



Viterra Operations Limited

Response to the ACCC's request for information dated 5 April 2011

1 Introduction

1.1 Purpose of submission

This submission sets out responses by Viterra Operations Limited (“**Viterra Operations**”) to the matters raised in the ACCC’s information request dated 5 April 2011.

1.2 [confidential]

[confidential]

2 Questions raised by the ACCC

2.1 *Question 1 - In the view of Viterra Operations Limited, has the 'first in, first served' capacity allocation system operated by Viterra Operations efficiently allocated capacity for the period 1 January 2012 to 30 April 2012? Please provide the reason(s) for your view.*

Application of the Port Loading Protocols

[confidential]

The efficient operation of the export supply chain

Viterra Operations considers that the Protocols -- and the first in first served (“**FIFS**”) system under the Protocols -- has operated, and continues to operate, efficiently and in a way that supports the efficient operation of the wheat export supply chain in South Australia.

Since Viterra Ltd acquired ABB Ltd in September 2009, it has invested over \$35 million in storage, transport, logistics and port terminal infrastructure in order to increase export supply chain efficiency and to facilitate greater throughput and increased grain exports from South Australia.

Viterra Operations’ significant investment is delivering results. The 2010/2011 harvest has been the largest on record and Viterra Operations has moved record tonnages through its system:

- March 2011 was the second highest shipping month on record for any month (the highest occurring in 2002);
- January 2011 and March 2011 had the highest volume of grain shipped for each of these months on record;
- February 2011 had the largest number of different grain grades exported on record;

- February and March 2011 were the highest consecutive two months of shipping on record;
- January, February and March 2011 were the highest consecutive three months of shipping on record;
- December, January, February and March 2011 were the highest consecutive four months of shipping on record; and
- the largest shipping volume for any 12 month period on record occurred in the period April 2010 to March 2011.

This has been achieved whilst managing a diverse client base, as indicated by the number of different exporters now shipping from South Australia.

In the **6 month** period 1 October 2010 to 31 March 2011, Viterra Operations loaded 3.8 million tonnes of grain, including 2.60 million tonnes of wheat for export. This can be compared to average **annual** export task over the last 10 years, where the average annual task for all grain is 4.3 million tonnes and for wheat is 2.44 million tonnes. The volume passed through Viterra Operations' ports in the past 6 months is evidently very high, particularly when considered in light of the significant delays in harvesting (due to weather) and in shipping.

In the 2010/2011 season to date, Viterra Operations has provided access at port to 12 exporters, all of which have been exporters of bulk wheat.

Of the 3.8 million tonnes of grain shipped in the season to date, [confidential] million tonnes has been exported by 11 third parties. Of the 2.6 million tonnes of bulk wheat shipped in the season to date, approximately [confidential] tonnes has been exported by 11 third parties, and approximately [confidential] tonnes has been exported by Viterra Limited. Of the approximately 5 million tonnes of wheat currently pending on the shipping stem for execution in the 2011/12 service year, around 3.9 million tonnes (or 77%) represent bookings by 12 third parties. Only three years ago, there was only one exporter of bulk wheat.

Viterra has continuing plans to invest in the export supply chain and to improve the services it offers to growers, exporters and other customers. It is committed to continuous improvement. However, having regard to the achievements set out above -- which have taken place in only 18 months since Viterra acquired the Australian business and in a transitioning market environment -- Viterra Operations considers that it is contributing significantly to the efficient operation of the South Australian export supply chain.

Access to Port Terminal Services

The FIFS system has supported these achievements and has enabled a number of third parties to export a substantial volume, and a substantial proportion, of grain from South Australia over the past 2 years (and, based on current shipping stem bookings, the 2011/2012 service year as well).

Those exporters operate in a national, and even international, market. In addition to the South Australian port terminals operated by Viterra Operations, accredited wheat exporters such as AWB, Louis Dreyfus, Elders Toepfer Grain, CBH, Cargill, Glencore and Bunge can (and do) export grain from 3 ports located in Queensland, 2 ports located in NSW, 3 ports located in Victoria, and 4 ports located in Western Australia. They can also purchase "free

on board” (“**FOB**”) at each of those ports and sell wheat domestically. Of the 12 accredited wheat exporters that have shipped out of South Australia in 2010/2011 to date, eight, including Viterro Ltd, have the capacity to source grain internationally for supply to their worldwide export customers.

With the exception of GrainCorp, CBH and AWB, none of these exporters has made a significant investment in export supply chain infrastructure in Australia. They operate their businesses by using infrastructure that involves substantial investment by other parties. Viterro Operations considers that it would be a highly inefficient outcome if the companies that have invested in this infrastructure were to be displaced from using it by companies that have not made that investment.

The size of any harvest is inherently variable. Table 1 below sets out details of the wheat crop in South Australia for each of the past 10 years. The harvest size is typically significantly smaller than the 2010/2011 harvest, and there are generally few (if any) capacity constraints in relation to the exporting of that crop.

That there is no standard “peak” period during which demand for shipping capacity outstrips supply is demonstrated by the conduct of exporters early in the 2009/2010 harvest period. There were relatively few bulk wheat shipments from South Australian ports in the period December 2009 to January 2010. The relatively high price of the Australian crop (compared to other regions in the world) made it uncompetitive in global terms. On the other hand, in Australia, growers were reluctant to sell at prevailing prices which they perceived to be too low. Accordingly, a situation arose where, despite the large crop size, shipping during this period was only [confidential]% of the yearly average.

Table 1 - Size of wheat crop in South Australia

Year	Size of crop (tonnes)	Tonnes exported
2001/2002	4,778,000	4,635,760
2002/2003	2,072,000	1,363,903
2003/2004	3,490,000	3,204,550
2004/2005	2,621,000	1,897,502
2005/2006	3,853,000	3,177,630
2006/2007	1,446,000	548,981
2007/2008	2,346,000	1,105,537
2008/2009	2,295,000	1,878,950
2009/2010	4,052,000	3,535,627
2010/2011	[confidential] million (Viterro grower receivables to date). This does not include grain held in third party storages	2.60 million (year to date) 5.1 million (forecast to 30 September 2011)

Having regard to the expected carry-over from the 2010/2011 season, soil moisture content and current weather predictions, Viterro Operations is anticipating that the 2011/2012 season will also involve a large South Australian wheat export task. [confidential]

This process of commercial negotiation -- and the substantial lead times provided by Viterro Operations considering the 2011/2012 bookings now -- is likely to generate substantial efficiencies and opportunities that may not otherwise have been available to those exporters.

Having regard to each of the matters set out above, Viterro Operations considers that the FIFS system is operating efficiently.

Efficiency and the provision of Port Terminal Services

It is also important that the efficient operation of this system is viewed in its broader context. It would be a highly inefficient outcome if significant costs were imposed on Viterro Operations and the industry to address a relatively short and historically infrequent peak capacity constraint [confidential].

It would also be a highly inefficient outcome if any alternative system were to undermine the incentives for infrastructure owners to continue to invest in efficient capacity expansions and improvements to the broader export supply chain (e.g. accumulation, storage, transport and port terminal infrastructure).

The “big prize” for the Australian and South Australian economies, and the main objective, is increasing throughput (and achieving cost savings) in the supply chain, and increasing the level of wheat exports. As a port terminal operator, Viterro Operations’ strongest incentive is to maximise throughput. This is how it obtains a return on its significant investment in South Australian infrastructure, and its commitment to doing so is demonstrated by both the level of its continuing investment and the record tonnages that it has moved through its system. Provided that it achieves this throughput, Viterro Operations is largely unconcerned with the identity of the exporter.

Any allocation methodology that undermines this incentive to invest in infrastructure, to improve services and to increase productive and dynamic efficiency -- for example, by introducing complex and costly systems or limiting the Viterro Group’s ability to use its own infrastructure -- is undesirable. It also has no basis under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (“CCA”).

Conclusion

Having regard to these matters, Viterro Operations considers that the FIFS system has operated, and continues to operate, efficiently. There is no compelling case for substantial change. This is particularly the case in the context of the 2011/2012 bookings which are governed by the processes already set out in the Protocols. In fact, substantial change is likely to create greater risk and uncertainty for exporters.

2.2 *Question 2 - What alternative methods for efficiently allocating shipping capacity might be appropriate:*

- (a) *For the period 1 January 2012 to 30 April 2012?*
- (b) *For the period 1 October 2011 to 30 September 2012?*
- (c) *For the remainder of the period covered by the proposed 2011 undertaking up to 30 September 2012)?*

[confidential]

Capacity allocation under the Proposed Access Undertaking

Viterra Operations considers that the FIFS system has worked, and continues to work, efficiently and has enabled substantial increases in exports and investment in the supply chain. The ACCC has also recently endorsed this system in its draft determination in relation to GrainCorp's proposed access undertaking. Viterra Operations is not aware of any compelling case for substantial change to this system.

Viterra Operations does not consider that any form of tonnage caps or pro rata rationing-back of user entitlements (in circumstances where there is greater demand for capacity than availability) would produce efficient outcomes. Any system of this type would not be more efficient than the FIFS system. It would potentially have the result that no exporter would be able to obtain their full capacity requirements. The ACCC has also previously expressed strong reservations in relation to capacity capping and rationing systems (e.g. the ACCC's authorisation decisions concerning capacity solutions at the Port of Newcastle).

Viterra Operations appreciates that auction systems are likely to have some benefits in efficiently allocating spare capacity in circumstances where demand for that spare capacity exceeds supply. However, auctions also involve a number of difficulties. As set out in CBH's submission to the ACCC dated 1 April 2011, these difficulties arise because:

- (a) auctions incur substantial costs;
- (b) demand can fluctuate markedly from year to year as a result of crop size and global market conditions;
- (c) in low-demand years, auctions are regarded by participants as unnecessary. Auctions are also unnecessary and costly for periods of low demand, or in respect of ports with lower demand;
- (d) participants are unable to acquire certainty of capacity until the auctions are held, which inhibits longer term planning for marketers and the infrastructure provider;
- (e) the CBH auction system has resulted in maximum accumulation periods that are shorter than would be possible with a more flexible system; and
- (f) reliance on an auction system reduces flexibility in port capacity management, because users are confined to hard shipping windows, with limited ability to manage risk.

To this list, Viterra Operations would add that auction systems tend to be highly complex and confusing for users. Operational issues with an auction system can often only be addressed by introducing further complex rules and procedures. This is demonstrated by the changes that CBH has made to its auction system in each of the three years since 2009. This

is likely to have provided very little certainty to exporters, and to have resulted in further transaction costs as exporters adjust to a new system each year.

In its submission, CBH estimated the costs of port terminal access regulation over the last 18 months to have exceeded \$1.5 million. Viterro Operations would expect that a significant proportion of this relates to the auction system. Together with auction premiums (which are in essence higher booking fees), the design, operation and maintenance of an auction system is likely to involve very substantial costs which are ultimately borne by exporters and growers.

Viterro Operations does not consider that this is a desirable or efficient outcome in circumstances where:

- the FIFS system continues to work efficiently, and there is no compelling case for substantial change;
- [confidential];
- the result of any auction system is likely to be the same as, or similar to, a FIFS system -- that is, certain exporters will miss out on the capacity that they would otherwise want. An auction system is also likely to favour larger participants that have the financial ability to pay higher premiums for scarce capacity. It is therefore far from clear that an auction system would deliver a better outcome. An auction system would also not change the overall level of output in the market. The total amount of grain exported would be the same regardless of whether an auction or some other mechanism is used. Given that the market is an export market, the prices charged to consumers are also unlikely to be affected.;
- Viterro Operations is not aware of any Client or grower having advocated the implementation of an auction system in South Australia; and
- Viterro Operations has no particular desire to design, operate and maintain a complex market-based auction system. Except to the extent that Viterro expects to be able to utilise its own infrastructure, Viterro Operations' strongest interest is in maximising throughput, regardless of which capacity is allocated to which user.

An auction system is also likely to involve greater uncertainty for all users and the infrastructure owner than a system which allows early bookings on the shipping stem, and enables commercial negotiations (underpinned by regulatory arbitration) to explore alternatives if capacity is not available.

Other alternatives

As set out in its submissions dated 23 December 2010 and 23 March 2011, Viterro Operations is committed to discussing further with its Clients whether it is feasible or desirable to make changes to its system to enable the movement or trading of slots. Viterro Operations is also open to discussing with its Clients and considering potential strategies for "spreading" any peak periods that may form (e.g. incentives to move a booking out of the peak) and creating incentives for exporters to vacate early slots that they will not use, so that any capacity can be re-allocated to other users.

Viterro Operations considers that these types of changes are likely to be far more appropriate to address any perceived issues in relation to the FIFS system, than any proposal to move away from the FIFS system.

Viterra Operations notes that this process of continuing commercial engagement with Clients is supported in a number of the submissions made by third parties in response to the ACCC's Issues Paper.

Use of the Port Terminal Services by Viterra Ltd

In any discussion concerning the efficient allocation of capacity, it is important to recognise Viterra's right to use its own infrastructure. Third party use of infrastructure services will only be efficient if it enables *more* use of the relevant services (as distinct from displacing the infrastructure owner's own use, or other users' existing use, of the service).

Companies investing in infrastructure also have a clear and legitimate business expectation that they will be able to meet their own needs for use of their infrastructure. This is reflected in:

- (a) the provisions of Part IIIA of the CCA, including sections 44X and 44ZZA(3) (which require the ACCC to consider the legitimate business interests of the provider), and section 44W (which prevents the ACCC from making an arbitral determination which would prevent an existing user obtaining a sufficient amount of the service to meet its actual or reasonably anticipated requirements). This is also reflected in sections 152BCA(1) and 152BCB of the telecommunications access regime in Part XIC of the CCA;
- (b) the Australian Competition Tribunal's decision in *Fortescue Metals group Limited* [2010] ACompT 2 (30 June 2010). In that decision, the Tribunal stated, in relation to any access determinations under Part IIIA of the CCA, that:

"Section 44X(1)(a) provides that in making a final determination, the ACCC must take into account the legitimate business interests of the provider and the provider's investment in the facility." There are "...reasons for thinking that the ACCC would not readily make a determination which did not enable the owner to meet its reasonably anticipated requirements. First, a contrary determination would drastically undermine the owner's incentives to invest in infrastructure in the future. It is one thing to give access to a service which the owner is not using; it is another to force the owner to forgo its own usage" (paragraphs 604-605);

- (c) the National Competition Council's submission to the Productivity Commission's Inquiry into Wheat Export Marketing Arrangements (completed 28 October 2010), which stated as follows:

"There are a set of provisions that apply to how the ACCC must conduct its arbitrations. One of the things it cannot do is displace a user's existing or reasonably foreseeable use of the facility itself to make room for others. That's not contemplated by Part IIIA. It shouldn't have been permissible under the access undertaking because those safeguard provisions apply generally. I think it's worth remembering that these parties did invest in these assets. They own them, and this is not about taking them away, it's not about stripping their use. It would be contrary to the operation of Part IIIA to do that. So it is about excess or additional capacity." (Productivity Commission, Inquiry into Wheat Export Marketing Arrangements

Transcript of Proceedings, John Feil, 24 November 2009, pp. 12–13);
and

- (d) CBH’s current proposal to reserve “Base Load Capacity” for major users (i.e. to exclude the “Base Load Capacity” from the auction system). This reflects a clear concern that infrastructure owners should be able to reserve sufficient use of that infrastructure to meet their own needs.

As set out in Viterro Operations’ submission dated 23 March 2011, the Proposed Access Undertaking currently relates to total capacity, and not just spare capacity over and above Viterro’s own requirements. This will also govern the booking process for 2011/2012 bookings. However, given the commentary that appears to arise from certain areas when Viterro Ltd seeks to make bookings to use its own infrastructure, Viterro Operations will consider whether, following the ACCC’s acceptance of the Proposed Access Undertaking, it will apply to the ACCC to vary the Proposed Access Undertaking. Any variation would seek to recognise more fully Viterro’s right to use its own infrastructure in order to meet its own requirements.



- 2.3 *Question 3 - What date was the first booking (or set of bookings if the exporter nominated more than one shipping slot) received by Viterro Operations for shipping slots after 30 September 2010? Which exporter made those bookings? What was the total tonnage nominated? On what date was the first booking (or set of bookings) accepted onto the shipping stem for execution after 30 September 2010?*

[confidential]

- 2.4 *Question 4 - What was the date of the second booking (or set of bookings) received by Viterro Operations for shipping slots after 1 October 2010? Which exporter made those bookings? What was the total tonnage nominated? On what date was the second booking (or set of bookings) accepted onto the shipping stem for execution after 1 October 2010?*

[confidential]

- 2.5 *Question 5 - In relation to shipping slots for the period 1 October 2010 to 30 September 2011, please provide the following details (in table form) of any nominations that were not accepted by Viterro Operations Limited: date of the nomination; shipping slot nominated; exporter; tonnage; and the reason for refusal.*

[confidential]

- 2.6 *Question 6 - In relation to accepted bookings for shipping slots for the period 1 October 2010 to the date of this notice, please provide the following details of any cancellations by Viterro Operations Limited including: shipping slot booked (and accepted); exporter; tonnage; date of cancellation; and reason booking was cancelled.*

[confidential]

- 2.7 *Question 7 - In the event that Viterro Operations Limited cancelled an accepted booking for shipping slots for the period 1 October 2010 to the date of this notice, was the shipping capacity subject of the cancellation subsequently utilised by another exporter (replacement booking)? If so, please provide the following details: date bookings was cancelled by Viterro Operations Limited; date the replacement booking was nominated; date the replacement booking was accepted; exporter; and tonnage.*

[confidential]

- 2.8 *Question 8 - In relation to accepted bookings for shipping slots for the period 1 October 2010 to the date of this notice, please provide the following details of any cancellations by Exporters: shipping slot booked (and accepted); exporter; tonnage; date of cancellation; and reason booking was cancelled (as far as Viterro Operations is aware)*

[confidential]

- 2.9 *Question 9 - In the event that an Exporter cancelled an accepted booking for shipping slots for the period 1 October 2010 to the date of this notice, was the shipping capacity subject of the cancellation subsequently utilised by another Exporter (replacement booking)? If so, please provide the following details: date bookings was cancelled by the Exporter; date the replacement booking was nominated; date the replacement booking was accepted; exporter; and tonnage.*

After a cancellation, Viterro Operations may release capacity back into the market for bookings in general after undertaking a risk assessment. This risk assessment is in relation to capacity at the port, including forward inward elevation capacity from the date of cancellation, and stock already in position at ports. In undertaking this assessment, Viterro Operations attempts to ensure that bookings already on the stem would not be unduly prejudiced if capacity was released. This will determine if Viterro Operations can specifically release a Client's cancelled capacity or a proportion of the cancelled capacity into the market for re-booking of that capacity.

A client-wide email is circulated in these circumstances which states that Viterro Operations is able to offer capacity in respect of a specified commodity/grade/tonnage to clients for prompt shipping at a specific port.

It is, therefore, unusual to have a "re-booking" of a specific slot, although it has occurred. Following the cancellation by Viterro Limited on 03/03/2011 (lupins), the slot was released and re-offered by Viterro Operations on 08/03/2011. To date we have not received a booking for this specially released capacity.

- 2.10 *Question 10 - Please provide a copy of the complete shipping stem from 1 October 2010 to the date of this notice*

A copy of the complete shipping stem for this period is set out at **Attachment 1**.

3 Further questions

If the ACCC has any further questions, Viterro Operations would be pleased to assist.

Viterro Operations Limited
11 April 2011

Attachment 1 - Shipping Stem