



Viterra Operations Limited

2011 Port Terminal Services Access Undertaking

Response to matters raised in the ACCC's Draft Decision

1 Introduction

1.1 Purpose of submission

Viterra Operation Ltd (“**Viterra Operations**”) welcomes the ACCC’s preliminary view, as set out in its draft decision, that Viterra Operations’ revised draft of the Port Terminal Services access undertaking could be accepted if it were re-submitted for assessment pursuant to section 44ZZA(1) of the *Competition and Consumer Act 2010* (Cth) (“**CCA**”).

Viterra Operations proposes to re-submit the access undertaking so that it can be accepted by the ACCC prior to 30 September 2011, as required for the purposes of Viterra Ltd’s accreditation under the *Wheat Export Marketing Act 2008* (Cth).

The purpose of this submission is to respond to a small number of matters raised in the draft decision and by industry participants during the ACCC’s market enquiries process.

1.2 Public register

This submission can be published on the ACCC’s public register.

2 Response to matters raised in the ACCC’s draft decision

2.1 Alleged lack of constraint on incentive to over-book the shipping stem

Viterra Operations notes the ACCC’s comments in the draft report concerning a perceived absence of sufficient constraints on Viterra Operations’ incentive to give preference to its trading arm in relation to capacity management, and the current booking fee not acting as a constraint on its trading arm booking in excess of its reasonably anticipated requirements.

Viterra Operations is committed to introducing an auction system which, as stated by the ACCC, would address these concerns. However, Viterra Operations notes that the ACCC’s comments in the draft decision appear to be made without any clear analysis of what may constitute Viterra’s reasonably anticipated requirements.

As set out in Viterra Operations’ submission dated 11 April 2011, it is vital in any discussion concerning the allocation of capacity, to recognise Viterra’s right to use its own infrastructure and its clear legitimate business interest in not being required to pay third parties for use of its own infrastructure.

Third party use of infrastructure services will only be efficient if it enables *more* use of the relevant services (as distinct from displacing the infrastructure owner's own use, or other users' existing use, of the service).

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

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

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

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

"There are a set of provisions that apply to how the ACCC must conduct its arbitrations. One of the things it cannot do is displace a user's existing or reasonably foreseeable use of the facility itself to make room for others. That's not contemplated by Part IIIA. It shouldn't have been permissible under the access undertaking because those safeguard provisions apply generally. I think it's worth remembering that these parties did invest in these assets. They own them, and this is not about taking them away, it's not about stripping their use. It would be contrary to the operation of Part IIIA to do that. So it is about excess or additional capacity." (Productivity Commission, Inquiry into Wheat Export Marketing Arrangements Transcript of Proceedings, John Feil, 24 November 2009, pp. 12–13).

It is imperative that both in making its final decision, and in assessing any auction system proposed by Viterra Operations, that the ACCC has appropriate regard to this issue and does not accept uncritically any submissions by industry participants which, in a number of cases, appear to suggest that Viterra should be disadvantaged in the use of its own infrastructure or should pay third parties for the right to book or use its own infrastructure.

In this regard, it should be recognised that Viterra Operations' has invested heavily, both in South Australian export infrastructure and in its relationships with South Australian growers. It has invested to a much greater degree than any other company, and with the express purpose of facilitating avenues to market for South Australian grain and sourcing by its global trading

business. This is clearly relevant to any assessment of Viterra's reasonably anticipated requirements and its legitimate business interests.

In considering capacity allocation issues, Viterra Operations also has a number of concerns in relation to the ACCC's comment in the draft decision that (without the transition proposed by Viterra Operations) bookings by Glencore and Viterra Ltd at two of the three deep water ports (Port Giles is also a deepwater port) during the January to April 2012 period would have resulted in growers having "*considerably fewer exporters competing to purchase their wheat and consequently [being] likely to receive lower prices*".¹ As previously explained to the ACCC, this would appear to misunderstand the important difference between *accumulation* and *shipping*.

Through-out the year, Viterra Operations competes with a range of exporters, traders and domestic customers to acquire wheat from growers. Almost 60 grain companies have operated in Viterra Operations' system in the last season, the majority of which are not exporters. Growers may enter into marketing arrangements well before, during or after the harvest of their wheat. In this regard, at any given time, growers may have title to a large proportion of the grains held in Viterra Operations' system, both up-country and at port. This grain may be transferred in-store one or many times before it is exported. It may be exported the month it is harvested, the month it is acquired or many months later. There is no clear nexus between the time of accumulation and the time of export.

Accordingly, the suggestion that a relatively short-term capacity constraint *for exporting* may result in considerably less competition *to acquire* wheat is not a matter that is in any way apparent to Viterra Operations. Viterra Operations notes that, in any event, the transitional plan that it has proposed addresses the ACCC's concerns in relation to bookings at Outer Harbor and Port Lincoln.

As an experienced operator in each of the Australian markets, Viterra Operations would also observe that the differences identified by the ACCC in relation to the Eastern States and South Australia (and, following the revocation of the exclusive dealing notification for Grain Express, Western Australia) appear to be significantly overstated, both in terms of their nature and impact.

2.2 Export Select and Export Standard

Viterra Operations notes the ACCC's suggestion in the draft determination that there appears to be an inconsistency between:

- (a) Viterra Operations' statement that "*clients -- regardless of whether they use the Export Select or Export Standard pathway -- have an equal (and the same) opportunity to book Port Terminal Services capacity and ... Clients always have a choice whether to use Export Standard or Export Select to take advantage of available capacity*"; and
- (b) the fact that certain up-country sites cater only for Export Select out-turn².

This suggestion in the draft decision is incorrect. The statement in paragraph (a) above relates to the capacity at Viterra Operations' Port Terminals. This capacity -- which is the subject of the access undertaking -- is available to clients, regardless of whether they wish to use the Export Standard pathway or the Export Select pathway.

¹ Draft Decision, page 2.

² Draft Decision, page 79.

Paragraph (b) above simply reflects the fact that, operationally, managing certain up-country sites as Export Select-only allows Viterra Operations to achieve greater operational efficiency (e.g. through the optimal clearance of grades or sites and reducing ongoing costs). These operational benefits are shared with industry through the rebate applied to Export Select movements. It is neither the purpose of, nor within the scope of the access undertaking, to focus on operational modes of out-turn at up-country locations in order to draw apparent conclusions about in-loading capacities at port.

Viterra Operations considers that the additional information to be provided in accordance with the revised draft of the access undertaking will assist both the Commission and clients in their understanding of export supply chain alternatives.

2.3 Investment in the South Australian grain industry

As set out in its submission dated 11 April 2011, since entering the Australian grains industry in September 2009, Viterra Operations has invested heavily in storage, transport, logistics and port terminal infrastructure in order to enhance supply chain efficiency and to facilitate greater throughput and increased exports from South Australia.

It has now invested over \$40 million in infrastructure and supply chain improvements.

This significant investment is delivering results. The 2010/2011 harvest has been the largest on record and Viterra Operations has moved record tonnages through its system. This culminated in its announcement last week of a new record for annual grain exports shipped through South Australia's ports, with almost 7 million tonnes of grain, including over 4.6 million tonnes of wheat, exported from South Australia on behalf of 13 exporters since 1 October 2010.

This compares to an average annual export task over the last 10 years of 4.3 million tonnes (for all grain) and 2.44 million tonnes (for wheat).

This record level of exports has been achieved whilst managing a diverse client base, as indicated by the number of different exporters now shipping from South Australia. In the 2010/2011 season, Viterra Operations has provided access at port to 13 exporters, all of which have been exporters of bulk wheat. A number of those exporters have shipped substantial volumes. Only three years ago, there was only one exporter of bulk wheat.

While there will always be operational challenges in the provision of export infrastructure -- particularly in record crop years -- Viterra Operations is justifiably proud of this achievement which has occurred in a relatively short period of time. The level of infrastructure investment, the increased volume of exports and the level of access for third parties are all very significant benefits for the industry.

Viterra Operations is therefore disappointed that these matters are not acknowledged in the draft decision and in many of the third party submissions provided to the ACCC. This is particularly the case as investment, increased exports and increased access would all seem to lie at the very heart of the goals of infrastructure regulation and, in particular, the objects under Part IIIA of CCA".

It is also disappointing that some of the comments by industry participants (and the apparent weight accorded to them in the draft decision) occur in circumstances where those industry participants, while benefiting from Viterra Operations' investment, have themselves chosen not to undertake any significant investment or commitment to the South Australian industry.

2.4 Commodity conversion

Viterra Operations notes that, in its draft decision, the ACCC has requested further information in relation to the impact (if any) of Viterra Operations allowing clients to change the commodity type in respect of bookings that have been accepted onto the shipping stem (e.g. converting bookings from canola to wheat).

This is a service that Viterra Operations seeks to provide to all of its clients in order to provide them with the maximum flexibility possible. Viterra Operations would therefore be surprised if this practice raised any concerns.

Naturally, in offering this flexibility, Viterra Operations needs to ensure that any changes will not have an adverse impact on port operations, other clients or Viterra Operation's own commercial interests (as an infrastructure provider). An example of an adverse impact might be where the initially booked commodity is already in a shippable position or there are insufficient stocks of the new commodity, such that the change in commodities could not operationally be implemented without significant impacts and/or costs. An example of a positive impact might be where the change in commodity would allow Viterra Operations to "free up" grain paths by moving the new commodity (and therefore subsequent or new bookings) more quickly than initially anticipated.

Viterra Operations applies these considerations equally to all exporters. This is made clear by Table A of the Port Loading Protocols which states as follows:

"Changes, alterations and modifications to Table A information (other than the matters set out in clause 9 of these Protocols) provided by a Client in support of the booking can be requested in writing by the Client. Viterra Operations will respond to the request change within 5 Business Days of receipt. The booking will be deemed to be varied as of the date of Viterra Operations' written acceptance of the change and, subject to the other provisions of these Protocols, will not be deemed a new booking. Please note:

- *Viterra Operations is not obliged to accept any requested variation and acceptance will depend on whether the requested change would be likely to compromise Viterra Operations' operational efficiencies taking into account operational constraints (such as grain under fumigation), or unreasonably impact on other Clients. **Charges may be applicable to cover the additional cost (if any) of accommodating requests.***
- *..."*.

To the extent that some clients may not have previously appreciated that there was a potential ability to convert booked commodities, the ACCC's draft decision and this submission make it clear.

3 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
1 September 2011