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Via electronic submission – transport@accg.gov.au; michael.eady@accg.gov.au

Dear Sir / Madam

RE: Viterra Operations exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct (supplementary issues paper)

On behalf of the South Australian Freight Council's (SAFC) Executive Committee and Membership I thank you for the opportunity to provide a supplementary submission on Viterra's application for exempt provider status in relation to six ports under the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code).

As you may be aware, SAFC is the State's peak, multi-modal freight and logistics industry group that advises all levels of government on industry related issues. SAFC represents road, rail, sea and air freight modes and operations, freight services users and assists the industry on issues relating to freight logistics across all modes.

Upon review of SAFC's first submission in light of subsequent developments and the information provided in the Supplementary Issues Paper, we believe that the points previously made still apply.

Effect of the Code

SAFC continues to be fundamentally concerned about the uneven application of the Code around Australia. We understand that six of the nine ports that are required to comply with the full Code are South Australian, which is distinctly disproportionate given the size of our state and provides a competitive disadvantage to grain port operations in SA. While the Code is intended to ensure there is no localised anti-competitive behaviour in port operations; it is perversely affecting SA's national and international competitive position by regulating SA grain ports in disproportionate numbers, increasing compliance costs and lowering flexibility.

SAFC contends that this is directly relevant to the question of exemption in this case. It appears that the Code is attempting to prevent localised anti-competitive behaviour in SA, at the cost of unfairly altering the competitive balance nationally.

Developments in the PTSP Market/Competition

We note that the ACCC has indicated that competition is important in determining whether exemptions will be granted:

'The ACCC considers that, in determining whether to exempt a PTSP, an important consideration is whether a PTSP is incentivised by competitive pressures to provide exporters with fair and transparent access.⁴⁶ One of these potential competitive pressures is from other PTSPs, including exempt PTSPs within the relevant catchment area. To the extent that competing facilities 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.' (pp19-20)

Indeed, the addition of several competitors with significant additional capacity into the system (T-Ports, ADM, Cargill) plus the rapid and advanced progression of plans for further entrants (i.e. Peninsula Ports/Port Spencer) strongly indicates that competition in this sector is growing and there are few barriers to entry, reducing the need for such strong controls in this market.

Port Lincoln

In our first submission, SAFC noted that we viewed the T-Ports (Lucky Bay) and Viterra-Pt Lincoln exemptions as linked; and that an exemption for one should result in the exemption of the other to promote equitable competition. We note that the ACCC formally provided an exemption to T-Ports on 1 April 2020.

We also note that since our first submission, there has been significant progress in the Peninsula Ports (Pt Spencer) proposal, including further capital raisings and early site works. This site sits between Lucky Bay and Port Lincoln, competing with both for grain, and is working towards a 2021 harvest opening target. SAFC considers it a virtual certainty that Peninsula Ports will apply for an exemption from the Port Wheat Code; and judging by the success of similar new entrant T-Ports it seems likely that they will receive one. This places Port Lincoln in the position of competing with 2 new exempt grain ports; while having a very significantly reduced catchment area.

Therefore, irrespective of the ACCC's position on other terminals, SAFC believes it is critical that Pt Lincoln is provided an exemption so as to compete on even regulatory terms with T-Ports and (likely) Peninsula Ports.

Domestic Demand

SAFC agrees with the ACCC analysis that *'it is unclear that the domestic grain flows that occurred in the recent shipping season can be viewed as reflecting a longer term trend'*. While climate change suggests that droughts may become a more frequent occurrence, it is not possible to identify what the exact effects on domestic demand may be in any given year. In this season the eastern states were strongly affected and SA was not – in other droughts SA may be affected more than the eastern states; or both may be affected equally. Either of these scenarios would result in different domestic grain movements.

Port loading Protocols/Capacity Allocation Systems

SAFC does not consider Viterra's ability to apply to the ACCC to alter its capacity allocation system to be inherently indicative of 'flexibility'. With respect to the Commission, while it is known for comprehensive examination of competition issues, it is not known for swift responses/decisions. This process has taken almost a year to reach this point; and page 25 of the supplementary paper indicates that the last attempt to modify the capacity allocation system resulted in very significant delays.

Again, SAFC casts no aspersions on the Commission; rather notes that speed of response is not its primary aim. Thus, Viterra is not able to use modification of capacity allocation systems as a reliable method of supplying short term flexibility to clients, or responding to unforeseen circumstances.

Scope of the Code

In our considered view, the Code is not an example of good regulation.

It overreaches and has many unintended effects – it is not a 'wheat' code in reality. Although the Code was intended to regulate wheat only, it increases the regulatory burden and creates inefficiencies for all commodities that move through Code regulated ports, including gypsum, salt, mineral sands and all types of grain and legumes. By way of clear evidence, GRA's previous submission highlights the lack of flexibility in shipping and maintenance caused by the Code. According to GRA's submission, the Code causes the "majority users" (non-grain users of the port) "significant inefficiency and cost" at Thevenard.

The Code sets strict rules around the allocation of shipping capacity at ports and how that shipping capacity is managed. It cannot impact wheat in isolation. When shipping capacity is booked by exporters, Viterra does not know what commodity is going to be shipped using that capacity and so must treat all applications and vessels the same.

It is applied unevenly, and in particular to the detriment of one state. Six of the nine regulated ports are South Australian, a state that represents 6.8% of the Australian population and approximately 20 – 25% of the national winter agricultural crop production in an average year¹.

Furthermore, exemption from large parts of the code are allowed to some port operators but not to others – even when these ports are in direct competition.

It is inflexible and heavy handed. To simply modify capacity allocation systems under the code takes more than a year. This inflexibility (in the absence of wrongdoing) appears to be an unreasonable restraint.

All three of these points suggest that a regulatory review is warranted. We note that GPSA also has submitted that the Code is not appropriate for regulating the wheat market. Providing an exemption to Viterra for its 6 ports would leave only three ports in Australia regulated under the part 3 – 6 provisions – which again brings into question the value of these parts and suggests a review is in order.

We note that in South Australia the *Maritime Services (Access) Act 2000* would continue to apply, providing a non-commodity specific access regime on commercial terms.

¹ Australian Crop report December 2019, table 1,
https://www.agriculture.gov.au/sites/default/files/documents/austcroprrt20191203_v1.0.0.pdf

Again, I thank you for the opportunity to provide a submission on this important topic. Should you wish to discuss any element of this submission further, please feel free to contact me on (08) 8447 0664 or via email knapp.evan@safreightcouncil.com.au.

Yours Sincerely,

A handwritten signature in blue ink, appearing to read 'E. Knapp', with a stylized flourish at the end.

Evan Knapp
Executive Officer, SA Freight Council.