



Australian
Competition &
Consumer
Commission

Viterra Operations Limited
Port Terminal Services Access Undertaking
Decision to accept

29 September 2011



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Glossary

ABA	Australian Bulk Alliance Proprietary Limited, the operator of the Melbourne Port Terminal.
ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ACCC	Australian Competition and Consumer Commission
the Act	<i>Competition and Consumer Act 2010</i> (Cth) (previously the <i>Trade Practices Act 1974</i> (Cth))
AGEA	Australian Grain Exporters Association - representative body for exporters of Australian grain
AQIS	Australian Quarantine and Inspection Service
BHC	Vertically integrated bulk handling company
CBH	Cooperative Bulk Handling Limited
Emerald	Emerald Group Australia Pty Ltd
ESCOSA	Essential Services Commission of South Australia
FCFS	‘First come, first served’ system of capacity allocation
FOB	Free on board
GrainCorp	GrainCorp Operations Limited
Mt	Metric tonne
NCC	National Competition Council
POAGS	P&O Automotive and General Stevedoring, a supplier of stevedoring logistics and port management services in Australia
PC	Productivity Commission
PLPs	Port loading protocols
Port Terminal Services	As defined by clause 4.2 of the Revised Undertaking
Proposed 2011 Undertaking	The access undertaking received from Viterro Operations Limited on 23 December 2010
Reference Prices	The reference prices described in clause 5.2(a) or as varied in accordance with clause 5.6 in the Revised Undertaking
Revised Draft	Draft revised version of the Proposed Undertaking provided by Viterro on 10 August 2011

Revised Undertaking	Revised version of the Proposed Undertaking provided by Vitterra on 22 September 2011
SAFFGIC	South Australian Farmers Federation Grains Industry Committee
SAPAR	South Australian Port Access Regime
SARAR	South Australian Rail Access Regime
Shipping Stem	Means the stem of ships nominated by exporters for loading at Vitterra's port terminals as published by Vitterra
Standard Port Terminal Service	A Port Terminal Service specified as such in a Port Schedule attached to the Revised Undertaking
Standard Terms	the Standard Terms and conditions described in clause 5.1(a) of the Revised Undertaking, or as varied by clause 5.6(e)
VFF	Victorian Farmers Federation Grains Group
Vitterra	Vitterra Operations Limited (ABN: 88 007 556 256)—Operator of the Port Terminals in South Australia
Vitterra's trading arm	Vitterra Limited (ABN 59 084 962 130)—accredited exporter of bulk wheat
WEA	Wheat Exports Australia
WEAS	Wheat Export Accreditation Scheme 2008
WEMA	Wheat Export Marketing Act 2008 (Cth)
2009 Undertakings	Access undertakings for GrainCorp Operations Limited, AusBulk Ltd (now Vitterra Operations Limited) and Co-Operative Bulk Handling Limited accepted by the ACCC on 29 September 2009

Summary

On 28 September 2011, the Australian Competition and Consumer Commission (**ACCC**) made a decision pursuant to section 44ZZA(3) of the *Competition and Consumer Act 2010* (Cth) (**Act**) to accept a proposed access undertaking lodged by Viterra Operations Limited (**Viterra**) on 22 September 2011 (**Revised Undertaking**). The reasons for the ACCC's decision are set out in this document.

The Revised Undertaking relates to the provision of access to services for the export of bulk wheat at six grain terminals operated by Viterra in South Australia.

These terminals are:

- Port Lincoln
- Port Adelaide Inner Harbour
- Port Adelaide Outer Harbour
- Port Giles
- Thevenard
- Wallaroo.

Viterra has submitted the Revised Undertaking to meet the access test provisions of the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**), required for it or an associated entity to be accredited as a bulk wheat exporter.

The ACCC is also issuing final decisions on proposed undertakings from Australian Bulk Alliance Pty Ltd (**ABA**) regarding its operation in Victoria and Co-operative Bulk Handling Limited (**CBH**) regarding its operations in Western Australian. On 22 June 2011, the ACCC accepted an undertaking from GrainCorp Operations Limited (**GrainCorp**) regarding its operations on the east coast of Australia.

GrainCorp, Viterra and CBH each have in place an access undertaking accepted by the ACCC in 2009 (**2009 Undertakings**), while ABA has provided an undertaking to the ACCC for the first time. The ACCC considers that the 2009 Undertakings are a relevant matter in the assessment of Viterra's Revised Undertaking, in accordance with s. 44ZZA(3)(e) of the Act. This is discussed further in section 2.1.1.1.

The ACCC has considered each undertaking on its own merits and notes that, while undertakings accepted by the ACCC from each bulk handling company (**BHC**) reflect the particular circumstances of that company, there are certain aspects of the undertakings for which the ACCC has sought a consistent approach across the bulk wheat export industry.

Viterra initially submitted a Proposed Undertaking on 23 December 2010 (**Proposed 2011 Undertaking**) pursuant to Division 6 of Part IIIA of the Act (then the *Trade Practices Act 1974* (Cth)). On 11 August 2011, the ACCC issued a Draft Decision to not accept the Proposed 2011 Undertaking, but acknowledged that a revised draft of

the Proposed 2011 Undertaking submitted on 10 August 2011 (**Revised Draft**) was likely to be accepted if formally lodged by Viterra. On 22 September 2011, Viterra withdrew the Proposed 2011 Undertaking and formally submitted the Revised Undertaking.

ACCC view on key issues

Overall approach

The overall approach of the Proposed 2011 Undertaking has been retained in the Revised Undertaking. This approach includes the following mechanisms for the provision of access:

- a publish-negotiate-arbitrate model for price and non-price terms of access
- obligations to provide non-discriminatory access and not to engage in conduct with the purpose of hindering access
- obligations to negotiate access in good faith
- provisions for arbitration of access disputes

The Revised Undertaking differs from the Proposed 2011 Undertaking in regards to the following features:

- the introduction of an auction system as opposed to a first come, first served approach;
- increased transparency with regard to:
 - available capacity
 - specific services provided for fees charged
 - stocks at port
- additional powers and an enhanced role for the ACCC

In the Draft Decision, the ACCC took the preliminary view that the Revised Undertaking was likely to be appropriate having regard to the matters in s. 44ZZA(3).

Capacity allocation method

It is the ACCC's view that an auction system is an appropriate means for allocating port terminal capacity in South Australia. The ACCC formed the view that the first come, first served (**FCFS**) capacity allocation system operated by Viterra under its 2009 Undertaking did not operate effectively in periods of constraint, most notably for bookings made for the 2011/2012 season.

Viterra's Revised Undertaking proposes to introduce an auction system by mid 2012 after engaging with industry on the design and development. The Revised

Undertaking also provides that the ACCC is to have an oversight role with respect to the final design of the auction system.

Submissions from stakeholders support the introduction of an auction system; however, four of the eleven submissions raise concerns regarding the payment of fees and suggest that there must be a mechanism within the auction system to ensure competitive neutrality between Viterra's own trading arm and third party exporters in making capacity bookings.

In making its decision to accept the undertaking, the ACCC has formed the view that the obligations in the Revised Undertaking to introduce an auction system, including that the auction rules satisfy a number of principles specified in the Undertaking, is appropriate. The process specified in the Undertaking includes industry consultation and based on submissions received the ACCC expects industry to be actively involved in the process of designing the auction rules. Through its oversight role, the ACCC will ensure that the final auction design is appropriate having regard to the legislative framework of the Act and the objectives of WEMA.

Transitional arrangements

Prior to the introduction of the auction system, Viterra proposes to continue the FCFS capacity allocation system as it currently exists in the 2009 Undertaking. Pursuant to these arrangements alone, capacity at Viterra's two most favoured terminals—Port Lincoln and Port Adelaide Outer Harbour—has been booked out by two exporters for the peak shipping period of January to April 2012. In order to address concerns raised by stakeholders and the ACCC, regarding the detrimental effect on competition resulting from having only two exporters with access to these ports for this period, Viterra has removed a proportion of its own trading arm's bookings from these ports during this period to allow capacity to be used by other third party exporters.

From 1 October 2011, Viterra will also introduce measures in its Revised Undertaking to increase the flexibility of capacity bookings and give an incentive for the return of unwanted capacity so that it can be offered back to the market. These measures include allowing bookings to be transferred between shippers and allowing shippers to move their bookings to different shipping periods or ports, provided there is available capacity.

Concerns raised by a number of industry participants in relation to the transitional arrangements proposed by Viterra relate to the fairness and transparency of the initial allocation of capacity, the large proportion of bookings held by a small number of exporters and the effect this will have on competition and prices in the upstream market.

Notwithstanding these submissions, the ACCC remains of the view that the transitional arrangements proposed by Viterra are a pragmatic approach to the interim period prior to the introduction of an auction and will allow for more competition in the upstream market than would have been the case in the absence of such arrangements. The ACCC understands that Viterra's proposal will allow a total of seven exporters to access capacity at each of Port Lincoln and Port Adelaide Outer Harbour. It is the ACCC's view that the arrangements will increase competition in the upstream wheat purchasing market and will have beneficial effects for growers.

For the corresponding period in 2011, eight exporters accessed each of these two ports.

This issue is discussed further in chapter 3 of this Final Decision.

Approach to pricing

The Revised Undertaking requires Viterra to publish details in relation to the specific services covered by its standard charges set out in the References Prices. The ACCC has formed the view that this provision in the Revised Undertaking will increase the transparency of Viterra's differential charges and criteria for the application of those charges, and is appropriate having regard to the interests of access seekers in accordance with s. 44ZZA(3)(c) of the Act. The ACCC considers that the additional information provided by Viterra under the Revised Undertaking will allow access seekers to negotiate which particular services they require, regardless of the 'approved' or 'non-approved' status of the origin of the wheat.

Decision

As set out in Chapter 6, on 28 September 2011, the ACCC decided to accept the Revised Undertaking provided by Viterra on 22 September 2011.

In reaching its decision the ACCC has had regard to all matters listed in s. 44ZZA(3), and is of the view that the Revised Undertaking is appropriate to accept having regard to each of those matters.

The ACCC has considered the views of stakeholders in reaching its decision to accept the Revised Undertaking.

1 Background

Under Division 6 of Part IIIA of the Act, the ACCC may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

The ACCC received the Revised Undertaking from Viterra on 22 September 2011. The Revised Undertaking relates to the provision of access to services for the export of bulk wheat at six grain terminals operated by Viterra in South Australia.

Viterra submitted the Revised Undertaking in accordance with legislative requirements under the WEMA, as set out in Chapter 2.

1.1 Process leading to the Revised Undertaking

In the ACCC's Draft Decision released on 11 August 2011 (**Draft Decision**), the ACCC took the view that the Proposed 2011 Undertaking submitted by Viterra on was not likely to be appropriate.

In the lead up to the ACCC releasing a Draft Decision the ACCC engaged in discussions with Viterra regarding concerns with Viterra's Proposed 2011 Undertaking. Based on these discussions, Viterra submitted a draft revision of its Proposed Undertaking (**Revised Draft**) with a view to addressing the ACCC's concerns. The Revised Draft was provided to the ACCC on 10 August 2011, and while it largely addressed the ACCC's concerns, a number of minor issues remained outstanding. The Revised Draft was not submitted as a formal 'replacement' of the Proposed 2011 Undertaking.

On 22 September 2011, Viterra submitted its Revised Undertaking, which the ACCC is accepting pursuant to s. 44ZZA(3).

1.1.1 Proposed 2011 Undertaking—23 December 2010

Viterra's Proposed 2011 Undertaking was based on the general approach of the 2009 Undertaking, for a further period of three years. It did, however, include a number of minor changes, which are detailed in the ACCC's Draft Decision.

In its Draft Decision, the ACCC formed a preliminary view that the Proposed 2011 Undertaking was not appropriate, but that it would be likely to be appropriate if certain changes were made.

1.1.2 Revised Undertaking— 22 September 2011

In response to the ACCC views set out in the Draft Decision, Viterra withdrew the Proposed Undertaking and formally submitted the Revised Undertaking on 22 September 2011. Significant changes from the Proposed Undertaking to the Revised Undertaking include:

- the introduction of an auction system commencing mid 2012
- greater flexibility for shippers to move, transfer, or surrender their capacity bookings

- provisions for the publication of greater information with respect to available capacity, stocks at port and pricing.

The Revised Undertaking incorporates minor amendments to the Revised Draft and a new clause 9.2(b) to the effect that the port loading protocols (**PLPs**) must be, and continue to be a comprehensive statement of Viterra's policies and procedures for managing demand for port terminal services.

The ACCC decided on 28 September 2011 to accept the Revised Undertaking.

1.2 Transitional arrangements

In addition to the Revised Draft, and in response to the ACCC's concerns regarding the large number of nominations received in early March 2011 for execution after the expiry of the 2009 Undertaking, Viterra submitted transitional arrangements pursuant to which Viterra indicated it would remove a proportion of its own bookings from the stem for Port Lincoln and Port Adelaide Outer Harbour in the period January to April 2012. As a result of vacating or moving these pending bookings Viterra's trading arm's bookings will be close to the proportions of capacity it executed in 2011—approximately 26 per cent of available capacity at Port Lincoln and 34 per cent of available capacity at Port Adelaide Outer Harbour.

The capacity made available by removing Viterra trading arm's bookings will be redistributed to other exporters based on the order of priority created under the FCFS capacity allocation system. In addition, exporters will be able to move or trade bookings in accordance with the new provisions in the PLPs.

These issues are discussed further in Chapter 3 of this Final Decision.

1.3 Public consultation process

The Act provides that the ACCC may invite public submissions on an access undertaking application.

The ACCC published an Issues Paper on 20 January 2011 inviting submissions on the Proposed Undertaking. The ACCC directly advised approximately 80 stakeholders, including accredited wheat exporters, grain growers, farming organisations and regulatory bodies of the public consultation process.

The ACCC published a Draft Decision on 11 August 2011 in which it considered that Viterra's Proposed Undertaking would not be appropriate, but that its Revised Draft submitted on 10 August 2011 was likely to be appropriate if formally submitted. Submissions on the ACCC's Draft Decision and the Revised Draft were invited.

1.3.1 Submissions received

The ACCC received submissions from Viterra and third parties on its Issues Paper and its Draft Decision, including the Revised Draft and Viterra's proposed transitional arrangements. Viterra also provided submissions in support of its Proposed 2011 Undertaking.

As part of its assessment of the Proposed 2011 Undertaking and the arrangements relating to the nominations made in March 2011, the ACCC considered the transitional arrangements relating to bookings made pursuant to the 2009 Undertaking for execution after the expiry of the 2009 Undertaking. In order to obtain views from industry participants, the ACCC issued 12 notices pursuant to s. 44ZZBCA(1) of the Act. The notices were issued to exporters who appeared on the Viterra shipping stem.

A summary of submissions received by the ACCC during consultation leading to the Draft Decision, and in response to the ACCC's requests for information is at Appendix A of the ACCC's Draft Decision. Submissions received in response to the Draft Decision are summarised in the relevant chapters of this Final Decision.

1.3.1.1 Submissions from Viterra

Viterra provided the following public information in respect of the Proposed 2011 Undertaking and Revised Undertaking:

- initial supporting information provided on 23 December 2010
- submission in response to third party submissions provided on 23 March 2011
- response to the ACCC's s. 44ZZBCA request for information issued on 5 April 2011, provided on 11 April 2011
- response to the ACCC's s. 44ZZBCA request for information issued on 15 April 2011, provided on 5 May 2011
- submission in relation to receivals into Viterra's port terminals dated 30 June 2011
- submission in relation to transitional arrangements provided 28 July 2011
- Revised Draft of the Proposed 2011 Undertaking dated 10 August 2011
- submission in response to the Draft Decision provided on 1 September 2011
- submission of the Revised Undertaking provided on 22 September 2011.

Viterra has also referred to information it submitted in relation to the 2009 Undertaking, provided on 16 April 2009, 3 September 2009 and 17 September 2009.

In addition, Viterra's trading arm, Viterra Limited, responded to the ACCC's s. 44ZZBCA request for information issued on 5 April 2011. The response was provided on 11 April 2011.

1.3.1.2 Submissions received from interested parties

The ACCC received public submissions on its Draft Decision from the following parties in relation to Viterra's Proposed 2011 Undertaking and Revised Draft:

- Australian Grain Exporters Association (**AGEA**), provided on 31 August 2011
- Bunge Agribusiness Australia Pty Ltd (**Bunge**), provided on 30 August 2011

- CBH Grain Pty Ltd (**CBH Grain**), provided on 31 August 2011
- Concordia Agritrading (Australia) Pty Ltd (**Concordia**), provided on 24 August 2011
- Emerald Group Australia Pty Ltd (**Emerald**), provided on 29 August 2011
- Flinders Ports South Australia (**Flinders Ports**), provided on 31 August 2011
- Gavilon Grain Australia Pty Ltd (**Gavilon**), provided on 29 August 2011
- JK International Pty Ltd (**JK International**), provided on 30 August 2011
- Louis Dreyfus Commodities Australia Pty Ltd (**Louis Dreyfus**), provided on 31 August 2011
- South Australian Farmers Federation Grains Industry Committee (**SAFFGIF**), provided on 29 August 2011
- Vitterra, provided on 1 September 2011

The ACCC received responses from the following parties in relation to the notices it issued pursuant to s. 44ZZBCA(1) of the Act, concerning the transitional arrangements relating to bookings made pursuant to the 2009 Undertaking for execution after the expiry of the 2009 Undertaking:

- AWB Limited
- Bunge
- Cargill Australia Limited (**Cargill**)
- CBH Grain
- Concordia
- Elders Toepfer Grain
- Emerald
- Gavilon
- Louis Dreyfus
- Pentag Nidera Pty Limited (**Pentag**)
- Plum Grove Pty Ltd (**Plum Grove**)
- Touton Australia Pty Limited (**Touton**).

1.3.1.3 Confidential submissions

To facilitate a fair and transparent process, the ACCC requested, and received, permission from parties who provided confidential submissions or responses to use information provided confidentially in a de-identified manner. This information is summarised in Appendix A of the Draft Decision.

1.4 Timeline

The following timeline sets out the key stages in the ACCC's assessment of Viterra's Proposed 2011 Undertaking and Revised Undertaking. All relevant documents are available on the ACCC website, www.accc.gov.au.

Timeline – Viterra Proposed 2011 Undertaking and Revised Undertaking

23 December 2010	Viterra's Proposed 2011 Undertaking submitted to the ACCC for assessment under Part IIIA of the Act
20 January 2011	Release of ACCC Issues Paper
20 January - 4 March 2011	Public consultation on the Proposed 2011 Undertaking
4 April 2011	The ACCC issued 12 notices pursuant to s. 44ZZBCA(1) of the Act concerning Viterra's transitional arrangements relating to bookings made pursuant to the 2009 Undertaking. Submissions in response to these requests for information were due by 7 April 2011
4 April 2011	Interested stakeholders who did not receive a s. 44ZZBCA(1) notice were also invited to make submissions in relation to Viterra's transitional arrangements. Submissions in response to these requests for information were due by 8 April 2011
5 April	Further requests for information were sent to Glencore, Viterra Limited (Viterra's trading arm) and Viterra Operations Limited (Port Operator)
15 April - 4 May 2011	On 15 April 2011 the ACCC sent a request for information to Viterra under s. 44ZZBCA of the Act. The notice operated as a 'clock stopper'. The 180 day statutory timeframe resumed on 4 May 2011.
20 June - 8 July 2011	Viterra requested that the period 20 June 2011 to 8 July 2011 be disregarded in calculating the 180 day period in order to allow Viterra additional time to provide information. On 5 July 2011, the ACCC agreed to Viterra's request.
1 August 2011	Viterra provided a Revised Draft of its undertaking, responding to ACCC concerns with the Proposed 2011 Undertaking

11 August 2011	ACCC issued a Draft Decision to reject Viterra's Proposed 2011 Undertaking, but stated its preliminary view that the Revised Draft would be acceptable
11 – 31 August 2011	Public consultation on Draft Decision
22 September 2011	Viterra formally lodged the Revised Undertaking
28 September 2011	ACCC accepts Viterra's Revised Undertaking.
29 September 2011	ACCC publishes its 'Final Decision' providing reasons for its decision

1.5 Further information

Viterra's accepted Revised Undertaking and other relevant materials, including supporting submissions from Viterra and public submissions by interested parties, are available on the ACCC's website at www.accc.gov.au by following the links to 'For regulated industries' and 'Wheat Export', or via the following link: Wheat Exports: Port Terminal Services Access Undertakings.

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

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2 Decision making framework

This chapter details the following:

- the legal test the ACCC must apply in assessing an access undertaking given to the ACCC under Part IIIA of the Act
- the regime for regulation of bulk wheat exports established under the WEMA.

2.1 Overview of the ACCC's assessment

2.1.1 Legal test for assessment

The test the ACCC applies in deciding whether to accept an access undertaking is set out in s. 44ZZA(3) of the Act. If the ACCC accepts the undertaking, the provider is required to offer third party access in accordance with the undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC. The ACCC may accept an access undertaking if it thinks it appropriate to do so, having regard to the following matters set out in s. 44ZZA(3) of the Act:

- the objects of Part IIIA of the Act, 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; and
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the pricing principles specified in s. 44ZZCA of the Act (see further below);
- 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; and
- any other matters that the ACCC thinks are relevant.

The ACCC has considered each port terminal services access undertaking on its own merits, but within the broader context of the Australian wheat export industry (having regard to sections 44ZZA(3)(aa) and (e) of the Act). There are some aspects of the undertakings where consistency is achieved by adopting the same approach for all undertakings and other aspects for which it is appropriate that the undertakings contain different provisions. Where consistency in the provisions contained in the

undertakings is considered appropriate, the ACCC has noted this in the Final Decision.

In relation to the pricing principles, s. 44ZZCA of the Act provides that:

- regulated access prices should:
 - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - include a return on investment commensurate with the regulatory and commercial risks involved; and
- access price structures should:
 - allow multi-part pricing and price discrimination when it aids efficiency; and
 - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

2.1.1.1 Other matters

WEMA

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

In particular, the ACCC acknowledges Parliament's intention in introducing the access test, which was to ensure that accredited exporters provide fair and transparent access to their facilities to other accredited exporters. As the Explanatory Memorandum states, the WEMA access test is:

...intended to ensure that accredited exporters that own or operate port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.¹

Further, in the second reading speech, the minister stated that 'unless all exporters can obtain access to these critical facilities on fair and reasonable terms then one of the major objectives of the policy could be frustrated.'²

¹ Explanatory Memorandum, Wheat Export Marketing Bill 2008, p. 31.

² Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture).

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

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

The ACCC acknowledges Parliament's recognition that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

WEMA and the accreditation scheme are discussed further in section 2.1.2.

2009 Undertakings

The ACCC also considers that the 2009 Undertakings are a relevant matter under s. 44ZZA(3)(e) in the assessment of Viterra's Revised Undertaking. Through the operation of the 2009 Undertakings the ACCC has gained insight as to the effect of Part IIIA access undertakings across the wheat export industry in practice. The ACCC considers that this experience is relevant to the assessment of Viterra's Proposed Undertaking and the Proposed 2011 Undertakings of the other port terminal operators.

2.1.2 Access test

The WEMA came into effect on 1 July 2008. The WEMA and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia (WEA), which has 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.³

Under the WEMA, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia. Parties seeking accreditation as bulk wheat exporters must be deemed by the WEA to be 'fit and proper' having regard to certain criteria. The WEMA further provides that parties seeking bulk wheat export accreditation that also provide 'port terminal services' (Port Terminal Operators) must satisfy an additional 'access test'.

Part of the 'access test' is linked to Part IIIA of the Act. The relevant part of the access test will be satisfied if either:

³ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

- 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 Act, and that undertaking relates to the provision to accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat; or
- there is in force a decision under Part IIIA of the Act that a State or Territory regime is an ‘effective access regime’ and that regime provides for access to the port terminal service for purposes relating to the export of wheat.

Under the ‘access test’ providers of port terminal services must also comply with ‘continuous disclosure rules’ set out in s. 24(4) of the WEMA. In summary, the continuous disclosure rules require the Port Terminal Operators to publish on their websites:

- their policies and procedures for managing demand for port terminal services (Port Loading Protocols)
- a statement, updated each business day, 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, the date on which the ship was nominated and the date on which the nomination was accepted (this statement is commonly termed the **Shipping Stem**).⁴

Viterra has submitted its Proposed Undertaking, and subsequent Revised Undertaking, to the ACCC pursuant to Part IIIA of the Act for the purpose of satisfying the access test.

2.1.3 South Australian regulatory regime

Under s. 44ZZA(3AA) of the Act, the ACCC must not accept an undertaking provided to it under subs. 44ZZA(1) if a decision of the Commonwealth Minister is in force under s. 44N of the Act that a regime established by a State or Territory for access to the service is an effective access regime. On 9 May 2011, the Parliamentary Secretary to the Treasurer, as designated Minister, accepted a recommendation from the National Competition Council (NCC) and certified that the South Australian Port Access Regime (**SAPAR**) is an effective access regime for a period of ten years under s. 44N of the Act.⁵ The SAPAR is administered by the Essential Services Commission of South Australia (**ESCOSA**).

The SAPAR provides for a negotiate/arbitrate framework for access to ‘maritime services’ at ‘proclaimed ports’, and a price regulation regime for ‘essential maritime services’ as defined under the *Maritime Services (Access) Act 2000* (SA). All ports covered by the Revised Undertaking are ‘proclaimed ports’ under the SAPAR. ‘Maritime services’ under the SAPAR include loading or unloading vessels by means of port facilities that are ‘bulk handling facilities’ (as defined in the *South Australian Ports (Bulk Handling facilities) Act 1996* (SA)) and involve the use of conveyor belts.

⁴ See s. 24(4) of the WEMA for detail about the continuous disclosure rules.

⁵ A copy of the certification and statement of reasons, together with the NCC’s Final Recommendation to the Minister on this matter, is available on the NCC website, www.ncc.gov.au.

The NCC states that this does not include storage.⁶ ‘Essential maritime services’ include providing or allowing for access of vessels, providing port facilities for loading and unloading vessels and providing berths for vessels, at the proclaimed ports.

On 26 July 2011, the Minister also certified the South Australian Rail Access Regime (**SARAR**) as an effective access regime under s. 44N of the Act. The SARAR provides a negotiation/conciliation/arbitration regulation of access to railway services, including the service of providing (or providing or operating) railway infrastructure for another industry participant. ESCOSA also has responsibility for enforcing and monitoring the SARAR.

In its Revised Draft, Viterra proposed drafting (refer clauses 4.1(b)(ii) and 7.6(b)(i)) to address what it considers is a potential ‘overlap’ issue. In short, it proposed to ‘carve out’ access to those services covered by the SAPAR and SARAR, and provide for the ACCC to determine whether it has jurisdiction to consider an access dispute.

In its submission in response to the ACCC’s Draft Decision, Flinders Ports, a private port operator which owns and operates the ports in which Viterra provides port terminal services, questions how Viterra’s access undertaking would operate under or beside the requirements of the *Maritime Services (Access) Act 2000* (SA) (the SAPAR). Flinders Ports submits that the undertaking should be amended to clarify that it only relates to services which are not subject to the SAPAR. Flinders Ports further suggests that the services to which the access undertaking applies should be clearly identified to avoid uncertainty for access seekers as to which regulator has jurisdiction.

The ACCC has formed the view that the ‘carve out’ provision at clause 4.1(b)(ii) of the Revised Undertaking is appropriate in that it specifies that the undertaking does not apply to any service to the extent that it is subject to a regime that has been certified in accordance with s. 44N of the Act (which includes services covered by the SAPAR and SARAR) and that this carve out addresses Flinders Ports’ concern that the Proposed 2011 Undertaking should be clarified to provide that it only relates to services which are not subject to SAPAR.

Further, the ACCC has formed the view that clauses 7.6(b)(i) and 7.7(a)(vi) of the Revised Undertaking are appropriate as these clauses provide that the ACCC, or an independent arbitrator, may assess any disputes on a case by case basis in order to determine whether the dispute relates to a port terminal service that is the subject of the undertaking and therefore determine the extent to which either the ACCC or the arbitrator has jurisdiction.

⁶ NCC, Final Recommendations on the South Australian Port Access Regime, 10 March 2011, p.9

3 Capacity management

3.1 Capacity allocation arrangements

3.1.1 Transparency of information

The ACCC expressed the view in its Draft Decision that information as to available capacity published on a yes or no basis was insufficient in assisting exporters to plan their export activities. In response, Viterra has undertaken to publish an available capacity table pursuant to clause 10.2 of the Revised Undertaking. The available capacity table will include an indicative estimate of the available capacity for each Port Terminal. Viterra will publish reasons for any variation of the indicative estimates.

3.1.2 Auction system

In its Draft Decision, the ACCC expressed the view that the FCFS capacity allocation method was not appropriate in the circumstances likely to be faced by Viterra over the term of its Proposed 2011 Undertaking, of expected capacity constraints and limited competitive constraints to neutralise the incentives for self preferential treatment by Viterra.

In response, Viterra has submitted a Revised Undertaking which contains an obligation to introduce an auction system. Viterra proposed to introduce auction arrangements by mid 2012. Clause 9.5 provides that the auction system will be introduced by a variation of the PLPs and that the ACCC will have an oversight role of that process. The ACCC may, after assessing the auction system proposed (including public consultation), issue an 'auction objection notice'. Pursuant to clause 9.6(f), if the ACCC issues an auction objection notice, Viterra will submit a revised variation notice amending the auction system to address any concerns raised by the ACCC. If Viterra fails to introduce an auction system by mid August 2012, pursuant to clause 9.6(i) the shipping stem will effectively reopen on a FCFS basis; however, Viterra's trading arm will be unable to export bulk wheat from the Viterra operated port terminals.

Clause 9.5(d) includes a list of features that must be incorporated into the auction system, unless otherwise agreed by the ACCC and Viterra. These include:

- (i) an auction should be the primary means of allocating port-loading capacity at each Port Terminal. For the avoidance of doubt, "port-loading capacity" means the capacity that is made available by the Port Operator to exporters to enable the export of Bulk Wheat, barley and other grain commodities through the Port Terminals;
- (ii) capacity should be defined on a consistent basis in terms of metric tonnes per month available at each Port Terminal and should reflect the total Available Capacity volumes that appear in the capacity table published in accordance with clause 10.2(a). For the avoidance of doubt, the total Available Capacity volumes may change from time to time (subject to the requirement to publish reasons set out in clause 10.2(b));

- (iii) subject to satisfying the Prudential Requirements and complying with the auction rules, all bona fide clients should have an equal opportunity to participate in the auction process;
- (iv) the auction should be conducted in a transparent and non-discriminatory manner;
- (v) slots should be allocated to those clients that value them most;
- (vi) the Auction System should feature rules to create disincentives which apply equally to all clients on booking in excess of reasonably anticipated requirements. For the avoidance of doubt, the Auction System will satisfy this requirement if it involves a mechanism to rebate any auction premiums paid by clients as part of the auction process to users of the Port Terminals on a pro rata basis; and
- (vii) rights purchased in the auction should be tradable and transferable between bona fide clients, subject to reasonable rules relating to the period of notice required to be given to the Port Operator and the tonnage and commodity involved. Any transfer fee payable to the Port Operator in relation to trades or transfers as between exporters should be cost-based.

The rules of the auction system are yet to be developed by Viterra. The auction system rules must be drafted in consultation with industry and the ACCC.

In addition to the introduction of an auction system, Viterra has included in its Revised Undertaking an ability to transfer or trade slots between exporters, move bookings between ports and between time frames and an incentive for exporters to return unwanted bookings to the shipping stem, by way of a partial refund in particular circumstances. These mechanisms are at clauses 9, 10 and 11 of the PLPs.

3.1.3 Transitional arrangements

Prior to the introduction of an auction system, Viterra has proposed a continuation of the FCFS capacity allocation system with respect to nominations already received and to be received for shipping slots up to 30 September 2012. No nominations can be made for shipping slots on or after 1 October 2012 until such time as an auction system is introduced. Once an auction system is introduced, all remaining shipping slots will be subject of that capacity allocation system. Viterra has submitted that it is not possible for Viterra to introduce a new auction system in respect of any available capacity for shipments from 1 January 2012.

As detailed in the ACCC's Draft Decision, in March 2011, a large number of nominations were received for shipping slots for execution after 1 October 2011. As a result of these bookings, made on a FCFS basis, capacity at Port Lincoln and Port Adelaide Outer Harbour was reached for the peak shipping period of January to April 2012. The ACCC notes that all available capacity during this peak shipping period, at these two ports was booked by two exporters, Glencore and Viterra.

The ACCC raised concerns with regard to the operation of the FCFS capacity allocation system, particularly relating to the 2012 bookings and the result that only two exporters would have access port terminal services at these two ports during the peak shipping period of January to April 2012.

In response to the ACCC's concerns, Viterra has vacated a proportion of its own bookings at Port Lincoln and Port Adelaide Outer Harbour in order to make capacity available to third party exporters. The remaining proportion of the shipping stem booked by Viterra's own trading arm at the constrained ports for the peak period reflects the proportions of capacity shipped by Viterra during the corresponding period in 2011.

The ACCC understands that as a result of Viterra vacating booking capacity, an additional five exporters will be able to access the two constrained ports for the peak shipping period. The ACCC notes that during the corresponding period in 2011, eight exporters accessed Port Lincoln and Port Adelaide Outer Harbor.

3.2 Viterra and third party submissions

3.2.1 Transparency of information

In terms of publication of greater information as to available capacity, the following submissions were received:

CBH Grain:

Determination and publication of capacity

- a) CBH Grain considers that the manner in which Viterra determines and subsequently offers capacity is not efficient or clear. Viterra have indicated that, in determining capacity, a process is applied whereby nominations for Export Select can be made until all of the designated Export Select capacity is utilised. However it is still not clear how the Export Select and Export Standard capacities will marry up and align.
- b) As per the submissions of CBH Grain in the letter to the ACCC dated 4 March 2011, CBH Grain considers that, in circumstances where a fully integrated supply chain is not in operation (i.e. in the case of Export Standard), exporters should be put in a position where they can determine how the two systems integrate together.
- c) CBH considers that the allocated capacity provided by Viterra needs to be a 'hard' or numerical figure which is independent of supply chain considerations. In this circumstance, if Viterra decided it was necessary to review that figure and offer additional capacity, then that additional capacity should be offered in a clear and transparent manner and be made available to all parties. If Viterra provided clear allocated capacity amounts (i.e. when offering Export Select), CBH Grain and other exporters would be in a better position to co-ordinate other resources to meet any additional capacity and plan export activities. Moreover, the assumptions which Viterra takes into account in determining capacity should be disclosed to exporters to provide additional certainty in this context.
- d) CBH Grain continues to support the idea of a phased approach to capacity allocation where Viterra provides a 'hard' and numeric allocation of capacity at given points in time. This would subsequently involve the release of additional capacity with a further 'hard' opening once the various general factors (associated with determining capacity in the South Australian Port Terminal network) can be assessed and exporters have collectively determined, in conjunction with Viterra, the additional transport capacity they are able to provide.

Louis Dreyfus

Louis Dreyfus submits that the ACCC Draft Decision, including the preliminary view in respect of the Revised Draft is appropriate with respect to the insertion of clause 10.2 that requires Vitterra to publish an indicative estimate of available capacity.

3.2.2 Flexible arrangements for the execution of capacity

With respect to the flexible arrangements, the following submissions were received:

AGEA

AGEA supports the introduction of flexibility through the transferability of slots. It is noted that the proposed rules for the transferability of slots are interim rules and that these will be reviewed in conjunction with the development of the auction system. AGEA believes that the proposed interim system could be enhanced to provide greater flexibility and requests that there will be an opportunity to make comment on the system during the consultation in relation to the auction system.

Concordia

Concordia supports the ability to trade capacity and the ability to move booked slots between ports and periods.

JK International

JKI supports the introduction of flexibility through the transferability and tradability of slots. It is critical that there be a transparent and open basis for the transfer of purchased slots. It is acknowledged that there will need to be rules that ensure that any secondary or tertiary purchaser of slots meets the BHC's requirements as laid down by the Service Level Agreements. Transfer of slots are not to be difficult or costly.

Tradability and or transferability will assist the market to ensure the right commodities, in the right volumes, are shipped at the most commercially advantageous times. This will benefit not only the trade but all components of the supply chain.

Louis Dreyfus

Outside of administrative simplicity, it is unclear why Vitterra, through clause 9.2 of their revised Port Loading Protocols, seeks to limit flexibility to exporters in transferring shipping slots between ports and periods. As noted in the Draft Decision, the ACCC considers transferability as a 'preferred mechanism' for allocating capacity on 'economic efficiency grounds'; Vitterra's clause 9.2 of the revised Port Loading Protocols directly limits efficiency in allocating shipping slots after one transfer is made.

3.2.3 Auction system

The following submissions were received with respect to the introduction of an auction system:

AGEA

AGEA supports the ACCC finding that an auction system is the most efficient mechanism for allocating capacity. AGEA further submits that:

There has been considerable experience gained through the operation of the CBH auction system which will assist in developing the business rules governing the proposed auction system by Vitterra....

AGEA has previously advocated for consistency in key principles across all the BHC access undertakings. AGEA believes that the greatest efficiency will be gained if the auction systems operated by CBH and Viterra can be aligned.

In relation to the issue of shipping stem fees, AGEA submits:

An issue that was raised in the AGEA submission during the consultation process in regard to the proposed undertakings for Viterra, GrainCorp and CBH related to treatment of stem fees to ensure that exporters have certainty to acquire and execute slots without having to speculate. To achieve this, all parties should incur a 'real cost' for capacity booked and not utilised.

It was proposed that slot fees for all participants across all BHC ports should be paid into a trust account. The fees resulting from non-performance by an exporter result in forfeiture to the incumbent BHC, while fees resulting from non-performance by a BHC result in forfeiture to the fund. The fund would be distributed to all parties who shipped grain in the designated period. The mechanisms are slightly different for the various BHCs, for example under current arrangements:

- in the case of Viterra and Graincorp, this would be the down payment (prepayment) of a part of the fobbing charge which is forfeited if capacity is not used; and
- in the case of CBH's auction premium it is the prepayment of a premium to secure capacity at CBH auction, accompanied with the commitment to pay all/part of the fobbing charge(s) if the slot is not used (or lost capacity charge).

The significant difference is that in the case of CBH the auction premium gets redistributed to those who ship, whereas the prepayment in the case of Viterra and GraiCorp [sic] and the lost capacity charge in CBH gets paid to the BHC.

The ACCC draft decision has not addressed this issue and AGEA would encourage the ACCC to consider the establishment of an independent management to ensure that capacity allocation and management occurs in a competitively neutral way.

Bunge

Bunge supports Viterra's proposal to move to an auction system. Bunge submits that:

When comparing the two models, Bunge found the Auction System to be more flexible, more transparent and more equitable. The industry has established an overwhelming majority view in favour of the Auction System since the flaws of the FIFS System were exposed in the speculative behaviour witnessed in March 2011....

The auction system will encourage development of a shipping stem that will be reflective of exporters who have a genuine desire to execute. Bunge therefore supports the re-distribution of auction premiums to those shippers who execute and acknowledge the need to provide a financial disincentive to those shippers who fail to do so, provided the level of penalty is not excessive and applicable to all traders equally.

Business rules should be largely consistent with those already in place in Western Australia in order to ensure efficiency in the supply chain to facilitate optimal throughput capacity. Specifically, the ability to trade, transfer and surrender slots is critical to ensuring the efficiency of the system post auction.

CBH Grain

CBH Grain submits that it was pleased to see that the ACCC has decided not to accept a straight rollover of the current Viterra Access Undertaking based on the inefficient process for the allocation of capacity.

Concordia

Concordia supports the introduction of a suitably structured auction system; however it considers that:

The strategic advantage associated with the fact that the \$5 per mt booking fee is an internal transfer of funds only for Viterra, and that Viterra's cash flow position benefits directly from having accessed this fee from all other market competitors up to 12 months in advance. We see this as simply unfair to all other exporters. Viterra's suggestion that their position is similar to all others because they operate different profit centres is at best misleading.

The introduction of an auction system and transferable slots is a positive move however unless structured appropriately it fails to suitably address this issue.

Emerald

Emerald supports the amendments to the Proposed 2011 Undertaking reflected in the Revised Draft and submits that:

Emerald was concerned to ensure that the proposed new auction system incorporates a mechanism to rebate auction premiums back to exporters based on export performance. As a genuine exporter we think such a mechanism is an important bulwark against speculative trading of shipping slots.

Gavilon

In support of the introduction of an auction system, Gavilon submits that:

... Gavilon fully supports the ACCC's preliminary view that the current system for allocating shipping slots is not appropriate going forward. Gavilon welcomes the introduction of an auction system for the 2012/2013 season and subsequent seasons. Gavilon believes an auction system will provide a fair system for exporters wishing to access capacity at Viterra operated port terminals. Gavilon encourages an auction system which ensures fair redistribution of auction premiums back to the exporters, similar to the current Cooperative Bulk Handling (CBH) model.

JK International Pty Ltd

JK International in relation to the introduction of an auction submits:

JKI supports the ACCC finding that an auction system is the most efficient mechanism for allocating and pricing shipping capacity...

It is important that as [the auction] systems are developed they are done on a minimalist basis so as not to increase overtly cost and complexity. Ideally and ultimately a national, independent system of stem auctions/access structure and fee/premium payments are likely to deliver lower administrative costs, reduced complexity along with increased transparency and liquidity.

However, JK International raises a concern with the arrangements of capacity payments:

The key disincentive for overt speculation on the stem is the payment of a fee or auction premium that all companies must book as an expense to the corporation in aggregate, rather than a Divisional or Inter Company funds transfers.

JKI would support the AGEA proposal that slot fees for all participants across all BHC ports should be paid into an independently managed trust account or third party administered structure...

This issue of shipping stem fee/auction premium payment is one of the key areas not addressed sufficiently in the ACCC's draft decision, and critically this is the main issue which if not addressed will detract from any movement towards an auction system which subsequently allows for tradability / transferability.

Louis Dreyfus

Louis Dreyfus submits that:

The fact that Viterra has agreed to amend the Revised Draft Undertaking to include an auction process in the future will go a significant way to ensuring that capacity is allocated to the parties that value it most highly once the auction system is operating. However, it does nothing to resolve the immediate problem, which is the excess of demand for capacity relative to supply during the period from 1 January to 30 April 2012.

Louis Dreyfus submits that the auction system should be introduced sooner and rejects Viterra's submission that it cannot have an auction system in place by October 2011.

South Australian Farmers Federation Grains Industry Committee

SAFFGIC supports the need to change the management of the shipping stem and submits that:

... Viterra Trading division has the ability to book shipping slots at favourable terminals, in excess of its historical shipping capacity. There is no financial disincentive for cancellation of the booking fee paid by Viterra Trading to Viterra Operations as the company as a whole is no worse off.

The movement to an auction system has in principle support from SAFFGIC however:

- Viterra Ltd, as a whole entity, must experience the same financial penalty as competing grain exporters should slots be cancelled or transferred.
- Therefore a system involving all access seekers wanting a slot, to lodge a letter of credit (LC) for a booking fee, with the fee to be rebated to the actual exporter for that slot should be established
- An auction system would then be used to determine the premium paid to allocate high demand slots to overcome the current "first in best dressed" system
- Transfer fees should not apply to transfer of slots between exporters unless there are changes in the type of commodity to be shipped advised at short notice.

The above system prevents:

- Viterra Trading purchasing slots at auction with payment made to Viterra Operations, only then to cancel that slot for no financial penalty, as is the case under the current system.
- The establishment of a secondary market of speculative booking of slots for sale / transfer

Viterra

In relation to the ACCC's Draft Decision with respect to capacity allocation arrangements, Viterra notes the ACCC's comments concerning a perceived absence of sufficient constraints on Viterra's incentive to give preference to its trading arm in relation to capacity management, and the current booking fee not acting as a constraint on its trading arm booking in excess of its reasonably anticipated requirements. Viterra submits:

... the ACCC's comments in the draft decision appear to be made without any clear analysis of what may constitute Viterra's reasonably anticipated requirements.

... it is vital in any discussion concerning the allocation of capacity, to recognise Viterra's right to use its own infrastructure and its clear legitimate business interest in not being required to pay third parties for use of its own infrastructure.

It is Viterra's view that third party use of infrastructure services will only be efficient if it enables more use of the relevant services as distinct from displacing the infrastructure owner's own use, or other users' existing use, of the service.

Viterra further submits that companies investing in infrastructure have a clear and legitimate business expectation that they will be able to meet their own needs for use of their infrastructure. Viterra submit that this position is supported by provisions of Part IIIA (ss. 44X, 44ZZA(3), 44W) and Part XIC (s.152BCA(1), s. 152BCB); the Australian Competition Tribunal's decision in Fortescue Metals Group Limited⁷ and the NCC's submission to the PC Inquiry into Wheat Export Marketing Arrangements⁸.

Viterra submits:

It is imperative that both in making its final decision, and in assessing any auction system proposed by Viterra Operations, that the ACCC has appropriate regard to this issue and does not accept uncritically any submissions by industry participants which, in a number of cases, appear to suggest that Viterra should be disadvantaged in the use of its own infrastructure or should pay third parties for the right to book or use its own infrastructure.

3.2.4 Transition arrangements

Submissions regarding the transitional arrangements proposed by Viterra generally align based on whether the third party exporter is likely to acquire relevant capacity in the initial allocation.

⁷ *Fortescue Metals Group Limited* [2010] ACompT 2 (30 June 2010) at paragraphs 604-605

⁸ Productivity Commission, *Inquiry into Wheat Export Marketing Arrangements* Transcript of Proceedings, John Feil, 24 November 2009, pp. 12-13

Submissions in favour of the proposal include:

Emerald

Emerald submits that it believes the transitional arrangements are fair and reasonable under the circumstances. In particular, it states that the vacation by Viterra of parts of the capacity at Port Lincoln and Port Adelaide Outer Harbour is an appropriate solution to industry concerns.

Bunge

Bunge generally supports the transitional plan that has been proposed as logical and sees no issue with the timeline put forward.

Submissions received against the proposal are:

Concordia

Concordia submits that:

...the proposal put forward by Viterra to allocate an arbitrary percentage of the estimated capacity to their own trading arm, and the remaining capacity on a first come, first served basis favours Viterra and maybe 1-2 other exporters who were simply fortunate enough to take advantage of a non-transparent and fundamentally flawed method of peak demand capacity allocation. We would contend that those who acted on March 8, 2011 have no more valid right to access than others now on the pending list for this peak demand capacity.

Gavilon

Gavilon has serious concerns regarding the proposed transitional arrangements and considers that they are inappropriate. In noting the intention of access undertakings, to provide third party access to port terminals operated by vertically integrated terminal operators, ensuring fair competition in the market for the export of bulk wheat, it is Gavilon's view that the transitional proposal does not provide fair competition in the market for the export of bulk wheat and this will be to the detriment of South Australian growers.

Gavilon submits:

Should this draft decision prevail and become binding, along with other exporters who did not secure access, we will have no other option than to withdraw from or significantly reduce our bids in this market due to the inability to access a single shipping slot from these high demand ports during the high demand period. This will result in lower prices and significantly less competition for grain from South Australian growers as the number of buying parties reduces. By our calculations, a total of 6-7 exporters will have access to shipping slots during the period of January to April 2012. Furthermore, the majority of slots are held by only 3 exporters. This is in comparison to some 15 exporters which have access to shipping slots at GrainCorp operated port terminals during the same period. To ensure appropriate competition for grower's grain, the export state of South Australia should have at least the same number of export participants as the more domestic markets of Victoria, NSW and Queensland.

Gavilon notes the ACCC's concerns regarding having a continually open shipping stem and the uncertainty in the industry regarding whether Viterra was accepting bookings for the 2011/12 season and submits that fair competition will be encouraged through re-opening the South Australian stem and establishing a 'hard opening' window for the transitional period.

Gavilon submits that such an option would:

... provide all interested parties an equal opportunity to participate in the South Australian market and would facilitate the appropriate level of competition for South Australian growers' grain.

CBH Grain

CBH Grain does not support the proposed transitional arrangements for the January to April 2012 period. It submits that the arrangements are unfair, inequitable and not beneficial to Australian grain producers in that they essentially retrospectively ratify large shipping allocations to two exporters.

It is CBH's view that the effect of the proposed interim arrangement will be that virtually all the available capacity at Viterra's two main ports from January to April 2012 will still effectively reside with two exporters.

CBH considers it highly unusual for exporters to be permitted to make bookings more than a year in advance of shipment and submits:

... all grain bookings for the peak period of January to April 2012 were based on a highly speculative premise and as such, the ratification of these bookings by ACCC for the upcoming peak period can be seen to facilitate an arbitrage on the ownership of shipping capacity, rather than promoting access to shipping slots based on rewarding the most efficient exporters in the market....

Despite the proposed mechanism to allow for capacity and shipping slots to be traded and bookings moved between ports, the cascading of bookings (whereby Viterra would forfeit nominated capacity down to other shippers) may not release enough capacity for all the remaining bookers to support sufficient liquidity in the market. Based on the level of capacity held by Viterra in 2011, the proposed process essentially has the effect to authorise the bookings made by Glencore and Viterra for January to April 2012 which will result in insufficient capacity to meet the demands of all the other exporters in the market, thus reducing and lowering prices for Australian grain producers....

CBH Grain considers that shipping slots obtained by Viterra and Glencore for January to April 2012 have been acquired pursuant to a flawed process. Accordingly, the introduction of a trading and transfer mechanism will now permit these two exporters to trade these shipping slots, make a profit and impose additional costs on other exporters. This is prominently due to the fact that there was no certainty in place regarding the terms of an access undertaking and that ACCC did not have a position in place at the time of the relevant nominations.

Louis Dreyfus

Louis Dreyfus submits that the ACCC's Draft Decision is not appropriate for the following reasons:

- the period for the introduction of an auction system is uncertain and even the earliest stated date of May 2012 is too late
- allowing Viterra to accept bookings under the flawed FCFS system is neither fair nor transparent
- transferability of slots is not a sufficient remedy for ineffective capacity allocation.

In support of its first argument, Louis Dreyfus submits:

The ACCC has determined that the first come, first served method is not satisfactory as the primary means of allocating capacity...

It seems incongruous with the ACCC's own reasoning that the first come, first served approach should continue to be used as the basis for allocating capacity during the period from 1 January 2012.

Given the extensions provided for in the Proposed Draft Undertaking, there is no effective penalty on Vitorra for not implementing an auction system until mid-August of 2012. Despite the penalty of Vitorra not being able to provide Port Terminal Services to its own trading division for loading bulk wheat after 1 October 2012, it is possible that there will be no appropriate mechanism (I.e. an auction) for allocating capacity to 3rd party exporters for shipment after 1 October 2012.

Louis Dreyfus has suggested that a more appropriate transition is to implement the auction system provided by Tradeslot to CBH to allocate capacity in Western Australian ports and that this could be implemented in a short period of time. Louis Dreyfus submits that:

The ACCC should impose a shorter period for the implementation of the auction system. The auction system should be in place (and the first auction should be held) no later than 16 December 2011 and capable of allocating capacity beyond 1 February 2012. Slot bookings currently showing as pending for the period starting 1 February 2012 shall be rejected and that capacity shall be made available to the market through auction.

In support of its second argument, Louis Dreyfus submits:

While it may be pragmatic for the ACCC to agree (in its preliminary opinion to the proposed transition arrangements) that Vitorra approves applications for currently pending 2012 export capacity on a first come, first served basis, including bookings for execution after the date by which an auction system is potentially in operation, it is far from satisfactory given that the ACCC has clearly determined that the first come, first served methodology is not an appropriate means of allocating capacity. In fact, the amount of capacity that would be committed under the proposed transition arrangements (utilizing the admittedly inappropriate mechanism) is large enough to exclude a significant number of exporters from accessing capacity for the peak period of the 2012 shipping season (January – April 2012). Allowing such an unfair distribution of capacity will greatly distort competition among exporters in South Australia by concentrating bookings in the hands of a few during this peak period of demand.

In relation to the ability to trade or transfer slots, Louis Dreyfus submits:

Given the crop prospects and the likely demand for Australian grain in early 2012, it is reasonable to assume that SA shipping capacity will be in demand during this period. Notwithstanding the fact that Vitorra has agreed to reduce the volume of slots that its own trading division has applied for, there will still be a very considerable concentration of capacity at key ports within the hands of a very few exporters.

The proposed transferability of slots, while otherwise welcome, could be expected to provide a mechanism for the transfer of capacity from those who booked early to those who missed out on capacity. However, it is doubtful that holders of capacity during the peak shipping period will transfer to others unless they are given a financial incentive to do so. As such, the holders of capacity would be in a position to extract market rent for transferring capacity that was obtained under an inappropriate method.

It would be preferable if an auction system were implemented at the earliest opportunity in order to allocate 2012 capacity to the party who places the highest value upon that capacity.

Viterra

Viterra submits in relation to the ACCC's views on capacity allocation issues:

... Viterra Operations also has a number of concerns in relation to the ACCC's comments in the draft decision that (without the transition proposed by Viterra Operations) bookings by Glencore and Viterra Ltd at two of the three deep water ports (Port Giles is also a deepwater port) during the January to April 2012 period would have resulted in growers having *'considerably fewer exporters competing to purchase their wheat and consequently [being] likely to receive lower prices'*. As previously explained to the ACCC, this would appear to misunderstand the important difference between accumulation and shipping.

Through-out the year, Viterra Operations competes with a range of exporters, traders and domestic customers to acquire wheat from growers. Almost 60 grain companies have operated in Viterra Operations' system in the last season, the majority of which are not exporters. Growers may enter into marketing arrangements well before, during or after harvest of their wheat. In this regard, at any given time, growers may have title to a large proportion of the grains held in Viterra Operations' system, both up-country and at port. This grain may be transferred in-store one or many times before it is exported. It may be exported the month it is harvested, the month it is acquired or many months later. There is no clear nexus between the time of accumulation and the time of export.

Accordingly the suggestion that a relatively short-term capacity constraint *for exporting* may result in considerably less competition *to acquire* wheat is not a matter that is in any way apparent to Viterra Operations. Viterra Operations notes that, in any event, the transitional plan that it has proposed addresses the ACCC's concerns in relation to bookings at Outer Harbour and Port Lincoln.

As an experienced operator in each of the Australian markets, Viterra Operations would also observe that the differences identified by the ACCC in relation to the Eastern States and South Australia (and following the revocation of the exclusive dealing notification for Grain Express, Western Australia) appear to be significantly overstated, both in terms of their nature and impact.

3.3 ACCC view

As set out in Chapter 2, in deciding whether to accept an undertaking given to the ACCC pursuant to Part IIIA of the Act, the ACCC is required to have regard to the matters set out in s. 44ZZA(3). Of particular relevance to the assessment of Viterra's proposed capacity management arrangements are the following matters listed in s. 44ZZA(3):

- the objects of Part IIIA, including 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
- the legitimate business interests of the provider
- the public interest, including the public interest of having competition in markets
- the interests of persons who might want access to the service.

In addition, the ACCC considers the intention of the access test, that accredited exporters that own, operate or control port terminal facilities provide ‘fair and transparent access’ to its facilities to other accredited exporters is a matter relevant to the assessment of an access undertaking.

The ACCC considers that for a capacity allocation method to appropriately allocate capacity it should meet the following key conditions:

- transparency as to available capacity
- reasonable flexibility for exporters to enable execution of booked capacity
- at peak times, when demand for port services by grain exporters exceeds available capacity, there are mechanisms to ensure that capacity does not go unused and that capacity goes to exporters that value it most.

3.3.1 Transparency of information—available capacity

Clause 10.2 of Viterra’s Revised Undertaking requires it to publish dynamic information regarding available capacity, including volumes, with reasons provided for any changes to these volumes.

Submissions received from CBH and Louis Dreyfus support the increased transparency in relation to available capacity as proposed by Viterra.

The ACCC considers that transparency of information is a key element of an appropriate capacity allocation model. Information provided on available capacity allows access seekers to assess the availability of capacity against their export needs and to plan appropriately. This information is in the interests of access seekers and also promotes the efficient use of the infrastructure because bookings can be made on an informed basis. Further, transparency of information, including in relation to available capacity, is considered necessary in order to promote effective competition, by providing information to third party exporters that may be available to Viterra’s trading arm by virtue of being vertically integrated.

The ACCC considers that clause 10.2 is appropriate in providing the information as to available capacity necessary for an appropriate capacity allocation method. The ACCC supports CBH’s submission that the amount of capacity made available by Viterra should be independent of supply chain considerations and if additional capacity is made available, it should be offered in a clear and transparent manner and made available to all parties. The ACCC considers that the Revised Undertaking provides for this.

3.3.2 Flexible arrangements for execution of capacity

The second key element of an effective capacity allocation model is flexibility for exporters to execute booked capacity. Having a degree of flexibility after the primary allocation of capacity is desirable as it ensures that the infrastructure is being used more efficiently in that it may assist preventing capacity going unused during periods of peak demand.

As submitted by JK International, the ability to trade or transfer shipping slots will assist the market to ensure the right commodities, in the right volumes are shipped at the most commercially advantageous times.

Flexibility enabling exporters to execute against bookings is also in the interests of access seekers. JK International submits that this will benefit not only the trade but all components of the supply chain. The ACCC, in its Draft Decision formed the view that the FCFS capacity allocation model operated by Vitterra did not provide sufficient flexibility for exporters to execute booked capacity.

Vitterra's Revised Undertaking provides that bookings can be moved between ports and time periods (clause 9 of the PLPs) and transferred to other exporters (clause 11 of the PLPs). The Revised Undertaking also includes a conditional partial refund in an incentive for access seekers to return unwanted capacity to the shipping stem (clause 10). Clauses 9.2 and 11.1.5 provide that bookings can only be moved between ports or time periods, or transferred between exporters once.

Submissions received from AGEA, Concordia, and JK International support the introduction of mechanisms to enhance the flexibility of the shipping stem.

The ACCC considers that the introduction of flexible arrangements for exporters contained in the Revised Undertaking is appropriate and in the interest of access seekers and efficient use of the infrastructure. While these factors may be further enhanced by allowing bookings to be traded more than once, as submitted by Louis Dreyfus, the ACCC does not consider such restriction at this time to be inappropriate.

In assessing an undertaking, the ACCC must have regard to Vitterra's legitimate business interests, including its operational requirements in providing port terminal services and the avoidance of unnecessary costs.

The ACCC has formed the view that clauses 9, 10 and 11 of the PLPs appropriately balance Vitterra's legitimate business interests, in terms of operational requirements, against the interests of access seekers in having flexible arrangements in order to execute booked capacity.

Accordingly, the ACCC considers clauses 9, 10 and 11 of the PLPs appropriate.

3.3.3 Capacity management during peak periods—efficient allocation

In assessing the appropriateness of a capacity allocation system within an access undertaking, the ACCC is required to have regard to, among other matters, the objects of Part IIIA, a relevant consideration under which is efficient allocation of capacity. This includes mechanisms to ensure that throughput is maximised, particularly at times of peak demand and that capacity is allocated to those who value it most.

As set out in appendix A, the ACCC considers two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances:

- the relationship between total port elevation capacity and average annual and seasonal demand for it

- the extent to which the incentive exists for vertically integrated BHCs to pursue self preferential treatment—including hindering other exporters from accessing port terminal services.

As discussed in the ACCC's Draft Decision and in appendix A of this Final Decision, it is the ACCC's view that an auction system is an appropriate means for allocating port terminal capacity in South Australia. It is the ACCC's view that the FCFS capacity allocation system operated by Viterra under its 2009 Undertaking did not operate effectively in periods of constraint, most notably for bookings made for the 2011/2012 season. It is therefore not appropriate to accept an undertaking seeking to continue the FCFS capacity allocation system.

This view is based on the circumstances of expected capacity constraints and limited competitive constraints to neutralise the incentives for self preferential treatment by Viterra. In these circumstances, 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 submission received from Viterra in response to the Draft Decision states that '[i]t is imperative that both in making its final decision, and in assessing any auction system proposed by Viterra Operations, that the ACCC has appropriate regard to [Viterra's right to use its own infrastructure and its clear legitimate business interest in not being required to pay third parties for use of its own infrastructure] and does not accept uncritically any submissions by industry participants which, in a number of cases, appear to suggest that Viterra should be disadvantaged in the use of its own infrastructure or should pay third parties for the right to book or use its own infrastructure'. The ACCC has had regard to Viterra's submission in the context of the capacity allocation model set out in the Revised Undertaking, which does not seek to preclude Viterra's trading arm from booking capacity (except in the circumstances identified in clause 9.6(i)(ii)).

The Revised Undertaking specifies that Viterra will introduce an auction system in mid 2012.

The ACCC considers that the proposal to introduce an auction is appropriate and should allow for port terminal services to be used efficiently by ensuring that, in periods of constraint, capacity is allocated to those users that value it most.

This position is supported by a number of submissions including, for example, AGEA which submits that 'AGEA supports the ACCC finding that an auction system is the most efficient mechanism for allocating capacity' and Louis Dreyfus who submits 'The fact that Viterra has agreed to amend the Revised Draft Undertaking to include an auction process in the future will go a significant way to ensuring that capacity is allocated to the parties that value it most highly once the auction system is operating'.

AGEA and Bunge submit that the experience with the CBH auction system should guide the development of auction rules.

The ACCC considers it appropriate that the details of the auction design are the subject of detailed consultation with industry and recognises Viterra's legitimate business interests in seeking to ensure that there are no unintended consequences resulting from introducing an auction system too quickly. The ACCC therefore considers Viterra's proposed process for introducing an auction to be appropriate.

While there is general support by industry for the introduction of an auction, there are mixed views on the arrangements specified in the Revised Draft in relation to the payment arrangements for capacity.

While the auction system has not been designed in detail as yet, the Revised Undertaking contains seven basic features that must be reflected in the auction system unless otherwise agreed by the ACCC and Viterra. These features are listed in clause 9.5(d).

Clause 9.5(d)(iv) specifies:

the Auction system should feature rules to create disincentives which apply equally to all clients on booking in excess of reasonably anticipated requirements. For the avoidance of doubt, the Auction system will satisfy this requirement if it involves a mechanism to rebate any auction premiums paid by clients as part of the auction process to users of the Port Terminals on a pro rata basis; and

The ACCC considers that this principle, and adoption by Viterra of a mechanism similar to that currently operating in CBH's auction system, whereby auction premiums are distributed to shippers based on actual shipments, will operate as a real constraint on Viterra's trading arm (and other exporters) booking in excess of its reasonably anticipated requirements and that this is appropriate, having regard to the objective of providing for competition in markets.

Submissions received from Bunge, Emerald and Gavilon specifically support the proposed arrangements whereby auction premiums are redistributed to exporters. Submissions received from Concordia, JK International and SAFFGIC suggest that these arrangements do not go far enough in terms of neutralising any advantage to Viterra's own trading arm with respect to the payment of shipping stem fees.

Specifically those concerns relate to whether the \$5 booking fee (and the equivalent under the proposed auction system) provides a sufficient disincentive to Viterra booking more capacity than reasonably anticipated requirements and / or whether it creates a competitively neutral environment. Concern was also raised by Concordia that Viterra's cash flow position benefits directly from having accessed this fee from all other market competitors up to 12 months in advance of execution.

A number of alternative models were suggested in submissions:

- That slot fees for all participants across all BHC ports should be paid into an independently managed trust account or third party administered structure. Fees resulting from non-performance by an exporter result in forfeiture to the incumbent BHC, while fees resulting in non-performance by a BHC result in forfeiture to the fund. The fund would be redistributed to those parties who shipped grain in the designated period. (AGEA, JK International)
- A system involving all access seekers wanting a slot to lodge a letter of credit for a booking fee, with the fee to be rebated to the actual exporter for that slot. (SAFFGIC)

These submissions appear to raise two issues.

1. whether clause 9.5(d)(iv) adequately addresses the issue of placing a sufficient constraint on Viterra's trading arm overbooking
2. whether additional measures are required in the undertaking to ensure competitively neutral arrangements between Viterra and third party exporters in terms of booking capacity or to ensure particular cash flow effects on Viterra or third party exporters from capacity payments.

It is the ACCC's view that the price mechanism inherent in the auction system will provide an adequate disincentive on Viterra's trading arm from booking in excess of reasonably anticipated requirements in periods of constraint. In periods of constraint, which is the situation where there would be concern about Viterra's trading arm overbooking, Viterra's trading arm would have to pay an auction premium determined by the market, which it would forfeit if it did not ship against its bookings. The performance of the CBH auction system in Western Australia suggests that the auction system adequately addresses concerns raised regarding overbooking.

On the second issue, the payment arrangements for the auction system have not yet been designed and the Revised Undertaking specifies a process for Viterra to consult with both industry and the ACCC on this design, which will need to include payment arrangements. The ACCC considers that it is appropriate that this issue is considered further by Viterra together with industry in proposing its auction design. The ACCC has a role under the Revised Undertaking to assess the proposed auction design and may object if it considers it appropriate to do so. In making its decision on whether to object to any or all of the variations proposed by Viterra set out in an Auction Variation Notice, under clause 9.6 of the Revised Undertaking, the ACCC must have regard to a range of factors, including whether the design incorporates the auction features set out in clause 9.5(d) of the Revised Undertaking, as well as the matters set out in s. 44ZZA(3) of the Act. The ACCC considers that this process set out in the Revised Undertaking is appropriate.

Accordingly, it is the ACCC's view that the auction features listed at clause 9.5(d) in the Revised Undertaking are appropriate.

3.3.4 Transitional arrangements

In its Draft Decision, the ACCC formed the preliminary view that Viterra's transitional proposal was a pragmatic approach to dealing with the ACCC's concerns with the application of the FCFS system to the 2012 bookings in advance of introducing an auction and was consistent with Viterra's legitimate business interests. The voluntary withdrawal of a proportion of Viterra's own bookings has in the short term addressed the ACCC's concerns regarding the allocation mechanism and the lack of effective constraints on Viterra's trading arm overbooking.

Emerald submits that 'the vacation by Viterra of parts of the capacity at Port Lincoln and Outer Harbor is an appropriate solution to industry concerns'.

The ACCC acknowledged in its Draft Decision that the transitional arrangements will not necessarily result in an initial allocation of capacity in line with users' willingness to pay for such capacity, but it will result in a more diversified allocation than would have occurred had Viterra simply applied its PLPs to the nominations and, together

with the proposal to allow for tradeability, should allow for an efficient allocation of capacity to exporters and more competition in the upstream market.

The ACCC remains of this view.

The ACCC acknowledges that the transitional arrangements are a pragmatic approach and considers that they are appropriate in the circumstances. The ACCC has considered the alternative suggestions for transitional arrangements submitted by exporters, but does not consider that any of them are, on balance, appropriate, taking into account the matters which the ACCC is required to take into account. The ACCC may accept an undertaking if it is appropriate having regard to the matters listed in s.44ZZA(3). The ACCC has, having regard to the s. 44ZZA(3) matters determined that the transitional approach is appropriate in the circumstances.

These alternatives include:

- Bringing forward the start date for the implementation of an auction system so that the first auction is held no later than 16 December 2011 for capacity beyond 1 February 2012 (Louis Dreyfus) or alternatively, auctioning capacity to those exporters whose nominations are currently pending (Concordia).
- Rejecting all pending bookings and ‘re-opening’ the South Australian shipping stem with a hard opening notified to all exporters. (Gavilon, CBH)
- Balloting out capacity to all exporters that currently sit on the pending list with a maximum tonnage placed on any one exporter (Concordia).

With respect to the first option, the ACCC notes that while an auction may be a more appropriate solution in terms of fair and transparent access and economic efficiency, weight has been given to Viterra’s legitimate business interests in allowing sufficient time in which to design and develop an appropriate auction system that does not result in unintended consequences.

The ACCC considers that rejecting all pending bookings and ‘re-opening’ the shipping stem is not an effective alternative. Rather, given the clear excess demand, re-opening is likely to create a rush on the shipping stem, oversubscription and uncertainty for exporters.

Balloting out capacity may result in a more dispersed initial allocation of capacity and may arguably be a fairer result to the extent that there was uncertainty among shippers as to whether bookings could be made for 2012 capacity. However, this solution would provide little certainty for exporters prior to the date of the ballot, requires a determination of an appropriate ‘maximum’ capacity and may result in an inefficient allocation of port terminal capacity in that optimum capacities for ship loading may not be possible.

Additionally, both re-opening the shipping stem, and conducting a ballot involve capacity being removed from exporters who have attained capacity based on the first come first served system acting in good faith. In determining appropriate access arrangements, the ACCC must have regard to Viterra’s legitimate business interests including exposing Viterra to potential third party litigation.

Accordingly, the ACCC maintains the view that the transitional arrangements offer a pragmatic solution to the problem created as a result of Viterra leaving its shipping stem open for nominations for execution after the expiry of the 2009 Undertaking.

In forming this view the ACCC has had regard to the effect on competition in the upstream wheat purchasing market. Without the transitional proposal submitted by Viterra, only two exporters would have access to the deep sea ports at Port Lincoln and Port Adelaide Outer Harbour. With the transitional arrangements, the ACCC understands that it would be possible for seven exporters to receive capacity. In terms of the effect on competition, the ACCC is of the view that seven exporters competing to purchase wheat for the purpose of export is likely to increase competition with beneficial effects for wheat growers.

The ACCC notes Viterra's submission that there is no clear nexus between the time of accumulation of wheat and the time of export, and accordingly Viterra does not support the ACCC's suggestion that capacity constraint for exporting may result in considerably less competition to acquire wheat.⁹ The ACCC does not agree with Viterra's submission and instead takes the view that a limited number of exporters being able to access export capacity may have a detrimental effect on competition in upstream markets. The ACCC is of the view that exporters are unlikely to accumulate wheat if they are unable to access port capacity for the purpose of export. Viterra's submission that there is no clear nexus between the time of accumulation and the time of export may be correct if holding costs were zero; however, this is not the case and accordingly the ACCC does not agree with Viterra's submission.

⁹ Viterra, Response to matters raised in the ACCC's Draft Decision, 1 September 2011, p. 3

4 Approach to pricing

4.1 Non-approved third party port receivals

The ACCC expressed the view in its Draft Decision that Viterra's approach to pricing under the Proposed 2011 Undertaking for at port receivals from non-approved third parties was not appropriate, as it did not provide a sufficiently transparent baseline for effective negotiation with access seekers.

In June 2011 Viterra provided to the ACCC information on the various services that were provided for each of the fees used to differentiate between grain received from different storage locations. The ACCC notes that Viterra charges receivals from non-approved third party sources the same rate as it does to growers delivering directly off farm.

In the Draft Decision the ACCC considered that it was not appropriate that:

- it is not clear whether the differentials applied by Viterra to receivals from alternative supply chains are cost reflective and what services are being supplied in exchange for the various charges
- the application by Viterra of criteria for eligibility for particular Reference Prices and differentials was not subject to negotiation under the Proposed 2011 Undertaking.

In response, as set out in clause 5.2(f), of the Revised Undertaking, Viterra undertook to provide additional detail around the services which are covered by the Reference Prices, and the criteria used to determine eligibility for particular prices. This information would provide a transparent baseline for negotiation in accordance with the publish-negotiate-arbitrate framework. Clause 5.2(f) provides that:

The Port Operator must, throughout the term of this Undertaking, publish in a prominent place on its website (in the same location as the Shipping Stem) details in relation to:

(i) the specific services covered by the charges set out in the Reference Prices including, where appropriate, the quantum of those services; and

(ii) the criteria (if any) which must be satisfied in order to qualify for any charges set out in the Reference Prices.

Note

In accordance with this Undertaking, Applicants will have an opportunity to negotiate with the Port Operator in relation to the Reference Prices and the application of, or Port Terminal Services underpinning, those prices. Disputes can be resolved in accordance with the processes set out in clause 7.

The criteria referred to in clause 5.2(f) may include criteria (if any) for Approved Third Party Storages.

4.2 Third party submissions

The following submissions were received with respect to pricing of non-approved third party port receivals:

Concordia Agritrading

Concordia stated that it found it encouraging that the issue of pricing of certain port services had been identified and addressed.

South Australian Farmers Federation Grains Industry Committee

SAFFGIC submits that it supports:

- Improved transparency of the approval process for third parties
- The approval process should be included within Port Services Access Undertaking
- Arbitration of disputes for non approved third parties denied approval, should be arbitrated by the ACCC
- Port in loading fee, shrinkage costs should be reduced to reflect the expense of the service being requested
- Fees for access from competitor storage be published by Viterra
- Removing the Export Select rebate and instead reducing the Export Select Fee, as receivals from third parties have difficulty accessing rail through Genesee Wyoming Australia (GWA)
- Access to non approved third parties is price prohibitive, SAFFGIC acknowledge that process have not been tested through publish-negotiate-arbitrate as non approved third parties are not included in Port Services Access Undertaking
- Proposed amendment by Viterra under 6.3.3 refers to Approved Third Party Storages does not address the Approval process for Third Party Storage. Does not allow for negotiation and arbitrage for “non approved” third party.

The following submission was received with respect to approved third party storage receivals:

Bunge

Bunge indicates that with respect to receivals from approved third party stores pricing is not its primary concern. Its key concern is that exporters receive fair access to the service and the related conditions. Bunge notes that exporters are

Required to behave with greater accountability and discipline from the time of application for a shipping slot ... until loading of the vessel

And yet notes:

Mistakes in planning or execution during the process mean penalties are incurred, some of these can be viewed as disproportionate between BHCs (lost capacity, variation) ... Bunge hope that protocols and pricing evolve nationally that are reasonably consistent and priced sensibly for both executed and non-executed tonnage.

Bunge also notes that:

Once a third party storage site is acknowledged as approved, that site should subsequently receive the same treatments as any other site, including Viterra's, when included in the mix for a vessel's cargo accumulation.

4.3 ACCC view

As the Revised Undertaking does not include ex ante prices, the ACCC is not, in this context, assessing the appropriateness of particular prices for port terminal services. However, in the context of assessment of the Revised Undertaking the ACCC has considered the prices published under the 2009 Undertaking in order to determine whether the publish-negotiate-arbitrate approach to determining access prices has been effective.

As stated in the Draft Decision, the ACCC is of the view that price differentials for port terminal fees based on the up-country supply chain are appropriate provided that the differential is reflective of differences in cost faced by the access provider, including either increased costs due to differences in the actual treatment of third party grain or increased risks associated with the receipt of third party grain.

Given Viterra's position and supporting submissions that the differential charges are reflective of higher costs, and therefore compliant with the non-discrimination provision, the ACCC has not formed a view on whether the quantum of the differentials applied by Viterra are appropriate, as Viterra's Reference Prices are subject to the publish-negotiate-arbitrate provisions in the Revised Undertaking.

However, the ACCC considers that Viterra should provide sufficient transparency around the terms on which access seekers may gain access to port terminal services, including relating to grain received at the port terminal from third party sites. In particular, where Viterra applies price differentials it should provide sufficient transparency around the basis on which the differential is applied. Increased transparency will provide exporters a more transparent baseline for negotiation in accordance with the publish-negotiate-arbitrate framework.

As noted in the Draft Decision the ACCC considers that clause 5.2(f) as included in Viterra's Revised Undertaking should provide an appropriate level of certainty to access seekers regarding the terms of access to port terminal services for wheat from third party storage sites. It should increase the transparency of Viterra's differential charges and criteria for the application of those charges.

The ACCC considers that increased information provided by Viterra around the services covered by each of the charges in accordance with clause 5.2(f) will assist access seekers in their negotiations under clause 6 of the Revised Undertaking. For example, if an access seeker does not require a particular service listed under a charge, it may be able to negotiate with Viterra a reduced charge which represents the services it does require.

Clause 6.3(a)(i) of the Revised Undertaking provides that:

Subject to clause 6.3(a)(iv), the Port Operator will provide any information requested by an Applicant which is related to access to the Port Terminal Services and which is

reasonably required by the Applicant to assist in negotiations in relation to an Access Application within 5 Business Days of receiving the request.

Where an access seeker considers that information provided by Viterra is not sufficient to ensure negotiation occurs in accordance with clause 6 of the Revised Undertaking, including negotiation in relation to the Reference Prices and the application of, or Port Terminal Services underpinning, those prices, the access seeker may raise a dispute under clause 7. This dispute resolution regime provides for arbitration of disputes by the ACCC or a private arbitrator.

The ACCC considers that this increased transparency will assist access seekers that wish to use alternative supply chains in South Australia, as they will be in a better position to determine the reasonableness of, and negotiate regarding, the differentials applied by Viterra. This is appropriate having regard to the public interest, including the public interest in having competition in markets in accordance with s. 44ZZA(3)(b). It is also appropriate having regard to the objects of Part IIIA, which include 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 (s. 44ZZA(3)(aa)). The ACCC considers that the market for up-country storage facilities is an upstream market relative to the market for port terminal services.

The ACCC notes that SAFFGIC has in its submission indicated its support for increased transparency of pricing and the opportunity for access seekers to seek arbitration from the ACCC on the matter of disputes arising over the third party non-approved receival fee.

Increased transparency will also assist growers who, as users of Viterra's Port Terminal Services, are eligible to seek arbitration on the receival fee when they deliver direct to port.

The ACCC considers clause 5.2(f) of the Revised Undertaking to be appropriate.

5 Overall approach

5.1 Publish–Negotiate–Arbitrate

5.1.1 Publish-negotiate-arbitrate framework

Viterra has proposed to roll forward the publish-negotiate-arbitrate model from the 2009 Undertaking. This 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 Proposed 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 Proposed 2011 Undertaking. Clause 7 provides a process whereby disputes may be escalated from negotiation to mediation to **arbitration**.

In addition to the above elements, key features of the 2009 undertaking include the robust non-discrimination and no hindering access provisions, which have been rolled forward into the Revised Undertaking. In summary:

- the non-discrimination provision (clause 5.5) stipulates that Viterra must not discriminate between different applicants or users in favour of its own trading business except to the extent that the cost of providing access to other applicants or users is higher
- the no hindering provision (clause 9.7) stipulates that Viterra shall not engage in conduct for the purpose of preventing or hindering access to port terminal services by existing customers or applicants.

The ACCC considers that this publish-negotiate-arbitrate framework balances the legitimate business interests of Viterra (refer s. 44ZZA(3)(a)) with the interests of access seekers (refer s. 44ZZA(3)(c)). The framework enables Viterra to negotiate 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 publish-negotiate-arbitrate model achieves this balance 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 (see 5.3 Publication of Information and Ring fencing below)
- 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

For the reasons above, the ACCC considers that the publish-negotiate-arbitrate approach adopted in the Revised Undertaking, as supported by robust non-discrimination and no hindering access provisions, is appropriate.

Given that the overall approach to access provision as provided in the publish-negotiate-arbitrate arrangements of the Revised Undertaking is appropriate, the ACCC therefore considers that prescriptive ex ante price regulation is not necessary in Viterra's Revised Undertaking. Further, it is the view of the ACCC that it is not appropriate to strengthen the publish-negotiate-arbitrate arrangements with ring-fencing rules for Viterra at this time, given that Viterra has provided increased transparency of its port operations under the Revised Undertaking.

5.1.2 Anti-hoarding provision

The PLPs attached to Viterra's Proposed 2011 Undertaking contained at clause 12 a 'Performance Risk / Anti-hoarding' provision that permitted Viterra to not accept a booking, if it considered that the booking, taken in aggregate with other bookings of the exporter involved an attempt by the exporter to reserve slots in excess of its reasonably anticipated requirements or to prevent competitors obtaining access to port terminal services or limit throughput at the port terminal.

The ACCC's preliminary view, published in the Draft Decision,¹⁰ was that the anti-hoarding provision provided Viterra with a broad discretion to reject bookings. Having regard to the objects of Part IIIA to the effect of the provision on the efficient use of Viterra's port terminal services, the interests of access seekers, as well as the public interest in having competition in markets, the ACCC formed the view that clause 12 was not appropriate.

Accordingly, Viterra has removed clause 12 of the PLPs in the Revised Undertaking. The ACCC considers this to be appropriate.

5.2 The ACCC's role under the Revised Undertaking

5.2.1 Non-discriminatory access

Clause 5.5 of the Revised 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. While the ACCC can require an audit of Viterra to ensure compliance with the non-discriminatory access

¹⁰ ACCC, Viterra Operations Limited Port Terminal Services Access Undertaking, Draft Decision, 11 August 2011, pp. 83-84

clause, the ACCC considers that Viterra's undertaking should also include a provision specifying that it will provide the ACCC with a copy of the access agreement it executes with its trading arm. The ACCC considers that this would aid its assessment of Viterra's compliance with non-discrimination requirements imposed by the undertaking.

Viterra has included clause 5.5(b) in its Revised Undertaking:

Within 5 business days of executing an Access Agreement with its own Trading Division, the Port Operator must provide to the ACCC a copy of that Access Agreement.

The ACCC notes that a similar clause was included in GrainCorp's accepted 2011 Undertaking. The ACCC takes the view that this is a common issue across industry and considers a consistent regulatory approach to be appropriate, given the ACCC's role in monitoring compliance with the port terminal services access undertakings. Therefore the ACCC considers that Viterra's Revised Undertaking is appropriate in this regard.

5.2.2 Information gathering

As set out in the ACCC's Decision on GrainCorp's Proposed 2011 Undertaking, the ACCC considers that it is necessary for it to have a general information gathering provision in the port terminal services access undertakings.¹¹ In particular, the ACCC considers it necessary to be in a position to obtain relevant information, in a timely manner. The ACCC acknowledges that during the operation of a Part IIIA access undertaking, it can request information from the undertaking provider at any time, but the provision of information is voluntary.

To address the ACCC's concerns regarding the ability to obtain relevant information from the port operator during the term of the Undertaking, Viterra has included the following provision in its Revised Undertaking:

5.7 Request for information

(a) The ACCC may, by written notice, request the Port Operator to provide information or documents that are required by the ACCC for the reasons specified in the written notice to enable it to exercise its powers or functions in relation to this Undertaking.

(b) The Port Operator will provide any information requested by the ACCC under clause 5.7(a) in the form and within the timeframe (being not less than 14 days) specified in the notice.

The ACCC considers that clause 5.7 addresses its concerns and is therefore appropriate because the ability for the ACCC to request information in a timely manner will assist the ACCC exercise its powers or perform its functions under the Revised Undertaking in a timely and fully informed manner. The ACCC is of the

¹¹ ACCC, GrainCorp Operations Limited Port Terminal Services Access Undertaking, Decision to Accept, 22 June 2011, pp. 19-20.

view that the ACCC's ability to carry out these functions is in the legitimate business interests of Viterra and the interests of access seekers.

5.2.3 Variation of the Port Loading Protocols

In the Draft Decision, the ACCC set out certain minimum standards for the process by which a port terminal operator may vary its protocols that it considered were necessary to ensure an efficient, meaningful and transparent consultation process for access seekers in accordance with s. 44ZZA(3)(c). The ACCC took the view that these standards should apply consistently to the four port terminal operators' undertakings (having regard to sections 44ZZA(3)(aa) and (e)) which promotes consistency in access regulation across industry.

In order to address these minimum standards Viterra has made changes in its Revised Undertaking, which are discussed in the following sections.

5.2.3.1 The comprehensive nature of the Port Loading Protocols

To address the ACCC's concerns regarding the comprehensive nature of the PLPs, Viterra has inserted drafting in its Revised Undertaking specifying that the Loading Protocols is a comprehensive document. Specifically, Viterra has inserted a new clause 9.2(b), which provides:

"the Port Loading Protocols must be, and continue to be, a comprehensive statement of the Port Operator's policies and procedures for managing demand for Port Terminal Services".

The ACCC considers that Viterra's insertion satisfies the minimum standards (which it has determined having regard to the criteria in s. 44ZZA(3)) and is appropriate.

5.2.3.2 Process for varying the Port Loading Protocols

To address the ACCC's concerns regarding minimum standards for the PLPs variation process, Viterra's Revised Undertaking amends the variation process set out in the Proposed Undertaking. Clause 9.3(c)(iv) of the Revised Undertaking provides that Viterra will publish written submissions on the variation on its website within five business days of receiving the submission. However Viterra is not required to publish any part of a written submission which contains information which is subject to a claim of confidentiality by a third party or that contains offensive or abusive material or is otherwise inappropriate for publication.

Clause 9.3(c)(vi)(B) of the Revised Undertaking provides that Viterra may prepare a further variation to take into account feedback from interested parties or the ACCC. Viterra is not required to recommence consultation.

The ACCC considers that Viterra's insertion satisfies the minimum standards (which it has determined having regard to the criteria in s. 44ZZA(3)) and is appropriate.

5.2.3.3 The ACCC's role in the process for varying the Port Loading Protocols

To satisfy the minimum standards regarding the ACCC's role in the PLPs variation process, Viterra's Revised Undertaking includes a proposed new clause 9.4:

9.4 Objection notice

- (a) *If the Port Operator seeks to vary the Port Loading Protocols in accordance with clause 9.3(b), the ACCC may object to the proposed variation (or any part of the variation). If the ACCC objects to a proposed variation (or any part of the variation), it must issue a notice to the Port Operator stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this clause 9.4(a) on the ACCC website.*
- (b) *Any notice issued under clause 9.4(a) must be issued at least 10 Business Days prior to the date on which it is proposed the variation will become effective.*
- (c) *If the ACCC proposes to issue a notice under clause 9.4(a), then at least 5 Business Days before issuing that notice, the ACCC must provide the Port Operator with a draft notice stating its intention to object to the proposed variation and providing reasons for that intended objection.*
- (d) *In issuing a draft notice under clause 9.4(c) or a final notice under clause 9.4(a), the ACCC must have regard to whether the proposed variation:*
 - (i) *is material; and*
 - (ii) *amounts to a breach of the anti-discrimination provision in clause 5.5 or the no hindering access provision in clause 9.7.*
- (e) *The ACCC may withdraw a draft notice issued under clause 9.4(c) or a notice issued under clause 9.4(a) if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under clause 9.4(c) or the notice issued under clause 9.4(a) no longer exist.*
- (f) *If the ACCC issues a notice under clause 9.4(a), the Port Operator must, within 3 Business Days, either:*
 - (i) *withdraw the proposed variation and commence a new variation process (in which case, the Port Operator must place a notice in a prominent place on the Port Operators website explaining the withdrawal and commencement of a new process and notify the ACCC in writing of the withdrawal and commencement of a new process); or*
 - (ii) *withdraw the proposed variation and confirm the status of the existing Port Loading Protocols (in which case, the Port Operator must publish a notice to this effect in a prominent place on its website and notify the ACCC in writing that it has withdrawn the proposed variation and confirmed the status of the existing Port Loading Protocols).*

The ACCC considers that Viterra's proposed drafting adopts a consistent approach with undertakings submitted by other BHCs regarding the specification of timeframes within the variation process.

The ACCC is of the view that a requirement for it to issue a draft notice of objection prior to issuing a final notice is appropriate. The ACCC notes the time between publication of the variation notice, after the minimum 10 business day consultation period, and the issuing of a draft notice, is five business days. This is a very short time for the ACCC to respond, but the ACCC anticipates that it will be able time to identify concerns and act if necessary within the timeframe.

For the reasons outlined above, the ACCC considers that the objection notice provision, as drafted in Viterra's Revised Undertaking, is appropriate.

Viterra has also broadened the approval provision previously found in clauses 5.5(c) and 7.5(d) of the Proposed Undertaking. In clause 1.1(i) of the Revised Undertaking, Viterra has inserted the following:

The ACCC may approve the Regulated Access, Pricing and Monitoring Committee or a member of the ACCC to exercise a decision making function under this Undertaking on its behalf and that approval may be subject to any conditions which the ACCC may impose.

The ACCC considers that Viterra's insertion satisfies the minimum standards (which it has determined having regard to the criteria in s. 44ZZA(3)) and is appropriate.

5.3 Publication of information and ring fencing

5.3.1 Revised undertaking

Clause 10.1 of the Revised Undertaking requires Viterra to publish information regarding stocks at port, including the names of the three largest grades of bulk wheat by volume held at each port terminal.

Clause 10.3 of the Revised Undertaking provides that Viterra will publish information in addition to the key performance indicators published pursuant to the 2009 Undertaking relating to:

- daily road receivals
- the total bookings received at each port terminal
- the total bookings rejected at each port terminal
- the total bookings cancelled at each port terminal by clients
- the average time taken to assess bookings at each port terminal
- the total number of port block outs at each port terminal
- the total number of vessels failing survey at each port terminal.

5.3.2 Third party submissions

SAFFGIC, in noting that there are no ring fencing arrangements in place submitted that information on commodity, grade, quality and tonnage of grain delivered into any

Viterra or Grain Trade Australia site should be provided in real time free of charge to the market. In addition, total receivals, carryover and domestic out turn for all grains should be provided to the market.

Bunge submitted that the Growers Warehouse Report (by grade, tonnes and port zone as a minimum) is made available to all exporters to ensure that Viterra's trading arm is not the only party holding this critical information that affects grain pricing and accumulation programs.

Louis Drefus submits:

LDC considers that it is desirable that Viterra publish information about the profile of the crop received at its upcountry facilities. As the ACCC points out this information was deemed to be relevant by the Productivity Commission. LDC does not agree with the Productivity Commission finding that the provision of such information would be unduly onerous on the BHC.

As such, LDC would like to see all BHC's publish weekly harvest reports that include the profile of each crop by port zone, in respect of the quantity of each grade of the commodities received. A final harvest report should be published which states the final quantity of each grade of commodity received in each port zone.

CBH Grain agrees that the publication of greater information provides clarity and certainty for access seekers. However, it does not consider it an alternative to ring fencing. CBH suggests that an express obligation in the port terminal services agreement that Viterra will not pass any information regarding CBH to Viterra's own trading arm would further reduce the opportunity for Viterra's trading arm to gain an improper advantage as a result of greater information access.

5.3.3 ACCC view

The ACCC is cognisant of submissions calling for greater information regarding the tonnage and quality of wheat received into all Viterra and approved third party storage facilities; however, all port terminal services access undertakings are limited to services provided at ports.

The ACCC considers that providing the same level of information regarding stocks held at port at the same time, to all exporters seeking to export bulk wheat, is in the interests of access seekers and in the interests of having competition in markets in accordance with ss. 44ZZA(3)(c) and 44ZZA(3)(b) of the Act.

The ACCC considers that performance indicators provide useful information to potential access seekers comparing the total overall operations at each port in their decisions and negotiations over access. Having regard to the interests of access seekers, the ACCC considers that the publication of additional indicators proposed by Viterra is appropriate.

Having regard to the additional information available to access seekers, the robust non-discrimination and no hindering clauses, the ACCC is of the view that formal ring-fencing is not required at this time.

5.4 Substance of the Standard Terms

5.4.1 Revised Undertaking

Pursuant to clause 5.1(a) of the Revised Undertaking, Viterra is obliged to offer port terminal services to access seekers on Standard Terms. The Standard Terms are set out at Schedule 3 of the Revised Undertaking in the form of an indicative access agreement. The Standard Terms provide a clear starting point for negotiations between access seekers and Viterra. The starting point provided by the Standard Terms is critical to ensuring access seekers can effectively negotiate with Viterra. The inclusion of Standard Terms also assists in ensuring that the costs of negotiation and/or arbitration are not excessive.

The Standard Terms act as the default access agreement in the event that parties are unable to reach a negotiated agreement. The Standard Terms attached at Schedule 3 of the Revised Undertaking have been altered from the terms attached to the 2009 Undertaking. Changes are detailed in the ACCC's Draft Decision. Further amendments have been made to the Standard Terms in anticipation of the introduction of the auction system.

5.4.2 ACCC view

The ACCC considers that, while all elements of the Standard Terms are subject to negotiations between Viterra and access seekers, the Standard Terms represent an appropriate starting point for those negotiations.

The ACCC remains of the view that liability and despatch and demurrage systems are commercial issues suited to negotiation between the parties to the agreement in accordance with the publish-negotiate-arbitrate model. If parties are unable to resolve these issues, the parties may seek arbitration. Accordingly the ACCC has not formed a view on the appropriateness of the liability provisions proposed in the Standard Terms and whether particular clauses will be acceptable to all parties.

6 Decision

The ACCC decided on 28 September to accept the Revised Undertaking, which was provided by Viterro on 22 September 2011.

The ACCC reached its decision following consultation on its Draft Decision and considering the matters to which it must have regard pursuant to s. 44ZZA(3) of the Act. The ACCC is of the view that Viterro's Revised Undertaking addresses the ACCC's concerns outlined in its Draft Decision and is appropriate.

Appendix A

Bulk wheat export markets analysis

Viterra in the wheat export industry

In assessing the undertakings provided by each of the Port Operators to commence in 2011, the ACCC has considered each on its own merits. While undertakings accepted by the ACCC from each port terminal operator reflect the particular circumstances of that operator, there are certain aspects of the undertakings for which the ACCC has sought a consistent approach across the bulk wheat export industry. Where consistency is considered appropriate, the ACCC has noted this in the Final Decision.

There are several instances in which the ACCC has taken the view that it is appropriate that arrangements for Viterra are different to those that may be required for other port terminal operators, due to the particular circumstances of Viterra. In this regard, the ACCC considered that Viterra has a significant degree of market power in the provision of port terminal services in South Australia and an incentive to use that market power, given its vertical integration in upstream and downstream markets and the lack of significant competition in the provision of port terminal services in South Australia.

Capacity allocation arrangements

The ACCC has assessed the differences across BHCs and the markets in which they operate so that its views are made on a consistent basis across undertakings. The analysis is of particular relevance in the ACCC's consideration of the capacity allocation and management arrangements proposed in the undertakings it is considering.

Capacity allocation arrangements include two main components:

- Primary allocation arrangements by which capacity is rationed between competing users and which are broadly categorised as either price or non-price rationing. Primary allocation arrangements currently operated by the BHCs include both non-price administered allocation (as in the case of the FCFS arrangements of GrainCorp, Viterra and ABA) and price rationing (as under the CBH auction system). Primary allocation systems of both types typically require exporters to make at least some capacity commitments before production outcomes, and hence export shipping requirements, are fully known.
- In-season arrangements that facilitate exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export capacity. These adjustment mechanisms include flexibility for shippers to move booked capacity between geographic and/or temporal locations (such as exists under GrainCorp's Protocols) and the ability for shippers to transfer bookings in a secondary market (as occurs under CBH's arrangements in WA). In-season response to changed, unforeseen or unplanned needs may also occur through grain trading or swapping along the supply chain, including by use of free on board (FOB) purchases or sales.

Two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances are:

- the relationship between total port elevation capacity and average annual and seasonal demand for it
- the extent to which the incentive exists for vertically integrated BHCs to pursue self preferential treatment—including hindering access to port services by other exporters—as opposed to seeking to maximise returns from their terminals.

The following sections discuss the relevance of these factors to a decision regarding the appropriateness of capacity management arrangements proposed by a port operator. An assessment in particular cases will be informed also by the current arrangements the operator has in place and the effectiveness of those arrangements in achieving fair and efficient outcomes.

Extent of capacity constraint

As the PC stated in its Inquiry Report on Wheat Export Marketing Arrangements, auctions can play a significant role in efficiently allocating limited port capacity.¹² This general economic principle, that allocative efficiency is best achieved through a price mechanism, has greatest application when supply is limited relative to demand. When no binding capacity constraint exists the demands of all users can be met and the means by which allocation occurs is not critical to achieving allocative efficiency.

In all Australian states from which wheat is exported there are periods when port capacity is more highly valued. These periods occur when new season grain is available to be shipped and differ depending on harvest times in the production zones. In all years, even those of poor harvest, demand for shipping slots during these peak periods exceeds capacity to some extent. However the frequency and extent to which demand exceeds capacity varies between the ports operated by the BHCs.

On this basis, it might be considered appropriate for all port operators to use auction systems to allocate port capacity as all (with the possible exception of ABA) have limited capacity at least at some ports for some periods. This was the view of the PC which noted ‘that port operators [other than CBH] might also consider adopting a similar [auction] system where there is a likelihood of excess demand for port capacity at certain points in time (effectively, a shifting peak demand problem driven by movements in the supply and demand for wheat)’.¹³

However, the ACCC considers that the mere likelihood of excess demand at some points during the wheat export year is not sufficient to warrant the ACCC taking the view that access arrangements employing a non-price system of allocating capacity are inappropriate. The ACCC’s view has taken into account the degree of the capacity constraint evident and a judgement as to whether resultant inefficiencies warrant requiring the operator to employ an auction system for primary allocation arrangements. Also relevant is the extent to which allocative inefficiencies arising under the first come, first served arrangements are mitigated by other measures such

¹² Productivity Commission, Wheat Export Marketing Arrangements, 1 July 2010, p. 205.

¹³ Ibid.

as transferability or greater flexibility to move capacity bookings. And, as discussed in the next section, the extent to which the incentive exists for vertically integrated BHCs to pursue self-preferential treatment is the other key relevant factor in determining appropriate capacity management arrangements.

Incentive for self-preferential treatment

A vertically integrated operator may have an incentive to utilise bottleneck infrastructure it controls to hinder access by competitors in upstream or downstream markets in order to gain market share at the expense of access seekers. The strength of such an incentive will be influenced by the existence or threat of competition to the operator's position. Where actual or potential competition exists, the incentive to hinder competitors is moderated by the threat that the hindering behaviour may instead result in loss of throughput to an alternative supply chain or use.

However, where competition to the operator is weak and the incentive to hoard capacity and so hinder others from accessing export capacity is strong, this will inform an assessment as to the appropriateness of proposed capacity allocation arrangements. Where this incentive is strong, so too is the argument that allocation arrangements should incorporate measures to prevent such behaviour. Auctions can provide such a mechanism as they are a fair, transparent and efficient means of allocating capacity under which the incumbent faces the same limits on its ability to acquire capacity as other users.

It is also possible to design non-price allocation systems in such a way as to prevent or reduce anti-competitive behaviours by the operator. Such measures include use of an independent body to manage the shipping stem and requiring that the access provider faces the same financial disincentive to hoard as do access seekers.

In the context of the Australian wheat export industry competition to the bulk shipment of wheat through an operator's ports comes from a number of sources:

- extent of vertical integration and alternative up-country supply chains
- domestic uses for wheat
- competition from ports in other regions
- threat of bypass by customers
- containerised exports.

The extent of competition varies significantly across the markets in which the BHCs operate. A high level summary of the key features of each region (including the differences that exist) in terms of their existing supply chain characteristics and competitive dynamics is outlined below.

Up-country supply chains

The key up-country supply chain characteristics (and differences) that exist in each of the three regions is summarised in Table A1 below:

Table A1: up-country supply chain characteristics by region

Region	Characteristics
East Coast	<p>GrainCorp holds significant market share in the provision of wheat storage and handling services in New South Wales, Victoria and QLD. Two other bulk handling companies operating on the east coast, AWB GrainFlow and ABA, also operate a relatively small number of storage and handling facilities.</p> <p>Alternative options to storage and handling services provided by GrainCorp, GrainFlow and ABA are:</p> <ul style="list-style-type: none">▪ on-farm storage (which makes up a relatively greater proportion of total storage capacity than in other regions);¹⁴▪ a wider choice of independent storage and transport providers compared to other regions▪ limited overlap of GrainCorp's and Viterra's up-country storage networks.
South Australia	<p>Viterra holds a significant market share in the provision of wheat storage and handling services in South Australia, with some alternative options provided by:</p> <ul style="list-style-type: none">▪ on-farm storage▪ independent bulk handlers.

¹⁴ The PC Report observed that the larger stock of on-farm storage in the East Coast may be attributable to the relative importance of the domestic market and longer history of choice in domestic marketing: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 68.

Region	Characteristics
Western Australia	<p>The provision of bulk wheat storage and handling services is dominated by CBH.</p> <p>There is some on-farm storage, a significant proportion of which is for on-farm use, but no competition from independent bulk handlers.</p> <p>Competition to CBH grain logistics and freight services is restrained by conduct that is the subject of Notification to the ACCC (N93439). The Notification relates to exclusive dealing conduct by CBH that requires growers that use CBH grain storage and handling services to also use transport services supplied by CBH to transport grain to port. The ACCC revoked the notification on 29 June 2011 from 1 May 2012 and CBH has sought a review of that decision by the Australian Competition Tribunal (Tribunal).</p>

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 67-68.

As Table A1 illustrates, there appears to be greater use of alternatives to the up-country wheat storage and handling services supplied by the BHCs on the east coast as compared to both South Australia and Western Australia.

Domestic and non-bulk export wheat

The proportion of wheat that is supplied into the Australian domestic market relative to the proportion that is exported overseas varies significantly between the three regions, as illustrated in Table A2 below:

Table A2: domestic and export wheat supply characteristics by region

Region	Characteristics
East Coast	<p>While a substantial volume of wheat is exported from the east coast, a significant proportion of wheat is also consumed domestically. The domestic market is therefore a significant alternative to bulk wheat export for grain growers on the east coast.</p> <p>Also, containerised export wheat volumes on the east coast have expanded in recent years. In particular, the Essential Services Commission (ESC) noted that containerised grain exports in Victoria and southern New South Wales expanded to represent a significant proportion of total exports from those areas.¹⁵</p>

¹⁵ Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime Final Report*, May 2009, pp 39-40.

Region	Characteristics
South Australia	<p>Almost all wheat in South Australia is exported, with only a relatively small proportion supplied into the domestic market.¹⁶ The domestic market is therefore a less significant alternative to the export market for SA growers than is the case for growers on the east coast.</p> <p>Almost all wheat exports from South Australia is exported in bulk with only limited export of wheat in containers and bags.</p>
Western Australia	<p>Almost all wheat in Western Australia is exported in bulk (90 per cent), with only a relatively small proportion supplied into the domestic market (5 per cent) and the balance exported in containers.</p>

Source: Sources: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 56 and 68. and Notice of 29 June 2011 re the CBH Notification

As Table A2 illustrates, there is greater use of alternatives to the bulk wheat supply chain by growers in the east coast region, as compared to both South Australia and Western Australia.

Port terminal facilities

The relative proximity of port terminals operated by different bulk handlers in particular regions is a key determinant of the extent to which those port terminals compete for the throughput of wheat. Table A3 provides an overview of the proximity of grain elevation ports.

Table A3: Proximity of port terminals by region

Region	Characteristics
East Coast	<p>Some port terminals in New South Wales, Victoria and the easternmost parts of South Australia operated by GrainCorp, ABA and Viterra are in relatively close proximity and may provide alternatives for some wheat throughput.</p> <p>The ESC, in its review of grain handling and storage arrangements in Victoria, noted that there is a ‘significant degree of competitive substitutability’ between the port terminals operated by ABA and GrainCorp.¹⁷ Also, by-pass of GrainCorp’s Newcastle facilities has resulted from recent construction of a facility to be used for cargo accumulation in order to utilise port loading facilities operated by POAGS at the K2 berth on Kooragang Island.</p>
South Australia	<p>Viterra operates all wheat port terminals in South Australia and is not</p>

¹⁶ Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 56.

¹⁷ Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime, Final Report*, May 2009, p. 48.

Region	Characteristics
	likely to face competition in the short to medium term from any alternative port terminal operator for wheat throughput, with the possible exception of weak competition from Port of Portland in far west Victoria.
Western Australia	CBH operates all wheat port terminals in Western Australia and the ACCC is unaware of any immediate alternative port terminal facility for use by grain exporters.

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p 68.