SUBMISSION NO. 12
Wheat Export Marketing Amendment Bill 2012

VITERRA™

A SUBMISSION BY VITERRA LTD

TO THE

HOUSE STANDING COMMITTEE ON

AGRICULTURE, RESOURCES, FISHERIES AND FORESTRY

INQUIRY INTO THE

WHEAT EXPORT MARKETING AMENDMENT BILL 2012

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Purpose

Viterra Ltd ("**Viterra**") is pleased to provide the following submission to the House Standing Committee on Agriculture, Resources, Fisheries and Forestry Committee inquiry into provisions of the Wheat Export Marketing Amendment Bill 2012.

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Background to Viterra

Viterra Ltd is a wholly owned subsidiary of Viterra Inc.

Viterra Inc provides premium quality ingredients to leading global food manufacturers. Headquartered in Canada, the global agri-business has operations across Canada, the United States, Australia, New Zealand and China, as well as a growing international presence that extends to offices in Japan, Singapore, Vietnam, Switzerland, Italy, Ukraine, Germany, Spain and India.

Viterra Ltd's storage and handling network in South Australia is an integrated network of 108 grain receival sites and six grain export terminals located throughout the State (refer to **Attachment A**). In addition, Viterra operates three receival sites in Victoria.

In accordance with the *Wheat Export Marketing Act 2008* ("WEMA"), Viterra Ltd holds accreditation to export bulk wheat and has in place an access undertaking approved by the Australian Competition and Consumer Commission ("ACCC"), relating to the provision of port terminal services.

1.0 Australia's wheat export marketing arrangements

a. Competition in relation to the export of bulk wheat

The Australian grain industry has undergone substantial transformation in recent years. The primary change has been introducing competition for the export of bulk wheat, through the introduction of the WEMA. Since this time, a highly competitive marketplace has evolved and growers are now benefiting from marketing choice in the form of new products and services, as well as from the range of buyers that help to spread counter-party risk.

Consistent with this development of competition, the Productivity Commission inquiry into Australia's wheat marketing arrangements in 2010[1] recommended further market deregulation, including by:

- abolishing the Wheat Export Accreditation Scheme, Wheat Exports Australia ("WEA") and the Wheat Export Charge from 30 September 2011; and
- removing the access test requirements for accredited grain port terminal operators from 30 September 2014.

The report's key findings included that:

- The benefits of accreditation of traders will rapidly diminish in the post transitional phase, leaving only the costs. The accreditation scheme, WEA and the Wheat Export Charge should be abolished on 30 September 2011.
- The port terminal access test has provided greater certainty for traders and made access easier, more timely and less costly than it could have been by relying on potential declaration under Part IIIA of the Trade Practices Act.
- There remain some transitional issues associated with port access and contestability in the logistics supply chain. Accordingly, the access test should remain a condition for port operators to export bulk wheat until 30 September 2014.
- However, the benefits of the access test will diminish and could become costly in the long term without the checks and balances of Part IIIA of the Trade Practices Act (now the *Competition and Consumer Act* 2010 ("CCA"). Accordingly, from 1 October 2014, regulated access should rely on Part IIIA, with continuation of mandatory disclosure, supplemented by a voluntary code of conduct by all port terminal services operators.

[1] Productivity Commission (2010) *Wheat Export Marketing Arrangements,* Report no. 51, Canberra.

- There is evidence that increasing on-farm storage, and competition between road and rail, are leading to improvements in supply chain efficiency. However, it is important that the regulatory arrangements enhance efficiency in the transport and storage market by facilitating contestability.
- The level and allocation of investment in road and rail infrastructure by governments should be based on rigorous cost-benefit analysis, with a focus on developing economically and socially efficient logistics chains.
- Monthly information by state on stocks, exports and domestic uses facilitates an efficient wheat market. Industry should consider funding its continuation.
- The provision of most other 'industry good' functions is best left to the industry.

In line with the findings of the Productivity Commission, Viterra considers that there is compelling evidence which demonstrates the success of wheat marketing reform, and that the industry is well positioned to manage wheat exports in the same way that it manages the competitive and efficient export of other agricultural commodities.

b. The South Australian supply chain

Viterra entered the 2011/12 harvest having set new records for the amount of grain exported from its South Australian ports, with shipping remaining consistently strong throughout the year.

- More than 8.41 million tonnes of grain was exported from South Australia in 2011.
- The previous highest amount shipped in a calendar year was 6.24 million tonnes in 2001.
- The average annual grain export task from South Australia, during the past 10 years, was 4.3 million tonnes.

South Australia's 2011 record shipping program was executed by 15 different exporters and more than two thirds of all grain from South Australia is shipped by companies other than Viterra. Since this time, and only three months into the 2012 calendar year, Viterra has shipped 2.39 million tonnes of grain from the State. In doing so, Viterra has broken another all-time shipping record for South Australia, with more than 900,000 tonnes of grain exported from Viterra's ports in March, 2012:

- 912,029 tonnes of grain shipped during March exceeded the previous monthly record of 839,658 tonnes shipped in February 2004.
- Viterra's newest port, Outer Harbor, also reached a new record for grain exported during one month, shipping 244,000 tonnes in March 2012.

This level of exports (supported by Viterra's significant investment in infrastructure and logistics) and diverse participation on the shipping stem further supports the Productivity Commission's views in relation to the rapid maturing of competition in the wheat exports industry and the need for continuing de-regulation.

c. The impact of regulation

Viterra provides port terminal access to a range of third party exporters under terms that meet the requirements of Australia's competition law and current wheat marketing arrangements, and in a manner that ensures fair and open access to all exporters.

Viterra's port terminal operations are regulated via a combination of State[2] and Federal regulatory bodies - including the Essential Services Commission of South Australia, WEA and the ACCC.

Viterra requires regulatory certainty to operate its business and derive a reasonable return from its significant investment in export grain infrastructure in South Australia. We also need flexibility to operate our port terminal facilities on commercial terms, without unduly prescriptive regulatory intervention or unnecessary duplication between State and Federal legislation.

Irrespective of any regulatory framework, as the owner and operator of a volume-driven infrastructure business, it is in Viterra's commercial interest to provide options to growers and grain marketers to attract their business and maximise volumes through its port assets.

Viterra does not support continuing heavy-handed regulation in the wheat export market beyond 30 September 2014. Rather, we support the continuing development of commercial port access arrangements with our clients under the proposed framework of competition law and industry self-regulation.

The Australian grain industry is maturing after a period of significant reform and bodies, such as Grain Trade Australia ("GTA"), are helping to facilitate trade and establish new standards for the industry. Viterra welcomes the leadership role that GTA has assumed in convening the Industry's Code

[2] The access regime set out in the *Maritime Services (Access) Act 2000* (SA) (MSA Act) has been certified as an effective access regime under the CCA. That regime provides for access to South Australian ports and maritime services on fair commercial terms and for the regulation of prices for essential maritime services. Essential maritime services are declared to be regulated industries for the purpose of the *Essential Services Commission Act 2002 (South Australia)*. The Essential Services Commission of South Australia is the economic regulator for seven commercial ports in South Australia, including the 'proclaimed ports' at Outer Harbor, Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln and Thevenard.

Development Committee[1], established to develop the voluntary port code of conduct (refer to **Attachment B**). Viterra will remain an active participant of this forum as a port infrastructure owner.

Viterra believes the transition to a voluntary port code of conduct is the most appropriate pathway for full deregulation of the Australian wheat export industry by 2014.

As outlined in Section 2.0 of this submission, Viterra has identified a number of concerns in relation to the Exposure Draft of the Wheat Export Marketing Amendment Bill 2012 ("Bill"), and changes that are required to deliver regulatory certainty to port terminal operators, in line with the Government's policy intent to transition the industry to full deregulation.

Viterra considers that the imposition of the access test (as presently proposed under the Bill), is likely to increase costs in the grain export supply chain with very little (if any) benefit to the industry, and place at risk potential new investment from the private sector in port infrastructure.

d. Conclusion

Viterra supports the removal of the current regulatory burden imposed by the *WEMA* and associated legislative instrument, the Wheat Export Accreditation Scheme.

Viterra believes that WEA has provided the necessary assurance to growers during the transition from the former wheat single desk arrangements, however the industry is now well placed for bulk wheat exports to be managed in the same way as all other grain commodities.

Viterra will not support any proposal to reconstitute WEA or expand the coverage of existing legislation to non-prescribed commodities, such as barley, pulses or canola. Retaining WEA beyond 30 September 2012 would only serve to impose an excessive and unnecessary regulatory burden on the industry, whilst the associated compliance costs would ultimately be passed back to Australian growers.

Viterra is fully supportive of the Government's position to transition to full deregulation of the Australian wheat industry by 30 September 2014 through:

- **abolishing WEA, the Wheat Export Charge and the requirements for accreditation to export bulk wheat in 2012, and**
- **governing port access arrangements under general competition law and a voluntary industry code of conduct.**

[1] For further information: http://www.graintrade.org.au/node/499

2.0 Provisions of the Wheat Export Marketing Amendment Bill 2012

a. Access Test

Viterra does not support the current position under both the WEMA and the Bill in which only certain export port terminals are subject to regulatory intervention and oversight. As a member of the code development committee, Viterra considers that the successful implementation of the code of conduct will require the participation of infrastructure owners to ensure coverage of all bulk wheat export terminals in Australia in meeting the objectives of the voluntary code of conduct.

Although the Access Test requirements in the WEMA were initially intended to address potential concerns in relation to the vertical integration of wheat exporters and port terminal operators, the Access Test imposes a very significant regulatory burden and very significant costs on only some port terminal operators – namely, those who are, or have an associated entity who is, an exporter of wheat.

This difference in regulatory environment creates a material risk of competitive distortions in the supply chain and, in particular, in relation to the provision of port terminal services. If the Committee considers that there are benefits in implementing legislation or a voluntary code of conduct that requires port terminal operators to publish detailed information and to implement transparent rules in relation to their respective booking and capacity management processes, it is unclear why these requirements should not apply to all operators.

This anomalous situation and the potential for competitive distortions is highlighted by the fact that, due to complications in the application of the Access Test, a significant competing bulk grain terminal – the Melbourne Port Terminal – was not required to have an ACCC access undertaking in place until 1 October 2011. Potential new developments such as the proposed Port Spencer port terminal in South Australia are also subject to a different regulatory environment.

Viterra considers that it is inconsistent with the stated objects of the Bill (in particular, promoting the "competitiveness of all sectors through the supply chain") to implement a regulatory regime that imposes costs and burdens on only some providers of a particular service. This potential for competitive distortion is a significant concern which should be the subject of further considerations by the Committee.

While Viterra does not support the imposition of increased industry regulation, this further highlights the need to progress the de-regulation process recommended by the Productivity Commission and to ensure that, post September 2014, **all** wheat exporting ports are subject to the same regulatory framework.

b. Continuous disclosure rules

Viterra does not support the expansion in scope of the continuous disclosure rules as set out in section 9(4)(c) of the Bill, or the requirement in section 9(4)(e) for the "loading statement" to be provided in a manner and form approved by the ACCC. These amendments to the WEMA are likely to add material costs for the industry with little (if any) benefit. Accordingly, Viterra considers that the continuous disclosure rules as set out in section 24(4) of the WEMA should remain unchanged.

Viterra already publishes some of the proposed new information as set out in section 9(4)(c) of the Bill on its shipping stem (e.g. a unique booking number, the name of the exporter and the type of grain). Given that this has been standard practice for several years, it is unclear why it needs to be the subject of legislative intervention, particularly given the potentially significant consequences of failure to comply with the continuous disclosure rules.

Other new matters specified in the proposed continuous disclosure rules set out in section 9(4)(c) of the Bill require urgent re-consideration:

- There is no case at all that has been articulated in relation to any possible benefits (for industry, exporters or regulators) of publishing details each day on whether the loading of a particular ship has started but not yet completed, and the time at which loading of each vessel is completed. These are operational matters that depend on a very wide range of factors and change continuously. Including these matters in the continuous disclosure rules would require Viterra to ***manually*** update its shipping stem ***each day***, in respect of ***every vessel*** at ***every port*** to provide information that (a) does not provide any clear benefit to industry; (b) is subject to a wide range of influences and causes; and (c) may often change within hours of the publication. The requirement for manual updating of these matters will add significant costs. The information may also provide a highly distorted and inaccurate view of port performance, particularly as, over the past season, the single greatest cause of vessel delays has been exporter's vessels failing marine surveys.

- There has also been no case articulated in relation to the possible benefits of requiring the publication of the estimated time of leaving the port terminal. The priority rules for providing port terminal services are set out (and published) as part of the ACCC Access Undertaking. Both these priority rules and the time that it may take to load a vessel depend on a wide range of operational matters and may also be subject to change. Including these matters in the continuous disclosure rules would again require Viterra to ***manually*** update its shipping stem each day, in respect of every vessel at every port in order to provide information the relevance and use of which is unclear. Again, this will involve significant costs.

Viterra strongly opposes the imposition of further costly regulatory burdens in circumstances where there has been no debate in the commercial sector in relation to the relative benefits and costs, and no clear articulation of the issue that the increased regulation is seeking to address.

In short, there is no compelling regulatory case for making any changes to the continuous disclosure rules as they presently exist under section 24(4) of the WEMA. Viterra, therefore, does not support the changes as set out in section 9(4)(c) of the Bill.

In addition, Viterra does not support the proposed new requirement in section 9(4)(e)(ii) of the Bill, that port terminal operators be required to provide a copy of the shipping stem each day to the ACCC "in the manner and form approved ... by the ACCC". Quite apart from the potentially significant costs of changing business systems and processes so that information can be reported in a particular form, it is unclear what benefit the legislation is seeking to achieve by imposing this daily reporting requirement. This is particularly the case given:

- the level of oversight the ACCC already has in relation to the allocation of port loading capacity (and, in particular with Viterra, the substantial involvement the ACCC has in relation to the implementation of a new auction system);
- the strong powers that the ACCC already has under the access undertakings to seek information if it considers that there may be potential concerns; and
- the robust dispute resolution framework available for industry to raise potential concerns as part of the Undertaking and associated Port Loading Protocols, in addition to the existing commercial agreements in place for the provision of port terminal services.

Viterra has significant concerns that the costs and other impact of this additional regulation have not been considered and weighed against any possible benefits. We therefore strongly urge the Committee to consider these matters and to recommend amendment to the Bill as presently drafted.

c. Voluntary port access code

Viterra supports the development of a code of conduct, and is an active participant in the code development committee. However, Viterra has substantial concerns in relation to the regulatory uncertainty likely to arise in relation to the criterion for approval of any code of conduct by the Minister set out in section 12(2)(c) of the Bill.

Section 12(2)(c) of the Bill provides that the minister **must not** approve a code of conduct unless satisfied that it "is consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain".

Viterra's concern is very straightforward. It does not understand what the criterion means. This is likely to create substantial difficulty, both for the industry in developing a code of conduct and for the Minister in determining whether or not to approve any code of conduct.

First, the code of conduct is intended to relate to the provision of port terminal services. However, the criterion requires it to advance certain objectives in respect of "the wheat export marketing industry" and "all sectors through the supply chain". It is not apparent how a code of conduct focused on port terminal services might achieve this.

Second, it is unclear what it might mean for a code of conduct relating to port terminal services to be consistent with a "profitable" export marketing industry. While infrastructure providers and users are familiar with concepts such as the interests of users, the legitimate interests of providers and the public interest in having competition in markets, section 12(2)(c) seeks to introduce entirely new concepts such as "consistency with industry profitability" and "support for all sectors in a supply chain". Viterra submits that, while these may involve very high level goals, they are also potentially conflicting and are wholly unsuited to statutory criteria for Ministerial approval of a code of conduct.

In order to facilitate the development and introduction of a code of conduct, Viterra submits that the proposed criterion in section 12(2)(c) of the Bill requires significant re-consideration. It should be amended so that it focuses on efficient outcomes in relation to the provision of port terminal services and not on matters that may be well outside the influence of the relevant code of conduct (i.e. industry profitability and the operation or competitiveness of other parts of the supply chain).

For the reasons set out above, Viterra also does not support the introduction of the new objective as set out in Part 1, paragraph 3(a) of the Bill.

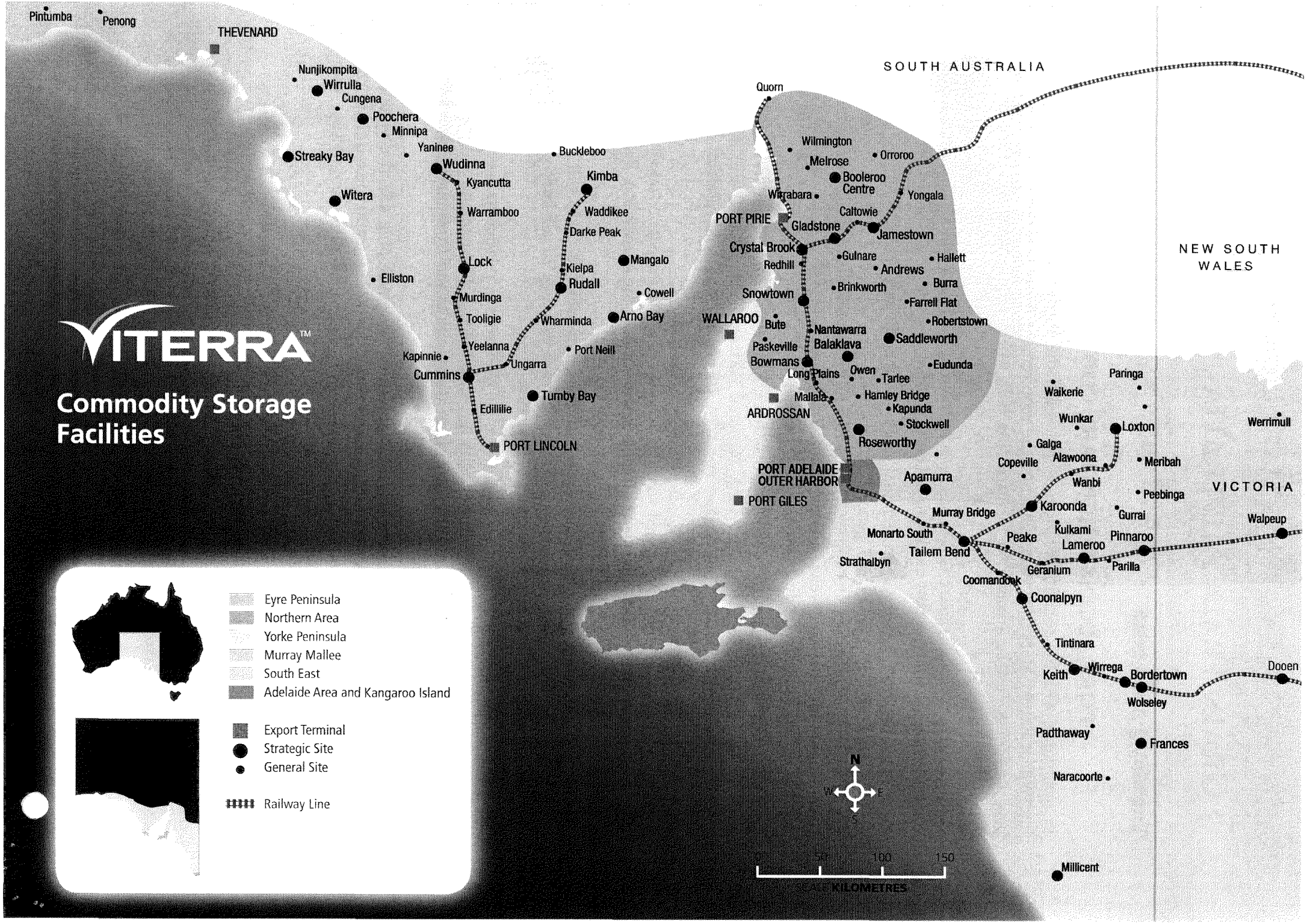
As the industry continues its path towards further de-regulation, it is imperative that this is not placed at risk by unclear policy goals or by imprecise legislative criteria that are not well calibrated to the focus of the regulatory reforms.

3.0 Attachments

a. Viterra commodity storage map (current 27 April 2012)

b. 'Port Access Voluntary Code of Conduct', GTA Press Release, 3 April 2012

ENDS.



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GRAIN TRADE AUSTRALIA

Tuesday 3 April 2012 **MEDIA RELEASE**

PORT ACCESS VOLUNTARY CODE OF CONDUCT

In accordance with the recommendations contained in the Productivity Commission Report into Wheat Export Marketing Arrangements, the requirement for port terminal operators to pass an Access Test as a condition for exporting bulk wheat requirement will cease on 30 September 2014.

The legislation to enable these changes has been introduced by the Australian Government and will transition the wheat export market to full deregulation.

From 1 October 2014, access to port terminal services will be governed by a voluntary industry code of conduct (the Code) and general competition law, subject to the Code meeting legislative requirements and the approval of the Australian Government. Recognising the need to coordinate industry to develop a Code, Grain Trade Australia (GTA) in its capacity as the secretariat, has formed an industry driven Code Development Committee (CDC).

The CDC consists of established port owner/operators, Australian Grain Exporters Association (AGEA), Grain Producers Australia (GPA), National Farmers' Federation (NFF) and Grain Trade Australia (GTA). Mr Tom Keene, the GTA Chairman, has been appointed as the Chairman of the CDC.

The CDC will develop a non-prescribed voluntary code of conduct for port terminal access for the export of bulk wheat and will report directly to the Minister for Agriculture, Fisheries and Forestry the Hon. Joe Ludwig.

Mr Keene commented that, "The successful implementation of the Code will require the participation of infrastructure owners which will ensure coverage of all bulk grain export terminals in Australia in meeting the Codes objectives."

The CDC will undertake a thorough examination of all the issues in relation to the current port access requirements and will liaise closely with key stakeholders, Department of Agriculture, Fisheries and Forestry (DAFF) and the Australian Competition and Consumer Commission (ACCC) throughout the development process.

"The Code must remain consistent with ACCC guidelines for developing effective voluntary codes of conduct and include continuous disclosure rules." Mr Keene further noted that "The Code will ensure that Australian grain producers will enjoy maximum competition with exporters enjoying the surety of access to port facilities."

Further information:
Geoff Honey – Grain Trade Australia, 02 9235 2155

Grain Trade Australia develops the grain standards and contracts that are used across the Australian grain industry and has over 250 member organisations ranging from regional family businesses to large national and international trading/storage and handling companies.

Members operate within all sectors of the grain industry in Australia. Organisations involved in related commercial activities such as banking, communications, grain advisory services and professional services (solicitors and accountants) are also members.