GRAIN PRODUCERS SA
The voice of South Australian growers

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Mr Matthew Schroder
General Manager
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Australian Competition and Consumer Commission
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Dear Mr Schroder

Submission on regulation at Viterra's bulk grain facilities

Grain Producers SA (GPSA) is the peak industry body for South Australian grain growers. GPSA is non-political and represents producers to government, the community and industry, including grain marketers, exporters, storage and handlers, researchers and farm input suppliers.

We develop and implement policies and projects that promote the economic and environmental sustainability of South Australian grain growing businesses.

We welcome the opportunity to provide this written submission to the Australian Competition and Consumer Commission on Viterra's application for exemption from parts 3 to 6 of the *Port Terminal Access (Bulk Wheat) Code of Conduct*.

GPSA looks forward to providing further commentary following the release of the draft determination by the ACCC in October.

Yours sincerely

Caroline Rhodes
Chief Executive Officer

1. Background

This submission is in response to the Australian Competition and Consumer Commission's ('ACCC') Issues Paper which was released following an application by Viterra Operations Pty Ltd ('Viterra') which requested that Viterra be determined an exempt service provider of port terminal services provided at all of its port terminal facilities in South Australia (ACCC, 2019).

GPSA supports maintaining appropriate regulatory settings to promote a competitive and cost-effective export supply chain in South Australia, noting that 85% of the state's grain harvest is exported to 55 countries around the world. [1] A profitable and sustainable grain production sector relies upon competition between buyers of Australian grain operating in the export supply chain.

Viterra is a port terminal service provider ('PTSP') which exercises significant market power through its up-country receival, storage, and transport infrastructure, its port terminal facilities, and through its integrated trading with parent company Glencore.

The Port Terminal Access (Bulk Wheat) Code of Conduct ('the Code') is a mandatory industry code of conduct prescribed under s51AE of the *Competition and Consumer Act 2010* (Cth). The Code's existence is predicated on two essential features:

1. The export-orientation of Australia's wheat industry, and
2. The natural monopoly characteristics of bulk export terminals.

The Code is designed to regulate the behaviour of bulk wheat PTSP's to ensure that exporters of bulk wheat have cost-effective and competitive access to port terminals. This in turn ensures that a nationally significant commodity can be exported to key markets. In addition, the Code is designed to reduce unnecessary regulatory burden on PTSPs.

PTSPs that are exempt from the Code are only required to comply with Parts 1 and 2. All other providers must comply with Parts 1 through to 6.[2]

Viterra submits that the Code "indirectly regulates" the export of other commodities due to the inefficiencies associated with having multiple port loading protocols for a port terminal.[3]

Bulk wheat terminals in South Australia

Viterra maintains the following bulk wheat port terminal facilities in South Australia:

- Thevenard,
- Port Lincoln,
- Wallaroo,
- Port Giles,
- Inner Harbour, and

[1] PIRSA Primary Industries Scorecard 2017-18
[2] *Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014* (Cth).
[3] Viterra, Submission, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 2 July 2019, p 11.

- Outer Harbor.

Through these sites, Viterra controls over 90% of South Australia's grain port export capacity as well as the majority of the grain receival, storage and transport capacity in South Australia.[4]

As noted by Viterra, competition in the South Australian supply chain is now beginning to emerge.

Two other bulk wheat port terminal facilities are currently operating in South Australia in competition with Viterra:

- LINX Cargo Care Group ('LINX'): LINX operates a temporary mobile loader from Berth 29 at Port Adelaide's Inner Harbour. In 2017-2018 LINX loaded approximately 240,000 tonnes of grain commodities.[5]
- Semaphore: Semaphore operates a bulk grain loader at Osborne Berth 1 at Port Adelaide Inner Harbour. In 2017-18 Semaphore loaded approximately 260,000 tonnes of grain commodities.[6]

Both LINX and Semaphore are limited by their physical geography and are incapable of fully loading 'Panamax' sized vessels, effectively operating on an opportunistic basis in response to high production years and as 'mobile port loading facilities' with little or no port storage capacity.[7] The limited extent of competition arising from these alternate bulk grain terminals is shown in Table 1 (9% of South Australia's throughput for in 2017-18).

Table 1: Port terminal facility share of state throughput (Source: 2017-18 ACCC Bulk Grains Monitoring Report)

Port	Percentage share of throughput 2017-18
Port Adelaide LINX	4%
Port Adelaide Semaphore	5%
Port Adelaide Viterra (Inner Harbour & Outer Harbour)	40%
Port Giles	13%
Port Lincoln	27%
Thevenard	2%
Wallaroo	10%
Viterra Total	91%
Competitor Total	9%

In order to remain globally competitive, South Australian growers need access to the most efficient and cost-effective grain export pathway. GPSA believes that reducing supply chain costs through competition – rather than regulation – is the best way to improve grower returns. This is particularly important on the Eyre

[4] AEGIC, Australia's grain supply chains: Costs, risks and opportunities, October 2019 p 32. Available at <https://www.aegic.org.au/wp-content/uploads/2019/01/FULL-REPORT-Australias-grain-supply-chains-DIGITAL__.pdf>.

[5] Above n3, p 3.

[6] Ibid.

[7] Above n4.

Peninsula, where Viterra is the sole port terminal operator servicing the region and growers have limited access to the domestic market.

This explains the commercial opportunity for new entrants. GPSA notes that a bulk wheat port terminal is currently being constructed by T-Ports near Lucky Bay on the Eyre Peninsula. T-Ports anticipates shipping 600,000 tonnes through this facility on the upper-east of the Eyre Peninsula.[8] However until such time as this facility becomes operational, Viterra will maintain a monopoly in the region, which may be a relevant consideration as to the timing of any future exemption granted by the ACCC coming into force.

GPSA does not support the assertion that the limited volume of grain exported in containers from South Australia presents a strong competitive constraint to bulk grain terminal services providers. The difficulty in sourcing food grade 20-foot containers for grain exports is one such practical limitation. GPSA notes that:

> *"Containers make up a small proportion of grain exports from South Australia, when compared with interstate. The Department of Primary Industries and Regions, South Australia (PIRSA) estimates 300,000 tonnes of grain is exported in shipping containers, compared with around 5.5 million tonnes exported annually as bulk dry cargoes."*[9]

It therefore follows that GPSA is concerned about the potential barriers to competition in bulk grain exports from South Australia and the application of regulatory settings needed to support new entrants.

2. The Viterra application

GPSA welcomes Viterra's application under Clause 5(2) of the Code for exemption of each of its port terminals in South Australia. It is appropriate for the ACCC to consider the changing nature of the industry since the Code came into force on 30 September 2014, including the development of alternative port terminal facilities and grain storage facilities, and the competitive environment in place today.

On Thursday 5 September 2019, GPSA met with representatives of the ACCC to discuss GPSA's views with respect to Viterra's application for exemption from the Code. On Friday 13 September GPSA met with representatives of Viterra to attempt to better understand and test the arguments for exemption from the Code.

Viterra have set out a range of factors in their application. GPSA accepts that Viterra has a legitimate business interest in seeking an exemption from Parts 3 to 6 of the Code with respect to all of the port terminals it operates. Exemption from these parts of the code would provide a nationally uniform application of regulation, enabling Viterra to operate its facilities at its sole discretion. Viterra's shareholders (through Glencore) have a rightful expectation that the company will make a profit and continue to deliver adequate returns from its capital investment in the South Australian supply chain.

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[8] T-Ports, Submission, Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014, 28 March 2019, p 4.

[9] Department of Primary Industries and Regions, South Australia (PIRSA), Submission to the Inquiry into the South Australian Bulk Grain Export Supply Chain Costs, May 2017, p. 6.

GPSA understands from the discussions and from Viterra's application that the following are critical factors:

- Reducing Viterra's costs by realising reductions in applicable regulation,[10]
- Enacting a nationally consistent regulatory regime,
- Providing flexibility to bulk exporters,[11]
- Providing flexibility to Viterra in reacting to a change in the export pathway (from overseas exports to interstate exports as in 2018-19).[12]

GPSA accepts that these factors have a significant impact on Viterra's operations and competitiveness.

GPSA's submission reflects our two primary concerns, namely that:

1. in the absence of the full application of the Code which ensures fair and transparent access to its terminal facilities there is limited assurance for grain producers about the future conduct of Viterra or likely impact on bulk wheat exporters in lowering the regulatory oversight by the ACCC.
2. the Code is not an appropriate regulatory instrument for governing the grain export market and a fresh, nationally consistent, whole-of-chain approach to regulation is required.

3. The public interest in competition

An assessment of the public interest is critical to the determination of this application. GPSA submits that the public interest must be assessed with reference to grain producers based on two significant factors:

1. Viterra's dominant position in South Australia's export grain supply chain and its ability to trade into end-user markets, and
2. South Australia's dependence on the export grain supply chain.

These factors mean that any decision made by Viterra with respect to bulk wheat exports has the potential to have a whole-of-state economic impact, giving Viterra significant influence over the profitability and economic sustainability of South Australian grain producers.

In January 2019, the Essential Services Commission of South Australia (ESCOSA) published its final report of an inquiry into the South Australian bulk grain supply chain costs. This request was made by the South Australian Treasurer in March 2017, pursuant to Part 7 of the *Essential Services Commission Act 2002* (SA).

The Inquiry focussed largely on the performance and behaviour of Viterra, given its position of strength within the grain export supply chain. ESCOSA generally found that Viterra was not charging excessive fees, despite potentially having the market power to do so. It also found that Viterra provides a range of services which generally meet the needs of its customers, observing that the grain export supply chain was not

[10] Viterra, Submission, Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014, 2 July 2019, p 2.
[11] Ibid.
[12] Ibid, p 14.

demonstrably inefficient in terms of its costs, from both an overall and individual supply chain segment perspective.

4. Grower perspectives

GPSA has a representative role in advocating for policies that promote the economic and environmental sustainability of the grains industry. In this instance, GPSA is predominantly concerned with ensuring that South Australian grain producers have continued access to overseas markets using the established supply chain, which predominantly includes ports currently under assessment for exemption.

Grain may flow off-farm to export destinations from an up-country Viterra site, through Viterra's system to an export market. Alternatively, grain may be marketed through an alternative bulk handler such as GrainFlow and exported through Viterra port facilities under terms prescribed in the Port Loading Protocols for third party deliveries.

GPSA has previously reflected concern about the impact of the 'Receival at Port Service Fee', charged by Viterra for grain from third party storage facilities delivered to port terminals. In the absence of ACCC regulatory oversight, GPSA notes the potential for this to be used as a mechanism to encourage, use of Viterra's up-country storage facilities, rather than third party facilities and from on-farm storage.

GPSA's interests lie in ensuring that producers receive competitive prices for their grain, which is derived in part from grain marketers' ability to export to world markets in an efficient manner. Despite carrying significant economic risk of the performance of the export supply chain, growers have little oversight and awareness of the commercial dealings between Viterra and its customers. GPSA instead relies on the ACCC's annual Bulk Grain Ports Monitoring Reports and its ongoing engagement with the industry directly to assess performance. GPSA notes that the ACCC monitors compliance with and enforces breaches of the Code, and provides regulatory oversight under the provisions of the Code applicable to Viterra's business.

The Code seeks to regulate the behaviour of Viterra as an integrated PTSP when dealing with customers seeking access to its port terminal services by third-party exporters. The scope of this regulatory framework affords access rights to these customers, not growers.

As a consequence, GPSA is unable to offer specific comments on Viterra's corporate behaviour in its dealings under the current regulatory framework or offer any prediction about how this may change in the absence of ACCC oversight following exemption under the Code.

The nature of the bulk wheat export industry means that the cost of any access difficulties as well as the direct costs of access will be borne by growers as reflected in the price received for their grain.

Viterra seeks to be relieved from certain obligations under the Code to 'not discriminate or hinder access in the provision of port terminal services' at each port terminal where exemption is granted by ACCC. The provision of third-party access will instead rely upon the outcome of commercial negotiation between parties.

GPSA notes that the ACCC Chairman's observation in relation to similar exemption applications under the Code, that "…should the declaration be revoked, the Port of Newcastle will be an unregulated monopolist that is able to determine the terms and conditions of its access with little constraint".[13]

In order to assess the effectiveness of Viterra's proposal in improving grower returns, GPSA has sought to understand how Viterra intends to manage access by third parties in the absence of regulatory oversight, and how operational efficiencies will benefit growers. GPSA's primary concern relates to the likely impact on competition in the bulk wheat export market.

Viterra's past behaviour with respect to sharing efficiencies through fees does not provide confidence that any efficiencies (though none have yet been demonstrated) from exemption will be passed on through more competitive pricing, and by extension for the benefit of growers.

GPSA notes that ESCOSA found, inter alia, that Viterra's returns are at the "*…upper end of what might be expected for a firm with Viterra's level of risk. The Commission's analysis of returns is consistent with its fee analysis, which showed that Viterra, to date, has not chosen to share efficiencies with industry through lower fees."*[14]

It is unclear how the terms of the existing Port Loading Protocols will be amended to operate at those port terminals granted exemption; particularly where existing bookings have been made by the third-party exporters in accordance with long term agreements under an ACCC approved capacity allocation system. This should be clearly identified in the ACCC draft determination paper, including any commitment by Viterra to grandfather existing terms for these bookings.

With these observations in mind, GPSA can take no formal stance on Viterra's application for exemption until we have a firmer understanding of what such an exemption means for growers and for the state's grain industry as a whole. The ability for Viterra, as a PTSP granted exemption to exercise self-preferential behaviour is a significant concern. GPSA does not wish to replace an inflexible regulatory environment with an inflexible unregulated monopoly, without further development of port access policy settings.

5. Interstate experiences

The Code has two tiers of regulation whereby port operators may be exempted from some of the Code requirements, giving rise to regulatory asymmetry. The nature of the Code and application of the Port Loading Protocols mean that the Code in effect also applies to other commodities loaded through the same facility.[15]

South Australia is the only state where the full Code applies to the major bulk wheat port loading facilities.

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[13] https://www.accc.gov.au/media-release/accc-concerned-by-ncc's-draft-recommendation-on-port-of-newcastle

[14] Essential Services Commission of South Australia, Inquiry into the South Australian bulk grain export supply chain costs, December 2018, p 4. Available at <https://www.escosa.sa.gov.au/ArticleDocuments/1076/20190129-Inquiry-BulkGrainExportSupplyChainCosts-FinalReport.pdf.aspx?Embed=Y>.

[15] Above n3, p 11.

Viterra's application for exemption cites a nationally consistent regulatory approach as a critical aspect of its proposal. It remains the only PTSP where the full application of the Code applies to its entire network of port terminals.

GPSA notes that Australia's eastern states have seen the introduction of competing port facilities, and the ACCC has assessed applications for exemption on that basis.

While the full application of the Code is unique to Viterra's operations in South Australia, a monopoly PTSP environment is not.

Under subclause 5(1) of the Code, Western Australia's monopoly PTSP, Co-operative Bulk Handling Limited's (CBH), has been provided exemption at each of its port terminal facilities on the basis of its legal and ownership structure.

GPSA contends that in the absence of a nationally consistent regulatory scheme, South Australian growers are unfairly disadvantaged through incurring (any and all) costs as a result of regulation under the Code. Further indirect costs may also accrue bulk wheat exporters seeking access on more preferential commercial terms at exempted ports interstate, making South Australia less competitive.

6. Future policy reform

It is GPSA's contention that, were the ACCC to consider the regulation of bulk grain exports afresh, it would be apparent that a regulatory instrument that only applies to port loading facilities would be inadequate in establishing competition policy settings in a rapidly changing operating environment for grain producers since wheat export deregulation in 2008. Many of these issues are canvassed in the Viterra exemption application, including the impact of drought, grain imports and the development of new shallow water port terminal loading facilities providing additional capacity.

As discussed above, the uneven application of the Code is a significant source of contention for PTSPs and bulk handlers. However, GPSA does not believe that regulatory asymmetry justifies that Viterra be exempted on that basis alone. The ACCC must consider the merits of the arguments put forward for each port terminal consistent with the purpose of the Code.

It is perverse that under the terms of a competition regulatory instrument that CBH is exempted solely based on its' ownership model as a cooperative, while Viterra continue to face full regulatory intervention under a competition policy instrument. GPSA acknowledges that the ACCC does not have any role in exemptions under subclause 5(1).

The ACCC has previously stated that it supports extending some of the regulations of the Code to upcountry receival sites in a 2018 submission to the Department of Agriculture & Water Resources.[16] GPSA notes the Minister for Agriculture is yet to respond to the Department's review of the Code completed in October

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[16] Australian Competition and Consumer Commission, Bulk Grain Ports Monitoring Report 2017-18, December 2018, p 13. Available at: <https://www.accc.gov.au/system/files/1466_Bulk%20grain%20ports_FA.pdf>.

2018, which may provide further consideration of these outstanding policy matters relating to the operation of the Code.

The lack of consumer protection or consideration under the current regulatory regime for growers is of significant concern. GPSA is aware of a range of issues more appropriately categorised as consumer protection issues across the grain industry, rather than Part 3A National Access issues arising from monopoly infrastructure providers.

GPSA considers overall nation-wide regulatory reform to be a higher priority issue than a singular assessment of one PTSP's facilities. We call upon the ACCC to address this policy matter as a priority, through consideration of a market study by the Agriculture Commissioner and dedicated Agriculture Unit.

ENDS.