



## Viterra Operations Limited

# Proposed Variations to Viterra's Port Terminal Services Access Undertaking

## Submission to the Australian Competition and Consumer Commission

### 1 Introduction

- 1.1 Viterra Operations Ltd ("**Viterra Operations**") makes this submission in support of proposed variations ("**Proposed Variations**") to the Port Terminal Services Access Undertaking provided by Viterra Operations and accepted by the Commission on 28 September 2011 ("**Access Undertaking**").
- 1.2 The Proposed Variations are submitted to the Commission for its consent under section 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) ("**CCA**").
- 1.3 Viterra Operations is seeking the Commission's consent to vary, and potentially extend the operation of, the Access Undertaking in order to obtain greater certainty for both itself and exporters pending the possible introduction of a mandatory industry code of conduct ("**Code**") from 1 October 2014.
- 1.4 In particular, Viterra Operations wishes to:
- (a) obtain, and provide for exporters, certainty about the process that will apply to the auctioning of capacity at its Port Terminals for the period from 1 October 2014 to 30 September 2015 (i.e. the period after the Access Undertaking currently expires); and
  - (b) obtain certainty that its associated entity, Glencore Grain Pty Ltd, will be able to export Bulk Wheat using Viterra Operations' Port Terminal Services if the Code is not in force by 1 October 2014 (and, as a result, Viterra Operations needs to have in place an access undertaking to satisfy the "access test" under the *Wheat Export Marketing Act 2008* (Cth) ("**WEMA**")).
- 1.5 The Proposed Variations will enable Viterra Operations to hold auctions for the 2014/2015 season in early 2014, whether or not the Code is introduced from 1 October 2014.

### 2 The Proposed Variations

- 2.1 The Proposed Variations involve the following key changes to the Access Undertaking:
- (a) An extension of the Expiry Date under the Access Undertaking from 30 September 2014 to 30 September 2015;
  - (b) Inserting a provision to make it clear that the Access Undertaking will expire if, in accordance with the *Wheat Export Marketing Amendment Act 2012* (Cth) and current government policy, a Code is implemented, with the result that:
    - (i) Viterra Operations is no longer required to pass the "access test" in order to export Bulk Wheat; and
    - (ii) access to Viterra Operations' Port Terminals is governed by the Code.

The purpose of this change is to provide Viterra and exporters with greater certainty in the lead up to the implementation of any Code, but ensure that if the Code is implemented, Viterra Operations is not subject to duplicative and potentially inconsistent regulation. The Access Undertaking will also expire if the WEMA (and the requirement to satisfy the “access test” via an access undertaking) is repealed independently of the implementation of the Code;

- (c) Various amendments to reflect the changes that have been made to the WEMA since the Access Undertaking was accepted by the Commission on 28 September 2011 (including removing the requirement for wheat exporters to be accredited by Wheat Exports Australia, changes to the Continuous Disclosure Rules and providing for the removal of the “access test” and likely introduction of the Code);
- (d) Removing the provisions in the Access Undertaking that set out the process for introducing an auction system and the consequences of not introducing an auction system by the specified date. These provisions are no longer required;
- (e) Inserting an ability for Viterra Operations to amend the Port Loading Protocols unilaterally on a temporary basis during any force majeure period. This is intended to provide Viterra Operations with the necessary operational flexibility to manage any unexpected events at its Port Terminals, and is consistent with the provisions in other access undertakings approved by the Commission;
- (f) Various changes to the Port Loading Protocols and Standard Terms to ensure that they will operate effectively both while the Access Undertaking is in force and as standalone documents once the Access Undertaking has expired and the Code has been implemented (e.g. by ensuring fewer cross-references to, but consistency between, the Standard Terms and Port Loading Protocols and the Access Undertaking); and
- (g) A small number of changes to the Port Loading Protocols to facilitate administration of the auction system and subsequent first-in-first-served system (based on Viterra Operations’ experience in implementing auctions for the 2012/2013 and 2013/2014 seasons) and to facilitate increased efficiency in loading vessels.

2.2 A further explanation of each of the Proposed Variations is set out in Attachment 1 of this submission.

2.3 The Proposed Variations (which comprise variations to each of the Access Undertaking, the Port Loading Protocols and the Standard Terms) are set out as mark-ups to the existing Access Undertaking, Port Loading Protocols and Standard Terms in Attachment 2 of this submission.

### **3 The Proposed Variations satisfy the criteria for the Commission’s consent under the CCA**

3.1 For the reasons set out below, Viterra Operations considers that the Proposed Variations satisfy the criteria for the Commission’s consent set out in section 44ZZA(3) of the CCA.

#### ***The Proposed Variations involve a “roll forward” of the current system***

3.2 The Proposed variations involve an extension for a further season of the existing auction system and first-in-first-served system that was approved by the Commission on 5 September 2012. Those systems have facilitated the allocation of approximately 10.84 million tonnes of port terminal capacity to 26 exporters during the period 1 October 2012 to September 2014.

3.3 Table 1 below sets out details of the tonnes booked through the auction system and the first-in-first served system during this period.

**Table 1 – Total bookings (Auction System and first-in-first served system)<sup>1</sup>**

Season	Period	Offered in Auction	Booked in Auction	FIFS	Total Booked	% Booked Auction	% Booked FIFS	% Capacity Booked
2012/13	Harvest	0	0	1,406,163	1,406,163			
2012/13	Non harvest	4,625,000	1,172,000	3,122,270	4,294,270	25.3	67.5	92.8
2013/14	Harvest	2,140,000	1,479,000	345,307	1,824,307	69.1	16.1	85.2
2013/14	Non harvest	4,395,000	1,369,000	1,945,526	3,314,526	31.1	44.3	75.4

3.4 Viterra Operations considers that the Proposed Variations are relatively minor in nature. In particular, the Proposed Variations do not involve any changes to the following key features of the Access Undertaking, Port Loading Protocols and Standard Terms:

- (a) **Method of allocating port terminal capacity:** The primary allocation of port terminal capacity via auctions and then subsequently via a first-in-first-served system will continue to be implemented in the manner approved by the Commission on 5 September 2012. The Proposed Variations do not involve any change to the method for calculating the Auction Premium Rebate payable to exporters;
- (a) **Publication of price and non-price terms for standard services:** The requirement for Viterra Operations to publish price and non-price terms for standard Port Terminal Services will continue unchanged;
- (b) **Negotiate access in good faith:** The requirement for Viterra Operations to negotiate with all access seekers in good faith and in accordance with a detailed negotiation procedure will remain unchanged;
- (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 Proposed Variations will not alter the existing publish / negotiate framework under the Access Undertaking, which will continue to be supported by a detailed dispute resolution mechanism; and
- (e) **Publication of key port information:** The Proposed Variations will not alter Viterra Operations' obligation to publish key port information including stocks held at each Port Terminal and cargo nominations on a monthly basis.

***The criteria under the CCA***

3.5 Given the limited nature and purpose of the Proposed Variations, Viterra Operations considers that the Proposed Variations are, and the Access Undertaking (as varied) will continue to be, consistent with:

- (a) the objects of Part IIIA of the CCA – namely, to:
  - (i) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
  - (ii) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;

<sup>1</sup> The figures in Table 1 represent volumes booked by clients rather than actual shipping volumes. Actual monthly shipping volumes for any particular month may vary from booked volumes due to a range of operational factors.

- (b) the pricing principles specified in section 44ZZCA of the CCA; and
- (c) the public interest, including the public interest in having competition in markets (whether or not in Australia).

- 3.6 Viterra Operations also considers that the Proposed Variations are consistent with and balance its legitimate interests as provider of the Port Terminal Services and the interests of persons who might want access to those services. In particular, the Proposed Variations provide greater transparency and certainty in relation to the process for allocating port terminal capacity for the 2014/2015 season, as they enable Viterra Operations to allocate that capacity in accordance with the Port Loading Protocols in early 2014 (i.e. prior to the expiry of the Access Undertaking and implementation of the Code).
- 3.7 Viterra Operations is also mindful in implementing the Proposed Variations that [Confidential] enables Viterra Operations to “lock in” and implement the process for allocating Port Terminal Services capacity for the 2014/2015 season regardless of whether or not the Code is introduced.
- 3.8 This is particularly important for both Viterra Operations and exporters in circumstances where there is currently very limited clarity about the future regulatory environment.
- 3.9 The Proposed Variations are also very important for Viterra Operations in circumstances where the consequence of it not having an Access Undertaking in place from 1 October 2014 (if the Code has not been implemented) is that its associated entity, Glencore Grain, will not be able to export Bulk Wheat from Viterra Operations’ Port Terminals.
- 3.10 These considerations provide strong support for Viterra Operations’ view that the Proposed Variations are consistent with the legitimate interests of the provider and the interests of persons who might want access to the service.
- 3.11 Viterra Operations also considers that the proposed duration (extending the Access Undertaking by only 12 months, subject to the introduction of the Code) also appropriately balances these interests as it does not entrench any arrangements for a lengthy period. It also ensures that Viterra Operations is not subject to duplicative regulation. This is clearly in Viterra Operations’ legitimate interests as provider of the Port Terminal Services.
- 3.12 Viterra Operations notes that clause 3.3(b) of the Access Undertaking currently provides that it may seek the Commission’s approval to the withdrawal of the Access Undertaking if:

*“the WEMA and/or other legislation is amended such that there is no longer any requirement under legislation for the Port Operator to have in place an access undertaking under Part IIIA of the CCA in relation to access to any of the Port Terminal Services in order for the Port Operator or its Related Bodies Corporate to export Bulk Wheat”.*

However, given the significant recent developments in relation to the implementation of a Code, the clear government policy on introducing a Code, and the Commission’s likely role in developing and enforcing the Code, Viterra Operations considers that the automatic expiry of the Access Undertaking to avoid duplicative and unnecessary regulation more appropriately balances both its legitimate interests as provider of the Port Terminal Services and the interests of users.

- 3.13 This also reflects that one of the key purposes of the Proposed Variations – [Confidential] - is to facilitate an orderly transition from the current Access Undertaking to the operation of the Port Terminal Services in accordance with the Code. This clear and transparent transition process will benefit both Viterra Operations and exporters.
- 3.14 Under the Proposed Variations, the Access Undertaking will also expire if the WEMA (and therefore the “access test”) is repealed without implementation of the Code. This amendment is intended to ensure that, if there is a change in Government policy, Viterra Operations will not be disadvantaged by its decision to extend the Access Undertaking in order to provide early certainty to clients.

#### **4 Further information**

4.1 If the Commission requires any further information in relation to the Proposed Variations, please contact Damian Fitzgerald on (08) 8304 1375 or [Damian.fitzgerald@viterra.com](mailto:Damian.fitzgerald@viterra.com).

**Viterra Operations Ltd**  
**25 July 2013**

## Attachment 1 - Explanation of Proposed Variations

This Attachment sets out a brief explanation of each of the Proposed Variations.

### 1. The Access Undertaking

	Clause	Explanation of Proposed Variation
1	1.1(d) - 1(f)	Viterra Operations proposes to amend these clauses to reflect the changes that have been made to the WEMA since 2011. In particular, the amendments reflect that the WEMA no longer requires exporters (including Viterra Operations' Associated Entities) to be "Accredited Wheat Exporters".
2	1.1(j)	This clause reflects Viterra Operations' intention that the Access Undertaking will cease to apply if the WEMA is repealed, including if it is repealed and the Code is declared by regulations under section 51AE of the CCA to be a mandatory industry code. The purpose of this amendment is to avoid duplication between the Access Undertaking and the Code in the event that the Code is introduced.
3	2.3	This clause will be amended to refer to "Associated Entities" of Viterra Operations (rather than "Related Bodies Corporate"). This amendment reflects more closely the terminology used in the WEMA.
4	3.2	<p>This amendment provides that the Access Undertaking will be extended by 12 months until 30 September 2015, unless the Code comes into force or the WEMA is otherwise repealed such that the "access test" ceases to apply. The purpose of this amendment is to avoid duplication between the Access Undertaking and the Code. It also ensures that if there is a change in Government policy and the WEMA (and therefore "access test") is repealed without implementation of the Code, Viterra Operations will not be disadvantaged by its decision to extend the Access Undertaking in order to provide early certainty to its Clients in relation to their capacity entitlements.</p> <p>The wording in clause 3.2(b) replicates the "trigger" for repeal of the WEMA set out in the <i>Wheat Export Marketing Amendment Act 2012</i> (Cth). The wording in clause 3.2(c) is broadly based on the language previously used in clause 3.3 of the Access Undertaking, but has been amended to provide greater certainty.</p>
5	3.3(a)	This clause has been amended to reflect amendments to the WEMA since 2011. In particular, the amendments reflect that it is no longer a requirement under the WEMA for Viterra Operations' Associated Entities to be "Accredited Wheat Exporters".
6	3.3(b)	This clause has been deleted as it is no longer needed as a result of the proposed "anti-overlap" provisions in clauses 3.2(b) and 3.2(c).
7	3.4	This clause has been amended to refer to "Associated Entities" of Viterra Operations (rather than "Related Bodies Corporate"). The amendment reflects more closely the terminology used in the WEMA.
8	3.5(c)	This clause has been inserted to provide clarity to users that the Proposed Variations will take effect in accordance with the time frames set out in section 44ZZAB(4) of the CCA.
9	4.1(a)(ii) and 4.1(b)(ii)	These amendments reflect, and are consistent with, the extension of the Access Undertaking by 12 months until 30 September 2015 (unless it expires earlier). The Access Undertaking will not apply to any agreements or negotiations after the expiry of the Access Undertaking.

	Clause	Explanation of Proposed Variation
10	4.1(c)	<p>This provision was initially intended to ensure that the Access Undertaking would apply to any negotiations in respect of Access Agreements that would commence or otherwise be in force after the commencement of the Access Undertaking (i.e. where the negotiations commenced prior to the start of the Access Undertaking).</p> <p>The Access Undertaking came into force in September 2011 and therefore this transition is no longer required in its current form. However, the amendments are intended to ensure that the Access Undertaking (as varied) will apply to any negotiations in respect of Access Agreements for the 2014/2015 season. That is, Viterro Operations will not enter into any Access Agreements in respect of that period until after the Proposed Variations come into force.</p> <p>The final sentence in clause 4.1(c) was initially inserted as a transitional provision into the new Access Undertaking (i.e. from pre-October 2011 to post 1 October 2011). Given that the Access Undertaking is already in force, it is no longer required as a transitional measure. Clause 5.3(c) makes it clear that Viterro Operations will continue to offer access on the Standard Terms.</p>
11	5.1(a)(ii), 5.3(c), 5.6(e), 5.6(f) and 5.6(g).	<p>These clauses have been amended to delete references to the introduction of an Auction System. These clauses are no longer required as the Auction System has already been introduced. The Auction System is set out in the Port Loading Protocols which can only be varied in accordance with the process set out in the Access Undertaking.</p>
12	6.4(a)	<p>This clause has been amended to reflect that it is no longer a requirement under the WEMA for exporters to be accredited by Wheat Exports Australia (“WEA”). However, it remains the responsibility of exporters to ensure that they meet all legal requirements relating to the exporting of Bulk Wheat.</p>
13	6.6(f)	<p>This clause has been amended to refer to “Associated Entities” of Viterro Operations (rather than “Related Bodies Corporate”). The amendment more closely reflects the terminology used in the WEMA.</p>
14	6.7(a)	<p>This clause has been amended to reflect the fact that it is no longer a requirement under the WEMA for exporters to be accredited.</p>
15	7.1(c)	<p>The initial purpose of this clause was to facilitate a transition from the 2009 access undertaking to the 2011 Access Undertaking. As the 2011 is already in effect, there is no longer any need to refer to clause 6.4(b) of the 2009 access undertaking.</p> <p>Viterro Operations has also deleted the transitional wording in relation to the introduction of the Auction System, as this has already occurred.</p> <p>In addition, Viterro Operations proposes to amend clause 7.1(c) to make it clear that, if a client does not submit an Access Application, the 90 day period for raising a dispute commences on the date that Viterro Operations issues the Standard Terms to the client in respect of the relevant season. This change reflects the fact that many clients do not formally submit an Access Application. Viterro Operations nonetheless negotiates in good faith and provides access on the Standard Terms.</p>
16	7.3(b) and (c)	<p>These changes update the position description for Viterro Operations’ representative in the dispute resolution procedure following the acquisition by Glencore.</p>
17	7.5(a)	<p>This amendment reflects the change in the name of the relevant ACCC branch to “Fuel, Transport and Prices Oversight”.</p>

	Clause	Explanation of Proposed Variation
18	7.7(a)(xiii)	This clause has been amended to delete references to the introduction of an Auction System. These references are no longer needed as the Auction System has already been introduced.
19	7.7(m)	This clause has been amended to reflect that the <i>Commercial Arbitration Act 2011</i> (SA) has replaced the former <i>Commercial Arbitration and Industrial Referral Agreements Act 1986</i> (SA).
20	9.1(a)	Viterra Operations has updated this clause so that it accurately reflects the changes to the Continuous Disclosure Rules (as set out in the WEMA) that have been made since the current Access Undertaking was accepted by the Commission.
21	9.2(a)	Given that the Port Loading Protocols have been amended significantly since September 2011 (e.g. to introduce the Auction System), this clause now reflects that the Port Loading Protocols attached to the Access Undertaking will be those in force as at the Variation Date (i.e. rather than September 2011).
22	9.3(a) and (b)	Viterra Operations has deleted the references to clause 9.5 in these clauses. Clause 9.5 provided for the future introduction of the Auction System and has therefore itself been deleted (i.e. on the basis that the Auction System has already been introduced).
23	9.3(g)	This clause has been inserted to provide Viterra Operations with an ability to vary the Port Loading Protocols unilaterally on a temporary basis during any force majeure period. This provision, which is also included in GrainCorp's access undertaking, provides Viterra Operations with greater operational flexibility to manage any unexpected operational issues that fall within the definition of "force majeure" under the Standard Terms.
24	9.5 and 9.6	These clauses have been deleted as they relate to the future introduction of the Auction System, and the consequences if Viterra Operations does not introduce an Auction System within the required timeframe. As the Auction System has already been introduced (and the Commission can object to any further changes to the Port Loading Protocols which set out the rules for how Viterra Operations will allocate port terminal capacity), these clauses are no longer required. Deleting these clauses will provide greater clarity in the Access Undertaking.
25	Former 9.7 (new 9.5)	This clause has been amended to refer to "Associated Entities" of Viterra Operations (rather than "Related Bodies Corporate"). The amendment reflects more closely the terminology used in the WEMA.
26	11.1(a)	This clause has been amended to reflect the proposed extension of the Access Undertaking for a further period of 12 months (unless it expires earlier). The amendments require Viterra Operations to provide Performance Reports to the Commission for the periods from 1 October 2014 to 31 March 2015, and from 1 April 2015 to 30 September 2015.
27	11.1(a)(xii)	The reference to AQIS has been replaced with the Department of Agriculture, Fisheries and Forestry ("DAFF"). This reflects that procedures for export certification are now performed by DAFF.
28	Clause 12(a)	This clause has been amended to update Viterra Operations' contact details for potential users.



	Clause	Explanation of Proposed Variation
29	Definitions	<p>Viterra Operations has made a number of consequential amendments to the definitions section to give effect to the amendments outlined above. In particular, the following definitions have been deleted as they are no longer required:</p> <ul style="list-style-type: none"> <li>• “Accredited Wheat Exporter”;</li> <li>• “Additional Capacity”; and</li> <li>• “WEAS”.</li> </ul> <p>Viterra Operations has also inserted new definitions for the terms “Associated Entity”, “Code”, “Corporations Act” and “Variation Date”.</p>
30	Schedule 4	<p>Schedule 4 has been amended so that:</p> <ul style="list-style-type: none"> <li>• It refers to “Associated Entities” of Viterra Operations (rather than “Related Bodies Corporate”); and</li> <li>• It deletes references to Viterra Operations providing audit reports to WEA, as WEA no longer exists.</li> </ul>
31	Port Schedule A – D, F, clause 3	<p>The references to AQIS have been replaced with DAFF to reflect that procedures for export certification are now performed by DAFF.</p>

## 2. The Port Loading Protocols

	Clause	Explanation of Proposed Variation
1	1(c)	<p>This change reflects that the Port Loading Protocols will only form part of the Access Undertaking (in respect of Bulk Wheat) for so long as the Access Undertaking is in force (see clauses 1.1(j) and 3.2(a) of the Access Undertaking). The Port Loading Protocols will, however, continue as a standalone document once the Code is introduced.</p>
2	1(f)	<p>This clause has been amended to make it clear that the Port Loading Protocols should be interpreted in accordance with the rules for interpretation in clause 17. Viterra Operations has inserted a new clause 17 to avoid potential ambiguity on certain interpretation issues (e.g. the application of legislation in circumstances where that legislation may change or be replaced).</p>
3	2.3 (c)	<p>During the review of the Auction System undertaken by Viterra Operations in accordance with clause 14 of the Port Loading Protocols, a number of exporters indicated that they would prefer that the Auctions were held earlier than the indicative August and November dates set out in clause 2.3 of the Port Loading Protocols.</p> <p>As a result, Viterra Operations proposes to delete the previous indicative timing for auctions set out in clause 2.3(c). In order to retain flexibility, Viterra Operations does not propose to specify the dates for any auction in the Port Loading Protocols. However, it is intended that the auctions will be in early 2014 (with appropriate notice requirements set out in clauses 2.3(a) and (b)).</p>

	Clause	Explanation of Proposed Variation
4	Former 2.4(g)	<p>Viterra Operations proposes to delete the requirement that each Client will have only one log-on to the online booking system that enables them to submit Booking Forms.</p> <p>This requirement is not necessary in the first five Business Days after Unallocated Capacity becomes available following an Auction, as there are other restrictions which would, in any event, preclude the use of multiple log-ons (e.g. one booking for each half hour period and individual bookings limited to 60,000 tonnes).</p> <p>Viterra Operations does not consider that there is any reason to retain the single log-on requirement after this initial period (i.e. in circumstances where any remaining capacity is not in high demand). The ability to have multiple log-ons is likely to be administratively efficient for Clients.</p>
5	Former 2.4(h) (now 2.4(g))	<p>This clause has been amended to make it clear that exporters <i>and their Associated Entities</i> can only make one booking in each half hour period during the two Business Days immediately following any auction. This amendment is intended to ensure that exporters cannot circumvent the intent of clause 2.4(g) by using different related companies to make different bookings.</p> <p>This amendment is not intended to prevent separate bookings by Clients (and their Associated Entities) that operate commercially separate export functions.</p> <p>This clause has also been amended to reduce the number of business days to which the “half hour rule” in 2.4(g) applies from five business days to two. This reflects feedback that Viterra Operations has received from Clients that five days is unnecessarily long. It also reflects Viterra Operations’ experience that the vast majority of any first-in-first-served bookings desired by Clients are made immediately after the opening of the shipping stem, and not several business days later.</p>
6	2.4(h)	<p>The intent of clause 2.4(g) is that Clients and their Associated Entities should only be able to make one booking in each half hour period during the two Business Days immediately following any auction. To reduce the potential for Clients to circumvent this intention by engaging third party “agents” to acquire capacity of their behalf, Viterra Operations proposes to insert a new clause that enables it to reject any booking that it considers (acting reasonably) may have been made for this purpose.</p> <p>Viterra Operations does not wish to prevent legitimate trading of Slots by exporters. However, it is important that Clients cannot circumvent the intention of clause 2.4(g) in this manner. Any disputes can be resolved in accordance with clause 12 of the Port Loading Protocols.</p>
7	4(a)(iv), 4(a)(xii) and 5.2(iv)	<p>The references to AQIS have been replaced with DAFF to reflect that procedures for export certification are now performed by DAFF.</p>
8	5.2(a)(iv) and (v)	<p>Viterra Operations proposes to amend these clauses so it is clear that Clients have to provide confirmation of the results of any marine and DAFF surveys. The provision and verification of this information is necessary for Viterra Operations to give effect to the priority rules set out in the Port Loading Protocols.</p>

	Clause	Explanation of Proposed Variation
9	5.6(b)	<p>Viterra Operations proposes to insert a new provision that:</p> <p><i>“Viterra Operations may, in its discretion and on a case-by-case basis, allow a vessel to load up to 1,000 tonnes in excess of the Capacity (plus tolerance) booked for that vessel. For the avoidance of doubt, this clause 5.6(b) does not entitle Clients to any additional tolerance in respect of the execution of Capacity. It is a discretion that Viterra Operations may exercise if it is necessary or desirable to facilitate the efficient or safe loading and departure of a vessel and/or the efficient operation of a Port Terminal”.</i></p> <p>There are a number of circumstances in which it may be necessary to increase by a small amount the volume of grain loaded onto a vessel (e.g. to ensure vessel stability). An ability for Viterra Operations to allow this, without the Client needing to acquire additional capacity from other exporters, will facilitate the efficient operation of the Port Terminals and reflects a pragmatic outcome for each of Viterra Operations, the Client and other exporters.</p>
10	5.7(a)(ii)	The proposed amendment is intended to make it clear that two-port loading vessels will not lose their booking at the second port if they are delayed at the first port after having arrived within their slot or the Grace Period.
11	5.7(c)	The proposed amendment is intended to clarify the flexibility that is available to Clients undertaking two-port loading in terms of the ways that they can re-distribute the loading of tonnes across the two ports. This flexibility is intended to provide benefits both for Clients and in terms of the operational efficiency of the Port Terminals.
12	7(e)(iii)	The proposed amendment clarifies that Clients cannot move a booking until after the shipping stem opens for first-in-first-served bookings in respect of the relevant period. Applications for the movement of bookings will be assessed in the same way as applications for new bookings (i.e. with booking priority granted to the first in time). This amendment also makes clear that movements made after the opening of the shipping stem will not be subject to the “half hour rule” (i.e. there is no requirement that Clients can move only one Booking in each half hour period).
13	7(g)	<p>Viterra Operations proposes to insert a new provision which makes it clear that Viterra Operations can (with the relevant Client’s consent) move bookings between the Outer Harbor and Inner Harbour Port Terminals. The purpose of the change is to facilitate the operational efficiency of both Port Terminals (and reflect the reality that, in practice, they are best managed operationally as a single Port Terminal).</p> <p>The amendment clarifies that the movement can take place without the need for a new booking and that, in making any move, Viterra Operations will take reasonable steps to minimise the impact on other Clients.</p> <p>The amendment will not have any impact on auction rebate payments as Outer Harbor and Inner Harbour form part of the same rebate pool for the purposes of any auction.</p>
14	9(a)(vii)	The proposed amendment makes it clear that Clients cannot transfer a Booking unless and until they have paid both: (a) the booking fee or Auction Fee and premiums in relation to the Booking, and (b) any other fees and charges that are at that time due and payable to Viterra Operations. The purpose of the amendment is to discourage the speculative acquisition of capacity intended only for on-sale to other exporters.

	Clause	Explanation of Proposed Variation
15	12(e) – (g)	These changes update the position description for Viterra Operations' representative in the dispute resolution procedure following the acquisition by Glencore.
16	14	<p>This clause has been amended to provide a mechanism for the Port Loading Protocols to be amended following the introduction of the Code in a manner consistent with any specific requirements in the Code. The purpose of this amendment is to ensure that the Port Loading Protocols are consistent with the Code.</p> <p>Viterra Operations has deleted the requirement to conduct a review of the Auction System following the completion of the Harvest Shipping Period ending in 2013. This review has already been completed.</p>
17	16	Viterra Operations has deleted clause 16 and the Transitional Provisions in Schedule 3. These provisions are no longer necessary as the Auction System has already been introduced.
18	16 (Definitions)	Viterra Operations has made a number of consequential amendments to the definitions section to give effect to the amendments outlined above, including the insertion of new definitions for the terms "Associated Entity", "Code", "DAFF" and "WEMA".
19	17 (Interpretation)	Viterra Operations has inserted a new interpretation section to set out rules for interpreting the Port Loading Protocols. The purpose of the amendment is to clarify how the Port Loading Protocols are to be interpreted in the event of any ambiguity.
20	Table A	The transitional provisions in Table A relating to the introduction of an Auction System have been deleted. These provisions are no longer necessary as the Auction System has already been introduced.
21	Schedule 3	Viterra Operations has deleted the Transitional Provisions in Schedule 3. These provisions are no longer necessary given that the Auction System has already been introduced.

### 3. The Standard Terms

	Clause	Explanation of change
1	Background	Viterra Operations proposes to amend the Background section to make it clear that the Standard Terms will operate both while the Access Undertaking is in force and as a standalone document once the Access Undertaking has expired and the Code has been implemented (e.g. by ensuring fewer cross-references to, but consistency between, the Standard Terms and the Access Undertaking).

	Clause	Explanation of change
2	Defined terms & interpretation	<p>Viterra Operations proposes to make a number of consequential amendments to the definitions section to give effect to the amendments outlined in this table. In particular, the following definitions have been deleted, as they are no longer used:</p> <ul style="list-style-type: none"> <li>• “Accredited Wheat Exporter”; and</li> <li>• “Auction” (this term was previously used only in the Background section).</li> </ul> <p>In addition new definitions have been inserted for the terms “Code”, “Excess Outturn Entitlement Amount”, “Excluded Services”, “Fair Market Value Price”, “Parent Guarantee”, “PPSA”, “Security”, “Shortfall Outturn Entitlement Amount”, “Viterra” and “Variation Date”.</p> <p>The definition for AQIS has been removed, and a definition for DAFF inserted, to reflect that all official documentation for export certification is now issued by DAFF.</p> <p>The definition for ‘Season’ has been updated to reflect the marketing year for Grain. The definition of “Port Loading Protocols” has been amended so that it can operate independently of the Access Undertaking.</p>
3	2.1(a)	The Standard Terms for the next Season will commence on 1 October 2013. The proposed change updates this from 1 October 2011.
4	2.1(b), 2.2(a), 3(a), 3(c), 4.3, and 7.8(c),	<p>The amendments to these provisions are designed to allow the Standard Terms to continue to operate on a standalone basis following the introduction of the Code (and expiry of the Access Undertaking). The purpose of the amendment is to provide certainty in relation to the process for allocating port terminal capacity for the 2014/2015 season, and enable Viterra Operations to allocate that capacity in accordance with the Port Loading Protocols in early 2014 (i.e. prior to the expiry of the Access Undertaking and implementation of the Code).</p> <p>These changes are not intended to affect Access Seekers’ substantive rights under the Standard Terms.</p>
5	7.3(b), 7.5, 7.7(c), 7.7(d)	The reference to AQIS has been replaced with DAFF. This reflects that procedures for export certification are now performed by authorised officers of DAFF, rather than under the AQIS brand.
6	7.13	Viterra Operations proposes to simplify the reconciliation and adjustment provisions in clause 7.13 so they are easier to apply and more transparent for both Viterra Operations and exporters. Rather than basing the adjustment price on a weighted average of season cash prices, Viterra Operations proposes to base the adjustment on fair market value, which will be calculated in accordance with accepted industry practices.
7	8.5	Following a review of the Standard Terms, clause 8.5 has been amended to provide that Viterra Operations can set-off amounts owed to it by Clients against amounts that it owes to Clients.
8	8.12	Viterra Operations proposes to update clause 8.12 to reflect the current clean energy legislative regime and to allow for Viterra Operations to respond to any potential future changes to that regime.

	Clause	Explanation of change
9	10.1	Following a review of the Standard Terms, Viterro Operations proposes to amend clause 10.1 to clarify the operation of its security interests over Clients' Bulk Wheat and to reflect the operation of the <i>Personal Property Securities Act</i> ("PPSA") in these circumstances. Viterro Operations relies on its security interests to secure payment for Port Terminal Services.
10	10.2 to 10.4	The amendments to these clauses are intended to give effect to the amendments to clause 10.1 explained above.
11	16.3(b)	The proposed changes update the position description for Viterro Operations' representative in the dispute resolution procedure following the acquisition by Glencore.
12	16.6(g)	The proposed amendments reflect that the <i>Commercial Arbitration Act 2011</i> (SA) has replaced the former <i>Commercial Arbitration and Industrial Referral Agreements Act 1986</i> (SA).
13	17.2(c)	See Item 4 (Standard Terms) above.
14	19.3	This clause has been amended to update Viterro Operations' contact details for Clients.
15	27A	Viterro Operations proposes to insert a new clause 27A to provide greater clarity in relation to the application of the PPSA to Bulk Wheat held in Viterro's system.
16	28.3	The proposed amendments are intended to allow Viterro Operations to vary the Standard Terms in order to meet the requirements of any Code. The purpose of the amendments is to ensure that the Standard Terms are consistent with the requirements of the Code which will be implemented as a mandatory industry code by regulations under section 51AE of the CCA.

## Attachment 2 – Proposed Variations