set out above for the purposes of a 2011 – 2014 undertaking.

Accordingly, the ACCC takes the preliminary view that the Proposed 2011 Undertaking is unlikely to be appropriate unless it includes:

- the ability of the ACCC to:
 - gather the necessary information to assess whether the ‘limited circumstances’ exist
 - issue a notice that the proposed variation raises concerns in relation to the provider’s anti-discrimination and/or no hindering access obligations
- an obligation on the port operator to withdraw the proposed variation upon receipt of the notice.

The ACCC is of the preliminary view that the inclusion of an objection notice under a new clause 9.4, combined with the proposed ACCC information gathering power under a new clause 5.7, is appropriate having regard to s. 44ZZA(3)(c) and the interests of access seekers. This increased oversight by the ACCC will deter Viterra from making inappropriate changes to the PLPs, which are the key rules governing the operation of the port and the provision of port terminal services. Access seekers will therefore benefit from an enhanced level of clarity and certainty in relation to the PLPs and the ACCC’s enhanced oversight over Viterra’s compliance with its obligations.

This approach to an ACCC role in the variation process is appropriate for all port terminal services access undertakings, particularly given that the same issues will be relevant to each of the different port operators in this context. In proposing this consistent approach to the PLPs across the industry, the ACCC has had particular regard to s. 44ZZA(3)(aa) of the CCA.

4.4.2 The mechanics of an ACCC role in the PLP variation process

4.4.2.1 How the proposed ACCC role would be applied to the variation process

Where the ACCC has concerns with the port operator’s proposed variations to the PLPs, it would raise those concerns with the port operator, and access seekers if appropriate, prior to issuing a notice.

In practice, the ACCC considers that the assessment and notification would be applied within the current timeframe for variation. Clause 9.3(b)(i) of the Proposed 2011 Undertaking provides that consultation on the proposed variation must commence at least 30 days prior to the date it is to become effective (the effective date). As noted earlier, the ACCC is acutely aware of the importance of timeliness in the variation process and the consideration of operational certainty for the port operator and access seekers.

The ACCC considers that it would be required to issue the notice no less than ten business days before the effective date, taking into account the overall period of time specified for the variation process in the Proposed 2011 Undertaking. Such a notice would include the ACCC's reasons.

4.4.2.2 Effect of the proposed ACCC role once exercised

The effect of the ACCC issuing an objection notice and the proposed variation to the PLPs not taking effect will depend on whether the notice relates to the entire variation or only part of it. If the notice relates to the entire variation, the variation cannot take effect and the port operator will be required to commence a new variation process (if it still wishes to vary the PLPs), as amended to address the ACCC's concerns.

Correspondingly, if only part of the proposed variation is the subject of a notice, it will not prevent the variation of changes that are not a subject of the notice. It will only be possible for the ACCC to disallow the variation in part where the proposed terms are not intrinsically related.

4.4.2.3 Suggested form of the provision

The ACCC takes the preliminary view that the following provision would be appropriate in providing the ACCC with a role with regard to PLP variations under the Proposed 2011 Undertaking.

Proposed amendment

9.4 Objection notice

- (a) If the Port Operator seeks to vary the Port Loading Protocols in accordance with clause 9.3(b), the ACCC may object to the proposed variation (or any part of the variation). If the ACCC objects to a proposed variation (or any part of the variation), it must issue a notice to the Port Operator stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this clause 9.4(a) on the ACCC's website.
- (b) Any notice issued under clause 9.4(a) must be issued at least 10 Business Days prior to the date on which it is proposed that the variation will become effective.
- (c) If the ACCC proposes to issue a notice under clause 9.4(a), then at least 5 Business Days before issuing that notice, the ACCC must provide the Port Operator with a draft notice stating its intention to object to the proposed variation and providing reasons for that intended objection.
- (d) In issuing a draft notice under clause 9.4(c) or a final notice under clause 9.4(a), the ACCC must have regard to whether the proposed variation:
 - (i) is material; and
 - (ii) amounts to a breach of the anti-discrimination provision in clause 5.5 or the no hindering access provision in clause 9.7.
- (e) The ACCC may withdraw a draft notice issued under clause 9.4(c) or a notice issued under clause 9.4(a) if in all the circumstances it becomes aware that the reasons

	specified in the draft notice issued under clause 9.4(c) or the notice issued under clause 9.4(a) no longer exist.
(f)	If the ACCC issues a notice under clause 9.4(a), the Port Operator must, within 3 Business Days, either: <ul style="list-style-type: none"> (i) withdraw the proposed variation and commence a new variation process (in which case, the Port Operator must place a notice in a prominent place on the Port Operator's website explaining the withdrawal and commencement of a new process and notify the ACCC in writing of the withdrawal and commencement of a new process); or (ii) withdraw the proposed variation and confirm the status of the existing Port Loading Protocols (in which case, the Port Operator must publish a notice to this effect in a prominent place on its website and notify the ACCC in writing that it has withdrawn the proposed variation and confirmed the status of the existing Port Loading Protocols).

The proposed drafting adopts a consistent approach to the specification of timeframes within the variation process. In the case of both the proposed objection notice power and the variation process generally, the minimum period between publication of the variation or objection and the date on which it becomes effective is at least 10 business days.

The ACCC is of the preliminary view that a requirement for it to issue a draft notice of objection prior to issuing a final notice is appropriate as this will provide Viterra with sufficient time to respond (i.e. five business days). In this regard, the ACCC notes the time between publication of the variation notice, after the minimum 10 business day consultation period, and the issuing of a draft notice, is five business days. This is a very short time for the ACCC to respond, but the ACCC anticipates that it will be sufficient time to identify concerns and act if necessary within the timeframe.

4.4.3 Viterra's proposed ACCC objection notice provision

In response to this issue, Viterra has included a draft provision at clause 9.4 of the Revised Draft, which provides the ACCC with the right to issue an objection notice in relation to any PLP variations proposed by Viterra.

The ACCC considers that clause 9.4 of the Revised Draft fulfils the requirements as outlined above in the suggested drafting of an ACCC objection notice provision.

Accordingly, the ACCC considers that the objection notice provision proposed by Viterra is appropriate.

4.4.4 Approval power and monitoring

The ACCC notes that clause 5.5(c) of the Proposed 2011 Undertaking provides for the ACCC to approve a member of the ACCC to exercise its powers regarding audit of Viterra's compliance with the non-discrimination provisions at clause 5.5. Additionally, clause 7.5(d) of the Proposed 2011 Undertaking provides for the ACCC

to approve a member of the ACCC to exercise its powers regarding the arbitration of disputes.

The ACCC considers that the introduction of a decision making role into the Proposed 2011 Undertaking and the short timeframes attaching to that role, warrant an extension of the existing approval provisions under the 2009 Undertaking. Having regard to s. 44ZZA(3)(c) and the interests of access seekers, this approval mechanism will facilitate the ACCC's monitoring role in relation to Viterra's compliance with the provisions of the Proposed 2011 Undertaking, particularly the non-discrimination and no hindering provisions, and will deter Viterra from engaging in self-preferential treatment. The ACCC takes the preliminary view that the Proposed 2011 Undertaking is unlikely to be appropriate unless the approval provision extends to all ACCC functions under the undertakings.

4.4.4.1 Viterra's proposed amendments

In response to this issue, Viterra has included the draft provisions at clause 1.1(h) and (i) of the Proposed 2011 Undertaking, which provide that:

1.1	Introduction
...	
(h)	The ACCC monitors compliance of undertakings accepted under Part IIIA of the CCA.
(i)	The ACCC may approve the Regulated Access, Pricing and Monitoring Committee or a member of the ACCC to exercise a decision-making function under this Undertaking on its behalf and that approval may be subject to any conditions which the ACCC may impose.

The ACCC takes the preliminary view that the proposed clauses 1.1(h) and 1.1(i) of the Proposed 2011 Undertaking are appropriate.

4.4.5 Information gathering

The ACCC considers that it is necessary to increase the ACCC's current ability to obtain relevant information, in a timely manner, under the Proposed 2011 Undertaking. The ACCC considers this to be appropriate as it will assist the ACCC in making effective and timely decisions when exercising its powers under the Proposed 2011 Undertaking, for example, in issuing an objection notice (see above). At present, the ACCC can obtain information from a port operator through an ACCC directed audit or on a voluntary basis. The ACCC considers that neither of these methods represents an appropriate way for the ACCC to obtain relevant information it requires to exercise the objection notice power.

An ACCC directed audit assesses whether Viterra has complied with clause 5.5, which requires it not to discriminate between access seekers in favour of its own trading business, except to the extent that the cost of providing access to the other access seekers is higher. Assessing the port operator's performance against the non-discrimination clause may be a relevant consideration for a decision on whether to

issue the objection notice; however, it does not encompass all the information that the ACCC would need in making the decision. For example, it does not provide information on the port operator's compliance with the no hindering access requirements in clause 10.8.

The ACCC further notes that while an audit may provide relevant information on whether to issue an objection notice, it may not be possible for the ACCC to receive the information within the variation timeframe. The ACCC considers that any extension of the variation timeframe, even for the ACCC to investigate whether or not to issue an objection notice, may give rise to uncertainty regarding port operations and should be avoided if possible.

For the reasons outlined above, the ACCC considers that the Proposed 2011 Undertaking is unlikely to be appropriate unless it includes information gathering powers to assist the ACCC in determining whether Viterra has complied with its various obligations under the Proposed 2011 Undertaking.

In response to this issue, Viterra in its Revised Draft has drafted a new information gathering provision at clause 5.7, which provides that the ACCC may request information from Viterra within 14 days of its receipt of the request.

The ACCC notes that since the information gathering powers are inserted into the Proposed 2011 Undertaking, a failure by the port operator to provide the information requested by the ACCC would result in a breach of the undertaking.

The ACCC is therefore of the preliminary view that the inclusion by Viterra of clause 5.7 in the Proposed 2011 Undertaking is appropriate because the ability for the ACCC to request information in a timely manner will assist the ACCC to exercise its powers or perform its functions under the Proposed 2011 Undertaking in a timely and fully-informed manner. This will assist Viterra in managing its operations in a timely and efficient manner and is therefore in its legitimate business interests (refer s. 44ZZA(3)(a)), particularly given that an audit may be onerous for ordinary information requests. The inclusion of clause 6.4 will also be in the interests of access seekers as it will enable the ACCC to assess Viterra's compliance with its various obligations under the Proposed 2011 Undertaking, in particular the non-discrimination and no hindering provisions (refer s. 44ZZA(3)(c)), and to thereby deter Viterra from engaging in self-preferential treatment to the detriment of non-affiliated exporters.

5 Capacity allocation method

5.1 The proposed allocation system

5.1.1 Viterra's Proposed 2011 Undertaking

Capacity management provisions are at clause 9 of the Proposed 2011 Undertaking and are outlined below.

Clause 9.1 requires Viterra to comply with the continuous disclosure rules as prescribed in the WEMA. In essence this requires Viterra to publish and update the shipping stem on a daily basis.

Clause 9.2 contains a requirement to comply with the PLPs attached at schedule 2 of the Proposed 2011 Undertaking.

Clause 9.3 contains a procedure for varying the PLPs which is discussed further in Chapter 4.

Clause 9.4 provides that Viterra, or a related body corporate, must not engage in conduct for the purpose of preventing or hindering access to port terminal services. This provision is discussed further in Chapter 4 of this Draft Decision.

Port Loading Protocols

The PLPs set out the manner in which shipping capacity is allocated to exporters, including Viterra's own trading arm. The PLPs prescribe that capacity is allocated on a first come, first served basis, to exporters who have an existing Port Terminal Services Access Agreement and/or a Storage & Handling Agreement. Bookings are accepted on a continuous basis as there is no prescribed closing or opening of the shipping Stem.

Once an electronic booking form is received by Viterra, a booking is placed onto the shipping stem on a 'pending' basis. Viterra accepts, rejects or enters into negotiations regarding this booking within five business days of being placed on the shipping stem. The wheat at port reference prices specify that a non-refundable fee of \$5 per tonne is charged on booking acceptance.²³

Bookings accepted by Viterra are allocated personally to the exporter and are not transferable to other exporters.²⁴ Additionally, a booking cannot be transferred to another shipping period or port terminal operated by Viterra. An exporter may divide a booking into more than one booking provided that each of those bookings is within the same shipping slot and the total tonnage of all the split bookings does not exceed the tonnage specified in the original booking.²⁵ The PLPs do not allow bookings to be rolled forward into subsequent booking slots; however, a ten day grace period is allowed for late arriving vessels.

²³ *Wheat at port reference prices*, available on Viterra's website <http://www.viterra.com.au/port-access-shipping-stem>, published 24 August 2010, accessed 4 August 2011..

²⁴ Viterra, Proposed 2011 Undertaking: PLPs, 23 December 2010, clause 2.5.

²⁵ *ibid*, clause 3.3.

There are also capacity management arrangements which function outside the requirements of the 2009 Undertaking and the Proposed 2011 Undertaking relating to information on available capacity and allocation of Export Select and Export Standard bookings. These arrangements are discussed below.

5.1.2 Information on available capacity

Following the start of the 2009/10 shipping season, Viterra commenced publishing a 'capacity table' on its website to provide greater clarity and information for exporters.

²⁶ The ACCC notes that Viterra has published this information in addition to the requirements contained in either the 2009 Undertaking and/or the Continuous Disclosure Rules, as prescribed by the WEMA. The publication of this information is therefore voluntary and may be withdrawn by Viterra in the future without breaching the Proposed 2011 Undertaking.

The capacity table is published on a daily basis alongside the Viterra shipping stem. The table indicates on a yes/no basis whether capacity is available either as part of Viterra's bundled port terminal services and transport to port product (Export Select) or as the stand alone port terminal services product (Export Standard). The table breaks down capacity per port per shipping slot, moving from month to month capacities to narrower shipping windows of 15 days as the date of proposed shipping draws closer. The capacity table states whether capacity is available for approximately eight months into the future.

Explanatory notes are published in conjunction with the table. These notes include *inter alia* a statement by Viterra that the table indicates where Viterra has restrictions to inward elevation, transport, or available up-country resources if known.

An example of the available capacity table as published by Viterra appears below.




Table 1: Available Capacity for Shipping Schedule

Shipping Period		Port Adelaide (IH & OH)	Port Giles	Port Lincoln	Wallaroo	Thevenard
16-30 Apr-11	Export Select	N	N	N	APW/H2/Lentils only	Y
	Export Standard	N	N	N	APW/H2/Lentils only	Y
1-15 May-11	Export Select	N	N	N	N	Y
	Export Standard	N	N	N	N	Y
16-31 May-11	Export Select	N	N	N	N	Y
	Export Standard	N	N	N	N	Y
Jun-11	Export Select	N	N	N	N	Y
	Export Standard	N	N	N	N	Y
Jul-11	Export Select	N	Y	N	N	Y
	Export Standard	N	Y	N	N	Y
Aug-11	Export Select	N	Y	N	Y	Y
	Export Standard	N	Y	N	Y	Y
Sep-11	Export Select	N	Y	N	Y	Y
	Export Standard	Y	Y	Y	Y	Y
Oct-11	Export Select	Y	Y	Y	Y	Y
	Export Standard	Y	Y	Y	Y	Y
Nov-11	Export Select	Y	Y	Y	Y	Y
	Export Standard	Y	Y	Y	Y	Y

Diagram 1: 'Available Capacity Table as published on 18 April 2011

²⁶ Viterra, Supporting Submission to ACCC on Proposed 2011 Undertaking, 23 December 2010, p.4.

5.1.3 Export Standard and Export Select services

Viterra currently makes available port terminal services as either a stand-alone service, Export Standard, or bundled with Viterra's freight services, Export Select. Export Select and Export Standard are not referred to in either the Proposed 2011 Undertaking or the PLPs, except to a very limited extent.

The ACCC understands that the significant majority of bulk wheat is exported via Viterra's Export Select product. This issue is discussed further in Chapter 7. Discussion of Export Select / Export Standard in this chapter is in relation to transparency of information.

5.2 Experience with the 2009 Undertaking

The capacity allocation model in the Proposed 2011 Undertaking mirrors the arrangements contained in the 2009 Undertaking. It is therefore appropriate in assessing the Proposed 2011 Undertaking to consider how the capacity allocation model, and Viterra's management of the shipping stem, have functioned in practice.

However, in considering the performance of the 2009 Undertaking, the ACCC has given consideration to external factors that may have impacted performance and behaviour of Viterra and exporters. These factors include adjusting to the new legislative arrangements, managing different capacity allocation systems, the impact of the auction system operating in Western Australia by CBH, and variable harvests.

5.2.1 Allocation of capacity 2009/10

The ACCC notes that submissions made to the Productivity Commission state that access to port terminal services in South Australia during the 2009/10 shipping season was difficult for a number of exporters due to the significant number of bookings made by Viterra's own trading arm early in the season.²⁷ As the season developed, a proportion of Viterra's own bookings went unexecuted due to issues experienced in Western Australia.²⁸

The Productivity Commission states:

There is prima facie evidence to suggest the differing approaches of CBH and Viterra might have influenced outcomes for growers in Western Australia and South Australia (chapter 3). In Western Australia, after experiencing congestion during the previous season, many auction participants wanted to book slots early and paid relatively high prices for shipping slots at auctions, with the fees largely being non-refundable. A number of participants highlighted that once the auction system started, the spread between grain prices in Western Australia and South Australia increased well above what would typically be expected. ...

Having committed to buying what effectively turned out to be 'overpriced' shipping slots given the depressed state of the global wheat market, it appears exporters did not believe there was any prospect of wheat prices improving enough to justify the cost of 'shifting' shipping slots to another time, and therefore had an incentive to pay 'above market' prices for Western Australian wheat to make up shipments. Having

²⁷ Productivity Commission, Wheat Export Marketing Arrangements, 1 July 2010, p. 216.

²⁸ *ibid*, p. 219.

committed well in advance to the Western Australian slots and incurred sunk costs, it appears exporters were less inclined to subsequently ship from South Australia, to the disadvantage of wheat growers in that State.

As a result of these issues, WEA required an audit of Viterra's shipping stem. As a result of the audit, Viterra undertook to review a number of its internal processes and implement a number of changes.

Viterra acknowledged some of these issues in its submission in support of the Proposed 2011 Undertaking.²⁹

5.2.2 Allocation of capacity 2010/11

The 2010/11 wheat harvest was considerably larger than that experienced in South Australia for some time. In addition, due to late rains, harvesting of the crop was delayed to late December 2010 and early January 2011. As such, the harvest placed considerable pressure on the supply chain, most notably at up country storage and receival sites and on testing procedures applied by Viterra when accepting grain into storage. In addition, growers raised issues with wait times for trucks unloading at port.³⁰

As a result of the issues encountered during the 2010/11 season, Viterra initiated a 'post harvest review'. Terms of reference for this review include inter alia communications to growers, available storage capacity and the provision of information such as quality data. The findings of the working group, together with Viterra's response, are available on Viterra's website.³¹

In addition to Viterra's own review, on 9 March 2011, the South Australian Parliament established a Select Committee to investigate the grain handling industry in South Australia. Terms of reference include inter alia: the capacity of the market to ensure a vigorous and competitive marketplace for grain growers; export and shipping arrangements, including port access and associated costs; and open and transparent information on all grains, including stock disclosures. The Select Committee is currently conducting public consultation – it is due to report on 14 September 2011.

On 23 March 2011, a notice of motion was put to the Federal Senate regarding the formation of a committee to consider operational issues arising in the export grain storage, transport, handling and shipping network. Submissions to this inquiry were due by 13 May 2011 and a final report is due on 2 November 2011.

5.2.3 Allocation of capacity 2011/12

In March 2011, a large number of bookings were nominated for the Port Lincoln and Port Adelaide Outer Harbour terminals for the January 2012 to April 2012 period. As a result of these bookings, capacity at Port Lincoln and Adelaide Outer Harbor appears to have been reached. This has caused a significant level of complaint from exporters.

²⁹ Viterra, Supporting Submission, 23 December 2010, p.3.

³⁰ South Australian Farmers Federation, Submission to Senate Standing Committee of Rural Affairs and Transport, Parliament of Australia, 12 May 2011, p. 29.

³¹ <http://www.viterra.com.au/grain/australia/harvest-201011/post-harvest-review>.

Based on information that appears on the Viterra shipping stem, at approximately 9.45am on 8 March 2011, Glencore nominated bookings totalling 440, 000 tonnes. At approximately 4:00pm Viterra published the shipping stem as it is required to do pursuant to clause 9.1(a)(ii) of the 2009 Undertaking. Between 5:21pm and 6:03pm on 8 March 2011, Viterra's own trading arm nominated bookings totalling 905, 000 tonnes. The nominations were for bookings between January 2012 to April 2012 at either the port terminal at Port Adelaide Outer Harbour or Port Lincoln. On 9 March 2011, Viterra's trading arm nominated an additional 545 000 tonnes for bookings in the December 2011, April 2012 and May 2012 shipping windows. Again these bookings were for the port terminals at Port Adelaide Outer Harbour and Port Lincoln.

The cumulative effect of the Glencore and Viterra bookings was to book out capacity at Port Lincoln and Port Adelaide Outer Harbour for the period January 2012 to April 2012.

Port Lincoln and Port Adelaide Outer Harbour are generally considered by exporters to be Viterra's most favoured port terminals as they are both able to accommodate a Panamax vessel and have the quickest loading times.³² It was submitted by a third party exporter that:

these are the two biggest panamax ports in South Australia and there are significant freight advantages shipping from a single load port. Current freight estimates depict 2USD/MT for this advantage.³³

The ACCC understands that January through to April is generally considered the 'peak' shipping period as it follows the harvest of new wheat and global demand for wheat during this period is high.

The ACCC understands that the shipping stem published on 9 March 2011 did not appear on Viterra's website until after 9:00pm due to the large number of bookings made after 5:00pm on 8 March 2011 and in the morning of 9 March 2011.

On 10 March 2011, AWB, Bunge, Cargill, CBH, Elders and Emerald nominated 67 bookings totalling 3.03 million tonnes. The ACCC understands that only a proportion of these bookings can be accepted as nominated due to capacity constraints.

5.3 Viterra and third party submissions

A summary of all Viterra's public submissions and submissions received from interested third parties in relation to capacity allocation is provided at Appendix A.

General issues raised in submissions regarding the capacity allocation model contained in the 2009 Undertaking include:

- lack of transparency as to available capacity

³² Average ship loading capacity: Port Lincoln: 1500tph; Outer Harbour: 1000tph; Port Giles: 850tph; Inner Harbour: 700tph; Wallaroo: 600tph; Thevenard: 600tph.

³³ Exporter M, Confidential response to ACCC request for information, pp. 1-2.

- lack of transparency as to the operation of Export Select and Export Standard
- Overbooking of the shipping stem, either by
 - Vitterra's trading arm thereby hindering access for other exporters
 - accepting too many bookings for a particular shipping slot causing exporters to incur demurrage costs
- the \$5 per tonne non-refundable booking fee does not act as a disincentive for overbooking to Vitterra's own trading division as it is an internal transfer of funds
- no incentive to return booked capacity in a timely manner if an exporter becomes aware that the booking will not be utilised
- the inability to move bookings between shipping slots.

The ACCC sought additional information from Vitterra, Vitterra's trading arm and other interested parties in relation to the 2012 bookings. Issues raised in the responses received include:

- Some exporters expressed confusion as to whether Vitterra was accepting bookings for the period after 30 September 2011 in the absence of agreed terms or conditions or an accepted access undertaking
- the first come, first served capacity allocation system has not allocated capacity efficiently for the period 1 January to 30 April 2012
- other options for allocating capacity efficiently include: auction, long-term take or pay contracts, independent body with responsibility for allocating capacity, and phased release of capacity
- the 2012 nominations were relatively speculative and made with is minimal business planning underpinning the nominations
- if exporters have been unable to secure capacity in a commercial manner, then it would be likely that they would not participate in the SA bulk wheat export market
- plans to grow, or enter the SA market have been hindered by the 2012 bookings
- nominating and booking shipping slots is preferably done further into the seasonal production cycle when export volumes are more certain, minimising risk and the cost of booking (being the non-refundable \$5 per tonne fee) so far from execution limits working capital

A more detailed summary of responses received from exporters in relation to the capacity allocation system and the 2012 bookings is provided at appendix A.

A summary of Vitterra's and Vitterra's trading arm's responses to similar requests for information is also provided at Appendix A.

5.4 ACCC view

As noted in Chapter 3, in deciding whether to accept an undertaking pursuant to Part IIIA of the CCA, the ACCC is required to have regard to the matters set out in s. 44ZZA(3). Of particular relevance to the assessment of Viterra's proposed capacity management arrangements are the following matters listed in s. 44ZZA(3):

- the objects of Part IIIA, including to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets
- the legitimate business interests of the provider
- the public interest, including the public interest of having competition in markets
- the interests of person who might want access to the service.

In addition, the ACCC considers the intention of the access test, that accredited exporters that own, operate or control port terminal facilities provide 'fair and transparent access' to its facilities to other accredited exporters is a matter relevant to the assessment of an access undertaking.

The ACCC considers that for a capacity allocation method to appropriately allocate capacity it should meet the following key conditions:

- transparency as to available capacity
- reasonable flexibility for exporters to enable execution of booked capacity
- at peak times, when demand for port services by grain exporters exceeds available capacity, there are mechanisms to ensure that capacity does not go unused and that capacity goes to exporters that value it most.

Transparency regarding available capacity is considered to be relevant in the ACCC's assessment of a proposed capacity allocation system as it is necessary to provide certainty to access seekers in planning export activities and helps to ensure efficient use of port terminal services because bookings can be made on an informed basis. Further, transparency of information, including in relation to available capacity, is considered necessary for creating a competitively neutral environment. Information available to Viterra's trading arm by virtue of being vertically integrated, not available to other exporters places Viterra's trading arm at a competitive advantage over other third party exporters as it is able to plan export programs based on actual capacity. This is important in relation to the public interest in having competition in markets.

Certainty and transparency regarding available capacity are factors relevant to whether access seekers have access to port terminal services on fair and reasonable terms and is thus in the interests of persons seeking access to port terminal services. Under s.44ZZA(3)(c) the interests of persons who might want access to the services is a matter to which the ACCC must have regard in making a decision whether it is appropriate to accept an undertaking.

Having a degree of flexibility after the primary allocation of capacity is desirable as it ensures that the infrastructure is being used more efficiently in that it may assist preventing capacity going unused during periods of peak demand. Flexibility enabling exporters to execute against bookings is also in the interests of access seekers.

In order to ensure that port terminal services are used efficiently, it is important that, in periods of constraint, capacity is allocated to those users that value it most. A market based capacity allocation system, such as an auction, ensures that capacity is allocated to users who value it most. However, where appropriate market conditions exist, features such as transparency of information and tradeable slots can be implemented to compliment a first come, first served system, and help to ensure that capacity is allocated efficiently.

The discussion below considers Viterra's proposed capacity allocation method against these characteristics.

The ACCC is required to form a view regarding capacity management arrangements proposed in the undertakings offered by the four BHCs (Viterra, GrainCorp, CBH and ABA). The ACCC does not consider that capacity management arrangements should necessarily be the same for all operators; it is of the view, however, that a consistent approach should be taken when forming its view on each of the proposed undertakings.

The ACCC considers that capacity allocation arrangements should be assessed for each BHC on the basis of its circumstances and notes that these circumstances differ as between the four BHCs and the markets in which they operate. In this regard the ACCC has analysed the similarities and differences between the BHCs and the markets in which they operate. Further detail as to the different market conditions and the analysis is provided in Appendix B.

5.4.1 Information availability

In considering transparency as to available capacity, the ACCC has considered two issues:

- the publication arrangements of available capacity, currently differentiated between Export Select and Export Standard capacity
- the arrangements for when exporters are able to make capacity bookings.

Publication of available capacity

Viterra currently voluntarily publishes an available capacity table in order to provide information regarding available capacity. The ACCC acknowledges that this information goes some way in terms of providing transparency to exporters as to available capacity; however in the absence of volumes available, considers that it is insufficient in assisting exporters to plan their export activities.

In addition, the ACCC notes that the publication of this information is voluntary and may be withdrawn by Viterra without breaching the Proposed 2011 Undertaking.

The ACCC considers that transparency is a key element of an appropriate capacity allocation model. Exporters must have sufficient information regarding available capacity necessary to plan export activities and obtain corresponding port services. Submissions indicate that the lack of transparency surrounding capacity availability at South Australian ports is a key concern for exporters.³⁴

The ACCC acknowledges the multi-faceted nature of the definition of capacity, and the various factors that impact on Viterra's ability to outturn grain onto vessels for export and notes Viterra's argument that such information would need to be so heavily qualified that it would mitigate the use of such information.³⁵ However, such information is provided in both the Western Australian and East Coast markets and is useful to exporters in planning their export activities. The numerical capacity of each port is made available either through a more detailed capacity table and/or as part of facilitating capacity auctions in these markets.

It is the ACCC's preliminary view that in order to manage its shipping stem and decide which bookings to accept, Viterra must have a good understanding of what the available capacities are for each port for each month. As capacity becomes scarcer the limitations of the yes/no indication become more apparent. To compensate for the limited public information about capacity, exporters are required to maintain ongoing contact with Viterra to learn about the state of capacity and marry that information with the nominations they observe coming onto the shipping stem. The ACCC considers this process to be inefficient and unnecessarily burdensome on exporters.

Further, as there is no formal ring fencing arrangements in place, Viterra's trading arm may have access to information regarding available capacity that is not available to third party exporters. The lack of transparency as to available capacity may confer a competitive advantage on Viterra's trading arm.

Export Select and Export Standard capacity

The ACCC further notes that overall available capacity may be impacted by the interrelationship of Export Select and Export Standard.

Following acceptance of the 2009 Undertaking, Viterra commenced publishing an available capacity table. The ACCC understands that Viterra subsequently refined the available capacity table, distinguishing the available capacity for each product. Prior to making the amendments it was unclear in the table as to what capacity it depicted. The ACCC understands that the table depicted only Export Select capacity for the reason that there had never been constraint on exporters seeking to use the Export Standard service.

Submissions from access seekers indicate a desire for increased transparency in relation to the quantities of capacity available for each service, how capacity is divided between Export Standard and Export Select, and how total capacity is

³⁴ Emerald Group, Submission to the ACCC, 4 March 2011, Elders Toepfer Grain, Submission: Issues Paper – Viterra Operations Limited proposed Port Terminal Services Access Undertaking, 8 March 2011.

³⁵ Viterra, Response to matters raised in the ACCC's Issues Paper, 23 March 2011, p. 5.

affected by cancellations of bookings or the making available of a particular type of capacity.³⁶

The ACCC notes that the majority of exporters use the Export Select product ahead of the Export Standard product as the key means to arranging port access. A client may have an Export Select booking either as a result of its initial capacity nomination or because during the course of managing its booking, it converts an Export Standard booking to the Export Select option.

The ACCC considers that available capacity should reflect the capacity at port, rather than any up-country constraints. Separately, Vitterra may choose to publish details relating to its upcountry capacity, but this should not impact on capacity at port.

Therefore the ACCC's preliminary view is that the Proposed 2011 Undertaking is not appropriate in relation to the level of transparency provided to access seekers about capacity availability, having regard to the interests of access seekers, competition and the efficient use of Vitterra's port terminals.

As noted previously, Vitterra's Revised Draft requires Vitterra to publish an available capacity table including indicative estimates of available capacity.

Open Shipping Stem

The nature of the bookings pattern experienced in relation to the 2011/12 bookings highlights a problem in having a continually open shipping stem and insufficient information as to whether bookings are able to be accepted.

Submissions indicate that some exporters were unaware that Vitterra was accepting bookings for the 2011/2012 season in the absence of an accepted undertaking or certainty regarding terms and conditions of supply.³⁷ Submissions received from exporters note that the majority of bookings made for execution after 1 October 2011. Further, submissions indicate that nominations made are highly speculative and have been made in order to have some access to the South Australian ports for the 2011/12 season.³⁸

It is the ACCC's preliminary view that greater transparency as to the 'open' nature of the shipping stem would have provided certainty to the industry in making nominations for bookings for the period after the expiry of the 2009 Undertaking. In contrast to the continually 'open' nature of Vitterra's shipping stem, GrainCrop has a 'hard opening', the date of which is communicated to exporters through a media release. Similarly, CBH publishes an auction schedule.

It is the ACCC's preliminary view that the Proposed 2011 Undertaking is not appropriate with regard to the arrangements for communicating to exporters the details of when capacity bookings are able to be made because they do not provide an

³⁶ Elders Toepfer Grain, Submission to ACCC Issues Paper, 8 March 2011; CBH Grain, Vitterra Access Undertaking, 4 March 2011; AGEA, Submission to the Public Consultation, 7 March 2011.

³⁷ Confidential submission: Exporter G, Exporter N.

³⁸ AWB, Response to ACCC's Request for Information – Allocation of shipping capacity at Vitterra Operations' South Australian port terminals, 7 April 2011, p. 3.

adequate level of certainty to enable exporters to plan their export programs based on business requirements.

Uncertainty as to the arrangements for making bookings is also not likely to result in fair and efficient access, particularly if some exporters become aware before others that they are able to make bookings. To the extent that this results in some exporters being unable to secure capacity, this may negatively impact on the efficient use of infrastructure and may affect competition in related markets which rely on access to port terminal services.

Viterra's Revised Draft, introducing an auction system addresses the ACCC's concerns with respect to transparency in relation to the operation of the shipping stem.

5.4.2 Flexible arrangements for execution of capacity

The second key element of an effective capacity allocation model is flexibility for exporters to execute booked capacity. In relation to this issue, the ACCC notes that the capacity allocation model operated by Viterra, when compared to other BHCs is the least flexible in terms of allowing exporters to move either port terminals or move booked shipping slots.

The PLPs governing access to GrainCorp port terminals down the East Coast allows exporters to move bookings forward on the shipping stem and between ports. In Western Australia, slots booked either by way of an auction system or allocated based on a first come, first served system are able to be traded or transferred between exporters. In addition, booked slots are able to be moved back two weeks or forward four weeks. The ACCC understands also that ABA allows booked shipping slots to be rolled forward; however, such a practice is not encapsulated in ABA's current PLPs.

In contrast, Viterra's PLPs do not allow for the movement of booked shipping slots, but for a 10 day grace period allowed to accommodate late arriving vessels. Further, Viterra's shipping slots cannot be transferred from one port to another and slots are not transferable or tradeable between exporters. It is unclear to the ACCC why Viterra's circumstances do not allow for similar flexibility provided by other BHCs.

There are many factors that can impact exporters' plans. These include disruption to the supply chain from weather conditions that impact harvest timing and grain quality through up-country storage and transport to port: and events at port. These factors mean that it is in the interests of access seekers to have some flexibility in executing slots they have booked on the shipping stem. It is also in the interests of Viterra in terms of the efficient use of port capacity. Flexible shipping arrangements are likely to assist in maximising throughput at port.

The ACCC's preliminary view is that the proposed arrangements are not appropriate because they do not provide for sufficient flexibility for exporters to execute booked capacity. Viterra's Revised Draft introduces mechanisms enabling exporters to move booked shipping slots and trade slots. In addition, the Revised Draft introduces an incentive to return unwanted capacity to the shipping stem.

5.4.3 Capacity management during peak periods – efficient allocation

In assessing the appropriateness of a capacity allocation system within an access undertaking, the ACCC is required to have regard to the efficient allocation of capacity. This includes mechanisms to ensure that throughput is maximised, particularly at times of peak demand and that capacity is allocated to those who value it most.

Capacity allocation arrangements include two main components:

- Primary allocation arrangements by which capacity is rationed between competing users and which are broadly categorised as either price (market based) or non price rationing.
- Secondary allocation arrangements or in season arrangements that facilitate exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export capacity.

Primary allocation arrangements

The ACCC considers two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances:

- the relationship between total port elevation capacity and average annual and seasonal demand for it
- the extent to which the incentive exists for vertically integrated BHCs to pursue self preferential treatment – including hindering other exporters from accessing port services.

Capacity constraints in South Australia

Due to the lack of transparency as to available capacity at Viterra's South Australian ports, it is difficult to determine the level of capacity constraint.

However, based on the pattern of bookings for the 2011/12 season, and the resulting order of priority created by the first come, first served system, and information provided by Viterra,³⁹ the ACCC is able to conclude that for the 2011/12 season, demand for capacity at both Port Lincoln and Port Adelaide Outer Harbour for the period January to April 2012 exceeds available supply.

The ACCC notes that the period January to April is the peak shipping period where global demand is at its highest and exporters are able to obtain the best price for new harvest grain. The high demand for the Port Lincoln and Port Adelaide Outer Harbour port terminals appears to be due to each port being able to accept panamax vessels and the port terminal ship loading facilities being able to more efficiently load grain.⁴⁰

³⁹ Viterra, 2011/12 Shipping bookings - letter to clients, 16 March 2011.

⁴⁰ Based on ship loading capacity detailed in Viterra's Proposed 2011 Undertaking: Port Schedules; Confidential Exporter M, above n 33.

The 2009/10 combined crop harvest was above the five year average of 4.9 million at 6.4 million tonnes.⁴¹ South Australian winter crop production in 2010/11 was expected to be the largest on record at 9.8 million tonnes.⁴² Viterra has stated in recent media that it is breaking records in terms of the amount of throughput at port.⁴³ Early forecasts for the 2011/12 seasons is that it will be another large crop.⁴⁴ It therefore appears likely that there will be increased demand for Viterra's port terminal services over the life of the Proposed 2011 Undertaking.

Self preferential treatment

As noted, the extent to which the incentive exists for vertically integrated BHCs to pursue self preferential treatment is relevant in assessing an appropriate capacity allocation system.

Where actual or potential competition exists, the incentive to hinder competitors is moderated by the possibility that throughput will be lost to an alternative supply chain or use.

In the context of the Australian wheat export industry competition in the bulk shipment of wheat through an operator's ports comes from four main sources:

- extent of vertical integration and alternative up-country supply chains
- domestic uses for wheat
- competition from ports in other regions
- threat of by pass by customers
- containerised exports.

The extent of competition varies significantly across the markets in which the BHCs operate. Further details are at Appendix B.

The South Australian wheat exports market appears not to provide the competitive constraints sufficient to neutralise the incentives for self preferential treatment by Viterra.

In terms of incentives to pursue self preferential treatment, the ACCC notes that Viterra is strongly vertically integrated in the upcountry storage and handling market with 106 receival sites.⁴⁵ AWB, the second largest operator of upcountry storage and handling services has four receival sites in South Australia.⁴⁶ Further, there is very little competitive constraint provided by the South Australian domestic market for bulk wheat, and due to the geographic location, there is very little, if any competition

⁴¹ ABARES: Australian crop report, February 2011, table 2

⁴² ABARES: Australian crop report February 2011, pg 14

⁴³ Viterra, *Grain shipments from SA continue at record pace*, Media Release, 24 June 2011.

⁴⁴ Commonwealth Bank, *Australia's 2011/12 wheat crop forecast at 24.3 million tonnes*, Commodities: Agri Updates, 10 May 2011.

⁴⁵ <http://www.viterra.com.au/grain/australia/storage-handling>.

⁴⁶ <http://www.grainflow.com.au/grainflow-sites/>

provided by ports in other regions. For the five year period to 2008-09, non bulk exports accounted for only 6-7 per cent of exports from South Australia.⁴⁷

Overbooking capacity

The ACCC notes a number of submissions from exporters that the current capacity allocation arrangements and PLPs do not prevent overbooking of the shipping stem.⁴⁸ Overbooking of the shipping stem can refer to both overbooking by Viterra's own trading arm; that is, booking in excess of its reasonably anticipated requirements; or alternatively, to Viterra accepting too many bookings onto the shipping stem.

A number of exporters submit that the \$5 per tonne non refundable deposit provides no disincentive on Viterra's trading arm to overbook capacity, because the payment of such a fee is merely a paper transaction from one division of Viterra to another.⁴⁹ In contrast, as noted in submissions and in particular in relation to the 2012 bookings, it is submitted that a \$5 per tonne booking fee on third party exporters is a real cost and for smaller exporters a significant cost and as such acts as a disincentive to overbooking by third party exporters.⁵⁰

In response, Viterra does not agree that there are insufficient incentives to prevent Viterra's trading arm from over-booking the shipping stem. Viterra submits that the potential to forfeit the \$5 per tonne booking fee is a clear disincentive as Viterra and Viterra's trading arm operate as separate profit centres. Further, Viterra submits that the Viterra group experiences substantial costs for booking cancellations if the relevant slots are not subsequently made available to others for utilisation. Viterra states that if bookings are cancelled it loses the opportunity to recover shipping fees, but still incurs fixed infrastructure costs and Viterra's trading arm loses the booking fee and does not get any revenue for the forgone export sale.⁵¹

It is the ACCC's preliminary view that the booking fee does not act as a constraint on Viterra's trading arm booking in excess of its reasonably anticipated requirements to the same extent that it operates as a constraint on third-party exporters.

Notwithstanding that Viterra and Viterra's trading arm operate as separate profit centres, the ACCC considers that the booking fee does not affect the financial incentives for the group and this places the BHC at a competitive advantage compared with third party exporters in placing capacity bookings. This competitive difference is greater the earlier in advance of execution the booking fee is payable.

The ACCC accepts Viterra's submission that the Viterra group may experience substantial costs for booking cancellations if the relevant slots are not subsequently made available to others for utilisation. However, this does not change the ACCC's concern that access to port terminal capacity should be made available on competitively neutral terms, so that the conditions for making a booking, for example, should impose an equivalent constraint against overbooking on all exporters. In the event that a booking is cancelled, and the slot is not subsequently used by another

⁴⁷ Productivity Commission, Wheat Export Marketing Arrangements, 1 July 2010, p. 58.

⁴⁸ For example: AGEA, Submission to the Public Consultation, 7 March 2011; AWB Limited, Submission on proposed Viterra undertaking, 2 March 2011.

⁴⁹ Exporter E, Confidential response to ACCC request for information, 6 April 2011; Exporter J, Confidential response to ACCC request for information, 8 April 2011.

⁵⁰ Exporter E, Confidential Response, 6 April 2011.

⁵¹ Viterra – Confidential submission dated: 5 July 2011

exporter, a third party exporter loses the booking fee and Viterra loses the opportunity costs associated with that booking. In the event that Viterra's trading arm cancels a booking and the slot is not subsequently used by another exporter, Viterra loses the opportunity costs; however, the booking fee is transferred from one part of the Viterra group to another. In contrast it is a real cost to third party exporters.

It is the ACCC's preliminary view that any disincentive to overbook in the capacity allocation arrangements applying in Viterra's undertaking must have the same effect on all exporters including the BHC in order to avoid placing the BHC at a competitive advantage, consistent with the objective of providing for competition in markets. This reflects the ACCC's view discussed above that Viterra has an incentive for self-preference which should be addressed in the capacity allocation arrangements. The ACCC notes that market conditions applying to Viterra are different from those on the East Coast, and are relevant in explaining the ACCC's view on GrainCorp's capacity management arrangements in its accepted 2011 Undertaking.⁵²

A number of exporters submit that Viterra accepts too many bookings on its shipping stem, leading to exporters incurring demurrage costs due to congestion at port. The call for the introduction of a despatch demurrage system is discussed further in Chapter 4. It is the ACCC's view, however, that increasing the transparency of available capacity should go some way to imposing greater discipline on Viterra's acceptance of bookings and provide greater information to exporters to assist their decisions about capacity bookings. It is the ACCC's view that this position appropriately balances the needs of access seekers in terms of access to information with Viterra's legitimate business interests of maintaining operational flexibility in terms of the number of bookings accepted onto the shipping stem.

Conclusion on appropriate primary allocation arrangements

In the circumstances discussed above, of expected capacity constraint and limited competitive constraints to neutralise the incentives for self preferential treatment by Viterra, the ACCC considers that an administered arrangement such as FCFS is not likely to be appropriate because it is unlikely to result in an efficient use of infrastructure. The ACCC considers that auctions and transferability are preferred mechanisms on economic efficiency grounds to allocate capacity in these circumstances. Auctions, by allocating capacity to users with the highest willingness to pay, are the preferred approach.

Secondary allocation arrangements

Secondary allocation arrangements or in season arrangements that facilitate exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export capacity are relevant when assessing the appropriateness of a capacity allocation system as they may improve the overall efficiency of the infrastructure by ensuring that capacity does not go unused, particularly during periods of constraint, and further, that it is utilised by the exporter that values it most.

⁵² ACCC, GrainCorp Decision to Accept, 22 June 2011, p. 25.

The current and proposed capacity allocation method operated by Viterra does not include any mechanisms that facilitate exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export capacity.

Ability to move bookings between shipping slots and ports

The capacity allocation arrangements in the Proposed 2011 Undertaking provides very little flexibility to exporters with regard to either moving slots between ports or time periods or transferring slots between exporters. As discussed above, the lack of flexibility limits exporters' ability to adjust to variations in demand.

As recognised in the decision to accept GrainCorp's 2011 undertaking, the ability to move the time and location of booked shipping slots allows exporters to respond to unanticipated market developments. However, these mechanisms in isolation may result in capacity going unused during peak times and does not encourage the return of unwanted capacity.⁵³

Tradeable or transferable shipping slots

The ACCC considers that tradeable (for payment) or transferable slots will result in more efficient use of capacity, particularly during peak times, as it reduces the likelihood of capacity going unused and facilitates the use of capacity by those who value it most highly. Further, tradeable slots enable an exporter who does not need a slot to seek a commercial arrangement that reduces the loss incurred by the forfeiture of the booking fee.

In this regard, the ACCC notes public submissions received from AGEA, AWB and CBH as well as confidential responses to the ACCC's request for information supporting the concept of 'tradeable shipping slots'.

However, the ACCC notes concerns raised by Elders that tradeable, as opposed to transferable, shipping slots may create a secondary market that lacks liquidity.⁵⁴

As noted in the GrainCorp Draft Decision, the ACCC acknowledges that there may be risks with tradeable or transferable slots and is cognisant of the need to consider how such arrangements may affect the legitimate business interests of Viterra and whether port operations are likely to be significantly adversely affected.⁵⁵ The GrainCorp Draft Decision also included the following appropriate conditions for tradeable slots:

- transfers to be between clients with whom the BHC has an access agreement in place
- the transferee must meet the BHC's usual trade terms, including in relation to any monies owed
- the booking that is transferred carries all booked arrangements as confirmed with the transferor – such as port, shipping slot and assigned load date

⁵³ *ibid*, p. 27.

⁵⁴ Elders Toepfer Grain, Submission to ACCC Issues Paper, 8 March 2011, p. 3.

⁵⁵ ACCC, GrainCorp Operations Limited, Port Terminal Services Access Undertaking, Draft Decision, 24 March 2011, p. 54.

- the transferee acquires all obligations, and rights held in relation to the booking by the transferor at the time of the transfer.⁵⁶

In addition to tradeable or transferable shipping slots, the ACCC recognises that there are other existing market mechanisms whereby slots booked by one trader can be used to ship another traders wheat, namely the practices of stock swaps and selling grain free on board (FOB). Such mechanisms may have similar benefits as tradeable slots in terms of increasing the efficient use of the infrastructure and ensuring that capacity does not go unused. The ACCC understands, however, that such mechanisms can result in complex transactions with a significant degree of risk. It is the ACCC's preliminary view that stock swaps and FOB sales, in isolation, are not sufficient to ensure that capacity does not go unused during periods of peak demand.

The ACCC notes that the current capacity allocation model does not allow slots to be transferred or traded.

Returning bookings to the shipping stem

In addition to the ability to move or trade bookings, the ACCC recognises that an incentive to return unwanted capacity to the shipping stem is a further mechanism that may improve the efficient allocation of capacity by ensuring that capacity does not go unused. Such a mechanism can also be considered to be in the interests of access seekers as it is likely to minimise costs associated with being unable to execute as anticipated and in Viterro's interests, as it will likely result in more efficient use of its infrastructure.

GrainCorp, in its PLPs has inserted a clause that provides a conditional refund for surrendered bookings during peak periods. Pursuant to this clause, GrainCorp will refund 50 per cent of the booking fee if:

- the client has surrendered the booking more than 35 days prior to the first day of the shipping slot, and no further bookings could previously be accepted for that shipping slot
- if, no later than 28 days prior to the first day of the shipping slot, another customer makes a booking for
 - an amount equivalent to, or greater than the quantity of tonnes surrendered, and
 - at the same port, for the same shipping slot, as the surrendered booking.

In its decision to accept GrainCorp's 2011 undertaking without a mechanism to allow exporters to trade or transfer bookings, the ACCC noted that:

The ACCC is of the view that the proposed change to capacity management arrangements will result in a reduced risk that capacity will go unused during peak periods and, hence, will aid greater economic efficiency.

⁵⁶ ibid, p. 55.

In reaching its decision, the ACCC formed the view that the inclusion of this provision in the 2011 Undertaking balances the interests of GrainCorp to maintain operational efficiency; the interests of access seekers to have more flexible access; and the public interest in the economically efficient use of GrainCorp's port facilities at peak times.

The ACCC notes that Viterra's Proposed 2011 Undertaking and PLPs, which are rolled over into the Proposed 2011 Undertaking, do not include any incentive to return bookings to the shipping stem in the event that an exporter is not going to execute against any booking.

5.4.4 Conclusion

It is the ACCC's preliminary view that the first come, first served, capacity allocation system contained in the Proposed 2011 Undertaking is not appropriate for the following reasons:

- insufficient transparency as to available capacity and the arrangements for accepting bookings on the shipping stem
- insufficient flexibility for exporters to execute booked capacity
- no mechanisms exist to ensure that capacity is allocated efficiently (i.e. to exporters that value it most) and to ensure that no capacity goes unused during periods of peak demand.

In relation to the third element, the ACCC notes that a first come, first served capacity allocation system may efficiently allocate capacity where capacity is not constrained and there are particular market conditions, or adequate mechanisms that neutralise any incentive for self preferential treatment by the BHC.

However, evidence suggests that the demand for port terminal services in South Australia exceeds current capacity to supply at particular ports in peak periods, and that this constraint is likely to continue for the period covered by the Proposed 2011 Undertaking. Further, the South Australian bulk wheat export market, where there is a limited domestic market, limited competition from other ports, and in which Viterra provides the majority of upcountry storage and handling, does not provide a sufficient constraint on the incentive on Viterra to give preference to its trading arm over other exporters. The proposed capacity allocation arrangements similarly do not provide a constraint on this incentive and, in particular, the booking fee does not act as a constraint on Viterra's trading arm booking in excess of its reasonably anticipated requirements to the same extent that it operates as a constraint on third party exporters.

In these circumstances, of expected capacity constraint and limited competitive constraints to neutralise the incentives for self preferential treatment by Viterra, the ACCC considers that an administered arrangement such as first come, first served is not likely to be appropriate because it is unlikely to result in an efficient use of infrastructure. The ACCC considers that auctions and transferability are preferred mechanisms on economic efficiency grounds to allocate capacity in these circumstances. Auctions, by allocating capacity to users with the highest willingness to pay in a primary allocation, are the preferred approach.

5.5 Introduction of an auction system – Viterra’s Revised Draft Proposed 2011 Undertaking

5.5.1 Viterra’s Revised Draft Proposed 2011 Undertaking - auction

In response to the ACCC’s concerns regarding the efficiency of the first come, first served capacity allocation system, Viterra proposes inserting clauses 9.5 and 9.6 into the Proposed 2011 Undertaking providing for changes to the capacity allocation system to introduce an auction system.

Clause 9.5 A (a), (b) and (c) provides that Viterra will vary its PLPs to introduce an auction system for the allocation of port terminal capacity by a specified date. The variation process will involve the publication of an ‘Auction Variation Notice’ after Viterra conducts extended consultation with industry. The varied PLPs will become effective 45 business days after publishing the notice if the ACCC does not issue an objection notice in relation to the variation.

Clause 9.5 (d) provides, in brief, that the auction system will incorporate the following features:

- (i) an auction should be the primary means of allocating port-loading capacity at each Port Terminal
- (ii) capacity should be defined on a consistent basis in terms of metric tonnes per month available at each Port Terminal and should reflect the total Available Capacity volumes that appear in the capacity table published in accordance with clause 10.2(a)
- (iii) all *bona fide* clients should have an equal opportunity to participate in the auction process
- (iv) the auction should be conducted in a transparent and non-discriminatory manner
- (v) slots should be allocated to those clients that value them most
- (vi) the auction system should feature rules to create disincentives which apply equally to all clients on booking in excess of reasonably anticipated requirements
- (vii) rights purchased in the auction should be tradeable and transferable between bona fide clients, subject to reasonable rules.

The Auction System will not apply to bookings that have been accepted prior to the date the variation takes effect even if those bookings relate to shipments after the date the variation takes effect (refer to discussion below regarding Viterra’s transitional arrangements).

Clause 9.5(g) details the formal industry consultation Viterra must undertake prior to publication of the Auction Variation Notice. Viterra must consider the issues raised by interested parties and the ACCC and may modify the variation proposal to reflect the feedback of these parties.

Clause 9.5(f) provides that Viterra must commence industry consultation by 30 January 2012.

Clause 9.6 provides that the ACCC may object to the proposed variation by issuing an auction objection notice. In deciding whether to issue an auction objection notice, the ACCC must have regard to whether the proposed variation complies with auction principles inserted into the undertaking, whether the variation would amount to a breach of the anti-discrimination or no hindering access provisions of the undertaking, the desirability of having consistency with other auction systems, balanced with the particular characteristics of the SA market, the matters set out in s. 44ZZA(3) of the CCA and any submissions from Viterra or other interested parties.

If the ACCC does object to the variation, it must do so at least 10 business days prior to the variation taking effect. That is, no later than 35 business days after the publication of the Auction Variation Notice. Any auction objection notice must specify the reasons for the objection. The ACCC must provide a draft objection notice 5 business days prior to issuing the auction objection notice.

In the event that the ACCC issues an objection notice, Viterra, pursuant to clause 9.6(f) will submit a revised variation notice to the ACCC, seeking to address the ACCC's concerns within 35 business days. The ACCC may, if its concerns are addressed, withdraw the objection notice. If concerns remain regarding the proposed variation, the objection notice issued by the ACCC remains in force. The ACCC must make a decision regarding the revised variation notice within 30 business days. Clause 9.6(g) provides that Viterra may, acting in response to feedback provided by the ACCC submit further amended variation proposals up to 15 business days prior to the ACCC issuing a final decision in relation to the appropriateness or otherwise of the proposed auction system.

If Viterra fails to introduce an appropriate auction system before the date specified in the undertaking (subject to extension if the ACCC issues an objection notice), Viterra has undertaken to not provide port terminal services, with the exception of port terminal storage, to its trading arm with respect to the export of Bulk Wheat.

Further pursuant to clause 9.6(m), if an auction system is not implemented before the specified date, and Viterra is unable to provide port terminal services to its trading arm by 16 August 2012, Viterra will reopen the shipping stem to other exporters on a first come, first served basis for bookings for execution for a three month period. This provision will repeat until such time as Viterra successfully implements an auction system.

5.5.2 Proposed transitional arrangements

Viterra submits that it is not possible to design and implement an auction system with respect to capacity from 1 October 2011. Further, Viterra submits that it is important that it treats the currently pending bookings for the 2011/12 season in accordance with the first come, first served capacity allocation system set out in the 2009 Undertaking.

The ACCC raised concerns with Viterra regarding the inefficient allocation of capacity based on a first come, first served basis and the proportion of bookings at Port Lincoln and Port Adelaide Outer Harbour during the peak shipping period of January to April 2012. In response, Viterra proposes to voluntarily remove a number

of bookings so that the proportion of capacity at the two constrained ports is more closely aligned with the proportion of capacity booked by Viterra for the corresponding period in 2011.

The capacity that is made available by Viterra's removal of bookings is to be reallocated in accordance with the order of priority created pursuant to the first come, first served capacity allocation system.

The ACCC notes that on 22 July 2011, Viterra closed the shipping stem for further bookings from 1 October 2011.

5.5.3 Viterra's Revised Draft Proposed 2011 Undertaking – Publication of available capacity

Viterra has inserted new clause 10.2 that requires Viterra to publish on its website an indicative estimate of the Available Capacity for each port terminal. The indicative estimate will be based on a number of assumptions and subject to qualifications. If the indicative estimate varies, Viterra will publish reasons for that variation.

The undertaking provides that the information published will not involve a minimum capacity guarantee.

Available Capacity refers to the amount of practical port terminal capacity that may be available from time to time for the provision of services for the exporting of bulk wheat and other grains at a port terminal.

5.5.4 Viterra's Revised Draft proposed 2011 Undertaking – Flexible arrangements

The PLPs attached to the Revised Draft have been amended to introduce new clauses 9, 10 and 11 regarding flexible arrangements.

Clause 9 allows exporters to move a booking either to a different 30 day shipping slot at the same Port Terminal, or to move a booking to a 30 day slot at a different Port Terminal. Exporters are able to move slots up to 30 days prior to the first day of the original 30 day booking slot.

Clause 10 provides that an exporter may cancel a shipping slot, by written notice up to 30 days prior to the first day of the relevant 30 day slot. If Viterra is able to accept another booking to replace the vacated booking, then the exporter that cancelled the booking is entitled to a 50 per cent refund of the initial booking fee. In effect, this provision provides an incentive to all exporters to return unwanted capacity to the shipping stem.

Clause 11 provides that an exporter is able to transfer a booking to another exporter provided:

- a signed notice is provided to Viterra no later than 30 days prior to the first day of the transferred booking;
- within two business days of the date on which the transfer is made the transferee completes a booking form in respect of the transferred booking;

- the quantity of Grain must not be more than the original bookings
- the transferor has met Table A requirements relevant to the date of the transfer notice; and
- the booking has not been previously transferred pursuant to clause 11.

Clause 11 states that no new booking fee will be applied. The PLPs are silent on whether Viterra will impose a transfer fee.

5.6 ACCC's view on the Revised Draft Proposed 2011 Undertaking

5.6.1 Information availability

It is the ACCC's preliminary view that Viterra's proposed clause 10.2 addresses the ACCC's concerns regarding insufficient information as to available capacity.

Further, the ACCC notes that available capacity will be more transparent with the implementation of an auction system, as it will be necessary to make known the quantum of available port terminal capacity to exporters in order to conduct an auction.

This improved transparency as to capacity availability is in the interests of access seekers in providing necessary information to enable them to make capacity bookings and will help to ensure efficient use of port terminal services because bookings can be made on an informed basis. Providing increased information will also benefit competition by reducing any information asymmetry between Viterra's trading arm and third party exporters

5.6.2 Flexible arrangements for execution of capacity

It is the ACCC's preliminary view that the insertion of clauses 9, 10 and 11 introducing the ability for exporters to move bookings between port and between time periods, the ability to trade slots and an incentive to return unwanted bookings to the shipping stem addresses the ACCC's concerns on this issue.

Having a degree of flexibility after the primary allocation of capacity is desirable as it ensures that the infrastructure is being used more efficiently in that it may assist preventing capacity going unused during periods of peak demand. Flexibility enabling exporters to execute against bookings is also considered to be in the interests of access seekers.

It is the ACCC's view that these arrangements may also provide greater flexibility to Viterra in managing its port terminals and will minimise capacity going unused. Such arrangements are therefore also considered to be in Viterra's legitimate business interests.

5.6.3 Capacity management during peak periods – efficient allocation

It is the ACCC's preliminary view that the proposal to introduce an auction is appropriate and should allow for port terminal services to be used efficiently by ensuring that, in periods of constraint, capacity is allocated to those users that value it most.

The ACCC considers it appropriate that the details of the auction design are the subject of detailed consultation with industry and recognises Viterra's legitimate business interests in seeking to ensure that there are no unintended consequences resulting from introducing an auction system too quickly. The ACCC therefore considers Viterra's proposed process for introducing an auction to be appropriate. The ACCC considers that the high level features listed in proposed clause 9.5 of the undertaking to be important and appropriate key features of the auction design.

Given the lead times to introduce an auction under Viterra's proposal, it has attempted to address concerns relating to the 2012 bookings by voluntarily surrendering capacity bookings made by its trading arm, to reduce these bookings to be more in line with shares in the previous year. The ACCC considers that this is a pragmatic approach and consistent with Viterra's legitimate business interests in the transitional period to addressing its concerns over the allocation mechanism and the lack of constraints on Viterra's trading arm overbooking capacity.

While this approach will not necessarily result in an initial allocation of capacity in line with users' willingness to pay for such capacity, it will result in a more diversified allocation than would have occurred had Viterra simply applied its PLPs to the nominations and, together with the proposal to allow for tradability, should result in an efficient allocation of capacity to exporters.

6 Approach to pricing

Viterra currently charges different port receipt fees based on the origin of the grain, specifically whether it is coming from an 'approved' third party storage site. This chapter discusses the differential prices applied to grain received at port.

6.1 Viterra's Proposed 2011 Undertaking

In providing port terminal services to customers, Viterra receives wheat at its port terminals from a number of sources, including from Viterra's own up-country storage and handling facilities, from storage and handling facilities operated by non-affiliated third parties, and direct-from-farm.

Viterra currently publishes Reference Prices in accordance with clause 5.2 of the 2009 Undertaking and this requirement is also contained in the Proposed 2011 Undertaking.

The Proposed 2011 Undertaking submitted by Viterra proposes to continue the publish-negotiate-arbitrate approach contained in its 2009 Undertaking, rather than, for example, adopting an ex ante pricing approach. Under the Proposed 2011 Undertaking, Viterra is obliged to publish prices at a specified time under clause 5.2(a). Access seekers that wish to obtain prices that differ from the offered Reference Prices can negotiate to do so. Should the access seeker and Viterra not reach agreement on price through negotiation, they may submit to binding arbitration.

As discussed in Chapter 3 the ACCC considers that the 2009 Undertakings are a relevant matter in the assessment of Viterra's Proposed Undertaking, in accordance with s. 44ZZA(3)(e).

As such, it is appropriate that the ACCC review how the Reference Prices have been operating under the 2009 Undertaking to inform its view on whether to accept the Proposed 2011 Undertaking. In addition, s.44ZZA(3) requires that the ACCC have regard to the interests of access seekers and the public interest, including the public interest in having competition in markets. The ACCC considers that port receipt pricing and the ability to effectively negotiate those prices is in the interests of access seekers.

6.1.1 Differential prices

Viterra's Reference Prices specify different charges based on where the wheat has been stored. There are currently three categories of storage: Viterra storage, approved third party storage and non-approved third party storage.

Application of these charges results in the following total charges for the various categories of receipts:

- Wheat received from Viterra's own storage facilities incurs only the port in-loading fee of \$3.40 by road and \$2.20 by rail.
- Wheat from 'approved third party storage' is \$5.90 per tonne for road receipt and \$4.70 for rail receipt, including the port in-loading fee of \$2.50 per tonne.

- Wheat received from all other sources external to Viterra is charged at a rate of \$13.30 per tonne for major grades and \$14.35 per tonne for minor grades.

Viterra publishes explanatory notes to the Reference Prices which outline some of the services that are provided in exchange for each of the fees.

6.1.2 Approval process

As port receipt fees are, in part, determined on the ‘approved’ or ‘non approved’ status of the storage facility, it is relevant to consider the ‘approval process’ undertaken by Viterra.

The conditions outlining Viterra’s requirements for approval as a third party storage facility are contained in a document entitled ‘Approved Operator Conditions & Deed of Access’. This document is currently available on the Viterra website and provides key elements of an approved third party storage facility together with key requirements of an approved operator. The Approved Operator Conditions & Deed of Access annexes a third party storage facility checklist that has been designed to assist storage providers who wish to gain approval. The checklist states:

Successful completion of the checklist is a minimum requirement and will not result in automatic approval as a third party storage facility. Absolute discretion for approval remains with Viterra.⁵⁷

In addition, on 3 March 2011, Viterra published a ‘Third Party Store Inspection Form’, listing individual items that would be considered by Viterra in granting approval.

Viterra is responsible for determining whether a particular storage site is classified as an Approved Third Party Storage site. Viterra submits that the approval process is transparent as it is contained within the Approved Operator Conditions and Deed of Access document, which is available on its website. Under the approval process, Viterra undertakes an inspection of the relevant site and applies a checklist in order to determine whether it is suitable to be classified as an Approved Third Party Storage site, for the purposes of Viterra grain receipts.

The process for the approval of third party storage sites by Viterra is not contained in either the Proposed Undertakings or the PLPs.

Clause 10 of the PLPs provides that wheat held at third party storage sites will only be taken into account for the purpose of showing stock entitlement if the third party site has been approved by Viterra. Clause 10 of the PLPs also provides that approval shall not be unreasonably withheld having regard to appropriate industry standards for example hygiene and quality. This is the only reference to approved or non-approved third party storage in the PLPs.

It is unclear whether disputes that arise in relation to the approval of third party storage sites would be covered by the publish-negotiate-arbitrate structure of the Proposed 2011 Undertaking. As a result, access seekers may not be able to seek

⁵⁷ Viterra, ‘Annexure A: Approved Third Party Storage Facility Checklist’, *Season 2009/10 Viterra Operations Ltd Approved Operator Conditions and Deed of Access*, 2010, viewed 10 August 2011, <http://www.viterra.com.au/Documents?file=3837&type=.pdf>.

arbitration should they dispute any finding by Viterra on whether a site proposed by them is considered suitable for approval under the published criteria.

Any dispute raised in relation to the terms of the PLPs, including whether a third party storage site is approved is dealt with in accordance with the internal dispute resolution mechanisms contained in the PLPs. In brief, pursuant to these provisions, the dispute is escalated to Viterra's management and a final decision is made. No avenue of appeal exists in relation to disputes regarding the terms of the PLPs.

Viterra submits that if an access seeker is dissatisfied with the receival fees payable in respect of their wheat delivered to port from third party storages, and is unable to negotiate a satisfactory resolution with Viterra, it can have recourse to the dispute resolution provisions set out in the Proposed 2011 Undertaking or access agreement as applicable.⁵⁸

6.2 Viterra and third party submissions

A summary of all Viterra's public submissions and submissions received from interested third parties in relation to Viterra's approach to pricing is provided at Appendix A.

Generally, submissions raise the following concerns:

- the price differentials between receivals from approved third party storage, non-approved third party storage and Viterra's own storage appear excessive, and may not reflect additional costs actually faced by Viterra⁵⁹
- the price differentials between receivals from Viterra and third party storage represent a deterrent to use third party storage sites⁶⁰
- the process for approval of third party storage is not sufficiently transparent⁶¹ and is open to manipulation by Viterra because it sits outside the Proposed 2011 Undertaking⁶²
- the approval process is not subject to the principles of publish-negotiate-arbitrate.⁶³

In response, Viterra submits that the price differential is based on additional services applied to grain from non-approved third party storage and additional risks associated with grain from this source.

6.3 ACCC view

As the Proposed 2011 Undertaking does not include ex ante prices, the ACCC is not, in this context, assessing the appropriateness of particular prices for port terminal

⁵⁸ Viterra, 'Response to matters raised in the ACCC's Issues paper', 23 March 2011, p. 8.

⁵⁹ Submissions by AGEA, AWB and Emerald, see Appendix A.

⁶⁰ Submission by Emerald, see Appendix A.

⁶¹ Submission by AWB, see Appendix A.

⁶² Submission by Elders, see Appendix A.

⁶³ Submission by Elders, see Appendix A.

services. However, in the context of assessment of the Proposed 2011 Undertakings the ACCC has considered the prices published under the 2009 Undertakings in order to determine whether the publish-negotiate-arbitrate approach to determining access prices has been effective. This is particularly relevant in the case of Viterra due to the concerns raised in submissions.

6.3.1 Differential prices

The ACCC has observed that the differentials applied to wheat received from various supply chains varies between port terminal operators. This is illustrated in the table 6.1, which compares the differentials applied by ABA, GrainCorp and Viterra. CBH does not apply differentiated prices based on where grain is received from, instead applying a flat rate of \$17.10 per tonne to all exports with various charges for additional services.⁶⁴

Table 6.1: Comparison of receival charges and differentials

Differential	ABA ⁶⁵	GrainCorp ⁶⁶	Viterra ⁶⁷
Standard receival charge	\$5.00	\$7.50	\$2.20 ^a
<i>Differential applied to receivals from:</i>			
All third parties	\$0.50	\$1.54	N/A
Approved ^b third parties	N/A	N/A	\$2.50
Non-approved third parties (major wheat)	N/A	N/A	\$11.10 ^c
Non-approved third parties (minor wheat)	N/A	N/A	\$12.15 ^d
Road transport receivals	\$0.50	\$1.75 ^e	\$1.20 ^f

^a Port in-loading fee for rail receivals

^b Approval process discussed in section 6.1.2

^c Major wheat receival fee, subtracted Port In-loading fee (not payable for non-approved third party receivals)

^d Minor wheat receival fee, subtracted Port In-loading fee (not payable for non-approved third party receivals)

^e NSW and QLD only

^f Does not apply to receivals from non-approved third party storage

⁶⁴ CBH, *Port Terminal Services Charge Schedule 2010/11*, September 2010.; Sum of Export fee and Marketer fee. Exporters must also pay an annual registration fee to access CBH's port terminal services.

⁶⁵ ABA, 'Schedule A - 2010/11 Charges', in *Storage and Handling Agreement 2010/11*, December 2010, pp. 24-26. ABA does not currently have an accepted access undertaking; these prices are published voluntarily.

⁶⁶ GrainCorp, 'Annexure A: Bulk Wheat Port Terminal Services Fee Schedule 2010/11', in *GrainCorp 2010/2011 Bulk Wheat Port Terminal Services Agreement*, 30 August 2010.

⁶⁷ Viterra, *Wheat Reference Prices – Port Terminal Services 2010/11*, 24 August 2010.

Table 6.1 illustrates that the differentials applied to wheat from different supply chains by Viterra are greater and vary more than those applied by the other port terminal operators. In particular, the ACCC notes that the differentials applied to wheat received from non-approved third party storage are significantly higher compared to the standard differential applied to receivals from all third party storage facilities by ABA and GrainCorp.

Viterra submits that, for bulk wheat received from non-Approved Third Party sites, the potential differences in quality or levels of risk associated with such wheat require ‘appropriate actions’ to be taken (e.g. fumigation and/or quality testing), which incur additional costs. The requirement for these additional services is reflected in the differential pricing charged by Viterra.⁶⁸

Submissions received from AGEA, AWB, SAFF and Emerald raise concerns with the magnitude of the price differentials applied by Viterra⁶⁹. The ACCC considers that price differentials for port terminal fees based on the up-country supply chain are appropriate provided that the differential is reflective of differences in cost faced by the access provider, including either increased costs due to differences in the actual treatment of third party grain or increased risks associated with the receipt of third party grain.

The ACCC notes that in its report on wheat export marketing arrangements the PC states that:

...[it] would anticipate that, for the next round of undertakings, the ACCC could be more proactive in ensuring up-front that port fees and charges were based only on expenses related to port operations (as distinct from the up-country transport and storage elements of the supply chain). The Commission would also expect, and encourage, the ACCC to ensure future port access arrangements do not inadvertently ‘lock in’ the bulk handler’s up-country supply chain...⁷⁰

The ACCC must have regard to whether an undertaking for access to Port Terminal Services is appropriate having regard to s. 44ZZA(a), being the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets, where the ACCC considers that the market for up-country storage facilities is an upstream market. Further, the ACCC must have regard to s. 44ZZA(3)(b), being the public interest, including the public interest in having competition in markets (whether or not in Australia).

The ACCC requested information from Viterra on the various services that were provided for each of the fees used to differentiate between grain received from different storage locations. A summary of the information provided by Viterra showing the services categorised according to up-country storage origin is provided in Table 6.2 below.

⁶⁸ Viterra, *Response to matters raised in the ACCC’s Issues paper*, 23 March 2011, p. 9.

⁶⁹ AWB, ‘Submission to the ACCC’, 4 March 2011, pp. 4-5; Emerald Group, ‘Submission to the ACCC’, 4 March 2011, pp. 3-4; AGEA, ‘Submission to the Public Consultation’, 7 March 2011, p. 3; SAFF, ‘Submission to the ACCC’, 4 March 2011, p. 1.

⁷⁰ Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 192.

Table 6.2: Services applied to wheat received from different up-country storage facilities⁷¹

Non approved third party	Approved third party	Viterra Operations
Truck marshalling	Truck or rail marshalling	Truck or rail marshalling
Inward elevation of grain	Inward elevation of grain	Inward elevation of grain
Recording and provision of delivery information on receival weighnote	Recording and provision of delivery information on receival weighnote (road)	Recording and provision of delivery information on receival weighnote (road)
Access to transactional information on ezigrain website	Access to transactional information on the ezigrain website	Access to transactional information on the ezigrain website
Short term storage for shipping	Short term storage for shipping	Short term storage for shipping
Weighing – inward and outward	Weighing – inward and outward	Weighing – inward and outward
Performance of Road “Chain of Responsibility” mass management procedures and requirements including issuance of breach warnings and recording	Performance of Road “Chain of Responsibility” mass management procedures and requirements including issuance of breach warnings and recording	Performance of Road “chain of responsibility” fatigue management procedures and requirements (road)
Significant levels of sampling, testing and grain classification on a load by load basis and according to truck configuration	Limited sampling. Grain quality is known. Sampling and testing on delivery. Sampling occurs at a higher rate than wheat received from Viterra Operations storage.	Limited sampling. Grain quality is known.
Warehousing of grain	Outturn sampling. Grain is sampled at a higher rate on outturn than Viterra wheat	
Segregation into storage according to classification on a load by load basis	Potential segregation and storage for risk mitigation, residue and fumigation periods	
Chemical residue testing for wheat following receival, and fumigation to prevent cross-infestation of insects	Review of grain treatment histories Wheat may be fumigated to prevent cross infestation of insects	
Marshalling and unloading of grain on a load by load basis	Marshalling and unloading of grain	Marshalling and unloading of grain
Clean down of inward grain path on a load by load basis as required		
Storage for undefined period		
Repositioning of stock for shipping		

⁷¹ Viterra, Receipts into Viterra Port Terminals, 30 June 2011, pp. 5-7.

Analysis of the data provided by Viterra suggests that services with no shading are applied to grain received from all sources. Services with light grey shading are applied to grain received from both approved and non-approved third party storage, except in the case of the additional outturn sampling. Services with dark grey shading are only applied to grain received from non-approved third party storage sites.

This indicates that additional services are applied to grain received from third party storage sites compared with grain from Viterra Operations' storage. Further additional services are applied to grain received from non-approved third party sites compared with grain from approved third party sites. This information supports Viterra's position that the differential prices are reflective of the variable costs faced by Viterra in receiving grain through different supply chains, and charging for the increased costs associated with provision of additional services would reflect Viterra's legitimate business interests, in accordance with s. 44ZZA(3)(a).

Given Viterra's position and supporting submissions that the differential charges are reflective of higher costs, and therefore compliant with the non-discrimination provision, the ACCC has not formed a view on whether the quantum of the differential applied by Viterra is appropriate. Rather, under the publish-negotiate-arbitrate framework the price and non-price terms are negotiable and subject to arbitration. Where an access seeker believes that negotiation of an agreement does not occur in accordance with clause 7 of the Proposed 2011 Undertaking, the access seeker may make use of the dispute resolution provisions in clause 8 of the Proposed 2011 Undertaking. The proposed dispute resolution regime provides for arbitration of disputes by the ACCC or a private arbitrator.

However, in order for the publish-negotiate-arbitrate approach to be effective, access seekers must have sufficient information to negotiate prices which are mutually acceptable (regardless of the 'approved' or 'non-approved' status of the storage provider). As the access provider, Viterra has an information advantage regarding the relative costs of providing various services, and determines the application of those services. Due to its vertically integrated position, Viterra also has the incentive to use its monopoly position at the port terminals to advantage its up-country storage and handling network and freight services provided through Export Select bookings.

The ACCC therefore considers that Viterra should provide sufficient transparency around the terms on which access seekers may gain access to port terminal services, including relating to grain received at the port terminal from third party sites. Where Viterra applies price differentials it should provide sufficient transparency around the basis on which the differential is applied.

The ACCC notes submissions from third parties stating that Viterra does not provide sufficient information around the cost of managing risks and providing additional services in order to determine whether the price differentials applied by Viterra accurately reflect costs.

The ACCC considers that the explanatory notes are not particularly clear and it is difficult to ascertain which fees apply to different deliveries of bulk wheat without the additional clarification provided to the ACCC by Viterra.

The ACCC notes that differential charges may also be justified to the extent that they reflect increased risks associated with the receipt of third party grain, and that other port terminal operators apply relatively small differential charges on this basis. Viterra has provided information which indicates that there is increased risk of contamination and infestation in grain received from third party sites, and particularly grain received direct from growers.⁷² However, the ACCC considers that the majority of this risk may be offset due to the increased sampling and treatments applied by Viterra to grain from third party approved and non-approved sites.

The ACCC's final decision on Viterra's 2009 Undertaking stated that:

as a transparency measure to support the publish-negotiate-arbitrate and the non-discrimination provisions, appropriate measures would require prices to be transparently specified for a standard set of port terminal services to all parties, including ABB, with any special requirements due to different origin being separately enumerated and priced.⁷³

The ACCC considers that the reference prices and explanatory notes currently published by Viterra are not appropriate, having regard to fair and reasonable access, competition in markets, and the interests of access seekers, as it is not clear whether the differentials applied are cost reflective and what services are being supplied in exchange for the various charges. It is also not clear what proportion of the differential, if any, is intended to compensate Viterra for increased risk. This issue is particularly relevant for Viterra given that its differential is significantly larger than the differentials applied by the other port terminal operators.

Accordingly, it would be appropriate for Viterra to provide information around the services that are reflected in the differential to assist potential access seekers in assessing the appropriateness of the price offered for access to port terminal services.

The ACCC considers that in order for the Proposed 2011 Undertaking to be appropriate it should include a requirement to this effect. Suggested drafting as included in Viterra's Revised Draft is included in section 6.3.3.

6.3.2 Approval process for third party storage

Submissions received from AGEA, AWB, Elders and Emerald express concern that the process by which Viterra will approve third party storage, including the standards which must be met, is not sufficiently transparent.⁷⁴ Elders and Emerald submit that the approval process should be incorporated in the Proposed 2011 Undertaking. The ACCC notes that the price differentials discussed in section 6.3.1 are based on the approval process for third party storage sites, and are applied in the context of access to port terminal services.

As with the magnitude of the differential, the ACCC considers that the process for approval of third party storage sites should be negotiated between parties, and does not seek to determine whether the general standard for approval applied by Viterra to

⁷² Viterra, Response to the ACCC's request for information dated 15 April 2011, 5 May 2011, p. 10.

⁷³ ACCC, Ausbulk Decision to Accept, 29 September 2009, p. 124.

⁷⁴ AGEA, Submission to the Public Consultation, 7 March 2011, p.3; AWB, Submission to the ACCC, 4 March 2011, p.4-5, Elders, Submission to the ACCC Issues Paper, 8 March 2011, p.4; Emerald, Submission to the ACCC, 4 March 2011, pp. 3-4.

third party storage facilities is appropriate. The ACCC acknowledges Vitterra's submission that if a client is dissatisfied with the terms on which it obtains access to the port terminal, the dispute resolution provisions set out in the Proposed 2011 Undertaking apply. However, the ACCC considers that the application of the dispute resolution provisions of the Proposed 2011 Undertaking to the approval process is not sufficiently clear. The ACCC considers that this is not appropriate with regard to s. 44ZZA(3)(c), as it does not provide sufficient certainty to access seekers around the Standard Terms of access and facilitate effective negotiation.

The ACCC considers that it would be appropriate for access seekers to be able to negotiate, in accordance with the Proposed 2011 Undertaking, what port terminal services are required for their grain and the prices for those services outside the approval process. The ACCC also considers that the Proposed Undertaking should include a requirement that Vitterra will publish any criteria which must be satisfied in order to qualify for any charges set out in the Reference Prices. This would ensure that any disputes arising between Vitterra and access seekers in relation to the application of particular port terminal services and the prices for those services will be subject to the dispute resolution mechanisms contained in the Proposed Undertaking.

6.3.3 Conclusion

The ACCC is of the view that it is appropriate to maintain a relatively 'light-handed' approach to pricing in Vitterra's Proposed 2011 Undertaking. However, the ACCC considers that Vitterra's approach to pricing under the Proposed 2011 Undertaking is not appropriate as it does not provide a sufficiently transparent baseline for effective negotiation with access seekers. In particular, the ACCC considers that it is not appropriate that:

- it is not clear whether the differentials applied by Vitterra to receivables from alternative supply chains are cost reflective and what services are being supplied in exchange for the various charges
- the application by Vitterra of criteria for eligibility for particular Reference Prices and differentials is not subject to negotiation under the Proposed 2011 Undertaking.

In order to address these issues, discussed in sections 6.3.1 and 6.3.2, the ACCC considers that it would be appropriate for Vitterra to provide additional detail around the services which are covered by the Reference Prices, and the criteria used to determine eligibility for particular prices. This information would provide a transparent baseline for negotiation in accordance with the publish-negotiate-arbitrate framework. In order to facilitate this, the ACCC considers it would be appropriate for Vitterra to include a requirement to that effect in the Proposed 2011 Undertaking.

Vitterra has proposed the following clause 5.2(f) in its Revised Draft:

The Port Operator must, throughout the term of this Undertaking, publish in a prominent place on its website (in the same location as the Shipping Stem) details in relation to:

- (i) *the specific services covered by the charges set out in the Reference Prices including, where appropriate, the quantum of those services; and*
- (ii) *the criteria (if any) which must be satisfied in order to qualify for any charges set out in the Reference Prices.*

In accordance with this Undertaking, Applicants will have an opportunity to negotiate with the Port Operator in relation to the Reference Prices and the application of, or Port Terminal Services underpinning, those prices. Disputes can be resolved in accordance with the processes set out in clause 7.

The criteria referred to in clause 5.2(f) may include criteria (if any) for Approved Third Party Storages.

The ACCC considers that this clause would provide an appropriate level of certainty to access seekers regarding the terms of access to port terminal services for wheat from third party storage sites. The ACCC therefore considers Viterra's Revised Draft would address its concerns relating to the transparency of Viterra's differential charges and criteria for the application of those charges, and is appropriate having regard to the interests of access seekers in accordance with s. 44ZZA(3)(c).

The ACCC also considers that increased transparency will assist access seekers that wish to use alternative supply chains in South Australia, as they will be in a better position to determine the reasonableness of, and negotiate regarding, the differentials applied by Viterra. This is appropriate having regard to the public interest, including the public interest in having competition in markets in accordance with s. 44ZZA(3)(b).

7 Other issues

This chapter includes discussion on remaining issues in relation to the Proposed 2011 Undertaking. These are: direct to port access, commodity conversion, anti-hoarding provision and the process for varying PLPs.

7.1 Direct to port access

7.1.1 Vitterra's Proposed 2011 Undertaking - Direct to port access and Export Standard service utilisation

Vitterra currently makes available port terminal services as either a stand alone service, Export Standard, or bundled with Vitterra's bundled transport and storage service, Export Select.

Export Select and Export Standard services

Export Standard is defined in the PLPs as:

Vitterra's standard export offering under which Clients have the option to arrange their own transport of commodity to port and site accumulation.

Current customers seeking to make an Export Standard booking are required, as set out in the PLPs, to fulfil the following requirements:

11.1 In the event that the Client selects Export Standard for the accumulation of the commodity the subject of a booking, the Client must provide Vitterra by no later than 18 days prior to the opening of the first day of the Slot:

11.1.1 a Site Assembly Plan that is complete for the purposes of the export of stock; and

11.1.2 a Transport Plan that is complete for the purposes of the export of stock.

11.2 If the Client fails to provide a Site Assembly Plan and/or a Transport Plan as required under clause 11.1, Vitterra may re-prioritise the Client's vessel on the Shipping Stem.

Schedule B of the Pricings Procedures and Protocols document addresses Export Select and Export Standard. It provides that a client assembling grain for outturn to a vessel is responsible for the assembly of that grain. The ACCC notes that the Pricings Procedures and Protocols document sits outside the scope of the Proposed 2011 Undertaking.

Assembly includes (without limitation):

- nominating the sites that the Grain is to be drawn from
- arranging freight
- demonstrating transport capacity for vessel accumulations
- organising movements

- contacting the Company for stock swaps (which are subject to counterparty consent and for which fees will apply: see the Fee Schedule)
- coordinating grain movements with other bulk handlers (where applicable).

Export Select is not referred to in either the Proposed 2011 Undertaking, the PLPs or the Standard Terms. Export Standard is noted in the PLPs as clients who select this alternative are required to provide Viterra with a Site Assembly Plan showing the arrangements for the assembling of stock at one or more storage sites for a ship's cargo and a Transport Plan showing arrangements for movement of grain assembled for a ship's cargo.

Export Select is defined in the 2010/2011 Season Storage and Handling Agreement as:

the bundled system operated by the Company (and described in Schedule B of the Pricing, Procedures and Protocols Manual) under which the Client elects to buy Grain at, or deliver Grain to, a Company facility in a Port Zone and to have equivalent Grain (but not necessarily the same Grain) Outturned by the Company to the Client at the Company Facility for that Port Zone.

Viterra on its website explains Export Select as:

... the most efficient method for executing grain movements for the accumulation of vessels. Export Select also provides direct access to our quality Storage, Handling, Shipping, Stevedoring and Freight Services.

Viterra publish four sets of geographically defined freight rate schedules. Within these schedules Viterra publishes an Export Select freight rate for each specific location within that region, to which is added the outturn and inloading fee. The Export Select rebate is then applied to arrive at the Export Select grouped service fee. The current Export Select rebate is approximately \$2.45 per tonne, though it is seasonal and reduces in value over the course of the shipping calendar.

Schedule B of Viterra's Pricings Procedures and Protocols document addresses Export Select and Export Standard. Under the heading Procedures for Export Select, clause 8 outlines that:

The nomination of Export Select does not guarantee that a Client's Grain will be in port when its nominated vessel arrives. There may be capacity constraints, factors beyond the Company's control or other unforeseen circumstances which may delay the loading of a Client's vessel.

Utilisation of direct to port access through Export Standard

Utilisation of direct to port access through the Export Standard product under the 2009 Undertaking has been limited.

In response to the ACCC's request for information Viterra outlined that from 1 October 2010 to 15 April 2011 six exporters executed 15 Export Standard bookings across the six South Australian ports. The total tonnage executed as Export Standard amounts to 308,233 tonnes which equates to approximately 7.5 per cent of the total grain exported through Viterra's port terminals for the relevant period. Though Viterra notes that:

... bookings recorded as Export Select that have a proportion of Export Standard cargo (i.e third party storages) are assumed to be fully executed as Export Select, i.e the stem is not amended to show the proportions of grain from originating sources.⁷⁵

Viterra has noted⁷⁶ that for the period 1 October 2010 to 15 April 2011 an additional 14 bookings, totalling 328 000 tonnes were accepted onto Viterra's shipping stem some time after the available capacity table indicated there was no Export Standard available. Viterra's data show that:

- Viterra made available an additional 328, 000 tonnes in Export Select capacity during this period.
- 13 of the 14 bookings were for shipping slot bookings from Port Lincoln (one of the two most efficient deep sea ports in SA);
- The 14 bookings are attributed to seven exporters, a representative sample of exporters shipping out of SA;
- Seven of the 14 bookings, a total of 192,000 tonnes were facilitated on the same day (26/11/2010), which can be attributed to Viterra securing additional freight for a range of shipping windows through January and February.⁷⁷
- The remaining seven bookings, a total of 136,000 tonnes, were facilitated by Viterra making available capacity for Export Select approximately a month before it was provided.
- Viterra indicates that for the majority of transfers the circumstances regarding how capacity became available were due to 'Extra logistics and outloading capacity identified, allowing for release of additional Export Select capacity.' Two of the transfers were facilitated due to cancellations and booking amendments, with the remaining two occurring due to other reasons.

7.1.2 Submissions

A summary of all Viterra's public submissions and submissions received from interested third parties in relation to the operation of Export Select and Export Standard is provided at Appendix A.

In general, submissions state that there is currently very little transparency regarding capacity allocated to Export Select and Export Standard.

In response, Viterra submits that exporters have equal opportunity to book port terminal services regardless of whether they book Export Select or Export Standard. In theory, all capacity could be allocated to Export Standard.

⁷⁵ Attachment 9 Viterra Operations' response to q 1.2(c).

⁷⁶ Attachment 4 Viterra Operations' response to q1.1(d)

⁷⁷ *ibid*

7.1.3 ACCC view

ACCC view on direct to port access

The ACCC notes that exporters may be attracting additional costs both directly through increased port terminal services charges and also more broadly due to the uncertainty surrounding capacity availability and the probable availability of additional capacity at least at Port Lincoln throughout the season. The ACCC considers that certainty regarding access to port terminal services is necessary to access seekers in determining their export programs. The interests of access seekers is a relevant consideration under s.44ZZA(3).

Considering the benefits Viterra believes it derives through Export Select⁷⁸, exporters highlight ongoing concern with service delivery including exposure to demurrage costs despite contracting with Viterra to provide a whole of supply chain product. In assessing the issues of direct to port access, the ACCC must also have regard to Viterra's legitimate business interests including operational flexibility. In assessing transparency of information and the need for certainty, the ACCC must balance the interests of access seekers with Viterra's legitimate business interests.

The ACCC considers the difficulties and concerns associated with non-approved third party storage is a relevant consideration that may have contributed to exporters' limited utilisation of direct to port access through the Export Standard product. Transparency arrangements around the publication of Export Select and Export Standard Capacity are considered in Chapter 3.

Viterra submits that Export Select capacity is constrained foremost by up-country constraints in storage, handling and freight⁷⁹. However exporters' ability to utilise the less constrained Export Standard capacity may have been circumvented due to the lack of transparency surrounding the process for approval of third party storage and the differential pricing applied to non approved third party storage sites.

A possible further constraint on whether exporters can practically accumulate Export Standard bookings is the practice by Viterra of operating certain Export Select only receipt and storage sites. As detailed in Viterra's Pricings Procedures and Protocols – Schedules A-I document, schedule B, clause 3:

The Client is able to choose between the Export Select and Export Standard in relation to the movement of grain for export shipments, except from an Export Select only site.

This is in contrast to the aforementioned statement from Viterra that:

Clients -- regardless of whether they use the Export Select or Export Standard pathway -- have an equal (and the same) opportunity to book Port Terminal Services capacity and ... Clients always have a choice whether to use Export Standard or Export Select to take advantage of available capacity.⁸⁰

⁷⁸ Based on payment of an Export Select rebate to clients using this option.

⁷⁹ Viterra, Response to matters raised in the ACCCs Issues Paper, 23 March 2011, p.6

⁸⁰ Ibid

The preference demonstrated by exporters for Export Select, despite its limitations, requires further consideration. Assembly of wheat for a shipping task is a potentially onerous task, with many variables.

In the absence of Export Select capacity many traders appear to reject offers from Viterra to take up Export Standard capacity. This practice is not evident on the East Coast where Grain Corp does not provide a bundled service and exporters must arrange their own accumulation and freight.

It is the ACCC's preliminary view that greater transparency is required in relation to the operation of Export Select and Export Standard in order to provide exporters with sufficient information to properly cost the risks associated with the assembly and transport of grain to port outside the Export Select system.

As detailed at Chapter 5, in the Draft Revision Viterra has proposed the introduction of an auction system. Once implemented this new form of capacity allocation should alleviate some of the concerns as detailed above concerning both transparency of total capacity and available capacity at any given point in time.

As detailed at Chapter 5, in the Draft Revision Viterra has proposed the inclusion of the requirement to publish a more detailed available capacity table including estimated volumes of available capacity. The improvements to the capacity table, should having regard to s. 44ZZA(3) address the concerns, as detailed above, of access seekers and others interested stakeholders. The greater transparency of information pertinent to the state of the market should promote the economically efficient operation of and use the port terminals.

Viterra in its Draft Revision will further address the concern and confusion surrounding the two types of capacity by providing a definition of Available Capacity. As detailed below Available Capacity, as to be made available through the auction, will not be explicitly linked to the Export Select up-country components.

Available Capacity means an estimate of, or guide to, the amount of practical Port Terminal capacity that may be available from time to time for the provision of services for the exporting of Bulk Wheat and other Grains at a Port Terminal. Whether or not that capacity (or more or less capacity) can ultimately be delivered to Users will depending on a range of factors, including supply chain constraints, the performance of prior shipments, weather and various matters outside the Port Operator's control.

Appropriately having regard to the legitimate business interests of Viterra it considers it necessary to stipulate that Available Capacity can only be an indicative estimate and is subject to qualifications. However it has also included at clause 10.2 (b) that if it varies the indicative estimate of the total amount of Available Capacity it will publish the reasons for that change.

The ACCC' preliminary view is that this change adequately addresses its concerns.

7.2 Commodity Conversion in accordance with the Port Loading Protocols

7.2.1 Arrangements under the Proposed 2011 Undertaking

Table A of the PLPs provides a timeline of the booking process, including what information is to be provided by the exporter at specified points prior to the shipping slot. Regardless of how far out the booking is made, exporters are required to provide the following information to Vitterra pursuant to Table A:

- load port
- commodity
- tonnage (min/max)
- treatment.

In addition, if the booking is for barley, the exporter is required to specify whether it is feed or malting grade barley.

Notes to Table A include:

“(1) in the event that the Client requests a booking Slot later than that required in accordance with Table A, the Client must satisfy all of its cumulative obligations owing and required under Table A to accept the booking...

(2) Changes, alterations & modifications to Table A information (other than the shipping period) provided by a Client in support of the booking can be requested in writing by the Client. Vitterra will respond to the request change within 5 business days of receipt. The booking will be deemed to be varied as of the date of Vitterra’s written acceptance of the change, and subject to the other provisions of these Protocols, will not be deemed a new booking. Please note:

- Vitterra is not obliged to accept any requested variation and acceptance will depend on whether the requested change would be likely to compromise Vitterra’s operational efficiencies taking into account operational constraints (such as grain under fumigation), or unreasonably impact on other clients. ***Charges may be applicable to cover the additional cost (if any) of accommodating requests.***
- If a Client does not comply with the Table A requirements (as may be varied from time to time by Vitterra’s acceptance of information changes), this will be addressed in accordance with clause 8.1.⁸¹ The booking fee is not refundable in these circumstances.
- If the Client’s requested change is not accepted by Vitterra, the Client must indicate within 5 business days of receipt of notice of non-acceptance of the change to either leave the booking unchanged, cancel the booking or request a new booking. If the client fails to make this election the booking will be deemed to be unchanged. The booking fee is not refundable in these circumstances.

⁸¹ Clause 8.1 specifies that “Subject to clause 8.3, where Vitterra identifies that a Client has not met the timeframes set out in Table A, or has failed to pay any storage or handling charges due and payable to Vitterra when they are due (and which are not subject of a genuine dispute), Vitterra will notify the Client within one business day. If the Client does not ensure compliance within the time specified in the notice issued by Vitterra, Vitterra may withdraw the booking from the Shipping Stem.

7.2.2 Experience with the 2009 Undertaking

Based on an analysis of the shipping stem for the period 1/10/2010 to 15/4/2011 a number of bookings made in accordance with clause 3 of the PLPs for a commodity other than bulk wheat (therefore not under the remit of the undertaking) were subsequently amended resulting in the shipping of bulk wheat. The analysis showed that:

- Fourteen bookings for a total of 496,000 tonnes were made for commodities other than wheat that were subsequently converted to wheat bookings prior to shipping;
- The bookings were held across all ports, though five of the fourteen bookings were for Outer Harbour with the remaining ports having two or three bookings, though no bookings were held at Thevenard.
- Three bookings were converted by third party exporters and the remaining 11 bookings were made by Viterra's trading arm which amounted to 331,000 tonnes.
- Except for two of its 11 bookings Viterra made the conversions approximately a month prior to shipping. Two of the bookings were converted within the shipping window of the nominated booking.
- Two of the three non Viterra Ltd bookings were converted at least two months prior to the shipping slot commencing.

7.2.3 ACCC view

The ACCC considers that the ability to convert commodities is a relevant factor in determining if all access seekers have fair and transparent access to port terminal services. As discussed in Chapter 3, this is a relevant consideration under s. 44ZZA(3)(e).

ACCC notes that while Viterra has been able to take advantage of flexibility with its shipping calendar, it appears that other exporters have not used this flexibility to the same extent. The ACCC notes that any cost associated with late conversion of a booking's commodity designation does not have a material impact on Viterra's trading arm.

This is especially relevant as greater flexibility of the shipping stem facilitates exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export capacity including adjustments to varying demands of different commodities. However as noted above it is Viterra's trading arm that predominately is undertaking this practice, with only limited examples of other exporters carrying out such behaviour. In those circumstances two of the three commodity conversions were notified several months in advance of the shipping window.

The effect of this practice of commodity conversion is that the non-wheat nominations and subsequent management of the shipping slot bookings only come under the remit of the Undertaking when the booking is converted from the non-wheat commodity to wheat, in the case of many of the Viterra trading bookings, this conversion does not occur until the final weeks of the life of the booking, just prior to the intended shipping date.

The ACCC understands that such practices may have also led to uncertainty in the market for exporters and growers alike as they use the information about up-coming shipping activity, as detailed in the shipping stem, to assist their marketing and trading decisions.

The ACCC seeks stakeholder views on this issue.

7.3 Anti-hoarding provision

7.3.1 Vitterra's Proposed 2011 Undertaking

The Vitterra PLPs contain at clause 12 a 'Performance Risk / Anti-hoarding' provision that permits Vitterra to not accept a booking, if it considers that the booking, taken in aggregate with other bookings of the exporter, involves an attempt by the exporter to reserve slots in excess of its reasonably anticipated requirements or to prevent competitors obtaining access to port terminal services or limit throughput at the port terminal.

Clause 12 also contains a list of factors that Vitterra must have regard to in making a decision to not accept a booking in accordance with this provision.

While the ACCC understands that clause 12 of the PLPs is consistent between the 2009 and Proposed 2011 Undertaking, a similar clause does not appear in any of the other BHCs' undertakings.

7.3.2 Vitterra and third party submissions

A summary of all Vitterra's public submissions and submissions received from interested third parties in relation to Vitterra's anti-hoarding provision is provided at Appendix A.

7.3.3 ACCC view

The ACCC acknowledges that anti-hoarding provisions can be an effective mechanism for aiding more efficient capacity allocation, in some circumstances.

However, as a vertically integrated infrastructure operator, Vitterra may have incentive to prevent access to infrastructure by third parties in order to favour its own upstream operations. The ACCC considers that a clause allowing such a course of action is not in the interests of access seekers; however, the legitimate business interests of Vitterra are also a relevant consideration in determining if Clause 12 of the PLPs is appropriate.

Clause 12 is relatively subjective and provides Vitterra with a broad discretion to reject nominations. Whilst there has been no evidence to date of this occurring, the ACCC considers that the discretion to reject bookings under clause 12 may allow for discrimination against third party exporters. In any event, the matters listed in clause 12.2 are uncertain in their application and appear to be of limited use in the context of the proposed first come first served capacity allocation mechanism.

In terms of allowing Vitterra the operational flexibility to deal with potential overbooking, the ACCC has formed the preliminary view that other mechanisms

within the Proposed 2011 Undertaking, and the Revised Draft operate so as to negate the need for Viterra to employ the anti-hoarding provision.

The ACCC considers that currently the \$5 per tonne, non refundable nomination fee acts as a reasonable disincentive for exporters (other than Viterra's own trading arm) to hoard capacity allocated on a first come first served basis. If Viterra's own trading arm were to book in excess of its reasonably anticipated requirements in order to prevent other exporters gaining access to the shipping stem, it would raise concerns under the no-hindering access provision of the Proposed 2011 Undertaking.

With the implementation of an auction system, the ability to hoard capacity is mitigated based on the associated costs of securing capacity.

For the reasons outlined above, the ACCC has formed the preliminary view that the inclusion of clause 12 in the PLPs is not appropriate, having regard under the objects of Part IIIA to the effect of the provision on the efficient use of Viterra's port terminal services and the interests of access seekers, as well as the public interest in having competition in markets.

Viterra has removed clause 12 from the PLPs in its Draft Revision.

7.4 Variation of the Port Loading Protocols

7.4.1 Viterra's Proposed 2011 Undertaking

Clause 9.3 of the Proposed 2011 Undertaking outlines the manner in which the PLPs are able to be varied. The undertaking specifies that the PLPs are able to be varied by Viterra without a formal variation of the undertaking in accordance with s. 44ZZBC(7). Before varying the PLPs, Viterra must consult with industry participants and provide adequate notice of the variation. The variation procedure in the Proposed 2011 Undertaking has been materially changed from the 2009 Undertaking by requiring Viterra to only modify the variation proposal to reflect the feedback received during the consultation phase if the modification is acceptable to the Port Operator.⁸²

7.4.2 Viterra and third party submissions on the variation of the Port Loading Protocols

A summary of all Viterra's public submissions and submissions received from interested third parties in relation to variation of PLPs is provided at Appendix A.

7.4.3 ACCC view

The provisions for variation of the PLPs contained in the Proposed 2011 Undertaking largely mirror those of the 2009 Undertaking.

This section focuses on the following issues:

- the comprehensive nature of the PLPs;

⁸² Clause 9.3(c)(v)(A)

- the process for varying the PLPs; and
- the ACCC's role in the process for varying the PLPs.

During the operation of the 2009 Undertakings, the Protocols of Viterra, GrainCorp and CBH have gone through the variation process set out in each of the respective undertakings. Different issues have arisen with the variation processes undertaken by each of the port operators to date.

In 2009 Viterra sought variations to the PLPs, however it failed to consult as required by its 2009 Undertaking. In the ACCC's view, this amounted to a breach of the 2009 Undertaking. The ACCC published on its website a disciplinary letter outlining how Viterra had breached its 2009 Undertaking. The letter noted the seriousness of Viterra's failure to observe the 2009 Undertaking's consultation obligations but stated that, given no apparent substantive harm was experienced by Viterra's customers, among other considerations, no further action would be taken.

Viterra undertook a second variation process to in September 2010. The ACCC understands that, to its credit, Viterra consulted extensively on its proposed variation and provided detailed notes explaining its variation decisions. However, the ACCC had concerns with Viterra's plan to introduce an 'explanatory notes' document to be read with the PLPs. The ACCC expressed its concerns to Viterra, who rectified the issue by moving the information from the 'explanatory notes' document into the proposed PLPs.

The ACCC has taken into consideration the experience of the previous variation processes under the 2009 Undertakings in assessing the Proposed 2011 Undertaking given that the Proposed 2011 Undertaking in many instances mirrors provisions of the 2009 Undertaking.

7.4.3.1 The comprehensive nature of the Protocols

The ACCC considers that clause 9.1(a) of the Proposed 2011 Undertaking (which incorporates the Continuous Disclosure Rules as set out in section 24(4) of the WEMA), requires the published PLPs to be comprehensive.

To ensure clarity and certainty, the ACCC takes the preliminary view that subclause 9.1(a) of the Proposed 2011 Undertaking should be amended to provide that the PLPs must be, and continue to be, a comprehensive statement of Viterra's policies and procedures for managing demand for the Port Terminal Services.

7.4.3.2 Process for varying the Protocols

In 2009 the ACCC accepted a Protocol variation mechanism based on an industry consultation process rather than a formal ACCC consultation process. In its Final Decision on the 2009 Undertakings the ACCC stated that it would monitor the success of this variation model and take its findings into account in any future review of access undertakings.⁸³

⁸³ ACCC, *GrainCorp/Viterra/CBH Operations Limited Port Terminal Services Access Undertaking Further Draft Decision*, 23 December 2009, p. 223.

In its Final Decision on the 2009 Undertaking, the ACCC recognised that the model accepted for variation of the PLPs carried some risks as the ACCC would not review all proposed amendments to determine their appropriateness. The ACCC further noted that this risk was mitigated by:

- the inclusion of a robust consultation mechanism;
- the inclusion of a provision allowing the ACCC to treat a breach of the amended PLPs as a breach of the Undertaking; and
- the recommendation of a robust non-discrimination provision and the inclusion of a provision that any variation to the PLPs must be made in accordance with and subject to the non-discrimination provisions of the Undertaking.⁸⁴

As mentioned above, in assessing the appropriateness of the variation process contained in the Proposed 2011 Undertaking, the ACCC has taken into account the experience of the port operators with 2009 Undertakings in making variations to their PLPs. The ACCC considers that there are a number of minimum standards that should apply to a variation process, to ensure a fair, meaningful and transparent consultation process. The ACCC notes that the industry wide approach it is taking with regard to the PLPs variation process is consistent with s. 44AA(b), which promotes consistency in access regulation across the industry.

The minimum standards that the ACCC considers are necessary for a fair, meaningful and transparent variation process are:

- a draft variation and an explanation for the changes, circulated to interested parties and the ACCC
- a reasonable consultation timeframe, which allows for meaningful consultation between industry participants and the port operator
- an obligation on the port operator to consider submissions in good faith, with submissions to be made publicly available
- an ability for the port operator to amend the draft variation based on consultation, without having to withdraw the draft variation and start another process
- a reasonable period of time following publication of a finalised variation before the variation takes effect.

The ACCC considers that these standards should apply consistently across the industry, while not necessarily resulting in identical variation processes.

The ACCC has assessed the variation process in the Proposed 2011 Undertaking against these proposed minimum standards in the discussion that follows. While the variation process meets some of these standards, the ACCC considers that some changes are necessary.

⁸⁴ ACCC, AusBulk Limited Port Terminal Services Access Undertaking Decision to Accept, 29 September 2009, p. 258.

A draft variation and an explanation for the changes, circulated to interested parties and the ACCC

The ACCC takes the preliminary view that clause 9.3(c)(i) of Viterra's Proposed 2011 Undertaking fulfil this minimum standard.

A reasonable consultation timeframe, which allows for meaningful consultation between industry participants and the port operator

Viterra's Proposed 2011 Undertaking allows for a 14 day consultation period. The ACCC's preliminary view is that this is appropriate.

An obligation on the port operator to consider submissions in good faith, with submissions to be made publicly available

Clause 9.3(c)(v)(B) Viterra's Proposed 2011 Undertaking requires it to make modifications to the proposed variation, acting in good faith, to reflect the feedback received from interested parties. The ACCC takes the preliminary view that this is appropriate.

Viterra's Proposed 2011 Undertaking does not provide for the publication of written submissions received during the variation process. The ACCC takes the preliminary view that in the interests of transparency, the Proposed 2011 Undertaking is unlikely to be appropriate unless it contains a provision specifying that Viterra must publish, on its website, written submissions received during the variation process consultation.

An ability for the port operator to amend the proposed variation based on consultation, without having to withdraw the current variation and start another process

The ACCC takes the view that clause 9.3(c)(v)(B) explicitly provides Viterra the ability to amend the proposed variation based on consultation. The ACCC considers that the Proposed 2011 Undertaking fulfils this minimum standard.

A reasonable period of time following publication of a finalised variation before the variation takes effect.

Clause 9.3(b)(ii) of Viterra's Proposed 2011 Undertaking provides that major users will be given at least 10 business days written notice prior to the date on which the variation is to become effective. Further, clause 9.3(e)(i) provides that, for the purposes of 9.3(b)(ii), Viterra must publish the variation notice on its website. The ACCC's preliminary view is that the current proposed timeframe is appropriate.

7.4.4 Conclusion

The ACCC takes the preliminary view that Viterra's Proposed 2011 Undertaking is unlikely to be appropriate unless it is amended to reflect that written submissions received during the variation process consultation will be published in Viterra's website.

Viterra's Revised Draft addresses the ACCC's concern in this regard.

Appendix A: Submissions

1 Publish-negotiate-arbitrate framework

1.1 Vitterra and third party submissions

1.1.1 Vitterra's submission accompanying undertaking – 23 December 2010

In its submission in support of the Proposed 2011 Undertaking, Vitterra submits that:

Vitterra Operations considers that the negotiate / publish / arbitrate framework set out in the Current Access Undertaking for providing access to Port Terminal Services on a non-discriminatory basis – including a clear procedure to resolve any disputes in relation to the terms of access – appropriately balances the legitimate interests of access seekers and Vitterra Operations as provider of the Port Terminal Services.

In particular, this framework as set out in the Current Access Undertaking has:

- (a) ensured fair, transparent and non-discriminatory access for third party accredited wheat exporters;
- (b) provided an appropriate level of regulation and oversight over Vitterra Operation's bulk wheat export terminals (which has been facilitated by the transparent provision of information by Vitterra Operations);
- (c) enabled Vitterra Operations sufficient flexibility in its operations to meet and respond to the demands of its Clients, as demonstrated by the 2 processes implemented to amend the Protocols in 2009/2010 and to provide greater transparency, certainty and flexibility for Clients; and
- (d) successfully achieved the objectives of Part IIIA of the TPA.⁸⁵

1.1.2 Third party submissions in response to the Issues paper

1.1.2.1 AGEA – 7 March 2011

AGEA submits that:

The obligation on bulk handling companies to negotiate rather than impose terms has led to the development of some improved flexibility in the provision of pricing of port terminal services. However, there is still some improvements to be made to establish an efficient and competitive marketplace that maximises the opportunity for bulk wheat exports from Australia.⁸⁶

AGEA submits that to its knowledge, the dispute resolution mechanism is yet to be tested.⁸⁷

The ACCC was advised during a meeting with AGEA that parties find that the arbitration of disputes is a difficult and time intensive process. AGEA stated that

⁸⁵ Vitterra, 23 December 2010, p. 3.

⁸⁶ AGEA submission, 7 March 2011, p. 1.

⁸⁷ AGEA submission, 7 March 2011, p. 4.

exporters are operating in a fast moving industry and formal arbitration may not be the most appropriate means of resolving a dispute.

1.1.2.2 AWB – 4 March 2011

AWB submit that it ‘has not resorted to the formal dispute resolution process to date. AWB does intend to utilise this process in the forthcoming season.’⁸⁸

1.1.2.3 Emerald – 4 March 2011

Similar to AGEA, Emerald submits that it has not tested the dispute resolution provisions, but believes they are soundly based.⁸⁹

1.1.2.4 VFF – 4 March 2011

Regarding the need for transparency and the publication of information, VFF submits that the lack of transparency of information restricts competition therefore it is crucial for all port operators to continue to publish their shipping stem, stocks of grain at port and port access protocols.⁹⁰

⁸⁸ AWB submission, 4 March 2011, p. 7.

⁸⁹ Emerald submission, 4 March 2011, p. 5.

⁹⁰ VFF submission, 4 March 2011, p. 6.

2 Publication of information and ring fencing

2.1 Viterra and third party submissions

2.1.1 Submissions from third parties in response to the Issues Paper

2.1.1.1 AWB – 4 March 2011

AWB submits that ‘the Viterra trading business unit is provided with preferential treatment to other accredited exporters as the Viterra Trading business unit is aware of the timeline for the commencement of the seasonal slot booking process.’⁹¹

Regarding the publication of information, AWB submits that:

- Viterra should provide transparency to exporters on the quality of the stock that has been accumulated for vessels. Viterra should provide a Cargo Quality Document or Authority to Load with predicted load specifications and grade tonnages being used for sign off by the exporter prior to loading.⁹²
- Due to the limited data provision by Viterra, its trading arm is at a significant advantage to other marketer as it would have access to full harvest quality data.⁹³

2.1.1.2 CBH Grain – 4 March 2011

CBH Grain submits that ‘there are a number of factors which impact on the availability of capacity and CBH Grain’s interest is in seeing that all exporting participants have reasonable and up to date access to the end result of this information which is throughput capacity when making a decision on whether to nominate a vessel or not.’⁹⁴

CBH Grain further submits that:

... CBH Grain remains concerned that capacity is not transferable to other participants under arrangements that do not engender ‘gaming’ and notes the lack of a clear process set out in the undertaking or PLP whereby the market is advised well prior to the capacity being made available. This would give rise to an apparent ability for Viterra to book out large portions of the available capacity immediately.⁹⁵

CBH submits that an express provision be included in the Port Terminal Services Agreement that Viterra will not pass any information concerning CBH Grain to its own trading arm without CBH’s consent. CBH would like to ensure that information about its activities is not passed to Viterra’s marketing and trading division.⁹⁶

⁹¹ AWB submission, 4 March 2011, p. 3.

⁹² AWB submission, 4 March 2011, p. 6.

⁹³ AWB submission, 4 March 2011, pp. 6-7.

⁹⁴ CBH Grain submission, 4 March 2011, p. 2.

⁹⁵ CBH Grain submission, 4 March 2011, p. 2.

⁹⁶ CBH Grain submission, 4 March 2011, p. 3.

2.1.2 Section 44ZZBCA requests for information: Vitterra/Vitterra's trading arm

In response to the ACCC's request for information, Vitterra submits that in addition to its legal and contractual arrangements, Vitterra complies with an internal Code of Business Conduct. This code requires that all employees and staff use confidential information appropriately and ensures compliance with all privacy requirements.

Vitterra submits that the level of information and transparency of information provided to all clients, together with the mandatory publication requirements, reduces any perceived competitive benefits or informational advantage for Vitterra's own trading arm.

3 Substance of the Standard Terms

3.1 Viterra and third party submissions

3.1.1 Viterra's submission in support of the Proposed Undertaking – 23 December 2010

Viterra submitted that its Proposed 2011 Undertaking includes updates to the Standard Terms to ensure greater alignment with the Proposed 2011 Undertaking and to reflect potential changes to the regulatory arrangements for bulk wheat export.⁹⁷ Viterra notes the following amendments as ensuring alignment with the Proposed 2011 Undertaking:

- The inclusion of clause 20, dealing with the treatment of confidential information, which is consistent with the confidentiality provisions of the Proposed 2011 Undertaking; and
- Amendments to clause 2.1, dealing with the term, commencement and application of the agreement, which Viterra submits ensures consistency with clause 5.3 of the Proposed 2011 Undertaking. Clause 5.3 of the Proposed 2011 Undertaking deals with access to the port terminal services.

Viterra noted that there have been no Disputes raised under clause 7 of the 2009 Undertaking, regarding the negotiation of access agreements. Further, there have been no disputes concerning access agreements entered into under the 2009 Undertaking.⁹⁸

Viterra summarised the main changes to the Standard Terms in its supporting submission.⁹⁹ The key changes are summarised in Chapter 4 of the Draft Decision.

3.1.2 Submissions from third parties in response to the Issues Paper

3.1.2.1 AGEA – 7 March 2011

AGEA submitted that the approach of publishing Standard Terms earlier has been helpful to exporters. AGEA further submitted that there is some lack of clarity on whether the Standard Terms can be varied. AGEA submitted that it would assist if ACCC provided clear guidelines on the ability to vary Standard Terms to deliver a better outcome than Standard Terms to individual access users and that such terms should not be less advantageous than those applying to the Viterra trading division.¹⁰⁰

AGEA anecdotally cites instances where performance against Export Select bookings by customers had been adversely impacted by Viterra's acceptance of Export Standard bookings, resulting in those customers incurring demurrage costs. To address this issue, AGEA suggests that despatch-demurrage on vessels booked under Export Select be provided by Viterra.¹⁰¹

⁹⁷ Viterra, 23 December 2010, p. 14.

⁹⁸ Viterra, 23 December 2010, p. 4.

⁹⁹ Viterra, Attachment 1, 23 December 2010, pp. 18-19.

¹⁰⁰ AGEA submission, 7 March 2011, p. 4.

¹⁰¹ AGEA submission, 7 March 2011, p. 3.

3.1.2.2 AWB Limited – 2 March 2011

AWB submitted with regard to the substance of the indicative agreement that:

The approach was in process and working but was reliant on one key person at Viterra, the General Manager- Commercial and compliance. When this person was away on extended leave, the process stalled. This clearly demonstrates the lack of contingent process for the provisions of the services.¹⁰²

AWB strongly advocates the inclusion of a despatch-demurrage mechanism in the PLPs. AWB argues that through such a mechanism:

the terminal operator receives an incentive for quick and efficient loading, whereas, the terminal operators will compensate the exporters through demurrage penalties in instances where terminal operators overbook shipping capacity, delays are caused by equipment failure, or delays occur in up-country grain transportation to port.¹⁰³

3.1.2.3 CBH Grain Pty Ltd – 4 March 2011

CBH Grain submitted that the port terminal services agreement should include an express obligation on Viterra to not pass any information concerned CBH Grain to Viterra Limited without CBH Grain's express consent. CBH Grain submitted that it would like to ensure that its information is not passed to Viterra's marketing and trading division.¹⁰⁴

CBH Grain submitted that the liability cap placed on Viterra where it has caused the destruction of wheat through gross negligence or wilful default is too low. CBH Grain submits that Viterra should fully compensate an affected party in this instance.¹⁰⁵

CBH Grain submitted that if Viterra is refusing to outturn grain on the basis of an alleged security interest, Viterra should immediately provide the full details and supporting evidence to the client.¹⁰⁶

3.1.2.4 Elders Toepfer Grain Pty Ltd – 8 March 2011

Elders submitted that it did not sign a negotiated access agreement with Viterra and instead operates under the Standard Terms.¹⁰⁷

3.1.2.5 Emerald Group Australia Pty Ltd – 4 March 2011

Emerald submitted that the concept of Standard Terms, in the form of an indicative access agreement, work well as the basis for negotiation or as a fall-back in the absence of negotiation.¹⁰⁸

Emerald further submitted that Viterra's indicative access agreement is a reflection of its historical role as a monopolist seeking terms most favourable to Viterra. Emerald provided three examples:

¹⁰² AWB submission, 4 March 2011, p. 7.

¹⁰³ AWB submission, 4 March 2011, p.3.

¹⁰⁴ CBH Grain submission, 4 March 2011, p. 3.

¹⁰⁵ CBH Grain submission, 4 March 2011, p. 3.

¹⁰⁶ CBH Grain submission, 4 March 2011, p. 3.

¹⁰⁷ Elders submission, 8 March 2011, p. 1.

¹⁰⁸ Emerald submission, 4 March 2011, p. 4.

- Liability for negligence is limited to \$250 000 per event, when cargo can be valued at \$6 million.
- Viterra will not be liable to compensate the exporter for demurrage costs in the absence of evidence of gross negligence. Emerald noted that previously, Viterra has argued that it should not be liable for events such as mechanical breakdown or labour strikes. Emerald submitted that these factors are in Viterra's control.
- Viterra, when it undertakes blending, will only guarantee the quality of the blended parcel at the level of the lowest component of the blend. Emerald submits that this favours Viterra's trading division.¹⁰⁹

3.1.3 Viterra's submission in response to third party submissions – 23 March 2011

Viterra responded to submissions made regarding the Standard Terms, which it refers to as 'substance of the indicative access agreement.'

Viterra submitted that it does not agree with Emerald's assessment that a number of the Standard Terms are one-sided in favour of Viterra. Viterra submitted that applicants are able to negotiate on the Standard Terms Viterra and if the parties are unable to agree, the applicant has a right to seek arbitration. Viterra Operations submitted that since no applicant has sought mediation or arbitration in relation to the terms of access under the 2009 Undertaking.¹¹⁰

Viterra responded to AGEA's submission and stated that it does not believe there is any lack of clarity regarding the ability to vary the Standard Terms. Viterra referred to clauses 4.1, 5.1, 5.2 and 5.5 of the Proposed 2011 Undertaking.¹¹¹

Viterra responded to CBH Grain's submission that the Proposed 2011 Undertaking does not place an express obligation on Viterra not to share information about CBH Grain with Viterra's marketing and trading divisions. Viterra submitted that it can only use confidential information for the purpose of negotiating an agreement or in any dispute related to the agreement. Further, Viterra submitted that it disagrees with CBH Grain's concern that the liability cap is too low. In regards to the concerns of CBH Grain, Viterra submitted that an applicant can negotiate variations to the Standard Terms with Viterra and seek arbitration. Regarding CBH Grain's concern that Viterra can refuse to outturn grain where a security interest is claimed, Viterra submitted that this is not a real issue in practice and Viterra would have to provide a reason if it refused to outturn grain.¹¹²

¹⁰⁹ Emerald submission, 4 March 2011, pp. 4-5.

¹¹⁰ Viterra, 23 March 2011, p. 17.

¹¹¹ Viterra, 23 March 2011, pp. 17-18.

¹¹² Viterra, 23 March 2011, p. 18.

4 Capacity allocation

4.1 Vitterra and third-party submissions

4.1.1 Vitterra's submission accompanying undertaking – 23 December 2010

The submission provided by Vitterra in support of the Proposed 2011 Undertaking acknowledges that a number of challenges arose in relation to capacity management at the start of the 2009/10 shipping season for both itself and its Clients. Vitterra submits that these issues arose for a number of reasons including:

- (a) lower than anticipated levels of global demand at the start of the shipping season ...
- (b) the impact of the auction system in its first year of operation in Western Australia and
- (c) the need for both Vitterra Operations and its Clients to adjust to the operation of the new Protocols in their first year of operation...¹¹³

To address these issues, Vitterra submitted that it voluntarily implemented a number of improvements to its systems and business processes including:

- (a) publishing a 'capacity table' ...
- (b) amending the shipping stem to include commodity information...
- (c) ...improvements in communications to clients... including:
 - ...(iii) additional information on the shipping stem (e.g. date and time of vessel naming); ...
- (v) direct (and simultaneous) email communications with existing and potential Clients to advise when additional capacity may become available...
- (d) amending the Protocols to provide greater flexibility and clarity around the booking process for Clients...¹¹⁴

Vitterra further submits that during the 2009/10 shipping season, Vitterra actively engaged with its clients to provide additional capacity to port terminal services during peak periods. Vitterra submits that its commitment to providing access to its clients is demonstrated by the lack of disputes either dealt with in accordance with the dispute resolution mechanism contained in the 2009 Undertaking or the Access Agreements. Vitterra states that there have only been a small number of disputes under the PLPs which have been resolved expeditiously.¹¹⁵

¹¹³ Vitterra, 23 December 2010, p. 3.

¹¹⁴ Vitterra, 23 December 2010, p. 4.

¹¹⁵ Vitterra, 23 December 2010, pp. 4-5.

4.1.2 Third party submissions in response to the Issues paper

4.1.2.1 AGEA – 7 March 2011

In relation to capacity management, AGEA submits that in principle the first come first served approach may be appropriate, but has yet to be tested during a period of high demand. In addition, the efficiency of such a model may be impacted by a number of factors including: the behaviour of the vertically integrated port terminal operators, inland efficiencies, capacity allocation and port capacity allocation.¹¹⁶

AGEA submits that the objective of port access arrangements is to promote an efficient supply chain. The undertakings should be a tool to ensure that there are no processes or practices in place that would hinder achievement of this objective. Specific outcomes that are yet to be realised or require improvement include greater flexibility, including tradeable shipping slots. AGEA submits that the current approach allows potential for overbooking.¹¹⁷

In relation to publication of available capacity information, AGEA submits that:

- ‘capacity’ needs to be defined under the proposed undertaking to provide clarity and certainty. AGEA defines ‘capacity’ as ‘the quantity that can be loaded in any given period for any given terminal’.¹¹⁸
- Viterra’s capacity table should show:
 - capacity offered by Export Select and Export Standard;
 - remaining capacity; and
 - additional capacity potential which might be a range and subject to revision.
- the most efficient method in regard to advice about additional capacity would be to update the Capacity Table on the website and then send an email alert to customers that the table has been updated.¹¹⁹

4.1.2.2 AWB – 4 March 2011

AWB submits that the first come, first served approach does not efficiently allocate capacity. Further, the PLPs do not guard against over booking of the stem as demonstrated by Viterra’s trading arm’s bookings and failure to execute against those bookings in the 2009/10 shipping season. AWB submits:

... the protocols have produced a pattern of behaviour amongst exporters of holding onto the booked shipping capacity to the end of the allocated shipping slot time period. There are numerous examples of the capacity owner or shipping moving all slots to the second half of the slot and then cancelling at the end of the month which has resulted in the capacity of the port for the month being forgone and other shippers being denied access to the unutilised shipping capacity...

¹¹⁶ Australian Grain Exporters Association (AGEA), Submission to the ACCC, 7 March 2011, p. 2

¹¹⁷ AGEA submission, 7 March 2011, pp. 2-3.

¹¹⁸ AGEA submission, 7 March 2011, p. 2

¹¹⁹ AGEA submission, 7 March 2011, p. 2

The charging of penalties (\$5 per metric tonne), also creates distortions in the market as it leads to exporters discounting the value of Australian grain to secure sales. If there were a mechanism (e.g. a secondary market for exporters facilitated by Viterra Operations as the broker) to permit the orderly transferral of slots without penalty this potential incentive to distort Australian export values for grain would be removed substantially.¹²⁰

In relation to tradeable slots, AWB submits that

... exporters should be able to trade capacity directly. Exporters with capacity which is high in demand should be able to sell, swap or otherwise negotiate this asset without Viterra unduly influencing or dictating behaviour of this secondary market.¹²¹

In relation to clarity and certainty as to available capacity, AWB submits that:

- the capacity table provided by Viterra is more helpful than having no table at all, but does not provide sufficient transparency or to accuracy to assist exporters. In particular, the table shows available shipping slots without reference to actual available capacity for those slots.¹²²
- Viterra's capacity table should provide figures on the available capacity of storage at port, ship loading capacity and in-loading capacity. Exporters must know what capacity for each stage of the supply chain exists in order to accurately price export demand for Australian grain.¹²³
- when additional capacity becomes available, clients should be notified both via email and by updating the capacity table – with quantitative figures and types of available capacity.¹²⁴
- published information should be provided in real time: 'Information should be provided in 'near or real time' for it to have a practical benefit to potential clients of Viterra'.¹²⁵
- the information currently published provides starting point to understand theoretical capacity – however to understand actual capacity, exporters need access to particular information, including:
 - available capacity at port;
 - details of recent or current interior transport discharge;
 - status of ship loading; and
 - storage volume utilisation at port.¹²⁶

¹²⁰ AWB, Submission to the ACCC, 4 March 2011, pp. 2-3.

¹²¹ AWB submission, 4 March 2011, p. 3.

¹²² AWB submission, 4 March 2011, p. 2.

¹²³ AWB submission, 4 March 2011, p. 3.

¹²⁴ AWB submission, 4 March 2011, p. 3.

¹²⁵ AWB submission, 4 March 2011, p. 4.

¹²⁶ AWB submission, 4 March 2011, p. 4.

AWB considers that this information is critical for exporters to determine:

- shipping requirements, including accumulation programs from up-country to port;
- the associated time require to load; and
- arrangement at the subsequent loading ports.¹²⁷

4.1.2.3 CBH Grain – 4 March 2011

In relation to the capacity allocation model, CBH Grain states that it has generally found that the PLPs have not efficiently allocated capacity over the last two seasons. Further, CBH Grain does not consider that first come first served is necessarily the most appropriate way to allocate resources in a high yield year.¹²⁸

CBH Grain submits its concern that capacity is not transferable. In particular, CBH Grain considers that without sufficient protections or the ability for market participants to transfer capacity, the port terminal operator may stand to make a windfall gain. CBH Grain submits that the PLPs do not adequately protect against the overbooking of the stem.¹²⁹

CBH Grain has also raised concerns regarding the process of booking slots, in particular:

- The five day period in which to respond is too long;
- There is a lack of clear process whereby the market is advised well prior to the capacity being made available; and
- The requirement to provide load grade and tonnages 60 days out from the first day of the booking slot unacceptably reduces CBH Grain's flexibility to deal with its booking slot.¹³⁰

On the issue of transparency of available capacity, CBH Grain submits that the capacity table could be improved by the addition of the quantities of capacity that Viterra considers is available at its port terminal facilities. There is also benefit in providing its indicative throughput capacity at given points in time.¹³¹

4.1.2.4 Elders Toepfer Grain (Elders) – 8 March 2011

Elders submits that overall Viterra's 2009 Undertaking did not work well. In relation to capacity management, Elders states:

As an access seeker, ETG believe the Port Loading Protocols have not efficiently allocated port loading capacity. A clear example of this can be illustrated from the allocation of capacity within the 2009/10 season where long range speculation led to significant defaults on capacity in nearby shipping windows... ETG supports the notion of 'first come, first served'

¹²⁷ AWB submission, 4 March 2011, p. 4.

¹²⁸ CBH Grain, Submission to the ACCC, 4 March 2011, p. 2.

¹²⁹ CBH Grain submission, 4 March 2011, p. 2.

¹³⁰ CBH Grain submission, 4 March 2011, pp. 2-3.

¹³¹ CBH Grain submission, 4 March 2011, p. 1.

when it coexists in an environment where the shipping stem is not speculated on...

Under the current Viterro system a shipper has the ability to book up capacity well in advance, hold this capacity right up until the shipping window has concluded and then decide not to ship against this capacity at no additional penalty over another shipper that has executed there [sic] booking. Should slot speculation continue there needs to be a mechanism to ensure the hand back or transfer of capacity within a suitable timeframe prior to the shipping window opening, if the holder can not utilise the booked capacity.¹³²

Elders does not support the concept of tradeable shipping slots, where a secondary market is created which lacks liquidity. It considers that if the primary market is efficiently servicing the market and coexisting with the hand back and / or transfer of capacity within a suitable timeframe prior to the slot opening, then the need for a secondary market in any form is limited. Elders states that:

An alternative that ETG would support is the ability for market participants to openly transfer shipping slots to assist in the facilitation of executing the open stem, (sic) basis provisions against performance risk and anti-hoarding are adhered to and managed by the incumbent BHC.¹³³

In relation to the transparency of capacity, Elders considers that transparency and disclosure are 'the key to driving an efficient and effective supply chain'.¹³⁴ Elders submits that the inclusion of quantities on the available capacity table for Export Select, Export Standard and remaining capacity is necessary to increase transparency. In addition, Elders submits that maximum elevation capacities outside the bundled services are illustrated for the market to establish a benchmark outside these services.¹³⁵

On Export Select and Export Standard, Elders submits that capacities of Export Select should be published for transparency. In addition, pipeline capacities should be visible and transparent as well as maximum elevation capacities outside of the bundled services.¹³⁶

4.1.2.5 Emerald Group Australia Pty Ltd – 4 March 2011

In relation to the first come, first served system, Emerald submits that it worked well for the 2009/10 season and is relatively easy to understand.¹³⁷

However, in a large crop year, where demand for shipping exceeds available capacity, it is a perilous system for grain traders. This is exacerbated when prices for the grain are high and the \$5 per tonne non-refundable booking fee represents a relatively minor proportion of the export value, thus failing to deter speculative booking.¹³⁸

As an alternative, Emerald notes that the auction system in Western Australia is based on placing a value on the shipping slots as a scarce commodity. Further, that as the

¹³² Elders Toepfer Grain Submission to the ACCC, 8 March 2011, pp. 2-3.

¹³³ Elders submission, 8 March 2011, pp. 4-5.

¹³⁴ Elders submission, 8 March 2011, p. 5.

¹³⁵ Elders submission, 8 March 2011, p. 2.

¹³⁶ Elders submission, 8 March 2011, p. 2.

¹³⁷ Emerald Group Australia Pty Ltd, Submission to the ACCC, 4 March 2011, p. 2.

¹³⁸ Emerald submission, 4 March 2011, p. 2.

auction premiums are rebated back to exporters based on volumes shipped, it mitigates speculative booking. In addition, such a system removes concerns that the payment of the \$5 per tonne non-refundable fee is not a deterrent for Viterra as it amounts to an internal transfer of funds.¹³⁹

Emerald submits that if Viterra is to continue with the first come, first served system, then a number of improvements are needed to 'level the playing field for exporters vis-à-vis Viterra's own trading division. These include:

- publication of a dynamic capacity table;
- all-client emails to notify changes to the shipping stem and capacity;
- prohibition on the logistics division of Viterra tipping – off changes to the stem or capacity to its trading division other than through all-clients emails; and
- in September of each year, Viterra should be required to report to the ACCC on the capacity booked by Viterra on the shipping stem versus actual shipped. There should be an automatic audit conducted by ACCC to test adherence to the Undertaking if Viterra's stem bookings are more than 10% in excess of the quantity of grain actually shipped by Viterra.¹⁴⁰

Emerald also submits that 'Viterra should have the flexibility to modify the first-in-first served system to provide some proportion of guaranteed shipping capacity to traders (other than Viterra's own trading arm) that have underpinned the SA storage and rail system via significant commitments or significant accumulation positions.'¹⁴¹

Emerald submits that:

The 2009 Undertakings of all the bulk handlers have been premised on the understanding that the export capacity of the port should be available to all accredited exporters ...

Accordingly it is important that *capacity* is defined in the Proposed Undertaking, to ensure that the bulk handlers are not reserving capacity for their own requirements.¹⁴²

Emerald acknowledges that export capacity is a function of various inputs including: Rail in-loading speed, rail resource availability, road intake speed, port storage, ship loading rates, labour availability, port rules and environmental constraints. Emerald further acknowledges that port capacity is complicated and dynamic. However it submits that, based on information published in the available capacity table, access seekers are unable to verify whether available capacity has been reached or determine the extent of available capacity.¹⁴³

Emerald suggests that the available capacity table should provide the projected (dynamic) capacity of the port and compare it quantitatively to the booked capacity.

¹³⁹ Emerald submission, 4 March 2011, p. 2.

¹⁴⁰ Emerald submission, 4 March 2011, p. 3.

¹⁴¹ Emerald submission, 4 March 2011, p. 3.

¹⁴² Emerald submission, 4 March 2011, p. 1.

¹⁴³ Emerald submission, 4 March 2011, pp. 1-2.

Emerald further submits that a mechanism whereby any changes to the daily published shipping stem (such as additional capacity becoming available) should be notified to all access seekers simultaneously. This is to prevent Viterra's trading arm from gaining an advantage by becoming aware of any new capacity in advance of other exporters.¹⁴⁴

Emerald submits that the use of 'average' capacity as published in the port schedules of the Proposed 2011 Undertaking are misleading, overly conservative and that the assumptions behind the calculation of 'average' capacity are not transparent. Emerald considers that the underlying assumptions used to calculate 'average' capacity rates should be published to provide greater transparency.¹⁴⁵

4.1.2.6 South Australian Farmers Federation (SAFF) – 4 March 2011

The submission from SAFF relates substantially to issues relating to up-country storage which falls outside the ambit of the assessment of the Proposed 2011 Undertaking. SAFF submits that there has been little or no improvement in information flow and shipping stem transparency since the Wheat Exports Australia audit in November 2010.¹⁴⁶

4.1.2.7 Victorian Farmers Federation (VFF) Grains Group

The VFF provided a submission commenting on both Viterra's Proposed 2011 Undertaking and ABA's Proposed 2011 Undertaking.

The VFF submission contains a number of statements as to competition between up-country storage providers and the application of the WEMA. These statements fall outside the ambit of the current assessment of the Proposed 2011 Undertaking. Relevant to assessment of the Proposed 2011 Undertaking VFF submits that it is crucial for all port operators to continue publishing their shipping stem, stocks of grain at port and port access protocols.¹⁴⁷

4.1.3 Viterra's response to submissions received – 23 March 2011

In response to the ACCC's issues paper and submissions received from third parties, Viterra provided a detailed submission dated 23 March 2011. Viterra submits that a key issue for the Proposed 2011 Undertaking is to ensure that the undertaking continues to support Viterra's ability to provide flexible and timely commercial solutions to clients. Viterra considers that a more prescriptive approach to operational matters may have an unintended consequence of limiting the approaches that Viterra may adopt in seeking to provide additional capacity and to cater for the individual requirements of exporters.¹⁴⁸

¹⁴⁴ Emerald submission, 4 March 2011, p. 2.

¹⁴⁵ Emerald submission, 4 March 2011, p. 3.

¹⁴⁶ South Australian Farmers Federation (SAFF) Submission, 4 March 2011, p. 1.

¹⁴⁷ Victorian Farmers Federation (VFF) Submission, 4 March 2011, p. 6.

¹⁴⁸ Viterra, Response to Submissions, 23 March 2011, p. 1.

4.1.3.1 Capacity Allocation

Viterra acknowledges the support provided for the first come, first served approach provided by AGEA, Emerald and Elders.¹⁴⁹

Viterra notes that certain submissions call for moveable or tradeable slots or some form of despatch and demurrage system. Viterra reiterated its commitment to continue engaging with clients in relation to these issues.¹⁵⁰

Viterra agrees with the submissions of AGEA and Emerald that any changes to the PLPs will need to be developed and tested to avoid creating any inefficiencies and that it is appropriate that any changes be developed in consultation with exporters. Viterra submits that the ability to vary the PLPs following the consult and notify mechanism strikes an appropriate balance between the interests of Viterra and all access seekers and also appropriately provides an ability for Viterra to respond to operational issues as they arise and are identified.¹⁵¹

Viterra notes Elders' submission in relation to the speculative bookings and the high degree of speculative behaviour in the early part of 2009/10 season. Viterra states that it has previously acknowledged these transitional issues and has made a number of changes to the PLPs and its internal processes, which reflect improvements identified during the first year of operations.¹⁵²

4.1.3.2 Transparency of available capacity

Viterra submits that there is no industry standard way of calculating or defining capacity. When referring to capacity, Viterra submits there is an important distinction between the inward elevation, storage and outloading capacity at each port terminal; and the capacity of the supply chain to deliver wheat to port.

In general, the constraint on the system or export chain is not the inward, storage or out-loading capacity at port. It is the availability, provision and utilisation of transport assets by third party providers, Viterra Operations and their respective clients.¹⁵³

Common ways of measuring or referring to capacity include 'maximum capacity' (nameplate capacity) or 'average capacity' (practical capacity). Viterra submits that given the number of factors that can affect the amount of actual capacity at any point in time, 'actual capacity' may be higher or lower than average capacity. Viterra considers that average capacity provides the best practical guide for access seekers and users in relation to measuring in-loading, storage and out-turn capacity at each port terminal.¹⁵⁴

Viterra submits that it has changed the manner in which 'capacity' is described in the Port Schedules attached to the Proposed 2011 Undertaking. Specifically, each port schedule now includes a maximum in-load capacity and an average in-load capacity

¹⁴⁹ Viterra, 23 March 2011, p. 6.

¹⁵⁰ Viterra, 23 March 2011, pp. 6-7.

¹⁵¹ Viterra, 23 March 2011, p. 7.

¹⁵² Viterra, 23 March 2011, p. 7.

¹⁵³ Viterra, 23 March 2011, p. 2.

¹⁵⁴ Viterra, 23 March 2011, pp. 2-3.

expressed as a tonnes per hour figure.¹⁵⁵ In each Port Schedule, further information has been provided for each port under the heading ‘additional capacity management terms’.

Viterra considers that wheat exporters will understand the information contained in the Port Schedules, what the information refers to as a practical matter, and how it has been measured. Viterra considers that the inclusion of further definitions of capacity would not assist access seekers and users in understanding the availability of port terminal services or provide additional clarity or certainty.¹⁵⁶

In relation to the available capacity table and the requests for publishing specific volumes, Viterra submits that publishing numerical capacity estimates is unlikely to provide, better, more accurate or more up to date information than is already available because:

- there are difficulties inherent in determining the precise volume of actual available capacity;
- any provision of estimated or forecast capacity volumes is likely to create a strong incentive to provide conservative and high level estimates which are subject to disclaimers and qualifications.¹⁵⁷

In relation to the submissions that request a breakdown of capacity available at different stages of the supply chain, Viterra submits there is likely to be limited benefit and would involve significant resources and cost for Viterra. Further, any requirement to provide such disaggregated information would increase the incentives to provide conservative and qualified estimates.¹⁵⁸

It is Viterra’s view that, rather than publishing high level and indicative numerical estimates of capacity, the most meaningful approach is to engage directly with Clients to make capacity available where required, and to advise a client through direct communication when capacity has become available.¹⁵⁹

4.1.4 Section 44ZZBCA requests for information: Industry

In early March 2011, Glencore made nominations for bookings for execution after the expiry of the 2009 Undertaking. This was quickly followed by a significant number of nominations for the 2011/12 shipping season. As a result of these nominations, shipping capacity was reached at two of Viterra’s port terminals for the peak shipping period of January 2012 to April 2012. Following these events, a number of exporters contacted the ACCC and raised concerns regarding these bookings and access to port terminal services.

¹⁵⁵ Viterra, 23 March 2011, p. 3.

¹⁵⁶ Viterra, 23 March 2011, p. 3.

¹⁵⁷ Viterra, 23 March 2011, pp. 4-5.

¹⁵⁸ Viterra, 23 March 2011, p. 5.

¹⁵⁹ Viterra, 23 March 2011, p. 5.

For the purpose of assessing whether the first come, first served capacity allocation system is appropriate, the ACCC sent a request for information to twelve exporters¹⁶⁰ who appeared on the Viterra shipping stem as at 4 April 2011. The request sought information in relation to previous bookings, anticipated shipping requirements for the 2011/12 season, bookings nominated for the 2011/12 shipping season, views as to whether the first come first served capacity allocation model operated by Viterra efficiently allocated capacity and any alternative models that may be appropriate.

Separate requests for information were also sent to Viterra and Viterra's trading arm specifically in relation to capacity allocation management.

Of the eleven exporters to respond, ten requested that responses be treated as confidential. The remaining submission was subject to partial confidentiality claims. In addition, two non-solicited confidential submissions were received in relation to the capacity allocation management issues.

The ACCC undertook to receive the responses to the requests for information from exporters on a confidential basis and to not publish responses on the ACCC's website. However, it is important to note that the assessment of any Part IIIA undertaking is a transparent process, and public submissions are preferred. In order to provide Viterra procedural fairness, the contents of confidential submission have discussed in this Draft Decision and made available on the ACCC website.¹⁶¹ Viterra has also been provided with de-identified versions of the confidential submissions.

4.1.4.1 Summary of confidential submissions

Confusion as to the 'opening of the shipping stem'

Viterra's current booking system does not prevent the booking of slots at any time; the shipping stem is continuously 'open'. Exporters were unaware that they were able to make bookings for the 2011/12 season in the absence of an accepted access undertaking and only became aware after Glencore's and Viterra's own trading arm appeared on the shipping stem.¹⁶²

Viterra's trading arm bookings

Exporter G states that at the time the first booking submissions for 2012 were made public, Viterra's own trading arm made applications to capture excessive amounts of elevation capacity in certain periods behind the largest, most active ports in South Australia. Exporter G considers that Viterra's trading arm receives an unfair advantage in relation to submitting applications for 2012 shipping capacity, as adverse changes in the terms, conditions and pricing structures enacted after the acceptance of these bookings would not affect Viterra as a whole to the same extent as other exporters given the internal transfer of risk between the divisions of the parent company. Exporter G expressed the view that the bookings made by Viterra's trading

¹⁶⁰ The following exporters received s. 44ZZBCA requests for information: AWB, Bunge, Cargill, CBH, Concordia, Elders, Emerald, Gavilon, Louis Dreyfus, Pentag, Plum Grove, Touton. The s. 44ZZBCA requests are available on the ACCC website: <http://www.accc.gov.au/content/index.phtml?itemId=868800>.

¹⁶¹ De-identified confidential responses from exporters are available on the ACCC website: <http://www.accc.gov.au/content/index.phtml?itemId=993330>.

¹⁶² Responses from Exporters D, G, H, I, J, M, N expressed similar concerns with the 'open' shipping stem.

arm, utilising its advantaged position, prompted other exporters to make hasty decisions for fear of losing access to export capacity for bulk grain in South Australia.

AWB submits that the recent events that led to the booking of 6.8mmt of shipping capacity in South Australia was driven by the 'first come, first served' approach, which inherently favours Viterra's trading business unit, and discriminates against all other accredited exporters. AWB further submits that due to the fact that Viterra can discriminate both on price and the operation of its port terminal services in favour of Viterra's trading business unit and Viterra also controls the port assets, as well as most of the upcountry storage, there will always be an element of bias in the South Australian supply chain in favour of Viterra's export trading business unit.

Speculative nature of the bookings and lack of business planning

Exporter J submits that it would have been unlikely that they would have booked slots this early in the year had the booking activity which commenced on 8 and 9 March not occurred.

Exporter N submits that being able to (or being forced to) book so far in advance increases the degree of speculation and as a result will drive more volatile market behaviour and likely raise the cost of exporting grain from South Australia.

Exporter M submits that booking so far in advance means that the contents of the Viterra Storage and Handling agreement is not yet known, and it is also not known how the crop will turn out. Exporter M submits that Viterra are potentially taking booking fees for more tonnage than will be grown in South Australia.

AWB submits that the argument that auctioning shipping slots will encourage unacceptable levels of speculative behaviour is completely spurious on the grounds that the current first come, first served basis of allocation in the twelve ports operating in South Australia, Victoria, New South Wales and Queensland is already encouraging unacceptable levels of hoarding behaviour on behalf of many accredited exporters, including AWB, because an equitable system to allocate this scarce resource does not exist. AWB further submits that there is a substantial element of uncertainty for all exporters who have booked capacity for the 2012 shipping season based on the fact that almost no known buyers have purchased Australian origin grain for that period of time.

Uncertainty of the terms and conditions

Exporter G submits that the conditions surrounding the use of Viterra Port Terminals during the period from 1 October 2011 to 30 September 2012 were lacking sufficient information in order to make commercially sound decisions. Exporter G submits that it was forced to act in a less than commercially viable manner to secure limited elevation capacity in South Australia.

Exporter D submits that it finds it unacceptable that it would be asked to nominate and pay a fee on a transaction to which the terms have not been defined.

Costs of bookings so far from execution

Exporter N submits that given the booking fee of \$5 per tonne is non-refundable, nominating and booking vessel slots is preferably done further into the seasonal

production cycle when export volumes are more certain and when there is not a requirement to finance a booking fee. Exporter J submits that the advanced payment of the bookings fee at that time of the year has financial implications on their businesses and inherent risk compared with the Bulk Handlers', which is seen as "paying from one pocket into the other". Exporter D submits that it did not expect to have to allocate working capital to the funding of shipping slots for use approximately one year in advance.

Effect on competition

Comments received in the confidential responses from industry participants indicate that the 2012 bookings, if accepted as nominated, will have a significant impact on an exporter's (other than Viterra's trading arm and Glencore) ability to operate as planned in the South Australian market. Comments include:

- Exporter F submits that its plans to grow its business in SA may now be restricted if the bookings as nominated are ultimately approved.
- Exporter H submits the lack of available capacity on the shipping stem is preventing it from providing new season offers to its key customers.
- Exporter N submits that the scale of the early nominations by Glencore and Viterra meant it needed to also commit to early nominations and to the non-refundable fee or risk being locked out of the bulk export market from South Australian ports. AWB submits a similar sentiment.
- Exporter I states that the behaviour of export participants in nominating bookings on the 2012 Viterra shipping stem, was driven by a desire to avoid being locked out of elevation capacity.

View on other capacity allocation systems

Exporter J submits that the current capacity allocation system worked reasonably well in the 2009/10 season. However, eight responses stated that the first come, first served system has not efficiently allocated capacity for the period 1 January to 30 April 2012 (in what is forecast to be another large crop year).¹⁶³

Exporter G submits that the environment surrounding the booking of shipping slots for 2012 lacked clarity. Combining the lack of clarity on the terms with the need to act sooner rather than later under the first come, first served system, market participants, including Exporter G claimed that they were put in a position to make commercially unsound decisions in an attempt to secure access to the South Australian grain markets.

Exporter E submits that the first come, first served approach favours Viterra's trading arm. Exporter B submits that the first come, first served system does not protect against speculation and overbooking and added that the inability to transfer capacity between exporters means that the system cannot meet demand in high production years.

¹⁶³ Exporters B, D, N, K, G, J, M and H.

Exporter F submits that both the first come, first served system and auction system have advantages and disadvantages depending on the situation in the particular state, in terms of crop supply, logistical availability and port terminal capacity.

There was some support for the current system with Viterra Ltd stating that the first come, first served system applies equally to all parties and efficiently manages capacity as the infrastructure owner has the opportunity to move as much grain as possible at minimal cost, regardless of the owner.¹⁶⁴

Exporter N submits that the Viterra system does not support efficient allocation of capacity as:

- allowing nominations prior to a crop being planted and established creates an environment susceptible to gaming; and
- the process commits traders to a non refundable fee prior to external variables such as the following being known: production levels, grain quality, market demand and supply in early 2012 and supply chain capacity available within each port zone.

Exporter N further submits that the current system should be replaced with a more orderly and structured process that lessens the opportunity for speculation and gaming within the nomination process:

- the process should be open and transparent;
- phased release of capacity after seeding; and
- holding back some capacity to provide an opportunity for the market to assess seasonal quality actually delivered.

Further improvements proposed to the first come first served proposed in the response from Exporter G include the following:

- clear opening date of shipping stem
- publication of full terms and conditions and pricing structures to be applied to the relevant period in which capacity is sought, prior to the opening date
- limitations on the volume of shipping capacity that may be submitted by an individual exporter on a given day.

AWB submits that the first come, first served approach:

- encourages long range hoarding by accredited exporters
- is a process that is biased in favour of the port terminal operator's trading business unit

¹⁶⁴ Viterra Ltd provided a non-confidential version of its submission, which was not required to be de-identified. The submission is available on the ACCC website:
<http://www.accc.gov.au/content/index.phtml?itemId=993330>.

- discriminates against accredited bulk exporters that do not have the ability to swap or move shipments between port zones over time to cover shipping slots bought well in advance of developing a sales program
- places increased risks upon exporters to forecast Australian grain supply and demand well in advance of grain production and sales negotiations and lock in to estimated shipping requirements or run the risk of making sales to reputable international buyers of Australian grain and run the unacceptable risk of not being able to secure shipping capacity to meet the timing requirements of these customers
- entrenches the power of the port terminal operator's trading arm within the geographic drawing arc of the port terminal's natural monopoly, which will diminish competition in the long term to the detriment of grain farmers and grain buyers.

Exporter D submits that the most efficient and equitable way to allocate shipping capacity is to have an independent body control or oversee the stem. Exporter D submits that the current system favours larger export companies who are able to take on the risk and have funds to book the shipping stem well in advance of knowing what they may actually ship. Further, they can block out competitors and limit competition for grain at the farm gate. In addition, Exporter D stated that a system should be considered that limits the amount of stem that can be booked in advance.

Exporter N submits that Viterra should consider a more orderly and structured process that lessens the opportunity for gaming and speculation within the nomination process and that consideration should be given to a phased release of capacity post-seeding.

Exporter I submits that whatever capacity allocation system is agreed, the system will only be as effective as the rules, processes and procedures that accompany it. Exporter I considered that in principle, an auction is too restrictive, but within the current environment may be required to function for the transitional period until full deregulation. Exporter I supports the first come, first served model but on the basis that it has correctly aligned processes, procedures and rules that will prevent the uncertainty of the current situation.

A few responses looked at other potential methods to improve capacity allocation with Exporter E suggesting that there should be a regulatory framework to put a body in place that will allocate the stem, receive funds for the same and provide a secondary market for trading the stem. Exporter H submits that an alternative method for efficiently allocating shipping capacity is for an independent body such as Grain Trade Australia to be the party that receives vessel nominations and allocates capacity to exporters pending substantiation of valid contracts within a specified period. Exporter H also submits that another appropriate alternative method is the introduction of a market based system, similar to the CBH auction system.

In addition, confidential responses provided to the ACCC's requests for information show strong support for transferable slots. Exporter D submits that the penalties for not using the shipping stem are anti-competitive, as exporters will lose the \$5 per tonne fee for failing to ship, whereas within Viterra the penalty is a transfer of value to a related party. As such, there is no apparent penalty to the Viterra group.

Exporter G submits that regardless of the capacity allocation system used by Vitterra, transferability of slots should be introduced, as this would lead to increased efficiency across the Vitterra system. The response stated transferable slots are not a means by which exporters can 'speculate' on shipping capacity, but that transferability provides exporters with increased flexibility to ensure efficient use of capacity.

Exporter L submits that a party should be required to have a sales contract in hand behind the request for a shipping slot. Exporter L submits that in the alternative, vessel slots should be able to be traded or sold provided it can be done in such a way that does not artificially increase the contract price and limits the incentives for speculation. This will increase use of port terminal capacity.

Confidential submissions provided a number of comments on the introduction of an auction system.

- Exporter G submits that an alternative method to first come, first served is an auction system. The system used by CBH could be used by Vitterra as a base to develop a similar program for the South Australian market. CBH's auction system is supported by Australian grain exporters and has proved to be a transparent and effective means of securing elevation capacity in Western Australia.
- Exporter K submits that an auction system like that run by CBH where the auction premiums are pooled and rebates are earned on shipment performance, would be more efficient than the current system.
- Exporter H submits that an alternative method to first come, first served may be the introduction of a market based system which allocates shipping slots similar to the CBH auction system.
- Exporter M submits that the auction system in Western Australia has significant merit. Each exporter receives the opportunity to book slots on the same day, at the same time. The fairness of the system is evidenced by the fact that all funds generated over and above the nominated fobbing charge are returned to shippers and not to the bulk handler.
- Exporter B submits that an auction system like being currently used in Western Australia works by putting a value on shipping slots therefore reducing the impact of speculative bookings. It allows every exporter equal opportunity to view upfront capacity and book accordingly. In addition to an auction system, the ability to transfer capacity between exporters in a secondary market is critical in keeping trade windows open.
- AWB submits that in Western Australia, the CBH system has an effective mechanism to transfer shipping slots and a mechanism exists to allocate shipping capacity, in the form of an open and contestable shipping slot auction process run by a independent auctioneer. AWB further submits that greater efficiency in export supply chain paths can be extracted if greater certainty of access and flexibility of slot management is afforded to exporters through the adoption of consistent national processes for shipping slot allocation and transfers. AWB submits that the auction should be independently operated and transparent and facilitate the transfer of shipping slots between accredited exporters.

On the other hand, Exporter I submits that the auction methodology is too restrictive, but within the current environment and subject to aligning processes associated with auctions, this methodology may be required to function for a period of industry transition to a fully de-regulated market.

4.1.5 Section 44ZZBCA requests for information: Viterra/Viterra's trading arm

The ACCC also sought information from both Viterra and Viterra's trading arm, which mirrored that asked of other exporters with additional questions as to cancelled bookings, ability to acquire capacity as sought and evidence to support the quantity of bookings nominated for the 2011/12 shipping season.

Viterra and Viterra's trading arm provided responses to the ACCC's requests for information on a confidential basis. Non-confidential responses were subsequently submitted.

Export standard and Export Select

In Viterra's response to the ACCC's request for information in regard to the interrelationship between Export Select and Export Standard capacity, Viterra submitted:

There are also a number of factors that are specific to each of Export Standard and Export Select. In particular:

Export Standard – Inward elevation capacity is allocated on a first come first served basis. The total (static) Export Standard capacity available at any given Port Terminal will be equal to the total inward elevation capacity at that port. Given that Export Standard deliveries require that the client provides logistics services, the client's ability to provide transport capacity (road or rail) will affect available inward elevation capacity; and

Export Select – As set out in previous submissions, Viterra Operations provides a set amount of Export Select capacity at each Port Terminal, based on providing transport and operational capacity during normal working hours – rail is scheduled to operate 7 days a week and road accumulation on a 5 day a week basis. Nominations for Export Select can be made until all of the designated Export Select capacity is utilised (unless that inward elevation capacity has already been nominated by clients to the Export Standard path).

4.1.6 Viterra submission to the ACCC – 28 July 2011

Viterra provided the ACCC with a submission detailing Viterra's plan for implementing transitional arrangements to an auction system for allocating capacity under the Proposed 2011 Undertaking. Viterra submits that the auction will apply from mid-2012, however in the meantime, Viterra would be taking a number of steps to ease capacity constraints at Port Adelaide Outer Harbor and Port Lincoln during the period 1 January to 30 April 2012. These steps are:

- Viterra Ltd voluntarily vacating a number of its existing pending bookings that would otherwise take priority at Port Adelaide Outer Harbor and Port Lincoln during the period 1 January to 30 April 2012 to make way for existing bookings by other exporters. This will leave Viterra Ltd with a share of bookings at Outer

Harbour and Port Lincoln for January to April 2012 that is comparable to its share of initial bookings for, and actual shipments from, those two ports during the corresponding period in 2011.

- Viterra will close the shipping stem to allow for existing bookings to be accepted in accordance with the current Port Loading Protocols. Once the shipping stem is re-opened, Viterra Operations will continue to offer capacity on a FCFS basis until the introduction of the new auction system. Viterra will provide all clients with equal notice of the re-opening of the shipping stem to enable these bookings.
- Pending the introduction of the auction system, Viterra will allow clients to transfer bookings, move bookings between ports and slots, and will provide an incentive for the early surrender of slots that will not be used. This will facilitate greater flexibility and the use of slots by exporters that value them most.¹⁶⁵

Additionally, Viterra will publish additional information on its website, in relation to the available port capacity and stocks held at its Port Terminals. Viterra submits that this capacity information is likely to assist clients to assess the potential availability of capacity so that they can plan their shipping programs.¹⁶⁶

Viterra submits that it is not possible for it to introduce an auction system by either 1 October 2011 nor 1 January 2012, and therefore transitional arrangements are required. Viterra submits that it is necessary to undertake significant work, and engage appropriate resources, in designing, implementing and communicating any new system in order to avoid the significant risk of unintended consequences. Viterra further submits that it is also imperative, both for Viterra and clients, that there is certainty in relation to the way that bookings will be allocated well prior to this date.¹⁶⁷

Viterra submits that it has already commenced work on planning and designing the auction system. Viterra submits that it will commence formal consultation with clients and the ACCC regarding the introduction of the auction, which will be done via variations to the Port Loading Protocols and Standard Terms. This will occur no later than 1 January 2012. Viterra submits that clients will have at least 15 Business Days to provide comments on the proposed auction system and that the ACCC will have a further period of 45 Business Days to review, and if necessary, object to the proposed amendments having regard to certain matters. Viterra submits that the auction will be implemented by the date given in the Undertaking, unless the ACCC raises objections. If the auction system is not implemented by the specified date, Viterra will not be able to provide port terminal services to its trading arm, Viterra Ltd. Viterra submits that this will provide an incentive for it to get the auction system in place by the required date.¹⁶⁸

¹⁶⁵ Viterra, 'Submission to the ACCC on Transition to Proposed Access Undertaking', 28 July 2011, p. 1.

¹⁶⁶ Viterra, 'Submission to the ACCC on Transition to Proposed Access Undertaking', 28 July 2011, p. 2.

¹⁶⁷ Viterra, 'Submission to the ACCC on Transition to Proposed Access Undertaking', 28 July 2011, pp. 2-3.

¹⁶⁸ Viterra, 'Submission to the ACCC on Transition to Proposed Access Undertaking', 28 July 2011, pp. 3-4.

Viterra submits that it is important that it treats the currently pending bookings for the 2011/2012 season in accordance with the processes set out in the 2009 Undertaking currently in force. Viterra proposes to honour all bookings made under the FCFS system (other than those voluntarily surrendered by Viterra Ltd), regardless of whether the execution of those bookings is before or after the auction implementation date. Viterra submits that this approach is both necessary and desirable, as there is and will be remaining capacity available on Viterra's shipping stem for various port and various periods. Viterra further submits that:

To enable Viterra Operations to accept bookings and give effect to this transition, Viterra Operations will close the shipping stem and re-open it in stages (i.e. 1 October to 31 December 2011 and then 1 January 2012 to 30 September 2012), so that all exporters have equal notice of the re-opening of the shipping stem to make bookings.

Unless otherwise agreed with the ACCC, Viterra Operations will not receive any bookings onto the shipping stem for execution post-1 October 2012 until the Auction System is in place or if, in accordance with the Undertaking, Viterra Operations is prevented from providing Port Terminal Services to Viterra Ltd, Viterra Operations opens the shipping stem for third party exporters for the relevant period.¹⁶⁹

Viterra refers to a previous suggestion regarding the pro-rata allocation of capacity for the constrained period and submits that this would be contrary to its obligations under both the Port Loading Protocols and its contracts with exporters which do not contemplate allocation on this basis and that there is currently no basis on which Viterra can require this from exporters.¹⁷⁰

Viterra submits it will take three steps to implement the transition plan:

1. Viterra will send an all client communication setting out that the shipping stem is closed, Viterra Ltd will be giving up some of its bookings and requesting clients to advise Viterra in three business days whether they too wish to surrender some bookings at the constrained ports during the constrained period.
2. Viterra will process each of the pending bookings in accordance with the current Port Loading Protocols, and will advise clients whether or not their bookings have been accepted. Viterra will enter into further negotiations with clients whose bookings have not been accepted in accordance with the all client communication sent on 16 March 2011.
3. Viterra will send an all client email five business days prior to the re-opening of the shipping stem for bookings. That communication will make it clear when the shipping stem is re-opening for bookings and for which period that re-opening relates. At the time of the all client communication, Viterra will also publish information about the capacity at all Port Terminals.¹⁷¹

¹⁶⁹ Viterra, 'Submission to the ACCC on Transition to Proposed Access Undertaking', 28 July 2011, p. 4.

¹⁷⁰ Viterra, 'Submission to the ACCC on Transition to Proposed Access Undertaking', 28 July 2011, p. 5.

¹⁷¹ Viterra, 'Submission to the ACCC on Transition to Proposed Access Undertaking', 28 July 2011, pp. 5-6.

Viterra submits that it will accept bookings in accordance with the three step process outlined above subject to the following conditions:

- (a) any “Port Terminal Services” provided in respect of those bookings after 1 October 2011 (e.g. in-loading, storage and out-loading) will be subject to the terms of the access undertaking, Standard Terms, Port Loading Protocols and Reference Prices that apply at the time those services are provided¹⁷². This means that the new rules in relation to movement, surrender and transferability of bookings will apply from 1 October 2011;
- (b) the client submits an Access Application in accordance with the Proposed Access Undertaking (as this is the date from which time periods for negotiations and any disputes are measured under the access undertaking);
- (c) if the booking is for Bulk Wheat, the client is accredited by WEA at the time the Port Terminal Services relating to the execution of the booking are provided; and
- (d) the exporter pays the booking fee for the relevant bookings within the currently required period from acceptance.¹⁷²

Viterra Operations submits that its transitional proposal – together with the other proposed amendments to the access undertaking – is consistent with the matters set out in s. 44ZZA of the CCA. Viterra further submits that there is a very real and pressing need to provide exporters with greater certainty in relation to bookings for the up-coming season, starting from 1 October 2011. Viterra submits that it is not possible, nor in the interests of either exporters or Viterra, to wait until late September 2011 before determining how bookings will be treated. Viterra submits that it is in the interests of both Viterra and exporters to ensure that ships can continue to be ordered and loaded on and from 1 October 2011. Viterra submits that the transitional plan achieves this objective.¹⁷³

¹⁷² Viterra, ‘Submission to the ACCC on Transition to Proposed Access Undertaking’, 28 July 2011, p. 6.

¹⁷³ Viterra, ‘Submission to the ACCC on Transition to Proposed Access Undertaking’, 28 July 2011, p. 7.

5 Approved third party storage and price differentials

5.1 Submissions from Viterra and third parties

5.1.1 Third party submissions in response to the Issues paper

5.1.1.1 AGEA – 7 March 2011

In terms of approved third party storage, AGEA submits that port terminal services should not discriminate between Australian wheat exporters based on where grain was stored or how it was transported to the BHCs' facilities.

The AGEA submission states:

The current third party storage arrangements as part of Viterra's undertakings could be improved to reduce any potential discrimination through:

- Publishing standards for third party storage and these should not be greater than the requirements placed on the bulk handling company's own storages
- The auditing and accreditation of third party storages being undertaken by an independent party not the bulk handling company
- Ensuring that grain being placed at port for shipment from third party storages is not be (sic) hindered or discriminated against in operational terms such as operating hours etc (AGEA members report that execution of shipments under Export Standard with grain from non bulk handling company storages has proved very difficult)
- Removing the differentials in pricing between grain from third party storages and bulk handling company storage (the additional charges imposed on grain (sic) third party storages should be justified as currently it is not possible for exporters to know if the price differential between approved and non approved third party storage accurately reflect the additional costs of managing risks associated with receiving wheat from non-approved third party sites.¹⁷⁴

5.1.1.2 AWB – 4 March 2011

AWB, as an approved third party storage site owner, and the major provider of alternative bulk storage in South Australia submits that:

- The approval process is not sufficiently transparent to access seekers or other parties seeking approval from Viterra.
- The price differential between receivals from Viterra's own storage and receivals from approved third party storage (\$2.50 per tonne) is indefensible on the grounds argued by Viterra, being to cover the additional quality risks of receiving grain from AWB's storage sites. AWB's quality system and testing procedures define

¹⁷⁴ AGEA submission, 7 March 2011, p. 3.

grain quality more accurately than Viterra's visual inspection of the 2010/11 harvest.

- Price differentials by other BHC's are significantly less: GrainCorp charges \$1.54 per tonne; ABA charges between \$0 and \$0.50 per tonne.¹⁷⁵

5.1.1.3 Elders Toepfer – 8 March 2011

Elders submits that because the 'Approved Operator Conditions and Deed of Access' sit outside the 2009 Undertaking, it lacks transparency and is open to manipulation on terms by the service provider. Elders submits that the approval process should be encapsulated into the Proposed 2011 Undertaking to ensure that it is subject to the principle of 'publish, negotiate, arbitrate'.¹⁷⁶

5.1.1.4 Emerald Group Australia Pty Ltd – 4 March 2011

Emerald supports the publication by Viterra of the approval process and submits that it should be incorporated into the Proposed 2011 Undertaking because the operation of third party sites is important to competition in storage in South Australia and any deterrence of third party sites would damage exporters of wheat other than Viterra.¹⁷⁷

Emerald considers that there should be differences in costs associated with receiving grain from non-approved third party storage. However, whether the difference is worth around \$11 per tonne is difficult to assess in the absence of a more detailed understanding of Viterra's costs structures and risk experience.¹⁷⁸

Emerald states that the throughput fee of \$2.50 per tonne (port in-loading fee) is excessive and represents to Emerald a deterrent to the use of third party storage. Emerald considers that the throughput fee should be returned to its previous level of \$1.54, with perhaps some allowance for CPI increases since its introduction.¹⁷⁹

5.1.1.5 South Australian Farmers Federation (SAFF) – 4 March 2011

SAFF submits that Viterra's access charges still create too large a price penalty for competing upcountry sites to get access to ports. Non-Viterra upcountry sites are penalised to the point of not being price efficient and this precludes the ability to build new sites or expand existing sites.¹⁸⁰

5.1.1.6 Victorian Farmers Federation (VFF) Grains Group – 4 March 2011

The VFF provided a joint submission on Viterra's Proposed 2011 Undertaking and ABA's Proposed 2011 Undertaking. VFF submits that there should not be any unjust discrimination for grain delivered ex-farm. The VFF would like to see a tiered system in place to recognise the differences in quality of grain delivered from different storages.¹⁸¹

¹⁷⁵ AWB submission, 4 March 2011, pp. 4-5.

¹⁷⁶ Elders submission, 8 March 2011, p. 4.

¹⁷⁷ Emerald submission, 4 March 2011, pp. 3-4.

¹⁷⁸ Emerald submission, 4 March 2011, p. 4.

¹⁷⁹ Emerald submission, 4 March 2011, p. 4.

¹⁸⁰ SAFF submission, 4 March 2011, p. 1.

¹⁸¹ VFF submission, 4 March 2011, p. 5.

5.1.2 Viterra's response to submissions received – 23 March 2011

Viterra states that it is practice to co-mingle all grains of like quality in its port receival and storage facilities as doing so maximises the efficient operation of the port terminal. Different parcels of grain however carry different levels of quality and other risks depending on how they have been managed prior to receival.¹⁸²

Viterra submits that it is necessary for it to provide a number of additional services at port in relation to wheat which is received directly from growers or from other storage systems. It is the cost of providing those services that is reflected in the price differential between receiving grain from third party storage, approved third party storage and Viterra's own storage network.¹⁸³

In terms of the approval process, Viterra states that it undertakes an inspection of the relevant site, a review of the experience and capability of the operator as a grain storage and handling provider, and a review of the relevant training, policies and procedures at the facility. Viterra submits that it is a transparent process as the deed setting out the requirements is available on the Viterra website. Viterra submits that it is not necessary or appropriate to include this criteria or checklist in the Proposed 2011 Undertaking, as if a client is dissatisfied with the terms on which it obtains access to the port terminal, the dispute resolution provisions set out in the Proposed 2011 Undertaking apply.¹⁸⁴

5.1.3 Viterra submission to the ACCC – 12 July 2011

Viterra gave a submission to the ACCC to provide further information about the receival of Bulk Wheat.

Viterra submits that it receives grain from grower receivals, Viterra up-country storage facilities and approved third party storage facilities. Viterra submits that:

Viterra Operations provides a range of different services on receival of grain into its Port Terminals, depending on the source of the relevant grain. These services are necessary to manage the quality risk to the food chain of grain from different origins, the risks and costs of disruption to the grain supply chain, and facilitate the efficient operation of the Port Terminals. The cost of providing these services (including costs associated with the greater use of infrastructure and other resources by certain modes of receival at port) are reflected in Viterra Operations' Reference Prices.¹⁸⁵

Viterra submits that parcels of grain received at port carry different levels of quality and other risks depending on how they have been managed prior to receival. Viterra further submits that these risks arise because of differences in:

- (a) the type and quality of storage infrastructure (including the level of investment in that infrastructure and commitment to ongoing maintenance);
- (b) the level of operator training and expertise in relation to grain storage;

¹⁸² Viterra, 23 March 2011, p. 8.

¹⁸³ Viterra, 23 March 2011, p. 9.

¹⁸⁴ Viterra, 23 March 2011, pp. 10-11.

¹⁸⁵ Viterra submission to the ACCC on Receivals into Viterra Port Terminals, 12 July 2011, p. 2.

- (c) how those grains have been managed while in storage, including the pest management techniques employed prior to delivery to port, and their exposure to contaminants and other lesser wheat grades. By way of example, contact insecticides are not allowed for certain overseas markets. Accordingly, and as wheat that has been treated with contact insecticides can downgrade other parcels of wheat, Viterro Operations does not use them in its system. However, contact insecticides remain a common form of insect treatment in other grower and third party storage systems; and
- (d) the standard of traceability and record keeping in relation to grains held by different operators and in different storage systems.¹⁸⁶

Viterro submits that it manages these risks by providing certain services when the grain is received into the system. Viterro submits that it provides a number of services for grain received from growers and others into its up-country storage facilities and while that wheat remains in its storage system. Viterro submits that therefore it does not need to resupply those services at port to wheat in its up-country system.¹⁸⁷

Viterro submits that it has much lower visibility regarding services provided to wheat received directly at port, and therefore a number of additional services are provided at port in relation to that wheat.¹⁸⁸ Viterro includes a table in its submission which details the different services provided depending on the origins of the wheat received into port.

In relation to approved third party storage, Viterro submits that the risks that apply to wheat received direct to port are ameliorated to a degree, which reduces the number of necessary services applying to that wheat and therefore reduces the overall receipt fee.¹⁸⁹

¹⁸⁶ Viterro, 'Submission to the ACCC on Receipts into Viterro Port Terminals', 12 July 2011, p. 2.

¹⁸⁷ Viterro, 'Submission to the ACCC on Receipts into Viterro Port Terminals', 12 July 2011, p. 3.

¹⁸⁸ Viterro, 'Submission to the ACCC on Receipts into Viterro Port Terminals', 12 July 2011, p. 3.

¹⁸⁹ Viterro, 'Submission to the ACCC on Receipts into Viterro Port Terminals', 12 July 2011, pp. 3-4.

6 Export Select / Export Standard

6.1 Submissions from Viterra and third parties

6.1.1 Third party submissions in response to the Issues paper

6.1.1.1 AGEA – 7 March 2011

On the management of Export Select / Export Standard, AGEA submits:

When booking Export Select capacity an exporter is passing the responsibility for meeting the requirements of that shipment to Viterra and has an expectation that this will be performed to avoid any delays or costs for the exporter. However, there is currently little transparency or means of the exporter knowing the capacity allocated to Export Standard and the impact this may have on Viterra's ability to meet Export Select customer requirements.¹⁹⁰

6.1.1.2 AWB – 4 March 2011

In terms of Export Select and Export Standard, AWB submits:

Viterra should also be able to define for market participants the capacity differential created depending on whether a customer elects to use the 'Export Select' or the 'Export Standard' service.

...

Viterra encourages exporters to contract the control of logistics to Viterra via pricing discounts under their 'Export Select' model. If exporters elect to use Export Select mode, by implication, exporters should expect more efficient performance by Viterra as the terminal operator, and this should translate into lower demurrage costs for users of Viterra's preferred service... There is a lack of justification of the differential of service charges available to the market at this time and exporters, who may pay for Viterra's proposed model of service (Export Select), are still at risk of demurrage in the event that Viterra does not secure the efficiencies it claims and charges accredited exporters for this 'preferred service'.¹⁹¹

6.1.1.3 CBH Grain – 4 March 2011

On the management of Export Select and Export Standard, CBH Grain submits:

CBH Grain considers that it is not clear how the Export Select and Export Standard capacities will differ and would not want to see Export Standard refused whilst Export Select remains available.¹⁹²

6.1.2 Viterra's response to submissions received – 23 March 2011

Viterra submits that exporters have an equal opportunity to book port terminal services regardless of whether they book Export Select or Export Standard. Viterra considers that the only constraints on Export Standard bookings are the available capacity at port and existing bookings – it is theoretically possible for all capacity to

¹⁹⁰ AGEA submission, 7 March 2011, p. 3.

¹⁹¹ AWB submission, 4 March 2011, p. 2.

¹⁹² CBH Grain submission, 4 March 2011, p. 1.

be allocated to Export Standard bookings. Viterro considers that that the further constraint on Export Select bookings is the availability of Viterro's logistics capacity to deliver that grain to port.¹⁹³

¹⁹³ Viterro, 23 March 2011, p. 6.

7 Commodity Conversion in accordance with the Port Loading Protocols

7.1 Viterra and third party submissions

7.1.1 Third party submissions in response to the Issues paper

7.1.1.1 CBH Grain – 4 March 2011

In its submission to the ACCC's Issues paper CBH submits:

CBH Grain does not consider that it is necessary for full details of Load Grades/tonnages and quality requirements to be provided 60 days out from the first day of a booking slot as set out in Table A of the Port Loading Protocols (this is especially the case for Export Standard cargoes). To do otherwise unacceptably reduces CBH Grain's flexibility to deal with its booking slot especially in circumstances where the booking is not transferable. Final details of load grades should be required around 21 to 30 days prior to the vessel ETA.¹⁹⁴

7.1.2 Viterra's response to submissions received – 23 March 2011

In response to CBH Grain's submission, Viterra submits:

This has not previously been raised as an issue, either by CBH or other exporters. Viterra Operations is also not aware of it impacting on the ability of any exporters to export wheat.

Viterra also notes that, operationally, it requires the time periods specified in Table A in order to be able properly to plan for accumulation and vessel arrivals. It is not operationally practical to implement some of the time periods suggested by CBH.¹⁹⁵

¹⁹⁴ CBH Grain submission, 4 March 2011, p. 3.

¹⁹⁵ Viterra, 23 March 2011, p. 16.

8 Anti-Hoarding

8.1 Vittera and third party submissions

8.1.1 Third party submissions in response to the Issues paper

8.1.1.1 AGEA – 7 March 2011

AGEA notes in its submission that:

AGEA members report that, more recently, Vittera has queried them where bookings have varied significantly from previous activity which suggests that Vittera is exercising diligence in managing bookings.¹⁹⁶

¹⁹⁶ AGEA submission, 7 March 2011, p. 3.

9 Variation of the Port Loading Protocols

9.1 Viterra and third party submissions on the variation of the Port Loading Protocols

9.1.1 Viterra's submission accompanying undertaking – 23 December 2010

Viterra submits that the PLPs are intended to evolve to respond to operational improvements identified by Viterra, either independently or through its ongoing discussions with Clients and regulators. Viterra notes that it implemented two variation processes in the 12 months from the date of the submission.¹⁹⁷

Viterra submits that in December 2009, it implemented a variation to the PLPs to provide greater flexibility and clarity around the booking process for Clients. Viterra submits that in November 2010, it again varied the PLPs to reflect feedback that Viterra received from Clients, and a number of areas of operational improvement that Viterra identified.¹⁹⁸

Viterra submits that the process for varying PLPs has been exercised responsibly by Viterra Operations, and that process remains appropriate to enable Viterra Operations to respond to operational issues which may arise during the term of the Proposed Access Undertaking.¹⁹⁹

With regard to its proposed amendment to clause 9.3(c)(v)(B), Viterra submits that the change is intended to be consistent with the both the consult and notify mechanism for variations to the PLPs and the criteria for acceptance of access undertakings which include protecting the legitimate business interests of access providers. Viterra submits that while it will consult with Clients in good faith, it should not be required to make any changes to the PLPs which are not acceptable to it or which are inconsistent with its business requirements.²⁰⁰ The ACCC notes that s. 44ZZA(3)(a) of the CCA refers to a service providers legitimate business interests.

9.1.2 Third party submissions in response to the Issues paper

9.1.2.1 AGEA – 7 March 2011

AGEA submits that it understands that access seekers are relatively satisfied with the consultation process carried out by Viterra prior to varying its PLPs, although AGEA members reported limited consultation in regard to the 2010 variation process.²⁰¹

AGEA submits that the flexible approach to the PLPs in allowing Viterra to vary the PLPs without seeking formal approval from the ACCC has not caused any issues for Australian wheat exporters. AGEA submits that it supports flexibility as part of the framework. AGEA further submits that it and exporters cannot speak for any issues

¹⁹⁷ Viterra, 23 December 2010, p. 7.

¹⁹⁸ Viterra, 23 December 2010, pp. 7-8.

¹⁹⁹ Viterra, 23 December 2010, p. 10.

²⁰⁰ Viterra, 23 December 2010, p. 14.

²⁰¹ AGEA submission, 7 March 2011, p. 4.

that Viterra may have incurred and noted that individual exporters may have incurred issues which they may choose to raise directly with the ACCC.²⁰²

9.1.2.2 AWB – 4 March 2011

AWB submits that Viterra's approach to varying the PLPs usually involves a telephone conference or a workshop with various customers/shippers. AWB submits that this method would be well supported if feedback was received post the workshop, regarding Viterra's final position on the process, or by releasing a draft of the amendments and then allowing customers/shippers to comment or raise issue with Viterra (or if necessary, the ACCC) before the PLPs are finalised.²⁰³

AWB submits that Viterra's ability to unilaterally change the PLPs introduces uncertainty to the process of managing export activity for accredited exporters. AWB submits that ideally any change in PLPs should be signalled well in advance of a change being applied to ensure that exporters are not adversely impacted without appropriate consultation and advance warning. AWB suggests a minimum of three months, rather than the 30 day notice period provided for in clause 9.3(b) of the Proposed 2011 Undertaking.²⁰⁴

9.1.2.3 CBH Grain – 4 March 2011

CBH Grain submits that it questions why there is no requirement on Viterra to notify Users of the port, who are not Major Users, of variations to the PLPs. CBH Grain submits that notwithstanding their size, Users of the port terminal facilities deserve to be notified.²⁰⁵

9.1.2.4 Elders Toepfer – 8 March 2011

Elders submits that it participated in and was satisfied with the consultation process in varying the PLPs. Elders submits that it is supportive of the current process for varying the PLPs without seeking ACCC approval, where the benefits are clear to industry and unanimously agreed upon by all participants.²⁰⁶

9.1.2.5 Emerald – 4 March 2011

Emerald submits that it is comfortable, provided that there is industry consultation and the views of access seekers are properly taken into account, Viterra should be allowed the flexibility to change the PLPs without the approval of ACCC. Emerald further submits that it has observed that the changes made by Viterra to the PLPs in the past have generally been directed to improving the efficiency or fairness of the system and Viterra's level of consultation has been reasonable.²⁰⁷

9.1.3 Viterra's response to submissions received – 23 March 2011

Viterra submits that a number of submissions provided to the ACCC support the process set out in the Proposed 2011 Undertaking for making amendments to the PLPs. Viterra submits that variations to the PLPs have been implemented responsibly

²⁰² AGEA submission, 7 March 2011, p. 4.

²⁰³ AWB submission, 4 March 2011, p. 5.

²⁰⁴ AWB submission, 4 March 2011, p. 5.

²⁰⁵ CBH Grain submission, 4 March 2011, p. 3.

²⁰⁶ Elders submission, 8 March 2011, p. 4.

²⁰⁷ Emerald submission, 4 March 2011, p. 4.

under the 2009 Undertaking. Viterra submits that the consult and notify mechanism strikes an appropriate balance between the interests of Viterra and all access seekers, and also appropriately provides an ability for Viterra to respond to operational issues as they arise and are identified.²⁰⁸

Viterra submits, in response to AWB's submission, that any proposal to require a three month consultation period for changes to the PLPs runs counter to, and would defeat, the purpose for which the consult / notify mechanism was introduced by Viterra and accepted by the ACCC in the first place. Viterra further submits that as the PLPs are an operational document, Viterra needs the ability to amend to meet the evolving requirements of Clients and address issues as they arise. Viterra therefore submits that a three month consultation period would significantly limit this ability.²⁰⁹

Viterra submits that any requirement for 'unanimous agreement' by exporters as suggested by Elders is likely to be unworkable, as there are approximately 26 accredited wheat exporters and a number of exporters of other commodities. Viterra further submits in relation to AWB's proposal that Viterra Operations should publish any draft amendments and allow Clients to comment on those amendments, that this is the exact process adopted by Viterra in November 2010.²¹⁰

Viterra submits that the best evidence that the current arrangements are appropriate is the level of support that they have from a range of Clients.²¹¹

Viterra submits, in response to CBH Grain's concern that there is only a requirement for Viterra notify Major Users of variations to the PLPs, that the intention of this position is to ensure that people who use the Port Terminals relatively frequently are consulted in relation. Viterra further submits that in practice, it consults with all existing users and also publishes consultation and variation notices on its website.²¹²

²⁰⁸ Viterra, 23 March 2011, p. 7.

²⁰⁹ Viterra, 23 March 2011, p. 7.

²¹⁰ Viterra, 23 March 2011, pp. 7-8.

²¹¹ Viterra, 23 March 2011, p. 7.

²¹² Viterra, 23 March 2011, p. 17.

Appendix B: Industry Overview

Viterra Operations Ltd

Viterra Operations Ltd (**Viterra**) is an Australian agribusiness company. It is a subsidiary of Viterra Ltd, who, in turn is a subsidiary of Viterra Inc. a global agribusiness company headquartered in Canada and listed on the Toronto Stock Exchange. Viterra operates primarily in South Australia, but also maintains a relatively small presence in Victoria.

Viterra owns and operates 106 grain receival sites in South Australia and two grain receival sites in Victoria with a total storage capacity of around 1.2 million tonnes²¹³, which makes up the vast majority of available storage capacity in South Australia. Viterra also owns and operates eight port terminals in South Australia (which are all of the bulk grain port terminals in that state) located at Port Adelaide, Port Lincoln, Port Pirie, Thevenard, Wallaroo, Ardrossan Outer Harbor and Port Giles. Of these eight port terminals, only six currently export bulk grain²¹⁴.

Viterra's Australian operations primarily consist of grain handling and marketing services, port terminal services, agri-products, food processing and feed products. In summary, these activities comprise:

- grain storage and handling – the provision of receival, handling and storage of wheat and other bulk commodities as an agent for marketing firms, end-users and growers in relation to both domestic and export markets;
- port terminal services – provision of receival, handling and storage of wheat and other products at its port terminals;
- agri-products – the marketing and distribution of agri-products including seed, fertiliser and crop protection products to customers involved in agricultural activities;
- food processing – the production of food product ingredients for consumer product firms and food processor firms. Viterra is the largest malt processor in Australia with an annual production capacity of around 500,000 tonnes a year; and
- feed products – manufacture, sale and distribution of feed products, primarily to livestock producers.²¹⁵

Background information on the grain industry in South Australia is provided below.

²¹³ Viterra Operations Ltd, *2010 Annual Financial Review*, p. 12.

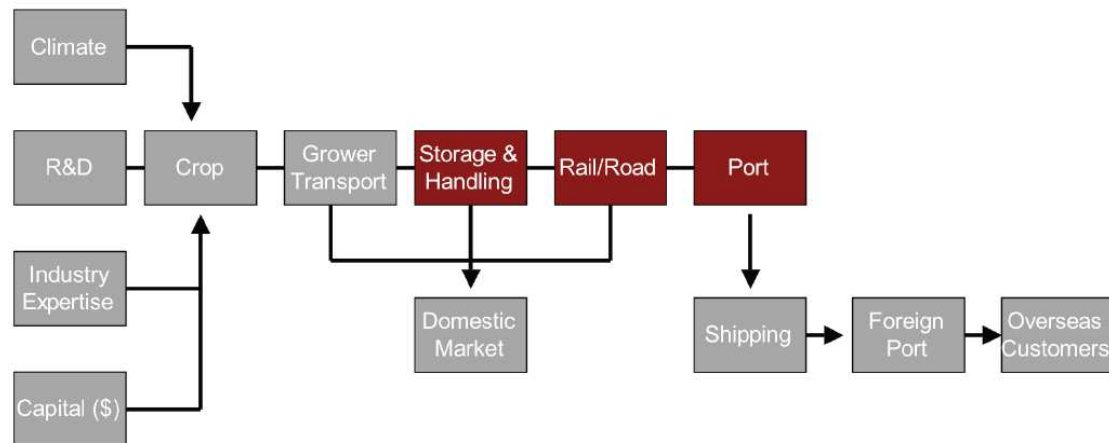
²¹⁴ The six Viterra ports that currently export bulk grain include Port Adelaide, Port Lincoln, Thevenard, Wallaroo, Outer Harbor and Port Giles.

²¹⁵ Viterra Operations Ltd, *2010 Annual Financial Review*, p. 9-20.

The Wheat industry in South Australia

Figure 1 sets out the grain supply chain for South Australia and includes primary inputs (climate, research and development, industry expertise and capital), grain production, transportation (road, rail and ship), storage and handling and the domestic and foreign markets.

GRAIN INDUSTRY SUPPLY CHAIN



Source: Ernst & Young (2008)

Source: Ernst & Young, in Allen (2008)

Figure 2 sets out Viterra's storage, handling and port elevator network in South Australia and Victoria.



Source: Viterra Operations Ltd (2011)

The Australian Bureau of Agricultural and Resource Economics and Sciences (**ABARES**) forecast that winter crop production in South Australia for 2010-11 would reach an estimated total of 9.8 mt, with wheat representing 5.6 mt.²¹⁶ Viterra reports that a total of 5.2 mt of grain moved through its South Australian ports in fiscal year 2010 (1 October 2009 to 30 September 2010), of which around 30 per cent related to Viterra's own grain marketing activities.²¹⁷

The remainder of this chapter expands on the key segments of the supply chain for South Australia.

South Australia

Grain production in South Australia

South Australia is Australia's second largest grain producing state and supplies around 19 per cent of the country's wheat.²¹⁸ Wheat is South Australia's main grain crop, with around 70 per cent of all wheat produced being exported. The area planted to wheat in South Australia in 2009-10 is estimated to have increased slightly to 2.2 million hectares. Total wheat production is estimated at 4.1 mt in 2009-10, which is around 1.7 mt more than what was produced in the 2008-09 season. Wheat production for the 2010-11 season is forecast at 5.6 mt, which represents an increase on previous seasons.²¹⁹

Grain production in South Australia is widely distributed and reliant on well coordinated storage, handling and transportation links at harvest. The storage, handling and transport links are also integrated with port facilities.

Viterra divides grain production and storage in South Australia into five key areas:

- Eyre Peninsula – stretching from Pitumba in the west to the Spencer Gulf in the east. This area represents around 28 per cent of total state production;
- Northern Area – stretching from Quorn in the north to Roseworthy and Stockwell in the south. This area represents around 30 per cent of total state production;
- Yorke Peninsula – this area represents around 19 per cent of total state production;
- Murray Mallee – which includes parts of Victoria. This area represents around 14 per cent of total state production; and
- South East – stretching from Tailem Bend in the north to Millicent in the south. This area represents around 7 per cent of total state production.²²⁰

²¹⁶ ABARES, *Australian Crop Report no.156*, 7 December 2011, p. 6 and 17.

²¹⁷ Viterra Operations Ltd, *2010 Annual Financial Review*, p. 38

²¹⁸ Above, n 198.

²¹⁹ *ibid*, p. 17.

²²⁰ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, p. 13; Viterra Operations Ltd, *Storage and handling* accessed on 30 March 2011, at: <http://viterra.com.au/grain/australia/storage-handling>.

Up-country storage and handling in South Australia

Two firms operate the majority of grain storage and handling facilities in South Australia. The dominant firm is Viterra, which is estimated to have handled around 95 per cent of the state's wheat receivals between 2001-02 and 2005-06.²²¹ Viterra achieved this through its network of 108 country storage and handling sites (with a total network capacity of around 9.5 mt), which is capable of handling the entire South Australian harvest in a typical crop year. Individual Viterra up-country storage sites range in capacity from less than 10,000 tonnes to more than 440,000 tonnes.²²² Viterra's storage network includes 33 'strategic' sites (figure 2). The key features of strategic sites include faster intake and out-load rates, a larger range of grain and grade segregations, and lower operating costs.

The second largest firm offering grain storage and handling services in South Australia is AWB Grainflow, which is estimated to have handled around 5 per cent of South Australia's receivals for the five years to 2005-06.²²³ AWB Grainflow operates a total of three grain centres in South Australia.

Transportation in South Australia

Genesee and Wyoming Australia Pty Ltd (**GWA**), an Adelaide based business formed in 2006, is the primary provider of grain rail freight in South Australia.²²⁴ GWA is a wholly owned subsidiary of Genesee and Wyoming Inc (**GWI**), a business based in the United States which owns and operates short line and regional freight railroads in the United States, Canada, Australia and the Netherlands.²²⁵

GWI purchased the rail network in South Australia in 1997 from the South Australian Government, which had made the decision to privatise the network.

South Australia's grain producing regions are generally located near the South Australian coastline, which means that export haulage distances are relatively short. On average, 70 per cent of grain produced in South Australia is transported to export facilities via rail transport.²²⁶ For example, rail transport typically moves around 1.5 mt to Port Adelaide and up to 1 mt to Port Lincoln alone, which accounts for around half the export tonnage from South Australia in any given year.²²⁷

It is becoming increasingly common, however, for grain to be moved to export facilities via road transport. This is due to the fact that grain terminal ports in South Australia are located closer to the grain producing areas compared to other states, making road transport less expensive and more efficient. The majority of Viterra grain

²²¹ Allen Consulting Group, *Competition in the Export Grain Supply Chain*, March 2008, p. 11.

²²² <http://viterra.com.au/grain/australia/storage-handling>.

²²³ Above, n 203.

²²⁴ Single Vision Grains Australia, *Transport Infrastructure Issues Paper One – Network Review for the Australian Grains Industry*, January 2007.

²²⁵ Genesee & Wyoming, *GWI Worldwide – Who we are*, accessed on 30 March 2011 at: <http://gwiweb.gwrr.com>.

²²⁶ Above, n 203.

²²⁷ Above, n 206.

receival sites are now only serviced by road and the only port terminals with rail intake (and that export grain commodities) are Adelaide, Outer Harbor and Port Lincoln (Figure 2), with the other three remaining grain export port terminals (i.e. Giles, Wallaroo and Thevenard) serviced via road intake.

Port terminals

There are eight bulk grain terminals in South Australia, all of which are owned by Viterra. Six of these ports are currently used to export bulk wheat.

Port Adelaide is located around 14 kms by road from Adelaide on the Port River and serves as the major port for the capital city. It has an estimated storage capacity of around 60,000 tonnes and is involved in the export of a wide range of products including: grains and seeds, limestone, petroleum products, soda ash, motor vehicles, containers, metals and scrap, cement and cement clinker, fertilisers, agricultural commodities, iron and steel, livestock, break-bulk and other general cargoes.²²⁸

Outer Harbor, which officially opened in 2010, is located 11 kms from Port Adelaide and around 28 kms by road from Adelaide. It has capacity for Panamax sized vessels and has an estimated storage capacity of around 65,000 tonnes. Outer Harbor is primarily involved in the export grains and seeds.²²⁹

Port Giles is located on the eastern side of the Yorke Peninsula and is around 217 km by road from Adelaide. It has an estimated storage capacity of around 75,000 tonnes and is involved primarily in the export of grains and seeds.²³⁰

Wallaroo is located on the eastern side of the Spencer Gulf and is around 160 km by road from Adelaide. It has an estimated storage capacity of around 150,000 tonnes and is involved primarily in the export of grains and seeds, and fertilisers.²³¹

Port Lincoln is located at the southern tip of the Eyre Peninsula and is around 682 km from Adelaide by road. It has an estimated storage capacity of around 300,000 tonnes and is involved primarily in the export of grains and seeds, petroleum products, and fertilisers.²³²

Thevenard is located on the West Coast of South Australia and is around 793 km by road from Adelaide. It has an estimated storage capacity of around 200,000 tonnes and is primarily involved in the export of gypsum, grains and seeds, and salt.²³³

²²⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, Port Schedules; <http://www.vitterra.com.au/wharf-services/ports/port-adelaide>, accessed 10/08/2011

²²⁹ <http://www.vitterra.com.au/wharf-services/ports/Outer-Harbor>, accessed 10/08/2011

²³⁰ <http://www.vitterra.com.au/wharf-services/ports/pt-giles>, accessed 10/08/2011

²³¹ <http://www.vitterra.com.au/wharf-services/ports/Wallaroo>, accessed 10/08/2011

²³² <http://www.vitterra.com.au/wharf-services/ports/pt-lincoln>, accessed 10/08/2011

²³³ <http://www.vitterra.com.au/wharf-services/ports/pt-lincoln>; accessed 10/08/2011

Industry structure – Viterra submissions

ABB Grain Ltd 2009 Submission

ABB Grain Ltd (**ABB**) was the signatory to the 2009 Undertaking as owner and operator of the South Australian port terminals now owned and operated by Viterra by virtue of its acquisition of ABB in 2009. The submissions provided in relation to the access undertakings in 2009, therefore, were made by ABB.

ABB provided responses to a range of questions posed by the ACCC during the 2009 assessment process. Their responses included the following main points:

- It has always been possible to export grain harvested in South Australia through Victorian ports, and vice versa, due to the geographic proximity of wheat production areas in both states, and the relative proximity of port terminals. To assist in competing for the provision of port terminal services with respect to Victorian harvested grain, ABB has constructed up-country storage facilities in Victoria and an additional terminal at Outer Harbor. Although it is difficult to quantify the precise amount of South Australian grain that is exported through Victorian port terminals, there is an increasing level of competition between Victorian and South Australian ports for the export of grain.
- The level of competition from Victorian ports, domestic sales and the container trade operate as a significant competitive constraint on the price and non-price terms offered by ABB for its port terminal services. Potential competition from supply chains in other countries for the business of global traders also poses a risk to ABB's port operations.
- Variations between the price and non-price terms offered at ABB's different port terminals are reasonable and justifiable given the costs of providing the services, the differences between the port terminal facilities and operational constraints in relation to individual terminals.
- Customers of port terminal services are highly price sensitive and will opt for the lowest cost supply chain. In this regard, grains harvested from certain areas in South Australia can be transported to Victorian ports at a lower cost, which provides an incentive for customers to switch to Victorian ports if South Australian ports offer uncompetitive price and non-price terms.
- There are a range of factors that affect the ability of bulk wheat exporters to switch between port terminals. These include: the quality of the grain in each port zone, the availability of shipping slots at the relevant port, the wheat exporter's ability to accumulate grain in the relevant area, the volume of grain available in a particular area, the level of stocks that an exporter may already have in a storage at a particular port, terminal capabilities, any requirements of the exporter's charter party, the ability for wheat exporters to switch grain between port zones either through ABB storage and handling or by trading grain, and the relative costs between different supply chains.

- Many exporters of bulk wheat are high sophisticated, multinational corporations that are well placed to make judgements about the least cost path to port and alternative ways to meet customer demands.²³⁴

Viterra 2011 Submission

Viterra refers to the content of ABB's submissions in 2009 and has made no further submissions in relation to the South Australian grain industry.

Regulatory Regimes

Since 1 October 2009, access to Viterra's port terminals for the export of bulk wheat (previously under ABB ownership) has been regulated via an access undertaking accepted by the ACCC.

In South Australia, regulated services are subject to the port access regime set out in Part 3 of the Maritime Services (Access) Act 2000 (SA) (the **MSC Act**). The objects of the MSC Act are to:

- provide access to maritime services on fair commercial terms;
- facilitate competitive markets in the provision of maritime services;
- protect the interests of users of essential maritime services by ensuring that regulated prices are fair and reasonable having regard to the level of competition in, and efficiency of, the regulated industry;
- ensure that disputes about access are subject to an appropriate dispute resolution process.²³⁵

The following services have been proclaimed by the Essential Services Commission of South Australia (**ESCOSA**) as regulated services:

- providing, or allowing for, access of vessels to the port;
- pilotage services facilitating access to port;
- providing berths for vessels at the following common user berths:
 - Port Adelaide Outer Harbor berths numbers 1 to 4 (inclusive), 16 to 30 (inclusive) and 29;
 - Wallaroo berths numbers 1 South and 2 South;
 - Port Pirie berths numbers 5 and 7;
 - Port Lincoln berths numbers 6 and 7;

²³⁴ ABB Grain Ltd, *Supplementary Submission to the ACCC*, 23 June 2009, pp. 14-19.

²³⁵ *Maritime Services (Access) Act 2000* (SA), s 3.

- berths adjacent to the loading and unloading facilities referred to two points below;
- providing port facilities for loading or unloading vessels at berths adjacent to the loading and unloading facilities referred to in the next point;
- loading or unloading vessels by means of facilities that:
 - are bulk handling facilities as defined in the *South Australian Ports (Bulk Handling Facilities) Act 1996*;
 - involve the use of conveyor belts; and
- providing access to land in connection with the provision of the above maritime services.

The Productivity Commission inquiry

The Productivity Commission (PC) conducted an inquiry into wheat export marketing arrangements, publishing its final report on 1 July 2010. In its final report, the PC stated that access to port terminal facilities represented the most significant issue in its inquiry, and that the ability of wheat exporters to access port terminal facilities is critical to the success of the deregulated market.²³⁶

The PC identified several characteristics particular to the wheat export industry in the South Australia:

- *Almost all wheat is exported in bulk.* However, the bulk supply chain competes to some extent with exports in containers and bags and the storage and transport of grain for sale in the domestic market.²³⁷ Viterra, as the dominant provider of bulk storage services, also competes with a number of independent storage providers.²³⁸
- *Bulk wheat storage may face competition from on-farm storage.* Although on-farm storage comprises a relatively small proportion of total storage capacity in South Australia (i.e. Viterra's storage capacity is approximately 9.5 mt and on-farm storage is 1.2 mt) competition may occur between Viterra's storage system and on-farm storage.²³⁹ The trend toward on-farm storage began prior to deregulation, but it is likely that a deregulated environment gives increased incentives for growers to use on-farm storage.²⁴⁰ Since deregulation, uneconomic bulk storage facilities have been closed down due to the increase in site-based costing.²⁴¹

²³⁶ Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 173.

²³⁷ *ibid*, p. 68.

²³⁸ *ibid*, pp. 67-68.

²³⁹ *ibid*, p. 69.

²⁴⁰ Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 259.

²⁴¹ *ibid*, pp. 261-2.

- *There may be competition in provision of port services.* Bulk grain export terminals in New South Wales, Victoria and South Australia operated by GrainCorp, Melbourne Port Terminal and Viterra are in relatively close proximity and might compete for some grain throughput.²⁴²
- *The share of wheat transported by road has increased relative to rail transport.* Prior to deregulation, 65-70 per cent of export wheat was transported by rail in South Australia, excluding road transport from farm to bulk receival sites. Since then it is likely that the share of grain transported by road has risen.²⁴³ This is partly a result of the privatisation of rail and deregulation of the wheat export industry, as:
 - the cost efficiency of road compared with rail transport has improved due to investment in road infrastructure and increased capacity of heavy vehicles.
 - competition in the wheat export market puts increased pressure on peak periods, resulting in increased use of trucks in conjunction with rail transport.
 - more cost reflective freight rates are being set across the different segments of the network. This has meant that in some areas road transport is now more cost effective.²⁴⁴
- *Investment in transport infrastructure is likely to be required in the future.* The Productivity Commission suggested that a thorough cost-benefit analysis, taking into account the economic and social costs and benefits of road and rail use, is required.²⁴⁵

Impact of flooding on the 2010-11 harvest

In response to flood events in eastern Australia in January 2011, ABARES published a special report outlining the effects of the flood on various commodities. Recent flooding in eastern Australia is estimated to have reduced agricultural production by at least \$500-600 million. At the time of publication it was considered too early to estimate the likely total losses in grain production, however, ABARES noted that if one million tonnes of the production not yet received by grain handlers or held on farm was lost, the total cost would be around \$250 million.²⁴⁶ Heavy rainfall during November and December 2010 has had broader effects on the quality of production and delays to the winter grain harvest.²⁴⁷

In South Australia, winter cropping regions have largely avoided major flooding. Significant rainfall occurred along the Victorian border, but this area does not form a significant proportion of the South Australian winter cropping area. The harvest in

²⁴² *ibid*, p. 68.

²⁴³ *ibid*, p. 257.

²⁴⁴ *ibid*, pp. 263-5.

²⁴⁵ *ibid*, p. 251.

²⁴⁶ ABARES, *The impact of recent flood events on commodities*, Special Report, Canberra, January 2011, p. 1.

²⁴⁷ ABARES, *The impact of recent flood events on commodities*, Special Report, Canberra, January 2011, p. 3.

South Australia is continuing and is around 80 per cent complete, although some delays to the harvest are expected due to recent heavy rainfall.²⁴⁸

While the rainfall and flooding has caused significant short term damage, there may be some benefit to agriculture production in the medium to long term through increases in soil moisture, improved pasture growth and increased water storages.²⁴⁹ In the current season, the value of winter crop exports is not expected to be significantly reduced further. Adverse effects on the quality and volume of exports are likely to be offset by higher grain prices on world markets.²⁵⁰

Key Features of each regional wheat market

Up-country supply chains

The key up-country supply chain characteristics (and differences) that exist in each of the three regions is summarised in Table 2 below:

Table 2: up-country supply chain characteristics by region

Region	Characteristics
East Coast	<p>The provision of wheat storage and handling services is dominated by GrainCorp (in New South Wales, Victoria and QLD) and Viterra (in South Australia).</p> <p>There is significant competition for the provision of such services from:</p> <ul style="list-style-type: none"> on-farm storage (which makes up a relatively greater proportion of total storage capacity than in other regions)²⁵¹; and a significant number of independent bulk handlers. There is a wider choice of independent storage and transport providers compared to other regions; and the overlap of GrainCorp's and Viterra's up-country storage networks.
South Australia	<p>The provision of wheat storage and handling services is dominated by Viterra.</p> <p>There is some competition from:</p> <ul style="list-style-type: none"> on-farm storage; and independent bulk handlers. <p>There is also no overlap in the storage network of Viterra and any other vertically integrated bulk handler.</p>
Western Australia	<p>The provision of bulk wheat storage and handling services is dominated by CBH.</p> <p>There is some competition from on-farm storage but none from independent bulk handlers. There is no overlap in the storage</p>

²⁴⁸ *ibid*, p. 12.

²⁴⁹ *ibid*, p. 3.

²⁵⁰ *ibid*, p. 10.

²⁵¹ Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 68. The PC report observed that the larger stock of on-farm storage in the East Coast may be attributable to the relative importance of the domestic market and longer history of choice in domestic marketing:.

Region	Characteristics
	network of CBH and any other vertically integrated bulk handler.

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 67-68.

As Table 2 illustrates, there appears to be a significantly higher level of competition in the up-country wheat supply chain (i.e. the provision of wheat storage and transport services) in the East Coast as compared to both South Australia and Western Australia.

Domestic and export wheat

The proportion of wheat that is supplied into the Australian domestic market relative to the proportion that is exported overseas varies significantly between the three regions, as illustrated in Table 3 below:

Table 3: domestic and export wheat supply characteristics by region

Region	Characteristics
East Coast	<p>While a substantial volume of wheat is exported from the East Coast, a significant proportion of wheat is also consumed domestically. A significantly higher proportion of wheat is consumed domestically in the East Coast relative to the other regions. The bulk wheat supply chain therefore competes with the storage and transport of wheat to be sold into the domestic market.</p> <p>The bulk wheat supply chain also faces significant competition from export wheat in containers and bags. Containerised export grain volumes on the East Coast are significant and have expanded in recent years. In particular, the Essential Services Commission (ESC) noted that containerised wheat exports in Victoria and southern New South Wales expanded to represent a significant proportion of total exports from those areas²⁵²</p>
South Australia	<p>Almost all wheat in South Australia is exported, with only a relatively small proportion supplied into the domestic market. The bulk wheat supply chain therefore does not face significant competition from the storage and transport of wheat to be sold into the domestic market.</p> <p>Almost all wheat in South Australia is exported in bulk. However, there is some competition from export wheat in containers and bags.</p>
Western Australia	<p>Almost all wheat in Western Australia is exported in bulk, with only a relatively small proportion supplied into the domestic market. The bulk wheat supply chain therefore does not face significant competition from the storage and transport of wheat to be sold into the domestic market.</p> <p>Almost all wheat in Western Australia is exported in bulk. However, there is also some competition from export wheat in containers and bags.</p>

²⁵² Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime Final Report*, May 2009, p. 39-40. The ESC noted that, on average, over the period from 2001/02 to 2007/08, containerised grain exports represented approximately one quarter of all grain exports in Victoria and southern NSW.

Source: Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 56 and 68.

As Table 3 illustrates, the bulk wheat supply chain in the East Coast region, as compared to both South Australia and Western Australia, appears to face a higher level of competition from both wheat supplied into the domestic market and containerised export wheat.

Port terminal facilities

The relative proximity of port terminals operated by different bulk handlers in particular regions is a key determinant of the extent to which those ports terminals compete for the through put of wheat. Table 4 below provides an overview of the level of competition that exists between ports operated by different bulk handlers in each region.

Table 4: competition between port terminals by region

Region	Characteristics
East Coast	Port terminals in New South Wales, Victoria and the easternmost parts of South Australia operated by GrainCorp, ABA and Viterra are in relatively close proximity and may compete for some wheat throughput. The Essential Services Commission, in its review of grain handling and storage arrangements in Victoria, also noted that there is a “significant degree of competitive substitutability” between the ports terminals operated by ABA and GrainCorp. ²⁵³
South Australia	Viterra operates all wheat port terminals in South Australia (the Eyre Peninsula) and is not likely to face competition from any alternative port terminal operator for wheat throughput, with the possible exception of weak competition from Port of Portland.
Western Australia	CBH operates all wheat port terminals in Western Australia and is not likely to face competition from any alternative port terminal operator for wheat throughput.

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pg 68.

As Table 4 illustrates, there appears to be a higher level of competition between wheat port terminals in sections of the East Coast (i.e. New South Wales, Victoria and the easternmost part of South Australia) as compared to port terminals in both South Australia and Western Australia.

²⁵³ Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime, Final Report*, May 2009, p. 48.

Analysis of bulk wheat export markets

Framework for an effective capacity allocation system

Section 4.4.1 identified a number of limitations of the first come first served capacity allocation system operated by Viterra. In forming a view about the appropriateness of the capacity allocation arrangements embodied in the Proposed 2011 Undertaking, the ACCC has applied the following framework:

Capacity allocation arrangements include two main components:

- *Primary allocation arrangements* by which capacity is rationed between competing users, and which are broadly categorised as either price or non-price rationing. Primary allocation arrangements currently operated by BHCs are non-price administered allocation (as is the case of first come, first served arrangements proposed by Viterra, ABA and GrainCorp) and price rationing (as under the CBH auction system). Primary allocation systems typically require exporters making capacity commitments before production outcomes, and hence export shipping requirements, are known.
- *In-season arrangements* that facilitate exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export capacity. These adjustment mechanisms include flexibility for shippers to move booked capacity between geographic and/or temporal locations (such as exists under GrainCorp's PLPs) and the ability for shippers to transfer bookings in a secondary market (as occurs under CBH's arrangements in WA). A further relevant question is the extent to which in-season adjustment is necessary at all given the nature of grain trading along the supply chain.

There are two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances:

- the extent to which the incentive exists for vertically integrated port terminal operators to pursue self preferential treatment—including hindering other exporters from accessing port services—as opposed to seeking to maximise total through put at their terminals.
- the relationship between total port shipping capacity and average annual and seasonal demand for it.

There are three distinct regions in relation to the production and supply of wheat in Australia:

- the East Coast (including Queensland, New South Wales, Victoria and the easternmost part of South Australia);
- South Australia; and
- Western Australia.

A high level summary of the key features of each region (including the differences that exist) in terms of their existing supply chain characteristics and competitive dynamics is detailed at Appendix 3.

The analysis below discusses the relevance of these factors to a decision regarding the appropriateness of capacity management arrangements proposed by a port operator. An assessment in particular cases will be informed also by the current arrangements the operator has in place and the effectiveness of those arrangements in achieving efficient outcomes.

Incentive for self-preferential treatment

A vertically integrated operator may have an incentive to use bottleneck infrastructure it controls to hinder competitors in upstream or downstream markets in order to gain market share at the expense of access seekers. The strength of such an incentive will be influenced by the existence or threat of competition to the integrated monopolist's position. Where actual or potential competition exists, the incentive to hinder competitors is moderated by the threat that the hindering behaviour may not deliver the intended gain of market share in upstream or downstream markets but instead result in loss of throughput to an alternative supply chain or use.

However, where competition to the integrated monopolist is weak and the incentive to hoard capacity and so hinder others from accessing export capacity is strong, this will inform an assessment of whether proposed capacity allocation arrangements are appropriate.

Where the incentive to block out access seekers is strong, so too is the argument that allocation arrangements that for measures prevent such behaviour. Auctions, offer a fair, transparent and efficient means of allocating capacity under which the incumbent faces the same limits on its ability to acquire capacity as other users.

It is also possible to design non-price allocation systems in such a way as to prevent or reduce anti-competitive behaviours by the operator. Such measures include use of an independent body to manage the shipping stem and requiring that the access provider faces the same financial disincentive to hoard as do access seekers.

In the context of the Australian wheat export industry competition to the bulk shipment of wheat through an operator's ports comes from four main sources:

- extent of vertical integration and alternative up-country supply chains
- domestic uses for wheat
- competition from ports in other regions
- threat of by pass by customers
- containerised exports

The extent of competition varies significantly across the markets in which the BHCs operate.

The South Australian wheat exports market does not appear to provide the competitive constraints sufficient to neutralise the incentives for self preferential treatment by Viterra.

As noted above, Viterra is strongly vertically integrated in the upcountry storage and handling market. Further, there is very little competitive constraint provided by the South Australian domestic market for bulk wheat, and due to the geographic location, there is very little, if any competition provided by ports in other regions. For the five year period to 2008-09, non bulk exports accounted for only 6-7 per cent of exports from South Australia.²⁵⁴

²⁵⁴ Productivity Commission, Wheat Export Marketing Arrangements, 1 July 2010, p. 58.

Appendix C: Legislative Framework

Access test

The *Wheat Export Marketing Act 2008* (Cth) (**WEMA**) came into effect on 1 July 2008. The WEMA and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia (**WEA**), which has the power to develop, administer and enforce an accreditation scheme for bulk wheat exports, including the power to grant, vary, suspend or cancel an accreditation.²⁵⁵

Under the WEMA, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia. Parties seeking accreditation as bulk wheat exporters must be deemed by the WEA to be ‘fit and proper’ having regard to certain criteria. The WEMA further provides that parties seeking bulk wheat export accreditation that also provide ‘port terminal services’ (Port Terminal Operators) must satisfy an additional ‘access test’.

Part of the ‘access test’ is linked to Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**Act**), (previously the *Trade Practices Act 1974* (Cth)). The relevant part of the access test will be satisfied if either:

- the ACCC has accepted from a person who owns or operates a port terminal facility used to provide a port terminal service an access undertaking under Division 6 of Part IIIA of the Act, and that undertaking relates to the provision to accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat; or
- there is in force a decision under Part IIIA of the CCA that a State or Territory regime is an ‘effective access regime’ and that regime provides for access to the port terminal service for purposes relating to the export of wheat.

Under the ‘access test’ providers of port terminal services must also comply with ‘continuous disclosure rules’ set out in subs. 24(4) of the WEMA. In summary, the continuous disclosure rules require the Port Terminal Operators to publish on their website:

- their policies and procedures for managing demand for port terminal services (generally known as Protocols or PLPs)
- a statement, updated each business day, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship, the date on which the ship was nominated and the date on which the nomination was accepted (this statement is commonly termed the Shipping Stem).²⁵⁶

Viterra has submitted its Proposed 2011 Undertaking to the ACCC pursuant to Part IIIA of the CCA for the purpose of satisfying the access test.

²⁵⁵ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

²⁵⁶ See s 24(4) of the WEMA for detail about the continuous disclosure rules.

Productivity Commission inquiry

The Productivity Commission (PC) completed an inquiry into the wheat export marketing arrangements following the deregulation of the industry. The PC has provided a final report to the government, which was released on 1 July 2010. The report made several findings and recommendations, including:

- The accreditation scheme has facilitated a smooth transition but the benefits will rapidly diminish in the post-transitional phase. Accreditation and Wheat Exports Australia should be abolished on 30 September 2011.
- The access test has provided greater certainty for traders and made access easier, more timely, and less costly compared to reliance on Part IIIA of the Act. The access test should remain in place for a further three years until 30 September 2014.
- The benefits of the access test will diminish and could become costly in the long term. Therefore, from 1 October 2014 regulated access should rely on Part IIIA of the CCA supported by mandatory disclosure and a voluntary code of conduct.

The full report is available on the PC website at:

<http://www.pc.gov.au/projects/inquiry/wheatexport/report>.

As at the date of release of this issues paper, the government has not yet responded to the PC's report.

Legal test for accepting an access undertaking under Part IIIA

Part IIIA of the CCA establishes a regime to assist third parties to obtain access to services provided through facilities with natural monopoly characteristics to promote competition in upstream or downstream markets.

Part IIIA provides three main mechanisms by which access can be obtained to infrastructure:

- declaration of a service (under s. 44H) and arbitration (under s. 44V);
- access undertakings and access codes (under sections 44ZZA and 44ZZAA respectively); and
- decision that a State or Territory access regime is effective (under s. 44N).

In relation to access undertakings, a provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which access will be made available to third parties. The ACCC may accept the undertaking if it thinks appropriate to do so after considering the matters set out in s. 44ZZA(3).

If the ACCC accepts the undertaking, the provider is required to offer a third party access in accordance with the undertaking. An access undertaking is binding on the access provider and is able to be enforced in the Federal Court upon application by the ACCC.

An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent.

In assessing a proposed access undertaking under Part IIIA of the Act, the ACCC must apply the test set out in subs. 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the Act, which are to:
 - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the 'pricing principles' specified in s. 44ZZCA of the CCA(see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.
- In relation to the pricing principles, s. 44ZZCA of the CCA provides that regulated access prices should:
 - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - include a return on investment commensurate with the regulatory and commercial risks involved; and
- that access price structures should:
 - allow multi-part pricing and price discrimination when it aids efficiency; and

- not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

The objects of Part IIIA and the public interest

The ACCC considers it appropriate, in having regard to the matters in s. 44ZZA(3)(aa) and (b) of Part IIIA, to have some regard to the competitive environment in which the services the subject of the undertaking are provided. That is, s. 44ZZA(3)(aa), by referring to the objects of Part IIIA, recognises the promotion of the economically efficient operation of, use of and investment in infrastructure, thereby promoting competition in upstream and downstream markets, while s. 44ZZA(3)(b) refers to the public interest, including the public interest in having competition in markets (whether or not in Australia).

The ACCC considers that economic efficiency has three components.

- Productive efficiency refers to the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs.
- Allocative efficiency refers to the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers. It also refers to the distribution of production costs amongst firms within an industry to minimise industry-wide costs.
- Dynamic efficiency refers to the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

Other matters

The ACCC considers that the regulatory scheme established by the WEMA, and the rationale for the inclusion of the access test in the statute are, under s. 44ZZA(3)(e), matters relevant to the current decision.

In particular, the ACCC acknowledges Parliament's intention in introducing the access test, which was to ensure that accredited exporters provide fair and transparent access to their facilities to other accredited exporters. As the explanatory memorandum states, the WEMA access test is:

...intended to ensure that accredited exporters that own or operate port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling

infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.²⁵⁷

Further, in the second reading speech, the minister stated that ‘unless all exporters can obtain access to these critical facilities on fair and reasonable terms then one of the major objectives of the policy could be frustrated.’²⁵⁸

The ACCC also acknowledges that Parliament’s intention to promote competition in the export of bulk wheat has various dimensions, including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers;
- the promotion of competition between exporters for the export of wheat from Australia; and
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

The ACCC further acknowledges Parliament’s recognition that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

The ACCC considers that the 2009 Undertakings are a relevant matter in the assessment of Viterra’s Proposed Undertaking, per s 44ZZA(3)(e). Through the operation of the 2009 Undertakings, the ACCC has gained insight as to the effect of the undertaking in practice. The ACCC considers this experience is relevant to the assessment of Viterra’s Proposed 2011 Undertaking and the Proposed 2011 Undertakings of the other port terminal operators. Further, consideration of the 2009 Undertakings is relevant to encouraging a consistent regulatory approach under the object of Part IIIA.

Recent changes to Part IIIA

The *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) took effect on 14 July 2010 and introduced changes to Part IIIA of the Act, including to the procedures set out in Part IIIA for the assessment of access undertakings.

Timeframes for ACCC decisions and stopping the clock

Subs. 44ZZBC(1) of the CCA now provides that the ACCC must make a decision on an access undertaking application within the period of 180 days starting at the start of the day the application is received (referred to as ‘the expected period’).

If the ACCC does not publish a decision on an access undertaking under s. 44ZZBE of the CCA within the expected period, it is taken, immediately after the end of the expected period, to have:

²⁵⁷ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 31.

²⁵⁸ Parliamentary Debates, *Wheat Export Marketing Bill 2008*, 29 May 2008, p. 3860.

- made a decision to not accept the application; and
- published its decision under s. 44ZZBE and its reasons for that decision: see s. 44ZZBC(6).

The changes to the CCA also introduce provisions for ‘stopping the clock’ that mean certain time periods are not taken into account when determining the expected period (see subs. 44ZZBC(2)). In particular, the ACCC may disregard a period:

- by written agreement between the ACCC and the access provider, and such agreement must be published: s. 44ZZBC(4) & (5);
- if the ACCC gives a notice under s. 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under s. 44ZZBD(1) inviting public submissions in relation to the application;
- a decision is published under s. 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

Amendment notices

Section 44ZZAAA(1) provides that the ACCC may give an ‘amendment notice’ in relation to an undertaking before deciding whether to accept the undertaking.

An ‘amendment notice’ is a notice in writing to the access provider that specifies:

- the nature of the amendment or amendments (the ‘proposed amendment or amendments’) that the ACCC proposes be made to the undertaking; and
- the ACCC’s reasons for the proposed amendment or amendments; and
- the period (the ‘response period’) within which the person may respond to the notice, which must be at least 14 days after the day the notice was given to the person: see s. 44ZZAAA(2).

An access provider may give a revised undertaking in response to the notice (within the response period), incorporating amendments suggested in the notice, and provided that undertaking is not returned to the provider by the ACCC, that revised undertaking is taken to be the undertaking the ACCC is assessing under Part IIIA: see subsections 44ZZAAA(5) & (7). In other words, the access provider may ‘swap over’ the revised undertaking for the original undertaking if it agrees to the amendments suggested by the ACCC in the notice.

If the access provider does not respond to the notice within the response period, it is taken to have not agreed to the proposed amendment: s. 44ZZAAA(8). If the access provider provides a revised undertaking that incorporates one or more amendments that the ACCC considers are not of the nature proposed in the amendment notice, and which do not address the reasons for the proposed amendments given in the

amendment notice, the ACCC must not accept the revised undertaking and must return it to the provider within 21 days of receiving it: s. 44ZZAAA(6).

The ACCC is not required to accept the revised undertaking under s. 44ZZA even when it incorporates amendments (see s. 44ZZAAA(9)) and does not have a duty to propose amendments when considering whether to accept the undertaking (see s. 44ZZAAA(10)).

Other changes

Information requests

Section 44ZZBCA(1) provides that the ACCC may give a person a written notice requesting the person give to the ACCC, within a specified period, information of a kind specified in the notice that the ACCC considers may be relevant to making a decision on an access undertaking application.

As noted above, the period within which the ACCC requests information constitutes a clock-stopper.

Fixed principles

Section 44ZZAAB of the CCA now provides that an access undertaking given to the ACCC under s. 44ZZA(1) may include one or more terms that, under the undertaking, are fixed for a specified period (known as ‘fixed principles’). Such principles must extend beyond the term of the undertaking: s. 44ZZAAB(3).

South Australian regulatory regime

Under s. 44ZZA(3AA) of the CCA, the Commission must not accept an undertaking provided to it under section 44ZZA(1) if a decision of the Commonwealth Minister is in force under section 44N of the Act that a regime established by a State or Territory for access to the service is an effective access regime. On 9 May 2011, the Parliamentary Secretary to the Treasurer, as designated Minister, accepted a recommendation from the National Competition Council (NCC) and certified that the South Australian Port Access Regime (SAPAR) is an effective access regime for a period of ten years under section 44N of the CCA.²⁵⁹ The SAPAR is administered by the Essential Services Commission of South Australia (ESCOSA), which is also tasked with reviewing every five years whether the regime should continue to apply to the industries subject to the SAPAR. The last review was in 2007.

The SAPAR provides for a negotiate/arbitrate framework for access to “maritime services” at “proclaimed ports”, and a price regulation regime for “essential maritime services” as defined under the *Maritime Services (Access) Act 2000* (SA). All ports covered by the Proposed Undertaking are “proclaimed ports” under the SAPAR. “Maritime services” under the SAPAR include loading or unloading vessels by means of port facilities that are “bulk handling facilities” (as defined in the *South Australian Ports (Bulk Handling facilities Act 1996* (SA)) and involve the use of conveyor belts. The NCC clarifies that this does not include storage. “Essential maritime services” include providing or allowing for access of vessels, providing port facilities for

²⁵⁹ A copy of the certification and statement of reasons, together with the National Competition Council’s (NCC’s) Final Recommendation to the Minister on this matter, is available on the NCC website, www.ncc.gov.au.

loading and unloading vessels and providing berths for vessels, at the proclaimed ports.

On 26 July 2011, the Minister also certified the South Australian Rail Access Regime (SARAR) as an effective access regime under s. 44N of the CCA. The SARAR provides a negotiation/conciliation/arbitration regulation of access to railway services, including the service of providing (or providing or operating) railway infrastructure for another industry participant. ESCOSA also has responsibility for enforcing and monitoring the SARAR.

In its draft revised undertaking, Viterra has proposed drafting (refer clauses 4.1(b)(ii) and 7.6(b)(i)) to address what it considers is a potential 'overlap' issue. In short, it proposes to 'carve out' access to those services covered by the SAPAR and SARAR, and provide for the ACCC to determine whether it has jurisdiction to consider an access dispute, which would be reviewable by a Court. Unlike an arbitration determination, the decision on jurisdiction would be reviewable by a Court. The ACCC welcomes submitters' views on the potential 'overlap' issue and Viterra's proposed drafting to address it.