



Australian
Competition &
Consumer
Commission

Draft Decision

Viterra Operations Limited's Application to extend and vary 2011 Port Terminal Services Access Undertaking

21 NOVEMBER 2013



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

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Glossary of terms and abbreviations

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|--------------------------------|---|
| 2009 Undertaking | The Port Terminal Services Access Undertaking submitted by Viterra Operations Limited on 24 September 2009, and accepted by the ACCC under Part IIIA of the <i>Competition and Consumer Act 2010</i> on 29 September 2009 |
| 2011 Undertaking | The Port Terminal Services Access Undertaking submitted by Viterra Operations Limited on 22 September 2011, and accepted the ACCC under Part IIIA of the <i>Competition and Consumer Act 2010</i> on 28 September 2011 |
| ACCC | Australian Competition and Consumer Commission |
| Application to extend and vary | The application lodged by Viterra Operations Limited on 25 July 2013 to vary and extend the operation of its 2011 undertaking |
| PLPs | Viterra's Port Loading Protocols – attaches as a schedule to Viterra's 2011 Undertaking |
| Standard Terms | Viterra's Port Terminal Services Agreement – attached as a schedule to Viterra's 2011 Undertaking |
| Viterra | Viterra Operations Limited |
| WEMA | <i>Wheat Export Marketing Act 2008</i> (Cth) |

Capitalised terms used in this draft decision and not defined in this glossary or the body of this document are terms defined in section 13 of Viterra's Port Terminal Services Agreement or section 16 of Viterra's Port Loading Protocols.

Summary

Viterra Operations Limited (**Viterra**) is proposing to extend and vary its 2011 Port Terminal Services Access Undertaking (**2011 Undertaking**), which governs access to port terminal services at Viterra's South Australian bulk grain ports.

Viterra proposes to extend the operation of its 2011 Undertaking until the earlier of 30 September 2015 or such a time as it is no longer required to have an access undertaking accepted by the Australian Competition and Consumer Commission (**ACCC**) (for instance, upon the anticipated commencement of a mandatory code of conduct on 1 October 2014).

It is the ACCC's preliminary view that it is appropriate to extend the operation of the 2011 Undertaking as proposed by Viterra in order to provide certainty regarding regulatory arrangements and the allocation of capacity for the 2014/15 harvest year. Further, the ACCC is of the view that the inclusion of clauses that cause the expiry of the 2011 Undertaking are appropriate having regard to the changing regulatory environment.

Viterra also proposes to make a number of variations to its 2011 Undertaking. Key changes include:

- an ability to make temporary amendments to its Port Loading Protocols (**PLPs**) during periods of force majeure
- amendments to the limitations on the use of the First In First Served (**FIFS**) booking system, including the use of 'associated entities' and agents to circumvent the purpose of the limitations, being to encourage exporters to acquire capacity through the auction system
- providing Viterra with the discretion to load up to an additional 1000 tonnes above existing tolerance levels
- an ability for Viterra to move bookings between Inner Harbour and Outer Harbor for the purpose of increasing efficiency.

It is the ACCC's preliminary view that the variations proposed by Viterra provide for greater certainty to access seekers, are in the legitimate business interests of Viterra, and are in the interests of access seekers. Further, the variations regarding the FIFS system, tolerance, and the movement of bookings will increase the efficiency of the port terminals operated by Viterra. The ACCC accordingly considers that these, and the other variations proposed by Viterra, are appropriate.

The ACCC's preliminary view is that, having regard to the matters listed in subsection 44ZZA(3) of the CCA and having considered the submissions received in response to the ACCC's Issues Paper, overall it would be appropriate to accept Viterra's application.

1 Introduction

This document sets out the reasons for the ACCC's draft decision regarding the application by Viterra Operations Limited (**Viterra**) to extend and vary its existing Port Terminal Services Access Undertaking, which was accepted by the ACCC on 28 September 2011 (**2011 Undertaking**), submitted on 25 July 2013 (**Application to extend and vary**).

The ACCC released an Issues Paper that invited submissions from stakeholders on the key issues relevant to Viterra's Application to extend and vary. The Issues Paper and responses to it are available on the ACCC's website at www.accc.gov.au > Regulated Infrastructure > Wheat > Viterra.¹

The ACCC seeks comments from interested parties in response to this draft decision by 5:00pm (EST), **6 December 2013**, after which the ACCC will issue a final decision. The ACCC welcomes comments on all aspects of Viterra's Application to extend and vary.

1.1 Background

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.² The CCA allows a provider of an access undertaking to apply to the ACCC for an extension of the period for which it is in operation.³ 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.⁴

On 28 September 2011, the ACCC accepted from Viterra, an access undertaking in relation to port terminal services. The 2011 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 2011 Undertaking pursuant to subsections 44ZZBB and 44ZZA(7) of the CCA. On 3 September 2013, the ACCC published an 'Issues Paper' seeking stakeholder views on Viterra's application. The ACCC has now made a draft decision with respect to Viterra's Application to extend and vary and is seeking submissions on the draft decision. Details on the ACCC's assessment process are set out in section 1.5 of this draft decision document.

Viterra provided its 2011 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 2011 Undertaking commenced on the expiry of Viterra's 2009 Undertaking.

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.⁵ 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

¹ Content relating to Viterra's Application to extend and vary is available directly via the following link: <http://www.accc.gov.au/regulated-infrastructure/wheat-export/viterra-2011/further-application-to-extend-and-vary>.

² Section 44ZZA(3) of Part IIIA of the CCA.

³ Subsection 44ZZBB(1) CCA.

⁴ Subsection 44ZZAA(7), CCA.

⁵ WEMA section 2 and Schedule 3.

- 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.⁶

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 the mandatory code of conduct be in place. Viterra has also applied to vary a number of provisions in the 2011 Undertaking; the Standard Terms and the Port Loading Protocols (PLPs). These are outlined in more detail below and assessed in Chapter 4 of this draft decision.

The Application to extend and vary, 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 - with the variations marked up
- Port Terminal Services Agreement for Standard Port Terminal Services (Standard Terms) - with the variations marked up
- supporting submission.

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

1.2 Separate process to vary Viterra's Port Loading Protocols

On 18 October 2013 Viterra published a Variation Notice under clause 9.3(b)(ii) of its 2011 Undertaking proposing to vary its PLPs (**Viterra's Variation Notice**). The variation notice followed an industry consultation process that began with Viterra's Consultation Notice, published by Viterra on 2 October 2013.

The proposed variations make it clear that if Viterra holds any further auctions⁷ pursuant to clause 2.2(e) of its PLPs with respect to additional capacity that is made available that:

- The auction premiums payable in respect of any of those further auctions will be included in the existing rebate pool for the relevant port terminal for that year; and
- The rebate per tonne for slots in all auctions held during the year (and therefore any auction premium rebate payable to clients) will be affected by the level of demand for slots offered in those additional auctions.

In addition to these clarifications, Viterra has also varied the PLPs to the effect that if Viterra offers any Additional Capacity by auction, Viterra can notify clients that the auction will be a Declared Auction and clients will be required to pay a Declared Auction Fee in place of the standard Auction Fee.

Viterra submits in relation to this separate variation process:

For the avoidance of doubt, this Variation Notice does not affect the proposed changes to the Protocols set out in Viterra's application to the ACCC for consent to vary and extend its Access Undertaking dated

⁶ Section 12 of the WEMA.

⁷ That is, auctions in addition to the single harvest auction and two non-harvest auctions specifically provided for in the PLPs.

25 July 2013 ("Application to Vary and Extend"). The variations set out in this Variation Notice are in addition to the changes set out in the Application to Vary and Extend.⁸

These variations set out in Viterra's Variation Notice are due to take effect on 15 November 2013. In order to manage the concurrent processes, Viterra proposes to resubmit its Application to extend and vary incorporating the variations to the PLPs that are due to take effect on 15 November 2013.

1.3 Viterra's proposed extension of its Undertaking

Viterra has proposed to extend the 2011 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 2011 Undertaking specifying that the undertaking will expire if, in accordance with the WEMA, the mandatory port access code of conduct is implemented.

1.4 Viterra's proposed variation

Viterra has proposed to vary its 2011 Undertaking, the Port Terminal Services Agreement (**Standard Terms**) and the PLPs.⁹

In brief, the variations:

- 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 PPS¹⁰ 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

⁸ Viterra Operations Limited, *Variation Notice: Proposed variations to the Port Loading Protocols*, 18 October 2013.

⁹ Viterra seeks to vary both its Standard Terms and PLPs via the undertaking variation process under Division 6, Part I IIA of the CCA. Viterra is not relying on the separate process set out in its 2011 Undertaking which can be used to vary the PLPs.

¹⁰ *Personal Property Securities Act 2009* (Cth).

- remove unnecessary provisions relating to the introduction of an auction system
- ensure the PLPs and the Standard Terms will continue to operate effectively as stand alone documents once the 2011 Undertaking has expired.

1.5 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 ACCC's decision making framework is set out in Chapter 2 of this draft decision.

The relevant factors the ACCC must consider include the objects of Part IIIA of the CCA.¹¹ These objects include providing a framework and guiding principles to encourage a consistent approach to access regulation in each industry.¹² In its assessment of Viterra's Application to extend and vary, the ACCC is required to form a view regarding what constitutes an appropriate access undertaking in the bulk wheat export industry. Where appropriate, the ACCC has considered industry-wide issues in its assessment of this application.

1.6 Making a submission

The CCA provides that the ACCC may invite public submissions on an access undertaking application, including applications to extend and vary an existing access undertaking. The ACCC invited earlier submissions on Viterra's Application to extend and vary by releasing an Issues Paper. The ACCC is now inviting submissions on its draft decision in respect of Viterra's Application to extend and vary.

Chapters 3 and 4 of this draft decision set out the ACCC's preliminary views on Viterra's Application to extend and vary. The matters listed in Chapters 3 and 4 do not represent a comprehensive summary of all aspects of the Application to extend and vary, nor are comments required on each of those matters. Further, interested parties are invited to comment on any aspect of the Application to extend and vary that they consider relevant to the ACCC's assessment.

Background information on the legislative framework by which the Application to extend and vary will be assessed is set out in Chapter 2 of this draft decision. If practicable, submissions should refer to the legislative framework, as this will assist the ACCC in assessing the Application to extend and vary.

Interested parties are asked to 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.

1.6.1 Invitation to make a submission

The ACCC, pursuant to section 44ZZBD of the CCA, invites public submissions on this draft decision on the Application to extend and vary Viterra's 2011 Undertaking.

¹¹ Subsection 44ZZA(3)(aa).

¹² Section 44AA sets out the objects of Part IIIA.

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@acc.gov.au

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

1.6.2 Due date for submissions

Submissions must be received before 5:00pm (EST), **6 December 2013**. The ACCC may disregard any submissions made after this date, as prescribed by subsection 44ZZBD(3) of the CCA. Therefore it is in interested parties' interest to make submissions within this timeframe.

1.6.3 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.¹³

1.7 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@acc.gov.au

¹³ Available at www.accc.gov.au.

2 Decision making framework

This Chapter sets out the legislative framework for assessing access undertaking applications under Part IIIA and the public consultation process that the ACCC has conducted in relation to Viterra's Application to extend and vary.

2.1 Legal framework

2.1.1 Extension of an access undertaking

The test the ACCC applies in deciding whether to extend an undertaking is set out in section 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 mentioned 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:

(a) 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

(b) 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

(c) access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

2.1.2 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.

2.1.3 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 a request made to the Commission to vary an access undertaking, and an application under subsection 44ZZBB(1) for an extension of the period for which an access undertaking is in operation.

Pursuant to subsection 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.

2.1.4 Current legislative arrangements

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.¹⁴

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.

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;
 - obliges the person to comply, at that time, with the continuous disclosure rules¹⁵ 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 disclosure 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 before that day the Minister for Agriculture has published a notice in the *Gazette* approving a code of conduct and the code has been declared by regulations under section 51AE of the CCA to be a mandatory industry code.¹⁶

The Minister must not approve a code of conduct unless the Minister is satisfied that the code of conduct:¹⁷

- 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

¹⁴ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

¹⁵ These are set out in section 9(4) of the WEMA. 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').

¹⁶ *Wheat Export Marketing Amendment Act 2012* (Cth) section 2 and Schedule 3.

¹⁷ Clause 12 of Schedule 1 to the *Wheat Export Marketing Amendment Act 2012* (Cth).

- 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.

2.2 Indicative timeline for assessment

Subsection 44ZZBC(1) of the CCA provides that the ACCC must make a decision on the Application to extend and vary the undertaking within 180 days, starting on the day that the Application to extend and vary was received (referred to in the CCA as the 'expected period'). The Application to extend and vary 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 (including an Application to extend and vary an undertaking), or gives a notice requesting information about an application.¹⁸ The consultation period following the release of this draft decision 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 extend and vary, although the actual timeframe will depend on the nature of comments received from industry:

- receipt of submissions on the ACCC draft decision by **6 December 2013**;
- ACCC final decision by January 2014.

2.3 Public consultation process

The CCA provides for the ACCC to invite public submissions in its consideration of Viterra's Application to extend and vary its accepted undertaking. Accordingly, the ACCC published an Issues Paper inviting submissions on key issues in relation to Viterra's Application to extend and vary on 3 September 2013. The ACCC received submissions from the following parties:

- Alfred C. Toepfer International (Australia) (**Toepfer**); and
- Cargill Australia Limited (**Cargill**).

The ACCC notes that Cargill submitted a brief submission noting that:

Cargill Australia has no issues or concerns regarding Viterra Operations Limited – Application to extend and vary the 2011 Port Terminal Services Access Undertaking.¹⁹

Cargill did not submit views on any specific variations and the ACCC has therefore not discussed the submission in the Stakeholders' views section at Chapter 4 of this draft decision.

As noted in Chapter 1, all public submissions received in response to the Issues Paper and Draft Decision are available on the ACCC's website at www.accc.gov.au > Regulated Infrastructure > Wheat.²⁰

¹⁸ Subsection 44ZZBC(2) of the CCA. See also section 3 of the Issues Paper for further information on these provisions of the CCA.

¹⁹ Cargill Australia Limited, *Submission in response to ACCC Issues Paper*, 24 September 2013, p. 1.

²⁰ Content relating to Viterra's Application to vary and extend is available directly via the following link: <http://www.accc.gov.au/regulated-infrastructure/wheat-export/viterra-2011/further-application-to-extend-and-vary>.

3 Assessment of Viterra's Application to extend the 2011 Undertaking

In assessing Viterra's Application to extend and vary the ACCC must determine if the continued operation of Viterra's 2011 Undertaking is appropriate, having regard to the matters listed in subsection 44ZZA(3) of the CCA. The ACCC also considers the rationale for the inclusion of the access test, the intention of Parliament to promote competition in the export of bulk wheat, and the changing regulatory environment, to be matters relevant to the assessment of the Application to extend and vary under subsection 44ZZA(3)(e).

In assessing the Application to extend and vary, the ACCC has had regard to the continued operation of the 2011 Undertaking as it currently operates (for those features that remain unchanged) and how the 2011 Undertaking will operate with the proposed variations. The ACCC discusses and provides its preliminary views on these variations at Chapter 4 of this draft decision.

3.1 Continuation of existing arrangements under Viterra's 2011 access undertaking

In addition to the proposed variations discussed below in Chapter 3 of this draft decision, Viterra's Application to extend and vary rolls over many of the provisions of Viterra's 2011 Undertaking. The publish-negotiate-arbitrate framework in relation to the negotiation of access agreements, along with 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.

The ACCC's assessment of Viterra's Application to extend and vary must therefore consider whether these arrangements remain appropriate, having regard to the matters listed in subsection 44ZZA(3) of the CCA.

3.1.1 Viterra's supporting submissions

In its Application to extend and vary, Viterra submits that the extension will provide for greater operational certainty for Viterra 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:
 - (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 2014.²¹

²¹ Viterra, *Submission in support of Application to extend and vary*, 25 July 2013, p. 3.

Viterra further submits that its proposed variations do not involve any changes to certain key features of its 2011 Undertaking, PLPs and Standard Terms. Regarding this continuity, Viterra submits:

- (a) **Method of allocating port terminal capacity:** The primary allocation of port terminal capacity via auctions and then subsequently via a first-in-first-served system will continue to be implemented in the manner approved by the Commission on 5 September 2012. The Proposed Variations do not involve any change to the method for calculating the Auction Premium Rebate payable to exporter;
- (a) **Publication of price and non-price terms for standard services:** The requirement for Viterra Operations to publish price and non-price terms for standard Port Terminal Services will continue unchanged;
- (b) **Negotiate in good faith:** The requirement for Viterra Operations to negotiate with all access seekers in good faith and in accordance with a detailed negotiation procedure will remain unchanged;
- (c) **Non-discriminatory access:** Viterra Operations will continue to be required to provide access on terms which do not favour its own downstream operations, except to the extent that such favourable treatment reflects the lower cost of providing the relevant services;
- (d) **Dispute resolution:** The Proposed Variations will not alter the existing publish / negotiate framework under the Access Undertaking, which will continue to be supported by a detailed dispute resolution mechanism,²²

In relation to the means of allocating capacity, Viterra submits:

The Proposed variations involve an extension for a further season of the existing auction system and first-in-first-served system that was approved by the Commission on 5 September 2012. Those systems have facilitated the allocation of approximately 10.84 million tonnes of port terminal capacity to 26 exporters during the period 1 October 2012 to September 2014.²³

3.1.2 Stakeholders' views

Regarding the overall continuation or extension of Viterra's 2011 Undertaking, Toepfer submits:

The extension of the Access Undertaking provides certainty to access seekers for the defined term in acquiring Port terminal capacity.²⁴

Regarding the principal method of allocating port terminal capacity, Toepfer submits:

Toepfer are of the opinion as a user of the integrated infrastructure and participant within previous capacity auctions, Viterra should address the fundamental principles of the primary allocator of capacity to ensure a robust framework is in place that efficiently facilitates the primary method of allocation. If the intent is to remain with an auction system, discretionary closure within a defined aggregate of overall supply and scheduling annual capacity auctions at crop maturity as demonstrated within the Western Australian model has ensured a more transparent initial bid and reduced manipulation.

Although it may be considered temporary solutions to the secondary allocator of capacity may assist the functionality of acquirement. Ensuring the integrity of the primary method would result in such variations being largely redundant and a doorway establishing the most efficient mechanism to allocate shipping capacity.²⁵

3.1.3 The ACCC's preliminary view

It is the ACCC's preliminary view that it is appropriate to extend the operation of the 2011 Undertaking to 30 September 2015, having regard to the matters listed at subsection 44ZZA(3) of the CCA and the intention of the access test as prescribed by the WEMA.

²² Viterra, *Submission in support*, p. 3.

²³ Viterra, *Submission in support*, p. 2.

²⁴ Toepfer, *Submission in response to ACCC Issues Paper regarding Viterra's Application to extend and vary*, 20 September 2013, p. 2.

²⁵ Toepfer, *Submission in response*, p. 1.

As submitted by both Viterra and Toepfer, certainty regarding arrangements in the transitional period between the current regulatory arrangements and the introduction of the mandatory code of conduct (discussed further below) is in the interests of access seekers and the legitimate business interests of Viterra. By extending the operation of the 2011 Undertaking all parties have certainty as to the arrangements governing the negotiation of access agreements and capacity allocation.

The publish-negotiate-arbitrate framework was initially proposed by Viterra and accepted by the ACCC in 2009. The framework was rolled forward in the 2011 Undertaking and Viterra propose to continue these arrangements during the period of extension. The model provides that:

- Viterra will offer to supply the standard port terminal services to access seekers on standard **published** non-price terms and conditions (Standard Terms). In providing access to port terminal services, Viterra must not discriminate between different applicants or users in favour of its own trading arm, except to the extent that the cost of providing access to other applicants or users is higher.
- Viterra must, for access to each standard port terminal service, **publish** reference prices on the Viterra website.
- Viterra will enter into **negotiations** with access seekers for the provision of access to port terminal services. Both parties must negotiate in good faith in accordance with the terms of the 2011 Undertaking. The negotiations will be finalised by the execution of an access agreement.
- Any dispute, except those in relation to executed access agreements or the PLPs, will be resolved in accordance with clause 7 of the 2011 Undertaking. Clause 7 provides a process whereby disputes may be escalated from negotiation to mediation to **arbitration**.

As noted by the ACCC in accepting the 2011 Undertaking, the ACCC considers that this approach continues to balance the legitimate business interests of Viterra with the interests of access seekers, having regard to subsections 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA.²⁶

The ACCC considers that this framework continues to enable Viterra and exporters to negotiate commercial terms and conditions that allow for the efficient operation of its business of providing port terminal services, while also promoting fair access to port terminal services for access seekers. The ACCC continues to hold the view that the publish-negotiate-arbitrate model appropriately balances the legitimate business interests of Viterra and access seekers by providing a framework within which:

- an appropriate level of information is provided via publication to enable access seekers to negotiate from a sufficiently informed position
- a defined process is set out for the conduct of negotiations
- parties can seek mediation or arbitration should any disputes arise during the negotiation process.

The ACCC notes that during the four years this model has been operating, no arbitrations have been necessary. Although there has not been any actual arbitration activity under Viterra's 2011 Undertaking, the ACCC does not consider this to mean that the negotiate-arbitrate framework has been unsuccessful. To the contrary, the ACCC considers that the threat of arbitration by the ACCC appears to be effective in encouraging parties to reach commercially negotiated outcomes.

Supporting the publish-negotiate-arbitrate model are robust non-discrimination and no hindering access provisions, that Viterra propose continuing during the period of the extension.

²⁶ ACCC, *Viterra Operations Limited, Port Terminal Services Access Undertaking, Decision to accept*, 29 September 2011, p. 39.

The non-discriminatory access provision, at clause 5.5 of the 2011 Undertaking, provides that Viterra must not discriminate against access seekers in favour of its own trading arm, except to the extent that the cost of providing access to other applicants or users is higher. The no hindering access provision at clause 9.7 of Viterra's 2011 undertaking provides that Viterra must not engage in conduct for the purpose of preventing or hindering access to port terminal services by any other access seeker in the exercise of a right of access under the 2011 Undertaking.²⁷

In accepting both Viterra's 2009 Undertaking and the 2011 Undertaking, the ACCC took the view that:

A robust non-discriminatory access clause is an important regulatory tool that can be used to constrain the behaviour of a vertically integrated owner of a key infrastructure facility. This is because many of the benefits of access to infrastructure can be lost if measures are not put into place to control potential anti-competitive leverage onto related markets.²⁸

In relation to the no hindering access provision, the ACCC took the view that such a clause is consistent with the objective of WEMA to ensure that vertically integrated bulk handling companies provide fair and transparent access to their facilities to other accredited wheat exporters. The ACCC considered the intention of the WEMA to be a relevant matter in the assessment of Viterra's 2009 and 2011 Undertakings, having regard to section 44ZZA(3)(e) of the CCA.

The ACCC remains of the view that the non-discriminatory access and no hindering access provisions continue to promote competition in wheat trading markets and therefore continue to be in the public interest, having regard to subsection 44ZZA(3)(b) of the CCA. The ACCC also remains of the view that these provisions deter Viterra from discriminating in favour of its trading arm and provide for fair and transparent access to port terminal services. The ACCC therefore considers that the non-discrimination and no hindering provisions of Viterra's 2011 Undertaking continue to be in the interest of access seekers, having regard to subsection 44ZZA(3)(c) and 44ZZA(3)(e) of the CCA.

It is the ACCC's preliminary view that it is appropriate that the publish-negotiate-arbitrate framework, supported by the non-discriminatory access and no hindering access provisions, continues for the extension period specified in the Application to extend and vary.

Regarding the auction system, which is the primary method of allocating port terminal capacity, the ACCC considers that it remains an appropriate means for allocating port terminal capacity in South Australia.

The ACCC expressed its view in the Final Decision on Viterra's 2011 undertaking that the FIFS capacity allocation method was not appropriate in the circumstances likely to be faced by Viterra over the term of its 2011 Undertaking. Market conditions in South Australia demonstrated a degree of capacity constraint and limited competitive constraints that could effectively neutralise the incentives for self-preferential treatment by Viterra.²⁹ The ACCC remains of the view that market conditions in South Australia continue to demonstrate a degree of capacity constraint and a lack of competitive constraint that could effectively neutralise incentives facing Viterra for self-preferential treatment.

As such, it is the ACCC's preliminary view that an auction system remains the appropriate means for allocating port terminal capacity in South Australia.

The ACCC considers that auctions and transferability are appropriate mechanisms on economic efficiency grounds to allocate capacity. Auctions, by allocating capacity to users with the highest willingness to pay, will ensure that capacity is allocated to those users who value it most, resulting in an allocation which is allocatively efficient. The ACCC considers the efficient allocation of capacity to be in the interests of Viterra and access seekers, having regard to subsections 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA, and consistent with the object of the WEMA to promote an efficient bulk wheat export market.³⁰ In addition, an auction system is consistent with the objects of Part IIIA

²⁷ The no hindering access clause is at clause 9.7 of Viterra's 2011 Undertaking and clause 9.5 of the Undertaking where Viterra's Application to extend and vary to be accepted.

²⁸ ACCC, *Ausbulk decision to accept*, 29 September 2009 p. 180.

²⁹ ACCC, *Final Decision – 2011 Viterra Undertaking*, 28 September 2011, p. 30.

³⁰ s.3(a) of the WEMA.

including to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided. An auction system therefore promotes effective competition in upstream and downstream markets.

The ACCC acknowledges Toepfer's view that a discretionary auction closure and the scheduling of annual capacity auctions at crop maturity have promoted transparency in initial bidding and reduced manipulation in Western Australia.³¹ The ACCC notes that discretionary auction closure and scheduling of annual auctions may increase the efficient allocation of capacity. Further, the ACCC does not consider these systems to be inappropriate and considers there to be merit in providing flexibility to port terminal operators in how they schedule and run their auction systems. However, discretionary auction closure and the scheduling of annual auctions do not form part of Viterra's application.

It is therefore the ACCC's preliminary view that the overall continuation of arrangements that have not been varied in Viterra's application is appropriate.

3.2 Variation of term and expiry

Viterra's 2011 Undertaking, accepted on 28 September 2011 is currently due to expire on 30 September 2014. It is currently anticipated that a revised regulatory scheme will be implemented from that time.

Section 2 of the Wheat Export Marketing Amendment Act 2012 provides that if, as at 30 September 2014 the Minister for Agriculture has approved a code of conduct governing port access, and that code is declared as a mandatory code under section 51AE of the CCA, then the WEMA, including the access test, will be repealed.

As discussed at Chapter 1.1 above, Viterra proposes to extend the date on which the 2011 Undertaking expires from 30 September 2014, to 30 September 2015.³² Viterra also proposes to vary its 2011 Undertaking to introduce clauses that provide for the expiration of its undertaking before 30 September 2015 in the event that a mandatory code is approved and declared. These new clauses at 3.2 provide that the undertaking will expire on 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;³³

The 2011 Undertaking will not operate past 30 September 2015 unless a further application to extend is submitted by Viterra.

3.2.1 Viterra's supporting submissions

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 ensures that if there is a change 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

³¹ *ibid.*

³² The expiration date of Viterra's Undertaking is detailed in clause 3.2(a).

³³ Viterra, *Application to extend and vary Undertaking*, 25 July 2013, clause 3.2.

its decision to extend the Access Undertaking in order to provide early certainty to its Clients in relation to their capacity entitlements.³⁴

3.2.2 ACCC's preliminary view

The ACCC considers that the circumstances in which Viterra has submitted its Application to extend and vary need to be taken into account in assessing the appropriateness of this extension, specifically the addition of the clauses effecting an automatic expiry. In the absence of clauses 3.2 (b) and (c), Viterra would be required to apply to the ACCC for consent to withdraw the 2011 Undertaking pursuant to section 44ZZA(7)(b).

As noted above, a mandatory industry code of conduct will come into effect if, as at 30 September 2014, that code has been approved by the Minister for Agriculture and declared under the CCA. Viterra's Application to extend and vary seeks to provide regulatory certainty for its own commercial operations, as well as the commercial operations of access seekers, in the event that a code is not approved and declared by 30 September 2014.

The ACCC considers operational certainty to be a key factor in a port owner or access seeker's ability to make commercially profitable decisions. The ACCC therefore considers that the continuation of Viterra's current access arrangements in the potential gap between the expiration of Viterra's 2011 Undertaking on 30 September 2014, and the potential commencement of a mandatory code, provides this certainty.

The ACCC considers that the certainty provided by the proposed extension is in the interests of both Viterra and access seekers, having regard to subsections 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA. The ACCC also considers that the operational certainty provided by the proposed extension promotes the operation of an efficient and profitable bulk wheat export marketing industry, and is consistent with the objects of the WEMA.³⁵

In summary, having regard to the matters listed in subsection 44ZZA(3) of the CCA, the ACCC considers the extension of Viterra's 2011 Undertaking, including the addition of clauses 3.2(b) and 3.2(c), to be appropriate.

³⁴ *ibid*, p. 6.

³⁵ s.3(a) of the WEMA.

4 Assessment of Viterra's Application to vary the 2011 Undertaking

In addition to the application to extend the term, and the addition of the automatic expiry terms, Viterra proposes to make a number of changes to its 2011 Undertaking, including the PLPs and Standard Terms.

In assessing Viterra's Application to extend and vary the ACCC must determine if it is appropriate to consent to these variations to the 2011 Undertaking having regard to the matters listed in subsection 44ZZA(3) of the CCA. The ACCC also considers the rationale for the inclusion of the access test, the intention of Parliament to promote competition in the export of bulk wheat, and the changing regulatory environment to be matters relevant to the assessment of the Application under subsection 44ZZA(3)(e) of the CCA.

The ACCC has assessed these variations as they would operate for the remainder of the existing term of the 2011 Undertaking,³⁶ and the proposed extension period as discussed in Chapter 3 of this draft decision.

4.1 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 clause 9.3(g) of Viterra's Application to extend and vary, and reads:

- (g) This clause 9.3 does not prevent the Port Operator from unilaterally amending the Port Loading Protocols on a temporary basis during the period of force majeure, as defined in the Standard Terms.

Clause 9.3 sets out the standard procedure for amending PLPs outside a variation of an undertaking process pursuant to subsection 44ZZA(7) of the CCA.³⁷

Clause 15.1 of the Standard Terms provides a definition of 'Force Majeure' and clause 15.2 suspends obligations of a party that is precluded from complying with an access agreement due to a force majeure event. The remainder of clause 15 of the Standard Terms provides for notice of a force majeure event between affected parties and a process to be followed in an attempt to minimise the effect of such an event.

4.1.1 Viterra's supporting submissions

Viterra submits regarding the proposed variation that:

This is intended to provide Viterra Operations with the necessary operational flexibility to manage any unexpected events at its Port Terminals, and is consistent with the provisions in other access undertakings approved by the Commission.³⁸

³⁶ Viterra's 2011 Undertaking is currently due to expire on 30 September 2014. This draft decision also proposes that the ACCC consent to an extension of the 2011 Undertaking to 30 September 2015.

³⁷ At page 202 of the ACCC's 2009 decision to accept Viterra's (then Ausbulk) Undertaking, the ACCC considered it appropriate that the PLPs form part of the Undertaking. However, in the interests of retaining flexibility and efficiency, the ACCC accepted the inclusion of a PLP variation process based on robust industry consultation as opposed to a formal ACCC consultation process.

³⁸ Viterra, *Submission in support*, p. 2.

4.1.2 Stakeholders' views

Toepfer submits:

Toepfer would not oppose the unilaterally amendment of the Port Loading Protocols on the basis of operational efficiency. Such variation(s) should be transparent and notified to all of the industry, not only parties impacted.³⁹

4.1.3 The ACCC's preliminary view

The ACCC considers that the introduction of a force majeure provision is appropriate as, consistent with the first objective of Part IIIA, it is likely to provide for greater efficiency in the operation of, and use of, port terminal infrastructure during a period of unforeseen events. Maintaining the efficient use of port terminal infrastructure is also in the interests of both access seekers and the port terminal operator.

The inclusion of the proposed clause 9.3(g) of the 2011 Undertaking allows Viterra to make changes to capacity allocation arrangements where an event outside of Viterra's or an access seeker's reasonable control affects the normal operation of a port facility. The Standard Terms include an obligation on parties affected by a force majeure event to attempt to mitigate the effect of a force majeure event.

Force majeure provisions are common to the access undertakings of the other port terminal operators that have been accepted by the ACCC. The ACCC notes that the GrainCorp Operations Limited 2011 Undertaking provides an identical provision at clause 9.3(b). While the precise definition of what constitutes a force majeure event in Viterra's Application differs marginally from that contained in the equivalent GrainCorp provision, both provisions cover substantively the same events.⁴⁰ Further, the ACCC notes that GrainCorp's equivalent provision was included in its 2009 undertaking and the ACCC has not been informed of any issues with respect to its use or ongoing appropriateness.

Generally however the ACCC considers clause 9.3(g) provides Viterra with an appropriate level of commercial flexibility in circumstances where events beyond Viterra's reasonable control have negatively impacted on the efficiency of its port operations. The ACCC therefore considers the variation to 9.3(g) to be in the legitimate business interests of Viterra and appropriate, having regard to section 44ZZA(3)(a) of the CCA. The ACCC also considers that a variation of the PLPs to maintain the efficiency of port operations in circumstances where that efficiency would otherwise be reduced, promotes the economically efficient use of Viterra's port terminal infrastructure. The ACCC therefore considers the force majeure clause to be consistent with the objects of Part IIIA and the WEMA, having regard to subsection 44ZZA(3)(aa) of the CCA and section 3(b) of the WEMA.

Regarding Toepfer's submission requesting greater transparency in the unilateral variation process, the ACCC notes its general position to support greater transparency for access seekers.

The ACCC notes that clause 15.3 of the Standard Terms would require Viterra to notify parties affected by a force majeure event, including where Viterra is unable to provide access to port terminal services pursuant to the terms of executed access agreements and/or the PLPs. In the event that Viterra is required to unilaterally vary PLPs to mitigate loss from a force majeure event, the ACCC would expect Viterra to notify all parties that are required to comply with the existing and varied PLPs.

In this regard, the ACCC notes Viterra's practice during the breakdown of its elevator at Outer Harbor during the second half of 2012 and early 2013. Following the breakdown Viterra emailed all affected clients and placed notices on Viterra's website. The ACCC would expect that the same level of notification would occur in the future.

The ACCC notes that it will monitor any claimed force majeure events closely and that Viterra will be required to comply with all other obligations in its undertaking through the force majeure period.

³⁹ Toepfer, *Submission in response*, p. 2.

⁴⁰ The equivalent provision is at clause 9.3(g) of GrainCorp's 2011 undertaking.

It is the ACCC's preliminary view to accept Viterra's proposed clause 9.3(g) as appropriate, having regard to the matters listed in subsection 44ZZA(3) of the CCA.

4.2 Auction timetable

Viterra proposes to delete clause 2.3(c) of its PLPs which provides indicative timings for its harvest shipping period auction and two non-harvest shipping period auctions.

Clause 2.3(c)(i) of Viterra's 2011 PLPs provides that Viterra anticipates 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, with a second auction (if held) approximately 4 weeks later.

Viterra's Application to extend and vary retains clause 2.3(b) which 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 the year. Viterra's most recent auction was conducted in April 2013.

4.2.1 Viterra's supporting submissions

Viterra submits that the removal of indicative timings is in response to customer feedback:

During the review of the Auction System undertaken by Viterra in accordance with clause 14 of the Port Loading Protocols, a number of exporters indicated that they would prefer that the Auctions were held earlier than the indicative August and November dates set out in clause 2.3 of the Port Loading Protocols.⁴¹

Viterra also submits that operational requirements are also a consideration:

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 in early 2014 (with appropriate notice requirements set out in clauses 2.3(a) and (b)).⁴²

4.2.2 The ACCC's preliminary view

The ACCC considers that Viterra's auction scheduling balances Viterra's interest in maintaining scheduling flexibility and the interests of access seekers in having certainty in auction timing.

The ACCC considers that the removal of the indicative auction timings in clause 2.3(c) of Viterra's PLPs removes the possibility of access seekers being misled as to auction timing.

The ACCC notes that clauses 2.3(a) and 2.3(b) require Viterra to publish the date and time of auctions on its website at least 10 business days prior to commencement,⁴³ and indicative timings for each auction by 1 July in the preceding year.⁴⁴ The ACCC considers that clauses 2.3(a) and 2.3(b) of Viterra's PLPs provide access seekers with an appropriate level of certainty regarding the timing of auctions. The ACCC therefore considers these publication requirements to be in the interests of access seekers, having regard to section 44ZZA(3)(c) of the CCA.

It is the ACCC's preliminary view to accept the deletion of clause 9.3(c) of Viterra's undertaking.

⁴¹ Viterra, submission in support, p.9.

⁴² *ibid.*

⁴³ Viterra, *PLPs*, clause 2.3(a).

⁴⁴ Viterra, *PLPs*, clause 2.3(b).

4.3 First in, first served bookings

The PLPs currently provide that, following the harvest auction, the second non-harvest auction, and any further auctions held for capacity that is subsequently made available, any capacity that has not been allocated at auction can be subsequently booked by exporters through a FIFS system.⁴⁵

The FIFS 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.’ Current arrangements provide that for the first five business days after opening the shipping stem, applications for capacity through the FIFS systems are limited to a maximum volume of 60,000 tonnes, at one port, in one shipping slot. In addition, current arrangements provide that for the first five business days after opening the shipping stem exporters are limited to one booking each half hour.

Auction as the primary means of allocating capacity

The development of the auction system as the primary method of capacity allocation was an important feature in the ACCC’s decision to accept Viterra’s 2011 Undertaking.

In the ACCC’s final decision to accept Viterra’s 2011 Undertaking, the ACCC stated:

the ACCC is required to have regard to, among other matters, the objects of Part IIIA, a relevant consideration under which is the efficient allocation of capacity. This includes mechanism to ensure that throughput is maximised, particularly at times of peak demand and that capacity is allocated to those who value it most...⁴⁶

Further, the ACCC’s final decision to accept Viterra’s 2011 Undertaking stated that:

Auctions, by allocating capacity to users with the highest willingness to pay, will ensure that capacity is allocated to those users who value it the most, resulting in an allocation which is allocatively efficient.⁴⁷

In accordance with the 2011 Undertaking, Viterra was required to introduce an auction system that incorporated a number of features. Clause 9.5(d)(i) of the 2011 Undertaking provides that:

Unless otherwise agreed by the ACCC and the Port Operator, the Auction system will incorporate the following features:

- (i) An auction should be the primary means of allocating port loading capacity at each Port Terminal

In relation to the operation of the FIFS system, the ACCC supports the position of the auction system as the primary method of capacity allocation. In its decision to withdraw the ACCC’s Auction Objection Notice,⁴⁸ the ACCC considered it appropriate that:

the FIFS system in Viterra’s Revised Variation Notice creates uncertainty with respect to the acquisition of high demand capacity and will therefore provide an incentive to exporters to participate in the auction in order to obtain high demand capacity.

...

The ACCC considers that a FIFS mechanism is relevant for allocating capacity during periods of low demand, or where it is impractical to subject capacity to further auction having regard to Viterra’s

⁴⁵ Viterra, *Application to extend and vary Undertaking - Port Loading Protocols*, 25 July 2013, clause 2.1(c) and clause 2.4.

⁴⁶ ACCC, *Decision to accept Viterra’s Port Terminal Services Access Undertaking*, 29 September 2011, p. 29.

⁴⁷ ACCC, *Decision to accept*, p. 30.

⁴⁸ On 17 February 2012 Viterra submitted an Auction Variation Notice containing the details of its proposed auction system. On 11 April 2012 the ACCC issued an Auction Objection Notice in objection to certain aspects of that proposal. Following consultation with industry Viterra submitted a Revised Variation Notice on 24 August 2012. On 5 September 2012 the ACCC decided to withdraw its Auction Objection Notice.

legitimate business interests. The ACCC does not consider it necessary in order to incorporate the feature in clause 9.5(d)(i) that the FIFS system be completely removed.⁴⁹

The ACCC remains of the view that an auction system is more allocatively efficient than the FIFS system during periods of capacity constraint in that an auction ensures that capacity goes to the party that values it most highly.

4.3.2 Restricted first in, first served bookings – 5 business days

As noted above, restrictions apply to bookings made within the first five business days after opening the shipping stem. These restrictions provide that a booking form submitted within five business days of the shipping stem opening will be invalid if:

- a booking form is submitted within 30 minutes of the client previously submitting another booking form
- The capacity applied for exceeds 60 000 tonnes
- The amount of capacity applied for exceeds the amount of capacity that remains available in the slot.

Viterra proposes varying clause 2.4(g) so that the restrictions in clauses 2.4(g)(i)(ii) and (iii) of the PLPs apply only for a period of two business days following the opening of the shipping stem.

4.3.2.1 Viterra's supporting submissions

Viterra submits that this amendment reflects feedback from exporters and that in practice, desirable capacity not allocated at auction is generally booked immediately after opening the shipping stem.⁵⁰

4.3.2.2 The ACCC's preliminary view

The ACCC notes that the FIFS system and the restrictions placed on bookings immediately following the opening of the shipping stem are designed to encourage exporters to acquire capacity through the auction system. Viterra's submission contends that it is not necessary to apply these restrictions for the full five day period as any available capacity is booked immediately following the opening of the stem. The ACCC notes that its review of the shipping stem confirms this to be the case.

Allowing Viterra to reduce the period from five business days to two business days is in the legitimate business interests of the port terminal operator, having regard to subsection 44ZZA(3)(a) of the CCA. Such arrangements may also be in the interests of access seekers as during a period of low demand, for example during a poor harvest, it will enable exporters to book capacity in an efficient manner. The ACCC also considers removal of the single log-on requirement to be unnecessary, given the restrictions of one booking for each half hour period and individual bookings of 60,000 tonnes prevent the use of multiple log-ins to an exporter's advantage. The ACCC considers however that multiple logins may be more efficient and therefore that the removal of the one login restriction to be in the interests of access seekers, having regard to subsection 44ZZA(3)(c) of the CCA.

The ACCC therefore considers these arrangements to be appropriate, having regard to subsection 44ZZA(3)(c) of the CCA.

4.3.3 Associated Entity of an exporter

Viterra proposes to amend clause 2.4(g)(i), which currently limits each exporter to one booking each half hour, to also limit the associated entities of exporters. The proposed amendment provides Viterra with discretion to determine which associated entities will be captured by the clause. Specifically Viterra proposes to amend Clause 2.4(g)(i) to invalidate a booking form if:

⁴⁹ ACCC, *Viterra Operations Limited Port Terminal Services Access Undertaking Decision to withdraw the ACCC's Auction Objection Notice*, 5 September 2012, p. 23.

⁵⁰ Viterra, *Submission in support of Application to extend and vary*, 25 July 2013, p. 10.

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);⁵¹

4.3.3.1 Viterra's supporting submissions

Viterra submits in support of this amendment:

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.

This amendment is not intended to prevent separate bookings by Clients (and their Associated Entities) that operate commercially separate export functions.⁵²

4.3.3.2 Stakeholders' views

Toepfer submits:

Toepfer note the rigor proposed around the associated entity clause, however the dispute clause (12) of the Port Loading Protocols covers notices directly between the access seeker and operator in respect to the acceptance/non-acceptance of bookings. We assume the implied intent of the clause would be to restrict access seekers from establishing an associated entity with a perceived separate export function, however no legitimate market share. A subsequent provision shall also be incorporated which references/allows third parties that are not a directly related party to the notice(s) between access seeker and Port operator to raise a grievance, if any client disputes Viterra operations adherence to the relevant protocols.⁵³

4.3.3.3 The ACCC's preliminary view

The FIFS capacity allocation system has been designed to create uncertainty with respect to acquiring specific capacity so as to provide an incentive to exporters to acquire capacity through the auction system in the first instance.

The ACCC considers that Viterra's proposed amendments to clause 2.4(g) clarify and reinforce this principle in ensuring that the auction system is the primary method of capacity allocation. The amendments achieve this by preventing third party access seekers creating an associated entity for the purpose of circumventing the restrictions on the FIFS system.

As noted above, it is the ACCC's view, having regard to the objects of Part IIIA to promote the economically efficient operation and use of the port terminal infrastructure, that an auction allocates capacity to the exporter with the highest willingness to pay for it. A FIFS system does not provide for the same level of efficiency, particularly during large harvests when peak shipping season capacity is relatively constrained.

The ACCC considers that Viterra's proposed variation of clause 2.4(g)(i), allowing it to reject a booking by an associated entity of an exporter, appropriately promotes the position of the auction system as the primary method of capacity allocation. The ACCC considers that amending the clause to reduce potential gaming increases the likelihood that exporters will participate in the auction in order to acquire peak shipping period capacity.

The ACCC notes that the variation does provide Viterra with the discretion to determine whether an exporter's associated entity is operating a commercially separate export function. The ACCC acknowledges that such a discretion may enable Viterra to prevent or hinder an exporter, or an associated entity of an exporter, legitimately accessing port terminal services. However, in the event that Viterra does exercise this discretion in a manner that hinders access, it risks breaching clause 9.7

⁵¹ Viterra, *Application to extend and vary Undertaking – PLPs clause 2.4(g)(i)*.

⁵² Viterra, *Submission in support*, p. 10.

⁵³ Toepfer, *submission in response*, 20 September 2013, p. 2.

of its 2011 Undertaking which prohibits Viterra from engaging in conduct for the purpose of preventing or hindering access to port terminal services.⁵⁴

With respect to Toepfer's submission in relation to the applicable dispute resolution mechanisms, the ACCC notes that if Viterra does invalidate a booking by an associated entity of a client pursuant to this clause, then the associated entity is entitled to raise a dispute under clause 12 of the PLPs. Toepfer submits that unrelated third parties should also be able to raise a dispute in relation to Viterra's application of this varied provision.

The ACCC notes that the dispute resolution mechanism in clause 12 of the PLPs does not prevent any client from raising a dispute regarding Viterra's adherence to the PLPs. This would likely include any decisions made by Viterra in relation to invalidating a booking it believes is made by an associated entity without its own commercially separate export function. Further, if a client is of the view that in applying this provision of the PLPs, Viterra has engaged in conduct for the purpose of hindering access, the client is able to raise concerns with respect to a potential breach of the 2011 Undertaking. Given these potential outcomes, it is the ACCC's preliminary view that Viterra is unlikely to exercise its discretion in a manner other than consistently with the intention of the clause, which is to prevent gaming of the FIFS system.

Allowing Viterra the discretion to invalidate a booking in this manner is in the legitimate business interests of the port terminal operator in maintaining the integrity of its FIFS system. Further, making the invalidation of bookings made within the same 30 minutes of an associated entity discretionary rather than automatic is in the interests of access seekers with an associated entity which operate a legitimate commercially separate export function.

Accordingly, it is the ACCC's preliminary view that these amendments are appropriate having regard to the efficient allocation of capacity (subsection 44ZZA(3)(aa) of the CCA), the legitimate business interests of Viterra (subsection 44ZZA(3)(a) of the CCA) and the interests of access seekers (subsection 44ZZA(3)(c) of the CCA).

4.3.4 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 that exporter.

The proposed clause provides:

- (h) If Viterra Operations considers, acting reasonably, that:
 - (i) a Booking form for Unallocated Capacity it receives from a Client within 2 Business Days of that capacity becoming available for booking on a first-in-first-served basis following an Auction is not genuinely required for use by that Client; and
 - (ii) the Client has been engaged by another person to submit the Booking Form on that person's behalf for the purpose of circumventing the restrictions in clause 2.4(g) above,

Viterra Operations may (either before or after accepting the Booking Form) reject the Booking Form or cancel the Client's Booking (or the Transferee's Booking if the Client has already transferred the Booking in accordance with clause 9) as the case requires. Any disputes will be resolved in accordance with clause 12.

4.3.4.1 Viterra's supporting submissions

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

⁵⁴ The no hindering access clause is at clause 9.7 of Viterra's 2011 Undertaking and clause 9.5 of the Undertaking where Viterra's Application to extend and vary to be accepted.

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.

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.⁵⁵

4.3.4.2 Stakeholders’ views

Toepfer submits regarding the new clause 2.4(h) that:

Under the proposed variations, Viterra have proposed the inclusion of where acting reasonably they can cancel or reject a booking if it considers that the booking is not genuinely required for use by the exporter. If the primary method of allocating shipping capacity is effectively functioning, then the potential for participants to manipulate the secondary allocator will be non-existent. The discretionary application of the rejection where acting reasonable is a subjective assessment. Under the Port Loading Protocols the dispute mechanisms final ruling reverts to the General Manager Storage and Handling, this could ultimately result in a conflict of interest. Toepfer would propose the incorporation of an independent body within any such dispute to negate any concerns. Regardless all sized trade participants should not be prohibited from participating, if at the time of offering they value the capacity.⁵⁶

4.3.4.3 The ACCC’s preliminary view

The ACCC considers that the transferability of slots provides for increased efficiency across the Viterra system. Transferability of slots ensures that where an exporter is not able to execute booked capacity, that capacity can be transferred to a party who values it and may execute it. This process contributes to the efficient use of capacity at port terminals. In addition, the discretion to prevent the circumvention of FIFS booking rules also encourages the use of the more allocatively efficient auction system. The ACCC considers that capacity allocated through an auction system is allocated to the exporter that values it most. This is consistent with the first objective of Part IIIA.

For this reason the ACCC considers that a discretion to reject bookings where a customer has made a booking in circumvention of the FIFS rules to be generally appropriate, having regard to the matters set out in subsection 44ZZA(3) of the CCA.

Specifically, the ACCC considers that Viterra’s proposed discretion under 2.4(h) to, acting reasonably, reject or cancel a booking where a customer has or has attempted to circumvent FIFS booking rules, is in the legitimate business interests of Viterra in maintaining the integrity of its FIFS capacity allocation system, having regard to subsection 44ZZA(3)(a) of the CCA.

Such arrangements are also in the interests of access seekers by ensuring that the same opportunity to acquire capacity exists for all exporters, and not only those exporters who are able to create agency arrangements.

In relation to Toepfer’s submitted concern regarding the dispute resolution procedure that would apply in the event that an access seeker disputes Viterra’s invalidation of a booking, the ACCC notes that the discretion could be potentially exercised by Viterra against the interests of exporters by blocking valid transfers of capacity. However the ACCC notes that Viterra must exercise this discretion reasonably and in compliance with the non-discrimination and no hindering obligations placed on Viterra at clauses 5.5 and 9.7 of its 2011 Undertaking.

In consideration of the above matters it is the ACCC’s preliminary view to accept Viterra’s proposed clause 2.4(h) as appropriate, having regard to the matters set out in subsection 44ZZA(3) of the CCA.

⁵⁵ *ibid*, p, 10.

⁵⁶ Toepfer, submission in response, p. 2.

4.4 Tolerance

Clause 5.6 of Viterra's current PLPs contains a plus or minus ten per cent tolerance in respect of the execution of capacity acquired by clients. This tolerance level was included in Viterra's 2011 Undertaking to provide Viterra and exporters with operational flexibility in accumulating cargo and loading vessels.

Viterra proposes inserting a provision that provides an additional discretion in relation to the amount that a vessel may load over the stated capacity booked, and the existing tolerance provided for in clause 5.6(a). Viterra's proposed clause 5.6(b) states:

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.

4.4.1 Viterra's supporting submissions

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 (ie to ensure vessel stability). An ability for Viterra Operations to allow this without the Client needing to acquire additional capacity from other exporters, will facilitate the efficient operation of the Port Terminals and reflects a pragmatic outcome for each of Viterra Operations, the Client and other exporters.⁵⁷

4.4.2 Stakeholders' views

In response to the new discretion on the part of Viterra, Toepfer submits that:

Toepfer International (Australia) does support the variation(s) to increase operational flexibility through discretionary tolerance in exceeding acquired lift ... Such flexibility should be executed without subsequent impact on the remainder of the shipping stem.⁵⁸

4.4.3 The ACCC's preliminary view

The ACCC considers refinements to PLPs that provide for an increase in port efficiency is beneficial for Viterra, access seekers, and the efficient use of port terminal infrastructure.

In terms of Viterra's legitimate business interests, the ability to load an additional 1000 tonnes of capacity provides operational flexibility and ensures that Viterra is able to deliver port terminal capacity in a safe manner. The ACCC notes that the additional 1000 tonne tolerance is in the context of export vessel that can hold in excess of 60,000 tonnes.

In addition, the safe loading of a vessel is in the interests of access seekers. The proposed variation enables Viterra to exercise the discretion to load up to an additional 1000 tonnes without the need for an exporter to acquire additional capacity from another exporter. Providing Viterra with this discretion will also increase the efficiency of throughput at port, which is consistent with the first objective of Part IIIA.

In relation to Toepfer's submission that the exercise of the discretion should not impact on the remainder of the shipping stem, the ACCC notes that it is not in Viterra's interest to load vessels unsafely, nor is it in Viterra's interests to cause delay at port. To the contrary, the discretion to load additional tonnage without the need for an exporter to acquire additional capacity may reduce delay in that the administrative tasks associated with transferring small volumes of capacity may be avoided.

⁵⁷ Viterra, *submission in support*, p. 11.

⁵⁸ Toepfer, *submission in response*, p. 1.

The ACCC therefore considers the proposed clause 5.6(b) to be in the legitimate business interests of Viterra in maximising the efficiency of its port operations, and the interests of access seekers in being able to have their vessels loaded without the need for further transactions, having regard to subsections 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA. The ACCC also considers that the proposed clause 5.6(b) promotes the economically efficient use of the port terminal infrastructure, having regard to subsection 44ZZA(3)(aa) of the CCA.

In consideration of the above matters it is the ACCC's preliminary view to accept the proposed clause 5.6(b) as appropriate, having regard to sub. 44ZZA(3) of the CCA.

4.5 Two port loading

The procedural rules regarding two port loading are outlined at clause 5.7 of the PLPs. Clause 5.7 governs the situation where a customer of Viterra has arranged to load its vessel at two ports, arrives within its original booking slot at the first port and then suffers a delay which causes the vessel to arrive outside of its booking slot at the second port.

These rules are intended to provide operational flexibility to Viterra to manage delays efficiently and to reduce the impact of those delays on affected customers. Viterra's Application to extend and vary seeks to change these rules to clarify the terms and nature of its discretion.

Viterra proposes to amend 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.⁵⁹

Viterra also proposes to amend 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 5.6(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.

4.5.1 Viterra's supporting submissions

Regarding the proposed amendment to clause 5.7(a)(ii), Viterra submits:

The proposed amendment is intended to make it clear 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.⁶⁰

Regarding the proposed amendment to clause 5.7(c), Viterra submits:

The proposed amendment is intended to clarify the flexibility that is available to Clients undertaking two-port loading in terms of the ways that they can re-distribute the loading of tonnes across the two ports. This flexibility is intended to provide benefits both for Clients and in terms of the operational efficiency of the Port Terminals.⁶¹

4.5.2 Stakeholders' views

Toepfer submits its support to the variation to increase operational flexibility through two port loading that facilitates commercial utilisation of the port infrastructure.

Toepfer adds:

⁵⁹ Viterra, *PLPs*, clause 5.7.

⁶⁰ Viterra, *submission in support*, p. 11.

⁶¹ *ibid.*

Such flexibility should be executed without subsequent impact on the remainder of the shipping stem.⁶²

4.5.3 The ACCC's preliminary view

The ACCC considers the two port loading provisions in Viterra's PLPs to be in the legitimate business interests of Viterra and also in the interests of access seekers. The ACCC also considers that the proposed variations to these provisions improve and clarify the provisions of clause 5.7.

The proposed clarification in clause 5.7(a)(ii) that an exporter will not forfeit a booking at a second port if arriving within the grace period at the first port provides additional flexibility to access seekers. The addition of the 10-day grace period (defined in clause 5.5(a)(i) of the PLPs) provides Viterra additional time in which to commence the loading process and reduces the likelihood that minor delays will have major impacts (for example, where an exporter arrives outside of its original booking slot and is required to make an additional booking). The ACCC considers that this additional 10-day window also provides access seekers with additional commercial flexibility and to be generally in the interests of access seekers, having regard to subsection 44ZZA(3)(c) of the CCA.

The proposed amendment to clause 5.7(c), similarly, provides exporters with additional flexibility in the way that they accumulate grain against booked capacity. The ACCC considers that the additional flexibility to complete two port loading in desired proportions to be in the interests of access seekers, having regard to subsection 44ZZA(3)(c) of the CCA. The ACCC also considers that the efficient distribution of tonnages to be in the interests of Viterra's port operations and the general efficient use of the port infrastructure, having regard to subsections 44ZZA(3)(c) and 44ZZA(3)(aa) of the CCA.

In consideration of the above matters it is the ACCC's preliminary view to accept the proposed amendments to clause 5.7(a)(ii) and 5.7(c), having regard to subsection 44ZZA(3) of the CCA.

4.6 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 FIFS 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 shipping stem for FIFS bookings. The restrictions provided for in clause 2.4(g) applied to new bookings for capacity do not apply to applications to move bookings acquired at auction.

Viterra propose to amend 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:

(iii) the Capacity at the Slot to which the Client has requested the Booking be moved 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.

4.6.1 Viterra's supporting submissions

Viterra submits:

The proposed amendment clarifies that Clients cannot move a booking until after the shipping stem opens for first-in-first-served booking 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

⁶² Toepfer, *submission in response*, p. 1.

of the shipping stem will not be subject to the “half hour rule” (i.e. there is no requirement that Clients can move only one Booking in each half hour period).⁶³

4.6.2 Stakeholders’ views

Toepfer submits its general concern regarding the movement of FIFS capacity:

Toepfer are of the opinion that simultaneous movement of booking acquired at auction once the first in, first serve opens has led to increased manipulation of the auction system. The intent of the auction is to allocate shipping capacity to those whom value it the most as the primary allocator of capacity. The relocation of capacity within auction from higher to lower demand slots/Ports, with the intent to reposition with multiple logins under the first in, first serve is clear conduct of manipulation.⁶⁴

Toepfer further submit its specific concern regarding the 2013/2014 auction process:

This was demonstrated in the 2013/14 capacity auction and subsequent opening of first in, first serve where 195, 000mt of acquired auction capacity at Thevenard was repositioned to alternative Ports/slots of higher demand. Such conduct only further creates uncertainty in which capacity has been acquired under the first in, first serve and accordingly the movement of acquired capacity under auction should be governed by the same principles of the first in, first serve in the 48 hours after auction.⁶⁵

4.6.3 The ACCC’s preliminary view

The ACCC notes that Viterra’s amendment to clause 7 of its PLPs is not a material change to its existing approach to the movement of FIFS bookings. The ACCC considers this amendment to be a clarification of existing arrangements that the ACCC considered appropriate in its assessment of Viterra’s 2011 Undertaking. The ACCC considers that the amendment provides greater certainty to access seekers and is therefore appropriate, having regard to subsection 44ZZA(3)(c) of the CCA.

In response to Toepfer’s submission that applications to move bookings of capacity acquired at auction should be subject to the same restrictions as new capacity bookings, the ACCC notes that the capacity allocation systems operated by Viterra are designed so that the auction is the primary means of allocating capacity and that exporters are discouraged from attempting to acquire capacity through the FIFS system. The uncertainty in acquiring capacity via the FIFS system, and priority afforded to capacity acquired at auction, provides an incentive for exporters to acquire capacity at auction. The ACCC notes that the only way that exporters can be assured of securing preferred capacity is to do so through the auction system. Further, regarding Toepfer’s concern that capacity has been moved from high to low demand slots, the ACCC does not consider capacity to be in ‘high demand’ if exporters have not bid for it at auction.

In general the ACCC considers that the movement of bookings generally assists with the efficient use of port terminal infrastructure. An ability to move bookings ensures that peak shipping capacity is less likely to go unused. Further, the ability to move booking provides greater operational flexibility to exporters in terms of executing an export program.

In consideration of the above matters it is the ACCC’s preliminary view to accept the proposed amendments to clause 7(e) of the PLPs as appropriate, having regard to subsection 44ZZA(3) of the CCA.

4.7 Movement of bookings between Inner Harbour and Outer Harbor

Viterra proposes to insert a new clause 7(g) into the PLPs to allow the movement of bookings between Inner Harbour and Outer Harbor. The new clause 7(g) reads:

⁶³ Viterra, *submission in support*, p. 11.

⁶⁴ Toepfer, *submission in response*, p.3.

⁶⁵ *id.*

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 vice 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.

4.7.1 Viterra's supporting submissions

Viterra submits regarding the purpose of the new clause:

The purpose of the change 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).⁶⁶

Viterra adds in support:

The amendment clarifies that the movement can take place without the need for a new booking and that, in making any move, Viterra Operations will take reasonable steps to minimise the impact on other Clients.

The amendment will not have any impact on auction rebate payments as Outer Harbor and Inner Harbour form part of the same rebate pool for the purposes of any auction.⁶⁷

4.7.2 Stakeholders' views

Toepfer submits regarding the movement of bookings between Inner Harbour and Outer Harbor:

Toepfer do not oppose the flexibility in repositioning acquired capacity between Outer Harbour and Inner Harbour for operational efficiency. If capacity is repositioned from Outer Harbour to Inner Harbour for the efficient utilisation of Port infrastructure and to mitigate Port congestion, the shipper should not be penalised the additional costs incurred through the additional transfer premium and Port, Handling and Shipping Fees. Assume this would be facilitated through commercial negotiation at time of reposition.⁶⁸

4.7.3 The ACCC's preliminary view

The ACCC considers that the ability to move bookings between Inner Harbour and Outer Harbor is in the legitimate business interests of Viterra and the interests of access seekers. The ACCC also considers that by enabling Viterra to move bookings between Inner Harbour and Outer Harbor, it will increase the overall operational efficiency of the port terminal infrastructure.

The ACCC considers the ability to move bookings between Inner Harbour and Outer Harbor facilitates flexible shipping arrangements that are likely to assist in maximising throughput at port. The ACCC therefore considers the movement of bookings to be in the legitimate business interests of Viterra and the efficient use of the port terminal infrastructure, having regard to subsections 44ZZA(3)(a) and 44ZZA(3)(aa) of the CCA. In addition, the ACCC considers that the ability to move bookings between Inner Harbour and Outer Harbor promotes the efficient operation of the bulk wheat export industry, which is consistent with the objects of the WEMA.⁶⁹

The ability of Viterra to move bookings between ports is likely to reduce delays at port and aid in the efficient delivery of port terminal services. This is likely to produce a benefit for access seekers in terms of minimising or avoiding any potential delays at port.

Regarding Toepfer's submission that it would be inappropriate for exporters to incur additional costs as a result of a booking movement between Inner Harbour and Outer Harbor, the ACCC notes that per clause 7(g) such movement can only take place 'with the Client's consent'. Further, it is unlikely to be in Viterra's interests to discourage the efficiency gains of a mutually beneficial booking movement

⁶⁶ Viterra, *submission in support*, p. 11.

⁶⁷ *ibid*, p. 11.

⁶⁸ Toepfer, *submission in response*, p. 34.

⁶⁹ s.3(b) of the WEMA.

by charging its customers to make that movement. Regardless, clause 7(g) imposes no obligation on a customer to consent to the movement if the relevant terms are not acceptable to them.

The ACCC notes that there is an ability for Viterra to exercise this discretion in a manner that causes a significant disadvantage to a minority of exporters. However, the ACCC notes further that the exercise of this discretion is subject to the 'no hindering access' provision of the Undertaking. The ACCC would expect Viterra to have regard to this provision in making any decisions pursuant to this provision. The ACCC also notes that clause 7(g) itself requires Viterra to take 'reasonable steps to minimise the impact on other Clients at those Port Terminals.'

In consideration of the above matters it is the ACCC's preliminary view to accept the proposed amendments to clause 7(g) of its PLPs as appropriate, having regard to section 44ZZA(3) of the CCA.

4.8 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.

The payment of charges is governed by clause 8 of the standard terms. The timing of invoices is specified in the reference prices and the PLPs.

4.8.1 Viterra's supporting submissions

Viterra submits:

The proposed amendment makes it clear that Clients cannot transfer a Booking unless and until they have paid both: (a) the booking fee or Auction Fee and premiums in relation to the Booking, and (b) any other fees and charges that are at that time due and payable to Viterra Operations. The purpose of the amendment is to discourage the speculative acquisition of capacity intended only for on-sale to other exporters.⁷⁰

4.8.2 The ACCC's preliminary view

The ACCC considers Viterra's proposed amendment to clause 9(a)(vii) of the PLPs provides greater certainty as to the payment of fees in relation to capacity that is transferred between exporters.

Viterra proposes to replace an obligation on transferors of bookings to pay 'all fees and charges which are at that time due and payable', to an obligation to pay 'any booking fee, Auction Fee or Auction premiums payable'. The ACCC considers that this amendment appropriately clarifies that the exporter that acquires the capacity must pay the relevant fees, not a potential transferee. It is the ACCC's view that greater certainty regarding the arrangements is in the interests of access seekers, having regard to subsection 44ZZA(3)(c) of the CCA.

In relation to the submission made by Viterra, the ACCC considers that the variation is consistent with the rules concerning transferability that are intended to prevent parties from booking capacity for another party's benefit. These are discussed above at Chapter 4.3.

In consideration of the above matters it is the ACCC's preliminary view to accept the proposed amendments to clause 9(a)(vii) of its PLPs as appropriate, having regard to section 44ZZA(3) of the CCA.

⁷⁰ Viterra, *submission in support*, p. 11.

4.9 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 adjustment⁷¹
- Clause 8.5 – Set off⁷²
- Clause 10.1 – Company’s lien and security interest⁷³
- Clause 27A – PPS Law⁷⁴

4.9.1 The ACCC’s preliminary view

Consistent with the ACCC’s decision to accept AusBulk’s 2009 Undertaking (now Viterra), and Viterra’s 2011 Undertaking, the ACCC remains of the view that it is necessary for the standard terms to ensure the following:

- the inclusion of a robust dispute resolution process that balances the legitimate business interests of the port terminal operator with the interests of access seekers
- any ability of the port terminal operator to unilaterally vary the terms of an executed indicative access agreement is only to be exercised in appropriate circumstances
- the terms and conditions of the indicative access agreement must provide for sufficient certainty and clarity in their terms, effect and operation.⁷⁵

The ACCC is of the view that the Standard Terms, and the proposed variations, remain consistent with the above elements.

The ACCC acknowledges that all elements of the Standard Terms, including the proposed variations listed above, are subject to negotiation between Viterra and access seekers in accordance with the publish-negotiate-arbitrate model. The Standard Terms represent an appropriate ‘starting point’ for those negotiations and in the event that negotiations between Viterra and access seekers fail, parties are able to apply to the ACCC for arbitration.

Considering the above discussion, the commercial nature of the contract terms that Viterra proposes to vary, that access seekers are able to negotiate different terms (with recourse to dispute resolution), and the lack of concerns raised by access seekers about the changes to these terms, the ACCC has not formed a specific view on each of the proposed variations. The ACCC’s preliminary view is that the proposed amendments to the Standard Terms do not raise any concerns and proposes to consent to the proposed variations.

4.10 Other variations

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

⁷¹ Viterra, *Application to extend and vary Undertaking; Standard terms*, clause 7.13.

⁷² Viterra, *Standard terms*, clause 8.5.

⁷³ Viterra, *Standard terms*, clause 10.1.

⁷⁴ Viterra, *Standard terms*, clause 27A.

⁷⁵ ACCC, *Viterra Operations Limited Port Terminal Services Access Undertaking, Draft Decision*, 11 August 2011, p. 34.

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

All variations, including a summary document drafted by Viterra are available on the ACCC's website.

4.10.1 The ACCC's preliminary view

The ACCC considers these variations as relatively minor or technical in effect. It is the ACCC's preliminary view that it is appropriate to consent to these minor variations as going forward, they should provide greater clarity and certainty with respect to the operation of the 2011 Undertaking and its component parts. Accordingly, having regard to subs.44ZZA(3)(c), it is the ACCC's view that clarity as to the operation of these provisions is in the interests of access seekers.

5 Draft Decision

The ACCC has considered the Application to extend and vary provided to the ACCC by Viterra on 25 July 2013, pursuant to subsections 44ZZBB and 44ZZA(7) of the CCA. The ACCC's preliminary view is that, having regard to the matters listed in subsection 44ZZA(3) of the CCA and having considered the submissions received in response to the ACCC's Issues Paper, overall it would be appropriate to accept Viterra's application.

The ACCC seeks views from interested parties on its draft decision. The ACCC also invites further views on Viterra's Application to extend and vary.