



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

Supplementary issues paper

Date 25 May 2020

Summary

The Australian Competition and Consumer Commission (ACCC) is seeking further views to assist in its assessment of whether Viterra Operations Pty Ltd (Viterra) should be an exempt service provider of port terminal services provided by means of its port terminal facilities at one or more of the following ports:

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

The ACCC considers it appropriate to release a supplementary issues paper in order to provide stakeholders with a further opportunity to comment on the exemption applications given various developments since stakeholders responded to the initial issues paper, including:

- the submission of additional materials by Viterra, including:
 - a consultant report by Charles Rivers Associates (CRA) which sets out economic modelling which considers whether Viterra has any incentive to deny port terminal access to third party exporters;
 - a supplementary report by CRA which provides further information to support its initial report;
 - two supplementary submissions which include Viterra's response to stakeholder submissions and the indirect costs of regulation; and
 - responses to ACCC information requests;
- a revised exemption application by Viterra, containing corrected capacity figures at all Viterra facilities;
- a number of port terminal developments with:
 - ADM Australia Pty Ltd (ADM) now facilitating coastal shipments from Port Pirie;
 - Cargill Australia Ltd (Cargill) entering the port terminal service provider (PTSP) market at Port Adelaide;
 - LINX Cargo Care Group (LINX) exiting the PTSP market at Port Adelaide; and
 - T-Ports Pty Ltd (T-Ports) beginning operations at Lucky Bay;
- the completion of an additional production season and publication of the ACCC's Bulk grain ports monitoring report 2018-19.

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 by means of specified port terminal facilities.¹ This means (among other things) that exempt service providers:

¹ *Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014*, subclause 4(8).

- (i) are not required to have a port loading protocol (with an ACCC-approved capacity allocation system);
- (ii) are not subject to clause 10 of the Code which prohibits a PTSP from discriminating in favour of its own (or a related) export business, and also prohibits a PTSP from engaging in conduct to prevent or hinder an exporter's access to port terminal services.

The Code states that in making a determination that a 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 along with submissions provided in response to both issues papers, prior to making its draft determination.

The Code applies to PTSPs in their dealing with entities seeking access to, or using, port terminal services for the purpose of exporting bulk wheat. To the extent this supplementary issues paper refers to 'grain' it includes bulk wheat, and the information sought is intended to assist in the ACCC's assessment of the matters referred to in subclause 5(3). The ACCC will consider the application for each of Viterra's port terminal facilities separately – exemptions may therefore be provided for none, all, or some of the port terminal facilities.

The ACCC notes that there has been considerable interest in this exemption application and acknowledges that, given the amount of new information, not all stakeholders may have capacity to respond to all the issues raised in this paper – particularly given the disruption caused by COVID-19.

The ACCC also notes that not all issues raised in this paper will necessarily be relevant to all stakeholders. The ACCC therefore welcomes any comments from stakeholders as they see fit, whether that be in response to some or all of the questions in this paper.

The ACCC invites comments in response to the supplementary issues paper by **5:00pm AEST on 19 June 2020**.

The standard process for providing a submission is set out in section 1.4. However, given the current circumstances, stakeholders who are interested in making a submission but unable to meet the deadline should contact the ACCC directly (as set out in section 1.4.4) to discuss options around extensions or an abridged submission to ensure the timeliness of the submissions process.

Appendices

- Further information on the ACCC's exemption role is available at **Appendix A**.
- Selected extracts from stakeholder submissions to the ACCC's initial issues paper are set out in **Appendix B**.²
- A brief summary and link to each of the additional documents submitted by Viterra since the ACCC's initial issues paper is available at **Appendix C**.

² This approach has been taken in order to minimise content in the Matters for Comment section of the paper where possible, and aid readability.

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1. Introduction

The Code commenced on 30 September 2014 and regulates the conduct of port terminal service providers (PTSPs). 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 to 6 of the Code in relation to port terminal services provided by means of a specified port terminal facility. Exempt service providers face a lower level of regulation, as they are only subject to Parts 1 and 2 of the Code. The obligations under each of the different Parts of the Code are discussed further in section 1.2.

This section sets out what the ACCC's assessment process will involve, what an exemption means, 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

In deciding whether to determine a PTSP to be an exempt service provider, the ACCC is required to consider the matters listed at subclause 5(3) of the Code:

- (a) the legitimate business interests of the PTSP;
- (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 PTSP 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.

1.2. What a determination of a PTSP 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; and
- **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 websites.

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 at port information and key performance indicators.

Part 6 requires PTSPs to retain certain 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 to date and recent industry developments

The ACCC considers that it is appropriate to seek the views of interested parties to inform the ACCC's consideration of the matters listed at subclause 5(3) of the Code. This approach is consistent with the ACCC exemption guidelines.³

The ACCC previously sought stakeholder views in response to the release of an initial issues paper in August 2019.

Since the release of the initial issues paper the ACCC has received a range of additional information from Viterra and stakeholders, as discussed below.

These materials are available on the [ACCC website](#).

1.3.1. Revised exemption application

On 7 February 2020 Viterra submitted revised exemption applications for all six of its South Australian port terminal facilities. The revisions corrected shipping capacity figures for all of Viterra's facilities. Shipping capacity and utilization rates are particularly relevant to the ACCC's consideration of any exemption application.

The revised exemption applications were published on 13 February 2020.

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

1.3.2. Charles River Associates reports

On 11 November 2019 Viterra submitted a report produced by Charles River Associates (CRA) in support of its exemption applications, *Report on the Benefits of Code Exemption on Viterra Grain Export Terminals* (the Port Terminal Report for Viterra).⁴

The report primarily focusses on the economic case for the granting of exemptions, as well as presenting analysis which contends that Viterra does not have an economic incentive to deny access to its port terminal facilities to third party exporters.

CRA submitted a supplementary report (the Supplementary Port Terminal Report for Viterra)⁵ on 13 January 2020 following discussion between the ACCC and Viterra regarding the assumptions used in the first report's analysis.

1.3.3. Additional information provided by Viterra

Viterra has also responded to requests from the ACCC for further information in respect of its exemption applications. The ACCC appreciates Viterra's effort in providing this information during the assessment process.

The information provided includes further detail about the characteristics and capacity of Viterra's port terminal facilities, upcountry storage and handling network,⁶ as well as grain movements and catchment zones. This information was made available on the ACCC's exemption assessment webpage on 13 February 2020.

In addition, Viterra has provided the ACCC with information regarding the indirect costs of regulation and the receipt of grain at port terminals. This information was made available on the ACCC website on 16 March 2020.

1.3.4. Stakeholder submissions to the issues paper

Eight stakeholder submissions were published on the ACCC's website on 10 October 2019. Viterra's response to the stakeholder submissions was also received and published on 14 November 2019.

Stakeholders may wish to have regard to the views expressed in the submissions and Viterra's responses when responding to this supplementary issues paper.

The ACCC appreciates the contributions of stakeholders to the process to date. The ACCC understands that, particularly in the current environment, not all stakeholders may have capacity to respond to the supplementary issues paper in part or in full. However, the ACCC is aware of the high level of industry interest in the exemption assessment processes and considers that it is important stakeholders are provided with a further opportunity to provide their views.

1.3.5. Additional production season

Since the publication of the initial issues paper a further shipping season (1 October 2018-30 September 2019) has been completed, as well as the first half of the 2019-20 season.

⁴ Charles River Associates, *Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019.

⁵ Charles River Associates, *Supplement to CRA Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 9 January 2020.

⁶ Upcountry storage and handling information was predominantly provided by Viterra on a confidential basis.

The ACCC has also published a further bulk grain ports monitoring report,⁷ which sets out a range of information on the 2018-19 production and shipping seasons, including views expressed by stakeholders during consultation for the monitoring report.

The availability of additional information regarding grain movements and shipping volumes is particularly relevant given the effect of recent drought conditions on domestic demand.

1.3.6. PTSP developments in South Australia

Since August there has also been a number of other developments in the South Australia bulk grain export market related to ADM, Cargill, LINX and T-Ports:

- ADM has begun loading grain for the purposes of coastal shipment at Port Pirie, and completed its first shipment on 19 November 2019.
- Cargill has established its own mobile ship loader at berth 20 Port Adelaide.
- LINX has confirmed it will exit the grain export market.
- T-Ports began operations at its Lucky Bay facility in March 2020.

1.4. Supplementary issues paper and additional consultation

Given the above, the ACCC is conducting additional public consultation during which interested parties are invited to comment on specific questions in this document and relevant matters to assist in its assessment of whether Viterra should be an exempt service provider for any or all of its port terminal facilities in South Australia.

Section 2 of this supplementary issues paper provides further information concerning key issues that have emerged in relation to the exemption applications from Viterra.

The paper contains key questions and issues relevant to the ACCC's assessment in relation to the port terminal facilities, as well as information provided by Viterra in support of its exemption applications.⁸

Key issues the ACCC is seeking stakeholder views on are:

- the capacity at Viterra's port terminal facilities;
- Viterra's incentive either to provide favourable access or deny access;
- grain catchment areas;
- new port developments;
- port loading protocols; and
- the operation of the Code.

The ACCC notes that not all matters raised in this supplementary issues paper may necessarily be relevant to all of the ports equally. The ACCC therefore invites interested parties to:

- respond to the questions as they see fit;
- comment on the updated and additional information provided by Viterra and industry stakeholders as relevant to their interests; and

⁷ Available at <https://www.accc.gov.au/publications/serial-publications/bulk-grain-ports-monitoring-reports/bulk-grain-ports-monitoring-report-2018-19>.

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

- provide any additional information they consider relevant to the ACCC's assessment.

Selected extracts from stakeholder submissions to the ACCC's initial issues paper are set out in **Appendix B**.

A brief summary of additional materials submitted by Viterra since the publication of the ACCC's initial issues paper is at **Appendix C**.

These materials are available in full on the [ACCC website](#).

1.4.1. 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 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

luke.sheehan@acc.gov.au

1.4.2. Due date for submissions

Submissions must be received before **5.00pm AEST** on **19 June 2020** unless other arrangements have been made with the ACCC before this date.

1.4.3. Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website.

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.

1.4.4. Further information

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

Luke Sheehan
Assistant Director
Infrastructure & Transport – Access & Pricing Branch
Phone: 03 6215 9304
Email: luke.sheehan@acc.gov.au

2. Matters for comment

2.1. Summary of key questions and issues

The ACCC welcomes responses from stakeholders to any or all of the questions listed below and issues discussed in this paper.

Characteristics of port terminal facilities and capacity

1. Noting that Viterra has submitted revised capacity figures for its port terminal facilities (see table 1), does the presence (or absence) of spare capacity affect your views on Viterra's incentive to provide fair and transparent access?
2. Do you agree with CRA's conclusion that Viterra does not have an incentive to completely deny access to its port terminal services for third party exporters? Do you consider Viterra may have incentives to preference some exporters ahead of others in providing access?
3. Do you think Viterra's decision not to raise port terminal fees indicates the absence of an incentive to deny access? What, if any, other factors would be relevant to this decision?
4. If Viterra were to deny or limit access to its port terminal services, is there sufficient alternate third party port terminal capacity available to third party exporters, including access to ports that service Panamax vessels?
5. Do you have any comments on the reasonableness of the assumptions used by CRA in its economic modelling?

Access by exporters to port terminal services

6. If one or more of Viterra's port terminal facilities are exempted, what would be the effect on:
 - a. Competition between exporters and/or competition between PTSPs?
 - b. Capacity availability at third party South Australian port terminal facilities, in the relevant grain catchment areas?
 - c. Access to Viterra's exempt and non-exempt facilities?
 - d. Export destinations for South Australian grain?

Competition between port terminal facilities

7. To what extent can, or does, grain grown on the Eyre Peninsula, Yorke Peninsula and the traditional Adelaide zone, move:
 - a. between these regions for export purposes?
 - b. between these regions for South Australian domestic usage?
 - c. to Adelaide for container export?
8. To what extent do rail receipt facilities at Adelaide advantage Inner Harbour and Outer Harbour over other PTSPs, in terms of the ability to draw grain from different regions?
9. How has the closure of rail on the Eyre Peninsula affected the ability of Port Lincoln to source grain from growing regions further away from port?

10. Are the location differentials published by Grain Trade Australia a suitable proxy for the cost to transport grain from storage to port? What alternate approaches are available?
11. How will the following market development affect competition:
 - a. The exit of LINX, and the entry of Cargill as a PTSP at Port Adelaide?
 - b. The recent commencement of operations at T-Ports' Lucky Bay facility?
 - c. ADM's Port Pirie facility?

Competition across the bulk grain supply chain/competition in upstream markets

12. In which regions are there sufficient competitive upcountry alternatives to Viterra's upcountry storage and handling network/system? How has the closure of Viterra's upcountry sites affected the ability of third party exporters to export grain? Does this differ by growing region?
13. Does the increase in domestic grain flows, and any resulting new supply chains, reflect a longer term trend in the market?
14. To what extent do changes in domestic grain flows provide a competitive constraint on South Australia's bulk export market (to date and in the longer term)? Which facilities compete most closely with the domestic market for grain?

Port loading protocols and capacity allocation systems

15. To what extent could changes to Viterra's port loading protocols (particularly the ACCC approved capacity allocation system) address concerns about a lack of operational flexibility?
16. If Viterra is not required to comply with an approved capacity allocation system in place for one or more ports (due to exemption), what effect would you expect this to have on the ability of exporters to obtain fair and transparent access?

Effect and scope of the Code

17. To what extent is the 'unequal' application of the Code on Viterra's facilities (as submitted by Viterra) relevant to the ACCC's assessment of the exemption applications?
18. To what extent is a reduction in regulatory burden (e.g. an exemption or exemptions) appropriate given the scope of the Code (e.g. that the obligations imposed on PTSPs in relation to discrimination and hindering are limited to bulk wheat exports)? Is the presence of the SA ports regime a relevant consideration?

2.2. Characteristics of port terminal facilities and capacity

2.2.1. Capacity at port terminal facilities

The ACCC is required to consider the likelihood that exporters will have fair and transparent access to port terminal services when determining whether to exempt a PTSP.⁹

The ACCC therefore considers the availability of port terminal capacity to be an important consideration in whether a port terminal facility should be exempted from Parts 3 to 6 of the Code.

The ACCC notes that Viterra provided corrected capacity figures on 13 December 2019. The revised capacity figures were used in the ACCC's 2018-19 Bulk grain ports monitoring report, which compared the historical level of exports at each of Viterra's port terminal facilities to these revised figures on an annual basis.¹⁰

Viterra subsequently provided a revised exemption application containing the corrected capacity figures on 7 February 2020. Table 1 below sets out the differences in capacity figures between the original and revised applications.

Table 1: Comparison of capacity figures (mt)

Port terminal facility	Original capacity figures	Corrected capacity figures
<i>Port Adelaide - IHB</i>	1.29	1.00
<i>Port Adelaide - OHB</i>	2.60	2.33
<i>Port Giles</i>	1.60	1.17
<i>Port Lincoln</i>	2.50	2.30
<i>Thevenard</i>	1.25	0.76
<i>Wallaroo</i>	1.10	0.84

Source: Viterra exemption application 2019 – submitted 2 July 2019; and Viterra revised exemption application 2019 - updated 20 February 2020.

Viterra, after submitting revised capacity figures, restated that they have no incentive to deny access due to the existence of excess capacity at each of its port terminal facilities. Viterra contend that the existence of excess capacity incentivises them to provide transparent access, in order to encourage the use of its facilities.¹¹

Further, Viterra also submitted that its incentive to provide transparent and non-discriminatory access has been demonstrated over a number of years.¹²

In contrast, stakeholders such as T-Ports and Cargill contend that, in the absence of the Code, Viterra still has an incentive to provide discriminatory access.¹³

⁹ *Port Terminal Access (Bulk Wheat) Code of Conduct*, section 5(3)(d).

¹⁰ See chapter 8: <https://www.accc.gov.au/publications/serial-publications/bulk-grain-ports-monitoring-reports/bulk-grain-ports-monitoring-report-2018-19>.

The capacity figures in the 2018-19 Bulk grain ports monitoring report refer to the amount of capacity released under long term, short term and additional short term capacity released for the 2018-19 season.

¹¹ See selected stakeholder comments at Appendix B.

¹² *Ibid.*

¹³ *Ibid.*

Key questions and issues

1. Noting that Viterra has submitted revised capacity figure for its port terminal facilities (see table 1), does the presence (or absence) of spare capacity affect your views on Viterra's incentive to provide fair and transparent access?

2.2.2. Port terminal facilities

As outlined above in section 1.1 the ACCC is required to consider the public interest, including the public interest in having competition in markets when determining whether to exempt a PTSP from Parts 3 to 6 of the Code.¹⁴

The extent to which different port terminals possess certain characteristics (such as storage, rail access, or the ability to load larger vessels) is a relevant factor when considering the level of competitive constraint one PTSP may place on another PTSP.

The ACCC notes that in South Australia there are currently four deep water port terminal facilities capable of loading Panamax sized vessels.¹⁵ Three of these port terminal facilities are operated by Viterra.¹⁶ The other facility capable of loading Panamax vessels is T-Ports' Lucky Bay port terminal facility, which can load a Panamax vessel through the use of its trans-shipment vessel.¹⁷

In its submission to the initial issues paper Cargill noted that deep water facilities have an advantage over shallower facilities and that Viterra's monopoly extends to all deep water ports in the state, which means that exporters must use Viterra's facilities if they want to load vessels exceeding certain tonnages.¹⁸ The ACCC notes that at the time of Cargill's submission T-Ports' Lucky Bay facility was not yet operational.¹⁹

The ACCC is seeking stakeholder views on the extent, and significance, of any advantage afforded to deep water facilities.

2.2.3. Economic modelling in the CRA report

The ACCC has been provided with two reports prepared by CRA for Viterra that examine South Australian port terminal facilities and the effect of Viterra obtaining exemptions from the Code. CRA's Port Terminal Report concludes that Viterra has no economic incentive to completely *deny* access to all third party exporters access to its port terminal services where it is provided an exemption at all of its port terminal facilities.²⁰

The CRA report, however, does not consider other forms of discrimination or preferential treatment that may not constitute complete denial of access. Consistent with previous exemption decisions, the ACCC notes that that a vertically integrated PTSP has an incentive to provide *preferential access* to its vertically integrated trading arm during periods of high demand, as opposed to completely *denying access*. Furthermore, the ACCC notes that the

¹⁴ *Port Terminal Access (Bulk Wheat) Code of Conduct*, section 5(3)(b).

¹⁵ Panamax vessels are capable of loading 65,000 DWT.

¹⁶ Port Adelaide Outer Harbor, Port Giles and Port Lincoln.

¹⁷ Lucky Bay is the other deep water port in South Australia. To date T-Ports have performed four shipments, totalling 61,000 tonnes, from its Lucky Bay facility.

¹⁸ See selected stakeholder comments at Appendix B.

¹⁹ The ACCC determined that T-Ports is an exempt service provider at Lucky Bay on 1 April 2020, following T-Ports' confirmation that its facility was capable of handling bulk wheat.

²⁰ CRA, Port Terminal Report for Viterra, p. 15.

purpose of the Code is 'to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.'²¹

The CRA Supplementary Port Terminal Report for Viterra seeks to clarify some of the assumptions used in the first report following discussion between the ACCC, CRA and Viterra.²²

In its report CRA makes a number of assumptions in its economic modelling, as listed below:²³

- Viterra's port terminal margins are assumed to be \$10 per tonne;
- Glencore's margins are assumed to be \$1.50 per tonne;
- If Viterra denies access to its port terminal services then 60 per cent of third party exporter volumes will switch to competing terminals (or the domestic or containerised markets); and
- Glencore's trader margin increases by \$5 per tonne as a result of reduced competition from exporters sourcing grain from growers.

For context, the ACCC notes that the Australian Export Grains Innovation Centre (AEGIC) estimated total supply chain costs for Port Adelaide Outer Harbor and Port Giles to be approximately \$73 and \$75 per tonne respectively.²⁴

CRA state that they consider these input assumptions to be conservative and are therefore 'likely biased towards finding that Viterra has an incentive to deny terminal access.'²⁵

The ACCC notes that the conclusion in CRA's initial report, that Viterra does not have an incentive to deny access, are partially based on the size of these assumed margins. The ACCC therefore wishes to test the reasonableness of the assumptions made by CRA with stakeholders.

In addition, the ACCC notes that the CRA report does not separately consider each of Viterra's port terminal facilities on an individual basis. Rather, CRA considers all of Viterra's port terminal services in their entirety.

The ACCC is assessing the exemption application for each of the port terminal facilities on an individual case-by-case basis.

The CRA report considers that Viterra could theoretically deny access by raising its port terminal fees, even without an exemption.²⁶ CRA state that a hypothetical increase in fees would also apply to Glencore Agriculture, and could therefore be viewed as an internal transfer between Glencore Agriculture and Viterra.²⁷

CRA argue that the fact Viterra have not raised port terminal fees further evidences that Viterra does not have an incentive to deny access to its port terminal services.²⁸

²¹ *Port Terminal Access (Bulk Wheat) Code of Conduct*, section 2.

²² CRA, Supplementary Port Terminal Report for Viterra, p. 1.

²³ The ACCC notes that all margins used in the CRA report are assumed, and are not representative of the actual margins of Viterra and Glencore.

²⁴ AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, November 2018, p. 18.

²⁵ CRA, Port Terminal Report for Viterra, p. 15.

²⁶ See extract in Appendix B.

²⁷ CRA, Port Terminal Report for Viterra, p. 22, fn 48.

²⁸ See extract in Appendix B.

Key questions and issues

2. Do you agree with CRA's conclusion that Viterra does not have an incentive to completely deny access to its port terminal services for third party exporters? Do you consider Viterra may have incentives to preference some exporters ahead of others in providing access?
3. Do you think Viterra's decision not to raise port terminal fees indicates the absence of an incentive to deny access? What, if any, other factors would be relevant to this decision?
4. If Viterra were to deny or limit access to its port terminal services, is there sufficient alternate third party port terminal capacity available to third party exporters, including access to ports that service Panamax vessels?
5. Do you have any comments on the reasonableness of the assumptions used by CRA in its economic modelling?

2.3. Access by exporters to port terminal services

In deciding whether to exempt a PTSP, the Code requires the ACCC to have regard to the interests of exporters who may require access to port terminal services. The Code also requires the ACCC to have regard to the likelihood that exporters will have fair and transparent access to port terminal services.²⁹

In having regard to the interests of exporters, the ACCC considers exporters' bargaining power and access to viable alternative port terminal facilities to be a pertinent factor. If exporters will still be able to compete in the grain export market on their relative merits if an exemption is granted, then the ACCC would be unlikely to consider the interests of exporters to be adversely affected.

The ACCC notes Viterra was the sole provider of port terminal services in South Australia prior to 2015-16. However, in the 2015-16 and 2016-17 seasons LINX (formerly Patrick) and Semaphore respectively established mobile loading facilities at Port Adelaide. Table 2 below shows the portion of total South Australian grain Viterra has exported in bulk compared to third party facilities since 2016-17.³⁰

Table 2 shows Viterra has facilitated 92 per cent of all South Australian bulk exports since 2016-17, while also demonstrating the effect the east coast drought has had on South Australian bulk export volumes.

Additionally, the ACCC notes that Viterra has loaded 81 per cent of all bulk exports out of Port Adelaide since the beginning of the 2016-17 season.³¹

There have also been changes to the PTSP market in the 2019-20 season, with LINX's exit and Cargill's entry at Port Adelaide and the commencement of operations at T-Ports' Lucky Bay facility on the Eyre Peninsula in March 2020. ADM also began loading grain for the purposes of coastal shipment at Port Pirie in November 2019. The ACCC acknowledges that these developments will help facilitate greater competition in the PTSP market in future seasons.

²⁹ *Port Terminal Access (Bulk Wheat) Code of Conduct*, section 5(3) (c) and (d).

³⁰ Table 2 does not include coastal shipment figures. When coastal shipments are included Viterra have loaded 93 per cent of all SA shipments since 2016-17.

³¹ This figure includes 2019-20 data up to 30 April 2020.

The ACCC is interested in stakeholder views on the ability of exporters to secure fair and transparent access and whether this would be impacted by an exemption, at one or more of Viterra's port terminal facilities.

Table 2: Viterra and third party PTSP bulk exports since 2016-17

PTSP	2016-17	2017-18	2018-19	2019-20*	Total
Viterra	90%	91%	100%	97%	93%
Third party	10%	9%	0%	32%	78%
Total (mt):	8.05	5.89	2.51	2.02	18.46

Source: PTSP loading statements; and ACF Shipping stem and market share report.

Notes: * 2019-20 data is inclusive of bulk exports between 1 October 2019 and 30 April 2020 (and is therefore inclusive of T-Ports operations).

The ACCC also considers the relative share of exports at each of Viterra's port terminal facilities and the ability of exporters to gain access for exports. Glencore, Viterra's trading arm, has been the exporter with the largest share of exports (39 per cent of all South Australian exports) out of all of Viterra's facilities since 2011-12. Glencore's export share differs by port, with its lowest share occurring at Thevenard (26 per cent), and highest at Inner Harbour (56 per cent).³²

Despite Glencore accounting for a large proportion of the exporter market share at Viterra's facilities, given that a relatively high portion of third party exporters ship across Viterra's port terminal facilities generally, the ACCC considers that third party exporters have generally been able to gain fair and transparent access to the South Australian export market.

The ACCC is particularly interested in whether, and the extent to which, shares of exports might change if Viterra were granted an exemption in relation to one or more of its port terminal facilities.

Viterra submits that changes in exports movements through Viterra's facilities since the entry of LINX shows exporters are able to access alternatives.³³

The South Australian Freight Council (SAFC) also submits that it is against Viterra's interests not to provide access on reasonable commercial terms.³⁴

However other stakeholders, such as Cargill and T-Ports contend that there is a continuing need for Viterra to be subject to the full Code.³⁵

Key questions and issues

6. If one or more of Viterra's port terminal facilities are exempted, what would be the effect on:
 - a. Competition between exporters and/or competition between PTSPs?
 - b. Capacity availability at third party port terminal facilities in South Australia, in the relevant grain catchment areas?
 - c. Access to Viterra's exempt and non-exempt facilities?
 - d. Export destinations for South Australian Grain?

³² ACCC, *Bulk grains ports monitoring report 2018-19 – Appendix 1 – Supplementary spreadsheet – tables and charts*.

³³ See extract in Appendix B.

³⁴ Ibid.

³⁵ Ibid.

2.4. Competition between port terminal facilities

2.4.1. Grain catchment areas

In making an exemption determination, the ACCC is required to have regard to the public interest, including the public interest in having competition in markets.³⁶

In order to assess the level of competition between PTSPs, the ACCC's previous determinations have examined the grain catchment areas or port zones that feed the port terminal facilities being considered for exemption, as well as the substitutability of different facilities or the domestic market.

In regards to the grain catchment areas across South Australia, Viterra submit that 'traditional' catchment zones are fluid and increasingly outdated constructs, with grain being able to move to a variety of markets.³⁷

In its submission to the initial issues paper, T-Ports were supportive of grower catchment zones being fluid, though not to the extent suggested by Viterra.³⁸

T-Ports also consider that there is some competition for grain by PTSPs on the South Australian and Victorian border.³⁹

SAFC stated that T-Ports' Lucky Bay facility and the cessation of rail was likely to significantly affect the catchment areas on the Eyre Peninsula.⁴⁰

Following these submissions, and in response to an ACCC information request, Viterra provided further information to the ACCC in relation to catchment zones. Viterra re-iterated its view that '*traditional "catchment zones" for grain grown in South Australia are fluid and increasingly outdated constructs*'.⁴¹

Specifically Viterra submitted that for grain grown in the:

Adelaide region

*Grain is commonly delivered or outturned from the Adelaide region to sites outside of what has been considered the traditional Adelaide catchment zone. This includes delivering and outturning grain to bulk grain port terminals on the Yorke Peninsula and in Victoria, for export by container as well as, more recently, to the east coast, for domestic consumption.*⁴²

Yorke Peninsula

*Grain is commonly delivered or outturned from the Yorke Peninsula to sites outside of what has been considered the traditional Yorke Peninsula catchment zone. This includes delivering grain to the Adelaide region and/or outturning grain to Port Adelaide (where Viterra faces competition from LINX and Semaphore), as well as, more recently, delivering to the east coast, for domestic consumption.*⁴³

³⁶ *Port Terminal Access (Bulk Wheat) Code of Conduct*, section 5(3)(b).

³⁷ T-Ports submission, 26 August 2019, pp. 2-3.

³⁸ *Ibid.*, p. 3.

³⁹ *Ibid.*, p. 3.

⁴⁰ SAFC submission, 6 September 2019, p. 2.

⁴¹ Viterra, *Response to 14/11/19 information request - question 9 – catchment zones*, 13 January 2020, p. 2.

⁴² *Ibid.*, p. 4.

⁴³ *Ibid.*, p. 4.

Eyre Peninsula

In 2018-19, the proportion of grain grown on the Eyre Peninsula that was exported through Thevenard and Port Lincoln was [c-i-c] less than 2017-18. It is likely that this grain was delivered to the east coast.⁴⁴

More generally, Viterra also stated in the further information it provided that:

...if the ACCC continues to adopt the view that catchment zones exist to some extent, then it must recognise that the boundaries of these “zones” are no longer fixed and are influenced by market conditions within South Australia, and more broadly within Australia and overseas.⁴⁵

The ACCC acknowledges that grain will not necessarily move to the closest port terminal facility, and that boundaries of catchment zones are therefore not fixed. Furthermore, the ACCC also acknowledges that certain market conditions, such as the east coast drought, mean grain located in ‘traditional’ catchment zones will move to alternate locations. However, the ACCC’s approach to date has been that the distance grain travels (and the related freight costs) remains pertinent to traders’/exporters’ decisions around where to outturn grain.

The ACCC also notes that CRA did not consider freight costs in their analysis, however as noted above, the ACCC considers freight costs to be a relevant consideration when assessing if it is viable for grain to move to alternate port terminals.

Key questions and issues

7. To what extent can, or does, grain grown on the Eyre Peninsula, Yorke Peninsula and the traditional Adelaide zone, move:
 - a. between these regions for export purposes?
 - b. between these regions for South Australia domestic usage?
 - c. to Adelaide for container export?
8. To what extent do rail receival facilities at Adelaide advantage Inner Harbour and Outer Harbor over other PTSPs, in terms of the ability to draw grain from different regions?
9. How has the closure of rail on the Eyre Peninsula affected the ability of Port Lincoln to source grain from growing regions further away from port?
10. Are the location differentials published by Grain Trade Australia a suitable proxy for the cost to transport grain from storage to port? What alternate approaches are available?

2.4.2. Developments in the PTSP market

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

⁴⁴ Ibid, p. 4.

⁴⁵ Ibid, p. 5.

⁴⁶ *Port Terminal Access (Bulk Wheat) Code of Conduct*, section 5(3)(d).

facility, third party access seekers will have alternatives through which to export and are more likely to obtain fair and transparent access.

Since the first issues paper was released there have been a number of relevant developments in the PTSP market:

- ADM has begun loading grain for the purposes of coastal shipment at Port Pirie, and completed its first shipment on 19 November 2019;
- Cargill established its own mobile ship loader at berth 20 at Port Adelaide;
- LINX has confirmed it will exit the grain export market; and
- T-Ports began operations at their Lucky Bay facility in March 2020.

Viterra submits that ADM's operations at Port Pirie will compete for the receipt of grain grown in the Adelaide and Yorke Peninsula regions.⁴⁷

Viterra also contends that Cargill, who operate at berth 20 in Adelaide, will also compete for grain grown from the Adelaide and Yorke Peninsula regions.⁴⁸

The ACCC notes that stakeholders have not yet had a chance to comment on the entry of Cargill into the Adelaide market.

Similarly, as LINX have recently exited the PTSP market, neither Viterra nor stakeholders has yet had a chance to comment on how LINX's exit will affect the South Australian grains industry.

The ACCC also notes that T-Ports began operations at its Lucky Bay facility at the end of March 2020. The ACCC will observe with interest how the introduction of T-Ports affects the market on the Eyre Peninsula.

Key questions and issues

11. How will the following market development affect competition:
 - a. The exit of LINX, and the entry of Cargill as a PTSP at Port Adelaide?
 - b. The recent commencement of operations at T-Ports' Lucky Bay facility?
 - c. ADM's Port Pirie facility?

2.5. Competition across the bulk grain supply chain / competition in upstream markets

The bulk grain export market interacts with various other industries in the broader supply chain. These include upcountry storage facilities, and the domestic market. The ACCC is required by subclause 5(3) of the Code 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' when considering an exemption application.⁴⁹

The ACCC therefore considers that it is relevant to seek information on and assess the level of competition in the bulk grain export supply chain, as well as the domestic markets, and

⁴⁷ Viterra, *Response to 14/11/19 information request – question 9 – catchment zones*, 13 January 2020, p. 5.

⁴⁸ *Ibid*, p. 5.

⁴⁹ *Port Terminal Access (Bulk Wheat) Code of Conduct*, s 5(3)(b) and 5(3)(g).

the extent to which these affect the level of competition in South Australian markets for bulk grain export port terminal services.

The ACCC notes that the containerised export market is relevant to its consideration of the level of competition faced by Viterra in South Australia. However, since Viterra has not submitted any new information on container exports since the release of the initial issues paper, the ACCC does not have any specific questions related to the container market at this time.

2.5.1. Upcountry storage

The ACCC is required under the Code to consider the promotion of competition in upstream markets in its assessment of an exemption application.⁵⁰ A bulk grain exporter's access to transport and/or storage services may have an impact on its ability to access port terminal services on a fair and transparent basis. If there is a sufficient degree of competition in upcountry services, this may limit a PTSP's ability to leverage market power from its upcountry networks, which could otherwise affect third party exporters' ability to obtain fair and transparent access.

Viterra submits that storage and handling in South Australia is currently unregulated, characterised by a large number of providers, and low barriers to entry. Further, Viterra references a recent Essential Services Commission of South Australia (ESCOSA) report which states that the upcountry market is operating efficiently.⁵¹

Viterra submits that low barriers to entry mean that alternate providers could open their own storage sites if Viterra's supply chain is inefficient, particularly given their customers are comprised of large multi-national exporters.⁵²

However, Grain Producers Australia (GPA) noted that whilst there are alternate upcountry facilities in some areas, their ability to compete effectively against Viterra is linked to ability to negotiate access to export facilities.⁵³

The ACCC notes that there is limited information available on the size and extent of third party and on-farm storage in South Australia. While the ACCC is aware of the existence of third party upcountry sites,⁵⁴ it is not clear to what extent third party (and on-farm) storage competes with Viterra's upcountry system, particularly given Viterra's dominance at port.

The ACCC also notes that ESCOSA stated that third party storage providers are relatively small in scale, and mostly serve the domestic and container export markets.⁵⁵

Primary Industries and Regions South Australia (PIRSA⁵⁶) considers that there is an estimated one million tonnes of on-farm storage, most of which is only suitable for short term storage.⁵⁷ The ACCC currently does not have an alternate estimate as to the extent of on-farm storage, but understands from stakeholders that on-farm storage in South Australia is limited.

⁵⁰ *Port Terminal Access (Bulk Wheat) Code of Conduct*, 5(3)(g).

⁵¹ Viterra, *Revised exemption application 2019*, 7 February 2020, p. 4.

⁵² *Ibid*, p. 36.

⁵³ GPA submission, 4 October 2019, p. 2.

⁵⁴ Most alternate sites appear to be available between Wallaroo and Adelaide.

⁵⁵ ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 26.

⁵⁶ PIRSA is a South Australian government agency focussed on the economic development of primary industries and regions.

⁵⁷ PIRSA, *Submission to the Inquiry into the South Australian Bulk Grain Export Supply Chain Costs*, May 2017, p. 6.

The ACCC also notes that Viterra have been focusing its storage operations on a decreasing number of sites.⁵⁸ Viterra recently announced the closure of 12 sites, reducing the number of sites that will be used for the 2020/21 season to 55.⁵⁹

Key questions and issues

12. In which regions are there sufficient competitive upcountry alternatives to Viterra's upcountry storage and handling network/system? How has the closure of Viterra's upcountry sites affected the ability of third party exporters to export grain? Does this differ by growing region?

2.5.2. Domestic demand

Viterra submits that the current drought is not a unique circumstance, with droughts and climate-related events becoming a more common occurrence in Australia.

Viterra further submits it "...[does] not consider this to be a unique or "shock" market event"⁶⁰ in relation to grain moved to the east coast due to drought conditions and new grain import arrangements.

Pastoralist and Graziers Association of WA (PGA) noted that the drought has meant a large portion of South Australian grain bypassed Viterra's system in 2018-19.⁶¹

In contrast T-Ports submitted that the 2018-19 conditions reflected an extreme market that is not representative of typical market conditions.⁶²

In its further submission, Viterra noted that the establishment of east coast supply chains lowers the cost of future usage of these supply chains.⁶³

While noting droughts are not uncommon in Australia, the ACCC notes that, to the extent the current drought is a temporary market condition, it is unclear that the domestic grain flows that occurred in the recent shipping season can be viewed as reflecting a longer term trend in grain movements. The ACCC considers that domestic consumption under usual growing conditions is likely to provide a limited alternative to the bulk grain export market.

This notwithstanding, the extent to which different regions in South Australia consume grain is an important consideration in assessing the level of competitive constraint the domestic market places on Viterra.

In particular, GPSA noted that growers on the Eyre Peninsula have limited access to the domestic market.⁶⁴

⁵⁸ Viterra's rationalisation of storage sites has led to a decrease from 114 sites in 2010 to 83 in 2017. ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 25.

⁵⁹ Viterra, 3 March 2020, <http://viterra.com.au/index.php/2020/03/03/viterra-adapts-to-provide-more-efficient-supply-chain/>, viewed 10 March 2020.

⁶⁰ Viterra, *Further submission on exemption application - public*, 11 March 2020, p. 9.

⁶¹ PGA submission, 3 September 2019, pp. 1-2.

⁶² T-Ports submission, 26 August 2019, p. 3.

⁶³ Viterra, *Further submission on exemption application – public*, 11 March 2020, p. 9.

⁶⁴ GPSA submission, 27 September 2019, pp. 3-4.

Key questions and issues

13. Does the increase in domestic grain flows, and any resulting new supply chains, reflect a longer term trend in the market?
14. To what extent do changes in domestic grain flows provide a competitive constraint on South Australia's bulk export market (to date and in the longer term)? Which facilities compete most closely with the domestic market for grain?

2.6. Port loading protocols and capacity allocation systems

All exempt and non-exempt PTSPs are required to publish policies and procedures for managing demand for port terminal services, which must include policies and procedures relating to the nomination and acceptance of ships to be loaded.⁶⁵

Non-exempt PTSPs are required to have in place a port loading protocol and to comply with that protocol.⁶⁶ A non-exempt PTSP can vary its protocols by making the variation available on its website for at least 20 business days prior to the commencement of the change.⁶⁷

The Code also requires that a PTSP's port loading protocol must include a capacity allocation system.⁶⁸ A non-exempt PTSP's capacity allocation system must be approved by the ACCC otherwise the PTSP may only allocate capacity up to six months in advance. In deciding whether to approve a PTSP's capacity allocation system, the ACCC must have regard to a list of matters set out at subclause 25(3) of the Code.⁶⁹ A variation to an existing capacity allocation system also requires this approval from the ACCC.

When the Code came into effect on 30 September 2014, Viterra's capacity allocation system from its Part IIIA access undertaking was taken to be approved by the ACCC under the transitional Code provisions. In 2015 Viterra varied its capacity allocation system to introduce long term agreements and the capacity allocation system was approved by the ACCC.⁷⁰

The ACCC recognises that regulation imposes costs and reduces flexibility on regulated businesses, however this must be balanced against the need to ensure that capacity allocation systems facilitate fair and transparent access to port terminal services. It may be appropriate to reduce costs or allow greater flexibility by granting exemptions where there are sufficient competitive constraints to result in fair and transparent access for exporters.

Viterra submits under Parts 3 to 6 of the Code "it cannot quickly and readily respond to changing circumstances or exporter requests in regard to the allocation of capacity"⁷¹ including slot trades and re-ordering priority of vessel berthing and loading.

⁶⁵ *Port Terminal Access (Bulk Wheat) Code of Conduct*, section 8.

⁶⁶ *Ibid*, sections 24 and 26 respectively.

⁶⁷ *Ibid*, section 27.

⁶⁸ *Port Terminal Access (Bulk Wheat) Code of Conduct*, section 25. A capacity allocation system is defined in the Code as a system that a PTSP uses to allocate, to exporters, capacity of a port terminal facility owned or operated by the provider.

⁶⁹ See section 1.1 for the list of matters subclauses in 25(3).

⁷⁰ ACCC final decision on Viterra's application to vary its capacity allocation system, available at <https://www.accc.gov.au/regulated-infrastructure/wheat-export/viterra-2015/final-decision>.

⁷¹ Viterra, *Revised exemption application 2019*, February 2020, p. 21.

Viterra submits that if it were exempt from Parts 3 to 6 of the Code, it would (amongst other things) be better able to service clients including by making long-term commitments and responding flexibly to changes in client's needs.⁷²

Stakeholders who have made submissions in response to the initial issues paper had varying views on the operational flexibility afforded to Viterra.⁷³

Gypsum Resources Australia (GRA) ships gypsum using Thevenard and submits that GRA's operations are impacted when Viterra shuts down the ship loader at Thevenard for planned maintenance and that Viterra's flexibility in this regard is limited due to the Code.⁷⁴

In contrast, Cargill submits that Viterra is currently afforded adequate flexibility and opportunity in how it provides services under the Code, including the ability to set, and negotiate, standard prices, terms and conditions. Viterra is also able to vary its capacity allocation systems with ACCC approval.⁷⁵

T-Ports submits it accepts there are costs incurred as result of compliance with Parts 3 to 6 of the Code, however it considers that full regulation is needed to ensure fair and transparent access to all exporters.⁷⁶

In considering these matters, the ACCC notes that under the existing regulatory arrangements Viterra can set prices, terms and conditions for elevation and can negotiate non-standard terms for different exporters.

The ACCC also notes that Viterra has not sought to change its capacity allocation system since its initial approval in 2015. Viterra can vary its capacity allocation arrangements by applying for approval from the ACCC.⁷⁷ Viterra submits that amendments to its port loading protocols are unlikely to be an adequate approach to addressing its concerns around flexibility.⁷⁸

Key questions and issues

15. To what extent could changes to Viterra's port loading protocols (particularly the ACCC approved capacity allocation system) address concerns about a lack of operational flexibility?
16. If Viterra is not required to comply with an approved capacity allocation system in place for one or more ports (due to exemption), what effect would you expect this to have on the ability of exporters to obtain fair and transparent access?

⁷² Viterra, *Exemption application 2019 - supplementary submission*, 11 November 2019, p. 4.

⁷³ See extract in Appendix B.

⁷⁴ Gypsum Resources Australia submission, 5 September 2019, p.2.

⁷⁵ Cargill submission, 6 September 2019, pp. 2-3.

⁷⁶ T-Ports submission, 26 August 2019, p. 2.

⁷⁷ Section 27 requires variations to a port loading protocol (and therefore to a capacity allocation system) to be instigated by a PTSP, rather than another party, such as the ACCC.

⁷⁸ Viterra, *Further submission on exemption application - public*, 11 March 2020, p. 2.

2.7. Effect and scope of the Code

In making an exemption determination, the Code requires the ACCC to consider a range of criteria, including:

- the legitimate business interests of the PTSP;
- the public interest, including the public interest in having competition in markets;
- the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;
- the promotion of the economically efficient operation and use of the port terminal facility; and
- any other matters the ACCC considers relevant.

In order to assess these criteria, the ACCC considers it appropriate to consider the effect of the application of the Code on Viterra's operations and the possible implications arising from multiple regulatory regimes applying with respect to Viterra's operations across its six port terminals.

2.7.1. Effect of the Code

The purpose of the Code is to regulate the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services. PTSPs are free to decide their own terms and conditions under the Code, subject to complying with the non-discrimination requirements in clause 10.

Viterra indicated in its exemption application that it considers that the Code imposes a significant burden on its operations. It submits that Parts 3 to 6 of the Code substantially reduces flexibility, are onerous and impose significant direct and indirect costs.⁷⁹

Viterra submitted that an example of this inefficiency occurred in 2015, where the process of securing ACCC approval for its capacity allocation system as required by the Code, delayed Viterra's proposed introduction of long term agreements by 12 months from 1 October 2015 to 1 October 2016, and impacted the competitiveness of South Australia's grain exports.⁸⁰

In response to the initial issues paper the ACCC received a number of submissions on the impact or otherwise of the application of the Code. Below are key observations and views from stakeholders relevant to this issue.⁸¹

- PGA supports the complete deregulation of Australia's wheat export market.⁸²
- SAFC submitted that it is concerned with the uneven application of the Code around Australia and the competitive disadvantage for South Australia.⁸³
- GRA raised concerns around the impacts of the Code on the efficient operation of Thevenard.⁸⁴
- Cargill submitted that Viterra is currently afforded adequate flexibility and opportunity in how it provides services under the Code.⁸⁵

⁷⁹ Viterra, *Revised exemption application 2019*, 7 February 2020, pp. 1-2.

⁸⁰ *Ibid*, p. 22.

⁸¹ Further information is available in Appendix B and in the full submissions, which are available on the ACCC website.

⁸² PGA submission, 3 September 2019, p.1.

⁸³ SAFC submission, 6 September 2019, p. 1.

⁸⁴ Gypsum Resources Australia submission, 5 September 2019, p. 2.

⁸⁵ Cargill submission, 6 September 2019, p. 2-3.

- GrainGrowers submitted that the Code plays an important role in relation to competition at ports and that applications for exemptions need to provide evidence that the Code places an unfair burden on their operations.⁸⁶
- GPA considered that Viterra had not evidenced the impact on their legitimate business interests.⁸⁷
- T-Ports submitted it accepted that compliance with the Code incurs costs for the service provider, but noted that exemptions would provide scope for Viterra to favour certain clients.⁸⁸
- GPSA submitted concerns regarding the impact of the Code on South Australia's competitiveness, but also noted the lack of assurance around the conduct of Viterra absent full application of the Code. GPSA also indicated that it does not consider the Code to be an appropriate instrument for governing the grain export market.⁸⁹

Subsequent to the publication of submissions, Viterra reiterated its concerns around the competitive disadvantage imposed upon South Australia in a supplementary submission.⁹⁰

Viterra's supplementary submission also indicated that it agreed with a number of submissions that either supported its exemption applications or supported the view that the uneven application of the Code resulted in distortions (such as GPSA's and SAFC's). However, Viterra disagreed with the suggestions that issues of unequal regulation could be addressed through further regulation and the characterisation of its port terminal facilities as natural monopoly infrastructure in certain stakeholder submissions.⁹¹

In response to these stakeholder submissions, Viterra submitted that their facilities are not monopoly assets and are subject to significant competitive constraint from port terminal operators around the world, and from within South Australia.⁹²

In addition, Viterra submitted the CRA Report on Viterra Port Terminals. The CRA report stated that the Code harms producers, exporters and Viterra by limiting Viterra's ability to allocate and price capacity at export terminals efficiently.

Viterra also subsequently responded to the ACCC's requests for further information, as well as submitting the supplementary CRA report. Viterra submitted that the main indirect costs to Viterra, exporters and growers of the full application of the Code resulted from inflexibility and the related loss of supply chain efficiency.⁹³

Key questions and issues

17. To what extent is the 'unequal' application of the Code on Viterra's facilities (as submitted by Viterra) relevant to the ACCC's assessment of the exemption applications?

⁸⁶ GrainGrowers submission, 26 September 2019, p. 1.

⁸⁷ GPA submission, 4 October 2019, p. 2.

⁸⁸ T-Ports submission, 26 August 2019, p. 2.

⁸⁹ GPSA submission, 27 September 2019, p. 5.

⁹⁰ Viterra, *Exemption application 2019 - supplementary submission*, 11 November 2019, p. 2.

⁹¹ *Ibid*, pp. 5-6.

⁹² *Ibid*, pp. 5-6.

⁹³ Viterra, *Further submission on exemption application – public*, 11 March 2020, p. 2.

2.7.2. Scope of the Code

The ACCC notes the differing views already submitted by stakeholders regarding the effectiveness and appropriateness of the Code. The ACCC recognises that some stakeholders, contrary to Viterra, may consider the existing provisions appropriate and effective. The ACCC also recognises that some stakeholders, notably GPSA, do not consider the Code to be an appropriate method by which to regulate the Australian bulk grain export market.

The ACCC acknowledges that the application of regulation can impose a compliance burden. The ACCC considers it appropriate to reduce regulatory burdens where the level of competitive constraint and other relevant factors would reasonably be expected to deliver fair and transparent access to port terminal services for exporters.

The Code imposes obligations on PTSPs which affect the way they deal with exporters of bulk wheat. The Code does not impose those obligations on PTSPs when they are dealing with exporters of other grains. For example, the non-discrimination obligation in clause 10 of the Code does not apply when a PTSP's associated entity is exporting a grain other than bulk wheat.

The ACCC understands that capacity can be secured by exporters without nominating a grain type (particularly if seeking long term capacity); and/or between the time of capacity booking and grain loading exporters can amend capacity bookings and change the type of grain nominated from wheat to a non-wheat grain or vice versa. It is not uncommon for exporters to not know the particular grain type they will be shipping and not nominate a grain type at the time of seeking access.

The ACCC understands that Viterra's six South Australian ports have been proclaimed under the South Australian *Maritime Services (Access) Act 2000 (SA)* (MSA) and that its services at those ports are regulated services. In brief, the MSA includes an access regime this is not commodity specific, and which provides for exporters to have access to regulated services at a proclaimed port on fair commercial terms determined by arbitration where the parties are unable to reach agreement.⁹⁴ The interaction between the Code and the South Australian access regime is unclear.

The ACCC is interested in obtaining views from any stakeholders who consider a reduction in regulatory burden to be appropriate due to these factors. For example, because they:

- anticipate benefitting more from the increased operational flexibility that an exemption (or exemptions) would allow Viterra to provide than they do from the application of Parts 3 to 6 of the Code; or
- consider that the regulatory burden imposed on Viterra exceeds any benefit that results from the application of Parts 3 to 6 of the Code.

Key questions and issues

18. To what extent is a reduction in regulatory burden (e.g. an exemption or exemptions) appropriate given the scope of the Code (e.g. that the obligations imposed on PTSPs in relation to discrimination and hindering are limited to bulk wheat exports)? Is the presence of the SA ports regime a relevant consideration?

⁹⁴ *Maritime Services (Access) Act 2000*, section 11

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* (Cth), which required vertically integrated providers of port terminal services to provide the ACCC with access undertakings. The purpose of the Code is provided for in clause 2 as follows:

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.

PTSPs must comply with the Code

The Code applies to PTSPs. The definitions in the Code include the following:

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

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.

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 PTSPs

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' (of bulk wheat) 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 PTSPs to retain certain records such as access agreements and variations to those agreements.

How a PTSP 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 Code 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).⁹⁵

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

This timeframe may vary where the ACCC conducts a public consultation process, and/or requests information from the PTSP. 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 a draft determination before the ACCC makes its final determination. The Guidelines, which are available on the ACCC website,

⁹⁵ The Guidelines are available on the ACCC's website at <http://acc.gov.au/publications/process-guidelines-for-making-revoking-exemption-determinations>.

provide further detail around the ACCC's process for making and revoking exemption determinations.

Indicative timeline for assessment

Submissions on this supplementary issues paper close at **5:00pm AEST on 19 June 2020**.

As noted above, the ACCC considers it likely that it will release a draft determination in respect to Viterra's six exemption applications, but may proceed directly to publish a final determination if it considers it appropriate to do so.

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

Appendix B: Selected stakeholder comments and submissions on key matters

Section 2.2: Characteristics of port terminal facilities and capacity

2.2.1. Capacity at port terminal facilities

Viterra submit:

...any ability of Viterra to exercise market power to the detriment of competition is limited because of the amount of excess capacity at each of its port terminals. Excess capacity at port terminals is increasing in South Australia with each of the new developments set out above. With excess capacity available in peak and non-peak periods at its port terminals, Viterra is incentivised to provide transparent, reasonable and non-discriminatory access to its port terminal services in order to encourage the use of its facilities (rather than competitors' facilities) to maximise throughput.⁹⁶

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.⁹⁷

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.⁹⁸

Cargill submit:

Removal of regulation under the full Code would create strong incentives for Viterra to exploit its market power to discriminate in favour of certain exporters, particularly Glencore, and such would hinder fair and transparent access to necessary facility services for other exporters.⁹⁹

T-Ports submit:

Viterra is clearly the dominant provider of Port Terminal services in South Australia, and operates as a vertically integrated PTSP via its ownership by Glencore. It is economically prudent for [Viterra] to maximise returns and they would be incentivised to provide better service to their related party.¹⁰⁰

2.2.2. Port terminal facilities

Cargill submit:

...Viterra's current monopoly extends to all of the deep water ports in the state, i.e. Port Adelaide, Port Giles, and Port Lincoln. The principal effect of this monopoly is that exporters have no other options for loading of vessels exceeding certain tonnages. Fair and transparent access to these ports is crucial in order to ensure the commercial viability of larger vessels and loads.¹⁰¹

⁹⁶ Viterra, *Revised exemption application 2019*, 7 February 2020, p. 4.

⁹⁷ *Ibid*, p. 2.

⁹⁸ *Ibid*, p. 38.

⁹⁹ Cargill submission, 6 September 2019, p. 2.

¹⁰⁰ T-Ports submission, 26 August 2019, p. 5.

¹⁰¹ Cargill submission, 6 September 2019, p. 2.

2.2.3. Economic modelling in the CRA report

CRA submit:

Viterra could theoretically deny access to Glencore Agriculture's export competitors today, without exemption from the Code, by increasing terminal fees. Such a fee increase would increase export competitors' costs, thereby making them less effective competitors for the purchase of grain from producers.¹⁰²

...the higher [fees] paid by Glencore could be viewed as an internal transfer to the benefit of Viterra, so that the combined revenues of Viterra/Glencore would be unchanged.¹⁰³

The fact that Viterra has the ability to disadvantage Glencore Agriculture's export competitors through higher port terminal fees, but does not do so, evidences that it does not have the incentive to disadvantage Glencore Agriculture's export competitors. This supports our conclusion, based on the benefits and costs to Viterra/Glencore Agriculture of denying access, that no such incentive exists.¹⁰⁴

2.3 Access by exporters to port terminal services

Viterra submit:

Since the entry of LINX at Port Adelaide, Cargill has stopped exporting grain through Viterra's Inner Harbour and Wallaroo facilities, and has significantly decreased its exports through Outer Harbor, Port Lincoln and Port Giles. These changes clearly show that exporters are able to access alternatives to Viterra to export wheat from across South Australia and that, contrary to the statement in GPSA's submission, the LINX and Semaphore terminals do not effectively operate "on an opportunistic basis in response to high production years".¹⁰⁵

SAFC submit:

...any failure by Viterra to negotiate reasonable commercial terms on access to its ports will provide impetus to the many grain port proposals that are currently under development in SA, resulting in further competition. This would result in less grain exported across Viterra wharves, which is against its own interests.¹⁰⁶

Cargill submit:

Indeed, Viterra is the dominant port terminal service provider in South Australia, many times over. Cargill is concerned that an absence of adequate regulation may incentivise discriminatory behaviour.¹⁰⁷

Removal of regulation under the full Code would create strong incentives for Viterra to exploit its market power to discriminate in favour of certain exporters, particularly Glencore, and such would hinder fair and transparent access to necessary facility services for other exporters.¹⁰⁸

¹⁰² CRA, Port Terminal Report for Viterra, p. 22.

¹⁰³ Ibid, p. 22 fn. 48.

¹⁰⁴ Ibid, p. 22.

¹⁰⁵ Viterra, *Exemption application 2019 - supplementary submission*, 11 November 2019, p. 6.

¹⁰⁶ SAFC submission, 6 September 2019, p. 2.

¹⁰⁷ Cargill submission, 6 September 2019, p. 1.

¹⁰⁸ Ibid, p. 2.

T-Ports submit:

*The dominance of Viterra/Glencore in both market share and as the established PTSP means that they are in an unfair position in regard to commercial negotiations of service prices and service levels.*¹⁰⁹

2.4. Competition between port terminal facilities

2.4.1. Grain catchment areas

Viterra submit:

*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.*¹¹⁰

T-Ports submit:

T-Ports supports Viterra’s comments that catchment zones are fluid, however not to the extent implied.

*To a minor extent PTSPs compete for grain produced on the South Eastern border regions of SA.*¹¹¹

*...should a PTSP charge unreasonable fees or access, prohibitive distance and road freight costs give little opportunity for movement out of catchment zones or to alternative ports.*¹¹²

SAFC submit:

*Where previously rail lines funnelled grain towards Pt Lincoln, increasing its catchment area, now trucking distance (and cost) will be a greater factor.*¹¹³

2.4.2. Developments in the PTSP market

Viterra submit:

*Viterra competes with Semaphore and LINX at Port Adelaide and ADM at Port Pirie for the receipt of grain grown in the Adelaide region and on the Yorke Peninsula.*¹¹⁴

¹⁰⁹ T-Ports submission, 26 August 2019, p. 2.

¹¹⁰ Viterra, *Revised exemption application 2019*, 7 February 2020, p. 1.

¹¹¹ *Ibid*, p. 3.

¹¹² T-Ports submission, 26 August 2019, p. 3.

¹¹³ SAFC submission, 6 September 2019, p. 2.

¹¹⁴ Viterra, *Response to 14/11/19 information request – question 9 – catchment zones*, 13 January 2020, p. 5.

2.5. Competition across the bulk grain supply chain / competition in upstream markets

2.5.1. Upcountry storage

Viterra submit:

The provision of storage and handling services in South Australia is not currently subject to regulation, is characterised by a large number of service providers, increasing competition and low barriers to entry (in particular, in regard to on-farm storage), and, as reflected in the recent ESCOSA Report, is operating efficiently.¹¹⁵

GPA submit:

Whilst in some areas growers have access to alternative up-country facilities the ability of these facilities to offer comparable rates and competitive pricing is in most instances also linked to their capacity to negotiate access to export facilities on equal terms to those offered by Viterra to their own marketing arm.¹¹⁶

2.5.2. Domestic demand

PGA submit:

The South Australian Department of Primary Industries and Regions estimated the 2018/2019 South Australian grain harvest to be 5.6 million tonnes, of which Viterra exported an estimated 2.5 million to 2.6 million tonnes. This shows that between 3 million and 3.1 million tonnes of grain bypass the Viterra bulk handling system, and are either consumed domestically within South Australia, exported using a competing South Australian supply chain or out-turned to the East Coast by road or rail.¹¹⁷

T-Ports submit:

The 2018/19 harvest reflected an extreme market, where domestic demand in western areas of Qld and NSW could not be satisfied by local supply, and business conditions did support the transfer of grain from some SA locations, but this is not the norm.¹¹⁸

Viterra submit:

In addition, grain will more readily be able to be moved towards the East Coast from both South Australia and Canada than prior to 2018-19. This is because of the development of new logistics knowhow and relationships to move grain to the East Coast from these areas.¹¹⁹

GPSA submit:

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 Peninsula, where Viterra is the sole port terminal operator servicing the region and growers have limited access to the domestic market.¹²⁰

¹¹⁵ Viterra, *Revised exemption application 2019*, 7 February 2020, p. 4.

¹¹⁶ GPA submission, 4 October 2019, p. 2.

¹¹⁷ PGA submission, 3 September 2019, pp. 1-2.

¹¹⁸ T-Ports submission, 26 August 2019, p. 3.

¹¹⁹ Viterra, *Further submission on exemption application – public*, 11 March 2020, p. 10.

¹²⁰ GPSA submission, 27 September 2019, pp. 3-4.

2.6. Port loading protocols and capacity allocation systems

Viterra submit:

Parts 3 to 6 of the Code substantially reduce the flexibility of a non-exempt port terminal operator as it cannot quickly and readily respond to changing circumstances or exporter requests in regard to the allocation of capacity. These costs and limitations are more acute today than when the Code was first introduced due to its unequal application.

...For example, exempt service providers have the flexibility to facilitate slot trades and re-order the priority with which vessels will be berthed and loaded without having to comply with protocols that cannot be changed without ACCC approval, "making them more responsive to the needs of their customers."¹²¹

Viterra submit

[an exempt Viterra would]...be better able to provide longer term commitments (which in turn will assist exporters with investment decisions and their back-to-back commitments), meet client capacity demand and changes in a flexible and efficient manner and offer individualised pricing arrangements.¹²²

Viterra submit:

Simply amending the PLPs to respond to each and every new operational situation is not a long-term solution. This is because it is not possible to predict every situation that may require operational flexibility that is not provided for in the PLPs...¹²³

Gypsum Resources Australia submit:

...Port Loading Protocols and associated capacity allocation agreements with grain clients are a key factor in driving the shutdown length and timing.¹²⁴

Cargill submit:

[Viterra is able to:]

(a) set prices, terms and conditions (the Code requires that these standard terms be published but does not stipulate what they should contain);

(b) negotiate prices, terms and conditions with individual access seekers that are different to published standard terms (as long as these negotiations are consistent with the good faith, non-discrimination and no hindering obligations); and

(c) vary its capacity allocations system (with ACCC approval).¹²⁵

T-Ports submit:

The interests of all other exporters in getting fair and reasonable access depends upon the provisions of Part 3 to 6 to provide information to other exporters and regulate Viterra's ability to make changes and variations without due notice. Whilst there may be

¹²¹ Viterra, *Revised exemption application 2019*, 7 February 2020, p. 21.

¹²² Viterra, *Exemption application 2019 - supplementary submission*, 11 November 2019, p. 4.

¹²³ Viterra, *Further submission on exemption application - public*, 11 March 2020, p. 2.

¹²⁴ Gypsum Resources Australia submission, 5 September 2019, p. 2.

¹²⁵ Cargill submission, 6 September 2019, pp. 2-3.

occasions where increased flexibility may be utilised to deliver benefit to Viterra's customers, there would be an increased and un-regulated opportunity for Viterra to manage shipping stems and loading to favour selected customers (including Glencore).¹²⁶

2.7. Scope and effectiveness of the Code

2.7.1. Effect of the Code

Viterra submit:

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. In addition, costs are incurred to develop systems, processes and expertise that are necessary to ensure compliance with regulation.¹²⁷

The inability to provide certainty of export paths for clients leading into the 2015-2016 season had a direct impact on the competitiveness of South Australian grain when compared to other Code-exempt grain origination regions in Australia and globally. This involved real and significant costs, including missed opportunities for South Australian growers.¹²⁸

The South Australian grain industry is seen by international shippers and exporters to be a highly regulated, inflexible and complex environment in which to operate when compared to its global competitors.¹²⁹

PGA submit:

...the PGA has consistently supported the complete deregulation of Australia's wheat marketing and export arrangements, and holds a genuine interest in port access arrangements for grain export.¹³⁰

Consequently, the PGA supports Viterra in its application for exemption from the Wheat Port Access Code. The PGA does not distinguish between Viterra's individual ports.¹³¹

SAFC submit:

One of the SAFC's prime concerns with the Code is its uneven application 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.

...the ACCC should take into account the effect this has on grain exports from SA versus other jurisdictions.¹³²

¹²⁶ T-Ports submission, 26 August 2019, p. 2.

¹²⁷ Viterra, *Revised exemption application 2019*, 7 February 2020, p. 21.

¹²⁸ *Ibid*, p. 22.

¹²⁹ *Ibid*, p. 23.

¹³⁰ PGA submission, 3 September 2019, p. 1.

¹³¹ *Ibid*, p. 2.

¹³² SAFC submission, 6 September 2019, p 1.

*S AFC supports V iterra’s statements in regards to its legitimate interests, noting that in many cases there are also customer interests – i.e. flexibility in Port Loading Protocols to maximise vessel loading opportunities and overall loading capacity. We note that all six ports are multi-grain and/or multi-commodity facilities, and that the code’s requirement for wheat impact on the loading of other commodities which is an unintended consequence.*¹³³

Gypsum Resources Australia submit:

*GRA seeks an efficient ship loading operation at Thevenard. V iterra’s ability to be flexible and efficient... is apparently compromised by their required compliance with the Code. This is causing the majority users of the port significant inefficiency and cost.*¹³⁴

Cargill submit:

*As the dominant service provider, and even though non-exempt, V iterra is currently afforded adequate flexibility and opportunity in how it provides services under the Code...The continuing application of the full Code may create incentives for V iterra to make efficient investments in its port terminal facilities, in order to compete with other service providers (to the extent they provide any competitive tension), at the ports, or in related markets.*¹³⁵

Grain Growers submit:

The Code plays an important role in encouraging competition at all grain ports across Australia and is imperative for the export-oriented Australian grains sector...

*...Should an application for exemption be granted GrainGrowers believes applicants should provide evidence that the Code and requirements associated with Parts 3 to 6 are placing an unfair burden upon the enterprises’ ability to operate. If the situation were to arise in which all Port Terminal Service Providers (PTSP) were granted exemptions due to the hindrances of needing to comply with Parts 3 to 6 of the Code, GrainGrowers would question the effectiveness of the Code.*¹³⁶

*While there is a dominant PTSP, and even more so a vertically integrated PTSP, the current levels of regulation must be at least maintained, and definitely not reduced.*¹³⁷

GPA submit:

The V iterra submission goes into considerable detail regarding their concerns that there is a perceived lack of fairness in being the only ‘bulk handler’ still subject to the full Port Code at all their port facilities. GPA would therefore propose that all current exemptions be reviewed in light of the findings of the Port Code review 2018.

Although persuasively written V iterra does not provide substantive evidence in support of how the requirement to meet the non-discrimination requirements, dispute resolution for negotiations with access seekers and ACCC approval of capacity allocation systems is having an impact on their legitimate business interests...

...V iterra has not provided publicly available evidence or substantive argument to support how exemption from those clauses of the code would improve operations. This includes how competition or the likelihood that exporters would have fairer and more transparent

¹³³ Ibid, pp. 1-2.

¹³⁴ Gypsum Resources Australia submission, 5 September 2019, p. 2.

¹³⁵ Cargill submission, 6 September 2019, pp. 2-3.

¹³⁶ GrainGrowers, 26 September 2019, p. 1.

¹³⁷ Ibid, p. 3.

access to port terminal services. The submissions provided by Viterra does not include substantive argument for how an exemption would promote more economically efficient operations and use of their port terminals.¹³⁸

T-Ports submit:

*It is accepted that compliance with Parts 3 to 6 of the code would incur costs for the service provider. However, it must be recognised that Viterra is a related entity to Glencore Agriculture Pty Ltd (Glencore), the largest grain exporter from SA in 2017-18. The interests of all other exporters in getting fair and reasonable access depends upon the provisions of Part 3 to 6 to provide information to other exporters and regulate Viterra's ability to make changes and variations without due notice. Whilst there may be occasions where increased flexibility may be utilised to deliver benefit to Viterra's customers, there would be an increased and un-regulated opportunity for Viterra to manage shipping stems and loading to favour selected customers (including Glencore).*¹³⁹

*There is no regulation of the other parts of the supply chain other than the ports services. The provisions of Part 3 to 6, whilst only regulating a small part of the entire supply chain, are currently the only means to regulate Viterra's ability to make changes and variations that may benefit selected customers, and should not be reduced.*¹⁴⁰

GPSA submit:

*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.*¹⁴¹

*... 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.*¹⁴²

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...

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

1. in the absence of the full application of the Code ...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...*¹⁴³

¹³⁸ GPA submission, 5 September 2019, p. 2.

¹³⁹ T-Ports submission, 26 August 2019, p. 2.

¹⁴⁰ Ibid, p. 2.

¹⁴¹ GPSA submission, 27 September 2019, p. 3.

¹⁴² Ibid, p. 4.

¹⁴³ Ibid, pp. 4-5.

...An assessment of the public interest is critical to the determination of this application...¹⁴⁴

... 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.¹⁴⁵

Viterra submit:

Parts 3 to 6 of the Code are onerous and are a significant cost to any port terminal operator that has to comply with them. 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. In addition, costs are incurred to develop systems, processes and expertise that are necessary to ensure compliance with regulation. These regulatory requirements have also impeded the availability of key personnel during crucial operational times.¹⁴⁶

Parts 3 to 6 of the Code substantially reduce the flexibility of a non-exempt port terminal operator as it cannot quickly and readily respond to changing circumstances or exporter requests in regard to the allocation of capacity. These costs and limitations are more acute today than when the Code was first introduced due to its unequal application.¹⁴⁷

...the global market for the supply of grain is highly competitive and the South Australian bulk grain industry is a price taker within this market.

Within this context, Viterra is restricted in its operations due to the inflexibility imposed on it by Parts 3 to 6 of the Code. This is a significant disadvantage for the South Australian industry, including growers, as it makes exporting grain from South Australia less attractive in circumstances where no other port terminal operators globally are subject to the degree of regulation imposed by the Code (and the vast majority of port terminals in Australia are also exempt).

Within South Australia, competition from alternative supply chains has also increased significantly since the introduction of the Code.¹⁴⁸

...GPSA submits that Parts 3 to 6 of the Code should continue to apply to Viterra and that the issue of inequality should be addressed by all port terminals in Australia being subject to increased regulation. Given the findings in the CRA report – and the previous finding by the Productivity Commission about the limited benefits and substantial costs of regulation – this submission... is simply not supported by any evidence or meaningful analysis of the facts and industry environment.¹⁴⁹

However, as clearly demonstrated by the CRA Report, Viterra's port terminals are not monopoly assets. Contrary to the submissions of Grain Growers, the structure of the grain industry does not "foster a potentially anticompetitive market environment", and, despite Cargill's and T-Port's suggestions to the contrary, Viterra is subject to significant competitive constraint from port terminal operators around the world, and more locally,

¹⁴⁴ Ibid, p. 5.

¹⁴⁵ Ibid, p. 7.

¹⁴⁶ Viterra, Revised exemption application 2019, 7 February 2020, p. 21.

¹⁴⁷ Ibid, p. 21.

¹⁴⁸ Ibid, p. 2.

¹⁴⁹ Viterra, Exemption application 2019 - supplementary submission, 11 November 2019, p. 5.

from within South Australia. Cargill's activities in South Australia themselves provide an example to highlight this competition at work...

...as demonstrated in the CRA Report, Viterra does not have any incentive to "reduce output ... or charge monopoly prices, to the detriment of users and the economy as a whole"...Viterra has an incentive to maximise throughput at its port terminals, and any attempt to deny or reduce access would be self-defeating as the costs would outweigh any benefits.

As further demonstrated by the ESCOSA Report, Viterra's prices for port terminal services are not excessive and do not reflect monopoly prices. In addition, Viterra has not increased these fees relative to other port terminals in Australia.¹⁵⁰

CRA submits:

...(the "Code") and the ACCC's oversight of Viterra's capacity allocation system (as set out in its Port Loading Protocols) harms producers, exporters and Viterra by limiting Viterra's ability to allocate and price capacity at export terminals efficiently. Capacity allocation protocols used by exempt terminals, which are not subject to regulatory review and are therefore guided by market forces, typically feature longer-term capacity commitments by terminals and exporters, and more flexible terms, including pricing terms. We expect that Viterra would shift towards more commercially flexible allocation mechanisms such as those used at exempt terminals if its own terminals were not constrained by ACCC oversight.

This would be likely to result in capacity commitments of longer duration and possibly less capacity allocated to short term capacity ("STC")—thereby incentivizing efficient investment and planning by both Viterra and exporters, and more efficient use of terminal capacity—and more timely adaptations to changing market conditions and exporter requirements. This would result in the use of more efficient pricing structures, which would reduce exporters' costs and facilitate increased sales in export markets, including the development of niche demand for specialty grains. To maximize efficiency and benefit producers, Viterra and exporters need the flexibility to adapt to changes in market conditions without the delays and limitations caused by regulatory oversight.

Since grain port terminals in South Australia are competitive, regulatory oversight is unnecessary and therefore imposes costs without providing off-setting benefits.

When exercising its oversight over Viterra's capacity allocation protocols, the ACCC has placed undue emphasis on 'fair' or 'open' access to terminal capacity for smaller exporters and potential entrants into the exporting business.

This harms producers and provides artificial (or inefficient) benefits only to smaller exporters who obtain access to Viterra's terminals on terms, and for capacity allocations, that they would not obtain in a competitive allocation process. The result has been the fragmentation of the exporting sector in South Australia, which has seen a disproportionate amount of capacity reserved for smaller exporters and potential entrants.

The costs of export sector fragmentation to the grain industry—in addition to the costs resulting from limiting contract duration and flexibility—include the loss of economies of scale and scope that would otherwise be achievable by successful exporters...

...Competition regulation should not be used to protect smaller individual exporters regardless of whether they are efficient. The artificial support of inefficient exporters harms grain producers by preventing efficient contracting and the efficient configuration of the

¹⁵⁰ Ibid, pp. 5-6.

industry. It is also unnecessary, as smaller exporters will survive and flourish in an unregulated market if they are efficient and innovative.

*The costs of ACCC oversight, in terms of inefficient capacity allocation practices and the fragmentation of the exporting sector, are ultimately borne by producers. The benefits of exemption will therefore ultimately flow to producers in South Australia.*¹⁵¹

¹⁵¹ CRA, Port Terminal Report for Viterro, pp. 1-2.

Appendix C: Additional materials submitted by Viterra

After releasing the initial issues paper (August 2019) the ACCC received a range of further information from Viterra, largely in response to information requests and ongoing discussions with/from the ACCC. Each document is briefly described below in table C.1.

These materials are available on the [ACCC website](#).

Table C.1: Additional materials submitted by Viterra

Document	Date received	Summary
Viterra exemption application 2019 – Supplementary submission	11/11/19	Briefly discusses the CRA report; and Viterra’s response to stakeholder submissions
CRA – Port Terminal Report for Viterra	11/11/19	Uses an economic model which contends that Viterra has no incentive to deny access to third party exporters who use its port terminal facilities Discusses a number of ‘likely changes’ Viterra would make to its Port Loading Protocols in the event of an exemption
Viterra – Response to 14/11/19 information request – Questions 1 to 8 – Port terminal facility features, capacity and storage & handling	13/12/19	Attachment 1 sets out several key features of Viterra’s port terminals, including port storage and rail/road receipt capabilities. Attachment 2 sets out Viterra’s published available capacity estimates on a semi-monthly basis between the 2013-14 and 2019-20 seasons. Attachment 4 provides a map of the location of each of Viterra’s upcountry storage facilities used in the 2018-19 season.
Viterra – Response to 14/11/19 information request – Question 9 – Catchment zones	13/1/20	Provides Viterra’s views on the movement of grain within South Australia, and the factors and extent to which grain will move across ‘traditional’ boundaries.
Viterra – Response to 23/1/20 information request	7/2/20	Discusses the corrections made in Viterra’s revised exemption application and stakeholder views regarding catchment zones.
CRA – Supplementary Port Terminal Report for Viterra	7/2/20	This supplementary report discusses a number of the assumptions used in the initial CRA report, and was submitted in response to discussions between the ACCC and Viterra about the initial CRA report
Viterra revised exemption application 2019 – updated February 2020	7/2/20	The revised report makes corrections to: <ul style="list-style-type: none"> • capacity estimates at each of Viterra’s port terminals • charts which contained the wrong T-Ports capacity figure. <p>No other changes were made to Viterra’s exemption application.</p>

Document	Date received	Summary
Viterra – Further submission on exemption application – Public version	12/3/20	This submission provides information on: <ul style="list-style-type: none"> • the indirect costs of regulation • how Viterra has responded to the increased competition in SA; and • the recieval of grain at port terminals