



**Viterra Operations Limited**

**ABN 88 007 556 256**

**2011 Port Terminal Services Access Undertaking**  
**Submission to the Australian Competition and Consumer**  
**Commission**

**1. Introduction**

*Purpose of submission*

- 1.1 Viterra Operations Ltd (“**Viterra Operations**”) makes this submission in support of its proposed 2011 Port Terminal Services Access Undertaking (“**Proposed Access Undertaking**”).
- 1.2 The Proposed Access Undertaking is submitted to the Commission for approval under section 44ZZA of the *Trade Practices Act 1974* (Cth) (“**TPA**”).
- 1.3 Viterra Operations is seeking approval of the Proposed Access Undertaking because:
  - (a) its associated entity, Viterra Ltd, is an accredited wheat exporter under the *Wheat Export Accreditation Scheme* (“**Scheme**”). Subject to any changes to the current regulatory arrangements in relation to bulk wheat exports, Viterra Ltd will be seeking to renew that accreditation when it expires on 30 September 2011;
  - (b) the *Wheat Export Marketing Act 2008* (Cth) (“**WEMA**”) and the Scheme provide that Viterra Ltd is not eligible for accreditation unless Viterra Operations (which provides Port Terminal Services) passes the “access test” in relation to each of those Port Terminal Services. Viterra Operations can satisfy the “access test” if there is in operation an access undertaking under Division 6 of Part IIIA of the TPA; and
  - (c) Viterra Operations’ current access undertaking approved by the Commission on 29 September 2009 (“**Current Access Undertaking**”) expires on 30 September 2011.

*The Proposed Access Undertaking*

- 1.4 The terms on which Viterra Operations currently provides access to its Port Terminal Services are governed by the Current Access Undertaking. The Proposed Access Undertaking in large part involves a roll-over of the Current Access Undertaking for a further period of 3 years. However, it also includes a number of changes to:

- (a) facilitate the transition from the Current Access Undertaking to the Proposed Access Undertaking (and to ensure continuous coverage);
  - (b) accommodate potential changes to the regulatory framework for exporting bulk wheat (in particular, the possible removal of any requirement for accreditation by Wheat Exports Australia (“WEA”)), and to ensure that the Proposed Access Undertaking will continue to operate effectively regardless of whether or not the Productivity Commission’s recent recommendations in relation to accreditation are adopted, either before or after the commencement of the Proposed Access Undertaking;
  - (c) reflect that AusBulk Ltd (the provider of the Current Access Undertaking) is now called Viterra Operations;
  - (d) provide greater clarity in relation to the process for issuing notices and other communications;
  - (e) reflect changes that have been made to Viterra Operations’ Port Loading Protocols (“**Protocols**”), which have been made in consultation with its Clients in accordance with the process set out in the Protocols;
  - (f) provide additional information in the Port Schedules in relation to the specific Port Terminal Services provided at each Port Terminal (and, in particular, information to assist Applicants and Users by providing further information in relation to operational arrangements and capacity at those Port Terminals); and
  - (g) update the Standard Terms to ensure greater alignment with the Proposed Access Undertaking.
- 1.5 A copy of the Proposed Access Undertaking (including the Standard Terms and the Protocols) is set out in Attachment 2. For the convenience of the Commission and our Clients, we have marked up all changes from the Current Access Undertaking and the current Standard Terms. The Protocols reflect the changes set out in the Variation Notice issued by Viterra Operations on 25 October 2010 (with one minor change in clause 14.3.5).

***Further information***

- 1.6 Viterra Operations has provided the Commission with a considerable amount of information in relation to its operations, the wheat export industry, the South Australian supply chain and the global market in its submissions in relation to the Current Access Undertaking in 2009.
- 1.7 This submission is not intended to repeat the information provided in those submissions. Rather, this submission seeks to update the Commission on Viterra Operations’ activities and matters affecting the bulk wheat export industry in 2009-2010.
- 1.8 This submission also explains the changes contained in the Proposed Access Undertaking, and why the Proposed Access Undertaking satisfies the criteria for acceptance by the Commission set out in section 44ZZA of the TPA.

## 2. Executive Summary

### *The framework in the Current Access Undertaking remains appropriate*

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

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

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

2.3 Accordingly, this framework remains appropriate for the Proposed Access Undertaking.

### *The 2009/2010 shipping season and improvements to Viterra Operations' processes*

2.4 Viterra Operations acknowledges that there were a number of challenges which arose at the start of the 2009/2010 shipping season for both itself and its Clients. Those issues arose for a number of reasons, including:

- (a) lower than anticipated levels of global demand at the start of the shipping season (which resulted in a relatively high level of unfulfilled bookings or shipping slots);
- (b) the impact of the auction system in its first year of operation in Western Australia (which Viterra Operations understands drove the timing of certain bookings and cancellations in South Australia). This is further explained in the Productivity Commission's report<sup>1</sup>; and
- (c) the need for both Viterra Operations and its Clients to adjust to the operation of the new Protocols in their first year of operation. This, in turn, resulted in Viterra Operations identifying a number of areas of potential improvement to further facilitate the efficient operation of the Port Terminal Services, and the level of transparency and certainty provided to Clients.

2.5 To address these issues, Viterra Operations has voluntarily (and in consultation with its Clients, WEA and the Commission) implemented a number of improvements to its

<sup>1</sup> Productivity Commission Report, *Wheat Export Marketing Arrangements*, 28 October 2010, page 219.

systems and business processes during the course of the past year. Those improvements include:

- (a) publishing a “capacity table” on its website to provide greater clarity to Clients in relation to available Export Standard and Export Select capacity;
  - (b) amending the shipping stem to include commodity information to provide greater transparency and information for Clients;
  - (c) implementing a number of improvements in communications with Clients and providing an increased level of information to the industry, including:
    - (i) access to grower warehouse information;
    - (ii) information in relation to commodity quality;
    - (iii) additional information on the shipping stem (e.g. date and time of vessel naming);
    - (iv) increased information regarding exported grain; and
    - (v) direct (and simultaneous) email communications with existing and potential Clients to advise when additional capacity may become available. Viterra Operations’ experience has been that this is a highly effective way of providing accurate, relevant and up to date information to Clients in relation to available capacity at Port Terminals;
  - (d) amending the Protocols to provide greater flexibility and clarity around the booking process for Clients (2 December 2009); and
  - (e) undertaking substantial consultation with Clients, and seeking feedback from WEA and the Commission, in relation to further amendments to the Protocols. Those amendments, which became effective from 12 November 2010, reflect a range of improvements which have been identified by Viterra Operations and others from the experience of the first year of operation of the Protocols.
- 2.6 During the 2009/2010 shipping season, Viterra Operations also actively engaged with its Clients to seek to provide additional capacity to Port Terminal Services during peak periods.
- 2.7 Viterra Operations’ commitment to providing access to its Clients in accordance with the Current Access Undertaking is demonstrated by the fact that:
- (a) there have been no Disputes under clause 7 of the Current Access Undertaking (which enables access seekers to seek arbitration by the Commission if they are unable to agree with Viterra Operations on the terms of access to the Port Terminal Services);
  - (b) there have been no disputes under Access Agreements entered into under the framework of the Current Access Undertaking; and

- (c) there has been only a small number of disputes under the Protocols, each of which was resolved expeditiously in accordance with the process and time frames set out in the Protocols.

### *The Proposed Access Undertaking*

2.8 Having regard to these matters, Viterra Operations considers that:

- (a) the negotiate / publish / arbitrate framework and other provisions set out in the Current Access Undertaking remain appropriate for the Proposed Access Undertaking;
- (b) the Protocols (as amended) set out a number of improvements which provide greater transparency and certainty for Clients, and further facilitate the efficient provision of Port Terminal Services. This has been facilitated by the mechanism for making variations to the Protocols; and
- (c) the Proposed Access Undertaking (including the Protocols as amended) satisfy the criteria for acceptance by the Commission set out in section 44ZZA of the TPA.

2.9 The Proposed Access Undertaking reflects a number of changes which Viterra Operations considers will facilitate the efficient operation of its Port Terminals, deliver benefits to Clients, and provide greater certainty and transparency in relation to the provision of Port Terminal Services. In addition, consistent with the views expressed by the Productivity Commission, the proposed “roll-forward” of Current Access Undertaking seeks to avoid “unnecessary” changes and prevent Viterra Operations, its Clients and ultimately growers from incurring additional costs.

## **3. Overview of the 2009/2010 export season**

### *Port Terminal Services Operations*

3.1 Table 1 below sets out an overview of operations at Viterra Operations’ port terminals during the period from 1 October 2009 to 30 September 2010.

**Table 1**

Number of bulk wheat exporters through Viterra Operations’ port terminals	13
Tonnes of bulk wheat exported through Viterra Operations’ port terminals	2,696,948
Tonnes of bulk wheat exported by third party exporters through Viterra Operations’ port terminals	[ <i>Confidential</i> ]
Number of bookings accepted from third party exporters - bulk wheat	140
Number of vessels loaded - bulk wheat	114
Number of vessels loaded for third party	85

exporters - bulk wheat	
Tonnes of bulk wheat booked and shipped for export 2010/11 season <sup>2</sup>	[Confidential]
Tonnes of bulk wheat booked and shipped for export 2010/11 season by third parties <sup>3</sup>	[Confidential]

- 3.2 During the past 12 months, Viterra Operations has also approved three third party storage facilities. Those facilities were approved in accordance with Viterra Operations' approval criteria which is available on its website ([www.viterra.com.au/grain/australia/storage-handling/resources](http://www.viterra.com.au/grain/australia/storage-handling/resources)). Viterra Operations is continuing to apply this criteria in respect of other third party facilities.

*The operation of the dispute resolution processes*

- 3.3 The Current Access Undertaking provides for separate dispute resolution mechanisms under:
- (a) the Current Access Undertaking (which enables mediation or arbitration in relation to the terms of access to Viterra Operations' Port Terminal Services);
  - (b) the Standard Terms or Access Agreements entered into in accordance with the Current Access Undertaking (which enable mediation or arbitration of disputes arising under concluded Access Agreements); and
  - (c) the Protocols (which enable quick resolution of operational issues arising in relation to the booking and nomination processes and port terminal operations).
- 3.4 During the period from 1 October 2009 to 30 September 2010, there were no Disputes under either the Access Undertaking or Access Agreements and Clients raised only a small number of disputes under the Protocols in relation to bulk wheat. As set out in the Dispute Report provided to the Commission on 31 July 2010 in accordance with clause 7.1(d) of the Current Access Undertaking, each of those disputes was resolved in accordance with the process and time frames set out in the Protocols.
- 3.5 In response to certain disputes raised by Clients, Viterra Operations also engaged with the relevant Clients to discuss possible improvements to the Protocols and Viterra Operations' processes.
- 3.6 Having regard to these matters, Viterra Operations considers that the negotiate / publish / arbitrate framework set out in the Current Access Undertaking -- and the processes for resolving disputes set out in the Current Access Undertaking, the Standard Terms and the Protocols:
- (a) have worked well during their first year of operation; and

<sup>2</sup> Current as at 6 December 2010.

<sup>3</sup> Current as at 6 December 2010.

- (b) appropriately balance the legitimate interests of Viterra Operations and its Clients.

[*Confidential*]

#### **4. Variations to the Protocols**

- 4.1 As discussed with the Commission during the process for seeking approval for the Current Access Undertaking, the Protocols are primarily intended to be an operational document which sets out the process for:
  - (a) applying for, accepting and cancelling bookings; and
  - (b) allocating priority to vessels (given the wide range of operational factors which can affect the efficient operation of port terminals).
- 4.2 The Protocols are also intended to be a document that can evolve to respond to operational improvements identified by Viterra Operations, either independently or through its ongoing discussions with Clients and regulators. Viterra Operations is committed to implementing ongoing improvements to the Protocols to facilitate the increased efficiency of its operations.
- 4.3 To this end -- and largely in response to issues raised by Clients -- Viterra Operations has implemented 2 processes to vary the Protocols in the past 12 months. Viterra Operations has also committed to consider further a number of additional business issues raised by Clients during the most recent consultation process.

#### ***The variation in December 2009***

- 4.4 In December 2009, Viterra Operations implemented a variation to the Protocols to provide greater flexibility and clarity around the booking process for Clients. The amendment arose directly out of discussions with a Client which identified that Viterra Operations would be better able to provide solutions to Clients if the booking acceptance response time was extended from 2 business days to 5 business days. This would allow more time for negotiation with Clients on alternative arrangements (i.e. rather than Viterra Operations having to reject bookings because it could not fully explore alternative solutions with Clients during the mandated 2 business day period for booking acceptances). This amendment was supported by a range of Clients.

#### ***The proposed variations in November 2010***

- 4.5 On 25 October 2010, Viterra Operations issued a Variation Notice setting out a number of further variations to the Protocols. The variations took effect on 12 November 2010.
- 4.6 The proposed variations reflect feedback that Viterra Operations has received from Clients, and a number of areas of operational improvement that Viterra Operations has identified, during the first year of operation of the Protocols. Specifically, the proposed variations involve:
  - (a) streamlining systems for both Clients and Viterra Operations, by allowing bookings to be electronically logged, tracked and managed;
  - (b) enabling Clients to “split” bookings. This provides significant additional flexibility to Clients to facilitate exports and throughput;

- (c) responding to Clients' requests for prioritisation based on turn of arrival, rather than naming. This is anticipated to facilitate greater operational efficiency;
  - (d) providing an ability to re-prioritise if an exporter is not willing to work a vessel on a 24 hour / 7 day a week basis, and another exporter is prepared to do so;
  - (e) providing an ability to re-prioritise vessels if certain conditions are not satisfied, specifically having regard to factors which will facilitate efficiency and throughput;
  - (f) providing a "Grace Period" to provide further flexibility for Clients;
  - (g) providing an ability for Viterra Operations to notify Clients of non-compliance with requirements and, if that non-compliance is not rectified, to remove the booking from the shipping stem; and
  - (h) providing an ability for Viterra Operations to remove bookings from the shipping stem if vessels do not arrive within the booking slot or Grace Period.
- 4.7 Viterra Operations has consulted extensively with Clients and others in relation to these proposed amendments and, in general, the feedback that Viterra Operations received from Clients in relation to the proposed variations has been very positive. This reflects the fact that many of the changes are being made specifically in response to issues identified by Clients.
- 4.8 In response to the feedback provided by Clients and other stakeholders, Viterra Operations has also proposed a number of further variations to the Protocols. Those further variations include:
- (a) moving the key components of the proposed Explanatory Notes from the Explanatory Notes into the actual Protocols. This was in direct response to feedback provided about the desire to avoid confusion about the status of the Explanatory Notes;
  - (b) making it clear that, if a booking is split, the date of nomination for each "split" booking will be the same date as the original booking;
  - (c) making it clear that, if two or more vessels arrive at the same time, the vessel that drops anchor first will be considered to be the first arrived vessel for the purposes of "turn of arrival" priority;
  - (d) facilitating bookings where the Client nominates a vessel and specifies the ETA in accordance with Item 5 of Table A (i.e. "short nominations"). In this situation, Viterra will take reasonable steps to accommodate the vessel if capacity and stock are available; and
  - (e) updating the dispute resolution procedures so that they reflect the current title of the relevant Viterra executive.
- 4.9 A copy of the Protocols (as varied) are set out in Schedule 2 to the Proposed Access Undertaking.



*Further issues raised during the Protocols consultation process*

- 4.10 During the consultation process, a small number of Clients and other stakeholders also raised certain additional or new issues that will require further consideration. By way of example, those additional matters included proposals to create an ability to move slots between months, obtain further information in relation to capacity, and create further incentives for the removal of bookings prior to the commencement of shipping windows (including potential changes to Viterra Operations' charging structure for bookings).
- 4.11 Viterra Operations is committed to considering all matters raised by Clients (whether as part of or separate to the consultation process). However, given the potential impact of matters listed above on both the efficiency of the Port Terminal Services and on Clients, we consider that they require more detailed scrutiny, and further detailed consultation with Clients and others.
- 4.12 Given the work required to explore and progress these additional proposals, Viterra Operations has decided not to delay the implementation of the proposed improvements to the Protocols (which occurred on 12 November 2010) while it undertakes that work.

*Summary*

- 4.13 Consistent with Viterra Operations' commitment to consider additional issues that have been raised by Clients, it is possible that there may be further changes to the Protocols. This will depend on the outcome of the consultation process with Clients. Any changes would be made in accordance with the process for variations set out in the Protocols and in the Current Access Undertaking or the Proposed Access Undertaking (as the case requires).
- 4.14 In its Protocols Variation Notice dated 25 October 2010, Viterra Operations indicated that it would consider and consult with its Clients further in relation to the additional issues raised by Clients after the peak harvest period (i.e. in early 2011). Viterra Operations is naturally mindful of the potential impact of any further changes to the Protocols on the Commission's process and timing for considering the Proposed Access Undertaking. Viterra Operations will work closely with its Clients and the Commission in relation to this issue. However, for the avoidance of doubt, Viterra Operations is seeking approval for the current Protocols which form Schedule 2 to the Proposed Access Undertaking.
- 4.15 The Protocols are (and are intended to be) an evolving document. However, importantly, Viterra Operations considers that:
- (a) the Protocols (as currently drafted) contain a number of improvements to the Protocols which applied from 29 September 2009. Many of those changes were made specifically in response to issues raised by Clients;
  - (b) the Protocols continue to provide an appropriate balance between the transparency, certainty and flexibility required by both Clients and Viterra Operations, and balance the legitimate interests of both access seekers and Viterra Operations in accordance with the criteria specified in section 44ZZA of the TPA;
  - (c) the dispute resolution process set out in the Protocols has been exercised responsibly and in good faith by Viterra Operations, and remains appropriate

to enable Viterra Operations to resolve operational disputes and balance potentially competing requirements in a quick and efficient manner; and

- (d) the process for varying Protocols has been exercised responsibly by Viterra Operations, and that process remains appropriate to enable Viterra Operations to respond to operational issues which may arise during the term of the Proposed Access Undertaking.

## **5. Explanation of changes to the Proposed Access Undertaking**

### *Overview*

5.1 The Proposed Access Undertaking involves a “roll forward” of the Current Access Undertaking, which incorporates changes to the Protocols made during the period October 2009 to November 2010. This “roll forward” is appropriate for the following reasons:

- (a) the Current Access Undertaking was successful in providing a framework for the successful negotiation of access to Viterra Operations’ Port Terminal Services for 13 access seekers (including Viterra Ltd) on non-discriminatory terms, supported by effective dispute resolution procedures and substantial regulatory oversight. This involved providing access to all parties who submitted an access application;
- (b) the success and continued appropriateness of this framework is demonstrated by the fact that no access seekers sought to commence any Dispute under the Current Access Undertaking, and the small number of disputes raised under the Protocols were dealt with swiftly and effectively in accordance with the processes set out for dealing with such disputes under the Protocols;
- (c) the Protocols (as drafted) provide Viterra Operations with an ability to manage and respond to operational issues identified by Clients and to address operational matters as they are identified. During the period October 2009 to November 2010, Viterra Operations implemented the process for varying the Protocols responsibly and in a responsive manner for the benefit of its Clients. In fact, each of the changes made to the Protocols during that period were intended to respond to opportunities for improvement identified by Clients and other stakeholders; and
- (d) Viterra Operations considers that a roll-over of the Current Access Undertaking will provide regulatory certainty to exporters. This is an important issue. Viterra has dedicated substantial resources to implementing business practices and to working and consulting with its Clients and other stakeholders on new procedures to support the processes set out in the Current Access Undertaking and in the Protocols.

The relatively quick transition from the single desk (which previously operated for nearly 60 years) to competition (as identified by the Productivity Commission in its report) has involved a degree of adjustment -- and also, realistically, some trial and error -- by both Viterra Operations and its Clients. Viterra Operations has responded to these opportunities by implementing a number of improvements and voluntary changes to provide further certainty and transparency to Clients.

- 5.2 Viterra Operations considers that maintaining the current framework (and the impetus for further commercial engagement with Clients and constructive developments in systems and procedures) will give rise to significant benefits in terms of cost savings, transparency, efficiency and certainty.
- 5.3 This is also consistent with the approach advocated by the Productivity Commission in its recent report (see section 2.9 above). In this regard, we also note that the Productivity Commission’s report highlighted that:
- “While the access test has provided benefits (particularly in the short term), it has also imposed costs”<sup>4</sup>.*
- 5.4 While some of these costs involve indirect or hidden costs in relation to incentives for infrastructure investment and development, maintaining the current framework would reduce the direct costs incurred by industry participants. In particular, it would avoid the very substantial costs likely to be incurred both by Viterra Operations and its Clients in implementing and complying with what would be a third regime in as many years. Viterra Operations considers that any such further costs would be particularly inefficient and costly to industry given its long-standing practice of providing open access to its Port Terminal Services.
- 5.5 Viterra Operations further notes that in the Commission’s final decision to accept the Current Access Undertaking, the Commission acknowledged that a 2 year term and a relatively “light handed” approach (including no ring fencing) was appropriate given the transitional nature of the wheat export industry.
- 5.6 The Commission’s view in relation to the inappropriateness of ring-fencing in relation to access to Port Terminal Services is further supported by the recent Productivity Commission report which stated that:
- “Although the Commission sees merit in ring fencing in certain circumstances, it does not see convincing arguments to enforce ring fencing provisions in what is very much a market in transition. In seeking to achieve competitive outcomes, ring fencing measures should be considered as more of a ‘last resort’ than a first option for a developing market.*
- Further, the Commission considers that there are benefits to be gained from vertical integration in the export of bulk wheat — indeed, the fact that all of the major handlers have acquired a trading arm would attest to this fact. Most of Australia’s overseas competitors are also vertically integrated and to deny such benefits in the Australian context could place domestic traders at a disadvantage relative to other global players”<sup>5</sup>.*
- 5.7 For the reasons set out above, the Current Access Undertaking has been successful in ensuring access to its Port Terminal Services on non-discriminatory terms. There has also been substantial industry and regulatory oversight. In these circumstances, Viterra Operations considers that there is no justification for any higher level of regulation or ring-fencing and that a “roll forward” of the Current Access Undertaking is appropriate.

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<sup>4</sup> Productivity Commission Report, page 173

<sup>5</sup> Productivity Commission Report, page 248.

### *Key features of the Proposed Access Undertaking*

- 5.8 The key features of the Proposed Access Undertaking will remain unchanged from the Current Access Undertaking. In particular, the Proposed Access Undertaking will have the following features:
- (a) **Publication of price and non-price terms for standard services:** Viterra Operations will be required to publish price and non-price terms for standard Port Terminal Services;
  - (b) **Negotiate access in good faith:** Viterra Operations will be required to negotiate with all access seekers in good faith and in accordance with a detailed negotiation procedure and timeframes set out in the Proposed Access Undertaking;
  - (c) **Non-discriminatory access:** Viterra Operations will continue to be required to provide access on terms which do not favour its own downstream operations, except to the extent that such favourable treatment reflects the lower cost of providing the relevant services;
  - (d) **Dispute resolution:** The publish / negotiate framework under the Proposed Access Undertaking will continue to be supported by a detailed dispute resolution mechanism. Any access seeker who is dissatisfied with the terms and conditions on which it can obtain access (both price and non-price) will be able to seek binding review of those terms either by an independent commercial arbitrator or the Commission; and
  - (e) **Publication of key port information:** Viterra Operations will be required to publish key port information including stocks held at each Port Terminal and cargo nominations on a monthly basis.

### *Commencement date and duration*

- 5.9 Viterra Operations proposes that the Proposed Access Undertaking will commence on 1 October 2011 and will continue for a period of 3 years.
- 5.10 Viterra Operations considers that the 2 year term of the Current Access Undertaking was appropriate given the transitional nature of the wheat export industry at that time. However, given the success of the Current Access Undertaking in providing a light-handed regulatory environment to ensure access for all industry participants, Viterra Operations considers that a 3 year period is now appropriate. This longer term will also avoid additional and unnecessary costs in negotiating a third access undertaking which might otherwise apply from October 2013.
- 5.11 The proposed expiry date also aligns with the Productivity Commission's recommendations in relation to the appropriate timeframe for the "access test" to apply to Viterra Operations' Port Terminal Services.
- 5.12 In addition, while it is not yet clear what the Government's response will be to the Productivity Commission's report, Viterra Operations considers that a 3 year term strikes an appropriate balance between providing a period of further certainty for both Viterra Operations and access seekers, and providing an opportunity for a timely review of the appropriate arrangements as the industry de-regulation progresses.

*Transitional provisions*

- 5.13 In order to facilitate a smooth transition from the Current Access Undertaking to the Proposed Access Undertaking (with no gaps in “coverage”), clause 4.1(b) provides that Viterra Operations will not execute any Access Agreement until after the commencement of the Proposed Access Undertaking. In practice, this will ensure that the Proposed Access Undertaking will apply to the negotiation of all Access Agreements which involve the provision of Port Terminal Services from 1 October 2011.
- 5.14 This is further supported by the proposed change to clause 7.1(c) which is intended to provide continuity for Access Applications regardless of whether they were lodged under the Current Access Undertaking or the Proposed Access Undertaking.
- 5.15 The transitional arrangements proposed in clause 4.1(b) are similar to the mechanics which were inserted into the Current Access Undertaking to ensure that the Current Access Undertaking applied to negotiations in respect of the provision of Port Terminal Services after 1 October 2009 (when the Current Access Undertaking commenced), even if those negotiations commenced before that date. This mechanism worked well, and as intended, in relation to the Current Access Undertaking.

*Explanation of further changes to the Proposed Access Undertaking*

- 5.16 Viterra Operations has also proposed certain further changes to the Proposed Access Undertaking as follows:
- (a) **Clauses 1.1(d) and (e)** - These changes are intended to reflect more accurately that Viterra Ltd is the accredited wheat exporter under the WEMA, and Viterra Operations (an “associated entity”) provides the Port Terminal Services. This more accurately reflects the approach to the “access test” currently set out in the WEMA. As noted in the Proposed Access Undertaking, it may be necessary to further amend clause 1.1 if the Government enacts legislation to adopt the Productivity Commission’s recommendations in relation to accreditation.

The Proposed Access Undertaking also incorporates a number of additional changes which are intended to reflect the possible changes to the existing regulatory framework from 30 September 2011, while ensuring that the Proposed Access Undertaking will continue to operate effectively regardless of whether or not those changes take place. Those changes appear in clauses 3.3(b), 3.4(b), 3.5(a)(ii), 4.2(a), 6.4(a)(i), 9.1(a) and in the definition of “Continuous Disclosure Rules”;

- (b) **Clauses 7.3(b) and (c)** - Currently any Dispute under these clauses must be referred to the chief executive officer of Viterra Operations. The amendment is intended to make it clear, following the acquisition by Viterra Inc, that this does not refer to the chief executive officer of the Viterra group of companies (i.e. Mr Mayo Schmidt in Canada). Rather, it refers to a senior executive in Australia;
- (c) **Clause 9.2** - This change is intended to provide further clarity that a person who is referred to as a “Client” under the Standard Terms or Protocols includes a “User” as that term is used in the Access Undertaking;

- (d) **Clause 9.3(c)(v)(B)** - This change is intended to be consistent with the both the consult and notify mechanism for variations to the Protocols and the criteria for acceptance of access undertakings which include protecting the legitimate business interests of access providers. While Viterro Operations will consult (and has demonstrated its commitment to consulting) with Clients in good faith, Viterro Operations should not be required to make any changes to the Protocols which are not acceptable to it or which are inconsistent with its business requirements;
- (e) **Clause 12** - This change is intended to provide greater clarity in relation to the process for issuing and receiving notices, approvals and communications under the Access Undertaking. This will assist Applicants in ensuring that enquiries are directed to the correct person at Viterro Operations, and therefore facilitate an efficient process to deal with issues that may be raised;
- (f) **Clause 13 (definition of “Port Terminals”)** - Viterro Operations has amended the definition of the Port Adelaide Inner Harbour and Outer Harbour terminals to provide greater clarity for Applicants;
- (g) **Port Schedules** - Viterro Operations has made certain changes to the Port Schedules so that they provide:
  - (i) greater operational information to Applicants, particularly in relation to the different operational arrangements and services available at each Terminal; and
  - (ii) greater transparency in relation to how the capacity at each Port Terminal is calculated and operates in practice. Viterro Operations has amended the capacity information in the Port Schedules so that it is more closely aligned with “practical capacity”, rather than the nameplate or theoretical maximum capacity of the relevant Port Terminal Facilities. There is no industry-standard method of calculating or defining “capacity”. However, Viterro Operations considers that the amended information in the Port Schedules provides the most accurate and appropriate information in relation to the capacity of its Port Terminal Facilities and is likely to be more beneficial to access seekers and users; and
- (h) **The Protocols** - An explanation of the changes to the Protocols are set out in the Consultation Notice issued by Viterro Operations on 13 September 2010 and the Variation Notice issued on 25 October 2010. Copies of the Consultation Notice and Variation Notice have previously been provided to the Commission.

***Explanation of changes to the Standard Terms (Schedule 3)***

- 5.17 Viterro Operations has made a number of changes to update the Standard Terms to ensure greater alignment with the Proposed Access Undertaking, and to reflect the potential changes to the regulatory arrangements for the exporting of bulk wheat.
- 5.18 An explanation of each of the proposed changes to the Standard Terms is set out in Attachment 1.

## 6. Conclusion - the TPA acceptance criteria are satisfied

### *Introduction*

- 6.1 In its submission to the Commission in support of the Current Access Undertaking, Viterra Operations set out the reasons why the Current Access Undertaking satisfied the criteria for acceptance by the Commission under Division 6 of Part IIIA of the TPA. For the reasons set out below, those criteria continue to be satisfied in respect of the Proposed Access Undertaking.

### *The objects of Part IIIA*

- 6.2 To the extent that Port Terminal Facilities cannot be economically duplicated, an undertaking to provide access to services from those facilities on transparent and non-discriminatory terms (supported by binding dispute resolution procedures) would promote the economically efficient use of those facilities and competition in vertically related markets, thereby promoting the objects of Part IIIA.
- 6.3 As noted in Viterra Operations' submissions to the Commission in 2009, the issue of whether or not the Port Terminal Services can be economically duplicated has never been the subject of detailed regulatory review. We appreciate that this issue does not arise for the purposes of the Commission's consideration of the Proposed Access Undertaking, and is primarily a policy issue in relation to the Government's regulation of bulk wheat exports. However, we would note for completeness the following statement by the National Competition Council in its submission to the recent Productivity Commission review:

*“In the Council's view, to date little if any evidence has been provided to establish that it is necessary to regulate port terminal services for bulk wheat export”<sup>6</sup>.*

- 6.4 In these circumstances, we consider that the current relatively “light-handed” approach established by the publish / negotiate / arbitrate framework (with a requirement for non-discriminatory access and the existence of industry and regulatory oversight) promotes the Objects of Part IIIA of the TPA.
- 6.5 This is particularly the case in circumstances where:
- (a) Viterra Operations has historically provided access to Port Terminal Services in the absence of formal access regulation, and reached commercially acceptable arrangements with its Clients; and
  - (b) there was no need for any Client to raise an access dispute with Viterra Operations in relation to the 2009 /2010 Access Agreements.
- 6.6 On this basis, Viterra Operations submits that the Proposed Access Undertaking is sufficient to promote the economically efficient operation of, use of and investment in bulk wheat export terminals and thereby promote effective competition in upstream and downstream markets. The Proposed Access Undertaking will continue to give industry confidence that they will be able to access the Port Terminal Services on commercial terms.

<sup>6</sup> Productivity Commission Report, , page 181

- 6.7 In this regard, we further note the report of the ADC Infrastructure Summit (Brisbane 6/7 October 2008) which stated that:

*“Australia is unique among OECD nations in pursuing a policy of mandated third party access to privately owned “essential” infrastructure, a matter discussed in some detail by the summit’s Institutional Barriers working group. However private asset owners, for example in port facilities, will not invest if they cannot be confident of capturing the benefits of their investment. Encouragement of negotiation between commercial entities, rather than reliance on regulation, may be a better approach in fostering both infrastructure capacity growth and optimal use of any existing level of capacity.”<sup>7</sup>*

***The Pricing Principles specified in section 44ZZCA of the TPA***

- 6.8 The Proposed Access Undertaking requires Viterra Operations to provide access to its Port Terminal Services on non-discriminatory terms. This means that Viterra Operations cannot provide less favourable treatment to a non-related exporter, except to the extent that the cost of providing the relevant services is higher.
- 6.9 An access undertaking that allows Viterra Operations to publish access prices at the first instance, together with a binding requirement for non-discriminatory access and a binding negotiation and dispute resolution process, is consistent with the Pricing Principles. It ensures that Viterra Operations will provide access at prices that generate expected revenue that is at least sufficient to meet the efficient costs of providing access to the Port Terminal Services, including a return on investment commensurate with risk.
- 6.10 Viterra Operations also considers that the proposed publish / negotiate / arbitrate arrangements (including non-discriminatory access) will facilitate incentives to reduce costs and increase efficiency. This is demonstrated by the number of steps that Viterra Operations has taken to improve its systems and provide additional capacity during the 2009/2010 season.
- 6.11 Accordingly, Viterra Operations considers that the Proposed Access Undertaking is consistent with the Pricing Principles set out in section 44ZZCA of the TPA.

***The legitimate business interests of the provider***

- 6.12 Viterra Operations has a legitimate business interest in providing access on price and non-price terms that ensure it receives at least a return on its investment that is commensurate with risk. Viterra Operations considers that the Proposed Access Undertaking would not prevent this outcome. However, naturally this would also need to be considered in respect of any individual dispute determination.

***The public interest, including the public interest in having competition in markets***

- 6.13 Viterra Operations considers that the public interest will be served if it continues to provide access to Port Terminal Services on published, non-discriminatory terms and conditions, subject to a binding process for negotiation and resolution of any disputes about the terms of access.

<sup>7</sup> Freight and Metropolitan Transport: report of ADC Infrastructure 21 Summit p 108



6.14 We consider this approach:

- (a) provides sufficient incentives for Viterra Operations to engage with its Clients to pursue and deliver commercial outcomes, including appropriate levels of investment, expansion and operational transparency, certainty and efficiency;
- (b) provides sufficient protections for access seekers to ensure that they can obtain access in a timely manner; and
- (c) balances the potentially large cost of regulation with the relatively minimal benefits of access regulation in this case.

***The interests of persons who might want access to the Port Terminal Services***

6.15 Under the Proposed Access Undertaking, Viterra Operations will continue to provide access to its Port Terminal Services to any accredited wheat exporter that meets reasonable “Prudential Requirements”. The requirement for Viterra Operations to provide access on non-discriminatory terms and conditions, and the ability for access seekers to seek binding arbitration provide sufficient protection in relation to the interests of access seekers.

6.16 The Proposed Access Undertaking is also consistent with the interests of access seekers, as the relatively light-handed approach avoids certain costs that would be likely to be incurred in an environment involving heavier-handed regulation.

6.17 That the Proposed Access Undertaking sufficiently recognises the interests of access seekers is demonstrated by the operation of the Current Access Undertaking and the extent to which, under that undertaking, Viterra Operations has provided access to third party Clients on fair and reasonable terms and conditions, which did not result in or require any access disputes to the Commission (see Table 1).

***Conclusion***

6.18 For the reasons set out above, Viterra Operations considers that the Proposed Access Undertaking satisfies the criteria for acceptance in section 44ZZA of the TPA.

**7. Further Information**

7.1 If the Commission requires any further information in relation to the Proposed Access Undertaking, please contact:

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**VITERRA OPERATIONS LTD**  
**23 DECEMBER 2010**

## Attachment 1 - Changes to the Standard Terms

This Attachment sets out an explanation of the main changes to the Standard Terms.

It does not seek to explain each minor change -- for example, where the change seeks simply to express the clause in a clearer manner or where, from the context, the reason is apparent (e.g. to avoid setting out dates which will vary during the term of the Access Undertaking).

If the Commission requires a further explanation of any change, we would be pleased to provide that information.

	<b>Clause</b>	<b>Explanation of change</b>
1	Background	This change is intended to accommodate potential changes to the regulatory framework for bulk wheat exports following the recent Productivity Commission report, and ensure that the Standard Terms will continue to operate regardless of whether or not those changes are adopted by government.
2	“Credit Support”, “Port Terminal Facility” and “Port Terminal Services”	These changes are intended to ensure that the relevant terms have the same meaning as in the Access Undertaking.
3	“Gross Negligence”	Viterra Operations has deleted this definition. It considers that it is more appropriate for a Court to determine whether or not an action or omission involves “gross negligence”, rather than to seek to define the term in the Standard Terms.
4	“Port Zone”	This definition has been deleted as it is not referred to in the Standard Terms.
5	“Reference Prices”	As terms relating to the timing of payments and invoicing are set out in the Explanatory Notes to the Reference Prices, we have amended the definition so that it includes the Explanatory Notes.
6	“Viterra Group of Companies”	This definition has been amended so that, following the acquisition by Viterra Inc, it covers each of Viterra’s Australian companies.
7	Clause 2.1(b)	This change is intended to ensure consistency with clause 5.3(c) of the Access Undertaking. Viterra Operations will provide access to the Port Terminal Services on the Standard Terms while it negotiates any Access Agreement with Applicants.
8	Clause 2.2(b)	The clause has been amended to provide greater clarity in relation to the terms and prices that apply to wheat that is held over in Viterra Operations’ system across seasons.

9	Clause 4.3	This change is intended to ensure consistency with the Access Undertaking and the Port Loading Protocols. It reflects that clause 9 of the Access Undertaking and the Port Loading Protocols set out the primary mechanisms for managing booking and vessel loading capacity / priority.
10	Clause 5.8	This change is intended to provide greater clarity in relation to reservation of Cells and the parties' obligations in respect of grain held in reserved Cells.
11	Clause 5.10	This change is intended to clarify the objective process that Viterro Operations applies in determining whether third party storage facilities qualify as Approved Third Party Stores.
12	Clause 6.5	The changes to sub-clauses (a) and (b) are intended to provide greater clarity in relation to the circumstances in which bulk wheat will be moved from or within Viterro Operations' facilities
13	Old clause 7.3	Viterro Operations has deleted this clause, as it is no longer required and does not reflect our current practices.
14	New clause 7.3	This change makes it clear that, subject to clause 7.4, bulk wheat will be outturned to the standards prescribed by the Receival (Classification) Standards and in accordance with the Outturn tolerances set out in the Booking Form. The clause did not previously refer to tolerances.
15	Clause 7.12	Clause 7.12(c) has been deleted, as issues relating to load priority for vessels are addressed in the Protocols.
16	Clause 8.10	This change is intended to ensure consistency with the Access Undertaking.
17	Clause 16.3	This change is intended to make it clear. following the acquisition by Viterro Inc, that the clause does not refer to the CEO of the Viterro group of companies. Rather, it refers to a senior executive in Australia.
18	Clause 17.2(c)	This change is intended to ensure consistency with the framework set out in the Access Undertaking. In particular, if Viterro Operations were to terminate the agreement on 3 months notice without cause, it would still be required to provide access in accordance with the Access Undertaking.
19	Clause 20	This clause has been inserted to ensure that all confidential information received or provided by either Viterro or Clients in accordance with the Standard Terms is treated appropriately. This clause is consistent with the confidentiality provisions of the Access Undertaking.

## **Attachment 2 - Proposed Access Undertaking 2011 to 2014**