



Issues Paper

Exempt service provider status assessments under the Port Terminal Access (Bulk Wheat) Code of Conduct

Viterra Operations Pty Ltd with respect to:

- Port Adelaide Inner Harbour
- Port Adelaide Outer Harbor
- Port Giles
- Port Lincoln
- Thevenard
- Wallaroo

Date 9 August 2019

Summary

The Australian Competition and Consumer Commission (ACCC) is seeking views on whether it is appropriate for the ACCC to determine Viterra Operations Pty Ltd (Viterra) to be an exempt service provider of port terminal services provided by means of its port terminal facilities at the following ports (together *the Ports*):

- Port Adelaide Inner Harbour;
- Port Adelaide Outer Harbor;
- Port Giles;
- Port Lincoln;
- Thevenard; and
- Wallaroo.

The ACCC will assess the exemption application on each of the Ports on an individual case-by-case basis.

Exempt service providers are not required to comply with Parts 3 to 6 of the *Port Terminal Access (Bulk Wheat) Code of Conduct* (the Code) in relation to port terminal services provided through specified port terminal facilities.¹ Accordingly, exempt service providers are not required to (among other things): have their process for allocating access to their port terminal services approved by the ACCC; allocate capacity according to the Code's non-discrimination and no hindering obligations; deal with negotiation disputes via specified processes; or publish information on expected port capacity, performance indicators, or stocks at port.

The Code states that, in making a determination that a Port Terminal Service Provider (PTSP) is an exempt service provider, the ACCC must have regard to the matters listed at subclause 5(3) of the Code. The ACCC will consider these matters in subclause 5(3), along with submissions provided in response to this Issues Paper, prior to making its draft determinations.

Viterra provided a submission in support of exempt service provider status at each of the Ports. Elements of this submission are set out as relevant in Section 2 of this Issues Paper.

The full submission is available on the ACCC's website for interested parties to consider.²

The ACCC invites comments in response to this issues paper by **5.00pm EST on 6 September 2019**.

Further information on the ACCC's exemption role is available at **Appendix A**.

¹ *Port Terminal Access (Bulk Wheat) Code of Conduct*, cl.4(8)

² See <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects>

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1. Introduction

The Code commenced on 30 September 2014 and regulates the conduct of bulk wheat port terminal service providers. It was prescribed by regulation under section 51AE of the *Competition and Consumer Act 2010 (Cth)* (CCA).

The Code provides that the ACCC or the Minister for Agriculture may exempt a PTSP from the application of Parts 3 - 6 of the Code in relation to port terminal services provided at a specified port terminal facility. Exempt service providers remain subject to only Parts 1 and 2 of the Code and therefore face a lower level of regulation. The obligations under each of the different Parts of the Code are discussed further in section 1.2.

This section sets out why the ACCC has a role assessing whether PTSPs should be determined to be exempt service providers, what that assessment process will involve, and how interested parties can participate in the assessment.

1.1. How the ACCC will assess whether it is appropriate to determine Viterra to be an exempt service provider at each of the ports

The ACCC is assessing whether it is appropriate to determine Viterra to be an exempt service provider of port terminal services provided by means of its port terminal facility at each of the Ports.

The ACCC will assess each of the exemption applications for the Ports on an individual case-by-case basis. Accordingly, it may ultimately determine Viterra to be exempt at none, some or all of the six Ports, based on its assessment of the situation at the particular Port.

In deciding whether to determine a PTSP to be an exempt service provider at a particular facility, the ACCC is required to consider 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
- (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.

To inform its consideration of these matters, and consistent with the exemption guidelines,³ the ACCC considers that it is appropriate to seek the views of interested parties.

³ ACCC, Guidelines on the ACCC's process for making and revoking exemption determinations, October 2014.

The ACCC is therefore conducting a public consultation during which interested parties are invited to comment on specific questions and matters relating to the appropriateness of Viterra receiving exempt service provider status at one or more of the Ports.

The ACCC will consider the matters listed at subclause 5(3) and the views expressed by interested parties during the course of the ACCC's public consultation process. The ACCC will then make its determinations on whether to exempt Viterra at one or more of the Ports.

The ACCC has previously considered issues relating to the South Australian grain market in its consideration of changes to Viterra's Port Loading Protocols at each of the Ports in 2015⁴, and for exemptions to LINX's⁵ and Semaphore's Port Adelaide facilities in 2017.⁶

The ACCC is also currently assessing an exemption application by T-Ports for its port terminal facility at Lucky Bay on South Australia's Eyre Peninsula.⁷

Interested parties may wish to make reference to those previous processes.

1.2. What a determination of a port terminal service provider as an exempt service provider means

Unless exempt, PTSPs are required to comply with Parts 1 to 6 of the Code (that is, the entire Code).

PTSPs that are determined by the ACCC or the Minister of Agriculture to be exempt service providers are:

- only required to comply with Parts 1 and 2 of the Code
- **not** required to comply with Parts 3 to 6 of the Code

in relation to the specified port terminal facility.

Part 1 of the Code contains general provisions about the Code.

Part 2 of the Code requires all PTSPs to deal with exporters in good faith, publish a port loading statement and policies and procedures for managing demand for their services, and make current standard terms and reference prices for each port terminal facility publically available on their website.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of itself or its trading business or hinder third party exporters' access to port terminal services,
- to enter into an access agreement or negotiate the terms of an access agreement with an exporter to provide services if an exporter has applied to enter into an access agreement and certain criteria are satisfied,
- to deal with disputes during negotiation via specified dispute resolution processes including mediation and arbitration, and to include the dispute resolution mechanism in the standard terms, and

⁴ ACCC, ACCC final decision on Viterra's application to vary its capacity allocation system - 3 December 2015

⁵ ACCC, ACCC letter to LINX re exempt service provider status at Port Adelaide - 18 October 2017

⁶ ACCC, ACCC final determination - Semaphore (Port Adelaide) wheat port exemption assessment, 28 July 2017

⁷ For further information see: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/t-ports-lucky-bay-wheat-port-exemption-assessment>

- to vary its standard terms in accordance with a set procedure.

Part 4 of the Code requires a PTSP to have, publish and comply with a port loading protocol which includes an ACCC approved capacity allocation system.

Part 5 of the Code requires a PTSP to regularly publish its expected capacity, stock at port information and key performance indicators.

Part 6 requires retaining records such as access agreements and variations to those agreements.

Exempt service providers are still required to comply with general competition law.

1.3. Consultation

The ACCC invites interested parties to provide their views on Viterra's application.

Section 2 of this Issues Paper contains what the ACCC considers to be key questions and issues relevant to the ACCC's assessment, as well as information provided by Viterra in support of its exemption.⁸

The ACCC invites interested parties to respond to these questions, comment on the information provided by Viterra, and provide any additional information they consider relevant to the ACCC's assessment.

As the exemption application for each of the Ports will be assessed on a case-by-case basis, interested parties are encouraged to distinguish between the Ports in their views, where appropriate.

1.3.1. Making a submission

Please address submissions to:

Mr Matthew Schroder
General Manager
Infrastructure & Transport - Access & Pricing Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001

The ACCC prefers that submissions be sent via email in Microsoft Word and/or PDF format (although other text readable document formats will be accepted). Submissions should be sent to both of the following email addresses:

transport@acc.gov.au

michael.eady@acc.gov.au

⁸ Submissions by Viterra are available on the ACCC's website at: <https://www.acc.gov.au/regulated-infrastructure/wheat-export/viterra-wheat-port-exemption-assessment/exemption-application>

1.3.2. Due date for submissions

Submissions must be received before **5.00pm AEST on 6 September 2019**.

1.3.3. Confidentiality of information provided to the ACCC

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

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

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the *ACCC & AER Information Policy – collection and disclosure of information*, available on the ACCC website.⁹

1.3.4. Further information

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

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⁹ See: <https://www.acc.gov.au/publications/acc-aer-information-policy-collection-and-disclosure-of-information>

2. Matters for comment

On 2 July 2019, Viterra provided a written application to the ACCC seeking to be determined an exempt service provider of port terminal services provided by means of its port terminal facility at each of the Ports.

The ACCC invites interested parties to provide submissions commenting on the specific questions and matters within this paper relating to the appropriateness of Viterra receiving exempt service provider status at one or more of the Ports. Interested parties are encouraged to reference the matters listed in subclause 5(3) of the Code in their response.

The exemption application for each of the Ports will be assessed on a case-by-case basis – interested parties are therefore encouraged to distinguish between the Ports in their comments where appropriate.

Additional detail relating to the information extracted below is available in Viterra's submission in support of its application, available on the ACCC's website.

2.1. Legitimate business interests of the service provider

All of Viterra's South Australian facilities are currently subject to the whole Code. In making a determination to exempt or not exempt a PTSP, the ACCC is required to consider the PTSP's legitimate business interests.

The ACCC is therefore seeking views on how removing the obligation to comply with Parts 3 to 6 of the Code would impact on Viterra's business interests in relation to each of the Ports for which an exemption is being sought.

General

In relation to Viterra's interests across all of the Ports, Viterra submits that:

Viterra is the only bulk grain export operator in Australia that is subject to Parts 3 to 6 of the Code in respect of all the port terminals it operates.

An exemption from Parts 3 to 6 of the Code for Viterra's port terminals would result in its regulatory costs decreasing significantly. The resources reallocated to, and the costs of responding to, requests for information by the ACCC and other regulators since the Code was introduced are extensive. These regulatory requirements have also impeded the availability of key personnel during crucial operational times.

Due to the unequal application of the Code, the burden and costs of associated regulatory processes have not been borne equally by the Australian bulk wheat export industry, but are largely shifted onto the South Australian wheat industry.

An exemption from the requirements of Parts 3 to 6 of the Code would place Viterra on a level playing field with competing port terminal operators right around the country who do not operate under the same level of regulation. In particular, an exemption would enable Viterra to provide more competitive and flexible services to exporters for bulk grain exports and support lower supply chain costs and increased investment by allowing Viterra to operate its port terminals with more flexibility and greater efficiency.

At present, the additional costs and inefficiencies associated with Parts 3 to 6 of the Code result in costs not only for Viterra but also in the form of missed opportunities for South Australian growers in export markets.¹⁰

Port Lincoln

In relation to Viterra's interests at its Port Lincoln facility, Viterra submits that:

An exemption for Port Lincoln is in Viterra's legitimate business interests, as it would reduce its costs and enable more flexible and timely solutions with its customers.

As set out in section 7 of our submission, Parts 3 to 6 of the Code impose significant costs on those port terminal operators that continue to be subject to it. In addition to the costs of participating in regulatory processes, costs are incurred to develop systems, processes and expertise that are necessary to ensure compliance with regulation.

In addition, these Parts of the Code reduces the flexibility of those operators in responding to changing conditions and customer needs. As set out in our submission, this played out in relation to the introduction of long-term agreements for capacity at Viterra's port terminals.

This has also played out in relation to other aspects of Viterra's operations. The fact that Viterra must strictly comply with the Port Loading Protocols that cannot easily be varied—particularly, the strict rules in relation to vessel loading—has at times adversely impacted the efficiency of the supply chain and has frustrated clients. If Viterra had greater flexibility it would be able to maximise vessel loading opportunities and overall capacity.

...The strict timeframes of the Port Terminal Protocols frustrate parties in the supply chain not only for wheat exports, but for all grains— it is impractical to have different port loading protocols for non-regulated grains and, therefore, the approved Port Terminal Protocols apply to the export of all grain from Viterra's port terminals. These costs and inflexibility undermine efficiency and competitive outcomes in circumstances where Parts 3 to 6 of the Code only apply to a small number of port terminals.

An exemption from Parts 3 to 6 of the Code for Port Lincoln would result in the regulatory cost to Viterra decreasing significantly. In addition, the exemption would enable Viterra to operate with improved flexibility in responding to customer needs in the increasingly competitive landscape. This would improve the efficiency of the Viterra export supply chain, as Viterra would have the ability to act in a timely manner, respond quickly to agricultural events and develop port operations that maximise throughput and capacity.¹¹

Thevenard

In relation to Viterra's interests at its Thevenard facility, Viterra refers to the matters raised in relation to its Port Lincoln facility and also submits that:

As referred to in section 2 of Attachment 1 (Port Lincoln), the strict requirements of the Port Terminal Protocols frustrate parties in the supply chain not only for wheat exports, but for all commodities— it is impractical to have different port loading protocols for non-regulated grains and, therefore, the approved Port Terminal Protocols apply to the export of all grain from Viterra's port terminals. This is particularly relevant for Thevenard, given the small proportion of wheat (as compared to other grains and commodities) exported from Thevenard.

¹⁰ Viterra Exemption Application, pp. 1-2.

¹¹ Ibid, pp. 26-27.

*Vessel owners and customers that use Thevenard have noted that Viterra is limited in its ability to respond to changing circumstances due to the requirements under the Port Loading Protocols. For example, the lack of flexibility of the Code makes it difficult to change the loading priority of vessels even if this could increase efficiency for all users.*¹²

Port Adelaide Inner Harbour and Outer Harbor, Wallaroo and Port Giles

In relation to Viterra's interests at its Port Adelaide Outer Harbor, Port Adelaide Inner Harbour, Wallaroo and Port Giles facilities, Viterra refers to the matters raised in relation to its Port Lincoln facility.

Key questions and issues

Port-specific Questions (please answer with regard to each of the Ports, where possible):

1. *How, and to what extent, do you consider that the legitimate business interests of Viterra are affected by Parts 3 - 6 of the Code applying to each of the Ports?*
2. *To what extent are there differences in the effect on Viterra's legitimate business interests at each of the Ports?*

2.2. Access to port terminal services

Subclause 5(3) requires the ACCC to consider the interests of exporters who may require access to the relevant port terminal services when determining whether to exempt a PTSP. The ACCC is also required to consider whether the port terminal service provider is an exporter or an associated entity of an exporter.

Therefore the ACCC is seeking views on how the interests of access seekers will be impacted if obligations to comply with Parts 3 to 6 of the Code were removed at each of Viterra's port terminal facilities, including access seekers' ability to secure fair and transparent access.

Port terminal facilities differ in capacity and other characteristics. Submitting parties may wish to make reference to the ACCC's annual monitoring reports in providing comment on certain questions in this section. The most recent of these reports, covering the 2017-18 shipping year, was published in December 2018. Chapter 7 of that report examines the South Australian market.¹³

Noting that the exemption applications for each of the Ports will be assessed on a case-by-case basis, interested parties are encouraged to distinguish between each of the Ports when providing their views.

General

Viterra is an associated entity of an exporter (Glencore Agriculture Pty Ltd).¹⁴ Glencore was the largest exporter of bulk grains from South Australia in 2017-18, with 35 per cent market share (down from 42 per cent in 2016-17).¹⁵

¹² Ibid, p. 44.

¹³ ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 61.

¹⁴ Viterra Exemption Application, p. 1.

¹⁵ ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 5.

Viterra submits that any ability for it to exercise market power as a result of this vertical integration is limited due to a range of factors, including: increasingly fluid grain catchment zones; excess capacity at its own port terminals and expected increases from new entrants; ongoing increases in South Australia's grain shipping capacity; and low barriers to the development and expansion of port terminal services.¹⁶

Viterra also submits that it has demonstrated its willingness and ability to provide fair and transparent access:

*Viterra has been providing open access to its port terminals since well before the introduction of access regulation. It has demonstrated over a long period of time that it is committed to providing fair and open access to exporters, and to responding to exporter needs.*¹⁷

*There are currently 11 exporters using the Viterra system in South Australia. There have been no complaints to Viterra under the Port Loading Protocols since the introduction of the Code.*¹⁸

Viterra further submits that it has strong commercial incentives to maximise throughput of grain and to provide transparent and open access to its facilities on reasonable terms.¹⁹

In addition, Viterra further submits that exemptions for its facilities will be in the interests of its customers at all of its ports, specifically that removal of regulation will allow it to better meet their needs:

*Over the past 10 years, each change to Viterra's capacity allocation system has been in response to customer feedback. However, Viterra has been limited in its ability to respond quickly to its customers' needs due to regulatory restrictions. A reduction in the level of regulation at its port terminals will enable Viterra to respond to its customers' needs more adeptly, innovate with its customers and open up competition within its network to provide an efficient export pathway for customers.*²⁰

Port Lincoln

In relation to its facility at Port Lincoln, Viterra submits that the imminent new entry of T-Ports Lucky Bay facility on the Eyre Peninsula, as well as other proposed developments, will compete with this facility and add to its already strong incentives to attract business to this facility:

*...Viterra is subject to significant new competition on the Eyre Peninsula, and is also competitively constrained by port terminal operators exporting grain from other grain growing regions around the world. Given this, along with the low barriers to entry for supplying port terminal services and the increasing excess capacity on the Eyre Peninsula, Viterra has a strong incentive to maximise throughput grain at its port terminals and to ensure that its terms and conditions of access are reasonable.*²¹

¹⁶ Viterra Exemption Application, p. 1.

¹⁷ Ibid, p. 2.

¹⁸ Ibid, p. 38.

¹⁹ Ibid, p. 10.

²⁰ Ibid, p. 2.

²¹ Ibid, p. 38.

Port Adelaide Inner Harbour and Outer Harbor

In relation to its port terminal facilities at Port Adelaide Outer Harbor and Port Adelaide Inner Harbour, Viterra submits that the proposed entry of T-Ports Wallaroo facility will further increase excess capacity at its Inner Harbour and Outer Harbor facilities:

T-Ports' proposed new facility at Wallaroo will further increase excess capacity at Port Adelaide, as T-Ports intends to export more than 300,000 tonnes of grain that is typically sent to Wallaroo or Port Adelaide.²²

In addition, Viterra submits that the presence of the existing PTSPs at Port Adelaide will also increase its incentives to maximise throughput at the Inner Harbour and Outer Harbor facilities:

... Viterra is subject to competition at Port Adelaide. Given this, along with being competitively constrained by port terminal operators exporting grain from other grain growing regions around the world, the low barriers to entry or expansion for port terminal services, and the excess capacity at Port Adelaide, Viterra has a strong incentive to provide open access and reasonable terms in order to maximise throughput grain at its port terminals.²³

Thevenard, Wallaroo and Port Giles

In relation to its port terminal facilities at Thevenard, Wallaroo and Port Giles, Viterra refers to the matters submitted in relation to its Port Lincoln facility. In addition, in relation to Wallaroo, Viterra further submits that:

In addition, as set out in section 3.1 above, Viterra is subject to competition at Port Adelaide (which serves the same catchment zone as Wallaroo) and T-Ports has proposed a new port terminal at Wallaroo.²⁴

²² Ibid, p. 51.

²³ Ibid, p. 51.

²⁴ Ibid, p. 59.

Key questions and issues

General Questions:

3. Noting that Viterra is vertically integrated with an associated export entity, to what extent could third party exporters expect to be able to negotiate fair and transparent access arrangements, absent the full level of regulation under the Code?

Port-specific Questions (please answer with regard to each of the Ports, where possible):

4. If Viterra is not required to comply with Parts 3 to 6 of the Code (including the dispute resolution, non-discrimination, and capacity allocation system approval obligations), would exporters still expect to be able to negotiate access to port terminal services on reasonable commercial terms at each of the Ports?
5. What characteristics or factors are relevant when considering access to each of the Ports? How do these characteristics or factors (or the differences in them) affect access?
6. Noting that Viterra submits that there is currently excess capacity at its port terminal facilities,²⁵ could exporters still expect to be able to negotiate access to port terminal services on reasonable commercial terms at each of the Ports in future years if there was reduced or no excess capacity?

2.3. Grain catchment area

In making an exemption determination, the Code requires the ACCC to have regard to the public interest, including the public interest in having competition in markets.

In order to assess the level of competition between providers of port terminal services, the ACCC considers that it is necessary to examine the grain catchment areas or port zones that will feed the Ports being considered for exemption, as well as the substitutability of different ports or the domestic market.

General

In regards to the grain catchment areas across South Australia, Viterra submits that:

Traditional “catchment zones” for grain grown in South Australia are fluid and increasingly outdated constructs. Traders purchase grain from, and traders and growers move grain to, the locations where it is most profitable having regard to the price of grain that can be obtained in domestic and export markets, the cost of freight to port terminals (or to domestic customers), the cost of sea freight, and the cost of using a particular port terminal. If Viterra is inefficient or its terms of access—including its fees—are unreasonable, grain traders will source grain from regions outside of South Australia or use alternative and competing terminals in South Australia or neighbouring states to export South Australian produced grain, or will sell grain in Australia, including directly from on-farm storage.²⁶

Each of the Ports

Viterra also variously submits in relation to grain catchment areas for each of the Ports that:

²⁵ Ibid, p. 19.

²⁶ Ibid, p. 1.

Port Lincoln has traditionally sourced grain from growers on the Eyre Peninsula in South Australia.²⁷

Thevenard has traditionally sourced grain from regions including the Eyre Peninsula in South Australia.²⁸

Port terminals at Port Adelaide have traditionally sourced grain from a large grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide...²⁹

Walleroo has traditionally sourced grain from a region that extends from above Melrose down to the Yorke Peninsula.³⁰

Port Giles competes for the same grain as port terminal operators at Port Adelaide.³¹

Key questions and issues

General Questions:

7. *To what extent do grain catchment areas remain relevant to the consideration of grain export activity?*
8. *To what extent do PTSPs in other jurisdictions (such as Victoria) compete for grain sourced from South Australia?*
9. *What are the key factors that grain exporters and/or grain producers consider when choosing which port to export grain through?*

Port-specific Questions (please answer with regard to each of the Ports, where possible):

10. *What are the appropriate regions to be considered in relation to grain export activity at each of the Ports?*
11. *Is it appropriate to consider facilities in other jurisdictions in relation to each of the Ports?*

2.4. Competition in bulk grain port terminal services

As noted, the ACCC considers that, in determining whether to exempt a PTSP, an important consideration is whether a PTSP is incentivised to provide exporters with fair and transparent access due to competitive pressures. One of these potential pressures is from other PTSPs. To the extent that competing terminals provide a competitive constraint on a particular port terminal facility, third party access seekers will have alternatives through which to export and are more likely to obtain fair and transparent access.

The ACCC is also required to consider whether there is already an exempt service provider within the grain catchment area of the relevant port, and to have regard to the promotion of efficient investment in port terminal facilities.

There are differences in the level of competition for each of Viterra's Ports in South Australia – with some competition already existing in Port Adelaide, and a competing facility being constructed near Port Lincoln.

²⁷ Ibid, p. 41.

²⁸ Ibid, p. 46.

²⁹ Ibid, p. 48.

³⁰ Ibid, p. 58.

³¹ Ibid, p. 62.

The ACCC therefore seeks to assess the current and reasonably anticipated levels of competition in port terminal services. In particular, the ACCC is considering the levels of capacity, demand and spare capacity at each of the Ports.

Submitting parties may wish to make reference to the ACCC's annual monitoring reports in providing comment on certain questions in this section. The most recent of these reports, covering the 2017-18 shipping year, was published in December 2018. Chapter 7 of that report examines the South Australian market.³²

General

As previously noted, Viterra submits that any ability for it to exercise market power as a result of its vertical integration is limited by a range of factors.³³

Viterra also submits that grain traders operate in a global export market, and that:

...Viterra and South Australian growers are subject to significant competition from other Australian and global grain producing regions, and Viterra competes with port terminal providers elsewhere in Australia and around the world.³⁴

Viterra also submits that barriers to entry in providing port terminal services are low, as eight new port terminal operations have commenced around Australia in less than five years. In addition Viterra notes there are also a number of proposed new developments on the Eyre Peninsula.³⁵ Viterra also submits that the development of mobile ship loaders has also made entry into the export of wheat easier.³⁶

In relation to investment in port terminal facilities, Viterra submits that:

Viterra has shown itself to be a responsible, committed and long term participant in the South Australian grain supply chain.

In the five years to December 2018, Viterra made significant investments in its port terminal infrastructure and in operational improvements affecting bulk loading facilities at its port terminals.³⁷

Viterra also submits a number of additional comments specifically relating to competition and capacity of each of its individual port terminal facilities.

Port Lincoln

In relation to Port Lincoln, Viterra submits that on the Eyre Peninsula it will face strong competition from T-Ports at Lucky Bay.³⁸ Viterra also notes the T-Ports Lucky Bay port terminal is the subject of an application for exemption from of Parts 3 to 6 of the Code.³⁹

Viterra also submits they will face increasing competition on the Eyre Peninsula from proposed new developments by Free Eyre at Port Spencer and the multi-partner facility at Cape Hardy.⁴⁰

³² ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018, p. 61.

³³ Viterra Exemption Application, p. 1.

³⁴ *Ibid*, p. 10.

³⁵ *Ibid*, p. 32.

³⁶ *Ibid*, p. 19.

³⁷ *Ibid*, p. 39.

³⁸ *Ibid*, p. 28.

³⁹ *Ibid*, p. 41.

⁴⁰ *Ibid*, p. 28.

Viterra's submission states that the South Australian Department of Planning, Transport and Infrastructure production outlook for Eyre Peninsula for the next five years is predicted to be 2.24 million tonnes per annum, and Viterra submits that the shipping capacity at Port Lincoln exceeded this in three of the past five seasons.⁴¹

Viterra also submits that the combined capacity of Port Lincoln, Lucky Bay and Thevenard would mean there would have been significant excess capacity on the Eyre Peninsula in all months of the 2015/16 and 2017/18 seasons. Viterra expects that even in a future "bumper crop" year there would be excess capacity in all months on the Eyre Peninsula.⁴²

Thevenard

In relation to its facility at Thevenard, Viterra submits that:

*There is significant excess capacity at Thevenard. As set out above in section 1, the annual capacity at Thevenard significantly exceeded grain throughput for the past three years. Based on historic throughput at Thevenard, there was excess capacity available in both peak and non-peak periods.*⁴³

Viterra also notes that the T-Ports Lucky Bay terminal will also export grain from regions including the Eyre Peninsula, a region Thevenard has traditionally sourced grain from.⁴⁴

Port Adelaide Inner Harbour and Outer Harbor

In relation to both Port Adelaide Outer Harbor and Port Adelaide Inner Harbour, Viterra submits that at Port Adelaide there are several existing competitors (Semaphore and LINX), and that Viterra's facilities also compete with GrainCorp and Riordan's port terminals at Geelong and Portland, and Emerald's port terminal at Melbourne.⁴⁵

*Semaphore's Berth 29 and LINX's Osborne port terminals are situated at Port Adelaide and export grain that is grown in the same region as grain exported from Viterra's Port Adelaide terminals. Each of Semaphore's Berth 29 and LINX's Osborne terminals are exempt from the application of Parts 3 to 6 of the Code. In addition, GrainCorp and Riordan have exemptions for their Geelong port terminals, Emerald has an exemption for its Melbourne port terminal and Riordan and GrainCorp are applying for an exemption at Portland. These port terminals also export grain sourced from the same regions from which Viterra's Port Adelaide terminals source grain.*⁴⁶

Viterra submits that since 2015/16, LINX and Semaphore have added further capacity at Port Adelaide. In addition, Viterra also submits that:

*T-Ports' proposed new facility at Wallaroo will further increase excess capacity at Port Adelaide, as T-Ports intends to export more than 300,000 tonnes of grain that is typically sent to Wallaroo or Port Adelaide.*⁴⁷

Viterra submits that in normal or low production years there is significant excess capacity at Outer Harbor and Inner Harbour in both peak and non-peak times, based on historic throughput.⁴⁸ In relation to high production seasons Viterra submits:

⁴¹ Ibid, p. 30.

⁴² Ibid, p. 31.

⁴³ Ibid, p. 45.

⁴⁴ Ibid, p. 46.

⁴⁵ Ibid, p. 48.

⁴⁶ Ibid, p. 52.

⁴⁷ Ibid, p. 51.

⁴⁸ Ibid, p. 50.

For the unusually high production season 2016/17, there was still excess capacity in peak and non-peak periods. Although, there was no excess capacity in December 2016 and in January, March and May 2017, there was excess capacity in February and April 2017 (both within the peak period), and Viterra was also able to expand its operational capacity (e.g. by increasing operating hours) to meet the unusually high demand for this season. Viterra expects that its competitors at Port Adelaide are similarly able to expand logistical capacity.⁴⁹

Wallaroo

In relation to Wallaroo, Viterra submits the annual shipping capacity at Wallaroo significantly exceeded grain throughput at Wallaroo for the past three years. Viterra also submits that T-Ports' proposed new facility at Wallaroo will further increase excess capacity that is available to exporters.⁵⁰ Viterra also notes that:

The port terminals at Port Adelaide export grain grown in the same region as grain exported from Wallaroo. As set out [in relation to Adelaide Outer Harbor], Semaphore and LINX have each been granted an exemption for their port terminals at Port Adelaide.⁵¹

Port Giles

In relation to Port Giles, Viterra submits that the annual shipping capacity at Port Giles significantly exceeded annual throughput for each of the previous three years.⁵²

Viterra also notes that Port Giles competes for the same grain as Port Adelaide, which offers a competitive constraint. Viterra also submits that this means that Port Giles competes with the exempted port terminals of LINX and Semaphore.⁵³

Key questions and issues

General Questions:

12. *Is it appropriate to consider global competition and the services offered at port terminal facilities outside of Australia when considering the competition for terminal services in South Australia?*

Port-specific Questions (please answer with regard to each of the Ports, where possible):

13. *What characteristics or factors are relevant in comparing the services provided at each of the Ports and other PTSPs' port terminal facilities? How do these characteristics or factors affect the level of competition between the port terminal facilities?*

14. *To what extent do the services currently offered by PTSPs at other facilities (either in South Australia, interstate, or overseas), represent a viable competitive alternative to the services provided at each of the Ports, or vice versa?*

15. *To what extent will proposed future port terminal services represent a viable competitive alternative to the services provided at each of the Ports, or vice versa?*

16. *What effect on access and pricing do capacity constraints or excess capacity have at each of the Ports?*

⁴⁹ Ibid, pp. 50-51.

⁵⁰ Ibid, p. 59.

⁵¹ Ibid, p. 60.

⁵² Ibid, p. 61.

⁵³ Ibid, pp. 62-63.

17. If, in future years, capacity was to become more constrained at each or all of the Ports, what impact, if any, would this have on whether each of the Ports are a viable competitive alternative to other PTSPs' facilities?

18. In what ways would an exemption for Viterra at each of the Ports impact on the likelihood of efficient investment in port terminal facilities either by Viterra or by others?

2.5. Competition in upstream, downstream and related markets

The bulk grain export market interacts with various other industries in the broader supply chain. These include the domestic grain market, upcountry storage facilities, road and rail transportation services (freight), and the export container market. Grain exporters also acquire grain from growers, and sell to international buyers in a downstream export market. Subclauses 5(3)(b) and 5(3)(g) requires 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'.

The ACCC therefore considers that it is relevant to seek information on and assess the level of competition in the bulk export supply chain, as well as the container export and domestic markets, and the extent to which these affect the level of competition of port terminal services operated by Viterra in South Australia.

Storage and transport services

A bulk grain exporter's access to transport and/or storage services may have an impact on the exporter's ability to access port terminal services. Accordingly, the ACCC considers that the level of competition in the upcountry supply chain is relevant to the level of competition in the market for port terminal services. The ACCC's examination of competition in the upcountry supply chain for this exemption is limited to impacts on fair and transparent access to port terminal services.

General

Viterra submits that it does not have ownership interests in road or rail freight companies. Viterra considers that the supply of freight in South Australia is highly competitive due to road competing with rail over the short distances to port.⁵⁴ Viterra notes that South Australia generally has the shortest distance to port of any state in Australia, further improvements to relevant road infrastructure are expected, and that new port terminal entrants are readily able to take advantage of the competitive freight arrangements in South Australia.⁵⁵

Viterra submits that:

...whether South Australian grown grain is transported to South Australian port terminals or to other port terminals across Australia (or sold to domestic customers) depends on a number of market factors, including the price of grain that can be achieved in export markets (compared to when sold to domestic customers), the level of port terminal fees and freight costs (both within Australia and sea freight to export).⁵⁶

Viterra submits that the provision of grain storage and handling services in South Australia is not currently regulated, and is characterised by a large number of service providers,

⁵⁴ Ibid, p. 4.

⁵⁵ Ibid, pp. 33-34.

⁵⁶ Ibid, p. 3.

increasing competition and low barriers to entry. Viterra also notes that the Essential Services Commission of South Australia (in its December 2018 review) considered the provision of these services to be operating efficiently.⁵⁷ Viterra submits that it currently competes with 11 alternative providers of upcountry storage facilities (including T-Ports on the Eyre Peninsula).⁵⁸ Viterra also considers that there is enough on-farm storage to store approximately 9% to 14% of the South Australian harvest.⁵⁹

Viterra considers that its customers are able to organise their own storage and transport from upcountry facilities to port. Viterra submits that:

*Viterra is not vertically integrated with any road or rail provider of freight, and has no competitive advantage under any freight agreement. There are low barriers to entering the transport logistics market. Growers, exporters and traders can enter into an agreement with a rail or road transport provider and, as noted above, there are many providers of road transportation services in South Australia that can transport grain from upcountry to port. These providers are distributed across the state.*⁶⁰

Each of the Ports

In relation to Port Lincoln, Viterra submits that:

*The exemption of Port Lincoln will not have any impact on the supply of freight services in South Australia. Viterra does not have any ownership interests in road or rail freight companies, and the supply of freight in South Australia is highly competitive, with road competing with freight due to the short distances to port.*⁶¹

In addition, Viterra also notes that:

*Between 60 and 70% of grain is currently transported to port by road on the Eyre Peninsula...*⁶²

Viterra further submits that:

*...Upcountry grain storage and handling in South Australia will not be affected by Viterra being granted an exemption for Port Lincoln.*⁶³

In relation to Viterra's Thevenard, Port Adelaide Outer Harbor, Port Adelaide Inner Harbour, Wallaroo and Port Giles facilities, Viterra refers to the matters raised in relation to its Port Lincoln facility.

Domestic and container markets

The ACCC also considers that the domestic and container export markets compete with the bulk export market for grain, the extent to which will vary in high and low production years.

Container market

Containerised grain exports are not a direct substitute for bulk grain exports, but they may provide a viable alternative export path for some growing regions, for niche and high quality

⁵⁷ Ibid, p. 4.

⁵⁸ Ibid, p. 34.

⁵⁹ Ibid, p. 35.

⁶⁰ Ibid, p. 34.

⁶¹ Ibid, p. 33.

⁶² Ibid, p. 33.

⁶³ Ibid, p. 38.

products, or for particular destinations. The ACCC's *Bulk grain ports monitoring report 2017-18* noted that for South Australia in the 2017-18 shipping year, container exports made up 6 per cent of exports while bulk exports made up 94 per cent of exports.⁶⁴ Similarly, for the 2016-17 shipping year in South Australia, container exports contributed 4 per cent to exports with bulk exports making up 96 per cent of total exports.⁶⁵

General Comment

Viterra submits that containers are becoming more common in South Australia and are a low cost entry alternative to bulk exports.⁶⁶ Viterra submits that:

*...container grain exports compete with bulk grain exports and are part of the same market. In addition, the supply of grain to domestic customers is a competitive constraint on bulk grain port terminal service providers. Viterra also considers that a related market is the global market for grain trading, as bulk wheat port terminal services are provided within this context.*⁶⁷

Viterra estimates that:

*...approximately 700,000 tonnes of grain are currently exported from South Australia in shipping containers – either bulk loaded or bagged (sometimes palletised) and packed into the container. In addition, grain grown in South Australia can be packed into containers for export from other states.*⁶⁸

Wallaroo

Viterra submits that containers from Port Adelaide are strong competitors to Wallaroo.⁶⁹

Domestic market

Viterra submits that where grain grown in South Australia is sold depends on a number of factors, including, the price that can be achieved in export markets (compared with domestically), the level of port terminal fees and freight costs.⁷⁰ Viterra also submits that they will lose throughput to the domestic market when the market conditions make it more profitable to sell grain domestically.⁷¹

*Recent grain movements since 2017/18 exemplify the power of this variable – large volumes of grain have been transported from South Australia (the Eyre Peninsula and the Yorke Peninsula) and Western Australia to the east coast of Australia, rather than for export, because traders were receiving higher prices on the East Coast for their grain.*⁷²

In addition, Viterra also submits that:

In regard to grain stored by Viterra, [c-i-c] grain has been transported to NSW by road and train in 2018/19 to date. In addition, since 2017/18, more than [c-i-c] tonnes has been shipped from Viterra's port terminals to QLD and NSW. This underestimates the total amount of grain moved interstate to the east coast, as it only represents grain

⁶⁴ ACCC, *Bulk grain ports monitoring report 2017-18*, December 2018.

⁶⁵ Ibid.

⁶⁶ Viterra Exemption Application, p. 19.

⁶⁷ Ibid, p. 48.

⁶⁸ Ibid, p. 49.

⁶⁹ Ibid, p. 58.

⁷⁰ Ibid, p. 3.

⁷¹ Ibid, p. 13.

⁷² Ibid, p. 14.

moved from Viterra's sites. It is likely that significant quantities have also been transported from competitors' sites (such as Cargill's sites) and directly from on-farm storage.⁷³

Grain acquisition market

The impact of an exemption on upstream grain acquisition markets will likely be strongly dependent on the effect on competition between exporters, as discussed in Section 2.2 above. To the extent that other exporters are unable to compete on equal terms with Glencore as a result of an exemption, their ability to compete for growers' grain may be limited.

International markets

In relation to international markets, Viterra submits that:

...the grain acquisition and trading market is global. ESCOSA has stated that "the global bulk grain export market is highly competitive, and South Australia's share is less than three percent (by volume)." As recognised by ESCOSA, South Australia faces vigorous competition from other Australian states, Canada, the United States of America, France, Germany, Russia, Ukraine and Argentina in the supply of grain.

The grain (and wheat) that is exported through Viterra's port terminals represents an even smaller proportion of the grain (and wheat) traded globally (1.8% for grain; 3% for wheat). In addition, grain from South Australia can be moved (and is moved) to domestic sales, depending on market conditions.

An exemption for any of Viterra's port terminals will not, therefore, have any material impact on the global grain acquisition and trading market.⁷⁴

Key questions and issues

General Questions:

- 19.** *What level of competition is there between upcountry storage and handling facilities servicing South Australian grain terminals?*
- 20.** *What transport services do producers and exporters use to transport grain to South Australian terminals for export? How much grain is transported to South Australian terminals by rail (if any) and how much by road? What level of competition is there in the provision of these transport services?*
- 21.** *How does the level of competition in upcountry storage and transportation currently impact on an exporter's ability to secure fair and transparent access to port terminal services in South Australia?*
- 22.** *To what extent can containers and bulk grain exports be considered to be in the same market?*
- 23.** *How should the interstate transfers occurring during the current drought be considered in relation to the South Australian market?*
- 24.** *To what extent would decisions on exemptions in the South Australian market affect*

⁷³ Ibid, p. 14.

⁷⁴ Ibid, p. 33.

the international market for grain?

Port-specific Questions (please answer with regard to each of the Ports, where possible):

- 25.** *With regard to fair and transparent access to port terminal services, how would an exemption at each of the Ports impact on competition in the upcountry storage and transportation markets, and the upcountry supply chain as a whole?*
- 26.** *What effect would an exemption have on the grain acquisition market relevant to the respective Ports?*
- 27.** *To what extent does domestic demand provide a competitive constraint on bulk grain exports from each of the Ports?*
- 28.** *To what extent do containerised exports provide a competitive constraint on bulk grain exports from each of the Ports?*

Appendix A: Exemption assessments under the Code

The Code, prescribed by regulation under section 51AE of the *Competition and Consumer Act 2010* (CCA), commenced on 30 September 2014. The Code replaced the previous regulatory framework provided for by the *Wheat Export Marketing Act 2008* (WEMA), which required vertically integrated providers of port terminal services to provide the ACCC with access undertakings.

The purpose of the Code is defined at clause 2 as:

The purpose of this code is to regulate the conduct of port terminal service providers to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

Port terminal service providers must comply with the Code

The Code applies to PTSPs. A PTSP is defined as:

the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service.

where:

port terminal service means a service (within the meaning of Part IIIA of the CCA) provided by means of a port terminal facility, and includes the use of a port terminal facility.

and:

port terminal facility means a ship loader that is:

- (a) at a port; and
- (b) capable of handling bulk wheat;

and includes any of the following facilities, situated at the port and associated with the ship loader, that are capable of handling bulk wheat:

- (c) an intake/receival facility;
- (d) a grain storage facility;
- (e) a weighing facility;
- (f) a shipping belt.

Obligations on port terminal service providers

Non-exempt PTSPs are required to comply with all six Parts of the Code. PTSPs that are determined by the ACCC or the Minister of Agriculture to be exempt service providers are not required to comply with Parts 3 to 6 of the Code.

Part 1 of the Code contains general provisions about the Code.

Part 2 of the Code requires all PTSPs to deal with exporters in good faith, publish a port loading statement and policies and procedures for managing demand for their services, and make current standard terms and reference prices for each port terminal facility publically available on their website.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of itself or its trading business or hinder third party exporters' access to port terminal services,
- to enter into an access agreement or negotiate the terms of an access agreement with an exporter to provide services if an exporter has applied to enter into an access agreement and certain criteria are satisfied, and
- to deal with disputes during negotiation via specified dispute resolution processes including mediation and arbitration.

Part 4 of the Code requires a PTSP to have, publish and comply with a port loading protocol which includes an ACCC approved capacity allocation system.

Part 5 of the Code requires a PTSP to regularly publish its expected capacity, stock information and key performance indicators.

Part 6 requires retaining records such as access agreements and variations to those agreements.

How a port terminal service provider can be determined to be an exempt service provider

Exempt service provider determination by the ACCC

Subclause 5(2) of the Code provides that the ACCC may determine a PTSP to be an exempt service provider of port terminal services provided by means of a specified port terminal facility. Subclause 5(3) of the Codes provides that the ACCC must have regard to a list of matters in making a determination under subclause 5(2) of the Code. The ACCC can subsequently revoke an exemption determination under subclause 5(6) of the Code.

Exempt service provider determination by the Minister for Agriculture

Subclause 5(1) of the Code provides that the Minister for Agriculture may determine that a PTSP is an exempt service provider if the Minister is satisfied that the provider is a cooperative that has:

- (a) grain-producer members who represent at least a two-thirds majority of grain-producers within the grain catchment area for the port concerned; and
- (b) sound governance arrangements that ensure the business functions efficiently and that allow its members to influence the management decisions of the cooperative.

The ACCC does not have any role in exemptions under subclause 5(1).

How the ACCC will conduct its assessment process

On 16 November 2014 the ACCC released its *Guidelines on the ACCC's process for making and revoking exemption determinations* (the Guidelines).⁷⁵

The Guidelines state that, when a port terminal service provider submits an exemption application, the ACCC will seek to conduct its exemption assessment and decide whether to make an exemption determination within 12 weeks.

⁷⁵ The guidelines are available on the ACCC's website at <http://acc.gov.au/publications/process-guidelines-for-making-revoking-exemption-determinations>.

This timeframe may vary where the ACCC conducts a public consultation process, and/or requests information from the port terminal service provider. Generally, the length of any consultation period(s) will extend the ACCC's timeframe for the exemption assessment.

Each exemption assessment process may be different and may include requests for information, consultation with interested parties, and draft determinations before the ACCC makes its final determinations. The Guidelines, which are available on the ACCC website, provide further detail around the ACCC's process for making and revoking exemption determinations.

Indicative timeline for assessment

Submissions to this Issues Paper close on at **5:00pm AEST on 6 September 2019**.

The ACCC anticipates that it will release draft determinations in respect to this application in October 2019, before releasing final determinations.

The ACCC notes that the timeframe for assessing the exemption application will depend on the nature and timeliness of information provided by interested parties.