



Viterra Operations Limited

2011 Port Terminal Services Access Undertaking

Response to matters raised in the ACCC's Issues Paper

1 Introduction

1.1 Purpose of submission

This submission sets out Viterra Operations' response to the matters raised in the Issues Paper published by the ACCC on 20 January 2011. It also sets out Viterra Operations' comments in relation to various matters raised by other parties in their respective submissions to the ACCC in March 2011.

Viterra Operations considers that there has been substantial constructive and commercial engagement with Clients in relation to a number of the matters raised in the Issues Paper and in relation to a range of other commercial issues. Having regard to this increasing commercial dialogue (which we understand is supported by Clients), a key issue will be to ensure that the Proposed Access Undertaking continues to support Viterra Operations' ability to provide flexible and timely commercial solutions for Clients.

There is a substantial risk that this ability will be undermined if the Proposed Access Undertaking adopts an approach that is too prescriptive in relation to operational matters. An approach that is too prescriptive may also have the unintended consequence of limiting the approaches that Viterra Operations may be able to adopt in seeking to provide additional capacity and to cater for the individual requirements of Clients. This desire for operational flexibility is reflected in a number of the submissions made to the ACCC.

1.2 The ACCC's Issues Paper

In providing this response, we have not sought to repeat the information contained in our submission dated 23 December 2010. Accordingly, we have not, in this submission, responded to all of the matters raised in the Issues Paper.

Viterra Operations' response to the matters raised by other parties in their respective submissions to the ACCC is set out in this submission and in **Attachment 1**.

1.3 [Confidential]

[confidential]

2 Response to matters raised in the Issues Paper

2.1 Capacity allocation

2.1.1 Definition of “Capacity”

As set out in our submission dated 23 December 2010, there is no industry-standard way of calculating or defining “capacity”. Viterra Operations agrees with the general proposition by AGEA that capacity is the quantity of grain that can be loaded in any given period for any given terminal. However, there are a number of ways that capacity can be calculated. As recognised in the submission by Emerald, there are also a large number of factors that can impact on the amount of capacity that is available.

When referring to “capacity”, there is an important distinction between:

- (a) the inward elevation, storage and out-loading capacity at each Port Terminal; and
- (b) 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.

Common ways of measuring or referring to “capacity” include:

- (a) **Maximum capacity** - in the Current Access Undertaking, the Port Schedules refer to the “maximum”, “nameplate” or “theoretical” capacity of Viterra Operations’ Port Terminal infrastructure. This represents the rated capacity of all the available infrastructure, based on Viterra Operations’ standard hours of operation for that service; and
- (b) **Average capacity** - this refers to the average practical capacity of particular infrastructure (or a supply chain) over a period of time. It makes allowances for a number of factors which affect actual capacity availability and utilisation, including the number of discharge points that Viterra Operations would expect to operate on a given day (based on segregations and other activities performed), requirements to clear grids and grain paths, and other operating issues experienced at the Port Terminal. Those “operating issues” could include:
 - (i) specific site issues;
 - (ii) vessel design issues (including air draft and vessel trimming issues);
 - (iii) vessel scheduling issues (e.g. if vessels all arrive within first 2 weeks of a 30 day scheduled slot);
 - (iv) modes of transport for port receivals;
 - (v) the requirements for loading of multi-grades (blending) or specific grain qualities;
 - (vi) client fumigation requirements;
 - (vii) receipt of multi-grades/sites;
 - (viii) the level of receipts of third party grain;
 - (ix) labour arrangements (including labour required from the Australian Quarantine and Inspection Service (“AQIS”));

- (x) utilisation of infrastructure (including impacts due to breakdowns, maintenance etc);
- (xi) performance of service providers who deliver grain to port; and
- (xii) the impact of multi-activities that may occur at particular Port Terminals which, in many cases, use the same infrastructure. This may include silo transfers, inward elevation, ship loading (outward elevation), and domestic out-loading.

Given the number of factors which can affect the amount of actual capacity that is available at any point in time, “actual capacity” may, at a particular point in time, be higher or lower than average capacity.

Accordingly, Viterra Operations considers that average capacity provides the best practical guide for access seekers and users in relation to measuring in-loading, storage and out-turn capacities at each of its Port Terminals.

Approach adopted in the Proposed Access Undertaking

Given that there is no standard definition of the term “capacity”, Viterra Operations has made a number of changes to the way that “capacity” is described and explained in each of the Port Schedules to the Proposed Access Undertaking. The purpose of those changes is to provide greater information, explanation and clarity to access seekers in relation to the practical capacity that is available at each Port Terminal.

This information is likely to be more helpful to access seekers than the “nameplate capacity” information set out in the Current Access Undertaking. Operationally, and for planning purposes, it is also the most appropriate way of describing the capacity at each Port Terminal.

Viterra Operations disagrees with the submission by Emerald that including “average” capacity information in the Port Schedules is misleading. By definition, average capacity reflects the quantity of grain that can generally be loaded for any given period. It provides significantly greater practical guidance than total or maximum capacity.

Viterra Operations also considers that it would not provide greater clarity by publishing the “underlying assumptions” for the calculation of average capacity rates. The average capacity stated in the Port Schedules simply reflects the average amount of grain that can be loaded in any given period, based on normal and efficient utilisation of Viterra Operation’s Port Terminal infrastructure. Rather than involving “assumptions”, this average amount reflects Viterra Operations’ actual experience over time having regard to the types of operational issues set out above. The average capacity is therefore a good guide for exporters.

Viterra Operations considers that wheat exporters will understand the information contained in the Port Schedules, what that information refers to as a practical matter, and how it has been measured. This is particularly the case as Viterra Operations has expressly explained the terms “maximum capacity” and “average capacity” in the Port Schedules (see footnotes 1 and 2 of Port Schedule A).

The inclusion of further definitions of “capacity” would not assist access seekers and users in understanding the availability of the Port Terminal Services or provide additional clarity or certainty.

In addition, Viterra Operations does not agree with the suggestion by AWB that the Port Schedules should contain separate definitions of capacity in relation to each step of the supply chain. A number of the matters raised by AWB (e.g. number of trucks, net weight of trucks,

number of trains and weight of trains) do not relate to Viterro Operations' infrastructure. They are also often outside Viterro Operations' control. In addition, those and other matters (e.g. hours of operation at up-country facilities) clearly do not relate to the provision of, or capacity at, Port Terminal infrastructure.

2.1.2 Capacity table

Viterro Operations already provides substantial capacity information to clients

Viterro Operations currently provides detailed information to its Clients in relation to the capacity that is available at each Port Terminal. For example, Viterro Operations:

- (a) provides clear information in relation to the average in-loading, storage and out-turn capacity at each Port Terminal. This is contained in the Port Schedules;
- (b) sets out details of all bookings on the shipping stem each business day, in accordance with its obligations under the continuous disclosure rules in the *Wheat Export Marketing Act* ("WEMA") and under clause 9 of the Current Access Undertaking;
- (c) publishes information in relation to the stocks of Bulk Wheat and non-Bulk Wheat grains held at each Port Terminal in accordance with clause 10 of the Current Access Undertaking;
- (d) voluntarily provides information on non-Bulk Wheat commodities on the Shipping Stem;
- (e) publishes an Available Capacity Table on its website each day which, following discussions with the ACCC, provides information in relation to whether there is any Export Select and/or Export Standard capacity¹;
- (f) sends simultaneous emails to all current clients (and also to persons who have expressed interest in exporting grains through its Port Terminals) advising when additional capacity at a Port Terminal may be available; and
- (g) actively works with clients to determine whether additional capacity can be made available, and whether the availability of that capacity will involve additional costs.

Requests for further capacity information

Certain Clients have indicated in their submissions to the ACCC that they would like Viterro Operations to publish specific volumes of available or forecast capacity in respect of each of its Port Terminals.

Viterro Operations has a number of reservations with this approach. Publishing numerical capacity estimates is unlikely to provide better, more accurate or more up-to-date information than is already available to Clients. This is because:

- (a) there are difficulties inherent in determining the precise volume of actual available capacity. The amount of available capacity can be affected by a number of factors, many of which are outside Viterro Operations' control. Other than for very high level estimates, it is not a simple task to provide specific volumes for actual or forecast volumes; and

¹ The "Export Select" capacity relates to the capacity of Viterro Operations' Export Select logistics offering (i.e. capacity to deliver grain to port). It does not relate specifically to Port Terminal intake capacity (see below).

- (b) 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. It is unlikely that this would be more beneficial to Clients, or provide any greater insight into the level of actual (or forecast) available capacity, than Viterro Operations' current approach. By way of example, GrainCorp's website expressly states that:

*“Monthly estimates of terminal elevation capacity **do not constitute a guarantee of monthly terminal elevation throughput** and cannot be relied on as a representation, an offer capable of acceptance or an invitation to treat. The monthly elevation estimates **do not constitute a ‘benchmark’ against which terminal elevation ‘performance’** is measured. The publication of these estimates of port terminal capacity will allow exporters considering the nomination of a cargo to make better-informed judgements about the availability of elevation capacity at GrainCorp terminals”* (emphasis included in the original).

Viterro Operations would also observe that GrainCorp, after identifying a large harvest in the Geelong region, reduced the “*total export elevation capacity available for bookings at the Geelong elevator*” by 120,000 tonnes for each of January and February 2011. This is not a criticism of GrainCorp. Rather, it highlights the limited practical value in providing numerical estimates in relation to the volume of available capacity in circumstances where those estimates necessarily require substantial qualifications or disclaimers, and are inherently variable. The strong incentive to “under-promise and over deliver”, rather than explain downwards estimates of capacity to clients, is also likely to further undermine the practical utility of numerical estimates.

In addition, there is likely to be very limited benefit in providing further disaggregated data or numerical estimates in relation to the volume of available capacity for different Port Terminal Services (e.g. storage at port, ship-loading capacity and in-loading capacity). In particular:

- (a) given the range of factors which can impact on the available capacity for individual services (see section 2.1.1 above), the provision of information disaggregated on a service-by-service basis would involve significant resources and cost for Viterro Operations with no material benefit for access seekers and users. As AGEA has noted in its submission to the ACCC, the issue is the “*quantity of grain that can be loaded in any given period*”, not the amount of capacity for each individual step in the supply chain; and
- (b) any requirement to provide such disaggregated information would increase the incentives to provide conservative and qualified estimates.

Viterro Operations' views

Viterro Operations considers 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 Clients through direct communications when capacity has become available.

That said, Viterro Operations is mindful that a number of Clients have raised in their submissions a preference for the publication of indicative capacity data. Viterro Operations will liaise directly with its Clients in relation to the level and type of indicative capacity data information it may voluntarily provide, and which appropriately balances the information required by Clients and the administrative burden of providing that data.

Export Select and Export Standard

Viterra Operations notes that there appears to be confusion in certain submissions in relation to the way that inward elevation capacity at its Port Terminals is made available to the Export Standard and Export Select pathways.

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.

The only constraints on Export Standard bookings are the available capacity at port and existing bookings (these also apply to Export Select). It is theoretically possible for all capacity to be allocated to Export Standard bookings.

The further constraint on Export Select bookings is the availability of Viterra Operations' logistics capacity to deliver that grain to port (see footnote 1 above).

This means that, subject to capacity constraints, Clients always have a choice whether to use Export Standard or Export Select to take advantage of available capacity.

Having regard to these matters, it is difficult to understand some of the matters raised in submissions concerning the impact of Export Select bookings on Export Standard (and *vice versa*).

2.1.3 Additional capacity

Viterra Operations does not have any difficulty with voluntarily publishing any "additional capacity" email notifications that are sent to Clients on its website with the capacity table on the date the capacity table is next updated (e.g. the following business day).

2.1.4 Port Loading Protocols

Introduction

Viterra Operations' views in relation to the operation of the Port Loading Protocols are set out in its submission dated 23 December 2010.

Viterra Operations notes AGEA's, Emerald's and ETG's support for the "first come, first served" approach under the Port Loading Protocols. This is consistent with the feedback that Viterra Operations has received in previous discussions and consultation with its Clients.

Potential changes to the Port Loading Protocols

Viterra Operations notes that certain submissions refer to the possibility of implementing some form of mechanism involving movable or tradable slots, or some form of "despatch and demurrage" system for the Export Select pathway. ETG's submission also refers to some form of mechanism to "hand back or transfer capacity", but expresses reservations in relation to the creation of any secondary market which lacks liquidity.

As the ACCC is aware, Viterra Operations has committed to continuing to engage with its Clients in relation to these issues. Ultimately, whether or not any changes to the Port Loading Protocols and other processes are necessary, desirable or practically workable will depend on the outcome of that ongoing dialogue consultation process. As is evident from the submissions received by the ACCC, these are issues in respect of which different parties have different views.

In this regard, Viterra Operations notes, and agrees with, AGEA's and Emerald's respective views that:

- (a) any significant changes to the Port Loading Protocols need to be developed and tested to avoid creating other inefficiencies such as that which might create unintended incentives for speculative behaviour. It should also be added that any changes need to be tested properly to ensure that they do not adversely impact on either the operations of Viterro Operations or its Clients; and
- (b) it is appropriate for any changes to be developed via consultation with exporters. Again, this is the very process that Viterro Operations has foreshadowed.

Viterro Operations also notes ETG's comments in relation to "speculative" bookings and the "*high degree of speculative behaviour in the early part of the [2009/2010] season*". As stated in our submission dated 23 December 2010, Viterro Operations acknowledges that there were some issues (both for Viterro Operations and its Clients) in transitioning to the new system early in the season. This also occurred in other States (e.g. in transitioning to the new auction system in Western Australia).

Viterro Operations has made a number of changes to the Port Loading Protocols, and to its internal processes, which reflect improvements identified during the first year of operations.

The process for changes to the Port Loading Protocols

Viterro Operations notes that a number of submissions provided to the ACCC support the process set out in the Proposed Access Undertaking for making amendments to the Port Loading Protocols. As set out in its submission dated 23 December 2010, Viterro Operations considers that variations to the Port Loading Protocols have been implemented responsibly under the Current Access Undertaking, and that the consult and notify mechanism strikes an appropriate balance between the interests of Viterro Operations and all access seekers, and also appropriately provides an ability for Viterro Operations to respond to operational issues as they arise and are identified.

Viterro Operations' response to the specific issues raised by AWB in relation to the Port Loading Protocols is set out in **Attachment 1**. However, as a headline issue, Viterro Operations notes that any proposal to require a three month consultation period for changes to the Port Loading Protocols runs counter to, and would defeat, the purpose for which the consult / notify mechanism was introduced by Viterro Operations and accepted by the ACCC in the first place. The Port Loading Protocols are an operational document that Viterro Operations needs to be able to amend in order to meet the evolving requirements of Clients and to address issues as they arise and are identified. A three month consultation period would significantly limit this ability.

Viterro Operations also considers that any requirement for "unanimous agreement" by exporters as suggested by ETG is likely to be unworkable. As the ACCC is aware, there are approximately 26 accredited wheat exporters and a number of exporters of other commodities (which represent approximately 40% of grain exported through Viterro Operations' Port Terminals). Of the accredited wheat exporters, some have significant involvement in South Australia, and some have very limited interests in South Australia.

As demonstrated by the submissions that the ACCC has received in response to its Issues Paper, the existence of divergent views on particular issues also highlights the difficulty with any requirement to obtain "unanimous agreement".

The best evidence that the current arrangements are appropriate is the level of support that they have from a range of Clients.

In relation to AWB's proposal that Viterra Operations should publish any draft amendments and allow Clients to comment on those amendments, we note that this is the exact process adopted by Viterra Operations in November 2010.

Viterra Operations' specific comments in relation to certain issues raised in third party submissions (both in relation to the "first in first served" system and specific factual issues are set out in **Attachment 1**).

2.2 Approved Third Party Storage

2.2.1 Introduction

Viterra Operations receives grain at its Port Terminals from a number of sources. This includes:

- (a) grain held in Viterra Operations' up-country storage and handling facilities on behalf of Viterra Ltd and a range of third party clients;
- (b) grain delivered direct to port by growers or otherwise from outside Viterra Operations' storage and handling system; and
- (c) grain held in up-country storage facilities by professional storage and handling providers that have been accredited by Viterra Operations as "Approved Third Party Storage" providers. Viterra Operations has accredited a number of "Approved Third Party Storage" providers and facilities in accordance with the process explained below.

2.2.2 Receival of grain - costs and risks

Where possible, Viterra Operations seeks to co-mingle all grains of like quality in its port receival and storage facilities. This storage together or "co-mingling" of grains owned by multiple customers maximises the efficient operation of the Port Terminal and also minimises the costs of providing the services. However, parcels of grain received at port carry different levels of quality and other risks depending on how they have been managed prior to receival. These risks directly impact on the ability of Viterra Operations to co-mingle those grains with grains owned by other Clients.

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;
- (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 contact insecticides from one parcel can contaminate all other parcels of wheat, Viterra 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.

Viterra Operations seeks to provide maximum protection and value retention for owners of grain held within its system and received at its Port Terminals. In receiving Bulk Wheat at its Port

Terminals, Viterra Operations also provides minimum quality guarantee out-turns (subject to shrinkage and other accepted risks). This provides Clients with a high degree of confidence that the quality of grains that they market to customers will be maintained.

Given the different levels of risk associated with grains delivered from different storage systems, Viterra Operations cannot make this guarantee (or ensure the protection of all Clients' grain and the efficient operation of its Port Terminals) unless it takes appropriate actions on the receipt of wheat from third party sources into its system, whilst in storage and on out-turn to vessels.

2.2.3 Viterra Operations' approach to managing risks

There are significant risks to the grains owned by Viterra Operations' Clients and also to the operation of the Port Terminals, if contaminants, insects, or contact insecticides are introduced into the system.

To manage these risks, Viterra Operations 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. It has complete visibility and traceability of that wheat.

However, Viterra Operations has much lower levels of visibility in relation to the services that have been provided in relation to wheat that is received directly at port from Clients or from third party up-country storage sites (i.e. both at the time of receipt into those facilities and while the wheat remains in the third party or grower storage). It is therefore necessary for Viterra Operations to provide a number of additional services at port in relation to wheat which is received directly from growers or from other storage systems.

The cost of providing these services as part of the Port Terminal Services for wheat received from growers and "Approved Third Party Storages" is reflected in Viterra Operations' Reference Prices, which are published on Viterra Operations' website.

The provision of these services at port does not involve discrimination in respect of receipts from growers and Approved Third Party Storages. Viterra Operations provides comparable services in respect of all wheat that it receives into its up-country storage facilities. As those services have already been provided (with strict quality controls while the wheat remains in Viterra Operations' system), there is no need for them to be re-provided (and those costs to be incurred again) at the time the wheat is received at port. This view is clearly supported and endorsed in the VFF's submission to the ACCC.

Viterra Operations recognises that the level of potential risk (and therefore the scope of the services that it needs to provide at port) can vary based on the quality of the storage systems from which the wheat is received. This is also clearly recognised in the submissions by Emerald and the VFF. These risks are ameliorated to a degree in relation to wheat that is received from "Approved Third Party Storages" (which, in turn, reduces the extent of the risk management services that need to be provided at port). This is because "Approved Third Party Storage" providers are generally professional grain handlers that have in place facilities, systems and training which are specifically designed, and are actively managed, to reduce these risks.

Viterra Operations' standard receipt fees for wheat received from Approved Third Party Storages are therefore lower than the standard prices for receipt of wheat from other sources.

However, additional services for all third party stored grain, such as sampling on receipt, remain necessary to manage risk. Examples include recent loads from two separate Approved Third Party Storages which could not be accepted because sampling on receipt detected the presence of contaminants exceeding prescribed limits.

Viterra Operations considers that there is transparency in relation to the additional services that it provides in respect of wheat received directly from growers and other storage systems and from Approved Third Party Storage facilities, the cost of these services (which is reflected in the prices published on its website) and the need for those services in order to reduce the risk of contamination, damage, loss and delays.

In accordance with the Current Access Undertaking (and Proposed Access Undertaking), Clients may also seek to negotiate access in relation to non-standard services. **[Confidential]**

[Confidential]

Viterra Operations considers that the services it provides in respect of grain received from third party facilities reflect a reasonable, efficient and necessary approach to managing risks which have the potential to seriously affect both it and all of its Clients, and the efficiency of the export supply chain and the market.

While Viterra Operations typically seeks an indemnity from Approved Third Party Storage providers, the effectiveness of any indemnity necessarily depends on the credit-worthiness and financial standing of the provider. Viterra Operations considers that prevention and appropriate management of risks represents a far superior approach to reliance on any form of indemnity or liability cap. Any indemnity is also unlikely to compensate Viterra Operations or the industry fully for any losses, or negative impact on reputation and efficiency.

2.2.4 The process for approving third party storage facilities

In order to determine whether or not a storage and handling facility meets the criteria for approval as an “Approved Third Party Storage”, Viterra Operations 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.

This is a transparent process. A copy of the deed which sets out the requirements of an Approved Operator as well as the criteria or checklist applied by Viterra Operations to approve facilities is publicly available **[confidential]**.² The public and transparent nature of this process is reflected in the submission to the ACCC by Emerald.

Viterra Operations applies — and has, for a number of years, applied — the criteria set out in the checklist objectively to all applicants without any need for it to be reflected in an access undertaking.

Pursuant to these criteria, Viterra Operations has accredited a number of up-country storage and handling facilities as Approved Third Party Storages. In the past 12 months, it has accredited three facilities **[confidential]**. As noted in Emerald’s submission, its EP Grain joint venture and partner Free Eyre accumulate approximately one-third of the Eyre Peninsula wheat crop.

In addition, Viterra Operations’ willingness to negotiate with, and provide flexible solutions to, third party providers is demonstrated by its proposed approach in relation to applicants which do not satisfy the criteria for “Approved Third Party Storages”.

For these reasons, Viterra Operations does not consider that it is necessary or appropriate to include its criteria or checklist in the Proposed Access Undertaking. To the extent that a client is dissatisfied with the terms on which it obtains access to the Port Terminal Services, it already

² See <http://www.viterra.com.au/Documents?file=3837&type=.pdf> which contains the requirements of an Approved Operator, as well as the facility checklist at Annexure A.

has an ability to seek independent arbitration via the dispute resolution provisions set out in the Proposed Access Undertaking.

3 Other issues

Viterra Operations refers to the submissions made by third parties in response to the Issues Paper. A number of the submissions raised particular points which Viterra Operations has sought to clarify in the attached schedule where those points have not otherwise been dealt with in this submission.

Viterra Operations has not, however, responded to the points raised in third party submissions in respect of processes outside the scope of the Proposed Access Undertaking. These points are more appropriately addressed in discussions with individuals and Viterra Operations would be pleased to have these discussions when it is approached by individuals.

4 Further information

If the Commission has any further questions in relation to the matters set out in this submission, Viterra Operations would be pleased to assist.

Viterra Operations Limited
23 March 2011

Attachment 1

Attachment 1 – Issues raised in submissions to the ACCC

This Attachment sets out Viterro Operations' response to certain issues raised by exporters in their respective submissions to the ACCC. This Attachment seeks to clarify certain matters that have been raised, and to address certain misconceptions which are apparent from the submissions provided to the ACCC.

No.	Issue raised	Viterro Operations' comments
1 Capacity Definition		
1.1	<p>The Emerald Group has submitted that it is important that “capacity” is defined in the Proposed Undertaking “<i>to ensure that bulk handlers are not reserving capacity for their own requirements</i>”. The submission also states that Viterro should be obliged to offer total storage capacity, not just excess or efficient storage capacity.</p>	<p>The Proposed Access Undertaking covers total capacity of the Port Terminal Services, with the total capacity and average capacity figures for each port set out in the relevant Port Schedule. The full capacity is available to all access seekers, including Viterro Ltd, each of which is subject to the same booking processes in respect of that capacity.</p> <p>As the ACCC is aware, the issue of total capacity vs excess capacity was considered by the Australian Competition Tribunal in its decision concerning <i>Fortescue Metals group Limited</i> [2010] ACompT 2 (30 June 2010). This decision is inconsistent with the argument set out in the Emerald Group's submission to the ACCC.</p> <p>At this stage, Viterro Operations intends to continue to offer total capacity under the Proposed Access Undertaking. However, Viterro Operations remains concerned that certain submissions to the ACCC do not appear to appreciate that Viterro Ltd has a clear right to use Viterro Operations' infrastructure, and has a right to make bookings to meet its reasonable capacity requirements. The result of these misconceived complaints may be that Viterro Operations seeks, in the future, to vary the Proposed Access Undertaking (with the ACCC's approval) to address this issue.</p> <p>In relation to Emerald's specific comments concerning the reference to 260,000 mt of storage at Port Adelaide in the Current Access Undertaking, this total capacity is available for all exporters. This has been clarified in Port Schedule A of the Proposed Access Undertaking.</p>

No.	Issue raised	Viterra Operations' comments
2 Capacity table		
2.1	The Emerald Group has suggested that the capacity table should be updated on a monthly basis and Viterra Operations provide a commentary explaining the reasons for any changes to the previous month's capacity estimate.	As set out in the Emerald Group's submission, capacity is dynamic and availability is subject to a number of factors at any given time. It is unclear to Viterra Operations what additional benefit would be provided to exporters by providing capacity updates on a monthly basis. In this regard, Viterra Operations already provides daily updates via the shipping stem, and advises all Clients as soon as practicable if additional capacity becomes available.
3 Port Loading Protocols ("PLPs") / First come first served system		
3.1	The Emerald Group has proposed that Viterra Operations should report to the ACCC each September on the capacity booked by Viterra Ltd on the shipping stem versus the actual capacity shipped by Viterra Ltd. Emerald has also suggested that there should be an automatic audit conducted by ACCC to test adherence to the Proposed Access Undertaking if Viterra Ltd's stem bookings are more than 10% in excess of the quantity of grain shipped by Viterra Ltd.	<p>Viterra Operations does not consider that these mechanisms are necessary:</p> <ul style="list-style-type: none"> • Information about bookings and cancellations is already publicly available on Viterra Operations' website. It is updated every business day. • There is already an audit process under clause 5.5 of the Proposed Access Undertaking which enables the ACCC to audit and consider any potential unjustifiable discrimination. • The ACCC already has powers under the <i>Competition and Consumer Act</i> to investigate any potential breaches of the Proposed Access Undertaking, including the Port Loading Protocols. <p>Viterra Operations also considers that the 10% threshold proposed by Emerald is unnecessary and arbitrary. There are a number of reasons why bookings may be cancelled, including the impact of seasonal variations, global supply conditions, and global commodity price movements.</p> <p>Viterra Operations is not aware of any previous suggestion that Viterra Ltd has overbooked the shipping stem during the 2010/2011 season.</p>
3.2	The Emerald Group has suggested that Viterra Operations should have the flexibility to modify the "first come first served" system to provide a proportion of guaranteed shipping capacity to traders, other than Viterra's trading division.	Viterra Operations has some difficulty in understanding this submission. It is unclear whether Emerald is suggesting that Viterra Operations should reserve a proportion of capacity for Viterra Ltd (and guarantee that the remainder is available for traders other than Viterra Ltd), or whether Emerald is suggesting that everyone except Viterra Ltd should be able to reserve a proportion of

No.	Issue raised	Viterra Operations' comments
		<p>capacity.</p> <p>If it is the former, Viterra Operations is willing to consider this suggestion (see Section 1.1 above).</p> <p>However, Viterra Operations has very substantial difficulty with the latter proposition. It is entirely unclear to Viterra Operations why all exporters (other than the one that spent the money on building the infrastructure) should be able to reserve guaranteed capacity. This is contrary both to section 44ZZA of the <i>Competition and Consumer Act</i> and the Australian Competition Tribunal's decision in the matter of <i>Fortescue Metals Group Limited</i> [2010] ACompT 2 (30 June 2010).</p> <p>In accordance with the Proposed Access Undertaking, there is a requirement that Viterra Operations does not discriminate in favour of Viterra Ltd except to the extent that it can be justified on the basis of cost. There is no obligation (nor should there be any obligation) to impose disadvantageous terms on Viterra Ltd.</p>
3.3	<p>CBH Grain has stated, in its submission, that there is no clear process set out in the Proposed Access Undertaking or PLPs whereby the market is advised well in advance of capacity being made available, which can potentially lead to Viterra booking out large portions of available capacity immediately.</p>	<p>With the exception of the current moratorium on post-1 October 2012 bookings (see Viterra Operations' letter to Clients dated 16 March 2011), the shipping stem is always open, and all exporters (including Viterra Ltd) have an equal opportunity to book capacity on the shipping stem. In addition, if additional capacity is available, Viterra Operations offers to provide that capacity to all exporters at the same time.</p> <p>In these circumstances, Viterra Operations considers that CBH's concern is misconceived.</p> <p>It is also misconceived to suggest that there are no clear processes in place to prevent overbooking by Viterra Ltd or others. These processes are set out in sections 3.1, 3.2 and 12 of the PLPs. Viterra has also implemented internal policies and procedures in relation to Viterra Ltd's bookings.</p> <p>As set out above, Viterra Operations is not aware of any previous suggestion that Viterra Ltd has overbooked the shipping stem during the 2010/2011 season.</p>
3.4	<p>CBH Grain has raised an issue that the PLPs do not adequately protect against overbooking the stem and that the PLPs appear to provide a method whereby the</p>	<p>It is difficult to respond meaningfully to this general and unsupported assertion. See Section 3.3 above.</p>

No.	Issue raised	Viterra Operations' comments
	Port Terminal Operator may discriminate against third parties seeking access.	
3.5	CBH Grain has noted that, in the early stages, Viterra Operations' adherence to requiring certain information in relation to bookings was not consistent across all participants. CBH Grain would like to ensure that the same level of information is clearly required from all participants and that information is required to be correct to the best of the participant's knowledge.	<p>Viterra Operations has previously acknowledged that there were some operational issues early in the transitional phase in the 2009/2010. Those issues have been addressed. Viterra Operations applies the booking process in accordance with the PLPs and consistently in relation to all applicants.</p> <p>Viterra Operations requires the same information from all applicants. In this regard AGEA has stated in its submission that <i>"AGEA members report that, more recently, Viterra has queried them where bookings have varied significantly from previous activity which suggests that Viterra is exercising diligence in managing bookings"</i>. This is further demonstrated by Viterra Operations' letter to all Clients dated 16 March 2011.</p> <p>In relation to CBH's final point, Viterra Operations would hope that its Clients provide it with correct information. However, it is unclear how this might be reinforced or policed simply by Viterra Operations stating in its access undertaking that users should provide correct information.</p>
3.6	CBH Grain has suggested that, without sufficient protections or the ability for market participants to transfer capacity, the port terminal operator may stand to make a windfall gain under the "first come first served" system.	It is difficult for Viterra Operations to respond meaningfully, as CBH Grain has not provided any details in relation to the manner in which the system could potentially result in a windfall gain to Viterra Operations. Please see our comments above.
3.7	CBH Grain has submitted that it is not appropriate or necessary for Viterra Operations to have up to five business days to respond on acceptance or rejection of a nomination.	<p>As the ACCC is aware, this was a change to the PLPs that Viterra Operations made with the support of the majority of its Clients. Previously, Viterra Operations was in the position that, if it could not find capacity within two business days, it was required to accept or reject the booking. Invariably, this involved rejecting some bookings.</p> <p>Both Viterra Operations and Clients recognised that a preferable approach was to provide a slightly longer period of time for Viterra Operations to explore capacity options for Clients.</p> <p>Viterra Operations is not aware of other Clients having concerns with this approach.</p>
3.8	Pursuant to clause 7.1.1 of the PLPs, Viterra Operations will determine the order of vessel loading on the basis of whether the Client has met certain conditions	Whether or not cargo for the named vessel is available and is in shipping position is clearly a practical consideration. Viterra Operations cannot load

No.	Issue raised	Viterra Operations' comments
	including whether the cargo for the named vessel is available and in shipping position. CBH Grain has questioned whether an appropriate factor to consider in this regard is the fact that Viterra Operations is the party in control of whether or not grain is in a shipping position at its ports.	<p>wheat that is not available or ready for shipping. Clients can request Viterra Operations to do this on their behalf, or they may elect to do it themselves.</p> <p>In addition, clause 7.1.1 of the PLPs should not be read in isolation. Clients may have rights under the Standard Terms and/or S&H agreement in circumstances where a delay or default is caused by Viterra Operations.</p>
3.9	CBH Grain has submitted that it is not 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 PLPs (this is especially the case for Export Standard cargoes). This 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.	<p>Viterra Operations has consulted extensively with its Clients in relation to the Table A (and other) requirements under the PLPs. 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.</p> <p>Viterra Operations 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.</p> <p>Viterra Operations has foreshadowed ongoing consultation with Clients in relation to the PLPs, and is prepared to include this in the list of issues for consultation.</p>
3.10	AGEA has referred to a number of examples given by members where performance against Export Select bookings has been adversely impacted by acceptance of Export Standard bookings, but in which circumstances Viterra Operations has not accepted responsibility for problems resulting in non-performance.	Viterra Operations is not aware of the examples referred to by AGEA. They have not been raised directly with Viterra Operations. Accordingly, we are not at this stage in a position to comment meaningfully.
3.11	AGEA has suggested that grain being placed at port for shipment from third party storages may be hindered in operational terms such as with regard to operating hours.	Viterra Operations is not aware of the basis for this suggestion. All operational matters (e.g. operational hours etc) are governed by genuine operational and safety considerations, rather than whether the grain is from Viterra Operations' storage or third party storage.
3.12	AWB has suggested that the "first come first served" approach does not efficiently allocate capacity and favours Viterra's trading arm because Viterra's trading arm is aware of the timeline for the commencement of the seasonal slot booking process before third parties.	<p>This suggestion is misconceived. Subject to the current communication in relation to bookings post-1 October 2012, the shipping stem is always open for bookings. Accordingly, there is no "commencement of the seasonal slot booking process".</p> <p>The team responsible for trading and shipping booking activities at Viterra Ltd does not have access to information concerning the operation of the shipping</p>

No.	Issue raised	Viterra Operations' comments
		stem that is not also available to all exporters.
4 Flexibility to vary Port Loading protocols		
4.1	CBH Grain has questioned why "Users" who are not "Major Users" are not required to be notified by Viterra of changes to the PLPs.	<p>The intention of the PLPs providing that "Major Users" are required to be notified of changes to the PLPs is to ensure that people who use the Port Terminals relatively frequently (as opposed to users who may have one shipment every 2-3 years) are consulted in relation to any changes. In practice, however, Viterra Operations consults with all existing users and also publishes consultation and variation notices on its website.</p> <p>Viterra Operations notes that a number of submissions have expressed support for the process adopted for changes to the PLPs.</p>
5 Publication of key port information		
5.1	AWB has submitted that key port information about capacity should be provided in "near to real time" for it to have practical benefit to potential Clients of Viterra Operations. This would include information pertaining to: available capacity at port; details of recent or current interior transport discharge; status of ship loading; and storage volume utilisation at port.	Viterra Operations is concerned that AWB's proposal would impose a very large administrative burden on Viterra Operations with no real added benefit to Clients, given that the shipping stem is updated every business day and other real time information can be obtained by speaking directly with Viterra Operations staff.
5.2	CBH Grain has submitted that key port information should be published each quarter (containing year to date information) and should be published not more than 7 days after the end of the relevant quarter.	Again, Viterra Operations is concerned that CBH's proposal would impose an additional administrative burden on Viterra Operations with no real additional benefit to Clients. Indeed, it is not clear to Viterra Operations what the benefit of this suggestion is for exporters.
6 Substance of Indicative Access Agreement		
6.1	The Emerald Group has suggested that the Indicative Access Agreement contains a number of terms which are "one-sided" in favour of Viterra.	Viterra Operations does not agree with this assessment. However, in any event, applicants are able to negotiate with Viterra Operations in relation to the Standard Terms. If they are unable to agree, applicant have a right to seek binding arbitration. Viterra Operations notes that since the commencement of the Current Access Undertaking in 2009, no applicant has sought mediation or arbitration in relation to the terms of access.
6.2	AGEA has suggested that there is lack of clarity in relation to whether the standard terms of the Indicative Access Agreement can be varied. It has submitted that it would assist if the ACCC provided clear guidelines on the ability to vary standard	Viterra Operations does not consider that there is any lack of clarity (see the Note below clauses 4.1, 5.1 and 5.2 of the Proposed Access Undertaking. See

No.	Issue raised	Viterra Operations' comments
	terms and that such terms should not be less advantageous than those applying to the Viterra trading division.	also clause 5.5 of the Proposed Access Undertaking).
6.3	CBH Grain has stated that it would like to see an express obligation in the Indicative Access Agreement that Viterra Operations will not pass any information concerning CBH Grain to Viterra Limited without CBH Grain's express consent. In particular, CBH Grain would like to ensure that information about its activities are not passed to Viterra's trading division.	<p>This is already addressed in both the Proposed Access Undertaking (clause 8.1) and the Standard Terms (clause 20.1). Viterra Operations can only use confidential information for the purpose of negotiating an agreement or in any dispute related to the agreement.</p> <p>As set out above, clause 20.1 could be the subject of further negotiation if requested by an individual applicant.</p>
6.4	CBH Grain has submitted that the liability cap for the destruction of Bulk Wheat caused by the gross negligence or wilful default is too small. It would be appropriate and more in line with industry practice for Viterra Operations to fully compensate an affected party in this instance.	Viterra Operations does not agree with this assessment. However, in any event, applicants are able to negotiate with Viterra Operations in relation to the Standard Terms. If they are unable to agree, applicant have a right to seek binding arbitration.
6.5	CBH Grain has submitted that, if Viterra Operations is refusing to outturn grain on the basis of an alleged security interest, then it must immediately provide the full details of the claim and supporting evidence to the Client.	This is not a real issue in practice. In practice, Viterra Operations would have to provide a reason if it refused to outturn a Client's wheat. It would also be in Viterra Operations' interests to disclose this if it were the reason that it did not comply with a Client's request.
7 Approved third party store		
7.1	AWB has submitted that the third party store approval process should be documented and made available to the public. AWB states that it has never been approached with the criteria.	<p>As acknowledged in certain submissions to the ACCC, the process is documented and publicly available.</p> <p>All AWB GrainFlow storage facilities in South Australia have been approved as Approved Third Party Storages.</p>
7.2	AWB has submitted that the SA GrainFlow sites test and define grain quality more accurately than the visual assessment approach of grain quality adopted by Viterra at the majority of their sites for the 2010/2011 harvest.	Viterra Operations does not agree with this assertion. As set out in the main submission, Viterra Operations' storage and handling facilities and processes operate at a higher level than is required from Approved Third Party Storage facilities.
7.3	AWB has submitted that Viterra lack the sophistication of AWB GrainFlow's quality management systems, as evidenced by this seasons performance. AWB refers the ACCC "to many media reports on this issue that have been produced in recent months"	Viterra Operations does not agree with this assertion and notes that many of the recent media reports would appear to involve unsubstantiated claims and competing agendas by various participants in the industry. Viterra Operations' storage and handling facilities and processes operate at a higher level than is

No.	Issue raised	Viterrra Operations' comments
		required from Approved Third Party Storage facilities.
7.4	<p>AWB has stated that in its view:</p> <ul style="list-style-type: none"> • Export Select rates do not reflect the actual cost of execution and are designed to minimise the potential competition by drawing grain away from GrainFlow sites; • Viterrra's current contracted rail provider GWA charges non-commercial track access fees and Viterrra controls access to a receival site at Pinaroo operated by GrainFlow; and • Viterrra controls the scheduling process of rail into their ports and Grainflow customers find it difficult to schedule trains from GrainFlow sites as a result. 	<p>Viterrra Operations does not agree with these assertions. As set out in the submission, Viterrra Operations' charges reflect the services that it provides at port for wheat received from approved and non-approved third party storage facilities.</p> <p>Viterrra Operations notes that the issues raised by AWB in relation to above and below rail services do not relate to services provided by Viterrra Operations and, in particular, do not relate to Port Terminal Services which are the subject of the Proposed Access Undertaking.</p> <p>In relation to AWB's comment concerning GWA, Viterrra Operations has an agreement with the rail provider GWA to use the rail network in South Australia and Victoria to transport grain to port in a cost-effective manner. The issue of access arrangements on GWA owner branch lines has nothing to do with the Viterrra Operations / GWA contract.</p> <p>GWA's access prices on the Pinaroo Line are overseen by the Essential Services Commission of South Australia (ESCOSA).</p> <p>In relation to AWB's comments concerning the scheduling of rail, Viterrra Operations notes that scheduling arrangements are driven by operational efficiency and safety considerations.</p>
7.5	<p>AWB has submitted that Viterrra has transferred operational risk exposures arising out of the management of the grain export task to the shipper while increasing the cost of using their supply chain. An example is provided of a Port Handling and Shipping fee in one port for one period of time being increased by 22% from the previous shipping year.</p>	<p>Viterrra Operations does not understand the specific issue raised by AWB in relation to operational risk exposure. Without understanding the precise issue, it is difficult to comment meaningfully (although Viterrra Operations would be pleased to engage directly with AWB in relation to this issue).</p> <p>In relation to the price increase cited by AWB, Viterrra Operations does from time to time increase prices between service years if there has been an increase in the cost of providing the services. The Reference Prices may also reflect that the cost of providing services is higher in the harvest period than in the non-harvest period, and accordingly specify a higher price for certain services in the harvest period. This is not inconsistent with Viterrra Operations' legitimate commercial interests or the negotiate / arbitrate framework under the Proposed Access Undertaking.</p>

No.	Issue raised	Viterra Operations' comments
7.6	<p>AWB has referred to a situation where an accredited exporter nominated a vessel to arrive during harvest and received Viterra's confirmation that it would be loaded upon arrival. However, 10 days before ETA, Viterra would not re-confirm and stated that due to late harvest the ship would be loaded when the stock was available, although provided no guarantee when this would be. AWB has also raised that, when the exporter arranged another vessel with a later ETA to reduce demurrage, Viterra charged the \$2.00 per mt charge for when vessels arrive late. AWB states this is an "example of penalties rather than fees based on the actual costs incurred by Viterra".</p>	<p>Viterra Operations is happy to engage with specific clients in relation to issues if those issues are raised with it. We would note that Clients not having sufficient stocks, Clients changing their bookings, and vessels arriving late involve costs for the Port Terminal Operator, and vessel variation and shipping repositioning fees are set out and explained in the published Reference Prices.</p>
7.7	<p>AWB has submitted that Viterra Operations discriminates against its competitor exporters by, for example, withholding the following information (with no explanation) from exporters of grain stock quality data which creates an unfair advantage:</p> <ul style="list-style-type: none"> representative shipping quality data after loading from samples it has collected and analysed; and harvest zone representative samples on request for the 2010/11 period (it is noted that Viterra Operations took a few months to reply to these requests with a statement that it was under-resourced and had no time to provide the requested samples, and that no samples have been provided to AWB since January 2011). <p>AWB has submitted that Viterra Operations should provide exporters with information on the quality of stock which has been accumulated for vessels, including a Cargo Quality Document or Authority to Load with predicated load specifications and grade tonnages being used for sign off by the relevant exporter prior to loading.</p>	<p>Viterra Operations provides the same information to AWB as it supplies to all exporters. AWB has requested a significant level of additional testing and information. However, as discussed with AWB, this would involve a material burden and significant increased costs.</p> <p>Viterra Operations does not currently have the resources to provide the customised and individualised sampling and information requested by AWB, particularly as no other Clients have requested this level of testing.</p> <p>Viterra Operations' Reference Prices - Explanatory Notes state (at C3) that:</p> <p><i>"The standard ship sampling procedures (performed as a component of this fee) include a running sample for every vessel's hatch and a composite sample (for the entire vessel). Sampling required in excess of the standard offering must be negotiated between the Company and the Client prior to the offering of any such service".</i></p> <p>[Confidential]</p> <p>For completeness, Viterra Operations notes the developments and improvements to its ezigrain facility, which demonstrate its commitment to providing information to exporters.</p>
8 Other issues		
8.1	<p>The Emerald Group has submitted that there should be an audit mechanism in the Proposed Access Undertaking.</p>	<p>Please see clause 5.5 of the Proposed Access Undertaking. The ACCC also has powers under the <i>Competition and Consumer Act 2010</i> to review any potential breach of an access undertaking.</p>

No.	Issue raised	Viterra Operations' comments
8.2	CBH Grain has submitted that it would be more appropriate to provide that the officers handling a dispute must be authorised to settle the dispute, rather than relying on position titles that may not be appropriate. In either case each party must put forward a representative who has full authority to bind that party to the outcome of the mediation.	Viterra Operations' Executive General Manager - Grain is authorised to settle disputes under the Proposed Access Undertaking. Viterra Operations' intention in appointing the Executive General Manager - Grain was to ensure that a sufficiently senior executive would be involved in settling any dispute.
8.3	CBH Grain has submitted that it is inappropriate to include a notice provision that allows for the date of provision of emails to be determined by when the recipient returns to work.	<p>Viterra Operations considers that any notices provided under the Proposed Access Undertaking should be formally sent and received. It is not sufficient that an access seeker sends an email without any reference to whether or not that email is actually received.</p> <p>Access seekers have a choice whether they send notices by mail, fax and email. If this is an issue, Viterra Operations would propose to delete email as a means by which notices under the Proposed Access Undertaking can be sent.</p>
8.4	In its submission, SAFF has noted that it has received complaints from growers about a wide range of operational issues when dealing with Viterra.	<p>Viterra Operations acknowledges that harvest issues arise from time to time. Viterra Operations would be pleased to discuss the issues raised with the individuals concerned.</p> <p>Consistent with its commitment to continuous improvement, Viterra Operations has also commenced a voluntary Post-Harvest Review to examine harvest performance issues in the context of the South Australian grain harvest in 2010/11, exploring the impact of widespread rain in early December and record volumes of production in South Australia.</p> <p>The review will investigate ways to improve Viterra Operations' service delivery, communication and methods of consultation with growers and stakeholders.</p> <p>The review process will engage with key industry stakeholders, including growers and their representative groups, industry bodies, companies and government agencies. A review working group has been set up with internal and external participants, including the former Premier of South Australia, the Hon Rob Kerin.</p> <p>The Working Group will give consideration to issues that influence the efficient operation of Viterra Operations' South Australian grain handling and storage</p>

No.	Issue raised	Viterra Operations' comments
		<p>network, including:</p> <ul style="list-style-type: none"> • communication to growers and carriers during and prior to harvest; • information provision for the benefit of growers, including warehouse and quality data disclosure during 2010/11; • available storage capacity, including the number of segregations made available during harvest; • grain classification, including sampling, assessment techniques (visual and objective), standards and classifier training; • site opening hours and service delivery to growers and carriers; • awareness of on-site safety procedures and protocols for all visitors to Viterra sites; • harvest forecasting; and • any other factors that may have impacted upon service delivery to growers during 2010/11 harvest.
8.5	SAFF has stated that Viterra controls the majority of road and rail logistics in the SA grains export supply chain.	This is misconceived. Viterra Operations has certain rail haulage agreements which it has negotiated on commercial arms length terms (see Section 7.4 above). It also seeks to manage receivals into port in an efficient manner. However, Viterra Operations does not own and operate the road, track or rail infrastructure in South Australia.

Attachment 2

[Confidential]