



**Australian
Competition &
Consumer
Commission**

Viterra Operations Limited
Port Terminal Services Access Undertaking
Decision to consent to variation

9 May 2012



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Summary

This document details the Australian Competition and Consumer Commission's (ACCC's) decision to consent to the application made by Viterra Operations Limited (Viterra) on 20 April 2012 to vary its 2011 Port Terminal Services Access Undertaking (**Application to Vary**).

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 in order to allocate port terminal capacity. On 17 February 2012, Viterra lodged an Auction Variation Notice with the ACCC seeking to vary its port loading protocols to introduce an auction system. On 11 April 2012, the ACCC issued an Auction Objection Notice objecting to the form of the auction system proposed. Pursuant to the existing 2011 Undertaking, Viterra is required to, within 35 business days, lodge a Revised Variation Notice amending the proposed auction system to address the ACCC's concerns as set out in the ACCC's Auction Objection Notice.

In issuing its Auction Objection Notice, the ACCC acknowledged that Viterra had acted in good faith in the development of its proposed auction system, but considered that recent auctions in Western Australia using substantially the same auction design as proposed by Viterra had highlighted a number of problems which the ACCC considered could also arise with the operation of Viterra's proposed auction system. The ACCC considered that more time should be given to address the issues in Viterra's proposed auction system before an auction system is introduced in South Australia.¹ In issuing its Auction Objection Notice, the ACCC stated that it would work with Viterra and the industry to ensure that the best possible auction system can be introduced in South Australia.

Given the need for further industry consultation on the design of the auction system, the ACCC recognised that this would involve extending the timelines set out in Viterra's access undertaking without penalty to Viterra.² As envisaged by the ACCC, Viterra has applied to the ACCC for consent to vary the 2011 Undertaking in general terms to:

- extend the timeframes in which Viterra must lodge a Revised Variation Notice
- extend the final date by which Viterra must introduce an auction system (thereby delaying the prohibition on Viterra providing port terminal services to its own trading arm)
- make arrangements to reopen the shipping stem on a first in first served (FIFS) basis in the absence of an auction system

¹ ACCC, Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice, 11 April 2012, available from the ACCC's website at www.accc.gov.au

² ACCC, News Release, 'ACCC to work with Viterra to improve auction system for bulk wheat exports', 11 April 2012.

- give the ACCC wider discretion to withdraw the Auction Objection Notice.

Under s. 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) (CCA) the ACCC may consent to the variation of an undertaking if it thinks it is appropriate to do so having regard to the factors set out in subs. (3). The reasons for the ACCC's decision, having regard to those matters, are set out in this document.

The ACCC is of the view that the proposed variations are appropriate as they:

- will allow more time and flexibility which is needed for Viterro to consider and, in conjunction with industry, develop an auction system that will allocate scarce port terminal capacity more efficiently, thereby promoting the economically efficient operation of and use of Viterro's port terminal infrastructure, thereby also promoting effective competition in the upstream wheat purchasing market and the downstream wheat export market
- are in the legitimate business interests of Viterro, as the variations will:
 - allow more time which is needed in which to develop an effective auction system
 - extend the date by which Viterro must introduce an auction system before the prohibition on Viterro providing port terminal services to its own trading arm comes into effect
 - provide the ACCC greater flexibility to withdraw the Auction Objection Notice
- are in the interests of access seekers as the variations:
 - allow for a more economically efficient, fair and transparent auction system to be introduced
 - allow for consultation with industry to develop an auction system
 - provide for the re-opening of the shipping stem in the event that an auction has not been introduced.

Accordingly, the ACCC consents to Viterro's application to vary its 2011 Port Terminal Services Access Undertaking.

1 Background

Viterra Operations Limited (**Viterra**) operates six bulk wheat grain terminals in South Australia. Under the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**) Viterra is required to satisfy an access test before it is able to export wheat. Viterra has an accepted access undertaking in place under Part IIIA of the CCA relating to the provision of access to port terminal services for the export of wheat for the purposes of satisfying the access test under the WEMA.

On 28 September 2011, the ACCC accepted from Viterra a Port Terminal Services Access Undertaking (**2011 Undertaking**) which requires that Viterra introduce an auction system for allocating port terminal capacity by 14 May 2012 (unless that date is extended in accordance with the 2011 Undertaking). The process set out in the 2011 Undertaking for the introduction of an auction system requires Viterra to lodge an Auction Variation Notice, and includes the ability for the ACCC to object to all or any of the proposed variations having regard to a range of matters set out in the Undertaking.

Viterra lodged its Auction Variation Notice on 17 February 2012. The ACCC issued an Auction Objection Notice on 11 April 2012, objecting to some of the proposed variations set out in Viterra's Auction Variation Notice. In objecting, the ACCC acknowledged that Viterra had acted in good faith in the development of its proposed auction system, but considered that recent auctions in Western Australia using substantially the same auction design as proposed by Viterra had highlighted a number of problems which the ACCC considered could also arise with the operation of Viterra's proposed auction system.

The ACCC considered that more time should be given to address the issues in Viterra's proposed auction system before an auction system is introduced in South Australia.³ In issuing its Auction Objection Notice, the ACCC stated that it would work with Viterra and the industry to ensure that the best possible auction system can be introduced in South Australia. Given the need for further industry consultation on the design of the auction system, the ACCC recognised that this would involve extending the timelines set out in Viterra's access undertaking without penalty to Viterra.⁴

1.1 Consultation process

The CCA provides that the ACCC may invite public submissions on an access undertaking application, including an application to vary an existing access undertaking. The ACCC published a consultation notice on 19 April 2012 inviting submissions on Viterra's proposed variations. The ACCC received four submissions from interested stakeholders. Submissions have been received from:

- Australian Grain Exporters Association (**AGEA**)

³ ACCC, Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice, 11 April 2012, available from the ACCC's website at www.accc.gov.au

⁴ ACCC, News Release, 'ACCC to work with Viterra to improve auction system for bulk wheat exports', 11 April 2012.

- Emerald Group Australia Pty Ltd (**Emerald**)
- Gavilon Grain Australia Pty Ltd (**Gavilon**)
- Grain Producers SA Ltd (**Grain Producers SA**).

Viterra's application to vary its 2011 Undertaking and other relevant materials, including supporting submissions from Viterra and public submissions by interested parties, are available on the ACCC's website at www.accc.gov.au/Viterra.

If you have any queries about any matters raised in this document, please contact:

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2 Decision making framework

This chapter sets out the framework by which the ACCC has assessed Viterra's application to vary its 2011 Undertaking.

2.1 Legal test for assessment

The test the ACCC applies in deciding whether to consent to the variation of an undertaking is set out in s. 44ZZA(7) of the CCA. This section provides that the ACCC may consent to a variation of an undertaking if it thinks it appropriate to do so having regard to the matters set out in s. 44ZZA(3). The matters under this section are:

- 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
 - 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 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 matters that the ACCC thinks are relevant.

The ACCC has had regard to the pricing principles specified in s. 44ZZCA and considers that they are not relevant to Viterra's application. Viterra's Port Terminal Services are not subject to an access code.

The ACCC considers that the regulatory scheme established by the WEMA, and the rationale for the inclusion of the access test in the statute are, under s. 44ZZA(3)(e), matters relevant to the current decision.

In particular, the ACCC acknowledges Parliament's intention in introducing the access test, which was to ensure that accredited exporters provide fair and transparent access to their facilities to other accredited exporters.⁵

The ACCC acknowledges that Parliament's intention to promote competition in the export of bulk wheat has various dimensions, including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers
- the promotion of competition between exporters for the export of wheat from Australia
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

⁵ Explanatory Memorandum, Wheat Export Marketing Bill 2008, p. 31.

3 ACCC assessment

This chapter considers the proposed variations by applying the test identified in chapter 2.

3.1 Proposed variations

The proposed variations to the Undertaking seek to extend the timeframe by which Viterra must introduce an auction system, increase flexibility in the process and to specify arrangements for the reopening of the shipping stem prior to the introduction of an Auction System.

Extensions to the timeframe by which Viterra must introduce an auction system are reflected by proposed variations:

- **Clause 9.6(f):** extends the 35 Business Day time period in which Viterra is required to submit a Revised Variation notice to 95 Business days; provides the ability for the ACCC and Viterra by agreement to further change the period by which Viterra must submit a Revised Variation Notice; and extends the date set out in clause 9.5(a) by which Viterra must have introduced an auction system from a period of 67 days to a period of 127 business days.
- **Clause 9.6(g):** provides that the final date by which Viterra must introduce an Auction System will be extended to reflect the timetable variations and will be determined with reference to the dates by which Viterra must submit and the ACCC must respond to the Revised Variation Notice.
- **Clause 9.6(k):** In the event that Viterra does not introduce an auction system by the 'Final Date' (as extended in accordance with the proposed variations to clause 9.6(f), i.e. 9 November 2012), the variations to clause 9.6(k), seek to
 - extends the date from which Viterra will not be able to provide Port Terminal Services in respect of Bulk Wheat to its own Trading Division to 1 February 2013.
 - If the 'Final Date', the date Viterra must introduce an Auction System by, is on or after 24 January 2013 (by way of a further agreement between Viterra and the ACCC), Viterra will not be able to provide Port Terminal Services in respect of Bulk Wheat to its own Trading Division 5 business days after the Final Date.

Clause 9.6(l) has been varied also to reflect the 1 February 2013 date and the possibility that the 'Final Date' may extend beyond 1 February 2013.

Greater flexibility is reflected in the variations to:

- **Clause 9.6(d):** provides the ACCC with greater flexibility in its ability to withdraw an Auction Objection Notice for any other reason not just in the circumstances when the reasons specified in the relevant notice no longer exist or have been addressed.
- **Clause 9.6(h):** provides the ACCC and Viterra with more flexibility in allowing Viterra to withdraw a Revised Variation Notice before 9 July 2012 if submitted before 1 June 2012 and to submit a replacement notice restarting the ACCC's assessment period. It is intended to overcome the situation which might arise if the proposed variation does not come into effect on or before 31 May 2012, with the result that Viterra would be obliged to submit a Revised Variation Notice even if it is still working to determine an appropriate solution.
- **Clause 9.6(i):** provides that Viterra will have the ability to make changes to the Revised Variation Notice to address specific drafting and/or procedural issues raised by either the ACCC or Viterra up to 15 Business Days prior to the Revised Proposal Decision Date. The proposed variation also clarifies that the ACCC assessment period does not restart if a change is made to the Revised Variation Notice pursuant to this provision.

Proposed variations allowing for the reopening of the shipping stem are reflected in changes to:

- **Clause 9.6(n):** given the new timeframe, this provides that unless otherwise agreed between the ACCC and Viterra, Viterra will not accept any bookings onto the shipping stem for shipment on or after 1 October 2012, except in accordance with clause 9.6(o).
- **Clause 9.6(o):**
 - Allows Viterra to open the shipping stem for all exporters after 16 August 2012 for shipment during the period 1 October 2012 to 31 January 2012.
 - Enables Viterra to open the shipping stem 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. 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 30 April 2013 period and will make those

bookings available to other exporters and Viterra's Trading Division in respect of grain commodities other than bulk wheat.

- If as at 12 November 2012 the final date by which Viterra must introduce an Auction System has occurred and Viterra has not introduced an Auction System, the shipping stem may be re-opened for the period 1 February to 30 April 2013 for other exporters excluding Viterra in respect of Bulk Wheat and exporters including Viterra in respect of non-Bulk Wheat Grain commodities.
- **Clause 9.6 (p):** allows the arrangements of reopening the shipping stem to vary as part of the transitional arrangements set out in the Auction System, however this will only occur if an Auction System is not introduced by the 'Final Date' and an Auction System is introduced by a subsequent variation to the Undertaking.

In addition to these changes, Clause 9.6(t) has been inserted into the undertaking for clarity and provides that an 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). Clause 9.5 has been varied to ensure that cross references to clause 9.6 are correct.

3.2 Submissions

The ACCC received four submissions from stakeholders. Viterra also provided a submission in support of its variation.

3.2.1 Submission from Viterra

Viterra submits that the proposed variations satisfy the criteria set out in s. 44ZZA(3) of the CCA. Viterra submits that the proposed variations:

- are consistent with the objects of Part IIIA of the CCA. Viterra submits: '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'⁶
- are consistent with Viterra's legitimate business interests. Viterra submits that the ACCC has previously recognised that it is within Viterra's legitimate

⁶ Application by Viterra Operations Ltd to vary its 2011 Access Undertaking, p.10.

business interests to be able to ensure that there are no unintended consequences resulting from introducing an auction system too quickly, and that it would be inconsistent with its legitimate interests to introduce a system that may not result in an efficient use of its port terminal infrastructure. It submits that it is in its interests to facilitate a timely transition to enable the introduction of an Auction System, including arrangements to enable exporters (including Viterra) to have sufficient certainty in relation to capacity bookings so that they can implement their respective accumulation and sales strategies

- are consistent with the public interest, including the public interest in having competition in markets. Viterra submits that the variations will facilitate the introduction of an Auction System that provides workably efficient outcomes that promote competition. Viterra submits that the variations are also intended to facilitate competition between all exporters in the lead up to the introduction of an Auction System by enabling equal participation and ensuring timely access to bookings
- are consistent with the interests of persons who might want access to the Port Terminal Services. Viterra submits that additional time to properly explore potential solutions is in the interests of access seekers as a new and effective auction system will address an industry wide problem. Further, the variations to enable exporters to obtain certainty in relation to bookings are in the interests of access seekers and the South Australian grain industry more generally
- are consistent with the other matters previously viewed as relevant by the ACCC in relation to the Auction System. Viterra submits that 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 are consistent with the intention of the access test in the WEMA to provide fair and transparent access to port infrastructure for third party exporters.

3.2.2 Submissions from third parties

The ACCC received four submissions from third party stakeholders.

Australian Grain Exporters Association

AGEA has expressed that it has no objection to extending the timeframe by which Viterra must introduce an auction system.

Emerald Group Australia Pty Ltd

Emerald Group Australia Pty Ltd stated in its submission:

Emerald supports the extended time proposed to be allowed to Viterra, with the expectation that the auction model that will ultimately be introduced by Viterra at the end of this extended period will represent an improvement on the CBH model and minimise, if not eliminate, the problems that have beset the CBH auction system this season.

We note that the practical impact of extending the time limit is that the Viterra auction system will only apply to slots available from 1 February 2013, and in the meantime that first-come-first-served system will apply. While this is not ideal, we accept that in the longer term it is more important that a robust auction model be developed for South Australian wheat exports.⁷

Gavilon Grain Australia Pty Ltd

Gavilon submits that it 'remain[s] committed to supporting an auction system as a means for allocating port capacity through Western Australia and South Australia.'

However, it objects to the time extensions proposed by the variation:

Gavilon notes that the Auction Objection Notice stated that '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'. However, Gavilon would not like to see a repeat of the issues the industry experienced in relation to the opening of the shipping stem for the 2011/12 harvest under a First In First Served system and prefer to have the auction system implemented in time for the 2012/13 harvest.

Furthermore, the industry has put forward a number of proactive ways to deal with some of the shortcomings of the system in WA, including more regular auctions, methods of limiting 'gaming' and offering shippers more flexibility to manage their slots.

Gavilon does not support the time extensions proposed in Viterra's Application to vary Port Terminal Services Access Undertaking. Gavilon believes that Viterra and the industry in general have had sufficient time to implement an auction system and believe that further delays with the implementation will again ultimately affect exporter's [sic] plans and competition in SA for the forthcoming season.

Grain Producers SA Ltd

Grain Producers SA expressed that it has no objection to the extension in time requested by Viterra.

3.3 ACCC view

The ACCC is of the view that the proposed variations are appropriate having regard to the factors set out in s. 44ZZA(3) and submissions received from Viterra and interested stakeholders.

⁷ Emerald Group Australia, Re: Viterra's application to vary 2011 Undertaking, 30 April 2012

3.3.1 Efficient operation of and use of Viterra's port terminal infrastructure

As noted in the ACCC's decision to accept Viterra's 2011 Undertaking,⁸ it is the ACCC's view that an auction system is an appropriate means for allocating scarce port terminal capacity in South Australia and that the FIFS capacity allocation system did not operate efficiently in periods of constraint. It is the ACCC's view that an efficient auction system will promote effective competition in the South Australian market for wheat export by allocating scarce capacity to those exporters who value it most. The introduction of an effective auction system will therefore meet the objects of Part IIIA of the CCA by promoting the economically efficient use of Viterra's port terminal infrastructure and thereby promote effective competition in upstream and downstream markets.

However, the auction system proposed by Viterra in its Auction Variation Notice is substantially similar to the system used in the recent Western Australian auctions, which have highlighted a number of problems with the operation of the system. As set out in the ACCC's Auction Objection Notice,⁹ the auction system proposed may not result in the economically efficient use of Viterra's port terminal infrastructure through allocating shipping slots to clients who value them most.

It is the ACCC's current view that the auction system adopted in South Australia should, so far as practicable, be modified to avoid or minimise the undesirable features of the Western Australian auction system.¹⁰

Extending the timeframe by which Viterra must introduce an Auction System will enable Viterra and the industry more broadly to consider and resolve the issues with the proposed auction system. The timings set out in Viterra's current undertaking would require Viterra to submit a Revised Auction Variation Notice by 31 May 2012. The ACCC does not consider that this allows sufficient time for Viterra and the industry more generally to properly consider the issues raised in the ACCC's Auction Objection Notice and to prepare a revised proposal. Additional time will also allow Viterra to test proposals with industry to help to ensure that a modified auction proposal will result in the efficient allocation of port terminal capacity. This view is supported by Emerald's submission.

Given the need to extend the timeframe by which Viterra must submit a Revised Auction Proposal and the date by which an auction system must be introduced, it is also consistent with promoting the efficient use of Viterra's port infrastructure to

⁸ ACCC, Viterra Operations Limited Port Terminal Services Access Undertaking Decision to accept, 29 September 2011, p. 2.

⁹ Auctions held by CBH in September and December 2011 raised concerns with respect to whether it amounted to an efficient allocation of capacity. Further information regarding the auction outcomes is set out in the ACCC's Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice, published 11 April 2012, p.27

¹⁰ ACCC Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice, 11 April p. 11

allow for Viterra to accept bookings under its current FIFS capacity allocation system relating to shipments occurring up to the period that will be subject to an auction system. Enabling Viterra to accept bookings from 16 August 2012 for port terminal capacity in the period 1 October 2012 to 31 January 2013 will ensure that capacity does not go unused in the event that an auction system has not yet been introduced.

It is the ACCC's view that additional time to modify the proposed auction system to seek to ensure that an auction system will result in an efficient allocation of capacity and providing for reopening of the shipping stem in the interim is appropriate having regard to the first object of Part IIIA of the CCA, being 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.

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

As stated above, the extended timeframe will allow Viterra and industry to address issues of efficiency with respect to Viterra's proposed auction system. An efficient auction system will enhance competition in both the upstream wheat purchasing markets and the market for the export of bulk wheat by allocating scarce capacity to competing exporters on the basis of willingness to pay. Increased competition in these markets is in the public interest. The ACCC also notes that the intention of the access test as it appears in the WEMA is to provide fair and transparent access to all exporters. An effective auction system aligns with the intention of the access test.

As noted, additional time is required in order to develop an effective auction system to ensure that third party access seekers are able to efficiently acquire port terminal services. Accordingly, the ACCC is of the view that the proposed variation to provide additional time to develop an effective auction system is in the public interest. This is because an efficient auction system will enhance competition in both the upstream and downstream markets. The ACCC shares the view of Viterra that the variations are in the public interest.

In addition, the proposed variations include arrangements to allow Viterra to accept bookings on a FIFS basis until such time as an auction system is introduced. Such arrangements ensure continuity in the bulk wheat export industry in South Australia, which in the ACCC's view is in the public interest.

3.3.3 Viterra's legitimate business interests

The ACCC acknowledges that Viterra has acted in good faith in the development of its proposed auction system. However, responding to the issues raised in the ACCC's Auction Objection Notice will require Viterra and industry to consider the issues further and refine the auction system proposed in Viterra's Auction Variation Notice.

It is the ACCC's view that it is in Viterra's legitimate business interest that additional time is provided in which to develop an effective auction system. It is incompatible with Viterra's legitimate business interests that the auction system be introduced without being fully developed and tested. The premature introduction of an auction system would expose Viterra as well as industry to an unreasonable level of uncertainty and risk.

The existing 2011 Undertaking, in effect, provides that if Viterra has not introduced an auction system by 15 August 2012, then it will not provide port terminal services to its own trading arm from the next business day following that date, until such time as the 2011 Undertaking is varied.

It is in Viterra's legitimate business interests to delay the operation of this export restriction given the extensions proposed in the variations to the requirement to introduce an auction system. It is the ACCC's view that this is appropriate given that Viterra has acted in good faith in the development of its proposed auction system and the complexity of the problems with the proposed auction system did not become apparent until after the auctions held in Western Australia.

In light of the uncertainty of the timeframes by which an improved auction system may be developed, it is within Viterra's legitimate business interests for the 2011 Undertaking to be extended and also to allow some flexibility in those timeframes.

Viterra's proposed variations provide additional flexibility to the ACCC to withdraw an Auction Objection Notice. It is the ACCC's view that this additional flexibility is in Viterra's legitimate business interests in that the ACCC's Auction Objection Notice can be withdrawn in a broader set of circumstances.

3.3.4 The interest of access seekers

Notwithstanding the proposed variations may continue the operation of the FIFS system in the interim, the ACCC considers that the proposed variation is in the interests of exporters seeking to access the port infrastructure as the extended timeframe will provide an opportunity for Viterra to introduce a more economically efficient and fair auction system which will be to the benefit of access seekers. The submission of Emerald supports the view that more time to introduce a more robust auction system will benefit South Australian wheat exports in the longer term. An improved auction system will increase certainty to exporters seeking access by providing a fairer and more transparent system where shipping slots are allocated to users who value them most. In this respect the variations are consistent with the intention of the access test in the WEMA.

Additional time will allow Viterra to consult with industry on how improvements can be made to the auction system. Access seekers through this process will be able to have direct input into the development of an improved system and will be given further opportunity to become familiar with the auction system.

It is the ACCC's view that the proposed variations are also in the interest of access seekers because they include transitional clauses that allow Viterra to open its shipping stem for bookings on a FIFS basis in the event that an auction system is still being developed. The ACCC shares the view held by Viterra that these transitional clauses are in the interests of access seekers because they provide certainty to the industry. Enabling exporters to make bookings from 16 August 2012 for port terminal capacity in the period 1 October 2012 to 31 January 2013 will ensure that exporters are able to continue exporting wheat while an efficient auction system is being developed.

The ACCC notes that the submissions from both Emerald and Gavilon express concern with respect to the continuation of the FIFS system for allocating capacity. Emerald accepts however that in the longer term it is more important that a robust auction model is developed for South Australian wheat exports. Gavilon has expressed concern that the continuation of the FIFS system may result in a repeat of the issues the industry experienced in relation to the opening of the shipping stem for the 2011/12 harvest under a FIFS system.¹¹

The ACCC acknowledges Gavilon's concerns with respect to the previous operation of Viterra's FIFS system but notes that the arrangements for accepting bookings (or re-opening the shipping stem) outlined in the new clause 9.6(o) at clause 9.6(o)(iii) are: the Port Operator 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.

It is the ACCC's view that providing clear and sufficient notice to exporters as to the reopening of the shipping stem will reduce the risk of the same outcome as experienced with respect to the 2011/12 harvest bookings. The ACCC notes that this notice period was not a feature of Viterra's previous FIFS capacity allocation system.

In addition, the ACCC notes that the variation seeks to re-open the shipping stem for bookings during a limited period in the first instance, that is between 1 October 2012 and 31 January 2013. The shipping stem may be re-opened for further periods of three months if necessary. So while the FIFS system will be continued, it is anticipated that it will be for a limited duration, during a period of what has traditionally been lower demand and accordingly, it is the ACCC's view that any negative impact on access seekers will be relatively small and is necessary in order to attempt to introduce a more efficient auction system.

¹¹ In March 2011, a large number of nominations were received for shipping slots for execution after 1 October 2011. As a result of the bookings, made on a FIFS basis, capacity at Port Lincoln and Port Adelaide Outer Harbour was reached for the peak shipping period of January to April 2012. As a result of these bookings only Glencore and Viterra were able to access port terminal services at these two ports. The ACCC formed the view that this was an inefficient allocation of capacity and Viterra's trading arm subsequently withdrew a number of its own bookings.

As noted in the ACCC's final decision to accept the 2011 Undertaking, it is the ACCC's view that the continuation of the FIFS system in South Australia is not appropriate in South Australia. However, it is the ACCC's view that in the current circumstances where an efficient auction system has yet to be introduced, it is in the interests of access seekers to re-open the shipping stem on a FIFS basis while a more efficient, fair and transparent auction system is developed.

4 Decision

The ACCC decided on 9 May 2012 to consent to the Application to Vary, which was provided by Viterra on 20 April 2012. The ACCC reached its decision following consultation and considering the matters in s. 44ZZA(3) of the CCA.