CARGILL AUSTRALIA LIMITED

30 October 2019

Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct

Cargill Australia Limited

APPLICATION FOR EXEMPTION UNDER THE PORT TERMINAL ACCESS (BULK WHEAT) CODE OF CONDUCT

I. EXECUTIVE SUMMARY

Cargill Australia Limited **(Cargill)** has acquired a mobile shiploader and is proposing to develop and commence port terminal services at Berth 20 in Port Adelaide. Cargill anticipates that its operations will be capable of facilitating bulk grain exports from around March 2020. Cargill will be a new entrant and first-time port terminal service provider and will face a significant level of competitive constraint from the Port Adelaide facilities of Viterra Operations Pty Ltd (**Viterra**).

Cargill respectfully requests a determination from the Australian Competition and Consumer Commission (**ACCC**) that Cargill is an exempt service provider under the Port Terminal Access (Bulk Wheat) Code of Conduct (**Code**).

II. BACKGROUND

A. The monopolistic structure of bulk wheat export in South Australia

Cargill is appreciative of the role that the Code plays in providing fair and transparent port access for the exporters that buy bulk grain from Australian growers.

The continuing need for the Code is apparent in areas where dominant bulk handlers have retained significant market share for bulk grain export port terminal services. The state of South Australia is a primary example of this.

Viterra operates six of the eight port terminal service facilities currently in use in South Australia.[1] Additionally, in 2017-18 alone, Viterra loaded 91% of South Australia's bulk exports,[2] with 40% going through Viterra's Port Adelaide facilities (mostly through its

[1] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 61
[2] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 3

Outer Harbour terminal).[3] Calculated over the last seven years, Viterra's share of this market was 97%.[4]

B. Competition in Port Adelaide

To date, Viterra has been, and remains, the dominant port terminal service provider (**PTSP**) in all ports in South Australia. Viterra's operations at Port Adelaide are its largest,[5] and Port Adelaide is no exception to Viterra's dominance in the market.

In July and October 2017, the ACCC granted exempt service provider status to each of Semaphore Container Services Pty Ltd (**Semaphore**) and LINX Cargo Care Group (**LINX**) at Osborne Berth 1 (Inner Harbour) and Berth 29, respectively. Each of these service providers occupy significantly smaller scale facilities, and each has operated at the port for five years.

The limited extent to which LINX and Semaphore imposes competitive constraint on Viterra is apparent from the numbers. Each of LINX and Semaphore accounted for just 240k and 270k tonnes of bulk exports in 2017-18 respectively, as against Viterra's 2.35 million tonnes in Port Adelaide. [6]

Additionally, despite industry downturns, Viterra's Port Adelaide terminals had a utilisation rate of 82% in 2017-18,[7] and bulk exports through Viterra's Port Adelaide facilities only declined by 12% compared to the previous year (0.5% below the seven-year average).[8]

Furthermore, Viterra's current monopoly extends to all of the deep-water ports in the state, i.e. Port Adelaide (Outer Harbour), Port Giles, and Port Lincoln. The effect of this monopoly is that exporters have no other alternatives for loading vessels exceeding certain tonnages, due to draft restrictions.

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[3] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 61
[4] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 3
[5] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 60
[6] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 60
[7] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 66
[8] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 66

III. CARGILL'S PROPOSED NEW PORT TERMINAL FACILITY

A. Cargill's current use of port terminal services in Port Adelaide

Currently, Cargill has an agreement with LINX to load grain at LINX's facility in Port Adelaide. The agreement incorporates use of LINX's shiploader and labour, as well as Cargill's hopper.[9] In 2017-18, LINX's facility in Port Adelaide accounted for 4% of the total port terminal facility throughput in South Australia.[10] Semaphore accounted for 5%, while Viterra accounted for the remaining 91%.[11] In addition to LINX, Cargill also uses, and in all likelihood will continue to use, Viterra ports. As of 2017-18, Cargill accounted for 2% of the market share of exporters using Viterra's facilities in Port Adelaide.[12]

B. Cargill's development of a new, small-scale facility

Cargill has acquired a mobile shiploader and is proposing to develop and commence port terminal services at Berth 20 in Port Adelaide. Cargill anticipates that its operations will be capable of facilitating bulk grain exports from around March 2020.

The estimated nominal capacity of Cargill's proposed facility is 300k tonnes per annum. Put into perspective through a comparison against tonnage volumes recorded for 2017-18, Cargill's expected 300k tonnes in annual nominal capacity represents about:

- 4% of the average total annual grain produced in South Australia;[13] or
- 5% of the total tonnes exported in bulk from South Australia;[14] or
- 10% of the total tonnes exported in bulk through Port Adelaide.[15]

To aid understanding of maximum capacity, it is noted that the highest practical capacity that the proposed facility *could* possibly reach is 60,000 tonnes a month over a period of 9 months in a year, being 540,000 tonnes annually. This is due to the practical limitations on the amount of capacity that may be provided through the proposed shiploader. At the time of this application, Cargill does not have any storage facilities at Port Adelaide. The current absence of port storage and the consequent need for grain to be trucked in,

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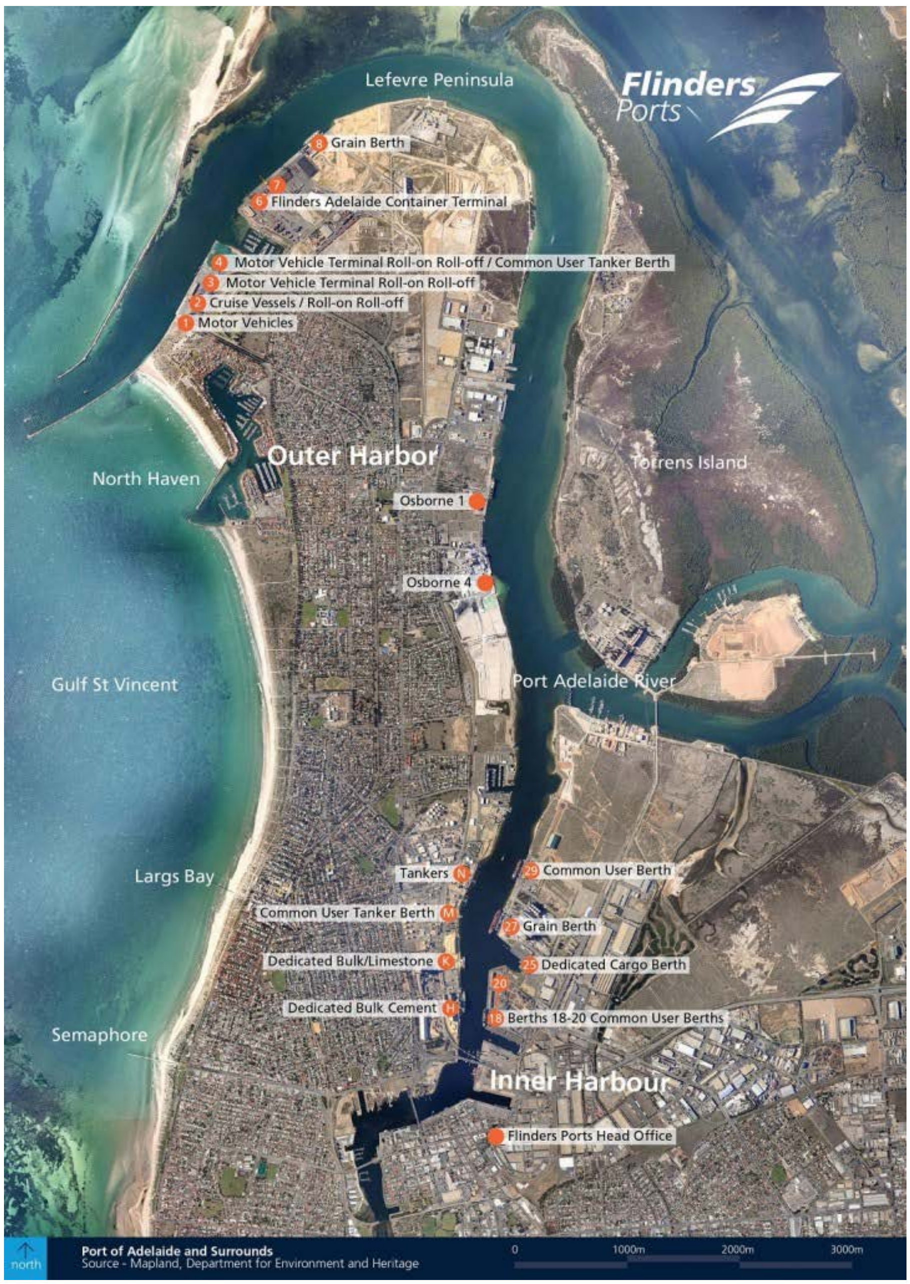
[9] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 67
[10] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 62
[11] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 62
[12] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 66
[13] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 61
[14] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 60
[15] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 61

i.e. in accordance with a just-in-time process, does not enable Cargill to increase capacity of the facility beyond the indications made here.

Cargill will be a new entrant and first-time port service provider. Cargill's previous experience in this market is only as a minority investor in Quattro at Port Kembla, in relation to which Cargill's shareholding is less than 5% and Cargill has no operational control. Cargill will be freshly entering the Port Adelaide market, and will face a significant level of competitive constraint from Viterra's facilities.

The location of Berth 20 may be observed in the below image, extracted from https://www.flindersports.com.au/ports-facilities/port-adelaide:



When Cargill's facility becomes operational and capable of handling bulk grain for export, Cargill will be proposing to use its own facility for export (as well as continuing to use the facilities of others, including Viterra). As a new entrant and PTSP, Cargill itself has limited expertise in relation to port terminal service operations. Cargill proposes to engage LINX, and LINX in turn has agreed, to provide Cargill with stevedoring services and, effectively, operate Cargill's facility for it.

The future of LINX's facility at Berth 29, which has had exempt service provider status since October 2017, is not known to Cargill at this time. Cargill has been the only active exporter at Port Adelaide LINX since the 2015-16 shipping year.[16] In 2017-18, the total volume exported through this facility was 240k tonnes. [17]

IV. RELEVANT MATTERS FOR CONSIDERATION

Overview

Cargill is aware that in deciding whether or not to determine that a PTSP is an exempt service provider, the ACCC must have regard to the matters listed at subclause 5(3) of the Code:

(a) the legitimate business interests of the port terminal service provider;

(b) the public interest, including the public interest in having competition in markets;

(c) the interests of exporters who may require access to port terminal services;

(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;

(e) the promotion of the economically efficient operation and use of the port terminal facility

(f) the promotion of efficient investment in port terminal facilities;

(g) the promotion of competition in upstream and downstream markets;

[16] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 67
[17] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 60

(h) whether the port terminal service provider is an exporter or an associated entity of an exporter;

(i) whether there is already an exempt service provider within the grain catchment area for the port concerned;

(j) any other matters the ACCC considers relevant.

Cargill addresses each of these matters in the following sections.

A. Criterion (a): the legitimate business interests of Cargill

Subclause 5(3)(a) of the Code requires the ACCC to consider whether an exemption from full regulation under the Code would be in Cargill's legitimate business interests.

Cargill's legitimate business interests

Cargill's legitimate business interests in the development of its facility includes the following:

- maximisation of Cargill's operational flexibility;
- reduction of (or not being subject to additional) regulatory compliance costs; and
- efficiencies in bulk loading and operations.

Although Cargill is intending to engage LINX for its operational expertise, Cargill is itself a new entrant to the port terminal service provider market, both generally as well as in Port Adelaide specifically. Exemption from regulation under Parts 3 to 6 of the Code will provide Cargill with a higher level of operational flexibility and allow Cargill to maximise efficiencies resulting from the use of its new mobile grain shiploader. The costs of setting up and running a program to accord with Parts 3 to 6 of the Code would otherwise consume significant resources from both a personnel and policy perspective, and it would be prohibitive and disruptive for Cargill to maintain the required regulatory compliance. This is particularly so given that Cargill is not currently regulated under the Code and would otherwise be required to develop an entirely new compliance program.

Effects of competition

As a new entrant PTSP, Cargill will be subject to a high level of competitive constraint from Viterra at Port Adelaide, as well as competitive constraint from Semaphore, and potentially, if its operations continue, LINX. There is zero possibility that Cargill would have any potential to exercise market power, and the application of Parts 3 to 6 of the Code is therefore unnecessary and prohibitive to the promotion of competition in Port Adelaide.

B. Criteria (b), (g), and (i): (b) the public interest, including the public interest in having competition in markets; (g) the promotion of competition in upstream and downstream markets; and (i) whether there is already an exempt service provider within the grain catchment area for the port concerned

In the ACCC's consideration of relevant matters, subclauses 5(3)(b) and (g) of the Code require the ACCC to have regard to the public interest, including the public interest in having competition in markets, and the promotion of competition in upstream and downstream markets. Subclause 5(3)(i) further requires the ACCC to have regard to whether there is already an exempt service provider within the grain catchment area for the port concerned.

Creation of an alternative export supply chain

Cargill's development of a new facility creates an alternative export supply chain in South Australia, a matter for which there is strong exporter, grower, and marketer support. The elevation charges currently levied by Viterra are higher than is efficient,[18] and these prices are supported by the monopolistic structure of Viterra's infrastructure and operations. The grant of an exemption status to Cargill's port terminal service facility would:

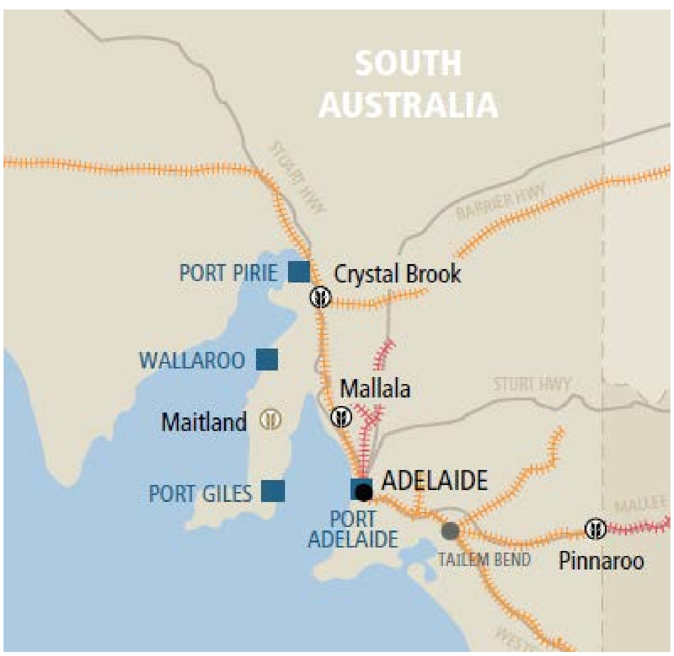
- provide exporters with greater flexibility regarding port access;
- offer an alternative export supply chain to exporters, growers, and marketers;

[18] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs - final report, 29 January 2019*, p. 2. Excerpt: **However, the decline in Viterra's real operating costs per tonne has not been accompanied by a similar drop in the fees charged to growers for its services. The result has been that Viterra's operating surpluses show a strong upward trend…and the corresponding cash flow benefits have been retained to date by Viterra's owners and its shareholders.**

- increase confidence in the general market for forward contracts and guaranteed delivery;
- increase capacity in relation to the port capacity allocation process;
- enable the efficient development of new long-term capacity and corresponding contracts;
- allow exporters better access to increased capacity; and
- enable competitive pressures that would improve prices and elevation charges.

Promotion of competition in upstream markets

Significantly, the development of an alternative supply chain from the point of grain production to ship loading would increase competition in the upstream markets of grain storage and grain trading. Viterra is, and will remain, the dominant operator in up-country storage and handling across the state. Notably, Viterra currently operates 67 up-country storage sites in South Australia.[19] Cargill has four sites: at Pinnaroo, Crystal Brook, Maitland, and Mallala.



[19] News article, https://www.abc.net.au/news/2019-06-01/drought-affected-farmers-slam-viterra-silo-closures/11168126, 1 June 2019.

The total capacity of this storage network is 665,000 tonnes. Exporters seeking to export bulk grain from South Australia will for the most part continue to have the same choices when deciding from where to ship bulk grain. Consequently, the combination of Cargill's proposed port terminal facility and its current upcountry storage facilities is likely to increase competition along the bulk grain export supply chain, and increase choice in the market for consumers seeking the services of bulk storage providers and export ship loading providers.

Comparison to other exempt service providers within Port Adelaide

LINX and Semaphore are currently the only exempt service providers within the grain catchment area for Port Adelaide. Each did volumes last year that are close to Cargill's proposed nominal annual capacity of 300k tonnes. The grant of an exemption to Cargill would be consistent with maintaining a level regulatory playing field amongst the smaller scale service providers. By comparison, Viterra's throughput was 2.35 million tonnes. [20] Cargill's operations are significantly smaller relative to that of Viterra's in Port Adelaide.

Effects of competition

In summary, given Viterra's dominance in the bulk wheat export market at Port Adelaide, and its outright current monopoly in relation to deep water ports, Cargill's facility will promote competition in a market (and the related markets of grain trading and grain storage) currently serviced by a monopolistic provider structure.

Cargill will face a significant level of competitive constraint from Viterra's Port Adelaide facilities, and will not be able to exert market power in the provision of port terminal services.

[20] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 60

C. Criteria (c), (d), and (h): (c) the interests of exporters who may require access to port terminal services; (d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services; and (h) whether the port terminal service provider is an exporter or an associated entity of an exporter

In deciding whether to exempt a PTSP, subclauses 5(3)(c) and (d) of the Code require the ACCC to have regard to the interests of exporters who may require access to port terminal services and the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services. Subclause 5(3)(h) requires the ACCC to have regard to whether the PTSP also exports bulk wheat or is associated with an exporter of bulk wheat.

Cargill's position as an exporter

In 2011-12, Cargill, as an exporter, accounted for 20% of the South Australian bulk export market share.[21] However, this market share has declined significantly since, and in 2017-18, Cargill's market share was just 6%.[22]

Likelihood that exporters of bulk wheat will have fair and transparent access

Cargill is committed to providing fair and transparent access to port terminal services in the event that it has the capacity and capability to do so. Cargill's exports through Port Adelaide over the four years up to 2017-18 averaged at 238k tonnes per year. In 2018-19, Cargill did not export through Port Adelaide at all due to drought conditions. Cargill therefore anticipates that it will likely have excess capacity in relation to its expected nominal annual tonnage of 300k tonnes through its new facility. That being the case, Cargill is committed to welcoming third parties to utilise any available capacity in its facility. All services would be offered and charged on a commercial basis.

Contrast to Viterra's position

Viterra is a subsidiary of Glencore. Glencore has been the largest exporter of bulk grains from South Australia for the last seven years. Glencore's exports account for an annual market share of between 30% to 45% over this time.[23] Additionally, and importantly, in every port but one that Viterra operates in South Australia, Glencore is already the largest exporter through each of Viterra's port terminal service facilities, and

[21] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 64
[22] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 64
[23] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 64

that is despite the Code's current, non-exempt, application to Viterra.[24] That one exception is Thevenard, which relevantly accounted for just 130k tonnes of bulk grain export in 2017-18, and in relation to which Glencore remains the second highest exporter after ADM.[25]

The interests of other exporters and the benefits of exemption to them

In relation to the interests of exporters who may require access to port terminal services, it is Cargill's understanding that many exporters would welcome new entry at Port Adelaide. Generally, exporters (Cargill included), welcome the introduction of an alternate supply chain and this typically boosts flexibility and competition in the market place for bulk grain export services out of the port.

Notably, given that Cargill is a new entrant service provider, and this market is currently serviced by a monopoly service provider, Cargill has strong incentives to provide fair and transparent access in order to attract and maintain a customer base for its available capacity. This would likely occur even without Parts 3 to 6 of the Code applying. Indeed, the lower level of regulation would allow Cargill to use its resources more efficiently and be in a better position to compete with a dominant incumbent service provider.

Increased port capacity

Relevantly, there is no current shortage in securing port capacity[26] and this is unlikely to change as a result of an exemption being accorded to Cargill. Indeed, Cargill's entry is likely to increase and improve access to capacity allocation for Port Adelaide, with the addition of its 300k tonnes of nominal capacity to what would be available in the market.

All of the above matters considered, Cargill being subject to a higher level of regulation would be of limited practical benefit to exporters.

[24] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 60
[25] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 60
[26] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 19

D. Criteria (e) and (f): (e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities

In deciding whether to exempt a PTSP, subclauses 5(3)(e) and (f) of the Code require the ACCC to have regard to the promotion of the economically efficient operation and use of the port terminal facility and efficient investment in port terminal facilities.

Increased efficiencies in operations and investments

An exemption will promote the efficient use of and investment in Cargill's new facility, which Cargill would require to have any opportunity to effectively compete against Viterra, and, to a lesser extent, Semaphore and LINX, given they are currently already exempt service providers. Granting the exemptions will allow Cargill to redirect resources efficiently (that would otherwise have been used for compliance with the full Code), and thereby reduce its costs and improve its flexibility in meeting customer demands. This in turn would encourage small scale entry into the grain supply chain.

Additionally, as noted above in section IV.A, granting Cargill an exemption will lower Cargill's Code compliance costs and provide it with greater operational flexibility. This will likely promote the efficient commencement and operation of Cargill's new facility at Port Adelaide. This, in turn, should provide incentives for Viterra to ensure that it too makes efficient decisions and investments in relation to its operations.[27]

Contrast to Viterra's position

Viterra has long established operations, relationships, networks, assets, facilities, and expertise as the dominant and incumbent service provider at Port Adelaide. It also has dominance in the market of up-country grain storage, which allows Viterra to exert its market power in both the port market, and related markets, to maximise its commercial gains.

Effects of competition

Cargill will only survive as a port terminal service provider to third parties if it can offer commercially favourable and competitive loading services. These can only be delivered

[27] See ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs - final report, 29 January 2019*, p. 35. Excerpt: **But, if Viterra continues its trend of increasing operating surpluses (notwithstanding potentially incurring losses in poor seasons such as 2018-19), it may start to earn excessive returns for a firm with its risk profile. This would not represent an efficient outcome. In this situation, the competitiveness of the supply chain would become questionable if Viterra did not share its continuing efficiencies with industry through lower fees.**

through a combination of efficient investment and flexible and efficient operating procedures.

There is no doubt that the competitive pressures that Viterra imposes will be sufficient to encourage Cargill to make efficient investments, and avoid inefficient investment, in its own facility.

Further, a grant of exemption for Cargill is consistent with the ACCC's published view that the removal of unnecessary regulation may demonstrate to potential new entrants that they will likely be provided with the flexibility to compete with dominant existing service providers.[28] As elucidated by the ACCC, this may encourage potential new entrants to invest in facilities when they consider it economically efficient to do so.[29]

E. Criterion (j): any other matters the ACCC considers relevant

Cargill considers that there is at least one additional matter relevant to the ACCC's assessment of whether Cargill should be determined an exempt service provider of port terminal services.

The possibility that LINX might exit the market of port terminal services

In the event that LINX might exit this market as a result of Cargill using its own facility for export, an exemption status for Cargill's facility is necessary to maintain the already limited competitive constraints on Viterra at Port Adelaide. The 2017-18 records indicate that LINX and Semaphore's market shares of the South Australian bulk export market are only 4% and 5% respectively, relative to Viterra's 91%.[30] Using those volumes as a guide, the estimated annual nominal capacity of Cargill's proposed facility would similarly account for only about 5% of total South Australian bulk grain exports.

V. CONCLUSION

Having regard to all of the matters listed for consideration under subclause 5(3) of the Code, Cargill is of the firm view that it should, and would need to be, an exempt service

[28] ACCC, *Final position paper regarding T-Ports Lucky Bay exemption assessment*, August 2019, p.14

[29] ACCC, *Final position paper regarding T-Ports Lucky Bay exemption assessment*, August 2019, p.14

[30] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 62. See also, ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs - final report, 29 January 2019*, p. 62. Excerpt: **While Viterra faces some competition (actual and potential), the extent to which it places effective and credible discipline on Viterra's behaviour is not clear.**

provider of port terminal services from the date that its facility at Berth 20 is covered by the Code. Cargill welcomes any discussion or consultation on the matter from the ACCC.