



Louis Dreyfus Commodities Australia Pty, Ltd  
Level 2, 650 Chapel Street  
Melbourne, VIC  
3141  
Australia

Tel 61.3.9828.6111  
Fax 61.3.9826.4776

August 31, 2011

Mr. Anthony Wing  
General Manager  
Transport and General Prices Oversight  
ACCC  
GPO Box 520  
MELBOURNE VIC 3001

VIA Email: [transport@acc.gov.au](mailto:transport@acc.gov.au)

Dear Mr Wing:

Attached please find our comments regarding the ACCC draft decision on Viterra Operations Limited Port Terminal Services Access Undertaking dated 11 August 2011. These comments are intended to be a public submission.

Louis Dreyfus Commodities believes that free and open markets for commodities provide the most fair, transparent and efficient allocation of resources. Our comments in this matter are grounded in these principles. We support ACCC's efforts to provide fair access to Australia's rich agricultural resources.

Sincerely,

A handwritten signature in black ink, appearing to read 'PC', written in a cursive style.

Philip Coffin  
General Manager, Grains  
Louis Dreyfus Commodities Australia Pty Ltd

Attachment: Submission in response to the ACCC Draft Decision on Viterra Operations Limited Port Terminal Services Access Undertaking dated 11 August 2011, and in response to the Viterra Revised Port Terminal Services Access Undertaking dated 10 August 2011.

**Submission in response to the ACCC Draft Decision on Viterra Operations Limited Port Terminal Services Access Undertaking dated 11 August 2011, and in response to the Viterra Revised Port Terminal Services Access Undertaking dated 10 August 2011.**

Louis Dreyfus Commodities Australia Pty Ltd (LDC) has previously submitted that the following principles should be common to all Access Undertakings for the provision of Port Terminal Services:

1. The standard Port Terminal Service offering(s) provided by the BHC should be made under the same terms and conditions for all Users.
2. Where demand for Port Terminal Services exceeds supply in any given period, price should be the determinant of capacity allocation.
3. Capacity for the Port Terminal Service should be expressed in metric tonnes of product to be shipped at the port per calendar month.
4. Where the BHC offers a bundled service incorporating logistics for delivery of grain to port and Port Terminal Services, the BHC should be required to offer as part of the bundled service a commercially acceptable vessel load rate and demurrage and despatch payments at rates relevant to the prevailing market rates for daily vessel hire.
5. Shipping slots should be transferable as between:
  - a. Users – as long as between Users holding a Current Port Terminal Services Agreement with the BHC.
  - b. Ports – so long as spare capacity is available.
  - c. Time Periods – so long as spare capacity is available in the period to which the User requests that the slot be moved.
  - d. Grains.

These principles continue to form LDC's position in relation to the Draft Decision and the Revised Draft Undertaking.

**ACCC Draft Decision**

LDC submits that the ACCC Draft Decision, including the ACCC's preliminary view in respect of the Revised Draft Undertaking, is appropriate in the following respects.

1. The ACCC has rejected first come, first served as the primary means by which Viterra will allocate capacity. Viterra, in its Revised Draft, has proposed an auction system.
2. Viterra has undertaken in clause 9.5(d)(ii) of the Revised Draft Undertaking to define capacity on a consistent basis in terms of metric tonnes per month available at each Port Terminal.
3. Viterra has inserted a new clause 10.1 in the Revised Draft Undertaking that requires Viterra to publish on a weekly basis information pertaining to the grade and quantity of grain at each Port Terminal.
4. Viterra has inserted a new clause 10.2 in the Revised Draft Undertaking that requires Viterra to publish an indicative estimate of Available Capacity.
5. Viterra has inserted a new clause 11 in the Revised Draft Undertaking providing for the transferability of slots between clients.
6. Viterra has inserted a provision in clause 9 of the Port Loading Protocols providing for the movement of slots between ports and between periods subject to available capacity. We do not, however, support the limitation of using each option only once per slot.

7. Viterra has inserted a new clause 10 in the Port Loading Protocols providing for a conditional refund of the booking fee where a slot is surrendered not later than 30 days prior to the commencement of that slot.

LDC submits that the ACCC Draft Decision, including the ACCC's preliminary view in respect of the Revised Draft Undertaking, is NOT appropriate in the following respects:

- 1. The period for the introduction of an Auction system is uncertain and even the earliest stated date of May 2012 is too late.**

The ACCC has determined that the first come, first served method is not satisfactory as the primary means of allocating capacity.

The fact that Viterra has agreed to amend the Revised Draft Undertaking to include an auction process in the future will go a significant way to ensuring that capacity is allocated to the parties that value it most highly once the auction system is operating. However, it does nothing to resolve the immediate problem, which is the excess of demand for capacity relative to supply during the period from 1 January to 30 April 2012.

It seems incongruous with the ACCC's own reasoning that the first come, first served approach should continue to be used as the basis for allocating capacity during the period from 1 January 2012.

Given the extensions provided for in the Proposed Draft Undertaking, there is no effective penalty on Viterra for not implementing an auction system until mid-August of 2012. Despite the penalty of Viterra not being able to provide Port Terminal Services to its own trading division for loading bulk wheat after 1 October 2012, it is possible that there will be no appropriate mechanism (i.e. an auction) for allocating capacity to 3<sup>rd</sup> party exporters for shipment after 1 October 2012.

LDC submits that Viterra's assertion that it cannot have an auction system in place by October is unsupported. If it has not already done so, the ACCC should independently assess the time required to implement an auction system. Ostensibly, the system provided by Tradeslot to CBH to allocate capacity in WA ports could be implemented in a short period of time.

Viterra has already confirmed in its submission to the ACCC dated 22<sup>nd</sup> July 2011 that it has commenced the work necessary to implement an auction system. Given there is an existing auction mechanism in place in WA for the allocation of export capacity, it does not seem reasonable that it should take in excess of 12 months, assuming the extensions provided for in the Proposed Draft Undertaking were exercised, for Viterra to implement an auction system.

The ACCC should impose a shorter period for the implementation of the auction system. The auction system should be in place (and the first auction should be held) no later than 16 December 2011 and capable of allocating capacity beyond 1 February 2012. Slot bookings currently showing as pending for the period starting 1 February 2012 shall be rejected and that capacity shall be made available to the market through the auction.

## **2. Allowing Viterra to accept bookings under the flawed first come, first served system is neither fair nor transparent.**

Since March 2011 when Viterra received export capacity applications in excess of the port capacity at Port Adelaide Outer Harbour and Port Lincoln, there has been very limited communication from Viterra. It is not clear that Viterra has followed its Port Loading Protocols in respect of its treatment of the pending bookings. Viterra has failed to accept or reject the applications within the two day period stipulated in the Port Loading Protocol.

Viterra did write to applicants requesting further information and advising that the bookings would be held in a pending status while Viterra entered into these “discussions and negotiations” with Clients and to allow Viterra to liaise with the ACCC. The use of the words discussion and negotiation in the letter were clearly an attempt by Viterra to invoke clause 4.5 of the Port Loading Protocol.

It is debatable whether the Port Loading Protocols from the 2009 Access Undertaking contemplated the circumstances that Viterra faced when it received the excess of early applications for export capacity. It does not seem satisfactory that applications for slots can be placed on hold for an extended and effectively indefinite period, now in excess of four months, in reliance of clause 4.5 invoked for Viterra’s convenience. There has been no good faith negotiation between LDC and Viterra since the letter was received. LDC provided the additional information within the period requested, but has received no direct response from Viterra. Discussions between LDC and Viterra as to the process and progress have been met with Viterra advising that in effect they were waiting for the ACCC. It is worth noting that these discussions were initiated by LDC and not by Viterra. In any case it is hardly indicative of a transparent process.

While it may be pragmatic for the ACCC to agree (in its preliminary opinion to the proposed transition arrangements) that Viterra approves applications for currently pending 2012 export capacity on a first come, first served basis, including bookings for execution after the date by which an auction system is potentially in operation, it is far from satisfactory given that the ACCC has clearly determined that the first come, first served methodology is not an appropriate means of allocating capacity. In fact, the amount of capacity that would be committed under the proposed transition arrangements (utilizing the admittedly inappropriate mechanism) is large enough to exclude a significant number of exporters from accessing capacity for the peak period of the 2012 shipping season (January-April 2012). Allowing such an unfair distribution of capacity will greatly distort competition among exporters in South Australia by concentrating bookings in the hands of a few during this peak period of demand.

## **3. Transferability of slots is not a sufficient remedy for ineffective capacity allocation.**

Given the crop prospects and the likely demand for Australian grain in early 2012, it is reasonable to assume that SA shipping capacity will be in demand during this period. Notwithstanding the fact that Viterra has agreed to reduce the volume of slots that its own trading division has applied for, there will still be a very considerable concentration of capacity at key ports within the hands of a very few exporters.

The proposed transferability of slots, while otherwise welcome, could be expected to provide a mechanism for the transfer of capacity from those who booked early to those who missed out on capacity. However, it is doubtful that holders of capacity during the peak shipping period will transfer to others unless they are given a financial incentive to do so. As such, the holders of capacity would be in a

position to extract market rent for transferring capacity that was obtained under an inappropriate method.

It would be preferable if an auction system were implemented at the earliest opportunity in order to allocate 2012 capacity to the party who places the highest value upon that capacity.

**4. Viterra's proposal to limit the number of times a client may transfer shipping slots between ports and periods limits the overall efficiency created by the introduction of these features.**

Outside of administrative simplicity, it is unclear why Viterra, through clause 9.2 of their revised Port Loading Protocols, seeks to limit flexibility to exporters in transferring shipping slots between ports and periods. As noted in the Draft Decision, the ACCC considers transferability as a "preferred mechanism" for allocating capacity on "economic efficiency grounds"; Viterra's clause 9.2 of the revised Port Loading Protocols directly limits efficiency in allocating shipping slots after one transfer is made.

**Other matters for consideration**

**1. Information**

LDC considers that it is desirable that Viterra publish information about the profile of the crop received at its upcountry facilities. As the ACCC points out this information was deemed to be relevant by the Productivity Commission. LDC does not agree with the Productivity Commission finding that the provision of such information would be unduly onerous on the BHC.

As such, LDC would like to see all BHC's publish weekly harvest reports that include the profile of the crop by port zone, in respect of the quantity of each grade of the commodities received. A final harvest report should be published which states the final quantity of each grade of commodity received in each port zone.

**2. Load rates and demurrage/despatch**

LDC notes that the ACCC believes this is a matter for commercial negotiation between the Client and the BHC. LDC acknowledges the process for negotiation of the terms of the Services Agreements, and for dispute resolution if negotiation does not yield a satisfactory outcome.