

Emerald Group Australia Pty Ltd**Submission to ACCC****Viterra: Proposed Port Access Undertaking****Introduction**

Emerald Group Australia Pty Ltd ("**Emerald**") is a leading grain trader with offices across Australia. Emerald has a particular interest in South Australian port access because of our prominent role as a grain accumulator on the Eyre Peninsula. Thanks to the support of our farmer customer base, our joint venture EP Grain and our partner *FREE Eyre*, it is estimated that Emerald accumulated approximately one-third of the Eyre Peninsula wheat crop in the 2010/11 season.

Viterra Proposed Undertaking

As a general proposition we do not have any issues with the proposed changes to Viterra's Undertaking. However we note that the Undertaking is intended to have a three-year duration and it is appropriate that the ACCC has raised a number of important industry matters that should be considered before unequivocally accepting Viterra's Proposed Undertaking. We appreciate the opportunity to comment on the issues highlighted by ACCC and other matters of concern to Emerald.

Capacity Allocation

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. The proposition that only the bulk handlers' spare capacity (ie capacity over and above their own export needs) should be available has, appropriately, been rejected by the ACCC.

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.

For example the Viterra 2009 Undertaking Port Schedule A Port Adelaide states that the port has 60,800 mt of steel shipping bins and 260,000 mt of capacity for grower receivals and longer term storage options. It is not clear whether the additional 260,000 mt of storage is available capacity for export. While direct delivery to shipping bins is obviously more efficient, Viterra should be obliged to offer total storage capacity, not just efficient storage capacity. A robust definition in the Undertaking should resolve these ambiguities.

Emerald understands that export capacity is a function of a number of inputs:

- Rail in-loading speed
- Rail resource availability
- Road intake speed
- Port storage
- Ship loading (mechanical) rates
- Labour availability
- Port rules
- Environmental constraints

Emerald recognises that the port capacity is both complicated and dynamic (ie ever-changing) and we have suggested below that Viterra needs to move to providing regularly updated (albeit subjective) information on port capacity.

Capacity Table

The capacity table provided by Viterra is more helpful than not but it is not transparent and it is not as helpful as it could be. It simply indicates whether slots are available, Yes or No.

An access seeker cannot verify from this table whether the available capacity of the port has been reached. Nor can an exporter understand the extent of available capacity. For example Emerald may in reliance on the table make a 30,000mt FOB sale only to find the available capacity is only 10,000mt and consequently incur expensive demurrage.

The table should provide the projected (dynamic) capacity of the port and compare it quantitatively to the booked capacity. This will enable exporters to make more informed decisions on overseas sales and the likelihood or otherwise that capacity will be available in a particular window.

In recognition that the dynamics of port capacity components will shift from time-to-time, as Viterra has argued, the table should be updated on a monthly basis and Viterra should be required to provide a commentary explaining the reasons for any changes to previous month's capacity estimate.

Additional Capacity Advice

Currently the Protocols do not oblige Viterra to notify clients of changes to capacity. In practice, traders will not be monitoring the capacity table and the shipping stem on a minute –by-minute basis. This potentially favours Viterra's own trading division who could be tipped off about such changes just after they are made. Accordingly we strongly support a mechanism whereby any changes to the daily published shipping stem or the capacity table are notified exclusively by all-client email.

General Observations on Port Loading Protocols

Generally Emerald has found that Viterra's *first-come-first-served* system worked well for the 2009/10 season and is relatively easy to understand.

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 bookings.

In Emerald's situation this season, with one-third of the EP wheat crop, we are naturally concerned that the *first –come-first-served* system does not recognise the weight of our exposure to shipping out of Port Lincoln.

What is the solution? We note that the WA auction system is based on placing a value on the shipping slots as a scarce commodity, thereby weeding out the speculators. The auction premiums are rebated back to exporters based on volume shipped. This seems to go a long way to addressing the twin concerns of speculators and the deep and changing pockets of the bulk handler and its trading arm. On the other hand, by CBH's own admission the auction system is complex.

If Viterra is to persevere with its *first-come-first-served* system then there should be more assurance for a more level playing field for exporters vis-a-vis Viterra's own trading division. Initiatives could 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-client emails; and
- in September of each year Viterra should be required to report to 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.

On the other hand we believe that Viterra should have the flexibility to modify the *first-come-first-served* system to provide some proportion of guaranteed shipping capacity to traders (other than Viterra's own trading arm) that have underpinned the South Australian storage and rail system via significant commitments or significant accumulation positions.

Audit

Emerald appreciated WEA's prompt action to audit Viterra's compliance with its obligations under the legislation. We were satisfied that the transgressions discovered by the auditor were mainly either oversights or teething problems on the part of Viterra, and that Viterra's responses to the audit have been appropriate.

Audit can be a very effective tool to ensure compliance. If WEA is to be abolished in line with the recommendations of the Productivity Commission at the end of 2011, we would like to see an audit mechanism in the Undertaking that can be overseen by ACCC.

Publication of key port information

We are concerned that the presentation of "average" capacity information in the Port Schedules to the Undertaking is misleading.

First of all the average capacities are, in almost every case, around one-half of the maximum capacities, which in our experience is overly conservative.

Secondly the assumptions behind the calculations of "average" capacity are not transparent. For example if a port has five road receipt stands and Viterra assumes that only two are open, the intake rate will be much different to the rate achieved by opening all five.

We believe the underlying assumptions for the calculation of "average" capacity rates should be published.

We also wonder whether the publication of "average" capacities will in the future form the basis of demands by Viterra for additional remuneration for over-average performance? We do not believe the ACCC should accept these proposals without a more rigorous inquiry.

Approved Third Party Sites

Emerald welcomed the publication by Viterra of the criteria for approval of third party sites.

Because the operation of third party sites is important to competition in storage in South Australia, any deterrence of third party sites would, of course, damage exporters of wheat other than Viterra.

Accordingly because of its importance we think that the approval process should be incorporated into the Proposed Undertaking and be subject to the dispute resolution mechanisms.

Pricing of receivals from approved and non-approved sites

Intuitively, the cost to Viterra of receiving grain from a non-approved site should be greater than the cost of receiving grain from an approved site. The former involves a full receival service whereas in practice the latter involves weighing and some modest additional sampling/testing. Whether that difference is worth around \$11 per tonne is difficult to assess in the absence of a more detailed understanding of Viterra's cost structures and risk experience.

We do however support the need for South Australia as an export state to take all reasonable steps to ensure the quality of exported grain. The initiative taken by Graincorp, in the eastern states, to abolish the distinction between the receival of grain from approved and non-approved sites, is not necessarily sensible for SA.

What we would like to point out to the Commission is that the throughput fee (ie the fee for receiving grain at a Viterra port from an approved third party site) of \$2.50 per tonne appears to be excessive and represents to Emerald a deterrent to the use of third party storage. The fee was increased from \$1.54 per tonne some 3 years ago to \$2.50 per tonne without any explanation or justification from Viterra. Certainly with the new rigorous approval process for third party sites introduced by Viterra, the quality risk to Viterra should be reduced, not increased. In our view, the throughput fee should be returned to its previous level of \$1.54, with perhaps some allowance for CPI increases since its introduction.

Flexibility to vary Port Loading Protocols

Emerald is comfortable that, provided there is industry consultation and the views of access seekers are properly taken into account, Viterra should be allowed the flexibility to change the protocols without the approval of ACCC. We have observed that the changes made by Viterra to the port loading protocols 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.

Approach to pricing

We observed that the opportunity to negotiate prices pursuant to the 2009 Undertaking was not really tested by access seekers, because the regime was new and unfamiliar. It is likely that more negotiation will be undertaken for the 2011/12 season port access agreement.

Substance of the Indicative Access Agreement

The concept of standard terms in the form of the indicative access agreement works well as the basis for negotiation or as a fall-back in the absence of negotiation.

However it must be said that Viterra's indicative access agreement merely reflects its historical insistence as a monopoly on terms most favourable to Viterra. For example:

- Viterra insists that its liability for negligence be limited to \$250K per event, a paltry offer in the context of what can at times be a \$6m cargo.
- By derivation, Viterra apparently will not be liable to compensate the exporter for demurrage costs in the absence of evidence of gross negligence. For example Viterra has argued in the past that it should not be liable for mechanical breakdown or labour strikes, both of which are ultimately in Viterra's control.

- If Viterra undertakes blending (for a fee) it will only guarantee the quality of the blended parcel at the level of the lowest component of the blend. This risk-averse philosophy favours its own trading division.

Dispute resolution

Emerald has not had the opportunity to test the dispute resolution provisions of the 2009 Undertaking. We believe, however, that they are soundly based.

Terms of the Undertaking

We are comfortable with the three year term of the Undertaking and the transition process. However it is not clear what happens at the end of the three years. We would like to think that there will be a review for the purpose of continuing to protect the interests of port access seekers.

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