



Application by Viterra Operations Ltd to vary its 2011 Access Undertaking

Updating the timetable to introduce an Auction System

1 Introduction

1.1 Application to vary the Access Undertaking

This is an application by Viterra Operations Ltd ("**Viterra**") to the Australian Competition and Consumer Commission ("**ACCC**") for consent to vary the Port Terminal Services Access Undertaking accepted by the ACCC on 28 September 2011 ("**Undertaking**") under section 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) ("**CCA**").

1.2 Purpose of variation

The purpose of the proposed variation is to update the current timeline set out in clauses 9.5 and 9.6 of the Undertaking for the introduction of an Auction System as the primary method for allocating port-loading capacity for Bulk Wheat and other grain commodities at Viterra's South Australian Port Terminals.

The application to update the current timeline is consistent with the following statements in the ACCC's News Release on 11 April 2012:

"The ACCC is mindful that the industry is currently considering how to respond to [the problems that occurred in Western Australia's recent auctions] and considers that more time should be given to allow the industry to consider potential modifications to address these issues before such an auction system is introduced into South Australia.

In issuing an auction objection notice, Mr Sims said "this is an industry wide problem and more time is required to properly explore potential solutions".

...

Given the need for further industry consultation, this will involve extending the timelines set out in Viterra's access undertaking without penalty to Viterra".

1.3 The proposed variations

Viterra seeks the ACCC's consent to vary clauses 9.5 and 9.6 of the Undertaking in accordance with the marked-up version of those clauses set out in Attachment 1.

A clean copy of the proposed Undertaking (as amended) is set out in Attachment 2.

2 The proposed variations

A brief explanation of the proposed variations to clause 9.6 of the Access Undertaking is set out below.

	Proposed variation	Reason for proposed variation
1	Clause 9.5(a) – The proposed variation updates the clause cross-references to reflect the proposed variations to clause 9.6 as set out below.	See the “proposed variation” column.
2	Clause 9.6(d) – The proposed variation will enable the ACCC to withdraw an Auction Objection Notice “for any reason”.	This change is intended to provide the ACCC with greater flexibility in its ability to withdraw an Auction Objection Notice. It also reflects that there may be a tension between some of the existing auction principles set out in clause 9.6(d) of the Undertaking and that any solution may therefore involve some compromises between those principles in order to deliver a practical and workable Auction System.
3	<p>Clause 9.6(f) – The proposed variation:</p> <ul style="list-style-type: none"> • extends the period within which Viterra must re-submit a variation proposal and Revised Variation Notice from 31 May 2012 to 24 August 2012; • provides an ability for the ACCC and Viterra to change this period by agreement; • provides an ability for the ACCC and Viterra to change (by agreement) the period within which the ACCC must respond to the Revised Variation Notice (currently 30 Business Days); • reflects that the ACCC may withdraw an Auction Objection Notice “for any reason”; and • reflects that the final date by which Viterra must introduce an Auction System needs to be extended in line with the timetable variations set out above. 	<p>The proposed timeline extensions reflect the comments by the ACCC in its News Release that more time should be given to allow the industry to consider potential modifications to address the issues that arose in Western Australia before an auction system is introduced into South Australia and that <i>“more time is required to properly explore potential solutions”</i>.</p> <p>Viterra’s intention is to work with the ACCC as quickly as possible. However, realistically Viterra cannot undertake the necessary work until it receives further guidance from the ACCC. In turn, Viterra understands that any further guidance from the ACCC will need to be based on its further market enquiries.</p> <p>Experience has shown the significant time required to implement an auction system even when working off a relatively known base (i.e. the Western Australian system) and naturally this will have timing implications.</p> <p>Those implications relate not only to discussions between Viterra and the ACCC, the ACCC’s market enquiries process, the need for Viterra to prepare revised documents and the time required for the ACCC’s internal processes. They also relate, critically, to the work required by Viterra to determine the</p>

	Proposed variation	Reason for proposed variation
		<p>impact on, and make any necessary adjustments to, its existing systems.</p> <p>In this regard, the ACCC has previously recognised “<i>Viterra’s legitimate business interests in seeking to ensure that there are no unintended consequences resulting from introducing an auction system too quickly</i>”¹, and that it is inconsistent with Viterra’s legitimate business interests to introduce an auction system that may not result in an efficient use of its port terminal infrastructure.²</p> <p>Viterra therefore considers that a “backstop date” of 24 August 2012 (unless otherwise agreed by the ACCC) for submission of the revised proposal is reasonable and appropriately balances Viterra’s legitimate business interests, the public interest (including the public interest in having competition in markets) and the interests of access seekers.</p> <p>The proposed variations will enable the implementation of the variations by 24 October 2012 with the first auction to be held in early November 2012.</p> <p>The additional flexibility afforded to the ACCC (i.e. to agree changes to the timetable and to withdraw an Auction Objection Notice for any reason) are also consistent with and balance these objectives.</p>
4	<p>Clause 9.6(g) – The proposed variation provides that, if the timelines set out in clause 9.6(f)(ii) and (iii) are varied by agreement between the ACCC and Viterra, the date by which Viterra must introduce an Auction System will also be extended to reflect the varied timeline.</p>	<p>See the “proposed variation” column. This variation reflects that the time by which Viterra must introduce the Auction System is determined by reference to the dates on which Viterra must submit and the ACCC must respond to the Revised Variation Notice.</p>
5	<p>Clause 9.6(h) – The proposed variation provides greater flexibility to both the ACCC and Viterra by providing that, if Viterra has submitted a revised proposal and Revised Variation Notice to the ACCC before 1 June 2012, it can withdraw that notice on or before 9 July 2012 and submit a replacement notice at any time</p>	<p>The proposed variation is intended to provide the greater flexibility referred to in the “proposed variation” column. However, it also serves a practical purpose if the variation to the Undertaking set out in this application does not take effect on or before 31 May 2012, with the result that (in accordance with the Undertaking) Viterra may be required to submit the Revised Variation Notice even if it is still working with the ACCC in good faith to determine an</p>

¹ ACCC, *Auction Objection Notice in response to Viterra Operations Limited’s Auction Variation Notice*, 11 April 2012, page 30..

² As above.

	Proposed variation	Reason for proposed variation
	up until the final dates for submission set out in clause 9.6(f).	<p>appropriate solution.</p> <p>The proposed clause 9.6(g) makes it clear that Viterra can re-submit the Revised Variation Notice after the variation to the Undertaking takes effect (and it has progressed discussions with the ACCC in relation to the proposed Auction System). The re-submission by Viterra will also restart the 30 Business Day period for the ACCC to assess the proposed Auction System.</p> <p>Viterra considers that this procedural change is reasonable and appropriately balances Viterra's legitimate business interests, the public interest (including the public interest in having competition in markets) and the interests of access seekers for the same reasons as set out above.</p>
6	<p>Clause 9.6(i) – The proposed variation makes it clear that Viterra will continue to have an ability to make changes to the Revised Variation Notice to incorporate changes to address specific drafting and/or procedural issues up until the date that is 15 Business Days before the Revised Proposal Decision Date (unless extended by the ACCC). This will not re-start the period within which the ACCC can assess the proposal. The proposed variation also reflects that the relevant drafting and/or procedural issues may be raised by Viterra or the ACCC.</p>	See the “proposed variation” column.
7	<p>Clause 9.6(j) – The proposed variation updates the clause cross-references to reflect the arrangements set out above.</p>	See the “proposed variation” column.
8	<p>Clause 9.6(k) – The proposed variation provides that, if Viterra has not introduced an Auction System by 9 November 2012 (or such other date agreed by the ACCC), Viterra will not be able to provide Port Terminal Services in respect of Bulk Wheat to its own Trading Division on and from 1 February 2013.</p> <p>However, if the “Final Date” occurs after 24 January 2013, Viterra will only be precluded from exporting Bulk Wheat from the date that is 5 Business Days after the Final Date..</p> <p>This prohibition will be avoided if the ACCC subsequently</p>	<p>The proposed variation extends the date from which Viterra's Trading Division cannot export Bulk Wheat from the “Final Date” (i.e. 9 November 2012 unless extended by the ACCC) to 1 February 2013.</p> <p>This change is very important as it reflects the fact that Viterra will need to open the shipping stem for all exporters in respect of the new harvest period well prior to 9 November 2012.</p> <p>It also reflects that auctions in early November 2012 (as contemplated by the proposed variations to the Undertaking) are too late for shipments occurring in December 2012 and January 2013.</p>

Proposed variation	Reason for proposed variation
<p>consents to vary the Undertaking to introduce an Auction System.</p>	<p>Viterra considers that both exporters and itself (in its capacity as infrastructure provider) require certainty in relation to shipping bookings for the early part of the new season by no later than the end of August / start of September.</p> <p>Traditionally exporters have started to make bookings on the shipping stem by no later than this time. For this reason, the current timelines in the Undertaking also involve Viterra implementing the Auction System by 30 July 2012, with the auction for the October 2012 – January 2013 period to be held at some time between 30 July 2012 and 10 August 2012.</p> <p>This practical and commercial need is further reflected in the current clause 9.6(m) of the Undertaking which enables re-opening of the stem for the new season if no Auction System is in place by 16 August 2012.</p> <p>This timing is not only necessary for Viterra from an operational perspective, but is critical for exporters and the South Australian industry. If exporters (including Viterra) do not have certainty that they can secure port capacity by late August / early September in respect of the new harvest period, this may result in them not buying South Australian crop and diverting their early season accumulation to other states and international origins. This can have a very significant impact on prices, the accumulation and logistics task, and the utilisation of export infrastructure. This involves consequences that are potentially extremely damaging for growers, exporters, Viterra and employment in South Australia.</p> <p>As previously discussed, Viterra appreciates the opportunity to work with the ACCC to implement revised timelines and to introduce an auction system which addresses the ACCC's concerns. However, the factors set out above mean that there would be very significant difficulties for the whole industry if:</p> <ul style="list-style-type: none"> • Viterra could not open the shipping stem for the 1 October 2012 to 31 January 2013 period shortly after 16 August 2012; or • exporters (including Viterra) could not make bookings in respect of the 1 October 2012 to 31 January 2013 period until an auction in

	Proposed variation	Reason for proposed variation
		<p>early November 2012.</p> <p>Accordingly, and in the absence of clear views on what changes may be required to Viterra's currently proposed system, Viterra proposes that the new timeline should be aiming for the introduction of the new Auction System for shipments from 1 February 2013 onwards and Viterra should not be precluded from participating in the first-in-first-served bookings along with other exporters up until that date. While still very tight from a timing perspective, an ability to book capacity (via auction in November 2012) for 1 February 2013 onwards periods is likely to reduce the potential impacts on the industry.</p> <p>For the reasons set out above, Viterra considers that the ability to open the shipping stem in late August / early September for bookings from 1 October 2012 to 31 January 2013 is critical and is also in Viterra's legitimate business interests, the public interest and the interests of access seekers.</p> <p>It is also consistent with the objects of Part IIIA of the CCA which include promoting the economically efficient operation of, and use of and investment in the relevant infrastructure, thereby promoting effective competition in upstream and downstream markets. It would not promote the economically efficient use of and investment in infrastructure if Viterra could not open the shipping stem soon after 16 August 2012 and, at that time, exporters (including Viterra) and Viterra (as infrastructure provider) could not obtain certainty in relation to the October to January shipping period.</p>
9	Clause 9.6(l) – The proposed variation is intended to ensure consistency with the 1 February 2013 date (or “Final Date” if it occurs after 1 February 2013) set out in clause 9.6(k).	See the “proposed variation” column.
10	Clause 9.6(n) – The proposed variation reflects that, under the new timetable, Viterra will need to open the shipping stem for bookings in respect of slots occurring after 1 October 2012 prior to the introduction of the Auction System. That operation of the shipping stem will take place in accordance with clause 9.6(o).	See the “proposed variation” column and Item 8 above.
11	Clause 9.6(o) – The proposed variation:	See the “proposed variation” column and Item 8 above. The variation provides some flexibility in relation to the date that Viterra may re-open the

Proposed variation	Reason for proposed variation
<ul style="list-style-type: none"> enables Viterra to re-open the shipping stem after 16 August 2012 to accept bookings from all exporters for the 1 October 2012 to 31 January 2013 period if the Auction System has not been introduced by that date; 	<p>shipping stem (both for itself and other exporters). This is because it may be preferable to delay opening the shipping stem by a short period if the introduction of the Auction System is imminent.</p>
<ul style="list-style-type: none"> enables Viterra to open the shipping after 12 November 2012 to accept bookings from all exporters for the 1 February to 31 April 2013 period if the Auction System has not been introduced by that date and the date by which Viterra must introduce the Auction System has not passed. The only situation in which this can occur is if the period for introducing the Auction System is extended as a result of agreement with the ACCC. <p>However, if subsequently the date by which Viterra must introduce an Auction System passes and Viterra has not introduced the Auction System, Viterra must cancel all non-executed Bulk Wheat Bookings by its Trading Division in respect of Slots which occur for the 1 February 2013 to 31 April 2013 period. If this occurs, Viterra will refund the relevant booking fees and make the relevant bookings available to:</p> <ul style="list-style-type: none"> other exporters for Bulk Wheat and other grain commodities; and Viterra's Trading Division for non-Bulk Wheat commodities. 	<p>Viterra considers that 12 November 2012 is late as the first opportunity for exporters to make bookings in respect of the 1 February to 30 April 2013 shipping period. However, as set out above, the new timelines which form part of the proposed variations to the Undertaking contemplate that the first auction in respect of 1 February 2013 onwards periods will be held in early November 2012.</p> <p>If the ACCC extends the date for introducing the Auction System, it will not be possible for the auction to be held in early November 2012. However, in order to facilitate exports, it will still be necessary for Viterra to open the shipping stem for bookings in respect of the February to April 2013 period (see Item 8 above).</p> <p>If the date by which Viterra must introduce the Auction System has been extended by the ACCC so that it occurs after Friday, 9 November 2012, Viterra should not be precluded from participating in the booking process along with other exporters. However, if by the Final Date (when it occurs) Viterra has not introduced an Auction System, Viterra will, unless otherwise agreed by the ACCC, cancel any slots that its Trading Division has booked for the export of Bulk Wheat and which have not already been executed in respect of the 1 February to 30 April 2013 period.</p> <p>If this occurs, Viterra will make those slots available to other exporters (and itself for non-Bulk Wheat bookings) on a first-in-first-served basis, and will refund the booking fees to its Trading Division.</p> <p>For the reasons set out above, Viterra considers that the ability to open the shipping stem in early November 2012 for bookings from 1 February 2013 to 30 April 2013 is critical and is also in Viterra's legitimate business interests, the public interest and the interests of access seekers. If the Final Date has not passed by that date, Viterra should be able to participate in that booking process (subject to a similar mechanism to that set out in the current</p>

	Proposed variation	Reason for proposed variation
		<p>Undertaking applying if an Auction System is not in place by the Final Date).</p> <p>This variation is also consistent with the objects of Part IIIA of the CCA which include promoting the economically efficient operation of, and use of and investment in the relevant infrastructure, thereby promoting effective competition in upstream and downstream markets. It would not promote the economically efficient use of and investment in infrastructure if Viterra could not open the shipping stem in early November 2012 and, at that time, exporters and Viterra (as infrastructure provider) could not obtain certainty in relation to the February to April shipping period.</p>
	<ul style="list-style-type: none"> • provides that if, as at 12 November 2012, the final date by which Viterra must implement the Auction System has passed (i.e. the timeframe has not been extended) – and Viterra has not introduced an Auction System -- Viterra may re-open the shipping stem for the period from 1 February to 31 April 2013, but only for: <ul style="list-style-type: none"> • other exporters in respect of Bulk Wheat; and • Viterra and other exporters in respect of non-Bulk Wheat Grain commodities. <p>The proposed variation (paragraph (iv)) also reflects that the initial period for opening the shipping stem will be for four months (October to January), not three months as set out in clause 9.6(o)(iv) of the Undertaking.</p>	<p>This is similar to the mechanism that exists in the current Undertaking. The only difference is the date from which Viterra would no longer be able to export Bulk Wheat.</p> <p>See the “proposed variation” column.</p>
12	<p>Clause 9.6(p) – The proposed variation provides that the arrangements for re-opening the shipping stem as set out above may be varied as part of the transitional arrangements set out in the Auction System. This will only need to occur if the Auction System is not introduced by the “Final Date” (in which case the Auction System will need to be introduced by a subsequent variation to the Undertaking).</p>	<p>See the “proposed variation” column. If an Auction System is introduced after the “Final Date” (by means of a further variation to the Undertaking), it will be necessary to consider, as part of that variation, the mechanics and timings for opening the shipping stem and transitioning to the first auctions.</p>
13	<p>Clause 9.6(t) – The proposed variation makes it clear that for the purposes of the Undertaking, the Auction System will be taken to</p>	<p>This variation provides greater clarity in relation to the time at which Viterra will have implemented the Auction System as required by the Undertaking.</p>

	Proposed variation	Reason for proposed variation
	be introduced and implemented when the relevant variations to the Port Loading Protocols and Standard Terms take effect. Those variations may involve certain transitional arrangements to enable the first auction.	

3 The proposed variation satisfies the criteria in section 44ZZA(3)

For the reasons set out above, Viterra considers that the proposed variations satisfy the statutory criteria set out in section 44ZZA(3) of the CCA.

The ACCC has already indicated that a variation to the timeline for introducing the Auction System is necessary and desirable. The proposed variations clearly support this objective and are intended to set out a clear, transparent and realistic process under which Viterra, the ACCC and industry participants can work to improve the proposed capacity allocation arrangements for Port Terminal Services in South Australia for the export of Bulk Wheat

Viterra considers that the proposed variations:

- (a) **Are consistent with the objects of Part IIIA** – The timely transition to introduce a new and effective Auction System -- including arrangements to enable exporters to obtain sufficient certainty in relation to port terminal bookings so that they can implement their respective accumulation and sales strategies -- will promote the economically efficient operation of, use of and investment in the Port Terminals. This will, in turn, promote competition in markets for wheat exports;
- (b) **Are consistent with Viterra’s legitimate business interests** - the ACCC has previously recognised “*Viterra’s legitimate business interests in seeking to ensure that there are no unintended consequences resulting from introducing an auction system too quickly*”, and that it is inconsistent with Viterra’s legitimate business interests to introduce an auction system that may not result in an efficient use of its port terminal infrastructure.

It is also consistent with Viterra’s legitimate interests to facilitate a timely transition to enable the introduction of a new and effective Auction System. This includes arrangements to enable exporters (including Viterra) to obtain sufficient certainty in relation to port terminal bookings so that they can implement their respective accumulation and sales strategies;

- (c) **Are consistent with the public interest, including the public interest in having competition in markets** – The variations will facilitate the introduction of an Auction System that provides workably efficient outcomes that promote competition. In this regard, the ACCC noted in its Auction Objection Notice 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 upstream wheat purchasing market and the market for the export of bulk wheat.*”³

The proposed variations are also intended to facilitate competition between all exporters in the lead up to introduction of the new Auction System (by enabling equal participation and ensuring sufficiently timely access to bookings for all exporters so that they can implement their respective accumulation and sales strategies);

- (d) **Are consistent with the interests of persons who might want access to the Port Terminal Services** – The ACCC has previously determined that the introduction of an Auction System is in the interests of access seekers. As reflected in the ACCC’s News Release, an extension of the timelines for introducing the Auction System is also in the interests of access seekers. Specifically, the ACCC has recognised that “*this is an industry wide problem and more time is required to properly explore potential solutions*”.

Arrangements to enable exporters to obtain sufficient certainty in relation to port terminal bookings so that they can implement their respective accumulation and sales strategies (i.e. in respect of the October 2012 to January 2013 period and the February to April 2013 period) are also in the interests of access seekers.

As set out above, this revised timing is not only necessary for Viterra from an operational perspective, but is critical for exporters who require access to Viterra’s port infrastructure

³ Page 30.

and for the South Australian grain industry more broadly. If exporters do not have certainty that they can secure port terminal capacity by late August / early September in respect of the new harvest period, this may result in them not buying South Australian crop and instead diverting their early season grain accumulation to other states and international origins. This could have a very significant impact on prices, grain accumulation and logistics, and the efficient utilisation of export infrastructure. These potential consequences would be extremely damaging to growers, exporters, Viterra and employment in South Australia;

- (e) **Are consistent with the other matters previously viewed as relevant by the ACCC in relation to the Auction System** - In particular:
- (i) the variations provide a process which will enable Viterra, the ACCC and industry participants to consider and address the issues that arose in the context of the recent auctions in Western Australia; and
 - (ii) are consistent with the intention of the access test as it appears in the *Wheat Export Marketing Act 2008* (Cth) that port operators provide fair and transparent access to their facilities for other exporters.

The pricing principles set out in section 44ZZCA are not relevant to the proposed variations. There is also no access code that applies to the Port Terminal Service.

4 Further questions

If the ACCC requires any further information in relation to the proposed variation, please contact:

Damian Fitzgerald
Director, Legal
Viterra Limited
Phone: +61 8 8304 1375
Email: damian.fitzgerald@viterra.com

Viterra Operations Ltd
20 April 2012

Attachment 1

Proposed changes to clauses 9.5 and 9.6 of the Undertaking

9.5 Changes to the capacity allocation system to introduce an auction

A. The variation process

- (a) Subject to clause 9.6(f)(iv), the Port Operator will vary the Port Loading Protocols and/or Standard Terms to introduce an Auction System for the allocation of Port Terminal Capacity by no later than 14 May 2012.
- (b) The Port Operator may vary the Port Loading Protocols and/or Standard Terms in accordance with clause 9.5(a) by:
 - (i) providing Major Users and the ACCC with written notice of the proposed variations (“**Auction Variation Notice**”); and
 - (ii) publishing that notice in a prominent place on its website (with a reference to the publication of the notice on the Shipping Stem),

which, subject to clause 9.6(hj) and clause 9.6(km), must be in each case at least 45 Business Days before the proposed variations take effect.

- (c) Prior to issuing an Auction Variation Notice, the Port Operator will consult with Major Users and the ACCC in accordance with clause 9.5(g).

B. The Auction System

- (d) Unless otherwise agreed by the ACCC and the Port Operator, the Auction System will incorporate the following features:
 - (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;
 - (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));
 - (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;
 - (iv) the auction should be conducted in a transparent and non-discriminatory manner;
 - (v) Slots should be allocated to those clients that value them most;
 - (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 Terminals on a pro rata basis; and

- (vii) rights purchased in the auction should be tradable 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.

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 and 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.

- (e) The Auction System will apply to new bookings on and from the date the Port Loading Protocols and/or Standard Terms are varied in accordance with clause 9.5 and clause 9.6 (“**Effective Date**”). The Auction System will not apply to bookings that have been accepted prior to the Effective Date, even if those bookings relate to shipments after the Effective Date.

C. The consultation process

- (f) Unless otherwise agreed between the Port Operator and the ACCC, the Port Operator will commence consultation with Major Users and the ACCC to vary the Port Loading Protocols and/or Standard Terms to introduce an Auction System by no later than 30 January 2012.
- (g) Consultation by the Port Operator with Major Users and the ACCC will involve the Port Operator:
 - (i) providing a written Consultation Notice to Major Users and the ACCC setting out details of the proposed Auction System, and inviting comments from interested persons;
 - (ii) publishing the Consultation Notice in a prominent place on its website (with a reference to the publication of the Consultation Notice on the Shipping Stem);
 - (iii) providing a period of not less than 15 Business Days for interested parties to provide their comments (if any) in relation to the proposed variations;
 - (iv) the Port Operator publishing on its website any written submissions received from interested parties under this clause 9.5(g) within 5 Business Days of receiving that submission. For the avoidance of doubt, the Port Operator is not required to publish on its website any part of a written submission that:
 - (A) contains information which is subject to a claim of confidentiality by a third party; or
 - (B) contains offensive or abusive material or is otherwise inappropriate for publication.

If the Port Operator excises any part of a written submission for the reasons set out above, it will nonetheless publish the remainder of the submission on its website and provide a copy of the entire submission to the ACCC within 5 Business Days of receiving the submission;

- (v) meeting with interested parties (if requested) to discuss the proposed variations and for the interested parties to provide feedback to the Port Operator (if any). Such meetings can be conducted with one or more interested parties, and may be conducted by telephone;
- (vi) considering the issues raised (if any) by Major Users, the ACCC and any other interested parties. The Port Operator may, where necessary:
 - (A) seek clarification and further details from relevant parties; and/or
 - (B) make any modifications to the variation proposal which are acceptable to the Port Operator, acting in good faith, to reflect the feedback (if any) received from interested parties. Any modifications to the variation proposal made in accordance with this clause 9.5(g)(vi) will not require the Port Operator to recommence the consultation process under clause 9.5(c) or clause 9.5(g);
- (h) The Port Operator will be deemed to have satisfied its obligation to consult with Major Users and the ACCC in clause 9.5(c) if it complies with the requirements set out in clause 9.5(g), even if no Major User, the ACCC or interested party provides any response to the Consultation Notice issued by the Port Operator.

9.6 Objection notice - Auction system

A. The ACCC may issue an Objection Notice

- (a) The ACCC may object to any or all of the variations set out in an Auction Variation Notice by issuing a notice in writing to the Port Operator ("**Auction Objection Notice**"). The Auction Objection Notice must:
 - (i) be issued at least 10 Business Days prior to the date on which it is proposed that the variation will become effective ("**Objection Notice Date**");
 - (ii) state that the ACCC objects to the proposed variation or variations and provide reasons; and
 - (iii) be published on the ACCC's website.
- (b) If the ACCC proposes to issue an Auction Objection Notice, then at least 5 Business Days before issuing that notice, the ACCC must provide the Port Operator with a draft notice stating its intention to issue an Auction Objection Notice and providing reasons for that intended objection.
- (c) In issuing an Auction Objection Notice or a draft notice under clause 9.6(b), the ACCC must have regard to:
 - (i) whether the proposed variations incorporate the features set out in clause 9.5(d);
 - (ii) 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;
 - (iii) 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;
 - (iv) the matters set out in section 44ZZA(3) of the CCA; and
 - (v) any submissions by the Port Operator and/or other interested persons.

- (d) The ACCC may withdraw a draft notice issued under clause 9.6(b) or an Auction Objection Notice if ~~in all the circumstances~~ it becomes aware that in all the circumstances the reasons specified in the relevant notice no longer exist, ~~or if~~ those reasons are addressed, or for any other reason.

B. What happens if the ACCC does not issue an Auction Objection Notice

- (e) If the ACCC does not issue an Auction Objection Notice in relation to an Auction Variation Notice, the variation will take effect in accordance with, and on and from the date specified in, the Auction Variation Notice.

C. What happens if the ACCC issues an Auction Objection Notice

- (f) If the ACCC issues an Auction Objection Notice:
- (i) the Auction Variation Notice will not take effect;
 - (ii) unless a different period is agreed by the Port Operator and the ACCC, the Port Operator will submit a revised variation proposal (including a revised variation notice ("**Revised Variation Notice**") to the ACCC within ~~35-95~~ Business Days of the date of the Auction Objection Notice, and use its best endeavours to address the issues raised in the Auction Objection Notice. The submission of a revised variation proposal under this clause 9.6(f) will not require the Port Operator to recommence the consultation process under clause 9.5(c) or clause 9.5(g);
 - (iii) the ACCC will advise the Port Operator in writing within 30 Business Days of receiving the revised proposal (or such other period as may be agreed by the Port Operator and the ACCC) ("**Revised Proposal Decision Date**") whether it will withdraw its Auction Objection Notice in respect of the Revised Variation Notice (as varied in accordance with clause 9.6(h) or (i) if applicable) or whether it proposes that the notice will remain in force ~~for the reason that some or all of its concerns have not been addressed~~, together with its reasons for that decision ("**Revised Proposal Decision Date**"); and
 - (iv) unless a different period is agreed by the Port Operator and the ACCC, the date set out in clause 9.5(a) will be extended by a period of ~~67-127~~ Business Days.
- (g) If the date for submission of the Revised Variation Notice or the date by which the ACCC must make its decision in respect of the Revised Variation Notice is extended by agreement between the Port Operator and the ACCC in accordance with clause 9.6(f)(ii) or clause 9.6(f)(iii) (as the case requires), then in addition to the extension set out in clause 9.6(f)(iv), the date set out in clause 9.5(a) will be extended by the Further Period. In this Access Undertaking, the "Further Period" means the period of time beyond 95 Business Days agreed by the Port Operator and the ACCC in accordance with clause 9.6(f)(ii) plus the period of time beyond 30 Business Days agreed by the Port Operator and the ACCC in accordance with clause 9.6(f)(iii).
- (h) If the Port Operator submits a Revised Variation Notice in accordance with clause 9.6(f) at any time prior to 1 June 2012, it may withdraw that Revised Variation Notice on or before 9 July 2012, and re-submit a different Revised Variation Notice at any time prior to the expiry of the period set out in clause 9.6(f)(ii) (as extended by agreement between the Port Operator and the ACCC). The submission of a further version of the Revised Variation Notice in accordance with this clause 9.6(h) will not require the Port Operator to recommence the consultation process under clause 9.5(c) or clause 9.5(g) and will restart the time period set out in clause 9.6(f)(iii).
- ~~(g)~~(i) Notwithstanding clause 9.6(h), tThe Port Operator may at any time prior to the date that is 15 Business Days before the Revised Proposal Decision Date change the Revised Variation Notice to incorporate changes to address specific drafting and/or procedural issues ~~raised by the ACCC~~, and submit a further version of the Revised Variation Notice to the ACCC. The ACCC may in its discretion extend the period of time for the Port Operator to submit a

further version of the Revised Variation Notice if it considers that this will facilitate the introduction of an Auction System. The submission of a further version of the Revised Variation Notice in accordance with this clause 9.6(i~~g~~) will not require the Port Operator to recommence the consultation process under clause 9.5(c) or clause 9.5(g) or restart the time period set out in clause 9.6(f)(iii).

~~(h)~~(i) If in accordance with clause 9.6(f)(iii) the ACCC withdraws any Auction Objection Notice in relation to the Revised Variation Notice (as varied in accordance with clause 9.6(h) or (g) if applicable), the Port Operator may vary the Port Loading Protocols and/or Standard Terms to give effect to the proposal in respect of which the ACCC has withdrawn its objections, by providing Major Users and the ACCC with notice in writing and publishing that notice in a prominent place on its website, in each case at least 10 Business Days before the variations take effect.

D. What happens if an Auction System is not introduced

~~(j)~~(k) If the Port Operator does not introduce an Auction System by the date specified in clause 9.5(a) (as extended in accordance with clauses 9.6(f)(iv) and 9.6(g)) ("**Final Date**"), then:

(i) the Port Operator will not breach this Undertaking; and

(ii) subject to clause 9.6(k)(v) and clause 9.6(o)(ii)(A), unless otherwise agreed between the Port Operator and the ACCC, the Port Operator will not, on and from the Business Day immediately following that date as extended 1 February 2013 ("**Final Date**"), provide Port Terminal Services in respect of Bulk Wheat to the Port Operator's Trading Division unless and until the ACCC consents to a variation to this Undertaking to introduce an Auction System.

For the avoidance of doubt:

(iii) if, during any period to which clause 9.6(i~~k~~)(ii) or clause 9.6(k)(v) applies, the Port Operator's Trading Division makes a booking in respect of a commodity other than Bulk Wheat, the Port Operator will not agree to any subsequent request by the Trading Division to amend that booking so that it relates to Bulk Wheat, or allow the Trading Division to use that booking for the export of Bulk Wheat; ~~and~~

(iv) subject to clause 9.6(j~~l~~), if, during any period to which clause 9.6(i~~k~~)(ii) or clause 9.6(k)(v) applies, the Port Operator provides Port Terminal Services in respect of Bulk Wheat to the Port Operator's Trading Division, the Port Operator will breach this Undertaking; and

~~(iv)~~(v) if the Final Date occurs on or after 24 January 2013 (and the Port Operator has not introduced an Auction System by that date), then, unless otherwise agreed by the ACCC, the Port Operator will not on and from the date that is 5 Business Days after the Final Date provide Port Terminal Services in respect of Bulk Wheat to the Port Operator's Trading Division unless and until the ACCC consents to a variation to this Undertaking to introduce an Auction System.

~~(j)~~(l) Clause 9.6(i~~k~~) does not prevent the Port Operator from supplying storage services at its Port Terminals in respect of Bulk Wheat that is already held at the Port Terminal as at ~~the Final Date~~ 1 February 2013 (or the Final Date if it occurs after 1 February 2013), or from facilitating the receipt, transfer or movement of Bulk Wheat to other clients or to meet domestic out-turn requirements.

~~(k)~~(m) If the ACCC consents to a variation of this Undertaking before or after the Final Date to introduce an Auction System, the Port Operator may vary the Port Loading Protocols and/or Standard Terms to introduce the Auction System by:

(i) providing Major Users and the ACCC with written notice of the proposed variations; and

- (ii) publishing that notice in a prominent place on its website (with a reference to the publication of the notice on the Shipping Stem),

in each case at least 5 Business Days before the proposed variations take effect.

E. Transition to the Auction System

~~(i)(n)~~ ~~Subject to clause 9.6(m), unless~~ Unless otherwise agreed by the ACCC and the Port Operator, the Port Operator will not accept any new bookings onto the Shipping Stem for shipment from the Port Terminals on or after 1 October 2012 ~~until the Auction System is implemented in accordance with clause 9.5 and this clause 9.6~~ except in accordance with clause 9.6(o).

~~(o)~~ If, as at ~~16 August 2012~~:

~~(i)~~ 16 August 2012 the Auction System has not been implemented, the Port Operator may re-open the Shipping Stem to accept new bookings on a first-in-first-served basis from all persons (including the Port Operator's Trading Division) for shipment from the Port Terminals during the period 1 October 2012 to 31 January 2013;

~~(ii)~~ 12 November 2012:

~~(A)~~ the Auction System has not been implemented and the Final Date has not occurred~~the Port Operator is not able to provide Port Terminal Services in respect of Bulk Wheat to its Trading Division (for the reason specified in clause 9.6(i)),~~ the Port Operator ~~will~~ may re-open the Shipping Stem to accept new bookings on a first-in-first-served basis from all persons (including the Port Operator's Trading Division) for shipment from the Port Terminals ~~on~~ during the period or after 1 October 2012 from 1 February 2013 to 30 April 2013. However, if at the time the Final Date occurs the Port Operator has not introduced an Auction System, the Port Operator:

~~(i)~~ will, unless otherwise agreed by the Port Operator and the ACCC, cancel any bookings (with full refund) that its Trading Division has made in respect of the shipment of Bulk Wheat from the Port Terminals during the period 1 February 2013 to 30 April 2013 (which bookings have not already been executed), such cancellation to be on and from the day that is 5 Business Days following the Final Date and make those bookings available to:

(aa) persons other than the Port Operator's Trading Division in respect of Bulk Wheat and other grain commodities; and

(bb) the Port Operator's Trading Division in respect of grain commodities other than Bulk Wheat,

in each case on a first-in-first-served basis; and

~~(i)(ii)~~ will not, unless otherwise agreed by the Port Operator and the ACCC, provide Port Terminal Services in respect of Bulk Wheat to the Port Operator's Trading Division for any period from the later of 1 February 2013 and 5 Business Days after the Final Date unless and until the ACCC consents to a variation to this Undertaking to introduce an Auction System;

~~(A)~~ (B) the Auction system has not been implemented (and the Final Date has occurred such that the Port Operator is no longer able to provide Port Terminal Services in respect of Bulk Wheat to its Trading Division on and from 1 February 2013, unless otherwise agreed by the Port Operator and the ACCC), the Port Operator may re-open the Shipping Stem to accept

new bookings for shipment from the Port Terminals on and from 1 February 2013:

~~(i)~~ (i) by persons other than the Port Operator's Trading Division in respect of Bulk Wheat and other grain commodities; and

~~(ii)~~ (ii) by the Port Operator's Trading Division in respect of commodities other than Bulk Wheat.

~~(ii)~~ by persons other than the Port Operator's Trading Division in respect of Bulk Wheat and other grain commodities; and

~~(iii)~~ by the Port Operator's Trading Division in respect of commodities other than Bulk Wheat.

The Port Operator:

~~(iii)~~ (iii) will provide at least 5 Business Days notice of the re-opening of the Shipping Stem by publishing that notice in a prominent place on its website (with a reference to the publication of the notice on the Shipping Stem); and

~~(iv)~~ (iv) will, subject to clause 9.6(o)(i), re-open the Shipping Stem for individual periods of 3 months, and will provide at least 5 Business Days notice of the re-opening of the Shipping Stem for each succeeding 3 month period.

~~(p)~~ (p) Clause 9.6(~~mo~~) will not apply if, after the Final Date, the ACCC consents to a variation to this Undertaking to introduce an Auction System and the Auction System provides for different transitional arrangements to enable implementation of the Auction System.

~~(q)~~ (q) The Port Loading Protocols (as varied from time to time in accordance with clause 9.3) will remain in force unless and until varied in accordance with clause 9.5.

F. Following variation to introduce an Auction System

~~(m)~~ (r) The Port Operator must:

(i) publish an updated copy of the Port Loading Protocols and Standard Terms in a prominent place on its website; and

~~(ii)~~ (ii) provide a copy of the revised Port Loading Protocols and Standard Terms to the ACCC,

within 3 Business Days of any variation in accordance with clause 9.5 and clause 9.6 taking effect.

(s) After the date that any variations in accordance with clause 9.5 and 9.6 take effect, the Port Operator may vary the Port Loading Protocols from time to time in accordance with clause 9.3 of this Undertaking. For the purposes of this Undertaking, the Port Loading Protocols include any document that replaces or is attached to the Port Loading Protocols to introduce the Auction System.

G. Introduction of an Auction System

(t) For the purpose of this Access Undertaking, the Auction System will be taken to be introduced and implemented if the variations to the Port Loading Protocols and Standard Terms relating to the primary allocation of port-loading capacity by auction (including any transitional arrangements) have taken effect (regardless of the date on which the first auction may be held).

Attachment 2

Clean version of proposed Undertaking as amended