



Australian
Competition &
Consumer
Commission

**Auction Objection Notice
in response to
Viterra Operations Limited's
Auction Variation Notice**

11 April 2012



© Commonwealth of Australia 2012

This work is copyright. Apart from any use permitted by the *Copyright Act 1968*, no part may be reproduced without permission of the Australian Competition and Consumer Commission. Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, Australian Competition and Consumer Commission, GPO Box 3131 Canberra ACT 2601.

Contents

Contents	iii
Glossary	iv
Summary.....	1
1 Authority to issue an Auction Objection Notice	3
1.1 Decision making framework.....	4
2 Auction Objection Notice.....	7
2.1 Port Loading Protocols	7
2.2 Schedule 1 – Auction Rules	8
2.3 Standard terms	8
3 ACCC reasons.....	9
3.1 Auction features	11
3.1.1 Clause 9.5(d)(i)	11
3.1.2 Clause 9.5(d)(ii)	16
3.1.3 Clause 9.5(d)(iii)	18
3.1.4 Clause 9.5(d)(iv)	19
3.1.5 Clause 9.5(d)(v)	19
3.1.6 Clause 9.5(d)(vi)	20
3.1.7 Clause 9.5(d)(vii)	22
3.2 Anti-discrimination – No hindering.....	23
3.2.1 ACCC’s view	23
3.3 Consistency with other auction systems	24
3.3.1 Submissions	25
3.3.2 ACCC view	27
3.4 Section 44ZZA(3) factors	28
3.4.1 The objects of Part IIIA	28
3.4.2 The legitimate business interests of Viterra.....	30
3.4.3 The public interest, including the public interest in having competition in markets.....	30
3.4.4 The interests of persons who might want access to the service....	31
4 Decision.....	33

Glossary

ACCC	Australian Competition and Consumer Commission
Auction Rules	Schedule 1 of the proposed port loading protocols
Auction System	An auction, booking and nomination system for Port Terminal Capacity; it includes all proposed amendments made pursuant to clause 9.5(b) of the 2011 Undertaking
BHCs	Vertically integrated Bulk Handling Company, includes Viterra, CBH, GrainCorp and Australian Bulk Alliance
CBH	Cooperative Bulk Handling Limited ABN: 29 256 604 947
CCA	<i>Competition and Consumer Act 2010 (Cth)</i> , formerly known as the <i>Trade Practices Act 1974 (Cth)</i>
FIFS	Viterra's first-in-first-served system of allocating capacity
PLPs	Port Loading Protocols
Viterra	Viterra Operations Limited (ABN 88 007 556 256)
2011 Undertaking	Port Terminal Services Access Undertaking provided by Viterra Operations Limited and accepted by the ACCC on 28 September 2011

Summary

The Australian Competition and Consumer Commission (ACCC) objects to some of the proposed variations set out in Viterra Operations Limited's (Viterra) Auction Variation Notice as published on 17 February 2012.

On 28 September 2011, the ACCC accepted from Viterra a Part IIIA access undertaking in relation to the provision of port terminal services to exporters of bulk wheat (2011 Undertaking). The 2011 Undertaking requires Viterra to introduce an auction system to allocate port terminal capacity by 14 May 2012. The process to be followed in order to introduce an auction system is detailed at clauses 9.5 and 9.6 of the 2011 Undertaking and involves varying Viterra's port loading protocols (PLPs) and / or its Standard Terms pursuant to which it provides port terminal services to exporters. This process also includes an ability for the ACCC to object to all or any of the proposed variations having regard to a range of matters listed in clause 9.6(c) of the 2011 Undertaking.

The ACCC acknowledges that Viterra has acted in good faith in the development of its proposed auction system. However recent auctions in Western Australia using substantially the same auction design as proposed by Viterra have highlighted a number of problems which the ACCC considers could also arise with the operation of Viterra's proposed auction system. The ACCC considers that more time should be given to address the issues in Viterra's proposed auction system, which will involve industry, before an auction system is introduced in South Australia.

The proposed variations to the PLPs and the Standard Terms that the ACCC objects to are set out in section 2 of this notice.

Based on the information before the ACCC at this time and having had regard to each of the matters set out in clause 9.6(c) of the 2011 Undertaking, it is the ACCC's view that it is appropriate to object to the proposed variations. As set out in this document reasons for the ACCC's objections are that:

- Viterra's proposed variations do not incorporate the following features as required by clause 9.5(d):

(i) *an auction should be the primary means of allocating port-loading capacity at each Port Terminal. For the avoidance of doubt, 'port-loading capacity' means the capacity that is made available by the Port Operator to exporters to enable the export of Bulk Wheat, barley and other grain commodities through the Port terminals*

and

(v) *Slots should be allocated to those clients that value them most.*

- It is the ACCC's view that the auction proposal put forward by Viterra may not promote the economically efficient use of Viterra's port terminal infrastructure.
- Having regard to the outcomes experienced in WA this season, and the submissions from stakeholders, it is the ACCC's current view that the system

adopted in SA should, so far as practicable, be modified to avoid or minimise the undesirable features of the CBH auction model prior to the introduction of the auction system in SA.

The reasons for the ACCC's decision are set out in section 3 of this Auction Objection Notice.

The ACCC issued a Consultation Paper on 28 February 2012 and received nine submissions on Viterra's proposal from interested parties. Viterra published a submission with its Auction Variation Notice and provided a further submission on 19 March 2012 in response to stakeholder submissions to the ACCC. The ACCC has had regard to these submissions, submissions received by Viterra during its formal consultation period and a report from RBB Economics, commissioned by Viterra, in issuing this Auction Objection Notice.

In accordance with clause 9.6(f)(ii) Viterra has 35 business days from the date of this Auction Objection Notice to provide the ACCC with a revised variation proposal (including a Revised Variation Notice).

1 Authority to issue an Auction Objection Notice

On 23 December 2010, Viterro Operations Limited (Viterro) submitted a proposed undertaking for assessment under Part IIIA of the *Trade Practices Act 1974* (Cth) (now named the *Competition and Consumer Act 2010* (Cth) (CCA)) by the Australian Competition and Consumer Commission (ACCC). On 11 August 2011, the ACCC issued a draft decision to the effect that the proposed undertaking required amendment in a number of areas, including capacity allocation, in order to be accepted by the ACCC. The proposed undertaking included a continuation of the first-in-first-served (FIFS) capacity allocation system that was in operation pursuant to the 2009 Undertaking. The ACCC determined that the FIFS capacity allocation system was not appropriate in the South Australian wheat export market having regard to the circumstances likely to be faced by Viterro over the term of its 2011 Undertaking of expected capacity constraint and limited competitive constraints to neutralise the incentives for self preferential treatment by Viterro.

Viterro submitted that it was unable to amend the proposed Undertaking to include a detailed auction system before the expiration of the 2009 Undertaking on 30 September 2011. Instead, Viterro submitted a revised undertaking that included an obligation to introduce an auction system by 14 May 2012. An auction system is to be introduced by a variation of the PLPs and/or Standard Terms.

In order to vary the PLPs and/or the Standard Terms to introduce an auction system, Viterro is required, pursuant to the 2011 Undertaking, to first conduct industry consultation (allowing a period of at least 15 business days for interested parties to provide their comments to Viterro) followed by the publication of the proposed variations (an Auction Variation Notice). Viterro published its Auction Variation Notice on 17 February 2012. The ACCC is then required to assess the auction system and determine whether to issue an objection notice (an Auction Objection Notice) having regard to the matters set out in clause 9.6(c) of the 2011 Undertaking, discussed below. Full details as to the process are provided at clauses 9.5 and 9.6 of the 2011 Undertaking.

As the ACCC has issued an Auction Objection Notice, the proposed variations will not take effect on 26 April 2012 as specified in the Auction Variation Notice and the date by which Viterro must introduce an auction system is extended in accordance with clause 9.6(f)(iv) so that Viterro may address the issues in the Auction Objection Notice by way of submitting a revised variation proposal to the ACCC (a Revised Variation Notice). The ACCC and Viterro may agree to further extend the date by which Viterro must introduce an auction system pursuant to clause 9.6(f)(iv).

The timeframes and process for issuing an Auction Objection Notice and receiving a Revised Variation Notice is as follows:

- (i) The ACCC provides Viterro with and publishes an Auction Objection Notice 10 business days prior to the date on which the Variation Notice will otherwise become effective (not after 11 April 2012).

- (ii) Viterra submits a Revised Variation Notice within 35 business days of the date of the Auction Objection Notice (not after 31 May 2012).
- (iii) Viterra may submit a further version of the Revised Variation notice incorporating specific drafting or procedural issues raised by the ACCC (not after 22 June 2012, however the ACCC may at its discretion extend the period of time for Viterra to submit a further version of the Revised Variation Notice if it considers that this will facilitate the introduction of an auction system).
- (iv) The ACCC advises Viterra whether it will withdraw its Auction Objection Notice within 30 business days of receiving the Revised Variation Notice (not after 13 July 2012 regardless of any extensions of time periods in (iii) above).

As described in (iii) if in the event the ACCC still has concerns regarding the revised auction proposal, the 2011 Undertaking allows Viterra to change the Revised Variation Notice to address any specific drafting or procedural issues raised by the ACCC and submit a further version of the Revised Variation Notice to the ACCC up to 15 business days prior to the Revised Proposal Decision Date (as calculated in accordance with the 2011 Undertaking).

If, despite this process, Viterra does not introduce an auction system before mid August (final date), then clauses 9.6(i) and 9.6(m) will operate. In brief:

- unless otherwise agreed between Viterra and the ACCC, Viterra will not provide port terminal services to its own trading arm in respect of bulk wheat
- the shipping stem reopens for bookings on a FIFS basis for a period of three months; that is, third party exporters will be able to book shipping slots between 1 October 2012 and 30 December 2012 on a FIFS basis
- if the ACCC consents to a variation of Viterra's 2011 Undertaking to introduce an auction system, Viterra's trading arm will be able to recommence exporting bulk wheat.

There is provision in the 2011 Undertaking for the ACCC to come to an agreement with Viterra to extend the final date (clause 9.6(f)(iv)).

1.1 Decision making framework

In determining whether to issue an Auction Objection Notice, the ACCC must, pursuant to clause 9.6(c), have regard to the following matters:

- whether the proposed variations incorporate the features set out in clause 9.5(d) of the Undertaking, which are:
 - an auction should be the primary means of allocating port loading capacity at each Port Terminal. For the avoidance of doubt, "port-loading capacity" means the capacity that is made available by Viterra to exporters to enable the

export of Bulk Wheat, barley and other grain commodities through the Port Terminals

- capacity should be defined on a consistent basis in terms of metric tonnes per month available at each Port Terminal and should reflect the total Available Capacity volumes that appear in the capacity table published in accordance with clause 10.2(a). For the avoidance of doubt, the total Available Capacity Volumes may change from time to time (subject to the requirement to publish reasons set out in clause 10.2(b))
- subject to satisfying the Prudential Requirements and complying with the auction rules, all bona fide clients should have an equal opportunity to participate in the auction process
- the auction should be conducted in a transparent and non-discriminatory manner
- slots should be allocated to those clients that value them most
- the Auction System should feature rules to create disincentives which apply equally to all clients on booking in excess of reasonably anticipated requirements. For the avoidance of doubt, the Auction System will satisfy this requirement if it involves a mechanism to rebate any premiums paid by clients as part of the auction process to users of the Port Terminals on a pro-rata basis
- rights purchased in the auction should be tradeable and transferable between bona fide clients, subject to reasonable rules relating to the period of notice required to be given to the Port Operator and the tonnage and commodity involved. Any transfer fee payable to the Port Operator in relation to trades or transfers as between exporters should be cost based
- whether the proposed variations would amount to a breach of the anti-discrimination provision in clause 5.5 or the no hindering access provision in clause 9.7 of the Undertaking
- the desirability of having a degree of consistency with other auction systems in Australia for the exporting of Bulk Wheat, balanced with the need to apply the system having regard to any different characteristics of Viterra's operations and the South Australian industry
- the matters set out in section 44ZZA(3) of the CCA which include:
 - the objects of Part IIIA of the CCA, which are to: 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 provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry
 - the pricing principles specified in section 44ZZCA
 - the legitimate business interests of the provider of the service

- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of the persons who might want access to the service
- whether the undertaking is in accordance with an access code that applies to the service
- any other matter that the ACCC considers relevant; and
- any submissions by Viterra and/or other interested persons.

The ACCC considers the operation of the auction system in Western Australia is a relevant matter under s. 44ZZA(3)(e) in assessing Viterra's proposed auction system, only in so far as it is relevant to Viterra's auction proposal. Reasons for this position are provided in section 3 of this notice.

In assessing the Part IIIA undertakings received from each of the four BHC's¹ in 2010/11, the ACCC also considered the intention of the access test as it appears in the *Wheat Export Marketing Act 2008* (Cth), that accredited exporters that own, operate or control port terminal facilities provide 'fair and transparent access' to its facilities to other accredited exporters is a matter relevant to the assessment of an undertaking. It is the ACCC's view that the intention of the access test is also relevant to the assessment of Viterra's proposed auction system.

The ACCC has had regard to the following matters in section 44ZZA(3), and determined they are not as relevant in the consideration of Viterra's proposed auction system:

- the pricing principles specified in section 44ZZCA
- whether the undertaking is in accordance with an access code that applies to the service.

¹ The four BHC's are Viterra, GrainCorp Operations Limited, CBH and Australian Bulk Alliance Pty Ltd

2 Auction Objection Notice

In accordance with clause 9.6(a), the ACCC gives notice that it objects to the following proposed variations set out in Viterra's Auction Variation Notice published on 17 February 2012. Reasons for the objection are set out in section 3 of this notice.

2.1 Port Loading Protocols

The ACCC objects to the following proposed variations of the PLPs. All references to clause numbers in this notice are references to the proposed PLPs unless otherwise specified.

Clause	Content
2	How to make a booking
3.1	Update of Shipping Stem
7(e)(ii)	Viterra Operations will not accept any request to agree or move a Booking to a Slot at a Port Terminal where: (ii) that Slot is in a Non-Harvest Shipping Period and the second Auction in respect of that Non-Harvest Shipping Period has not yet occurred.
8.2	Refund of booking fee
9(a)(viii)	A client (Transferor) may transfer a Booking if the following conditions are satisfied: (viii) where the booking relates to a slot in the Non-Harvest Shipping Period, the second Auction in respect of that Non-Harvest Shipping Period has occurred.
15	Use of information

The ACCC is of the view that while aspects of these provisions are not considered to be objectionable, other aspects include references to elements of the proposed auction system which are of concern. These concerns are discussed further in section 3 of this notice.

2.2 Schedule 1 – Auction Rules

The ACCC objects to the following provisions of the Auction Rules.

Clause	Content
4	Auction principles
5	Overview of how the auction works
6	Bidding activity
7	Excess capacity / capacity not sold
11	Grievance procedures
13	Auction premium rebate

2.3 Standard terms

The ACCC objects to the following clauses of the Standard Terms.

Clause	Content
1.1	Defined terms: Harvest Auction Premium Rebate; Harvest Shipping Period; Non-Harvest Auction Premium Rebate; Non-Harvest Shipping Period;
8.7	Auction Premium Rebate

The ACCC notes that Viterro has included as part of its Auction Variation Notice an amended version of its 2011/12 Season Storage & Handling Agreement. As this document relates to the export of grain that is not bulk wheat, the ACCC provides no comments because these matters fall outside the scope of the 2011 Undertaking.

3 ACCC reasons

In accordance with clause 9.6 of the 2011 Undertaking, the ACCC must provide reasons for objecting to the proposed variation or variations and in issuing an Auction Variation Notice, the ACCC must have regard to the factors listed in clause 9.6(c) of the 2011 Undertaking. These factors, and how the ACCC has had regard to each of them, are discussed below. The ACCC's consideration of submissions by Viterra and other interested persons are discussed, where relevant, against each of the other specified factors.

The ACCC has concerns with the proposal set out in Viterra's Auction Variation Notice, which are set out below. These concerns are relevant to the specific factors discussed further below:

- auction feature (i), that an auction should be the primary means of allocating port loading capacity at each Port Terminal. For the avoidance of doubt, "port loading capacity" means the capacity that is made available by Viterra to exporters to enable the export of Bulk Wheat, barley and other grain commodities through the Port Terminals
- auction feature (v), that slots should be allocated to those clients that value them most
- the object of Part IIIA of the CCA to promote the economically efficient use of the infrastructure by which services are provided, thereby promoting competition in upstream and downstream markets.

The first concern is that it appears to the ACCC that the auction mechanism contained in the Auction Variation Notice may not come to an outcome at all. In other circumstances, the auction may reach a conclusion, but the outcome of the auction may not reflect an efficient allocation of scarce port capacity. That is, port capacity that exporters are willing to pay a positive amount for will not be allocated at the auction.

This effect arises as a consequence of the impact of rebating the proceeds of the auction to exporters. In the presence of the proposed rebate, exporters can be expected to base their demands for capacity at auction on the basis of an 'effective price', which is the difference between the auction price and the expected rebate for that slot.

In order for the proposed auction to achieve an efficient allocation, the effective price paid should increase until supply and demand are in balance. However, while the proposed auction mechanism ensures that the auction price increases when demand exceeds supply, the effective price may not increase at all when demand exceeds supply, or may continue to increase after demand falls short of supply. As a consequence, although the auction may terminate at an efficient allocation, there is no guarantee that the auction will terminate or will terminate at an efficient allocation.

The second concern is that it appears to the ACCC that exporters may be able to choose not to participate in the auction process, but nevertheless secure scarce capacity through the FIFS allocation mechanism, even in circumstances of high demand. The possibility of securing capacity through the FIFS mechanism alters the

incentives on exporters to participate in the auction process, particularly for slots with a high (effective) price and particularly for an exporter which can be reasonably sure of obtaining the allocation that it desires in the FIFS mechanism.

It appears to the ACCC that it may be possible in the proposed auction design for an exporter, at the point in an auction where the excess demand on high-priced slots is relatively small, to bring the auction to a close by withdrawing demand in the high-priced slots. This exporter may then be able to secure its demand through the FIFS system, at no premium. Such an exporter will have secured high-priced capacity at no premium, placing it at a competitive advantage over its rival exporters (who have paid a high effective price for the same capacity). At the same time, the exporter may retain its auction allocation of low-priced capacity for which it expects to receive a rebate.

For such a strategy to be successful, it appears to the ACCC that the exporter must not expect to lose too much capacity. This implies that (a) the exporter's bid must be large relative to the excess demand for a slot; (b) that the exporter can be reasonably certain of the auction coming to an end; and (c) that the exporter can have an ability to acquire capacity that is made available through the FIFS system.

In response to these concerns, RBB Economics, on behalf of Viterra, provided a submission outlining an alternative view.²

RBB Economics raised certain objections to the economic analysis underlying the ACCC's concerns. RBB's primary objection was that the demand and supply scenarios under which the proposed auction would fail to reach an outcome, or where it would reach an inefficient outcome, were unrealistic or unrepresentative. RBB Economics suggested that the demand and supply conditions likely to arise in South Australia are consistent with the proposed auction reaching an efficient outcome.

In response to these views, the ACCC makes the following points:

- The views expressed by RBB Economics do not change the conclusion expressed above, that, while the proposed auction system may in certain circumstances reach an efficient allocation, it may in other circumstances not reach a conclusion, or in other circumstances will not result in an efficient allocation.
- In order for an auction to reach a conclusion at all, there must be slots that are initially undersubscribed to such an extent that the market clearing price of those slots is sufficiently negative to offset the positive price for the oversubscribed slots.³ It is the ACCC's view that the higher the demand for slots available through the auction, the less likely this condition is to be satisfied. Even if there are slots which are undersubscribed at the outset of the auction, this does not guarantee that the auction will reach a conclusion.

² RBB Economics, Response to the ACCC's analysis of the proposed Viterra port loading capacity auction mechanism, 23 March 2012

³ In order for the proposed auction to reach a conclusion, the sum of the market-clearing price for a slot times the capacity available in that slot must be a negative number.

- Demand for port terminal services may vary from year to year and as such it is the ACCC’s view that it does not have sufficient information at this time to accept the argument advanced that there is a strong likelihood that the auction will in practice reach an outcome. At the same time it is not possible to say that the auction will not reach an outcome.
- It is the ACCC’s view that it is not possible, on the information currently available to it, to conclude whether or not an efficient outcome from the proposed auction is likely. RBB Economics has modelled demand for wheat port capacity in South Australia using a number of simplifying assumptions. However, it is the ACCC’s view that there is currently insufficient information to form a view as to the likely relevant demand and supply conditions. It is therefore not possible to conclude with certainty that the proposed auction would always or would likely reach an efficient allocation. Neither is it possible to say that it will always reach an inefficient allocation—only that this may occur and appears to have occurred in recent auctions in Western Australia.

In conclusion, it is the ACCC’s view that currently, there is insufficient information to form a view as to the likelihood of the proposed auction resulting in an inefficient allocation, but that such an outcome is possible under the proposed auction.

In addition to these two concerns, the ACCC is of the view that having regard to the outcomes experienced in WA this season, the system adopted in SA should, so far as practicable be modified to avoid or minimise the undesirable features of the CBH auction model prior to the introduction of the auction system in SA.

3.1 Auction features

Clause 9.6(c)(i) provides that the ACCC must have regard to whether the proposed variations incorporate the features set out in clause 9.5(d) of the 2011 Undertaking. Each of those features, and whether they have been incorporated into the proposed variation is discussed in turn.

3.1.1 Clause 9.5(d)(i)

- (i) *an auction should be the primary means of allocating port loading capacity at each Port Terminal. For the avoidance of doubt, “port-loading capacity” means the capacity that is made available by the Port Operator to exporters to enable the export of Bulk Wheat, barley and other grain commodities through the Port Terminals;*

In relation to clause 9.5(d)(i), the following provisions also appear at clause 9.5(d) of the 2011 Undertaking:

For the avoidance of doubt, clause 9.5(d)(i) does not prevent the Port Operator from consulting with Major Users and the ACCC in relation to potential mechanisms to allocate:

- (viii) *Additional Capacity which is requested by an exporter and becomes available after any auction for use prior to the next scheduled auction;*

(ix) a proportion of port-loading capacity as “base load capacity” for major exporters on an objective take or pay basis; and/or

(x) capacity that is “passed in” at auction on a different basis,

in each case as part of the Auction System.

Viterra’s proposed auction system sets out that all port capacity will be made available at either the harvest shipping period auction or one of two non-harvest shipping period auctions. Capacity that is passed in at the conclusion of the harvest shipping period auction and at the conclusion of the second non-harvest shipping period is proposed to be made available to exporters via Viterra’s first-in-first-served (FIFS) system of capacity allocation. Capacity not allocated during the first non-harvest shipping period auction is rolled into the second non-harvest shipping period auction.

‘Additional capacity’ that becomes available following an auction either through supply chain efficiencies or because exporters have moved bookings or returned capacity to the stem is also made available to exporters through the FIFS system. Viterra’s proposal includes parameters whereby if the total of this type of capacity exceeds 200K tonnes, then it will also be subject to a separate auction.

3.1.1.1 Submissions

Viterra submits that ‘primary’ in this context means ‘first in time’. Specifically Viterra submits that:

...From our perspective, “primary” refers to the fact that (with the very limited exception of “Additional Capacity”) clients cannot make a FIFS booking unless the relevant Capacity has already been auctioned. Accordingly, the primary way that Capacity is allocated is via auction. We understand that, during consultation, certain participants have highlighted that, in the 2011/12 season, a large volume of CBH capacity was allocated through the FIFS system (with the suggestion that if the majority of capacity is allocated via FIFS, then FIFS is the “primary” method of allocation). However, in our view, this suggested interpretation is highly problematic and unrealistic. Viterra has no control over the amount of Capacity that is *actually* acquired at auction (or, indeed, the amount that is subsequently allocated at FIFS or via transfers). Viterra can only make Capacity available for purchase at auction, and clients can bid for that Capacity if they want it and value it at that time (clients will either acquire the Capacity at the \$5 Auction Fee or at the Auction Fee plus premium if they wish to). However, it is possible that clients may decide they do not wish to acquire Capacity at auction. In this situation, it is still in Viterra’s interests (as an infrastructure provider) to seek to fill that Capacity and recover the costs of providing the infrastructure. It is possible that in some years nearly all Capacity will be allocated at auction. In drought years, it is possible that clients may choose not to bid at auction. Provided that the first opportunity clients have to acquire their Capacity requirements (at the price they are willing to pay) is at auction, and bookings cannot be made under the FIFS system until they have

had this opportunity, then it is clear that the auction represents the primary method of allocating Capacity.⁴

Submissions from stakeholders include:

Emerald Group Australia Pty Ltd (Emerald):

We are disappointed, however to find that, despite Viterra's apparent commitment to the auction system as the "primary" method of allocating scarce port capacity, it has not taken any steps to address the flaws in the auction system which manifested themselves in the CBH auctions this season.

To remind you, the CBH auctions experienced dramatic withdrawals of demand after the premiums had been bid up. This created a large quantity of what CBH call "overshoot" ie unallocated capacity which was then allocated under the FIFS system, thereby circumventing the auction system as the "primary" method of capacity allocation and creating uneven supply chain costs on exporters as a by-product.⁵

Gavilon Grain Australia Pty Ltd (Gavilon):

With the intention being that the auction system is designed to be the primary means of allocating port capacity and based on the results from the previous port capacity auctions held by CBH for the 2011/2012 season, Gavilon suggests auctions held quarterly in advance for quarterly periods at a time to avoid the need to use the FIFS system.

Gavilon also suggests, that in an effort to avoid occurrences where the final result for any given auction is that which is grossly undersubscribed after having commenced grossly oversubscribed, limiting the quantity which marketers may reduce their individual demand by on a round by round basis.⁶

Grain Producers SA Ltd submits that there should be a system in place to prevent bidders withdrawing bids and then reverting to a FIFS basis.

Louis Dreyfus Commodities Australia Pty Ltd (Louis Dreyfus):

Louis Dreyfus Commodities Australia Pty Ltd supports creating an auction system for the allocation of export capacity in South Australia. Viterra has submitted a proposal for an auction system modelled closely after the existing capacity auction system utilized by CBH under its current Access Undertaking. We previously expressed our support for CBH's auction system as a fair and transparent method of allocating capacity, however this support was challenged by the experience last season.

The most recent auction cycle in WA highlighted significant shortcomings in the current CBH auction rules. The auction process did not efficiently allocate the capacity on offer despite a significant excess of demand for capacity in the first round of bidding. Because the auction did not achieve its intended function, millions of tons of export capacity were unable to be allocated via the auction system. This unallocated capacity was subsequently offered First Come/First Served (FCFS), which the ACCC has rejected as a primary capacity allocation mechanism.⁷

PentAG Nidera Pty Ltd:

⁴ Viterra, email from Tim Krause, General Manager Strategic Planning: Grain to Kerry Leigh Taylor of the ACCC, 28 February 2012.

⁵ Emerald, Submission to ACCC Consultation paper, 8 March 2012

⁶ Gavilon, Submission to the ACCC Consultation paper, 9 March 2012

⁷ Louis Dreyfus, Submission to the ACCC Consultation paper, 9 March 2012

PentAG does believe an auction system is currently the best method available to the industry for primary allocation of capacity. This is not to say that it is perfect, or that another method will not become clearer in the future. This belief is not reliant on the auction method proposed (ascending clock) being the most appropriate. We only suggest that determining the allocation through value is the fairest method available to us.⁸

Anonymous submission A

To avoid speculation and/or manipulation it is prudent to ensure that there is only one primary method of allocating shipping capacity, this being the auction system. The subsequent alternative that capacity can be secured under First In / First Served (FIFS) at a lower financial risk leaves the auction open to manipulation when such method is in place as a secondary allocator of capacity...⁹

Anonymous submission B

We believe that Viterra has not provided a sufficient disincentive to clients to prevent the common scenario where participants drop significant volumes at crucial stages during an auction. To counter this situation, Viterra operations should have the power to close the auction at any point in time it considers it has the ability to meet the specific demand profile.

...

We submit that all spare and additional capacity should be re-auctioned. We accept that Viterra could hold an operation [sic] flexibility of approximately 5000 tonnes, but anything in excess of that limit should always be offered to clients in an auction.¹⁰

In response to these submissions Viterra stated:

Viterra also notes the view expressed in some of the submissions that there are certain flaws in relation to the current CBH system. However, those criticisms relate to the CBH system, not the capacity allocation and management system proposed by Viterra. There are a number of significant differences between the capacity allocation system proposed by Viterra and that implemented by CBH...¹¹

In its submission accompanying the Auction Variation Notice, Viterra stated:

...the first-in-first-served system (which applies on and from a published time after the relevant auction or auctions have taken place) is an online and clearly auditable booking system with each client limited to five log-ins and each booking restricted to one port terminal and one slot. This places increased structural disciplines on bookings for capacity not acquired at auction and prevents one booking application from securing significant volumes of the available capacity.¹²

3.1.1.2 ACCC's view

It is the ACCC's view that the meaning of 'primary' in this regard is 'first or highest in rank or importance; chief; principal'.¹³

⁸ PentAg Nidera, Submission to the ACCC Consultation paper, 9 March 2012

⁹ Anonymous A, Submission to the ACCC Consultation paper, 9 March 2012

¹⁰ Anonymous B, Submission to the ACCC Consultation paper, 9 March 2012

¹¹ Viterra, Introduction of Auction System, Response to submissions in relation the ACCC's Consultation paper, 19 March 2012

¹² Viterra, Introduction of Auction System, Proposed variations to Viterra's Port Loading Protocols, Standard Terms and Storage & Handling Agreement, 17 February 2012, p.3

¹³ As defined in the Macquarie Australia's National Dictionary "Primary"

The intention of 'Primary' in this regard is that capacity should first be allocated through auction, and then only through any secondary allocation arrangements for capacity that is not demanded via auction. In periods of high demand, where exporters are willing to pay a premium for capacity, that capacity should be allocated via the auction mechanism, rather than the capacity being allocated initially through a secondary mechanism (for example, one not based on price).

The ACCC's Draft Decision in relation to the assessment of Viterra's 2011 Undertaking stated that:

Capacity allocation arrangements include two main components:

- Primary allocation arrangements by which capacity is rationed between competing users and which are broadly categorised as price (market based) or non price rationing.
- Secondary allocation arrangements or in season arrangements that facilitate exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export capacity.¹⁴

It is the ACCC's view that, in relation to discussion of capacity allocation arrangements for Viterra's port terminals, 'primary' does not simply refer to first in time.

The ACCC is of the view that the FIFS mechanism is relevant for allocating capacity during periods of low demand, or where it is impractical to subject capacity to a further auction having regard to Viterra's legitimate business interests.

However, as discussed above, it appears to the ACCC that exporters may be able to choose not to participate in the auction process, but nevertheless secure scarce capacity through the FIFS allocation mechanism, even in circumstances of high demand.

As noted in the submissions above, bidding behaviour of exporters in the recent auctions held by CBH resulted in large volumes of in demand capacity being allocated through CBH's FIFS system.

The ACCC acknowledges Viterra's response to the exporters' submissions, that the Viterra FIFS system, in contrast to CBH's FIFS system, places increased structural disciplines on bookings for capacity not acquired at auction. However, the ACCC notes that the key aspects of Viterra's FIFS system that purportedly create the increased structural discipline on exporters are not included in the proposed PLPs.

For these reasons, the ACCC is currently of the view that Viterra's proposal does not incorporate a feature or features whereby an auction is the primary means of allocating port terminal capacity at each port terminal.

¹⁴ ACCC, Viterra Operations Limited Port Terminal Services Access Undertaking Draft Decision, 11 August 2011, p. 54

3.1.2 Clause 9.5(d)(ii)

- (ii) *capacity should be defined on a consistent basis in terms of metric tonnes per month available at each Port Terminal and should reflect the total Available Capacity volumes that appear in the capacity table published in accordance with clause 10.2(a). For the avoidance of doubt, the total Available Capacity volumes may change from time to time (subject to the requirement to publish reasons set out in clause 10.2(b));*

Clause 10.2 of Viterra's 2011 Undertaking requires Viterra to publish an indicative estimate of Available capacity for each port terminal. Available capacity in this regard means an estimate of, or guide to, the amount of practical port terminal capacity that may be available from time to time for the provision of services for the exporting of bulk wheat and other grains.

Capacity is defined in the proposed PLPs as meaning the capacity that is made available by Viterra Operations to exporters to enable the export of Bulk Wheat, barley and other Grain commodities through a Port Terminal Facility measured in tonnes.

Clause 2.3(a) of the proposed PLPs requires that Viterra will publish details of Capacity on offer at an auction 10 days prior to the start of that auction.

Clause 2.2(e) of the proposed PLPs requires that if the cumulative amount of additional capacity that has become available in respect of the relevant year exceeds 200K tonnes, and the relevant parcel of additional capacity that has become available exceeds 50K, and there is more than 60 days prior to the commencement of the first day of the shipping slot then an auction will be held for any additional capacity.

3.1.2.1 Submissions

Submissions from stakeholders to the ACCC raise concerns with respect to the type of capacity available at auction, either Export Select, or Export Standard.¹⁵

Gavilon submits:

...the port capacity available at auction is not associated with the Export Select or Export Standard products which Viterra currently offers to marketers. Furthermore, it appears unclear as to how Export Select and Export Standard will be offered to marketers in conjunction with the proposed auction system.¹⁶

Anonymous submission B states:

Viterra operates its network on the basis of two alternative service arrangements. In essence, the Export Select system provides for a full bundled supply chain service and Export Standard allow Viterra clients to be responsible for management of the accumulation process (including freight) from country sites to port.

¹⁵ Export Select is Viterra's bundled service and includes both port terminal services and storage and logistics services; Export Standard is port terminal services only.

¹⁶ Gavilon, Submission to the ACCC Consultation paper, 9 March 2012

We submit that the proposed auction system should incorporate a transparent mechanism to allow Viterra's clients to acquire a full understanding of the particular type of capacity that other clients are bidding for at the auction. Ultimately, the particular logistics that will be required to transport grain to port will impact the capacity sought by the clients at auction.¹⁷

PentAG Nidera submits:

Definition of capacity in any sense creates issues. PentAG does not believe it is arguable that the restriction on export capacity out of Australia is due to the lack of capacity ex the spout. Capacity is restricted by the link in the chain at which grain flows the slowest and that is accumulation to port. Currently the ACCC allows Viterra to determine their export 'capacity' based on Viterra's own infrastructure systems and business desires. Under the current definition of capacity, if PentAG were to add to that infrastructure system via the placement of rail or road assets in South Australia, there is no system in place let alone any expectation that Viterra would increase their export 'capacity' to accommodate the increase in grain accumulation to port. It is inherently uncompetitive and costs the grower as Australia continues to carry out grain. To suggest Viterra would not restrict capacity as it does not serve their interests ignores the fundamentals of Viterra's own dominance in their own accumulation to port space and unfettered ability to charge for service that cannot be effectively competed against.

Notwithstanding the above and while the current structure for determining capacity is in place, the publishing of total, booked and available capacity is necessary along with the publication of the stem. ...¹⁸

Grain Producers SA submits that:

The determination of capacity should reflect the capacity available in a previous year. Where capacity varies to a previous year, an explanation must be provided for the change in capacity.¹⁹

AGEA submits:

Capacity offered at auction should reflect the capacity that is available to exporters to enable the export of bulk grain. While the capacity table as published is adequate, care should be taken that capacity offered and booked can be executed...²⁰

3.1.2.2 ACCC's view

The ACCC notes that the proposed PLPs do not expressly state that Capacity to be made available through auction reflects the Available Capacity published in the Available Capacity table as required by the 2011 Undertaking. However, it is the ACCC's view that the requirement of clause 10.2(b) of the 2011 Undertaking, to provide reasons for varying available capacity published and the limitations on the capacity that is not offered at auction as specified in clause 2.2(e) of the proposed PLPs operate together to ensure that Viterra's total port terminal capacity will be made available through auction, with the exception of the additional capacity made available due to operational reasons.

With regard to the submissions received from stakeholders, the ACCC notes that clause 9.5(d)(ii) refers only to 'total Available Capacity' and not 'Export Select' or 'Export Standard' capacity and accordingly it is not necessary for Viterra to

¹⁷ Anonymous B, Submission to the ACCC Consultation paper, 9 March 2012

¹⁸ PentAG Nidera, Submission to the ACCC Consultation paper, 9 March 2012

¹⁹ Grain Producers SA Ltd, Submission to the ACCC Consultation paper, 9 March 2012

²⁰ AGEA, Submission to the ACCC Consultation paper, 9 March 2012

distinguish between the two services. Viterra may choose to do so for operational reasons, however it is not relevant to the ACCC's consideration of the proposed auction system. With regard to AGEA's submission, the ACCC notes that in accordance with clause 10.2(a) of the 2011 Undertaking, Viterra is required to provide an indicative estimate of the Available Capacity for each port terminal. The definition of 'Available Capacity' in the 2011 Undertaking provides a range of factors that may impact on whether the port terminal capacity can be ultimately delivered. If Viterra is unable to supply contracted port terminal services, the ACCC is of the view that this is a matter to be resolved commercially between the parties involved.

The ACCC considers that Viterra's proposed auction system incorporates the auction feature at clause 9.5(d)(ii).

3.1.3 Clause 9.5(d)(iii)

- (iii) *subject to satisfying the Prudential Requirements and complying with the Auction Rules, all bona fide clients should have an equal opportunity to participate in the auction process;*

Prior to participating in an auction, exporters must enter a Registered Bidder Agreement for Online Auctions with Tradeslot, who is the third party provider of the auction to Viterra.²¹ Auction participants are also required to enter into an Auction Participation Deed with Viterra.

Auction Rule 2 provides that each Bidder will be set up as a registered bidder by Tradeslot.

3.1.3.1 Submissions

With respect to this auction feature, PentAG has submitted to the ACCC:

PentAG believes this is the most significant reason why the government of the day recognised the need for Port Access Undertakings. Whilst the cost burden of an auction is notable, there are steps that could be taken to reduce the cash burden on all exporters to allow all clients to compete equally...²²

3.1.3.2 ACCC's view

It is the ACCC's view that there appears to be no unreasonable restrictions on participating in auctions for capacity at Viterra's port terminals. The issue of costs as raised by PentAG do not preclude clients from participating in the auction.

Accordingly, the ACCC considers that Viterra's proposed auction system incorporates this feature.

²¹ Viterra notification N95640, allowed to stand 30 November 2011

²² PentAG Nidera, Submission to the ACCC Consultation paper, 9 March 2012

3.1.4 Clause 9.5(d)(iv)

- (iv) *the auction should be conducted in a transparent and non-discriminatory manner;*

Auction rule 6.3(b) provides that the aggregate demand for each Lot during the previous round will be displayed on the Online Auction System. Past round data will also be able to be viewed and downloaded from the bid history section of the Online Auction System.

The ACCC understands that the identity of bidders, and the quantities of each bid are concealed until the final capacity allocation is published on the shipping stem. Clause 3 of Vitterra's proposed PLPs provides that clients' bookings will be updated on the shipping stem within one business day of the finalisation of the auction. That is, before 'auction results' are published. Vitterra's proposal further states that the auction results, that is, the final prices and capacity allocated, will be published within three business days of the finalisation of the auction.

3.1.4.1 Submissions

Vitterra has submitted that:

Vitterra provides a significant level of transparency and earlier information on its shipping stem. This information provides substantial assistance to clients seeking to understand future capacity availability or to trade or move slots.²³

In terms of non-discrimination, Vitterra has engaged Tradeslot as an independent third party supplier to conduct the auction. In relation to the resolution of any grievances that arise during the auction, Vitterra's proposal includes an 'Auction Review Committee' constituted by two Vitterra representatives (only one of whom possesses voting rights), one trade representative and one representative from Tradeslot.

3.1.4.2 ACCC's view

The ACCC considers that Vitterra's proposal provides sufficient transparency and protection against discrimination during the conduct of the auctions. Accordingly, it is the ACCC's view that this feature has been incorporated in the proposed auction system.

3.1.5 Clause 9.5(d)(v)

- (v) *slots should be allocated to those clients that value them most*

Vitterra's proposed auction system operates as an on-line, ascending clock auction. In brief:

- (a) Vitterra determines and publishes the port capacity available in the exporting season and the date and time for the commencement of the auction
- (b) All lots are opened for bidding and contested simultaneously

²³ Vitterra, Introduction of Auction System, Proposed variations to Vitterra's Port Loading Protocols, Standard Terms and Storage & Handling Agreement, 17 February 2012, p.2

- (c) Bidders indicate how much capacity they would purchase in that slot at that uniform price per tonne
- (d) As long as total demand for one slot is higher than total supply, the uniform price increases by one increment each round. With every new round, bidders are asked to submit a new volume bid at the new price per tonne. Bidders are not permitted to increase the volume of their bids past the total capacity requested in previous rounds.
- (e) The auction ceases when across all slots, demand for capacity matches or is less than supply
- (f) Following the auction, parties that export against capacity bookings acquired at the auction are rebated back the auction premiums. The rebate is paid at a flat rate of tonnes during either the harvest shipping period or the non-harvest shipping period.

3.1.5.1 Submissions

With respect to the auction design, and whether capacity is allocated to the party who values it most, Anonymous submission A states that:

...To ensure capacity is awarded to those who value it most, the capacity becoming available within the 'prompt' [30-45 days within the slot opening] window outside of auction acquirement should still be awarded under the FIFS method. The last determined market value (auction premium) achieved at the preceding auction for the relevant Port / period would apply. Any acquirement under such method would also be included within the auction pool and rebate process.

3.1.5.2 ACCC's view

The ACCC has analysed the auction design with respect to whether this auction feature is incorporated and is currently of the view that the rules allow for in demand capacity to be allocated to parties who do not value it most highly.

As noted above in section 3, the ACCC's analysis of the auction system proposed shows that the auction design allows for port terminal capacity that exporters are willing to pay a positive amount for may not be allocated in the auction (due to withdrawal of bids that create an excess of supply). Capacity allocated through the FIFS system is not necessarily allocated to the exporter who values it most highly, but rather is allocated based on which nomination is received first.

The ACCC therefore considers that this auction feature is not incorporated in Viterra's proposed auction system.

3.1.6 Clause 9.5(d)(vi)

- (vi) *the Auction System should feature rules to create disincentives which apply equally to all clients on booking in excess of reasonably anticipated requirements. For the avoidance of doubt, the Auction System will satisfy this requirement if it involves a mechanism to rebate any auction premiums paid by clients as part of the auction process to users of the Port Terminal on a pro rata basis;*

Viterra's proposal includes, in a variation to its Standard Terms, an obligation on Viterra to pay clients an auction rebate. The calculation of that rebate sits in clause 13 of the Auction Rules and provides that auction premiums, less the costs of running the auction, plus any interest that accrues, are rebated back pro rata to the exporters that ship against capacity acquired at auction. Viterra's proposal provides that the rebates are calculated and paid at the end of each of the harvest shipping period (1 October to 31 January) and the non-harvest shipping period (1 February to 30 September).

3.1.6.1 Submissions

In relation to the auction premium rebate, stakeholders made the following submissions to the ACCC:

Anonymous submission B:

Given the operational characteristics of the ports of Wallaroo and Thevenard, we submit that, by Viterra applying the premium pool across disparate ports, the rebates payable to clients will be distorted to have the potential to provide an unfair advantage to certain clients who are limited by [sic] vessel size.

Due to the relevant operational characteristics of port, demand for capacity would be reduced, which in turn, will have the effect of reducing the premium that would be applied as compared to shipping out of the major ports in the corresponding time period. The rebate would be fairer if it took into account the particular client's Port usage.²⁴

PentAG Nidera submits that the auction premium rebate is necessary but that adjustments to the timing of payment of rebate are required.

Grain Producers SA submits:

The auction premium rebate distributed on a pro rata basis appears to be a disincentive to all exporters, including Viterra, to purchasing more capacity than is reasonable.²⁵

Gavilon submits that:

The auction rebate should be calculated and paid on each auction round independent of the other auctions. This will avoid the instance where marketers who buy capacity in one auction round at a higher price are financially disadvantaged when other marketers purchase capacity in another round at a lower price thereby reducing the auction rebate.²⁶

AGEA submits that it does not have any comment on the auction premium rebate design, however, would like to see more frequent payments of the rebate and greater transparency as to the auction costs.

3.1.6.2 ACCC's view

In its assessment of the 2011 Undertaking, the ACCC took the view that market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements include the extent to which the incentive exists for vertically integrated port terminal operators to pursue self preferential treatment.

²⁴ Anonymous B, Submission to the ACCC Consultation paper, 9 March 2012

²⁵ Grain Producers SA Ltd, Submission to the ACCC Consultation paper, 9 March 2012

²⁶ Gavilon, Submission to the ACCC Consultation paper, 9 March 2012

The ACCC determined at that time that the \$5 non-refundable booking fee for bookings in Viterra's existing FIFS system did not provide a disincentive on Viterra's trading arm booking in excess of its reasonably anticipated requirements as it essentially amounted to a transfer between different parts of Viterra in the event that the capacity went unused. Viterra addressed the ACCC's concerns in this regard by the inclusion of this auction feature.

In terms of the auction rebate, it provides a disincentive on Viterra's trading arm booking in excess of its reasonably anticipated requirements, because if Viterra does not ship against booked capacity, the auction premium paid for those bookings will be rebated back to those exporters who actually shipped. That is, a real cost is incurred by Viterra.

Specifically, in its Final Decision to accept the 2011 Undertaking, the ACCC said:

The ACCC considers that this principle [clause 9.5(d)(iv)], and adoption by Viterra of a mechanism similar to that currently operating in CBH's auction system, whereby auction premiums are distributed to shippers based on actual shipments, will operate as a real constraint on Viterra's trading arm (and other exporters) booking in excess of its reasonably anticipated requirements and that this is appropriate, having regard to the objective of providing for competition in markets.²⁷

The rebate system prior to the 2011/12 CBH auctions was considered by the ACCC and industry²⁸ as a likely effective constraint on Viterra (and other exporters) overbooking capacity. However, subsequent analysis discussed above has shown that the impact of the rebate on bidding behaviour in the proposed auction may cause undesirable outcomes.

While the ACCC considers that this auction feature has been incorporated into the auction system proposal, as discussed above, the ACCC has concerns with the impact of the rebate on bidding behaviour in the auction system as proposed.

3.1.7 Clause 9.5(d)(vii)

(vii) rights purchased in the auction should be tradeable and transferable between bona fide clients, subject to reasonable rules relating to the period of notice required to be given to the Port Operator and the tonnage and commodity involved. Any transfer fee payable to the Port Operator in relation to trades or transfers as between exporters should be cost-based.

In its 2011 Undertaking, Viterra introduced the ability for exporters to trade or transfer bookings between parties or move bookings between slots or ports. These mechanisms have been modified marginally in the Viterra proposed auction system and continue post the introduction of an auction. The ACCC understands that these mechanisms have been utilised a number of times since introduction in September 2011.

²⁷ ACCC, Decision to accept Viterra's Port terminal services Access Undertaking, 29 September 2011, p.31

²⁸ See for example, Bunge Agribusiness Australia Pty Ltd, Submission to the ACCC's draft decision on Viterra's proposed 2011 Undertaking, 30 August 2011.

In addition to the mechanisms to move or transfer bookings, Viterra, in its 2011 Undertaking, introduced an incentive to return unwanted bookings back to the shipping stem by way of a partial refund if that capacity was subsequently taken up by another exporter.

3.1.7.1 Submissions

With regards to these mechanisms, anonymous submission A states that:

An effective secondary market can only operate in our opinion with an effective method of transferring shipping slots. Consideration should seriously be given to a platform being created that will facilitate transfer in the secondary market.

Viterra's submission accompanying the Auction Variation Notices states:

Viterra provides very significant flexibility to clients once they have made a booking. There are no limits to the number of times clients can trade or move bookings. Clients can also surrender (and obtain a partial refund for) bookings and split their bookings. Again this supports the efficient allocation of capacity.

3.1.7.2 ACCC's views

These mechanisms were introduced following the assessment of the 2011 Undertaking have been slightly modified in Viterra's proposed auction system. It is the ACCC's view that these modifications are minor and for operational reasons. The ACCC is of the view that Viterra has incorporated this auction feature in its proposed auction system.

3.2 Anti-discrimination – No hindering

Clause 9.6(c)(ii) provides that the ACCC must have regard to:

Whether the proposed variations would amount to a breach of the anti-discrimination provision in clause 5.5 or the no hindering access provision in clause 9.7.

Clause 5.5 provides that 'in providing access to Port terminal services, the Port Operator must not discriminate between different Applicants or Users in favour of its own Trading Division, except to the extent that the cost of providing access to other Applicants or Users is higher'.

Clause 9.7 provides that 'the Port Operator, or a Related Body Corporate of the Port Operator, must not engage in conduct for the purpose of preventing or hindering access to the Port Terminal Services by any other Applicant or User in the exercise of a right of access under this Undertaking'.

3.2.1 ACCC's view

As discussed with respect to the auction features at (iii) and (iv) the proposed auction system allows all bona fide clients to have an equal opportunity to participate in the auction and the auction is conducted in a transparent and non-discriminatory manner. Accordingly, it is the ACCC's view that the auction system proposed by Viterra raises no concerns with respect to these provisions.

3.3 Consistency with other auction systems

Clause 9.6(c)(iii) requires the ACCC to have regard to:

The desirability of having a degree of consistency with other auction systems in Australia for the exporting of Bulk Wheat, balanced with the need to apply the system having regard to any different characteristics of the Port Operator's operations and the South Australian industry;

The auction rules proposed by Viterra are consistent with the CBH system in terms of the rules of the auction that govern bidding behaviour during an auction. The system in its entirety does differ however in a number of ways:

- Auction timetable: Viterra's system specifies that three auctions will be held per season, each for shipping slots in a specified time period; the CBH system provides CBH with discretion to set an 'auction timetable' specifying the number of auctions to be held and the time periods to which they relate.
- Publication of the auction results: Both Viterra and the CBH system publish auction results, noting the price paid and the proportion of the available capacity allocated at the auction. Viterra however updates its shipping stem with details as to which exporter acquired what capacity for all bookings regardless of how far out the shipping slot is; CBH only updates its shipping stem with details of which exporter acquired particular capacity when a vessel is named, generally within 4-6 weeks of the commencement of the shipping slot.
- Unallocated capacity / Overshoot: The Viterra system specifies that if capacity is not allocated at either the harvest shipping period auction or the second non-harvest shipping period auction, then that capacity is made available via its FIFS system. Capacity not allocated in the first non-harvest shipping period is rolled into the subsequent auction. The CBH system provides that capacity not allocated at auction *may* be offered at a subsequent auction. Alternatively, it may be offered for booking under CBH's FIFS system.
- Publication of available capacity: Viterra's FIFS system specifies that capacity available will be published within specified time frames and bookings will be accepted in relation to that capacity after a specified time frame has passed. The CBH systems allows for bookings to be accepted once the spare capacity is posted on its website. CBH's Port Terminal Rules (equivalent to Viterra's PLPs) do not specify a time frame for the publishing of available capacity.
- FIFS booking system: Viterra's auction proposal is silent on how its booking system works, however Viterra has submitted that:

The first-in-first-served system (which applies on and from a published time after the relevant auction or auctions have taken place) is an online and clearly auditable booking system with each client limited to five log ins and each booking restricted to one port terminal and one slot. This places increased structural disciplines on bookings for capacity not acquired at auction and prevents one booking application from securing significant volumes of the available capacity.²⁹

²⁹ Viterra, Introduction of Auction System Proposed variations to Viterra's Port Loading Protocols, Standard Terms & Handling Agreement, 17 February 2012, p.3

In contrast, the CBH system requires customers to submit a Spare Capacity Booking Form to the port operator at any time before the last day of the relevant shipping window for which Spare Capacity is available.³⁰ The ACCC understands that each Spare Capacity Booking Form allows exporters to nominate four volumes of capacity across different ports and shipping slots. These forms are subsequently emailed to CBH and there are no restrictions on the number of forms attached to each email.

3.3.1 Submissions

Submissions received from stakeholders responding to the ACCC's consultation paper on Viterra's proposed auction system, as well as submissions received by Viterra during its formal consultation period raised significant concerns with regards to how the CBH auction system operated this past season. These concerns are relevant as many stakeholders do not distinguish between the CBH system and the proposed Viterra system, or alternatively, do not consider that the differences will have a significant impact on bidding behaviour. Where stakeholders do acknowledge the differences between the two systems, Viterra's modifications are seen as improvements over the CBH model, however stakeholders do not consider that these modifications overcome the shortcomings or flaws of the CBH model.

Submissions received by the ACCC:

Anonymous submission A

The Auction system as proposed does not provide a strong enough deterrent to speculative bidding and/or manipulation.

We believe that there are alternative methodologies that can be built into the proposed Auction System to ensure a level playing field and promote a more competitive environment for all parties.³¹

PentAG Nidera

Significant concerns exist regarding the mechanism that triggers the 'closure' of the auction as has been demonstrated in the last three CBH auctions running identical rules. Allowing a "single half-month in a single port" slot to keep the entire auction open allows massive incentive to 'game' with very little effective sanction for an auction participant. If Viterra ran an auction tomorrow under their proposed system, there can be little expectation that a different outcome to the last three CBH auctions would occur.³²

Emerald

Generally we are satisfied that Viterra has considered most of the key issues and has endeavoured to establish a workable and fair system. We note that Viterra's level of transparency of the shipping stem is superior to that of CBH.

We are disappointed, however, to find that, despite Viterra's apparent commitment to the auction system as the "primary" method of allocating scarce port capacity, it has not taken any steps to

³⁰ CBH Auction Rules 4.2(b)

³¹ Anonymous Submission A

³² PentAG Nidera

address the flaws in the auction system which manifested themselves in the CBH auctions this season.³³

Anonymous submission B

We agree that limiting participants to 5 log-ins (effectively 5 slots) is a prudent approach given that it should have the effect of placing more emphasis and relevance on the auction. However, Viterra needs to provide clients with more detail in respect to the proposed process (i.e. when can a participant re-apply after the 1st of the 5 log-ins are used).³⁴

Louis Dreyfus

...Viterra has submitted a proposal for an auction system modeled closely after the existing capacity auction system utilized by CBH under its current Access Undertaking. We previously expressed our support for CBH's auction system as a fair and transparent method of allocating capacity, however this support was challenged by the experience last season.

...

We do not see the results of this year's CBH auction as a failure of the auction concept, but more as a failure of the specific rules governing bidding activities...

LDC believes Viterra's proposed auction system is progress towards the primary goal of implementing the auction system to allocate shipping capacity in South Australia. The proposed model, however, does not address the shortcomings of the model on which it was based. It should be further refined to meet the needs of the industry as highlighted in the recent consultations held regarding changes to the current CBH system.³⁵

AGEA

...AGEA supports the auction system as the most appropriate means of allocating capacity, however, has some concerns that the system proposed by Viterra is similar to that of CBH in a number of areas and that this has the potential to reflect some of the weakness that have been highlighted in the CBH auction system...

The experience in WA provides a strong basis for identifying modifications to the system to improve its fairness and efficiency.

In response to these submissions Viterra has stated:

...Viterra has expressly committed in the new Port Loading Protocols to undertake a review and to consult with industry participants after the 2012/13 harvest period, with a view to determining what (if any) changes may further improve the auction system. Viterra will undertake this review in the same good faith that it has demonstrated in the current process.

Viterra also notes the view expressed in some submissions that there are certain flaws in relation to the current CBH system. However, those criticisms relate to the CBH system, not the capacity allocation and management system proposed by Viterra. There are a number of significant differences between the capacity allocation system proposed by Viterra and that implemented by CBH.

...

³³ Emerald

³⁴ Anonymous Submission B

³⁵ Louis Dreyfus

Viterra also considers that it is not appropriate for the ACCC to use the processes under Viterra's Access Undertaking, which were designed to facilitate the introduction of an auction system in South Australia, to revisit issues that may have arisen in a different State, in respect of one previous season and under different auction and port loading rules. While Viterra understands that certain industry participants consider that some of their fellow exporters may have engaged in 'gaming' conduct last season in Western Australia, there is very real risk that some of the proposals provided to the ACCC are so focussed on preventing past conduct in Western Australia, that they have lost sight of the primary intention of the auction system and the actual requirements of Viterra's Access Undertaking.³⁶

3.3.2 ACCC view

In response to the submission from Viterra, the ACCC is of the view that the experience in WA this season is a relevant factor in the decision making framework for the ACCC for a number of reasons.

Firstly, the recent WA auction results demonstrate an inefficient allocation of capacity, in that large amounts of high demand capacity were allocated through CBH's FIFS mechanism and not necessarily to those parties that valued the capacity most highly. To the extent that the system proposed by Viterra is similar to the system operated by CBH, the recent outcomes in WA are a relevant factor for the ACCC.

Secondly, the ACCC is required to have regard to the submissions of other interested persons (as well as Viterra) pursuant to clause 9.6(c)(v) of the 2011 Undertaking and, further the interests of persons seeking access to Viterra's port terminal services under s.44ZZA(3) of the CCA. As noted above, of the nine submissions received from stakeholders, all but one raised concerns with the outcome of the auctions in WA this harvest.

Clause 9.6(c)(iii) requires that the ACCC have regard to the desirability of having a degree of consistency between auction systems in Australia for the exporting of Bulk Wheat, balanced with the need to apply the system having regard to any different characteristics of Viterra's operations and the South Australian industry. Viterra has submitted an auction system that is largely consistent with the CBH auction system, in particular in relation to how an auction will be conducted. Further, the record breaking harvest seen in WA this season³⁷ is similar to the record breaking crop experienced in SA in 2010/11 and the above average crop in 2011/12.³⁸ In addition, during the assessment of the 2011 Undertakings, the ACCC concluded that the SA and WA markets were similar in terms of lack of competitive constraint on the incumbent BHC's in providing favourable treatment to their own trading arms.³⁹

Given the similarities between the SA market and the WA market this season, it is somewhat desirable to have a degree of consistency between the Viterra auction system and the auction system operated by CBH. However, having regard to the

³⁶ Viterra, Introduction of Auction System: Response to submissions in relation to the ACCC's Consultation paper, 19 March 2012

³⁷ ABARES, Australian Crop Report, February 2012, p.16

³⁸ Ibid, p.15

³⁹ ACCC, Decision to accept Viterra Operations Port terminal services Access Undertaking 28 September 2011, Appendix A

outcome experienced in WA this season, and the submissions from stakeholders, it is the ACCC's view that the system adopted in SA should, so far as practicable, be modified to avoid or minimise the undesirable features of the CBH auction model prior to the introduction of the auction system in SA rather than relying on the review mechanism proposed by Viterra.

3.4 Section 44ZZA(3) factors

Clause 9.6(c)(iv) requires that the ACCC have regard to the matters set out in section 44ZZA(3) of the CCA. In its decision to accept Viterra's 2011 Undertaking the ACCC determined that the following matters in s. 44ZZA(3) were of particular relevance when assessing capacity management arrangements:

- the objects of Part IIIA, including to 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 markets⁴⁰
- the legitimate business interests of the provider
- the public interest, including the public interest in having competition in markets
- the interests of persons who might want access to the service
- any other matters that the Commission thinks are relevant.

As noted in the decision making framework at section 2 of this notice, the ACCC considers other relevant matters are:

- the intention of the access test as it appears in the *Wheat Export Marketing Act 2008 (Cth)* that BHC's provide fair and transparent access to its port terminal facilities to other exporters; and
- the operation of the auction system in Western Australia, only in so far as it is relevant to Viterra's auction proposal.

The ACCC is of the view that these matters are relevant in considering Viterra's proposed auction system, introduced pursuant to the provisions of Viterra's 2011 Undertaking.

3.4.1 The objects of Part IIIA

In relation to the objects of Part IIIA, in assessing the 2011 Undertakings, the ACCC determined that for a capacity allocation method to appropriately allocate capacity it should meet three key conditions. These are:

- transparency as to available capacity

⁴⁰ The objects of Part IIIA also includes to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

- reasonable flexibility for exporters to enable execution of booked capacity and
- at peak times, when demand for port terminal services by grain exporters exceeds available capacity, there are mechanisms to ensure that capacity does not go unused and that capacity goes to exporters that value it most.

Two key market characteristics were considered to be relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances:

- the relationship between total port elevation capacity and average annual and seasonal demand for it
- the extent to which the incentive exists for vertically integrated BHC's to pursue self preferential treatment – including hindering other exporters from accessing port terminal services.

This analytical framework is reflected in the auction features at clause 9.5(d) of the 2011 Undertaking and was designed to ensure that any capacity allocation method met the objectives of Part IIIA including that a consistent approach is taken with respect to access regulation in the bulk wheat export industry.

The final decision to accept the 2011 Undertaking stated that

the ACCC is required to have regard to, among other matters, the objects of Part IIIA, a relevant consideration under which is the efficient allocation of capacity. This includes mechanisms to ensure that throughput is maximised, particularly at times of peak demand and that capacity is allocated to those who value it most...⁴¹

For those reasons, it was important that the auction system implemented by Viterra include mechanisms to ensure that capacity is allocated to those users who value it most and that capacity does not go unused during periods of constraints.

The ACCC's final decision stated that:

Auctions, by allocating capacity to users with the highest willingness to pay, will ensure that capacity is allocated to those users who value it the most, resulting in an allocation which is allocatively efficient.⁴²

The final decision further stated that:

It is the ACCC's view that the price mechanism inherent in the auction system will provide an adequate disincentive on Viterra from booking in excess of reasonably anticipated requirements in periods of constraint. In periods of constraint, which is the situation where there would be concern about Viterra's trading arm overbooking, Viterra's trading arm would have to

⁴¹ ACCC, Decision to accept Viterra's Port Terminals Services Access Undertaking, 29 September 2011, p.29

⁴² Ibid, p.30

pay an auction premium determined by the market, which it would forfeit if it did not ship against its bookings.⁴³

Based on ACCC concerns outlined above at section 3, it appears that the impact of the rebate on the auction mechanism may undermine the usual operation of auction pricing contemplated in the ACCC's final decision and as a result, the auction mechanism may not produce a result and in the event that the auction does conclude, there is no guarantee that it will conclude at an efficient outcome.

Further, as discussed above, exporters may be able to acquire high demand capacity through the FIFS mechanism at no premium, meaning that capacity is not necessarily allocated to the exporter who values it most highly.

It is the ACCC's view therefore that the auction system proposed may not result in the efficient allocation of scarce port terminal services capacity and is inconsistent with the objects of Part IIIA.

3.4.2 The legitimate business interests of Viterra

In its final decision to accept the 2011 Undertaking, the ACCC formed the view that it was appropriate that the details of the auction design are the subject of detailed consultation with industry. The ACCC recognised Viterra's legitimate business interests in seeking to ensure that there are no unintended consequences resulting from introducing an auction system too quickly.

The ACCC maintains this view with respect to the auction system proposal.

3.4.2.1 ACCC's view

The ACCC acknowledges that it is in Viterra's legitimate business interests for the ACCC to 'approve' (or not object to) the proposed variation introducing an auction system, given the consequence of not being able to provide port terminal services to its own trading arm.

Further, the ACCC acknowledges that it is in Viterra's legitimate business interests to introduce the auction system as proposed given the level of investment from Viterra to date.

However it is inconsistent with Viterra's legitimate business interests to introduce an auction that may not result in an efficient use of its port terminal infrastructure.

3.4.3 The public interest, including the public interest in having competition in markets

It is the ACCC's view that an auction system that allocates capacity efficiently and incorporates effectively all of the features of clause 9.5(d) of the 2011 Undertaking will enhance competition in both the up stream wheat purchasing market and the market for the export of bulk wheat.

⁴³ Ibid p.32

As discussed above, it is the ACCC's view that the proposed auction system may not allocate capacity efficiently. It is the ACCC's view that the inefficient allocation of scarce port terminal capacity is likely to have a detrimental effect on competition. An exporter who acquires high demand capacity at a zero premium is at a competitive advantage to its rivals who have paid an auction premium, in the upstream and downstream markets of wheat purchasing and selling.

It is the ACCC's view that the current auction proposal may result in an inefficient allocation which would be detrimental to competition in the upstream purchasing and the downstream selling markets and is not in the public interest.

3.4.4 The interests of persons who might want access to the service

The ACCC notes that a number of aspects of Viterra's proposed auction system are in the interests of exporters. These include transparency of auction results and the independence of the auction system proposed. It is the ACCC's view however that an auction system that does not allocate capacity efficiently is not in the interests of access seekers as it provides little certainty in relation to acquiring capacity, particularly if high demand capacity is allocated through the FIFS system.

The ACCC also objects to the following clauses of the proposed auction system which it considers are not in the interests of access seekers.

Clause 8.2 and 2.4 of the proposed PLPs

Clause 8.2 provides that Viterra will offer a conditional refund for capacity that is surrendered by exporters, when that capacity is subsequently acquired by another exporter. Clause 2.4 of the proposed PLPs provides that Viterra may decide to not reoffer capacity that is surrendered to the shipping stem. In effect, these clauses may act to the detriment of an exporter who surrenders capacity to the stem and Viterra decides to not reoffer that capacity.

While not noted in the PLPs, Viterra has submitted that Viterra will pay the refund in the event that returned capacity is not reoffered to the market. Viterra has advised that it will make this clear to clients in future communications.⁴⁴

It is the ACCC's view that clause 2.4 should be amended to ensure that when exporters return unwanted capacity to the stem, and Viterra decides to not re-offer it to market, then the exporter is not disadvantaged due to Viterra's operational decision.

Clause 15 of the proposed PLPs

Clause 15 of the proposed PLPs provides that the Auction Provider (Tradeslot) will disclose information about the Client and its participation in the auction to Viterra and that the company may publish this information.

The ACCC is of the view that the ability of Viterra to request information from Tradeslot regarding a client's participation in the auction is very broad and may in

⁴⁴ Viterra, email from Tim Krause, General Manager Strategic Planning: Grain to Kerry Leigh Taylor of the ACCC, 28 February 2012.

some instances include bidding strategies. It is the ACCC's view that this is not in the interests of access seekers to require the disclosure of commercial in confidence information and it would be more appropriate to limit the type and nature of the information being provided by Tradeslot to Viterra to only include information that is necessary for Viterra to carry out its obligations under the 2011 Undertaking.

Clause 11 – of the proposed Auction Rules

Clause 11 of the proposed Auction Rules sets out the procedure with respect to any grievances that may arise with respect to the auction process. If exporters wish to lodge a non-technical grievance, they must lodge a notification of intent during the auction and then provide details of the grievance in writing by 5:00pm on the first Business day following the 'Auction end'.

Other provisions of the auction rules refer to an 'Auction Results Validation Date' which appears as a defined term in the proposed PLPs as the date that all auction results are finalised by Viterra.

The ACCC is of the view that clause 11 will benefit from minor amendment to clarify that written grievances must be lodged by 5.00pm on the first business day following the end of bidding. The ACCC considers it would be in the interests of access seekers to have certainty regarding the grievance procedure.

4 Decision

The ACCC has decided to issue this Auction Objection Notice pursuant to clause 9.6(a) of the 2011 Undertaking in response to the Auction Variation Notice provided by Viterra on 17 February 2012.

Based on the information before the ACCC at this time and having had regard to each of the matters set out in clause 9.6(c) of the 2011 Undertaking, the ACCC objects to the proposed variations to the PLPs and the Standard Terms that are set out in section 2 of this document. As set out in section 3 of this document, reasons for the ACCC's objections are that:

- Viterra's proposed variations do not incorporate the following features as required by clause 9.5(d):
 - (ii) *an auction should be the primary means of allocating port-loading capacity at each Port Terminal. For the avoidance of doubt, 'port-loading capacity' means the capacity that is made available by the Port Operator to exporters to enable the export of Bulk Wheat, barley and other grain commodities through the Port terminals*
- and
- (vi) *Slots should be allocated to those clients that value them most.*
- It is the ACCC's view that the auction proposal put forward by Viterra may not promote the economically efficient use of Viterra's port terminal infrastructure.
 - Having regard to the outcomes experienced in WA this season, and the submissions from stakeholders, it is the ACCC's current view that the system adopted in SA should, so far as practicable, be modified to avoid or minimise the undesirable features of the CBH auction model.

The ACCC reached this decision following consultation with Viterra and stakeholders and having regard to each of the matters listed in clause 9.6(c) of the 2011 Undertaking.