

# Auction Participation Deed

Dated

Viterra Operations Ltd (ABN 88 007 556 256) ("Company")  
[insert Client name] (ABN [insert]) ("Client")

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# Auction Participation Deed

## Details

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<b>Parties</b>	<b>Company and Client</b>	
<b>Company</b>	Name	<b>Viterra Operations Ltd</b>
	ABN	88 007 556 256
	Address	Grain House, 124-130 South Terrace, Adelaide, SA 5000
	Telephone	(08) 8238 5217
	Fax	(08) 8212 1723
	Attention	General Manager, Commercial and Compliance
<b>Client</b>	Name	
	ABN/ACN/ARBN	
	Address	
	Telephone	
	Fax	
	Attention	
<b>Recitals</b>	<b>A</b>	The Company is: (i) the operator of the Port Terminal Facilities; and (ii) the provider of services involving the handling of Grain.
	<b>B</b>	The Company's primary method of allocating Capacity at the Port Terminal Facilities is through the use of an auction system.
	<b>C</b>	This deed sets out the terms on which the Client and the Company agree that the Client may participate in an Auction.
<b>Governing law</b>	South Australia	
<b>Date of deed</b>	See Signing page	

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# Auction Participation Deed

## General terms

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### 1 Definitions and Interpretation

#### 1.1 Definitions

In this deed:

**ACCC** means the Australian Competition and Consumer Commission.

**Access Undertaking** means the undertaking provided by the Company to the ACCC pursuant to the WEMA and Part IIIA of the CCA and accepted by the ACCC on 28 September 2011. The Access Undertaking is available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au).

**Auction** means the sale by auction of Capacity.

**Auction Provider** means Tradeslot Pty Ltd (ACN 092 784 846) or such other person nominated by the Company from time to time.

**Auction Provider Bidder Agreement** means the agreement between the Client and the Auction Provider in connection with the use of the Online Auction System by the Client.

**Auction Rules** means the rules of that name set out in Schedule 1 of the Port Loading Protocols. The current version of the Port Loading Protocols can be found on the Company's website [www.viterra.com.au](http://www.viterra.com.au).

**Bulk Wheat** has the meaning given in the Access Undertaking.

**Business Day** means a day other than a Saturday, Sunday or public holiday in Adelaide, South Australia.

**Capacity** means the capacity that is made available by the Company to exporters to enable the export of Bulk Wheat, barley and other Grain commodities through a Port Terminal Facility, measured in tonnes.

**CCA** means the Competition and Consumer Act 2010 (Cth).

**Commencement Date** means the date of the Business Day immediately before the day on which the Client first participates in an Auction.

**Expiry Date** means 30 September 2014.

**Grain** means the seed of any crop or pasture species of any genus or grade and (for the removal of doubt) includes Pulses but excludes minerals and processed or value added products such as malt.

A person is **Insolvent** if:

- (a) it is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act); or

- (b) it is in liquidation, in provisional liquidation, under administration or wound up or has had a Controller appointed to its property; or
- (c) it is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by the other parties to this deed); or
- (d) an application or order has been made (and in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with that person, which is preparatory to or could result in any of (a), (b) or (c) above; or
- (e) it is taken (under section 459F(1) of the Corporations Act) to have failed to comply with a statutory demand; or
- (f) it is the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act (or it makes a statement from which another party to this deed reasonably deduces it is so subject); or
- (g) it is otherwise unable to pay its debts when they fall due; or
- (h) something having a substantially similar effect to (a) to (g) happens in connection with that person under the law of any jurisdiction.

**Loss** means any claim, damage, loss, liability, cost or expense (including legal costs).

**Online Auction System** means the online system provided by the Auction Provider for the conduct of Auctions.

**Port Loading Protocols** means the protocols of that name published by the Company from time to time and for the avoidance of doubt includes the Auction Rules. The current version of these can be found on the Company's website [www.viterra.com.au](http://www.viterra.com.au).

**Port Terminal** means, depending on the context, the Company's seaboard terminals at:

- (a) Port Adelaide, Inner Harbour, Berth 27, South Australia;
- (b) Port Adelaide, Outer Harbor, Berth 8, South Australia;
- (c) Port Giles, South Australia;
- (d) Wallaroo, South Australia;
- (e) Port Lincoln, South Australia; or
- (f) Thevenard, South Australia.

**Port Terminal Facility** has the meaning given to that term in the Access Undertaking and, in respect of a Port Terminal, means those facilities listed and described in the applicable Port Schedule in the Access Undertaking as being the 'Port Terminal Facilities' for that Port Terminal.

**Port Terminal Services** has the meaning given to that term in the Access Undertaking.

**Pulses** means chickpeas, lupins, field peas, faba beans, lentils, vetch, broad beans and all other Grain legumes.

[Rebate per Tonne has the meaning given to that term in Schedule 2 of the Port Loading Protocols.](#)

**S&H Services** means services including receipt, storage, outturn, transport and other services in relation to Grain that is not Bulk Wheat.

**Services** means:

- (a) Port Terminal Services; or
- (b) S&H Services.

**Services Agreement** means the terms on which the Company agrees to provide and the Client agrees to purchase, Port Terminal Services or S&H Services, as applicable.

**Slot** means a half month period of between 14 and 16 days within which a Client may book Capacity at a Port Terminal Facility for the shipment of Grain.

**Standard Terms** has the meaning given in the Access Undertaking.

**Storage & Handling Agreement** means the agreement of that name published by the Company from time to time.

[Year has the meaning given in the Port Loading Protocols.](#)

**WEMA** means the Wheat Export Marketing Act 2008 (Cth).

## 1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The singular includes the plural, and the converse also applies.
- (b) A gender includes all genders.
- (c) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity.
- (e) A reference to a clause is a reference to a clause of this deed.
- (f) A reference to an agreement or document (including a reference to this deed) is to the agreement or document as amended, supplemented, novated or replaced.

- (g) A reference to writing includes any method of representing or reproducing words, figures, drawings or symbols in a visible and tangible form but excludes a communication by electronic mail.
- (h) A reference to a party to this deed or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).
- (i) A reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
- (j) A reference to conduct includes an omission, statement or undertaking, whether or not in writing.
- (k) A reference to an agreement includes any undertaking, deed, agreement and legally enforceable arrangement, whether or not in writing, and a reference to a document includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind.
- (l) A reference to dollars and \$ is to Australian currency.
- (m) Mentioning anything after includes, including, for example, or similar expressions, does not limit what else might be included.
- (n) A reference to time is a reference to the local time in Adelaide, South Australia (unless otherwise stated).
- (o) Where any matter or thing is required to be attended to or done on a day which is not a Business Day, it will be attended to or done on the next Business Day.
- (p) Measurements of physical quantities are in Australian legal units of measurement within the meaning of the *National Measurement Act 1960 (Cth)*.

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## **2 Term**

### **2.1 Term**

This deed commences on the Commencement Date and continues, unless terminated earlier in accordance with clause 2.2, until the Expiry Date.

### **2.2 Termination events**

This deed may be terminated by the Company immediately by written notice to the Client where:

- (a) the Client becomes Insolvent; or
- (b) the Client commits a breach of this deed; and
  - (i) the breach is material and not capable of being cured; or

- (ii) the breach is capable of being cured and the defaulting party fails to cure the breach within 5 Business Days of being notified in writing of the breach by the party giving the notice.

### 2.3 Notice

A notice given under clause 2.2 must specify the event or events in relation to which the notice is given.

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## 3 Terms of Auction Participation

- (a) The Client agrees that if it elects to participate in an Auction, that it will be bound by and will comply with:
  - (i) the terms of this deed;
  - (ii) the Port Loading Protocols (including the Auction Rules);
  - (iii) the Auction Provider Bidder Agreement; and
  - (iv) the Services Agreement which applies to the Client at the time the Company provides the Client with the relevant Services.
- (b) If at the time the Client participates in an Auction or at the time any Services are provided by the Company the Client has not executed a Services Agreement, the Client acknowledges and agrees that:
  - (i) the Storage & Handling Agreement, where S&H Services are being provided; or
  - (ii) the Standard Terms, where Port Terminal Services are being provided,

will apply to any Services or Port Terminal Services, as applicable, provided by the Company, and the Client agrees to comply with those terms.

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## 4 Limitation of liability and indemnity

### 4.1 Limitation of liability

- (a) Subject to clause 4.1(b) and clause ~~4.34.1(e)~~ and to the maximum extent permissible by law, the Client and Company agree that the Company will not be liable to the Client or any other person for any Loss, including but not limited to any direct, indirect or consequential Loss, arising in any way out of, or in any way connected with, the participation by the Client in an Auction including, without limiting the foregoing, any Loss arising from:
  - (i) failure of the Online Auction System;
  - ~~(ii) errors in the submission or processing of proxy bids;~~

~~(iii)~~(ii) any system malfunctions, systems failure, error in programming or error in input data in relation to the Online Auction System; or

~~(iv)~~(iii) any loss or delay in the receipt by the Company of any notification (whether electronic or otherwise) from the Client,

except to the extent that such Loss arises as a result of:

~~(v)~~(iv) a breach of this Deed by the Company;

~~(vi)~~(v) any negligent acts or omissions by the Company; or

~~(vii)~~(vi) any unlawful acts by the Company.

- (b) Notwithstanding any other provision of this deed, the Client agrees that the Company will not in any circumstance be liable to the Client:
- (i) for any Loss which neither arises naturally from, nor is in the reasonable contemplation of, the Company or the Client as a consequence of an action by the Company; or
  - (ii) for any loss of profit, loss of business opportunity or reputation; or
  - (iii) for any Loss which arises as a result of any act or omission of the Auction Provider.

#### 4.2 Online Auction System - Rebate per Tonne

(a) The Client acknowledges and agrees that:

- (i) during an Auction, the Company may display on the Online Auction System an indicative estimated snapshot of the Rebate per Tonne for the relevant Slot as at the end of the previous round (“**Indicative Current RpT**”);
- (ii) the Indicative Current RpT is not an estimate of the Rebate per Tonne that may apply (and will be calculated) in accordance with the Port Loading Protocols, and provides only an indicative estimated snapshot of the Rebate per Tonne for the relevant Slot based on bidding activity as at the end of the previous round (if any);
- (iii) the Indicative Current RpT may vary significantly from the actual Rebate per Tonne that is calculated in accordance with the Port Loading Protocols, as the Rebate per Tonne calculated in accordance with the Port Loading Protocols will depend on a range of factors, including subsequent bidding activity in respect of all Slots in any subsequent rounds and in any subsequent Auctions in respect of the relevant Year;
- (iv) having regard to the matters set out in clauses 4.2(a)(ii) and (iii) it will not (and does not) rely on the Indicative Current RpT as providing any estimate of the likely actual Rebate per Tonne.

- (b) The Client acknowledges and agrees that, notwithstanding any other provision of this deed, or any other agreement, the Company will not be liable for any Loss (including but not limited to any direct, indirect or consequential Loss) arising in any way out of or in connection with:
- (i) the Company displaying an Indicative Current RpT on the Online Auction System;
  - (ii) any difference between the Indicative Current RpT displayed by the Company at any point in time and the Rebate per Tonne that is ultimately calculated in accordance with the Port Loading Protocols; and
  - (iii) error in the calculation of the Indicative Current RpT at any point in time.
- (c) The Client releases the Company from all claims, actions or proceedings arising, or which may in the future arise, in any way out of, or in connection with, any matter referred to in this clause 4.2
- (d) The Client agrees:
- (i) not to commence or maintain any claim, action or proceeding against the Company; and
  - (ii) to ensure that any person with whom it is associated in any way does not commence or maintain any claim, action or proceeding against the Company,
- in connection with any matter referred to in this clause 4.2
- (e) The Client agrees and acknowledges that the Company is entitled to enforce this clause 4.2 directly against the Client and may raise and plead this clause 4.2 as an absolute bar to any claim, action or proceedings commenced by the Client in relation to, or arising in any way out of or in connection with, any matter referred to in this clause 4.2.

### **4.3 Exclusion of liability**

- ~~(a)~~ (a) The Company excludes under clause 4.1(a), ~~and~~ clause 4.1(b) and clause 4.2 all conditions and warranties implied by statute, general law or custom except any implied condition or warranty the exclusion or limitation of which would contravene any statute (including the Australian Consumer Law) or cause any part of clause 4.1(a), ~~or~~ clause 4.1(b) or clause 4.2, to be void (“**Non-Excludable Condition**”).
- ~~(b)~~ (b) The liability of the Company under any Non-Excludable Condition may be limited in the discretion of the Company respectively to:
- (i) in the case of services, the supply of the relevant services again or payment of the costs of having the relevant services supplied again; and
  - (ii) in the case of goods, the repair or replacement of those goods or the payment of the cost of having the goods repaired or replaced.

#### **4.24.4 Indemnity**

The Client indemnifies the Company against all Loss of the Company resulting directly or indirectly from:

- (a) any breach by the Client of the Auction Rules, the Port Loading Protocols, the Auction Provider Bidder Agreement or this deed;
- ~~(a)~~(b) any claim, action or proceeding commenced by the Client in relation to the matters set out in clause 4.2, including (without limitation) any Loss of the Company resulting directly or indirectly from a breach of clause 4.2(d); or
- ~~(b)~~(c) any act or omission of the Client in connection with the Auction.

#### **4.34.5 Exclusion and indemnity for benefit of the Company's officers and employees**

- (a) Where clauses 4.1 and 4.2 exclude or limit the liability of the Company, release the Company from liability or provide for an indemnity in favour of the Company, then to the extent permitted by law, that exclusion, limitation, release or indemnity (as applicable) extends to every officer, employee, agent, delegate, person acting for or on behalf of the Company or contractor of the Company.
- (b) The benefit of any limitation, exclusion, release or indemnity in favour of any person other than the Company under clauses 4.1 or 4.2 is held by the Company for the benefit of those other persons and the Company may enforce that benefit on their behalf.

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## **5 Notices**

### **5.1 Form**

Unless expressly stated otherwise in this deed, all notices, certificates, consents, approvals, waivers and other communications in connection with this deed must be in writing, signed by the sender (if an individual) or an authorised officer of the sender and marked for the attention of the person identified in the Details or, if the recipient has notified otherwise, then marked for attention in the way last notified.

### **5.2 Delivery**

They must be:

- (a) left at the address set out or referred to in the Details;
- (b) sent by prepaid ordinary post (airmail if appropriate) to the address set out or referred to in the Details; or
- (c) sent by fax to the fax number set out or referred to in the Details.

However, if the intended recipient has notified a changed postal address or changed fax number, then the communication must be to that address or number.

### **5.3 When effective**

They take effect from the time they are taken to be received unless a later time is specified.

### **5.4 Receipt - post**

If sent by post, they are taken to be received three days after posting (or seven days after posting if sent to or from a place outside Australia).

### **5.5 Receipt - fax**

If sent by fax, they are taken to be received at the time shown in the transmission report as the time that the whole fax was sent.

### **5.6 Receipt - general**

Despite clauses 5.4 and 5.5, if they are received after 5.00pm in the place of receipt or on a non-Business Day, they are to be taken to be received at 9.00am on the next Business Day.

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## **6 General**

### **6.1 Assignment**

The Client may not assign or otherwise deal with its rights under this deed or allow any interest in them to arise or be varied in each case, without the consent of the Company.

### **6.2 Severability**

If the whole or any part of a provision of this deed is void, unenforceable or illegal in a jurisdiction it is severed for that jurisdiction. The remainder of this deed has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected. This clause has no effect if the severance alters the basic nature of this deed or is contrary to public policy.

### **6.3 Entire agreement**

This deed constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter.

### **6.4 No representations or warranties**

Each party acknowledges that in entering into this deed it has not relied on any representations or warranties about its subject matter except as expressly provided by the written terms of this deed.

### **6.5 Variation and waiver**

A provision of this deed or a right created under it, may not be waived or varied except in writing, signed by the party or parties to be bound.

## **6.6 Construction**

No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of, or seeks to rely on, this deed or any part of it.

## **6.7 Counterparts**

This deed may consist of a number of copies, each signed by one or more parties to the deed. If so, the signed copies are treated as making up the one document and the date on which the last counterpart is executed will be the date of the deed.

## **6.8 Governing law**

This deed is governed by the law of the place set out in the Details.

## **6.9 Jurisdiction**

- (a) Each party submits to the non-exclusive jurisdiction of the courts of the place set out in the Details and courts of appeal from them.
- (b) Each party waives any right it has to object to an action being brought in those courts including, without limitation, by claiming that the action has been brought in an inconvenient forum or that those courts do not have jurisdiction.

**EXECUTED** as a deed

# Auction Participation Deed

## Signing page

DATED: \_\_\_\_\_

**SIGNED, SEALED AND  
DELIVERED** by )  
as attorney for **Viterra Operations Ltd** )  
**ABN 88 007 556 256** under power of )  
attorney dated \_\_\_\_\_ in the )  
presence of: )

..... )  
Signature of witness )  
..... )  
Name of witness (block letters) )

.....  
By executing this deed the attorney  
states that the attorney has received no  
notice of revocation of the power of  
attorney

**EXECUTED** by [**Insert Client name**  
**and ABN**] in accordance with section )  
127(1) of the Corporations Act 2001 )  
(Cwlth) by authority of its directors:<sup>1</sup> )

..... )  
Signature of director )  
..... )  
Name of director (block letters) )

.....  
Signature of director/company  
secretary\*  
\*delete whichever is not applicable  
.....  
Name of director/company secretary\*  
(block letters)  
\*delete whichever is not applicable

<sup>1</sup> Note: as this agreement is executed by a deed, Client must sign under section 127 or POA.