Australian
Competition &
Consumer
Commission

Issues Paper

Viterra Operations Limited – Application to extend and vary the 2011 Port Terminal Services Access Undertaking

3 September 2013

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

First published by the ACCC 2013

10 9 8 7 6 5 4 3 2 1

www.accc.gov.au

1 Introduction

The Australian Competition and Consumer Commission (**ACCC**) may accept an undertaking under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**), from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service. The CCA allows a provider of an access undertaking to apply to the ACCC for an extension of the period in which it is in operation.[1] The CCA also allows the provider of an access undertaking to vary that undertaking at any time after it has been accepted by the ACCC, but only with the ACCC's consent.[2]

On 28 September 2011, the ACCC accepted, from Viterra Operations Limited (**Viterra**), an access undertaking in relation to port terminal services (**Undertaking)**. The Undertaking relates to the provision of access to services for bulk wheat export at the six bulk wheat terminals operated by Viterra in South Australia: Port Adelaide: Inner Harbour; Port Adelaide: Outer Harbor; Port Giles, Wallaroo, Port Lincoln and Thevenard.

On 25 July 2013, Viterra applied to extend the operation of and vary its Undertaking pursuant to subsections 44ZZBB and 44ZZA(7) of the CCA (**Application to extend and vary)**. The ACCC is conducting public consultation as part of its assessment of the application to extend and vary its 2011 Undertaking and seeks submissions from interested parties by 20 September 2013.

Viterra provided its Undertaking in order to meet the access test prescribed by the *Wheat Export Marketing Act 2008* (WEMA). The access test, in part, can be met if port terminal operators that also export bulk wheat have an access undertaking accepted by the ACCC. The Undertaking commenced on the expiry of Viterra's previous undertaking that was accepted in 2009.

In November 2012, amendments to the WEMA were introduced which stipulate that the access test will be repealed on 1 October 2014, subject to there being in place a mandatory code of conduct.[3] The code must (among other things):

- deal with the fair and transparent provision to wheat exporters of access to port terminal services by the providers of port terminal services
- be consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain.[4]

Viterra has applied to the ACCC to extend the operation of its Undertaking past 1 October 2014, notwithstanding the amendments to WEMA that provide for the repeal of the access test from that date should a mandatory code of conduct be in place.

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[1] ss. 44ZZBB(1) *Competition and Consumer Act 2010* (Cth) (**CCA**)
[2] ss. 44ZZAA(7), CCA
[3] Schedule 3 – *Wheat Export Marketing Amendment Act 2012* (Cth)
[4] s.12 of the *Wheat Export Marketing Act 2008* (**WEMA**)

Viterra provided the Application to extend and vary the Undertaking to the ACCC on 25 July 2013. The application and associated documents are available on the ACCC's website and include:

- Port Terminal Services Access Undertaking - with the variations marked up
- Port Loading Protocols (**PLPs**) - with the variations marked up
- Port Terminal Services Agreement for Standard Port Terminal Services (**Standard Terms**) - with the variations marked up
- A supporting submission.

The documents can be accessed by visiting to the ACCC's website at www.accc.gov.au/wheat.

1.1 Viterra's proposed extension of its Undertaking

Viterra proposes to extend the Undertaking from 30 September 2014 to 30 September 2015 pursuant to section 44ZZBB of the CCA. In addition, Viterra proposes inserting a provision into the Undertaking specifying that the Undertaking will expire if, in accordance with the WEMA, the mandatory port access code of conduct is implemented.

The extension and variation of the Undertaking relating to the expiration of the Undertaking are specified at clause 3.2 of the Undertaking.

1.2 Viterra's proposed variations to its Undertaking

In brief, Viterra is seeking to amend the Undertaking, PLPs and Standard terms to:

- allow Viterra to unilaterally amend PLPs temporarily during a force majeure event
- remove references as to the timing of the harvest and non harvest auctions
- modify the PLPs to facilitate the administration of the auction system and subsequent first in, first served system including restricting the use of associated entities and agents for the purpose of circumventing the 30 minute restriction on first in, first served bookings
- require that the results of marine and port surveys are provided to Viterra
- allow an additional tolerance of 1,000 tonnes to be applied in certain circumstances at Viterra's discretion, for example to ensure the safe loading of a vessel
- clarify how tolerance is applied with respect to two-port loading
- clarify the procedures in regards to the movement of bookings
- allow Viterra to move bookings between the Outer Harbor and Inner Harbour Port Terminals to increase the efficiency of both port terminals

- modify payment terms with respect to bookings being transferred
- modify standard terms in relation to reconciliation and adjustment, set off, company lien and security interest and PPS[5] law.

In addition, Viterra has made a number of more minor changes to:

- reflect the changes made to the WEMA since the 2011 Undertaking was accepted
- remove unnecessary provisions relating to the introduction of an auction system
- ensure the port loading protocols and the standard terms will continue to operate effectively as stand alone documents once the 2011 Undertaking has expired.

1.3 ACCC assessment

The ACCC must apply the tests set out in Division 6 of the CCA in deciding whether to consent to the variation and / or to extend the operation of an existing undertaking. Subsection 44ZZA(7) of the CCA provides that the ACCC may consent to a variation of an access undertaking if it thinks it is appropriate to do so having regard to the matters set out in subsection 44ZZA(3).

Subsection 44ZZBB(3) provides that the ACCC may extend the period for which an undertaking is in operation if it thinks it is appropriate to do so having regard to the matters mentioned in subsection 44ZZA(3).

The legal framework is set out in Section 3 of this Issues Paper.

The relevant factors the ACCC must consider include the objects of Part IIIA of the CCA.[6] These objects include providing a framework and guiding principles to encourage a consistent approach to access regulation in each industry.[7] In its assessment of Viterra's Application to extend and vary, the ACCC will be required to form a view regarding what constitutes an appropriate access undertaking in the bulk wheat export industry. Where appropriate, the ACCC will consider industry-wide issues in its assessment of this application.

1.4 Indicative timeline for assessment

Subsection 44ZZBC(1) of the CCA provides that the ACCC must make a decision on the application to vary and extend the undertaking within 180 days, starting on the day that the application was received (referred to in the CCA as the 'expected period'). The application was received from Viterra on 25 July 2013.

The CCA also provides for 'clock-stoppers', meaning that some days will not count towards the 180-day expected period. Specifically, the clock is stopped where the ACCC either publishes a notice inviting public submissions on an undertaking application (including an application to vary or extend an undertaking), or gives a

[5] *Personal Property Securities Act 2009* (Cth)
[6] Subsection 44ZZA(3)(aa).
[7] Section 44AA sets out the objects of Part IIIA.

notice requesting information about an application.[8] The consultation period following the release of this Issues Paper will not count towards the 180-day timeframe for this decision, in accordance with the 'stopping the clock' provisions.

The ACCC has developed the following indicative timeline for its assessment of the application to vary and extend, although the actual timeframe will depend on the nature of comments received from industry:

- receipt of submissions on the ACCC Issues Paper by **20 September 2013**;
- ACCC draft decision in early November 2013; and
- ACCC final decision by December 2013.

1.5 Consultation

Section 2 of this Issues Paper sets out specific matters on which the ACCC is seeking views. The matters listed in Section 2 do not represent a comprehensive summary of all aspects of the application to vary and extend, nor are comments required on each of those matters. Further, interested parties are invited to comment on any aspect of the application they consider relevant to the ACCC's assessment.

Background information on the legislative criteria by which the application to vary and extend Viterra's Undertaking will be assessed is set out in Section 3 of this Issues Paper. If practicable, submissions should refer to the legislative criteria, as this will assist the ACCC in assessing the application.

Please include detailed reasons to support the views put forward in submissions. If interested parties consider that any aspect of the Application to extend and vary is *not* appropriate, please suggest changes that may address the concern/s, including drafted amendments where possible.

1.5.1 Invitation to make a submission

The ACCC, pursuant to section 44ZZBD of the CCA, invites public submissions on the application to vary and extend Viterra's Undertaking.

Submissions should be addressed to:

Mr David Salisbury
Deputy General Manager
Fuel, Transport and Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@accc.gov.au

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted).

[8] See section 3 of the Issues Paper for further information on these provisions of the CCA.

1.5.2 Due date for submissions

Submissions must be received before 5:00pm (EST), **20 September 2013**. The ACCC may disregard any submissions made after this date, as prescribed by section 44ZZBD of the CCA. Therefore it is in interested parties' interest to make submissions within this timeframe.

1.5.3 Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part. The ACCC will then assess the Application to extend and vary in the absence of that information.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information*, available on the ACCC website.[9]

1.6 Further information

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

Mr Michael Eady
Director
Fuel, Transport and Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001
Ph: 03 9290 1945
Email: michael.eady@accc.gov.au

[9] Available at www.accc.gov.au

2 Matters for comment

This section outlines matters on which the ACCC is seeking comment from stakeholders in order to assess whether the Application to extend and vary Viterra's Undertaking is appropriate.

2.1 Extension of expiry date

In November 2012, Parliament passed the *Wheat Export Marketing Amendment Act 2012*, which made a number of changes to the WEMA. One significant change is allowing for the introduction of a mandatory code of conduct to govern access to bulk wheat ports, in place of the current access test arrangements. More specifically, the amending legislation provides that if, as at 30 September 2014, the Minister for Agriculture, Fisheries and Forestry has approved a code of conduct governing port access, and that code is declared as a mandatory code under the CCA, then the WEMA, including the access test, is repealed.[10] As noted above, Viterra's Undertaking has been provided in order to meet the current requirements of the access test in the WEMA.

While it is the current intention of Government for port access to be governed by the mandatory code of conduct from 1 October 2014, Viterra proposes to extend the date the Undertaking expires from 30 September 2014 in clause 3.2(a) of its current Undertaking to 30 September 2015. While Viterra proposes to make some variations to its Undertaking, discussed further in this issues paper, the publish-negotiate-arbitrate framework of the Undertaking as well as the non-discrimination and no hindering access provisions will continue to operate as they do currently. Further, Viterra's auction system remains unchanged for the period of the proposed extension.

In addition to the application to extend its Undertaking, in relation to the term of the Undertaking, Viterra proposes to insert new provisions at clauses 3.2(b) and (c). These clauses provide that the undertaking will expire the earlier of 30 September 2015, or:

> (b) the date on which the WEMA (including the "access test") is repealed, the Code having been declared by regulations under section 51AE of the CCA as a mandatory industry code; or
>
> (c) the date on which the WEMA is repealed or amended such that there is no longer any requirement for the Port Operator to have in place an access undertaking under Part IIIA of the CCA in order for the Port Operator or its Associated Entities to export Bulk Wheat (and there is no requirement for the Port Operator to have in place an access undertaking for this purpose under any other legislation; [11]

In its Application, Viterra submits that it believes the extension will provide for greater certainty for both itself and exporters. More specifically, Viterra states:

> 1.3 Viterra Operations is seeking the Commission's consent to vary, and potentially extend the operation of, the Access Undertaking in order to obtain greater certainty for both itself and exporters pending the possible introduction of a mandatory industry code of conduct ("Code") from 1 October 2014.
>
> 1.4 In particular, Viterra Operations wishes to:

[10] *Wheat Export Marketing Amendment Act 2012* (Cth), s.2

[11] Viterra, Application to extend and vary Undertaking, clause 3.2

(a) obtain, and provide for exporters, certainty about the process that will apply to the auctioning of capacity at its Port Terminals for the period from 1 October 2014 to 30 September 2015 (i.e. the period after the Access Undertaking currently expires); and

(b) obtain certainty that its associated entity, Glencore Grain Pty Ltd, will be able to export Bulk Wheat using Viterra Operations' Port Terminal Services if the Code is not in force by 1 October 2014 (and, as a result, Viterra Operations needs to have in place an access undertaking to satisfy the "access test" under the *Wheat Export Marketing Act 2008* (Cth) ("WEMA")).

1.5 The Proposed Variations will enable Viterra Operations to hold auctions for the 2014/15 season in early 2014, whether or not the Code is introduced from 1 October 2014.[12]

In relation to the introduction of clauses 3.2(b) and 3.2(c) that will cause the undertaking to expire if the mandatory code is introduced, Viterra submits that:

> The purpose of this amendment is to avoid duplication between the Access Undertaking and the Code. It also ensure that if there is a changes in Government policy and the WEMA (and therefore the "access test") is repealed without implementation of the Code, Viterra Operations will not be disadvantaged by its decision to extend the Access Undertaking in order to provide early certainty to its Clients in relation to their capacity entitlements .[13]

Issues for Comment

- *Is it appropriate that Viterra's undertaking automatically expires in the event that a mandatory code is introduced?*
- *Does the extension of the undertaking (with the automatic expiry) provide certainty to access seekers regarding the arrangements for acquiring port terminal capacity?*
- *Has the bulk wheat export market undergone any significant changes since the acceptance of the 2011 Undertaking (and subsequent introduction of the auction system) such that the ongoing operation of the Undertaking is not appropriate having regard to the interests of Viterra and access seekers?*
- *In so far as the Undertaking will remain unchanged with respect to:*
  - *the publish-negotiate-arbitrate framework*
  - *the non-discrimination and no hindering access provisions*
  - *the operation of the auction and first in, first served capacity allocation mechanisms*

  do the existing arrangements appropriately balance the interests of Viterra and access seekers?

[12] Viterra, Submission in support of Application to extend and vary, pg 1
[13] Ibid pg 6

2.2 Force Majeure

Viterra proposes introducing a 'Force Majeure' clause allowing the unilateral amendment of the PLPs on a temporary basis during the period of force majeure. The proposed clause is at 9.3(g) of the varied undertaking.

Viterra submits that this provision provides Viterra Operations with greater operational flexibility to manage any unexpected operational issues that fall within the definition of force majeure under the Standard Terms. Viterra also submits that this provision appears in GrainCorp's access undertaking.[14]

The ACCC notes that, as submitted by Viterra, an identical clause appears at clause 9.3(b) of GrainCorp Operations Limited's undertaking. However what constitutes a force majeure event in each of the respective standard terms differs.

Issues for Comment

- *Could the proposed force majeure provision operate in a manner that is adverse to the interests of access seekers?*
- *Is it sufficiently clear how the 'temporary basis' amendment will apply?*

2.3 Auction Timetable

Viterra proposes deleting clause 2.3(c) of its PLPs which provides indicative timings for each of the auctions. Currently clause 2.3(c)(i) provides that the harvest auction will be held around the start of August preceding the relevant period. Clause 2.3(c)(ii) provides that the first of the two non-harvest auctions will be held at the start of November preceding the relevant period, and then the second auction if held will be approximately 4 weeks later.

Clause 2.3(b) of Viterra's PLPs provides that Viterra will publish an indicative date and time for each auction to be held in a year (October – September) by 1 July immediately preceding the start of that year.

Viterra submitted that a number of exporters indicated a preference that auctions be held earlier each year than provided for by clause 2.3(c). Viterra further submitted that:

> In order to retain flexibility, Viterra Operations does not propose to specify the dates for any auction in the Port Loading Protocols. However, it is intended that the auctions will be held in early 2014 (with appropriate notice requirements set out in clauses 2.3(a) and (b)).[15]

[14] Ibid pg 8. GrainCorp's undertaking is available from GrainCorp's website www.graincorp.com.au/
[15] Ibid pg 9

Issues for Comment

- *In the absence of any set timetable in the undertaking, does the notice published in accordance with clause 2.3(b) provide sufficient certainty to exporters?*

2.4 First in, first served bookings

The PLPs currently provide that, following the harvest auction and the second non-harvest auction, any capacity that has not been allocated can be booked by exporters through a first in, first served system. [16]

The first in, first served system provides that capacity not allocated at auction will be available for booking from a specified date and time following the auctions. This is often described as 'opening the shipping stem.' Applications for capacity through the first in, first served systems are limited to a maximum volume of 60,000 tonnes, at one port, in one shipping slot. In addition, for the first five business days after opening the shipping stem, exporters are limited to one booking each half hour. The first in, first served capacity allocation system has been designed to create uncertainty with respect to acquiring capacity so as to provide an incentive to exporters to acquire capacity through an auction in the first instance.

Viterra proposes two significant variations to this process which are discussed further below. Viterra also proposes reducing the five business day period in clause 2.4(g) (in which the limitations apply to first in first served bookings), to two business days. Viterra submits that changing this period reflects feedback from exporters and that in practice, desirable capacity not allocated at auction is generally booked immediately after opening the shipping stem.[17]

2.4.1 Associated Entity of an exporter

Viterra proposes to amend clause 2.4(g)(i), that limits each exporter to one booking each half hour, to include associated entities of an exporter, although Viterra has discretion as to the entities captured by the clause. Specifically Viterra proposes to amend Clause 2.4(g)(i) to invalidate a booking form if:

> the Booking form is submitted within 30 minutes of the Client or any Associated Entity of the Client submitting any other Booking Form in relation to that Unallocated Capacity (except in circumstances where Viterra Operations considers, acting reasonably, that the Associated Entity operates a commercially separate export function from that undertaken by the Client);[18]

Viterra submits:

> This clause has been amended to make it clear that exporters and their Associated Entities can only make one booking in each half hour period during the two Business Days immediately following any auction. This amendment is intended to ensure that exporters cannot circumvent the intent of clause 2.4(g) by using different related companies to make different bookings.

[16] Viterra, PLPs, clause 2.1(c) and clause 2.4
[17] Viterra, Submission in support of Application to extend and vary, pg 10
[18] Viterra, Application to extend and vary Undertaking, PLPs clause 2.4(g)(i)

> This amendment is not intended to prevent separate bookings by Clients (and their Associated Entities) that operate commercially separate export functions.[19]

Issues for comment

- *Will the proposed clause effectively prevent exporters circumventing the intention of clause 2.4(g)?*
- *Is it appropriate that Viterra has the discretion to make a decision to invalidate a booking on the basis of this proposed variation? Is invalidating such a booking an appropriate outcome for conduct by exporters that may circumvent the intent of clause 2.4(g)?*
- *Is the discretion appropriately defined or limited? Is it appropriate that the test is whether 'the Associated Entity operates a commercially separate export function' or should it be related to the purpose of the Associated Entity in making the particular booking? How might the purpose be identified?*
- *How prevalent is the practice of having two associated entities operating commercially separate export functions? What features or characteristics identify a commercially separate export function, and would these characteristics or features be consistent across all commercially separate entities?*
- *Is there sufficient certainty with respect to the process to be followed if a booking is to be rejected?*
- *Disputes regarding the application of this clause will be resolved pursuant to clause 12 of the PLPs. Is the dispute resolution procedure appropriate in these circumstances?*

2.4.2 Transferability of first in, first served bookings

Viterra proposes to insert a new clause 2.4(h) into the PLPs so that Viterra, acting reasonably, may reject the booking form, or cancel the booking if it considers that the booking is not genuinely required for use by the exporter who has submitted the booking form. Viterra may only reject the booking form or cancel the booking if the exporter submitting the booking form has done so on behalf of another exporter for the purpose of circumventing the limitations placed on first in first served bookings made immediately after the opening of the shipping stem.

In support of this variation Viterra has stated:

> The intent of clause 2.4(g) is that Clients and their Associated Entities should only be able to make one booking each half hour period during the two Business Days immediately following any auction. To reduce the potential for Clients to circumvent this intention by engaging third party "agents" to acquire capacity on their behalf, Viterra Operations proposes to insert a new clause that enables it to reject any booking that it considers (acting reasonably) may have been made for this purpose.

[19] Viterra, Submission in support of Application to extend and vary Undertaking pg, 10

> Viterra Operations does not wish to prevent legitimate trading of Slots by exporters. However, it is important that Clients cannot circumvent the intention of clause 2.4(g) in this manner. Any disputes can be resolved in accordance with clause 12 of the Port Loading Protocols.[20]

Issues for comment

- *Is it appropriate for Viterra to have the discretion to determine when a booking may be made on behalf of another party for the purpose of circumventing the intention of clause 2.4(g)?*
- *Could the use of 'agents' for the purpose of circumventing the intention of clause 2.4(g) be prevented in some other manner, for example by placing some restrictions on the ability to transfer capacity acquired immediately following an auction?*
- *Could this proposed variation result in any adverse consequences for the way in which bookings are currently made?*
- *Is the dispute resolution process at clause 12 of the PLPs appropriate for resolving disputes that may arise from the application of this clause?*

2.5 Tolerance

In addition to the plus or minus 10 per cent tolerance provided for in clause 5.6(a), Viterra proposes inserting a provision that provides discretion in relation to the amount that a vessel may load over the stated capacity booked. The provision states that:

> (b) Viterra Operations may, in its discretion and on a case by case basis, allow a vessel to load up to 1,000 tonnes in excess of the Capacity (plus tolerance) booked for that vessel. For the avoidance of doubt, this clause 5.6(b) does not entitle Clients to any additional tolerance in respect of the execution of Capacity. It is a discretion that Viterra Operations may exercise if it is necessary or desirable to facilitate the efficient or safe loading and departure of a vessel and/or the efficient operation of a Port Terminal.[21]

Viterra submits that there are a number of circumstances in which it may be necessary to increase by a small amount the volume of grain loaded onto a vessel (e.g. to ensure vessel stability). Further, Viterra submits that an ability for Viterra Operations to allow this, without the exporter needing to acquire capacity from other exporters, will facilitate the efficient operation of the port terminal.[22]

Issues for Comment

- *Is it appropriate for Viterra to have the discretion to apply this additional tolerance in the circumstances noted in the clause?*

[20] Ibid pg 10
[21] Viterra, Application to extend and vary Undertaking, PLPs clause 5.6
[22] Viterra, Submission in support of Application to extend and vary Undertaking, pg 11

2.6 Two port loading

Clause 5.7 of Viterra's PLPs sets down some procedural rules with respect to two port loading.

Viterra proposes amending clause 5.7(a)(ii) to include a reference to a vessel, scheduled for two port loading, arriving in its grace period at the first port.[23] Viterra submits the intention of this variation is to clarify that two port loading vessels will not lose their booking at the second port if they are delayed at the first port after having arrived within their slot or the grace period. [24]

In addition, Viterra propose varying clause 5.7(c) so that exporters can, with the consent of Viterra, redistribute the booked tonnage across the two bookings within a tolerance of plus or minus of 10 per cent. This includes the tolerance specified in clause 5.7(a) of the PLPs.

Further, the variation specifies that the total tolerance allowed by clause 5.7(a) to the two bookings can be allocated to one of those bookings.

Viterra submits that the proposed amendment is intended to clarify the flexibility that is available to exporters undertaking two port loading in terms of how exporters are able to re-distribute the loading of tonnes across the two ports. Viterra further submits that flexibility is intended to provide benefit to both exporters and Viterra in terms of operational efficiency.[25]

Issues for Comment

- *Do the proposed variations to the two port loading provisions provide sufficient certainty to exporters regarding the treatment of tolerance applicable to two port loading?*

2.7 Movement of first in, first served bookings

Clause 7 of Viterra's current PLPs allow for the movement of any capacity acquired at auction, or through the first in, first served system to different shipping slots or ports, provided a number of conditions are met.

Viterra's current PLPs are silent on the earliest time an exporter can apply to move a booking following an auction. However, until the details of available capacity are published pursuant to clause 2.4, exporters are unable to determine whether capacity is available in the shipping slot, or at the port they would like to move bookings to.

It has been Viterra's practice to accept applications to move bookings on the opening of the stem for first in, first served bookings.

Viterra propose amending clause 7(e) to specify that Viterra will not accept any request or agree to move a booking to a slot at a port terminal where:

[23] Viterra, Application to extend and vary Undertaking, PLPs clause 5.7
[24] Viterra, Submission in support of Application to extend and vary Undertaking, pg 11
[25] Ibid

(iii) The Capacity at the Slot to which the Client has requested the Booking be moved to has not yet become available for booking on a first-in-first served basis in accordance with clause 2.4(d). For the avoidance of doubt, clause 2.4(g) does not apply to the movement of any Booking.

Viterra submits that:

> The proposed amendment clarifies that Clients cannot move a booking until after the shipping stem opens for first-in-first served bookings in respect of the relevant period. Applications for the movement of bookings will be assessed in the same way as applications for new bookings (i.e. with booking priority granted to the first in time). This amendment also makes clear that movements made after the opening of the shipping stem will not be subject to the 'half hour rule".[26]

Issues for comment

- *Do the proposed variations provide sufficient certainty regarding the ability to move bookings following the opening of the shipping stem?*

2.8 Movement of bookings between Inner Harbour and Outer Harbor

Viterra proposes inserting, into clause 7 of the PLPs, the following clause allowing the movement of bookings between Inner Harbour and Outer Harbor:

> (g) Notwithstanding any other provision of these Protocols, Viterra Operations may at any time, with the Client's consent, move a Booking for a Slot at Outer Harbor to a Slot in respect of the same half month period at Inner Harbour (or visa versa), if it facilitates the efficiency of operations at either or both of Outer Harbor and Inner Harbour and Viterra Operations takes reasonable steps to minimise the impact on other Clients at those Port Terminals.[27]

Viterra submits that the purpose of this new clause is to facilitate the operational efficiency of both port terminals and reflect the reality that in practice they are best managed operationally as a single port terminal. [28]

Viterra further submits that the amendment clarifies that the movement can take place without the need for a new booking and that, in making any move, Viterra will take reasonable steps to minimise the impact on other exporters.[29]

Issues for comment

- *Does the ability for Viterra to move bookings between Inner Harbour and Outer Harbor raise concerns with respect to the interests of access seekers?*
- *Disputes regarding the application of this provision will be subject to the dispute resolution mechanism in clause 12 of the PLPs. Is this dispute resolution mechanism appropriate for resolving any disputes that may arise from the application of this proposed clause?*

[26] Ibid
[27] Viterra, Application to extend and vary Undertaking; PLPs clause 7
[28] Viterra, Submission in support of Application to extend and vary Undertaking, pg 11
[29] Ibid

2.9 Transferring bookings

Viterra proposes to vary clause 9(a)(vii) of its PLPs to require the payment of fees prior to a booking being transferred. Specifically, an exporter may transfer a booking if, amongst other things:

> (vii) the Transferor has paid any booking fee, Auction Fee or Auction premiums payable to Viterra Operations in connection with the Grain the subject of the Transfer Notice, and any other fees or charges which are at that time due or payable to Viterra Operations in connection with that Grain;[30]

Viterra submits the purpose of the amendment is to discourage the speculative acquisition of capacity intended only for on-sale to other exporters.[31]

Issues for Comment

- *Is there any aspect of this proposed variation that causes concern for access seekers?*

2.10 Standard Terms

The ACCC notes that Viterra also proposes a number of variations to the standard terms, specifically in relation to the following:

- Clause 7.13 – Reconciliation and adjustment [32]
- Clause 8.5 – Set off[33]
- Clause 10.1 – Company's lien and security interest[34]
- Clause 27A – PPS Law[35]

Given the commercial nature of these contract terms and noting that standard terms (as well as reference prices) are all subject to negotiation between Viterra and exporters, the ACCC does not intend to raise specific issues for comment on each of these variations, but welcomes any views from interested parties in relation to the variations proposed to the Standard Terms.

Issues for Comment

- *Do the variations to the standard terms appropriately balance the interests of Viterra and access seekers as a starting point to commence commercial negotiations?*

[30] Viterra, Application to extend and vary Undertaking; PLPs clause 9(a)
[31] Viterra, Submission in support of Application to extend and vary Undertaking, pg 11
[32] Viterra, Application to extend and vary Undertaking; Standard terms, clause 7.13
[33] Viterra, Application to extend and vary Undertaking; Standard terms, clause 8.5
[34] Viterra, Application to extend and vary Undertaking; Standard terms, clause 10.1
[35] Viterra, Application to extend and vary Undertaking; Standard terms, clause 27A

2.11 Other variations

In addition to the variations specified above, Viterra proposes a number of other amendments that have the intention of:

- removing obsolete references or clauses (for example regarding the accreditation scheme previously regulated by the WEMA or the introduction of an auction).[36]
- updating references to other legislation or concepts contained in other legislation (for example, the replacement of 'related body corporates to associated entities')[37]
- ensuring that the PLPs and the Standard Terms continue to operate as stand alone documents following the expiration of the undertaking.[38]

The ACCC considers the effect of these variations appears to be relatively minor; however, interested parties are welcome to provide comments on any aspect of Viterra's Application to extend and vary.

[36] Viterra, Application to extend and vary Undertaking; Undertaking, clause 1.1(d) and (e)
[37] Ibid
[38] Viterra, Application to extend and vary Undertaking; for example, PLPs clause 14: Varying these protocols

3 Legal framework

3.1 Extension of an access undertaking

The test the ACCC applies in deciding whether to extend an undertaking is set out in subsection 44ZZBB of the CCA. This section provides that the ACCC may extend the period for which the undertaking is in operation if it thinks it appropriate to do so having regard to the matters set out in subsection 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.

In relation to the pricing principles, section 44ZZCA of the CCA provides that regulated access prices should:

- be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
- include a return on investment commensurate with the regulatory and commercial risks involved; and

and that access price structures should:

- allow multi-part pricing and price discrimination when it aids efficiency; and
- not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

3.2 Variation of an access undertaking

The test the ACCC applies in deciding whether to consent to the variation of an undertaking is set out in subsection 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 subsection 44ZZA(3) listed above.

In practice, in assessing a dual application to extend and vary, the ACCC will consider whether it is appropriate for the Undertaking, including the variations, to continue for the period specified.

3.3 Timeframes for ACCC decisions and clock-stoppers

Subsection 44ZZBC(1) of the CCA provides that the ACCC must make a decision on an access undertaking application within 180 days starting on the day the application is received (referred to as the 'expected period').

Section 44B of the CCA defines an 'access undertaking application' to include an application to vary an undertaking and an application under subsection 44ZZBB(1) for an extension of the period for which an access undertaking is in operation.

Pursuant to 44ZZBC(6), if the ACCC does not publish a decision on an access undertaking under section 44ZZBE of the CCA within the expected period, it is taken, immediately after the end of the expected period, to have:

- made a decision to not accept the application; and
- published its decision under section 44ZZBE and its reasons for that decision.

Subsection 44ZZBC(2) of the CCA provides for 'clock-stoppers', which mean that certain time periods are not taken into account when determining the expected period. In particular, the clock may be stopped:

- by written agreement between the ACCC and the access provider, and such agreement must be published: subsection 44ZZBC(4) & (5);
- if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application; and
- a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

3.4 Current legislative arrangements

The *Wheat Export Marketing Act 2008* (Cth) (**the WEMA**) came into effect on 1 July 2008 and was amended by the *Wheat Export Marketing Amendment Act 2012* (Cth) in November 2012.

In 2008, the WEMA and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia, which was given the power to develop, administer and enforce an accreditation scheme for bulk wheat exports, including the power to grant, vary, suspend or cancel an accreditation.[39]

Amendments to the WEMA in November 2012 saw the Wheat Export Accreditation Scheme and the Wheat Export Charge abolished on 10 December 2012, and Wheat Export Australia wound up on 31 December 2012. As per these amendments, the WEMA will be repealed on 1 October 2014 on condition that a mandatory code of conduct has been declared under section 51AE of the CCA by this date.

Until then, parties seeking to export bulk wheat from Australia are required to pass the 'access test' in the WEMA until 30 September 2014. The access test, set out in section 9 of the WEMA, will be satisfied if either:

- the ACCC has accepted from a person who owns or operates a port terminal facility used to provide a port terminal service an access undertaking under Division 6 of Part IIIA of the CCA, and that undertaking relates to the provision to wheat exporters of access to the port terminal service for purposes relating to the export of wheat; and the access undertaking obliges the person to comply, at that time, with the continuous disclosure rules[40] in relation to the port terminal service; and at that time, the person complies with the continuous disclosure rules in relation to the port terminal service; or

- there is in force a decision under Division 2A of Part IIIA of the CCA that a regime established by a State or Territory for access to the port terminal service is an 'effective access regime'; and under that regime, wheat exporters have access to the port terminal service for the purposes relating to the export of wheat; and at that time, the person complies with the continuous disclose rules in relation to the port terminal service.

The *Wheat Export Marketing Act 2008* (Cth) will be repealed in its entirety on 1 October 2014 if the Minister for Agriculture, Fisheries and Forestry has by notice published in the *Gazette* approved a code of conduct and the code has been declared by regulations under section 51AE of the CCA to be a mandatory industry code.[41]

[39] The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

[40] In summary, the continuous disclosure rules require port terminal operators to publish on their website their policies and procedures for managing demand for port terminal services; a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship (if known), the date on which the ship was nominated and the date on which the nomination was accepted (this statement is termed the 'Loading Statement').

[41] *Wheat Export Marketing Amendment Act 2012* (Cth) s. 2 and Schedule 3

The Minister must not approve a code of conduct unless the Minister is satisfied that the code of conduct:[42]

- deals with the fair and transparent provision to wheat exporters of access to port terminal services by the providers of port terminal services; and
- requires providers of port terminal services to comply with continuous disclosure rules; and
- is consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain; and
- is consistent with any guidelines made by the ACCC relating to industry codes of conduct.

If a code of conduct is not approved and declared by 30 September 2014, the WEMA will not be repealed and the current arrangements, including the access test, will continue.

[42] Clause 12 of Schedule 1 to the *Wheat Export Marketing Amendment Act 2012* (Cth)