



Australian
Competition &
Consumer
Commission

Viterra Operations Limited
Port Terminal Services Access Undertaking
Decision to withdraw the ACCC's
Auction Objection Notice

5 September 2012



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Contents

Contents	3
Summary.....	5
1 Background.....	7
1.1 The ACCC's Auction Objection Notice	7
1.1.1 ACCC reasons for issuing the Auction Objection Notice	8
1.2 Consultation process	10
2 Decision making framework.....	12
2.1 Withdrawal of the Auction Objection Notice	12
3 Revised Variation Notice	15
3.1 Auction Variation Notice	15
3.2 Draft Revised Proposal	16
3.3 Revised Proposal.....	18
3.4 Revised Variation Notice	20
4 Analysis of the Revised Variation Notice	21
4.1 Withdrawal of the Auction Objection Notice	21
4.1.1 Clause 9.5(d)(i)	22
4.1.2 Clause 9.5(d)(v)	24
4.1.3 Promotion of the economically efficient use of Viterra's port terminal infrastructure	26
4.1.4 WA auction outcomes – 2011/12.....	31
4.1.5 Conclusion	32
4.2 Clause 9.5(d) auction features.....	32
4.2.1 Clause 9.5(d)(i)	32
4.2.2 Clause 9.5(d)(ii)	33
4.2.3 Clause 9.5(d)(iii)	33
4.2.4 Clause 9.5(d)(iv)	34
4.2.5 Clause 9.5(d)(v)	34
4.2.6 Clause 9.5(d)(vi)	34
4.2.7 Clause 9.5(d)(vii)	35
4.3 Anti-discrimination – no hindering.....	35
4.4 Consistency with other auction systems	36
4.5 Section 44ZZA(3) factors	36
4.5.1 The objects of Part IIIA	37
4.5.2 The legitimate business interests of Viterra.....	37
4.5.3 The public interest, including the public interest in having competition in markets	38
4.5.4 The interests of persons who might want access to the service	39
5 Decision.....	41

Glossary

ACCC	Australian Competition and Consumer Commission
Auction Objection Notice	Notice issued by the ACCC to Viterra pursuant to clause 9.6(a) of the 2011 Undertaking on 11 April 2012
Auction Features	Features listed in clauses 9.5(d)(i) to (vii) of the 2011 Undertaking
Auction Variation Notice	Notice provided by Viterra pursuant to clause 9.5(b)(i) of the 2011 Undertaking on 17 February 2012 – containing Viterra’s initial auction proposal
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))
Draft Revised Proposal	Revised auction system proposal subject of industry consultation, dated 7 June 2012, revised on 13 June 2012
FIFS	First in, first served capacity allocation system
PLPs	Port Loading Protocols – Schedule 2 to the 2011 Undertaking
Revised Proposal	The Draft Revised Proposal updated by a series of variations to Viterra’s auction system, detailed in the documents submitted to the ACCC on 12 July 2012
Standard Terms	Port Terminal Services Agreement for Standard Port Terminal Services
Viterra	Viterra Operations Limited (ABN: 88 007 556 256) – provider of port terminal services for the export of bulk wheat
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(as varied from time to time)

Summary

The Australian Competition and Consumer Commission (ACCC) has decided to withdraw, pursuant to clause 9.6(d) of Viterra's 2011 Undertaking, the Auction Objection Notice issued to Viterra Operations Limited (Viterra) on 11 April 2012 in response to its Auction Variation Notice. The ACCC has formed the view that in all the circumstances it is appropriate to withdraw the Auction Objection Notice after assessing the revised auction system detailed in the Revised Variation Notice submitted by Viterra on 24 August 2012. The ACCC's reasons are set out in this decision document.

This means that Viterra will operate an auction to allocate capacity to its port terminal services for the export of grain from its South Australian port terminals. The first auctions are due to be held in November 2012, to allocate capacity from 1 February 2013 to 30 September 2013. The ACCC considers that the use of an auction system to allocate capacity 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.

In its consideration of Viterra's access undertaking under Part IIIA of the *Competition and Consumer Act 2010* (CCA) in 2011 (2011 Undertaking), which relates to the provision of port terminal services to exporters of bulk wheat, the ACCC considered that Viterra's first in, first served (FIFS) system of capacity allocation was not appropriate. This view took into account the circumstances likely to be faced by Viterra over the term of the 2011 Undertaking, of expected capacity constraint and limited competitive constraints to neutralise the incentives for self preferential treatment by Viterra.

As background, on 28 September 2011, the ACCC accepted from Viterra the 2011 Undertaking. The 2011 Undertaking requires Viterra to introduce an auction system to allocate port terminal capacity. The process to be followed in order to introduce an auction system is detailed in clauses 9.5 and 9.6 of the 2011 Undertaking and involves Viterra changing its Port Loading Protocols (PLPs) and / or its Standard Terms pursuant to which it provides port terminal services to exporters. This process also included an ability for the ACCC to object to all or any of the proposed variations having regard to a range of matters listed in clause 9.6(c) of the 2011 Undertaking.

On 11 April 2012, the ACCC issued an Auction Objection Notice to Viterra. The reasons for the ACCC's objections were set out in the Auction Objection Notice. In summary, they were that:

- Viterra's proposed variations in its Auction Variation Notice did not incorporate the following features as required by clause 9.5(d) of the 2011 Undertaking:
 - (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*
 - and
 - (v) *Slots should be allocated to those clients that value them most.*

- it was the ACCC's view that the auction proposal put forward by Viterra in its Auction Variation Notice may not promote the economically efficient use of Viterra's port terminal infrastructure
- having regard to the outcomes experienced in Western Australia during the 2011/12 season, and the submissions from stakeholders, it was the ACCC's view that the system adopted in South Australia should, so far as practicable, be modified to avoid or minimise the undesirable features of the (then) CBH auction model prior to the introduction of the auction system in South Australia.

It is the ACCC's view that the modifications to the auction premium rebate and the inclusion of business rules regarding Viterra's residual FIFS system set out in the Revised Variation Notice make it more likely that:

- the auction will conclude, and will conclude at an efficient outcome
- exporters will participate in the auction in order to acquire high demand capacity as opposed to engaging in bidding behaviour in order to acquire capacity through the FIFS system.

The ACCC considers that the modifications set out in the Revised Variation Notice go a significant way towards mitigating the risks identified in the ACCC's Auction Objection Notice that the auction will fail to conclude, or will conclude at an inefficient outcome.

The ACCC therefore considers it appropriate, in all the circumstances, to withdraw the Auction Objection Notice. The ACCC acknowledges that a reduced risk remains, given the auction system is untested in practice, however considers in all the circumstances that it is appropriate to withdraw the Auction Objection Notice. The ACCC notes that Viterra has committed to conducting a review of the operation of the auction system following completion of the Harvest Shipping period ending in 2013. This review mechanism provides an opportunity for Viterra to determine whether any further changes are necessary or desirable.

1 Background

Viterra Operations Limited (**Viterra**) provides port terminal services for the export of bulk wheat at six grain terminals in South Australia. 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) (**CCA**) to accept an access undertaking lodged by Viterra (**2011 Undertaking**). Viterra submitted the 2011 Undertaking in order to meet the access test provisions of the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**). The 2011 Undertaking provides for third party exporters to access the port terminal services offered by Viterra.

The 2011 Undertaking requires Viterra to introduce an auction system to allocate port terminal capacity. The process to be followed in order to introduce an auction system is detailed in clauses 9.5 and 9.6 of the 2011 Undertaking and involves varying Viterra's Port Loading Protocols (PLPs) and/or its Standard Terms pursuant to which it provides port terminal services to exporters. This process also includes an ability for the ACCC to object to all or any of the proposed variations having regard to a range of matters listed in clause 9.6(c) of the 2011 Undertaking.

Pursuant to the process in the 2011 Undertaking, Viterra lodged its Auction Variation Notice on 17 February 2012. The ACCC issued an Auction Objection Notice on 11 April 2012, objecting to some of the proposed variations set out in Viterra's Auction Variation Notice. Reasons for the ACCC's objection are set out in summary below.

In objecting to the Auction Variation Notice, the ACCC acknowledged that Viterra had acted in good faith in the development of its proposed auction system. However, the ACCC considered that recent auctions in Western Australia using substantially the same auction design as proposed by Viterra had highlighted a number of problems which the ACCC considered could also arise with the operation of Viterra's proposed auction system.

The ACCC considered that more time should be given to address the issues in Viterra's proposed auction system, in consultation with industry, before an auction system was introduced in South Australia.

Viterra lodged its Revised Variation Notice pursuant to clause 9.6(f)(ii) of the 2011 Undertaking on 24 August 2012.

1.1 The ACCC's Auction Objection Notice

The ACCC issued its Auction Objection Notice on 11 April 2012 objecting to the following clauses:

Port loading protocols

<i>Clause</i>	<i>Content</i>
---------------	----------------

2	How to make a booking
---	-----------------------

3.1	Update of Shipping stem
-----	-------------------------

7(e)(ii) Viterra Operations will not accept any request to agree or move a Booking to a Slot at a Port Terminal where: (ii) that Slot is in a Non-Harvest Shipping Period and the second Auction in respect of that Non-Harvest Shipping Period has not yet occurred.

8.2 Refund of booking fee

9(a)(viii) A client (Transferor) may transfer a Booking if the following conditions are satisfied: (vii) where the booking relates to a slot in the Non-Harvest Shipping Period, the second Auction in respect of that Non-Harvest Shipping Period has occurred.

15 Use of information

Auction rules

4 Auction principles

5 Overview of how the auction works

6 Bidding activity

7 Excess capacity / capacity not sold

11 Grievance procedures

13 Auction premium rebate

Standard terms

1.1 Defined terms: Harvest Auction Premium Rebate; Harvest Shipping Period; Non-Harvest Auction Premium Rebate; Non-Harvest Shipping Period

8.7 Auction Premium Rebate

The decision making framework set out in the 2011 Undertaking required that in issuing an Auction Objection Notice, the ACCC had regard to each of the matters set out in clause 9.6(c) of the 2011 Undertaking. Further details regarding these matters are set out in section 2 of this decision document.

1.1.1 ACCC reasons for issuing the Auction Objection Notice

Based on the information before the ACCC at the time and having regard to each of the matters set out in clause 9.6(c), it was the ACCC's view that it was appropriate to object to the proposed variations as described in Viterra's Auction Variation Notice. The ACCC's reasons were set out in section 3 of the Auction Objection Notice. In summary, the reasons for the ACCC's objections were that:

- Viterra’s proposed variations did not incorporate the following features as required by clause 9.5(d):
 - (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*

and

 - (v) *Slots should be allocated to those clients that value them most.*
- It was the ACCC’s view that the auction proposal put forward by Viterra may not promote the economically efficient use of Viterra’s port terminal infrastructure.
- Having had regard to the outcomes experienced in Western Australia in the 2011/12 season, and submissions from stakeholders, the ACCC formed the view that the system adopted in South Australia should, so far as practicable, be modified to avoid or minimise the undesirable features of the CBH auction model prior to the introduction of an auction system in South Australia.

In addition to these key reasons for issuing the Auction Objection Notice, four clauses in Viterra’s Auction Variation Notice were identified by the ACCC as not being in the interests of persons who might want access to the service. These provisions related to the payment of the conditional refund in the event that Viterra chose not to reoffer capacity that was returned to the shipping stem;¹ sharing of information between the independent auction provider and Viterra² and the grievance procedure with respect to any disputes arising with respect to the auction process.³

In its assessment of the Auction Variation Notice, the ACCC identified a number of concerns with the proposed auction system.

The first concern was that it appeared to the ACCC that the auction mechanism contained in the Auction Variation Notice may not come to an outcome at all. In other circumstances, the auction may reach a conclusion, but the outcome of the auction may not reflect an efficient allocation of scarce port capacity. That is, port capacity that exporters are willing to pay a positive amount for will not be allocated at the auction.

This effect arises as a consequence of the impact of rebating the proceeds of the auction to exporters. In the presence of the proposed rebate, exporters can be expected to base their demands for capacity at auction on the basis of an ‘effective price’, which is the difference between the auction price and the expected rebate for that slot.

In order for the proposed auction to achieve an efficient allocation, the effective price paid should increase until supply and demand are in balance. However, while the proposed auction mechanism ensures that the auction price increases when demand exceeds supply, the effective price may not increase at all when demand exceeds supply, or may continue to

¹ Clauses 8.2 and 2.4 of the proposed Port Loading Protocols submitted as part of the Auction Variation Notice.

² Clause 15 of the proposed Port Loading Protocols submitted as part of the Auction Variation Notice.

³ Clause 11 of the proposed Auction Rules submitted as part of the Auction Variation Notice.

increase after demand falls short of supply. As a consequence, although the auction may terminate at an efficient allocation, there is no guarantee that the auction will terminate, or will terminate at an efficient allocation.

The second concern was that it appeared to the ACCC that exporters may be able to choose not to participate in the auction process, but nevertheless secure scarce capacity through the first in, first served (FIFS) capacity allocation mechanism, even in circumstances of high demand. The possibility of securing high demand capacity through the FIFS mechanism alters the incentives on exporters to participate in the auction process, particularly for slots with a high (effective) price and particularly for an exporter which can be reasonably sure of obtaining the allocation that it desires in the FIFS mechanism.

It appeared to the ACCC that it may be possible in the proposed auction design for an exporter, at the point in an auction where the excess demand on high priced slots is relatively small, to bring the auction to a close by withdrawing demand in the high-priced slots. This exporter may then be able to secure its demand through the FIFS system, at no premium. Such an exporter will have secured high-priced capacity at no premium, placing it at a competitive advantage over its rival exporters (who have paid a high effective price for the same capacity). At the same time, the exporter may retain its auction allocation of low-priced capacity for which it expects to receive a rebate.

These concerns are discussed further in Chapter 4 of this decision document and the full reasons for the ACCC's decision to object are contained in *Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice*, available on the ACCC's website at www.accc.gov.au/Viterra.

1.2 Consultation process

On 13 June 2012, Viterra provided a 'Draft Revised Proposal' which outlined in principle how Viterra proposed amending its auction system set out in the Auction Variation Notice.

The ACCC and Viterra held joint industry meetings on Viterra's Draft Revised Proposal in Adelaide and Melbourne on 20 and 27 June 2012 respectively. The purpose of the industry consultation was to explain why the ACCC issued the Auction Objection Notice, Viterra's changes to the proposal set out in the Auction Variation Notice aimed at resolving the issues identified by the ACCC and to get industry's preliminary views on Viterra's Draft Revised Proposal.

Following those meetings, based on feedback received from industry, Viterra made further modifications to the Draft Revised Proposal including providing for the publishing of an indicative, estimated snapshot of the rebate per tonne payable relevant to the issue of uncertainty with respect to the rebate calculation. In addition, Viterra increased the amount of capacity that could be withdrawn by exporters in any one round from 50 000 tonnes to 110 000 tonnes. Viterra provided its Revised Proposal, including these changes, to the ACCC on 12 July 2012.

The ACCC published a consultation notice on 20 July 2012 inviting submissions on Viterra's Revised Proposal. The ACCC received four submissions from interested stakeholders.

On 24 August 2012, Viterra submitted its Revised Variation Notice pursuant to clause 9.6(f)(ii) of the 2011 Undertaking.

As the Revised Variation Notice is substantially the same as the Revised Proposal provided to the ACCC on 12 July 2012, and which was the subject of industry consultation conducted by the ACCC between 20 July 2012 and 3 August 2012, the ACCC did not consult further on the Revised Variation Notice.

Differences between the Revised Proposal and the Revised Variation Notice are discussed at section 3.4 of this decision document.

In making its decision to withdraw its Auction Objection Notice, the ACCC has had regard to submissions received from stakeholders with respect to Viterra's Revised Proposal.

Viterra's Revised Variation Notice and other relevant materials including supporting submissions from Viterra and public submissions from interested parties, are available on the ACCC website at www.accc.gov.au/Viterra.

2 Decision making framework

This chapter sets out the framework by which the ACCC has assessed Viterra's Revised Variation Notice.

2.1 Withdrawal of the Auction Objection Notice

Clause 9.6(d) of the 2011 Undertaking provides that:

The ACCC may withdraw a draft notice issued under clause 9.6(b) or an Auction Objection Notice if it becomes aware that in all the circumstances the reasons specified in the relevant notice no longer exist, those reasons are addressed, or for any other reason.

In determining whether to withdraw the Auction Objection Notice, the ACCC has assessed the Revised Variation Notice against each of the reasons referred to in section 3 of the Auction Objection Notice (summarised in section 1.1.1 above), to determine if the reason no longer exists or has been addressed. The ACCC has also considered whether it is appropriate to withdraw the Auction Objection Notice for any other reason.

The ACCC's reasons referred to in section 3 of the Auction Objection Notice were based on particular matters to which the ACCC was required to have regard under clause 9.6(c) of the 2011 Undertaking.

In deciding whether it is appropriate to withdraw the Auction Objection Notice, the ACCC has also had regard to the other matters referred to in clause 9.6(c) of the 2011 Undertaking, including whether the Revised Variation Notice as a whole incorporates the features set out in clause 9.5(d).

As noted in the Auction Objection Notice, in deciding to issue an Auction Objection Notice, the ACCC had regard to the following matters, pursuant to clause 9.6(c) of the 2011 Undertaking:

- whether the proposed variations incorporate the features set out in clause 9.5(d) of the Undertaking, which are:
 - 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 Viterra to exporters to enable the export of Bulk Wheat, barley and other grain commodities through the Port Terminals
 - 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))
 - 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 auction 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. Any transfer fee payable to the Port Operator in relation to trades or transfers as between exporters should be cost based
- whether the proposed variations 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:
 - 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
 - whether the undertaking is in accordance with an access code that applies to the service
 - under s 44ZZA(3)(e) any other matter that the ACCC considers relevant; and
- any submissions by Viterra and/or other interested persons.

In making its decision to issue the Auction Objection Notice, the ACCC considered:

- the operation of the auction system in Western Australia in so far as it was relevant to Viterra's auction proposal; and

- the intention of the access test in the WEMA, that accredited exporters that own, operate or control port terminal facilities provide fair and transparent access to its facilities to other accredited exporters,

as matters relevant to the assessment of Viterra's proposed auction system, pursuant to section 44ZZA(3)(e).

In having regard to the matters referred to in clause 9.6(c) of the 2011 Undertaking in deciding whether it is appropriate to withdraw the Auction Objection Notice, the ACCC considers it appropriate to have regard to these same matters.

In determining whether to issue the Auction Objection Notice, or to subsequently withdraw the Auction Objection Notice, the ACCC had regard to the following matters in section 44ZZA(3), and determined they were not as relevant in the consideration of Viterra's proposed auction system:

- the pricing principles specified in section 44ZZCA
- whether the undertaking is in accordance with an access code that applies to the service.

3 Revised Variation Notice

Pursuant to clause 9.5 of the 2011 Undertaking, Viterra is required to introduce an Auction System to allocate port terminal capacity by varying its PLPs and/or Standard Terms. The Revised Variation Notice is intended to address the issues raised by the ACCC in the Auction Objection Notice issued in response to Viterra's Auction Variation Notice.

3.1 Auction Variation Notice

Viterra's Auction Variation Notice was provided to major users and the ACCC and published, pursuant to clause 9.5(b) of the 2011 Undertaking, on 17 February 2012. The complete Auction Variation Notice is available on the ACCC's website at www.accc.gov.au/viterra.

In summary, the auction system detailed in the Auction Variation Notice included:

- a) An online ascending clock auction operated by a third party provider, Tradeslot Pty Ltd. Tradeslot also operates the auction in Western Australia. In brief:
 - (i) Viterra determines the amount of capacity available and subsequently publishes an auction catalogue. The date and time of each auction and the capacity on offer will be published at least 10 business days prior to the commencement of the auction.⁴ Capacity will be offered in lots, within 14 to 16 day shipping slots.
 - (ii) All lots made available for auction are contested simultaneously.⁵
 - (iii) Capacity in each slot is offered at a per tonne uniform price across all bidders. Bidders bid how much capacity they are willing to purchase in respect of a lot at the stated auction fee.⁶
 - (iv) As long as total demand for one slot is higher than total supply, the uniform price increases by one increment each round (with the exception of the first and second rounds when there is no auction price change between rounds). With every new round, bidders are asked to submit a new volume bid at the new price per tonne.⁷ Bidders are not permitted to increase the volume of their bid past the total capacity requested in the previous rounds; however, bidders are able to move bids from lot to lot (across ports / across slots).⁸
 - (v) The auction ceases when, across all slots, demand for capacity matches or is less than supply.⁹
- b) three auctions: the first auction for port terminal capacity for the period 1 October to 31 January (Harvest Period);¹⁰ two sequential auctions for port terminal capacity for the period 1 February to 30 September (Non-harvest Period). Capacity not acquired

⁴ Viterra, Port Loading Protocols submitted as part of the Auction Variation Notice, clause 2.3(a); Auction Rule 3

⁵ Viterra, Auction Rules submitted as part of the Auction Variation Notice, Rule 4(b)

⁶ Viterra, Auction Rules submitted as part of the Auction Variation Notice, Rule 4(d)

⁷ *ibid*

⁸ Viterra, Auction Rules submitted as part of the Auction Variation Notice, Rule 4(e)

⁹ Viterra, Auction Rules submitted as part of the Auction Variation Notice, Rule 4(b)

¹⁰ Viterra, Port Loading Protocols submitted as part of the Auction Variation Notice, clause 2.2(a)

during the first non-harvest period auction would be made available during the second non-harvest period auction.¹¹

- c) Exporters may provide a proxy bid to Tradeslot at the beginning of an auction. Proxy bids can be modified or replaced and are overridden by a live bid.¹²
- d) a FIFS system for capacity not acquired at either the first Harvest Period auction or the second Non-harvest Period auction to be made available to clients.¹³ Viterra was required to publish details of available capacity within specified timeframes following the auction and would only accept nominations following the passing of a specified time period after these details were published.¹⁴

Viterra included in a submission additional detail of its FIFS system, including, for example, that exporters would be limited to only booking one slot at one port per nomination. These rules were not included in the Auction Variation Notice.¹⁵

- e) auction premiums to be rebated back to exporters at a flat rate per tonnes shipped; auction premiums accumulated during the Harvest Period auction are rebated back to exporters who shipped bulk wheat during the Harvest Period; auction premiums accumulated during the Non-harvest Period auction would be rebated to exporters who shipped during the Non-harvest Period. (Exporters who failed to ship against capacity acquired at auction do not receive a rebate in relation to that capacity.)¹⁶

In addition to the above auction system proposed in the Auction Variation Notice, Viterra proposed the inclusion of the following provision into the PLPs.

Following completion of the second Auction in respect of the February to September 2013 Non-Harvest Shipping Period (i.e. in early 2013), Viterra Operations will conduct a review and seek feedback from its Clients in relation to the operation of the Auction system with a view to determining whether any changes to the Auction system are necessary or desirable. Viterra Operations will communicate with Clients in relation to that review and the outcome of the review.¹⁷

The ACCC objected to the Auction Variation Notice for the reasons in section 3 of the Auction Objection Notice, outlined above in Chapter 1 of this document.

3.2 Draft Revised Proposal

For the purpose of informal industry consultation, on 13 June 2012, Viterra provided a Draft Revised Proposal.

The Draft Revised Proposal proposed modifying the auction system set out in the Auction Variation Notice by making the following changes:

¹¹ Viterra, Port Loading Protocols submitted as part of the Auction Variation Notice, clause 2.2(b)

¹² Viterra, Auction Rules submitted as part of the Auction Variation Notice, Rule 8

¹³ Viterra, Port Loading Protocols submitted as part of the Auction Variation Notice, clause 2.2(a)

¹⁴ Viterra, Port Loading Protocols submitted as part of the Auction Variation Notice, clause 2.4

¹⁵ Viterra, Introduction of Auction System, Proposed variations to Viterra's Port Loading Protocols, Standard Terms and Storage and Handling Agreement, 17 February 2012, p. 3

¹⁶ Viterra, Auction Rules submitted as part of the Auction Variation Notice, Rule 13; Standard Terms, clause 8.7

¹⁷ Viterra, Port Loading Protocols submitted as part of the Auction Variation Notice, clause 14(b)

- Treatment of the Auction Premium
 - The Auction rebate will be calculated by reference to a full season with all auction premiums paid in respect of all auctions in the relevant season included in the rebate pool.
 - The rebate pool will be distributed to exporters in accordance with a specified formula that has the effect of ensuring that the rebate is paid to exporters that buy and execute capacity using slots that have the greatest proportion of spare capacity across all rounds of each auction for the relevant year.
 - There will be a separate rebate pool in respect of each of Viterra's Port Terminals except for Adelaide Outer Harbor and Inner Harbour which are part of the same supply chain.
 - Auction costs will be spread across each rebate pool and allocated to the rebate pools on a *pro rata* basis based on tonnes executed through each relevant Port Terminal.
 - If Viterra is unable to provide Port Terminal services in respect of capacity acquired at auction, the auction premium will be refunded to the exporter and deducted from the rebate pool; if Viterra requests an exporter to move a booking for operational reasons, the exporter will retain its entitlement to the rebate attached to the original slot.
- The auction rules will specify limits on withdrawing bids, exporters will only be able to reduce their aggregate amount of bids for capacity across all Port Terminals by 50 000 tonnes per round.
- Changes to the FIFS system. Under the Draft Revised Proposal, Viterra's PLPs would be amended to specify that:
 - Each exporter will only have one log-on to Viterra's on-line booking system.
 - For 5 business days after the re-opening of the shipping stem following an auction, an exporter will not be able to submit a booking within 30 minutes of its previous booking form.
 - For 5 business days after the re-opening of the shipping stem, the maximum amount of any single booking will be 60,000 tonnes.
 - The introduction of a rule in the FIFS system that provides that Viterra will reject a FIFS booking if the capacity nominated is greater than the capacity available.
 - When Viterra rejects a booking form due to operational reasons, it will seek to commence discussions with the client in relation to potential alternative arrangements (except within the first 5 business days following an auction).
- Changes to movement, transfer and surrendering bookings.
- Bookings will be fully transferable with no limits on the number of transfers, with amendments to the PLPs to make it clear that any entitlements to participate in the distribution of the relevant rebate pool will be transferred to the Transferee.

- The PLPs will be amended to reflect that bookings may only be moved to a slot that occurs within the same year.
- If a client moves a booking between slots at the same Port Terminal, it will retain its entitlement to participate in the rebate attaching to the original booking if it actually ships through the new slot.
- Further amendments to the PLPs to clarify that:
 - If an exporter returns unwanted capacity to the shipping stem and Viterra decides not to re-offer that capacity to the market, Viterra will nonetheless pay the conditional refund of booking fee / Auction fee.
 - The type and nature of the information provided by Tradeslot to Viterra will be limited to information required to facilitate Viterra's compliance with the 2011 Undertaking and the PLPs.
 - Written grievances must be lodged by 5.00pm on the first business day following the end of bidding.

The ACCC and Viterra held joint industry meetings in Adelaide in respect of the Draft Revised Proposal on 20 June 2012 and Melbourne on 27 June 2012. Three main concerns were raised.

The first concern was regarding an inability to calculate the rebate attached to each particular slot during both the Harvest Period Auction and the first of the Non-Harvest Period Auctions. It appears that the uncertainty comes about due to the annualisation of the rebate. Exporters argued that certainty of prices was necessary in order to devise bidding strategies.

The second concern raised related to the limit on the ability to withdraw bids. Some exporters suggested that the limit should be raised from 50 000 to 100 000 tonnes to ensure greater flexibility, particularly for larger exporters.

The third concern related to the FIFS mechanism. It was also suggested that the FIFS mechanism might be improved, if it allowed exporters to nominate a minimum volume that would be acceptable. It was suggested that a rule such as this would assist in matching available capacity against nominated volumes.

Noting these concerns, Viterra made a number of changes to its auction system prior to submitting the Revised Proposal to the ACCC.

3.3 Revised Proposal

On 12 July 2012, Viterra submitted the Revised Proposal to the ACCC for the purpose of ACCC informal consultation prior to the submission of a Revised Variation Notice. The ACCC issued a consultation paper regarding the Revised Proposal. The Revised Proposal made the following changes to the auction system specified in the Draft Revised Proposal:

- An amendment to clause 4 of the Auction Participation Deed to allow Viterra to display during the auction an indicative estimated snapshot of the rebate per tonne for the relevant slot as at the end of the previous round. Viterra notes that the estimated rebate per tonne

will be subject to significant change, that is the actual rebate per tonne will depend on a range of factors, including subsequent bidding activity in respect of all slots in any subsequent rounds and in any subsequent auctions in respect of the relevant year. Viterra has introduced this change as during industry consultation certain participants suggested that information on the current rebate per tonne calculations may provide greater certainty. Viterra submits that publication of the indicative rebate per tonne is intended to address this issue.¹⁸

- An increase in the limit previously proposed in the Draft Revised Proposal applying to the withdrawal of bids during the auction: exporters will only be able to reduce their aggregate amount of bids for capacity across all Port Terminals by 110,000 tonnes per round.
- The removal of proxy bids at Auction as a consequence of introducing limits on withdrawing bids per round.
- An amendment of the FIFS rules to allow an exporter to specify in their booking application the minimum amount of capacity they wish to acquire on a FIFS basis if the full amount of capacity set out in their booking application is not available. If the exporter does not nominate a separate minimum amount, the amount set out in the booking form will be taken to be the minimum amount.
- The Revised Proposal also amended the timing of the auction system review. Viterra has committed to conducting a review (including seeking feedback from its clients) in relation to the operation of the auction system within three months following completion of the Harvest Shipping period ending in 2013.

On 20 July 2012, the ACCC issued a consultation paper seeking views from industry regarding Viterra's Revised Proposal. Submissions were received from:

- Cargill Australia Limited (Cargill)¹⁹
- Gavilon Grain Australia Pty Ltd (Gavilon)²⁰
- Grain Producers SA Limited (GPSA)²¹
- Louis Dreyfus Commodities Australia Pty Ltd (Louis Dreyfus)²²

As noted in section 1.2 above, in making its decision to withdraw the Auction Objection Notice, the ACCC has had regard to these submissions.

¹⁸ Viterra, Revised Auction System proposal 13 July 2012, p. 11

¹⁹ Cargill, Submission to the ACCC consultation on the Revised Proposal, 3 August 2012

²⁰ Gavilon, Submission to the ACCC consultation on the Revised Proposal, 6 August 2012

²¹ GPSA, Submission to the ACCC consultation on the Revised Proposal, 3 August 2012

²² Louis Dreyfus, Submission to the ACCC consultation on the Revised Proposal, 3 August 2012

3.4 Revised Variation Notice

On 24 August 2012, pursuant to clause 9.6(f) of its 2011 Undertaking, Viterra submitted its Revised Variation Notice. The Revised Variation Notice, while substantially the same as the Revised Proposal, differs from the Revised Proposal in the following respects:

- Modification of the rebate factor formula at clause 4 of schedule 2 of the PLPs. The effect of the modification is to clarify that the rebate is weighted to the undersubscribed slots based on the *proportion* of capacity by which it is undersubscribed rather than the *number of auction* rounds. A consequential change has also been made to the first line of clause 4 of schedule 2 by replacing the words ‘Weighted Capacity_p’ with ‘Weighted Volume_p’.
- The insertion of the following sentences into clause 1 of schedule 2 of the PLPs for clarity “When the Weighted Volume equals zero, the Rebate per Tonne is zero for all Slots. In addition, if the Rebate per Tonne for all Slots is zero, the Rebate Pool will be distributed equally across all tonnes acquired at Auction in respect of the relevant Port Terminal (and which are actually shipped), and will be rebated to Clients on that basis.”
- Extending the time frame in clause 1(c)(ii) of the transitional provisions in schedule 3 of the PLPs from 5 business days to 12 business days.
- The insertion of clause 1(e) of schedule 3 of the PLPs, the effect of which is to ensure that Viterra will comply with clause 1(b) and 1(c) of the transitional provisions after the provisions become effective in the event that it has not already done so.

4 Analysis of the Revised Variation Notice

As noted in Chapter 2, in determining whether or not to withdraw the Auction Objection Notice, the ACCC has considered whether, in all the circumstances, the reasons specified in the Auction Objection Notice no longer exist, or whether the Revised Variation Notice has addressed the concerns expressed in that notice. The ACCC has also considered whether it is appropriate to withdraw the Auction Objection Notice for any other reason.

The ACCC considers that the reasons specified in the Auction Objection Notice still exist. In the period since issuing the Auction Objection Notice it is the ACCC's view that there have not been significant changes to either market conditions or the regulatory environment with the effect of negating the reasons for issuing the Auction Objection Notice.

In determining whether the ACCC's reasons for issuing the Auction Objection Notice (which were based on matters to which the ACCC was required to have regard under clause 9.6(c)) have been addressed, or if there is any other reason to withdraw the Auction Objection Notice, the ACCC has had regard to the matters referred to at clause 9.6(c) of the 2011 Undertaking including whether the auction system set out in the Revised Variation Notice as a whole incorporates the features set out in clause 9.5(d).

4.1 Withdrawal of the Auction Objection Notice

Clause 9.6(d) of the 2011 Undertaking provides that the ACCC may withdraw its Auction Objection Notice if it becomes aware that in all the circumstances the reasons specified in the relevant notice no longer exist, those reasons are addressed, or for any other reason.

The ACCC has formed the view that, while the reasons specified in the Auction Objection Notice still exist, the Revised Proposal goes a significant way to towards mitigating the risks identified in the ACCC's Auction Objection Notice that the auction will fail to conclude, or will conclude at an inefficient outcome. The ACCC, however, does not consider that the modifications in the Revised Variation Notice completely eliminate the risk that an auction will not conclude, or will conclude at an inefficient outcome.

Notwithstanding the remaining risks, the ACCC considers that, in all the circumstances, it is appropriate to withdraw the Auction Objection Notice in light of the significant steps taken by Viterra in its Revised Variation Notice to reduce these risks.

By amending the rebate mechanism in the manner specified in the Revised Proposal, economic modelling undertaken by Viterra's economic consultants suggests that, when compared to the existing system, the proposed auction is likely to draw to a close sooner, allocating a greater amount of capacity during periods of high demand.²³ In addition, by including business rules for the FIFS system that reduce the certainty of acquiring capacity through this mechanism, exporters are more likely to participate in the auction to secure high demand capacity.

The ACCC has formed the view that the Revised Variation Notice does not completely eliminate the possibility that the auction will not conclude, or will not conclude at an efficient allocation. Further the potential for 'gaming' the auction system set out in the Revised

²³ RBB Economics, *Response to the ACCC's analysis of the proposed Viterra port loading capacity auction mechanism*, 23 March 2012, p.11.

Variation Notice has not been tested in practice. In addition, the ACCC acknowledges that a cost of Viterra's approach to addressing the ACCC's concerns with the impact of the rebate by adjusting the way in which the rebate is calculated is the increased uncertainty regarding the amount of the rebate that will be payable to exporters.

The ACCC notes that Viterra's review mechanism whereby Viterra has specified that it will conduct a review and seek feedback from exporters within three months of the end of the Harvest Shipping Period with a view to determining whether any changes to the Auction system are necessary and desirable remains a part of Viterra's Revised Proposal. This review mechanism provides an opportunity for Viterra to make further improvements to the auction system.

The ACCC has formed the view that, in all the circumstances, the changes to Viterra's proposed auction system, which reduce the possibility of an auction not closing, closing at an inefficient outcome, or exporters acquiring high demand capacity through the FIFS system, make it appropriate to withdraw its Auction Objection Notice.

How the Revised Variation Notice has mitigated the risks specified in the ACCC's Auction Objection Notice is discussed further below.

4.1.1 Clause 9.5(d)(i)

Clause 9.5(d)(i) provides that:

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

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

In issuing the Auction Objection Notice, the ACCC formed the view that Viterra's proposal as outlined in the Auction Variation Notice did not incorporate a feature or features to ensure that an auction is the primary means of allocating port terminal capacity.²⁴

The operation of the auction system in Western Australia during the 2011/12 season auctions where large volumes of high demand capacity were allocated through CBH's first come, first served mechanism, in so far as it was relevant to Viterra's Auction Variation Notice, was a matter the ACCC had regard to in forming this conclusion. In addition, the ACCC had regard to submissions from stakeholders that raised concerns with respect to the CBH auction system.

It was the ACCC's view that it appeared that exporters may, under the proposal in the Auction Variation Notice, be able to choose not to participate in the auction process, but nevertheless secure scarce capacity through the FIFS allocation mechanism, even in circumstances of high demand.²⁵ The possibility of securing capacity through the FIFS mechanism alters the incentives on exporters to participate in the auction process, particularly

²⁴ ACCC, Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice, 11 April 2012, p. 15

²⁵ *ibid.*, p. 9

for slots with a high (effective price) and particularly for an exporter which can be reasonably certain of obtaining the allocation that it desires through the FIFS mechanism.

The Revised Variation Notice prescribes a list of rules in relation to the FIFS system whereas the Auction Variation Notice provided little detail. Details of these rules are included in the discussion of the Draft Revised Proposal and the Revised Proposal at sections 3.2 and 3.3 above.

4.1.1.1 Submissions

Viterra submits in relation to the changes to its FIFS system:

Viterra considers that, under its February 2012 proposal, exporters would have limited certainty of obtaining bookings through the FIFS system if they do not acquire Capacity at Auction. However, Viterra's proposal involves documenting those arrangements ... more clearly in the Port Loading Protocols

This will not prevent some exporters from "taking their chances" in acquiring Capacity through the FIFS system (or deciding that they do not value a Slot at the price available through Auction). However, in response to the issues raised in the Auction Objection Notice, it ensures ... that, if an exporter genuinely wishes to acquire highly-demanded Capacity, the only certainty it can obtain is by acquiring that Capacity at Auction.²⁶

Cargill submits in relation to the Revised Proposal:

Cargill does not want a FIFS system in the current format under any circumstances as this gives marketers a reason to 'game' the auction system. Instead we propose more auctions more often similar to CBH timeframe [sic] whereby eliminating the need for FIFS unless capacity is to be shipped between auctions.²⁷

Gavilon submits:

Gavilon is largely in support of the proposed changes to the FIFS system with the exception of the 30 minute time limit between bookings. Gavilon believes this time limit is unnecessary and creates further uncertainty in what is already a difficult process to manage.²⁸

4.1.1.2 ACCC view

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

As such, it is more likely, when compared to the FIFS system in the Auction Variation Notice, that an auction will be the primary means of allocating capacity.

The ACCC considers that a FIFS mechanism is relevant for allocating capacity during periods of low demand, or where it is impractical to subject capacity to further auction having regard to Viterra's legitimate business interests. The ACCC does not consider it necessary in order to incorporate the feature in clause 9.5(d)(i) that the FIFS system be completely removed.

²⁶ Viterra, Revised Auction System proposal, Submission in support of the Revised Proposal, 13 July 2012, pp 6-7

²⁷ Cargill, Submission to ACCC's consultation paper on Revised Proposal, 3 August 2012, p.2

²⁸ Gavilon, Submission to ACCC's consultation paper on Revised Proposal, 6 August 2012, p.2

It is the ACCC's conclusion that the Revised Variation Notice adequately incorporates the auction feature at clause 9.5(d)(i), that an auction is the primary means for allocating capacity.

4.1.2 Clause 9.5(d)(v)

Clause 9.5(d)(v) provides that:

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

(v) Slots should be allocated those clients that value them most

The ACCC's Auction Objection Notice concluded that this auction feature was not incorporated into the auction system detailed by the Auction Variation Notice. The ACCC was of the view that the auction design and rules allowed for in demand capacity to be allocated to parties who did not value it most highly.²⁹

The ACCC's economic analysis outlined in the Auction Objection Notice stated that:

... it appears to the ACCC that the auction mechanism contained in the Auction Variation Notice may not come to an outcome at all. In other circumstances, the auction may reach a conclusion, but the outcome of the auction may not reflect an efficient allocation of scarce port capacity. That is, port capacity that exporters are willing to pay a positive amount for will not be allocated at the auction.³⁰

4.1.2.1 Submissions

Viterra submits that the change to the rebate mechanism, together with the withdrawal limit on capacity bids will ensure that capacity is allocated through auction rather than through the FIFS system.

With respect to the revised rebate mechanism, Viterra submits:

Economic modelling performed by external economists suggests that, based on reasonable demand and capacity assumptions, this rebate mechanism will involve an Auction ending after 21 Rounds and allocating 94.7% of Capacity.³¹

With respect to the withdrawal limit, Viterra submits:

more capacity will be allocated at Auction – Bidders will not be able to withdraw large amounts of tonnage with the result that Slots move from significant over-demand to significant under-demand. This has been identified as one of the factors contributing to the “over-shoot” issue in Western Australia.³²

Louis Dreyfus submits:

We are also not in favor of the restriction on bid withdrawals proposed by Viterra. With restrictions on withdrawal, we would be forced to anticipate how many more rounds the auction will last to start withdrawing capacity bids as price levels approach our pre-determined price limit. To compound matters, the deliberate clouding of what rebates will be reduces our capability to determine what our net price will be in order to start the withdrawal process.

²⁹ ACCC, Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice, 11 April 2012, p. 20

³⁰ ACCC, Auction Objection Notice in response to Viterra's Auction Variation Notice, 11 April 2012, p. 9

³¹ Viterra, Revised Auction System proposal, Submission in support of the Revised Proposal, 13 July 2012, p.3

³² *ibid*, p.5

We are not sure the weighting of rebates to less-demanded slots will result in shorter or fairer auctions.³³

Cargill submits:

Cargill believes the withdrawal of capacity limit will ensure the export capacity bidders are more likely to bid their actual requirements instead of trying to 'game' the system and over bid early to inflate the market. Cargill believes the tonnage limit to remove each round should be capped to 120,000mt which equates to 2 Panamax vessels or two maximum size slots available to book as per auction rules.³⁴

Gavilon submits:

Gavilon supports the proposed volume limit of 110,000 tonnes per auction round as we believe it may discourage gaming and bidders from chasing unnecessary demand. Gavilon feel that this limit represents a reasonable volume for any trade participant to withdraw from any round.

Whilst we believe, this is a good volume limit it certainly would not prevent gaming as exporters will still have the flexibility to move volume across port zones and port slots where there is spare capacity and it could result in significant changes to the auction participant's rebate.³⁵

4.1.2.2 ACCC view

The ACCC is of the view that the revised rebate mechanism, in combination with the changes to the FIFS system and the limit on capacity that can be withdrawn in any one round of the auction will increase the likelihood that capacity is allocated to the party that values it most highly.

It is the ACCC's view that a limitation on the volume that can be withdrawn in any one round during an auction is likely to produce an outcome where more capacity will be allocated at auction rather than through the FIFS system. It is the ACCC's view that high demand capacity allocated through the FIFS is not allocated to the party who values it most highly.

With respect to the submission from Louis Dreyfus questioning whether the weighting of rebates to less-demanded slots will result in shorter or fairer auctions, the ACCC notes the economic modelling of RBB Economics, Viterra's economic consultants. RBB Economics' analysis suggests, based on reasonable demand and capacity assumptions provided by Viterra, that the auctions will close sooner and allocate more capacity via auction.³⁶

The ACCC has no reason to discount this submission.

It is the ACCC's view that the Revised Proposal will operate to ensure that capacity that parties are willing to pay a positive price for will more likely be allocated at auction, based on a market price rather than through the FIFS system.

With respect to references of 'gaming the auction' in both Gavilon and Cargill submissions, the ACCC notes that the auction system in the Revised Variation Notice has not been tested in practice and it may prove to be susceptible to gaming strategies. In this regard, the ACCC is of the view that any revenue neutral auction system may be susceptible to gaming. However, Viterra's limitation on the volume that can be withdrawn is a direct attempt to prevent an exporter's ability to push high demand capacity to the FIFS mechanism.

³³ Louis Dreyfus, Submission to the ACCC consultation on the Revised Proposal, 3 August 2012

³⁴ Cargill, Submission to the ACCC consultation paper on the Revised Proposal, 3 August 2012

³⁵ Gavilon, Submission to the ACCC consultation paper on the Revised Proposal, 6 August 2012

³⁶ RBB Economics, Response to the ACCC's analysis of the proposed Viterra port loading capacity auction mechanism, 23 March 2012, p.11

The ACCC notes that this auction feature is closely linked to the economically efficient use of Viterra's infrastructure discussed below.

4.1.3 Promotion of the economically efficient use of Viterra's port terminal infrastructure

Clause 9.6(c)(iv) provides that in issuing an Auction Objection Notice, the ACCC must have regard to the matters set out in section 44ZZA(3) of the CCA; Section 44ZZA(3)(aa) lists 'the objects of this Part'. The objects of Part IIIA of the CCA are to:

- (a) 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
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

In issuing the Auction Objection Notice the ACCC concluded that the auction system contained in the Auction Variation Notice may not promote the economically efficient use of Viterra's port terminal infrastructure.³⁷

In its decision to accept Viterra's 2011 Undertaking, the ACCC stated:

the ACCC is required to have regard to, among other matters, the objects of Part IIIA, a relevant consideration under which is the efficient allocation of capacity. This includes mechanisms to ensure that throughput is maximised, particularly at times of peak demand and that capacity is allocated to those who value it most...³⁸

The ACCC's Auction Objection Notice stated that for these reasons, it is important that the auction system implemented by Viterra includes mechanisms to ensure that capacity is allocated to those users who value it most and that capacity does not go unused during periods of capacity constraint.³⁹

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

Auctions, by allocating capacity to users with the highest willingness to pay, will ensure that capacity is allocated to those users who value it the most, resulting in an allocation which is allocatively efficient...⁴⁰

The ACCC concluded that, based on its economic analysis, it appeared that the impact of the rebate contained in the Auction Variation Notice may undermine the usual operation of auction pricing contemplated in the ACCC's final decision and the auction mechanism may therefore not produce a result. In the event that the auction does conclude, there is no guarantee that it will conclude at an efficient outcome. The ACCC considered this was particularly relevant when considering the impact of the rebate on the effective price paid for shipping slots.⁴¹

³⁷ ACCC, *Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice*, 11 April 2012, p. 33

³⁸ ACCC, *Decision to accept Viterra's Port Terminal Services Access Undertaking*, 29 September 2011, p. 29

³⁹ ACCC, *Auction Objection Notice in response to Viterra's Auction Variation Notice*, 11 April 2012 p.29

⁴⁰ ACCC, *Decision to accept Viterra's Port Terminal Services Access Undertaking*, 29 September 2011, p.30

⁴¹ ACCC, *Auction Objection Notice in response to Viterra's Auction Variation Notice*, 11 April 2012, p.30

The ACCC's Auction Objection Notice stated:

... it appears to the ACCC that the auction mechanism contained in the Auction Variation Notice may not come to an outcome at all. In other circumstances, the auction may reach a conclusion, but the outcome of the auction may not reflect an efficient allocation of scarce port capacity. That is, port capacity that exporters are willing to pay a positive amount for will not be allocated at the auction.

This effect arises as a consequence of the impact of rebating the proceeds of the auction to exporters. In the presence of the proposed rebate, exporters can be expected to base their demands for capacity at auction basis of an 'effective price', which is the difference between the auction price and the expected rebate for that slot.

In order for the proposed auction to achieve an efficient allocation, the effective price paid should increase until supply and demand are in balance. However, while the proposed auction mechanism ensures that the auction price increases when demand exceeds supply, the effective price may not increase at all when demand exceeds supply, or may continue to increase after demand falls short of supply. As a consequence, although the auction may terminate at an efficient allocation, there is no guarantee that the auction will terminate or will terminate at an efficient allocation.⁴²

In the ACCC's accompanying economic analysis, Dr Darryl Biggar identifies two potential scenarios that may result because of the rebate mechanism in the Auction Variation Notice. The first scenario arises in circumstances where all slots that form part of the rebate pool are oversubscribed. In this scenario, the rebate may move at the same rate as the auction price. As a result, the effective price payable for the slot does not alter, and exporters are not incentivised to withdraw capacity, or alternatively, exporters may withdraw capacity bids for non-price reasons.⁴³

The second scenario relates to what is described in the ACCC's economic analysis as the 'downward' spiral effect. This occurs when the effective price payable increases not because the auction price increases, but rather because the rebate pool reduces due to a fall in demand, causing the rebate payable to drop, meaning that the effective price increases. When the effective price increases, exporters are incentivised to withdraw more capacity bids causing the rebate pool to further contract and the effective prices to increase further, the effect can be expected to continue.⁴⁴

Viterra has sought to remedy these potential auction outcomes by altering the mechanism by which the rebate is paid to exporters in the Revised Variation Notice.

4.1.3.1 Submissions

Viterra submits that:

Calculating rebates by reference to a full season is intended to provide further comfort that a situation will not arise where demand exceeds supply in all Slots (which the ACCC identified in its Auction Objection Notice as potentially creating a situation where an Auction would not end). Viterra's historical data also provides strong evidence (and its experience supports) that demand for Capacity will not exceed supply in all Slots available at any Port Terminal during a season⁴⁵

...

⁴² *ibid*, p.9

⁴³ Biggar, D, Analysis of the Proposed Viterra Port Capacity Auction Mechanism, 7 March 2012, pp.3-4

⁴⁴ *ibid* pp.5-6

⁴⁵ Viterra, Revised Auction System proposal, Submission in support of the Revised Proposal, 13 July 2012, p.1

One of the issues identified by the ACCC in relation to the February 2012 Auction proposal was that, in certain circumstances, the “nominal” Auction price may rise at a similar rate to the exporter’s rebate entitlement (with the result that there is only a small increase, if any, in the “effective price” payable by exporters).⁴⁶

The formula set out in Schedule 2 (together with spreading the rebate across both Auction Periods) breaks any clear link between the Auction price paid by an exporter in respect of particular Slots and the expected rebate due if it were to ship grain using those Slots⁴⁷

With respect to dividing the rebate pool in respect of each of Viterra’s Port Terminals, Viterra submits that:

This change is intended to remove the potential for distortions in the supply chain and physical execution of grain that may otherwise occur if the Auction Premium were to produce significant financial incentives for exporters to transport grain over greater distances to alternate ports (or to less efficient port terminals)⁴⁸

Stakeholder submissions raise considerable concern with regard to the revised rebate mechanism.

Cargill submits:

2.1.1 Cargill believe there is too much opportunity of market distortion for the rebate not to be known when bidding at the auction. If marketers cannot see what rebate will be applied to their shipping slot how can they price their wheat to the export market? This would increase risk factor to all marketers involved in the Viterra auction which could result in some marketers reducing their appetite to participate in the South Australian market and concentrating on East and West coast for their export program as they are unable to effectively manage the risk at the capacity auction. The risk of having to purchase highly priced slots 12 months in advance at an unknown value ultimately puts pressure on prices growers will receive at harvest.

2.1.2 We would expect some people to remove themselves from the auction and potentially remove themselves from the South Australian export market. The organisations that have enough risk appetite to bid at the auction will significantly lower their demand for higher end slots. This also goes against optimising the marketing of Australian grain as the value is higher in the first half of the year before other countries product comes on-line.

2.1.3 Cargill believes this will lead to such ports as Wallaroo and Thevenard to have very little demand unless exporters have specific sales from these ports.

Bulk exporters will try to use arbitrage opportunities to draw stock out of zone if the economics work, this will also have a large impact on the truck efficiencies when hauling stock out of natural catchment areas. This will also be driven by the opportunities at neighbouring ports ie tonnes from Thevenard zone will be shipped from Port Lincoln as this port offers greater options for vessel sizes and ultimately the number of markets EP wheat can be sold to. We encourage Viterra to publish the sites allocated to each port zone so marketers can easily plan the best execution pathway for sales.

2.2.1 Cargill believes the withdrawal of capacity limit will ensure the export capacity bidders are more likely to bid their actual requirements instead of trying to ‘game’ the system and over bid early to inflate the market. Cargill believes the tonnage limit to remove each round should be capped at 120,000mt which equates to 2 Panamax vessels or two maximum size slots available to book as per auction rules.⁴⁹

⁴⁶ Ibid, pp. 2-3

⁴⁷ Ibid

⁴⁸ Ibid, p.2

⁴⁹ Cargill, Submission to the ACCC consultation paper on the Revised Proposal, 3 August 2012

Louis Dreyfus Commodities submits:

I can speak only for us, but the cost of an elevation slot affects our demand for it. If we are unable to accurately determine the cost of a slot, how are we to bid efficiently?

We are also not in favor of the restriction on bid withdrawals proposed by Viterra. With restrictions on withdrawal, we would be forced to anticipate how many more rounds the auction will last to start withdrawing capacity bids as price levels approach our pre-determined price limit. To compound matters, the deliberate clouding of wheat rebates will be reduces our capacity to determine what our net price will be in order to start the withdrawal process.

We are not sure the weighting of rebates to less-demanded slots will result in shorter or fairer auctions. This is reinforced where Viterra chooses to isolate the rebate pool in each port zone. It is plausible that the most popular ports will be fully subscribed in the early stages of the auction. If all slots in a port are over-bid initially, the weighting scheme would not provide any increased incentive to move demand. Offering full flexibility across ports and shipping periods may help to break the bid logjam in high demand markets. The port-specific rebate scheme is more focused on flattening demand across time in a single port, than in distributing demand to the appropriate port in each shipping period. This does not conform as well to the seasonal nature of Australian grain demand.⁵⁰

Gavilon submits:

Gavilon is of the view that the proposed rebate calculation is highly complex and creates difficulty in estimating the cost for which we are liable over the course of the auction process.

The proposed auction rebate calculation works in favour of those slots with spare capacity. Gavilon believes its complexity may lead to gaming and dramatically affect an auction participants rebate by a sudden switch of demand, at a late stage in the auction, to slots with spare capacity.

With rebates applying to the back end slots Gavilon believes this will greatly advantage the larger exporters who have the ability to manage their slots throughout the year as opposed to the smaller to medium exporters that will need to focus on the front end slots.

Furthermore, where the auction is oversubscribed consistently throughout the rounds the rebate may not be distributed back to bidders at all or may only be distributed to the obscure slots. These obscure slots are likely to be dominated by one or two larger players.

Gavilon has previously recommended and supported the auction rebate to be calculated on a per auction basis rather than a single rebate pool where an exporter is exposed to the outcome of further auctions regardless of its participation.⁵¹

Regarding uncertainty, Viterra submits that:

Spreading the rebate across multiple Auctions (and Auction Periods) is also likely to create less certainty in relation to the likely amount of any Auction Rebates and therefore provide a greater incentive for “truthful bidding”... This is particularly the case in the earlier auctions. While this is a desirable outcome, to ameliorate any adverse impacts from this uncertainty, Viterra proposes to publish during the Auction a snapshot of the indicative Rebate per Tonne as at the last round.⁵²

4.1.3.2 ACCC view

The ACCC considers that by allocating the rebate in accordance with the revised formula set out in the Revised Variation Notice, it will reduce the likelihood that the auction premium and the rebate will move in lockstep when compared to the previous proposal and

⁵⁰ Louis Dreyfus, Submission to the ACCC consultation paper on the Revised Proposal, 3 August 2012

⁵¹ Gavilon, Submission to the ACCC consultation paper on the Revised Proposal, 6 August 2012

⁵² Viterra, Revised Auction System proposal, Submission in support of the Revised Proposal, 13 July 2012, p.1

accordingly draw the auction to a conclusion sooner. However the ACCC acknowledges that the calculation and payment of the rebate pursuant to the revised formula is dependent on having sufficient undersubscribed slots to absorb the proceeds from the oversubscribed capacity at other slots.

In order to increase the likelihood of having sufficient undersubscribed slots, Viterra has annualised the rebate pool to capture both the high demand season (January to April) and the remaining months where demand for port terminal capacity decreases.

This positive effect of annualising the rebate, however, is somewhat offset by dividing the rebate pools on a port by port basis. Viterra has made this change to the auction system to avoid incentives that might otherwise be created by the operation of the rebate to shift demand to ports outside the natural catchment zone for wheat supply.

It is the ACCC's view that splitting the rebate pool along the lines of each port increases the theoretical risk that the auction will not reach an outcome. It seems possible that demand at some high valued ports might remain sufficiently high across the entire year so that the auction will not reach an outcome. However the ACCC acknowledges the concern raised by Viterra with respect to the rebate providing an incentive to exporters to move grain through more inefficient supply chains. In contrast to Viterra's reasoning for splitting the rebate along port lines, Cargill submits that the rebate mechanism in the Revised Proposal may provide an incentive for exporters to transport grain from natural catchment areas.

The ACCC is unable to predict with certainty the potential effect of the rebate in this regard; however, notes that if, as a result of the revised rebate mechanism, grain is transported through inefficient supply chains to the degree that it distorts the market, it would expect Viterra to attempt to address this issue in the review of its auction system.

The ACCC considers that, by splitting the rebate pool along port lines, it is more likely to prevent the inefficient movement of grain solely due to the rebate. It is the ACCC's view that the theoretical risk that the auction will not conclude because all slots in a particular port are oversubscribed is less likely to occur under the rebate mechanism in the Revised Variation Notice. Additionally, the ACCC notes the economic modelling performed by Viterra's consultants, which Viterra submits is based on reasonable demand and capacity assumptions, and the conclusions reached in that modelling that with the revised rebate mechanism, auctions are likely to conclude sooner allocating a substantial proportion of capacity.

Annualising the auction rebate, in conjunction with multiple auctions, does have the consequence of removing a degree of certainty with respect to the effective price of particular slots, at least for those slots which are in low demand. As the rebate pool in the revised proposal is made up of the auction premiums attached to all slots, it is not possible to calculate the size of the rebate payable to any of the slots until after the final auction has been completed. (The exact price will only be determined at the conclusion of the shipping period, once actual shipments are known.)

The ACCC acknowledges the submissions from some stakeholders regarding the increased uncertainty created by the revised rebate mechanism and appreciates that traditionally exporters seek to arbitrage high demand slots (with a higher effective price) against lower demand slots (with a lower effective price, or in some instances a negative price). This strategy under the revised proposal is less attractive because of the increased uncertainty regarding the effective price attached to each slot.

The ACCC notes that as a result of this increased uncertainty, there may be a concern that some bidders may be reluctant to participate in an auction in which they cannot determine precisely how much they will eventually have to pay. Or, put another way, the concern is that only bidders with the greatest tolerance of risk will be willing to participate – suggesting that slots may not go to those who value them most highly.

In order to address industry concern regarding the uncertainty of the rebate, Viterra amended the Revised Proposal, and the Revised Variation Notice to include an indicative estimated snapshot of the rebate per tonne for the relevant slot as at the end of the previous round during the auction. The ACCC is unable to determine the effectiveness of this mechanism in addressing the level of uncertainty as it is untested at this time. The ACCC notes that the proposed mechanism was included in the Revised Proposal put to industry for consultation; however, submissions received did not specifically mention this mechanism.

It is the ACCC's view that the revised rebate mechanism does create uncertainty as to the minimum price payable as the auction price represents the maximum price payable for any particular slot. The effective price of high demand slots is able to be determined as the auction price is likely to represent the effective price. Accordingly, exporters will be able to determine their maximum exposure for auction premiums. With less certainty regarding the amount of the rebate, the ACCC is of the view that this might incentivise exporters to engage in more traditional bidding behaviour.

As submitted by Viterra, economic modelling of this rebate mechanism suggests that an auction will close sooner. It is the ACCC's view that the lower number of auction rounds produces a smaller rebate pool and thereby minimises the effect of the rebate on bidding behaviour.

With respect to the potential downward spiral effect of the rebate whereby the effective price increases as demand for a particular slot falls, it is the ACCC's view that the revised proposed rebate formula effectively reduces the likelihood that this scenario will eventuate. If the demand for a particular slot falls, then the rebate increases, thereby reducing the effective price paid for that slot. As a result, in high demand slots, the auction price will more closely mimic a traditional auction mechanism whereby a high level of demand is reflected in higher prices, helping to balance supply and demand.

The ACCC considers that the revised rebate mechanism goes a significant way to addressing the concerns outlined in the Auction Objection Notice by reducing the risk that the auction will not conclude or will conclude at an efficient outcome.

4.1.4 WA auction outcomes – 2011/12

In issuing the Auction Objection Notice, the ACCC stated:

Having regard to the outcomes experienced in WA this season, and the submissions from stakeholders, it is the ACCC's current view that the system adopted in SA should, so far as practicable be modified to avoid or minimise the undesirable features of the CBH auction model prior to the introduction of the auction system in SA.⁵³

⁵³ ACCC, Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice, 11 April 2012, p. 11

4.1.4.1 ACCC view

The ACCC considers that because of the changes proposed by Viterra and the reasons outlined above, there is a low likelihood of experiencing auction outcomes similar to those experienced in Western Australia during the 2011/12 season where large volumes of high demand capacity were allocated through CBH's first come, first served mechanism.

4.1.5 Conclusion

It is the ACCC's view that the modifications to the auction premium rebate and the inclusion of business rules regarding Viterra's residual FIFS system set out in the Auction Variation Notice make it more likely that:

- the auction will conclude, and will conclude at an efficient outcome
- exporters will participate in the auction in order to acquire high demand capacity as opposed to engaging in bidding behaviour in order to acquire capacity through the FIFS system.

The ACCC considers that the modifications set out in the Revised Variation Notice go a significant way towards mitigating the risks identified in the ACCC's Auction Objection Notice that the auction will fail to conclude, or will conclude at an inefficient outcome.

However, it needs to be acknowledged that the Revised Variation Notice, and in particular the rebate mechanism, reduces, but does not completely eliminate the possibilities of an auction not drawing to a conclusion, concluding at an inefficient outcome, or gaming of the system so that one or more exporters acquire high demand capacity through the FIFS system.

4.2 Clause 9.5(d) auction features

Clause 9.5(d) of the 2011 Undertaking provides that unless otherwise agreed between the ACCC and Viterra, the auction system must incorporate a list of features. In deciding whether to withdraw the Auction Objection Notice, the ACCC has also considered whether the Revised Variation Notice incorporates each of these features.

4.2.1 Clause 9.5(d)(i)

- (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;*

In relation to clause 9.5(d)(i), the following provisions also appear at clause 9.5(d) of the 2011 Undertaking:

For the avoidance of doubt, clause 9.5(d)(i) does not prevent the Port Operator from consulting with Major Users and the ACCC in relation to potential mechanisms to allocate:

- (viii) *Additional Capacity which is requested by an exporter and becomes available after any auction for use prior to the next scheduled auction;*

(ix) a proportion of port-loading capacity that is “base load capacity” for major exporters on an objective take or pay basis; and/or

(x) capacity that is “passed in” at auction on a different basis,

In each case as part of the Auction System

For the reasons discussed above at section 4.1.1, the ACCC is of the view that this auction feature is adequately incorporated into the auction system set out in Viterra’s Revised Variation Notice.

4.2.2 Clause 9.5(d)(ii)

(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).

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

The ACCC notes that the proposed PLPs do not expressly state that Capacity to be made available through auction reflects the Available Capacity published in the Available Capacity table as required by the 2011 Undertaking. The ACCC’s view remains that the obligation in clause 10.2(b) of the 2011 Undertaking, to provide reasons for varying available capacity published and the limitations on the capacity that is not offered at auction as specified in clause 2.2(e) of the proposed PLPs operate together to ensure that Viterra’s total port terminal capacity will be made available through auction.

This auction feature in Viterra’s Revised Proposal remains unchanged from the Auction Variation Notice. It remains the ACCC’s view that this auction feature has been incorporated into the Revised Proposal.

4.2.3 Clause 9.5(d)(iii)

(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.

Prior to participating in an auction, exporters must enter a Registered Bidder Agreement for Online Auctions with Tradeslot, who is the third party provider of the auction to Viterra.⁵⁴ Auction participants are also required to enter into an Auction Participation Deed with Viterra.

This remains unchanged under Viterra’s Revised Proposal. It remains the ACCC’s view that there appears to be no unreasonable restrictions on participating in auctions for capacity at

⁵⁴ Viterra notification N95640, allowed to stand 30 November 2011. Absent the notification, which was given to the ACCC under section 93 of the CCA, the requirement to use the services of Tradeslot in order to acquire port terminal services from Viterra may amount to exclusive dealing (third line forcing).

Viterra's port terminals. Accordingly, the ACCC considers that Viterra's Revised Proposal incorporates this auction feature.

4.2.4 Clause 9.5(d)(iv)

(iv) the auction should be conducted in a transparent and non-discriminatory manner

The Auction Objection Notice stated that the ACCC considers that Viterra's proposal in the Auction Variation Notice provides sufficient transparency and protection against discrimination during the conduct of the auctions.⁵⁵

The Revised Variation Notice increases the transparency during the auction compared with the Draft Revised Proposal by providing an indicative estimated snapshot of the rebate per tonne for the relevant slot as at the end of the previous round.⁵⁶

While comment has been made above (section 4.1.2) of the increased uncertainty arising from the change to the rebate calculation, the Revised Variation Notice ensures that all auction participants face the same auction rules and those rules are transparent.

It is the ACCC's view that this auction principle has been incorporated into Viterra's revised auction proposal.

4.2.5 Clause 9.5(d)(v)

(v) Slots should be allocated to those clients that value them most.

For the reasons outlined in section 4.1.2 above, the ACCC is of the view that this auction feature is adequately incorporated into Viterra's Revised Variation Notice.

4.2.6 Clause 9.5(d)(vi)

(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

The obligation for Viterra to pay clients an auction rebate is included in its Standard Terms. The mechanism by which auction premiums are rebated back to port terminal users has changed in the auction system set out in Viterra's Revised Variation Notice, however, the obligation to pay a rebate remains.

Under Viterra's Auction Variation Notice proposal, the rebate was payable equally against all tonnes acquired at auction and subsequently shipped.⁵⁷ Therefore, if Viterra's trading arm (or any other exporter) booked capacity in excess of its reasonably anticipated requirements and subsequently failed to ship against that booked capacity, it would forfeit the rebate payable against that booking.

⁵⁵ ACCC, *Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice*, 11 April 2012, p. 19.

⁵⁶ Viterra, *Revised Auction System proposal* 13 July 2012, p. 12.

⁵⁷ Viterra, *Auction Variation Notice*, 17 February 2012, p. 35.

Under the revised rebate mechanism, high demand capacity is unlikely to attract a rebate, therefore failure to ship against a booking in a high demand slot will not result in a loss of an anticipated rebate as it did under the previous system.

However, as the payment of auction premiums is not a payment to Viterra, but rather a payment to the rebate pool that will ultimately be distributed to all exporters who ship against capacity acquired at auction, the payment of auction premiums cannot be characterised as an internal transfer from Viterra's trading arm to Viterra. This concern was raised by stakeholders during the ACCC's assessment of the 2011 Undertaking.⁵⁸ In accepting the 2011 Undertaking, the ACCC took the view that this auction feature (together with the inherent pricing mechanism of an auction), would provide a disincentive on Viterra's trading arm booking in excess of its reasonably anticipated requirements.

The ACCC remains of the view that as the rebate is only payable in respect of tonnes that are acquired at auction and are actually shipped, this acts as an equal disincentive on Viterra's trading arm and all other third party exporters against booking in excess of reasonably anticipated requirements.

It is the ACCC's view that this auction feature is incorporated in the auction system set out in Viterra's Revised Variation Notice.

4.2.7 Clause 9.5(d)(vii)

(vii) 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. Any transfer fee payable to the Port Operator in relation to trades or transfers as between exporters should be cost-based.

Consistent with Viterra's Auction Variation Notice, under the Revised Variation Notice, bookings will continue to be fully transferable with no limits placed on the number of transfers. The Revised Variation Notice also provides that any entitlement to receive an auction premium rebate in respect to a transferred booking will be transferred to the transferee.⁵⁹

4.2.7.1 ACCC's view

It is the ACCC's view that Viterra's initial auction proposal detailed in the Auction Variation Notice incorporates this auction feature. Amendments to the rebate payable, in that the rebate entitlement follows a booking in the event that it is traded or transferred does not negate this conclusion.

It is the ACCC's view that this auction feature is incorporated in the auction system set out in Viterra's Revised Variation Notice.

4.3 Anti-discrimination – no hindering

Clause 9.6(c)(ii) provides that the ACCC must have regard to:

⁵⁸ ACCC, Decision to accept Viterra's Port Terminal Services Access Undertaking, 29 September 2012, pp 19-23

⁵⁹ Viterra, Revised Variation Notice, 24 August 2012, p. 17.

Whether the proposed variations 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 Viterra's 2011 Undertaking]

The ACCC's view on this matter as expressed in the Auction Objection Notice remains unchanged.

Auction features at clause 9.5(d)(iii) and (iv) of the proposed auction system require that all bona fide clients have an equal opportunity to participate in the auction and the auction is conducted in a transparent and non-discriminatory manner. As the Revised Variation Notice sufficiently incorporates these auction features, it is the ACCC's view that the auction system proposed in the Revised Variation Notice raises no concerns with respect to the anti-discrimination or no hindering access provisions in the 2011 Undertaking.

4.4 Consistency with other auction systems

Clause 9.6(c)(iii) requires the ACCC to have regard to:

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 the Port Operator's operations and the South Australian industry.

In issuing the ACCC's Auction Objection Notice, the ACCC concluded that, given the similarities of the South Australian and Western Australian markets, it was somewhat desirable to have a degree of consistency between the Viterra auction system and the auction system operated by CBH. However, having regard to the outcome experienced in Western Australia in the 2011/12 season, and the submissions from stakeholders, it was the ACCC's view that the system adopted in South Australia should, so far as practicable, be modified to avoid or minimise the undesirable features of the CBH auction model prior to the introduction of the auction system in South Australia.⁶⁰

It is the ACCC's view that the Revised Variation Notice does, so far as practicable, modify the proposed auction system to minimise undesirable features of the CBH auction model (as it then was) prior to its being introduced in South Australia. The ACCC notes further that CBH has altered its Port Terminal Rules in an attempt to avoid a similar auction outcome as experienced in the 2011/12 season auctions.

While the result is that the auction systems in Western Australia and South Australia are not identical, the ACCC considers that they have a degree of consistency, in that they share the main features in common.

4.5 Section 44ZZA(3) factors

Clause 9.6(c)(iv) requires that the ACCC, in issuing an Auction Objection Notice, have regard to the matters set out in section 44ZZA(3) of the CCA. In its decision to accept Viterra's 2011 Undertaking the ACCC determined that the following matters in s. 44ZZA(3) were of particular relevance when assessing capacity management arrangements:

⁶⁰ ACCC, Auction Objection Notice in response to Viterra Operations Limited's Auction Variation Notice, 11 April 2012, p. 27

- 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 markets⁶¹
- the legitimate business interests of the provider
- the public interest, including the public interest in having competition in markets
- the interests of persons who might want access to the service
- any other matters that the Commission thinks are relevant.

As noted in the decision making framework at section 2 of this notice, the ACCC considers other relevant matters are:

- the intention of the access test as it appears in the *Wheat Export Marketing Act 2008 (Cth)*, that accredited exporters that own, operate or control port terminal facilities provide fair and transparent access to its facilities to other accredited exporters; and
- the operation of the auction system in Western Australia in so far as it is relevant to Viterra's auction proposal.

The ACCC is of the view that these matters remain relevant in considering Viterra's Revised Variation Notice.

4.5.1 The objects of Part IIIA

The objects of Part IIIA, including the promotion of the economically efficient use of Viterra's port terminal infrastructure has been considered above in section 4.1.3 of this decision document.

4.5.2 The legitimate business interests of Viterra

It is the ACCC's view that enabling Viterra to implement the auction system as outlined in the Revised Variation Notice is in the legitimate business interests of Viterra.

Additionally, the ACCC considers that the proposed protocols and auction rules are in the legitimate interests of Viterra as they provide sufficient operational flexibility to Viterra in its port operations, whilst providing access seekers fair and transparent access to Viterra's port terminal facilities. Examples of these rules include:

- Clause 2.4(c) of the proposed PLPs which provides that Viterra may decide to not publish and offer all or part of any capacity that is surrendered by an exporter, or becomes available following the movement of a booking.
- Clause 4 of the proposed PLPs that enables Viterra to make changes to booked slots and estimated load dates for a range of operational reasons.

⁶¹ The objects of Part IIIA also includes to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

- The transitional provisions at schedule 3 of the proposed PLPs which provide Viterra with sufficient time in which to prepare for its first auction.

Movement of bookings – payment of the auction premium rebate

Clause 7 of the proposed PLPs allows exporters to move bookings between port terminals and timeframes. Schedule 2 of the proposed PLPs provides that if an exporter moves a booking to another port terminal, it loses its rebate entitlement in respect of that booking.

In relation to the movement of slots and the associated rebate, Viterra submits:

Exporters should not be able to “optimise” their entitlements to rebates by moving Bookings from high demand periods (acquired at Auction) to lower demand periods (which are likely to have higher rebate entitlements). This would effectively reduce the price paid at Auction for the high demand Slots.⁶²

Cargill submits:

Cargill believes the rebate should always follow the slot even if the move to another port zone is requested by the shipper.⁶³

Gavilon submits:

If an exporter does move across port terminals the lower rebate of either the original port terminal or new port terminal should apply. In other words the rebate is capped at the level of the original port terminal. This will prevent exporters optimising their rebates and provide flexibility for an efficient system.⁶⁴

The ACCC is of the view that rules regarding the payment of the rebate with respect to moved slots set out in the Revised Variation Notice are in the legitimate interests of Viterra as it will likely prevent unnecessary movement of bookings by exporters in an attempt to maximise the rebate payable.

4.5.3 The public interest, including the public interest in having competition in markets

In issuing the Auction Objection Notice, the ACCC concluded that an auction system that allocates capacity efficiently and incorporates effectively all the features of clause 9.5(d) of the 2011 Undertaking will enhance competition in both the upstream wheat purchasing market and the market for the export of bulk wheat.

The ACCC’s Auction Objection Notice stated:

... it is the ACCC’s view that the proposed auction system may not allocate capacity efficiently. It is the ACCC’s view that the inefficient allocation of scarce port terminal capacity is likely to have a detrimental effect on competition. An exporter who acquires high demand capacity at a zero premium is at a competitive advantage to its rivals who have paid an auction premium, in the upstream and downstream markets of wheat purchasing and selling.⁶⁵

⁶² ACCC, Auction Objection Notice in response to Viterra Operations Limited’s Auction Variation Notice, 11 April 2012, p. 30

As discussed above in section 4.1, the ACCC is of the view that the auction system set out in the Revised Variation Notice is likely to allocate capacity efficiently and effectively incorporates all the features of clause 9.5(d) of the 2011 Undertaking. Accordingly, it is the ACCC's view that the Revised Variation Notice is in the public interest as it promotes competition in the upstream and downstream wheat markets.

4.5.4 The interests of persons who might want access to the service

In addition to the key reasons expressed in the ACCC's Auction Objection Notice discussed above in section 4.1, the ACCC also formed the view that a number of the proposed clauses in the PLPs as submitted in the Auction Variation Notice were not in the interests of access seekers.⁶⁶

Clause 8.2 and 2.4 of the proposed PLPs

Clause 8.2 of the PLPs contained in the Auction Variation Notice provides that Viterra will offer a conditional refund for capacity that is surrendered by exporters, when that capacity is subsequently acquired by another exporter. Clause 2.4 of the proposed PLPs provides that Viterra may decide to not re-offer capacity that is surrendered to the shipping stem. Previously, these clauses in effect may have acted to the detriment of any exporter who surrendered capacity to the stem where Viterra chose to not reoffer that capacity.

The ACCC expressed the view in the Auction Objection Notice that these provisions should be amended to ensure that when exporters return unwanted capacity to the stem, and Viterra decides to not re-offer it to market, then the exporter is not disadvantaged due to Viterra's operational decision.⁶⁷

Viterra's Revised Variation Notice specifies at clause 8.2 that in the event Viterra chooses to not re-offer capacity that has been returned to the stem by an exporter, then Viterra will refund up to 50% of the booking fee or auction fee paid by the exporter on a pro rata basis.

The ACCC considers that this amendment in the Revised Variation Notice is in the interests of access seekers.

Clause 15 of the proposed PLPs

The Auction Variation Notice specified at clause 15 of the PLPs that the auction provider (Tradeslot) will disclose information about exporters and their participation in the auction to Viterra and that the company may publish this information.

The ACCC noted that this provision was very broad and may have enabled Viterra to obtain a range of information regarding competitors, including potentially bidding strategies. The ACCC formed the view that, as drafted, this provision was not in the interests of access seekers.⁶⁸

The Revised Variation Notice has amended this provision to restrict the nature of the information that can be provided by Tradeslot to information regarding exporters that is only necessary to facilitate compliance with the 2011 Undertaking and PLPs.

⁶⁶ *ibid.*, p. 31.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

The ACCC is of the view that this amendment is in the interests of access seekers.

Clause 11 of the proposed auction rules

Clause 11 of the Auction Rules proposed in the Auction Variation Notice set out the procedure with respect to any grievances that may arise during the auction process.

The ACCC's Auction Objection Notice stated that clause 11 of the Auction Rules would benefit from minor amendment to clarify that written grievances must be lodged by 5:00pm on the first business day following the end of bidding. The ACCC formed the view that it would be in the interests of access seekers to have certainty regarding the grievance procedure.⁶⁹

Viterra's Revised Variation Notice has amended clause 11 accordingly, and the ACCC has formed the view that this amendment is in the interests of access seekers.

⁶⁹ *ibid.*, 32.

5 Decision

The ACCC has decided, pursuant to clause 9.6(d) of Viterra's 2011 Undertaking, to withdraw the Auction Objection Notice that was issued to Viterra on 11 April 2012 in response to its Auction Variation Notice. For the reasons set out in this decision document, the ACCC has formed the view that in all the circumstances it is appropriate to withdraw the Auction Objection Notice after assessing the revised Auction System detailed in the Revised Variation Notice submitted by Viterra on 24 August 2012.

Based on the information before the ACCC at this time, it is the ACCC's view that the modifications to the auction premium rebate and the inclusion of business rules regarding Viterra's residual FIFS system set out in the Revised Variation Notice make it more likely that:

- the auction will conclude, and will conclude at an efficient outcome
- exporters will participate in the auction in order to acquire high demand capacity as opposed to engaging in bidding behaviour in order to acquire capacity through the FIFS system.

The ACCC considers that the modifications set out in the Revised Variation Notice go a substantial way towards mitigating the risks identified in the ACCC's Auction Objection Notice that the auction will fail to conclude, or will conclude at an inefficient outcome. The ACCC acknowledges that a reduced risk remains, given the auction system is untested in practice, however considers in all the circumstances that it is appropriate to withdraw the Auction Objection Notice.