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**Australian
Competition &
Consumer
Commission**

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Mr Tim Krause
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Dear Mr Krause,

Breach by Viterra of its Port Terminal Services Access Undertaking (Wheat Access Undertaking)

I refer to Viterra's (then AusBulk) purported variation to its Port Loading Protocols on 2 December 2009 and the ACCC's investigation into whether this conduct breached Viterra's Wheat Access Undertaking.

This letter sets out:

- Details of the procedure, set out in Viterra's Wheat Access Undertaking, that was required to be followed in order for Viterra to vary its Port Loading Protocols (Correct Procedure);
- Details of the process followed by Viterra between 20 November 2009 and 2 December 2009 to purport to vary its Port Loading Protocols (Viterra's Conduct);
- The outcome of the ACCC's investigation into whether Viterra's conduct breached its Wheat Access Undertaking (Investigation Outcome); and
- The ACCC's proposed course of action to address Viterra's conduct (Remedy).

Correct Procedure

In its Final Decision to accept Viterra's Wheat Access Undertaking, the ACCC accepted that Viterra ought to have flexibility to change its Port Loading Protocols without being subject to the formal variation procedures in section 44ZZA(7) of the *Trade Practices Act 1974* (Cth). However, in recognising the interests of access seekers, and the public interest in having competition in downstream markets, the ACCC noted that:

...[I]t is appropriate that any changes to the port loading protocols occur with adequate notice and consultation... [and that] should such processes prove unsatisfactory, the port loading protocols may in future need to be the subject of more prescriptive processes.¹

The ACCC accepted that the following procedure, set out in Viterra's Wheat Access Undertaking at Clause 9, would comprise adequate notice and consultation:

¹ ACCC—Final Decision on AusBulk Undertaking—29 September 2009, p.7.

- Clause 9.3(b)(i) stipulates that Viterra must commence consultation with Major Users² in relation to the proposed variation at least 30 days before the variation takes effect;
- Clause 9.3(b)(ii) stipulates that Viterra must provide Major Users with written notice of the proposed variation (“Variation Notice”) at least 10 Business Days before the proposed variation takes effect (which for the avoidance of doubt, can be given before or after the expiry of the 30 day period set out in clause 9.3 (b)(i));
- Clause 9.3(c) further defines the nature of the consultation Viterra should undertake, including providing access seekers with a Consultation Notice (a document that outlines the nature of, and reasons for, the proposed variation, and invites comments from interested persons). Clause 9.3 (iii) stipulates that Viterra must provide Major Users with a minimum of 14 days to respond to the consultation; and
- Viterra is obliged to publish the Variation Notice in a prominent place on its website (Clause 9.3 (e)(i)) and provide a copy of the Variation Notice to the ACCC within 3 Business Days of the date of the Variation Notice (Clause 9.3 (e)(ii)).

Viterra’s Conduct

Following its investigation the ACCC has concluded that Viterra failed to adhere to the variation protocols set out in its Wheat Access Undertaking. Rather, Viterra conducted its variation process as outlined below:

- On 20 November 2009 Viterra sent an email to its clients advising of proposed changes to the Port Loading Protocols and posted a Consultation Notice on their website. Viterra provided clients with only 7 days to provide feedback on the proposed changes;
- Viterra notified clients and the ACCC of the variation on 2 December 2009, the day the changes took effect; and
- Viterra did not provide the prescribed Variation Notice to the ACCC as required by the Undertakings. Viterra provided a document, titled Variation Notice to the ACCC only after it had implemented the variations on 2 December 2009.

Investigation Outcome

The ACCC has now finalised its investigation into the matter and has concluded that Viterra failed to provide its clients with the requisite notice and consultation to vary its Port Loading Protocols thereby breaching Clause 9 of its Wheat Access Undertaking.

The ACCC’s investigation revealed that a number of Viterra’s clients were disappointed with Viterra’s approach to the variation process and the limited consultation opportunities.

The ACCC is also concerned that Viterra did not engage with the ACCC during the consultation process and failed to provide it with a Variation Notice in accordance

² Users that, at the date of the proposed variation to the Port Loading Protocols, have exported an average of 50,000 tonnes of commodity through relevant port terminals in each of the preceding two seasons.

with Clause 9.3 (e)(i) of the Wheat Access Undertaking.

That said, the ACCC notes that Viterra voluntarily brought the matter to the attention of the ACCC and sought to consult with all of their clients, not just the Major Users of their port terminals as required by the Wheat Access Undertaking.

Further, the ACCC has found that, among Viterra's clients, the variations made to the Port Loading Protocols have been generally viewed as acceptable, with many clients indicating their support for the changes and the increased flexibility the changes have borne with regard to shipping stem bookings.

Remedy

In considering appropriate remedial action for Viterra's conduct, the ACCC has taken into account the following matters:

- That no apparent substantive harm was experienced by Viterra's clients;
- That, in the main, Viterra's clients viewed the changes as acceptable and appropriate;
- That Viterra brought the matter to the attention of the ACCC (albeit after the variations had taken place);
- That Viterra cooperated with the ACCC throughout the course of the investigation; and
- That this is Viterra's first breach of its Wheat Access Undertaking.

Therefore, the ACCC has decided not to pursue further action against Viterra in relation to this matter, but will, in the interests of transparency and accountability, publish this letter on the ACCC's website.

This decision is consistent with the objectives of the Wheat Access Undertaking, which notes the need to reach an appropriate balance between the interests of the Port Operators, the public and access seekers.

The ACCC recognises that Viterra needs flexibility to conduct its day-to-day operations but notes that this must not come at the expense of adherence to the Wheat Access Undertaking and its accompanying suite of documents. The Wheat Access Undertaking is binding upon Viterra, and the ACCC is empowered to take Federal Court action to enforce the Wheat Access Undertaking.

Please contact Katie Young on (03) 9290 6980, if you have any questions in relation to this matter.

Yours sincerely



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