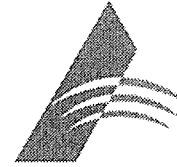


Our Ref: 43889
Contact Officer: Lyn Camilleri
Contact Phone: (03) 9290 1973



Australian
Competition &
Consumer
Commission

15 April 2011

Mr Damian Fitzgerald
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Viterra Operations Limited
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By email: Damian.Fitzgerald@viterra.com

cc Mr Wayne Leach
Mallesons Stephen Jaques

By email: wayne.leach@mallesons.com

Dear Mr Fitzgerald

**Request for information – Viterra Operations Limited: Port Terminal Services
Proposed Access Undertaking**

Thank you for the prompt response to the request for information issued on 5 April 2011 in relation to the capacity allocation method. As foreshadowed, the Australian Competition and Consumer Commission (ACCC) requires additional information in order to assess the appropriateness of the undertaking lodged in accordance with Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA) by Viterra Operations Ltd (Viterra) on 23 December 2010.

Please find attached at schedule 1 a notice pursuant to section 44ZZBCA(1) of the CCA requesting information. As required by section 44ZZBCA(2)(b), a copy of this notice will be published on the ACCC's website. Some of the information requested relates to the operation of the 2009 undertaking. This information is considered relevant to the current assessment process as the substance of the 2009 undertaking, including the capacity allocation system, has been continued in the proposed 2011 undertaking.

Section 44ZZBCA is attached for information at schedule 2.

To assist the ACCC in its assessment of the proposed 2011 undertaking, please provide a response to the notice, in writing, to transport@accc.gov.au by 5:00pm on Wednesday, 4 May 2011.

Unless information provided in response to this notice is marked confidential, it will be made available to any organisation or person on request. Any information that is confidential should be clearly identified.

As you would be aware, section 44ZZBC of the CCA requires that the ACCC make a decision on an access undertaking application within 180 days, plus any 'clock-stopper' periods. The clock is stopped on the day on which a notice pursuant to section 44ZZBCA(1) is issued. The clock restarts on the last day of the period specified in the notice for the giving of the information requested.

The request for information attached to this letter is a 'clock-stopper' for the purposes of section 44ZZBC(2) of the CCA. Accordingly, the 20 days from 15 April 2011 to 4 May 2011 will not count towards the 180 days within which the ACCC is required to make its decision on Viterra's proposed 2011 undertaking.

Please note that the ACCC has not treated the request for information issued under cover of my letter of 5 April 2011 as a clock stopper due to the very short response timeframe.

If you have any questions in relation to the contents of either this letter, or the attached notice, please contact Kerry Leigh Taylor on ph: 03 9290 6922 or kerryleigh.taylor@accc.gov.au or alternatively Lyn Camilleri at Lyn.Camilleri@accc.gov.au or on ph: (03) 9290 1973.

Thank you for your co-operation.

Yours sincerely



Anthony Wing
General Manager
Transport & General Prices Oversight Branch

Schedule 1

INFORMATION REQUESTED PURSUANT TO S.44ZZBCA

1. Capacity allocation

Please provide the following information:

1.1 General Information

- a) In order to accept bookings onto the Viterra shipping stem, the ACCC assumes that Viterra must assess the nominated booking against available capacity. Please provide the following information (in table format) on the available capacity at each port for each particular shipping slot on which this assessment is made (this information may be provided as a range):

- Total inward elevation capacity
- Total storage capacity
- Total out-loading capacity

Please provide any assumptions used to make these calculations (for example staff numbers, mode of receipt, hours of operation)

- b) For each of the periods: 1 October 2009 to 30 September 2010, and 1 October 2010 to the date of receipt of this notice, please provide the following information (in table format) in relation to each port, per shipping slot:
- Total throughput (i.e total tonnage loaded onto vessel for all commodities)
 - The proportion of bulk grain that arrived at port by rail, including Viterra contracted rail and third party rail
 - The proportion of bulk grain that arrived at port by road, including Viterra contracted transport providers and third party transport
- c) For the period 1 October 2010 to the date of receipt of this notice, provide details of any shipping slots, at any port where there was insufficient intake, grain storage and shipping capacity to accept bookings onto the shipping stem in accordance with clause 3 of the port loading protocols.
- d) For the period 1 October 2010 to the date of receipt of this notice, provide the following details of any 'additional capacity' that was made available after the 'available capacity table' indicated that there was no capacity:
- Port
 - Shipping slot
 - Date available capacity table indicated no capacity was available
 - Date capacity became available
 - Circumstances regarding how that capacity became available
 - Which exporter, if any, utilised the additional capacity made available
- e) The ACCC understands that following the audit conducted by Wheat Exports Australia (WEA), Viterra Operations Ltd implemented a number of

improvements to its business processes and procedures. Please explain the changes implemented as a result of the WEA audit and supply any supporting documentation in relation to:

- Lines of reporting, accountability
 - Policy in relation to ensuring compliance with continuous disclosure rules
 - Escalation of decision making about Viterra's Ltd bookings on the shipping stem and whether and when slots held by Viterra Ltd should be vacated
- f) For the period 1 October 2010 to the date of receipt of this notice, please provide the following details for bookings accepted onto the shipping stem in accordance with clause 3 of the port loading protocols for a commodity other than bulk wheat that were subsequently amended resulting in the shipping of bulk wheat:
- Shipping slot
 - Port
 - Exporter
 - Tonnage
 - Initial commodity booked
 - Date amendment made to booking that appeared on the shipping stem

1.2 Export Select / Export Standard

- a) If all bookings are executed as Export Select, what would be the total shipping capacity available at each port in a particular shipping slot? If all bookings are Export Standard, what would be the total shipping capacity available through each port in a particular shipping window? If this figure varies throughout the year, please provide details.
- b) What are the factors that determine the quantity of available Export Select and Export Standard capacity? How variable are these factors? How does a booking of Export Select impact on the availability of Export Standard capacity and vice versa?
- c) For the period 1 October 2010 to the date of receipt of this notice, please provide details of all Export Standard bookings that were nominated and accepted onto the shipping stem and subsequently executed as an Export Standard booking.
- d) Please provide a copy of the terms and conditions of supply of Export Select.
- e) For the period 1 October 2010 to the date of receipt of this notice, please provide details as to any refusals of Export Standard bookings, including:
- Port
 - Shipping slot nominated
 - Exporter
 - Tonnage
 - Commodity

- Reason for refusal
 - Whether any Export Select capacity was available at the time of refusal
- f) For the period 1 October 2010 to the date of receipt of this notice provide the following details for vessels that were not loaded on the "Load Date" allocated pursuant to clause 5 of the port loading protocols:
- Port
 - Shipping slot
 - Exporter
 - Tonnage
 - Allocated load date
 - Whether the booking was Export Select or Export Standard
 - Actual load date
 - Total tonnage of bookings accepted onto the shipping stem for that 15 day window
 - Reason(s) for the delay between allocated load date and actual load date

1.3 Performance Risk / Anti-hoarding

- a) For the period 1 October 2009 to the date of receipt of this notice, please provide details as to the operation of clause 12 of the Port Loading Protocols to either request information or to refuse a booking. Details should include, but not be limited to:
- Shipping slot(s)
 - Port
 - Exporter
 - Tonnage
 - If information was sought, the information requested and supplied
 - Whether the booking nomination was accepted onto the shipping stem in whole or in part
- b) The ACCC understands that clause 12 of the Port Loading Protocols has been applied in the consideration of bookings made for execution after 30 September 2010. Please provide the following details:
- Which booking(s) are subject to consideration under clause 12 (exporter, shipping slot, port)
 - An explanation of how clause 12 has been applied in respect of each such exporters booking(s)
 - Details of any refusals due to the application of clause 12 of the Port Loading Protocols

2. **Treatment of wheat from third party storage**

2.1 Differential Prices

Based on the reference prices published in accordance with the proposed access undertaking and [REDACTED], the ACCC's current understanding of Viterra's receipt at port charges is as follows:

- For **ex Vitterra storage grain**, the charge is \$3.40 per tonne for road receivals or \$2.20 per tonne for rail receivals.
 - For **ex Approved Third Party Storages grain**, the charge is \$5.90 per tonne for road receivals or \$4.70 for rail receivals. This includes the 'Port In-Loading Fee (Wheat)' and the 'Receival At Port Service Fee (from Approved third party storage)'.
 - For **grain delivered from all other sources** including from non-approved third party storage facilities and grain delivered direct from growers, the charge is \$13.30 per tonne for major wheat grades or \$14.35 per tonne for minor wheat grades.
- a) Please confirm whether the ACCC's current understanding of the differential charges applied by Vitterra to grain received, is correct. If the above interpretation is incorrect, please provide the total applicable receival fees for grain received from each source.
- b) What are the services provided for each of the following fees:
- 'Receival fee' for major and minor wheat (Ref. A1)
 - 'Port In-Loading Fee (Wheat)' for rail and road receivals (Ref. B2)
 - 'Receival At Port Service Fee (from Approved third party storage)' (Ref. C7)?
- c) How are each of these fees determined?
- d) Vitterra stated in its submission dated 23 March 2011 that it is necessary 'to provide a number of additional services at port in relation to wheat which is received directly from growers or from other storage systems'. What, if any, are the differences between the services, testing, treatments and processes applied to grain received at port from:
- Vitterra's own storage facilities
 - Approved third party storage facilities
 - Non-approved third party storage facilities
 - Farm gate (i.e. delivered direct to port from harvest)
 - Any other supply chain options not included in categories listed above?
- e) Vitterra stated in its submission of 23 March 2011 that it is necessary to provide different services due to the increased risk faced by Vitterra in receiving grain from third party sites. Please provide any quantitative data supporting differing rates of insect infestation, presence of pesticide residues, quality misrepresentation or any other factors relevant to Vitterra's risk management between grain received from:
- Vitterra's own storage facilities
 - Approved third party storage facilities
 - Non-approved third party storage facilities
 - Farm gate (i.e. delivered direct to port from harvest)
 - Any other supply chain options not included in categories listed above?

- f) Based on Viterra's published reference prices, the ACCC understands that the \$1.20 differential between grain received via rail and road transport is not applied to grain received from sites other than Viterra's own storage sites and approved third party sites. Is grain from non-approved storage sites received from both road and rail? If yes, why is the differential not applied in this case?
- g) Based on Viterra's published reference prices the ACCC understands that the \$1.05 differential between major and minor wheat is not applied to grain received from Viterra's own storage sites and approved third party sites. Does Viterra receive both types of wheat from these sites? If yes, why is the differential not applied in this case?
- h) What factors are reflected in the differing shrinkage rates applied to grain delivered to a Port Terminal from approved third party sites, and from other third party sites? Does the shrinkage factor applied to grain that has been stored for a period of time in non-approved third party storage differ from grain that is received direct from farm?
- i) How is the \$2.45 rebate for Export Select bookings applied, and is this differential reflective of reduced costs? If so, please provide information in relation to the differences in cost to Viterra of Export Select and Export Standard bookings.

2.2 Approval of third party storage sites

- a) Please provide details of all storage sites that have been 'approved' by Viterra Operations, including, but not limited to, the operator, the type of storage, the volume of storage and the location.
- b) Please provide details of all storage sites that have been subject to Viterra's approval process and not been approved, including but not limited to the operator, the type of storage, the volume of storage and the location and the reason(s) for failing to approve that storage site.
- c) The ACCC understands that the audit and accreditation process was developed by Viterra Operations. Please provide the following details:
 - The source of the information checklist
 - Who assesses the storage sites and the qualifications of the staff concerned
 - What happens to the information regarding third party storage sites collected during the assessment process, and who has access to that information.
- d) What dispute resolution mechanisms apply in the event that a third party disagrees with Viterra's findings following an audit and accreditation process?

3. **Information handling**

3.1 Publication of information

The ACCC understands that the following information is published on Viterra's website in accordance with the 2009 undertaking, and it is proposed that this practice continue pursuant to the proposed 2011 undertaking:

- Aggregate stocks of bulk wheat and non-bulk wheat grains held at each port terminal (clause 10.1(a))
 - Details of booking applications including the name of the exporter and the volume of Bulk Wheat to be exported (the shipping stem)
- a) Please provide details of any additional types of information that is published or provided to third parties without restriction, in relation to the quantity or quality of stock held by Viterra either at port or up-country and any other stock information. Please include details as to how often this information is updated, and the degree this information is aggregated.
- b) Please provide details of any additional types of stock information that is available on a limited basis, such as via Viterra's ezigrain website or provided to clients of Viterra on request.

3.2 Information sharing – Viterra Limited / Viterra Operations Limited

- a) For each of Viterra Limited and Viterra Operations Limited and any other related corporate entity involved in the management of port terminal services in South Australia please provide an organisational chart.
- b) Please provide details as to any of Viterra Operation's policies or procedures, if any, in relation to the sharing of information with third parties, including Viterra Limited, that is received by virtue of its role as port terminal operator.
- c) Please advise whether employees of Viterra Limited are able to access stock information such as grade and quantities, provided to Viterra Operations in their role of port terminal operator.
- d) In relation to any additional capacity that becomes available after the 'available capacity table' indicates that capacity has been reached for a particular shipping slot at a particular port, please advise if any employees of Viterra Limited become aware of available additional capacity prior to notification to industry more broadly.

Schedule 2

44ZZBCA Commission may request information

- (1) The Commission may give a person a written notice requesting the person give to the Commission, within a specified period, information of a kind specified in the notice that the Commission considers may be relevant to making a decision on an access undertaking application or an access code application.
- (2) The Commission must:
 - (a) give a copy of the notice to:
 - (i) in the case of an access undertaking application—the provider of the service (unless the provider is the person); and
 - (ii) in the case of an access code application—the industry body that gave the application to the Commission (unless the body is the person); and
 - (b) publish, by electronic or other means, the notice.
- (3) In making a determination, the Commission:
 - (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
 - (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.