



Viterra Operations Limited

2011 Port Terminal Services Access Undertaking

Transition to Proposed Access Undertaking

1 Introduction

1.1 Purpose of submission

This submission sets out Viterra Operations' plan for implementing transitional arrangements to a new system for allocating capacity under the Proposed Access Undertaking.

1.2 Summary

Viterra Operations proposes to introduce a new auction, booking and nomination system ("**Auction System**") which will apply from mid-2012.

Viterra Operations will take the following steps to deal with capacity constraints at Port Adelaide Outer Harbor and Port Lincoln during the period 1 January to 30 April 2012:

- (a) Viterra Ltd will voluntarily vacate [*confidential*] tonnes of its existing pending bookings that would otherwise take priority at Port Adelaide Outer Harbor and Port Lincoln during the period 1 January to 30 April 2012 to make way for existing bookings by other exporters. Following the surrender of [*confidential*] tonnes and the movement of a further [*confidential*] tonnes to other ports Viterra Ltd will have a share of bookings at Outer Harbour and Port Lincoln for January to April 2012 that is comparable to its share of initial bookings for, and actual shipments from, those two ports during the corresponding period in 2011.

Viterra Ltd intends to vacate these bookings voluntarily in order to address issues that have been raised in relation to Outer Harbor and Port Lincoln during the January to April 2012 period, and as a pragmatic solution to secure ACCC approval of the Proposed Access Undertaking.

- (b) Viterra Operations will close the shipping stem to allow for existing bookings to be accepted in accordance with the current Port Loading Protocols. Once the shipping stem is re-opened, Viterra Operations will continue to offer capacity on a "first in first served" ("**FIFS**") basis until the introduction of the new Auction System. Viterra Operations will provide all clients with equal notice of the re-opening of the shipping stem to enable these bookings.
- (c) Pending the introduction of the Auction System, Viterra Operations will allow clients to transfer bookings, move bookings between ports and slots, and will provide an incentive for the early surrender of slots that will not be used. This will facilitate greater flexibility and the use of slots by exporters that value them most.

Further details of Viterra Operations' proposed transitional arrangements are set out below and in Attachment 1.

2 Transition to the Proposed Access Undertaking

2.1 Introduction

The ACCC has raised certain concerns in relation to:

- the current FIFO method for allocating capacity at Viterra Operations' Port Terminals;
- the perceived lack of flexibility for exporters in dealing with their bookings for exports from Viterra Operations' Port Terminals; and
- a perceived lack of transparency and clarity in relation to the available capacity at Viterra Operations' Port Terminals and the operation of Viterra Operations' shipping stem.

Viterra Operations proposes to address these concerns by introducing an Auction System to apply from mid-2012. In addition, prior to the implementation of the Auction System:

- (a) Viterra Operations will introduce an ability for clients to move bookings to other Slots or Port Terminals, an ability for clients to transfer Slots to other exporters, and an ability and financial incentive for clients to surrender unwanted bookings early, so that they can be used by other clients;
- (b) Viterra Operations will publish significant additional information on its website, in relation to the available port capacity and stocks held at its Port Terminals. This capacity information is likely to assist clients to assess the potential availability of capacity so that they can plan their shipping programs;
- (c) Viterra Limited will voluntarily vacate a substantial volume of its existing pending bookings from Outer Harbor and Port Lincoln during the period 1 January to 30 April 2012 to make way for bookings by other exporters. Following the vacation of these bookings, Viterra Ltd will have:
 - (i) a share of bookings at Outer Harbour and Port Lincoln for January to April 2012 that is comparable to its share of initial bookings for, and actual shipments from, those two ports during the corresponding period in 2011. There has also been an increase in capacity at Outer Harbor, which will result in even further capacity being made available to third party exporters; and
 - (ii) total bookings on the shipping stem for the 2011/2012 season which are substantially less than its total volume of exports in the 2010/2011 season to date; and
- (d) Viterra Operations will take a number of practical measures to increase certainty for clients in relation to the operation of the shipping stem, including increased communications (see below). The proposed transition to new auction rules will also provide greater clarity and transparency for clients.

2.2 The need for transitional arrangements

As previously discussed with the ACCC, it is not possible for Viterra Operations to introduce a new auction system in respect of any available capacity for shipments from 1 October 2011 or 1 January 2012. The time required for planning, system design, system implementation, and effective client communications and education about a completely new system does not permit the introduction of an auction system within the next few weeks, which would be necessary in order to apply to any available capacity from 1 October 2011.

It is necessary to undertake significant work, and engage appropriate resources, in designing, implementing and communicating any new system in order to avoid the significant risk of unintended consequences. It is also imperative, both for Viterra Operations and clients, that there is certainty in relation to the way that bookings will be allocated well prior to this date.

Accordingly, Viterra Operations is proposing a transition to an Auction System which seeks to balance:

- (a) the ACCC's desire to see an auction system introduced as soon as practicable (together with ACCC oversight of the system that is introduced);
- (b) the time genuinely required to plan, design, engage with clients and the ACCC, and implement the completely new system; and
- (c) Viterra Operations' desire to accept bookings made by clients in good faith in accordance with, and subject to, the Current Access Undertaking.

The matters set out in paragraphs (b) and (c) above are fundamental to Viterra Operations' legitimate business interests. They are also fundamental to the interests of persons who want access to the Port Terminal Services.

2.3 Implementation of the proposed transitional arrangements

Viterra Operations' proposed transition plan is set out below.

A new Auction System

- (a) Viterra Operations has already commenced work in relation to the planning and design of the Auction System. This work will involve appointing a project team and any necessary consultants, reviewing other auction systems, considering system and technology implementation issues, consulting informally with clients in relation to potential models and preparing proposed changes to the Port Loading Protocols and Standard Terms;
- (b) Once this is completed, Viterra Operations will commence formal consultation with clients and the ACCC in relation to variations to the Port Loading Protocols and Standard Terms. Viterra Operations has proposed that this will occur by no later than January 2012. This is intended to provide Viterra Operations with time to design an auction system which will efficiently allocate capacity in South Australia without unintended consequences. It is also intended to allow both Viterra Operations and clients an opportunity to focus on key business requirements at the start of and during the harvest season. It also seeks to avoid likely practical difficulties in consulting formally with clients and the ACCC over the summer holiday period;
- (c) Viterra Operations will provide clients with a period of at least 15 Business Days to provide comments. The ACCC will have a further period of 45 Business Days to review, and if necessary, object to the proposed amendments having regard to the matters set out in the Proposed Access Undertaking;
- (d) Viterra Operations will introduce the Auction System by the date specified in the Proposed Access Undertaking. However, this date may be extended for a finite period if the ACCC raises objections in relation to the proposed variations, which Viterra Operations needs to address; and

- (e) If Viterra Operations does not introduce the Auction System by that date (as extended), Viterra Operations will not be in breach of the Proposed Access Undertaking. However, Viterra Operations will not be able to provide Port Terminal Services to Viterra Limited in respect of Bulk Wheat unless and until the Auction System is implemented. The purpose of this solution is to provide a very strong incentive for Viterra Operations to implement the system.

Treatment of bookings prior to the Auction System

Viterra Operations considers it to be important that it treats the currently pending bookings for the 2011/2012 season in accordance with the processes set out in the Current Access Undertaking. With the new season three months away, it is becoming critical to deal with the pending bookings as soon as possible.

Accordingly, Viterra Operations proposes to honour all bookings made under the FIFS system (other than those voluntarily surrendered by Viterra Ltd), regardless of whether the execution of those bookings is before or after the auction implementation date. Viterra Operations will also continue to receive bookings from all clients on a FIFS basis until the Auction System is implemented.

This approach is both necessary and desirable, as there is and will be remaining capacity available on Viterra Operations' shipping stem for various port and various periods. Clients also need to be able to avail themselves of the ability to book shipments under the current booking system given that there is not yet a precise implementation date for the Auction System.

Having regard to this "grand-fathering" of existing bookings, the first auction will be only in respect of available capacity during the relevant auction period.

To enable Viterra Operations to accept bookings and give effect to this transition, Viterra Operations will close the shipping stem and re-open it in stages (i.e. 1 October to 31 December 2011 and then 1 January 2012 to 30 September 2012), so that all exporters have equal notice of the re-opening of the shipping stem to make bookings.

Unless otherwise agreed with the ACCC, Viterra Operations will not receive any bookings onto the shipping stem for execution post-1 October 2012 until the Auction System is in place or if, in accordance with the Undertaking, Viterra Operations is prevented from providing Port Terminal Services to Viterra Ltd, Viterra Operations opens the shipping stem for third party exporters for the relevant period.

Steps to address concerns in relation to pending bookings

Viterra Operations is mindful of the concerns raised by the ACCC in relation to the current FIFS bookings. However, Viterra Operations considers that these concerns should be addressed by:

- (a) Viterra Limited will voluntarily vacating [*confidential*] tonnes of its bookings during the January to April 2012 peak period at Outer Harbor and Port Lincoln;
- (b) Viterra Operations introducing substantial new flexibility for bookings (e.g. transferability, movability and incentives for early surrender). These new measures will apply to all bookings post-1 October 2011 regardless of when the booking was made; and
- (c) Viterra Operations publishing further information in relation to capacity at its Port Terminals, to assist clients in making bookings and in exercising the new ability to move and transfer bookings.

Viterra Operations considers that these measures appropriately balance the considerations set out in section 2.2 above. Viterra Operations also considers that this proposal is consistent with the matters set out in section 44ZZA of the *Competition and Consumer Act 2010* (Cth).

Viterra Operations notes for completeness a previous suggestion by the ACCC that it could possibly seek to allocate capacity during the January to April 2012 period on a pro rata basis between exporters. However, Viterra Operations considers that this would be contrary to its obligations under both the Port Loading Protocols and its contracts with exporters which do not contemplate allocation on this basis. There is currently no basis on which it can require this from exporters.

Allocation on this basis would also be undesirable as it would create substantial uncertainty. It would introduce a third system of allocation to apply within the one season (that is, first in first served for some bookings, pro rating of other bookings, and an auction of further bookings). Having regard to the level of bookings vacated by Viterra Ltd from Outer Harbor and Port Lincoln, the ability for exporters to make bookings at other Port Terminals (which will be facilitated by publication of capacity data), and the ability for exporters to trade and move bookings, Viterra Operations considers that the further pro rating of bookings is neither necessary nor desirable to address the issues raised by the ACCC.

3 Implementation of transitional arrangements

To give effect to this transition plan, Viterra Operations will undertake the following practical steps:

- (a) **Step 1** - Viterra Operations will send an “all client” communication:
 - (i) advising clients that the shipping stem will remain closed to new bookings until further notified, while Viterra Operations communicates with clients in relation to their respective bookings;
 - (ii) advising that Viterra Limited will be:
 - (A) voluntarily surrendering [confidential] tonnes at Outer Harbor and [confidential] tonnes at Port Lincoln; and
 - (B) voluntarily moving a further [confidential] tonnes of bookings from Port Lincoln and [confidential] tonnes from Outer Harbor to Port Giles and Wallaroo (which do not have capacity constraints),in order to make these slots in January to April 2012 available to other exporters. If, for any reason, slots are not available at Port Giles and Wallaroo, Viterra Ltd will also surrender these bookings.

[confidential] vacating these bookings is intended to be a pragmatic solution to address the ACCC’s concerns and to secure acceptance of the Proposed Access Undertaking; and
 - (iii) requesting clients to advise Viterra Operations within 3 business days if they wish to surrender voluntarily any of their bookings at Port Adelaide or Port Lincoln during the January to April 2012 period or move them to another port (subject to availability), in each case without penalty. If the new slot is not available on a FIFS basis, the client will not lose its priority to the existing pending slot.

This communication will be sent via email and posted on Viterra Operations' website;

- (b) **Step 2** - Viterra Operations will process each of the pending bookings in accordance with the current Port Loading Protocols, and will advise clients whether or not their bookings have been accepted. This will include Viterra Operations accepting the currently pending bookings for the period 1 October 2011 to 31 December 2011 in accordance with the current Port Loading Protocols.

Viterra Operations will enter into further negotiations with clients whose bookings have not been accepted in accordance with the all client communication sent on 16 March 2011. Viterra Operations will conclude these negotiations expeditiously so that it can re-open the shipping stem¹. Any acceptances will be subject to the conditions set out in section 3.2 below; and

- (c) **Step 3** - Viterra Operations will send an "all client" email 5 business days prior to the re-opening of the shipping stem for bookings. That communication will make it clear when the shipping stem is re-opening for bookings and for which period that re-opening relates. At the time of the "all client" communication, Viterra Operations will also publish information about the capacity at all Port Terminals. This will assist clients in determining the potential availability of other Slots, which can continue to be booked on a FIFS basis until the introduction of the Auction, System. All clients will be able to participate on an equal basis once the shipping stem re-opens.

Viterra Operations will invoice clients for booking fees in respect of accepted bookings in accordance with its current arrangements.

3.2 Conditions for acceptance of bookings

Viterra Operations will accept bookings in accordance with the process outlined above subject to the following conditions:

- (a) any "Port Terminal Services" provided in respect of those bookings after 1 October 2011 (e.g. in-loading, storage and out-loading) will be subject to the terms of the access undertaking, Standard Terms, Port Loading Protocols and Reference Prices that apply at the time those services are provided². This means that the new rules in relation to movement, surrender and transferability of bookings will apply from 1 October 2011;
- (b) the client submits an Access Application in accordance with the Proposed Access Undertaking (as this is the date from which time periods for negotiations and any disputes are measured under the access undertaking);
- (c) if the booking is for Bulk Wheat, the client is accredited by WEA at the time the Port Terminal Services relating to the execution of the booking are provided; and
- (d) the exporter pays the booking fee for the relevant bookings within the currently required period from acceptance.

¹ Viterra Operations will undertake these negotiations and, where possible, accept alternate bookings for clients (pursuant to clause 4.4 of the Protocols, while the shipping stem remains closed. The purpose of this is to facilitate acceptance of bookings without the complication of receiving new bookings at the same time.

² In accordance with the Proposed Access Undertaking, clients will have an ability to negotiate the Standard Terms and the Reference Prices, with potential recourse to the dispute resolution procedures. While any negotiation takes place, the Standard Terms will apply to the provision of the Port Terminal Services to which the bookings relate.

4 Conclusion

Viterra Operations considers that each these measures outlined above should address the ACCC's concerns in relation to the current FIFS system and bookings, and also appropriately balance the considerations set out in section 2.2 above.

Viterra Operations also considers that this proposal – together with the other proposed amendments to the access undertaking – is consistent with the matters set out in section 44ZZA of the *Competition and Consumer Act 2010* (Cth).

As previously discussed with the ACCC, Viterra Operations considers that there is a very real and pressing need to provide exporters with greater certainty in relation to bookings for the up-coming season. The new season starts from 1 October 2011 and it is not possible, nor in the interests of either exporters or Viterra Operations, to wait until late September 2011 before determining how bookings will be treated. It is in the interests of both Viterra Operations and exporters to ensure that ships can continue to be ordered and loaded on and from 1 October 2011.

The transitional plan achieves this objective.

If the ACCC has any questions, Viterra Operations would be pleased to assist.

22 July 2011

Attachment 1

1. Comparison of bookings in January - April 2012 to the same period in 2011

The ACCC has indicated that, based on a review of the shipping stem as at 23 December 2010, Viterra Ltd had:

- 31% of all grain bookings at Outer Harbor for the period 1 January to 30 April 2011; and
- 24% of all grain bookings at Port Lincoln for the period 1 January to 30 April 2011.

The ACCC has indicated that these figures are likely to provide an appropriate benchmark for assessing the level of currently pending bookings by Viterra Ltd in respect of the period 1 January to 30 April 2012.

Viterra Operations does not agree that a snapshot of the shipping stem as at 23 December 2010 provides an appropriate benchmark for assessing the level of Viterra Ltd's currently pending bookings.

First, data from any previous season provides relatively limited information in relation to future years. The volumes of grain booked and shipped by all exporters varies on a yearly basis, and a purely historical perspective does not take account of any growth or competition for increased exports. [*confidential*].

Second, even if the ACCC were to make an assessment of "reasonable requirements" having regard to the same period during the previous season, the status of the shipping stem as at 23 December 2010 is not an appropriate way to undertake this comparison. The shipping stem as at 23 December 2010 provides only a snapshot of bookings as at that particular date, which is a date that is between 8 and 128 days earlier than the dates of actual shipments. It does not take account of any new bookings, any cancellations or any split bookings that occurred during that period.

Viterra Operations appreciates that an historical snapshot of bookings may provide an illustration of the initial or "primary" bookings that were made before the start of the relevant period. However, bookings, nominations and cancellations are a dynamic process and, as a result, Viterra Operations considers that a more appropriate comparison is to look at the actual share of exports during the relevant period.

In addition, Viterra Operations would expect that all exporters are likely to make their initial nominations in succeeding years having regard (among many other factors) to the volume of grain that they actually exported during previous periods. Viterra Operations would not expect that exporters would have a particular focus on the initial level of their bookings during the prior season (i.e. without regard to subsequent cancellations and new bookings).

Accordingly, if the ACCC intends to assess the level of Viterra Ltd's currently pending bookings against the January to April 2011 period (on the basis that the ACCC considers that the 2011 period involved more competitive outcomes), Viterra Operations submits that a more appropriate approach would be to compare the currently pending bookings against Viterra Ltd's **actual** share of exports during that period.

Details of actual exports by Viterra Ltd and other exporters during the period 1 January to 30 April 2011 are set out in Table 1 below. In summary, Viterra Ltd exported:

- 35.7% of all grain commodities from Outer Harbor during that period; and
- 30.3% of all grain commodities from Port Lincoln during that period.

In addition, Port Adelaide Outer Harbor and Port Adelaide Inner Harbor effectively operate as a single port. In the period January to April 2011, Viterra Ltd exported [confidential] tonnes from Inner Harbor. It currently has no bookings for the January to April 2012 period at Inner Harbor.

[confidential]

Table 1 - Grain exports by Viterra Ltd from Outer Harbor and Port Lincoln (January - April 2011)

	Viterra Ltd (tonnes)	Total exports (tonnes)	Viterra Ltd share of exports
Outer Harbor			
Bulk Wheat	[confidential]	[confidential]	[confidential]
Barley	[confidential]	[confidential]	[confidential]
Canola	[confidential]	[confidential]	[confidential]
Total	[confidential]	[confidential]	35.7%
Port Lincoln			
Bulk Wheat	[confidential]	[confidential]	[confidential]
Barley	[confidential]	[confidential]	[confidential]
Canola	[confidential]	[confidential]	[confidential]
Oats	[confidential]	[confidential]	[confidential]
Peas	[confidential]	[confidential]	[confidential]
Total	[confidential]	[confidential]	30.3%

2. Proposal - Voluntary surrender and movement of bookings

[confidential]

- following the withdrawal of these bookings from Outer Harbor and Port Lincoln, Viterra Ltd's bookings will account for approximately:
 - 33.9% of capacity (i.e. the bookings that are likely to be accepted) at Outer Harbor for the period January to April 2012. This compares with Viterra Ltd's 35.7% share of actual grain shipments during the period January to April 2011, and its 31% share of bookings as at 23 December 2010; and
 - 26.2% of capacity (i.e. the bookings that are likely to be accepted) at Port Lincoln for the period January to April 2012. This compares with Viterra Ltd's 30.3% share of actual grain shipments during the period January to April 2011, and its 24% share of bookings as at 23 December 2010;

[confidential]

Confidential Attachment 2

[*confidential*]