



23rd April 2010

The Commissioners
Productivity Commission
Wheat Export Marketing Arrangements
Level 28, 35 Collins Street
Melbourne VIC 3000

By e-mail: wheatexport@pc.gov.au

Dear Commissioners

Wheat Export Marketing Arrangements: Productivity Commission Draft Report

Viterra Limited (“**Viterra**”) welcomes the opportunity to provide this submission to the Productivity Commission (“**Commission**”), on behalf of the Viterra Group, in response to the Wheat Export Marketing Arrangements Draft Report, published by the Commission on 22 March 2010 (“**Draft Report**”).

1 Executive Summary

Viterra supports the Commission’s draft findings that the current level of regulation that applies exclusively to the exporting of bulk wheat (and not to any other agricultural export commodities) imposes unnecessary costs on the Australian industry and cannot be justified. Viterra also supports the Commission’s draft finding that the transition from the single desk to competition has “*progressed remarkably smoothly and the industry is performing well under the new arrangements*”¹.

However, in these circumstances, Viterra considers that the Commission’s proposed timeframe for winding back these unnecessary and inefficient layers of regulation should be accelerated. In particular, Viterra considers that there is no justification for extending either the accreditation requirements or access test beyond 30 September 2010.

If, as set out in its Draft Report, the Commission considers that it is not possible or appropriate to cease the accreditation requirements before 30 September 2011, Viterra submits that the application of the access test should also cease on that date.

The access test

Viterra acknowledges that the access test has provided certain benefits which have facilitated the rapid and orderly transition from one bulk wheat exporter to more than 29 exporters. However, the benefits have also come at a significant and continuing cost. Given the rapid transition which has already taken place, Viterra considers that any benefits which might have been associated with requiring port terminal operators to submit “voluntarily” to an additional regulatory regime governing the terms on which they supply port terminal services in respect of one commodity in bulk form are very rapidly diminishing, leaving only significant costs.

¹ Draft Report, p.38.

As set out in Viterra's submission dated 13 November 2009, the requirement to enter into "voluntary" access undertakings has involved (and continues to involve) a number of direct costs in terms of establishment, management and compliance. However, as recognised by the Commission in its Draft Report, this is the "tip of the iceberg". The most significant costs associated with the access test, and any unnecessary regulation, is the strong disincentive for future efficient investment in infrastructure. In Viterra's view, it would be a very unfortunate result if the benefits of deregulation of the single desk could not be fully realised (to the significant detriment of the Australian industry) because of inappropriate and unnecessary regulatory settings which result in lack of certainty and under-investment in relation to the export supply chain.

Having regard to these costs, which have been clearly recognised by the Commission, Viterra considers that the access test should cease on 30 September 2010, or, no later than 30 September 2011, when the existing access undertakings expire.

De-coupling the access test from accreditation requirements

In addition to its concerns relating to the proposed continuation of the access test until 30 September 2014, Viterra has significant concerns with any proposal to introduce unclear and unspecified sanctions for failing to enter into a "voluntary" access undertaking. This proposal significantly heightens the level of investment uncertainty for infrastructure providers. In Viterra's view, it is imperative that:

- the Commission considers fully the potential consequences on investment certainty and efficient investment in infrastructure which would be likely to arise from a proposal to introduce more heavy-handed sanctions; and
- any proposal is considered openly and transparently with a proper opportunity for industry participants to consider and comment on any proposed sanctions.

There is a very real risk that this proposal could result in significant consequences for infrastructure providers in circumstances where the Commission has itself recognised that there are limited and diminishing benefits of the access test in the first place.

The future - after the access test

Viterra supports the Commission's draft findings that Part IIIA of the *Trade Practices Act 1974* ("TPA") is an appropriate regulatory framework to deal with the issue of access to port terminal services following the withdrawal of the access test.

There are strong commercial incentives for port operators to continue to provide access for third party customers to port terminal infrastructure on reasonable terms. This was the case prior to the current access undertakings and remains the case in relation to other non-regulated grains. The incentive for infrastructure owners to maximise throughput through port terminal facilities has facilitated, and will continue to facilitate, the negotiation of access on commercial terms. In the event that commercial negotiation is not possible, the National Access Regime provides an appropriate "regulatory backstop" to ensure access on terms which balance the interests of infrastructure users and owners.

The National Access Regime also contains a number of important safeguards, including the requirement that the Australian Competition and Consumer Commission ("ACCC") cannot make a determination which prevents an existing user (including the infrastructure owner) obtaining a sufficient amount of the services to be able to meet its reasonably anticipated requirements. This issue -- namely, that the access regime should be about providing access to spare or excess capacity -- is

well articulated in the submission to the Commission by the National Competition Council (“NCC”). However, it is not necessarily well reflected in the current access test / access undertaking regime.

Viterra considers that Part IIIA of the TPA is an appropriate regulatory framework. Indeed, what is the point of having a National Access Regime if specific regimes are continually created for infrastructure in different industries? However, should the Government be minded to require any additional regulation for bulk wheat, Viterra considers that a voluntary code is likely to be the most appropriate option to balance the commercial interests of all market participants.

2 The Transitional Period for Accreditation is Ending

Consistent with the views expressed in the NCC’s submission², Viterra considers that the abolition of the single desk for wheat and the introduction of competition for the marketing and export of bulk wheat has had significant benefits for growers, exporters and ultimately the Australian industry. Australian bulk wheat has become more competitive in the international market and has increased its customer base. In addition, as noted in the Draft Report, growers have received clearer price signals through the market mechanisms now in place³.

The accreditation requirements of the WEMA may have been an appropriate mechanism for the initial transition from the single desk to a deregulated market. In particular, the accreditation requirements may have provided confidence to growers and international buyers that bulk wheat exporters would not default on their liabilities. However, as recognised in the Draft Report, these limited benefits have rapidly decreased, and only the costs and burdens of the scheme remain. In particular:

- the costs of administering both Wheat Exports Australia (“WEA”) and the accreditation scheme are high, at approximately \$4 million per annum, or approximately \$0.22 per tonne. Other grain and non-grain export industries in Australia (including pulses, canola and barley) are not subject to similar costs;
- the accreditation process is time-consuming. Combined with the expense of obtaining and maintaining accreditation, the requirements to obtain accreditation are likely to act as a significant deterrent to new entrants wishing to export bulk wheat. This is consistent with the view set out in the Draft Report⁴;
- the perceived benefits of credit security associated with accreditation are unfounded. In particular:
 - there is no guarantee that bulk wheat exporters will not default on their payments solely due to the fact that they are accredited. To the contrary, the WEA’s “endorsement” of the financial viability of accredited bulk wheat exporters without the necessary detail to ensure such financial viability is more likely to give false confidence to growers;
 - there is no requirement that domestic traders be accredited. As a result of this discrepancy, growers will continue to be credit exposed when they sell their wheat, irrespective of the accreditation system;
 - Viterra understands that the WEA’s “fit and proper” benchmarks are not applied uniformly, with smaller exporters examined less rigorously, with the aim to avoid raising barriers to entry for smaller traders. Such apparent inconsistencies may create greater risk for growers; and

² NCC Submission to the Commission, dated 11 November 2009.

³ Draft Report, p.XXXI.

⁴ Draft Report, p.XXVII.

- as noted by Graincorp in its submission to the Commission⁵, there is considerable duplication of responsibilities and obligations under the WEMA compared to the *Corporations Act 2001* (Cth), the TPA and various industry specific and general statutes and regulations. Accordingly, the Australian bulk wheat export industry is at a regulatory and commercial disadvantage when compared to other grain and non-grain export industries and, perhaps more importantly, the bulk wheat industries in other countries.

Viterra supports the Commission draft findings that “*the transition to competition in the exporting of bulk wheat has progressed remarkably smoothly and the industry is performing well under the new arrangements*”⁶, and that:

*“there is no persistent market failure that requires government intervention in the bulk wheat export industry. There is nothing particular about wheat that requires a system of accreditation that other grains and agricultural commodities markets do not have”*⁷.

In view of the success of the rapid transition to deregulation and the significant costs and burdens of the accreditation scheme, Viterra supports draft recommendation 4.1. However, in light of these same matters, Viterra considers that the accreditation scheme has already “outlived its usefulness” and should end on 30 September 2010, with the WEA being disbanded from the same date.

3 Access Undertakings Regulating Access to Port Terminal Facilities are No Longer Appropriate

The access test imposes burdens which outweigh any benefits

The access test element of the WEMA accreditation requirements resulted in AusBulk (a Viterra subsidiary), along with other port terminal operators, being required to enter into a “voluntary” access undertaking with the ACCC under Part IIIA of the TPA. This requirement under the accreditation regime was imposed without any genuine consideration of the history of open access arrangements or the likely costs and benefits of such mandated access requirements. As stated by the NCC in its submission to the Commission:

*“In the Council’s view, to date little if any evidence has been provided to establish that it is necessary to regulate access to port terminal services for bulk wheat export. The increasingly deregulated environment and the greater number of market participants militates against the exercise of monopoly market power by wheat marketers that own handling facilities...In such circumstances, the Council considers that it is undesirable and risky to continue imposing access regulation to port terminal services”*⁸.

Viterra fully supports this observation by the NCC, the regulator charged with overseeing aspects of the National Access Regime.

As set out above, and in Viterra’s submission dated 13 November 2009, the process for entering into, managing, and complying with the access undertaking was (and continues to be) time-consuming and costly. Combined with the costs of accreditation, Viterra estimates that bulk wheat exports are subject to an additional cost of approximately \$0.50 - \$1.00 per tonne. This is a considerable cost disadvantage compared to non-regulated grain and non-grain exports and bulk wheat exports from other countries. This is particularly the case in circumstances where there is nothing intrinsically different about bulk wheat exports that requires or justifies a bespoke regulatory regime.

⁵ Graincorp submission to the Commission, dated 19 November 2009, cited in Draft Report, p.92.

⁶ Draft Report, p.38.

⁷ Draft Report, p.119.

⁸ NCC submission to the Commission, dated 11 November 2009, p.4.

Viterra acknowledges that the access test may have had certain short term benefits in aiding the transition from a single wheat desk to a competitive environment. As noted by the Commission in its Draft Report, the access test may have helped to facilitate a smooth transition by providing “*certainty in the face of dramatic overnight change*” for bulk wheat exporters that “*they would have access to port terminal facilities*”⁹. However, there are no significant long term benefits to maintaining the access test, certainly beyond 30 September 2011. Competition within the bulk wheat export industry has become entrenched remarkably quickly, and there is already a clear understanding on the part of all participants (including Viterra as a bulk handler) of the rights and responsibilities under the competitive framework, which facilitates and enables the efficient operation of the system.

As recognised by the Commission, there are significant long term costs associated with continuing the access test. These costs include:

- reduced incentives to invest in port terminal infrastructure. The NCC’s submission recognises that “*inappropriate access regulation could restrict investment and innovation, and impede desirable change*”¹⁰. The existing structure of the access test and access undertaking exposes Viterra and other port terminal operators to a significant degree of uncertainty as to how the ACCC or other arbitrator would make decisions (including pricing decisions). This uncertainty substantially reduces any incentive for new investment or expansion. Moreover, any investment by Viterra or any other port terminal operator would be required to be made available for the use of competing wheat exporters, without Viterra being able to guarantee sufficient capacity for its reasonably anticipated requirements. This raises a clear problem of “free riding” by Viterra’s competitors, which dampens any incentive to undertake new investment;
- reduced incentives for operators to invest in competing infrastructure. The existence of an access test and associated requirements that Viterra and other port terminal operators provide access to third party exporters provides a disincentive to invest in competing facilities. A competing bulk wheat exporter has limited incentives to build dedicated infrastructure if it can rely on the existence of an access test. In turn, this may have longer term negative costs for the Australian bulk wheat industry, as bottlenecks in the supply chain do not result in new port facilities being constructed to satisfy any additional demand; and
- the financial costs of administering and complying with the access undertaking. Notwithstanding the Commission’s recommendation that any changes to the access undertaking be kept to a minimum until the access test falls away¹¹, the costs of negotiating and agreeing a replacement to the access undertaking could be considerable. Indeed, notwithstanding the Commission’s recommendation that there should only be minimal changes to existing access undertakings, the ACCC will form an independent view. Given Viterra’s experience of the process for negotiating the initial undertaking, we will need to consider starting work on negotiating a new access undertaking 12 months prior to the termination date of the existing undertaking. This would add further unnecessary costs to bulk wheat exports.

These costs (in particular the impact on investment incentives) may significantly damage the Australian bulk wheat export industry. Moreover, they are not consistent with the Commission’s initial view that the access test “*costs are not likely to be too large in the short term*”¹².

⁹ Draft Report, p.136.

¹⁰ NCC submission to the Commission, dated 11 November 2009, p.4.

¹¹ Draft Report, draft recommendation 5.1, p.152.

¹² Draft Report, p.127.

The existing access test and associated access undertaking may have been beneficial during the deregulation transition phase. However, as noted above, and consistent with the views set out in the Draft Report, “*the costs associated with [the access test] would almost certainly outweigh the benefits*”¹³. Accordingly, Viterra strongly agrees that the access test should be abolished.

Viterra considers that there has been no convincing evidence put forward to justify extending the period of the access test beyond the existing access undertaking. In particular, Viterra does not support the Commission’s proposal to maintain the access test until 1 October 2014. There are considerable costs and risks associated with continuing the access scheme for an additional three year period, which will continue to provide strong disincentives to invest in infrastructure during this time. Even a three year hiatus in infrastructure investment may have significant detrimental impacts on growers and all industry participants in the form of ageing export infrastructure and compounded additional investment costs in the future.

For the reasons set out above, Viterra considers that there is no commercial or policy justification for maintaining the access test, certainly beyond 30 September 2011, the date the current access undertaking is due to expire.

Regulation of access beyond the provisions of Part IIIA of the TPA is unnecessary

Viterra supports the Commission’s draft findings that Part IIIA of the TPA is an appropriate regulatory framework to deal with the issue of access to port terminal services following the withdrawal of the access test. In particular, Viterra notes the Commission’s draft finding that:

*“Part IIIA of the Trade Practices Act, combined with the transition path outlined by the Commission, is better placed than industry specific regulation to balance the costs and benefits of access regulation in the long run. Application of Part IIIA will bring the wheat industry into line with the general competition law applying to other industries in Australia”*¹⁴.

Reliance on Part IIIA of the TPA as a “regulatory backstop” to commercial negotiations would also be consistent with other grain and non-grain export industries in Australia. In addition, the strong commercial incentives to maximise throughput through the port terminals and the provisions and outcomes available under Part IIIA of the TPA will continue to provide strong incentives for Viterra to provide access to its port terminal facilities for the export of bulk wheat in accordance with its general competition law obligations.

The very real prospect of declaration of a port terminal facility is a compelling disincentive to prevent third party bulk wheat exporters from obtaining access to port terminal services, or to provide access to those services on unfair or unreasonable terms. This position is recognised by the Commission where it states that “*it is of the view that considerations such as domestic competition, the need to maximise throughput and the threat of declaration under Part IIIA would be more significant in preventing bulk handlers from discriminating against rival exporters*”¹⁵.

Additional means of regulating access are unlikely to be necessary if Part IIIA of the TPA applies to the export of bulk wheat

In its Draft Report, the Commission also raises the possibility of alternative or additional layers of regulation that may apply to the provision of access to port terminal services for the export of bulk

¹³ Draft Report, p.139.

¹⁴ Draft Report, p.152.

¹⁵ Draft Report, p.157.

wheat, over and above the application of the National Access Regime under Part IIIA of the TPA. In particular, the Draft Report raises the possibility of:

- implementing an additional “*level of light handed regulation beyond Part IIIA alone*”, due to “*ongoing concerns about the ability of the bulk handlers to discriminate against rival exporters*”¹⁶;
- price monitoring of prices charged for port terminal services; or
- ring fencing or a full structural separation between the wheat exporting and bulk handling operations of the bulk handlers.

Viterra considers that the implementation of any additional layer of regulation in relation to access to port terminal services, even a so-called “light touch” regime, over and above the application of the National Access Regime, is likely to have significant costs and provide limited benefits. Any additional regime will add further costs along the whole bulk wheat supply chain, and may result in Australian bulk wheat being higher in cost, and therefore disadvantaged, compared to its international competitors. However, as set out below, in the event that the Government is minded to require a further regulatory framework, Viterra considers that a genuinely voluntary code of conduct for access to port terminal services is likely to be the most appropriate option, and this is an option that should be explored by policy-makers and legislators.

A. Additional ‘light touch’ voluntary code of conduct

One of the issues canvassed in the Draft Decision is whether an additional level of regulation may be appropriate in order to provide comfort to competing wheat exporters that bulk handlers will not discriminate against them when offering access to port terminal services. The Draft Decision also recognises that “*heavy handed regulation for port terminals*” is not appropriate, in particular due to the risk that “*if infrastructure owners and operators are not adequately protected they will have a diminished incentive to invest in facilities*”¹⁷.

Viterra agrees that “heavy handed” regulation is not appropriate, and shares the concerns of the Commission that such regulation may provide disincentives to port operators to invest in those facilities. However, Viterra also has concerns with other types of regulation which have a similar potential to add costs, without any commensurate benefit.

Viterra firmly believes that there is no requirement for an access test and that the “backstop” of Part IIIA is an appropriate regulatory framework to deal with the issue of access to port terminal services following the withdrawal of the access test. However, Viterra acknowledges that this framework could usefully be supplemented by the continued publication and transparency of shipping activity and procedures. Accordingly, Viterra has no objection to the Commission’s draft recommendation to maintain the publication of the daily shipping stem and port access protocols (draft recommendation 5.3). Viterra considers that draft recommendation 5.3 is likely to be sufficient to ensure that competing wheat exporters have:

- access to the shipping information that they require in order to plan and execute their export shipping needs; and
- clear rights and responsibilities governing the provision of access to port terminal services by Viterra (and other bulk handlers).

¹⁶ Draft Report, p.155.

¹⁷ Draft Report, p.156.

However, if the Government is minded to consider an additional layer of regulation which sits above Part IIIA of the TPA in relation to the provision of access to port terminal services, Viterra considers that a voluntary code is likely to be the most appropriate format, provided that any such code:

- is genuinely voluntary, and not subject to the formal approval and ongoing involvement of the ACCC under Part IIIA of the TPA;
- appropriately balances the interests and commercial incentives of both the bulk handlers and access seekers; and
- does not impose unreasonable compliance costs on the bulk handlers, for example, due to its being administered or arbitrated by the ACCC.

B. Price monitoring and ring-fencing requirements for port terminal services

Viterra strongly supports the Commission's draft findings that:

- price monitoring of access to port terminal services is not appropriate in the context of bulk wheat exports;
- *"it does not see convincing arguments to enforce ring fencing provisions in what is very much a market in transition"*, because, in such a context, *"ring fencing measures should be considered as more a 'last resort' than a first option for a developing market"*¹⁸; and
- any suggested separation would *"occur at potentially great cost"*¹⁹ without any clear benefits.

In these circumstances, Viterra considers that there is no case for these forms of additional regulation. This is particularly the case given that the regulatory framework under review relates solely to the exporting of bulk wheat. It is entirely unclear to Viterra why there is any case for imposing greater regulatory burdens in relation to one particular commodity, particularly in circumstances where transition from the single desk to competition has *"progressed remarkably smoothly and the industry is performing well under the new arrangements"*²⁰.

4 CBH Auction System and Grain Express

The Commission has requested further information in respect of the CBH auction system in use in Western Australia for the allocation of capacity at port. In addition to Viterra's port terminal operations in South Australia, Viterra is also an exporter of bulk wheat in a number of other states across Australia, including Western Australia. Accordingly, Viterra has considerable experience of the Western Australian supply chain for the export of bulk wheat.

Viterra considers that CBH's use of an auction system is an appropriate method of allocating finite capacity between different exporters. However, implementing such an auction system cannot, in and of itself, address the underlying issue of capacity constraints in the Western Australian bulk wheat export supply chain. Put another way, an auction system is inherently a "band aid" solution, rather than a solution which enables expansion and investment to remove any capacity constraints. The current system is also highly complex, although users will no doubt become accustomed to how it operates with further experience.

5 Conclusion

¹⁸ Draft Report, p.163.

¹⁹ Draft Report, p.164.

²⁰ Draft Report, p.38.

Viterra is grateful for the opportunity to provide the Commission with its comments on the Draft Report. Viterra would also appreciate the opportunity to address the Commission's public hearing on 17 May 2010.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "D Fitzgerald". The signature is written in a cursive style with a horizontal line above the letters.

Damian Fitzgerald
Director Legal