



Australian
Competition &
Consumer
Commission

Consultation Paper

Viterra Operations Limited

**Proposed auction system for
allocating port terminal capacity**

28 February 2012



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Glossary

ACCC	Australian Competition and Consumer Commission
Auction Objection Notice	As described in clause 9.6(a) of the 2011 Undertaking
Auction Principles	Clauses 9.5(d)(i) to (vii) of the 2011 Undertaking
Auction Variation Notice	As described in clause 9.5(b)(i) of the 2011 Undertaking
CBH	Cooperative Bulk Handling Limited
CCA	<i>Competition and Consumer Act 2010</i> (Cth) (formerly known as the <i>Trade Practices Act 1974</i> (Cth))
PLPs	Port Loading Protocols – Schedule 2 to the 2011 Undertaking
Standard Terms	Port Terminal Services Agreement for Standard Port Terminal Services
Viterra	Viterra Operations Limited (ABN: 88 007 556 256) – Operator of the Port Terminals in South Australia
Viterra’s trading arm	Viterra Limited (ABN: 59 084 962 130) – accredited exporter of bulk wheat
WEMA	<i>Wheat Export Marketing Act 2008</i> (Cth)
2011 Undertaking	Port Terminal Services Access Undertaking accepted by the ACCC from Viterra pursuant to Division 6 of Part IIIA of the CCA on 28 September 2011.

1 Introduction

The ACCC is conducting public consultation as part of its assessment of Viterra's proposed auction system. This paper seeks industry stakeholder views on Viterra's proposed auction system.

Pursuant to Part IIIA of the *Competition and Consumer Act 2010*, (CCA) the Australian Competition and Consumer Commission (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.

On 28 September 2011 the ACCC accepted, pursuant to Division 6 of Part IIIA of the CCA, the 2011 Undertaking provided to the ACCC by Viterra Operations Limited (Viterra) on 22 September 2011. The 2011 Undertaking was provided as a replacement to the 2009 Undertaking accepted by the ACCC on 29 September 2009. The 2009 Undertaking expired on 30 September 2010. Viterra's 2011 Undertaking relates to the provision of access to services for bulk wheat export at six grain terminals operated by Viterra in South Australia. These terminals are:

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

The 2011 Undertaking was submitted in accordance with legislative requirements of the *Wheat Export Marketing Act 2008* (Cth) (WEMA).

As part of the 2011 Undertaking accepted by the ACCC, Viterra must change its capacity allocation system to introduce an auction. The 2011 Undertaking provides that the auction system is to be introduced by varying the Port Loading Protocols (PLPs) and/or the Standard Terms. The 2011 Undertaking further specifies the process which must be followed in order to introduce the auction system

The ACCC is required to assess the proposed auction system and decide whether or not to object to any or all of the proposed variations set out in the Auction Variation Notice. The matters the ACCC is required to have regard to in deciding whether to object include whether the proposed variations comply with the clauses in the 2011 Undertaking relevant to the introduction of the auction system, and the matters set out in section 44ZZA(3) of the CCA. Further details are set out in section 1.3 of this Consultation paper.

1.1 Viterra's 2011 Undertaking

On 23 December 2010, Viterra submitted a proposed undertaking for assessment by the ACCC. On 11 August 2011, the ACCC issued a draft decision to the effect that

the proposed undertaking required amendment in a number of areas, including capacity allocation, in order to be accepted by the ACCC. The proposed undertaking included a continuation of the first come, first served capacity allocation system that was in operation pursuant to the 2009 Undertaking. The ACCC determined that the first come, first served capacity allocation system was not appropriate in the South Australian wheat export market having regard to the circumstances likely to be faced by Viterra over the term of its 2011 Undertaking of expected capacity constraint and limited competitive constraints to neutralise the incentives for self preferential treatment by Viterra.

Viterra submitted that it was unable to amend the proposed Undertaking to include a detailed auction system before the expiration of the 2009 Undertaking on 30 September 2011. Instead, Viterra submitted a revised undertaking with a commitment to introduce an auction system by 14 May 2012. An auction system is to be introduced by a variation of the PLPs and/or Standard Terms. Viterra is also amending the terms of Storage & Handling agreement that applies to grains other than bulk wheat, however this is not governed by the 2011 Undertaking.

In order to vary the PLPs and/or the Standard Terms to introduce an auction system, Viterra is required, pursuant to the 2011 Undertaking, to first conduct industry consultation for a period of at least 15 business days followed by the publication of an Auction Variation Notice. The ACCC is then required to assess the auction system and determine its appropriateness having regard to the matters set out in clause 9.6(c) of the 2011 Undertaking, discussed below. If the ACCC decides that the auction system proposed by Viterra in the Auction Variation Notice is not appropriate the ACCC is required to issue an Auction Objection Notice. Full details as to the process are provided at clause 9.5 and 9.6 of the 2011 Undertaking.

1.2 Viterra's proposed auction system

Viterra's proposals seek to change its PLPs and Standard Terms to implement an auction system in accordance with the Auction Principles outlined in the 2011 Undertaking.

Viterra provided its Auction Variation Notice to the ACCC on 17 February 2012. The Auction Variation Notice, including the new Auction Rules and associated documents are available on the ACCC's website at:

<http://www.accc.gov.au/wheat>

Alternatively, go to the ACCC's homepage at www.accc.gov.au and follow the links to 'For regulated industries' and 'Wheat Export: Port Terminal Services Undertakings' and 'Viterra'.

Viterra propose to vary:

- The Protocols by deleting all of the current provisions in the Protocols and replace them with new provisions which include the new Auction Rules
- The Standard Terms; and

- The 2011/2012 Season Storage & Handling Agreement .

1.3 ACCC assessment process

In determining whether to issue an Auction Objection Notice, the ACCC must, pursuant to clause 9.6(c), have regard to the following matters:

- Whether the proposed variations include the features set out in clause 9.5(d) of the Undertaking (the Auction Principles), which include:
 - an auction should be the primary means of allocating port loading capacity at each Port Terminal
 - 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 by Viterra
 - 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
 - the auction should be conducted in a transparent and non-discriminatory manner
 - slots should be allocated to those clients that value them most
 - 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 premiums paid by clients as part of the auction process to users of the Port Terminals on a pro-rata basis
 - rights purchased in the auction should be tradeable 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
- whether the proposed auction system would amount to a breach of the anti-discrimination provision in clause 5.5 or the no hindering access provision in clause 9.7 of the Undertaking
- the desirability of having a degree of consistency with other auction systems in Australia for the exporting of bulk wheat, balanced with the need to apply the system having regard to any different characteristics of Viterra's operations and the South Australian industry
- the matters set out in section 44ZZA(3) of the CCA which include *inter alia*:
 - the objects of Part IIIA of the CCA, which are to: promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream

and downstream markets; and provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry

- the pricing principles specified in section 44ZZCA
- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of the persons who might want access to the service
- any other matter that the ACCC considers relevant; and
- any submissions by the Viterra and/or other interested persons.

In its assessment of Viterra's proposed auction system, the ACCC is required to form views regarding what constitutes an appropriate auction system in the bulk wheat export industry. Where appropriate, given Viterra's circumstances, the ACCC will consider industry-wide issues in its assessment of the proposed auction system.

The ACCC considers the operation of the auction system in Western Australia as a matter relevant in assessing the Viterra proposed auction system.

1.4 Indicative timeline for assessment

The process Viterra is required to follow in introducing an auction system is outlined in clause 9.5 and 9.6 of the 2011 Undertaking. In accordance with this process, Viterra has completed formal consultation prior to the publication of the Auction Variation Notice. Following the publication of the Auction Variation Notice, the ACCC is required to determine if the auction system proposed is appropriate.

The ACCC has developed the following indicative timeline for its assessment of the proposed auction system:

- receipt of submissions to the ACCC's Consultation Paper by 9 March 2012
- if the ACCC determines that the auction proposal is not appropriate,
 - a Draft Objection Notice is to be provided to Viterra on or before 2 April 2012
 - publication of an Auction Objection Notice on or before 11 April 2012, if the draft notice is not withdrawn prior.

Pursuant to clause 9.6(e) of the Undertaking, if the ACCC does not issue an Auction Objection Notice, the variation, including the varied PLPs and auction rules take effect on and from Thursday, 26 April 2012.

1.5 Consultation and making a submission

The ACCC now invites submissions on the proposed auction system.

Section 2 of the Consultation Paper sets out certain matters on which the ACCC is seeking views. Note that section 2 is not a comprehensive outline of all the matters able to be considered and you are not required to provide views on each of the matters listed in that section. You are invited to comment on any aspect of the proposed auction system that you consider relevant.

Note however that the 2011 Undertaking requires Viterro to implement an auction system. Pursuant to the 2011 Undertaking, Viterro is unable to introduce, and the ACCC is unable to consider, any form of capacity allocation system that is not an auction system.

Please include detailed reasons to support the views put forward in your submission. If you consider that an aspect of the proposed auction system is *not* appropriate, please suggest changes that may address your concerns.

1.5.1 Making a submission

Submissions should be addressed to:

Mr David Salisbury
A/g General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@accc.gov.au

Taking into account the timeframes specified in the Undertaking and outlined above, the ACCC has allowed a two-week consultation period. Submissions must be received by 5.00pm, on **9 March 2012**. The ACCC may be unable to consider submissions received after this date.

1.5.2 Confidentiality of information provided to the ACCC

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

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

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

1.6 Further information

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

Lyn Camilleri
Director
Transport and General Prices Oversight Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001

Ph: +61 3 9290 1973

Email: lyn.camilleri@accc.gov.au

2 Matters for comment

This section outlines matters on which the ACCC is seeking comment from stakeholders to assess whether the proposed auction system is likely to be appropriate.

The ACCC is aware that the auction system proposed by Viterra mirrors in part a number of features of the auction system operated by Cooperative Bulk Handling Limited (CBH). Viterra has outlined a number of differences between the system it proposes and the auction system implemented by CBH last season in its covering letter published with the Auction Variation Notice dated 17 February 2012.

The ACCC acknowledges the differences between the auction system proposed by Viterra and the existing system operated by CBH and invites views from stakeholders as to the significance of these differences.

2.1 Capacity allocation

2.1.1 Primary means for allocating capacity - auction

Clause 9.5(d)(i) of the 2011 Undertaking requires Viterra to introduce an auction system that is the primary means of allocating port loading capacity at each port terminal and clause 9.5(d)(v) provides that slots should be allocated to those clients that value them most.

The proposed PLPs specify at clause 2.1(b) and (c) that

The primary method of allocation of Capacity will be by Auction conducted in accordance with these Protocols.

If Capacity is not acquired by Clients at Auction, or if Additional Capacity becomes available ... Clients may apply for the Capacity or Additional Capacity on a first-in-first-served basis in accordance with these Protocols.

The Auction Rules relating to bidding at auction proposed by Viterra, in effect, mirror the auction rules operated by CBH. During the most recent auctions held by CBH a large quantity of capacity was allocated through the first come, first served capacity allocation system as a result of bids being withdrawn despite initial demand for shipping slots being high. Capacity on offer through the first come first served system was allocated very quickly after it was made available indicating that demand for these shippings slots was still high. Some exporters were not able to acquire capacity through the first come first served system.

Issues for comment:

(a) Does the proposed auction system satisfy the principles that the primary method of allocation of capacity is by auction and that slots should be allocated to those clients that value them most?

(b) Does the auction design adequately prevent inefficient 'gaming' or manipulation of the auction result? If so, what would be necessary to prevent this?

2.1.2 Auction timing

Viterra proposes holding three auctions in the following format:

- one auction in respect of the Harvest Shipping Period (1 October to 31 January) to be held at the start of August
- two auctions in respect of the Non-Harvest Shipping Period (1 February to 30 September) to be held at the start of November, and the start of December.

Viterra proposes publishing an indicative date for these auctions by 1 July in the preceding year and confirming the date and time of each auction, and the capacity available at each auction at least 10 business days prior to the commencement of each auction.

The ACCC notes that the auction timing proposed by Viterra differs from the CBH model in that it is more prescriptive in terms of the number of auctions to be held whereas the CBH model provides CBH with discretion to hold further auctions or to move to a first come, first served capacity allocation system.

Issues for comment:

Does the proposed timetable for auctions meet the needs of exporters?

2.1.3 Secondary means for allocating capacity - First come, first served

Viterra proposes that capacity not allocated at auction, and any additional capacity, is made available to clients of a first come, first served basis. The auction proposal specifies that details of the capacity available under first come, first served will be published within either:

- five days following either the Harvest Shipping Period Auction or the second Non-Harvest Shipping Period Auction; or
- two days of it becoming available if it becomes available following the surrender or movement of a booking or it is Additional Capacity

and that clients may only be able to nominate for that capacity two days after its availability is published.

Viterra has submitted in its cover letter to the Auction Variation Notice that:

the first-in-first-served system (which applies on and from a published time after the relevant auction or auctions have taken place) is an online and clearly auditable booking system with each client limited to five log-ins and each booking restricted to one port terminal and one slot. This places increased structural disciplines on bookings for capacity not acquired at auction and prevents one booking application from securing significant volumes of the available capacity.

The ACCC understands that it is Viterra's practice to update its shipping stem following receipt of booking forms under the first come, first served system. Nominations may appear on the shipping stem as pending prior to Viterra assessing

whether it can accept the nomination. The ACCC also notes that the Viterra shipping stem includes details as to when a nomination was received and when that nomination was accepted.

Issues for comment:

- (a) Does the combination of the auction system and the first come, first served system encourage or allow exporters to withdraw bids for capacity from an auction and instead obtain capacity through the first come, first served system and should this be curtailed?*
- (b) Is the two-day period between publication of capacity available through the first come, first served system and the opening for nominations appropriate?*
- (c) Is there sufficient transparency with respect to the allocation of capacity through the first come, first served system?*
- (d) Does the on-line system provide all exporters with equal opportunity to book capacity through the first come, first served system?*
- (e) Is there sufficient clarity and certainty as to the operation of the first come, first served system?*

2.2 Capacity

2.2.1 Determination of capacity made available at auction

Clause 10.2 (a) of the 2011 Undertaking requires that Viterra publish an available capacity table that includes an indicative estimate of the Available Capacity for each port terminal. Clause 10.2 (b) provides that if Viterra varies the indicative estimate of the total amount of Available Capacity that may be available for all bookings, then Viterra will publish in the same location as its available capacity table, the reasons for that change.

The auction principles included in the 2011 Undertaking specify that ‘port loading capacity’ is 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.

Further, the auction principles specify:

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))

The proposed PLPs define ‘Capacity’ as the capacity that is made available by Viterro Operations to exporters to enable the export of Bulk Wheat, barley and other Grain commodities through a Port Terminal Facility, measured in tonnes.

Clause 2.3(a) of the proposed PLPs requires Viterro to publish on the Viterro website the Capacity on offer at auction at least 10 business days prior to the commencement of the auction.

Issues for comment:

- (a) Is the determination of capacity made available through the auction sufficiently transparent?*
- (b) Do the timeframes for publication of capacity to be offered at auction meet the needs of exporters?*

2.2.2 Additional capacity

Clause 2.2(e) of the proposed PLPs specifies that in endeavouring to maximise port terminal throughput, Additional Capacity may become available. ‘Additional Capacity’ is defined as

new capacity which becomes available for any reason after an Auction in respect of the relevant Period. For the avoidance of doubt, “Additional Capacity” does not include Capacity which has been offered at Auction.

Clause 2.2(e) of the proposed PLPs provides that Additional Capacity that becomes available will be offered to exporters on a first come, first served basis unless:

- (i) the cumulative amount of Additional Capacity that has become available in respect of that Year exceeds 200,000 metric tonnes; and
- (ii) the relevant parcel of Additional Capacity that has become available exceeds 50,000 metric tonnes; and
- (iii) there are 60 or more days between the date the relevant parcel of Additional Capacity becomes available and the first day of the slot to which the parcel of additional capacity relates.

Issues for comment:

Are the above parameters relating to the making available of additional capacity appropriate to ensure that an auction is the primary means of allocating port capacity?

2.3 Transparency

2.3.1 Shipping Stem and auction results

It is Viterra's current practice to publish a shipping stem including details of all bookings and nominations made regardless of whether a vessel has been named. This differs from the CBH shipping stem which only publishes details of bookings (and consequently details of who acquired capacity through the auction process) at the time a vessel is named by the exporter.

Clause 3.1 of Viterra's auction proposal provides that the shipping stem will be updated within one business day of the Auction Results Validation Date, with respect to client bookings for capacity acquired through auction or within one business day of receipt by Viterra of the booking form with respect to acquiring unallocated capacity through the first come, first served capacity allocation system.

In operation, this provision ensures that Viterra's current practice is maintained and also has the effect of ensuring that the auction results become public once the shipping stem is updated.

In addition, clause 10(c) of the auction rules provides that Viterra will publish details of the final prices and Capacity sold within each Lot within 3 business days of the Auction Results Validation Date.

Viterra submits that this increased transparency and earlier information on its shipping stem provides substantial assistance to clients seeking to understand future capacity available or to trade or move slots.

Issues for comment:

Does the proposal in respect of updating the shipping stem and publishing auction results meet the needs of exporters?

2.4 Auction Review Committee

Clause 12 of the proposed auction rules provides that an Auction Review Committee will resolve grievances with respect to the auction in a similar manner to the CBH system.

The role of the Auction Review Committee in the Viterra proposal is set out in clause 12(a) which provides that its primary role is to ensure that the Auction Rules have been complied with. This differs from the CBH system where the Auction Review Committee is responsible for ensuring the auction proceeds in an orderly and fair manner. The CBH Auction Review Committee is charged with investigating any outcomes that it believes may have contravened the operations of a fair and equitable market.

The constitution of Viterra's proposed Auction Review Committee is two representatives from Viterra, one of whom sits as the Chair of the Committee and is entitled to vote, the other is not entitled to vote; one representative from Tradeslot and one 'trade' representative that is approved by a majority of Major Users.

The powers of the Auction Review Committee include but are not limited to:

- (i) enter a trading halt to the Auction process
- (ii) suspension of Auction Trades during the Auction and the repeat of an Auction round or rounds
- (iii) the suspension and/or cancellation of Bidder registration
- (iv) validating the Auction
- (v) recommending improvements to the Auction process.

Issues for comment:

- (a) Are the proposed role and powers of the Auction Review Committee appropriate?*
- (b) Is the Auction Review Committee adequately empowered to carry out this role?*
- (c) Is the Auction Review Committee sufficiently independent?*

2.5 Auction Premium Rebate

Premiums paid at auction are proposed to be rebated to clients in a similar manner to the practice in the CBH auctions.

Clause 8.7 of the Port Terminal Services Agreement for Standard Port Terminal Services (Standard Terms) provides that Viterra will pay the Harvest Auction Premium Rebate (if any) to the Client within 30 business days of the end of the Harvest Shipping Period. Similarly, the Non-Harvest Auction Premium Rebate is proposed to be paid to the Client within 30 business days of the end of the Non-Harvest Shipping Period.

The formula for calculating the Auction Premium Rebates is at clause 13 of the Auction Rules. The formula includes any interest paid on the auction premiums and is allocated on the basis of tonnages shipped by a particular client.

The 2011 Undertaking provides at Clause 9.5(d)(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;

In its Final Decision to accept the 2011 Undertaking, the ACCC stated:

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.

During the ACCC's assessment of the 2011 Undertaking, submissions raised a number of alternative payment models including a payment by way of a letter of credit, or that payments are made into an independently managed trust account. The ACCC notes also that a number of alternative models were suggested during Viterra's formal consultation.

Issues for comment:

Is the proposed design of the Auction Premium Rebate appropriate?