Final Determinations

Viterra Operations Pty Ltd

Exemption assessments of port terminal services provided at the following port terminal facilities:

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

27 April 2021

Contents

Executive Summary

Under subclause 5(2) of the *Port Terminal Access (Bulk Wheat) Code of Conduct* (the Code), the Australian Competition and Consumer Commission (ACCC) has determined Viterra Operations Pty Ltd (Viterra) to be an exempt service provider of port terminal services provided by means of its port terminal facilities at:

- Port Adelaide Inner Harbour (IHB); and
- Port Adelaide Outer Harbor (OHB).

As a result of these exemptions Viterra will be subject to a lower level of regulation with respect to its Port Adelaide IHB and OHB facilities, as Parts 3 to 6 of the Code will not apply to Viterra in relation to port terminal services provided at these facilities.

The ACCC has also determined Viterra not to be an exempt service provider of port terminal services provided by means of its port terminal facilities at:

- Wallaroo; and
- Port Giles.

Viterra will remain subject to Parts 3 to 6 of the Code in relation to its Wallaroo and Port Giles facilities.

These Final Determinations are consistent with the decisions proposed in relation to each of these 4 facilities in the ACCC's Draft Determinations, released on 6 October 2020.

In making its Final Determinations the ACCC has:

- considered each of Viterra's port terminal facilities individually; and
- carefully considered the matters listed at subclause 5(3) of the Code.

A summary of the ACCC's views in relation to each of the facilities referred to above is set out below.

Port Adelaide IHB

The ACCC considers that:

- Viterra's Port Adelaide IHB facility faces sufficient competitive constraint from the combination of alternate port terminal service providers (PTSPs), domestic markets, the Port Adelaide container market and Victorian markets (including domestic, container and PTSP markets) to provide an incentive for Viterra to provide fair and transparent access to third party exporters.
- Determining Viterra to be an exempt service provider in relation to its Port Adelaide IHB facility will not be detrimental to competition in bulk grain port terminal services markets, and is unlikely to be detrimental to competition in upcountry grain storage and handling markets.
- Determining Viterra to be an exempt service provider in relation to its Port Adelaide IHB facility will allow Viterra to provide more flexible services for its customers, as well as reducing regulatory burden and promote the efficient operation of this facility.
- The potential for an exemption to be revoked if the reasons for granting the exemption no longer apply is relevant to and is a factor that provides some level of support for determining Viterra to be an exempt service provider in relation to its Port Adelaide IHB facility.

Port Adelaide OHB

The ACCC considers that:

- On balance Viterra's Port Adelaide OHB facility faces sufficient competitive constraint from the combination of alternate PTSPs, domestic markets, the Port Adelaide container market and Victorian markets (including domestic, container and PTSP markets) to provide an incentive for Viterra to provide fair and transparent access to third party exporters.
- On balance determining Viterra to be an exempt service provider in relation to its Port Adelaide OHB facility will not be detrimental to competition in bulk grain port terminal services markets, and is unlikely to be detrimental to competition in upcountry grain storage and handling markets.
- Determining Viterra to be an exempt service provider in relation to its Port Adelaide OHB facility will allow Viterra to provide more flexible services for its customers, as well as reduce regulatory burden and promote the efficient operation of this facility.
- The potential for an exemption to be revoked if the reasons for granting the exemption no longer apply is relevant to and is a factor that provides some level of support for determining Viterra to be an exempt service provider in relation to its Port Adelaide OHB facility.

Wallaroo

The ACCC considers that:

- Viterra's Wallaroo facility currently faces limited competition from alternate PTSPs, and domestic and container markets, for the majority of grain that is likely to be exported from this facility.
- Determining Viterra to be an exempt service provider in relation to its Wallaroo facility would likely be detrimental to the likelihood that exporters are able to gain fair and transparent access to the facility, and may be detrimental to competition in upstream and downstream markets.

Port Giles

The ACCC considers that:

- Viterra's Port Giles facility only faces limited competition from alternate PTSPs at this time. In addition domestic and Port Adelaide container markets place limited competitive constraint on Viterra's Port Giles facility.
- Determining Viterra to be an exempt service provider in relation to its Port Giles facility would likely be detrimental to the likelihood that exporters are able to gain fair and transparent access to the facility, and to competition in upstream and downstream markets.

The ACCC's views are based on analysis of the capacity constraints and utilisation at Viterra's port terminal facilities, as well as the extent to which they compete with other port terminal facilities. The ACCC has also considered the competitive constraint imposed on Viterra's facilities by container exports and domestic markets.

In forming its views the ACCC notes that the level of competition in the SA market has increased in recent seasons, and that there is an inherent level of uncertainty associated with a dynamic environment. The decisions made in relation to Viterra's Port Adelaide IHB, Port Adelaide OHB, Port Giles and Wallaroo are based on the information available to the ACCC at the time of making its Final Determinations.

The ACCC notes T-Ports' proposed facility at Wallaroo has the potential to introduce additional competitive constraint on the relevant Viterra facilities. The ACCC will continue to closely monitor developments in the SA market.[1]

The ACCC's full assessment of the matters listed at subclause 5(3) of the Code is set out in chapter 5 of this document.

The ACCC has not yet made its Final Determinations in relation to Viterra's applications for exemption at its Port Lincoln and Thevenard facilities. Given recent changes in the export market on the Eyre Peninsula, the ACCC considers the peak period of the 2020-21 shipping season to be of particular relevance to its assessment of Viterra's exemption applications in relation to these facilities. The ACCC will make Final Determinations in relation to Viterra's Port Lincoln and Thevenard facilities following consideration of this data. This is discussed further in section 1.4 of this document.

[1] An exemption assessment can be initiated by either a port terminal service provider or the ACCC. See: https://www.accc.gov.au/system/files/Guidelines%20on%20the%20ACCC%E2%80%99s%20process%20for%20making%20and%20revoking%20exemption%20determinations%20-%20October%202014.pdf

1. Introduction

The Code was prescribed by the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* under section 51AE of the *Competition and Consumer Act 2010* (Cth) (the Act). The Code commenced on 30 September 2014 and regulates the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

The Code provides that the ACCC or the Minister for Agriculture (the Minister)[2] 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 remain subject to only Parts 1 and 2 of the Code.

1.1. Exempt service providers

PTSPs that are not exempt 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 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.

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

Part 2 of the Code requires a PTSP to:

- deal with exporters in good faith;
- publish and make available a port loading statement;
- publish policies and procedures for managing demand for its port terminal services; and
- make current standard terms and reference prices for each port terminal facility that it owns or operates publicly available on its website.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of itself or an associated entity or hinder an exporter's access to port terminal services;
- to enter into an access agreement or negotiate the terms of an access agreement with an exporter to provide services if an exporter has applied to enter into an access agreement and certain criteria are satisfied;
- to deal with disputes during negotiation via specified dispute resolution processes including mediation and arbitration; and
- to include a dispute resolution mechanism in its standard terms and to vary standard terms in accordance with a prescribed procedure.

Part 4 of the Code requires a PTSP to have, publish and comply with a port loading protocol (PLP), which includes a capacity allocation system (and provides for the circumstances in which the capacity allocation system must be approved by the ACCC).

[2] The Code specifically refers to '…The Minister administering section 1 of the *Farm Household Support Act 2014*…'.

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

Part 6 of the Code requires a PTSP to retain records such as access agreements and variations to those agreements.

Exempt service providers are still required to comply with the general competition law provisions in Part IV of the Act.

1.2. Viterra's exemption applications

Currently, Parts 1 to 6 of the Code apply to Viterra's provision of port terminal services at the following bulk grain port terminal facilities:

- Port Adelaide IHB;
- Port Adelaide OHB;
- Port Lincoln;
- Wallaroo;
- Port Giles; and
- Thevenard.

On 2 July 2019 Viterra submitted applications to the ACCC seeking to be an exempt service provider of port terminal services in relation to all 6 of its South Australian (SA) port terminal facilities.

Viterra also submitted a range of substantial additional materials supporting its applications for exemption over the course of the ACCC's assessment. This included additional information on the characteristics and capacity of its port terminals, catchment areas, operational considerations, and revised exemption applications. Viterra also provided the ACCC with a number of reports from its economic consultant Charles River Associates (CRA). The ACCC also sought further information from Viterra to assist with its analysis and met with Viterra on a number of occasions (as well as meeting with CRA).

As outlined below in section 1.3, Viterra provided additional submissions in response to the Draft Determinations, including a submission from CRA.

Further details of Viterra's exemption applications and related materials are set out as relevant throughout this document.

The materials submitted by Viterra in support of its exemption applications are available on the ACCC website[3].

1.3. Public consultation undertaken

The ACCC has undertaken extensive public consultation in relation to Viterra's applications for exemption from Parts 3 to 6 of the Code. The ACCC has given time throughout the assessment process to enable both Viterra and stakeholders to consider and respond to detailed and extensive consultation materials. Additional time was provided to stakeholders to make submissions due to seasonal demands, as well as the particular challenges of COVID-19. At its request, Viterra was also provided additional time to respond to information

[3] See: https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/exemption-application-issues-papers

requests and make submissions responding to stakeholder submissions on a number of occasions.

As part of this process the ACCC released the following documents for public consultation:

- an Issues Paper in August 2019 (following Viterra's applications in July 2019);
- a Supplementary Issues Paper in May 2020 (to provide stakeholders the opportunity to respond to additional information and various developments in the market); and
- Draft Determinations for all 6 of Viterra's facilities in October 2020.

The ACCC would like to thank all parties for their involvement over the course of its exemption assessment process. Stakeholder submissions have been carefully considered and referred to in relevant parts of the Final Determinations for IHB, OHB, Port Giles and Wallaroo.

1.3.1. Issues Paper

The ACCC released an Issues Paper on 9 August 2019 seeking submissions on Viterra's exemption applications.

The ACCC received 8 public submissions from stakeholders (other than Viterra) in response to the Issues Paper:

- Cargill;
- GrainGrowers;
- Grain Producers Australia (GPA);
- Grain Producers South Australia (GPSA);
- Gypsum Resources Australia Pty Limited (GRA);
- Pastoralists and Graziers Association of WA (PGA of WA);
- South Australian Freight Council (SAFC); and
- T-Ports.

1.3.2. Supplementary Issues Paper

The ACCC released a Supplementary Issues Paper on 25 May 2020 seeking submissions on a range of new information that became available to the ACCC following stakeholder submissions to the August 2019 Issues Paper.

Specifically:

- Viterra provided a number of new documents, updates to previously submitted information and responses relating to ACCC information requests and ongoing discussions. These included:

- Revised exemption applications, provided on 7 February 2020, containing corrected capacity figures for all 6 of Viterra's port terminal facilities (all other elements of the exemption applications remained the same).
- Two public consultant reports prepared by Viterra's economic consultant CRA on 11 November 2019 and 7 February 2020. The reports included economic modelling which considered whether Viterra has an economic incentive to deny third party exporters' access to its facilities.
- Two supplementary submissions, one in response to stakeholder submissions regarding the ACCC's Issues Paper, and the other in response to ongoing discussions with ACCC staff regarding the indirect costs of regulation. These submissions were provided on 11 November 2019 and 12 March 2020, respectively.
- Responses to ACCC information requests on features of Viterra's port terminal facilities (such as road and rail receival capabilities), port terminal capacity and catchment areas. This information was received in three tranches between December 2019 and February 2020.

- A number of port developments in markets of potential relevance to the ACCC's exemption assessments also occurred since the Issues Paper consultation period which are relevant to the ACCC's Final Determinations. These included:
  - T-Ports' Lucky Bay port terminal facility entering the PTSP market for bulk grain in March 2020;
  - ADM Trading Australia (ADM) entering the PTSP market for bulk grain at Port Pirie in December 2020;[4]
  - Cargill Australia Limited (Cargill) entering the PTSP market for bulk grain at Port Adelaide Inner Harbour in January 2021; and
  - LINX Cargo Care Group (LINX) exiting the PTSP market for bulk grain at Port Adelaide Inner Harbour in April 2020.
- The completion of another production season also provided further relevant market data and industry observations, which were considered in the ACCC's Bulk grain ports monitoring report 2018-2019 (published in December 2019) prior to the release of the Draft Determinations.

The ACCC therefore released a Supplementary Issues Paper on 25 May 2020 to allow stakeholders' to respond to these developments.

The ACCC received responses from the following parties in response to the Supplementary Issues Paper:

- Mr Geoff Ryan, Viterra Strategic Site Committee Chair for Wirrulla/Nunjikompita;
- SAFC; and
- T-Ports.

[4] ADM began facilitating coastal shipments at Port Pirie in November 2019.

Viterra also provided a further submission addressing the Supplementary Issues Paper and the submissions from stakeholders.

1.3.3. Draft Determinations

The ACCC released Draft Determinations for all 6 of Viterra's port terminal facilities on 6 October 2020. The Draft Determinations proposed to make Viterra an exempt provider of port terminal services in relation to its IHB and OHB port terminal facilities (but not in relation to its Port Giles, Wallaroo, Port Lincoln and Thevenard facilities).

The ACCC received 7 public submissions from stakeholders (as well as submissions from Viterra and CRA) in response to the Draft Determinations:

- Australian Grain Export (AGE);
- Mr Geoff Ryan;
- GPSA;
- GrainCorp;
- Mr John Hill;
- SAFC; and
- T-Ports.

Viterra subsequently provided 2 submissions to the ACCC (including one from CRA). Viterra's submissions responded to both the Draft Determinations and stakeholder submissions to the Draft Determinations.

All public materials received from Viterra and stakeholders are available on the ACCC's website[5].

1.4. Separation of exemption assessments

The ACCC has not made its Final Determinations in relation to Viterra's applications for exemption at its Port Lincoln and Thevenard facilities in this document. Given recent changes in the Eyre Peninsula port terminal services market, the ACCC considers the peak period of the 2020-21 shipping season to be of particular relevance to its assessment of Viterra's exemption applications in relation to these facilities.

The ACCC notes that it considers the Eyre Peninsula and eastern SA predominantly operate as 2 separate and distinct markets, with each being comprised of numerous catchment areas (see section 4.2). Consequently, the ACCC does not consider recent developments on the Eyre Peninsula to be of direct relevance to its assessment of Viterra's IHB, OHB, Port Giles and Wallaroo facilities.

As such, the ACCC will make Final Determinations in relation to these facilities following consideration of this data. Separating the Final Determinations will enable the ACCC to:

[5] See: https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment

- make determinations earlier for Viterra's IHB, OHB, Port Giles and Wallaroo facilities, which the ACCC considers are not directly affected by the recent changes on the Eyre Peninsula; and

- take into account the emerging information of particular relevance to its assessment of Viterra's applications for exemption in relation to its Port Lincoln and Thevenard facilities.

The ACCC anticipates it will release its Final Determinations for Viterra's Port Lincoln and Thevenard facilities in July 2021.

1.5. Outline of this document

The Final Determinations document is set out as below:

- Chapter 2 outlines stakeholders' responses to the ACCC's Draft Determinations on Viterra's exemption applications.

- Chapter 3 considers the characteristics of Viterra's respective port terminal facilities, including their capacity and the demand for their services.

    - The analysis of capacity and demand indicates whether there is spare capacity, or capacity constraints, at the port terminals and to what extent this would impact a PTSP's incentive to provide fair and transparent access if Parts 3 to 6 of the Code did not apply.

- Chapter 4 considers the level of competition in upcountry storage and handling markets. This chapter also examines the degree of competitive constraint imposed by container exports and domestic demand.

    - The analysis of these issues informs the ACCC of whether a port terminal facility faces a sufficient degree of competitive constraint to promote fair and transparent access to port terminal services should Parts 3 to 6 of the Code not apply in respect of that facility.

- Chapter 5 uses the analysis and findings from chapters 2, 3 and 4 to set out the ACCC's assessment of the matters listed at subclause 5(3) of the Code in relation to each of Viterra's IHB, OHB, Wallaroo, and Port Giles facilities.

- Chapter 6 sets out the ACCC's Final Determinations in regard to Viterra's IHB, OHB, Wallaroo, and Port Giles facilities.

Further information

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1.6. Terminology used in the Final Determinations

For the readers' convenience a glossary of key acronyms and terms used in the Final Determinations has been included at section 1.7.

As noted, the Code's purpose is to regulate the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services. The ACCC notes that the terminology used by the bulk grain industry does not typically distinguish between bulk wheat and other bulk grains. For example, available capacity at a port terminal facility is not typically recorded or referred to with respect to a particular type of grain and a bulk grain port terminal facility (or a bulk grain loader) is rarely, if ever, exclusively used in relation to bulk wheat (though is almost always capable of handling bulk wheat).

The ACCC notes that, in making submissions to exemption application assessments, stakeholders have therefore typically taken the approach of referring to 'grain' rather than 'wheat'. Consistent with this, and for readability, the ACCC has also used the term 'grain'. Where this has occurred in the context of the ACCC's assessment of the matters referred to in clause 5 of the Code, it should be taken to relate to 'bulk wheat' for the purposes of the Code.[6]

1.7. Glossary/Definitions

ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ACCC	Australian Competition and Consumer Commission
ACF	Australian Crop Forecasters
ADM	ADM Trading Australia Pty Ltd
AGE	Australian Grain Export Pty Ltd
AEGIC	Australian Export Grains Innovation Centre
Berth	A location at a port or harbour used for mooring vessels
Bulk grain exports	Grain loaded onto a ship for export. Does not include grain to be exported in a bag or container that is not capable of holding more than 50 tonnes of grain
Bulk shipments	Grain loaded onto a ship for either export or coastal shipment
Cargill	Cargill Australia Limited (a subsidiary of multinational agribusiness Cargill Inc.)
CBH	Co-operative Bulk Handling Ltd
Capacity	The amount of grain in tonnes that can be loaded onto a

[6] The ACCC notes that 65% of all bulk grain exported from SA between the 2011-12 and 2019-20 seasons was wheat.

	ship during a shipping window, as determined by the port terminal service provider that owns or operates the port terminal facility[7]
CCA	*Competition and Consumer Act 2010* (Cth)
Coastal shipments	Shipments of bulk grain made between Australian ports
CRA	Charles River Associates
Department	Department of Agriculture Water, and the Environment
East coast	NSW, Queensland and/or Victoria
Eastern South Australia	The portion of South Australia to the east of the Spencer Gulf
ESCOSA	Essential Services Commission of South Australia
Exporter	An entity seeking access to, or using, port terminal services for the purpose of exporting bulk grain
Glencore	Glencore Agriculture Pty Ltd (associated entity to Viterra Operations Pty Ltd)
GPA	Grain Producers Australia
GPSA	Grain Producers South Australia
GRA	Gypsum Resources Australia Pty. Limited
GrainCorp	GrainCorp Operations Limited
Grain usage	Refers to how a state's grain production supplies various markets. Grain can be consumed domestically, exported in bulk or by container, or transferred to other states
GTA	Grain Trade Australia Ltd
GWA	Genesee and Wyoming Australia Pty Ltd.
IHB	Viterra's Inner Harbour Port terminal facility located at Port Adelaide
Just-In-Time	A process for managing inventory where a commodity (such as wheat) is loaded onto a vessel as it is delivered to the port terminal facility

[7] The definitions of specific types of capacity and allocation process terminology used by Viterra and referred to in this document are defined in Viterra's protocols (see: http://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf for further information).

LINX	LINX Cargo Care Group
Long-term agreement	An agreement entered into for long-term capacity between a port terminal service provider and an exporter
Mobile ship loader	A ship loader which is able to be transported between port terminals and can be used on general purpose wharves to load bulk grain (or other commodities)
NSW	New South Wales
OHB	Viterra's Outer Harbor port terminal facility located at Port Adelaide
Panamax	A class of large (high-capacity) vessel that is typically unable to load grain at shallow (i.e. non-deep water) port terminal facilities
Peak period	The period where demand for bulk grain shipment port terminal services is highest. In SA this is typically from 1 December until 31 May
PGA of WA	Pastoralists and Graziers Association of Western Australia
PIRSA	Department of Primary Industries and Regions in South Australia
PLP	A Port Loading Protocol is a statement of a port terminal service provider that sets out the port terminal service provider's policies and procedures for managing demand for its port terminal services
Port terminal facility	A ship loader that is at a port and capable of handling bulk wheat, including an intake/receival facility, a grain storage facility, a weighing facility and a shipping belt
PTSP	Port terminal service provider – the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service
SA	South Australia
SAFC	South Australian Freight Council
Semaphore	Semaphore Container Services Pty Ltd
Shipping year	The period from 1 October to 30 September the following year

Supply chain	A network between companies and their suppliers to produce and distribute grain. This includes upcountry grain storage and handling services, transportation of grain and port terminal services
The Code	The *Port Terminal Access (Bulk Wheat) Code of Conduct*
T-Ports	T-Ports Pty Ltd
Transhipment Vessel	A shallow draft vessel used to move grain from a port terminal facility to an ocean going vessel stationed offshore
Vertically integrated	A company that operates at more than one stage of the supply chain
Viterra	Viterra Operations Pty Ltd (associated entity to Glencore Agriculture Pty Ltd)

2. Industry response to the ACCC's Draft Determinations

On 6 October 2020 the ACCC released Draft Determinations in response to Viterra's exemption applications. The Draft Determinations proposed to:

- make Viterra an exempt provider of port terminal services provided by means of its port terminal facilities at Port Adelaide IHB and OHB; and
- not make Viterra an exempt provider of port terminal services provided by means of its port terminal facilities at Port Giles, Port Lincoln, Thevenard and Wallaroo.

Viterra provided 2 submissions, including a report from its economic consultant CRA, in response to the ACCC's Draft Determinations, re-affirming its view that all of Viterra's port terminal facilities should be exempted from Parts 3 to 6 of the Code.

A number of interested stakeholders also responded to the ACCC's Draft Determinations, largely focussing on the Port Adelaide market and the exemptions proposed in relation to Viterra's IHB and OHB facilities. Broadly, stakeholders took one of the three following viewpoints:

1) the ACCC should not grant exemptions in relation to any of Viterra's port terminals;
2) the ACCC could/should grant an exemption in relation to Viterra's Port Adelaide IHB facility only (and not in relation to OHB); and
3) the ACCC should grant exemptions in relation to Viterra's Port Adelaide IHB and OHB facilities (at a minimum), or in relation to all of Viterra's facilities.

This section summarises a number of the key issues raised by Viterra, CRA and stakeholders which the ACCC has carefully considered when making its Final Determinations, including Viterra's response to stakeholder submissions.

In addition, the ACCC has also briefly addressed a number of the issues raised by Viterra and CRA at a high level in this section (see the 'ACCC views' subsections). Other issues raised by Viterra and CRA have been addressed as relevant throughout the document.

The ACCC notes that stakeholders presented a range of views on a number of issues. While, the ACCC has carefully considered submissions from stakeholders it has not attempted to summarize its responses in this chapter. Detailed consideration of the issues raised by stakeholders and related ACCC views are set out in the relevant sections of this document.

Viterra's, CRA's and stakeholder's responses to the Draft Determinations are available on the ACCC website.[8]

Some aspects of the submissions provided by Viterra, CRA and stakeholders relate specifically to Viterra's Port Lincoln and Thevenard facilities. As set out in section 1.4, the ACCC will make its Final Determinations in relation to Port Lincoln and Thevenard separately (following consideration of the 2020-21 peak period shipping data). As such the ACCC has not listed or commented on issues that specifically relate to these 2 port terminal facilities (except where they are also relate to other facilities).

[8] Submissions can be found at: https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/draft-determinations.

2.1 Summary of ACCC views on Viterra and CRA's responses

Both Viterra and CRA contend that Viterra should be exempted from Parts 3 to 6 of the Code at all its port terminal facilities.

2.1.1 Views on Viterra's response

Viterra's level of market power and incentives to exercise it

Viterra submitted that it is subject to a high level of competition at each of its 6 port terminal facilities and has strong incentives to provide fair and transparent access. More specifically, in response to the Draft Determinations Viterra submitted that:

- SA, and therefore Viterra, is a price taker in global markets and Viterra is incentivised to operate an efficient supply chain in order to be able to compete more effectively in global markets. The benefits of this are passed onto other participants in the supply chain. For example:
    - Viterra has reduced its supply chain costs for exporting during peak shipping periods over the past 3 years and has passed on cost reductions in the form of some reduced fees.
    - Viterra has also passed on efficiencies in the form of quality improvements. In particular, Viterra, in the 5 years to June 2019, has invested over $200 million in its port terminal and supply chain infrastructure, enabling export customers to better meet the exacting standards of individual-end customers.
- Viterra has an incentive to provide fair and transparent access to its facilities.
    - In particular, Viterra is incentivised to maximise throughput. Given the high fixed cost structure and variability in grain trading Viterra needs a diversity of customers as its investment would be put at risk if it were to rely on only a small number of exporters.
    - Currently there are 11 exporters using Viterra's port terminal facilities, and, over the past 10 years, each change to Viterra's capacity allocation system has been in response to customer feedback.
    - To Viterra's knowledge no exporter has stopped using port terminals in SA to export grain in recent years due to Viterra's fees or service quality.
- The ACCC made unrealistic adjustments to the assumptions in CRA's model in the Draft Determinations. The CRA report, which uses conservative assumptions in its modelling, showed Viterra has no incentive to deny access to its facilities.
    - Viterra referred to a number of other matters in CRA's submission. These are discussed below.
- ESCOSA (in its 2018 review of the SA supply chain) did not find any evidence of Viterra exercising its market power to the detriment of competition.
- Viterra is subject to a range of competitive constraints at port, including:

- alternate ports (Cargill, Semaphore and T-Ports), which have a combined capacity of 3.09 million tonnes (excluding ADM);[9] [10]
- the ACCC underestimated Viterra's port terminal capacity by not including Viterra's 10% tolerance factor in its calculations, including the tolerance factor further evidences that there is significant excess capacity at Viterra's facilities;
- the SA and east coast domestic grain markets;
- container markets (which are a low cost entry alternative to the bulk market);
- Victorian bulk, container and domestic markets; and
- the credible threat of entrant PTSPs (including the potential return of LINX at Port Adelaide). Barriers to entry are not prohibitive, as indicated by the number of new and planned port terminal developments.

- Viterra is subject to competition in the SA storage and handling market. Specifically:
  - alternate storage capacity in SA represented 41.3% of the 2017-2018 harvest;
  - there are at least 15 alternative upcountry storage providers;
  - there is approximately 1 million tonnes of on farm storage (which represents 9-14% of the average harvest in SA); and
  - there are low barriers to enter the storage market.
- The ACCC's theory of harm regarding how Viterra's upcountry system impacts access to port terminal services is unclear, and the ACCC does not put forward specifics or analysis, supported by cogent evidence, as to how this might occur.
- Viterra is constrained from exercising market power as a number of its port terminals – in particular IHB, Thevenard, and Wallaroo – export a very small proportion of the wheat produced in Australia, and a small proportion of the wheat produced in South Australia.

The ACCC's consideration of the degree to which Viterra is competitively constrained and has incentives to provide fair and transparent access is presented throughout this document. The ACCC's views on each of these competitive aspects are included in chapters 3 and 4 of this document. In particular:

- The impact that the international market imposes upon Viterra's incentives to provide fair and transparent access are presented in section 3.1.6.
- Viterra's capacity utilisation on an annual and peak period basis as well as exporters access to that capacity are set out in section 3.2.
- The level of competitive constraint Viterra faces from competing PTSPs and related markets (container and domestic markets) are discussed in sections 3.1.4 and 4.3 respectively.
- CRA's profit and loss model is discussed at the end of chapter 3.

[9] The ACCC notes that ADM began performing bulk grain export operations at its Port Pirie facility after the release of the Draft Determinations in relation to Viterra's exemption applications (in December 2020). ADM has since applied for exemption from Parts 3 to 6 of the Code in relation to its Port Pire facility. ADM's exemption application was published on the ACCC's website on 3 February 2021. The ACCC notes that, while Viterra's response to the Draft Determinations doesn't account for ADM as a current bulk export competitor, the ACCC has taken into account the competitive constraint ADM's Port Pirie facility may impose upon Viterra's facilities when making its Final Determinations in relation to Viterra's applications for exemption. Exemption applications can be found at https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects

[10] Exemption applications can be found at https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects

- The ACCC's views on the level of competition in upcountry storage and handling markets, and how these markets interact with markets for port terminal services is discussed in section 4.1.

Viterra considers the ACCC adopted an overly protectionist approach to its assessment and has the ability to revoke exemptions if harm arises

Viterra, in response to the Draft Determinations, submitted the ACCC's assessment is based on potential rather than real risks and that the ACCC has the ability to revoke any exemptions provided to Viterra in the event that actual issues arise in the future. Viterra submitted that:

- The ACCC adopted an overly protectionist approach in its assessment, relying on speculative risks to support its position without providing evidence that demonstrates the likelihood of such risks occurring should exemptions be granted. In particular, the ACCC seems to have made little (if any) attempt to weigh the benefits of exemption against the potential costs of exemption and seems intent on protecting small exporters at the expense of overall competition. While protecting smaller exporters (regardless of efficiency) may increase the number of exporters using SA ports, it reduces efficient competition.
- The ACCC can revoke an exemption if speculative risks were to eventuate. The potential for revocation would also provide an incentive for Viterra not to engage in conduct that could result in revocation.
- In relation to exporters' opportunities to obtain access, it is important that fairness is not misinterpreted to mean 'obtaining exactly the same' in relation to opportunities to obtain access.

<u>Submission that the ACCC has adopted an overly protectionist approach</u>

Subclause 5(3) of the Code requires the ACCC to consider numerous market conditions when considering an exemption application. There are a variety of market conditions which can reduce a PTSP's incentive, or ability, to use its market power to the detriment of the competitive process absent the constraint imposed by regulation under Parts 3 to 6 of the Code.

Where a vertically-integrated PTSP is subject to sufficient competition, it may continue to have an incentive to discriminate, or favour, but it will be constrained in its ability to do so (and any negative impacts on exporters and growers will be limited by the opportunity for them to switch to alternate PTSPs). The potential that market power will be exercised to the detriment of competition increases when the constraint imposed by sufficient competition is not present. While appropriate regulation can provide an alternate constraint on the use of market power in such circumstances, underlying incentives are likely to remain. As such a PTSP's conduct while complying with the regulatory obligations of the full Code is unlikely to provide a robust indicator of future conduct once the entity is no longer subject to current regulatory obligations.

The ACCC therefore considers it appropriate to have regard to the current markets, and (in particular) the likely effect of an exemption (e.g. a future market in which the relevant PTSP is subject to a non-discrimination obligation) when assessing the case for exemption.

The ACCC does not consider, as submitted by Viterra, it has taken an overly protectionist approach or relied on speculative risks in undertaking its assessment of Viterra's exemption applications.

The ACCC also recognises it is not possible to ensure particular market outcomes following an exemption decision. However the ACCC has relied on the most contemporaneous information (including that provided by Viterra and stakeholders) to assess the level of competition and incentives Viterra currently faces, and can reasonably be expected to face in the future (including the incentive to provide fair and transparent access to its services). Informed by this analysis the ACCC has balanced the range of matters set out under subclause 5(3) of the Code, including Viterra's legitimate business interests.

Furthermore, the ACCC does not seek to protect smaller exporters at the expense of competition or efficiency, and does not have a view on the optimal size or number of exporters in the SA bulk grain market. The ACCC also acknowledges that exporters' access (whether large or small in scale) must be balanced against a range of other factors, including the public interest in having competition in markets and the legitimate business interests of the PTSP. As noted above, the ACCC's consideration has focussed on the market conditions that support competition and ensure exporters have fair and transparent access to port terminal services. In doing so the ACCC has also had regard to the costs regulation imposes on Viterra as well as other relevant parties (and the other relevant matters under subclause 5(3) of the Code).

The ACCC considers that the promotion of a robust competitive market for the export of bulk wheat is integral to the regulatory framework. The ACCC notes that it is often new entrants and smaller exporters who are best placed and have the greatest incentive to compete vigorously in the market, for example by offering a unique service or lower fee.

The ACCC notes 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'. The ACCC can only achieve this objective if its exemption assessments involve a comprehensive analysis of all criteria required by the Code, including a detailed consideration of the interests of exporters who may require access to the port under consideration.

These matters are discussed in more detail in section 5.1(c).

Viterra's submission that the ACCC must consider the purpose of the Code in conjunction with each of the matters under subclause 5(3) and the Explanatory Statement

Viterra further submitted in relation to the ACCC's approach to assessment that:

> *It is important that in its Final Determination, the ACCC does not seek to protect smaller inefficient competitors at the expense of efficient competition.*[11]

Additionally, Viterra submitted that the purpose of the Code:

> *…must be considered in conjunction with each of the exemption criteria and the Explanatory Statement to the Code, which provides that the objectives of the Code include promoting the operation of an efficient and profitable bulk wheat export industry and reducing unnecessary regulatory burden on port terminal service providers.*[12]

The ACCC notes that the Explanatory Statement to the Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014 states that the objectives of the Code are to:

- promote the operation of an efficient and profitable bulk wheat export industry;
- provide a regulatory framework to ensure all bulk wheat exporters have port terminal access; and

[11] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 5.

[12] Ibid, p. 5.

- reduce unnecessary regulatory burden on port terminal service providers.[13]

The Explanatory Statement outlines the background to the Code's development. The issues which Viterra have raised in relation to the Explanatory Statement have been considered for the purposes of the ACCC's assessment of the exemption applications. The ACCC also notes that an Explanatory Statement may be used to assist in interpreting the Code in the circumstances outlined in section 15AB of the *Acts Interpretation Act 1901* (Cth).[14]

The ACCC notes the Explanatory Statement states that "[O]wners and operators of port terminal facilities control significant bottle-neck infrastructure required for export of bulk wheat" [15] and points to the existence of "…concern within industry over behaviours in the supply chain related to potential abuse of market power and monopolistic behaviour, particularly by port terminal operators with associated wheat export businesses."[16]

While there have been a range of developments in Australia's markets for bulk grain port terminal services (as well as related markets), the ACCC remains concerned that in bulk wheat export markets a vertically integrated PTSP is likely to favour its related entity exporter, absent the presence of sufficient competitive constraint (or appropriate regulation). In such a scenario the prospect of a robust competitive market is stifled and this will likely be reflected in the outcomes for market participants along the supply chain.

The objectives referred to in the Explanatory Statement are consistent with the criteria in subclause 5(3) of the Code and they have been carefully considered by the ACCC in undertaking its assessments. The ACCC has undertaken a thorough and considered analysis of SA's bulk grain port terminal services (and related) markets as part of its assessment of Viterra's exemption applications. In doing so the ACCC has had regard to the purpose set out in clause 2 of the Code, each of the criteria in subclause 5(3) of the Code and has considered contemporaneous information and engaged widely with stakeholders, including through the release of an initial Issues Paper and a Supplementary Issues Paper.

Submission regarding the potential to revoke an exemption

Viterra submitted the possibility of revocation of an exemption provides an incentive for Viterra to not engage in behaviour that could lead to a revocation.[17]

The ACCC has the ability under subclause 5(6) of the Code to review an exemption determination with a view to revoking it in certain circumstances. Similar to the process for granting an exemption, the ACCC may revoke an exemption determination if, after having regard to matters (a) to (j) of subclause 5(3) of the Code, it is satisfied that the reasons for granting the exemption(s) no longer apply.

The ACCC notes that the power to revoke in subclause 5(6) of the Code may be exercised only where the ACCC is satisfied that the reasons for granting an exemption no longer apply. This could, for example, include unforeseen changes in the market, the emergence of information that was not considered as part of the decision making process, or where expected market outcomes did not occur following a decision to exempt (such as exporters subsequently not being able to gain fair and transparent access to port terminal services).

[13] Explanatory statement, Select Legislative Instrument No.136, 2014, *Competition and Consumer Act 2010 Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014,* p. 1.

[14] See, section 15AB of the *Acts Interpretation Act 1901* (Cth). The *Acts Interpretation Act 1901* (Cth) also applies to legislative instruments, notifiable instruments and other instruments made under an Act: see subsection 13(1) of the *Legislation Act 2003* (Cth) and subsection 46(1) of the *Acts Interpretation Act 1901* (Cth).

[15] Ibid, p. 2.

[16] Ibid, p. 2.

[17] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 5.

The ACCC considers its ability to review (and potentially revoke) an exemption to be a relevant factor when deciding whether or not to grant an exemption (including where it considers a decision to be finely balanced). However, the power to revoke is only one factor which is relevant to the ACCC's assessment. In the context of the Code's regulatory scheme, where the default for PTSPs is regulation under Parts 3 to 6, the ACCC needs to carefully consider the matters specifically listed in subclause 5(3) before deciding to exempt. The ACCC's view is that it must be careful not to give potential future revocation (and re-regulation) too much weight where its findings in relation to the subclause 5(3) matters lead to competition and transparency concerns about the possible effects of exemption.

These matters are discussed in more detail in section 5.1(j) where relevant.

Viterra's legitimate business interests

In relation to Viterra's legitimate business interests, Viterra submitted that the ACCC must give sufficient weight to the benefits that Viterra securing greater operational flexibility via an exemption would have both for Viterra and its exporter customers, more specifically:

- The ACCC must give due consideration to Viterra's legitimate business interests (including its interest in securing greater flexibility) and ensure that the importance of these interests are not considered inferior to, or dependent on, other interests that the ACCC is required to consider under subclause 5(3).
- The ACCC must recognise that while non-exempt PTSPs such as Viterra have the ability to secure variations to ACCC-approved capacity allocation systems that would likely result in greater operational flexibilities and efficiencies, securing such variations is highly burdensome and impractical.
- The requirements to seek the ACCC's approval of changes to Viterra's PLPs is highly burdensome and the fact that Viterra has not sought to do this since 2015 does not mean that certain changes would not benefit the efficiency of its operations.

As noted in the Draft Determinations the ACCC acknowledges that:

- The Code imposes a level of regulatory costs and a level of restriction on operational flexibility.
- It is in Viterra's interest (as is the case for all PTSPs) to minimise its regulatory costs and maximise its operational flexibility.
- Exempt service providers will likely have a lower level of Code-related regulatory costs and a higher level of operational flexibility than non-exempt service providers.
- Being granted exemptions would serve Viterra's interests and (where Viterra is subject to sufficient competition and thus has strong incentives to provide fair and transparent access absent the application of Parts 3 to 6 of the Code), the interests of Viterra's exporter customers.

The ACCC also noted in its Draft Determinations that Viterra's legitimate business interests (including its interests in reducing regulatory costs and maximising operational flexibility) are one of a number of interests that the ACCC must consider. The ACCC considers that while a reduction in Viterra's regulatory costs and an increase in its operational flexibility would be in Viterra's interests, these benefits must be balanced against other factors such as the level of competitive constraint faced by Viterra, the public interest in having competition in markets and the interests of exporters who may require access to port terminal services (which the ACCC considers includes an interest in securing fair and transparent access).

In relation to Viterra's concern that the ACCC's Draft Determinations did not give due consideration to Viterra's legitimate business interests, the ACCC's response is that:

- Its Draft Determinations acknowledged the benefits of operational flexibility for a PTSP and exporters, but that the benefits of increased operational flexibility may not flow equally to all exporters where the PTSP is a vertically integrated and not subject to sufficient competition (and may allow the PTSP to more freely preference related exporter interests over third party exporter interests).
- The concurrent presentation of views on related subclause 5(3) criteria (such as Viterra's legitimate business interests and the interests of exporters who may require access to port terminal services) does not (and in this instance did not) preclude their individual consideration.

Viterra's submission outlines its concern that the ACCC's Draft Determinations suggests that, because Viterra has not sought to change its PLPs, this indicates that it does not need to do so and/or that changes could be made easily if sought.[18]

In relation to these concerns about the potential need, benefit and practicality of securing variations to PLPs, the ACCC notes that

- The ACCC's comments regarding the potential for Viterra to apply to make changes to its capacity allocation system were not intended to suggest that Viterra may (or may not) need to vary its current PLPs or whether such changes would (or would not) benefit Viterra. The ACCC considers that the need for such changes, and the benefits that Viterra would derive, are matters for Viterra.
- The only application to vary a capacity allocation system that has been received by the ACCC to date (Viterra, 2015) proposed substantial and fundamental changes to an existing system (i.e. moving from an auction system to long-term agreements of up to 5 years). This application was detailed in nature and elicited strong and divergent views from industry. The ACCC does not expect that future applications to vary would necessarily be as substantial and contentious.

These views are discussed in more detail in section 5.1(a).

SA grain catchment areas

In response to the Draft Determinations Viterra submitted that the ACCC's identified catchment areas are too narrow. Viterra submitted that the narrowest potential catchment areas are:

- the grain growing region on the Eyre Peninsula; and
- the grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide (stretching from Dooen and Werrimull in Victoria to Port Pirie and Melrose in SA).

In response, the ACCC emphasises that it's interest in 'catchment areas', relates to the relevant scope of the geographic market – that is, the geographic area over which PTSPs compete to provide services to grain growers and exporters.

The ACCC's analysis indicates that the relevant geographic markets for grain in SA are narrower and more complex than the 2 catchment areas submitted by Viterra.

In particular, while recognising freight costs are only one factor in where grain will move, the distance grain needs to move to different port terminal facilities appears to be a significant factor when considering which port terminal facilities are potential substitutes for different growing regions.

[18] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 43.

Consideration of freight costs shows that, while some catchment areas overlap in certain areas, significant differences in the expected costs still exist when delivering grain across different port terminals. Specifically, outside of the region of SA served by Port Adelaide's port terminal facilities, many growers or exporters would incur significantly higher freight costs to transport grain to the second-closest port terminal relative to the cost of transporting grain to the closest port terminal facility (likely affecting their willingness to switch ports).

The ACCC therefore does not accept the catchment areas proposed by Viterra (as set out above).

These matters are discussed in more detail in section 4.2.

2.1.2 CRA's submission

CRA contended that all of Viterra's port terminal facilities should be exempted from Parts 3 to 6 of the Code. CRA, in response to the Draft Determinations, submitted that:

- The ACCC's analysis of CRA's profit and loss model is misguided. In particular:
    - CRA's model uses conservative assumptions, specifically the $10 per tonne port terminal margin;
    - the ACCC's modification of the assumptions are unrealistic; and
    - the ACCC's future market scenario is "irrelevant and inappropriate".
- The ACCC does not quantify or provide qualitative estimates on the purported benefits and harms associated with continued regulation, or the likelihood that either of the purported harms or benefits would actually occur.

Additionally, CRA stated there are a number of contradictions and shortcomings in the ACCC's Draft Determinations. Specifically:

- The ACCC's analysis of upcountry competition states Viterra has market power, while separately stating barriers to entry upcountry are low. Furthermore, given there are low barriers to entry it is unclear why Viterra's high upcountry market share is relevant to the analysis of its port terminals.
- It would be misguided to conclude that the objective of promoting competition should simply involve maximising the number of competitors, rather than focusing on efficient competition that reduces costs and maximises benefits to participants throughout the supply chain.

2.1.3 ACCC Response to CRA

Profit and loss model – ACCC response

CRA submitted the ACCC's analysis of the CRA profit and loss model was misguided.[19] However, the ACCC considers that CRA's profit and loss model is based on a number of assumptions which have not been adequately justified, and that the model is highly sensitive to changes in these assumptions.

The ACCC also considers that the model has not considered a number of other relevant factors, including the:

- freight cost of moving grain to alternate port terminal facilities;
- efficiency and service offerings of alternate PTSPs; and

[19] Charles Rivers Associates, *CRA comments on the ACCC's Draft Determinations regarding code exemption for Viterra grain export terminals,* 18 December 2020, p. 5.

- seasonality of demand for export capacity.[20]

Furthermore, it is the ACCC's view that favourable access is a more relevant consideration than the denial of access considered in CRA's model.

Matters relating to CRA's profit and loss model are discussed in greater detail in chapter 3.

The ACCC does not provide estimates on the costs and benefits of exemption – ACCC response

CRA submitted the ACCC does not quantify or provide qualitative estimates on the purported benefits and harms associated with continued regulation, or the likelihood that either of the purported harms or benefits would actually occur.[21]

The ACCC does not consider a detailed analysis of the specific costs and benefits of regulation and/or exemption to be practical or necessary when considering the exemption applications. Relatedly the ACCC does not require PTSPs to submit a detailed cost benefit analysis as part of an exemption application.

While some of the costs associated with compliance with the full Code may be able to be appropriately quantified, other costs (and many of the likely benefits) may be more difficult to quantify, resulting in large uncertainties in this analysis. For example, the full extent of the opportunity cost faced by a PTSP from having to comply with the full Code as well as the potential benefits of an exemption may be unclear and not fully apparent until after an exemption is granted. The benefits of the application of the full Code (or an exemption) to exporters may be similarly unclear.

Furthermore, the ACCC considers it has not been provided with appropriate information to perform a cost-benefit analysis that is likely to provide an accurate representation of the complete costs and benefits of regulation or exemption under the Code. Rather, the ACCC has made its assessment by considering the matters specified under subclause 5(3) of the Code and the potential for regulatory costs to be reduced where a sufficient level of competition exists.

Barriers to entry upcountry and its relevance to competition at port – ACCC response

CRA submitted that given there are low barriers to entry in the upcountry market it is unclear why Viterra's high upcountry market share is relevant to the analysis of its port terminals.[22]

The ACCC acknowledges CRA's (and Viterra's) comments that the capital costs to enter into the upcountry market are relatively low (particularly given many exporters are large multinational companies). However, while the ACCC considers there are low capital costs to small scale entry into the upcountry market, new entrants likely need to be able to secure access to markets, including the export market, to justify the initial and ongoing costs of entry (particularly as the scale of entry increases). In particular the export market represents 78% of the SA market (due to the typically small container and domestic markets available to marketers).[23]

[20] As per section 3.2.3, ESCOSA state that exporters are generally able to obtain higher prices on the international market for SA grain between December and May.

[21] Charles Rivers Associates, *CRA comments on the ACCC's Draft Determinations regarding code exemption for Viterra grain export terminals,* 18 December 2020, p. 2.

[22] Charles Rivers Associates, *CRA comments on the ACCC's Draft Determinations regarding code exemption for Viterra grain export terminals,* 18 December 2020, p. 9.

[23] The ACCC notes that eastern SA exports approximately 65% of grain produced (PIRSA estimates that between 2012-13 and 2019-20 4.90 million tonnes of grain, on average was produced in eastern South Australia, and in this same time period eastern SA port terminals have on average exported 3.18 million tonnes of grain). Prior to the east coast drought (i.e. 2012-13 to 2017-18) 73% of grain produced in eastern SA was exported.

Consequently, the ACCC considers that larger scale entry is unlikely to occur if potential entrants are not able to secure reliable access to export pathways. The ACCC considers the extent to which access to export pathways differs by region.

The ACCC also considers that, as Viterra's upcountry network is extensive and well-established, barriers to entry are higher for a new entrant to establish a network of storage facilities that are connected to a port terminal facility. The ACCC considers it is reasonable to expect that where Viterra has a dominant presence both at port and upcountry, these services are likely to interact due to the interconnected nature of these markets within the supply chain. The ACCC also notes the bundled nature of Viterra's Export Select service also reinforces barriers to entry upcountry.

Matters relating to the upcountry market (including barriers to entry and its relevance to competition at port) are discussed in greater detail in section 4.1.

Maximising the number of competitors is not efficient competition – ACCC response

CRA submitted the promotion of competition should involve a focus on efficient competition, as opposed to maximising the number of competitors.

As noted above, the ACCC does not seek to protect smaller exporters at the expense of competition or efficiency, nor does it have a view on the optimal size or number of exporters in the SA bulk grain market.

The ACCC acknowledges that exporters' access (whether large or small in scale) must be balanced against a range of other factors, including the public interest in having competition in markets and the legitimate business interests of the PTSP. As noted above, the ACCC's consideration has focussed on the market conditions that support competition and ensure exporters have fair and transparent access to port terminal services. In doing so the ACCC has also had regard to the costs regulation imposes on Viterra as well as other relevant parties (and the other relevant matters under subclause 5(3) of the Code).

This issue is discussed in greater detail in section 5.1(c).

2.2 Stakeholder submissions to the Draft Determinations

Stakeholder views relating to Viterra's Port Adelaide IHB, OHB, Wallaroo and Port Giles facilities are discussed below (and in more detail in the relevant sections in chapter 5 of this document). Stakeholder views regarding broader matters (such as state-wide matters) are also discussed below.

As previously noted, stakeholder views that specifically relate to Viterra's Port Lincoln and Thevenard facilities are not discussed below. Views regarding these 2 port terminal facilities will be considered in separate determinations.

2.2.1 Stakeholders that supported exemptions for (at a minimum) Viterra's Port Adelaide Inner Harbour and Outer Harbor port terminal facilities

GrainCorp, the SAFC and Mr Geoff Ryan (grower and Viterra Strategic Site Committee Chair for Wirrulla/Nunjikompita) provided submissions which supported the exemption of Viterra's Port Adelaide IHB and OHB facilities.

The SAFC supported exemptions in relation to all of Viterra's facilities. SAFC submitted that:

- The current regulation limits Viterra's flexibility and imposes costs on SA not faced in other states, in particular the time taken by the ACCC to approve changes to port loading protocols means there is little point in Viterra attempting to optimise them each year.
- A revocation provides for the possibility of trial exemptions, with a review in 3 to 5 years, which could be overturned should future evidence of uncompetitive conduct by Viterra be presented.
- Its views were not given appropriate consideration, and it reasserts those positions.
- The Draft Determinations casted unreasonable doubt over T-Ports' operations at Lucky Bay.

Mr Ryan supported exemptions in relation to all of Viterra's facilities, and submitted that:

- Exemptions would increase flexibility and simplify vessel loading/capacity allocations, therefore attracting more exporters to SA and increasing competition for grain.
- The majority of commodities shipped from Viterra's Thevenard facility are not wheat, and yet are bound by the rules that govern wheat.
- Exemptions would reduce the cost of regulatory compliance, improve the competitiveness of SA grain in the global market, and deliver savings for growers.

GrainCorp submitted that (as a customer of Viterra in SA), it was supportive of the ACCC's Draft Determinations to grant exemptions in relation to Viterra's Port Adelaide IHB and OHB facilities. GrainCorp did not express a view in relation to Viterra's other facilities. GrainCorp submitted that:

- Exporters have viable access to alternate port terminal service providers at Port Adelaide and Lucky Bay.
- It is satisfied that Viterra has an incentive to provide fair and transparent access to services at Port Adelaide.
- The proposed exemptions will benefit Viterra's customers and grain growers.
- The proposed exemptions will increase flexibility, reduce costs/the price of services in periods of low demand, encourage optimisation of supply chains and promote long-term investment.

2.2.2 Stakeholders that did not support exemptions in relation to Viterra's port terminal facilities

Mr John Hill, a private citizen with 20 years of experience in the SA grain industry, and T-Ports provided submissions in response to the Draft Determinations arguing that exemptions should not be granted in relation to any of Viterra's port terminal facilities.

Mr Hill submitted that:

- Viterra acquired a monopoly when it purchased ABB Grain's export facilities. Supply chain charges are now $17 per tonne higher than CBHWA's (despite the the SA grain handling system having a range of more efficient features) and should be reviewed. This is resulting in unnecessary duplication of infrastructure.
- Deep water facilities (and rail access) offer Viterra a large advantage, and limit competition from other facilities in Inner Harbour.
- Unused capacity at OHB largely reflects drought conditions in the eastern states.

T-Ports submitted that:

- Viterra and Glencore operate as a vertically integrated PTSP (and not in isolation from each other). Glencore is using its significant market presence to dominate the SA grain industry at every level.
- Price bundling reinforces Viterra/Glencore's dominance across multiple points in the supply chain.
- The relationship between Glencore and other traders across different Viterra facilities means that traders may not be prepared to use a third party port and risk their relationship with Glencore/Viterra and access at Viterra's facilities.
- Several assumptions used in the CRA modelling appear to be erroneous.
- Other than T-Ports' storage there has been limited growth in upcountry storage in recent seasons, with Viterra being the dominant provider.
- The domestic market does not provide a competitive constraint on the bulk export market and the container export market is not seen as a realistic alternative to the bulk export market.
- Glencore appears to be offering growers higher than otherwise expected prices at sites in the Lucky Bay and Port Pirie catchment zones, as well as targeting delivery or volume premiums to growers in the Lucky Bay catchment zone (anecdotally).

2.2.3 Stakeholders in favour of an exemption in relation to Port Adelaide IHB, but not other Viterra port terminal facilities

AGE and GPSA provided submissions which supported the proposed exemption of Viterra's Port Adelaide IHB facility. Neither AGE nor GPSA supported exemptions at any of Viterra's other port terminal facilities.

AGE was "strongly" opposed to an exemption in relation to OHB, while supporting (or at least recognizing the case for an exemption in relation to IHB. Amongst other things, AGE submitted that:

- Upcountry storage is intrinsically linked to ports, and there is no comparable alternate integrated supply chain in the Port Adelaide zone, that is rail accessible and can accommodate deep water vessels.
- Cargill's and Semaphore's facilities are direct competitors to Viterra's IHB facility, but not to OHB (primarily due to its deep water capability).[24]
- Once grain in Viterra's upcountry system is purchased exporters are effectively "locked" into using a Viterra port and the removal of regulatory safeguards means this grain will be forced into the least cost effective export pathways.
- Exempting OHB will impact the viability of third party exporters, create a two-tiered pricing system for growers, and reduce incentives for alternate upcountry storage.
- The CRA material is not compelling or persuasive as the ACCC has been unable to test the assumptions, CRA use misleading capacity data and CRA are not independent.
- The container, domestic and Victorian markets all provide marginal/limited competition to the bulk export market.

[24] AGE noted in its submission that this view may change if there was third party access to the belt at Outer Harbor.

GPSA submitted that while it does not consider that an exemption should be provided in relation to OHB, there was a case for an exemption in relation to IHB (and that this exemption might provide evidence of Viterra's likely behaviour absent the full application of the Code). GPSA also submitted, amongst other things, that:

- Inner Harbour PTSPs (i.e. Cargill and Semaphore) are unable to compete effectively with OHB due to factors such as: OHB's capacity to fully load Panamax vessels; limited amounts of at-port storage; and the absence of an upcountry freight network.
- A 'one-size-fits-all' approach that exempts both IHB and OHB may not deliver the desired competitive outcomes and it would be overly simplistic to exempt both without understanding how Viterra would operate as an exempt PTSP.
- The CRA reports do not expressly consider Viterra's incentives during the counter-cyclical (i.e. peak) marketing period. Assumptions used in the CRA analysis should be vigorously tested by the ACCC.
- While reducing the costs of (regulatory) compliance should lower supply chain costs, grain producers have seen little benefit from efficiencies and a public interest test should be applied to exemptions.
- Exemption could leave exporters seeking to use Viterra's facilities without regulatory oversight of a mediation process, or a dispute resolution mechanism, potentially meaning that Viterra's behaviour may place constraints on fair competition.

2.2.4 Viterra's response to stakeholder submissions

Viterra's submission in response to the Draft Determinations responded to a number of stakeholder submissions, including T-Ports', GPSA's, AGE's and Mr John Hill's submissions (all of which opposed an exemption in relation to Viterra's OHB facility (at a minimum)). Viterra did not address other stakeholder submissions in its response to the Draft Determinations.

T-Ports

Viterra rejected T-Ports' claims that Viterra/Glencore is misusing their market power (by selectively providing premiums to growers in the Lucky Bay catchment area). Viterra stated that its behaviour is evidence of: the competitive process at work and that Viterra is competitively constrained by T-Ports.

Viterra also considered that a number of T-Ports' comments on the assumptions used in the CRA report were not supported by evidence and were highly speculative.

GPSA

Viterra disputed GPSA's claim that third party facilities at IHB do not compete with Viterra's OHB facility (due to the differences in infrastructure). Viterra considered that different port terminal facilities still compete for the same grain even if they do not have identical infrastructure characteristics.

In addition Viterra responded to GPSA's view that Semaphore's and Cargill's facilities only perform limited throughput in off-peak periods. Viterra stated that capacity itself does not decrease just because throughput in particular months decreases. Viterra also noted that it exports less grain in the off-peak period (with its capacity remaining the same) and is incentivised to increase throughput in these periods, eliminating any incentive to discriminate.

In relation to the CRA report, Viterra contended that GPSA incorrectly claimed the 2017-18 production figures are not representative of average production levels.

AGE

Viterra rejected AGE's view that it is not subject to competitive constraints at port or upcountry and considered that AGE had made a number of claims not supported by substantive analysis. Viterra's views on the competitive constraint they face upcountry and at port are briefly stated in section 2.1.

Viterra also disputed AGE's claim that CRA used misleading data when estimating Lucky Bay's capacity.[25]

Mr John Hill

Viterra disputed Mr Hill's suggestion that Viterra does not pass on cost savings to its customers in the form of fee reductions (or otherwise). Viterra's views on their incentive to pass through cost savings (or otherwise) to its customers are briefly stated in section 2.1.

2.2.5 ACCC response to stakeholder submissions

The ACCC notes that stakeholders presented a range of views on a number of issues. The ACCC has carefully considered submissions but has not attempted to summarize its responses in this chapter. Rather, detailed consideration of the issues raised by stakeholders and related ACCC views, are set out in the relevant sections of this document. An overview of the subject matter discussed in each chapter is outlined below:

- Chapter 3 considers the characteristics of Viterra's IHB, OHB, Port Giles and Wallaroo port terminal facilities (including their capacity), the demand for those services, and the degree to which alternate port terminal facilities impose a competitive constraint on these facilities.
    - The analysis of capacity and demand indicates whether there are capacity constraints at Viterra's facilities, and the extent to which capacity utilisation may impact a Viterra's incentive to provide fair and transparent access if Parts 3 to 6 of the Code did not apply.
- The ACCC's consideration of CRA's profit and loss modelling can be found at the end of chapter 3 (in the 'Charles River Profit and Loss Analysis' section).
- Chapter 4 considers the level of competition in SA upcountry storage and handling markets. This chapter also examines the degree of competitive constraint imposed by container exports and domestic demand upon the bulk grain export market.
    - The analysis of these issues helps inform the ACCC of whether a port terminal facility faces a sufficient degree of competitive constraint to promote fair and transparent access to port terminal services should Parts 3 to 6 of the Code not apply in respect of that facility.
- Chapter 5 uses the analysis and findings in chapters 3 and 4 to set out the ACCC's assessment of the matters listed at subclause 5(3) of the Code in relation to Viterra's IHB, OHB, Port Giles and Wallaroo facilities.

[25] The ACCC notes its views on T-Ports capacity will be discussed when considering Final Determinations for Port Lincoln and Thevenard.

3. Bulk grain export port terminal services

This chapter presents the ACCC's analysis of the market for port terminal services and sets out the ACCC's views on the availability of, and demand for, these services at each of Viterra's port terminal facilities.

The availability of, and demand for, port terminal services at Viterra's facilities is relevant to the ACCC's assessment of the exemption applications, having regard to the matters specified in subclause 5(3) of the Code.

As set out in section 1.4, the ACCC will make its determinations in relation to Viterra's Port Lincoln and Thevenard facilities separately. As such, matters relating to these facilities are generally only discussed in this chapter where they are of relevance more broadly (e.g. state-wide trends) or of particular relevance to the facilities considered in this document.

The ACCC notes that Viterra was the sole provider of port terminal services in SA prior to 2015-16. Since that time, LINX (formerly Patrick) and Semaphore established mobile loading facilities at Port Adelaide (in the 2015-16 and 2016-17 seasons respectively).[26] T-Ports also commenced operations at its Lucky Bay facility in March 2020, ADM commenced export operations at Port Pirie in December 2020, and Cargill commenced operations at Port Adelaide in January 2021. Viterra has facilitated 91% of all SA bulk exports since 2016-17.[27]

This chapter begins with the consideration of the supply of port terminal services in SA, including:

- the particular characteristics of each SA port terminal facility (in sections 3.1.1 to 3.1.4) including the ability to store and receive grain at port, and the overall port terminal capacity available;
- the level of competitive constraint alternate PTSPs impose upon Viterra's facilities (section 3.1.4); and
- the level of competitive constraint imposed by proposed port terminal facilities on Viterra's facilities (section 3.1.5); and
- the constraint international markets place upon Viterra's operations (section 3.1.6).

The ACCC notes that the recent entry of competing port terminal facilities has increased the supply of capacity outside of the Viterra system. This has placed a level of competitive constraint upon Viterra. However, this competitive constraint differs by region, and the relatively recent entry of some alternate PTSPs means the constraint remains somewhat uncertain at this time.

The chapter then considers the demand for port terminal services, including:

- capacity utilisation at each of Viterra's port terminal facilities on an annual and peak period basis (sections 3.2.2 to 3.2.3); and
- whether exporters have historically been able to obtain access to Viterra's port terminal facilities in both peak and off-peak periods (section 3.2.4).

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[26] On 8 April 2020 LINX Cargo Care Group formally notified the ACCC that it had ceased providing port terminal services to bulk grain exporters at its Port Adelaide facility. However, LINX's only export customer, Cargill, subsequently established its own mobile ship loading service at Port Adelaide Inner Harbour.

[27] Data up to March 31 2021.

With regard to the demand for port terminal services, the ACCC considers that third party exporters will likely continue to be reliant on gaining access to Viterra's port terminal facilities. Historically third party exporters have been able to access a level of capacity at Viterra's port terminal facilities. However, the ACCC considers that there is a risk that Viterra would favour its associated entity, particularly during peak periods, absent the application of Parts 3 to 6 of the Code or the presence of sufficient competitive constraint.

The level of capacity constraint is a key factor in the ACCC's assessment of the level of competition for port terminal services on a port-by-port basis. As a general proposition the ACCC considers that, where demand for port terminal services exceeds supply (i.e. capacity is constrained), a vertically integrated PTSP will have a stronger incentive to favour its associated entities (i.e. its exporting business).

Where demand for port terminal services is lower than supply a PTSP will generally have greater incentive to provide access on fair and transparent commercial terms (i.e. to offer its capacity to exporters in order to promote more efficient use of its infrastructure). In general the ACCC considers that, in the presence of sufficient competition (i.e. from other PTSPs and the domestic and container markets), a greater oversupply of capacity will increase the incentive for a PTSP to provide access on fair and transparent terms.

The ACCC considers it unlikely that a PTSP will have an incentive to completely deny access to third party exporters during periods of constrained capacity. Rather, it is more likely that a PTSP will have an incentive to favour certain exporters, such as its associated entities. This could include, for example, providing an associated entity with first choice access to shipping slots, with the remaining slots then being offered to third party exporters.

The competitive constraint imposed by international markets is also considered in this chapter. As set out in section 3.1.6 the ACCC's view is that Viterra has some incentive to minimise supply chain costs as a result of competition in international markets, however efficiencies will not necessarily be passed on to other SA market participants in circumstances where Viterra retains significant market power at port.

This chapter also sets out the ACCC's views on the reports provided by Viterra's consultant CRA (including their economic modelling and views on vertical integration) where relevant. In doing so, the ACCC notes that CRA's modelling focusses on the complete denial of access, however the ACCC considers favourable access to be a more relevant consideration. The ACCC also notes that the results of CRA's modelling are sensitive to certain input assumptions, and that several of the model's assumptions have not been adequately justified. These limitations significantly increase the uncertainty associated with any conclusions reached by the modelling. The CRA box also sets out the ACCC's view on issues associated with vertical integration in the context of the SA bulk grain export market.

The ACCC notes that a range of the matters raised during the consideration of Viterra's exemption applications may directly relate to only one or a small number of facilities (such as a nearby competing port terminal facility), while other matters may be broader in nature and potentially of relevance to most or all of Viterra's facilities (such as competition in the international market).

The information and discussion in this chapter (and in chapter 4) is presented with respect to its relevance to specific Viterra's facilities, or to Viterra's facilities generally. More detailed and specific consideration is given to how these matters specifically relate to each individual facility, as well as to the ACCC's view as to whether or not that facility should be exempt, in chapter 5.

3.1 Port terminal facilities and capacity

There are currently 10 operational bulk grain export port terminal facilities in SA. Six of these facilities are operated by Viterra, and one each operated by ADM, Cargill, Semaphore and T-Ports. A map showing the locations of each of the 10 terminals is presented below in figure 3.1.

Table 3.1 below provides an overview of the features of bulk grain export port terminal facilities that are currently operational in eastern SA. The ACCC is also aware of proposals to build additional port terminals in SA. These are discussed further in section 3.1.5.

The amount of grain a port terminal facility is able to load in a given year (i.e. a facility's capacity) is related to a variety of 'at port' characteristics, in particular:

- **road and/or rail receival facilities:** road/rail receival facilities determine how quickly grain received at port can be processed into storage or onto a vessel;

- **at-port storage:** at-port storage provides a PTSP with greater flexibility to coordinate the receival and loading of grain; and

- **ship loading rate:** how quickly a PTSP can load grain onto a vessel is a significant factor in how much grain a port terminal can facilitate.

The level of capacity available at each port terminal facility is relevant to assessing the relationship between the supply and demand of port terminal services. It is also relevant to the identification of capacity constraints (i.e. circumstances in which demand for capacity exceeds supply). In the absence of viable competitive alternatives, capacity constraints could lead to a PTSP exercising market power in the provision of port terminal services.

The supply of port terminal services is discussed throughout the rest of section 3.1. Exporter demand for port terminal capacity in SA is discussed in section 3.2.

Figure 3.1: Map of SA port terminal facilities

Source: Map sourced from PIRSA and updated by ACCC to include SA's port terminals. See: https://www.pir.sa.gov.au/primary_industry/crops_and_pastures/crop_and_pasture_reports

Table 3.1: Overview of port terminal facilities in eastern SA

Port terminal facility	Rail receival	Road receival	Storage capacity (tonnes)*	Ship loader (tonnes per hour)	Port of anchorage declared depth
Port Adelaide – Inner Harbour (Viterra)	Standard gauge 1,600 t/hr 1 hopper	800 t/hr 2 hoppers	366,500 tonnes	1,000 t/hr	10.9m
Port Adelaide – Outer Harbor (Viterra)	Standard gauge 2,400 t/hr 1 hopper	800 t/hr 1 hopper	65,000 tonnes	2,200 t/hr	16.2m
Port Adelaide – Inner Harbour (Cargill)	N/A	1,000 t/hr 2 hoppers	None	1,000 t/hr**	10m
Port Adelaide - Osborne (Semaphore)	N/A	375 t/hr 3 hoppers	16,500 tonnes	300 t/hr	10m
Port Giles (Viterra)	N/A	3,600 t/hr 10 hoppers	514,100 tonnes	1,000 t/hr	14.7m
Port Pirie (ADM)	N/A	500 t/hr 2 hoppers	80,000 tonnes	250 t/hr	8.2m
Wallaroo (Viterra)	N/A	2,150 t/hr 6 hoppers	757,500 tonnes	800 t/hr	9.5m

Source: Flinders Ports website (https://www.flindersports.com.au/ports-facilities/port-adelaide/); Viterra, *Attachment 1 – Response to 14/11/19 information request 2020, Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020; Viterra website (http://viterra.com.au/index.php/ports-and-terminals/); Cargill Code exemption application; ADM, Cargill and Semaphore responses to ACCC information requests; ADM exemption application.

Note: * This includes storage which is directly connected to ship loading facilities at port, as well as nearby storage which is not located directly at port and therefore may require grain to be transported a short distance by road freight services to the shipping bins for loading onto conveyors. Storage located directly at port is as follows: Viterra IHB at least 60,000 tonnes (see footnote 29), OHB 65,000 tonnes, Wallaroo 192,000 tonnes, Port Giles 239,100 tonnes; Semaphore 16,500 tonnes; Cargill zero tonnes; ADM 80,000 tonnes.

** Cargill has submitted that while its loading rate is designed to intake at 1,000 tonnes per hour, due to operational reasons (truck availability and the absence of at-port storage) it expects to load grain to vessels at 400 tonnes per hour.

3.1.1 Receivals

Table 3.1 (above) shows the road and rail receival facilities for each eastern SA port terminal facility. Viterra's Port Adelaide IHB and OHB facilities are the only facilities in SA currently able to receive grain via both road and rail transport (all other facilities in SA are only able to receive grain via road transport).

As shown there is significant variation across the combined receival rates of road and rail infrastructure at SA's port terminal facilities, with Port Giles having the most efficient capability to facilitate grain intake (3,600 tonnes per hour), and Semaphore's Port Adelaide facility having the lowest (375 tonnes per hour).

The ACCC notes that the rate at which ADM, Cargill and Semaphore state that their facilities are able to receive grain from road transport is at 500, 1,000 and 375 tonnes per hour respectively. However Cargill submitted that, while its facility can receive grain at 1,000 tonnes per hour, operationally it expects to load grain at 400 tonnes per hour (due to factors such as truck availability and the absence of at-port storage).

Both of Viterra's Port Adelaide port terminal facilities have road intake rates of 800 tonnes per hour, and in addition, as noted above, are also able to receive grain via rail (at rates of 1,600 and 2,400 tonnes per hour respectively). Viterra's IHB and OHB port terminal facilities are therefore likely able to facilitate the receival of grain more efficiently than ADM's, Cargill's and Semaphore's facilities (particularly as these do not have rail grain receival capabilities).

The ACCC also considers that rail receival capability at Viterra's IHB and OHB port terminal facilities likely gives these facilities a competitive advantage over ADM's, Cargill's and Semaphore's facilities with respect to the grain they are able to source from within the Port Adelaide catchment area.[28]

Upcountry transport network links for each port terminal facility are discussed further in section 4.1.2.

3.1.2 Storage at eastern SA port terminal facilities

Table 3.1 shows storage that is directly located at (or near) each port terminal facility (i.e. storage which is connected to ship loading facilities or only needs to be transported a short distance to ship loading facilities).

The ACCC considers that storage located directly at port likely provides a PTSP with a higher level of operational flexibility (as the PTSP is not reliant on transport services to be able to load grain onto a vessel). Off-site storage facilities located relatively close to port likely provide a higher level of operational flexibility than more distant sites (to the extent that shorter transport distances enable greater flexibility in grain movements). Consequently, the ACCC considers both on and off site storage facilities relevant to its assessment.

As shown in Table 3.1 all of Viterra's port terminal facilities, with the exception of OHB, are able to store significant amounts of grain at (or near) port.

Viterra's OHB facility only has 65,000 tonnes of storage available and operates largely on a Just-In-Time (JIT) process. However Viterra's nearby IHB facility has 366,500 tonnes.[29] Given the close proximity of the 2 ports, the ACCC notes there appears to be potential for IHB to be used as a storage and accumulation facility for OHB.[30]

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[28] The ACCC notes that while Cargill's port terminal facility is not able to facilitate grain receivals via rail services, its Crystal Brook upcountry site can receive and load grain using rail freight services.

[29] Viterra submitted that its IHB facility has 60,000 tonnes of storage connected to shipping bins which allows grain to be directly loaded onto the shipping conveyor for export. With respect to remaining 306,500 tonnes Viterra submitted that: *"some of [this] storage is connected to the shipping bins [and can be used to load grain directly onto a vessel], but is typically used to for long term storage, containers and/or domestic outturn."* See: *Attachment 1 – Response to 14/11/19 information request – Questions 1 and 2 – Viterra port terminal facility features* for further details.

[30] Viterra did not expressly state this in its exemption applications, however in 2013 Viterra submitted that IHB and OHB are best managed as a single port terminal facility. See: ACCC, *Draft Decision Viterra Operations Limited Application to Extend and Vary 2011 Port Terminal Services Access Undertaking*, 21 November 2013, p. 28.

The 2 competing alternate facilities at Port Adelaide, operated by Cargill and Semaphore, both (largely) operate on a JIT process and, as a result, have little-to-no storage available at their facilities (as per table 3.1 Cargill's facility does not have any at-port storage and Semaphore's has only 16,500 tonnes).[31]

ADM has submitted that its Port Pirie facility has 80,000 tonnes of storage on the outskirts of Port Pirie.[32] This storage is located 9km from port and, as previously noted, the relatively close proximity of this storage likely provides ADM with greater flexibility to manage its operation (compared to storage located a significant distance from port).[33]

The ACCC considers that Viterra's ability to store grain at its Port Adelaide terminal facilities, particularly IHB, provides it with a competitive advantage over Cargill's and Semaphore's operations, and to a lesser extent ADM's.

Viterra's Port Giles and Wallaroo facilities, which are located on the Yorke Peninsula, have a combined total of 1.27 million tonnes of at-port storage. As discussed in section 4.1.1 there is little upcountry storage available on the Yorke Peninsula and it is expected that a relatively large amount of storage (either at-port or otherwise) would be required to facilitate shipments or for a new entrant to compete.

3.1.3 Ship loading capacity

Viterra's OHB facility has the highest ship loading (or elevation) capacity of all eastern SA ports. This facility is capable of achieving up to 2,200 tonnes per hour respectively (see table 3.1). Ship loading capacity at the other SA port terminal facilities ranges from 300 to 1,000 tonnes per hour.

Viterra's Port Adelaide OHB and Port Giles facilities are the only deep water ports in eastern SA capable of fully loading Panamax class vessels. As such, exporters must be able to gain some level of access to one of these 2 facilities in order to fully load larger vessels (i.e. those that exceed certain tonnages) in eastern SA.

As Cargill noted in its submission:

> *…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.*[34]

The ACCC notes that it has not considered Viterra's Port Lincoln and Thevenard facilities in these Final Determinations. In addition the ACCC notes T-Ports' Lucky Bay facility was not in operation at the time of Cargill's initial submission.

Several stakeholders raised concerns regarding access to OHB, the only Port Adelaide facility capable of fully loading Panamax vessels, in response to the proposed exemption of the facility in the ACCC's Draft Determinations.

AGE noted in its submission:

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[31] Cargill's closest upcountry storage site to port is Mallala (approximately 53km from Inner Harbour). Cargill's upcountry storage sites are discussed in section 4.1.1.

[32] ADM, *Application for Exemption Port Terminal (Bulk Wheat) Code of Conduct*, 14 January 2021, p. 3. See footnote 10 for further details.

[33] As per the note in Table 3.1 a significant volume of Viterra's port storage is not directly connected to conveyor services. However all of ADM's storage is not connected to conveyor services, likely reducing the operational flexibility this storage would otherwise provide.

[34] Cargill, *Submission in response to Issues Paper*, 6 September 2019, p. 2.

No current viable alternative to Outer Harbor currently exists, it is the only deep water port in the Adelaide draw zone where all forward contracts are priced via the NTP (Natural Terminal Port) pricing system.

Moreover, Outer Harbor is important to users of Semaphore and Cargill's berth as neither can fully load Panamax vessels and would likely require access to top-up at Outer Harbor. Comparing Outer Harbour to Semaphore is not a comparison that is likely to withstand scrutiny. Having little regulatory constraints on behavior at the only deep water port is unlikely to be what the proponents of building Outer Harbor had in mind.[35]

GPSA also expressed similar views in its submission:

Both Cargill and Semaphore are limited by their physical geography within Inner Harbour and are incapable of fully loading Panamax sized vessels. This is a key determinant of competition.[36]

In addition, Mr Hill submitted:

The only location at Port Adelaide with deep water berths is the Outer Harbour container berth where the Viterra ship loader is located…

…*Viterra's OH terminal has only 65,000 tonnes of storage capacity which places greater than usual demand on the need for totally unhindered access for competitive marketers to assemble cargo for export.*[37]

The ACCC considers that the ability to fully load Panamax vessels provides a competitive advantage for deep water ports over shallower ports due to their ability to facilitate the use of larger, more economically efficient, vessels. Consequently, the ACCC's view is that Viterra's Port Adelaide OHB and Port Giles facilities are advantaged over port terminal facilities that do not have the ability to fully load Panamax vessels.

3.1.4 Capacity estimates of eastern SA port terminal facilities

Table 3.2 below shows capacity estimates for each eastern SA port terminal facility which was operational during the 2020-21 shipping year. Table 3.2 compares Viterra's maximum published available capacity, maximum seasonal exports and the annualised historic monthly throughput at each of Viterra's facilities, to various capacity estimates of alternate port terminal facilities.

The ACCC's Draft Determinations used Viterra's maximum published available capacity as the estimate of capacity at each of Viterra's port terminal facilities.

In its response to the Draft Determinations Viterra submitted that:

This approach underestimates the maximum capacity at Viterra's port terminals because, as previously explained to the ACCC, Viterra's published available capacity estimates provided to the ACCC in Viterra's response to the information request dated 14 November 2019 do not account for tolerance (i.e. +10%). This tolerance factor was included in Viterra's capacity estimates provided in its Application. It is important that this is included as the practical capacity of each of Viterra's port terminals takes this into account – i.e. Viterra will always be able to expand capacity to meet the +10% tolerance allowance.

[35] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 3.

[36] GPSA, *Submission in response to Draft Determinations*, 27 November 2020, p. 2.

[37] Mr John Hill, *Submission in response to Draft Determinations*, 3 November 2020, p. 3.

The ACCC notes non-tolerance-inclusive capacity figures were used in the Draft Determinations, as tolerance inclusive capacity figures were provided to the ACCC confidentially as part of Viterra's exemption applications.[38] [39]

The ACCC notes that, as set out in its PLPs, Viterra permits a 10% tolerance factor when executing shipment volumes:

> *Viterra will permit a +/-10% tolerance in respect of the execution of Capacity acquired by Clients.*[40]

The ACCC considers it appropriate to factor in this tolerance factor when assessing Viterra's capacity, as Viterra are obligated to be able to load this extra tonnage of grain under its PLPs.

As Viterra has now provided tolerance-inclusive capacity figures on a public basis, the ACCC considers it appropriate to refer to tolerance-inclusive capacity figures throughout the Final Determinations.

Table 3.2 includes updated tolerance-inclusive capacity data for the 2019-20 season (compared to the Draft Determinations).[41] These changes reflect the release of additional short term capacity in the 2019-20 season (and other minor amendments).[42]

It should be noted that the capacity estimates used in each column of table 3.2 are not directly analogous between Viterra and third party exporters, and as such the figures should be considered alongside the discussion in this section.

The ACCC notes that there is inherent uncertainty in estimating a port terminal facility's capacity, and that capacity estimates are typically based on a variety of factors that may not be possible to fully reflect in a single figure. As submitted by Viterra:

> *Shipping capacity varies year to year as a result of logistics including scheduled shut-downs (e.g. for maintenance), loading rates, working hours and available stock.*[43]

The ACCC notes that Viterra has submitted (in relation to Semaphore) that capacity is a flexible concept which can vary between seasons (as PTSPs are able to adapt operational conditions to meet demand). Viterra also submitted that the capacity which is relevant when considering the level of competitive constraint placed upon another facility, is the level of capacity a facility can reach in order to meet maximum demand:

> *In Viterra's view, when considering what competitive constraint is imposed by Semaphore, one needs to consider how much grain it could export in the event of a shift in demand to it from Viterra's port terminals. As previously submitted, capacity is a flexible concept that changes (and can be deliberately changed) to meet demand. This occurs through moving operational levers such as working hours and staff numbers. Port terminals are constructed to be able to meet higher levels of demand in good harvest years. In these years, provided that they offer competitive*

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[38] As per pages 50, 62, 30, 31 and 58 of Viterra's revised exemption applications - Viterra's Port Adelaide IHB (and OHB), Port Giles, Port Lincoln, Thevenard and Wallaroo facilities all contained confidential tolerance-inclusive capacity figures.

[39] Viterra response to the ACCC's Draft Determinations (published 10 February 2021) included tolerance inclusive capacity figures on a public basis (see table 1.1 on page 7 of Viterra's response).

[40] Viterra Port Loading Protocols, 24 December 2015, p. 31. (See: https://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf)

[41] Provided by Viterra on 8 February 2021. See: Attachment 2 - UPDATED - Response to 14/11/19 information request - Question 3 - Viterra published available capacity estimates (XLSX 35.52 KB)

[42] The capacity figures used in the ACCC's Draft Determinations were provided by Viterra on the 13 February 2020, and as such did not include all additional short term capacity released from the 2019-20 season.

[43] Viterra, *Application under clause 5(2) of the Port Terminal Access (Bulk Wheat) Code of Conduct for exemption from Parts 3 to 6 of the Code in respect of the following port terminals in South Australia: Port Lincoln - Port Adelaide Outer Harbor - Port Adelaide Inner Harbour - Wallaroo - Port Giles - Thevenard (Exemption Application 2019)*, 2 July 2019, p. 30.

> *terms, the port terminal will stretch capacity to the maximum to meet demand. It is this figure which is relevant to the assessment of competitor capacity.*[44]

While the ACCC notes that Viterra submitted this view in the context of discussing Semaphore's facility at Port Adelaide, the ACCC generally considers a facility's capacity to be flexible within certain limits. For example, the ACCC accepts that operational changes have the potential to materially increase a facility's capacity during periods of high demand, however the ACCC notes that there may be a range of practical limitations to this flexibility and that the limitations of a facility's infrastructure will ultimately constrain its capacity in the short-to-medium-term.

In addition Viterra also submitted that it has made infrastructure upgrades between seasons, and that such upgrades can be expected to increase the capacity of its port terminal facilities:

> *Viterra has made significant investments in its supply chain, including port terminal infrastructure, to ensure and enhance the long-term sustainability, reliability and capacity of the supply chain. Over the past 5 years, Viterra has made investments in capital and maintenance of over $200 million in port terminal and supply chain infrastructure.*[45]

The ACCC acknowledges that a facility's capacity can be increased across seasons due to infrastructure upgrades, or improved operational practices, and that historical capacity estimates may not necessarily be representative of the current, or future, capacity of a port terminal.

The ACCC also acknowledges that a facility's capacity is relatively flexible and has the potential to be adapted to meet anticipated demand. It is reasonable to expect that PTSPs operate their facilities in response to expected demand (for example, by increasing staffing levels or extending work hours in response to high demand) and are likely to be able, to expand or contract capacity in response to market conditions to some extent.

However, as noted above, the ACCC considers that a facility's capacity will ultimately be limited, at least in the short-to-medium-term, by certain physical constraints (primarily the infrastructure available at the facility). In addition the ACCC also notes that the potential to increase a facility's capacity in response to demand (as well as a facility's capacity more generally) may be affected by a range of external circumstances (such as delays in road or rail deliveries, delays in vessel arrivals, etc.).

As such, the ACCC generally considers the level of throughput that a facility can reasonably be expected to perform in the short-to-medium-term in response to high demand to be the figure most directly relevant to its exemption assessment. The ACCC considers that this figure reflects the capacity most directly relevant to the competitive constraint a facility imposes on competing facilities.

For the reasons discussed further below the ACCC considers that, on balance, Viterra's maximum published available capacity figures to be the best capacity estimate of Viterra's facilities. The ACCC also sets out its position regarding the best available estimates of alternate PTSPs' capacity below.

[44] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 9.

[45] Viterra, *Exemption Application 2019*, 2 July 2019, p. 11.

Table 3.2: Different capacity estimates at eastern SA port terminal facilities (mt)

Viterra - Port terminal facility	Maximum published available capacity	Maximum season	Annualised maximum historical monthly throughput	ACCC capacity estimate
Port Adelaide – IHB	1.01	0.87	1.83	1.01
Port Adelaide – OHB	2.54	1.82	3.13	2.54
Port Giles	1.17	0.99	2.15	1.17
Wallaroo	0.84	0.90	1.53	0.84
Viterra total (eastern SA):	5.56	4.58	8.64	5.56
Third party - Port terminal facility	**Nominal capacity**	**Maximum season***	**Annualised maximum historical monthly throughput****	**ACCC capacity estimate**
Port Adelaide – Inner Harbour - Cargill	0.30	-	0.54	0.54
Port Adelaide – Osborne - Semaphore	0.40	0.37	0.82	0.62
Port Pirie – ADM***	0.15	-	0.58	0.44
Third party eastern SA total:	0.85	1.33**	1.94	1.59
Eastern SA total:	6.41	5.91**	10.58	7.16

Source: Viterra, *Supplementary Information Provided by Viterra, Response to 14/11/19 information request – Attachment 2 – Question 3 – Published available capacity estimates*, 13 February 2020; PTSP loading statements; Cargill Code exemption application; Semaphore response to ACCC information request; and ADM Code exemption application.

Notes: Capacity data for the 'maximum season' and 'annualised maximum historical monthly throughput' columns uses shipping data since the beginning of the 2011-12 season, except for Port Adelaide IHB and OHB which use data since the beginning of the 2014-15 season (prior to 2014-15 the ACCC received the combined shipments of IHB and OHB as a single Port Adelaide facility). Viterra's 'Maximum published available capacity' was provided between the 2013-14 and 2019-20 seasons.

* ADM's Port Pirie and Cargill's Port Adelaide facilities are new providers of port terminal services that have yet to operate for a complete season. As such the maximum amount of grain loaded in a single season is not yet available for these facilities. The ACCC has instead used its estimate of ADM and Cargill's capacity (437,854 and 540,000 tonnes respectively) to calculate total third party capacity (and therefore total eastern SA capacity) for the maximum year column.

** The theoretical maximum for Cargill's facility is taken from its exemption application and discussed further below. The theoretical maximum for ADM's Port Pirie facility and Semaphore's Port Adelaide facility is estimated by using the annualized maximum historical monthly throughput (over 12 months), as done for Viterra's port terminal facilities.

*** As per below, the ACCC's estimation of the capacity of ADM's Port Pirie facility is based on limited data and as such is uncertain.

Maximum published available capacity

Viterra has submitted capacity figures to the ACCC for each of its port terminal facilities since, and inclusive of, the 2013-14 season. These capacity figures represent the total amount of long-term, short-term and additional short-term capacity that has been released by Viterra in each respective season (inclusive of tolerance).[46] To determine the 'maximum published available capacity', listed in column 1 of table 3.2, the ACCC has used the maximum amount of capacity released in a season for each of Viterra's facilities.

The ACCC notes that Viterra submitted that the amount of long-term, short-term and additional short-term capacity released estimates maximum capacity in a given season, once a 10% tolerance factor is accounted for.[47]

Importantly, the ACCC recognises that Viterra is not required to release all of its available capacity to exporters each shipping year, and so the capacity released in an individual shipping year is not necessarily representative of the total capacity Viterra has available at each of its port terminal facilities in any given season. The ACCC considers that using the maximum amount of released capacity at each facility over a number of seasons (i.e. as per table 3.2), ameliorates this problem and provides a more reasonable estimate of a facility's capacity in the future.

In addition, it is noted that even in circumstances where a PTSP has released all available capacity at a certain port terminal facility in previous seasons, this may not accurately reflect the facility's current or future capacity, if infrastructure or operational improvements have been undertaken since this time.

The ACCC also considers that the use of maximum released capacity as an estimate for capacity likely adequately accounts for the need for maintenance periods, which typically occur during off-peak periods (as a PTSP is unable to release capacity at a facility during these 'shutdown' periods).

While the ACCC acknowledges that a broad combination of factors (both at-port and elsewhere in the supply chain) can be expected to affect the capacity of a port terminal facility, the ACCC considers that the maximum amount of capacity released is likely to provide a reasonable indication of how much capacity is available at each of Viterra's facilities in practice. This is because this figure reflects the amount of capacity Viterra, as the operator of the facility, has been willing to commit to providing in a single season.

Maximum seasonal shipments

The ACCC considers the maximum amount of grain shipped in a single season can provide an indication of a facility's capacity. However (similar to the maximum amount of released capacity discussed above) while maximum seasonal shipments can potentially serve as a useful indicator, it does not necessarily represent the maximum amount of grain that can ve loaded via a port terminal facility.

However, as shown in table 3.2, a PTSP does not necessarily use all the capacity it offers to exporters at port terminal facility in any given year. As such published capacity likely provides a better indication of the capacity of the facility (as this reflects as the amount a PTSP has committed to being able to export).

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[46] Viterra, *Supplementary Information Provided by Viterra, Response to 14/11/19 information request – Questions 1 to 8 – Port terminal facility features, capacity and storage & handling 2020,* 13 February 2020, p. 2.

[47] Ibid, p. 2.

Annualised maximum historic monthly throughput

In considering the maximum historic monthly throughput actually achieved at each facility, the ACCC notes that the theoretical maximum capacity at each of the port terminal facilities is potentially substantially higher than the maximum available capacity published by the PTSP.[48] As shown in table 3.2 (column 3), under this approach the total capacity of Viterra's 4 port terminal facilities in eastern SA would be 8.64 million tonnes per annum (i.e. around 55% more than total maximum released capacity, and 88% more total maximum annual grain shipments).[49]

The ACCC considers that the high throughput level achieved during the maximum historical month may not be achievable on a long-term basis due to practical limitations: as such, this approach likely overestimates port terminal capacity. For example, while regular maintenance activities and unavoidable closures or delays due to externally-driven circumstances (e.g. vessels failing survey) may not have impacted the maximum throughput month, they could reasonably be expected to affect some months, and therefore a facility's total capacity over the course of an entire shipping year.

A port terminal facility's maximum capacity may also be affected by the mix of commodities that are loaded at the port. For example, a port may be able to achieve higher throughput if it is dealing with only a few commodity types and/or grades as this will maximise use of the available storage space and reduce downtime for cleaning to ensure commodities and/or grades are appropriately segregated.

Additionally, grain is predominantly loaded within a peak period in order to obtain maximum benefit from advantageous conditions in international markets. As noted by the Essential Services Commission of South Australia (ESCOSA):

> *South Australian grain production is counter-cyclical relative to the northern hemisphere. South Australian grain producers thus have a window of opportunity (December to May) to sell to international markets when there is less global supply. To maximise the value that can be obtained during that window, participants in the South Australian bulk grain export market need to move bulk tonnages quickly before northern hemisphere grain is available.*[50]

The ACCC notes that the majority (62% on average[51]) of SA grain is loaded within the December to May timeframe to take advantage of international conditions. It is generally not economically desirable to load grain at its maximum possible rate during the off-peak period, as international demand for Australian grain is lower during this time. This consequently reduces demand for port terminal services in this period. The ACCC understands that, in order to take advantage of the cyclical nature of demand, PTSPs may use the off-peak period to perform maintenance or upgrade works to their facilities.

Given the above, the ACCC considers that Viterra's current total capacity is likely to be significantly lower than the annualised historic monthly maximum estimates in practice.

The ACCC notes that Viterra and CRA have used a 9 month period (as opposed to a 12 month period) to calculate annualised capacity estimates for alternate PTSPs.[52] This is

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[48] The annualised maximum monthly historic throughput estimate of capacity is calculated by multiplying the maximum amount of grain exported at a port terminal in a single month by 12, thus providing an 'annualised' maximum estimate.

[49] The maximum amount of capacity released and exported at each individual facility occurs across different seasons. As such the figures in table 3.2 do not necessarily represent the maximum amount of capacity released or exported by Viterra (as a whole) in any one season.

[50] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 17.

[51] Over the 2011-12 to the 2019-20 seasons.

[52] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 8.

intended to account for downtime and maintenance (rather than necessarily meaning the port only operates for 9 months).[53]

The ACCC acknowledges that this approach (annualising capacity over a 9 month, rather than 12 month period) is more likely to account for factors such as reduced throughput during the off-peak period, as well as factors such as maintenance or infrastructure upgrades.

However, the ACCC considers that using the maximum historic throughput month to estimate capacity may not be a reasonable method to determine a facility's maximum practical capacity, even when adjusted on a 9 month basis. Absent data which supports the assumption that the maximum month can reasonably be expected to be achieved on a regular and long-term basis the use of the highest throughput month is unlikely to provide a representative estimate of a facility's capacity on a long-term basis (such as over the course of a season or multiple seasons). As such, while the use of a 9 month period is likely a reasonable approach to account for the off-peak period, it is unlikely to sufficiently account for the variations from a facility's maximum historic monthly throughput to provide a reasonable capacity estimate over a prolonged period.

The ACCC notes that Viterra has submitted that its combined maximum capacity across its 4 eastern SA facilities is 5.6 million tonnes (see table 3.2). However the 9 and 12 monthly maximum throughput methodologies result in capacity estimates for Viterra's facilities of 6.5 and 8.6 million tonnes respectively. The ACCC notes that the use of these methodologies appear to materially overestimate Viterra's submitted capacity for its own facilities[54] and that similar issues may apply to its application to third party facilities.

Capacity of alternate PTSPs in SA

The capacity of alternate PTSPs must also be considered when assessing the availability of port terminal capacity in SA. The amount of available alternate port terminal capacity provides an indication of the extent to which third party facilities offer a viable competitive alternative to Viterra's facilities.

In response to third party capacity figures used by the ACCC in the Draft Determinations,[55] Viterra provided table 3.3 below which summarises the differences in the ACCC's and CRA's estimates of third party capacity, and submitted that:

> *It is clear that the ACCC's approach underestimates the highest achievable practical capacity at competing port terminals. It is important that maximum capacity is not underestimated as this is a key element to the ACCC's decision on whether there is spare capacity available at Viterra's port terminals. The ACCC's approach is also inconsistent – in some cases it relies on public capacity information provided by port terminals, while in other cases it ignores it. In addition, the ACCC sometimes uses nominal capacity and at other times it uses business cases. And critically, it does not apply the same approach to the assessment of capacity at Viterra's port terminals.*[56]

The ACCC acknowledges that different methodologies were used to determine capacity estimates for different third party facilities in the Draft Determinations.

[53] Charles River Associates, *Supplement to CRA Report on the Benefits of Code Exemption for Viterra Grain Export Terminals* Public version, p. 4, fn. 9.

[54] As per the "maximum published available capacity" subsection, Viterra submitted that their maximum capacity is its published capacity (that is the sum of long-term, short-term and additional short-term capacity) plus tolerance (see question 4 of Viterra's response to the ACCC's 14/11/19 information request).

[55] In the Draft Determinations the ACCC considered that: Cargill's facility had 300,000 to 540,000 tonnes of capacity, Semaphore's facility had 396,000 tonnes of capacity, and T-Ports' Lucky Bay facility had 600,000 tonnes of capacity (although significant uncertainty around the capacity of the operation was acknowledged).

[56] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 10.

Port terminal facility capacity information has been provided to the ACCC on different methodological bases by different PTSPs. As such the ACCC considers it appropriate to select the methodology which it considers best suited to the differing sets of information available.

The ACCC's specific capacity estimates for all SA alternate (including those presented in Viterra's response to the capacity estimates used in the Draft Determinations) are discussed in detail below.

Table 3.3: CRA and ACCC Draft Determination estimates of alternate PTSP capacity

PTSP	ACCC estimate	CRA estimate[2]
Cargill, IHB (Berth 20)	540,000 *This estimate is based on Cargill's stated maximum monthly throughput achievable (60,000 tonnes) multiplied by 9 months. A 9 month period is used because of the practical limitations on the amount of capacity that may be provided through the proposed shiploader and the lack of port terminal storage.*[3]	540,000 *The approach taken is the same as adopted by the ACCC.*
Semaphore, IHB	396,000 *The ACCC multiplied Semaphore's monthly capacity estimate (33,000 tonnes) by 12 to get to an annual nominal capacity estimate of 396,000 tonnes. It noted that Semaphore shopped 370,000 tonnes of grain from its facility in 2016-17.*	615,000 *This is the based on the maximum monthly throughput previously achieved (68,336 tonnes in April 2017) multiplied by 9 months. A 9 month period is conservative, but is used to allow for maintenance and shutdowns.*
T-Ports, Lucky Bay	600,000 *The ACCC has used T-Ports' business case estimate of throughput.*	1.93 million (lower end of estimate) *T-Ports publicly stated that it has a maximum capacity of 3.6 million tonnes. However, CRA adopted a more conservative estimate. Its estimate was based on mean operational daily loading rates of 10,800 tonnes multiplied by 9 months on a 5 day week.*[4] *If a 7 day week was used, then the estimated capacity would be 2.7 million tpa.* Viterra notes that, in Attachment 1 to its Application, Viterra adopted an even more conservative estimate of 1.2 mtpa when considering spare capacity.
Total SA	**1,536,000**	**3,085,000 (excluding ADM)**

Source: Viterra response to the Draft Determinations public version, replica of table 2, p. 8.

Cargill and Semaphore

Table 3.2 indicates that Viterra has a total of 3.15 million tonnes of capacity (using maximum published available capacity) at Port Adelaide (via IHB and OHB).

In its exemption application Cargill stated that its estimated nominal capacity is 300,000 tonnes per annum.[57] Though Cargill also stated that:

> *…the highest practical capacity that the proposed facility could possibly reach is 60,000 tonnes a month over a period of 9 months in a year, being 540,000 tonnes annually.*[58]

In addition, the ACCC notes that Cargill has publically indicated that "…our first year we are looking to export 300,000 tonnes, the following years we have capacity of 540,000 tonnes."[59]

Consequently, the ACCC considers 540,000 tonnes per annum to be an appropriate capacity estimate for Cargill's facility at Port Adelaide Inner Harbour. As per table 3.3 this is also congruent with CRA's estimate of Cargill's capacity.

Semaphore has submitted to the ACCC that its facility has an annualised capacity of 396,000 tonnes per annum. However, due to Australia's export market only being competitive for 8 to 9 months per annum, the amount of grain Semaphore expects to be loaded would be between 264,000 and 297,000 tonnes per annum in practice:

> *Semaphore's estimated maximum capacity would be approximately 33,000mt per month or 2 x turns of the operational storage. This annualised capacity would be 396,000mt, however Australia is generally competitive for approximately 8 – 9 months per annum or which would then equate to 264,000mt – 297,000mt of bulk operational capacity per annum. In season 2016/2017 Australian grain on a record crop was competitive for a longer period of the season to drawdown old crop carry out and accordingly saw a more seasonalised volume target.*[60]

The ACCC notes Semaphore's 396,000 tonne per annum estimate in relation to its facility's nominal capacity (see table 3.2). The ACCC also notes that Semaphore's facility shipped 370,000 tonnes of grain in the 2016-17 shipping year, which demonstrates that Semaphore's facility is able to facilitate greater volumes of grain than the 297,000 tonnes per annum capacity estimate.

As shown in table 3.3, CRA has submitted that Semaphore's facility has capacity of 615,000 tonnes per annum. The estimate is based on Semaphore's maximum historical monthly throughput (prior to the 2020-21 season) of 68,336 tonnes per month, which equates to 615,000 tonnes per annum when calculated on a 9 month per annum basis.

As discussed previously,[61] the ACCC generally does not consider annualising the maximum historic throughput month to estimate capacity to be a reasonable method to determine a facility's maximum practical capacity. Broadly speaking, the ACCC considers that there are a range of operational factors which could likely prevent a PTSP from being able to achieve this historical maximum on a long-term basis in practice. However, the ACCC considers that, in certain circumstances, the historical monthly maximum may provide a useful benchmark of a facility's capacity, particularly if the available shipment data indicates that the facility may be capable of achieving similar levels of exports (to its maximum throughput month) on

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[57] Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, 30 October 2019, p. 3. See footnote 10 for further details.

[58] Ibid, p. 3.

[59] See video at: https://www.cargill.com.au/en/2021/cargill-welcomes-arrival-of-export-mobile-ship-loader (Accessed 4 February 2021).

[60] Information provided by Semaphore in response to a request for information from the ACCC.

[61] See '*Annualised maximum historic monthly throughput'* section 3.1.4 on pages 43 to 44.

a long-term basis (i.e. the historic monthly maximum figure does not appear to be an outlier and has been shown to be broadly representative of a facility's monthly capacity on an long-term basis).

With specific regard to Semaphore the ACCC notes that its facility has exceeded 65,000 tonnes in monthly exports on 5 occasions.[62] The facility has also exceeded 50,000 tonnes in monthly exports on 8 occasions, as well exceeding Semaphore's submitted monthly maximum of 33,000 tonnes on 11 occasions.[63]

The ACCC also notes that there were limited shipments from any of the Port Adelaide facilities during both the 2018-19 and 2019-20 seasons. As such there is a relatively small amount of data available in relation to Semaphore's throughput (i.e. only the 2016-17, 2017-18 seasons and the first half of the 2020-21 season). Noting that Semaphore's facility has exceeded its submitted monthly capacity estimate on 11 occasions, the ACCC considers it reasonable to expect that the facility could achieve monthly exports of more than 33,000 tonnes on a long-term basis.

However the ACCC considers there is limited evidence to suggest that Semaphore's historical monthly maximum throughput (93,844 tonnes) can reasonably be sustained over a longer period (as per footnote 62, one of these shipments appears to have been performed across 2 months). As such the ACCC considers it unlikely that an annual capacity estimate based on 9 months of the maximum monthly throughput (i.e. 862,596 tonnes per annum) provides a reasonable estimate Semaphore's capacity in practice.

Based on the relatively limited available data the ACCC considers it likely that Semaphore could facilitate the 68,336 tonnes a month as submitted by Viterra and CRA. Consequently, the ACCC considers Semaphore's facility to have a capacity of 615,000 tonnes per annum (as submitted by Viterra/CRA).

ADM – Port Pirie

ADM has submitted that it *"estimate[s] the total shipping capacity through Port Pirie to be maximum 150,000mt per annum".*[64]

The ACCC notes that ADM only recently commenced export operations at its Port Pirie facility (in December 2020).[65] As of 12 April 2021 ADM has completed 9 shipments totalling 141,939 tonnes at this facility.[66] In addition the ACCC notes that ADM has an extra 2 shipments (totalling 40,000 tonnes) on its shipping stem that were due to begin loading in late April.[67]

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[62] The ACCC also notes that the maximum exports performed in a single month at Semaphore's facility is 93,844 tonnes (in March 2021). However, it appears part of the loading of one of these shipments was performed across February and March. As per section 3.1.4, the ACCC notes that a single month's exports may be influenced by a variety of operational factors, which are not necessarily practical on an ongoing basis. The other 4 occasions where Semaphore exceeded 65,000 tonnes were: 79,736 tonnes (January 2021), 72,059 tonnes (in December 2020), 65,440 tonnes (in April 2017), and 65,268 tonnes (in February 2018). The ACCC notes there is a small difference between the ACCC's April 2017 shipment figure (65,440 tonnes) and Viterra/CRA's estimate (68,336 tonnes).

[63] All data in this section discussing Semaphore is up to the end of March 2021. The ACCC notes that 2020-21 export data is currently provisional and therefore subject to revision.

[64] ADM, *Application for Exemption Port Terminal (Bulk Wheat) Code of Conduct*, 14 January 2021, p. 2.

[65] In addition ADM completed 51,461 tonnes of coastal shipments during the 2019-20 season (as per Flinders ports website) prior to gaining the appropriate exporter accreditation from the Department of Agriculture (which the ACCC understands is not needed to perform coastal shipments).

[66] See: https://www.admgrain.com.au/wp-content/uploads/2021/04/ADM-Shipping-Stem-12042021.pdf. Accessed 21 April 2021.

[67] See: https://www.admgrain.com.au/wp-content/uploads/2021/04/ADM-Shipping-Stem-12042021.pdf. Accessed 21 April 2021.

Given that ADM is expected to exceed its 150,000 tonnes per annum estimate by the end of April 2021, the ACCC considers that the submitted maximum figure (of 150,000 tonnes per annum) understates the actual capacity of ADM's facility. The ACCC notes that it has not been provided with another capacity estimate of ADM's facility.

As set out in section 3.1.4, the ACCC does not generally consider it appropriate to annualise historic maximum monthly shipping figures (over either 9 or 12 months) to estimate a facility's annual capacity (absent data which suggests that the historic maximum monthly shipping figures can be achieved on an ongoing basis). However, notwithstanding only having data since December 2020, in this instance the ACCC considers annualising ADM's facilities capacity over 9 months to be the best available method to estimating ADM's capacity at this time. The ACCC notes that as more data becomes available its estimate of ADM's capacity is likely to change over time.

The ACCC notes that ADM's largest completed export month (which occurred in March 2021) indicates a historic maximum monthly shipping figure of 48,650 tonnes.[68] Equating this over 9 months of a season results in a capacity estimate 437,854 tonnes.

The ACCC also notes that ADM currently has 40,000 tonnes due to be loaded in late April 2021. However, given the uncertainty in relation to ADM's capacity, the ACCC generally considers that actual exports are more likely to provide an accurate basis for estimation purposes than prospective exports (given the range of operational considerations which have the potential to impact a facility's ability to load grain in a given month).

The ACCC also notes that, despite very limited shipping data available at this time, the 2020-21 season was a high production year in eastern SA (30% above average), in particular the Upper North region is 36% above average (which is where ADM expects to source its grain from).[69] [70] While acknowledging the limited shipping data available, the ACCC generally expects that export figures following high production seasons will be more likely to reflect a facility's actual capacity.

Consequently, for the purpose of these determinations, the ACCC considers the capacity estimate for ADM's Port Pirie facility to be 437,854 tonnes per annum at this time. As noted above, this estimate is based on limited data and as such is uncertain. However, based on the information available to the ACCC at this time, the ACCC considers this to be the most appropriate estimate of ADM's capacity.

Furthermore, while the ACCC notes the uncertainty regarding the capacity of ADM's Port Pirie facility in practice at this time, table 3.1 indicates that the constraint the facility is expected to place upon Viterra's facilities is likely to be limited in any event.[71]

T-Ports – Lucky Bay

The ACCC does not consider the capacity of T-Ports' Lucky Bay facility to be directly relevant to the exemption applications of Viterra's IHB, OHB, Port Giles and Wallaroo

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[68] The ACCC notes that while these 3 shipments have been recorded as March shipments on ADM's loading statement, parts of the loading of one of these March shipments occurred across months (MV Daily was loaded across February and March). For this shipment the ACCC has assumed uniform loading between its loading commencement date (26 February 2021) and its loading completion date (2 March 2021). See ADM's 12 April 2021 loading statement for further details: https://www.admgrain.com.au/wp-content/uploads/2021/04/ADM-Shipping-Stem-12042021.pdf.

[69] PIRSA, Crop and pasture reports South Australia 2021 Harvest Report, January 2021.

[70] ADM, *Application for Exemption Port Terminal (Bulk Wheat) Code of Conduct*, 14 January 2021, p. 4. See footnote 10 for further details.

[71] As per table 3.1 ADM's Port Pirie facility has the slowest ship loading rate and second slowest receival rate. Furthermore Port Pirie is also the shallowest port, limiting the size of vessels it can accommodate.

facilities. As discussed in section 4.2.2 the ACCC generally considers that bulk grain exports on the Eyre Peninsula are largely separate from operations in the rest of SA.

The ACCC will present its final views on the capacity of, and competitive constraint imposed by, T-Ports' Lucky Bay facility when it releases its Final Determinations in relation to Viterra's Port Lincoln and Thevenard facilities. These Final Determinations will be released following the ACCC's consideration of the peak shipping period data for the 2020-21 season.

Competitive constraint from alternate PTSPs

The ACCC notes that Viterra has submitted that its IHB and OHB facilities compete with alternate port terminal facilities at Port Adelaide and Port Pirie:[72]

> *…IHB is competitively constrained locally by Cargill and Semaphore at Port Adelaide and ADM at Port Pirie, as well as by containerised exports and port terminals in nearby Victoria.*[73]

> *…OHB is competitively constrained locally by Cargill and Semaphore at Port Adelaide, ADM at Port Pirie as well as by containerised exports and port terminals in nearby Victoria.*[74]

Port Adelaide Inner Harbour – Exit of LINX and Entry of Cargill

The ACCC notes that while LINX has exited the bulk grain export market, Cargill commenced operations at a different berth at Port Adelaide Inner Harbour in January 2021.[75] As of 31 March 2021 Cargill has shipped 134,425 tonnes from its Berth 20 facility at Port Adelaide's Inner Harbour.[76]

Cargill is the only exporter which made use of LINX's port terminal facility since the operation began in the 2015-16 season, exporting 210,000 tonnes of grain per annum on average. During this time Cargill also operated its own upcountry system that was used to transport grain to LINX's port terminal facility.

In light of the above, the ACCC does not expect the exit of LINX and entry of Cargill to affect market conditions to a significant extent. Though the ACCC does expect Cargill will likely impose a higher level of competitive constraint on Viterra's port terminal facilities than LINX previously did.[77]

The ACCC notes that Cargill was exempted from the application of Parts 3 to 6 of the Code in respect of its Port Adelaide Inner Harbour port terminal facility on 2 July 2020. In making this determination, the ACCC considered that Cargill's facility faces significant competition

[72] The ACCC notes that at the time of Viterra's (and other stakeholder's) initial submissions Cargill had not yet entered the port terminal service market at Adelaide, and LINX had not yet announced its exit. The Draft Determination uses the term LINX/Cargill where it aids ease of reading.

[73] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 65.

[74] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 71.

[75] The ACCC granted an exemption for Cargill's facility at Port Adelaide, Inner Harbour on 24 June 2020 (https://www.accc.gov.au/system/files/ACCC%20final%20determination%20%20Port%20Adelaide%20wheat%20code%20exemption%20assessment%20%20Cargill%20Australia%20Limited.pdf). On 8 April 2020 LINX notified the ACCC that it has ceased providing port terminal services to bulk wheat exporters through its Port Adelaide facility (https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/linx-port-adelaide-exemption/linx-suspends-bulk-grain-export-services).

[76] PTSP loading statements. Cargill's published shipment stem is available at: https://www.cargill.com.au/en/doc/1432178601142/port-adelaide-shipping-stem.pdf

[77] The ACCC generally takes a range of information into account when considering the likely competitive constraint imposed by a port terminal service. The ACCC notes that Cargill's mobile loader is capable of loading grain significantly quicker than LINX's facility (1,000t/hr compared to [c-i-c]t/hr). While the ACCC notes Cargill's comments that it expects to be limited to loading grain at 400t/hr due to truck availability and lack of at-port storage, the ACCC considers that these types of issues are likely more easily resolved than limitations imposed by loading infrastructure.

from Viterra's port terminal services at Port Adelaide and in SA more broadly, as well as from Semaphore's exempt Port Adelaide, Osborne facility. Consequently, the ACCC considered that Cargill has an incentive to provide exporters with fair and transparent access at its Port Adelaide facility.[78]

While the ACCC generally accepts that IHB and OHB most closely compete with alternate facilities at Port Adelaide and Port Pirie (see section 3.1.4), the ACCC views the combined capacity of ADM's, Cargill's and Semaphore's facilities (1.59 million tonnes) to be small, though not insignificant, compared to that of Viterra's IHB and OHB facilities, which have a combined capacity of 3.55 million tonnes.

The ACCC notes that some stakeholders submitted that competing port terminals only provide limited competition to Viterra's IHB and OHB facilities. These stakeholders generally considered that there are sufficient competitive alternatives to Viterra's IHB facility to support granting an exemption, but that differences in capacities and characteristics did not support granting an exemption in relation to the larger, deep water, OHB facility.

GPSA

Both LINX and Semaphore are limited by their physical geography and are incapable of fully loading 'Panamax' sized vessels, effectively operating on an opportunistic basis in response to high production years and as 'mobile port loading facilities' with little or no port storage capacity. The limited extent of competition arising from these alternate bulk grain terminals is shown in Table 1 (9% of South Australia's throughput for in 2017-18).[79]

Competition at a limited level exists at Inner Harbour, and the exemption of IHB would provide evidence of Viterra's likely behaviour in the absence of the Code to enable consideration of other facilities, including OHB.

As outlined above, IHB is a vastly different port to OHB in terms of its capabilities, setup, and physical geography. We do not believe that there is sufficient competitive constraint to merit the exemption of OHB from the Code.[80]

Cargill

The limited extent to which LINX and Semaphore imposes competitive constraint on Viterra is apparent from the numbers. Each of LINX and Semaphore accounted for just 240k and 270k tonnes of bulk exports in 2017-18 respectively, as against Viterra's 2.35 million tonnes in Port Adelaide.[81]

AGE

Inner Harbour does have direct competition at Semaphore. Cargill have not yet begun exports, but the argument for exemption from the higher level of the code where it pertains to Inner Harbour is, in our opinion, reasonable.

With the port of Outer Harbor we would strongly argue against a reduction in regulatory safeguards – with no direct competition in regard to deep sea port efficiencies, no competition in up country supply efficiencies (only Viterra has rail discharge facilities), will lead to a reduction in competition and a two-tiered pricing system that will only serve to destroy grower value. The incentives for building and operating alternative storage upcountry is severely damaged. In short,

[78] ACCC, *Final determination – Cargill Australia Limited, Port Adelaide*, 24 June 2020, p. 1. See footnote 10 for further details.

[79] GPSA, *Submission in response to Issues Paper*, 27 September 2019, p. 3.

[80] GPSA, *Submission in response to Draft Determinations*, 27 November 2020, p. 7.

[81] Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, 30 October 2019, p. 2. See footnote 10 for further details.

while competition is potentially emerging in SA, there is no alternative deep water port in the Port Adelaide zone that the exporter or grower can access.[82]

In contrast, a number of other stakeholders submitted that IHB and OHB are subject to a significant competitive constraint due to the presence of alternate facilities:

<u>SAFC</u>

There are already two exempt providers in the Port of Adelaide catchment region (Semaphore and LINX). These providers exported over half a million tonnes in 17/18, compared to 2.35m from Viterra's Pt Adelaide facilities and a total state crop of 6.94m tonnes – a significant proportion.[83]

<u>PGA of WA</u>

Viterra is already subject to competition at Port Adelaide from containerised exports and a bulk ship-loader, but also to domestic grain movements from competitors' sites and directly from on-farm storages.[84]

<u>GrainCorp</u>

Exporters have access to viable alternative port terminal service providers at Port Adelaide including mobile ship loading providers as well as the recent opening of operations at Lucky Bay. GrainCorp, as a long term customer of Viterra at Port Adelaide, is satisfied that Viterra has adequate incentive to provide fair and transparent access to its port terminal services at Port Adelaide.[85]

The ACCC acknowledges that alternate facilities can reasonably be expected to impose a level of competitive constraint on Viterra's port terminal facilities, particularly in relation to its IHB and OHB facilities. However, as shown below in table 3.4, since 2016-17 alternate facilities have accounted for just 20% of all bulk grain exports out of Port Adelaide.[86] The ACCC also notes that facilities that make use of mobile ship loader arrangements are intrinsically more temporary in nature than more conventional facilities. A range of factors, including the potential to relocate the loader, as well as the lower capital investment and fixed costs, mean that the level of competition provided by a mobile ship loader is likely to be less consistent and may fluctuate significantly in response to market conditions. For example, lower fixed costs likely make it easier for the operators of mobile ship loaders to choose not to participate in the market during less favourable seasons.

As such, the ACCC considers that ADM, Cargill and Semaphore are likely to impose a material level of competitive constraint on IHB, and a small but not insignificant level of constraint on OHB. The existence of viable, though limited, alternative capacity may be sufficient to provide an incentive for Viterra to provide fair and transparent access to third party exporters. Furthermore, the ACCC notes that the presence of these facilities serves to demonstrate that smaller scale entry into the port terminal service market in eastern SA is both possible and viable (increasing the credibility of the threat of future entry).

The ACCC acknowledges that ADM's, Cargill's and Semaphore's facilities' smaller capacity, and less efficient port infrastructure (as illustrated by table 3.1), including the absence of rail access, limits the amount of competitive constraint they place on IHB and OHB. However, the ACCC does not consider the level of constraint imposed to be insignificant and notes

[82] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 4-5.

[83] SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 3.

[84] PGA of WA, *Submission in response to Issues Paper*, 3 September 2019, p. 1.

[85] GrainCorp, *Submission in response to Draft Determinations*, 17 November 2020, p. 1.

[86] LINX began bulk export operations out of Port Adelaide in the 2015-16 season, while Semaphore began operations in the 2016-17 season.

that a range of other factors, including the upcountry, domestic and container markets (all of which are discussed in chapter 4), must be considered when determining if a PTSP has an incentive to provide fair and transparent access to a port terminal facility.

Table 3.4: Bulk grain shipments at Port Adelaide and Port Pirie (million tonnes), 2016-17 to 2020-21

Port terminal facility	2016-17	2017-18	2018-19	2019-20	2020-21*	Total
Port Adelaide IHB	0.87	0.73	0.07	0.27	0.33	2.26
Port Adelaide OHB	1.82	1.64	0.17	0.53	0.81	4.97
Port Adelaide LINX	0.42	0.24	0.00	0.00	-	0.66
Port Adelaide Cargill	-	-	-	-	0.13	0.13
Port Adelaide Semaphore	0.37	0.27	0.03	0.09	0.30	1.06
Port Pirie ADM	-	-	-	0.05**	0.12	0.17
Port Adelaide and Port Pirie total:	**3.48**	**2.87**	**0.27**	**0.94**	**1.69**	**9.25**
Viterra export portion:	77%	82%	88%	85%	67%	78%
Alternate PTSP export portion:	23%	18%	12%	15%	33%	22%

Source: PTSP loading statements; ACF Shipping stem and market share report; and Flinders Ports website.[87]

Notes: Table 3.4 presents bulk shipment data from 2016-17 to 2020-21 as this is the period since both LINX and Semaphore entered the PTSP market (in 2015-16 and 2016-17 respectively).
* 2020-21 and total columns are as of 31 March 2021. The ACCC notes that all 2020-21 data is provisional and subject to change.
** These were coastal shipments (which are not covered under the Code).

The ACCC notes that Viterra has submitted that the current capacity of alternate port terminal facilities could be used to facilitate the export of 58% and 47% of the 2017-18 and 2018-19 harvest production respectively:

> *Taking Viterra's estimate of capacity at competing port terminals in South Australia (which, as noted above, are conservative), there is currently sufficient capacity at competing port terminals in South Australia to export 58.3% and 46.8% of the crop in the past two years (2017-18 production was 7.0 million tonnes and 2018-19 production was 5.5 million tonnes).*[88]

As previously discussed the ACCC notes that it considers the Eyre Peninsula and eastern SA (i.e. the Yorke Peninsula catchment area and the Port Adelaide catchment area) to function as separate markets (see section 4.2.2).

Based on eastern SA production figures[89] and the combined capacity of alternate facilities in this area (1.59 million tonnes - as per the ACCC's estimates in table 3.2),[90] the ACCC notes there is sufficient capacity to export 32% and 48% of the 2017-18 and 2018-19 (eastern SA) production respectively. The ACCC also notes that the 2018-19 season was a low

[87] Flinders Ports, Port Statistics, https://www.flindersports.com.au/ports-facilities/port-statistics/, 2021, accessed 13 February 2021.

[88] Viterra, *Response to Draft Determination*, Public version 8 February 2021, pp. 19-20.

[89] PIRSA, *Crop and pasture reports – final summary and estimates*, 2012-13 to 2019-20.

[90] The competing eastern SA port terminal facilities (ADM, Cargill and Semaphore) have a combined capacity of 1.59 million tonnes (see section 3.1.4).

production season for eastern SA (33% below average) and that alternate capacity (in eastern SA) would be able to export 27% of (eastern SA) production on average.[91]

The ACCC has reproduced table 3 from Viterra's response to the Draft Determinations below, using data from the 2019-20 Bulk grain ports monitoring report (as Viterra submitted its 2019-20 export figures on a confidential basis).[92]

Table 3.5: Reproduction of table 3 from Viterra's submission in response to the Draft Determinations – Competitor capacity vs exports by Glencore Agriculture's competition (including ADM)

	Competitor port terminal capacity*	Exports by competitors from Viterra's port terminals	
		2018-19**	**2019-20**
Port Adelaide	1.59	0.11	0.28
Eastern SA (Yorke Peninsula + Port Adelaide)	1.59	0.29	0.61

Source: Viterra Response to Draft Determinations public version Table 3; ACCC 2019-20 Bulk grains ports monitoring report.

Notes: The ACCC has excluded rows related to exports on the Eyre Peninsula from Table 3 of Viterra's response to the Draft Determinations, consistent with the ACCC's view that these exports are not directly relevant to the assessment of Viterra's Inner Harbour, Outer Harbor, Port Giles or Wallaroo facilities (see section 1.4).

** Viterra did not include ADM's Port Pirie facility in its competing port terminal capacity (which the ACCC has accounted for in table 3.5). The ACCC notes ADM's facility is likely to compete closest with Port Adelaide terminals, as opposed to Wallaroo or Port Giles (see section 4.2.3).*

*** There have been slight updates to 2018-19 export figures since the release of the 2018-19 bulk monitoring report.*

On the basis of the 2018-19 and 2019-20 export statistics Viterra stated there would be sufficient competing capacity today:

- *at Port Adelaide to process all of Glencore Agriculture's competitors' exports who used Viterra's IHB and OHB; and*
- *Port Adelaide to process all of Glencore Agriculture's competitors' exports who used Viterra's facilities at Port Adelaide and on the Yorke Peninsula (together considered by ESCOSA to be a catchment area).*[93]

While the ACCC acknowledges there would have been sufficient capacity at alternate port terminal facilities to accommodate all 2018-19 and 2019-20 exports by third party exporters in the eastern SA area, the ACCC notes both these seasons were severely affected by the east coast drought. In contrast the ACCC notes that average[94] third party exports from Port Adelaide and eastern SA (i.e. Port Adelaide and the Yorke Peninsula) are 1.22 and 1.98 million tonnes respectively.[95]

Consequently, the ACCC notes that 77% of estimated alternate capacity at Port Adelaide and Port Pirie would be needed to facilitate the average level of third party exporter shipments from Port Adelaide. Furthermore, while noting that the ACCC does not consider the Port Adelaide catchment zone to include the Yorke Peninsula (see section 4.2.3),

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[91] PIRSA, *Crop and pasture reports – final summary and estimates*, 2012-13 to 2019-20; PTSP loading statements; ACF.

[92] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 20 (table 3).

[93] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 20.

[94] Over the 2011-12 to 2019-20 period.

[95] The ACCC notes that if the drought affected 2018-19 and 2019-20 seasons are excluded, on average third party exports from Port Adelaide and eastern SA (i.e. Port Adelaide and the Yorke Peninsula) are 1.50 and 2.40 million tonnes respectively.

alternate port terminals in eastern SA would only be able to facilitate around 80% of the combined third party exports from eastern SA. However, and as discussed throughout this document, there are a range of other factors which must be considered in relation to accessing alternate port capacity (for example the benefit of exporting through a deep water facility, and the freight costs of delivering grain to different port terminals).

The ACCC has also considered the level of competitive constraint imposed by competing port terminal facilities on Viterra's other port terminal services.

As discussed in section 4.2 (which sets out the ACCC's views on catchment areas) the ACCC considers that ADM's, Cargill's and Semaphore's facilities are likely to place little to no competitive constraint on Viterra's Port Giles facility. However, the ACCC considers there is a degree of overlap between the Wallaroo, Port Adelaide and Port Pirie catchment areas.[96] The ACCC also notes that T-Ports has submitted that alternate Port Adelaide facilities potentially compete with Wallaroo:

> *These services provide an alternative to Viterra Port Adelaide (Inner harbour and Outer Harbor) and potentially to Wallaroo.*[97]

As such the ACCC's final view is that ADM's, Cargill's and Semaphore's facilities likely place a limited level of competitive constraint on Viterra's Wallaroo facility, though less than the level of constraint imposed on Viterra's IHB and OHB facilities.

3.1.5 Proposed port terminal facilities

In addition to those port terminal facilities currently in operation, the ACCC is aware of a number of proposed port developments in SA of potential relevance to the assessment of Viterra's exemption applications.

This includes proposals for port terminals at Wallaroo (T-Ports), Port Spencer (Free Eyre Limited) and Cape Hardy (multiple partners). In the event that one or more of these facilities enter the port terminal services market the ACCC expects that this would increase the competitive constraint placed upon existing PTSPs.

The ACCC also considers that, while proposals located on the Eyre Peninsula (Port Spencer and Cape Hardy) are not expected to be in direct competition with Viterra's IHB, OHB, Port Giles or Wallaroo facilities, these facilities still provide a general indication of the willingness of parties to enter (or consider entering) the SA port terminal services market.

In addition, since the ACCC released its Draft Determinations (in October 2020) ADM has begun export operations out of its Port Pirie facility (in December 2020).[98] As of 12 April 2021 ADM had loaded 9 shipments totalling 141,939 tonnes, and also has an additional 2 shipments (totalling 40,000 tonnes) scheduled to load in late April.[99] The competitive constraint imposed by ADM's Port Pirie port terminal facility is discussed throughout chapters 4 and 5 as relevant.

In its exemption applications Viterra submitted that it is subject to significant competitive constraint as a result of existing alternate PTSPs and proposed port terminal facilities:

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[96] As per section 4.2, the ACCC considers Port Pirie will most closely compete for grain with port terminal service providers at Port Adelaide.

[97] T-Ports, *Submission in response to Issue paper*, 26 August 2019, p. 4.

[98] See: https://www.admgrain.com.au/grain-marketing/grain-storage-options/adm-port-pirie.

[99] See: https://www.admgrain.com.au/grain-marketing/grain-storage-options/adm-port-pirie.

Competition within South Australia is intensifying, with new entrants at Port Adelaide and on the Eyre Peninsula, and proposed projects at Wallaroo and on the Eyre Peninsula. Viterra is therefore subject to increasing and significant competitive constraints.[100]

Similarly, CRA submitted that the threat of entry from prospective PTSPs removes any incentive for Viterra to deny access:

…even the threat of entry or expansion of port terminals eliminates any market power that Viterra might otherwise have in the supply of port terminal services and removes Viterra's incentive to deny access to its terminals for competing exporters.[101]

Viterra also submitted that proposed port terminal facility developments indicate low barriers to entry in the port terminal services market.[102] In particular, Viterra submitted that technological changes have reduced barriers to entry, and that this is evidenced by the recent entry of alternate PTSPs:

The barriers to entering the market for providing port terminal services are not prohibitive. There have been significant technological changes at port terminals, meaning that the cost of entry has reduced. For example, T-Ports has stated that Lucky Bay has a "lower build cost…compared to traditional grain export port facilities in South Australia, making the financial feasibility of the investment easier to attain with a lower throughput requirement."

The development of mobile ship loaders has also made entry into the export of wheat easier. These facilities have lower construction costs than traditional grain export terminals, reducing barriers to entry.

…

The fact that barriers to entry are not high is evident from the amount of recent entry in South Australia (at Port Adelaide as well as on the Yorke Peninsula and Eyre Peninsula) as well as developments underway or being planned. These recent entrants and planned developments act as significant constraints on Viterra.[103]

SAFC also submitted that new technologies have lowered barriers to entry into the port terminal services market, and that increasing competition as well as the proposed development of additional port terminal facilities provides a strong incentive for Viterra to provide fair and transparent access:

…Viterra has a strong incentive to negotiate attractive commercial terms that do not spur further entry into this market. It is worth noting that several of these proposals are for 'barging' operations, which are low capex, high(er) opex and thus have lower barriers to entry. It is not just current competition, but also the advanced nature of future competitive service provider proposals that will deter anti-competitive conduct.[104]

Indeed, the addition of several competitors with significant additional capacity into the system (T-Ports, ADM, Cargill) plus the rapid and advanced progression of plans for further entrants (i.e. Peninsula Ports/Port Spencer) strongly indicates that competition in this sector is growing and there are few barriers to entry, reducing the need for such strong controls in this market.[105]

However, as noted by the Australian Export Grains Innovation Centre (AEGIC), mobile ship loaders face a range of challenges:

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[100] Viterra, *Exemption Application 2019*, 2 July 2019, p. 14.

[101] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 11 November 2019, p. 17.

[102] Viterra, *Exemption Application 2019*, 2 July 2019, p. 1.

[103] Viterra, *Response to Draft Determination*, Public version, 8 February 2021 pp. 21-22.

[104] SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 2.

[105] SAFC, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 2.

> *These services provide flexibility to small operators to bypass long-term ownership and use of costly port infrastructure. These operations are more exposed to grain hygiene risk and delays associated with out-of-specification truckloads. The logistics associated with these just-in-time deliveries are also more exposed to quality fluctuations between loads, where there is insufficient flexibility to blend.*[106]

The ACCC has also highlighted similar concerns from stakeholders in its 2017-18 Bulk grain ports monitoring report:

> *The general concern was that mobile ship loading operations do not have the same level of quality controls that larger scale, fixed loader operations do. Some stakeholders noted reports of contaminated shipments originating from mobile loaders.*
>
> *An equal number of stakeholders do not see any basis for concerns about mobile ship loading operations.*[107]

In addition, GPSA submitted that LINX/Cargill's and Semaphore's facilities operate on an opportunistic basis:

> *Whilst exempt from the Code, Table 2.3 in the Draft Determinations shows that LINX/Cargill and Semaphore are opportunistic operators, wholly dependent on seasonal variabilities. The market share of both exporters fluctuates and in lower return years such as 2018-19, provided little competition to Viterra's bulk exports.*[108]

However, Viterra submitted that this capacity also remains present during periods of low demand:

> *Viterra does not agree that mobile ship loaders are only for additional capacity during periods of high demand. The highest maximum capacity at a port terminal does not disappear during lower demand years – capacity is a flexible concept and a port terminal operator can, and will, increase capacity to the maximum practical level in high demand years.*[109]

The ACCC expects that alternate technologies (such as mobile ship loaders) have the potential to lower capital costs and therefore the barriers to entry faced by prospective PTSPs. This is likely evidenced by the entry of several PTSPs in recent years (i.e. ADM, Cargill and T-Ports).

The ACCC also considers that mobile loaders continue to provide a level of competitive constraint on existing services in lower output seasons. However (and as noted by AEGIC and GPSA) mobile loading facilities potentially face a range of operational challenges which may restrict the level of competition they place on PTSPs operating conventional (i.e. more capital intensive) loading facilities.

However, the ACCC also received several stakeholder submissions indicating that Viterra likely has a substantial amount of market power at port, and that alternate PTSPs only impose limited competitive constraint on Viterra:

> <u>T-Ports</u>
>
> *Service (sic) currently offered by PTSPs at other facilities outside of South Australia have minimal competitive alternative to the services provided in SA by Viterra.*[110]
>
> <u>Cargill</u>

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[106] AEGIC, *Australia's grain supply chains – costs, risks and opportunities,* October 2018, p. 70.

[107] ACCC, *Bulk grain ports monitoring report 2017-18*, December 2019, p. 33.

[108] GPSA, *Submission in response to Draft Determinations*, 27 November 2020 p. 3.

[109] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 22.

[110] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 4.

…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.[111]

Viterra therefore continues to operate in all of the ports that are the subject of its application relatively unrestrained by competition.[112]

<u>GPSA</u>

Both LINX and Semaphore are limited by their physical geography and are incapable of fully loading 'Panamax' sized vessels, effectively operating on an opportunistic basis in response to high production years and as 'mobile port loading facilities' with little or no port storage capacity. The limited extent of competition arising from these alternate bulk grain terminals is shown in Table 1 (9% of South Australia's throughput for in 2017-18).[113]

It is GPSA's view that the Draft Determination presents little evidence that operators in Inner Harbour (or indeed third party users at IHB) can compete with OHB due to the above factors. Emerging service providers with mobile loading facilities appear unable to consistently challenge permanent facilities.[114]

<u>AGE</u>

Outer Harbor is the only deep water grain berth in Adelaide. Cargill and Semaphore are direct competitors to only Inner Harbour. The impacts of loading rate differentials and the Vessel chartering advantages of a deep sea port over a smaller port have been well documented. It is why we support Inner Harbour being removed but not Outer Harbour.[115]

<u>Mr John Hill</u>

…there appears to be no real basis for easing controls on the operation of either Viterra bulk grain export facility at Port Adelaide.[116]

In contrast, submissions from other stakeholders suggested that Viterra's port terminal services are subject to a significant amount of competition (particularly at Port Adelaide):

<u>SAFC</u>

SAFC notes that competition in the grain ports sector has considerably increased in SA since the establishment of the Code…

…Viterra's share of the grain bulk export market in SA, while still significant, is declining (from 97% on average over the last 7 years, to 91% in 2017/18)…

As such, Viterra has a strong incentive to negotiate attractive commercial terms that do not spur further entry into this market.[117]

<u>PGA of WA</u>

Viterra is already subject to competition at Port Adelaide from containerised exports and a bulk ship-loader, but also to domestic grain movements from competitors' sites and directly from on-farm storages.[118]

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[111] Cargill, *Submission in response Issues Paper*, 6 September 2019, p. 1.

[112] Ibid, p. 2.

[113] GPSA, *Submission in response to Issues Paper*, 4 October 2019, p. 3.

[114] GPSA, *Submission in response to Draft Determinations*, 27 November 2020, p. 2.

[115] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 1.

[116] Mr John Hill, *Submission in response to Draft Determination*, 3 November 2020, p. 3.

[117] SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 2.

[118] PGA of WA, *Submission in response to Issues Paper,* 3 September 2019, p. 1.

GrainCorp

Exporters have access to viable alternative port terminal service providers at Port Adelaide including mobile ship loading providers as well as the recent opening of operations at Lucky Bay. GrainCorp, as a long term customer of Viterra at Port Adelaide, is satisfied that Viterra has adequate incentive to provide fair and transparent access to its port terminal services at Port Adelaide.[119]

The ACCC acknowledges that alternate port terminal facilities currently operating in the market impose a level of competitive constraint on the relevant Viterra facilities. However, the ACCC's view (as per section 4.3.3) is that the competitive constraint from third party operators, while differing by region, is likely to be relatively small (though not insignificant).

In considering future market entrants as a potential source of competitive constraint, the ACCC notes SAFC's submissions that the proposed Port Spencer facility has achieved further governmental approvals,[120] and has begun early site works.[121] However the ACCC understands that, at the time of publication, further approvals are still needed before Peninsula Ports can begin construction at Port Spencer.[122] As discussed above, while the ACCC does not consider port terminals proposed for the Eyre Peninsula to be directly relevant to eastern SA grain markets, the proposals provide an indication of the willingness of parties to enter the SA market.

The ACCC also understands that the other proposed facilities generally still have several important stages to progress through before they commence operations. For example, while early site works have begun at T-Ports' proposed Wallaroo facility, the facility is still pending further approval from relevant government authorities.[123] However, should T-Ports' Wallaroo facility commence and operate as proposed, the ACCC expects that it could impose a significant level of competitive constraint on Viterra's Wallaroo facility. The facility will also likely impose a lesser degree of competitive constraint on Viterra's Port Giles, IHB and OHB facilities.

As such, the ACCC acknowledges that if the currently proposed facilities proceed this would likely result in significant additional competition amongst PTSPs within SA. However the ACCC considers that significant uncertainty remains around if or when these facilities will commence operations.

Nonetheless, the ACCC also acknowledges that the threat of entry of additional facilities will impose a level of competitive constraint on Viterra, particularly to the extent that the threat of entry is credible and can be expected to compete with a particular Viterra facility (or facilities). In particular, the ACCC notes that the credibility of the threat of entry by T-Ports at Wallaroo has increased following the commencement of operations at T-Ports' Lucky Bay facility (particularly given the proposed use of the same transhipment vessel by both operations). The ACCC notes the level of constraint imposed by T-Ports' proposed Wallaroo facility could change rapidly once greater certainty around the operation becomes available.

While the ACCC does not generally consider the threat of competition to impose as effective a constraint as actual competition, the ACCC considers that Viterra is increasingly competitively constrained by both actual and proposed competition. The ACCC also notes that any future increase in competition (such as the realisation of significant additional capacity by alternate PTSPs or the entry of additional facilities into the market) has the

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[119] GrainCorp, *Submission in response to Draft Determinations*, 17 November 2020, p.1.

[120] SAFC, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

[121] SAFC, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 2.

[122] See: https://www.premier.sa.gov.au/news/media-releases/news/port-spencer-grain-facility-approved, accessed 23 September 2020.

[123] See: https://soundcloud.com/t-ports/wallaroo-port-development-1, accessed 24 February 2021.

potential to materially affect the level of competitive constraint faced by (one or more) of Viterra's port terminal facilities.

More broadly the ACCC notes that the commissioning of new port terminal facilities and/or the development of storage networks is a complex process (particularly with respect to larger scale operations). Parties typically are required to secure a range of regulatory approvals, across all levels of government. Both Cargill's and T-Ports' operations commenced later than expected. Additionally, the Department of Agriculture, Water and the Environment (the Department) recently established a specific licensing regime for mobile loaders.[124]

The ACCC also notes that the extent of the constraint imposed by a newly entered (and operational) PTSP may not be immediately apparent, due to a range of possible factors:

- Potential exporters may have ongoing long term capacity commitments with other PTSPs and may be constrained in their ability to switch some or all of their export task to the newly entered PTSP in the short to medium term.
- Commissioning may commence outside of harvest or at a time of low production.
- The operation may commence at a time when domestic demand for grain is high, such as during the recent drought on Australia's east coast (though it is noted that many PTSPs facilitated coastal shipments at this time).
- Storage and handling facilities associated with the newly entered PTSP may not yet be completed/fully operational.
- Freight and logistics failures (e.g. as seen in Victoria in relation to ongoing rail redevelopment works.[125]

The ACCC will continue to closely monitor developments in the SA market, including in relation to T-Ports' proposed Wallaroo facility.

3.1.6 The constraint international markets place upon Viterra's operations

In its exemption applications Viterra submitted that SA is a price taker in the global grain market and that, as a result, Viterra has a strong incentive to maintain a "*…cost effective and efficient supply chain*."[126]

In particular, Viterra submitted that:

> *The acquisition and trading of grain is undertaken globally, and South Australia, which accounts for less than 3% of global volume, is a price taker. South Australia face vigorous competition from other Australian states, Canada, the United States of America, France, Germany, Russia, Ukraine and Argentina to supply grain.*[127]
>
> *The global bulk grain export market is highly competitive and South Australia's share is less than 3% by volume. As a result, Viterra is a price taker. If Viterra is not efficient in outturning bulk wheat to vessels and keeping fees as low as possible, it will lose business to competitors in South Australia, other states and overseas.*[128]

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[124] Department of Agriculture, Water and the Environment, Grain and Seeds Exports Program – Mobile bulk loading of prescribed goods for export 12 August 2020, See: https://www.agriculture.gov.au/export/controlled-goods/plants-plant-products/ian/2020/2020-53.

[125] See: https://www.weeklytimesnow.com.au/agribusiness/rail-freight-victoria-works-to-cause-more-delays-for-grain/news-story/d6c83cc1c7d3e4494c6f3dbc8bf41142, https://www.graincentral.com/news/trucks-gain-rail-languishes-ahead-of-big-victorian-crop/.

[126] Viterra, *Exemption Application 2019*, 2 July 2019, p. 17.

[127] Ibid, p. 4.

[128] Ibid, p. 13.

Viterra also referenced ESCOSA's report which stated that SA is a price taker in the global market, and that Viterra has an incentive to minimise the costs of its supply chain in response to competition internationally:

> *The South Australian bulk grain industry is a price taker within the global market. Globally, Viterra faces pressure to be efficient in outturning bulk wheat to vessels, and to keep fees as low as possible, while maintaining the quality at required specification. To do so, Viterra should focus on the efficiency of its whole supply chain, from receiving bulk grain upcountry to transporting it to port and then loading it onto vessels. Otherwise, Viterra risks losing business to interstate and overseas competitors.*[129]

The ACCC acknowledges that, given its relative size, SA is a price-taker in international grain markets and that Viterra operates in a global market. However while SA (and by extension Viterra) may face significant competition (and have little to no market power) in international markets, this does not necessarily mean that Viterra does not have substantial market power at the port terminal service level within the SA supply chain. Market power at this level has the potential to be used to increase Viterra's profitability at the expense of other participants in the SA market.

Although Viterra's associated entity exporter is a price-taker in international grain markets, Viterra may have a degree of market power in the provision of port terminal services in SA (or within certain catchment areas). The absence of sufficient competitive constraint in SA may also result in Viterra: not having an incentive to pass cost savings through to other participants in the SA bulk grain export supply chain; increasing its charges for port services, (which may ultimately affect the prices paid for grain in SA);[130] or providing preferential treatment to itself, or its associated entity exporter. In considering the effect of international competition the ACCC notes that ESCOSA, in its review of the SA bulk grain export supply chain, found that Viterra were *"choosing not to share efficiencies made with the industry through lower fees."* [131] It is also noted that ESCOSA found that "*Viterra is earning returns, on average, towards the upper end of what might be expected for a firm with Viterra's level of risk.*"[132] ESCOSA, however, concluded that there is:

> *…no evidence that Viterra's fees are excessive compared with the total fees charged by its Australian counterparts, as shown by AEGIC's latest study of Australian supply chain costs.*[133]

Furthermore, the ACCC also notes ESCOSA's finding that:

> *[ESCOSA] has not found or been presented with any conclusive evidence of Viterra exercising market power to the detriment of competition.*[134]

The ACCC is not in a position to comment on the efficiency of Viterra's supply chain in the context of this exemption assessment, however the ACCC stated in its Draft Determinations that efficiencies will not be necessarily passed on to other SA market participants in circumstances where Viterra retains significant market power at port.

In its response to the Draft Determinations Viterra submitted:

> *The fact that Viterra operates in a global market is what incentivises Viterra to pass through efficiencies to its customers and to continuously strive to improve the quality of its services. This is because Viterra's main customers are large global marketers and exporters who source grain*

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[129] Ibid, p. 16. Note: This excerpt is quoted from: ESOCSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 42.

[130] As submitted by T-Ports: *"Without the existence of a competing PTSP serving the catchment zone, any unreasonable fees would simply be passed straight on to the growers in that catchment zone."* See T-Ports Submission, 26 August 2019, p. 3.

[131] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 82.

[132] Ibid, p. 83.

[133] Ibid, p. 62.

[134] Ibid, p. 35.

> *from many countries around the world. If Viterra's services are not high quality, efficient and cost effective, these marketers can easily switch their acquisition source to other parts of Australia or to other countries.*[135]

The ACCC accepts that Viterra's main customers' source grain from many countries around the world. As a consequence, Viterra's associated entity exporter Glencore likely has little or no ability to charge a premium for grain exported from SA. However, this does not imply that Viterra is forced to maintain high quality, efficient or cost effective supply-chain services in SA. To the extent that grain growers in SA are 'locked-in' to producing grain (perhaps through sunk investments in on-farm equipment or expertise, or lack of profitable alternatives), there is the potential for Viterra, in the absence of sufficient competitive alternatives, to raise its prices without risk of the grain growers in SA switching to other uses for their land (or third party exporters leaving the SA market).

Viterra also submitted that it has commercial incentives to avoid relying on, or favouring, only a single exporter:

> *…Viterra has a strong commercial incentive to maximise throughput at its ports and is cognisant of the fact that relying on, or favouring, one marketer is an uncommercial model given the high-risk nature of grain trading and the significant investments it has made in its infrastructure.*[136]

The ACCC generally accepts that PTSPs, particularly those with substantial capital investments and high fixed costs, face commercial incentives to maximise throughput (and to manage risks to their businesses more broadly). However, the ACCC notes that a firm with substantial market power, with the ability to price discriminate, could maximise throughput while simultaneously raising prices significantly for some customers. If Viterra (or its associated entity exporter Glencore) is able to price discriminate and to identify growers with few competitive alternatives, Viterra may be able to charge higher prices for these growers for supply chain services, without any loss in throughput through its ports (in the absence of sufficient competitive constraints).

The ACCC also accepts that managing commercial relationships with customers (i.e. exporters) is likely a relevant consideration in this regard (particularly in circumstances where a PTSP is seeking to establish a new operation). However throughput at any particular facility is also likely to relate to a number of other factors, such as the size of the harvest, the location and capacity of the facility, as well as the presence of competitive alternatives.

As such the ACCC does not consider the risk of third party exporters leaving the market as a result of focussing their operations in other geographic markets, provides a sufficient incentive for Viterra to provide fair and transparent access (or to pass through cost savings). As discussed throughout this section, the ACCC considers Viterra will likely only pass through supply chain efficiencies in response to competition from within the SA market (or markets within Australia that directly compete for SA grain, such as Victoria, and in the case of recent seasons NSW and Queensland).

The ACCC notes that Viterra also submitted that exporters have not been exiting the SA market due to Viterra's conduct.

> *…to Viterra's knowledge, no exporter has stopped using port terminals in South Australia to export grain in recent years as a result of Viterra's fees or service quality. To the extent that an exporter stops exporting from South Australia to compete in the global grain market, this will be*

[135] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 11.

[136] Ibid, p. 54.

due to a combination of other factors including grain availability, the efficiency and risk appetite of the exporter and global market conditions.[137]

The ACCC accepts that exporters' decisions to enter, remain or exit a particular market will be influenced by a range of factors. The ACCC considers fair and transparent access to port terminal services to be one of these factors. While acknowledging that third party exporters have been able to secure access to Viterra's facilities over recent years, the ACCC notes that Viterra's operations have been covered by the full Code, including those Parts of the Code which focus on exporters' access to port terminal services, since its commencement on 30 September 2014.[138]

Viterra submitted it has passed through cost savings

In its response to the Draft Determinations Viterra submitted that:

…contrary to the ACCC's suggestions, the evidence shows that Viterra does in fact pass on efficiencies to other market participants. In Viterra's view, this indicates that Viterra is incentivised to (and does) operate an efficient supply chain to compete on a global stage, and to pass through the benefits of efficiency gains to its customers.[139]

The ACCC notes that, as set out in the Draft Determinations, ESCOSA found Viterra were choosing not to share efficiencies with the industry through lower fees, and that Viterra's earnings appeared to be on the upper end (but not in excess) of what might be expected for a firm with Viterra's level of risk:

…Viterra is choosing not to share efficiencies with industry through lower fees. However, taking into account corporate structural issues, Viterra's fees are not considered excessive at this time, compared with the total fee levels charged by its Australian counterparts.[140]

Viterra appears to be earning returns towards the upper end of, but not in excess of, what might be expected for a firm with its level of risk (on average across harvest years, but subject to significant year-on-year variations depending on harvest yields). Viterra appears to have focused on extracting supply chain efficiencies, rather than protecting and preserving unduly high returns.[141]

ESCOSA also indicated that its findings were based on the available evidence and did not represent an assessment of how the market may evolve. In doing so ESCOSA noted that:

One possibility is that Viterra's operational efficiencies will continue, resulting in stronger returns if service fees are not reduced. In this case, Viterra might use its position of strength to exercise market power to the detriment of competition to protect these returns, or it might share some future gains with users of the supply chain (which may address growers' equity concerns).[142]

However, ESCOSA found no evidence Viterra's fees are excessive compared to its Australian counterparts, and had not been presented with any conclusive evidence of Viterra exercising market power to the detriment of competition:

[ESCOSA] found no evidence that Viterra's fees are excessive compared with the total fees charged by its Australian counterparts, as shown by AEGIC's latest study of Australian supply chain costs.[143]

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[137] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 13-14.

[138] Access Undertakings were in place prior to this time.

[139] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 11.

[140] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 35.

[141] Ibid, p. 83.

[142] Ibid, p. 2.

[143] Ibid, p. 62.

> *[ESCOSA] has not found or been presented with any conclusive evidence of Viterra exercising market power to the detriment of competition.*[144]

Viterra submitted that ESCOSA's statement that Viterra has chosen not to share efficiencies with industry, if it ever was accurate, is now incorrect.[145] As an example of sharing supply chain efficiencies, Viterra submitted that:

> *Over the past three years, Viterra's supply chain costs for exporting during peak shipping periods fell by [c-i-c]. Over this period, Viterra continued to invest heavily in its infrastructure (including by investing in services such its laboratory and IT services to create additional value for marketers and growers) and increased productivity by maintaining or improving turnaround at its port terminal and up-country sites.*[146]

Viterra also submitted that it has made a number of reductions in other fee areas over recent seasons:

> *As set out in previous submissions to the ACCC, Viterra has also passed through cost reductions in the form of fee reductions. For example:*
>
> - *Viterra reduced its booking fee from $5.50 to $5.00 in 2019;*
> - *[c-i-c]; and*
> - *to provide growers more time to sell their grain to marketers, since October 2019, Viterra has provided growers a free full month of storage for deliveries. This is in addition to not charging growers for the remainder of the month in which delivery occurs (which itself can be a full month).*[147]

As set out in the Draft Determinations, the ACCC is not in a position to comment on the efficiency of Viterra's supply chain in the context of this exemption assessment. However the ACCC acknowledges that Viterra has provided certain fee reductions to its customers in recent seasons (as set out above).

The ACCC considers that fee reductions likely evidence the increasing competition at port within SA (as well as upcountry), with the recent entry of competing PTSPs (T-Ports, ADM, and Cargill (following the exit of LINX)). As set out in the Draft Determinations, and above, the ACCC considers that Viterra will have an incentive to pass on supply chain efficiencies when faced with competition from within the SA market (or from other states to the extent to which they also compete for SA grain).

While the ACCC notes competition in SA has increased over recent seasons, the level of competition differs by region. As such the level of competitive constraint has been considered in detail on a port-by-port basis in relation to each exemption decision (see chapter 5).

Fee reductions are not the only way to share the benefits of efficiencies

Viterra has submitted that price is not the only way in which a PTSP can pass through increased efficiencies to other supply chain participants.[148] A PTSP may also invest in its infrastructure which, amongst other things, allows it to handle and process higher quality grain, which exporters can use to obtain higher prices on the international market.

[144] Ibid, p. 35.

[145] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 46.

[146] Ibid, p. 11-12.

[147] Ibid, p. 12.

[148] Ibid, p. 12.

Viterra submitted that it has made a number of investments in recent years to ensure that grain passing through their system is of high quality, consistent and reliable. This includes:[149]

- Investing $3 million in a state of the art laboratory capable of managing variable crop volume, commodities and quality.
- Introducing dynamic binning which allows customers to deliver grain into Viterra's system that, at the time of recieval, does not meet the specific quality requirements of industry recieval standards.[150]
- The creation of a new quality program "Verified Viterra" to reflect the high standards and systems needed to deliver quality grain.

Additionally, Viterra submitted that over the last 6 years it has invested $223 million in its facilities:

> *In the 5 years to June 2019, Viterra made investments of over $200 million in port terminal and supply chain infrastructure and made a further investment of $23 million in its supply chain in 2020 (a low production year) demonstrating its commitment to operating an efficient supply chain. These investments better enable Viterra's export customers to meet the exacting standards of individual end-customers.*[151]

The ACCC considers that investments to improve the quality of grain outturned by a PTSP, have the potential to enable its customers (i.e. exporters) to either access, or gain a competitive advantage, in international markets which place a premium on grain with certain quality characteristics. However, absent sufficient competitive pressure the ACCC considers that a PTSP is unlikely to have sufficient incentives to ensure such gains are passed on to exporters (rather than being captured by the PTSPs via changes in fees for example).

As stated in the Draft Determinations the ACCC considers that it is in a PTSP's interests to make investment decisions which ensure it maximises its return to shareholders irrespective of whether or not an exemption is granted. As such a PTSP will have an incentive to invest in the quality of its supply chain to the extent that the return (or expected return) exceeds (or is at least equal to) the cost of that investment (irrespective of an exemption). It is noted that the returns from an investment could be in a range of forms, including higher fees for the PTSP's services, or maintaining throughput that might otherwise be lost to a competitors.

In response to the Draft Determinations Viterra submitted that it has an incentive to operate its facilities efficiently irrespective of whether an exemption is granted,[152] and that being able to operate its facilities more flexibly will encourage further investment:

> *If Viterra is able to operate its terminals more flexibly because of the removal of unnecessary regulation, it will be encouraged to invest further in its supply chain. Conversely, the imposition of continued regulation—and the operational inflexibility and uncertainty that this creates—adversely affects Viterra's incentive to invest.*[153]

The ACCC acknowledges that, to the extent that unnecessary regulation limits a PTSP's ability to extract returns from its investments, it has the potential to discourage a PTSP from making otherwise efficient investments in its port terminal facilities (or the supply chain more broadly). However, as stated in section 5.1 (IHB) subclause (f), the ACCC considers that an inadequate level of regulation also risks affecting efficient investment in port terminal services. The inability to gain access to port terminal services on fair and transparent terms,

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[149] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 12.

[150] Viterra stated this has delivered $10.7 million in value to growers in the past 2 years, and can be used to help track the quality of grain within its system to meet the requirements of end-customers on the international market.

[151] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 12-13.

[152] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 54.

[153] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 55.

could result in under investment by current market participants or discourage new entry.[154] Conversely, inadequate regulation may also encourage current market participants (or new entrants) to unnecessarily duplicate existing infrastructure,[155] resulting in inefficient over investment.

The ACCC notes that different parties will have different investment incentives and expects that these incentives will be influenced by a range of factors, including the level of regulation imposed on PTSPs.

While the ACCC accepts (and Viterra has demonstrated) that it has the incentive to invest in its infrastructure the ACCC does not consider that this necessarily demonstrates that Viterra is subject to sufficient competitive constraint. As previously discussed the ACCC considers that a PTSP will have an incentive to invest in its infrastructure irrespective of whether or not it is subjected to competitive constraints, and that the presence of competitive constraints will likely result in greater incentives to undertake efficient investment decisions.

As set out in the Draft Determinations the ACCC has not undertaken a detailed quantitative analysis of the appropriate level of investment in port terminal facilities in SA. As such the ACCC has not assessed the basis for, and merit of, individual investment decisions by PTSPs. Rather the ACCC considers it more appropriate to assess the level of competitive constraint faced by each of Viterra's port terminal facilities. This analysis is set out in detail in section 3.1.4.

3.2 Exports and exporters

This section considers the demand for port terminal services in SA. In particular, the ACCC has considered: stakeholder comments on the potential for future droughts across Australia, and whether this will have an impact on future SA shipping seasons; capacity utilisation at Viterra's port terminal facilities, both annually and in the peak period; and the level of access that third party exporters have historically been able to secure.

The supply of port terminal services in SA is discussed above in section 3.1.

3.2.1 Exports and drought related conditions

Since 2011-12 SA has exported 5.5 million tonnes of grain per season on average, with Viterra port terminals facilitating 92% of these exports since 2016-17 (the first season that both LINX and Semaphore were in operation).

Port Adelaide and Port Lincoln are the 2 largest exporting regions in SA, with Port Lincoln and all 4 Port Adelaide port terminals accounting for 33% and 39% of SA shipments respectively since 2011-12.[156]

In this section the ACCC first considers the capacity utilisation of each of Viterra's eastern SA port terminal facilities throughout the whole year and during the peak period, before then considering third party exporter utilisation.

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[154] For example exporters may be reluctant to make otherwise efficient investments for grain acquisition services (or leave the market), which could extend to the upcountry and logistics markets. Growers may be reluctant to make efficient investment in on-farm equipment specialised in the growing of grain.

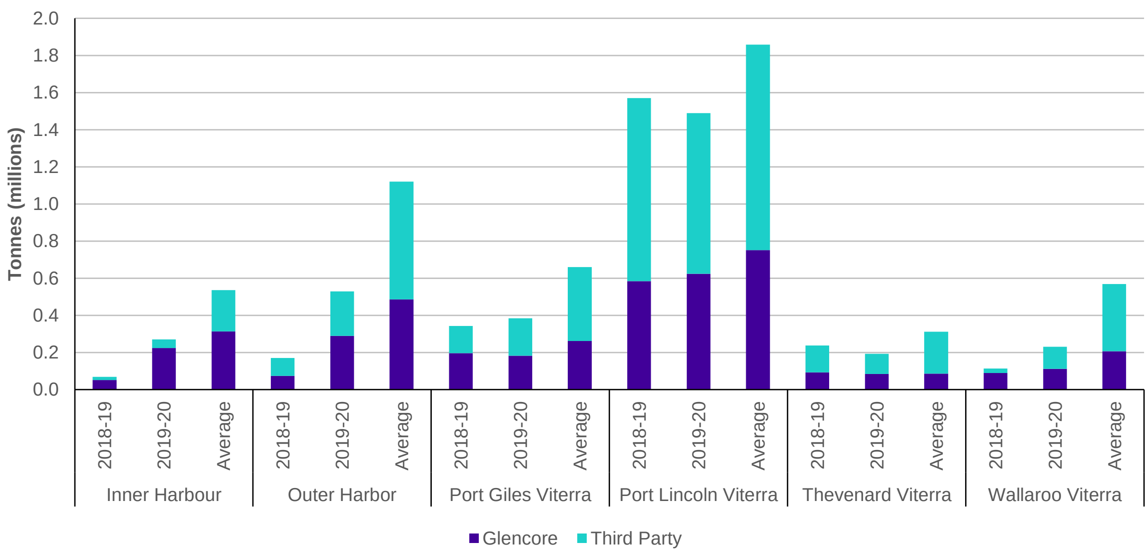
[155] For example exporters may choose to respond to difficulties accessing port terminal facilities by investing in additional unnecessary port terminal services (instead of reducing their investments or exiting the market).

[156] Data considered between 2011-12 and 31 March 2021. The ACCC notes that all 2020-21 data is provisional and subject to revision.

When considering Viterra's capacity utilisation on a port-by-port basis it is important to note that the 2018-19 and 2019-20 shipping seasons were marred by a severe drought along the east coast of Australia, which also extended into parts of SA. In 2018-19 and 2019-20 production in SA was just 5.5 and 6.0 million tonnes, 21% and 15% below the 9 year average of 7.1 million tonnes respectively.

The low production levels (both in SA and on the east coast) in 2018-19 and 2019-20 subsequently resulted in low shipment volumes in each of these 2 seasons: only 2.5 and 3.3 million tonnes of grain was shipped from SA in 2018-19 and 2019-20 respectively,[157] with Viterra performing 96% of these shipments. This was 54% (in 2018-19) and 40% (in 2019-20) below the 9 year average of 5.5 million tonnes. The extent of the low shipment levels from SA in the 2018-19 and 2019-20 seasons is shown below in figure 3.2.

Figure 3.2: Viterra bulk shipments by port and exporter, 2018–19, 2019-20 and 9 year average



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

Notes: (1) All averages are from 2011-12 to 2019-20, except for IHB and OHB which use averages from 2014-15 to 2019-20. Prior to 2014-15 Viterra reported IHB and OHB exports together.

(2) Low export levels were impacted by both: low SA production levels, and low production levels in NSW and Qld (65 and 54% below average across the 2018-19 and 2019-20 seasons respectively). As discussed below low production levels in NSW and Qld resulted in SA grain being moved to NSW and Qld domestic markets, therefore resulting in less grain being shipped out of SA port terminal facilities.

The intensification of east coast drought conditions in the 2018–19 and 2019-20 shipping years led to 440,000 and 500,000 tonnes of grain being sent to NSW and Qld from SA via coastal shipments in response to domestic demand in those states.[158] In addition to coastal shipments from SA, the east coast drought also resulted in significant tonnages of SA grain moving east via inland rail transfers. The ACCC understands that, by September 2019, Viterra had moved its 100th train of grain to the east coast in the 2018-19 season.[159]

With respect to the impact of drought-related grain movements Viterra submitted that:

Droughts and climate-related events are becoming increasingly regular in Australia and it is likely that the domestic market will continue to be affected by these in the coming years.

[157] These figures include 440,000 and 500,000 tonnes of coastal shipments in the 2018-19 and 2019-20 seasons respectively.

[158] PTSPs' loading statements; and ACF Shipping stem and market share report.

[159] Viterra loads 100th east coast bound train, (11 September 2019) See: http://viterra.com.au/index.php/2019/09/11/viterra-loads-100th-east-coast-bound-train/.

> *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. This includes the fact that exporters have been able to meet the phytosanitary requirements for importing grain into Australia and will retain the knowhow and logistical requirements to do so…*
>
> *…Accordingly, we consider that grain will easily be able to be redirected to the East Coast of Australia—from South Australia and overseas—in response to any changing climate or economic conditions in future.*[160]

In addition, SAFC submitted that:

> *It is difficult to determine how current drought related interstate grain transfers should be considered. Droughts are reasonably frequent occurrences in Australia, and may be more prevalent in the future due to climate change. They are also not uniform – while large parts of SA have not been unreasonably affected this time that is unlikely to always be the case.*
>
> *As such, **some** interstate transfers will occur in **some** years, but predicting their long term competitive impacts are virtually impossible other than to say there will be **some** effect.*[161]

The ACCC notes that matters relating to future growing conditions and climate change are highly complex. The ACCC considers that there is insufficient evidence at this time to indicate that the 2018-19 and 2019-20 seasons reflect a longer term trend in domestic grain movements. While noting droughts are not uncommon in Australia, at this time the ACCC is inclined to view recent east coast drought conditions, while undoubtedly significant for those affected, to be a temporary event in the context of the SA grain market. As such, the related grain movements may not reflect a long-term trend in domestic grain flows, and rather reflect the poor growing conditions along the east coast.

Notwithstanding the above, the ACCC acknowledges that the drought has likely had some effect in relation to establishing and/or reinforcing supply chains between these markets. As such the ACCC considers that, in the event future droughts impact the east coast's ability to satisfy its own domestic demand, these supply chains will likely enable grain to move more easily between WA, SA and east coast markets than prior to the 2018-19 season.

The ACCC, where possible, will monitor growing conditions and interstate grain movements as part of its monitoring of access to bulk grain port terminal facilities. In the 2020-21 season SA's harvest is estimated to be 8.4 million tonnes (which would be SA's second largest harvest since the 2002-03 season).[162]

Furthermore, ABARES has predicted a 2020-21 harvest of 19.3 million tonnes of grain for NSW (14.7 million tonnes above NSW's average domestic demand), and a harvest of 2.8 million tonnes for Queensland (which is slightly below Queensland's average domestic demand of 3.0 million tonnes).[163] [164] This suggests that grain movements from SA to the east coast are unlikely to continue in significant volumes (if at all) into the 2020-21 season.

The ACCC notes that it does not receive data relating to interstate grain movements that have occurred via road and rail services, and therefore is not aware of the exact extent of recent interstate grain movements in response to the east coast drought. However the

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[160] Viterra, *Further Supplementary Submission on Exemption Application 2020*, 11 March 2020, p. 10.

[161] SAFC, *Submission in response to Issues Paper, 6 September 2019*, p. 3. Note: SAFC's emphasis.

[162] ABARES, State data underpinning: Australia crop report: February 2021 No. 197.

[163] The ACCC notes that the shortfall of grain in a state is dependent on the specific types of grain that are demanded, however overall state production and consumption of grain can still serve as a useful indication for a general indication of how much grain can be expected to be moved interstate to certain markets. Furthermore, the ACCC understands that due to Queensland's low wheat and barley production that grain from NSW is usually delivered to Queensland to meet domestic consumption needs (even in typical seasons).

[164] ABARES, State data underpinning: Australia crop report: February 2021 No. 197.

ACCC receives data on coastal shipments, and therefore is able to monitor those interstate grain movements which occur via coastal shipment.

3.2.2 Annual capacity utilisation

As set out in a number of the ACCC's previous exemption determinations, the ACCC considers that when there is spare export capacity at a port terminal facility, a vertically integrated PTSP likely has an incentive to provide access to exporters in order to increase throughput at its facility.

However, in circumstances where capacity is constrained relative to demand, the ACCC considers that a vertically integrated PTSP may have an incentive to provide preferential treatment to itself, or its associated entity exporter compared to third party exporters.

As such, the ACCC considers that the level of capacity utilisation at a port terminal facility provides an indication of whether a PTSP has an incentive to discriminate in favour of its associated entity exporter, in a way that does not reflect the costs of providing the same services (in the absence of regulation).[165]

Periods of increased demand for shipping capacity (i.e. the Australian peak bulk grain shipping period when international prices for grain are higher) are therefore particularly relevant to the ACCC's consideration, as capacity constraints during these periods are typically more acute, and therefore a PTSP's incentive to favour, or limit access, for certain exporters increases.

The ACCC notes that shipment levels can exceed a port terminal facility's stated capacity (such as in table 3.2, and figures 3.3 to 3.7 below) for a variety of reasons, including that:

- economic conditions may make it profitable for a PTSP to extend the normal operating hours of a facility;
- unavoidable closures or delays due to external circumstances (e.g. vessels failing survey) may reduce throughput (and may or may not have been taken into account to a greater or lesser degree in a PTSP's capacity estimates for its facility); and
- capacity can be affected by the mix of commodities loaded. For example, a port may be able to achieve higher throughput when shipping a small number of commodities/grades than assumed in its capacity estimates (as this streamlines operations and improves the efficiency of the facility).

Capacity utilisation for each of Viterra's port terminal facilities in the context of the peak period is discussed below (in section 3.2.3). The ACCC also considers annual capacity utilisation to be relevant to the assessment of a PTSP's incentive to provide favourable access and/or deny access to certain exporters.

Table 3.6 below shows annual capacity utilisation rates at each of Viterra's port terminal facilities since 2013-14.[166] When considered on an annual basis Viterra's facilities generally appear to have spare capacity in most seasons (although this differs between facilities).[167]

Table 3.6 also shows that:

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[165] The ACCC notes that Viterra's (ACCC-approved) PLP's provide for a range factors that are relevant to differentiating the allocation of available Initial Long Term Capacity, including the size of the nomination, and the responsiveness and demonstrated ability of the client seeking the nomination.

[166] Table 3.6 uses the amount of capacity released via long, short, and additional short-term capacity in each season for each port.

[167] Capacity utilisation is determined using the capacity figures listed for each port in table 3.2. The ACCC notes the capacity utilisation is higher when using the amount of capacity (including tolerance) used in that specific season (as opposed to the maximum capacity released over the 2013-14 to 2019-20 seasons).

- capacity utilisation at all Viterra's facilities was higher in the bumper 2016-17 season; and
- low shipment levels during the drought-affected 2018-19 and 2019-20 seasons led to low utilisation rates at all port terminal facilities.

In relation to the average capacity utilisation rates set out in table 3.6, it should be noted that these rates increase significantly across each of Viterra's ports if the drought-affected 2018-19 and 2019-20 seasons are excluded (IHB, 71%; OHB, 59%; Port Giles, 60%; and Wallaroo, 77%).

Table 3.6: Annual capacity utilisation for Viterra's port terminal facilities, 2013-14 to 2019-20

	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	Average
IHB*	-	77%	50%	86%	72%	7%	27%	53%
OHB*	-	56%	43%	72%	64%	7%	21%	44%
Port Giles	67%	51%	50%	72%	62%	29%	33%	52%
Wallaroo	78%	76%	66%	95%	67%	14%	28%	61%

Source: Viterra, Attachment 2 - published available capacity estimates; PTSP loading statements; and ACF Shipping stem and market share report.

Notes: * Viterra started reporting IHB and OHB as separate facilities in the 2014-15 season. Prior to that time they were jointly reported as 'Port Adelaide' and had utilisation rates of 110%, 88% and 95% in 2011-12, 2012-13 and 2013-14 respectively.

3.2.3 Capacity utilisation in peak periods

The ACCC considers that the peak period in the shipping year occurs when exporters can receive the best prices internationally. During this period there is more demand from exporters for shipping capacity at port terminal facilities. As noted by ESCOSA:

> *Another advantage (for the other Australian states too) is that South Australian grain production is counter-cyclical relative to the northern hemisphere. South Australian grain producers thus have a window of opportunity (December to May) to sell to international markets when there is less global supply. To maximise the value that can be obtained during that window, participants in the South Australian bulk grain export market need to move bulk tonnages quickly before northern hemisphere grain is available. The task of the supply chain is to maintain quality and facilitate efficient grain movement, which is why it is important to South Australia.*[168]

When considering capacity and utilisation, the ACCC notes that it may not be economically efficient to have sufficient port terminal infrastructure to accommodate the entire export task within a 3 to 6 month window that is otherwise largely under-utilised for the remainder of the year. While the ACCC notes exporters' preferences may be to export the majority of grain within the peak period, it is possible that spreading the export task across peak and off-peak periods may be an efficient outcome for the industry.[169]

Given the above, the ACCC considers that a key concern is the extent to which a vertically integrated PTSP can provide favourable access to its associated entity exporter in the peak

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[168] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 17.

[169] GPSA states on page 41 of its SA grain industry blueprint: *"Finally, the counter-cyclical nature of grain production in Australia provides a natural advantage over Northern Hemisphere production. Therefore, the final priority in this pillar is to determine whether SA should have the practical capacity to ship its entire average export by the end of June following harvest to maintain this natural marketing advantage over grain originating in the Northern Hemisphere."*

period. Such discrimination will enable the associated entity to obtain premium international prices for their grain, at the expense of third party exporters.

Given that the provision of port terminal services typically involves a high proportion of fixed infrastructure costs, which do not vary based on throughput, a PTSP that faces sufficient competitive constraints has an incentive to maximise throughput during off-peak periods (subject to spare capacity). However in peak periods, when capacity is likely to be constrained and international grain prices higher, a PTSP is more likely to have an incentive to deny or provide favourable access to certain exporters. Alternatively, or in addition, a PTSP could increase its fees for port terminal services during periods of high demand and constrained capacity. The ACCC notes that the vertical integration (or otherwise) of a PTSP with an exporter is likely to influence the strength of the incentive a PTSP faces to provide favourable access to certain exporters ahead of others (notably associated entities) and/or increase its service fees. This is because the profitability of a vertically integrated entity reflects the costs and benefits to both the PTSP and its associated entity exporter.

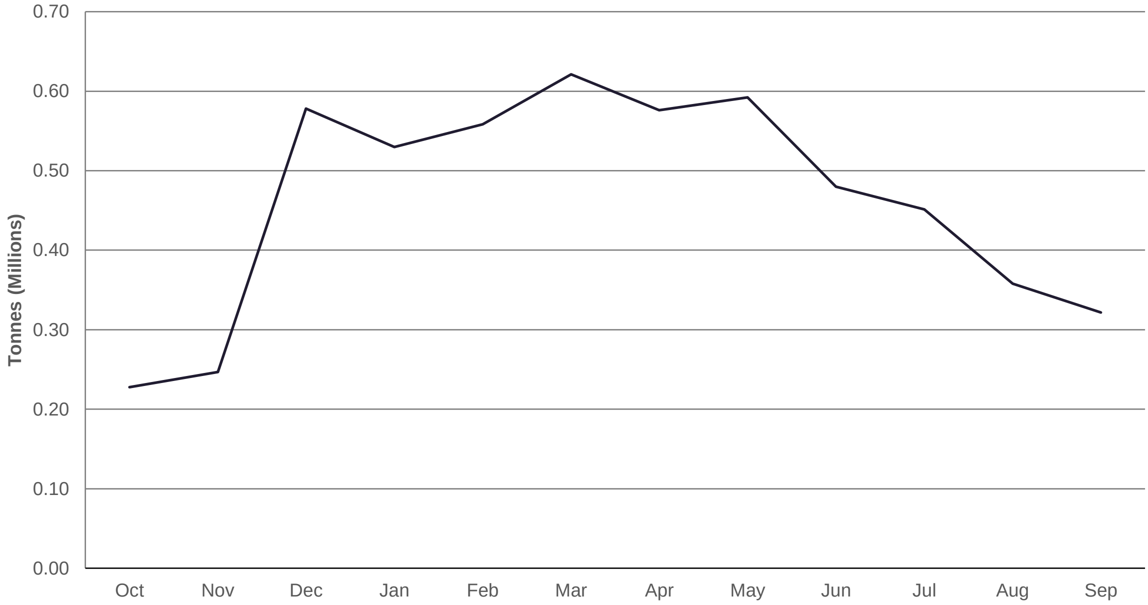
When sufficient competition is present and exporters have the option of shipping from more than one PTSP, a PTSP's behaviour in relation to providing favourable access to certain exporters may be constrained by the need to attract exporters to use its facility during off-peak periods. High levels of competition may result in outcomes such as reduced fees or changes to terms, increased levels of negotiation between exporters and PTSPs, as well as exporters switching between PTSPs. The extent to which capacity constraints in peak periods are a concern also depends on the presence of competing port terminal facilities and the overall level of spare capacity throughout the rest of the year.

In its annual bulk grain monitoring reports the ACCC has generally regarded the peak period to occur, on a national level, between the months of February and May (inclusive). However, as noted above by ESCOSA and shown below in figure 3.3, the SA peak export period generally spans a 6 month period between December and May (inclusive). Consequently, this section will consider December to May as the peak period in SA, as opposed to the February to May period used when considering the national market. In total, 62% of SA grain is shipped during the December to May peak period.[170]

Figures 3.3 to 3.7 below compare available capacity to bulk grain shipments, during the peak period from December to May across numerous seasons, and at each of Viterra's port terminal facilities (inclusive of tolerance). Figures 3.3 to 3.7 also show the proportion of grain shipped by Glencore and third party exporters across each season. This is discussed in further detail in section 3.2.4.

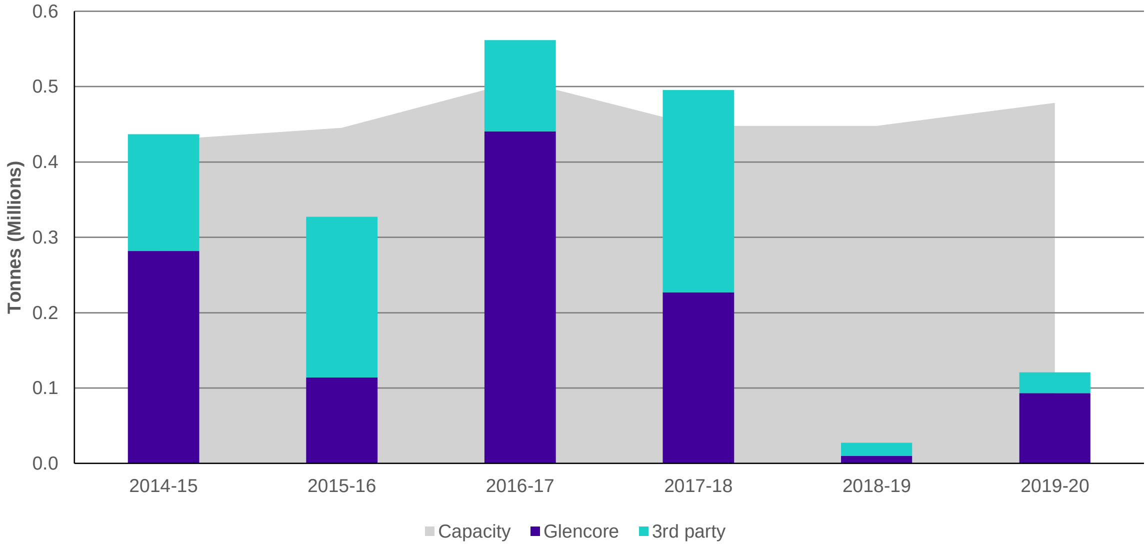
[170] PTSP loading statements; and Australian Crop Forecasters (ACF) Shipping stem and market share reports.

Figure 3.3: SA average monthly bulk exports, 2011-12 to 2019-20



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

Figure 3.4: Capacity utilisation across the peak period by exporter at Port Adelaide Inner Harbour, 2014-15 to 2019-20

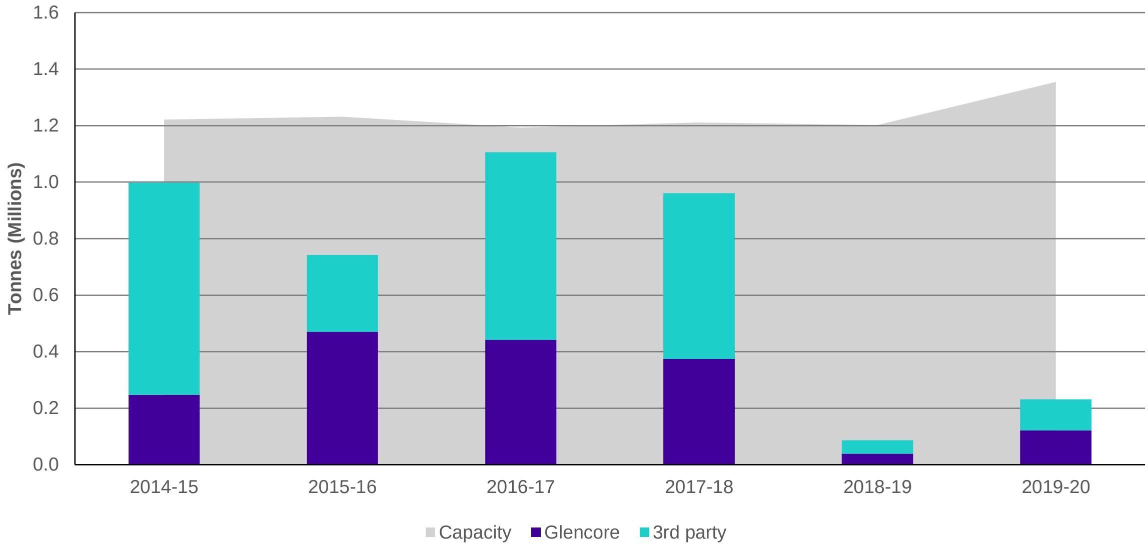


Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 (Updated) - published available capacity estimates.

Notes: (1) Shipments can exceed capacity in any given year due to a variety of factors (see section 3.2.2), including: PTSPs operating facilities for extended hours due to favourable economic conditions; port delays; and the mix of commodities loaded. These factors (and others) may have been factored into PTSPs' capacity estimates to a greater or lesser degree (or not at all).

(2) The ACCC notes Viterra began reporting shipment figures for IHB and OHB separately in 2014-15. Prior to that Viterra reported IHB and OHB as a combined Port Adelaide facility.

Figure 3.5: Capacity utilisation across the peak period by exporter at Port Adelaide Outer Harbor, 2014-15 to 2019-20

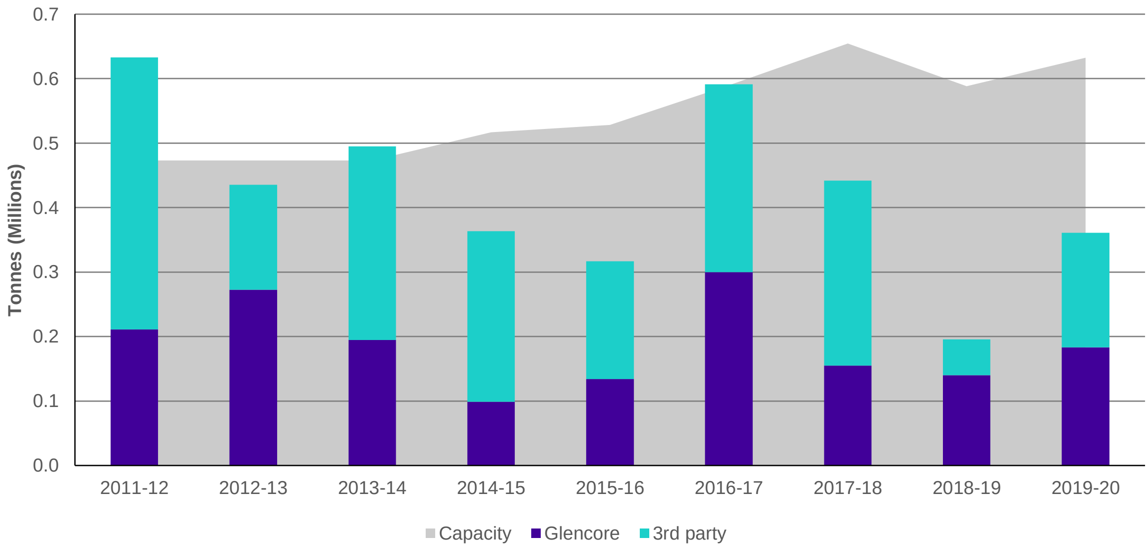


Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 (Updated) - published available capacity estimates.

Notes: (1) Refer to note (1) from figure 3.4.

(2) Refer to note (2) from figure 3.4.

Figure 3.6: Capacity utilisation across the peak period by exporter at Port Giles, 2011-12 to 2019-20

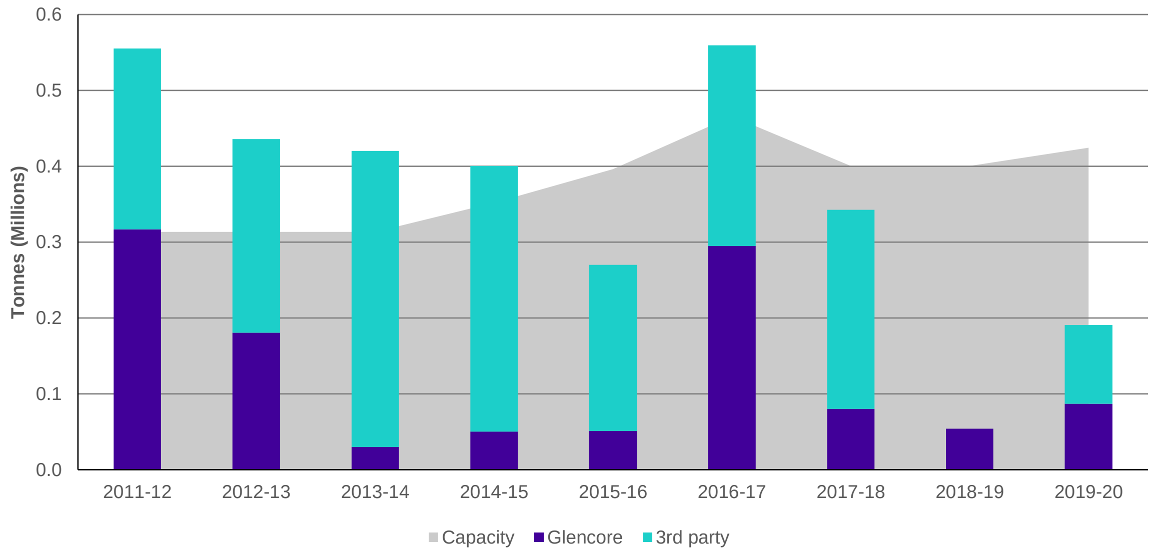


Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 (Updated) - published available capacity estimates.

Notes: (1) Refer to note (1) from figure 3.4.

(2) The ACCC notes it does not have Viterra's 2011-12 and 2012-13 capacity figures and so those capacity figures in the above chart are assumed to be the same as those submitted by Viterra for 2013-14. The ACCC notes it considers the 2011-12 and 2012-13 shipment figures to be relevant to the assessment of peak period capacity utilisation.

Figure 3.7: Capacity utilisation across the peak period by exporter at Wallaroo, 2011-12 to 2019-20



Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 (Updated) - published available capacity estimates.

Notes: (1) Refer to note (1) from figure 3.4.

(2) Refer to note (2) from figure 3.6.

As shown in figures 3.4 to 3.7 Viterra's IHB, Port Giles and Wallaroo port terminal facilities have exceeded maximum released capacity over the peak shipping period at least once since the 2013-14 shipping season.[171] This suggests that significant capacity constraints have been present at all of Viterra's port terminal facilities at least once during the peak period since the 2013-14 season.

Figure 3.5 shows that OHB has not exceeded its stated peak period capacity since at least the 2014-15 season.[172] OHB came closest to exceeding its peak period capacity during the (bumper) 2016-17 season, where 1.11 million tonnes of grain was exported, compared to 1.19 million tonnes of capacity released.

Figures 3.4 to 3.7 also indicate that Viterra's IHB, OHB, Port Giles and Wallaroo facilities had significant spare capacity available during the 2018-19 and 2019-20 seasons. The ACCC considers that this reflects lower SA production and, more significantly, the large quantities of grain moving via rail to the east coast in response to drought conditions.[173]

Peak period capacity utilisation is discussed further in relation to each port terminal facility in section 5 subclause 5(3) (d).

[171] The ACCC notes it does not have Viterra's 2011-12 and 2012-13 capacity figures (capacity figures from 2011-12 and 2012-13 are therefore assumed to be the same as those submitted by Viterra for 2013-14).

[172] Prior to the 2014-15 season the ACCC received IHB and OHB shipment data in a combined form (as 'Port Adelaide'). As such, the ACCC does not have data specific to OHB prior to 2014-15.

[173] As stated previously, the ACCC does not receive data relating to interstate grain movements that have occurred via road and rail services. The ACCC is therefore is not aware of the exact extent of interstate grain movements. In contrast, the ACCC does receive data on coastal shipments, and notes that SA sent 440,000 tonnes of grain to the east coast via coastal shipment in the 2018-19 season.

3.2.4 Exporters and bargaining power

The ACCC has considered whether exporters have historically been able to obtain access to Viterra's port terminal facilities. This is relevant to the ACCC's assessment of Viterra's exemption applications, having regard to the matters under subclause 5(3) of the Code.

Viterra has historically operated an annual first-in-first-served capacity allocation model at its SA port terminal facilities, with an auction system introduced in 2012-13. Viterra has also operated a long-term agreement capacity allocation model since 2016. Under this arrangement exporters can sign long-term 'take or pay' agreements for port capacity (long-term agreements).

Viterra currently publishes PLPs setting out its policies and procedures for managing demand, as required by the Code. The Code's Part 2 requirements to publish policies and procedures for managing demand will continue to apply regardless of whether or not an exemption is granted in relation to a facility.[174] However Viterra will not be required to submit changes to its capacity allocation systems in its protocols for approval by the ACCC at any port terminal facilities for which they are granted an exemption.

Viterra is vertically integrated and provides export services to its associated entity Glencore, which competes with third party exporters for port terminal facility access.

Glencore is the largest exporter in SA and is Viterra's single largest customer. Glencore accounted for 41% of all exports from Viterra facilities (and 40% of all SA's exports) between 2011-12 and 2019-20.[175]

Glencore has accounted for 43% of exports at Viterra's IHB, OHB, Port Giles and Wallaroo facilities between 2011-12 and 2019-20.

The largest third party exporters (by volume) from Viterra's IHB, OHB, Port Giles and Wallaroo facilities between 2011-12 and 2019-20 were:

- CBH (11.8%):
- ADM (9.1%);
- Cargill (8.6%); and
- Bunge (8.3%).

Table 3.7 provides a season-by-season breakdown of exporters' market shares at Viterra's IHB, OHB, Port Giles and Wallaroo port terminal facilities.

[174] Part 2 of the Code requires all PTSPs to deal with exporters in good faith, publish and make available a port loading statement, publish 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.

[175] Glencore has exported on average 2.21 million tonnes of bulk grain per annum from Viterra's SA port terminals since the 2011-12 season, compared to an average of 3.13 million tonnes per annum from all third party exporters over the same time period.

Table 3.7: SA bulk shipment market share from Viterra's IHB, OHB, Port Giles and Wallaroo port terminal facilities, 2011-12 to 2019-20

	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Glencore	44%	48%	33%	29%	45%	51%	42%	59%	57%
CBH	6%	14%	13%	11%	14%	14%	14%	9%	7%
ADM	14%	12%	13%	8%	6%	7%	4%	0%	5%
Cargill	19%	7%	12%	19%	2%	1%	1%	4%	5%
Bunge	5%	5%	8%	5%	11%	10%	14%	13%	10%
Others	12%	13%	22%	28%	22%	17%	24%	15%	17%
Number of exporters	12	12	15	18	11	10	11	8	9

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

The ACCC notes that Viterra has submitted that, since the introduction of the Code in 2014, exporters have entered the market in significant numbers. Viterra also submitted that many changes have occurred since the Code's introduction, such as new PTSPs and exporters (many of which have substantial bargaining power) entering the market, supporting the case for exempting Viterra from Parts 3 to 6 of the Code in respect of all of its SA port terminal facilities.[176]

The ACCC notes that there has been an increase in the total SA market share of smaller exporters since the 2013-14 season across SA (from 17% to 25%).[177] Glencore's total SA market share has also marginally declined across the same period (from 41% to 39%).

In relation to Viterra's IHB, OHB, Port Giles and Wallaroo facilities the market share of smaller exporters has increased since the end of the 2013-14 season (from 15% to 22%). However this appears, in large part, to reflect a reduction in Cargill's shipment volumes through Viterra's facilities since the end of the 2014-15 season (see table 3.7). Glencore's market share has increased across the same period at these 4 ports (from 42% to 45%).[178]

Table 3.8 below compares average exporter access statistics at CBH, GrainCorp and Viterra port terminal facilities (over 2011-12 to 2019-20). This provides a comparison of the use of these services by the exporting arms of different vertically integrated PTSPs. While the ACCC recognises that different states have different market characteristics, table 3.8 indicates that historically exporters have been able to gain access to Viterra's port terminal facilities at rates similar to, or better than, CBH's and GrainCorp's facilities.

Specifically table 3.8 shows that, on average:

- 11.8 exporters gain access to Viterra's IHB, OHB, Port Giles and Wallaroo port terminal facilities each season. This is slightly lower than CBH, who provide services

[176] Viterra, *Exemption Application 2019*, 2 July 2019, pp. 4-5.

[177] That is the 2 time periods are: the 2011-12 to 2013-14 seasons (17%); and the 2014-15 to 2019-20 seasons (25%). The ACCC notes table 3.7 displays the market share of bulk shipments from Viterra's port terminals, whereas the figures in this paragraph refer to bulk shipments across IHB, OHB, Port Giles and Wallaroo.

[178] See footnote 177.

to an average of 13.3 exporters a season, and marginally higher than GrainCorp at 11.3;

- Glencore secures 43% of Viterra's services (at IHB, OHB, Port Giles and Wallaroo), 7 percentage points below that secured by CBH's exporting arm at CBH's facilities, and 4 percentage points above the services secured by GrainCorp's exporting arm;
- Exporter access to Viterra's port terminal facilities are the least concentrated among the top 3 and top 5 exporters, suggesting that smaller exporters have historically been able to secure access to Viterra's facilities.

Table 3.8: Average exporter market share at CBH, GrainCorp and Viterra's IHB, OHB, Port Giles and Wallaroo facilities

	CBH	GrainCorp	Viterra
Average number of exporters per year	13.2	11.3	11.8
Market share of vertically integrated exporter arm	50%	39%	43%
Combined market share of top 3 exporters	72%	73%	64%
Combined market share of top 5 exporters	83%	89%	81%

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

<u>Peak vs off-peak period</u>

As discussed in section 3.2.3, an important consideration in the assessment of third party exporter access to Viterra's port terminal facilities is the level of access available during the peak period. During this period shipping slots are in higher demand and a vertically integrated PTSP will likely have a greater incentive to favour its associated entity exporter, or to raise its port terminal charges.

Figure 3.8 below compares the market share of exporters at each of Viterra's IHB, OHB, Port Giles and Wallaroo port terminal facilities, across peak and off-peak periods (as discussed in section 3.2.3 the peak period refers to shipments performed in December through May).

Figure 3.8 shows that Glencore generally has similar market shares during peak and off-peak periods at Viterra's IHB and Wallaroo facilities. In addition at Viterra's OHB facility there is a notably lower proportion of exports facilitated by Glencore during the peak period (41%) when compared to the off-peak period (47%).

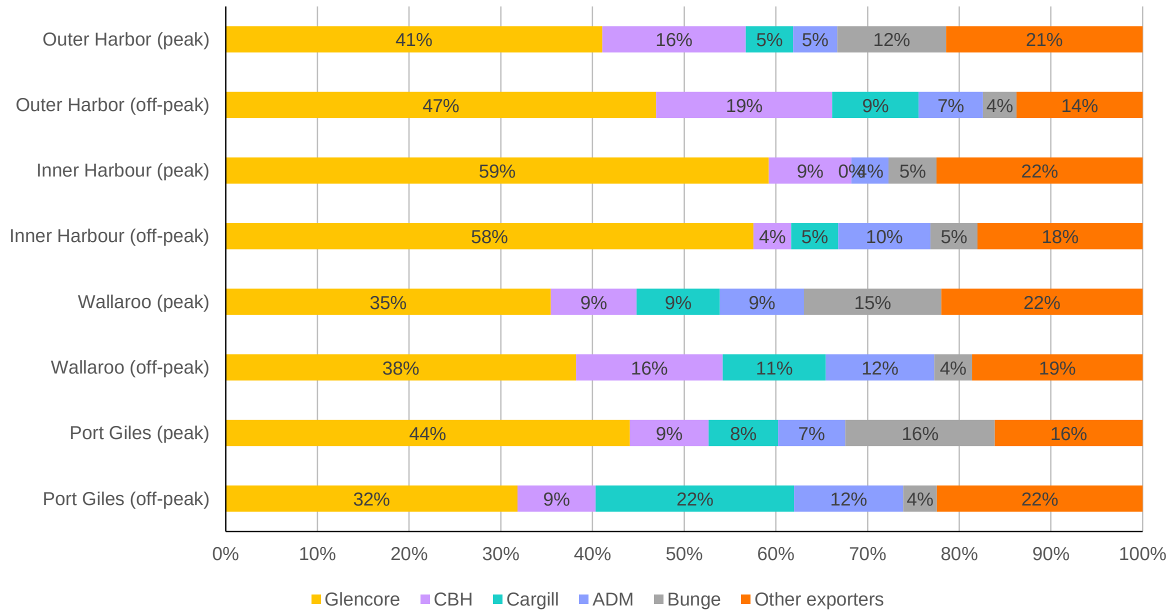
However at Viterra's Port Giles facility, a noticeably higher proportion of exports are facilitated for Glencore during the peak period (44%) compared to the off-peak period (32%). However, Glencore accounts for a similar proportion of peak period throughput at Port Giles to that of Viterra's OHB facility (where Glencore accounts for 41% of peak period shipments). As noted above, exporters have been able to secure greater access at the more efficient OHB facility in the peak period.

Additionally, while Glencore accounts for the majority of IHB exports (59% in the peak period and 58% in the off-peak period), the ACCC notes that third party exporters have had greater access to capacity at Viterra's higher capacity deep water OHB facility (where Glencore performs 41% of peak period throughput). Third party exporters also have greater access to alternate port terminal facilities at Port Adelaide.

As set out on Figure 3.8 third party exporters have been able to access similar, or greater, shares of total capacity at Viterra's IHB, OHB and Wallaroo port terminal facilities during peak periods compared to off-peak periods. In the case of Port Giles the ACCC notes that while a noticeably larger portion of shipments are performed by Glencore in the peak period (compared to the off-peak period), Glencore's peak period market share at Port Giles (44%) is similar to that of OHB (41%) and SA on a state-wide basis (41%).

Exporters' ability to access capacity in relation to each of Viterra's individual port terminal facilities is discussed in relation to subclauses 5(3)(c) and (d) in chapter 5.

Figure 3.8: Share of exports annually and during peak periods at Viterra's port terminal facilities, 2011-12 to 2019-20



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

Contractual arrangements

The ACCC notes that contractual arrangements have the potential to affect exporters' access and bargaining power.

Under the current ACCC-approved capacity allocation system Viterra was able to offer 3 year long-term agreements (covering the period 1 October 2016 to 30 September 2019), as well as offer subsequent long-term agreements for 2 year periods.[179] A minimum of 25,000 tonnes per annum applies to exporters' initial applications for long-term capacity. The current PLPs also contain caps which prevent any one exporter from applying for more than 40% of the available initial long-term capacity at OHB and Port Lincoln (between 1 January and 30 June), or 50% at Viterra's other facilities. In addition at least 500,000 tonnes of capacity (across Viterra's 6 facilities) each quarter must be reserved for short-term capacity which is allocated on a first-in-first-served basis when the shipping stem for each year opens.[180]

Viterra will no longer be required to seek the ACCC's approval for changes to its capacity allocation systems (which include the above noted arrangements) in respect of any facilities for which an exemption is granted.

[179] The ACCC understands that Viterra intends to offer all 2021-22 capacity as short-term capacity (i.e. no capacity will be offered as long-term capacity in 2021-22).

[180] Viterra, *Port Loading Protocol*, 24 December 2015, See: [http://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf.](http://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf)

CRA has submitted that not needing to seek ACCC approval of changes to Viterra's capacity allocation system could be expected to result in a more commercially flexible system better able to respond to market conditions. CRA indicated that they expect an exemption:

> *…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.*[181]

While acknowledging the potential benefits of long-term arrangements (long-term agreements or otherwise)[182] for all parties, the ACCC also notes the potential for such arrangements to formalise existing imbalances between different parties, as well as forestall change (by virtue of their duration).

In particular, the ACCC notes that third party exporters, and exporters that are vertically integrated with a PTSP, are likely exposed to different levels of risk under these types of arrangements. For example, while both kinds exporter are likely to face a forfeiture fee in the event they are unable to fulfil a shipping slot, such fees are unlikely to affect the profitability of the vertically integrated exporter (to the extent they simply constitute an internal transfer between the related entities) in comparison to the impact on the third party exporters' profitability.

The ACCC generally expects that contractual arrangements between parties will reflect the relevant commercial interests, market dynamics, and regulatory frameworks. Factors such as available capacity (particularly during the peak period), exporter bargaining power, competition at port (and elsewhere in the supply chain and related markets), and the requirements under the Code are likely of particular relevance in relation to the contractual arrangements established between PTSPs and third party exporters.

In the context of increasing competition in SA, the ACCC notes that arrangements of sufficient duration, as well as those which reflect existing and/or significant asymmetries in the bargaining power of the different parties have the potential to affect the development of competition at port (as well as in the supply chain and in related markets).

Given the above, the ACCC considers that long-term arrangements have the potential to provide benefits for both PTSPs and exporters. However, in the absence of sufficient competitive constraint, there is the potential for these types of arrangements to discriminate between different exporters (including a PTSP's associated entity) in a way that is detrimental to the development of competition.

ACCC views on capacity utilisation and third party exporter access

Based on the above analysis, the ACCC's view is that third party exporters appear to have been able to access a reasonable level of capacity at Viterra's port terminal facilities.[183] This includes being able to access facilities during the more desirable peak period.

The ACCC has also considered the effect on the level of competition among exporters, if an exemption were granted under the Code in relation to one or more of Viterra's port terminal facilities. The effect of exemptions will likely depend on a range of factors, including: capacity

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[181] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 11 November 2019, p. 1.

[182] Note: the term 'long-term agreements' (which are specific agreements offered by Viterra) is used here as a subset (or type) of the broader term 'long-term arrangements' (which include Viterra's long-term agreements, or any other type of long-term arrangement which may be used to allocate access).

[183] Note: The above analysis is based on data between 2011-12 and 2019-20 for Port Giles and Wallaroo. For Port Adelaide IHB and OHB the analysis is based on data between 2014-15 and 2019-20 (due to IHB and OHB being jointly reported as Port Adelaide between 2011-12 and 2014-15).

constraints, PLPs, contractual arrangements (such as long-term agreements), the presence of alternate PTSPs (discussed in section 3.1), upcountry supply chains and domestic and container markets (discussed in chapter 4).

The ACCC notes that the available capacity data (as discussed in sections 3.2.2 and 3.2.3) suggests that Viterra's IHB, OHB, Port Giles and Wallaroo port terminal facilities are likely to experience some level of capacity constraint during peak periods, although this appears less likely to occur in relation to OHB. As previously noted, the ACCC considers that in periods where the supply of port terminal services is constrained the incentive for a vertically integrated PTSP to deny, or provide discriminatory access, to certain exporters is increased.

As such, the ACCC considers that if an exemption (or exemptions) were granted so that Parts 3 to 6 of the Code did not apply in relation to Viterra's IHB, OHB, Port Giles and Wallaroo port terminal facilities, there is a risk that absent sufficient competitive constraint, Viterra would favour its associated entity, Glencore. This risk is expected to be highest during peak periods.

Were this to occur Glencore would be able to gain greater access to port terminal services, while third party exporters' ability to negotiate terms of access would be reduced, particularly in the peak period. Concerns around the absence of adequate regulation and the potential for discriminatory behaviour, were noted by Cargill in its submission:

> *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.*[184]

The ACCC acknowledges that third party exporters have been able to secure access to Viterra's facilities over recent years under the Code. However, the ACCC continues to hold concerns around Viterra's incentive to provide fair and transparent access absent the application of the full Code or the presence of sufficient competitive constraint.

However the ACCC acknowledges that ADM's, Cargill's and Semaphore's facilities provide a level of competition at Port Adelaide (and to a lesser extent Wallaroo).[185] These alternate port terminal facilities have significantly smaller capacity than Viterra's OHB facility (as well as IHB and Wallaroo to a lesser degree), therefore somewhat limiting the constraint placed upon OHB (compared to that faced by IHB).

In addition the ACCC considers that the ADM, Cargill and Semaphore facilities will place very limited (if any) competitive constraint on Viterra's Port Giles facility.

However the ACCC considers that, in addition to competition from alternate PTSPs, several other markets must be considered when considering the total level of competitive constraint a port terminal facility faces (such as upcountry, container and domestic markets, all of which are discussed in chapter 4). While a dominant PTSP may not face sufficient competition from alternate PTSPs to constrain their incentive to provide favourable access to certain exporters, the presence of other markets may also impose a level of competitive constraint. In addition to the constraint imposed by alternate PTSPs, this may be sufficient to ensure fair and transparent access is provided to the relevant port terminal facility.

The extent to which each of the concerns discussed in this chapter, and any other relevant competitive constraints, apply to each of Viterra's individual port terminal facilities is discussed in detail in chapter 5.

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[184] Cargill, *Submission in response to Issues Paper*, 6 September 2019, p. 1.

[185] The ACCC notes the associated at-port storage and upcountry storage of these facilities is discussed in section 3.1.2 and 4.1.1 respectively. The total level of competitive constraint the ACCC considers these PTSPs place upon each of IHB, OHB, Port Giles and Wallaroo is discussed in chapter 5.

Charles River Associates' profit and loss analysis

This section sets out a number of the matters of particular relevance to the profit and loss modelling presented by CRA as part of Viterra's exemption applications. Given these matters are relatively technical in nature they have been set out separately here for ease of reading by stakeholders.

The ACCC has considered the matters set out in this section as part of its assessment of Viterra's exemption applications, to the extent relevant under subclause 5(3) of the Code. Other matters raised by CRA and Viterra have been considered elsewhere in the Final Determinations as relevant. Issues raised by CRA in relation to Port Lincoln and Thevenard will be considered in the separate Final Determinations for these port terminal facilities.

Charles River Associates modelling

Viterra engaged economic consultants CRA to provide materials in support of its exemption applications.

As part of this work CRA examined the economic impact of exempting all of Viterra's port terminal facilities from Parts 3 to 6 of the Code and provided the ACCC with 2 public reports, as well as a submission in response to the Draft Determinations.[186] The reports contend that Viterra does not have an economic incentive to deny access to third party exporters, despite being vertically integrated with an associated entity that is an exporter, Glencore.[187]

The CRA reports and submission were made available to stakeholders as part of the consultation process through the ACCC website.[188] In addition to reviewing CRA's reports and submission to the Draft Determinations, the ACCC has engaged directly with CRA in the course of its consideration of Viterra's exemption applications. This includes requesting and receiving additional materials from CRA in support of its views.

In considering the CRA modelling, the ACCC notes the inherent challenges and uncertainties associated with economic modelling, particularly with regard to the reasonableness of the assumptions used. While acknowledging this difficulty, the ACCC considers that:

- CRA has not adequately justified several of the model's assumptions (including the use of assumed rather than actual values for Viterra's and Glencore's margins); and
- the modelling is sensitive to small changes in the assumptions.

The ACCC considers that these limitations increase the uncertainty associated with the modellings' conclusions. The ACCC discusses these limitations in detail below (see section 2 in this box).

In addition, the ACCC notes that CRA's economic modelling does not consider factors such as the upcountry supply chain (including the freight cost of moving grain to alternate port terminal facilities) or the seasonality of demand for export capacity.

In considering the supporting materials provided by CRA, the ACCC considers it is particularly important to have regard to the express purpose of the Code, namely, '...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.'[189]

Consistent with this, the ACCC notes that a number of stakeholders indicated in their submission(s) to the exemption assessment process that while third party exporters are provided access to Viterra's facilities, consideration must be given to whether they have fair and transparent access to Viterra's facilities:

T-Ports

[186] The *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals,* 11 November 2019, (Port Terminal Report for Viterra); *Supplement to CRA Report on the Benefits of Code Exemption for Viterra Grain Export Terminals,* 9 January 2020; and *CRA comments on the ACCC's Draft Determinations regarding code exemption for Viterra Grain Export Terminals,* December 2020.

[187] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 11 November 2019, p. 15.

[188] See: https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment.

[189] *Port Terminal Access (Bulk Wheat) Code of Conduct*, clause 2.

[T-Ports] accept that Viterra does not have an incentive to completely deny access to its port terminal services for third party exporters, but again, the important issue is how they provide access if/when multiple customers seek access at the same time. Without any oversight, Viterra would be commercially incentivised to give its related trading entity (Glencore) preferential access to capacity, minimising their idle time and optimising their despatch/demurrage at the expense of others.[190]

<u>Cargill</u>

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 [as] such would hinder fair and transparent access to necessary facility services for other exporters.[191]

<u>AGE</u>

The absence of current regulatory constraint will likely allow Viterra to provide favourable access to their own trading arm.[192]

In contrast SAFC submitted that Viterra has strong incentives to offer attractive commercial terms to access seekers due to current, and potential future competition:

As such, Viterra has a strong incentive to negotiate attractive commercial terms that do not spur further entry into the market…it is not just current competition, but also the advanced nature of future competitive service provider proposals that will deter anti-competitive conduct.[193]

Additionally GrainCorp submitted that, as a customer of Viterra, they are satisfied Viterra has an incentive to provide fair and transparent access at Port Adelaide:

Exporters have access to viable alternative port terminal service providers at Port Adelaide including mobile ship loading providers as well as the recent opening of operations at Lucky Bay. GrainCorp, as a long term customer of Viterra at Port Adelaide, is satisfied that Viterra has adequate incentive to provide fair and transparent access to its port terminal services at Port Adelaide.[194]

This section first briefly outlines the level of third party exports in SA and CRA's capacity estimates for alternate PTSPs. The ACCC's views on SA port terminal capacity are discussed in greater detail in section 3.1 (including its views on mobile ship loaders).

This section then discusses CRA's modelling. The modelling indicates that Viterra does not have an economic incentive to deny access to third party exporters, and is based on the assumption that there is sufficient alternate port terminal capacity to handle any grain which is diverted from Viterra's port terminal facilities (in the event access is denied). As previously noted the values of the margin used in CRA's modelling in relation to Viterra and Glencore are assumptions, as opposed to actual values. The ACCC notes it has not been provided with this information (on a confidential basis or otherwise), and as such is not well placed to attest to the reasonableness of certain assumptions used in CRA's modelling.

Furthermore, the ACCC notes that the modelling is sensitive to changes in certain assumptions, and that small changes can result in the model showing that it is profitable for Viterra to deny access.

Stakeholder views regarding CRA's modelling (and assumptions) are also discussed in this section.

This section then considers other views presented by Viterra and CRA in relation to the incentives of vertically integrated firms. In particular, denial of access compared to less extreme forms of discrimination.

Finally, this section discusses the possible implications of vertical integration. The ACCC notes that the question of vertical integration and a PTSP's incentives is integral to CRA's profit and loss modelling.

[190] T-Ports, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 2.

[191] Cargill, *Submission in response to Issues Paper,* 6 September 2019, p. 2.

[192] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 2.

[193] SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 2.

[194] GrainCorp, *Submission in response to Draft Determinations*, 17 November 2020, p. 1.

1. *Capacity of alternate port terminal facilities to accommodate third party exports*

The ACCC notes CRA used a lower and upper bound of SA alternate PTSP capacity as part of the analysis in its supplementary report. CRA state that the lower end of this capacity estimate is larger than 2017-18 third party exporter shipments:

> *Total competing port capacity is 3.835 to 5.355 million tonnes (i.e., including T-Ports capacity), the lower figure slightly higher than the total competitor exporter export shipments during the 2017/2018 growing season.*[195]

CRA's estimate of SA alternate port terminal capacity is based on the following (annual) capacity estimates:[196]

- 0.75 -1.5 million tonnes of capacity at LINX's facility at Port Adelaide;
- 0.54 million tonnes of capacity at Cargill's facility at Port Adelaide;
- 0.62 million tonnes of capacity at Semaphore's facility at Port Adelaide; and
- 1.93 - 2.7 million tonnes of capacity at T-Ports' facility at Lucky Bay.[197]

The ACCC notes that since the time of CRA's supplementary report there have been several relevant changes in the SA bulk grain export market. Notably, LINX has announced it will no longer export grain, and ADM has commenced loading grain out of Port Pirie.[198]

In its response to the Draft Determinations Viterra did not include CRA's capacity estimate for LINX's facility in its estimates of third party SA port terminal capacity.[199] However, Viterra noted that while LINX are no longer active, they continue to act as a potential competitor.[200]

Viterra also did not include the capacity of ADM's Port Pirie facility. However Viterra considered that ADM had the infrastructure in place to export grain from Port Pirie once it gained the accreditation to do so.[201]

The ACCC notes that ADM has since begun bulk export operations at Port Pirie and considers the facility to be relevant to any estimate of SA's alternate port terminal capacity. The ACCC also has estimated the capacity of ADM's Port Pirie facility as 0.44 million tonnes, however given the limited export data available the capacity of this facility is uncertain (see section 3.1.4).

Adjusting CRA's capacity estimates to account for the exit of LINX and entry of ADM indicates estimated total third party SA port terminal capacity of between 3.52 and 4.29 million tonnes.[202]

CRA's supplementary report indicates that approximately 4.6 and 3.8 million tonnes of grain was exported via non-Glencore (i.e. third party) exporters in SA in 2016-17 and 2017-18 respectively.[203]

The ACCC notes that, in its original report, CRA stated that competing terminals have sufficient capacity to handle all of the exports conducted by third part exporters in the 2016-17 and 2017-18 seasons.[204] However taking into account the exit of LINX and entry of ADM (as discussed above), the lower bound of this capacity estimate could have handled 75% and 93% of all third party exports in 2016-17 and 2017-18 respectively (assuming it would have been economically or practically viable to transport this grain to these facilities rather than Viterra's). The upper bound of

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

[196] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 8.

[197] Viterra's response to the Draft Determinations lists only the lower end of CRA's capacity estimate (used in CRA"s supplementary report) for T-Ports' Lucky Bay facility (1.93 million tonnes). In its supplementary report CRA used an upper capacity estimate of 2.7 million tonnes for the Lucky Bay facility (see page 5 of CRA's supplementary report).

[198] CRA submitted its confidential supplementary report on 13 January 2020. LINX announced it would stop providing bulk grain services at its Port Adelaide facility on 8 April 2020. ADM commenced providing grain export services in December 2020.

[199] Viterra *Response to Draft Determination,* Public version 8 February 2021, p. 8.

[200] Ibid, p. 15.

[201] Ibid, p. 14.

[202] Consistent with section 3.1.4, the ACCC has used ADM's capacity estimate of 437,854 tonnes for this calculation.

[203] The ACCC notes that these figures are based on the ACCC's 2017-18 Bulk grain ports monitoring report. See CRA's supplementary report page 3.

[204] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 11 November 2019, p. 17.

the capacity estimate could have handled all third party exports in 2017-18 and 91% of all third party exports in 2016-17.

In considering the above capacity estimates, the ACCC notes that the available estimates for alternate port terminal capacity vary significantly, and that this variation has the potential to significantly influence the total amount of third party capacity that is expected to be available in SA. In particular, while the ACCC considers the capacity estimates used by CRA in relation to Cargill's and Semaphore's Port Adelaide facilities to be appropriate, the ACCC notes that the capacity estimate used for T-Ports' Lucky Bay facility significantly influences the level of alternate capacity available to exporters.[205]

As set out in table 3.2 in section 3.1.4 estimates of the total amount of alternate annual capacity vary from as low as 1.45 million tonnes, to as high as 5.54 million tonnes, depending on which capacity estimates are used for different facilities.[206]

The ACCC discusses its views on SA port terminal facility capacity in greater detail in chapter 3. While the ACCC acknowledges there is uncertainty around capacity estimates, the ACCC considers that the 3.52 to 4.29 million tonnes per annum capacity estimates used by CRA likely overstate the amount of available alternative capacity in SA.[207]

2. *<u>CRA's modelling</u>*

As discussed above, CRA's initial report asserted that Viterra has no incentive to deny access to competing exporters.[208] In addition CRA asserted:

> *The presumption underlying the economic rationale for the continued application of the Code is that Viterra has the incentive to deny terminal access to export competitors to Glencore Agriculture for anticompetitive purposes. The Code purportedly removes Viterra's ability to deny or reduce access by ensuring that its capacity allocation practices are non-discriminatory, and in particular by ensuring that Viterra does not exclude Glencore Agriculture's export competitors from terminal access.*[209]

The ACCC acknowledges that when there is spare export capacity at a port terminal facility, a PTSP (vertically integrated or otherwise) may have an incentive to provide access to exporters to increase throughput (as it likely faces significant fixed costs). However, in circumstances where supply is constrained, the ACCC considers that a vertically integrated PTSP will have an incentive to discriminate in favour of an associated entity exporter, potentially to the detriment of the fairness and transparency of access for other exporters.

For example, absent appropriate regulation or sufficient competitive constraint, a vertically integrated PTSP may have an incentive to offer capacity to an associated entity exporter in the first instance, thus providing its associated entity with more desirable shipping capacity slots (before offering the remaining slots to the market more broadly). The incentive to discriminate in favour of its associated entity is likely strengthened in circumstances where capacity is constrained.

Notwithstanding the ACCC's view that issues relating to favourable access are more relevant considerations than the denial of access,[210] the ACCC notes that:

[205] The ACCC has not provided its final view on its capacity estimate for T-Ports' Lucky Bay facility in these Final Determinations, as it does not consider this directly relevant to the assessment of the exemption applications for Viterra's IHB, OHB, Port Giles and Wallaroo facilities (see section 1.4). The ACCC will provide its views on the capacity of T-Ports' Lucky Bay facility in its Final Determinations for Viterra's Port Lincoln and Thevenard facilities.

[206] As per the Draft Determinations, the low bar assumes T-Ports Lucky Bay facility has capacity of 0.60 million tonnes. The high bar assumes T-Ports' Lucky Bay facility has capacity of 3.60 million tonnes.

[207] As per section 3.2 the ACCC considers the capacity figures provided by Viterra in its response to the Draft Determinations for Cargill and Semaphore to be appropriate. In the Draft Determinations the ACCC took the view that T-Ports' capacity estimate of 0.6 million tonnes for its Lucky Bay facility, while uncertain, was a more reasonable estimate than 3.6 million tonnes. The ACCC will provide its final views on the capacity of T-Ports' Lucky Bay facility in its Final Determinations for Viterra's Port Lincoln and Thevenard facilities.

[208] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 11 November 2019, p. 15.

[209] Ibid.

[210] Consistent with previous ACCC exemption determinations, the ACCC considers that a vertically integrated PTSP is more likely to have an incentive to discriminate in favour of an associated entity exporter during periods of high demand, rather than necessarily completely denying access to third party exporters.

- the outcomes of the CRA modelling are highly sensitive to changes in certain assumptions, several of which the ACCC does not consider to be adequately justified; and
- CRA's model is based on capacity assumptions which the ACCC considers are not reflective of the likely state of the SA market.

These matters are discussed in detail below.

2.1. Sensitivity to the assumptions used in the modelling

In order to support its view that Viterra does not have an economic incentive to deny access to third party exporters CRA has presented modelling which finds that, in net, Viterra/Glencore Agriculture would experience a 1.3% reduction in profit if it were to deny third party exporters access to all of its port terminal facilities.

That is, CRA's modelling finds that if Viterra were to deny access at port, the profit lost as a result of the reduction in throughput at Viterra's facilities would outweigh the profit gained by Glencore as a result of the increased volume of grain now needing to be exported through Glencore (which would be the only exporter with access to Viterra's port terminal facilities in a denial-of-access scenario) and the lower price paid to growers as a result.

In doing so, CRA's modelling assumes that there is sufficient alternate port terminal capacity available to accommodate the grain which switches away from Viterra's port terminal facilities as a result of third party exporters being denied access (as discussed above).

The ACCC notes that a number of assumptions have necessarily been made in order to arrive at this conclusion. These include:

1) The use of 2017-18 export figures as a 'representative' season.
2) That Glencore's trading margins are $1.50 per tonne.[211]
3) That Viterra's port terminal margins are $10 per tonne.[212]
4) That 60% of third party exporter volumes will switch to competing terminals (or the domestic or containerised markets) in response to Viterra denying access to its port terminal services.
5) That Glencore's trader margin increases by $5 per tonne as a result of reduced competition from exporters sourcing grain from growers.

CRA state that it considers these assumptions to be conservative and that, even using these conservative assumptions, CRA's model shows that Viterra does not have an incentive to deny access:

> *We show that, in a simple model of 'full' foreclosure (i.e. Viterra denies access to its port terminals to all competing exporters) using indicative but reasonable and very conservative input assumptions (i.e. assumptions that are likely biased towards finding that Viterra has an incentive to deny terminal access), the costs to Viterra from denying terminal access to competing exporters are likely to exceed benefits to Glencore Agriculture, such that denying access is not profitable for Viterra.*[213]

The ACCC notes CRA's comments that the assumptions are conservative, however (as discussed below) the ACCC considers that a number of these assumptions have not been adequately justified.

Furthermore, the ACCC notes that CRA's modelling indicates that Viterra's incentive to completely deny access is finely balanced (i.e. the decrease in net profit for Viterra/Glencore Agriculture is only 1.3%).

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[211] See earlier discussion regarding Viterra and Glencore margin figures.

[212] See earlier discussion regarding Viterra and Glencore margin figures.

[213] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 11 November 2019, p. 15.

Given the uncertainty regarding the input assumptions, the ACCC has undertaken a sensitivity analysis of how the profit margin changes in response to changes in certain input assumptions (see tables 3.8, 3.9 and 3.10).

Before discussing this sensitivity analysis the ACCC discusses each assumption below.

Reasonableness of input assumptions

1) The use of 2017-18 export figures as a representative season

The ACCC notes that GPSA contested the reasonableness of using the 2017-18 season as a representative export season for the purposes of CRA's modelling. Specifically, GPSA submitted:

> *The [CRA report] is predicated on harvest figures from 2017/18, which produced approximately 6.94 million tonnes of grain in South Australia. This sits far below the long-term average of 7.9 million tonnes.*
>
> *In addition, the use of 2017/18 data is misguiding, in that those years export volumes have generally been low due to large quantities of SA grain moving to the east coast to meet domestic demand due to the drought. This resulted in South Australia's grain supply chain operating in non-traditional and short-term domestic markets to meet demand.*[214]

In responding to the Draft Determinations and stakeholder submissions, Viterra stated that:

> *…7.9 million tonnes significantly overstates average production in the period between 2011-12 to 2019-20. Production levels between 2011-12 and 2019-20 varied between 5.5 million tonnes (2018-19) and 10.7 million tonnes (2016-17) as set out in Table 4 below. Average annual production over this period was 7.1 million tonnes.*

T-Ports also considered the use of the 2017-18 figures to be "ok" given the drought over the past few seasons.[215]

The ACCC notes GPSA's comments that grain was moved to the east coast in the 2017-18 season. However, the ACCC also notes that between the 2011-12 and 2019-20 seasons SA's average shipments and production figures (5.33 and 7.06 million tonnes respectively)[216] are almost identical to that of the 2017-18 season (5.38 and 7.00 million tonnes respectively).

In addition to the volumes of grain exported in a specific season, the ACCC notes the market share of Glencore and third party exporters is relevant to the results of CRA's modelling. As explained below in relation to assumption 4, CRA assume that 60% of third party exports will switch to competing facilities if Viterra deny access to their facilities. That is, if third party exporters account for a smaller (or larger) portion of exports from Viterra's facilities then a smaller (or larger) volume of grain will switch to opposing ports (for a given switching percentage). This will affect the results of CRA's modelling.

As such, the portion of third party exports being shipped from Viterra's facilities also needs to be considered when assessing the reasonableness of the representative season.[217] The ACCC notes that in the 2017-18 season third party exporters accounted for 39% of exports from Viterra's facilities, which is similar to the average portion of third party exports of 41%.[218]

[214] GPSA, *Submission in response to Draft Determinations*, 27 November 2020, p. 2.

[215] T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 3.

[216] The ACCC notes it obtains production figures from: ABARES, State data underpinning: Australia crop report: February 2021 No. 197. The ACCC is unaware of the source of GPSA's production data. PIRSA production data is available (and therefore considered) over the 2012-13 to 2019-20 seasons.

[217] For example, in 2017-18 third party exporters performed 61% of the 5.4 million tonnes (or 3.3 million tonnes) of throughput facilitated through Viterra's facilities; a switching percentage of 60% therefore assumes 2.0 million tonnes will switch to competing facilities. If instead, for example, third party exporters performed 50% of the 5.4 million tonnes of exports, than a switching percentage of 60% equates to 1.6 million tonnes of grain switching to competing facilities, thereby affecting the total profitability of Glencore and Viterra under CRA's modelling.

[218] Similarly CRA's modelling is also reliant of the portion of shipments from Viterra's ports. As implied above if the portion of third party exporters are similar across the 2017-18 and average season, than Glencore's portion of exports will also be similar across the 2017-18 and average season.

Given the average volume of exports and portion of third party exports in the 2017-18 season is similar to averages across seasons, the ACCC considers the 2017-18 season is likely suitably representative of a typical export season.

2) Glencore's trading margins are $1.50/t

The ACCC notes that CRA's assumption on Glencore's trading margin is based on an estimate provided by ESCOSA (which stated that exporter margins were in the order of $1-$2 per tonne).[219] The ACCC notes that it has not been provided with Glencore's actual exporter margin (either on a public or confidential basis).

T-Ports submitted that the ESCOSA exporter margin range appears extremely low and that it would be more comfortable with an assumption in the $5-$10 per tonne range:

> *In the absence of any empirical evidence, it would appear that this base point is extremely low, and while we note it is based on an ESCOSA range of $1-$2 we have not delved deeper into the ESCOSA report.*
>
> *A simple return on working capital calculation would say that for $300 to be used on buying a tonne of wheat, then say minimum 5% return on capital would be $15 (per annum). Given that grain is held on average for say 6 months (mid-point between 3 and 9 months) you would look to be earning an average of $7.50 on every tonne traded. T-Ports would have been more comfortable with an assumptions of $5-$10 per mt.*[220]

In its response to the Draft Determinations Viterra stated that T-Ports' assessment of exporter margins is highly speculative:

> *T-Ports' assessment of marketer margins is highly speculative. T-Ports (who Viterra notes does not have any grain trading expertise) suggests that marketer margins are likely to fall within a $5-$10 per mt range as opposed to the range used by ESCOSA being $1-$2 per mt. However, T-Ports admits that it has not examined ESCOSA's calculation. In addition, T-Ports' "back-of-the-envelope" calculation uses unsupported assumptions and it is unclear whether it has included all relevant costs in this assessment.*[221]

Absent further information the ACCC considers that the best available estimate at this time to be the $1.50 per tonne margin, which represents the midway point of the estimate from ESCOSA's report (that is exporter margins are within the $1-$2 per tonne range). However the ACCC notes T-Ports' comments on exporter margins (as well as Viterra's response) and considers that not being provided with Glencore's actual exporter margins increases the uncertainty associated with this assumption.

3) Viterra's port terminal margins are $10/t

Viterra submitted that the $10 per tonne margin used by CRA to analyse the profitability of a strategy by Viterra to foreclose terminal access was highly conservative and noted that, even using this conservative assumption, CRA found that Viterra still did not have an incentive to deny access.[222]

To illustrate the conservative nature of the assumption Viterra noted that:

[219] ESCOSA's estimate referenced an estimate provided in the Department's *Review of the Wheat Port Access Code of Conduct* (2018, p. 58.). The Department appears to have based this estimate off a personal communication with AEGIC in May 2018.

[220] T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 3.

[221] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 36-37.

[222] Ibid, p. 31.

The fact that $10 per tonne is a conservative estimate for the margins that a PTSP would expect to earn was later demonstrated by information in the Peninsula Ports Information Memorandum…[who] projected contribution margins ranging from $38.14 per tonne in 2022 to $42.93 per tonne in 2026, and EBITDA margin ranging from $30.26 per tonne in 2022 to $36.79 per tonne in 2026.[223]

And that:

The CRA Supplemental Report also showed that, if other assumptions are maintained at their initial levels (which are very conservative), increasing the terminal margin to the lower end of the Free Eyre range (i.e. $30 per tonne) increases the losses associated with a foreclosure strategy substantially. The CRA Supplementary Report further demonstrated that, assuming a less conservative margin of $30 per tonne and changing the other input assumptions to make them even more conservative would result in the strategy still remaining unprofitable, e.g., if the switching percentage is reduced to 40% from 60% and the exporter margin is increased to $7.50/tonne from $5.00/tonne, a foreclosure strategy remains unprofitable.

These aspects of CRA's reports do not, however, appear to have been taken into account or otherwise given much weight by the ACCC. [224]

T-Ports, the only stakeholder to comment on the port terminal margin assumption, submitted that Viterra's assumed port terminal margin appears low, and that it would have been more comfortable with an assumption of $15-$20 per tonne:

[Viterra's port terminal margins] *appear low. The analysis should consider gross margins before any capital recovery or fixed costs. T-Ports would have been more comfortable with an assumption of $15-$20 per mt.*[225]

As per Viterra's above comment, CRA used a $30 per tonne port terminal margin in its supplementary report (CRA used a $10 per tonne margin in its original report).[226] However the ACCC notes that (as per ESCOSA's 2018 report) Viterra's port terminal charges were approximately $26 per tonne.[227] The ACCC also notes that ESCOSA did not consider various extra charges that a PTSP may charge (such as at-port storage, blending, overtime, late vessel nomination fees and vessel variation fees), which can be expected to increase the revenue received by Viterra.

As such the ACCC expects the revenue Viterra receives from its port terminal charges will be in the order of $26 per tonne (or higher), however the margins Viterra earn from this will be lower due to the cost associated with providing these services.

The ACCC is not aware of Viterra's actual port terminal margin (as previously stated, this has not been provided to the ACCC on a public or confidential basis) and notes the uncertainty around this assumption. Absent further information, the ACCC does not consider it appropriate to identify a 'best estimate' for the port terminal margin, but considers this margin is likely to be less than the $30 per tonne estimate provided by CRA.

The sensitivity analysis below therefore presents a range of assumed port terminal values (see tables 3.8 to 3.13). As discussed below the assumed port terminal margin impacts significantly on the results of the sensitivity analysis, and adds considerable uncertainty to the results of the modelling (as presented below).

[223] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 31.

[224] Ibid, p. 31.

[225] T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 3.

[226] The ACCC notes that the $30 per tonne port terminal margin was initially provided to the ACCC on a confidential basis as part of CRA's supplementary report. However Viterra's subsequent discussion on this figure in its response to the ACCC's Draft Determinations was provided on a public basis.

[227] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report, December 2018*, p. 61. The ACCC notes the exact figure does not appear to be available in the ESCOSA report and was taken from figure 4.4.

4) <u>60% of third party exporter volumes would switch to competing markets if Viterra denied access</u>

In its original report CRA stated:

> *If Viterra denies access to its terminals to competitors, some proportion of competitors' exports is lost to Viterra (i.e. with those competitors switching to other terminals in South Australia or Victoria, and the containerized market). We assume that only 60 percent of Viterra's export volume switches to competing terminals (or the domestic or containerized markets), which is conservative.*[228]

In its supplementary report CRA also stated that this assumption is conservative due to the availability of alternate capacity:

> *Given the availability of capacity at competing export terminals, it is likely that more than 60 percent of Viterra's volume of export shipments by competitive exporters would switch to competitor terminals (and in the long run would incentivize competitor port terminals to increase capacity further).*[229]

As above the ACCC notes that CRA's model is based on 2017-18 export data, which means an estimated total 3.3 million tonnes of third party exports is assumed to be exported from Viterra's facilities.[230] CRA's 60% switching assumption means that 1.98 million tonnes worth of third party grain would switch to alternative export markets. Using CRA's capacity estimates as a base, and accounting for the exit of LINX and entry of ADM (i.e. 3.52 to 4.29 million tonnes), there is sufficient capacity to handle 60% of grain switching to alternate PTSPs (notwithstanding questions regarding the economic or practical viability of this occurring).[231]

The ACCC notes that T-Ports was the only stakeholder to comment on the switching assumption. T-Ports considered that this is the hardest assumption to forecast and justify.

T-Ports did however note that it considered there would be little opportunity for exporters to "switch" to other PTSPs as they do not have the capacity to take on significant additional volumes, and therefore the only "realistic" assumption is that exporters would have to leave the SA market (therefore resulting in closer to 100% of the grain would be picked up by Glencore).[232]

The ACCC acknowledges that, using CRA's capacity estimates, alternate facilities would be able to accommodate third party exports if Viterra were to deny access to its facilities (if factors such as the economic and practical viability of this occurring are not considered).[233] However the ACCC does not consider the existence of alternate capacity to be an adequate justification for the portion of grain which would switch to competing terminals. Rather, the ACCC considers available alternate capacity indicates the maximum amount of grain that, in theory, could possibly switch in the event of denial of access.

The ACCC notes that the portion of grain that would switch to competing PTSPs would depend on the profitability of exporting grain through Glencore, or through third party exporters (who would have to find an alternate export path if access is denied). Consequently, a range of other

[228] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 11 November 2019, p. 20.

[229] Charles River Associates, *Supplement to CRA Report on the Benefits of Code Exemption for Viterra Grain Export Terminals Public version* 11 November 2019, p. 7.

[230] These figures are based of the 2017-18 season. As per the discussion regarding this assumption, the ACCC considers the 2017-18 season reasonable to use for the purposes of this modelling.

[231] The ACCC notes that using 2017-18 figures there were 0.51 million tonnes exported through alternate port terminal services. Therefore, there would be 3.01 and 3.78 million tonnes of available alternate capacity, which would still be sufficient (using CRA's estimates) to facilitate the export of 1.98 million tonnes of grain (which is assumed to switch under assumption 4).

[232] T-Ports, *Submission in response to Draft Determinations*, 17 November 2020 p. 3.

[233] Using the ACCC's capacity estimates for ADM, Cargill and Semaphore (as set out in this document) and the ACCC's capacity estimates from the Draft Determinations for T-Ports (noting that the ACCC will provide its final estimate of capacity at T-Ports' Lucky Bay facility in its Final Determinations for Viterra's Port Lincoln and Thevenard facilities), there would be 2.19 million tonnes of capacity. Given that 0.51 million tonnes of alternate capacity was used in the 2017-18 season, only 1.69 million tonnes of spare capacity would remain available to exporters seeking to switch ports. Using these estimates third party exporters would, at most, be able to switch 51% of their grain to alternate PTSPs.

factors should be considered as part of any attempt to determine the portion of grain that would switch to competing PTSPs, for example:

- the amount Glencore would be able to reduce its prices compared to third party exporters due to the denial of access (i.e. assumption 5);
- the extra freight cost charges which may (or may not) be associated with exporters switching to alternate PTSPs; and
- the efficiency and service offerings of alternate PTSPs.

The ACCC also notes that the seasonality of demand for export capacity, in particular the ability of alternate PTSPs to meet demand within the peak period where higher prices for grain are more likely to be able to be received,[234] is also not considered in the modelling.

CRA has not provided an explanation of whether and/or how these (or other) relevant factors have been taken into account in developing its assumed switching rate. Consequently, the ACCC considers that the use of an assumed 60% switching rate has not been adequately justified.

The ACCC notes that it considers that there is a direct connection between the assumptions made in relation to the switching percentage and the increase in the Glencore trading margin (assumptions 4 and 5). Specifically, if Glencore increased its trading margin by more than $5 per tonne than this would give growers a greater incentive to switch their grain to non-Glencore exporters (and therefore to non-Viterra facilities). Conversely, if the increase to Glencore's trading margin was smaller than $5 per tonne, than this would mean growers have a reduced incentive (compared to the $5 per tonne assumption) to switch grain to competing exporters and facilities.

5) <u>Glencore could increase its trading margin by $5/t as a result of reduced competition in the exporter market</u>

CRA submitted that it considers this assumption to be conservative:

> *Glencore Agriculture's trader margin increases by $5 per tonne (because it reduces the price it pays to producers for their grain as a result of reduced competition from competing exporters). This is a very conservative assumption, as it represents a more than 300 percent increase to the exporter margin. Since competing exporters would continue to have sufficient access to export terminal capacity in South Australia even if they were denied access at Viterra terminals, we expect that they would continue to compete to purchase wheat from producers in South Australia as vigorously as they do today.*[235]

As discussed above in relation to assumption 4, the ACCC considers the amount which Glencore could reduce its prices to growers (as a result of denial of access) to be related to the amount of non-Glencore-exported grain which would switch from Viterra's ports to competing PTSPs. More specifically, the ACCC considers that a larger increase in Glencore's margin (as a result of a greater reduction in the price offered to growers), would result in a larger portion of grain switching to alternate PTSPs. Consistent with the ACCC's views in relation to assumption 4, the ACCC does not consider that use of a $5/t margin assumption to be adequately justified.

2.2. ***<u>Sensitivity analysis in 2017-18 market scenario</u>***

Due to the uncertainty associated with assumptions 3, 4 and 5 (and to a lesser extent assumption 2), the ACCC has undertaken a sensitivity analysis in relation to these assumptions for a wide range of values (see tables 3.8 to 3.13).

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[234] As per section 3.2.3, ESCOSA states that exporters are generally able to obtain higher prices on the international market for SA grain between December and May. (ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018).

[235] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals,* 11 November 2019, p. 20.

While the below tables present a wide range of values for the assumptions, the ACCC notes that the outcomes of the model in relation to Viterra's incentive to deny access appear to be highly sensitive. For example, keeping all other assumptions the same as CRA's original assumptions, if the third party exporter switching percentage (assumption 4) is assumed to be less than 58.7% (compared to the 60% assumption used in CRA's own analysis), then the denial of access becomes profitable under CRA's modelling.

Similarly, the ACCC notes that if the *increase* in Glencore's trader margin (assumption 5) is greater than $5.21 per tonne (compared to the $5.00 per tonne assumption used in CRA's own analysis), then the denial of access also becomes profitable, keeping all other assumptions the same.

Furthermore, if Glencore's trading margin (assumption 2) is assumed to be $2.05 per tonne (rather than the $1.50 per tonne in CRA's analysis, or the $1 to $2 per tonne range estimated by ESCOSA[236]) then the denial of access also becomes profitable, keeping all other assumptions the same.[237]

While the ACCC notes CRA's (and Viterra's) views that the assumptions used in the modelling are conservative, as discussed above the ACCC considers several of these assumptions have not been adequately justified.

The ACCC notes that the minor changes to the assumptions above indicate CRA's modelling is sensitive to the margins and switching percentages inputs, with relatively small changes to these assumptions potentially resulting in the model indicating that it would be profitable for Viterra to deny access.

The modelling also appears to be sensitive to the value assumed for port terminal margin. The ACCC notes that the $10 per tonne port terminal margin used in CRA's analysis is an assumption and not necessarily Viterra's actual margin. While the ACCC is not aware of Viterra's actual port terminal margin(s), as shown in table 3.8 there are significantly more scenarios under which the denial of access becomes profitable if Viterra's port terminal margin is assumed to be $10 per tonne (compared to the $15 and $20 per tonne margin shown in tables 3.9 and 3.10 respectively). Conversely, if a $20 per tonne port terminal margin is assumed (see table 3.10) there are significantly more scenarios in which a denial of access becomes unprofitable (compared to tables 3.8 and 3.9).

To highlight this point the ACCC notes that, holding all other CRA assumptions the same, changing the port terminal margin between $10 per tonne, $15 per tonne and $20 per tonne significantly alters Viterra's incentive to deny access. For example, assuming Glencore increase their trading margin by $5.00 per tonne and a 50% switching percentage, the net profit for Viterra/Glencore Agriculture changes from a gain of 8.3% under a $10 per tonne margin, to a loss of 4.2% using the $15 per tonne margin, and a loss of 10.6% using the $20 per tonne margin (as shown in tables 3.8, 3.9 and 3.10 respectively).

As above, the ACCC notes that the wide range of values used for the switching percentage and increase in Glencore trading margin in tables 3.8, 3.9 and 3.10, reflects the uncertainty associated with these assumptions. The ACCC considers that this uncertainty, and the sensitivity of the model's results to these assumptions reduces the credibility of any single outcome of CRA's model.

For example, in the event that Viterra's port terminal margin was shown to be substantially higher than $10 per tonne, the ACCC does not consider that the model could reliably conclude that Viterra does not have an incentive to deny access, as there are a range of values for Glencore's trading margin and the switching percentage (in which denial of access is profitable. The ACCC notes that the reverse is also true, that is due to the uncertainty in the assumptions (and variability of the modelling to these assumptions) the model cannot reliably conclude that Viterra has an incentive to deny access.

[236] ESCOSA has based this reference to the Department's *Review of the Wheat Port Access Code of Conduct* (2018, p. 58.). The Department appears to have based this estimate off a personal communication with AEGIC in May 2018.

[237] The ACCC notes CRA's modelling considers the change in profit. As such, the **change** in margin gained by Glencore is different depending on whether grain was originally exported by Glencore or a third party exporter. As a result of denial of access Glencore gain a further $5 per tonne margin on the grain it originally exported before the denial of access (i.e. in addition to the $1.50 per tonne margin they already received in relation this grain). However, Glencore gains a $6.50 per tonne margin on the grain which switches to them as a result of the denial of access (i.e. Glencore gains its original $1.50 per tonne margin, as well as the additional $5 per tonne margin increase on the grain that switches to it).

In addition, and as discussed in relation to assumption 4, the ACCC also notes that CRA's model does not account for a number of other relevant factors, such as: the freight cost of moving grain to alternate port terminal facilities; the efficiency and service offerings of alternate PTSPs; and the seasonality of demand for export capacity (specifically the ability of alternate PTSPs to meet demand within the peak period where higher prices for grain are more likely to be able to be received).[238]

As previously noted, the ACCC considers issues around favourable access to be more relevant than the denial of access (see section 2.3 in this box). Notwithstanding this, the ACCC considers that the apparent sensitivity of the modelling presented by CRA reduces the strength of the conclusion that Viterra does not have an incentive to deny access to third party exporters.

The ACCC also notes that CRA's modelling did not consider the current market scenario which accounts for the entry and exit of several PTSPs (given export figures were based on 2017-18 export data). This is discussed below in section 2.3.

Table 3.8: CRA modelling sensitivity analysis: Percentage change in net profit - $10 per tonne port terminal margin assumption

		Increase in Glencore trader margin (Assumed)							
		$1.00	$2.50	$3.50	$5.00	$6.50	$7.50	$8.50	$10.00
Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)	10%	10.9%	24.2%	33.1%	46.4%	59.7%	68.6%	77.4%	90.7%
	20%	3.7%	16.1%	24.4%	36.9%	49.3%	57.6%	65.9%	78.3%
	30%	-3.5%	8.0%	15.7%	27.3%	38.9%	46.6%	54.3%	65.9%
	40%	-10.8%	-0.1%	7.1%	17.8%	28.5%	35.6%	42.8%	53.5%
	50%	-18.0%	-8.1%	-1.6%	8.3%	18.1%	24.7%	31.2%	41.1%
	60%	-25.2%	-16.2%	-10.2%	-1.3%	7.7%	13.7%	19.7%	28.7%
	70%	-32.4%	-24.3%	-18.9%	-10.8%	-2.7%	2.7%	8.1%	16.2%
	80%	-39.6%	-32.4%	-27.6%	-20.3%	-13.1%	-8.2%	-3.4%	3.8%
	90%	-46.9%	-40.5%	-36.2%	-29.8%	-23.5%	-19.2%	-15.0%	-8.6%

Notes: (1) The switching percentage assumes that grain can readily be switched to competing markets, including opportunities offered by competing PTSPs, and the domestic and container markets.

(2) Tables 3.8, 3.9 and 3.10 use CRA's methodology and assume that Cargill and Semaphore are exporting from their Port Adelaide facilities at 2017-18 levels (i.e. a combined capacity of 510,000 tonnes per annum), and that ADM and T-Ports are not exporting any grain from their respective facilities. Section 2.3 of the CRA box below assumes the current market scenario, with ADM, Cargill and T-Ports active and LINX having exited.

(3) Each 'switching percentage' increment of 10% assumes that an extra 0.33 million tonnes of grain will be diverted from Viterra ports to alternate markets.

[238] As per section 3.2.3, ESCOSA state that exporters are generally able to obtain higher prices on the international market for SA grain between December and May.

Table 3.9: CRA modelling sensitivity analysis: Percentage change in net profit - $15 per tonne port terminal margin assumption

		Increase in Glencore trader margin (Assumed)							
		$1.00	$2.50	$3.50	$5.00	$6.50	$7.50	$8.50	$10.00
Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)	10%	5.4%	14.5%	20.5%	29.5%	38.6%	44.6%	50.6%	59.7%
	20%	-1.4%	7.0%	12.7%	21.1%	29.6%	35.2%	40.8%	49.3%
	30%	-8.3%	-0.4%	4.8%	12.7%	20.5%	25.8%	31.0%	38.9%
	40%	-15.2%	-7.9%	-3.0%	4.2%	11.5%	16.4%	21.2%	28.5%
	50%	-22.0%	-15.3%	-10.9%	-4.2%	2.5%	7.0%	11.4%	18.1%
	60%	-28.9%	-22.8%	-18.7%	-12.6%	-6.5%	-2.5%	1.6%	7.7%
	70%	-35.7%	-30.2%	-26.6%	-21.1%	-15.5%	-11.9%	-8.2%	-2.7%
	80%	-42.6%	-37.7%	-34.4%	-29.5%	-24.6%	-21.3%	-18.0%	-13.1%
	90%	-49.5%	-45.1%	-42.2%	-37.9%	-33.6%	-30.7%	-27.8%	-23.5%

Notes: Refer to table 3.8 notes.

Table 3.10: CRA modelling sensitivity analysis: Percentage change in net profit - $20 per tonne port terminal margin assumption

		Increase in Glencore trader margin (Assumed)							
		$1.00	$2.50	$3.50	$5.00	$6.50	$7.50	$8.50	$10.00
Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)	10%	2.6%	9.5%	14.0%	20.9%	27.7%	32.3%	36.8%	43.7%
	20%	-4.0%	2.3%	6.6%	13.0%	19.4%	23.7%	27.9%	34.3%
	30%	-10.7%	-4.8%	-0.8%	5.1%	11.1%	15.1%	19.0%	25.0%
	40%	-17.4%	-11.9%	-8.2%	-2.7%	2.8%	6.5%	10.1%	15.6%
	50%	-24.1%	-19.0%	-15.7%	-10.6%	-5.5%	-2.2%	1.2%	6.3%
	60%	-30.8%	-26.2%	-23.1%	-18.5%	-13.8%	-10.8%	-7.7%	-3.1%
	70%	-37.4%	-33.3%	-30.5%	-26.3%	-22.2%	-19.4%	-16.6%	-12.4%
	80%	-44.1%	-40.4%	-37.9%	-34.2%	-30.5%	-28.0%	-25.5%	-21.8%
	90%	-50.8%	-47.5%	-45.3%	-42.1%	-38.8%	-36.6%	-34.4%	-31.1%

Notes: Refer to table 3.8 notes.

2.3. <u>Sensitivity analysis in current market scenario</u>

The CRA modelling uses export figures from the 2017-18 shipping season and, as such, assumes that there are 5.4 million tonnes of exports through Viterra terminals (i.e. a total of 2.1 million tonnes Glencore and 3.3 million tonnes non-Glencore exports).

The ACCC notes that CRA's modelling therefore reflects the situation *before* the opening of 3 rival port terminal facilities in SA (ADM's Port Pirie facility, Cargill's berth 20 Inner Harbour facility, and T-Ports' Lucky Bay facility), as well as the closure of LINX's port terminal facility at Port Adelaide. The ACCC considers it more appropriate for any modelling to consider whether Viterra has an incentive to deny access in a *future* status quo in which ADM's, Cargill's and T-Ports' facilities are active, and LINX's facility is inactive.

The ACCC considers that modelling this future status quo means:

- subtracting 1.05 million tonnes[239] from the forecast exports through Viterra terminals (reflecting ADM's, Cargill's and T-Ports' facilities operating at their combined nominal capacities[240]); and
- adding an additional 0.24 million tonnes, due to the exit of LINX from the market.[241]

Factoring these changes into the model reduces the volume of non-Glencore exports such that, even accepting all the other assumptions in CRA's model, a denial of access by Viterra is now profitable.[242]

Similarly the results presented below in tables 3.11, 3.12 and 3.13 show that, once ADM's, Cargill's and T-Ports' facilities are included, and LINX's facility is removed, a greater number of the assumed scenarios become profitable if Viterra denies access to its port terminal services.

The ACCC notes that it presented the same analysis in its Draft Determinations (without accounting for the entry of ADM, as at the time ADM did not have appropriate exporter accreditation). CRA in response to this analysis in the Draft Determination submitted that:

> *The ACCC also critiqued CRA's illustrative model for not including certain adjustments to the volumes used in the model to account for recent terminal entry and exit. The Draft Determination purports to show that denial of access by Viterra becomes profitable if these adjustments are made. While this is technically correct (i.e., in the sense that all models are sensitive to changes in assumptions and inputs), any denial of access remains unprofitable if the model is adjusted to reflect scenarios that are not unrealistic and speculative. This is the case even when using CRA's conservative assumptions, which are explicitly biased towards a conclusion that denial by Viterra could be profitable.*[243]

The ACCC notes CRA's (and Viterra's) comments that it considers the assumptions it used in the modelling are conservative.

The ACCC discusses its views on these assumptions in section 2 of this box, and, as discussed in detail above, considers several of these assumptions have not been adequately justified, which increases the uncertainty associated with the modelling.[244]

[239] That is assuming ADM, Cargill and T-Ports facilitate 150,000, 300,000 and 600,000 tonnes of grain respectively. As per section 3.1.4 the ACCC has estimated ADM's and Cargill's capacity as 437,854 and 540,000 tonnes respectively. The ACCC has not estimated T-Ports' capacity in this document.

[240] Alternate PTSPs' export volumes are assumed to be comprised from the non-Glencore share of exports.

[241] In the 2017-18 season LINX facilitated the export of 240,000 tonnes of grain, all of which was by non-Glencore exporters.

[242] Under the future status quo a denial of access by Viterra to non-Viterra exporters, with all the other assumptions remaining the same, results in an increase in Viterra's and Glencore's net profit of 4.1%, i.e. the complete denial of access becomes profitable.

[243] Charles River Associates, *CRA Comments on the ACCC's Draft Determinations Regarding Code Exemption for Viterra Grain Export Terminals*, 21 December 2020, p. 2.

[244] The ACCC notes that if the volumes were to remain the same as opposed the switching percentage (as suggested by CRA in their response to the Draft Determinations) than this decreases Viterra's incentive to deny access to its port terminal services. However, the ACCC considers that neither the volume and/or portion of grain which would switch services have been adequately justified.

Table 3.11: CRA modelling sensitivity analysis in the current market scenario (percentage change in profit) - $10 per tonne port terminal margin assumption

		Increase in Glencore trader margin (Assumed)							
		$1.00	$2.50	$3.50	$5.00	$6.50	$7.50	$8.50	$10.00
Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)	10%	10.6%	23.9%	32.8%	46.0%	59.3%	68.2%	77.0%	90.3%
	20%	4.3%	16.8%	25.1%	37.7%	50.2%	58.5%	66.9%	79.4%
	30%	-2.1%	9.7%	17.5%	29.3%	41.0%	48.9%	56.7%	68.4%
	40%	-8.4%	2.6%	9.9%	20.9%	31.9%	39.2%	46.5%	57.5%
	50%	-14.8%	-4.5%	2.3%	12.5%	22.8%	29.6%	36.4%	46.6%
	60%	-21.1%	-11.6%	-5.3%	4.1%	13.6%	19.9%	26.2%	35.7%
	70%	-27.4%	-18.7%	-12.9%	-4.2%	4.5%	10.3%	16.1%	24.8%
	80%	-33.8%	-25.8%	-20.6%	-12.6%	-4.7%	0.6%	5.9%	13.9%
	90%	-40.1%	-33.0%	-28.2%	-21.0%	-13.8%	-9.0%	-4.2%	3.0%

Notes: (1) The switching percentage assumes that grain can be readily switch to competing markets, including opportunities offered by alternate PTSPs, and the domestic and container markets.

(2) Tables 3.11, 3.12 and 3.13 assume a future market scenario in which ADM, T-Ports and Cargill are active, but LINX has exited. That is table 3.11, assumes Semaphore is exporting at its 2017-18 levels (265,000 tonnes), Cargill is operating at LINX's 2017-18 levels (240,000 tonnes), and that ADM and T-Ports are exporting according to their nominal capacities (combined 0.75 million tonnes).

(3) Each 'switching percentage' increment of 10% assumes that an extra 0.25 million tonnes of grain will be diverted from Viterra ports to alternate markets.

Table 3.12: CRA modelling sensitivity analysis in the current market scenario (percentage change in profit) - $15 per tonne Port Terminal Margin Assumption

		Increase in Glencore trader margin (Assumed)							
		$1.00	$2.50	$3.50	$5.00	$6.50	$7.50	$8.50	$10.00
Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)	10%	5.5%	14.6%	20.6%	29.6%	38.7%	44.7%	50.7%	59.8%
	20%	-0.5%	8.0%	13.7%	22.2%	30.7%	36.4%	42.1%	50.6%
	30%	-6.6%	1.4%	6.8%	14.8%	22.8%	28.1%	33.4%	41.4%
	40%	-12.6%	-5.2%	-0.2%	7.3%	14.8%	19.8%	24.8%	32.3%
	50%	-18.7%	-11.7%	-7.1%	-0.1%	6.9%	11.5%	16.1%	23.1%
	60%	-24.8%	-18.3%	-14.0%	-7.6%	-1.1%	3.2%	7.5%	14.0%
	70%	-30.8%	-24.9%	-20.9%	-15.0%	-9.1%	-5.1%	-1.1%	4.8%
	80%	-36.9%	-31.4%	-27.8%	-22.4%	-17.0%	-13.4%	-9.8%	-4.4%
	90%	-42.9%	-38.0%	-34.8%	-29.9%	-25.0%	-21.7%	-18.4%	-13.5%

Notes: Refer to table 3.11 notes.

Table 3.13: CRA modelling sensitivity analysis in the current market scenario (percentage change in profit) - $20 per tonne Port Terminal Margin Assumption

		Increase in Glencore trader margin (Assumed)							
		$1.00	**$2.50**	**$3.50**	**$5.00**	**$6.50**	**$7.50**	**$8.50**	**$10.00**
Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)	**10%**	2.9%	9.7%	14.3%	21.2%	28.0%	32.6%	37.2%	44.0%
	20%	-3.0%	3.4%	7.7%	14.2%	20.7%	25.0%	29.3%	35.8%
	30%	-8.9%	-2.9%	1.2%	7.3%	13.3%	17.4%	21.4%	27.5%
	40%	-14.8%	-9.2%	-5.4%	0.3%	6.0%	9.8%	13.6%	19.2%
	50%	-20.7%	-15.5%	-11.9%	-6.6%	-1.4%	2.2%	5.7%	11.0%
	60%	-26.6%	-21.7%	-18.5%	-13.6%	-8.7%	-5.4%	-2.2%	2.7%
	70%	-32.5%	-28.0%	-25.0%	-20.5%	-16.0%	-13.0%	-10.0%	-5.5%
	80%	-38.4%	-34.3%	-31.6%	-27.5%	-23.4%	-20.7%	-17.9%	-13.8%
	90%	-44.3%	-40.6%	-38.2%	-34.4%	-30.7%	-28.3%	-25.8%	-22.1%

Notes: Refer to table 3.11 notes.

2.4. *ACCC views on CRA's modelling*

While the ACCC notes the inherent challenges and uncertainties associated with economic modelling, as well as CRA (and Viterra's) comments that the modelling is based on conservative assumptions, the ACCC considers that:

- there is uncertainty regarding the reasonableness of the input assumptions in the modelling, which the ACCC considers have not been adequately justified;
- CRA's model is sensitive to relatively small changes in the assumptions (for example under the original assumptions, if a switching percentage of 58.7% is used instead of 60% than the model indicates Viterra has an incentive to deny access); and
- CRA's modelling does not consider the current market scenario, which accounts for the entry and exit of several PTSPs (given export figures were based on 2017-18 export data).

More broadly the ACCC also notes that:

- CRA's modelling has not accounted for various relevant factors, such as the freight cost of moving grain to alternate port terminal facilities, the efficiency and service offerings of alternate PTSPs, and the seasonality of demand for export capacity;[245] and
- it is the ACCC's view that favourable access is a more relevant consideration than the denial of access scenario considered in CRA's model.

Consequently, the ACCC's view is that these (and other) factors substantially increase the uncertainty regarding any conclusions resulting from CRA's modelling.

2.5. *Lesser forms of discrimination*

As set out in the materials submitted to support Viterra's applications for exemption, CRA and Viterra consider a complete denial of access to be the most extreme form of discrimination, and have argued that if such a form of discrimination is unprofitable, it follows that all lesser forms of discrimination are also unprofitable.[246]

The ACCC notes that this would mean that Viterra would not, for example, have an economic incentive to provide *favourable* access to Glencore during the peak shipping period.

While the ACCC does not necessarily disagree with CRA's and Viterra's proposition, the ACCC's view is that it is necessary to show that the *most profitable* increase in Glencore's margin,[247]

[245] As per section 3.2.3, ESCOSA state that exporters are generally able to obtain higher prices on the international market for SA grain between December and May.

[246] Viterra, *Submission in response to the ACCC's supplementary issues paper and third party responses 2020*, 26 June 2020, p. 3.

[247] CRA assumes that the increase in Glencore's margin is due to Glencore being able to offer growers a lower price for grain (i.e. $5 per tonne) as a result of reduced competition from third party exporters.

following the denial of access, is unprofitable in order to definitively conclude that the complete denial of access is unprofitable.[248]

In regards to favourable access, CRA submit that:

> *In addition, the Draft Determination sets out the ACCC's view that favourable access is a more relevant consideration than the denial of access considered in CRA's illustrative model. However, the changed assumptions proposed by the ACCC are not realistic, and the Draft Determination fails to consider a number of factors that limit or eliminate any potential benefits to Viterra from favouring Glencore Agriculture. These factors include (but are not limited to) the following:*
>
> - *Glencore Agriculture would have limited, if any, ability to reduce the prices paid to growers if Viterra merely favoured Glencore Agriculture over other exporters (i.e., rather than denying access altogether); and*
> - *exporters and producers would have the ability and a strong incentive to seek re-regulation of Viterra's terminals, and the ACCC would have the ability to easily reverse its exemption decision, if Viterra were to inflict harm.*[249]

In regards to CRA's contention that the ACCC's changed assumptions in the Draft Determinations are unrealistic, the ACCC discusses its views on these assumptions in section 2.1.3. Generally, the ACCC considers the lack of adequate justification for several of CRA's assumptions significantly reduces the credibility of any individual outcome in the modelling.

The ACCC disagrees with CRA's contention that Glencore would have limited ability to reduce prices paid to growers if Viterra merely provided Glencore with favourable access. The ACCC notes that access to more desirable shipping slots is generally associated with higher prices in international grain markets. Favourable access would enable Glencore to earn higher margins than those exporters who are unable to access (or have greater difficulty accessing) these desirable slots. Therefore, if exporters are unable to compete on a fair and transparent basis this could be expected to lower the prices paid for grain (as affected exporters will be unable to compete as vigorously in related grain trading markets).

In relation to the potential for exporters and growers to seek the re-regulation of Viterra's facilities, the ACCC discusses its view on revocation in section 5.1 subclause (j).

CRA also stated that Viterra's incentive to favour Glencore is limited due to its customers being large and sophisticated global operations, which could use existing competing terminals or establish new terminals. Further, any attempt by Viterra to favour Glencore that harms competing exporters would increase the incentive of exporters to sponsor the construction of competing port terminals.[250]

The ACCC discusses its views on the threat of competing and prospective port terminals in section 3.1.4 and 3.1.5 respectively, as well in subclause (i) and (g) in chapter 5 for each of IHB, OHB, Port Giles and Wallaroo.

2.6. ***Potential implications of vertical integration***

As noted above, CRA's profit and loss model is intended to demonstrate Viterra does not have an economic incentive to deny third party exporters' access to its facilities despite being vertically integrated with, and an associated entity of, Glencore.

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[248] Or, alternatively (and equivalently), it would need to be shown that every possible increase in Glencore's margin following the denial of access is unprofitable.

[249] Charles River Associates, *CRA Comments on the ACCC's Draft Determinations Regarding Code Exemption for Viterra Grain Export Terminals*, 21 December 2020, p. 1.

[250] Ibid, pp. 4-5.

The ACCC also notes that Viterra has submitted that vertical integration in and of itself is not anti-competitive, and that there are a number of benefits associated with vertical integration:

> *Viterra is an associated entity of an exporter, Glencore Agriculture. However, vertical integration is not in and of itself anti-competitive, and a corporation should not be subject to regulation merely because of its vertical integration.*[251]

The ACCC does not consider vertical integration in a market to be inherently problematic. In circumstances where adequate competition is present between competing supply chains, vertical integration does not necessarily pose a problem. However, in circumstances where a vertically integrated firm holds substantial market power in, for example, downstream markets (for example as a result of the ownership of a piece bottleneck infrastructure), this can create an opportunity (and the incentive) for the vertically integrated firm to engage in discriminatory or foreclosure strategies against rival upstream firms, thus having a substantial negative impact on rival downstream competition and/or investment in the absence of adequate regulation.

In order to enter the market and compete, upstream firms must make substantial investments in reliance on (their or their clients') access to the bottleneck facility. In order to justify such investments, these upstream firms are likely to seek strong assurances that: there will not be discriminatory behaviour from the vertically integrated firm; information will not be misused; and access arrangements to bottleneck services (owned by the vertically integrated firm) will not change in the future, which would prevent the rival firms' ability to obtain access on fair and transparent terms. Such assurances may be difficult to obtain and/or are not sufficiently robust to support investment.

When a firm is vertically integrated, transactions which would otherwise be arms-length arrangements between separate firms, such as those between the owner of a piece of bottleneck infrastructure and a user of that infrastructure, are converted into internal transactions within the vertically integrated firm. This can therefore make discrimination difficult to detect. As a consequence, upstream firms may be reluctant to invest, and existing firms may leave the market, reducing competition and economic welfare.

Therefore, in considering the potential competitive effects of exempting Viterra's port terminal facilities from Parts 3 to 6 of the Code, the ACCC notes that if there is insufficient transparency in the dealings of Viterra and Glencore it would likely be difficult for rival firms along the supply chain to detect discrimination occurring, or to be confident that discrimination is not occurring. Furthermore, rival firms may also hold concerns around the possibility of the misuse of information gained by Viterra in its dealings with competing exporters to favour Glencore, or the possibility of increases to charges for access to port terminal facilities that cannot otherwise be passed on.

Absent the presence of regulatory oversight (such as the Code), rival firms in upstream markets may be reluctant to invest and/or may seek to exit the market, therefore reducing competition.

The ACCC notes that historically this broadly appears to be the case in relation to storage for the export market in SA. However, the recent entry of T-Ports and ADM upcountry potentially indicates that entry into the upcountry storage market is more feasible when associated with a port terminal facility. In addition, Cargill's entry at port (which will make use of its existing SA GrainFlow upcountry sites) could also indicate that entry into the port terminal services market is more feasible with the existence of an upcountry storage network.

Concerns around vertical integration and access may also lead rival firms to look for ways to bypass bottleneck infrastructure, even when it is not economically efficient to do so. In the context of the grain export industry this could include, for example, establishing their own port terminal facilities even when sufficient spare capacity is otherwise available.

When considering the viability (or otherwise) of entry into the SA market the ACCC notes that it has limited oversight of Viterra's pricing of port (or related) services under the Code. For example, the ACCC does not approve prices and should parties seek to dispute prices by way of arbitration the matter would be referred to an independent arbiter. However, the ACCC acknowledges that firms have entered the market at various positions in the bulk export supply chain, suggesting there are sufficient incentives to justify entry. In addition to existing new entrants, the ACCC also notes that a number of potential port terminal facility developments are currently proposed across several catchment areas in SA. However the ACCC understands that these proposals generally have a number of important stages to progress through before commencing operations (see section 3.1.5).

The ACCC has not undertaken a detailed analysis of the level of infrastructure investment appropriate to the SA grain market. However the ACCC notes that, in addition to affecting the likelihood that exporters will be able to obtain fair and transparent access to port terminal facilities, further entry into the supply chain markets has the potential to affect economic outcomes for the SA grain market more broadly.

4. Competition across the bulk grain supply chain, container exports and domestic demand

This chapter sets out the ACCC's views on bulk grain supply chain services, such as upcountry storage and grain transportation services, upstream from each of SA's port terminal facilities.[252] In particular, the ACCC has considered the extent to which each of the port terminal facilities draws grain from overlapping catchment areas, and therefore the extent to which each of the facilities compete for bulk grain export volumes.

The ACCC has also considered the interaction between the ownership of upcountry supply chain assets and competition at port.

Vertically integrated supply chains can deliver efficiency benefits. However effective constraints (such as appropriate regulation or sufficient competition) are required to avoid market power in one market affecting competition in a related upstream or downstream market. The ownership of upcountry supply chain assets, such as storage facilities, may provide an alternate avenue for a dominant vertically integrated PTSP to limit the ability of alternative PTSPs to compete for grain at port. That is, the potential exists for a dominant vertically integrated PTSP to use its position in the upcountry supply chain to hinder (or prevent) third party exporters from accessing competing PTSPs' facilities. A dominant vertically integrated PTSP may also use its position at port to affect upstream markets.

The ACCC has considered Viterra's position in the SA supply chain, including that the majority of grain exported through Viterra's port terminal facilities uses a logistics package known as Export Select that bundles services in the supply chain.

This chapter also discusses the competitive effect of container export services and domestic demand. Containerised exports and domestic demand are alternative options for grain marketers wishing to sell grain, and therefore potentially impose a level of competitive constraint on the bulk grain PTSPs.

The ACCC has considered the extent to which Viterra's port terminal facilities compete for wheat (and other grains) with alternate PTSPs, and the extent to which they are constrained by containerised exports and domestic demand. These considerations are relevant to the ACCC's assessment of the exemption applications, having regard to the matters which the ACCC is required to consider under subclause 5(3) of the Code.

4.1. South Australian port terminals' upcountry links

4.1.1. Upcountry storage and handling

The ACCC considers the state of competition in upcountry storage and handling facilities across SA to be relevant to the assessment of an exemption application. In the absence of alternate upcountry services (i.e. sufficient competition upcountry) there is the potential for a vertically integrated PTSP to use its position upcountry to limit the ability of third party exporters to access port terminal services on fair and transparent terms.

[252] As noted in chapter 1, the terminology used by the bulk grain industry does not typically distinguish between bulk wheat and other bulk grains. Bulk wheat is stored and transported using the same equipment as other grains and the analysis provided in this chapter reflects this. As noted in chapter 1, where the analysis relating to the Final Determinations refers to bulk grain it should be taken to relate to bulk wheat for the purposes of the Code.

Both GPA's and T-Ports' submissions to the ACCC's initial Issues Paper noted the importance of the entire supply chain in facilitating a competitive market for port terminal services. Specifically, GPA submitted that the availability of competitive upcountry services impacts the ability to negotiate access to export facilities on equal terms:

> *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.*[253]

T-Ports submitted that competition in each part of the supply chain is interlinked across the entire supply chain:

> *The ability to compete in any part of the supply chain is dependent upon the ability to compete across the full supply chain. The commercial access to port terminal services is a combination of all the components of the supply chain, and also of price & service levels across all these components.*[254]

Before discussing the various storage options offered by Viterra and alternate providers, the ACCC considers it relevant to note that the extent of available storage is influenced by the size of harvest, which varies from season to season.[255]

SA has, on average since the 2011-12 season, produced 7.2 million tonnes of grain per season. While SA's grain production has typically been relatively stable,[256] particularly in comparison to the eastern states, there can still be relatively large grain production fluctuations across seasons. For example, since 2011-12 grain production has ranged from a low of 5.3 million tonnes in the 2018-19 season, to a high of 10.7 million tonnes in the bumper 2016-17 season.

Viterra upcountry storage

In addition to being the dominant PTSP in SA, Viterra is also the largest provider of upcountry storage and has a well-established and extensive network of upcountry storage sites.

In its submission to the Draft Determinations AGE submitted that:

> *Viterra are the largest provider of upcountry services in the Adelaide catchment zone, by a very significant margin.*[257]

Viterra's website indicates that Viterra has a total storage capacity of 9.8 million tonnes,[258] and, in its 2017 submission to ESCOSA, stated that it has a 10 year average receival of 6.3 million tonnes per season.[259]

However the ACCC understands that Viterra has been focussing on the rationalisation of its upcountry network: Viterra owned 114 upcountry sites in 2010, compared to 103 sites in 2017.[260]

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[253] GPA, *Submission in response to Issues Paper*, 4 October 2019, p. 2.

[254] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 2.

[255] The ACCC understands that upcountry storage sites which have been previously closed in certain seasons may be opened in response to a larger harvest.

[256] Since 2011-12 every season, with the exception of the 2016-17 and 2018-19 seasons, has had production between 6.0 and 7.5 million tonnes.

[257] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p, 1.

[258] Viterra, http://viterra.com.au/index.php/about-us/ Accessed 11 September 2020.

[259] Viterra, *Submission to the Inquiry into the South Australian Bulk Grain Export Supply Chain Costs*, May 2017, p. 9.

[260] AEGIC, *Australia's Grain Supply Chains: Costs, Risks and Opportunities*, October 2018, p.42.

The ACCC also notes that the total number of Viterra sites that are operational in any given season may be less than this amount depending on the size of the harvest.[261] For example, the ACCC understands that Viterra opened 62 upcountry storage sites for the 2019-20 harvest. In addition, in March 2020, Viterra announced that it intends to open 55 upcountry sites for the 2020-21 harvest (these are shown in figure 4.1 below).[262] The ACCC understands that additional upcountry sites may be opened in response to large harvests.

[261] Ibid.

[262] These sites have previously taken 97% of total receivals. Viterra media release: http://viterra.com.au/index.php/2020/03/03/viterra-adapts-to-provide-more-efficient-supply-chain/

Figure 4.1: SA Upcountry Storage Sites

Source: Viterra 2020-21 upcountry sites, see: http://viterra.com.au/wp-content/uploads/Storage-and-Handling-Map_website-.pdf (accessed 5 April 2021). The ACCC has amended the figure to indicate the location of third party storage sites; these locations were obtained from Viterra's exemption applications, Viterra's response to the Draft Determinations and GTA's 2019-20 Location Differential sites.

Notes: Third party Victorian storage sites are not shown in the above figure.

Bundling of upcountry storage and port services

In T-Ports' submission to the Draft Determinations, it noted that service bundling supports Viterra's dominance:

> *Viterra's bundling of services – including the effect of this and any interaction with Viterra's position at port and upcountry*
>
> *Further cements their dominance in multiple segments of the supply chain.*[263]

Similarly, AGE submitted with regard to OHB that upcountry storage is an integral part of the export supply chain and that using Viterra's upcountry network effectively locks exporters into using Viterra ports:

> *The upcountry storage is intrinsically linked to the port it feeds. There is no comparative integrated supply chain of grain in the Adelaide zone, either for scope, for rail logistics, or for access for deep water. Outer Harbour and its associated upcountry feeding silos are the only access to this supply chain.*[264]
>
> *It is AGE's primary concern, that once we have forward purchased product in Viterra's upcountry system we are effectively 'locked' into using their port.*[265]

GPSA also commented on the relevance of the connection of upcountry to port as part of its discussion of port terminal facilities' characteristics in its submission to the Draft Determinations, submitting that:

> *Analysis of Inner Harbour PTSPs demonstrates that an efficient port and upcountry freight network is a fundamental precursor for securing grain to export in South Australia. When combined with small levels of at-port storage, the absence of an upcountry freight network places a significant impediment on the level of competition that Inner Harbour operators are able to provide, especially when compared to OHB.*[266]

Viterra submitted that its supply chain is efficient and would be bypassed by exporters in favour of alternative options if it became inefficient.[267] Viterra also noted that ESCOSA, in its inquiry into the SA bulk grain export supply chain costs, considered Viterra's supply chain to be efficient:

> *In its recent report into the supply chain in South Australia, ESCOSA found that the South Australian supply chain was efficient.*
>
> *If Viterra did not operate an efficient supply chain, growers and traders would turn to these other providers of upcountry storage and receival facilities in South Australia and Victoria.*[268]

Additionally, Viterra noted that ESCOSA did not find conclusive evidence of Viterra exercising market power to the detriment of competition:

> *[ESCOSA has] not found or been presented with any conclusive evidence of Viterra exercising market power to the detriment of competition.*[269]

Viterra also considered the ACCC's theory of harm between upcountry and its operations at port to be unclear:

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[263] T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 3.

[264] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 1.

[265] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 3.

[266] GPSA, *Submission in response to Draft Determinations*, 27 November 2020, p. 3.

[267] Viterra, *Exemption Application 2019*, 2 July 2019, p. 17.

[268] Ibid pp. 37-38.

[269] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 35.

> *In addition, it is unclear what theory of harm the ACCC is seeking to put forward in relation to Viterra's operations at port (the subject of the Code)… Despite stating that it is unclear how Viterra may use its position upcountry to the detriment of users of port terminal services, the ACCC speculates that factors such as bundling and network effects "may" make it difficult for competitors to enter the upcountry market by reinforcing barriers to entry. However, the ACCC at other points in the Draft Determination recognises that barriers to entry are low and its suggestions otherwise are speculative and contrary to the facts.*
>
> *It is important that the ACCC does not continue to impose regulation on Viterra—the removal of which will have many benefits particularly in terms of operational flexibility—on the basis of speculative theories of harm...*[270]

CRA also raised similar concerns to Viterra and stated that:

> *CRA suggests that, to the extent that the ACCC intends to rely on Viterra's alleged upcountry dominance in its decision not to grant its port terminals an exemption from the Code, the ACCC should clearly articulate this theory and support this with cogent evidence and analysis.*[271]

In responding to the Draft Determinations AGE submitted that bundling limits transparency over costs:

> *The bundling of services can have the effect of reducing costs, however reducing the cost in one aspect of the "bundle" (eg export select) while maintaining or increasing the cost in others is worrying. Little transparency over the methodology for the setting of export select rates is available.*[272]

Export Select

Viterra makes the storage and handling at its facilities available either as a stand-alone service (Export Standard) or as part of a bundle of services (Export Select).

Export Select is an end-to-end package that bundles a number of services across the supply chain to move grain from a Viterra upcountry storage or receival site to a Viterra port terminal facility. The package includes: grain accumulation planning and storage, outturn from Viterra's upcountry storage, transportation to port, and in-loading at the relevant port terminal facility. The users of Export Select effectively transfer their grain into Viterra's system to secure whole of supply chain coordination.[273]

The ACCC understands that the majority of grain exported through Viterra's port terminal facilities is done using Export Select, and that Export Select is used by nearly all of Viterra's export customers.[274] Consistent with this, the ACCC notes that CRA has submitted that exporters that use Viterra's storage facilities typically also purchase logistics services (such as storage, freight, and certain port services) from Viterra via Export Select.[275]

Viterra indicates that:

> *Export Select enables Viterra to manage an efficient supply chain to all Viterra Export Terminals…*

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[270] Ibid, p. 27.

[271] Charles Rivers Associates, *CRA comments on the ACCC's Draft Determinations regarding code exemption for Viterra grain export terminals,* 18 December 2020 pp. 9-10.

[272] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 4.

[273] The ACCC understands that clients for Export Select are predominantly third party exporters.

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

[275] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 11 November 2019, p. 9.

…Our current Export Select freight rates reflect efficiency gains that we've obtained through changes in our operations, while also ensuring the long term sustainability of our supply chain through ongoing investment.[276]

Viterra also stated that:

Export Select provides Clients with a low risk and cost effective method of accumulation from Viterra Upcountry Receival Facilities.[277]

Reflecting the bundled nature of the service offering, the ACCC understands that grain moved using the Export Select service must move from a Viterra upcountry site to a Viterra port terminal facility.[278]

The ACCC notes that, in addition to offering its services provided under Export Select through a combined/single fee structure ('Export Select Grouped Service Fee'), a rebate ('Export Select Rebate') is also provided in relation to using Export Select to move grain to export at Viterra port terminal facilities, though the size of this rebate has reduced since its introduction in 2009.[279]

Consistent with the high-volume nature of bulk grain exports, freight is typically the most significant cost component of the total Export Select package.[280] Freight costs are discussed in more detail in section 4.2.1.

The ACCC also notes that certain Viterra sites (as well commodities or grain grades) are designated as 'Export Select only'. Viterra stated that this in order to enable the low risk and cost effective handling of grain at these facilities.[281] However the ACCC notes that the use of dedicated Export Select only sites limits the usefulness of the site as an alternate storage facility, noting grain received can't be out-turned.

As discussed elsewhere, the ACCC notes that ESCOSA investigated Viterra's pricing structure, fees and practices in its 2018 inquiry. While ESCOSA indicated possible concerns in relation to the pricing structure, it found that Viterra's other fees and practices (which included Export Select) were not, on their own, detrimental to the efficiency of the supply chain.[282] ESCOSA also did not find conclusive evidence of Viterra exercising market power to the detriment of competition.[283]

The ACCC acknowledges that the bundling of services has the potential to offer a range of benefits to Viterra and its clients, including creating efficiencies across the supply chain and reducing the transaction costs associated with accumulating and moving grain to a port terminal facility.

However the bundled nature of the Export Select service may also serve to reinforce Viterra's position upcountry by strengthening the vertically integrated connection of the services offered across the port and upcountry markets.

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[276] Viterra, *Export Select*, See: http://viterra.com.au/index.php/export-select-freight-rates/ (accessed 28 July 2020).

[277] Viterra, *Pricing, Procedures & Protocols Manual 2019/20*, See: http://viterra.com.au/wp-content/uploads/Viterra_1920-Season_Pricing-Policy-Protocols-Manual-v1.pdf, p. 17.

[278] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 23.

[279] Ibid p. 68.

[280] Freight appears to typically constitute more than half of the cost of the Export Select service. Details of Viterra's Export Select fees are available at: http://viterra.com.au/index.php/export-select-freight-rates/.

[281] Viterra, *Pricing, Procedures & Protocols Manual 2019/20*, See: http://viterra.com.au/wp-content/uploads/Viterra_1920-Season_Pricing-Policy-Protocols-Manual-v1.pdf, p. 18.

[282] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 4.

[283] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 35.

The ACCC notes that it appears Viterra's clients need to use the full suite of services in order to benefit from Export Select (or avoid certain fees). This may affect the ability of third party exporters to access alternate upcountry supply chains and move grain to non-Viterra port terminal facilities, affecting competition upcountry.

While the bundling of storage and handling services has the potential to reduce competition upcountry, the ACCC notes that it also has the potential to deliver benefits to exporters (to the extent that the bundled service creates cost saving efficiencies across the supply chain). However the ACCC also notes that, while ESCOSA did not find Viterra's fees excessive compared to its Australian counterparts, ESCOSA did consider Viterra's earnings to be at the upper end of what might be expected for its level of risk, and that Viterra had not shared efficiencies with industry (through lower fees) to date.

The bundling of storage and handling services is also discussed further below (see 'barriers to entry').

Delivery to Viterra facilities from alternate storage providers

The ACCC notes that growers' and third parties' ability to deliver grain direct to port (i.e. bypass Viterra's upcountry facilities) could constrain the potential for Viterra to exercise market power upcountry.

GPSA has expressed concerns that the fees charged by Viterra for grain received from both third party and on-farm storage, which is delivered direct to its port terminal facilities, discourage the use of alternative storage. Specifically, GPSA submitted that:

> *In the absence of ACCC regulatory oversight, GPSA notes the potential for [these fees] to be used as a mechanism to encourage, use of Viterra's upcountry storage facilities rather than third party facilities and from on-farm storage.*[284]

Similar concerns were raised by AGE in its submission to the ACCC's Draft Determinations:

> *Viterra charge an additional fee for grain from outside their upcountry system to go through their ports, in addition to this fee there is an additional shrink charged. This has the effect of reducing competition in upcountry storage when the grain is executed through a Viterra port. The upcountry storage is intrinsically linked to the port it feeds. There is no comparative integrated supply chain of grain in the Adelaide zone, either for scope, for rail logistics, or for access for deep water. Outer Harbour and its associated upcountry feeding silos are the only access to this supply chain.*[285]

In response to GPSA's concern, Viterra stated in its supplementary submission that:

> *…in practice, this fee has only been used on a limited number of occasions in the past few years. However, it is important for Viterra to reserve an ability to charge this fee in order to provide additional services (if needed) to ensure the integrity and quality of South Australian grain exports.*[286]

In its response to the Draft Determinations Viterra further submitted that:

> *The ACCC itself refers to AEGIC's finding that Viterra's Export Select rates steadily decreased in the period from 2012 to 2018 and to ESCOSA's finding that there is no evidence of Viterra exercising market power to the detriment of competition…In addition, as recognised by ESCOSA,*

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[284] GPSA, *Submission in response to Issues Paper*, 27 September 2019, p. 6.

[285] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 1.

[286] Viterra, *Exemption application 2019 – supplementary submission,* 11 November 2019, p. 5.

there is no evidence that Viterra is setting fees that are not reflective of its logistical and/or operational requirements. For example, as explained to the ACCC in Viterra's supplementary submission dated 12 March 2020, it is necessary to charge a higher fee for deliveries from non-approved sites to a Viterra port terminal because it is required to provide a significantly higher number of services in relation to this grain to protect the quality of grain exported from its port terminals.[287]

The ACCC understands from ESCOSA's 2018 inquiry that Viterra accepts 25% of total receivals from deliveries direct to port (for example from nearby growers that would not be expected to deliver upcountry).[288] As such, the ACCC considers that direct-to-port grower deliveries are likely to be a relevant factor in how Viterra receives grain.

Viterra has submitted that its receival-at-port fees reflect the need to manage the risk associated with the quality of grain received, and to ensure quality standards for clients:

There are different risks associated with receivals from each of these sources. Therefore, the number and type of services that have to be undertaken at port on receival of grain will vary depending on the source of the grain. This results in Viterra incurring different costs at port dependent on the source of grain, which is reflected in the receival fee for wheat from (a) Approved Third Party Storage providers (A$2.76 per tonne); and (b) non-approved third party sources (A$17.00 per tonne for all port terminals except Wallaroo; $17.50 per tonne for Wallaroo)…

…parcels of grain received at port carry different levels of quality and contamination risks depending on how they have been managed prior to receival. These risks directly impact on the ability of Viterra to co-mingle those grains with grains owned by other clients.[289]

Viterra has also submitted that, while grain from approved third party storage still has to undergo a range of tests to ensure its quality, Viterra is able to have more confidence in the quality of that grain, and that this is reflected in the significantly reduced price (compared to the grower direct to port recieval fee).[290]

The ACCC notes that ESOCSA considered Viterra's receival-at-port service fee in its inquiry into the SA bulk grain export supply chain, and stated that:

Viterra's pricing and operational behaviour might limit the potential for grower direct deliveries to port to constrain Viterra's exercising of market power upcountry to the detriment of competition.[291]

However, ESCOSA subsequently concluded that Viterra was setting fees that reinforced its logistical and operational requirements, and ESCOSA did not consider there to be any issue with Viterra's pricing approach in this regard.[292]

ESCOSA also noted Viterra's submission that the grower receival fee helps to encourage efficient investment in storage facilities and considered that Viterra had clear and practical operational reasons for its behaviour:

In addition, Viterra submitted that accepting too much grain [at port]*, or grain that is not in demand for immediate shipment, can result in the port 'blocking' (when the port has insufficient capacity to efficiently process grain for shipment). In this case, Viterra might invest in more storage capacity at port, assuming adequate land is available. But the resulting additional costs would be unlikely*

[287] Viterra *Response to Draft Determination* Public version, 8 February 2021, p. 27.

[288] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 70.

[289] Viterra, *Further Supplementary submission on Exemption Application 2020*, 11 March 2020, p. 5.

[290] Ibid pp. 6-7.

[291] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 70.

[292] Ibid.

> *to represent an efficient investment for the supply chain, which already has sufficient total storage capacity to cope well with even the biggest harvest.*[293]

The ACCC considers that charging different receival fees for third party grain received outside of a vertically integrated PTSP's system has the potential to enable a PTSP to leverage its market power at port to affect competition in upcountry markets, therefore limiting growers' and third parties' ability to bypass the PTSP's network.

Third party storage providers

Viterra has submitted that it faces an increasing level of competition across its supply chain, and that this has resulted in a lower proportion of the SA harvest entering its supply chain:

> *Historically, grain grown in South Australia was mainly delivered using Viterra's supply chain and to Viterra's port terminals (or to port terminals in neighbouring Victoria) for shipping. However, this has changed and will continue to change with an increasingly lower proportion of South Australian grain being delivered into Viterra's supply chain, and an even lower proportion being exported from Viterra's port terminals. This is due to the entry of alternate supply chains and the flexibility of market participants to react to changing economic conditions across Australia.*[294]

Viterra also submitted that a significant proportion of SA's grain production bypasses Viterra's upcountry storage sites:

> *The evidence clearly shows that Viterra's upcountry storage sites can be (and are) bypassed by producers and exporters (either by using third party storage facilities or on-farm storage) in respect of a substantial proportion of annual grain production in South Australia…*[295]

> *Competitor storage capacity in South Australia (upcountry and at-port) represented more than 48.1% of the 2019-20 harvest (52.5% of the 2018-19 harvest and 41.3% of the 2017-18 harvest). This level of competitor storage will likely increase as barriers to entering the market are very low and new competitors, such as T-Ports, are encouraging direct deliveries from on-farm storage.*[296]

In contrast, T-Ports submitted there has been limited growth in upcountry storage in recent seasons:

> *Other than T-Ports own development of storage at Lock to support our port loading operations, there has not been noticeably significant recent development from third parties in that market nor on-farm storage.*[297]

The ACCC notes that, using the (above) percentages submitted by Viterra from the 2019-20 harvest, there is 2.9 million tonnes of alternate (upcountry and at port) storage available in SA (compared to Viterra's total storage capacity of 9.8 million tonnes[298]).

Viterra in its response to the Draft Determinations submitted that, in addition to competing with on-farm storage, it competes with at least 15 alternate providers of upcountry storage.[299] These 15 upcountry storage providers are:

- AGT Foods Australia (sites at Bowmans and Kadina);

[293] Ibid.

[294] Viterra, *Response to 14/11/19 information request from the ACCC, 2020, Question 9 – Catchment Zones,* 13 January 2020, p. 2.

[295] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 27.

[296] Ibid, p. 4.

[297] T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

[298] Viterra, http://viterra.com.au/index.php/about-us/ Accessed 11 September 2020.

[299] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 24.

- Australian Grain Exports (grain receival, storage, cleaning and processing facility at Dublin);
- Australian Growers Direct (storage site at Balaklava);
- AW Vater & Co (grain receival and storage site at Saddleworth);
- Big River (storage site at Loxton);
- Cargill which operates sites through GrainFlow (grain receival and storage sites at Pinnaroo, Crystal Brook, Maitland and Mallala);[300]
- GrainCorp (storage site at Naracoorte);[301]
- Dublin Clean Grain stores lentil and barley for ADM exclusively at a storage facility in Dublin;[302]
- Kangaroo Island Pure Grain (grain receival and storage sites at Kingscote and Osborne);
- Pilgrim Grain Storage (grain receival and storage site at Bordertown);
- Plain Grains (storage site at Mallala);
- San Remo (grain receival sites at Balaklava and Kulpara);
- TE Storage and Logistics (grain storage site at Naracoorte);
- T-Ports (grain receival and storage sites at Lock and Lucky Bay); and
- Tremlett Grain and Fertiliser (grain receival and storage site at Shea-Oak Log).[303]

In addition, the ACCC also understands that:

- ADM operates a storage facility at Port Pirie (see table 3.1);[304] and
- Semaphore has a small amount of at-port storage at its Osborne port terminal facility (see table 3.1).[305]

The ACCC notes that Grain Trade Australia (GTA) publish a list of storage sites alongside its Location Differentials, with GTA listing a total of 9 alternate upcountry sites in SA in the 2020-21 season.[306] The ACCC understands the more extensive list of storage providers submitted by Viterra better represents the total number of alternative storage providers in SA.[307]

T-Ports has submitted that competing storage and handling sites provide alternatives to Viterra's upcountry storage at 'strategic' sites, but not across all areas of SA:

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[300] GrainFlow is a wholly owned subsidiary of Cargill Australia Ltd. See: https://www.cargill.com.au/en/grainflow.

[301] As per GTA's 2019-20 Location Differentials.

[302] Note: this facility opened after Viterra submitted its applications for exemption: https://www.admgrain.com.au/latest-news/new-harvest-options-at-dublin. Accessed 1 April 2021.

[303] Viterra, *Exemption Application 2019*, 2 July 2019, pp. 34-35; Viterra, *Response to Draft Determination Public version*, 8 February 2021, p. 25; GTA 2019-20 Location Differentials; and ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 26.

[304] ADM Trading Australia Pty Ltd, *Application for exemption port terminal (bulk wheat) code of conduct,* January 2021, p. 3.

[305] Semaphore response to ACCC information request.

[306] These sites were operated by: Australia Grower Direct (Balaklava), Cargill/AWB (Crystal Brook, Maitland, Mallala and Pinnaroo), T-Ports (Lock), GrainCorp (Naracoorte), TE Storage & Logistics (Naracoorte), and Tremlett (Shea-Oak Log).

[307] The ACCC notes ESCOSA in their 2018 Inquiry into the bulk grain export supply chain used a similar list of alternative providers to that submitted to the ACCC. See ESCOSA report, p. 26.

The existing competitive upcountry alternatives to Viterra's upcountry storage and handling network/system are located in strategic sites across the state, providing alternatives in those immediate areas, but still not providing alternatives to all areas across the state.[308]

As illustrated above in figure 4.1, most of the third party storage and handling facilities in SA are located in the Lower, Mid and Upper North regions. As such, the competition these facilities provide to Viterra's upcountry storage and handling services largely relates to these regions. However the ACCC notes that Viterra operated the majority of upcountry sites (12 out of 23) in these regions in the 2020-21 season. Viterra also has a combined 1.2 million tonnes of at-port storage through its IHB, OHB and Wallaroo port terminal facilities.[309] The ACCC notes that ADM has 80,000 tonnes of at-port storage, Cargill has no at-port storage, and Semaphore has 16,500 tonnes (see table 3.1).

While the ACCC is not aware of the storage capacity of most alternate upcountry storage providers, the ACCC notes that ESCOSA has indicated that most of the above-noted third party storage providers are relatively small in scale, and that many of them serve the domestic and container export markets.[310] The ACCC understands that third party storage operators may also service particular markets and production processes. As such, they may not provide a storage facility for the purpose of grain warehousing or accumulation for the export market.

The ACCC has also considered Cargill's upcountry storage facilities. Given the size of these facilities (665,000 tonnes[311]), this appears likely to provide a material amount of competition to Viterra's storage facilities.

In addition, ADM own 80,000 tonnes of storage supporting its Port Pirie facility, with access to another 40,000 tonnes at Dublin (where they have an exclusive partnership with Dublin Clean Grain).[312]

In its response to the Draft Determinations Viterra submitted that it competes with at least 15 alternate providers of upcountry storage in SA, including GrainFlow (Cargill) and T-Ports, who each have a significant amount of storage capacity in SA:

T-Ports has 524,000 tonnes of storage capacity on the Eyre Peninsula, which is equivalent to 23% of forecast annual production on the Eyre Peninsula; and

Cargill has 670,000 tonnes of storage capacity in South Australia, which is equivalent to 20% of 2018/19 production in the rest of South Australia (i.e. excluding Eyre Peninsula).[313]

The ACCC notes that T-Ports' storage facilities are located on the Eyre Peninsula, which it considers to be a separate and distinct market from eastern SA (see section 4.2). As such, the ACCC does not consider T-Ports' storage facilities relevant to its assessment of Viterra's IHB, OHB, Port Giles and Wallaroo facilities.

Cargill has stated that its 4 storage facilities (Pinnaroo, Crystal Brook, Maitland and Mallala) combine to provide a total network capacity of 665,000 tonnes.[314] Cargill has also stated that

[308] T-Ports, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 3.

[309] Viterra, *Attachment 1 – Response to 14/11/19 information request 2020, Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

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

[311] Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct,* 30 October 2019, p. 9.

[312] See: https://www.admgrain.com.au/latest-news/new-harvest-options-at-dublin. Accessed 1 April 2021.

[313] Viterra, *Response to Draft Determination* Public version, 8 February 2021, p. 25.

[314] Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct,* 30 October 2019, p. 9. See footnote 10 for further details.

it does not have storage facilities at its upcoming Port Adelaide, Inner Harbour port terminal and will operate this facility on a Just In Time basis.[315] As explained by Cargill:

> *Consequently, the combination of Cargill's proposed port terminal facility and its current upcountry storage facilities is likely to increase competition along the bulk grain export supply chain, and increase choice in the market for consumers seeking the services of bulk storage providers and export ship loading providers.*[316]

The ACCC notes that the recent establishment of ADM's and Cargill's vertically integrated supply chains provides exporters with 2 potential alternatives to Viterra's supply chain in eastern SA. The ACCC considers that the ability of both ADM and Cargill to move grain via their own storage facilities means they are likely to place greater competitive pressure on Viterra at the port terminal level.[317] This is because they are not reliant on a competitor's supply chain to access grain, and therefore are likely to have greater flexibility in storing and transporting grain to their respective port terminal facilities.

On-farm storage

The ACCC considers that on-farm storage may also serve as an alternative to Viterra's storage and handling network to some extent. The Department of Primary Industries and Regions South Australia (PIRSA) estimates that there was approximately 1 million tonnes in on-farm storage in SA in 2017.[318]

As submitted by Viterra, this suggests that there is enough on-farm storage to store approximately 9 to 14% of the SA harvest.[319] Viterra also submitted that the amount of on-farm storage is increasing in SA.[320] The ACCC notes that the same conclusion (i.e. increasing levels of on-farm storage in SA) was reached by both AEGIC and ESCOSA, although they both note that the level of on-farm storage in SA is relatively small and increasing at a slower pace than in the eastern states (see below).

The ACCC notes that PIRSA and ESCOSA state that on-farm storage is generally used as short-term storage to manage the logistics of harvest by buffering for cartage to silos.[321] The ACCC also notes that Viterra charges different fees for grain received from approved third party storage providers and direct to farm deliveries or non-approved third party storage providers reflecting the different risks associated with the recieval of grain from these sources (see pages 107-109).[322]

As such the ACCC understands that on-farm storage, while offering a constraint to Viterra's storage sites, is not completely analogous with Viterra's (or other third party providers) storage networks, therefore limiting the constraint this places on Viterra's storage network.

[315] Ibid, pp. 3-4.

[316] Ibid, p. 9.

[317] The ACCC also notes that Semaphore has a small amount (16,500 tonnes) of at-port storage at its Port Adelaide facility. The ACCC understands that users of Semaphore's facility likely make use of a range of alternate storage options, including third party upcountry and on-farm storage, as well as Viterra's network.

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

[319] Viterra, *Exemption Application 2019*, 2 July 2019, p. 35.

[320] Ibid, p. 49.

[321] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 24; PIRSA, *Submission to the Inquiry into the South Australian Bulk Grain Export Supply Chain Costs*, May 2017, p. 6.

[322] Viterra charge a $17.41 per tonne receival fee at all ports (except for Wallaroo where they charge $17.92 per tonne) for bulk wheat receivals at port directly from growers or from sources external to Viterra excluding receivals from an approved third party storage provider; Viterra charge a receival fee of $2.76 per tonne from approved third party storage providers. Viterra submit that there are different risks and costs associated with receivals from receivals from these different sources, and therefore the cost differences reflect different services which need to be undertaken when receiving grain. See: Viterra, *Supplementary submission*, 11 March 2020, pp. 4-9; and Viterra, *Schedule A – Storage & Handling charges 2020/21,* p. 1 and 8.

AEGIC

Farm storage in SA and WA is at a lower level than in these other states but continues to grow, albeit at a slower pace.[323]

ESCOSA

A small number of growers submitted to the Commission that South Australian grain growers are building an increasing amount of on-farm storage infrastructure in response to concerns about Viterra's storage and handling services. While [ESCOSA] has not had access to independently derived data, based on the advice it has received during consultation it concludes that there has been an increase in the amount of on-farm storage in South Australia in recent years, although this is likely to be occurring mainly in eastern South Australia. The level of on-farm storage in South Australia remains relatively small compared to the eastern States.[324]

The trend to on-farm storage in South Australia has been a lot slower than in the eastern states. Eastern states have significant domestic consumption that has driven growers to invest in on-farm storage, giving them the option to enter the export supply chain. In contrast, Eyre Peninsula farmers are unlikely to participate in the supply chain through on-farm storage, because for most seasons their primary market is export; they use such storage for logistical reasons, to deal with the volume of grain coming off the field during harvest.[325]

As above, ESCOSA stated that the majority of on-farm storage is located in eastern SA. The ACCC notes that this is also where the majority of third party storage lies (see figure 4.1).

In addition, ESCOSA also stated that a small number of growers may have built on-farm storage in response to concerns about Viterra's storage and handling services.[326]

In response to the Draft Determinations Viterra submitted that the on-farm storage places significant competitive constraint on Viterra:

The ability to bypass Viterra's storage sites for 9-14% of the harvest is a significant competitive constraint on Viterra. It seems incongruous to describe this amount of alternative storage as "limited competition". This is particularly the case given that the amount of on farm storage can be increased very easily, is increasing and is likely to increase further as T-Ports is expressly encouraging deliveries to it from on-farm storage, which will encourage the construction of more on-farm storage in this region. As recognised by ADM, exporters are increasingly supportive of sourcing grain from on-farm storage systems across South Australia (from the Adelaide region to the Eyre Peninsula).[327]

Viterra also submitted that it considered that the ACCC's regional approach to considering storage does not support the view of Viterra as the dominant provider of storage:

If the ACCC's regional approach to storage is adopted, Viterra finds it difficult to understand how a 40% and 57% share of sites in particular regions can be viewed as "dominant", particularly given that there are a number of smaller third party storage facilities on the Yorke Peninsula that have not been included in the ACCC's analysis. In addition, the 75% figure in south eastern South Australia fails to account for the substantial volume of on-farm storage in this region, and the movement of grain to storage sites in Victoria.[328]

The ACCC notes that GPA has questioned whether the increasing volume of on-farm storage in SA indicates that the current upcountry storage market is inefficient:

[323] AEGIC, *Australia's grain supply chains – costs, risks and opportunities,* October 2018, p. 38.

[324] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 24.

[325] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 25.

[326] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 24.

[327] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 25.

[328] Ibid, pp.25-26.

Up-country competition is used to illustrate competition but even if access to a port is no longer predicated on use of a particular supply chain then why is on farm storage increasing and duplicative port facilities being seen as a viable investment when it is actually an inefficient way of managing supply chain issues.[329]

The ACCC notes that ESCOSA found that SA's supply chain was not demonstrably inefficient in terms of its costs and that it did not find any evidence of market power being exercised to the detriment of competition. However, ESCOSA did note that Viterra's earnings were at the upper end of what might be expected for its level of risk and that Viterra had not shared efficiencies with industry to date (through lower fees).[330]

<u>Total alternative storage to Viterra</u>

As above, the ACCC notes that Viterra has indicated that there is 2.9 million tonnes of alternate storage available in SA (including on-farm storage).[331] In comparison, Viterra has total storage capacity of 9.8 million tonnes.[332]

As discussed above the ACCC is aware of the following amounts of alternate storage:

- On-farm storage of (an estimated) one million tonnes;[333]
- T-Ports' 510,000 tonnes of storage;[334]
- Cargill/GrainFlow's 665,000 tonnes of storage;[335]
- ADM's 80,000 tonnes of storage at Port Pirie[336], as well exclusive arrangements to access a further 40,000 tonnes of storage at Dublin;[337] and
- Semaphore's 16,500 tonnes of at-port storage.[338]

Consequently, the ACCC expects that providers of alternate storage listed above (see pages 109-110), account for around 588,500 tonnes of storage.

The ACCC also notes that T-Ports is the only alternative storage provider on the Eyre Peninsula to Viterra. In addition the ACCC understands the majority of on-farm storage lies within eastern SA.[339]

Consequently, the ACCC understands that up to 2.4 million tonnes of alternative storage is available in eastern SA (which includes one million tonnes of on-farm storage).

The ACCC is not aware of the exact size of the storage by specific region within eastern SA. The ACCC's views on alternative storage in eastern SA, as well as the number of sites available in different regions, are discussed below.

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[329] GPA, *Submission in response to Issues Paper*, 4 October 2019, p. 4.

[330] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 35.

[331] Ibid, p. 4.

[332] Viterra, http://viterra.com.au/index.php/about-us/ Accessed 11 September 2020.

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

[334] T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014,* 28 March 2019, p. 3. Note: T-Ports appears in its application to use 'mt' tto refer o metric tonnes, rather than million tonnes.

[335] Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct,* 30 October 2019, p. 9. See footnote 10 for further details.

[336] ADM, *Application for exemption port terminal (bulk wheat) code of conduct*, January 2021, p.3. See footnote 10 for further details.

[337] ADM, *New Harvest Options at Dublin*, 2 November 2020, See: https://www.admgrain.com.au/latest-news/new-harvest-options-at-dublin. Accessed: 7 April 2021.

[338] Semaphore response to ACCC information request.

[339] ESCOSA, Inquiry into the South Australian bulk grain export supply chain costs – Final Report, December 2018, p. 24.

ACCC view on alternative storage to Viterra

The ACCC considers that the level of upcountry storage alternatives to Viterra's storage and handling network differs by region in SA.

In particular, the ACCC understands that the majority of alternative storage (both that provided by third party storage providers and via on-farm storage[340]) is located in the Lower, Mid and Upper North regions of SA. This storage is expected to provide a level of competition to Viterra's upcountry storage and handling network in this area. However, the ACCC notes that Viterra will operate 12 out of 23 upcountry sites in these regions for the 2020-21 season, as well as an additional 1.2 million tonnes of at-port storage at its IHB, OHB and Wallaroo facilities.[341] Given the above, the ACCC's view is that there are meaningful alternative storage options available to traders within this region, as well as a higher level of on-farm storage (when compared to the Eyre Peninsula).

The ACCC notes that determining the extent to which this storage is likely to competitively constrain Viterra's services is difficult to assess due to the lack of information (publicly available and submitted by stakeholders) around the size of non-Viterra storage sites. However the ACCC understands these upcountry sites are likely relatively small (compared to Viterra's sites), and predominantly deliver to the domestic and container markets (with the notable exception of ADM and GrainFlow's operations).

The ACCC also notes that growers that have on-farm storage may also have reasons to store their grain at commercial facilities and that this may reduce the overall constraint that on-farm storage has on alternate storage facilities. For example, growers may need to use their own on-farm storage (or at least some of their on-farm storage) to rebuild stocks, store seed, blend grain and for other logistics purposes over the course of the year.[342] In addition, growers may also store certain grain type's off-farm, particularly if their own phytosanitary capabilities are limited or inadequate. Overall the level of constraint imposed by on-farm storage is likely to depend on its location (and whether growers can deliver direct to port).

The ACCC also notes that the effects of costs, bundling and storage services are discussed on pages 119 to 121 of this document.

Consequently, despite the presence of some meaningful alternative storage options to Viterra, the ACCC understands that third party exporters remain somewhat reliant on Viterra's upcountry network if they wish to export grain from Port Adelaide and/or Wallaroo. This is expected to be particularly the case during the peak period (as Viterra's incentive to prioritise port terminal access for grain in its upcountry network over third party networks is likely to be strongest when there are capacity constraints at Viterra's port terminal facilities).

The ACCC's view is therefore that Viterra is likely to continue to have a degree of market power in the Lower, Mid and Upper North regions of SA.

The ACCC also notes that Viterra is expected to operate the vast majority of upcountry sites in south eastern SA in the 2020-21 season (13 out of 18). While the ACCC acknowledges that (consistent with ESCOSA's report) there is likely a higher degree of on-farm storage in this region, the ACCC considers it likely that Viterra still owns the majority of storage in south eastern SA.

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[340] The ACCC understands most of SA's on-farm storage lies within eastern SA, of which the Lower, Mid and Upper North regions are a part of. The ACCC is not aware of the prevalence of on-farm storage within specific regions in eastern SA.

[341] Viterra, *Attachment 1 – Response to 14/11/19 information request 2020, Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

[342] C Harris, *On-farm grain storage a worthwhile investment*, Stock Journal, published 15 Feb 2020. See: https://www.stockjournal.com.au/story/6630022/on-farm-grain-storage-a-worthwhile-investment/

Furthermore, the ACCC considers that Viterra is likely to own the majority of storage on the Yorke Peninsula. There are only 5 upcountry storage sites on the Yorke Peninsula (2 of which are owned by Viterra),[343] however Yorke Peninsula storage appears to be largely located at port with Viterra's Port Giles and Wallaroo facilities accounting for 1.27 million tonnes of at-port storage.

The ACCC's view is that Viterra is the dominant upcountry storage provider on the Yorke Peninsula, as well as in the south eastern regions of SA. As such the ACCC's view is that in these regions, absent the application of Parts 3 to 6 of the Code, there is the potential for Viterra's position across the supply chain to affect competition at port.

Barriers to entry

Viterra is the dominant vertically integrated, provider of port terminal services and upcountry services in the SA bulk grain export market.

Viterra has significantly more capacity to store and export bulk grain than any other PTSP in SA and, importantly, it has occupied an incumbent position in SA markets for a significant period of time.[344]

The ACCC considers the ability of third parties to enter into the storage market to be directly relevant to the discussion of alternate grain storage options. In its exemption applications, Viterra noted that the Department has suggested that there are relatively low barriers to enter into the upcountry storage market:

> *The costs of upcountry grain receival sites are around 10 times less than those of port facilities with public construction costs of some recently constructed (or being offered for sale) upcountry grain storage facilities being in the range of $3 million to $19 million.*[345]

In it submission to the Draft Determinations T-Ports submitted that upcountry storage has a lower barrier to entry than port operations, however margins are also lower:

> *While the up-country storage market has a lower barrier to entry (lower Capex) than port operations market, the margins earned from such facilities are also lower.*[346]

Viterra also submitted that if it were to operate its supply chain inefficiently, the low barriers to entry would mean that alternate providers could be expected to respond, particularly given that Viterra's competitors are typically large multi-national exporters:

> *Barriers to entry and expansion are particularly low for exporters that use Viterra's port terminals. These exporters are large multi-national businesses that have already invested in port terminal and upcountry storage infrastructure. It would be easy for these customers to invest upcountry in South Australia if they considered that Viterra or Viterra's upcountry competitors were not offering an efficient and competitive service.*[347]

In its submission to the Draft Determinations Viterra also rejected the ACCC's view in the Draft Determinations that barriers to entry might be otherwise higher than expected as a result of Viterra's dominant position upcountry:

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[343] In its exemption applications Viterra submitted that there are 5 upcountry sites on the Yorke Peninsula: Ardrossan (Viterra), Bute (Viterra), Kadina (AGT Foods Australia), Kulpara (San Remo), and Maitland (Cargill). GTA did not include the Kadina and Kulpara sites in its 2019-20 list of upcountry storage sites.

[344] According to GTA's 2019-20 Location Differentials Viterra operated 66 out of 75 upcountry storage sites in SA. In addition, since 2016-17 (the first season both LINX and Semaphore were in the market) Viterra has facilitated 91% of all SA bulk grain shipments (up until 31 March 2021).

[345] Viterra, *Exemption Application 2019,* 2 July 2019, p. 36.

[346] T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

[347] Ibid p. 36.

This finding does not, however, easily fit with other statements that the ACCC makes in its Draft Determination…In addition, the ACCC's preliminary view is based on speculation about the impact of bundling and network effects and, as set out below, the ACCC puts forward no concrete theory of harm in this regard. Finally, the ACCC's preliminary view is contrary to the facts which show that barriers to entry into upcountry storage in South Australia are low. If barriers to entry were not low, there would not be:

- *15 competitor upcountry storage providers in South Australia; and*

- *a significant volume (9-14% of harvest) of on-farm storage in South Australia, which is increasing.*[348]

Similarly, CRA submitted that the ACCC's analysis of upcountry competition is inconsistent with its view that barriers to entry upcountry are low:

…it is CRA's view that the ACCC's analysis of upcountry competition—specifically its conclusion that Viterra has upcountry market power—is inconsistent with its view that barriers to entry upcountry are low. Furthermore, it is unclear why, if entrants can construct upcountry storage at low cost, Viterra's high upcountry share is relevant to an analysis as to whether its port terminals should be exempted from the Code (especially when the growth in on-farm storage is also considered).[349]

T-Ports submitted that there have not been significant recent developments by third parties in storage markets, other than its development at Lock:

Other than T-Ports own development of storage at Lock to support our Port loading operations, there has not been noticeably significant recent development from third parties in that market nor on farm storage.[350]

T-Ports also agreed with the ACCC's observations that:

…ESCOSA has indicated that most of the above-noted third party storage providers are relatively small in scale, and that many of them serve the domestic and container export markets. The ACCC understands that third party storage operators may also service particular markets and production processes. As such, they may not provide a storage facility for the purpose of grain warehousing or accumulation for the export market.[351]

The ACCC acknowledges that the barriers to small scale entry into the upcountry storage market are likely relatively low (i.e. the cost of building a single storage facility is not prohibitive). However the ACCC notes that Viterra's upcountry network is extensive and well-established (reflecting Viterra's dominant position in the SA grain market since its acquisition of ABB Grain Ltd in 2009[352]) and that there are likely significant barriers to entry to establishing larger scale storage facilities (including a network of storage facilities), which are capable of supporting a port terminal facility's export operations.

In relation to the SA market, GPA has submitted that:

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.[353]

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[348] Viterra, *Submission to the Draft Determinations*, p. 26.

[349] CRA, *Comments on the ACCC's Draft Determinations Regarding Code Exemption for Viterra Grain Export Terminals*, 21 December 2020, p. 10.

[350] T-Ports*, Submission in response to Draft Determinations*, 17 November 2020, p. 2.

[351] T-Ports *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

[352] As discussed earlier in this chapter, the number of upcountry storage sites operated by Viterra appears to be reducing somewhat.

[353] GPA, *Submission in response to Issues Paper*, 4 October 2019, p. 2.

T-Ports submitted that being able to secure access to export services when entering the upcountry market is the most significant barrier to entry:

> *T-Ports considers the biggest barrier to entry for more upcountry storage is the absolute reliance on interaction with all the other parts of the supply chain to make the investment work. T-Ports internal analysis, and anecdotal industry "belief" is that upcountry storage investment is difficult to justify without a rock solid path to export.*[354]

AGE also submitted that:

> *Viterra charge an additional fee for grain from outside their upcountry system to go through their ports, in addition to this fee there is an additional shrink charged. This has the effect of reducing competition in upcountry storage when the grain is executed through a Viterra port. The upcountry storage is intrinsically linked to the port it feeds. There is no comparative integrated supply chain of grain in the Adelaide zone, either for scope, for rail logistics, or for access for deep water. Outer Harbour and its associated upcountry feeding silos are the only access to this supply chain.*[355]

T-Ports submitted that:

> *The ability to compete in any part of the supply chain is dependent upon the ability to compete across the full supply chain. The commercial access to port terminal services is a combination of all the components of the supply chain, and also of price & service levels across all these components.*[356]

As discussed above, the ACCC considers that charging different receival fees for third party grain received outside of a vertically integrated PTSP's system has the potential to enable a PTSP to leverage its market power at port to affect competition in the upcountry markets, therefore limiting growers' and third parties' ability to bypass its network. The ACCC also notes that Viterra has offered a bundled storage and handling package, Export Select, since 2009 and that alternate PTSPs were not available to third party exporters in SA until 2015-16 (see the "Export Select" box above).[357]

The ACCC considers that the bundled nature of the Export Select service may serve to reinforce Viterra's position upcountry by strengthening the vertically integrated connection of the services offered across the relevant port and upcountry markets. As such, while the barriers to small scale entry into the upcountry storage market may be low, the ability of these facilities to compete once entered may be hampered by a PTSP's dominance at port.

The ACCC notes that the recent entry of T-Ports upcountry, suggests that entry into the upcountry storage market is likely more feasible when associated with a port terminal facility. The ACCC also notes that Cargill's facility at Port Adelaide will make use of its existing SA GrainFlow upcountry sites. As such, barriers to entry to the upcountry storage market may be more significant in practice than otherwise expected due to the need to be able to access port terminal infrastructure (which in the absence of Parts 3 to 6 of the Code, or sufficient competitive constraints, may be difficult for exporters to do on a fair and transparent basis).

The ACCC notes that exporters may also attract a range of fees if they opt to use Viterra's storage network but not its ports to facilitate a shipment. For example an exporter who opts to out-turn grain from a Viterra storage facility for the purpose of delivery to a competing PTSP or to self-deliver to a Viterra port will incur greater fees compared to using Export Select. As discussed above, this is evident in the current throughput rates for Export Select, where the majority of grain in the Viterra network is moved to port via Export Select.

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[354] T-Ports, *Submission in response to Supplementary issues Paper*, 19 June 2020, p. 3.

[355] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 1.

[356] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 2.

[357] In circumstances where a third party exporter has established its own port terminal facility the ACCC considers it likely that it will seek to use its own port terminal facility over Viterra's facilities.

The ACCC notes that this does not appear to be the case in other grain trading supply chains across Australia – especially where growers are located approximately 200km or less from a port terminal. Both growers and exporters typically attract lower fees when delivering direct to port at other port terminals across Australia.[358]

In addition a range of Viterra's grower delivery fees upcountry and at port, as well as storage charges, may also influence how and where a grower will enter the Viterra supply chain.[359] In turn this affects how and when exporters can accumulate and trade grain, with limited on-farm storage (in some areas of SA more than others) exporters have a limited window to accumulate grain ahead of it entering the Viterra network.

For a grower to deliver at port the fee is higher than if they delivered to a Viterra upcountry site.[360] To deliver at port a grower would also need transport and some on-farm storage. Accordingly, the incentive for growers to enter the storage market and/or the freight market is lower than might otherwise be expected.

Economies of scope and scale

The ACCC expects that a range of supply chain related factors will influence exporters' decisions around moving bulk grain to export markets, including location of grain production, the availability and ownership of storage facilities, access to, and the cost of, transport options, as well as the accessibility and timing of available capacity.

While these factors are discussed individually in other sections of this document, the ACCC notes that there are likely to be scope and scale effects associated with a PTSP having a dominant presence across multiple elements of the supply chain, particularly when this has been the situation over an extended period of time.[361]

The extensive nature of Viterra's network can reasonably be expected to enable Viterra to achieve operational efficiencies and enable service offerings that are likely beyond smaller entrants. For example, the ability to segregate and/or blend grain are important elements of the bulk grain supply chain,[362] and these are likely more effectively (or efficiently) achieved within an established network of larger sites (than at smaller storage sites that are not part of an integrated network).

In particular there is greater opportunity for exporters to trade grain within the Viterra storage network ahead of shipping, including the potential to acquire additional port capacity in

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[358] For example, port terminal intake fees at GrainCorp port facilities are the same for grain arriving at port from upcountry GrainCorp storage sites and for treated or fumigated grain arriving from third party storage: GrainCorp, *2020/21 Bulk Wheat and Non-Wheat Port Terminal Services Fee Summary*, p. 1. Similarly, fees for grain received at Emerald's Melbourne port differ only depending on the mode of receival (road or rail): Emerald, *Storage and Handling Agreement 2020/21*, p. 20. To deliver grain from farm to port at Viterra's OHB facility, it would cost $36.96/mt. Delivering grain in the same way to Emerald's Melbourne port terminal facility would attract a fee of $23.50/mt (where grain is transported by road), delivery to GrainCorp's Portland facility by road attracts a fee of $27.65/mt. The fee to deliver grain direct to T-Ports' Lucky Bay facility is higher at $37.50/mt.

[359] For example, the fee for grain received at a Viterra upcountry facility is $13.17/mt, while the fee for grain received at port at OHB is $17.41/mt. Grain received at a Viterra upcountry facility for export at OHB attracts a further $4.00/mt port inloading fee, however, even with the inclusion of this fee, receival of grain delivered to port remains more expensive than grain delivered to a Viterra upcountry facility (by $0.24/mt). When the Export Select rebate is added, the gap increases to $0.84/mt: Viterra, *Storage & Handling Charges 2020/21*.

[360] For example, delivery direct to Viterra's OHB facility for export attracts a fee of $36.96/mt while delivery to a Viterra upcountry site for export attracts a fee of $36.12/mt. The fee for upcountry delivery includes fees for receival of grain at both the upcountry site and the port, the vessel booking fee, the port handling & shipping fee and a deduction of the $0.60/mt efficiency rebate. The fee for delivery direct to port includes a fee for the receival of grain at port, the vessel booking fee and the port handling & shipping fee.

[361] Network effects arise when a product or service becomes more valuable as the number of customers using it increases or due to the benefits of compatible and/or complementary products. Network effects therefore provide advantages to established firms with an existing customer base, relative to rivals and prospective entrants.

[362] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 31.

locations to take advantage of grain acquisitions. For some exporters trading or acquiring grain at smaller operations may not be viable due to logistical difficulties out-turning grain (particularly absent access to a bundled logistics product). Viterra's Export Select product allows an exporter to move their grain entitlement to port, without individually arranging to physically move grain from potentially multiple upcountry sites to a port.

Exporters may also find that smaller sites can't provide access to sufficient quantum of grain and/or certain quality of grain grade. If an exporter decides to trade grain at smaller operations or stand-alone sites, lower prices may be needed to offset additional charges they may incur accumulating and moving the grain to port (particularly if they have to enter the Viterra supply chain at port).

The size and level of integration of the Viterra services across its network may also present further incentives for exporters to stay within the network. For example, Viterra's upcountry storage receival sites are allocated specific grain segregation plans,[363] which can in turn affect or influence how an exporter can most efficiently accumulate grain for a shipment. Equally, while the selection of Export Select does not provide absolute certainty shipping will proceed as planned, the risks surrounding delivery, delay and demurrage are reduced for the exporter.

Growers may also benefit from scale effects when storing and trading their grain in the Viterra upcountry network. A grower that elects to store grain in a smaller site, or operation, risks its grain being stranded if the storage site can't attract sufficient grain to interest exporters. A larger storage and handling network that provides a competitive grain trading marketplace is therefore likely to be a prudent decision for growers which may, for example, sell some of their grain on delivery but also elect to store some of their grain until a later point in time. A grower delivering to a smaller storage site may forgo access to a competitive grain trading market either at the time of delivery and/or over the course of the key trading months of the shipping season.

ACCC view

The ACCC notes that third party storage providers now have more opportunities to outturn grain to different export markets through the introduction of ADM's facility at Port Pirie, Cargill's and Semaphore's facilities at Port Adelaide, and T-Ports' Lucky Bay facility on the Eyre Peninsula. This has the potential to support the entry and/or continued existence of third party upcountry sites and on-farm storage.

However, as discussed above, the ACCC also notes that exporters may prefer to remain within the Viterra network for a range of reasons (including to avoid the transaction costs associated with the need to establish new/alternate logistics arrangements). The ACCC acknowledges the potential for exporters (and growers) to benefit from service offerings made possible by the scope and scale of Viterra's operations (in the presence of sufficient competition). However, the ACCC considers that certain factors, notably the fee structures associated with moving grain to port, may enable a PTSP to leverage its market power at port, therefore influencing exporters' (and growers') supply chain choices and potentially affecting competition upcountry.

The ACCC further notes that the recent entry of T-Ports upcountry (and Cargill at Port Adelaide) suggest that entry into the upcountry storage market is likely more feasible when associated with a port terminal facility (or that entry into the port terminal services market is likely more feasible when connected or associated with upcountry storage).[364] As such the

[363] Viterra, *Segregation Plan*, See: https://viterra.com.au/index.php/segregation-plan2/

[364] The ACCC notes that Cargill's GrainFlow storage network in SA, was in effect a historic acquisition and one at risk of stranding (in 2011 Cargill Australia acquired the GrainFlow storage and handling business and the AWB trading. See:

barriers to entry into the upcountry storage market are likely higher than might otherwise be expected due to the need to be able to access port terminal infrastructure (which in the absence of Parts 3 to 6 of the Code, or sufficient competitive alternatives, may be difficult for exporters to do on a fair and transparent basis). This is also likely reinforced by fee structures (notably the bundling of services) which serve to strengthen the connection between port and upcountry.

The ACCC considers that in order for alternate storage and handling providers to compete effectively with Viterra in the upcountry storage and handling market, they are likely still reliant on Viterra (or other PTSPs) accepting their customers' grain at its port terminal facilities at commercially viable rates.

The ACCC has also considered the extent to which the Port Adelaide container market and the SA domestic market offer alternative pathways via which the customers of third party storage providers can outturn their grain. As noted in section 4.3, these markets are relatively small in SA, with 78% of grain grown in SA having entered the bulk export market since the 2011-12 season. These alternate markets are also primarily located within the east of the state. Given these limitations the ACCC considers that fair and transparent access to port terminal services is important if current, and prospective, third party storage and handling service providers are to compete with Viterra's upcountry storage and handling network.

As previously stated, the ACCC's view is that Viterra faces only limited competition from third party and on-farm storage along the supply chain. Given Viterra also occupies a dominant position in the provision of port terminal services in SA, the ACCC has reached the view that the incentives for competitors to enter these parts of the supply chain will be limited if they, or their clients, are unable to gain fair and transparent access to the bulk export market (i.e. via access to port terminal facilities). This is particularly the case given the majority of grain grown in SA is exported in bulk.

Nonetheless, the ACCC acknowledges that the recent introduction of alternate PTSPs has increased incentives for prospective third party storage and handling providers to enter the supply chain with their potential customers (i.e. exporters) having the opportunity to access the bulk export market via a larger number of PTSPs.

4.1.2. Grain transport services

The ACCC considers the use of rail and/or road networks to transport grain from storage facilities to port can be a relevant consideration when examining the level of competition between bulk grain port terminal facilities. Specifically, a PTSP could potentially be advantaged (over alternate PTSPs) if it is able to access transportation infrastructure (in particular rail services), which is unavailable to competing PTSPs.

Transport networks, and the associated freight charges to move grain to port, are significant factors for exporters/traders when determining which port terminal to export from. In particular, port terminal facilities are generally only considered viable substitutes for each other in circumstances where a sufficient number of exporters can transport grain to each of the competing facilities at similar cost.

The ACCC notes that Viterra has submitted that it does not have any ownership interests in road or rail freight companies, and that road and rail accessible facilities compete with each other in SA due to the short distances to port.[365]

https://www.grainflow.com.au/about-grainflow). As such it is unlikely to illustrate a typical example of entry into the upcountry storage market.

[365] Viterra, *Exemption Application 2019*, 2 July 2019, p. 33.

The ACCC notes that Viterra undertakes a tendering process when securing road and rail services for its logistical operations. As discussed below GWA is the only provider of rail freight services in SA and therefore for Viterra.

The barriers to entry to the provision of road freight services are generally viewed as low. However the ACCC notes that Viterra's tendering process results in a relatively small number of freight service providers being responsible for the delivery of grain via road freight services in SA.[366] This is because the majority of SA grain moves to export through Viterra's Export Select product. As previously discussed, Export Select is an end-to-end package that bundles a number of services across the supply chain (including transport) to move grain from a Viterra upcountry storage site to a Viterra port terminal facility.

In considering the substitutability of road and rail transport, the ACCC notes that the Department estimated that the catchment area in which rail and road are generally competitive with each other is for distances of up to 200 km from port, though this depends on the season and volume of grain needing to be transported.[367]

ESCOSA has noted that 3 quarters of SA's upcountry sites are within 200 km of port, and that road transport is therefore 'very competitive' with rail for these sites.[368] In addition, AEGIC has indicated that SA has the shortest distance between grain receival sites and ports of all states, averaging 144 km to port,[369] resulting in a relatively high portion of grain being transported to port via road freight services (50%).[370]

The ACCC also notes that since the release of the AEGIC and ESCOSA reports, Viterra decided not to renew its Eyre Peninsula rail contract with GWA (in February 2019).[371] As such, road transport is likely to account for the majority of grain delivered to port in SA going forward.

Rail

GWA, SA's freight rail services provider for grain, operates all rail transportation services in SA (on ARTC's interstate rail network). Figure 4.2 below shows the current rail freight services used by Viterra, and by extension for all SA grain intended for export. As shown rail freight services are used to move grain to Viterra's IHB and OHB facilities at Port Adelaide.

Neither Cargill's nor Semaphore's facilities at Port Adelaide have rail access. As such Viterra's OHB and IHB port terminal facilities are the only facilities capable of receiving grain via rail in SA (as set out in table 3.1).

Viterra has submitted that road and rail services compete strongly with one another.[372] This view is also held by T-Ports, who submitted that:

> *Rail has historically provided operational efficiencies (at higher Capital expense) to handle larger tonnages, usually with dedicated equipment (receival sheds, pits, conveyors etc.). However, for a long time now, the "all-up" per tonne rate for rail transfers compared to road transfers have been*

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[366] ESCOSA's Inquiry into the South Australian bulk grain export supply chain costs indicates that Viterra has consolidated the tender of road transportation contracts and, as of the time of the release of the inquiry's final report (2018) Viterra had used 7 different road freight providers.

[367] Department of Agriculture and Water Resources, *Wheat Port Code Review*, Interim Report, 10 April 2018, p. 10.

[368] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 37.

[369] AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 22.

[370] Ibid p. 50.

[371] Viterra, media release, *Viterra decision provides competitive supply chain to Eyre Peninsula growers*, viewed 1 June 2020. See: http://viterra.com.au/index.php/2019/02/26/viterra-decision-provides-competitive-supply-chain-to-eyre-peninsula-growers/.

[372] Viterra, *Exemption Application 2019*, 2 July 2019, p. 4.

very evenly matched. It is hard to argue rail provides any advantage in drawing grain from different regions.[373]

The ACCC notes that ARTC's rail network in eastern SA has multiple users and therefore is not solely reliant on grain.[374] However, as noted in ESCOSA's 2015 review of the SA rail access regime, ARTC's network in SA has a low utilisation rate, which led to the closure of the Murray Mallee line previously used by Viterra:

Utilisation of the South Australian intrastate railways is generally low. Where demand for railway infrastructure services is low, the incentive for a railway operator to invest in that infrastructure may reduce. This may limit the capacity and performance of railways, in turn increasing the competitive position of road transport, leading to further reductions in demand for rail. In South Australia, a lack of demand has led to the closure of some grain railways. For example, Viterra announced in May 2015 that it would no longer use rail to transport grain in the Murray Mallee region.[375]

The ACCC presents further analysis (and discusses its views) regarding the relative efficiency of rail and road freight services below.

Figure 4.2: Rail services in SA

Source: http://viterra.com.au/wp-content/uploads/Storage-and-Handling-Map_website-.pdf.

[373] T-Ports, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 2.

[374] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 22.

[375] ESCOSA, *South Australian Rail Access Regime Final Report,* August 2015, p. 22.

Road

Unlike rail, all of SA's port terminal facilities have the ability to receive grain via road transport services. As noted by AEGIC, road transport can offer a number of advantages over rail:

> *…road rates* [show] *more flexibility and variability than fixed rail rates…Road freight has advantages, including scalability, lesser regulation and ability to redeploy to or from alternate industries in very good (or very poor) seasons.*[376]

As previously noted, Viterra undertakes a tendering process when securing road and rail services for its logistical operations. This has resulted in a relatively small number of road freight service providers being responsible for transporting grain (via road) that has entered into Viterra's system.[377] These arrangements are particularly significant, given the majority of SA grain moves to export through Viterra's Export Select product.

T-Ports submitted that the dynamics in the road freight market have the potential for major road freight service providers to be reluctant to engage with alternate PTSPs:

> *Viterra may not be vertically integrated with road/rail providers but as the dominant PTSP across the state of SA has the ability, either intentionally or non-intentionally, to exert influence on major suppliers of services. Due to their market dominance they find "allies" intent on serving the needs of Viterra, sometimes at the expense of any new entrant.*
>
> *T-Ports has gathered anecdotal evidence of road transport providers un-willing to engage with us as they did not wish to risk their relationship with Viterra.*[378]

However, the ACCC notes that T-Ports acknowledged these issues are not necessarily the result of intentional action undertaken by Viterra, but rather due to the size of Viterra.[379]

The ACCC notes that, while only a small number of road freight companies provide services to Viterra, road transport is typically characterised by a large number of players. As submitted by SAFC:

> *Competition within the road transport industry is fierce, with many providers and low profit margins. Viterra is not integrated with any road or rail companies – they access services from the market like any other player.*[380]

In addition, both AEGIC and ESCOSA considered that the road freight transport industry was competitive, in their respective reviews of the SA market.[381] ESCOSA also found that road freight transport had low barriers to entry.[382]

Given the above, the ACCC's view is that there may be potential for other PTSPs to encounter difficulties when attempting to engage with larger road freight service providers who are contracted to Viterra, particularly given the majority of SA grain is sold into Export Select. In addition, as noted in section 4.1.1, Viterra charges a grower receival-at port-fee which has the potential to discourage grower deliveries to port. This could further encourage the use of Export Select and therefore impact the amount of grain which is transported via

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[376] AEGIC, *Australia's grain supply chains – costs, risks and opportunities,* October 2018, p. 54.

[377] According to ESCOSA's *Inquiry into the SA Bulk Grain Export Supply Chain,* 2018, Viterra has consolidated the tender of road transportation contracts, and as of the time of the release of the report (2018) Viterra used 7 different road freight providers.

[378] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p 4.

[379] Ibid.

[380] SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 3.

[381] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 38; AEGIC, *Australia's grain supply chains – costs, risks and opportunities,* October 2018, p. 54.

[382] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 38.

road freight services contracted to Viterra. However, given the relatively low barriers to entry and large number of potential providers within the road freight market, alternative PTSPs are unlikely to experience prolonged issues when securing road freight services, although broader network effects may also be relevant (see section 4.1.1).

The general efficiency of road transport also appears to have increased over time, with AEGIC finding that the average load size of a truck having increased from approximately 24.5 tonnes in 2009-10, to over 29 tonnes in 2016-17.[383]

Comparing road and rail transport

The ACCC notes that AEGIC investigated the costs of rail and road transport for different regions in SA in its 2018 report.[384] These results are displayed in figure 4.3 below.

Figure 4.3 indicates that rail offered a relatively large freight advantage in the central region, and a somewhat less pronounced advantage in the eastern region.[385] However the ACCC notes that, due to the small number of rail sites in the eastern region, the linear relationship here should be interpreted cautiously.

In its Draft Determinations the ACCC considered (in part due to AEGICs findings) that Viterra likely has an advantage at its IHB and OHB facilities compared to Cargill's and Semaphore's Port Adelaide facilities (which cannot receive grain via rail).[386]

Mr Hill submitted that rail access to OHB results in a significantly more efficient operation:

> *It is considerably more efficient than Inner Harbour in every facet of its operation from rail discharge to ship loading with a focus on a better integrated supply chain.*[387]
>
> *Competitive facilities do not have access to rail whereas both IH and OH Viterra facilities both have rail access, In the case of OH a very efficient rail loop around its 25 hectare site that enables discharge of trains at 2,500 tph without any shunting.*[388]

However, Viterra disagreed with the ACCC's view in the Draft Determinations:

> *Viterra does not agree with the ACCC's preliminary finding that Viterra's IHB and OHB port terminals have an advantage in terms of being able to source grain from a larger area compared to Cargill's and Semaphore's Port Adelaide facilities. This is because:*
>
> - *as ESCOSA has noted, three quarters of SA's upcountry sites are within 200 km of port, and road transport is 'very competitive' with rail for these sites;*
> - *as AEGIC has indicated, South Australia has the shortest distance between grain receival sites and port of all states, averaging 144 km to port, resulting in a relatively high portion of grain being transported to port via road freight services;*
> - *there are significant fixed costs associated with rail and take or pay contracts, meaning that the Viterra bears significant risks under rail contracts; and*

[383] AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 53.

[384] The ACCC notes that rail was operational on the Eyre Peninsula at the time of AEGIC's consideration. As previously stated, rail operations on the Eyre Peninsula have since stopped.

[385] The central region is made up of the following provincial regions: Yorke Peninsula; and Lower, Mid and Upper North. The eastern region includes: Centrals Hills and Fleurieu Peninsula, Lower Murray, Northern Murray Mallee, Southern Murray Mallee, Upper South East and Lower South East. ARTC's rail line in the eastern region runs from Adelaide to the Upper South East.

[386] ACCC, *Draft Determinations Viterra Operations Pty Ltd, Exemption assessments of port terminal services provided at the following port terminal facilities: Port Adelaide Inner Harbour, Port Adelaide Outer Harbor, Port Lincoln, Wallaroo, Port Giles, Thevenard*, 6 October 2020 , p. 82.

[387] Mr John Hill*, Submission in response to Draft Determinations*, 3 November 2020, p. 2.

[388] Mr John Hill, *Submission in response to Draft Determinations,* 3 November 2020, p. 3.

- *the efficiency of road transportation in South Australia has increased significantly in the past decade, with the size of freight trucks increasing by around 29% since 2012-13 and by 13% in the past three years which means that more grain can be transported with fewer trucks.*[389]

The ACCC agrees that the relatively shorter distances to port, as well as the widespread use of road to transport grain, suggest that road transport is a viable alternative to rail for a significant proportion of grain in SA. The ACCC also notes that, in the current environment, road transport appears to be the preferred form of transport by a number of industry participants in certain areas of SA.

The ACCC also notes Viterra's comments that the size of freight trucks has continued to increase in recent seasons. The ACCC notes that this is consistent with AEGIC's finding that average load sizes of trucks have increased from 24.5 tonnes in 2009-10 to 29 tonnes in 2016-17,[390] and that increases in road freight efficiency likely mean that the relative advantage of rail has dissipated over time. The ACCC also notes AEGIC's views that there is generally a significant catchment area where road transport costs are competitive with rail for all ports.[391]

Furthermore, the ACCC notes Viterra's comments regarding the higher fixed costs and take or pay nature of rail contracts, mean Viterra bears greater risk when using rail. However, the ACCC notes that a business will generally only choose to take on greater risk if it is associated with higher returns.

Viterra's IHB and OHB facilities are the only port terminal facilities in SA that are able to receive grain directly via both rail and road. While the ACCC acknowledges Viterra's comments (see above), consistent with AEGIC's analysis (see figure 4.3) the ACCC considers that IHB and OHB appear to have a material freight advantage when using rail to transport grain to port,[392] compared to competing PTSPs at Port Adelaide, for grain located in the central region.[393] The ACCC notes AEGIC's analysis indicates that the further away from port grain is located, the larger the advantage rail transportation provides to Viterra. As such, the ACCC considers that both Viterra's IHB and OHB facilities have an advantage in terms of being able to source grain from the central region compared to Cargill's and Semaphore's Port Adelaide facilities.[394]

The potential advantage of rail in SA's south east is less clear. As per figure 4.3 below AEGIC's analysis of the eastern region (i.e. SA's south east)[395] indicates there is a slight rail freight advantage in this region. However, due to the small number of rail freight sites in this region the results should be interpreted cautiously. Furthermore, the eastern region on average has significantly lower grain production along ARTC's rail line compared to areas in the central region production (0.37 million tonnes compared to 1.70 million tonnes).[396] As such, this may limit any potential advantages rail has over road freight services.

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[389] Viterra, *Response to Draft Determinations,* Public version, 8 February 2021, p. 21.

[390] AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 53.

[391] AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 54.

[392] See the eastern and central region charts within figure 4.3.

[393] ARTC's rail line in the central region (Yorke Peninsula and Lower, Mid and Upper North regions) runs through the Lower, Mid and Upper North regions.

[394] The ACCC notes that certain Cargill/GrainFlow's upcountry storage facilities have access to rail freight services. However Cargill's port terminal facility at Port Adelaide is unable to facilitate the intake of grain directly via rail services.

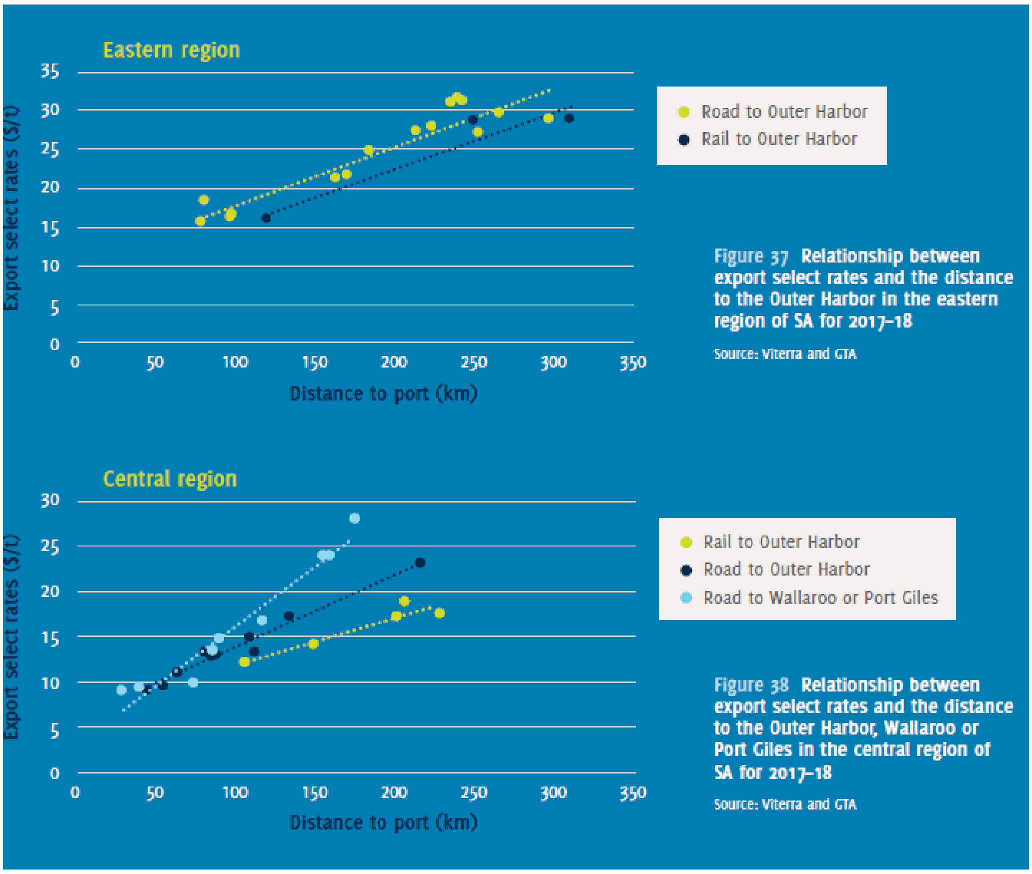
[395] The eastern region defined by AEGIC includes the following provincial SA regions: Centrals Hills and Fleurieu Peninsula, Lower Murray, Northern Murray Mallee, Southern Murray Mallee, Upper South East and Lower South East. ARTC's rail line in the eastern region runs from Adelaide to the Upper South East.

[396] Viterra's upcountry sites with rail access in the eastern region are located in the Upper South East, which has an average annual production of 0.37 million tonnes. In comparison rail accessible sites in the central region are located in the Mid and Upper North, which combined have a significantly higher annual average production of 1.70 million tonnes.

Given the above the ACCC does not consider it clear that rail provides an advantage to road freight services for IHB and OHB when sourcing grain from SA's south eastern regions.

The ACCC also considers that as Viterra's Port Giles and Wallaroo facilities are not capable of receiving grain via rail, they will not have a competitive advantage sourcing grain over their closest competitors – Cargill's and Semaphore's Port Adelaide facilities – due to access to different transportation methods.

Figure 4.3: Road vs rail freight rates across SA, as estimated by AEGIC



Source: AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 57.

4.2. Grain catchment areas by port

The ACCC generally expects port terminal facilities to be in competition with each other to the extent that grain from the same region can practically and economically move to either of the 2 (or more) facilities.

The ACCC notes that the grains industry generally refers to geographic areas where it is typically economically viable for grain to move to a particular port for export as a 'catchment area' (or 'catchment zone').

The ACCC notes that industry's use of the term 'catchment area' has mostly been used in relation to describing the area of relevance to any one port with respect to the various competitive and logistic factors (such as distances and associated logistics and handling costs[397]). In some instances references to catchment areas were likely to envisage a fixed

[397] For example, see Kingwell, *Changes in grain handling catchments in Australia: an historical perspective*, 2017. This paper discusses models of grain transport and grain handling within grain catchments, based upon the cost of transporting grain

geographic and/or very broad geographic region. However more recently the industry has adopted the view that catchment areas can shift and change due to a range of logistic factors and competitive pressures,[398] though in many scenarios there remains a relatively set geographic area from which a port sources the majority of its grain.

The ACCC generally considers the relevant catchment area for a port terminal facility to be related to a number of factors, including: access to each port (including costs); the transportation links to each port including rail networks and road pathways that connect the port terminals to growing regions; and the associated upcountry storage infrastructure.

The ACCC also notes that the Port Adelaide container market exports a different mix of commodities than the bulk export market (see section 4.3.1). As such, some growers which produce grain for the purposes of the containerised export may be located outside of the traditional Port Adelaide catchment area. However, given the container market is relatively small the movement of grain associated with this is expected to be relatively limited.[399] This, does however, indicate (to some extent) that certain market conditions can result in growers moving grain to port terminals that would otherwise be considered to be outside of their traditional catchment zone.

The ACCC notes that its use of the term 'catchment areas' in this document is intended to indicate (or otherwise describe) the area in which competitive interaction between port terminal facilities in relation to the geographic location of grain can and most likely occurs. The ACCC accepts that, as submitted by Viterra below, grain will move to where it is most economically advantaged (which is determined by a variety of factors – including freight costs). As such, the ACCC does not consider identified catchment areas (either in this document or historically in relation to SA) to be definitive or inflexible, and uses this term to indicate the extent to which different port terminals may (or may not) effectively constrain each other in relation to certain geographic regions.

In addition, and as highlighted in this document, the ACCC notes that there has been a range of atypical factors that have led to grain moving well beyond the traditional understanding of the defined catchment area for any one port terminal. Most recently this has arisen as a result of the recent drought in Australia and the resulting extraordinary pricing of grain. A further example of grain moving in a substantially different way than otherwise expected in relation to catchment areas is when an exporter's own specific freight considerations (for example take or pay rail obligations) dictates specific freight incentives that would otherwise not be a relevant consideration for the industry more broadly.

In its exemption applications Viterra submitted that:

> *Traditional "catchment zones" for grain grown in South Australia are fluid and increasingly outdated constructs. Traders purchase grain from, and traders and growers move grain to, the locations where it is most profitable having regard to the price of grain that can be obtained in domestic and export markets, the cost of freight to port terminals (or to domestic customers), the cost of sea freight, and the cost of using a particular port terminal. If Viterra is inefficient or its*

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from farms in a grain catchment to a central receival point, the costs of grain handling and storage at the receival point, transport costs, grain yield and density.

[398] Kingwell, *Changes in grain handling catchments in Australia: an historical perspective*, 2017. Available at: http://onlinelibrary.wiley.com/doi/10.1111/1467-

8489.12206/abstract

[399] For example ADM, which has an exclusive arrangement with Dublin Clean Grain for its facility at Dublin, stated that "growers from the Yorke Peninsula through to the Upper North now have a new delivery option for their lentils and barley". ADM also stated that "…these grain products will provide base load volume for Dublin Clean Grain to pack on ADM's behalf and support our export container business and international customer demand," As such the ACCC understands that Clean Grain's Dublin facility will be used by ADM primarily for the container export market. The ACCC understands that the facility will offer storage for grain intended for containerised export to growers in the Yorke Peninsula and Upper North region (despite Dublin being located in the Lower North). For further details see: https://www.admgrain.com.au/latest-news/new-harvest-options-at-dublin

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.[400]

In relation to the grain catchment areas for each of its facilities, Viterra also submitted the following:

> *Port terminals at Port Adelaide have traditionally sourced grain from a large grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide…*[401]
>
> *Wallaroo has traditionally sourced grain from a region that extends from above Melrose down to the Yorke Peninsula.*[402]
>
> *Port Giles competes for the same grain as port terminal operators at Port Adelaide.*[403]

In response to the Draft Determinations, Viterra further submitted that:

> *As recognised by the Australian Export Grains Innovation Centre (AEGIC), grain growing regions in South Australia are relatively large due to distances to port in the state being short, and road transport costs being competitive. In addition, freight differentials (which appears to be the primary—if not sole— factor used by the ACCC to define a grain catchment area) are not the sole indicator of where grain will be delivered – other factors, including the grain price that can be achieved at a site and slot availability and timing, are also very relevant. Based on these factors and historical grain movements, Viterra considers the following to be the narrowest potential grain catchment areas for the purposes of the ACCC's assessment:*
>
> - *the grain growing region on the Eyre Peninsula; and*
> - *the grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, stretching from Dooen in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia.*[404]

Viterra also submitted that:

> *For the reasons set out in Viterra's previous submission, the concept of traditional "catchment zones" for grain grown in South Australia are fluid and increasingly outdated constructs. The fluidity and increasing irrelevance of catchment zones is recognised by a number of PTSPs (in addition to Viterra) including Semaphore,[405] GrainCorp,[406] Emerald[407] and T-Ports[408].* [409]

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[400] Viterra, *Exemption Application 2019*, 2 July 2019 (public), p. 1.

[401] Ibid, p. 48.

[402] Ibid, p. 58.

[403] Ibid, p. 62.

[404] Viterra *Response to Draft Determinations*, 8 February 2021, p. 3-4.

[405] Viterra footnoted the following statement here (see footnote 15 on page 15 of their response to the Draft Determinations): *In its Port Adelaide wheat port exemption assessment (16 May 2017), Semaphore stated that "as South Australia has the shortest distance to port than any other Australian State, the catchment area for the grain for exporters to utilise the SCS operations can be potentially drawn from a considerable growing region".*

[406] Viterra footnoted the following statement here (see footnote 16 on page 15 of their response to the Draft Determinations): *In its Geelong and Portland exemption application supplementary submission (27 February 2015), GrainCorp stated "The catchment concept was applicable under the single desk export arrangements when there was only one exporter, but has lost currency since export deregulation and changes in transport arrangements."*

[407] Viterra footnoted the following statement here (see footnote 1 on page 15 of their response to the Draft Determinations): *In its Melbourne Port Terminal exemption application (28 November 2014), including its supplementary submission (26 February 2015), Emerald stated that "Grain produced in Victoria is consumed domestically or exported through Melbourne or its competitor ports, primarily Geelong and Portland but also Port Kembla and Port Adelaide. Grain produced is transported either directly to the domestic consumer/port or via upcountry storage silos.*

[408] Viterra footnoted the following statement here (see footnote 18 on page 15 of their response to the Draft Determinations): *T-Ports' submission in response to ACCC's issues paper on Viterra's application for exemption, 26 August 2019.*

[409] Ibid, p. 15.

The ACCC acknowledges the views of other PTSPs as to the fluidity of catchment zones. The ACCC also notes that these PTSPs' views generally also consider that economic factors influence catchment zones (as noted by Viterra above). For example, the ACCC notes that while the submission was not in relation to these present exemption applications, Emerald (as referenced above by Viterra) noted that the Melbourne catchment area could be considered as the region which should be freight advantaged to Melbourne under normal circumstances, and the contestability between Melbourne, Portland and Geelong is dependent on pricing which is impacted by each season's production, domestic demand and other market forces.[410]

In its submission T-Ports supported Viterra's view that catchment zones are fluid, though not to the extent implied by Viterra in its exemption application:

> *T-Ports supports Viterra comments that catchment zones are fluid, however not to the extent implied… 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.*[411]
>
> *As discussed earlier, there is small scope for competition of grain grown near the lower SA/Vic border, but other than that grain seldomly [sic] moves outside of traditional catchment zones.*[412]

Specifically, T-Ports noted that catchment zones overlap and fluctuate based on market conditions, however freight costs will limit the flexibility to move outside these zones:

> *There are some terminals where catchment zones overlap and fluctuate with market conditions, but in general terms, road distances and associated freight costs between competing terminals is a limiting factor in the flexibility to move outside catchment zones.*[413]

The ACCC recognises that there is a level of fluidity to the catchment areas for different port terminal facilities. However the ACCC considers that the economic viability and extent to which different port terminals may (or may not) effectively constrain each other in relation to certain geographic regions remain relevant to the exemption assessments. Therefore the ACCC considers catchment areas remains relevant to the exemption assessment.

This section discusses: the relationship between distance and freight costs; the ACCC's view on catchment areas; and the extent to which exporters are able to access port terminal facilities to export grain grown in different geographical locations across SA.

What are the different growing regions in SA?

AEGIC stated that SA is unlike other Australian states, due to its unique geography. AEGIC considers that the existence of 2 major growing areas on the 2 different peninsulas (the Eyre and Yorke) has resulted in a higher number of ports than other Australian states:

> *Different geographies also need to be considered when comparing the supply chains of each state of Australia. For example, SA with its series of peninsulas and coastal cropping areas results in it having a higher number of smaller ports compared with other states, and its resulting need to balance land transport costs with the operating scale of ports. Some Thevenard growers, for example, would incur additional freight of more than $34/t if shipping only occurred through Port Lincoln.*[414]

The ACCC notes that, despite the relatively high number of ports in SA compared to other states, SA's geography results in grain grown in many areas being unlikely to be able to

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[410] Emerald, *Submission in support of exemption for its Melbourne Port Terminal,* 28 November 2014, p. 11.

[411] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 3.

[412] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 4.

[413] T-Ports, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 2.

[414] AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 52.

(practically and/or economically) move to export via numerous port terminal facilities. In its inquiry into the SA bulk grain export supply chain costs ESCOSA suggested that the SA market can be split into 2 distinct regions:

> *For this Inquiry, the (local) market for supply chain services is defined as the area bounded by the South Australian borders. Within that area, two separate geographic markets may be defined: the Eyre Peninsula and eastern South Australia (remainder of the South Australian land mass). Factors such as the location of grain producing areas, the isolated Eyre Peninsula rail network, and the distance from the Eyre Peninsula to domestic markets means the potential for substitution between these two geographic areas is low.*[415]

Furthermore, it appears that SA's unique geography has resulted in differences in how logistical networks operate across different parts of the state. As noted by AEGIC (see figure 4.3 above):

> *There is also considerable variation in the competitiveness between road and rail transport in South Australia's eastern and central regions compared with the western region. Road transport rates are up to 35 per cent higher in the eastern region than in the western region for an equivalent 150km road journey.*[416]

Given the above, the ACCC has considered how likely it is for grain from various growing regions to move to port terminal facilities outside those regions (see below). However the ACCC will first examine the relationship between distance and freight costs in SA.

4.2.1. The relationship between distance and freight costs in SA

As noted above, Viterra has submitted that catchment areas are fluid and increasingly outdated concepts. However Viterra has also acknowledged that distance is a relevant cost driver when exporters outturn grain to a port terminal facility.[417]

The ACCC considers that it is useful to explore the relationship between distance and freight costs. The ACCC provides its views on this relationship below using Viterra's Export Select freight rates.[418]

<u>Export Select freight rates</u>

As previously noted, Viterra's Export Select is a logistics package that bundles a number of services including: accumulation planning, outturn from Viterra's upcountry storage, transport to port and in-loading at port. Viterra's Export Select freight rates (i.e. transport to port) comprise the most significant cost element of the total Export Select package offered by Viterra.

The ACCC notes that CRA modelled a linear regression using Viterra's Export Select freight rates in order to establish the level of competition Viterra faces from Victorian port terminals.[419] Figure 4.4 below presents CRA's results, which indicate a pronounced relationship between freight costs and distance. Specifically, CRA found that every additional kilometre grain has to travel to port adds an extra 7.9 cents per tonne to the total freight cost:

> *The estimated intercept term in 8.1351, which is interpreted to mean that the fixed cost of freight (e.g. loading and other handling costs, which are incurred irrespective of the distance shipped) is*

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415 ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, pp. 42-43.

416 AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 56.

417 Viterra, *Response to 14/11/19 information request 2020 – Question 9 – Catchment zones*, 13 January 2020, p. 3.

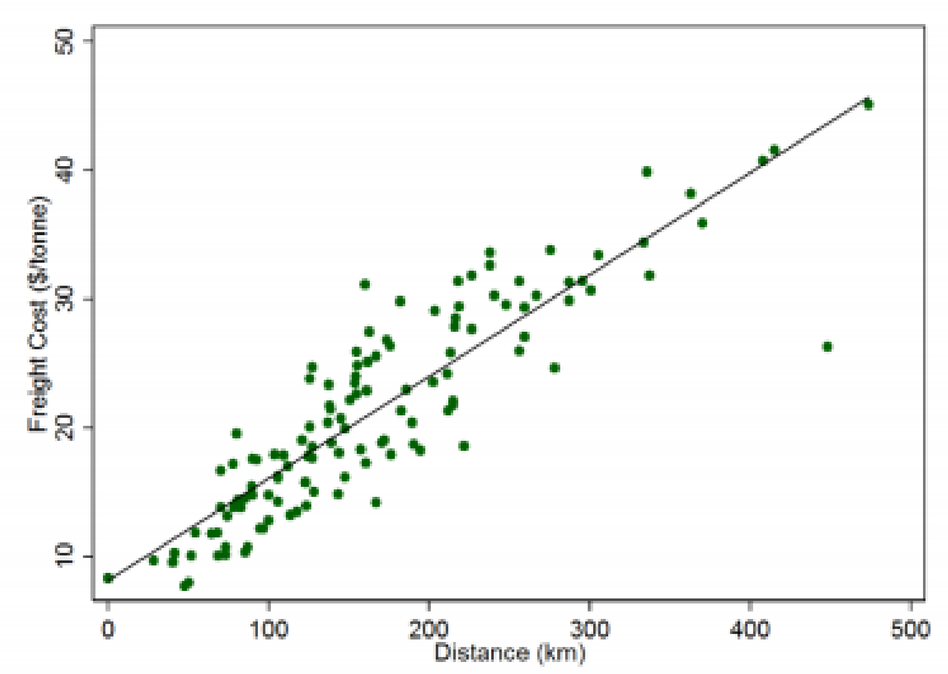
418 Viterra's Export Select freight rates are the basis for GTA's Location Differential values (see 'GTA Location Differentials' box in section 4.2.3).

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

$8.14 per tonne. The estimated slope term is 0.0792, which is interpreted to mean that the incremental freight cost for every additional kilometre shipped after is $0.079/tonne.[420]

The degree to which Viterra faces competition from Victorian markets is discussed in section 4.2.3.

Figure 4.4: Scatter plot of freight rates and distances, extracted from CRA supplementary report



Source: CRA Supplementary report, Appendix A, p. 12.

<u>The importance of distance in Export Select rates appears to have reduced over time</u>

Noting that Viterra submitted in its exemption applications that catchment areas were more relevant in the past,[421] the ACCC considers it appropriate to consider the extent to which distance has diminished as a factor in determining freight costs. This may provide an indication as to the expected importance of distance in future freight costs.

Figure 4.5 below, which was produced by AEGIC, shows the relationship between transport costs (using Export Select charges) and distance between the 2012-13 and 2017-18 seasons.[422] The analysis by AEGIC shows that the importance of distance to overall freight costs (shown by the slope of the graph) has declined close to 15%.[423]

The ACCC considers that the reduced distance premium supports the view that catchment areas have likely become less relevant over time. As such grain grown or stored in different areas likely now has a greater range of competitive alternatives that it is able to access. However, as illustrated in figure 4.5, there continues to be a strong relationship between distance and freight costs.

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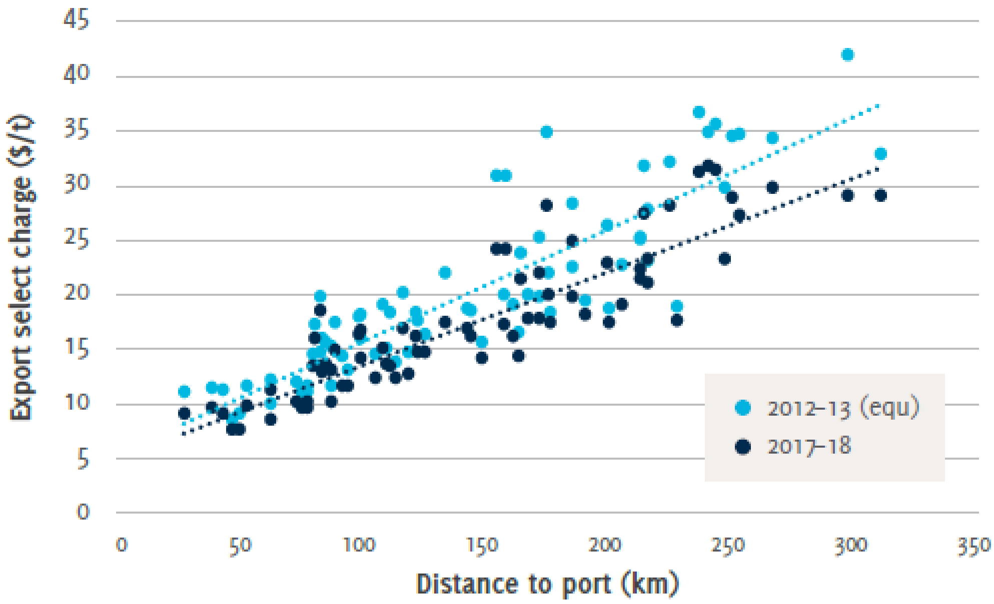
[420] Charles River Associates, *Supplement to CRA Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 9 January 2020, Appendix A, p. 11.

[421] Viterra, *Response to 14/11/19 information request 2020 – Question 9 – Catchment zones,* 13 January 2020, p. 2.

[422] AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 55.

[423] In real terms.

Figure 4.5: Relationship between Export Select rates and the distance to the closest port in SA for the 2012-13 and 2017-18 seasons



Source: AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 55.

ACCC view on the relationship between freight costs and distance

Consistent with the above analysis, the ACCC continues to consider that distance remains a significant factor in freight costs, and therefore relevant when considering which port terminal facilities are available to exporters seeking to export grain from different areas. However the ACCC notes that the relationship between distance and freight costs has likely weakened over time, with catchment areas becoming more fluid as a result.

The ACCC also notes that grain will not always move to the closest port terminal facility and that market conditions, such as recent drought conditions on the east coast, can result in grain movements which significantly diverge from typical catchment areas. In some instances certain exporters may also face other commercial considerations (such as take or pay arrangements at certain ports), while others may be better positioned to incur greater upfront costs (e.g. freight) in the interests of longer term commercial certainty.

4.2.2. Competition for grain between the Eyre Peninsula and eastern SA

As noted in the introduction to section 4.2 ESCOSA considers SA to be comprised of 2 distinct markets: the Eyre Peninsula and eastern SA, with little substitution between these regions.[424]

Furthermore, in its exemption applications, Viterra submitted that its Port Lincoln and Thevenard facilities have traditionally sourced grain from the Eyre Peninsula. However Viterra also noted that competition for grain from the Eyre Peninsula is not limited to port terminals on the Eyre Peninsula.[425] In contrast, T-Ports submitted that Port Lincoln only draws grain from the Eyre Peninsula.[426]

[424] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, pp. 42-43.

[425] Viterra, *Exemption Application 2019,* 2 July 2019, p. 28 and p. 44.

[426] T-Ports, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 2.

As part of its response to the Draft Determinations Viterra submitted that that the narrowest potential grain catchment areas can be considered are the Eyre Peninsula and the grain growing region encompassing the Yorke Peninsula and a large area surrounding Adelaide.[427]

In considering these grain movements, the ACCC acknowledges that some of the grain shipped via Viterra's IHB, OHB, Wallaroo and Port Giles facilities could be sourced from the Eyre Peninsula: however the ACCC considers this likely represents an unusual case. For example, Viterra's closest storage facility in eastern SA to the Eyre Peninsula is Melrose. Melrose is located 163 km from Viterra's closest eastern SA facility (Wallaroo), 407 km and 535 km from Viterra's Port Lincoln and Thevenard facilities respectively, as well as 253 km from T-Ports' Lucky Bay facility.[428] Furthermore, Melrose is located 71km from ADM's Port Pirie facility. As such, the ACCC considers it unlikely that grain grown in eastern SA will move to export from any of the Eyre Peninsula facilities under typical market conditions (given the significantly larger freight distances).

In addition, Viterra's closest upcountry storage facility on the Eyre Peninsula to Wallaroo, Kimba, is located 212 km and 316 km from Viterra's Port Lincoln and Thevenard facilities respectively, as well as 102 km from T-Ports' Lucky Bay facility. However Kimba is located 350 km away from Viterra's Wallaroo facility and 248km from ADM's Port Pirie facilities.[429] Given these distances, it seems unlikely that grain would move from the Eyre Peninsula to eastern SA under typical market conditions.

The ACCC acknowledges that distance from a particular port terminal facility is not the only factor which influences the movement of grain. However, given the significantly greater distances to Eyre Peninsula ports for grain grown in eastern SA, it appears highly unlikely that this grain will be exported via a port terminal facility on the Eyre Peninsula in material quantities under typical market conditions. As such, the ACCC's view is that the vast majority of grain grown in eastern SA is unlikely to move to export via the Eyre Peninsula.

4.2.3. Competition for grain in Eastern SA

The ACCC considers that there is a range of potential opportunities to export or otherwise sell grain grown in eastern SA. The exact competitive constraint each of these opportunities place on each other depends on the specific location in which the grain is grown. However there appears to be an interplay between the available port terminal facilities and their catchment areas; which likely intersect with each other to some degree.

The ACCC understands that, depending on the specific location, grain grown in eastern SA can potentially be exported through: Port Giles or Wallaroo on the Yorke Peninsula; Port Pirie; Port Adelaide (via the bulk export services provided by Viterra, Semaphore, Cargill, or via containers); or port terminal facilities located in Victoria.

The ACCC also considers that the export of this grain is likely subject to a degree of competitive constraint from SA and/or interstate domestic markets. This is discussed further in section 4.3.2.

In the Draft Determinations the ACCC provided its draft views on each port terminal facility's individual catchment area.[430] Viterra disagreed with the analysis in the Draft Determinations, and submitted that:

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[427] Viterra *Response to Draft Determination*, Public version, 8 February 2021, pp. 3-4.

[428] Distances from storage locations to terminals were obtained using Google Maps.

[429] Distances from storage locations to terminals were obtained using Google Maps.

[430] In the Draft Determinations the ACCC considered that: Port Adelaide draws grain from a large catchment area stretching from the Victorian and SA border into the Upper North region, but not including the Yorke Peninsula; Port Giles sources

Viterra considers that this catchment area analysis defines too narrow an area of competitive overlap because the assessment is based primarily, if not wholly, on GTA location differentials (i.e. freight differentials) without consideration of other relevant factors.[431]

As noted above, Viterra considers the following 2 regions to be the narrowest potential grain catchment areas for the purposes of the ACCC's assessment:

• the grain growing region on the Eyre Peninsula; and

• the grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, stretching from Dooen in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia.[432]

Viterra has stated that grain grown in the 'traditional' Adelaide region is subject to a variety of competitive constraints:

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.[433]

Similarly, Viterra has submitted that grain grown in the Yorke Peninsula can be delivered to Adelaide:

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.[434]

The ACCC will first discuss the catchment area of the Port Adelaide facilities in relation to the Mid and Upper North regions, and the Yorke Peninsula. The ACCC will then discuss the extent to which catchment areas for facilities at Port Adelaide interact with the catchment areas for Victorian facilities. Finally, the ACCC will discuss its views on where ADM's Port Pirie facility will likely draw grain from.

The below box discusses GTA's Location Differentials, which the ACCC used to help inform its analysis of these catchment areas.

GTA Location Differentials

In the below analysis, the ACCC refers to GTA's Location Differentials to estimate freight costs. GTA's Location Differentials are a value attributed to an upcountry grain bulk storage and handling facility,[435] which represents the transport costs of moving grain from an upcountry site to a port terminal facility.

the majority of its grain from the Yorke Peninsula; and Wallaroo sources its grain from the Yorke Peninsula and Upper North regions (therefore overlapping with the Port Adelaide catchment zone).

[431] Viterra *Response to Draft Determination*, Public version, 8 February 2021, p. 19.

[432] Ibid, pp. 3-4.

[433] Viterra, *Response to 14/11/19 information request - question 9 – catchment zones*, 13 January 2020, p. 4. The ACCC notes that Viterra broadly reiterated this point and the subsequent point in its submission to the Draft Determinations (see, Viterra submission, 8 February 2021, p. 15).

[434] Viterra, *Response to 14/11/19 information request - question 9 – catchment zones*, 13 January 2020, p. 4.

[435] According to Grain Trade Australia Fact Sheet Series No.005 20 April 2018, a Location Differential is the "value" attributed to a specific up-country grain bulk storage and handling facility to an export port terminal facility. They are produced by the GTA Commerce Committee for the purpose of valuing upcountry grain on a 'port basis'. For the determination of the Natural Terminal Port for a site, rail transportation to a port takes precedence over road transportation to that same port. For sites with only road access, the natural port terminal for a storage site is the port with the lowest location differential.

The ACCC notes that GTA uses the rates set by Viterra's Export Select freight rates for its SA Location Differentials. However, the ACCC also notes that there are a small number of third party sites which are not located at the same location as a Viterra site (for example Cargill operates a site at Maitland, whereas Viterra does not). In these cases GTA is not able to use Viterra's Export Select freight rates for its Location Differentials.[436]

The ACCC's understanding of how Location Differentials are used by industry is consistent with ESCOSA, which in its 2018 inquiry stated:

> [ESCOSA] *understands that traders use locational differentials set by Grain Trade Australia in developing contracts with growers.*[437]

The ACCC considers that Location Differentials provide a useful indication of the costs to move grain from a specific upcountry site to port. Accordingly, GTA's Location Differentials can assist in consideration of the extent to which port terminal facilities compete for bulk grain export volumes.

As previously noted Viterra submitted that the ACCC relies too much on GTA Location Differentials at the exclusion of other factors:

> *Viterra considers that the ACCC's catchment area analysis (as explained above) defines too narrow an area of competitive overlap by virtue of the fact that it is based primarily, if not wholly, on GTA location differentials (i.e. freight differentials). But freight is not the only determinative—nor always the most pertinent—factor for a grower or marketer when deciding where to deliver grain.*[438]

However, T-Ports submitted that Location Differentials are a suitable proxy for the cost of transport:

> *GTA Location differentials are a suitable proxy for the cost of transport. No doubt, there are occasions when spot freight may be able to be negotiated at lower rates, but the GTA [Location Differentials] are a good proxy.*[439]

While the ACCC acknowledges that particular market conditions may affect the relationship between freight costs and distance (and that certain regions may have favourable costs to transport to certain ports at certain times as a result), the correlation between Location Differentials and generally accepted industry principles suggests that, for the majority of grain movements, Location Differentials serve as a useful proxy for freight costs.

[436] The ACCC notes that table 4.1 also contains Location Differentials (from both Viterra and third party storage sites) to Victorian port terminals, whose Location Differentials were not able to be taken from Viterra's Export Select freight rates.

[437] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 53, fn. 175.

[438] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 17.

[439] T-Ports, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 2.

Mid and Upper North Regions of SA

Table 4.1 below presents GTA's 2020-21 Location Differentials for various upcountry sites across the Mid and Upper North regions of SA, to Viterra's Port Adelaide OHB,[440] Port Giles and Wallaroo facilities.[441]

The ACCC notes that OHB is able to receive grain via rail transport which, as discussed in section 4.1.2 (see figure 4.3[442]) is likely a more efficient mode of transport than road for grain located in the Mid and Upper North regions. The relative efficiency of upcountry sites with rail access is likely reflected in GTA's Location Differentials. The ACCC notes that Viterra's IHB facility is also able to facilitate receival via rail, and that ADM's, Cargill's and Semaphore's Port Adelaide facilities are not. As such, it appears that GTA's Location Differentials may underestimate the freight cost to transport grain from storage sites with rail access to Cargill's and Semaphore's port terminal facilities.

Table 4.1 indicates that, for most sites in the Mid and Upper North regions, there is a slight freight advantage in moving grain to Viterra's Wallaroo facility over its OHB facility. However table 4.1 only considers a selection of sites in the Mid and Upper North regions. When considering GTA's Location Differentials for all 14 sites in the Mid and Upper North region, 9 sites have a freight advantage to move grain to Wallaroo, while 5 sites are freight advantaged to move grain to OHB.

GTA's Location Differentials also show that both Viterra's Wallaroo and OHB facilities have significant freight cost advantages over its Port Giles facility for sites in this region (see table 4.1).

In addition, table 4.1 indicates that typically the further south a site is located, the more advantaged that site will be to Viterra's OHB facility compared to Viterra's Wallaroo facility. For example, Crystal Brook has a $2.92 freight advantage to Wallaroo over OHB, whereas Bowmans, which is located 105 km south of Crystal Brook has a $0.42 freight advantage to OHB over Wallaroo.

However the relative efficiency and capacity of a port terminal facility is also relevant to the consideration of where it is most economically efficient to move grain.

Therefore, table 4.1 also presents an analysis of the combination of Viterra's freight and at-port costs to provide an indication of which port terminal facility it is most economically efficient to move grain to.[443] These costs were determined using Viterra's upcountry receival fee,[444] Export Select Grouped Service fee,[445] and Port Handling & Shipping fee.[446] Unlike the consideration of GTA's Location Differentials (which indicated that 9 out of 14 sites in the Mid and Upper North regions are freight advantaged to Wallaroo over OHB), once Viterra's at-port

[440] The Export Select freight rate (and therefore GTA Location Differential) for Viterra's IHB facility is an extra $0.40 per tonne on top of the freight rate for Viterra's OHB facility. For canola this charge is $2.35 per tonne. See: Viterra's 2020-21 Export Select rates for OHB.

[441] There is some discrepancy in the number of upcountry sites submitted by Viterra (as in section 4.1.1) and the sites listed in GTA's 2019-20 Location Differentials. Excluding sites Viterra does not intend to open for the 2020-21 season, GTA listed 14 upcountry sites (11 of which are owned Viterra) in the Mid and Upper North regions in their Location Differentials. However, in Viterra's list of alternate storage providers there are 18 upcountry sites in the Mid and Upper North regions (11 of which are owned by Viterra). As in section 4.1.1 the ACCC understands Viterra's list of upcountry storage sites to be more representative of the SA storage market.

[442] The Mid and Upper North regions are a part of the 'central' region used by AEGIC in figure 4.3.

[443] The 'Export Select and port costs' presented in table 4.1 considers the combination of Viterra's 2020-21 fees for: Recieval Fee (Major Wheat), Export Select Grouped Service fee and Viterra's 'Port Handling & Shipping Fee' (which differs by port). Viterra's Port Handling & Shipping Fee is described fully in Viterra's wheat reference prices document, which can be found here.

[444] See section A1 (Major Wheat) of: Viterra, Schedule A – Storage & Handling Charges 2020/21.

[445] See: http://viterra.com.au/index.php/export-select-freight-rates/, accessed 1 September 2020.

[446] See section C3 of: Viterra, *Schedule A – Storage & Handling Charges 2020/21.*

fees are considered, there are 9 upcountry sites that are economically advantaged to move grain to the OHB facility, and 5 to the Wallaroo facility.

The ACCC notes that the costs in table 4.1 are not representative of the total costs exporters face when using Viterra's network. Rather table 4.1 intends to show the *relative difference in fees* when comparing the cost of using Viterra's port terminal facilities. In practice, there are a variety of extra fees which exporters may face when using Viterra's services, including: at-port and/or upcountry storage fees, booking fees, vessel nomination/variation fees, and administration fees.[447]

Consequently, table 4.1 indicates that when also considering the relative efficiency of the port terminal services (in addition to freight costs), for most sites in the Mid and Upper North regions it is more economically efficient to export grain out of Viterra's OHB facility over Viterra's Wallaroo facility.

The ACCC notes that a range of other factors, such as available capacity and at port storage, will impact on the ability of grain in the Mid and Upper North regions to move to Viterra's IHB, OHB or Wallaroo facilities.[448]

As such, the ACCC's view is that grain from the Mid and Upper North regions likely falls within the Port Adelaide catchment area. The ACCC considers that the Wallaroo facility likely has a small freight advantage over the IHB and OHB facilities, both of which are able to receive grain via rail. However, as stated above, the ACCC considers that the freight advantage to the Wallaroo facility is likely larger when compared to Cargill's and Semaphore's facilities at Port Adelaide's IHB, neither of which can facilitate rail receivals.

Furthermore, the ACCC notes that because of the similar differential in freight costs, the efficiency of the facilities at Port Adelaide and Wallaroo will likely be relevant to decisions around which facility to export from. As discussed above, this is expected to result in Viterra's OHB facility having a slight cost advantage over its Wallaroo facility.

[447] Viterra's fees are set out in *Wheat Reference Prices – Port Terminal Services 2020/21*: http://viterra.com.au/wp-content/uploads/Viterra_1920-Season_Wheat-Reference-Prices.pdf

[448] For example, OHB only has 65,000 tonnes of at-port storage, so if grain is transported to Adelaide it may need to be stored at Viterra's IHB facility which has 366,500 tonnes of storage capacity.

Table 4.1: GTA location differentials (and selected supply chain fees) for storage sites in the Mid and Upper North regions to SA port terminal facilities

Site and site operator	Adelaide (OHB)	Port Giles	Wallaroo
GTA Location Differentials*			
Gladstone (Viterra)	17.91	-	16.28
Crystal Brook (Viterra and Cargill)	17.61	29.65	14.69
Snowtown (Viterra)	13.68	24.15	11.12
Bowmans (Viterra)	11.98	19.26	12.40
Saddleworth (Viterra)	13.68	-	23.33
Export Select and port costs**			
Gladstone (Viterra)	52.38	-	54.20
Crystal Brook (Viterra and Cargill)	52.08	64.82	52.61
Snowtown (Viterra)	48.15	59.32	49.04
Bowmans (Viterra)	46.45	54.43	50.32
Saddleworth (Viterra)	48.15	-	61.25

Source: GTA Location Differentials 2020/21; Viterra 2020/21 Export Select rates; and Viterra 2020-201 Storage & Handling Charges.

Notes: * As noted above GTA uses Viterra's Export Select freight rates to determine Location Differentials where available.

** The *'Export Select and port costs'* fees are comprised of the total Export Select Grouped Service fee (of which the Export Select freight rates are one component of), Viterra's upcountry recieval fee and Viterra's Port Handling & Shipping fee.

The above fees are not indicative of the total fees exporters will pay to export grain, and are only intended to show the relative differences in the efficiencies of Viterra's different port terminal services.

Yorke Peninsula

There is relatively limited upcountry storage on the Yorke Peninsula, with Viterra submitting there are 5 upcountry sites (2 of which are owned by Viterra).[449] However the ACCC notes that Viterra's Port Giles and Wallaroo facilities have a combined 1.27 million tonnes of storage capacity. This suggests that a relatively large proportion of grain grown on the Yorke Peninsula is delivered directly to port.

The GTA Location Differential figures in table 4.2 below also suggest that grain grown on the Yorke Peninsula has a significant freight advantage to Viterra's Port Giles and/or Wallaroo facilities, as compared to OHB (and other Port Adelaide port terminal facilities by extension).

[449] These sites are located at: Ardrossan (Viterra), Bute (Viterra), Kadina (AGT Foods), Kulpara (San Remo) and Maitland (AWB/Cargill). The ACCC, however notes that GTA has submitted there are 3 upcountry sites on the Yorke Peninsula (Ardrossan, Viterra; Bute, Viterra; Maitland, Viterra).

Furthermore, the ACCC notes that Viterra has indicated that in 2017-18 *[c-i-c]* of grain grown on the Yorke Peninsula was exported via its Wallaroo and Port Giles facilities,[450] further indicating that grain grown on the Yorke Peninsula is unlikely to move to Port Adelaide for export.

However the ACCC notes that large quantities of grain moved from the Yorke Peninsula to domestic markets on the east coast in response to recent drought conditions. For example, while PIRSA estimates that 1.2 million tonnes of grain was grown on the Yorke Peninsula in 2018-19, the ACCC notes that Viterra's Port Giles and Wallaroo facilities' combined export volume that year was only 410,000 tonnes. This suggests that most of the grain grown on the Yorke Peninsula in 2018-19 was not exported and it appears likely that the remaining grain largely moved east in response to the drought conditions. The ACCC also notes that the combined exports of Viterra's OHB and IHB facilities was 240,000 tonnes in 2018-19, suggesting it is unlikely that a significant quantity of grain from the Yorke Peninsula was instead exported from Port Adelaide.[451]

Given the above, the ACCC considers that, while grain from the Yorke Peninsula can move to alternate locations, this is likely to occur only in specific and unusual market conditions, such as the east coast drought. Consequently, the ACCC's view is that the port terminal facilities located at Port Adelaide provide limited competition for grain grown on the Yorke Peninsula.

Table 4.2: GTA's Location Differentials from Yorke Peninsula storage sites to SA port terminals

Site and site operator	Adelaide (OHB)	Port Giles	Wallaroo
Yorke Peninsula			
Ardrossan (Viterra)	18.96	9.25	10.95
Bute (Viterra)	17.97	20.93	9.63
Maitland (Cargill)	20.47	10.84	8.29
Port Giles (Viterra)	26.90	-	20.24
Wallaroo (Viterra)	22.64	20.24	-

Source: GTA 2020/21 Location Differentials; and Viterra 2020/21 Export Select rates.

Notes: As noted above GTA uses Viterra's Export Select freight rates to determine Location Differentials where available.

<u>Lower North</u>

Table 4.3 below sets out GTA's Location Differentials for various storage sites in the Lower North region.[452] As shown, areas within the Lower North have a significant freight advantage

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[450] Viterra, *Response to 14/11/19 information request – question 9 – catchment zones,* 13 January 2020, p. 4.

[451] Similarly, PIRSA estimated that 1.2 million tonnes was grown in the 2019-20 season, with Port Giles and Wallaroo combining to export 615,000 tonnes. Again, this suggests significant quantities of grain grown on the Yorke Peninsula was likely moved to the east coast in response to drought conditions. The ACCC also notes that Port Adelaide PTSPs combined to export 891,000 tonnes (58% below average), again suggesting it is unlikely that significant quantities of grain were moved from the Yorke Peninsula for export at Port Adelaide (given the significant freight advantage grain closer to Port Adelaide would be able to receive).

[452] In addition to the sites in table 4.3, which lists all storage sites in the Lower North per GTA's 2019-20 Location Differentials (minus Viterra's Mallala facility which Viterra did not open in the 2020-21 season), Viterra has submitted there is an additional upcountry storage site at Dublin (owned by Australian Grain Exports).

when delivering to port terminal facilities at Port Adelaide over the Wallaroo facility (and the Port Giles facility by extension). As such, the ACCC expects that grain from the Lower North region will move to export via port terminal facilities at Adelaide.

Furthermore, given the high Location Differential to move grain from IHB to Wallaroo (26.90, see table 4.3), it appears unlikely that grain located to the south east of Adelaide would move past the facilities at Port Adelaide to either Wallaroo or Port Giles for export.

Table 4.3: GTA Location Differentials from Lower North storage sites to SA port terminals

Site and site operator	Adelaide (OHB)	Port Giles	Wallaroo
Lower North			
Mallala (Cargill)	9.70	-	17.42
Inner Harbor (Viterra)*	2.35	-	26.90
Roseworthy (Viterra)	9.22	-	22.05

Source: GTA 2020/21 Location Differentials; and Viterra 2020/21 Export Select rates.

Notes: As noted above GTA uses Viterra's Export Select freight rates to determine Location Differentials where available.

* Canola only

Competition between south-east SA and Victoria

In relation to the interaction between catchment areas in SA and Victoria, Viterra has submitted that:

> *…Viterra is constrained by competition with port terminals in other states. This is particularly the case for grain grown in the eastern regions of South Australia—this grain is often exported through port terminals in Victoria.*[453]

Reflecting this, CRA has contended that any attempt by Glencore to reduce prices to growers in the Adelaide region will likely be unsuccessful due to the availability of alternate port terminal services, as well as the domestic and container markets:

> *Any attempt to reduce prices to producers near Port Adelaide will cause substantial substitution of volume towards ports in Victoria, which further reduces the incentive for Viterra to deny access to exporters that compete with Glencore Agriculture at its Port Adelaide terminals. The option of delivering wheat to domestic markets and containerized export terminals provides an additional constraint on Viterra pricing.*[454]

In relation to competition between the SA and Victoria markets, T-Ports has submitted that the competition Viterra faces is limited to the south eastern border and is relatively minor.[455]

The ACCC notes that Viterra operates 3 storage sites in Victoria: Werrimull, Walpeup and Dooen (see table 4.4), 2 of which are advantaged to OHB (Werrimull and Walpeup) and the

[453] Viterra, *Exemption Application 2019,* 2 July 2019, p. 14.

[454] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 11 November 2019, p. 19.

[455] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 3.

other to Portland (Dooen).[456] In addition GrainCorp operates 2 storage sites at Underbool and Murrayville that are freight advantaged to Viterra's OHB facility.[457]

Table 4.4 below presents a selection of SA and Victorian upcountry storage sites located near the SA-Victorian border (excluding Tailem Bend, which is located closer to Adelaide). As shown most upcountry storage sites in south-east SA do not have Location Differentials available for Victorian port facilities (or other SA ports). However, there are several Victorian upcountry storage sites which have Location Differentials available for both Viterra's OHB facility and Victorian port facilities, which likely give a better indication of potential catchment areas.

Table 4.4 shows that there is the potential for SA grain to move to Victorian port terminal facilities and, conversely, that there is also the potential for Victorian grain to move to port terminal facilities at Adelaide. For example grain stored at Frances (located in south east SA) is freight advantaged to Portland over OHB, while grain located at Werrimull (located in north-west Victoria) has a substantial freight advantage to OHB over Melbourne and Geelong. Specifically, table 4.4 indicates that grain near the northern SA-Victorian border is freight advantaged to Adelaide (Werrimull, Walpeup and Underbool storage sites), but grain located further south along the border is freight advantaged to Portland over Adelaide (Dooen, Lillimur and Frances storage sites).

Given the above, the ACCC considers that grain near the border of SA and Victoria can move into both the SA and Victorian bulk export markets, as well as the Victorian domestic and container markets. The opportunity to access these markets depends on the exact location of the grain, with more northern locations appearing to be economically advantaged to Adelaide, while southern locations appears to favour Portland.

In that respect the ACCC considers that grain growing regions stretching into northern Victoria (Murrayville, Underbool, Walpeup and Werrimull) provide substantial freight advantages to OHB and as such grain in this region is unlikely to move to Victorian port terminal facilities for bulk export.

However, there are some grain growing regions located in northern Victoria which provide a freight advantage to Victoria. For example, while grain from Lillimur is advantaged to OHB over both Geelong and Melbourne, it is further advantage to Portland. As such, grain from Lillimur may be moved to Portland for export rather than Port Adelaide. Conversely, the ACCC considers that growing regions located near the south of the Victorian and SA border provide significant freight advantages to Portland over Port Adelaide. As such grain in this region may not move to Port Adelaide for export.

[456] As per GTA's 2020-21 Location Differentials.

[457] As per GTA's 2020-21 Location Differentials.

Table 4.4: GTA's Location Differentials from South East SA and Victorian storage sites to SA and Victorian port terminals

Site and site operator	Adelaide (OHB)	Geelong	Melbourne	Portland
South east SA				
Bordertown (Viterra)	30.26	-	-	-
Frances (Viterra)	30.72	-	-	22.60
Pinnaroo (Cargill and Viterra)	28.17	56.30	57.10	-
Tailem Bend (Viterra)	15.26	-	-	-
Victoria				
Dooen (Viterra)	42.75	29.75	32	25
Lillimur (GrainCorp)	32.25	40.25	41.25	27.75
Murrayville (GrainCorp)	30.5	51.25	51	-
Underbool (GrainCorp)	34.25	46.50	45.50	-
Walpeup (Viterra)	35.50	45	43.75	-
Werrimull (Viterra)	37.29	54.25	54	-

Source: GTA 2020-21 Location Differentials; and Viterra 2020-21 Export Select rates.

Notes: As noted above GTA uses Viterra's Export Select freight rates to determine Location Differentials where available.

Port Pirie catchment area

In its exemption application ADM submitted that grain delivered to Port Pirie is traditionally exported through Port Adelaide.[458] Specifically, ADM provided figure 4.7 below which indicates ADM's expected catchment area for grain delivered to its Port Pirie site. As can be seen ADM expects to draw grain from SA's Upper North region.[459]

ADM also submitted that Port Pirie will offer logistical efficiencies for growers within the Port Pirie catchment area:

> [The Port Pirie] *supply chain provides farmers with logistical efficiencies. Farmers within the Port Pirie catchment zone can access the delivered port premium as opposed to having to freight grain larger distances to port.*[460]

[458] ADM, *Application for exemption port terminal (bulk wheat) code of conduct*, January 2021, p. 6. See footnote 10 for further details.

[459] The area ADM has submitted as their expected catchment zone stretches from north of Melrose, to Jamestown and down to Hope Gap.

[460] ADM, *Application for exemption port terminal (bulk wheat) code of conduct*, January 2021, p. 2. See footnote 10 for further details.

As stated above the ACCC considers that grain in the Upper North region could move to either Port Adelaide or Wallaroo. As such Port Pirie will likely compete for grain with facilities located at Wallaroo and Port Adelaide.

The ACCC also considers that ADM's Port Pirie facility will likely offer significant freight advantages to growers in the Upper North region compared to Port Adelaide and Wallaroo due to the shorter distances to Port Pirie.[461] However, the ACCC notes that it is unlikely that Port Pirie will have a freight advantage for growing regions in the Mid North, as all storage sites are located closer to Port Adelaide and/or Wallaroo than Port Pirie.[462]

However, as discussed above the ACCC considers that catchment areas are also dependent on the relative efficiency and/or capacity of the relevant port terminal facilities. As discussed in section 3.1.4 there are several limiting factors which could impact the level of competitive constraint that ADM's Port Pirie facility place on competing facilities at Wallaroo and Port Adelaide. In particular, and as per table 3.1, the ACCC notes that ADM's Port Pirie facility:

- is the shallowest bulk grain export port in SA, which limits the size of vessels it can accommodate;
- has the lowest ship loading rate and second lowest road receival rate in SA;
- has access to significantly less at-port storage than Viterra's facilities; and
- is likely to have significantly less capacity than competing Wallaroo and Port Adelaide terminals (see section 3.1).

The ACCC considers that the above noted limitations of the Port Pirie facility will affect the relative efficiency of the terminal and size of its catchment area, therefore limiting the competitive constraint the facility imposes on facilities at Wallaroo and Port Adelaide.

In addition, the ACCC does not consider Port Giles will compete for grain in the Mid and Upper North regions (see section 4.2.3). Furthermore, given Wallaroo is located closer to grain growing regions on the northern Yorke Peninsula and is likely a relatively more efficient port than Port Pirie, the ACCC considers it unlikely that ADM's facility will be able to source grain from the Yorke Peninsula in significant quantities.

Given the above, the ACCC's view is that it is reasonable to expect that ADM's Port Pirie facility will compete for grain grown in the Upper North region, which the ACCC considers overlaps with the catchment areas of competing Port Adelaide and Wallaroo facilities.

Noting the recent commencement of ADM's export operations at its Port Pirie facility, the ACCC will carefully monitor the effect of the facility on the competitive landscape in the Mid and Upper North regions.

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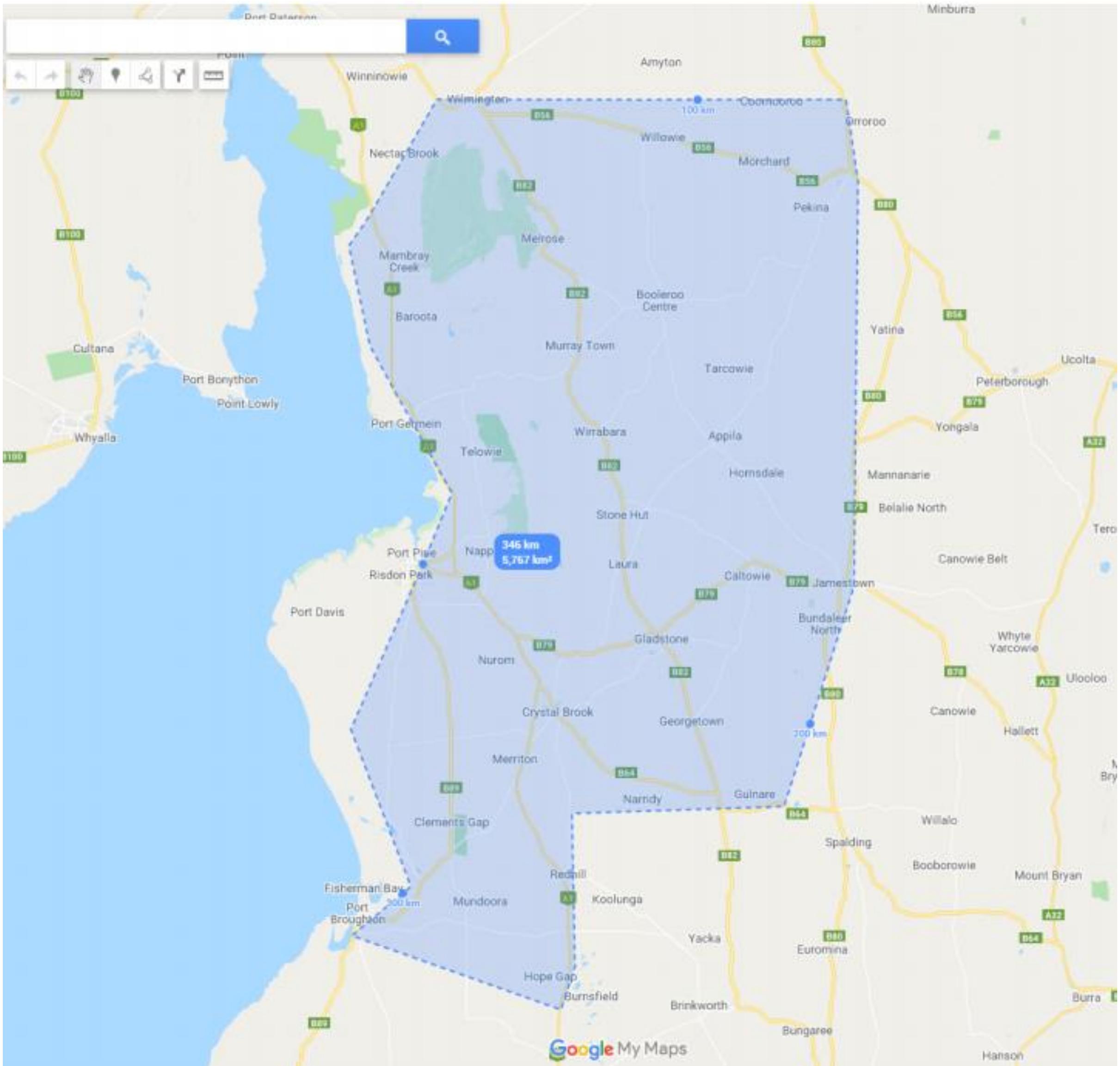
[461] ADM's Port Pirie facility is located significantly closer to all 6 upcountry sites which were operational in the 2020-21 season. By way of example Crystal Brook (where both Viterra and Cargill have upcountry sites) is 30km from Port Pirie, 90km from Wallaroo and 200km from Port Adelaide.

[462] Wallaroo is located closer to all Mid North upcountry sites operational during the 2020-21 season. By way of example Snowtown (the most northern Mid North site) and Bowmans are located: 79 and 132kms from Port Pirie respectively; 64 and 74kms from Wallaroo respectively; and 148 and 105km from Port Adelaide respectively. The ACCC also notes that Snowtown and Bowmans are rail advantaged sites, which the ACCC considers will give these sites a freight cost advantage to Viterra's IHB and OHB facilities. No other sites in the Mid North are rail access sites, however

Figure 4.7: ADM's expected catchment area for Port Pirie



Source: ADM application for exemption port terminal (bulk wheat) code of conduct, January 2021, p. 4.

ACCC view on eastern SA catchment areas

Consistent with the above analysis the ACCC considers that, amongst other factors, the location where grain is grown is relevant to its assessment of the port terminal that certain grain is economically advantaged to move to. The ACCC considers that port terminal facilities typically source grain from the regions set out below:

- **Adelaide:** The Adelaide region appears to encompass a large area that extends from the Mid and Upper North regions of SA down to the Victorian-SA border. It seems unlikely that grain from the Yorke Peninsula moves in large quantities to Adelaide for export.
- **Port Giles:** Port Giles appears to source the majority of its grain from the Yorke Peninsula.

- **Port Pirie:** It appears that Port Pirie will source the majority of its grain from the Upper North region.
- **Wallaroo:** Wallaroo's catchment area appears to extend from the Yorke Peninsula to the Upper and (to a lesser extent) Mid North regions, where it competes for grain with port terminal facilities at Adelaide.

Furthermore, the ACCC notes Viterra's statement 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.*[463]

The ACCC considers that catchment areas do not necessarily have fixed boundaries. Catchment areas can, at times, be relatively flexible and influenced by a range of factors, which themselves affect the profitability of a trade. However the ACCC considers that transport costs, and therefore distance to port, remain a materially relevant factor when deciding where to sell grain. The ACCC's view therefore is that catchment areas remain an important and relevant concept to the assessment of an exemption application under the Code.

The ACCC acknowledges that the 2018-19 and 2019-20 shipping years, where large quantities of grain were transported interstate from SA to meet domestic demand on the east coast, are prominent examples of situations where non-typical market conditions resulted in it becoming feasible for grain to move significantly beyond traditional catchment areas.

The ACCC also acknowledges that grain can move outside traditional catchment areas in more typical seasons in response to a variety of factors, such as capacity constraints at certain port terminal facilities. However, with the exception of circumstances where grain is located within 2 catchment areas, or close to alternate catchment areas, instances of grain moving outside traditional catchment areas are likely to limited to atypical market conditions.

4.3. Containerised exports and domestic demand

The ACCC considers the domestic and container markets are relevant to its consideration of the level of competition faced by bulk grain export port terminal facilities.

The ACCC notes that SA has the smallest domestic and container markets out of all states in Australia.

However, in its exemption applications Viterra stated that both the container and domestic markets impose a competitive constraint on Viterra:

> *Viterra considers that container grain exports compete with bulk grain exports, and therefore act as a competitive constraint to bulk grain port terminal service providers. In addition, the supply of grain to domestic customers is as a competitive constraint on bulk grain port terminal service providers.*[464]

In its response to the Draft Determinations Viterra restated its view that both the container and domestic market provide a competitive constraint on Viterra, noting that:

> *…[Viterra] also faces competitive threats from planned new entrants and from containerised competition and domestic demand, which has been a very significant constraint in recent years.*[465]

[463] Viterra, *Response to 14/11/19 information request 2020 - Question 9 – Catchment zones*, 13 January 2020, p. 5.

[464] Viterra, *Exemption Application 2019*, 2 July 2019, p. 32.

[465] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 10.

4.3.1. Containerised exports

Grain can be exported either in bulk or via containers. The ACCC understands that:

- container export markets allow growers and exporters to access international customers who demand high quality and niche grain products in relatively small volumes (compared to the bulk market);
- some international customers are unable to receive grain via bulk services due to limitations in port infrastructure or lack of finances, and so receive grain via container services; and
- exporters may also respond to price signals in the global container trade and bulk vessel markets.

As such, the ACCC does not consider the containerised grain exports to be a perfect substitute for bulk grain exports. However containerised exports may provide a viable alternative export path for some growing regions, niche and high quality products, or for particular destinations.[466]

SA has the smallest containerised grain exporter market in Australia. On average SA exports 436,000 tonnes of grain per annum via containers, which represents only 6% of SA's average grain production. This is below the 7% national average for grain exported via the container market. The ACCC notes that all container data presented in this chapter is over the time period 2016-17 to 2019-20.[467]

As shown below in table 4.5 the vast majority (95%) of containerised grain in SA is exported from Port Adelaide.

Table 4.5: Location of containerised exports out of SA, 2016-17 to 2019-20 (mt)

	2016-17	2017-18	2018-19	2019-20	Total
Port Adelaide	0.37	0.35	0.45	0.49	1.65
Port Giles	0	0	0	<0.01	<0.01
Port Lincoln	<0.01	<0.01	0.02	0.03	0.05
Thevenard	0	0	0	0	0
Wallaroo	0	0	0.01	0.01	0.02
Other SA ports	0	0	0	0.02	0.02
Grand total	**0.37**	**0.35**	**0.48**	**0.54**	**1.74**

Source: ACF, Export report.

Notes: The ACCC has considered container data over the 2016-17 to 2019-20 (see footnote 467).

[466] For further discussion of container activity see section 6.5 (titled '*Containerised exports also increased slightly*') in ACCC Bulk grain ports monitoring report 2019-20, pp. 37-39. (https://www.accc.gov.au/system/files/Bulk%20grain%20ports%20monitoring%20report%202019-20.pdf)

[467] The ACCC notes that the SA container data which was presented in the Draft Determinations included the 2014-15 and 2015-16 seasons. However, as above, the ACCC has not presented the 2014-15 and 2015-16 container data within this chapter. This is because it appears lentil container exports have not been included in the ACF's container dataset that the ACCC uses (lentils accounted for 41% of SA container exports over the 2016-17 to 2019-20 period). Consequently, the 2014-15 and 2015-16 seasons likely understate the total amount of grain exported in SA. Table 4.8 presents the commodity mix of grain exported out of SA. The ACCC also notes that on a national basis lentils account for 11% of total container exports (over the 2016-17 to 2019-20 time period).

In response to Viterra's exemption applications several stakeholders submitted that containerised exports provide a competitive constraint on Viterra's port terminal operations.

PGA of WA submitted that both container and domestic markets provide a competitive constraint on Viterra's operations:

> *Viterra is already subject to competition at Port Adelaide from containerised exports and a bulk ship-loader, but also to domestic grain movements from competitors' sites and directly from on-farm storages.*[468]

Similarly the SAFC submitted that containerised exports represent a competitive constraint and do not have capacity restrictions like bulk exports, though they acknowledged that containerised exports are available only out of Port Adelaide:

> *Containerised grain exports also offer an alternative export channel, with only location, not capacity restrictions (i.e. only available via Pt Adelaide only).*[469]

In contrast GPSA submitted that container exports provide only a limited constraint on Viterra:

> *GPSA does not support the assertion that the limited volume of grain exported in containers from South Australia presents a strong competitive constraint to bulk grain terminal services providers.*[470]

In his submission Mr Hill considered that containers have minimal bearing on bulk grain export access decisions.[471]

AGE also submitted that containers provide a limited constraint as part of its response to the Draft Determinations:

> *With respect to containers, we note:*
>
> - *Containers represent only a small amount of total exports even from the Adelaide catchment area 288kmt pa on a 5 year average*
> - *The majority of exports in containers from Adelaide are pulses. Outer harbour exports of pulses are insignificant, therefore containers are not in competition with that facility*
> - *Viterra themselves are a major packer of containers in Adelaide, to point to the Viterra container division as a constraint on Viterra bulk ports is not an argument.*[472]

T-Ports also considered that the container market is focussed on specific commodities and is not seen as a realistic alternative to the bulk export market:

> *The container export market seems to be concentrated on specific grains/grades into selected export destinations and not seen as a realistic alternative to bulk exports. The 22mt (maximum) that can be handled in a single 20ft TEU is no match to even the smaller bulk ships loading 30,000mt.*[473]

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[468] PGA of WA, *Submission in response to Issues Paper*, 3 September 2019, p. 1.

[469] SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 2.

[470] GPSA, *Submission in response to Issues Paper*, 27 September 2019, p. 4.

[471] Mr John Hill, *Submission in response to Draft Determinations*, 3 November 2020, p. 3.

[472] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 2.

[473] T-Ports, *Submission in response to Draft Determinations,* 17 November 2020, p. 2.

However, in its response to the Draft Determinations Viterra asserted that containers are becoming more common in SA and are a low cost alternate.[474] Viterra also stated that SA grain can be packed into containers for export from other states.[475]

The ACCC considers that containerised exports impose some competitive constraint on Viterra. However the ACCC agrees with the view of some stakeholders that the level of competitive constraint imposed by containerised exports is likely to be limited, and is also confined to the Port Adelaide region (see table 4.5).

The ACCC notes that of SA's total exports, on average only 8.1% of grain has been exported via containers since the 2016-17 season (see table 4.6 below).[476]

Table 4.6 shows a significant increase in the proportion of container usage for the 2018-19 and 2019-20 seasons. However, as shown in table 4.6 this is due to the significantly reduced bulk export volumes across SA (which fell by 57% from the 2017-18 season) as opposed to a large increase in container exports.

Table 4.6: Portion and volume of containerised and bulk exports in SA, 2016-17 to 2019-20

	Proportion of Bulk exports	Proportion of Container exports	Bulk (mt)	Container (mt)	Total (mt)
2016-17	95.6%	4.4%	8.06	0.37	8.43
2017-18	94.0%	6.0%	5.89	0.35	6.24
2018-19	84.3%	15.7%	2.54	0.48	3.02
2019-20	85.9%	14.1%	3.31	0.54	3.85
Avg (%)/Total (mt)	91.9%	8.1%	19.79	1.74	21.53

Source: PTSPs loading statements; ACF Shipping Stem and Market Share Reports; and ACF Export Reports.

As previously mentioned the vast majority of SA's containerised grain is exported out of Port Adelaide (95%). Consequently, containerised exports are considered against bulk exports from Viterra's IHB and OHB facilities as in table 4.7 below.

Table 4.7 shows that despite SA containerised exports almost exclusively coming out of Port Adelaide, they still appear to only represent a limited competitive constraint on Viterra's bulk export operations at Port Adelaide. Specifically, since the 2016-17 season IHB and OHB have, on average, combined to export 1.52 million tonnes of grain in bulk,[477] compared to an average of 0.41 million tonnes of (Port Adelaide) containerised exports

[474] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 22.

[475] Ibid, p. 68.

[476] This includes the drought affected 2018-19 and 2019-20 seasons, which had substantially reduced bulk exports, but relatively unaffected containerised exports (see table 4.6).

[477] Average bulk exports out of Port Adelaide over the 2011-12 to 2019-20 period were 2.13 million tonnes.

Table 4.7: Port Adelaide container exports compared to Viterra IHB and OHB bulk exports, 2016-17 to 2019-20.

	Portion of bulk exports	Portion of container exports	IHB and OHB bulk exports (mt)	Container exports (mt)	Total exports (mt)
2016-17	88.0%	12.0%	2.69	0.37	3.05
2017-18	87.2%	12.8%	2.36	0.35	2.71
2018-19	34.6%	65.4%	0.24	0.45	0.70
2019-20	62.2%	37.8%	0.80	0.49	1.28
Avg (%)/ Total (mt)	78.6%	21.4%	6.09	1.65	7.74

Source: PTSP loading statements; ACF Shipping Stem and Market Share Reports; and ACF Export Reports.

Notes: Table 4.7 does not include data from alternate Port Adelaide PTSPs.

In considering the competitive constraint imposed by container exports the ACCC notes AGE's comments that Viterra is a major packer of containers at Port Adelaide, and that this limits the competitive constraint imposed by container exports on Viterra at Port Adelaide.

Container data is typically presented on a port basis only, that is while the ACCC is aware of container exports from specific ports, it is not aware of any data which segregates container export data by packer.

Bulk and container grain exports also differ in the composition of commodities they export. The ACCC notes that this was raised in AGE's and T-Ports' submissions to the Draft Determinations (see above). As illustrated in table 4.8 there are significant differences in the composition of grain which is exported via bulk and container at Port Adelaide. Specifically, wheat, barley and canola account for 95% of Port Adelaide's bulk exports, but only 54% of containerised exports. Lentils are the largest grain exported via container at Port Adelaide (on average 0.17mt, which represents 42% of container exports), but are rarely exported via bulk services (on average 0.02mt, or 1% of bulk exports).

The ACCC considers that the difference in the composition of commodities exported reduces the competitive constraint that containers impose on the bulk market.

Table 4.8: Port Adelaide container and bulk exports by commodity, 2016-17 to 2019-20

	Bulk		Container	
Commodity	**Average Tonnage (mt)**	**Portion of exports (%)**	**Average Tonnage (mt)**	**Portion of exports (%)**
Wheat	1.00	53%	0.12	30%
Barley	0.65	35%	0.09	22%
Canola	0.13	7%	0.01	2%
Lentils	0.02	1%	0.17	42%
Other	0.08	4%	0.02	4%
Total (mt):	1.88	-	0.41	-

Source: PTSP loading statements; ACF Shipping Stem and Market Share Reports; and ACF Export Reports.

4.3.2. Domestic demand

The ACCC notes that domestic demand has the potential to affect the amount of grain that is available for export.

The ACCC understands that Australia's domestic markets are generally considered within the industry to have 'first call' on grain, with the amount of grain remaining after demand in domestic markets has been satisfied often referred to as the 'exportable surplus'.

The ACCC notes that the movement of grain to satisfy domestic demand is not regulated under the Code and that the domestic market likely offers a reliable and stable source of demand for grain. The ACCC notes that the stability of domestic demand indicates that domestic consumption is less sensitive to changes in market conditions (notably price) than export markets.

The supply of grain to the domestic market is also likely to involve lower supply chain costs (relative to export markets) making it a relatively attractive (but limited) option that generally leaves a surplus of grain to move to export markets. However supply side conditions, notably the growing conditions on the east coast (or elsewhere), can have a significant effect on the stability of domestic demand.

SA domestic consumption

SA has the lowest domestic demand for grain of any mainland Australian state (see figure 4.8 below).[478] On average SA consumes 1.2 million tonnes of grain per season domestically[479]. This represents 16% of SA's total production. In comparison at the national level Australia consumes 32% of the grain it produces.

The ACCC considers SA domestic consumption, which has varied between 1.11 million tonnes and 1.24 million tonnes per annum since 2014-15, to be relatively stable (see figure 4.8).

The ACCC does not have data on the specific regions in SA where grain is consumed. However, GPSA submitted that growers on the Eyre Peninsula have limited access to the domestic market:

> *…on the Eyre Peninsula, where Viterra is the sole port terminal operator servicing the region and growers have limited access to the domestic market.*[480]

In addition, ESCOSA in its 2018 inquiry also contended that the Eyre Peninsula is largely confined to the export market:

> *Further, eastern South Australia has limited access to the domestic bulk grain market whereas the Eyre Peninsula, given its location and an unconnected rail system, is largely confined to the export market.*[481]

Furthermore, the ACCC notes that most of the grain grown on the Eyre Peninsula is exported (2.13 million tonnes of the 2.42 million tonnes grown[482]). This suggests only a small amount of grain grown on the Eyre Peninsula is supplied to the SA domestic market.

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[478] ACF, Supply and Demand reports.

[479] ACCC, *Bulk grain ports monitoring report 2019-20*, March 2021, Appendix 1 – supplementary spreadsheet – tables and charts.

[480] GPSA, Submission in response to Issues Paper, 27 September 2019, pp. 3-4.

[481] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 43, fn. 136.

[482] PTSP loading statements; ACF Shipping stem and market share report; PIRSA, Crop and pasture reports – final summary and estimates, 2012-13 to 2019-20.

Consequently, the ACCC considers that the majority of domestic consumption in SA occurs within the east of the state.[483]

In its response to the Supplementary Issues Paper T-Ports submitted that SA has a relatively fixed volume of domestic demand, and that this does not provide a competitive constraint to the SA bulk export market:

> *T-Ports believes the domestic market / grain flows from South Australia are a relatively fixed volume, and do not provide a competitive constraint on South Australia's bulk export market to date nor in the longer term.*[484]

In the Draft Determinations the ACCC noted that domestic markets are generally considered within the industry to have 'first call' on grain, with the amount of grain remaining after demand in domestic markets has been satisfied often referred to as the 'exportable surplus'. It was also noted that a number of characteristics of the domestic market likely make it an attractive (but limited) option over export markets. As such the ACCC's view in the Draft Determinations was that the domestic market likely provides limited, though not non-existent, degree of constraint on the bulk export market.

In response to the Draft Determinations T-Ports reiterated its view that domestic competition does not constrain the bulk export market, adding:

> *T-Ports concurs with the ACCC understanding that Australia's domestic markets are generally considered within the industry to have 'first call' on grain, with the amount of grain remaining after demand in domestic markets has been satisfied often referred to as the 'exportable surplus'. This means that the domestic market does not provide a competitive [sic] on the bulk export market.*
>
> *As highlighted above, SA domestic has the 'first call' on supply (approx. 1.2M tonnes), and once satisfied, then the balance of supply becomes the exportable surplus. The domestic consumption places a volume constraint on available supply but no competitive constraint on Viterra's operations.*[485]

Furthermore, AGE submitted that the domestic market is too insignificant to have an impact on the bulk export market:

> *Domestic consumption in SA is insignificant to influence the export supply chain as we are always in an exportable surplus situation.*[486]

The ACCC notes the views expressed by T-Ports and AGE that SA domestic demand does not place a competitive constraint on the bulk export market. As previously noted, the ACCC understands that grain is typically considered to preference the domestic market in the first instance, with the remaining surplus then being available for export. However, consistent with the Draft Determinations the ACCC continues to consider that the presence of the SA domestic market likely imposes some degree of competitive constraint on the bulk export market. Given the small size of the SA domestic market (and lower sensitivity of domestic demand to grain prices than the export market), the level of competitive constraint is likely to be limited, and not expected to constrain all volumes of SA grain (given the large exportable surplus that typically exists in SA).

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[483] The ACCC considers that there is limited grain movement between the Eyre Peninsula and eastern SA (see section 4.2.2). It is therefore considered unlikely that grain from the east of the state will be exported from the Port Lincoln, Thevenard or Lucky Bay facilities.

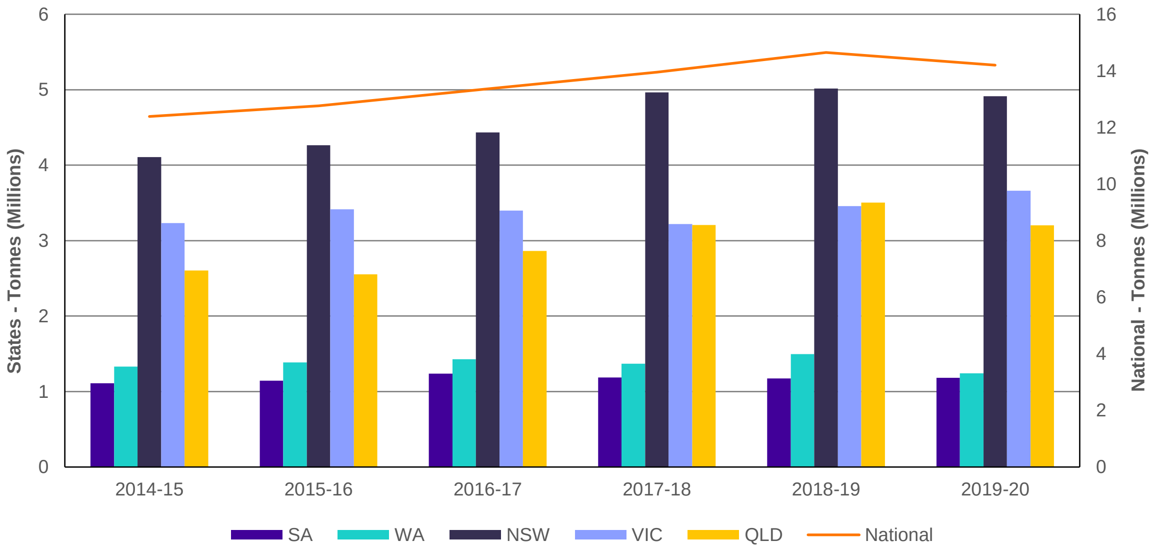
[484] T-Ports, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 3.

[485] T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

[486] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 2.

Additionally, the level of competitive constraint imposed in relation to the export of bulk grain may also depend on factors particular to the domestic demand, such as the level of demand for certain grain types and/or the substitutability of different grains.

Figure 4.8: Domestic grain consumption across Australia



Source: ACF, Supply and Demand report.

Interstate domestic consumption

In addition to domestic consumption in SA, domestic markets in other states have the potential to competitively constrain bulk export facilities in SA in certain circumstances. For example the recent east coast drought resulted in large volumes of grain moving towards the east coast from SA (and WA) via road and rail services as well as via coastal shipments. The resulting effect of the increased need for grain along the east coast provided a strong competitive constraint to the bulk export market during that time.

Viterra submitted that drought-related market conditions will become a more common occurrence due to the impact of climate change:

> *In 2018-19 and 2019-20, grain moved to the east coast in large quantities due to drought conditions. This is not a unique or "shock" market event. Droughts and climate-related events are becoming increasingly regular in Australia and it is likely that the domestic market will continue to be affected by these in the coming years.*[487]

Viterra also submitted that the drought has resulted in the establishment of supply chains with the east coast, which will mean grain is more readily able to move east in future seasons:

> *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.*[488]

In contrast, T-Ports submitted (to the ACCC's 2 Issues Papers that the 2018-19 season represented highly unusual market conditions, and that any new resulting supply chains do not reflect permanent market conditions:

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[487] Viterra, *Response to 14/11/19 information request 2020, Question 9 – Catchment Zones*, 13 January 2020, pp. 3-4.

[488] Viterra, *Further Supplementary Submission on Exemption Application 2020*, 11 March 2020, p. 10.

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.[489]

T-Ports does not believe the increase in domestic grain flows, and any resulting new supply chains, reflects a longer term trend in the market. 2018/19 was a response to a severe drought and production losses in Queensland and NSW.[490]

However SAFC considered that the possibility of future droughts, and their effects, is highly uncertain:

SAFC agrees with the ACCC analysis that 'it is unclear that the domestic grain flows that occurred in the recent shipping season can be viewed as reflecting a longer term trend.' While climate change suggests that droughts may become a more frequent occurrence, it is not possible to identify what the exact effects on domestic demand may be in any given year. In this season the eastern states were strongly affected and SA was not – in other droughts SA may be affected more than the eastern states; or both may be affected equally. Either of these scenarios would result in different domestic grain movements.[491]

In the Draft Determinations the ACCC considered that matters relating to future growing conditions and climate change are highly complex and that there is insufficient evidence that the 2018-2019 and 2019-20 seasons reflect longer term trends in domestic grain movements.[492]

In response to the Draft Determinations, Viterra reiterated its position that drought related events are increasingly common and that the established knowhow and relationships will make future sales of SA grain to east coast markets easier and more common in the future:

It is unclear how the ACCC can disregard the impacts of drought when they have been a historical regularity and it is considered that droughts and climate-related events are becoming increasingly regular in Australia. It is likely that the domestic market will continue to be affected by these in the coming years. The recent development of new logistics knowhow and relationships to move grain to the East Coast from South Australia means that sales from South Australia to the East Coast will be easier (and more common) in the future.[493]

In contrast, GPSA submitted grain moving to meet east coast domestic demand was a short term solution:

[East Coast grain movements] *resulted in South Australia's grain supply chain operating in non-traditional and short-term domestic markets to meet demand.*[494]

The ACCC considers that grain production across states significantly influences activity in the bulk grain shipment market. Further, and as noted above, the ACCC understands that Australia's domestic markets are generally considered within the industry to have 'first call' on grain, with the amount of remaining grain referred to as the 'exportable surplus'.

In regards to the 2018-19 and 2019-20 east coast grain movements, figure 4.9 below shows the grain production in NSW since the 2011-12 season (as well as forecasts for the 2020-21 season). As can be seen NSW produced substantially less grain in 2018-19 (3.60 million tonnes) and 2019-20 (3.45 million tonnes) compared to its average production (10.02 million

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[489] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 3.

[490] T-Ports, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 3.

[491] SAFC, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 2.

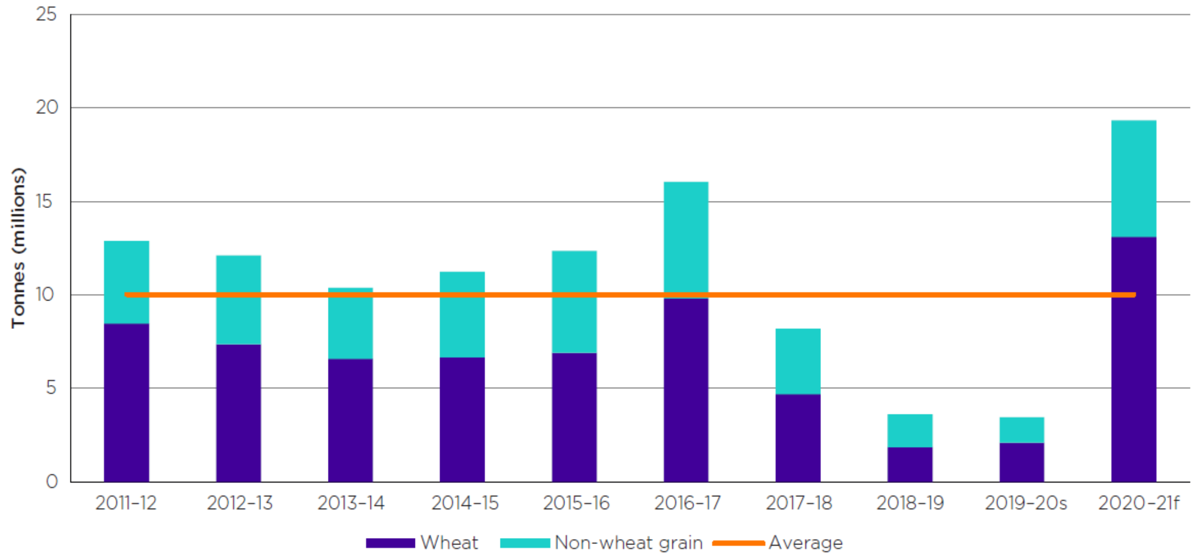
[492] ACCC, *Draft Determinations Viterra Operations Pty Ltd, Exemption assessments of port terminal services provided at the following port terminal facilities: Port Adelaide Inner Harbour, Port Adelaide Outer Harbor, Port Lincoln, Wallaroo, Port Giles, Thevenard*, 6 October 2020 p. 103.

[493] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 23.

[494] GPSA, *Submission in response to Draft Determinations*, 27 November 2020, p. 2.

tonnes) due to the drought. As per stakeholder comments above this resulted in significant volumes of grain being moved from SA and WA to the east coast (in particular NSW).

Figure 4.9: NSW annual grain production compared to 9 year average, 2011–12 to 2019–20, and 2020–21 forecast



Source: ABARES, State data underpinning: Australia crop report: February 2021 No. 197

Notes: s 2019-20 figures are ABARES estimates which are subject to revision. f 2020-21 figures are ABARES forecasts.

Figure 4.9 also shows that ABARES has predicted a 2020-21 harvest for NSW of 19.3 million tonnes of grain (14.7 million tonnes above NSW's average domestic demand). This is NSW's largest harvest since at least 1989-90.[495] ABARES have also predicted an improvement in Queensland growing conditions to an approximately average level with a harvest of 2.8 million tonnes (which is slightly below Queensland's average domestic demand of 3.0 million tonnes).[496] [497] This suggests that grain movements from SA to the east coast are unlikely to continue in significant volumes (if at all) into the 2020-21 season.

Furthermore, the ACCC notes that the last time NSW produced below 8 million tonnes of grain was in the 2007-08 season, where they produced 5.27 million tonnes.[498] [499] Additionally, the last time NSW had grain production lower than that of the 2018-19 and 2019-20 seasons (3.45 and 3.60 million tonnes respectively) was in 1994-95 (where just 1.98 million tonnes of grain was produced).[500]

However, as noted by ABARES there have been improvements in technology over time which have led to significant increases in farm productivity (suggesting previous low production years would produce greater quantities of grain now).[501] As per below ABARES

[495] ABARES do not provide production data before the 1989-90 season.

[496] The ACCC notes that the shortfall of grain in a state is dependent on the specific types of grain that are demanded, however overall state production and consumption of grain can still serve as a general indication of how much grain can be expected to be moved interstate to certain markets. Furthermore, the ACCC understands that due to Queensland's low wheat and barley production grain from NSW is usually delivered to Queensland to meet domestic consumption needs (even in typical seasons).

[497] ABARES, State data underpinning: Australia crop report: February 2021 No. 197.

[498] ABARES, State data underpinning: Australia crop report: February 2021 No. 197.

[499] NSW produced 8.36 and 8.18 million tonnes of grain in the 2009-10 and 2017-18 respectively. Source: ABARES, State data underpinning: Australia crop report: February 2021 No. 197.

[500] The ACCC notes that 4.06, 4.27 and 5.27 million tonnes of grain was produced in NSW in 2002-03, 2006-07 and 2007-08 respectively. Source: ABARES, State data underpinning: Australia crop report: February 2021 No. 197.

[501] ABARES, *Measuring drought risk: the exposure and sensitivity of Australian farms to drought*, November 2020, p. 5.

also note the drought farm risk has increased slightly over this period, though in the cropping sector farm drought risk has decreased due to technological improvements:

> *Over the period since 1988–89 improvements in technology and increases in farm scale have led to significant increases in average farm productivity and profitability. However, the results also show that farm drought risk has increased slightly over this period, driven in part by a trend towards greater cropping activity (a shift toward intensive crop farming and away from more diversified mixed cropping-livestock farm systems). In the cropping sector, farm drought risk has decreased in recent years, due largely to improvements in technology, along with some shifts in the location of cropping activity.*[502]

Consistent with the views expressed in the Draft Determinations, the ACCC continues to consider that matters relating to future growing conditions and climate change are complex and uncertain. Consequently the ACCC's view is that there is insufficient evidence at this time that the 2018-19 and 2019-20 seasons necessarily reflect a long-term trend in domestic grain movements.

Therefore, while noting droughts are not uncommon in Australia, at this time the ACCC is inclined to view recent east coast drought conditions (which resulted in large quantities of grain moving from SA to the east coast), while undoubtedly significant for those affected, to be a temporary event in the context of the SA grain market. As such, the related grain movements may not reflect a long-term trend in domestic grain flows, but rather reflect the poor growing conditions along the east coast.

Notwithstanding the above, the ACCC acknowledges that the drought has likely had some effect in relation to establishing and/or reinforcing supply chains between these markets. As such the ACCC considers that, in the event future droughts impact the east coast's ability to satisfy its own domestic demand, these supply chains will likely enable grain to move more easily between WA, SA and east coast markets than prior to the most recent drought.

In addition, the ACCC does not generally expect grain to move interstate in significant quantities to satisfy a state's domestic demand during seasons where that state is readily able to meet its own needs.

4.3.3. Total competitive constraint faced by Viterra

The ACCC acknowledges that Viterra's port terminal facilities face competition from a range of different sources. However the extent to which each of Viterra's facilities is competitively constrained differs across facilities.

Table 4.9 shows bulk grain shipments (by Viterra and alternative PTSPs),[503] container exports and domestic consumption as a proportion of the total SA grain production by season from 2016-17 to 2019-20. As shown, on average 63% of the grain grown in SA has been shipped through one of Viterra's port terminal facilities during this period (though the ACCC notes that large volumes of grain were moved inland from SA to the east coast in the 2018-19 and 2019-20 seasons).

The ACCC notes that 3 competing PTSPs operated in the SA market during the 2016-17 to 2019-20 period considered in table 4.9: LINX (formerly Patrick) who entered in 2015-16, Semaphore who entered in 2016-17, and T-Ports who entered in 2019-20. While LINX has

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[502] ABARES, *Measuring drought risk: the exposure and sensitivity of Australian farms to drought*, November 2020, p. 5.

[503] Coastal shipments are included in shipping figures in Table 4.9.

since exited the market, Cargill began performing bulk export operations in January 2021.[504] ADM also commenced its bulk export operation at Port Pirie in December 2020.[505] The recent entry of 3 PTSPs and exit of another is expected to increase the proportion of grain shipped by third parties. As such, while table 4.9 shows alternate PTSPs only shipped 5% of total SA production (over 2016-17 to 2019-20), this figure is likely to increase in the current and future seasons.

Table 4.9 also shows that SA domestic consumption and container exports account for a small but not insignificant proportion of SA's total grain production (22% combined).[506] As such, while expected to place some competitive constraint on Viterra's port terminal facilities, the extent of this constraint is likely to be limited (on a state level). However it is noted that the domestic market is generally considered to be a stable and attractive market. As such grain generally only becomes available for export via containers or in bulk once the domestic demand has been met. As such, the domestic market likely offers limited competitive constraint for the majority of grain in SA in practice (see section 4.3.2).

While the data in table 4.9 is presented on a state-wide basis for convenience the ACCC notes that, as discussed in section 4.3.1, containerised exports from SA come almost exclusively from Port Adelaide (95%).

The ACCC also notes that ESCOSA in its 2018 inquiry contended the Eyre Peninsula has a limited domestic market and is therefore largely reliant on the export market.[507] In addition GPSA submitted that the Eyre Peninsula is largely confined to the export market.[508] Consequently, the ACCC understands that most domestic consumption in SA is located in eastern SA.

The ACCC also notes that the percentage figures in table 4.9 do not add up to 100% for each shipping season. This is because the domestic consumption figures do not include grain that has been transferred interstate for domestic use. That is, the domestic consumption figures only include SA domestic consumption, and do not include grain grown in SA subsequently transported to the east coast via road or rail services. This is particularly relevant to the 2018-19 and 2019-20 seasons where bulk exports, containerised exports and SA domestic consumption accounted for only 80% of grain usage (with the remaining grain either being kept in storage or sent interstate). Grain may also be put in storage from one season to the next.

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[504] On 8 April 2020 LINX informed the ACCC that it would cease providing bulk grain export services out of Port Adelaide. Relevantly, the ACCC notes that LINX's only export customer, Cargill, announced that it would be entering the port terminal services market, and were determined an exempt status service provider on 2 July 2020. Cargill performed its first shipment in January 2021, and as of 31 March 2021 has facilitated 134,425 tonnes of shipments.

[505] As of 12 April 2021 ADM have facilitated 141,939 tonnes of shipments in the 2020-21 season.

[506] Table 4.9 records SA domestic consumption and container exports as 17% and 5% of production respectively. Due to rounding errors the sum of these markets comprise 21% of SA production.

[507] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 43, fn. 136.

[508] GPSA, *Submission in response to Issues Paper*, 27 September 2019, pp. 3-4.

Table 4.9: South Australia grain usage 2014-15 to 2019-20

	2016-17	2017-18	2018-19	2019-20	Average
Total production (mt)	10.63	7.01	5.48	5.99	7.28
Bulk shipments – Viterra	68%	77%	46%	52%	63%
Bulk shipments – alternate PTSPs	7%	7%	1%	4%	5%
SA Domestic consumption	12%	17%	21%	20%	16%
Container export	3%	5%	9%	9%	6%

Source: ABARES, State data underpinning: Australia crop report: February 2021 No. 197; PTSP loading statements; ACF Shipping Stem and Market Share Reports; ACF, Export Reports; and ACF, Supply and Demand Reports.

Notes: Percentages do not add up to 100% as grain may be: transferred interstate for domestic use (which is not captured in the above domestic row); and/or kept in storage for subsequent seasons.

Averages are recorded over the 2014-15 to 2019-20 period and so bulk export averages in table 4.9 may not align with other "average" figures in this document (which are typically recorded over the 2011-12 to 2019-20 time period).

Coastal shipments have been included in bulk shipment figures.

5. ACCC's exemption assessment of Viterra's South Australian port terminals

The ACCC's assessment of whether it should determine under subclause 5(2) of the Code that Viterra is an exempt service provider at none, some or all of its port terminal facilities is set out in this chapter.

In making a determination under subclause 5(2), subclause 5(3) provides that the ACCC must have regard to the following matters:

a) the legitimate business interests of the port terminal service provider;
b) the public interest, including the public interest in having competition in markets;
c) the interests of exporters who may require access to port terminal services;
d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;
e) the promotion of the economically efficient operation and use of the port terminal facility;
f) the promotion of efficient investment in port terminal facilities;
g) the promotion of competition in upstream and downstream markets;
h) whether the port terminal service provider is an exporter or an associated entity of an exporter;
i) whether there is already an exempt service provider within the grain catchment area for the port concerned;
j) any other matters the ACCC considers relevant.

The ACCC's assessment below is set out against the matters which the ACCC must have regard to in subclauses 5(3)(a) to (j) of the Code.

5.1. Port Adelaide Inner Harbour

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

Subclause 5(3)(a) of the Code requires the ACCC to have regard to the PTSP's legitimate business interests in deciding whether to grant an exemption.

The ACCC considers that an exemption will be in a PTSP's legitimate business interests when there are sound reasons why it is not necessary for the PTSP to be subject to all of the Code's obligations. For example, obligations in the Code intended to prevent a PTSP from exercising market power may not be necessary where competition already provides sufficient constraint on the PTSP's ability to exercise market power.

The ACCC considers when having regard to the legitimate business interests of the PTSP, the following may be relevant:

- the ongoing commercial viability of services provided from the relevant port terminal facility

- the likely impact that the application of Parts 3 to 6 of the Code may have on any investment decisions made by the PTSP

- the likely costs or impacts associated with the PTSP having to comply with Parts 3 to 6 of the Code and the impact of the PTSP incurring these costs

- the likely impact that the application of Parts 3 to 6 of the Code may have on the PTSP's ability to compete in the provision of port terminal services or other upstream and downstream markets.

The ACCC recognises that regulation imposes costs, both direct and indirect, on the regulated business. These costs also have the potential to affect the markets that the regulated business participates in, as well as in related upstream and downstream markets.

To the extent that compliance with the stricter obligations under Parts 3 to 6 of the Code results in such costs, the ACCC considers that this is appropriate to the extent necessary to ensure that the Code's purpose is achieved (i.e. ensuring that exporters of bulk wheat have fair and transparent access to port terminal services).

In circumstances where stricter regulation is unnecessary, such as where there is sufficient competition, it is appropriate and efficient to reduce those costs and the related restrictions on operational flexibility.

Viterra has submitted that an exemption from Parts 3 to 6 of the Code would be in its legitimate business interests as it would reduce the direct costs imposed on its operations:

> *An exemption from Parts 3 to 6 of the Code for Viterra's port terminals would result in its regulatory costs decreasing significantly. The resources reallocated to, and the costs of responding to, requests for information by the ACCC and other regulators since the Code was introduced are extensive. These regulatory requirements have also impeded the availability of key personnel during crucial operational times.*[509]

CRA submitted that:

> *The ACCC's oversight also imposes direct costs on Viterra and exporters. For example, it is our understanding that the direct costs to Viterra in relation to the [long term agreement] application and other parallel regulatory processes exceeded $800,000. The costs of compliance to Viterra in terms of personnel time that could have been devoted to running the business and other expenses would have added significantly to the total costs.*[510]

Viterra also submitted that there are significant indirect costs associated with complying with the Code, which places a burden on its operations and reduces flexibility:

> *The Code—and, in particular, the strict requirements to comply with highly prescriptive port loading protocols (PLPs)— prevent Viterra from being able to meet changing market conditions and to quickly adopt efficient and flexible practices that would help it, growers and exporters make longer term investments and customer commitments.*[511]
>
> *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*

[509] Viterra, *Exemption Application 2019*, 2 July 2019, pp. 1-2.

[510] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals,* 11 November 2019, p. 25.

[511] Viterra, *Further Supplementary submission on Exemption Application 2020*, 11 March 2020, p. 2.

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.[512]

Viterra also referenced a submission made by CBH, in response to the then Department of Agriculture and Water Resources' 2018 draft Code review report, which indicated that the delays associated with regulatory approval caused significant frustration and uncertainty for exporters seeking to buy WA grain for international sales.[513] CBH also stated that exemption from the full application of the Code had provided significant flexibility:

Once CBH was exempted from the Code and was no longer subject to a regulatory drawn-out approval process, the LTAs CBH subsequently negotiated created considerably enhanced access certainty and flexibility of service for export customers.[514]

Stakeholders who made submissions to the ACCC's initial Issues Papers had varying views on the operational flexibility afforded to Viterra:

- Cargill submitted that Viterra is currently afforded adequate flexibility in how it provides services under the Code.[515]
- GrainGrowers submitted that the Code plays an important role in relation to competition at ports and that applications for exemption need to provide evidence that the Code places an unfair burden on their operations.[516]
- GPA submitted that Viterra had not evidenced the impact on their legitimate business interests.[517]
- 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.[518]
- GPSA submitted concerns regarding the impact of the Code on SA's competitiveness, but also noted the lack of assurance around the conduct of Viterra absent full application of the Code as follows:

  The nature of the bulk wheat export industry means that the cost of any access difficulties as well as the direct costs of access will be borne by growers as reflected in the price received for their grain.[519]

  Viterra's past behaviour with respect to sharing efficiencies through fees does not provide confidence that any efficiencies (though none have yet been demonstrated) from exemption will be passed on through more competitive pricing, and by extension for the benefit of growers.[520]

- GPSA also indicated that it does not consider the Code to be an appropriate instrument for governing the grain export market.[521]

Stakeholders made further submissions in response to the Draft Determinations:

[512] Viterra, *Exemption Application 2019*, 2 July 2019, p. 21.

[513] Ibid.

[514] Ibid p. 23.

[515] Cargill, *Submission in response to Issues Paper*, 6 September 2019, p. 2-3.

[516] GrainGrowers, *Submission in response to Issues Paper*, 26 September 2019, p. 1.

[517] GPA, *Submission in response to Issues Paper*, 4 October 2019, p. 2.

[518] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 2.

[519] GPSA, *Submission in response to Issues Paper*, 27 September 2019, p. 6.

[520] Ibid p. 7.

[521] Ibid p. 5.

- GPSA submitted that reducing the costs of compliance should provide lower supply chain costs, however it also considered that any efficiencies were likely to be absorbed by Viterra.[522]
- GrainCorp submitted that exemption would provide "*flexibility to provide customers with customised solutions. Rigidity of additional regulatory requirements often leads to standardised services which limits the ability to meet the specific needs of the grain grower or customer.*"[523] GrainCorp also submitted that supply chain efficiencies may be optimised under an exemption.[524]

In relation to the direct costs of regulation, the ACCC recognises that the Code imposes costs on regulated businesses, and that non-exempt PTSPs likely face a higher level of compliance costs than exempt PTSPs.

The ACCC is not in a position to assess the direct (or indirect) costs Parts 3 to 6 the Code imposes upon Viterra (or any other PTSP) as specific costing was not submitted by Viterra or CRA.

In relation to the costs of the ACCC's 'oversight' more broadly, CRA submitted that the direct costs to Viterra in relation to the long-term agreement application and other parallel regulatory processes exceeded $800,000:

> *The ACCC's oversight also imposes direct costs on Viterra and exporters. For example, it is our understanding that the direct costs to Viterra in relation to the LTA application and other parallel regulatory processes exceeded $800,000. The costs of compliance to Viterra in terms of personnel time that could have been devoted to running the business and other expenses would have added significantly to the total costs. Furthermore, it took about one year for Viterra to obtain ACCC approval for its LTA protocols, which resulted in foregone efficiencies for at least one season.*[525]

CRA also submitted that "*to the extent that Viterra would avoid direct compliance costs and delay in implementation of efficient allocation practices in the future if its terminals were exempt from the Code, the benefits would likely be passed on through to producers through competition for the purchase of grain.*" [526]

The ACCC considers that, in general, the compliance costs faced by a large well-established PTSP with multiple facilities are likely to be proportionally lower than those faced by a smaller PTSP or a PTSP that has recently commenced operations (i.e. on a per port basis).

However, the ACCC accepts that the direct costs of compliance with the full Code are likely significant and that being granted an exemption from Parts 3 to 6 of the Code would substantially reduce a PTSP's direct costs of complying with the Code. The ACCC notes that prior to the Code's commencement the Department[527] provided the following estimates:

1. *The direct costs of complying with the former access test were estimated at between $500,000 and $700,000 per operator per year (DAWR, 2014). The mandatory code at its introduction was estimated to impose a lower direct cost of $360,000 per year for operators subject to the full provision of the Code and only $20,000 per year for exempt operators.*[528]

[522] GPSA, *Submission in response to Draft Determinations*, 27 November 2020, pp. 4-5.

[523] GrainCorp, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

[524] Ibid, p. 2.

[525] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals,*,11 November 2019 p. 25.

[526] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals,* 11 November 2019, p. 25.

[527] Then the Department of Agriculture and Water Resources, now the Department of Agriculture.

[528] AEGIC, *Australia's grain supply chains – costs, risks and opportunities,* October 2018, p. 35.

CRA submitted there are also broader economic benefits associated with having contractual flexibility without regulatory oversight.[529] For example the ability to choose the duration of a contract would allow upstream and downstream firms to increase certainty and reduce risk, will reinforce Viterra's ability to implement its current investment plans and also provide the necessary protections for Viterra to further invest in its supply chain.[530]

CRA also submitted that the non-discrimination provisions of the Code can (in many cases) prevent Viterra from negotiating discounts for certain services or agreeing to different forms of pricing (such as bundling of certain terminal services) with exporters:

> *…if an exporter seeks a discount for some terminal service from Viterra—perhaps to more effectively supply a customer or otherwise respond to a change in market conditions—then unless the discount is justified by a cost differential, Viterra must offer the discount to all other exporters if it also wants to grant the discount to Glencore Agriculture. Viterra may justifiably not wish to provide a competitive advantage to the exporter relative to Glencore Agriculture (Viterra's largest customer), while at the same time not want to lose revenue by offering the discount to other exporters for whom it may not be as important. The non-discrimination provisions of the Code may therefore be a disincentive for Viterra to provide the discount to the exporter in the first place, and the perverse result may be that some exporters pay higher prices than they would if price discrimination was not prohibited*. [531]

CRA submitted that if Viterra were exempted, there are some examples of capacity allocation practices Viterra could adopt, including:

- increasing the duration of capacity allocation contracts (when required by exporters) to periods longer than the rolling 2 year periods allowed for the existing PLPs.
- removing or reducing the existing short term capacity reserve (that requires Viterra to make at least 500,000 tonnes of capacity per quarter as short term capacity) and removing the capacity cap on initial long-term capacity bookings (of 40% percent at OHB and Port Lincoln during the January to June period, and 50% in all other cases);
- increased pricing flexibility and discounting. For example, a pricing structure that provides an incentive for the efficient use of capacity by providing increased flexibility for an exporter to move slots for a premium price and/or a discount for a firm capacity commitment;
- greater flexibility to offer additional capacity - Viterra would be able to allocate additional long and short term capacity to exporters more flexibly and efficiently, such as in response to changes in market circumstances or specific customer requests;
- greater ability to provide exporters with increased capacity tolerance (than the current +/-10%), as well as the ability to roll capacity between years; and
- providing increased flexibility for non-grain clients (such as Iluka and Gypsum Resources Australia[532] at Thevenard), including in relation to the scheduling of maintenance.[533]

CRA also indicated that it understands that Viterra could also consider more fundamental changes to its capacity allocation system (subject to negotiation with growers and exporters),

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[529] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals,* 11 November 2019, p. 23.

[530] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 11 November 2019, p. 29.

[531] Ibid p. 24.

[532] Gypsum Resources Australia, *Submission: Exempt Thevenard from the Port Terminal Access (Bulk Wheat) Code of Conduct Parts 3 to 6*, 5 September 2019

[533] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 11 November 2019, pp. 26-28.

such as a new category of capacity which is allocated to any (rather than a specific) Viterra port terminal facility.[534]

More broadly CRA also indicated that it considered the SA exporting sector to be more fragmented than in other states (where ports have been exempted from the Code) and that economies of scale in the exporting sector (which result from a range of factors such as vessel/shipment sizes and the fixed costs associated with certain services) mean that some smaller exporters in SA are likely inefficient and unable to survive absent mandated access.[535] CRA contend that:

> *When market forces determine which exporters receive terminal capacity, economies of scale in exporting can be fully realized, which reduces costs along the supply chain. In a competitive exporting market—which, as we explain below, the South Australian market is likely to be if Viterra terminals are exempted from the Code—the benefits of increased economies of scale are passed on to producers. Supply chain cost reductions are also likely to make South Australian exporters more competitive in export markets.*[536]

In addition to direct regulatory costs, the ACCC acknowledges that Parts 3 to 6 of the Code have the potential to reduce a PTSP's flexibility to respond to its customers, imposing indirect costs. The ACCC also considers that increased operational flexibility could also benefit other parties, particularly exporters, in circumstances where exporters are otherwise able to secure fair and transparent access to port terminal services.

The ACCC does note however that non-exempt PTSPs have the ability to set the terms and conditions on which they will provide access to services and the flexibility to change their approach either at their discretion or with ACCC approval. For example, non-exempt PTSPs are able to:

- define their own standard terms of access and prices for its services (i.e. the Code requires non-exempt PTSPs to publish their 'standard terms' and 'reference prices' and that the standard terms must include a dispute resolution mechanism but otherwise does not restrict how non-exempt PTSPs define their terms or set their prices)

- negotiate and agree to provide exporters with services on terms and conditions that are different to their published standard terms and reference prices (as long as these negotiations are consistent with the good faith, non-discrimination and no hindering obligations)

- vary their capacity allocation system (with ACCC approval).

This notwithstanding, the ACCC considers that as a non-exempt PTSP Viterra has a reasonable level of flexibility to set its prices, terms and conditions for access, and is also able to negotiate non-standard terms with different exporters.

As such, the ACCC considers that the indirect costs associated with compliance with Parts 3 to 6 of the Code primarily relate to the impacts on a PTSP's operational flexibility, and accepts that an exemption from Parts 3 to 6 of the Code can reasonably be expected to provide a PTSP with greater operational flexibility.

In considering the impact of Parts 3 to 6 of the Code on Viterra's operational flexibility, the ACCC notes that clause 27 of the Code allows Viterra to vary its capacity allocation

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[534] Ibid, p. 28.

[535] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals,* 11 November 2019, pp. 29-30.

[536] Ibid p. 30.

arrangements with ACCC approval.[537] The ACCC notes that Viterra has not sought to change its capacity allocation system since its initial approval in 2015. As quoted above, Viterra has submitted that amendments to its PLPs (including its capacity allocation system) are unlikely to be an adequate approach to addressing its concerns around flexibility.[538]

The ACCC acknowledges that securing variations to an existing capacity allocation system is unlikely to provide a PTSP with the same level of flexibility as an exemption. The ACCC also acknowledges that variations to a PTSP's capacity allocation system are unlikely to able to resolve all inflexibilities imposed by Parts 3 to 6 of the Code, and that seeking approval for changes to a capacity allocation system may also impose additional direct costs on the non-exempt PTSP.

As an exempt PTSP, the ACCC expects that Viterra would face reduced direct and indirect costs, largely as a result of having greater flexibility to make changes to its capacity allocation arrangements and operations more broadly. Viterra could also be expected to be able to engage more freely in direct commercial negotiations and tailor access agreements for certain customers.

The ACCC considers the removal of unnecessary regulatory obligations and costs to be in a PTSP's legitimate business interests. The ACCC also considers it is in a PTSP's legitimate business interests to promote the ongoing commercial viability of its business, and that this may involve efforts to reduce its regulatory compliance costs (or to not incur additional costs). Viterra, an associated entity of exporter Glencore Agriculture Pty Ltd,[539] has an incentive to minimise costs and maximise the use of its infrastructure for commercial reasons (and to provide a return to shareholders).

In addition, based on the material submitted by CRA it is unclear which changes Viterra may make to its capacity allocation arrangements. Viterra has also not submitted specifically on how it would, if granted an exemption, change a port's PLPs. Absent this information, in markets where there remains insufficient competitive alternatives or credible constraint it is the ACCC's view that changes to capacity allocation arrangements may risk hindering exporters' access to port terminal facilities and thereby affecting the overall level of competition in the market.

Further analysis of long term capacity allocations, including risks associated with how capacity is split between long and short term markets can be found in the ACCC's assessment of Viterra's long-term agreement capacity allocation variation application. [540]

In sum, the ACCC's view is that an exemption in respect of IHB is in the legitimate business interests of Viterra. However the ACCC considers that Viterra's legitimate business interests must be balanced against the level of competitive constraint faced by Viterra and the other matters the ACCC must have regard to in subclause 5(3) of the Code. This includes the interests of exporters who may require access to port terminal services, as well as the public interest.

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537 Subclause 27(1) of the Code provides that a PTSP may vary its PLP. However, variations to an approved capacity allocation system must be approved by the ACCC (subclause 27(2)).

538 Viterra, *Further Supplementary Submission on Exemption Application,* 11 March 2020, p. 2.

539 Viterra, *Exemption Application 2019*, 2 July 2019, p. 1.

540 The ACCC notes that several of the CRA proposals involve long term capacity or changes to the ratio of short and long term capacity offered. If adopted by Viterra such proposals like the reduction of short term capacity and the allocation of extended long-term agreements could benefit some exporters more than others based on their capacity to manage risk over the longer term. The ACCC assessment of Viterra's application for long-term agreements assessed in detail the benefits and risks of apportioning different amounts of capacity between long and short term allocations. In addition the decision considered the appropriateness of the length of long-term agreements. See: Viterra application seeking capacity allocation system approval Final decision, 3 December 2015, (https://www.accc.gov.au/system/files/ACCC%20final%20decision%20on%20Viterra%27s%20application%20to%20vary%20its%20capacity%20allocation%20system%20-%203%20December%202015_0.pdf).

ACCC view on Viterra's response to the Draft Determinations

As noted in section 2.1.1, in response to the ACCC's Draft Determinations Viterra submitted regarding its legitimate business interests that the ACCC must give greater weight to the benefits that Viterra securing greater operational flexibility via an exemption would have both for Viterra and its exporter customers. More specifically, Viterra submitted that:

- the ACCC must give due consideration to Viterra's legitimate business interests (including its interest in securing greater flexibility) and not relegate them to 'inferior' criteria[541]
- the ACCC must recognise that while non-exempt PTSPs such as Viterra have the ability to secure variations to ACCC-approved capacity allocation systems that would likely result in greater operational flexibilities and efficiencies, securing such variations is highly burdensome and impractical.[542]

The ACCC's consideration of Viterra's legitimate business interests

The ACCC considers that given the interrelated nature of the matters in subclause 5(3) of the Code the ACCC's views in relation to one of these matters may be relevant to its consideration of other matters. The ACCC does not consider that the concurrent presentation of views on related matters does (or in the context of the Draft Determinations did) preclude their individual consideration.

In response to the Draft Determinations Viterra submitted that:

> *It is important that the ACCC gives sufficient weight to Viterra's legitimate business interests when balancing the clause 5(3) criteria, particularly as Viterra's legitimate business interests in increasing operational flexibilities and efficiencies within the South Australian supply chain are also in the interests of growers, exporters and shipping companies.*[543]

> *It is important that the ACCC has regard to all the information provided to it and does not subjugate one or more of the exemption criteria to another. As the High Court has stated, where there is a range of criteria that the ACCC must have regard to, it cannot simply "ignore some of those factors or give them cursory consideration only in order to put them to one side". It is critical that the ACCC gives proper, genuine and realistic consideration to Viterra's legitimate business interests and not relegate this as inferior, or dependent on, other criteria that it considers.*[544]

> *It should not be the case that the ACCC focuses its analysis on a particular criterion, to the suppression of others.*[545]

The interrelated nature of the matters in subclause 5(3) is further discussed below.

The concurrent presentation of ACCC views on related subclause 5(3) matters

The ACCC notes that a number of the subclause 5(3) matters 'overlap' to some extent. For example, the ACCC considers that:

- the interests of exporters who may require access to port terminal services (subclause 5(3)(c)) includes an interest in having fair and transparent access to port terminal services (subclause 5(3)(d))

[541] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 42.

[542] Ibid, p. 43.

[543] Ibid, p. 42.

[544] Ibid, p. 3.

[545] Ibid, p. 36.

- exporters securing fair and transparent access to port terminal services (subclause 5(3)(d)) will likely promote efficient investment in port terminal facilities (subclause 5(3)(f)) and competition in relevant upstream and downstream markets (subclause 5(3)(g)).

The ACCC also considers that a PTSP's legitimate business interests need to be balanced against a number of other subclause 5(3) matters, most directly the other specific interests that the ACCC is required to consider. Unlike the examples of overlap noted above (subclauses 5(3)(c) and 5(3)(d), 5(3)(d) and 5(3)(g)), the ACCC does not consider that these interests will always be aligned and therefore requires the ACCC to balance these interests.

For example, the ACCC considers that the legitimate business interests of the PTSP (subclause 5(3)(a)) will not necessarily align with the public interest in having competition in having markets (sucbaluse 5(3)(b)) and the interests of exporters who may require access to port terminal services (subclause 5(3)(d)), if the PTSP is not subject to sufficient competition in the provision of port terminal services.

Where the ACCC considers that a PTSP is not subject to sufficient competition, the ACCC must weigh the interests of the PTSP reducing its regulatory costs and increasing its operational flexibility against the public interest, including the public interest in having competition in markets, and the interests of exporters who may require access to port terminal services. In balancing these interests the ACCC considers it appropriate to provide views as to why despite being in the specific PTSP's legitimate business interests, an exemption may not be appropriate.

ACCC views on a PTSP's ability to secure variations to its capacity allocation system and the potential benefits

The ACCC considers that:

- the variation of a capacity allocation system is a Code mechanism that provides an avenue by which a non-exempt PTSP can secure greater operational flexibility should market conditions warrant the change
- the duration of a variation process will depend on a range of factors including how extensive the proposed variations are and the level of industry concern
- securing ACCC approval for variations to a capacity allocation system is unlikely to provide a PTSP with the same level of flexibility as being granted an exemption, whether seeking a variation is appropriate is a matter for the individual non-exempt PTSP.

It should also be noted that a non-exempt PTSP is permitted to make a range of changes to its PLP without securing ACCC approval.

Practicality of a PTSP securing ACCC approval for variations to its capacity allocation system

Viterra submitted that the pathway to a non-exempt PTSP securing variations to its capacity allocation system is highly burdensome and impractical. Viterra submitted that:

> *…non-exempt PTSPs are not incentivised to change their PLPs because of the costly and unduly long time it takes to do this, which results in missed opportunities. This does not mean that the PTSP does not consider that certain changes would greatly benefit the efficiencies of its operations to the benefit of its customers, which is particularly the case for Viterra given the highly prescriptive nature of its PLPs.*[546]

[546] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 43.

The ACCC notes that since the Code's commencement in 2015 it has received one application to vary a capacity allocation system, with Viterra lodging an application to vary on 26 March 2015. The application proposed to replace an annual auction system (that included a 'first-in-first-served' process for capacity not allocated via auction) with a 'long-term agreement system that proposed to allow Viterra to enter into capacity agreements with exporters covering 5 years.

While Viterra's application was afforded broad in-principle support (partly due to industry's desire for certainty over access and partly due to dissatisfaction over the auction system) industry held strong and divergent views on the specifics of Viterra's proposal (including the 5 year timeframe). As an indication of the interest Viterra's application attracted, 12 public submissions were received in response to the ACCC's Issues Papers regarding Viterra's application a significantly higher level of interest when compared with other Code consultation processes.

The ACCC undertook a considered and comprehensive assessment of the proposal, including considering several variations. As outlined at the time with regard to the timeliness of the assessment process, Viterra formally lodged an initial proposal in March 2015 and made subsequent revisions in June, September, and November that year ahead of a final decision from the ACCC in December 2015.

Reflective of the complexity and significance of the decision the ACCC's July 2015 draft decision to not approve Viterra's proposal indicated several concerns with the June proposal, including that:

- Viterra would have considerable discretion in relation to the allocation of long-term capacity in the event of oversubscription and some exporters would likely not have been in a position to effectively negotiate for capacity.
- The proposed 5 year term for long-term agreement might effectively lock in a market structure dominated by the largest exporters for a significant period of time.

On 22 September 2015, Viterra lodged a revised set of protocols addressing key concerns raised in the ACCC's draft decision. Viterra then submitted further revised protocols on 10 November 2015 making a minor amendment to clarify its September protocols. The ACCC then released its final decision supporting the proposal in December 2015.[547]

The ACCC does not consider that all proposed variations to a PTSP's PLPs would necessarily involve variations as substantial and complex as the Viterra long-term agreement proposal. In addition the PTSP can vary certain aspects of its PLPs without the need for ACCC approval. While the ACCC has not received specific proposals from non-exempt PTSPs to vary existing capacity allocation systems (and therefore is not aware of what these proposals would entail), the ACCC anticipates that non-exempt PTSPs would want to address the flexibility and prescriptiveness of their capacity allocation systems. Proposed variations to PLPs that do not represent fundamental changes to existing capacity allocation systems would be less likely to attract significant industry concern and would likely entail an assessment process that is more limited in scope and shorter in duration.

[547] For further information see: https://www.accc.gov.au/regulated-infrastructure/wheat-export/viterra-2015

The extent to which an exemption would benefit Viterra's operational flexibility relative to ACCC approval of a variation to Viterra's PLPs

Viterra also submitted its concern that the Draft Determinations indicate that:

> *In its Draft Determination, the ACCC states that:*
>
> > *The ACCC accepts that the regulatory process for approving changes to the PLPs imposes a greater burden on Viterra than if it were exempted from the full application of the Code and was not required to have proposed changes to its PLPs approved by the ACCC. However the ACCC notes that **Viterra has not sought to change its capacity allocation system since its initial approval in 2015, and that Viterra is not required to change its PLPs in response to being made an exempt port terminal service provider at any of its facilities**.*
> >
> > *(Emphasis added)*
> >
> > *Viterra is concerned that the ACCC is suggesting that Viterra may not in fact need to change any aspects of the PLPs (as it has not sought to do so to date) and/or that Viterra could easily do so if necessary and, therefore, that an exemption may not benefit Viterra in this regard.*[548]

In response to these concerns the ACCC notes that the ACCC's comments regarding the potential for Viterra to apply to make changes to its capacity allocation system were not intended to suggest that:

- Viterra may (or may not) need to vary its current PLPs or whether such changes would (or would not) benefit Viterra. The ACCC considers that the need for such changes and the benefits that Viterra and alternate exporters would derive are matters for Viterra
- Viterra securing the ACCC's approval for variations to its capacity allocation system would provide it with the same level of operational flexibility that it would have if granted an exemption.

In sum, while securing the ACCC's approval for variations to Viterra's capacity allocation system would be unlikely to provide it with the same level of operational flexibility that it would have operating as an exempt service provider, the ACCC considers that the variation process represents an avenue via which Viterra can increase its operational flexibility.

ACCC view regarding Viterra's legitimate business interests

The ACCC considers that Viterra has a level of flexibility to manage its legitimate business interests in relation to its IHB facility under the existing regulatory arrangements.

However, in an environment where Viterra faces significant competition the increased flexibility resulting from an exemption is expected to allow Viterra to compete more vigorously, including through improved (i.e. more competitive) service offerings.

The ACCC notes that, in the presence of sufficient competition, the risks that such changes will hinder port access are mitigated and that there is potential for benefits to flow to other parties, such as third party exporters and growers.

While the level of competitive constraint faced by Viterra at its different facilitates varies, the ACCC considers that ADM's, Cargill's and Semaphore's facilities will impose a material level of competitive constraint on Viterra's IHB facility (as discussed below in more detail in relation to subclause 5(3)(d)).

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[548] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 43.

The ACCC also notes the competitive constraint imposed by the SA domestic and container markets, as well as from Victorian markets for certain regions of SA (as discussed below in more detail in relation to subclauses 5(3)(b) and 5(3)(g) of the Code).

The ACCC has also considered the effect that exempting some facilities and not others may have on Viterra's legitimate business interests. The ACCC acknowledges the potential for additional administrative and/or operational requirements as a result of Viterra having to manage facilities under different levels of regulation under the Code. However, the ACCC generally considers it reasonable to expect that the benefits of an exemption(s) at some facilities and not others would generally exceed the cost of any additional requirements arising from differing levels of regulation applying to their facilities.

As such, the ACCC's view is that an exemption in respect of IHB is in the legitimate business interests of Viterra.

(b) the public interest, including the public interest in having competition in markets; and (g) the promotion of competition in upstream and downstream markets

The ACCC considers that subclauses 5(3)(b) and (g) relate to the promotion of competition in markets, including the market for bulk grain port terminal services as well as for upstream, downstream and related markets.

Relevant upstream and downstream markets considered by the ACCC include: the international bulk grain export market (including how the Code impacts SA's competitiveness in this market); the grain acquisition market (where grain is acquired prior to being exported or on-sold); as well as the other markets discussed in chapter 4 (such as grain storage and handling services) and the transport of grain to port.

Related markets, such as container grain exports and domestic demand for grain, are also discussed in chapter 4.

The ACCC recognises the importance of the grain industry, in particular the grain export supply chain, to the SA economy (as per below).

As such, the ACCC considers the efficient operation of the bulk grain export supply chain, including the ability of exporters to obtain fair and transparent access to bulk grain export services, to be in the public interest.

Consistent with its consideration of this matter in previous exemption determinations, the ACCC considers the following factors are relevant when having regard to subclauses 5(3)(b) and (g):

- Whether there is sufficient competition in the market for bulk grain export port terminal services, such that the full application of the Code may not be required to promote competition for those services or in upstream and downstream markets.
- Whether reducing regulation will allow the PTSP to better compete in upstream or downstream markets such that it would also promote competition. This consideration overlaps with the ACCC's consideration of legitimate business interests (subclause 5(3)(a), discussed above).
- Whether there is sufficient competition in upstream and downstream markets such that there is a constraint on the exercise of market power in the provision of port terminal services in the absence of Parts 3 to 6 of the Code applying.

The competitiveness of SA's bulk grain exports

Viterra has submitted that the SA grain supply chain, including the grain export supply chain, is significant to the SA economy, and that the efficient operation of the supply chain is therefore in the public interest. Viterra considers that exemption/s would contribute to the efficient operation of the supply chain, and therefore is in the public interest:

> *Viterra considers that it is in the public interest for the ACCC to provide these exemptions. The grain industry is a significant contributor to the South Australian economy. The 2017/18 harvest produced 6.94 million tonnes of grain in South Australia worth an estimated $1.7 billion at the farm gate, with about 5.94 million tonnes (86% of the harvest) exported. The ability of growers to export their product is a significant contributor to the South Australian rural and regional economies, and is dependent upon efficiencies to cover narrowing margins in a global market which is highly competitive and price-sensitive. Therefore, ensuring the efficient operation of the South Australian grain supply chain is in the public interest.*[549]
>
> *An exemption from Parts 3 to 6 of the Code, and consequent reduction in potential regulatory distortions, will assist Viterra to engage commercially and more flexibly with third-party exporters. For example, Viterra would be better able to facilitate shipping slot trades as well as additions and changes to its shipping stem at short notice. This greater flexibility would enable Viterra to meet the different needs of its customers and therefore drive higher utilisation. This would facilitate the efficient allocation and use of port terminal infrastructure and the competitiveness of South Australian grain in global markets.*[550]

In response to the ACCC's Draft Determinations, Viterra further submitted that an exemption at each of its port terminals will improve SA's position in global grain markets:

- *As recognised by the ACCC, Viterra is a price taker in the global grain market. As such, Viterra is incentivised to operate an efficient supply chain, and passes through any improvements in efficiencies—whether they be in terms of quality or fee reductions, or investments back into the supply chain—to its customers. It follows that the operational benefits (including increased efficiency) that will ensue from an exemption at each of its port terminals will be of benefit to not only Viterra but also to other market participants. An exemption will therefore improve South Australia's position in the global grain market, to the benefit of all market participants*.[551]

GPSA submitted that Viterra's dominant position in the SA grain export supply chain, and SA's dependence on grain exports, is of direct relevance when considering the public interest:

> *An assessment of the public interest is critical to the determination of this application. GPSA submits that the public interest must be assessed with reference to grain producers based on two significant factors:*
>
> > *1. Viterra's dominant position in South Australia's export grain supply chain and its ability to trade into end-user markets, and*
> >
> > *2. South Australia's dependence on the export grain supply chain.*[552]

In response to the Draft Determinations, GPSA further submitted that:

> *South Australian grain producers have seen little evidence of mutual benefit from Viterra's efficiencies and consequential reduced costs,… there is no clear public interest or benefit that arises from conferring widespread exemption from the Code to Viterra/Glencore, especially given*

[549] Viterra, *Exemption Application 2019,* 2 July 2019, p. 6.

[550] Ibid, p. 2.

[551] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 3.

[552] GPSA, *Submission in response to Issues Paper*, 27 September 2019, p. 5.

> *that any efficiencies, on the one hand, are likely to be absorbed by Viterra/Glencore, and the costs of any lessening in competition will, on the other hand, be borne by growers.*[553]

In addition, GPA submitted that an exemption will be in the public interest only if returns are passed onto growers:

> *GPA argue once again that the public interest is this case should be purely whether or not granting an exemption will encourage innovation and reduce prices to growers thereby facilitating trade of grain.*[554]

Relatedly, concerns have also been raised in regard to the impact of the Code on SA's international export competitiveness. Viterra has submitted that it faces competition from other Australian states as well as from international markets:

> *The acquisition and trading of grain is undertaken globally, and South Australia, which accounts for less than 3% of global volume, is a price taker. South Australia face vigorous competition from other Australian states, Canada, the United States of America, France, Germany, Russia, Ukraine and Argentina to supply grain.*[555]

A number of stakeholders also submitted that the uneven application of the Code affects SA's competitiveness in global markets:

- SAFC submitted that while it understands the Code is intended to ensure there is no localised anti-competitive behaviour, it is perversely affecting SA's competitiveness against national and international markets.[556]
- GPSA submitted concerns regarding the impact of the Code on SA'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.[557]
- Mr Geoff Ryan (Strategic Site Committee Chair[558]) submitted that an exemption from the Code for Viterra would reduce regulatory compliance costs and therefore improve the competitiveness of SA in the global market. [559]

In response to the ACCC's Draft Determinations, Viterra submitted in relation to IHB that:

> *Viterra as a price taker in global grain markets is incentivised to operate an efficient supply chain, and passes through any improvements in efficiencies—whether they be in terms of quality or cost reductions—to its customers. It follows that the operational benefits (including increased efficiency) that will ensue from an exemption at IHB will be of benefit to not only Viterra, but also to other market participants. An exemption will therefore improve South Australia's position in the global grain market, to the benefit of all market participants.*[560]

The ACCC views issues relating to SA's competitiveness in the global grain market as relevant to its consideration of the public interest, as well as competition in upstream and downstream markets.

In considering the public interest, the ACCC acknowledges that the Code imposes costs on Viterra and that, by extension, there is the potential to affect the SA grain industry more

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553 GPSA*, Submission in response to Draft Determinations,* 27 November 2020, p. 5.

554 GPA, *Submission in response to Issues Paper,* 4 October 2019, p. 2.

555 Viterra, *Exemption Application 2019,* 2 July 2019, p. 4.

556 SAFC, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 1.

557 GPSA, *Submission in response to Issues Paper*, 27 September 2019, p. 5.

558 Strategic Site Committees have been established by Viterra to act as a communication point between growers and Viterra regarding issues in local areas: http://viterra.com.au/index.php/sscc/.

559 Mr Geoff Ryan, *Submission in response to Supplementary Issues Paper*, 18 June 2020, p. 1.

560 Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 65.

broadly. However the ACCC considers that any impacts need to be balanced against a range of other factors.

Viterra's incentive as a price taker in international grain markets

The ACCC notes that Viterra holds significant market power in upstream markets and could, in the absence of sufficient competitive constraints and/or appropriate regulation, provide favourable access to certain exporters. The ACCC considers that this has the potential to affect the ability of the SA grain industry (i.e. exporters and growers) to access international grain markets on a competitive basis. The ACCC notes that concerns regarding favourable access were raised in submissions by a number of stakeholders.[561]

As discussed in section 3.1.6, the ACCC accepts that Viterra (and the SA bulk grain industry more broadly) is a price taker in international markets. However the ACCC considers that, as an associated entity of an exporter (Glencore), Viterra faces commercial incentives to maximise its profit and to generate a return to shareholders. While SA (and by extension Viterra) may face significant competition (and have little to no market power) in international markets, this does not necessarily mean that Viterra does not have substantial market power at the port terminal service level within the SA supply chain. Market power at this level has the potential to be used to increase Viterra's profitability at the expense of other participants in the SA market.

The ACCC notes ESCOSA's view that it appears Viterra has chosen not to share supply chain efficiencies with industry participants and that Viterra's earnings are at the "…*upper end of what might be expected for a firm with Viterra's level of risk*".[562] In circumstances where Viterra (or any PTSP) is able to prevent cost savings being passed on to other industry participants, these industry participants may reduce their upstream investments, or may exit the market, and/or focus their operations in markets where cost savings are passed on by the PTSP. This has the potential to harm competition in both upstream and port terminal services markets, further reducing incentives to improve supply chain efficiency and potentially affecting SA's position in international grain markets.

In its response to the Draft Determinations Viterra submitted that the evidence shows that Viterra has passed on cost savings to other market participants as a result of global competition:

> *…contrary to the ACCC's suggestions, the evidence shows that Viterra does in fact pass on efficiencies to other market participants. In Viterra's view, this indicates that Viterra is incentivised to (and does) operate an efficient supply chain to compete on a global stage, and to pass through the benefits of efficiency gains to its customers.*[563]

Viterra submitted that ESCOSA's statement that they choose not to share efficiencies with industry, if it ever was accurate, is now incorrect.[564] In particular, Viterra submitted that its supply chain costs have fallen in recent seasons,[565] and that it has made a number of recent fee reductions.[566]

Viterra also submitted that it has passed on efficiencies in the form of quality improvements. Specifically, Viterra submitted it has:

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[561] AGE, Mr John Hill, Cargill, T-Ports, GPSA, GPA, and GrainGrowers all submitted that Viterra holds significant market power and has an incentive to discriminate in relation to access.

[562] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 4.

[563] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 11.

[564] Ibid, p. 46.

[565] Ibid, pp. 11-12.

[566] Ibid, p. 12.

- made a number of investments in recent years to ensure that grain passing through their system is of high quality, consistent and reliable (see section 2.1.1);[567] and
- invested over $223 million in its facilities over the last 6 years.[568]

The ACCC considers that investments to improve the quality of grain outturned by a PTSP, has the potential to enable its customers (i.e. exporters) to either access, or gain a competitive advantage, in markets which place a premium on grain with certain quality characteristics.

However, the ACCC continues to consider that while Viterra is a price-taker in international grain markets, it may have a degree of market power in the provision of port terminal services in SA. The absence of sufficient competitive constraint in SA may also result in Viterra: not having an incentive to pass cost savings through to other participants in the SA bulk grain export supply chain; increasing its charges for port services, which may ultimately affect the prices paid for grain in SA;[569] or, providing preferential treatment to itself, or its associated entity exporter compared to third party exporters.

Where Viterra has passed through supply chain efficiencies to other market participants, the ACCC considers this is most likely in response to competition from within the SA market. While the ACCC notes competition in SA has increased over recent seasons, the level of competition differs by region (see section 3.1.6).

As such, while acknowledging that the costs of business for PTSPs (or exporters and growers) have not been considered in detail as part of this assessment process, the ACCC considers that it is not clear that any cost savings will necessarily be passed on to other SA market participants in circumstances where Viterra retains significant market power at port.

Consequently, the ACCC's view is that, in the absence of sufficient competitive constraints, an exemption is unlikely to assist in improving SA's position in international bulk grain markets, when considering all industry participants. The ACCC's view of the level of competitive constraint Viterra's IHB facility is subject to is discussed in detail below.

Competition in bulk wheat export operations

The ACCC notes that there are currently 4 port terminal facilities located at Port Adelaide: 2 Viterra-owned facilities (the smaller IHB facility and the larger deep water OHB facility), and 2 alternate facilities (Cargill's Berth 20 Inner Harbour facility and Semaphore's Osborne facility).

In addition, the ACCC notes that ADM has recently begun bulk grain export operations out of its Port Pirie facility.[570] As per section 4.2 the ACCC considers PTSPs at Port Adelaide and Port Pirie will compete for grain in the Upper North region.

In response to the ACCC's Draft Determinations Viterra submitted that:

> *There is strong evidence that IHB is subject to competition in a global and regional context and, as recognised by ESCOSA, there is no evidence that Viterra has exercised any market power that it may have—including in regard to IHB or upcountry storage facilities that deliver grain to Port*

567 Ibid, p. 12.

568 Ibid, pp 12-13.

569 As submitted by T-Ports: ***"Without the existence of a competing PTSP serving the catchment zone, any unreasonable fees would simply be passed straight on to the growers in that catchment zone."*** See: T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 3.

570 ADM began bulk grain export operations in December 2020. As of 12 April 2021 ADM has loaded 141,939 tonnes of grain of export.

Adelaide—to the detriment of other market participants. Viterra has provided a significant amount of information to the ACCC which shows that:

• Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain, the benefits of which it has passed through to other market participants;

• IHB is constrained by competition within South Australia and, more locally, at Port Adelaide and Port Pirie, and is constrained by the credible threat of new entry, including re-entry by LINX at Port Adelaide; and

• Viterra's upcountry storage facilities are subject to competition and there is a real threat of new entry given the low barriers to entry.[571]

While the ACCC has previously recognised increasing competition between PTSPs at Port Adelaide,[572] overall the ACCC continues to view Viterra as the dominant PTSP for grain located within the Port Adelaide catchment area.[573]

The ACCC also considers it likely that Viterra will remain the dominant provider of port terminal services within the Port Adelaide catchment area for the foreseeable future: Viterra's port terminal facilities at Port Adelaide have significantly higher annual capacities than the alternate facilities, and Viterra is an associated entity of SA's largest exporter (Glencore).[574]

Given this relationship it appears highly unlikely that Glencore would transfer significant volumes of bulk grain exports to alternate PTSPs at Port Adelaide or Port Pirie.[575] In the absence of sufficient competitive constraints (or appropriate regulation) Viterra, as part of a vertically-integrated PTSP/exporter, has an incentive (and the ability) to discriminate in favour of Glencore over third party exporters at its IHB facility to the detriment of competition (particularly during peak periods, when capacity is more likely to be constrained and favourable grain prices are available in international markets).

In contrast the ACCC notes that Viterra's commercial incentives to maximise profits likely also provides an incentive to ensure significant throughput at its IHB facility. This is because high levels of throughput are typically needed to ensure the viability of large conventional port terminal facilities, which have relatively high fixed-costs when compared to facilities that use mobile ship loaders.

The ACCC's view is that Viterra's IHB facility is sufficiently competitively constrained to be granted an exemption from Parts 3 to 6 of the Code.

In forming this view, the ACCC considers it important to note that IHB faces competition from a number of sources (in addition to alternate PTSPs at Port Adelaide and Port Pirie). This includes containerised bulk grain exports and domestic demand for grain, as well as (to a lesser extent) competing PTSPs in Victoria.

[571] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 65.

[572] See: [ACCC final determination – Port Adelaide wheat code exemption assessment – Cargill Australia Limited.]

[573] The ACCC considers the Port Adelaide catchment area to include a large area that extends from the Mid and Upper North regions of SA down to the Victorian-SA border. The ACCC considers that grain from the Yorke Peninsula is unlikely to move in large quantities to Adelaide for bulk export.

[574] Average shipment figures at Port Adelaide excluding the 2018-19 and 2019-20 drought seasons are: IHB 720,000 tonnes, OHB 1.49mt, LINX 280,000 tonnes, and Semaphore 320,000 tonnes.

[575] Glencore has not performed any shipments from alternate SA PTSPs.

The ACCC's view is based on the analysis of the port terminal services markets presented in chapter 3, and the consideration of upcountry and related markets presented in chapter 4. These indicate the following:

IHB is competitively constrained by alternate PTSPs at Port Adelaide and Port Pirie

While the ACCC considers Viterra's IHB and OHB facilities to be significantly larger than alternate PTSPs at Port Adelaide and Port Pirie, the ACCC acknowledges that ADM's, Cargill's and Semaphore's facilities place a level of competitive constraint on Viterra's facilities.[576] However the level of constraint is limited by the comparative difference in the scale of operations. Since the 2016-17 season (i.e. the first shipping season both LINX[577] and Semaphore were operational at Port Adelaide) Viterra has performed 80% of all bulk export shipments out of Port Adelaide (25% from IHB, and 55% from OHB).

In addition, the extent to which mobile ship loader facilities provide a reliable and ongoing competitive constraint has been raised by stakeholders:[578] for example, recent events suggest that such operations are less likely to operate during low production seasons. However, the ACCC also acknowledges this may result in mobile ship loaders providing a form of flexible and responsive competition (see subclauses 5(3)(e) and (f)).

IHB is competitively constrained by Victorian markets in certain regions

The ACCC considers that Viterra's IHB facility also faces competitive constraints near the SA and Victorian border from markets in Victoria (e.g. container, domestic and bulk grain export markets). In forming this view the ACCC notes that GTA's Location Differentials (see table 4.4) indicate that grain can be economically advantaged to travel to facilities located in Victoria over facilities located at Port Adelaide. In particular, sites closer to the south of the Victorian and SA border appear to be advantaged to Victorian PTSPs, while sites on the northern border appear to be advantaged to Port Adelaide PTSPs. The ACCC also notes that T-Ports submitted that Viterra faces minor competition from Victorian PTSPs along the SA-Victorian border.[579]

IHB's catchment area overlaps with alternate PTSPs' catchment areas

Given that Viterra's IHB and OHB facilities as well as Cargill's and Semaphore's facilities are all located at Port Adelaide, the ACCC considers that these PTSPs can reasonably be expected to compete for grain within the same general catchment area. However the ACCC notes that catchment areas can be influenced by the mode of transport to port (amongst a range of other factors).

As noted in section 4.1.2 rail is generally considered more efficient than road when transporting grain located over 200 km from port. Given that Viterra's IHB facility is able to facilitate rail receivals, whereas ADM's, Cargill's and Semaphore's facilities can only receive grain via road,[580] the ACCC considers that IHB has an advantage in drawing grain located

[576] Both Cargill's and Semaphore's Port Adelaide facilities are exempt from Parts 3 to 6 of the Code. ADM has commenced bulk grain exports from Port Pirie in December 2020 and has submitted an application for exemption from Parts 3 to 6 of the Code in relation to this facility.

[577] Cargill was the only exporter which made use of LINX's port terminal facility since the operation began in the 2015-16 season. In light of the above, the ACCC does not expect the exit of LINX and entry of Cargill to affect market conditions to a significant extent. However, the ACCC does expect Cargill will likely impose a higher level of competitive constraint on Viterra's port terminal facilities than LINX previously did (due to its ability to load grain at a quicker rate than LINX's facility).

[578] GPSA, *Submission in response to Draft Determinations*, p. 2.

[579] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 3.

[580] The ACCC notes that while Cargill's port terminal facility is not able to facilitate grain receivals via rail services, its Crystal Brook upcountry site can receive and load grain using rail freight services.

further from port than ADM's, Cargill's or Semaphore's facilities.[581] Furthermore, despite the provision of road freight services typically being a competitive market, Viterra's tendering process may mean that relatively few road providers perform the majority of bulk grain services.[582]

In addition, the ACCC notes that ADM has also recently commenced bulk grain export services out of Port Pirie (in December 2020).[583] The ACCC considers ADM's Port Pirie facility will compete with Port Adelaide PTSPs for grain in the Upper North region (see section 4.2).

<u>IHB's infrastructure</u>

The ACCC considers that Viterra's IHB facility has several infrastructure advantages over competing PTSPs at Port Adelaide and Port Pirie:

- **At port-storage:** Viterra's IHB facility has a significant amount of at-port storage (366,500 tonnes) and is not reliant on a Just In Time process,[584] whereas ADM, Cargill and Semaphore have 80,000, zero and 16,500 tonnes of at-port storage respectively.[585] The ACCC therefore considers that IHB has greater flexibility in managing its operations compared to ADM's, Cargill's and Semaphore's facilities. There also appears to be potential for Viterra to use the storage at its IHB facility to support operations at its OHB facility (see section 3.1).

- **IHB's rail recieval facilities:** In addition to being able to receive grain via rail (which neither ADM's, Cargill's nor Semaphore's facilities are able to do),[586] the rate at which IHB can receive grain from rail receivals is higher than the rate at which Cargill's and Semaphore's facilities can receive grain via road receivals. As shown in table 3.1 IHB can receive grain via rail at 1,600 tonnes per hour, whereas ADM's, Cargill's and Semaphore's facilities can receive grain via road at 500, 1,000[587] and 375 tonnes per hour respectively.[588]

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[581] The ACCC acknowledges that catchment areas are potentially fluid and that grain can and will move to where it is most economically advantaged. However the ACCC continues to consider distance to be an important factor in determining the likely movement of grain.

[582] According to ESCOSA's *Inquiry into the SA Bulk Grain Export Supply Chain,* 2018, Viterra has consolidated the tender of road transportation contracts, and as of the time of the release of the report (2018) Viterra used 7 different road freight providers.

[583] See: https://www.admgrain.com.au/wp-content/uploads/2021/04/ADM-Shipping-Stem-12042021.pdf. Accessed 21 April 2021.

[584] Viterra, *Attachment 1 – Response to 14/11/19 information request 2020 – Questions 1 and 2 – Viterra port terminal facility features,* 13 February 2020.

[585] The ACCC notes that not all 'at-port storage' is necessarily located directly at-port. Storage located directly at port and connected to conveyor loading services is expected to provide a PTSP with the greatest level of operational flexibility. Storage located in relatively close proximity to port (but not directly at port) is similarly expected to provide a PTSP with greater flexibility the storage located a significant distance from port, In this regard, the ACCC notes that all of ADM's at-port storage is located 9 km from port and therefore grain needs to be transported a short distance via road services. The volume of at-port storage which can be loaded directly onto a vessel at Viterra's IHB facility is unclear. Viterra has submitted that 60,000 tonnes can be loaded directly onto the shipping conveyor, but with respect to the remaining 306,500 tonnes Viterra submitted that: *"some of [this] storage is connected to the shipping bins [and can be used to load grain directly onto a vessel], but is typically used to for long term storage, containers and/or domestic outturn."* See *Attachment 1 – Response to 14/11/19 information request – Questions 1 and 2 – Viterra port terminal facility features* for further details.

[586] See footnote 580.

[587] Cargill has submitted that while its loading rate is designed to intake at 1,000 tonnes per hour, due to operational reasons (truck availability and the absence of at-port storage) it expects to load grain to vessels at 400 tonnes per hour.

[588] The ACCC notes that Viterra's IHB and OHB facilities can both receive grain via road receival at a rate of 800 tonnes per hour.

IHB appears to be capacity constrained

As noted in section 3.2, there appears to be capacity constraints at Viterra's IHB facility during the peak period (see figure 3.4). The ACCC generally considers that a vertically integrated PTSP will have an incentive (and the ability) to discriminate between different exporters (including a PTSP's associated entity) in a way that is detrimental to the development of competition in circumstances when supply is constrained.

However, the ACCC notes that the presence of PTSPs at Port Adelaide (as well as Port Pirie and Victoria to a lesser extent), and the container and domestic markets (discussed below), likely serve to limit Viterra's incentive (and ability) to discriminate access in favour of its associated entity exporter. In the case Viterra was to provide discriminatory access, any negative impacts on exporters and growers would be limited by the opportunity for them to switch to alternates PTSPs.

Proposed port terminal facilities

The ACCC notes that T-Ports has proposed building a port terminal facility at Wallaroo.[589] This facility would compete most closely with Viterra's Wallaroo facility, though the catchment area of T-Ports' Wallaroo facility would likely overlap with that of PTSPs located at Port Adelaide to some extent. It is therefore likely the facility would compete for the same grain as Viterra's IHB facility (in certain regions).

The ACCC acknowledges that the threat of entry of additional facilities will impose a level of competitive constraint on Viterra, particularly to the extent that the threat of entry is credible and can be expected to compete with a particular Viterra facility (or facilities). Furthermore, the recent entry of alternate PTSPs likely indicates that the barriers to entry for low capital costs operations are not insurmountable for prospective entrants.

However, the ACCC notes that the recent entry of PTSPs may also serve to discourage further entry, to the extent that each successive entrant increases competition and lowers commercial viability for future entrants.

Consequently, the ACCC considers that the threat of entry by other PTSPs can be expected to place some level of constraint on Viterra (to the extent it is considered credible). However, the ACCC generally does not consider the threat of competition to be as effective as actual competition.

Proposed port terminal facilities are discussed further below in relation to subclauses 5(3)(e) and (f).

Competition in upstream and downstream markets

The ACCC has considered whether the level of competition in upcountry storage, handling, and transport markets might provide Viterra with market power. Absent the full application of the Code, the potential exists for a vertically integrated PTSP with market power to affect competition in the port terminal services market by, for example, limiting the ability of third party exporters to participate in upstream grain acquisition.

In addition to upstream and downstream markets, the ACCC has also considered the potential for related markets, such as container exports and domestic demand for grain, to affect the promotion of competition in bulk grain export port terminal services.

[589] The ACCC notes that given the Port Adelaide and Wallaroo catchment areas likely overlap (to some extent), T-Ports' proposed Wallaroo facility would likely compete for grain with Port Adelaide PTSPs (in certain regions).

Storage markets

As discussed in section 4.1, the ACCC's view is that the level of competition from third party upcountry storage sites differs by region, with more alternatives appearing to be available in the Port Adelaide region (see figure 4.1). Nonetheless, the ACCC notes that Viterra still likely owns the majority of grain storage in the Port Adelaide region.

As discussed in section 4.2 the ACCC considers the Port Adelaide catchment area likely encompasses a large region which stretches from the Lower, Mid and Upper North regions down to the Victorian and SA border:

- **Lower, Mid and Upper North regions:** the greatest number of third party upcountry storage sites are located in the Lower, Mid and Upper North regions, where Viterra operated 12 out of a total of 23 upcountry sites in these regions in the 2020-21 season. The ACCC notes that determining the extent to which third party storage sites are likely to competitively constrain Viterra's services is difficult to assess due to the lack of information around the size of non-Viterra sites. However the ACCC understands that most of these third party sites are relatively small compared to Viterra's facilities, and deliver predominantly to domestic and container markets.[590]

- **South-east SA:** Viterra likely owns the majority of storage in south-east SA. Viterra operated 13 out of a total of 18 sites for the 2020-21 season.

- **On-farm storage:** The ACCC understands that the majority of SA's estimated 1 million tonnes of on-farm storage[591] is located in eastern SA,[592] and is therefore expected to offer a competitive alternative to Viterra's upcountry network in this area.

In response to the ACCC's Draft Determinations, several stakeholders made submissions in relation to upcountry storage networks in grain acquisition markets and the effect on competition of bundling of upcountry and port terminal services.

GPSA submitted that the absence of an upcountry freight network places a significant impediment on a PTSP's operations (as shown from Inner Harbour operators):

> *Analysis of Inner Harbour PTSPs demonstrates that an efficient port and upcountry freight network is a fundamental precursor for securing grain to export in South Australia. When combined with small levels of at-port storage, the absence of an upcountry freight network places a significant impediment on the level of competition that Inner Harbour operators are able to provide, especially when compared to OHB.*[593]

AGE submitted that an upcountry network is intrinsically linked to the port it feeds, and Viterra has no comparative integrated supply chain in the Adelaide catchment area:

> *Viterra are the largest provider of upcountry services in the Adelaide catchment zone, by a very significant margin…The upcountry storage is intrinsically linked to the port it feeds. There is no comparative integrated supply chain of grain in the Adelaide zone, either for scope, for rail logistics, or for access for deep water.*[594]

AGE also expressed concerns regarding the bundling of services:

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

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

[592] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 24.

[593] GPSA, *Submission in response to Draft Determinations,* 27 November 2020, p. 3.

[594] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 1.

The bundling of services can have the effect of reducing costs, however reducing the cost in one aspect of the "bundle" (eg export select) while maintaining or increasing the cost in others is worrying. Little transparency over the methodology for the setting of export select rates is available.[595]

T-Ports submitted that while barriers to enter the upcountry storage market are lower than those associated with entering at port the margins earned are also lower, and that outside of T-Ports' development of storage at Lock there has been no significant recent developments in the storage market:

While the up-country storage market has a lower barrier to entry (lower Capex) than port operations market, the margins earned from such facilities are also lower. Other than T-Ports own development of storage at Lock to support our Port loading operations, there has not been noticeably significant recent developments from third parties in that market nor on-farm storage. T-Ports agree with the ACCC observations:

> *"…The ACCC notes that ESCOSA has indicated that most of the above-noted third party storage providers are relatively small in scale, and that many of them serve the domestic and container export markets. The ACCC understands that third party storage operators may also service particular markets and production processes. As such, they may not provide a storage facility for the purpose of grain warehousing or accumulation for the export market."*[596]

However CRA submitted that the ACCC's conclusion that Viterra has significant upcountry market power (which has the potential to affect fair and transparent access at port) is inconsistent with the view that barriers to entry are low:

…the ACCC again concludes that "there is the potential for Viterra's dominant position upcountry to affect competition and impact the ability of third party exporters to gain fair and transparent access at port." The ACCC arrives at these draft findings even though it acknowledges that "barriers to small scale entry into the upcountry storage market are likely relatively low."

However, it is CRA's view that the ACCC's analysis of upcountry competition—specifically its conclusion that Viterra has upcountry market power—is inconsistent with its view that barriers to entry upcountry are low.[597]

Similarly, Viterra submitted that competitor storage capacity represented more than 41.3% of the 2017-18 harvest,[598] and that:

The evidence clearly shows that Viterra's upcountry storage sites can be (and are) bypassed by producers and exporters (either by using third party storage facilities or on-farm storage) in respect of a substantial proportion of annual grain production in South Australia, a fact made clear by deliveries to, for example, Cargill's, ADM's and T-Ports' facilities. Further, even if the ACCC considered that competition was currently limited in South Australia or a particular region, the evidence clearly shows that barriers to entry are low and Viterra has not exercised any hypothetical market power to the detriment of its customers to date.[599]

The ACCC considers that the barriers to entry into the storage market are higher for a new entrant seeking to establish a network of storage facilities that are connected to a port terminal facility. The ACCC also notes the bundled nature of Viterra's Export Select service reinforces barriers to entry upcountry for new entrants, who are seeking to compete in storage and handling services for export destined grain.

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595 Ibid, p. 4.

596 T-Ports*, Submission in response to Draft Determinations*, 17 November 2020, p. 2.

597 Charles River Associates, *CRA Comments on the ACCC's Draft Determinations Regarding Code Exemption for Viterra Grain Export* Terminals, 21 December 2020, p. 9-10.

598 Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 24.

599 Ibid, p. 27.

As such, the ACCC considers it reasonable to expect that where Viterra has a dominant presence both at port and in upcountry markets these services likely interact with one another, given the interconnected nature of these markets within the supply chain.[600] The extensive nature of Viterra's network can reasonably be expected to enable Viterra to achieve operational efficiencies (i.e. economies of scale) and service offerings that are likely beyond smaller entrants.[601]

The ACCC also notes that the recent entry of T-Ports upcountry potentially indicates that entry into the upcountry storage market is more feasible when associated with a port terminal facility. In addition, ADM's and Cargill's entry at port (Cargill will make use of its existing SA GrainFlow upcountry sites) could also indicate that entry into the port terminal services market is more feasible with the existence of an upcountry storage network.

In relation to Viterra's IHB facility, the ACCC, as above, acknowledges there appears to be credible alternative storage options for grain grown within the Port Adelaide catchment area. However Viterra still appears to provide the majority of storage in this area, and the ACCC considers it is possible that Viterra's more extensive upcountry network could be leveraged to restrict the ability of third party exporters to secure fair and transparent access at port. Such restrictions could be through limiting third party exporters' ability at Export Select Only sites to trade and outturn grain as they could at alternate storage sites.

Domestic markets

The ACCC considers that PTSPs are competitively constrained by the domestic market. While the ACCC does not have detailed data on where grain is processed or consumed within a state, the ACCC notes that SA as a whole has the smallest domestic market of any mainland state in Australia (at 1.2 million tonnes of grain per annum).[602]

However, as discussed in section 4.3.2, the ACCC understands that SA's domestic consumption is largely located within the east of the state. The ACCC also understands that the majority of grain grown on the Yorke Peninsula is exported through either Port Giles or Wallaroo (see section 4.2).

Therefore the ACCC considers SA's domestic market primarily draws grain from the same catchment area as Viterra's IHB (and OHB) facilities.

The ACCC notes that SA's domestic consumption has been fairly constant since the 2014-15 season.[603] The domestic market generally offers a reliable and stable source of demand for grain, and typically involves lower supply chain costs (relative to export markets), making it a relatively attractive (but limited) market. As such grain typically moves to the export market once domestic market opportunities have been met.

The ACCC also notes that, as demonstrated by the poor growing conditions along the east coast in recent seasons, grain can move in large quantities to meet domestic demand in other states in response to certain market conditions.[604]

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[600] The ACCC considers Viterra's presence in upcountry storage markets differs by region (see section 4.1.1).

[601] For example, the ability to segregate and/or blend grain are important elements of the bulk grain supply chain, and these are likely more effectively (or efficiently) achieved within an established network of larger sites (than at smaller storage sites that are not part of an integrated network).

[602] ACCC, *Bulk grain ports monitoring report 2019-20*, March 2021, Appendix 1 – supplementary spreadsheet – tables and charts.

[603] SA domestic consumption has varied between 1.11 and 1.24 million tonnes per annum since the 2014-15 season.

[604] The ACCC does not receive data on inland grain movements. The ACCC notes that Viterra's IHB facility did not perform any coastal shipments over the 2017-18 to 2019-20 seasons (OHB performed 0.08 million tonnes of coastal shipments over this period).

T-Ports submitted that it concurs with the ACCC's Draft Determinations that the domestic markets generally have 'first call' on grain, which T-Ports considers means the domestic market does not provide a competitive constraint on the bulk export market:

> *T-Ports concurs with the ACCC understanding that Australia's domestic markets are generally considered within the industry to have 'first call' on grain, with the amount of grain remaining after demand in the domestic market has been satisfied often referred to as the 'exportable surplus'. This means that the domestic market does not provide a competitive [constraint] [sic] on the bulk export market.*
>
> *The container export market seems to be concentrated on specific grains/grades into selected export destinations and not seen as a realistic alternative to bulk exports.*[605]

AGE submitted that domestic consumption is too insignificant to influence the export supply chain:

> *Domestic consumption in SA is insignificant to influence the export supply chain as we are always in an exportable surplus situation.*[606]

The ACCC notes AGE's and T-Ports views that the domestic market has 'first call' on grain, and that the domestic market is too insignificant to influence export markets.

The ACCC notes that the level of competitive constraint imposed on the export of bulk grain may depend on a range of factors particular to the domestic demand, such as the level of demand for certain grain types and/or the substitutability of different grain types.[607]

This notwithstanding, the ACCC's view is that the domestic market places some degree of competitive constraint on the bulk export market. While the ACCC considers the level of the competitive constraint imposed is limited in practice, the ACCC considers the domestic market still offers an attractive (but limited) market for a relatively stable amount of grain.

As SA's domestic market appears to be primarily located within the Port Adelaide catchment area, the ACCC expects it will place a (limited) degree of competitive constraint on Viterra's IHB (and OHB) facilities.

Container markets

PTSPs located at Port Adelaide also face a level of competitive constraint from the container market, with 95% of SA's containerised grain exports having been loaded at Port Adelaide since the 2016-17 season. However the volume of containerised grain exports in SA (and therefore Port Adelaide) is relatively small, with only 0.41 million tonnes of grain being exported on average from Port Adelaide since the 2016-17 season. This is significantly below the total average bulk exports of 1.88 million tonnes over this same period (with IHB and OHB accounting for 0.48 and 1.04 million tonnes respectively).[608]

Table 5.1 below summarises the total amount of grain that has been exported, via bulk and containers, from Port Adelaide, between the 2016-17 and 2019-20 seasons. The ACCC notes the 2016-17 season was the first shipping year both LINX and Semaphore were

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605 T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

606 AGE, *Submission in response to Draft Determinations*, 23 November 2020 p. 2.

607 For example the domestic feed market typically demands lower protein wheat than the overseas milling market (which typically requires high protein wheat).

608 Average Port Adelaide bulk exports over 2011-12 to 2019-20 were 2.13 million tonnes.

operational, and therefore is more reflective of the current market than seasons prior to this time period.[609]

However, the ACCC does note that the 2018-19 and 2019-20 seasons represented atypical market conditions in SA (and Port Adelaide) due to significant quantities of grain being transported inland to the east coast (see section 4.3.2). As such, the average bulk grain exports presented in table 5.1 likely understates the level of future Port Adelaide bulk grain exports (noting that ADM's entry at Port Pirie will likely draw a small amount of grain away from Port Adelaide PTSPs.)[610]

Table 5.1: Bulk and container exports out of Port Adelaide, 2016-17 to 2019-20

	2016-17	2017-18	2018-19	2019-20	Average (mt)	Average (%)
Viterra IHB	0.87	0.73	0.07	0.27	0.48	21%
Viterra OHB	1.82	1.64	0.17	0.53	1.04	45%
Port Adelaide LINX	0.42	0.24	0.00	0.00	0.16	7%
Port Adelaide Semaphore	0.37	0.27	0.03	0.09	0.19	8%
Container exports	0.37	0.35	0.45	0.49	0.41	18%
Grand Total	3.84	3.22	0.73	1.38	2.29	100%

Source: PTSP loading statements; ACF Shipping Stem and Market Share Reports; and ACF Export Reports.

Notes: 2016-17 was the first season there were 2 alternate Port Adelaide PTSP's to compete with Viterra's IHB and OHB facilities.

The ACCC notes that bulk and container grain exports also differ in the composition of commodities they export. The ACCC notes that this was raised in AGE's and T-Ports' submissions to the Draft Determinations (see section 2.2).[611] As illustrated in table 5.2 below there are significant differences in the composition of grain which is exported in bulk and in containers from Port Adelaide. Specifically, wheat, barley and canola account for 95% of bulk exports, but only 54% of containerised exports. Lentils are the largest grain exported via container (on average 0.17mt, which represents 42% of container exports), but are rarely exported via bulk services (on average 0.02mt, or 1% of bulk exports).

The ACCC considers that the difference in the composition of commodities exported (i.e. that wheat, barley and canola make up 95% of bulk grain exports, but 54% of container exports) serves to limit the competitive constraint that containers impose on the bulk wheat export market.

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609 As per section 4.3.1 the ACCC presents SA containerised data over the 2016-17 to 2019-20 period. The ACCC understands that the ACF did not include lentil export data prior to the 2016-17 season.

610 The ACCC also notes that several relevant changes to the PTSP market have recently occurred: (1) LINX has exited the Port Adelaide bulk grain export market; (2) Cargill has entered the Port Adelaide bulk grain export market, as per section 3.1.4 the ACCC notes that Cargill was LINX's only customer, and as such the ACCC expects Cargill to perform a similar (but slightly higher) level of exports than LINX"s facility; and (3) ADM has entered the bulk grain export market at Port Pirie and will likely compete for grain with Port Adelaide PTSPs in the Upper North region of SA (see section 3.1.4).

611 See AGE and T-Ports submissions in response to the Draft Determinations

Table 5.2: Port Adelaide bulk and container exports by commodity, 2016-17 to 2019-20

	Bulk		Container	
Commodity	**Average Tonnage (mt)**	**Portion of exports (%)**	**Average Tonnage (mt)**	**Portion of exports (%)**
Wheat	1.00	53%	0.12	30%
Barley	0.65	35%	0.09	22%
Canola	0.13	7%	0.01	2%
Lentils	0.02	1%	0.17	42%
Other	0.08	4%	0.02	4%
Total (mt):	1.88	-	0.41	-

Source: PTSP loading statements; ACF Shipping Stem and Market Share Reports; and ACF Export Reports.

In considering the competitive constraint imposed by container exports the ACCC notes AGE's comments that Viterra is a major packer of containers at Port Adelaide.[612] The ACCC considers this limits the competitive constraint imposed by container exports on Viterra's bulk export facilities at Port Adelaide.[613]

The ACCC also notes that containerised grain exports may also not a provide a direct substitute for bulk grain exports as certain destinations may prefer particular grain types or grades of grain more suited to containers: for example, the export of wheat in containers is generally more heavily weighted towards South-East Asia than bulk wheat exports.[614]

Given the above the ACCC considers that, as SA container exports are predominantly located at Port Adelaide, the constraint they impose on the bulk export market is primarily limited to PTSPs located at Port Adelaide. However, the ACCC considers the constraint imposed from the container export market on Viterra's IHB (and OHB) facilities to be limited because:

- the Port Adelaide container market is significantly smaller than the Port Adelaide bulk export market;
- the Port Adelaide bulk export and container export markets differ in the types of commodities they export;
- Viterra is a packer of containers out of Port Adelaide; and
- it appears that container exports may only provide a viable alternative export path for some growing regions, niche and high quality products, or for particular destinations in practice.

Consequently, the ACCC considers that the competitive constraint imposed by SA's (and Port Adelaide's) relatively small container export market on Viterra's IHB (and OHB) facilities is likely to be limited.

[612] AGE, *Submission in response to Draft Determination*, 23 November 2020, p. 2.
[613] The ACCC notes container data is presented on a port only basis. As such, the ACCC is aware of container exports from specific ports, however the ACCC is not aware of container exports segregated by packer.
[614] AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 28.

Conclusion

The ACCC notes the likelihood of capacity constraints at IHB, and that Viterra appears to own the majority of upcountry storage in the Port Adelaide region (though there does appear to be credible storage alternatives in the Lower, Mid and Upper North regions).

The ACCC acknowledges that the recent introduction of alternative PTSPs has increased incentives for prospective third party storage and handling providers to enter the supply chain with their potential customers (i.e. exporters) having the opportunity to access the bulk export market via a larger number of PTSPs. Additionally, Cargill's storage and port terminal facilities offer a competing integrated supply chain to Viterra's IHB (and OHB) facility.

The ACCC considers that Viterra's IHB facility faces competitive constraints from a variety of sources:

- the combination of ADM's, Cargill's and Semaphore's facilities are likely to impose a material level of competitive constraint on IHB;
- Victorian PTSPs (as well as Victorian domestic and container markets) are likely to impose a competitive constraint from growers in certain regions of the Port Adelaide catchment area;
- the SA container market, while small, is located almost exclusively at Port Adelaide and likely provides a limited competitive constraint; and
- the SA domestic market likely provides a limited competitive constraint (in particular the ACCC understands SA's domestic market while small, is largely located within the Port Adelaide catchment area).

In light of the above, the ACCC's view is that, there is sufficient competitive constraint on Viterra's IHB facility such that competition at port and upcountry will likely be maintained if an exemption is granted to Viterra in relation to this facility. The ACCC considers this relevant to subclauses 5(3)(b) and (g) of the Code.

While the ACCC considers that it is not clear that granting an exemption to Viterra in respect of its IHB facility would necessarily promote a significant increase in competition in the port terminal services markets and in upstream or downstream markets, the ACCC does not expect an exemption to be detrimental to competition in these markets.

Given the above the ACCC's view is that exempting Viterra from Parts 3 to 6 of the Code in relation to its IHB facility is likely to be in the public interest, and unlikely to be detrimental to competition in upstream and downstream markets.

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

In deciding whether to exempt a PTSP, subclause 5(3)(c) of the Code requires the ACCC to have regard to the interests of exporters who may require access to port terminal services.

The ACCC generally considers that granting an exemption will not be detrimental to the interests of exporters requiring access to port terminal services if exporters can continue to access port terminal services on a fair and transparent basis and therefore compete on their relative merits.

In forming its views the ACCC has therefore considered the relative bargaining power of exporters, as was well as exporters' access to IHB and alternative port terminal facilities.

Support for smaller exporters under the Code

The ACCC notes that CRA contends on behalf of Viterra that the Code potentially focusses too heavily on the interests of individual smaller exporters and potential new entrants, to the detriment of competition:

> *As a preliminary matter, in exercising its oversight over Viterra's capacity allocation protocols, the ACCC has emphasized equal non-discriminatory access, especially for smaller exporters and potential new entrants. It is virtually universally agreed by antitrust enforcers and regulators that the appropriate focus of competition law and access regulation is the protection of competition, not individual competitors. By protecting individual competitors—in this case, smaller competing exporters and potential entrants who may not be efficient—the ACCC potentially harms producers of grain by preventing efficient contracting and the efficient configuration of the industry.*[615]

CRA also submitted that exemptions will allow for the defragmentation of the trading segment so that economies of scale (such as in relation to vessel sizing and sales commitments) can be fully realized, reducing costs along the supply chain:

> *…the exporting sector in South Australia is more fragmented relative to other States where ports are exempt from the Code. Because of economies in scale in exporting, some smaller exporters in South Australia are likely to be inefficient and may not survive in a competitive market without mandated 'fair' access to capacity at non-exempt terminals, which is likely to be the reason why they are much less prevalent in States where terminals are exempt. Inefficient exporters who may lose some market share or not survive if exemptions are granted are likely the smaller exporters…*
>
> *… The largest exporters in South Australia—Glencore Agriculture, CBH, Cargill, ADM, and Bunge—are sophisticated and have large global operations, and are likely to continue operations if Viterra's port terminals are exempted. They will continue to compete to purchase wheat from South Australian producers, and it is likely that some smaller efficient exporters will continue to thrive and possibly expand in an unregulated market…*
>
> *…When market forces determine which exporters receive terminal capacity, economies of scale in exporting can be fully realized, which reduces costs along the supply chain. In a competitive exporting market—which, as we explain below, the South Australian market is likely to be if Viterra terminals are exempted from the Code—the benefits of increased economies of scale are passed on to producers. Supply chain cost reductions are also likely to make South Australian exporters more competitive in export markets.* [616]

In its response to the ACCC's Draft Determinations Viterra submitted that the ACCC appears to have adopted an overly protectionist approach to its assessment:

> *Viterra is concerned that the ACCC has adopted an overly protectionist approach to its overall assessment of whether to grant the exemptions. By doing so, it relies on potential speculative risks to support its position without regard to the fact that there is no evidence to demonstrate the likelihood that such risks would in fact eventuate (with the evidence actually pointing to the opposite outcome)*
>
> *In particular, the ACCC seems intent on protecting small exporters regardless of their efficiency or competitiveness, relying on the fact that clause 2 of the Code states that the purpose of the 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". However, this stated purpose must be considered in conjunction with each of the exemption criteria and the Explanatory Statement to the Code.*[617]

[615] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 11 November 2019, pp. 29 - 30.

[616] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 11 November 2019, p. 23.

[617] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 5.

Viterra also submitted that it would be contrary to the fundamental principles of competition law if the ACCC protected smaller exporters in the interests of “fairness” at the expense of efficient competition.[618]

The ACCC does not consider that, as submitted by Viterra and CRA, it has taken an overly protectionist approach (or relied on speculative risks) in undertaking its assessment of Viterra’s exemption applications.

The Code provides protections to exporters to ensure they are able to access a PTSP’s port terminal services on fair and transparent terms. In the absence of regulation under Parts 3 to 6 of the Code, and/or sufficient competitive alternatives, the ACCC considers that exporters (particularly smaller or entering exporters) may have difficulty accessing the level of port terminal services they would otherwise have been able to obtain in a competitive market (particularly in circumstances where these services are primarily supplied by a dominant vertically integrated PTSP). The ACCC notes that in practice, while certain third party exporters may have a limited presence in relation to SA bulk grain, they are often related to large multi-national companies. As such, when referring to the size of an exporter the ACCC is referring to the size of an exporter’s presence in the SA market: specifically the volume of exports.

The ACCC’s exemption decisions are based on its consideration of market conditions as required by subclause 5(3) of the Code. The ACCC notes that there is a variety of market conditions which can reduce a PTSP’s incentive, or ability, to use its market power to the detriment of the competitive process absent the constraint imposed by regulation under Parts 3 to 6 of the Code.

Where a vertically-integrated PTSP is subject to sufficient competition, it may continue to have incentives to discriminate, or favour, but it will be constrained in its ability to do so (and any negative impacts on exporters and growers will be limited by the opportunity for them to switch to alternate PTSPs). The potential that market power will be exercised to the detriment of competition increases when the constraint imposed by sufficient competition is not present. While appropriate regulation can provide an alternate constraint on the use of market power in such circumstances, underlying incentives are likely to remain. As such a PTSP’s conduct while complying with regulatory obligations under the full Code is unlikely to provide a robust indicator of future conduct once the PTSP is exempted from Parts 3 to 6 of the Code.

The ACCC therefore considers it appropriate to have regard to the current market(s), and (in particular) the likely effect(s) of an exemption (i.e. a future market in which the relevant PTSP is not prevented from discriminating or hindering an exporter’s access to its port terminal services under the Code) when assessing the case for exemption.

The ACCC also recognises that it is not possible to ensure particular market outcomes following an exemption decision. However the ACCC has relied on contemporaneous information (including that provided by Viterra and stakeholders) to assess the level of competition and incentives Viterra currently faces, and can reasonably be expected to face in the future (including the incentive to provide fair and transparent access to its port terminal services). Informed by this information and analysis, the ACCC has considered and balanced the matters set out under subclause 5(3) of the Code, including Viterra’s legitimate business interests.

The ACCC does not seek to protect smaller exporters at the expense of competition or efficiency, nor does it have a view on the optimal size or number of exporters in the SA bulk grain market. While the ACCC acknowledges the possibility that the Code could allow for

[618] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 5.

inefficient exporters to secure access, the ACCC notes that such exporters would still have to compete for grain with other exporters. Should certain exporters only be able to secure access as a result of the Code, those exporters will only be able to compete in the SA market in the long-term to the extent they are able to compete with other exporters (i.e. offer comparable (or better) terms and conditions to growers).

While the ACCC acknowledges the possibility that an exporter could be competitive with other exporters from the perspective of a grower (i.e. in relation to the terms and conditions it offers to growers), the exporter could also impose higher costs on Viterra (for example due to that exporter's operational practices). However, the ACCC notes that the Code does not prevent a PTSP from charging different exporters different fees, or offering different terms to exporters (to the extent these fees or terms do not discriminate in favour of the PTSP itself or an associated exporter entity, and/or are not for the purpose of preventing or hindering access). A PTSP discriminating in favour of its own associated entity exporter (by charging higher fees to another exporter) is permissible where it reflects higher costs of providing the same service to that other exporter.

Separately the ACCC also notes the potential for smaller market participants to play an important role in promoting competition and disrupting the market.

In addition, the ACCC acknowledges that exporters' access (whether large or small) must be balanced against a range of other factors, including the public interest in having competition in markets and the legitimate business interests of the PTSP. The ACCC also acknowledges that each exporter's interests likely vary (i.e. it is not reasonable to expect that exporters' interests are entirely uniform in nature).

In considering Viterra's interests, the ACCC notes that Viterra has a degree of flexibility under the current level of regulation: for example, Viterra has the ability to set standard terms and prices for its services. However the ACCC acknowledges that the added operational flexibility available to an exempt PTSP (as well as the direct cost savings to a lesser extent) can reasonably be expected to allow Viterra to better respond to the needs of its customers (i.e. exporters).

The ACCC notes that this added flexibility (and cost savings) resulting from an exemption must be balanced against the potential for access to be provided on favourable terms to certain exporters, which could have a significant impact on other exporters and competition more broadly. As discussed further in relation to subclause 5(3)(d) the presence of sufficient competitive alternatives likely limits the ability of Viterra to discriminate in favour of its associated entity exporter. The added flexibility associated with an exemption therefore may be appropriate.

As such the ACCC's view is that, given the greater operational flexibility afforded to Viterra, the limited ability of Viterra to discriminate between different exporters (including a PTSP's associated entity) in a way that is detrimental to competition, and the alternate PTSP options available to third party exporters, an exemption from Parts 3 to 6 of the Code in respect of IHB would not be detrimental to the interests of exporters.

The competitiveness of SA's bulk grain exports

In considering the interests of exporters, the ACCC also notes that concerns have been raised in regard to the impact of the Code on the competitiveness of SA's bulk grain exports in international markets.

As discussed in relation to subclause 5(3)(b) and (g) of the Code, Viterra has submitted that the SA grain supply chain is significant to the SA economy, and that exemptions for its facilities would contribute to the efficient operation of the supply chain.[619]

In response to the Draft Determinations Viterra submitted that:

> *As set out in Viterra's application and further submissions, Parts 3 to 6 of the Code—and, in particular, the requirement to have port loading protocols (PLPs) approved by the ACCC—hinders Viterra's flexibility to respond to changes in market conditions and exporter requirements. The inefficiency of this regulation has placed South Australia at a disadvantage in international grain markets as compared to other states in Australia where there is far less regulatory interference.*[620]

A number of stakeholders also previously submitted that the uneven application of the Code affects SA's competitiveness in global markets.[621]

The ACCC considers that the competitiveness of SA's bulk grain exports is relevant to the interests of exporters, and that it is reasonable to expect that exporters' interests generally align with the public interest in this regard (i.e. that the international competitiveness of SA's bulk grain exports is in both the public interest and exporters' interests).

The ACCC considers increased operational flexibility has the potential to be in the interests of exporters. As, such the ACCC acknowledges that unnecessary impediments to operational flexibility are not in the interests of exporters or SA's competitiveness in global grain markets. However, in assessing an application for exemption from Parts 3 to 6 of the Code, the potential benefits of increased operational flexibility must be balanced against a range of considerations, including the potential for Viterra to discriminate in favour of its associated entity exporter to the detriment of competition. The ACCC discusses its views on Viterra's incentive to provide fair and transparent access to exporters in relation to subclauses 5(3) (b), (g) and (d).

As such, the ACCC's view is that, given the ACCC considers Viterra's IHB facility is subject to sufficient competitive constraint, an exemption is likely to assist in improving SA's position in international bulk grain markets. An exemption to Viterra's IHB facility is therefore unlikely to be detrimental to the interests of exporters in this regard.

Conclusion

Given the above, the ACCC's view is that an exemption from Parts 3 to 6 of the Code is not detrimental to the interests of exporters.

In reaching its view the ACCC notes that an exemption is expected to provide Viterra with greater flexibility to respond to its customers' needs, which the ACCC considers will likely be passed on to exporters.

The ACCC also considers that an exemption will ensure that unnecessary costs are not imposed upon Viterra, which, in the presence of sufficient competition, can reasonably be expected to be passed on to other industry participants. Consequently, given the ACCC's view is that Viterra's IHB facility is subject to sufficient competitive constraints, an exemption

[619] Viterra, *Exemption Application 2019,* 2 July 2019, p. 2.

[620] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 2.

[621] See: SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 1; GPSA, *Submission in response to Issues Paper*, 27 September 2019, p. 5; Mr Geoff Ryan, *Submission in response to Supplementary Issues Paper*, 18 June 2020, p. 1.

at IHB may improve the international competitiveness of bulk grain exports from IHB, and is therefore likely in the interests of industry participants (including exporters) in this regard.

The ACCC's view is that the increased operational flexibility and potential for improvement in SA's competitiveness in international bulk grain markets associated with an exemption from Parts 3 to 6 of the Code in relation to IHB will not be detrimental to the interests of exporters.

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

In deciding whether to exempt a PTSP subclause 5(3)(d) requires the ACCC to consider the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

The ACCC considers that, in circumstances where the demand for port terminal services exceeds supply (i.e. capacity at a port terminal facility is constrained), a vertically integrated PTSP will have stronger incentives to discriminate in favour of its associated entity.

The ACCC notes that Viterra has acknowledged it is vertically integrated with an exporter:

> *Viterra is an associated entity of an exporter, Glencore Agriculture Pty Ltd (Glencore Agriculture). However, vertical integration in and of itself is not anti-competitive and a corporation should not be subject to regulation only because of its vertical integration.*[622]

GPSA has submitted that

> *CRA's assertion that "Viterra has no incentive to deny access to competing exporters" is correct to the extent that Viterra have demonstrated a high cost base for the operation of their network and must ensure a certain, albeit unknown, level of throughput in order to effectively spread that cost base. However, CRA is silent on the counter-cyclical marketing period, when Viterra/Glencore is likely to have an incentive to prioritise its own use of port terminal facilities and shipping slots for exports. There is questionable incentive to provide competitors access to Viterra/Glencore port facilities during the counter-cyclical marketing period, especially during average or above-average seasons.*[623]

While the ACCC acknowledges that the complete foreclosure of access is unlikely, the ACCC considers that Viterra, as a vertically integrated PTSP, has an incentive to favour its associated entity exporter over other exporters at its facilities under certain circumstances. It is particularly likely that during periods when capacity is constrained (which typically occurs during the Australian peak shipping period when grain from the northern hemisphere is less available and premium prices can be obtained in downstream markets (i.e. international bulk grain markets[624]) Viterra has incentives to provide favourable access to its associated entity exporter.

Conversely, the ACCC generally considers that spare capacity at its port terminal facility provides a vertically integrated PTSP with an incentive to provide access on fair and transparent terms, with a greater level of spare capacity likely providing a stronger incentive (.e. PTSPs have a greater incentive to offer their capacity to exporters in order to promote more efficient use of their infrastructure). In this regard the ACCC notes that PTSPs generally demonstrate greater flexibility in their engagement with access seekers during periods of greater spare capacity, such as in low production or export years. Under such

[622] Viterra, *Exemption Application 2019, 2 July 2019*, p. 1.

[623] GPSA, *Submission in response to Draft Determinations*, 27 November 2020, p. 4.

[624] SA grain production is counter cyclical to the northern hemisphere. As discussed in ESCOSA's *inquiry into the SA bulk wheat export supply chain* (p17) SA grain producers have a window (December to May) where there is less global supply in international markets, typically resulting in higher prices being available for grain exported from SA during this period.

circumstances the ACCC expects that Viterra would have incentives to facilitate third party access in order to maximise throughput at its facilities.

In considering port terminal facility capacity constraints during the peak period, the ACCC notes that it may not be economically efficient to have sufficient port terminal infrastructure to accommodate the entire annual export task within a 6 month window, given that this infrastructure is likely to be under-utilised for the remainder of the shipping season. While acknowledging that an exporter's preference is likely to be able to export the majority of grain within the peak period, spreading the export task across a broader timeframe (i.e. into the off-peak period) could potentially represent a more efficient outcome in relation to infrastructure investment. However the ACCC has not formed a particular view in relation to this matter as part of this assessment.

The presence of competing PTSPs, as well as the credible threat of the entry of new participants into the market, can also be expected to provide a level of competitive constraint and promote third party exporters' access to Viterra's services.

Similarly, the ability to access viable alternate port terminal services is expected to increase the relative bargaining power of third party exporters and their ability to secure fair and transparent access to Viterra's port terminal facilities. In this regard, the ACCC notes that larger third party exporters (i.e. those more likely to deliver greater throughput) are likely to have a greater ability to bargain with Viterra, relative to smaller exporters.

The ACCC also considers that the expected level of throughput at an existing port terminal facility is relevant when considering the case for exemption. When considering the expected level of competitive constraint faced by a facility, the ACCC notes that a larger facility (i.e. facility with higher grain throughput and capacity) will likely need to face greater absolute levels of alternate capacity (whether at competing facilities, or in alternate markets such as containers) in order to impose the same level of competitive constraint as would be the case with a smaller facility.

Although a small or large port terminal facility may face the same absolute level of alternate capacity, the effect of these competitive alternatives is dependent on their size relative to the incumbent port. That is, competitive alternatives are less able to take on the higher level of throughput from third party exporters in the event discriminatory or favourable access occurs at a larger port terminal facility. However, the competitive alternatives will have greater ability to take on the affected amount of third party exporter grain, should the same access issue occur at a smaller port terminal facility. As such the credibility of third party exporters using the competitive alternatives is greater at a smaller port terminal facility. Therefore a higher absolute level of competitive constraint is likely required at larger port terminal facilities in order for third party exporters to be able obtain the same standard of access they would otherwise receive at a smaller port terminal facility.

In considering these matters, the ACCC notes that Viterra's Port Adelaide IHB facility is one of 4 port terminal facilities at Port Adelaide. As such the ability of exporters to obtain fair and transparent access at IHB must be considered with regard to the other facilities located at Port Adelaide.

In relation to this, the ACCC understands that it may be possible for Viterra to operate its IHB and OHB facilities in conjunction with one another to some extent (for example in relation to storage capacity). While the extent to which this occurs in practice is unclear, the ACCC notes that Viterra has previously indicated that IHB and OHB are best managed operationally as a single port terminal facility (in 2013).[625] As set out in section 3.1 the ACCC

[625] ACCC, *Draft Decision Viterra Operations Limited Application to Extend and Vary 2011 Port Terminal Services Access Undertaking*, p.28.

also notes there are significant differences in the scale of Viterra's operation at Port Adelaide, when compared to alternate PTSPs.

IHB capacity utilisation

In relation to concerns expressed specifically in relation to the ACCC's views expressed in the Draft Determination on capacity utilisation at Inner Harbour, the ACCC notes that Viterra submitted:

> *The ACCC states that "IHB appears to have little extra spare capacity available, particularly during peak periods." Viterra does not agree with this finding, which also seems to contradict the ACCC's own statement that IHB had an average annual capacity utilisation rate of 78%. The highest practical capacity at IHB is 1.01 mtpa, which is the amount of grain Viterra was able to ship from IHB in 2016-17. Annual throughput at IHB has been below 1.01 million tonnes since the unusual bumper crop harvest of 2016-17 and it is unlikely that Viterra will be capacity constrained at IHB in the foreseeable future.*
>
> *Since 2016-17, the highest throughput months at IHB were [c-i-c]. This shows that the vast majority of months (in fact, all but [c-i-c] in the past three seasons) fell short of IHB's maximum monthly capacity of 84,166 tonnes (i.e. the highest practical capacity divided by 12 which likely understates monthly capacity in peak periods once shutdowns are accounted because, as previously noted, these would take place outside of peak periods).*
>
> *Therefore, when taking the capacity at other port terminals using Port Adelaide into account, IHB is unlikely to be capacity constrained going forward. It is important that the ACCC does not seek to base its decision on an unusually high crop year (2016-17) particularly in circumstances where a significant amount of competitor capacity is available at Port Adelaide (and there are plans for increased competitor capacity at Wallaroo which competes with grain from the same growing region) such that, even in a rare bumper harvest going forward, Port Adelaide ports are unlikely to be capacity constrained.*[626]

The ACCC notes that Viterra's IHB facility has a stated annual capacity of 1.01 million tonnes,[627] with an average capacity utilisation rate of 71% and 90% from an annual and peak period perspective respectively (excluding the drought-affected 2018-19 and 2019-20 seasons).[628] Viterra's associated entity exporter, Glencore, performs the majority of shipments through IHB, with a market share of 59% in peak periods and 58% in off-peak periods.[629] While Glencore's peak period market share at IHB (59%) is significantly higher than the next highest peak period market share at other Viterra facilities (the next highest is Port Giles, where Glencore performs 44% of peak period shipments), the ACCC notes that third party exporters have historically had greater access to capacity at Viterra's more efficient OHB facility (where Glencore performs 41% of peak period shipments).

In addition, and for comparison, the second largest exporter at IHB is CBH, with a peak and off-peak period market share of 9% and 4% respectively (and 7% annually).

In addition the ACCC notes that Viterra's current PLPs ensure that no single exporter can apply for more than 50% of the initial long-term capacity at IHB.[630] [631] The ACCC notes that exporters' current and historical levels of access were likely influenced by these provisions under Viterra's PLPs and that if Viterra were granted an exemption, it would be able to vary its capacity allocation system without the need for ACCC approval.

[626] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 68.
[627] Ibid, p. 7.
[628] Including the drought affected 2018-19 and 2019-20 seasons IHB has annual and peak period capacity utilisation of 53% and 65% respectively.
[629] Figures are averaged across the 2014-15 to 2019-20 seasons.
[630] PLPs, clause 3.5(a) and definition of 'Initial Nomination Cap' in clause 1.
[631] The ACCC understands that Viterra intends to make all 2021-22 capacity available as short-term capacity only.

The above indicates that IHB appears to have had little spare capacity available, during peak periods, and that most of IHB's current capacity is used by Glencore.

However, as previously noted, the ability of exporters' to obtain fair and transparent access at IHB must also be considered with regard the other Port Adelaide port terminal facilities (including Viterra's OHB facility).

OHB capacity utilisation

Viterra's OHB facility is the largest bulk grain loading facility at Port Adelaide with a stated annual capacity of 2.54 million tonnes.[632] When considered on an annual basis, there appears to be a significant amount of spare capacity available at this facility, with the maximum amount of exports from OHB being 1.82 million tonnes (which occurred during the bumper 2016-17 season). Overall OHB's average annual and peak capacity utilisation (excluding the drought affected 2018-19 and 2019-20 seasons) is 59% and 70% respectively, suggesting that spare capacity is likely available for third party exporters on both a peak and annual basis.[633]

The ACCC does, however, note that during the peak period in high grain output seasons it appears there may be some capacity constraints at OHB: for example, Viterra performed 1.11 million tonnes of shipments at OHB in the peak period of the bumper 2016-17 season, which is just below the facility's peak period capacity of 1.35 million tonnes.[634] This suggests that, in the absence of sufficient competitive constraints, Viterra could potentially have an incentive to provide discriminatory access during peak periods in high output seasons.

The ACCC also notes that third party exporters otherwise appear to be able to secure access at OHB during peak periods, with Glencore accounting for 41% of OHB's peak period shipments (which represents 29% of OHB's peak period capacity[635]). However, and as discussed in section 3.2.4, the ACCC notes that the fact Glencore only currently accounts for a relatively small portion of OHB's shipments (or, more importantly, OHB's total capacity) during peak periods does not necessarily mean that this would continue to be the case absent the application of Parts 3 to 6 of the Code.

In particular the ACCC notes that Viterra's current PLPs ensure that combined across Viterra's 6 facilities a minimum of 500,000 tonnes of capacity is reserved for short term capacity per quarter,[636] and that no single exporter at OHB can apply for more than 40% of the initial total long-term capacity in the first 6 months of the calendar year (and 50% at all other times).[637] As above, the ACCC notes that exporters' current and historical levels of access were likely influenced by these provisions under Viterra's PLPs and that if Viterra were granted an exemption, it would be able to vary its capacity allocation system without the need for ACCC approval.

Consequently, the ACCC's view is that there is the potential for third party exporters to be able to access spare capacity at Viterra's OHB facility in the event that there are capacity constraints at IHB.[638] However, as indicated above, in the absence of sufficient competitive

[632] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 7.

[633] Including the drought affected 2018-19 and 2019-20 seasons OHB has annual and peak period capacity utilisation of 44% and 51% respectively.

[634] Viterra released 1.35 million tonnes of capacity in the peak period in the 2019-20 season. In the 2016-17 season Viterra released 1.19 million tonnes of capacity.

[635] Glencore shipments to determine the 29% were considered over the 2014-15 to 2017-18 time period.

[636] Viterra, Port Loading Protocols, 24 December 2015, clause 3.12(a). See: https://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf

[637] Viterra, Port Loading Protocols, 24 December 2015, clause 3.5(a). See: https://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf

[638] As discussed in section 3.1, OHB has more efficient infrastructure than IHB, and is therefore likely the more desirable facility to export from. However the ACCC understands that OHB is largely run on a Just in Time process, and it may be more

alternatives Viterra may have an incentive to discriminate in relation to the access it provides at OHB, particularly in periods of high demand.

<u>The impact of Cargill on capacity utilisation at IHB</u>

Cargill's Berth 20, Inner Harbour facility is also relevant to the likelihood that exporters will be able to obtain fair and transparent access when considering the possible exemption of Viterra's IHB facility. As discussed in section 3.1.4 Cargill has publicly indicated that "…our first year we are looking to export 300,000 tonnes, the following years we have capacity of 540,000 tonnes."[639]

In its exemption application Cargill also stated that:

> *Cargill's exports through Port Adelaide over the four years up to 2017-18 averaged at 238k tonnes per year. In 2018-19, Cargill did not export through Port Adelaide at all due to drought conditions. Cargill therefore anticipates that it will likely have excess capacity in relation to its expected nominal annual tonnage of 300k tonnes through its new facility. That being the case, Cargill is committed to welcoming third parties to utilise any available capacity in its facility. All services would be offered and charged on a commercial basis.*[640]

The amount of spare available capacity available at Cargill's facility therefore will likely be 302,000 tonnes per year (assuming, as per above, Cargill performs 238,000 tonnes of exports). In considering the capacity available at Cargill's facility the ACCC notes that Cargill, as a vertically integrated PTSP, likely faces incentives to provide greater access to its associated entity exporter.

In addition, as an exempt service provider in relation to its Berth 20, Inner Harbour facility, Cargill is also less constrained by the Code in this regard. However the ACCC also notes that Cargill is subject to significant competitive constraint, and has also indicated its intention to continue to use other facilities at Port Adelaide (including Viterra's port terminals).[641] The ACCC notes that should Cargill choose to export through Viterra's Port Adelaide facilities (over its own facility) slightly more spare capacity will be available to third party exporters at Cargill's facility. In addition, the ACCC also notes that Cargill's upcountry network provides an alternate (albeit limited in size) vertically integrated network through which third party exporters can export grain from Port Adelaide (see section 4.1.1).

The ACCC also notes that Cargill's exports through Viterra's IHB and OHB facilities decreased significantly (from 280,000 tonnes to 20,500 tonnes per season) after it commenced using LINX's facility in 2015-16.[642] Therefore, Cargill's decision to export outside of Viterra's IHB and OHB facilities have meant (and likely will continue to mean) there is a reduced demand for Viterra's IHB and OHB facilities compared to before the 2015-16 season.

Given the above, the ACCC expects that the presence of Cargill's Berth 20 facility at Port Adelaide Inner Harbour will have 2 effects, both of which are likely to reduce Viterra's incentive to provide access to certain exporters on a favourable basis: firstly, Cargill's facility will give third party exporters a small amount of additional capacity and offer credible (though

efficient for exporters to store and load grain from Viterra's IHB facility. Furthermore, depending on contractual arrangements between the exporter and Viterra, the exporter may not always have choice of which port to use when using Export Select.

[639] Accessed 4th Feb: https://www.cargill.com.au/en/2021/cargill-welcomes-arrival-of-export-mobile-ship-loader - see video.

[640] Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct,* 30 October 2019, p. 10. See footnote 10 for further details.

[641] Ibid, p. 5.

[642] The ACCC note that Cargill has only loaded 3 vessels at Viterra's Port Adelaide facilities since the beginning of the 2015-16 season (which coincides with the entry of LINX). As such, the ACCC anticipates Cargill will likely continue to use its own facility for the majority of its shipments out of Port Adelaide,

limited) competition to Viterra's IHB and OHB facilities; and secondly, that Cargill will be unlikely to choose to export large volumes of grain through IHB or OHB, reducing the potential for capacity constraints at these facilities (and also Viterra's incentive to discriminate in favour of its associated entity exporter).

The impact of Semaphore on capacity utilisation at IHB

Semaphore's Osborne facility is also relevant to the likelihood that exporters will be able to obtain fair and transparent access, when considering whether to exempt Viterra from Parts 3 to 6 of the Code in relation to its IHB facility. The ACCC notes that Semaphore is not vertically integrated with an exporter.[643] As per section 3.1.4, the ACCC considers the capacity of Semaphore's port terminal facility is likely to be 615,000 tonnes per season (as submitted by Viterra and CRA).[644]

The ACCC considers that Semaphore's facility provides an alternative export path for third party exporters. As Semaphore is not vertically integrated with an exporter, it appears unlikely that Semaphore faces strong incentives to favour, or unfairly discriminate against, certain exporters. Therefore, all of Semaphore's capacity (615,000 tonnes) will likely be available to third party exporters when deciding which port terminal to export out of Port Adelaide.

The impact of ADM's Port Pirie facility on capacity utilisation at IHB

The ACCC considers that the catchment areas for ADM's Port Pirie facility and Viterra's IHB facility (as well as other Port Adelaide providers) overlaps in the Upper North region of SA (see section 4.2). Consequently, ADM's Port Pirie facility is relevant to the likelihood that exporters will be able to obtain fair and transparent access when considering whether to exempt Viterra from Parts 3 to 6 of the Code in relation to its IHB facility.

As discussed in section 3.1.4 the ACCC considers that ADM's Port Pirie facility has capacity of 437,854 tonnes per annum at this time.

The ACCC also recognises that ADM operates a vertically integrated supply chain.[645] ADM has submitted an application for exemption from Parts 3 to 6 of the Code in relation to this facility.

The ACCC considers that ADM's Port Pirie facility provides an alternative export path for third party exporters, which will, to some extent, limit the Viterra's incentive (and ability to) discriminate in favour of its associated entity exporter.

Size of port terminal facility

As part of its submission to the Draft Determinations, Viterra stated that it is constrained from exercising market power at a number of its port terminals, since they export a small proportion of wheat produced in Australia and SA:

> *Viterra is constrained from exercising any market power in the provision of port terminal services to the detriment of other market participants because…a number of Viterra's port terminals—in particular, IHB, Thevenard and Wallaroo— export a very small proportion of the wheat produced in Australia and a small proportion of the wheat produced in South Australia.*[646]

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[643] Semaphore, *Exemption application*, p. 6. See footnote 10 for further details.

[644] Viterra, *Response to Draft Determinations,* Public version, 8 February 2020, p. 8.

[645] ADM, *Application for exemption Port Terminal (Bulk Wheat) Code of Conduct*, 14 January 2021, p. 6. See footnote 10 for further details.

[646] Viterra, *Response to Draft Determinations,* Public version, 8 February 2020, pp. 2-3. The ACCC notes that Viterra also raises this matter in relation to Port Giles (Viterra response to Draft Determinations, p. 80).

The ACCC notes that a number of Viterra's facilities only export a small proportion of the total wheat produced in SA (or Australia). However, the ACCC considers that this is not relevant to the likelihood that exporters will have fair and transparent access to services at these facilities. The ACCC notes that a facility that exports a small proportion of a state's grain may still hold significant market power in relation to the provision of port terminal services within a catchment area. As such, a PTSP performing only a small proportion of a state's (or a country's) grain exports can be in a position to discriminate in favour of itself or an associated entity to the detriment of competition (absent appropriate regulation or sufficient competition).

The ACCC sets out its views on the competitive constraint imposed on Viterra's IHB facility and the likelihood that exporters will have fair and transparent access to services at this facility in relation to subclauses 5(3)(b), (d) and (g).

Conclusion

While, the above indicates that IHB appears to have had little spare capacity available, during peak periods, the ACCC considers ADM's, Cargill's and Semaphore's facilities will impose a material level of competitive constraint on Viterra's IHB facility. The existence of this viable, though limited, alternative capacity provides a material incentive for Viterra to provide fair and transparent access to third party exporters at its IHB facility and will also likely reduce potential future capacity constraints at IHB.

As discussed above in relation to subclauses 5(3)(b) and 5(3)(g) of the Code, PTSPs operating at Port Adelaide also face competitive constraint from the local domestic and container markets, as well as from Victorian markets (for certain regions of SA). These markets also constrain the potential for Viterra to discriminate access in favour of its associated entity exporter at its IHB facility to the detriment of competition.

As above the ACCC considers the combination of competition from alternate PTSPs located at Port Adelaide and Port Pirie, the SA domestic and container markets, as well as Victorian markets, should impose sufficient competitive constraints on Viterra to ensure fair and transparent access will be provided to its IHB facility absent the full application of the Code.

As discussed in relation to subclause 5(3)(j), the ACCC considers that its ability to review (and potentially revoke) an exemption decision under subclause 5(3) of the Code is a further incentive for an exempt PTSP to provide fair and transparent access to exporters when no longer subject to Parts 3 to 6 of the Code.

While acknowledging the significance of revoking an exemption, the ACCC considers that its future ability to revoke an exemption if the reasons for granting the exemption no longer apply is relevant to its decision to grant an exemption in relation to IHB.

As such the ACCC's view is that exempting Viterra from Parts 3 to 6 of the Code in respect of IHB will not be detrimental to exporters' ability to obtain fair and transparent access to port terminal services.

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

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

The ACCC considers the following factors will likely be relevant when having regard to the matters listed at subclauses 5(3)(e) and (f) of the Code:

- whether competition among PTSPs will drive the efficient operation and use of the port terminal facility in the absence of full regulation under the Code;
- whether a requirement to comply with Parts 3 to 6 of the Code would result in reduced throughput of the port terminal facility than would otherwise be efficient; or
- whether the efficient investment in port terminal facilities will be influenced by a reduction in regulation.

Promotion of the efficient operation and use of Viterra's IHB facility

The ACCC generally considers that it is in Viterra's interests to operate its facilities efficiently (i.e. to keep costs as low as possible) in order to provide a return to investors regardless of whether an exemption is granted in respect of its IHB (or any other) facility.

The ACCC also recognises that unnecessary regulation has the potential to affect the operational efficiency and level of investment in port terminal facilities.

As such, the ACCC considers that the level of regulation applied under the Code (including the capacity allocation systems approved pursuant to it) should be reduced in circumstances where exporters are otherwise able to access capacity on fair and transparent terms (as a result of competition). This ensures the regulation does not impose unnecessary operational constraints or any other unnecessary burdens.

The ACCC also considers that the full Code provides Viterra with a level of flexibility to negotiate with exporters on key terms at its port terminal facilities. Significantly, while the Code requires PTSPs to publish standard terms and reference prices, it does not restrict how PTSPs set those terms and prices. The ACCC notes that the Code's non-discrimination obligation prevents PTSPs from inappropriately offering more favourable terms to related export businesses. As such, the non-discrimination obligation is not intended to, and does not, prevent PTSPs from offering different terms and conditions to different access seekers (as long as this is undertaken on a fair and transparent basis).

The ACCC also notes that Viterra's capacity allocation system (which includes relevant timeframes for releasing amounts of capacity) can be amended by Viterra, subject to ACCC approval. However, Viterra has submitted that changing the PLPs in response to new operational situations is not a practical long-term solution, due to the difficulty of predicting what changes might be needed in the future and the timeframes involved in the approval of changes to the protocols:

> *Viterra's PLPs set out detailed and prescriptive rules for allocating capacity, and any change to these rules must be approved by the ACCC…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 (e.g. vessel issues as a result of the coronavirus)…*
>
> *…In addition, the introduction of increased flexibility through changes to the PLPs is not a simple or quick process, as illustrated by the variations to Viterra's PLPs in 2015. Following many months of consultation with its customers and the ACCC, Viterra submitted its formal application to vary the capacity allocation system in its Port Loading Protocols to the ACCC on 12 March 2015. Notwithstanding the significant level of prior consultation, it then took a further nine months of consideration and review by the ACCC for Viterra to obtain approval for the variations.*
>
> *This process would have to be undertaken each time Viterra identified a need for variation – such need not always being apparent until newly varied protocols are implemented.*[647]

[647] Viterra, *Further Supplementary Submission on Exemption Application 2020*, 11 March 2020, p. 2.

Viterra re-iterated this view in response to the Draft Determinations:

> *…non-exempt PTSPs are not incentivised to change their PLPs because of the costly and unduly long time it takes to do this, which results in missed opportunities. This does not mean that the PTSP does not consider that certain changes would greatly benefit the efficiencies of its operations to the benefit of its customers, which is particularly the case for Viterra given the highly prescriptive nature of its PLPs.*[648]

As previously noted Viterra also referenced a submission made by CBH in response to the then Department of Agriculture Water and Resources' 2018 draft Code review report which indicated that the delays associated with regulatory approval had caused significant frustration and uncertainty for exporters seeking to buy SA grain for international sales.[649] CBH also stated that exemption from the full application of the Code had provided significant flexibility:

> *Once CBH was exempted from the Code and was no longer subject to a regulatory drawn-out approval process, the LTAs CBH subsequently negotiated created considerably enhanced access certainty and flexibility of service for export customers.*[650]

The SAFC submitted the below in relation to the need for Viterra to have changes to its capacity allocation system approved:

> *SAFC does not consider Viterra's ability to apply to the ACCC to alter it's [sic] capacity allocation system to be inherently indicative of 'flexibility'. With respect to the Commission, while it is known for comprehensive examination of competition issues, it is not known for swift responses/decisions. [Viterra's exemption application] has taken almost a year to reach this point; and page 25 of the supplementary paper indicates that the last attempt [by Viterra] to modify the capacity allocation system resulted in very significant delays.*[651]

The SAFC reiterated its views in its submission to the Draft Determinations that Viterra's ability to change its PLPs is not indicative of flexibility:

> *In relation to Port Loading Protocols (PLPs), the ACCC responded to SAFC's concerns over lack of flexibility by noting that Viterra has not sought to change its capacity allocation system since 2015. We respond by noting that given it takes a year for the ACCC to approve such a request, there is little point in Viterra making this attempt to optimise PLPs for the conditions faced in each discrete year. The ACCC's approval timeframes, in conjunction with parts 3 to 6 of the Code, are creating inefficiencies to the detriment of South Australian grain exporters. These inefficiencies are not faced in the same way by interstate grain exporters, due to the Code's unreasonable focus on South Australia.*[652]

The ACCC acknowledges the challenges associated with predicting future operational needs and accepts that changes to the PLPs are unlikely to be able to adequately address all potential issues ahead of time. In this regard the ACCC also notes that the PLPs likely need to balance operational needs across many elements of the supply chain (for example in grain transport and receival, terminal facility operations and shipping industry needs).

The ACCC accepts that the regulatory process for approving changes to the PLPs imposes a greater burden on Viterra than if it were exempted from the full application of the Code and was not required to have proposed changes to its PLPs approved by the ACCC. However the ACCC notes that Viterra has not sought to change its capacity allocation system since its initial approval in 2015, and that Viterra is not required to change its PLPs in response to being made an exempt PTSP at any of its facilities.

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[648] Viterra, *Response to Draft Determinations,* Public version, 8 February 2020, p. 43.

[649] Viterra, *Exemption Application 2019,* 2 July 2019, pp. 22-23.

[650] Viterra, *Exemption Application 2019,* 2 July 2019, p. 23.

[651] SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 3.

[652] SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 1.

However, as per subclause 5(3)(a), the ACCC does not consider that all proposed variations would necessarily involve variations as substantial and complex as the Viterra long-term agreement proposal in 2015,[653] which involved a significant change from an annual auction system with a long-term agreement system.[654] The ACCC notes this attracted significant stakeholder interest.[655]

While the ACCC has not received specific proposals from non-exempt PTSPs to vary existing capacity allocation systems (and therefore is not aware of what these proposals would entail), the ACCC anticipates that non-exempt PTSPs would want to address the flexibility and prescriptiveness of their capacity allocation systems. Proposed variations to PLPs that do not represent fundamental changes to existing capacity allocation systems would be less likely to attract significant industry concern and would likely entail an assessment process that is more limited in scope and shorter in duration. Furthermore, a PTSP can vary certain aspects of its PLPs without ACCC approval.

This notwithstanding the ACCC, as above, considers that an exemption would provide Viterra with greater levels of flexibility.

The improved level of flexibility associated with an exemption was noted by GrainCorp and Mr. Geoff Ryan in response to the Draft Determinations.

> *GrainCorp*
>
> *Flexibility to provide customers with customised solutions. Rigidity of additional regulatory requirements often leads to standardised services which limits the ability to meet the specific needs of the grain grower or customer.*[656]
>
> *Mr. Geoff Ryan*
>
> - *It would increase flexibility when dealing with exporters. This would encourage exporters to come to South Australia and buy grain.*
> - *It would simplify the rules around loading vessels and capacity allocation at ports. Once again this is about encouraging exporters to come to South Australia to compete to buy grain.*
> - *It would reduce the cost of regulatory compliance and improve the competitiveness of South Australia grain in the global market.*[657]

In forming its view in relation to IHB, the ACCC has considered whether greater flexibility would provide for the more economically efficient use of Viterra's IHB facility, as well as whether removing the requirement to comply with Parts 3 to 6 of the Code has the potential to drive stronger user demand for, and the uptake of, port terminal services.

The ACCC acknowledges the potential benefits of an exemption (as raised by GrainCorp and Mr. Geoff Ryan) and considers that removing the requirement to comply with Parts 3 to 6 of the Code will likely result in cost savings being passed on to exporters, driving stronger user demand for port terminal services when a PTSP is subject to sufficient competitive constraint (which provides the PTSP with an incentive to provide fair and transparent access to third party exporters).

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[653] The ACCC notes that Viterra formally lodged an initial proposal in March 2015 and made subsequent revisions in June, September, and November that year ahead of a final decision from the ACCC in December 2015.

[654] The auction system included a 'first-in-first-served' process for capacity not allocated via auction. While a 'long term agreement' (LTA) system proposed to allow Viterra to enter into capacity agreements with exporters covering 5 years.

[655] 12 public submissions were received in response to the ACCC's issues paper regarding Viterra's application, a significantly higher level of interest when compared with other Code consultation processes.

[656] GrainCorp, *Submission in response to Draft Determination*, 17 November 2020, p. 2.

[657] Mr Geoff Ryan, *Submission in response to Draft Determinations*, 27 November 2020, p. 1.

As discussed in relation to subclauses 5(3)(b) and (g) of the Code, the ACCC considers IHB is subject to sufficient competitive constraint to provide Viterra with an incentive to provide fair and transparent access to third party exporters. Consequently, the ACCC's view is that exempting Viterra's IHB facility from Parts 3 to 6 of the Code can be expected to result in more efficient use of the port terminal facility.

Promotion of efficient investment in port terminal facilities

The ACCC considers it is in Viterra's interests to make investment decisions that ensure Viterra can maximise its return to its shareholders, irrespective of whether or not exemptions are granted in relation to any of Viterra's facilities. As previously noted, this primarily reflects the need to provide a return to shareholders.

Viterra has submitted that an exemption would allow for greater flexibility, which would result in greater investment in their facilities and a more efficient supply chain:

> *…an exemption would enable Viterra to provide more competitive and flexible services to exporters for bulk grain exports and support lower supply chain costs and increased investment by allowing Viterra to operate its port terminals with more flexibility and greater efficiency.*[658]

In contrast, T-Ports submitted that reducing regulation will reduce the incentives for potential entrants to invest in the SA port terminal facilities:

> *Future investment in port terminal facilities will depend upon the expectation of a fair and even playing field in the market. If there is a dominant provider in the market, with little or no regulation on pricing and access, the incentive to invest diminishes with the increased risk of retaliatory behaviour through differential service offerings to customers who may otherwise have supported the new investment.*[659]

However, other stakeholders contended that reducing regulation would attract further investment in the SA market.

For example, GrainCorp submitted that:

> *Greater operational flexibility promotes and encourages longer term investment in the supply chain, rather than seeking short term commercial outcomes.*[660]

As above, Mr. Geoff Ryan also submitted that a reduction in regulation would increase Viterra's operational flexibility, which would encourage more exporters to enter the SA bulk grain market.[661]

The ACCC acknowledges that unnecessary regulation has the potential to discourage a PTSP from making otherwise efficient investments in its port terminal facilities (or the supply chain more broadly). The ACCC also acknowledges that, if Viterra faces sufficient incentives to pass on flexibility to its customers, greater operational flexibility will be in the interests of exporters, which will promote efficient investment into the SA supply chain.

However, the ACCC also considers that an inadequate level of regulation risks affecting efficient investment in port terminal services, this could result in either:

- **Under investment:** to the extent that the inadequate regulation reduces the incentives for current participants and/or new entrants to invest, due to their inability to gain access on fair and transparent terms; or

[658] Viterra, *Exemption Application 2019,* 2 July 2019, p. 2.

[659] T-Ports, *Submission in response to Issues paper*, 26 August 2019, p. 4.

[660] GrainCorp, *Submission in response to Draft Determination*, 17 November 2020, p. 2.

[661] Mr Geoff Ryan, *Submission in response to Draft Determinations*, 7 December 2020, p. 1.

- **Over investment:** to the extent the inadequate regulation encourages current participants and/or new entrants to unnecessarily duplicate existing infrastructure.

The ACCC acknowledges that different parties will likely have different investment incentives and that these incentives will be influenced by a range of factors, including the level of regulation imposed on competing PTSPs.

In addition, the ACCC notes that GPA submitted that investment in further port terminal facilities in SA may be inefficient and reflect concerns around access to existing facilities or the service offered.[662]

While the ACCC has not undertaken a detailed quantitative analysis of the appropriate level of investment in port terminal facilities in SA, significant consideration has been given to the effect of the Code and the related effects on the decision to exempt (or not exempt) each of Viterra's port terminal facilities.

The ACCC considers that efficient investment decisions can generally be expected to occur in circumstances where adequate competition is present, or where there is sufficient regulatory intervention to ameliorate the absence of competition.

Consequently, when considering the investment effects which may result from an exemption from Parts 3 to 6 of the Code, the ACCC has considered the investment incentives of current and potential future market participants.

Investment in port terminal facilities within the Port Adelaide catchment area

In the case of Port Adelaide, the ACCC notes that there has been an increase in the level of investment in low-capex port terminal facilities, with ADM, LINX, Semaphore and Cargill all using mobile ship loaders in recent seasons.[663] The ACCC notes that in April 2020 LINX announced that it has ceased providing bulk grain export services.[664]

The ACCC notes that the competitive constraint imposed by mobile ship loaders (whether at Port Adelaide or elsewhere) is generally only present in high output years and is limited by the vessel size they can load. For example GPSA submitted that service providers with mobile loading facilities are appear unable to consistently challenge permanent facilities.[665]

The ACCC expects that Viterra will have significant spare capacity at IHB in low output seasons, and that Viterra's need to offset fixed costs will likely provide an incentive for it to maximise throughput at its facility. As such, the ACCC expects Viterra will have little incentive to favour certain exporters in low output seasons. Therefore, the possibility that alternate PTSPs using mobile ship loaders will perform little to no exports in low output seasons is unlikely to reduce Viterra's incentives to provide access to a broad range of exporters.

Given their low capex and mobile nature, the ACCC considers that mobile ship loaders have the potential to provide a more flexible form of competitive constraint. That is, mobile ship loaders are able to provide additional capacity during periods of high demand without the

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[662] GPA, *Submission in response to Issues Paper*, 4 October 2019, p. 3.

[663] Semaphore began operations in the 2016-17 season; LINX began operations in the 2015-16 season and on 8 April 2020 informed the ACCC that they had ceased bulk grain loading operations; Cargill recently commenced operations in January 2021; and ADM commenced bulk export operations at Port Pirie in December 2020.

[664] A letter confirming the suspension of LINX's operations at Port Adelaide, Inner Harbour is available at: https://www.accc.gov.au/system/files/LINX%20-%20letter%20confirming%20suspension%20of%20bulk%20grain%20services%20-%208%20April%202020.pdf.

[665] GPSA, *Submission in response to Draft Determinations*, 27 November 2020, p. 2.

significant capital investment associated with conventional port terminal infrastructure.[666] The ACCC also notes that investment in conventional infrastructure may be inefficient and/or financially unviable in these circumstances (i.e. given additional port terminal capacity may only be needed for high output seasons the demand for additional services may be 'temporary' in nature).

As stated in section 3.1.5 ADM performed a small number of coastal (i.e. domestic) shipments out of Port Pirie in the 2019-20 season, and began export operations in December 2020.[667] The ACCC notes that the catchment area of ADM's Port Pirie facility likely overlaps with the grain catchment area of Port Adelaide PTSPs (see section 4.2). However, ADM's facility is small in size, and limited in the vessel size it can accommodate (see section 3.1). Consequently, the ACCC expects that the additional constraint placed upon IHB by ADM is limited.

The ACCC also notes that T-Ports is proposing to build a port terminal facility at Wallaroo. T-Ports has indicated that the site will take 18 months to build,[668] with initial site works having begun in late 2020. The ACCC's understanding is that T-Ports is still seeking a range of relevant government approvals before they can progress with various stages of the construction process.[669] Were T-Ports' Wallaroo facility to commence operations it would primarily place a competitive constraint on Viterra's Wallaroo facility, however it would also likely place a level of competitive constraint on Viterra's IHB (and OHB) facility (as discussed in relation to subclause 5(3)(i) of the Code, the ACCC considers there is some overlap between the Port Adelaide and Wallaroo catchment areas).

The ACCC will continue to closely monitor developments in the SA market, including in relation to T-Ports' proposed Wallaroo facility. However, as discussed in section 3.1.5, while the ACCC acknowledges that the threat of competition has the potential to place a degree of competitive constraint upon Viterra, the ACCC does not consider the threat of competition to be as effective as actual competition.

The ACCC also notes that, in relation to the promotion of efficient investment in port terminal facilities, GPA has indicated that they consider there could be an over investment in infrastructure in SA:

> *Given both Viterra has already pointed out there has been over-investment in facilities, this condition becomes problematic. The ACCC need to better explain their reasoning behind this condition. What do they believe is the appropriate outcome? GPA do not believe investment in multiple duplicative facilities is efficient investment.*[670]

While, as previously noted, the ACCC has not undertaken a detailed quantitative analysis of the appropriate level of investment in port terminal facilities in SA, the ACCC notes that it is not necessarily appropriate to conclude that all additional investment in port terminal infrastructure in SA is inefficient (i.e. can be considered 'over-investment'). The ACCC notes that a broad range of factors may influence different parties' investment decisions including, for example, an interest in having increased access to capacity at peak times.

[666] The ACCC also acknowledges there could be a number of factors that limit the flexibility with which a mobile ship loaders may be operated.

[667] ADM completed 0.05 million tonnes of coastal shipments in the 2019-20 season from Port Pirie, and has completed 0.14 million tonnes of exports in the 2020-21 season.

[668] T-Ports website: https://tports.com/wallaroo/, (accessed 22 April 2021).

[669] The ACCC understands that T-Ports expects to receive grain from the 2021 harvest and begin export operations in January 2022. More information is available at: https://soundcloud.com/t-ports/wallaroo-port-development-1

[670] GPA, *Submission in response to Issues Paper*, 4 October 2019, p. 3.

Viterra's incentive to invest in its IHB facility

Viterra has also submitted that it has made significant investment at its IHB facility in recent years:

> *…Viterra notes that it has made a number of significant investments at Port Adelaide IHB and OHB in the five year period to 31 December 2018. In this period, it invested [c-i-c] at Port Adelaide, including:*
>
> - *recladding the bulk loading facilities;*
> - *upgrading the electrical switch rooms;*
> - *replacing conveyor and elevator belts;*
> - *concrete remedial works; and*
> - *upgrading weighbridges and bulk loader compressors.*[671]

The ACCC considers that this indicates that Viterra is willing to make investments under the current regulatory arrangements. As previously noted, this likely reflects the need to generate a return for shareholders. However it is unclear how Viterra's investment decisions would be affected in relation to a decision to exempt or not exempt Viterra in relation to this facility.

Conclusion

The ACCC considers that it is in Viterra's interests to make investment and operational decisions that ensure their profitable operation of its port terminal facilities, so that Viterra can maximise return to their shareholders.

The ACCC considers that the competitive constraint provided by ADM's, Cargill's and Semaphore's facilities (as well as from the container, domestic and Victorian markets) is likely sufficient to encourage Viterra to make efficient investments (and/or deter inefficient investment) in its operations. An exemption in respect of IHB may also provide an incentive for ADM, Cargill and Semaphore to make efficient investment decisions in relation to their port terminal facilities, in order to respond to the increased competition with Viterra at port and/or in related markets.

More broadly, while the ACCC has not reviewed each of the investments that have been made in the SA port terminal facilities in specific detail, the ACCC generally considers that the removal of unnecessary regulation is unlikely to be detrimental to (and is likely to promote) efficient investment outcomes and operations.

With specific regard to operations at Viterra's IHB facility the ACCC considers that, given the level of competitive constraint IHB faces, it is reasonable to expect that the removal of unnecessary regulation will drive greater operational efficiency (in part because Viterra will be able to operate more flexibly).

Given the above, the ACCC's view is that exempting Viterra in relation to its Port Adelaide IHB facility will likely promote the economically efficient operation of and use of its facility, and the efficient investment in port terminal facilities.

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[671] Viterra, *Exemption Application 2019,* 2 July 2019, pp. 51-52.

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

Under subclause 5(3)(h) of the Code the ACCC generally considers the degree to which the PTSP is vertically integrated in grain exportation. As such, the ACCC has also given significant consideration to the level of vertical integration when considering subclause 5(3)(c) and (d) matters.

The extent to which a vertically integrated PTSP favours, or is likely to favour, its related entity exporter will influence the ACCC's decision on whether an exemption from Parts 3 to 6 of the Code should be granted.

Viterra has acknowledged it is vertically integrated across bulk grain export operations and port terminal services at its facilities:

> *Viterra is an associated entity of an exporter, Glencore Agriculture Pty Ltd (Glencore Agriculture). However, vertical integration in and of itself is not anti-competitive and a corporation should not be subject to regulation only because of its vertical integration.*[672]

As a vertically integrated PTSP, the ACCC considers that Viterra has an incentive to provide discriminatory access to its associated entity exporter, particularly in circumstances where port terminal capacity is constrained. These actions are potentially to the detriment of competition and third party exporters seeking access to port terminal services.

In general, the ACCC considers there is a stronger case for full regulation in circumstances where the potential for a vertically integrated provider to exercise market power is not constrained. The ACCC notes that, in the absence of Parts 3 to 6 of the Code applying to Viterra's IHB facility, Viterra could more easily alter the terms and conditions of access for some or all third party exporters seeking to use the facility.

Accordingly, the ACCC considers that third party exporters would have difficulty obtaining fair and transparent access, if an exemption were granted to Viterra at its IHB facility absent the presence of sufficient competitive alternatives. However, as noted above when considering subclauses 5(3)(b) and (g), the ACCC considers that the degree of competition Viterra's IHB facility faces is likely sufficient to limit the ability of Viterra to favour certain exporters, including its vertically integrated trading arm, Glencore.

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

Subclause 5(3)(i) of the Code requires the ACCC to have regard to whether there is already an exempt service provider within the grain catchment area for the port concerned. The ACCC generally considers that, in circumstances where there is already an exempt service provider within a grain catchment area, or where the Code does not otherwise apply to a service provider in a catchment area, this supports the case for an exemption. However, the ACCC also considers this matter on a case-by-case basis, taking into account the full extent of competitive constraint operating on each facility.

The ACCC notes that, at a broad level, Viterra has submitted that:

> *Traditional "catchment zones" for grain grown in South Australia are fluid and increasingly outdated constructs. Traders purchase grain from, and traders and growers move grain to, the locations where it is most profitable having regard to the price of grain that can be obtained in domestic and*

[672] Viterra, *Exemption Application 2019,* 2 July 2019, p. 1.

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.[673]

In relation to Port Adelaide Viterra has submitted that:

Port terminals at Port Adelaide have traditionally sourced grain from a large grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, which stretches to Dooen in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia. Competition for grain grown in this area is not limited to the various port terminals run by various operators at Port Adelaide. It is often delivered to Wallaroo in South Australia and to port terminals in Victoria operated by GrainCorp, Emerald and Riordan.[674]

Viterra also submitted that its IHB (and OHB) facility exports grain from the same region as Cargill's and Semaphore's Port Adelaide facilities:

Semaphore's Berth 29 and LINX's Osborne port terminals are situated at Port Adelaide and export grain that is grown in the same region as grain exported from Viterra's Port Adelaide terminals.[675]

T-Ports noted that there is some fluidity to catchment areas though not to the extent implied by Viterra:

T-Ports supports Viterra comments that catchment zones are fluid, however not to the extent implied. There are some terminals where catchment zones overlap and fluctuate with market conditions, but in general terms, road distances and associated freight costs between competing terminals is a limiting factor in the flexibility to move outside catchment zones.

If a PTSP is inefficient or its terms of access-including fees-are unreasonable, and in the absence of a competing PTSP in the same catchment zone, grain from that catchment zone is unlikely to move to other port terminals (as the Viterra application suggests).[676]

T-Ports also submitted that the Victorian and Port Adelaide PTSPs compete for grain on the south-eastern border of SA to a minor extent.[677] CRA also indicated that Port Adelaide competes for grain with Victorian markets.[678]

As discussed in section 4.2 the ACCC acknowledges that catchment areas are not necessarily fixed and are likely influenced by a range of factors. However the ACCC continues to consider that distance remains a significant factor when considering which port terminals facilities are available to exporters seeking to export grain from different growing areas (see section 4.2.1 for an analysis of distance and freight costs). As such, the ACCC considers that catchment areas generally remain relevant to the assessment of exemption applications, including for the purposes of discussing the presence, or otherwise, of competing exempt service providers.

With respect to exempt port terminal service providers in SA:

- Semaphore was determined to be an exempt service provider in respect of its facility at Osborne Berth 1, Inner Harbour, Port Adelaide in July 2017;

[673] Viterra, *Exemption Application 2019,* 2 July 2019, p. 1.

[674] Viterra, *Exemption Application 2019,* 2 July 2019, p. 48.

[675] Ibid p. 52.

[676] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 3.

[677] Ibid, p. 3.

[678] Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 11 November 2019, p. 19.

- Cargill was determined to be an exempt service provider in respect of its facility at Port Adelaide, Inner Harbour on 2 July 2020;[679]
- T-Ports was determined to be an exempt service provider in respect of its facility at Lucky Bay on 3 April 2020; and
- ADM submitted an application for exemption on 3 February 2021, which is currently under assessment by the ACCC.

The ACCC does not consider T-Ports' Lucky Bay facility to be in the Port Adelaide catchment area (see section 4.2).

As discussed in relation to subclauses 5(3)(b) and (g) the ACCC considers that, as Cargill's, Semaphore's and Viterra's IHB and OHB facilities all operate out of Port Adelaide, they have largely the same catchment area. The ACCC therefore considers there to be 2 exempt service providers in IHB's catchment area (Cargill and Semaphore), and that the relevant facilities impose a level of competitive constraint on IHB (and OHB).

However, the ACCC considers that the presence of rail receival facilities at IHB and OHB (and their absence at Cargill's and Semaphore's facilities) gives Viterra an advantage in sourcing grain from distances further from port. As noted in section 4.2.1 rail is considered more efficient than road for grain located over 200 km from port. As such, given Viterra's IHB and OHB facilities are able to facilitate rail receivals, whereas Cargill's and Semaphore's facilities can only receive grain via road services (see table 3.1), the ACCC's view is that IHB (and OHB) is likely be able to source grain from distances further away from port than Cargill and Semaphore, and therefore have a somewhat larger (though overlapping) catchment area.[680]

The ACCC also considers that the Port Adelaide catchment area is likely to overlap with that of Victorian PTSPs for certain regions around the SA and Victorian border. As noted in section 4.2 and in relation to subclauses 5(3)(b) and (g) GTA's Location Differentials indicate that grain can be economically advantaged to travel to Victorian PTSPs over Port Adelaide facilities, with sites closer to the south of the Victorian and SA border being more likely to move to Victorian PTSPs, and sites on the northern border being more likely to move grain to Port Adelaide.

While acknowledging the potential for some level of competitive constraint under certain conditions, particularly at the margin of catchment areas along the Victorian and SA border, the ACCC does not consider that the Victorian ports generally share the same catchment area as Viterra's IHB facility. Furthermore, the ACCC notes that grain grown near the Victoria and SA border only represents a small portion of grain in the larger Adelaide catchment area.

The ACCC notes that ADM recently commenced export operations out of its Port Pirie facility, with the first shipment recorded on its shipping stem in December 2020.[681] As discussed in section 4.2, the ACCC considers that Port Pirie (which is located in the Upper North region) falls within the Port Adelaide catchment area, and therefore represents a competitive constraint on Viterra's IHB (and OHB) facility. As of 12 April 2021 ADM had

[679] On 21 May 2020 the ACCC also published a letter from LINX Cargo Care confirming it has ceased grain loading operations at its mobile ship loader at Flinders Port Berth 29, Port Adelaide.

[680] The ACCC acknowledges that catchment areas are fluid and grain can and will move to where it is most economically advantaged. However, the ACCC still considers that distance remains an important factor in determining the movement of grain (see section 4.2).

[681] ADM, Grain Marketing Storage, Port Pirie, See: https://www.admgrain.com.au/grain-marketing/grain-storage-options/adm-port-pirie

performed 9 shipments totalling 141,939 tonnes, and also has an additional 2 shipments (totalling 40,000 tonnes) on its shipping stem due to begin loading in late April 2021.[682]

However, the ACCC understands that ADM's facility is small in size, and limited in the vessel size it can accommodate. Consequently, the ACCC expects that the additional constraint placed upon IHB to be limited.

Given the ACCC's view that the Wallaroo and Port Adelaide catchment areas overlap the ACCC notes that should T-Ports' proposed Wallaroo facility commence operations, its catchment area would likely overlap with IHB's (and OHB's). However, as previously noted, the ACCC understands that T-Ports' Wallaroo facility still requires further governmental approvals before it can progress with various stages of the construction process.[683]

The ACCC considers that should T-Ports' Wallaroo facility commence export services, it would provide a level of competitive constraint on Viterra's IHB (and OHB), as its catchment area will likely overlap with Port Adelaide PTSPs. The ACCC will continue to closely monitor developments in the SA market, including in relation to T-Ports' proposed Wallaroo facility.

Given the above, the ACCC's view is that the catchment area for IHB currently contains 2 exempt PTSPs: Cargill and Semaphore. Both of these alternate facilities at Port Adelaide compete for grain within IHB (and OHB's) catchment area and, further, these facilities impose a material level of competitive constraint on Viterra's IHB facility.

The ACCC notes its decision that Viterra's OHB facility will be an exempt service provider. As both IHB and OHB are located at Port Adelaide the ACCC considers that OHB lies within IHB's catchment area, and therefore Viterra will also be an exempt service provider in relation to its OHB facility within IHB's catchment area.

(j) any other matters the ACCC considers relevant

The ACCC's decision to determine Viterra to be an exempt service provider in relation to its IHB facility involves balancing the relevant considerations referred to in subclause 5(3) of the Code. In making its decision the ACCC considered the power to revoke an exemption as relevant to its assessment.

The ACCC has the ability under subclause 5(6) of the Code to review an exemption determination with a view to revoking it in certain circumstances. Similar to the process for granting an exemption, the ACCC may revoke an exemption determination if, after having regard to matters (a) to (j) of subclause 5(3) of the Code, it is satisfied that the reasons for granting the exemption/s no longer apply.

The ACCC notes that, in its response to the Draft Determinations, Viterra argued that the ACCC's ability to revoke exemptions supported the case for exemptions at its facilities:

> *The Draft Determination also fails to consider a number of other factors that ameliorate (if not eliminate) any potential benefits to Viterra from providing favourable access to Glencore Agriculture. These factors, which are discussed in the CRA Comments, include:*
>
> - *…if the ACCC grants an exemption and Viterra subsequently engages in harmful discriminatory behaviour, competitor exporters or producers will complain and the ACCC can revoke an exemption. Given the significant benefits of an exemption (particularly in terms of operational flexibility), Viterra would not be incentivised to engage in conduct that could lead to an exemption being removed, as it would then lose the significant advantages related to that exemption.*[684]

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682 Ibid.

683 The ACCC understands that T-Ports expects to receive grain from the 2021 harvest and begin export operations in January 2022. More information is available at: https://soundcloud.com/t-ports/wallaroo-port-development-1

684 Viterra, *Response to Draft Determination, 21 December 2020,* pp. 29-30.

This was also noted by CRA:

> *If Viterra's terminals were exempted from Parts 3-6 of the Code, and Viterra subsequently reduced terminal access for competing exporters in a way that harmed them and/or producers, the harmed parties would have a strong incentive to bring any problems to the attention of the ACCC. If the ACCC found actual harms, it could easily and quickly respond by reversing the exemption. As explained in our report, Viterra, as well as exporters and producers, would benefit substantially from the supply chain efficiencies that would likely result from exemption. 6 Viterra would lose these benefits if it took any material actions that would cause the ACCC to reverse the exemption, providing a strong incentive to forego anti-competitive discrimination that would risk reversing an exemption.*[685]

Further, the SAFC also considered that revocation supported the case for exemption:

> *We further note that there no impediment to granting exemptions to all ports applied for by Viterra at this time, and revoking them in the future should evidence be presented of uncompetitive conduct by Viterra, or of a reduction in competition in the market (due to competitors leaving):*
>
> > *"In making its draft decision the ACCC considered the power to revoke an exemption as relevant to its assessment. The ACCC has the ability under subclause 5(6) of the Code to review an exemption determination with a view to revoking it in certain circumstances. Similar to the process for granting an exemption, the ACCC may revoke an exemption determination if, after having regard to matters (a) to (j) of subclause 5(3) of the Code, it is satisfied that the reasons for granting the exemption/s no longer apply."*
>
> *This ability should give the ACCC the courage to grant the requested exemptions – potentially on a trial basis with a review in 3-5 years – based on the strong evidence provided by Viterra and others for this to occur, and safe in the knowledge that a review will in and of itself provide an additional incentive for Viterra to act in a just manner.*[686]

The ACCC notes that the power to revoke in clause 5(6) of the Code may be exercised only where the ACCC is satisfied that the reasons for granting an exemption no longer apply. This could, for example, include unforeseen changes in the market, the emergence of information that was not considered as part of the decision making process, or where expected market outcomes did not occur following a decision to exempt (such as exporters subsequently not being able to gain fair and transparent access to port terminal services).

As noted, the ACCC considers that its ability to review (and potentially revoke) an exemption decision under subclause 5(3) of the Code is a further incentive for an exempt PTSP to provide fair and transparent access to exporters when no longer subject to Parts 3 to 6 of the Code.

While the ACCC considers the ability to review (and potentially revoke) an exemption to be relevant to its decision to exempt in certain circumstances (such as where it considers decisions to be finely balanced), the ACCC does not generally consider the potential for revocation to be a significant factor in its decisions about exemption.

Given the nature of the decision in relation to Viterra's IHB facility the ACCC considers the ability to review (and potentially revoke) an exemption determination is relevant to its decision.

Therefore, while acknowledging the significance of revoking an exemption, the ACCC considers that its future ability to revoke the exemption if the reasons for granting the exemption no longer apply is relevant to, and is a factor that provides some level of support for, its decision to grant an exemption in relation to IHB.

[685] Charles River Associates, *CRA Comments on the ACCC's Draft Determinations Regarding Code Exemption for Viterra Grain Export Terminals*, 21 December 2020, p. 4.

[686] SAFC, *Submission in response to Draft Determinations*, 17 November 2020, p. 3.

5.2 Port Adelaide Outer Harbor

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

The ACCC's findings about Viterra's legitimate business interests are the same in relation to Port Adelaide OHB as they are for Viterra's other port terminal facilities.

Section 5.1 (IHB) subclause (a) sets out the ACCC's views on Viterra's legitimate business interests.

(b) the public interest, including the public interest in having competition in markets; and (g) the promotion of competition in upstream and downstream markets

The ACCC's findings about the public interest in relation to OHB are the same as they are in relation to Viterra's other port terminal facilities.

Section 5.1 (IHB) sets out the ACCC's views in relation to subclauses 5(3)(b) and (g).

To the extent the ACCC has views on these matters that specifically relate to Viterra's OHB facility, these are set out below.

Competition in bulk wheat export operations

The ACCC notes that there are currently 4 port terminal facilities at Port Adelaide: 2 Viterra-owned facilities (the smaller IHB facility and the larger deep water OHB facility), and 2 alternate facilities (Cargill's Inner Harbour Berth 20 facility and Semaphore's Osborne facility).

In addition, the ACCC notes that ADM has recently begun bulk grain export operations out of its Port Pirie facility.[687] As per section 4.2 the ACCC considers PTSPs at Port Adelaide and Port Pirie will compete for grain in the Upper North region.

In response to the ACCC's Draft Determinations Viterra submitted that:

> *There is strong evidence that OHB is subject to competition in a global and regional context and, as recognised by ESCOSA, there is no evidence that Viterra has exercised any market power that it may have—including in regard to OHB or upcountry storage facilities that deliver grain to Port Adelaide—to the detriment of other market participants. Viterra has provided significant information to the ACCC which shows that:*
>
> *• Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain the benefits of which it has passed through to other market participants;*
>
> *• OHB is constrained by competition within South Australia and, more locally, at Port Adelaide and Port Pirie, and is constrained by the credible threat of new entry, including re-entry by LINX at Port Adelaide; and*
>
> *• Viterra's upcountry storage facilities are subject to competition and there is a real threat of new entry given the low barriers to entry.*[688]

[687] ADM began bulk grain export operations in December 2020. As of 12 April 2021 ADM has loaded 141,939 tonnes of grain of export.

[688] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 71.

While the ACCC has previously recognised increasing competition between PTSPs at Port Adelaide,[689] overall the ACCC continues to view Viterra as the dominant PTSP for grain located within the Port Adelaide catchment area.[690]

The ACCC also considers it likely that Viterra will remain the dominant provider of port terminal services within the Port Adelaide catchment area for the foreseeable future. Viterra's port terminal facilities at Port Adelaide have significantly higher annual capacities than the alternate facilities, and Viterra is also an associated entity of SA's largest exporter (Glencore).[691]

Given this relationship, it appears highly unlikely that Glencore would transfer significant volumes of bulk grain exports to alternate PTSPs at Port Adelaide or Port Pirie.[692] In the absence of sufficient competitive constraints (or appropriate regulation) Viterra, as part of a vertically-integrated PTSP/exporter, has an incentive (and the ability) to discriminate in favour of Glencore over third party exporters at its OHB facility to the detriment of competition (particularly during peak periods, when capacity is more likely to be constrained and favourable grain prices are available in international markets).

In contrast the ACCC notes that Viterra's commercial incentives to maximise profits likely also provide an incentive to ensure significant throughput at its OHB facility. This is because high levels of throughput are typically needed to ensure the viability of large conventional port terminal facilities, which have relatively high fixed-costs when compared to facilities that use mobile ship loaders.

On balance, the ACCC's view is that Viterra's OHB facility is sufficiently competitively constrained to be granted an exemption from Parts 3 to 6 of the Code.

In forming this view, the ACCC considers it important to note that OHB faces competition from a number of sources (in addition to alternate PTSPs at Port Adelaide and Port Pirie). This includes containerised bulk grain exports and domestic demand for grain, as well as (to a lesser extent) competing PTSPs in Victoria.

The ACCC's view is based on the analysis of the port terminal services market presented in chapter 3, and the consideration of upcountry and related markets presented in chapter 4. These indicate the following:

OHB is competitively constrained by alternate PTSPs at Port Adelaide and Port Pirie

While the ACCC considers Viterra's IHB and OHB facilities to be significantly larger than alternate PTSPs at Port Adelaide and Port Pirie, the ACCC acknowledges that ADM's, Cargill's and Semaphore's facilities place a level of competitive constraint on Viterra's facilities.[693] However the level of constraint is limited by the comparative difference in the scale of operations. Since the 2016-17 season (i.e. the first shipping season both LINX[694]

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[689] See: ACCC final determination – Port Adelaide wheat code exemption assessment – Cargill Australia Limited.

[690] The ACCC considers the Port Adelaide catchment area to include a large area that extends from the Mid and Upper North regions of SA down to the Victorian-SA border. The ACCC considers that grain from the Yorke Peninsula is unlikely to move in large quantities to Adelaide for bulk export.

[691] Average shipment figures at Port Adelaide excluding the 2018-19 and 2019-20 drought seasons are: IHB 720,000 tonnes, OHB 1.49mt, LINX 280,000 tonnes, and Semaphore 320,000 tonnes.

[692] Glencore has not performed any shipments from alternate SA PTSPs.

[693] Both Cargill and Semaphore Port Adelaide facilities are exempt from Parts 3 to 6 of the Code. ADM commenced bulk grain exports from Port Pirie in December 2020 and has submitted an application for exemption from Parts 3 to 6 of the Code in relation to this facility.

[694] Cargill was the only exporter which made use of LINX's port terminal facility since the operation began in the 2015-16 season, In light of the above, the ACCC does not expect the exit of LINX and entry of Cargill to affect market conditions to a significant extent. However, the ACCC does expect Cargill will likely impose a higher level of competitive constraint on

and Semaphore were operational at Port Adelaide) Viterra has performed 80% of all bulk grain export shipments out of Port Adelaide (25% from IHB, and 55% from OHB).

In addition, the extent to which mobile ship loader facilities provide a reliable and ongoing competitive constraint has been raised by stakeholders:[695] for example recent events suggest that such operations are less likely to operate during low production seasons. However, the ACCC also acknowledges this may result in mobile ship loaders providing a form of flexible and responsive competition (see subclause 5(3)(e) and (f)).

OHB is competitively constrained by Victorian markets in certain regions

The ACCC considers that Viterra's OHB facility also faces competitive constraints near the SA and Victorian border from markets in Victoria (e.g. container, domestic and bulk grain export markets). In forming this view the ACCC notes that GTA's Location Differentials (see table 4.1) indicate that grain can be economically advantaged to travel to facilities located in Victoria over facilities located at Port Adelaide. In particular, sites closer to the south of the Victorian and SA border are advantaged to Victorian PTSPs, while sites on the northern border are advantaged to Port Adelaide PTSPs. The ACCC also notes that T-Ports submitted that Viterra faces minor competition from Victorian PTSPs along the SA-Victorian border.[696]

OHB's catchment area overlaps with alternate PTSPs' catchment areas

Given that Viterra's IHB and OHB facilities as well as Cargill's and Semaphore's facilities are all located at Port Adelaide the ACCC considers that these PTSPs can reasonably be expected to compete for grain within the same general catchment area. However the ACCC notes that catchment areas can be influenced by the mode of transport to port (amongst a range of other factors).

As noted in section 4.1.2 rail is generally considered more efficient than road when transporting grain located over 200 km from port. Given that Viterra's OHB facility is able to facilitate rail receivals, whereas ADM's, Cargill's and Semaphore's facilities can only receive grain via road,[697] the ACCC considers that OHB has an advantage in drawing grain located further from port than ADM's, Cargill's or Semaphore's facilities.[698] Furthermore, despite the provision of road freight services typically being a competitive market, Viterra's tendering process may mean that relatively few road providers perform the majority of bulk grain services.[699]

In addition, the ACCC notes that ADM has also recently commenced bulk grain export services out of Port Pirie (in December 2020).[700] The ACCC considers ADM's Port Pirie facility will compete with Port Adelaide PTSPs for grain in the Upper North region (see section 4.2).

Viterra's port terminal facilities than LINX previously did (due to its ability to load grain at a quicker rate than LINX's facility).

[695] GPSA, *Response to Draft Determination*, 27 November 2020, p.2.

[696] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 3.

[697] The ACCC notes that while Cargill's port terminal facility is not able to facilitate grain receivals via rail services, its Crystal Brook upcountry site can receive and load grain using rail freight services.

[698] The ACCC acknowledges that catchment areas are fluid and that grain can and will move to where it is most economically advantaged, however the ACCC still considers that distance remains an important factor in determining the movement of grain.

[699] According to ESCOSA's *Inquiry into the SA Bulk grain export supply chain costs,* 2018, Viterra has consolidated the tender of road transportation contracts, and as of the time of the release of the report (2018) Viterra used 7 different road freight providers.

[700] See: https://www.admgrain.com.au/wp-content/uploads/2021/04/ADM-Shipping-Stem-12042021.pdf/. Accessed 21 April 2021.

OHB's infrastructure

The ACCC considers that Viterra's OHB facility has several infrastructure advantages over alternate PTSPs at Port Adelaide and Port Pirie:

- **OHB is a deep water port:** OHB is the only deep water port in the Port Adelaide catchment area. OHB is therefore able to fully load Panamax vessels, while ADM's, Cargill's and Semaphore's facilities are only able to accommodate smaller vessels.

- **OHB's rail receival facilities:** In addition to being able to receive grain via rail (which neither ADM's, Cargill's nor Semaphore's facilities are able to do)[701], the rate at which OHB can receive grain via rail is significantly higher than the rate at which ADM's, Cargill's and Semaphore's facilities can receive grain via road receivals. As shown in table 3.1 OHB can receive grain via rail at 2,400 tonnes per hour, whereas ADM's, Cargill's and Semaphore's facilities receive grain via road at 500, 1,000[702] and 375 tonnes per hour respectively.[703]

- **Ship loading rates:** OHB (2,200 tonnes per hour) is able to load grain onto vessels significantly quicker than ADM's, Cargill's and Semaphore's facilities (250, 1,000,[704] and 300 tonnes per hour respectively).

- **At-port storage:** Viterra's OHB facility only has 65,000 tonnes of at-port storage, and appears to largely run on a 'just in time' basis.[705] However, the ACCC notes that Viterra's IHB facility has a significant amount of at-port storage (366,500 tonnes) which could potentially be used to support operations at OHB.[706] The ACCC therefore considers that OHB likely has greater flexibility in managing its operations compared to ADM's, Cargill's[707] and Semaphore's facilities (which have 80,000, zero and 16,500 tonnes of at-port storage respectively).[708]

In response to the Draft Determinations several stakeholders (AGE, GPSA and Mr John Hill) raised concerns regarding access to OHB given it is the only Port Adelaide facility capable of fully loading Panamax vessels (this is also discussed in section 3.1.3).

Mr Hill submitted that OHB's efficient operation increases the focus on the supply chain:

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[701] The ACCC notes that while Cargill's port terminal facility is not able to facilitate grain receivals via rail services, its Crystal Brook upcountry site can receive and load grain using rail freight services.

[702] Cargill has submitted that while its loading rate is designed to intake at 1,000 tonnes per hour, due to operational reasons (truck availability and the absence of at-port storage) it expects to load grain to vessels at 400 tonnes per hour.

[703] The ACCC notes that Viterra's OHB facility can receive grain via road receival at 800 tonnes per hour.

[704] See footnote 702.

[705] Viterra, *Attachment 1 – Response to 14/11/19 information request 2020 – Questions 1 and 2 – Viterra port terminal facility features,* 13 February 2020.

[706] Viterra, *Attachment 1 – Response to 14/11/19 information request – Questions 1 and 2 – Viterra port terminal facility features,* 13 February 2020.

[707] The ACCC notes that Cargill has 4 upcountry storage sites (Crystal Brook, Maitland, Mallala and Pinnaroo), which the ACCC considers gives Cargill some level of flexibility in how it manages its supply chain.

[708] The ACCC notes that not all 'at-port storage' is necessarily located directly at-port. Storage located directly at port and connected to conveyor loading services is expected to provide a PTSP with the greatest level of operational flexibility. Storage located in relatively close proximity to port (but not directly at port) is similarly expected to provide a PTSP with greater flexibility than storage located a significant distance from port. In this regard, the ACCC notes that all of ADM's at-port storage is located 9km from port and therefore grain only needs to be transported a short distance via road services. All of OHB's storage (65,000 tonnes) is located at port. However, the volume of at-port storage from which grain can be loaded directly onto a vessel at Viterra's IHB facility is unclear. Viterra has submitted that 60,000 tonnes can be loaded directly onto the shipping conveyor, but with respect to the remaining 306,500 tonnes Viterra submitted that: *"some of* [this] *storage is connected to the shipping bins [and can be used to load grain directly onto a vessel], but is typically used to for long term storage, containers and/or domestic outturn."* See: *Attachment 1 – Response to 14/11/19 information request – Questions 1 and 2 – Viterra port terminal facility features* for further details.

> *Outer Harbour was developed to cater for Panamax vessels which enable lower sea freight costs and not a need for export tonnage capacity from the Port Adelaide catchment area. It is considerably more efficient than Inner Harbour in every facet of its operation from rail discharge to ship loading with a focus on a better integrated supply chain. This brings the interaction between country silos, terminal storage capacity and rail transport into closer focus.*[709]

In addition, Mr. Hill submitted that OHB is the only deep water Port Adelaide berth, and given OHB has only 65,000 tonnes of storage this places greater demand on the need for unhindered access to assemble cargo for export.[710]

AGE submitted that there is no viable alternative to OHB as it is the only deep water port at Port Adelaide (and that this means that users of Semaphore's and Cargill's facilities require access to OHB in order to fully load Panamax vessels):

> *No current viable alternative to Outer Harbor currently exists, it is the only deep water port in the Adelaide draw zone where all forward contracts are priced via the NTP (Natural Terminal Port) pricing system.*
>
> *Moreover, Outer Harbor is important to users of Semaphore and Cargill's berth as neither can fully load Panamax vessels and would likely require access to top-up at Outer Harbor. Comparing Outer Harbour to Semaphore is not a comparison that is likely to withstand scrutiny.*[711]

GPSA also expressed similar views in its submission regarding the importance of fully loading Panamax sized vessels:

> *Both Cargill and Semaphore are limited by their physical geography within Inner Harbour and are incapable of fully loading Panamax sized vessels. This is a key determinant of competition.*[712]

In response to stakeholder submissions to the Draft Determinations, Viterra submitted that although OHB has different infrastructure this does not mean it doesn't compete for the same grain as competing PTSPs:

> *GPSA [and other stakeholders make] claims that competitor port facilities at IHB are not competitive with OHB. This is premised on the concept that competitor operations at IHB have different characteristics to Viterra's facilities, including in relation to the vessel size they can load and road receival rates. This is a narrow view of competition.*
>
> *Port terminal services are not homogenous products and competition should not be framed on the basis of whether two port terminals offer identical services. The fact that port terminals differ in their receival rates and vessel loading size does not indicate that these terminals do not compete to attract the same grain. Each of Cargill and Semaphore have a significant amount of capacity at their IHB operations, which can be used to take grain away from Viterra's operations. A loss of even 10% of throughput to a competitor significantly affects Viterra's earnings.*[713]

The ACCC notes stakeholder concerns regarding the supply chain and port characteristics at Viterra's OHB facility (in particular OHB's ability to fully load Panamax vessels). The ACCC considers that OHB's infrastructure and ability to fully load Panamax vessels advantages it over alternate PTSPs at Port Adelaide and Port Pirie.

The ACCC also notes AGE's views that users of Cargill's and Semaphore's facilities likely require access to OHB to fully load vessels for export. However, the ACCC understands that

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[709] Mr John Hill, *Submission in response to Draft Determinations*, 3 November 2020, pp. 2-3.

[710] Mr John Hill, *Submission in response to Draft Determinations*, 3 November 2020, p.3.

[711] AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 3.

[712] GPSA, *Submission in response to Draft Determinations*, 27 November 2020, p. 2.

[713] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, pp. 38-39.

vessels from Cargill's and Semaphore's facilities do not generally use OHB as a top-up site before leaving SA for export markets.[714]

OHB appears to have spare port terminal capacity

The ACCC notes that it appears that Viterra's OHB facility will have a significant amount of spare capacity available at this facility in most seasons, with maximum annual exports (1.82 million tonnes) being significantly below stated capacity (2.54 million tonnes). OHB also appears it will have ample spare capacity available during peak periods (with peak period capacity utilisation of 70%). There does, however, appear to be some potential for future capacity constraints at OHB in high output seasons (peak period exports were 1.11 million tonnes in 2016-17, which is just below peak period capacity of 1.35 million tonnes).[715] This suggests that, in the absence of sufficient competitive constraints, Viterra could potentially have an incentive to provide discriminatory access during peak periods in high output seasons.

The ACCC notes that the presence of alternate PTSPs at Port Adelaide (as well as Port Pirie and to a lesser extent, Victoria) and the container and domestic markets (discussed below) likely serve to limit Viterra's incentive (and ability) to discriminate access in favour of its associated entity exporter during periods of high demand (in a way that is detrimental to competition). Further, in the event Viterra was to discriminate, in these circumstances the negative impacts on exporters and growers would be limited by the opportunity for them to switch to alternate PTSPs (although these negative impacts could potentially be heightened by the deep water nature of the OHB facility).

Proposed port terminal facilities

The ACCC notes that T-Ports has proposed building a port terminal facility at Wallaroo.[716] This facility would compete most closely with Viterra's Wallaroo facility, though the catchment area of T-Ports' Wallaroo facility would likely overlap with that of PTSPs located at Port Adelaide to some extent. It is therefore likely the facility would compete for the same grain as Viterra's OHB facility (in certain regions

The ACCC acknowledges that the threat of entry of additional facilities will impose a level of competitive constraint on Viterra, particularly to the extent that the threat of entry is credible and can be expected to compete with a particular Viterra facility (or facilities). Furthermore, the recent entry of alternate PTSPs likely indicates that the barriers to entry for low capital costs operations are not insurmountable for prospective entrants.

However, the ACCC notes that the recent entry of PTSPs may also serve to discourage further entry, to the extent that each successive entrant increases competition and lowers commercial viability for future entrants.

Consequently, the ACCC considers that the threat of entry by other PTSPs can be expected to place some level of constraint on Viterra (to the extent it is considered credible). However,

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[714] The ACCC notes that it is not proposing to exempt Viterra's nearby Port Giles facility at this time (and that this is also a deep water port). The ACCC is currently considering Viterra's application for exemption in relation to its Port Lincoln facility, which is also able to fully load Panamax vessels. T-Ports' Lucky Bay facility is also capable of fully loading Panamax vessels (the ACCC determined T-Ports to be an exempt service provider in relation to its Lucky Bay facility on 1 April 2020).

[715] Viterra released 1.35 million tonnes of capacity in the peak period in the 2019-20 season. In the 2016-17 season Viterra released 1.19 million tonnes of capacity.

[716] The ACCC notes that given the Port Adelaide and Wallaroo catchment areas likely overlap (to some extent), T-Ports' proposed Wallaroo facility would likely compete for grain with Port Adelaide PTSPs (in certain regions).

the ACCC generally does not consider the threat of competition to be as effective as actual competition.

Proposed port terminal facilities are discussed further below in relation to subclauses 5(3)(e) and (f).

Competition in upstream and downstream markets

The ACCC considers that matters relating to competition in upstream and downstream markets are generally the same in relation to OHB as they are in relation to Viterra's IHB port terminal facility (see section 5.1 (IHB) subclause (b)).

Conclusion

The ACCC notes OHB will likely have excess capacity during the peak period, but notes there may be some potential for constraints during the peak period in high output seasons.

The ACCC also understands Viterra owns the majority of upcountry storage in the Port Adelaide region (though there appears to be some credible alternatives in the Mid and Upper North regions).

The ACCC acknowledges that the recent introduction of alternate PTSPs has increased incentives for prospective third party storage and handling providers to enter the supply chain with their potential customers (i.e. exporters) having the opportunity to access the bulk export market via a larger number of PTSPs. Additionally, Cargill's storage and port terminal facilities offer a competing integrated supply chain to Viterra's OHB facility.

The ACCC considers that Viterra's OHB facility faces competitive constraints from a variety of sources:

- the combination of ADM's, Cargill's and Semaphore's facilities are likely to impose a material level of competitive constraint on OHB;
- Victorian PTSPs (as well as Victorian domestic and container markets) are likely to impose a competitive constraint from growers in certain regions of the Port Adelaide catchment area;
- the SA container market, while small, is located almost exclusively at Port Adelaide and likely provides a limited competitive constraint; and
- the SA domestic market will likely provide a limited competitive constraint (in particular the ACCC understands SA's domestic market while small, is largely located within the Port Adelaide catchment area).

The ACCC also notes that OHB is generally advantaged over alternate PTSPs at Port Adelaide and Port Pirie, largely due to the fact that it is the only facility at Port Adelaide capable of fully loading Panamax vessels.

While acknowledging OHB is the only deep water port in the Port Adelaide catchment area, in light of the above (and the views set out in section 5.1 (IHB) in relation to subclauses 5(3)(b) and (g)), the ACCC's view is that, on balance, there is sufficient competitive constraint on Viterra's OHB facility such that competition at port and upcountry will likely be maintained if an exemption were granted to Viterra in relation to this facility. The ACCC considers this to be relevant to subclauses 5(3)(b) and 5(3)(g) of the Code.

On balance, the ACCC considers it is not clear that granting an exemption to Viterra in respect of its OHB facility would necessarily promote a significant increase in competition in the port terminal services markets and in upstream or downstream markets. However the ACCC does not expect an exemption to be detrimental to competition in these markets.

Given the above the ACCC's view is that exempting Viterra from Parts 3 to 6 of the Code in relation to its OHB facility is likely to be in the public interest, and unlikely to be detrimental to competition in upstream and downstream markets.

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

The ACCC's findings about matters relating to the interests of exporters who may require access to port terminal services are the same in relation to OHB as they are in relation to Viterra's IHB facility.

Section 5.1 (IHB) subclause (c) sets out the ACCC's views on these matters in detail.

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

Section 5.1 (IHB) subclause (d) sets out the ACCC's views on the likelihood that exporters will have fair and transparent access to port terminal services. ACCC views that specifically relate to these matters and Viterra's OHB facility are set out below.

In considering these matters, the ACCC notes that Viterra's Port Adelaide OHB facility is one of 4 port terminal facilities at Port Adelaide. As such the ability of exporters to obtain fair and transparent access at OHB must be considered with regard to the other facilities located at Port Adelaide.

In relation to this, the ACCC understands that it may be possible for Viterra to operate its IHB and OHB facilities in conjunction with one another to some extent (for example in relation to storage capacity). While the extent to which this occurs in practice is unclear, the ACCC notes that Viterra has previously indicated that IHB and OHB are best managed operationally as a single port terminal facility (in 2013).[717] As set out in section 3.1 the ACCC also notes there are significant differences in the scale of Viterra's operation at Port Adelaide, when compared to alternate PTSPs.

<u>OHB capacity utilisation</u>

In relation to concerns expressed specifically in relation to the ACCC's views expressed in the Draft Determinations on capacity utilisation at Outer Harbor, the ACCC notes that Viterra submitted:

> *Viterra agrees that there is significant excess capacity at OHB on an annual basis. As explained in section 2.1 of the submission, the highest practical capacity at OHB is 2.33 mtpa, which is higher than grain throughput at OHB in each of the past three seasons. However, the ACCC also states that OHB appears to be capacity constrained during peak periods. It refers to the bumper crop season 2016-17 to support its view. However, this was an unusual season over the past ten years and, since then, Viterra has not been capacity constrained at OHB in peak periods. Since 2016-17, the highest throughput months at OHB were [c-i-c]. Based on a maximum monthly capacity of around 194,444 tonnes (i.e. the highest practical capacity divided by 12 which likely understates monthly capacity in peak periods once shutdowns are accounted because, as previously noted, these would take place outside of peak periods), Viterra has had excess capacity at OHB in all but [c-i-c] during the past three seasons.*

[717] ACCC, *Draft Decision Viterra Operations Limited Application to Extend and Vary 2011 Port Terminal Services Access Undertaking*, 2013, p. 28.

Therefore, taking other capacity at Port Adelaide and Port Pirie into account, OHB is unlikely to be capacity constrained going forward. It is important that the ACCC does not seek to base its decision on an unusually high harvest year (2016-17). This is particularly in circumstances where a significant amount of competitor capacity is available at Port Adelaide (and there are plans for increased competitor capacity at Wallaroo which competes with grain from the same growing region) such that, even in a rare bumper harvest going forward, Port Adelaide ports are unlikely to be capacity constrained.[718]

The ACCC notes Viterra's OHB facility is the largest bulk grain loading facility at Port Adelaide, with capacity of 2.54 million tonnes per annum.[719] When considered on an annual basis there appears to be a significant amount of spare capacity available at this facility, with the maximum amount of exports from OHB being 1.82 million tonnes per annum (which occurred during the 2016-17 season). Overall OHB's average annual and peak capacity utilisation (excluding the drought affected 2018-19 and 2019-20 seasons) is 59% and 70% respectively, suggesting that spare capacity is likely to be available for third party exporters on both a peak and annual basis.[720]

The ACCC does, however, note that during the peak period in high grain output seasons it appears there may be some capacity constraints at OHB. For example, Viterra performed 1.11 million tonnes of shipments at OHB in the peak period of the bumper 2016-17 season, just below the facility's peak period capacity of 1.35 million tonnes.[721] This suggests that, in the absence of sufficient competitive constraint, Viterra could potentially have an incentive to provide certain exporters with more favourable access than others during peak periods in high output seasons.

In addition, Viterra's associated entity exporter, Glencore, is the largest exporter at OHB by throughput, performing 41% of shipments in peak periods and 47% in off-peak periods.[722] By comparison the largest third party exporters at OHB during the peak period, CBH, Bunge and COFCO, represent 16%, 12% and 5% of peak period shipments respectively (and 19%, 3% and 7% in the off-peak period respectively). As such it appears third party exporters have historically been able to access similar (or greater) levels of capacity during the peak period compared to the off-peak period at Viterra's OHB facility.

As such, third party exporters appear to be able to secure access at OHB during peak periods, with Glencore accounting for 41% of OHB's shipments (or 31% of OHB's capacity[723]) during peak periods. However, and as discussed in section 3.2.4, the fact Glencore only currently accounts for a relatively small portion of OHB's shipments (or total capacity) during peak periods does not necessarily mean that this would continue to be the case absent the application of Parts 3 to 6 of the Code.

In particular the ACCC notes that Viterra's current PLPs ensure that combined across Viterra's 6 facilities a minimum of 500,000 tonnes of capacity is reserved for short term capacity per quarter.[724] In addition no single exporter can apply for more than 40% of the initial long-term capacity in the first 6 month period of the calendar year at OHB (or 50% at

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[718] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, pp. 71-72.

[719] Ibid, p. 7.

[720] Including the drought affected 2018-19 and 2019-20 seasons OHB has annual and peak period capacity utilisation of 44% and 51% respectively.

[721] Viterra released 1.22 million tonnes of capacity in the peak period in the 2019-20 season. In the 2016-17 season Viterra released 1.08 million tonnes of capacity.

[722] The portion of shipments performed at OHB by exporters is taken from 2014-15 to 2019-20 data.

[723] Excluding shipment data from the 2018-19 and 2019-20 season.

[724] See, clause 3.12, Viterra Port Loading Protocols, 24 December 2015, p. 31. (See: https://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf)

all other times).[725] [726] As above, the ACCC notes that exporters' current and historical levels of access were likely influenced by these provisions under Viterra's PLPs and that if Viterra were granted an exemption, it would be able to vary its PLPs without the need for ACCC approval.

Consequently, the above appears to indicate that OHB will likely have spare capacity available on both a peak and annual basis. However, OHB may experience some capacity constraints during peak periods in high output seasons.

As previously noted the ability of exporters to obtain fair and transparent access at OHB must be also be considered with regard to the other port terminal facilities at Port Adelaide.

IHB capacity utilisation

Viterra's IHB facility has a (stated annual capacity) of 1.01 million tonnes per annum,[727] with an average capacity utilisation rate of 71% and 90% in annual and peak periods respectively (excluding the drought-affected 2018-19 and 2019-20 seasons). Viterra's associated entity exporter, Glencore, also performs the majority of shipments through IHB, with a market share of 59% in peak periods and 58% in off-peak periods.[728]

Glencore's peak period market share at IHB (59%) is significantly higher than the next highest peak period exporter market share at other Viterra facilities (the next highest is Port Giles, where Glencore performs 44% of peak period shipments). However the ACCC notes that third party exporters have historically had greater access to capacity at Viterra's more efficient OHB facility (where Glencore performs 41% of peak period shipments). In addition, and for comparison, the second largest exporter at IHB is CBH, with a peak and off-peak period market share of 9% and 4% respectively (and 7% annually).

In addition the ACCC notes that Viterra's current PLPs ensure that no single exporter can apply for more than 50% of the initial long-term capacity at IHB. [729] [730] The ACCC notes that exporters' current and historical levels of access were likely influenced by these provisions under Viterra's PLPs and that if Viterra were granted an exemption, it would be able to vary its PLPs without the need for ACCC approval.

Given the above, the ACCC's considers that IHB appears to have limited extra spare capacity available, particularly during peak periods, and that most of IHB's current capacity is typically utilised by Glencore. The ACCC therefore considers that, while it is possible that third party exporters could access some level of spare capacity at Viterra's IHB facility in the event that there are capacity constraints at OHB, this seems unlikely given IHB generally experiences greater capacity constraints than OHB.[731]

[725] See clause 3.5(a) and definition of 'Initial Nomination Cap' in clause 1. Viterra Port Loading Protocols, 24 December 2015, p. 31. (See: https://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf)

[726] The ACCC notes that it has defined the peak period in this document as December through to May.

[727] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 7.

[728] Figures are averaged across the 2014-15 to 2019-209 seasons.

[729] See clause 3.5(a) and definition of 'Initial Nomination Cap' in clause 1,.Viterra, Port Loading Protocols, 24 December 2015, clause 3.12(a). See: https://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf

[730] The ACCC understands that Viterra intends to make all 2021-22 capacity available as short-term capacity only.

[731] As discussed in section 3.1, OHB has more efficient infrastructure than IHB, and is therefore likely more desirable the more desirable facility to export from. However the ACCC understands that OHB is largely run on a 'just in time' process, and it may be more efficient for exporters to store and load grain from Viterra's IHB facility. Furthermore, depending on contractual arrangements between the exporter and Viterra, the exporter may not always have choice of which port to use when using Export Select.

The impact of Cargill on capacity utilisation at OHB

Cargill's Berth 20, Inner Harbour facility is relevant to the likelihood that exporters will be able to obtain fair and transparent access when considering the possible exemption of Viterra's OHB facility. As discussed in section 3.1.4 Cargill has publicly indicated that "…our first year we are looking to export 300,000 tonnes, the following years we have capacity of 540,000 tonnes."[732]

In its exemption application Cargill also stated that:

> *Cargill's exports through Port Adelaide over the four years up to 2017-18 averaged at 238k tonnes per year. In 2018-19, Cargill did not export through Port Adelaide at all due to drought conditions. Cargill therefore anticipates that it will likely have excess capacity in relation to its expected nominal annual tonnage of 300k tonnes through its new facility. That being the case, Cargill is committed to welcoming third parties to utilise any available capacity in its facility. All services would be offered and charged on a commercial basis.*[733]

The amount of spare available capacity available at Cargill's facility therefore will likely be 302,000 tonnes per annum (assuming, as per above, that Cargill performs 238,000 tonnes of exports per annum). In considering the capacity available at Cargill's facility the ACCC notes that Cargill, as a vertically integrated PTSP, likely has an incentive to provide greater access to its associated entity exporter.

In addition, as an exempt service provider in relation to its Berth 20, Inner Harbour facility, Cargill is also less constrained by the Code in this regard. However the ACCC also notes that Cargill is subject to significant competitive constraint, and has also indicated its intention to continue to use other facilities at Port Adelaide (including Viterra's port terminals).[734] The ACCC notes that should Cargill choose to export through Viterra's Port Adelaide facilities (over its own facility) slightly more spare capacity will be available to third party exporters at Cargill's facility. In addition, the ACCC also notes that Cargill's upcountry network provides an alternate (albeit limited in size) vertically integrated network through which third party exporters can export grain from Port Adelaide (see section 4.1.1.).

The ACCC also notes that Cargill's exports through Viterra's IHB and OHB facilities decreased significantly (from 280,000 tonnes to 20,500 tonnes per season) after it commenced using LINX's facility in 2015-16.[735] Therefore, Cargill's decision to export outside of Viterra's IHB and OHB facilities has meant (and likely will continue to mean) there is a reduced demand for Viterra's IHB and OHB facilities compared to before the 2015-16 season.

Given the above, the ACCC expects that the presence of Cargill's Berth 20 facility at Port Adelaide Inner Harbour will have 2 effects, both of which are likely to reduce Viterra's incentive to provide access to certain exporters on a favourable basis: firstly, Cargill's facility will give third party exporters a small amount of additional capacity and offer credible (though limited) competition to Viterra's IHB and OHB facilities; and secondly, that Cargill will be unlikely to choose to export large volumes of grain through IHB or OHB, reducing the potential for capacity constraints at these facilities (and also Viterra's incentive to discriminate in favour of its associated entity exporter).

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[732] Accessed 4th Feb: https://www.cargill.com.au/en/2021/cargill-welcomes-arrival-of-export-mobile-ship-loader - see video.

[733] Ibid p. 10.

[734] Ibid p. 5.

[735] The ACCC notes that Cargill have only loaded 3 vessels at Viterra's Port Adelaide facilities since the beginning of the 2015-16 season (which coincides with the entry of LINX). As such, the ACCC anticipates Cargill will likely continue to use its own facility for the majority of its shipments out of Port Adelaide.

The impact of Semaphore on capacity utilisation at OHB

Semaphore's Osborne facility is also relevant to the likelihood that exporters will be able to obtain fair and transparent access when considering whether to exempt Viterra from Parts 3 to 6 of the Code in relation to its OHB facility. The ACCC notes that Semaphore is not vertically integrated with an exporter.[736] As per section 3.1.4, the ACCC considers the capacity of Semaphore's port terminal facility is likely to be 615,000 tonnes per annum (as submitted by Viterra and CRA).[737]

The ACCC considers that Semaphore's facility provides an alternative export path for third party exporters. As Semaphore is not vertically integrated with an exporter, it appears unlikely that Semaphore faces strong incentives to favour, or discriminate against, certain exporters. Therefore, all of Semaphore's capacity (615,000 tonnes) will likely be available to third party exporters when deciding which port terminal to export out of Port Adelaide.

The impact of ADM's Port Pirie facility on capacity utilisation at OHB

The ACCC considers that the catchment areas for ADM's Port Pirie facility and Viterra's OHB facility (as well as other Port Adelaide providers) overlap in the Upper North region of SA (see section 4.2). Consequently, ADM's Port Pirie facility is relevant to the likelihood that exporters will be able to obtain fair and transparent access when considering whether to exempt Viterra from Parts 3 to 6 of the Code in relation to its IHB facility.

As discussed in section 3.1.4 the ACCC considers that ADM's Port Pirie facility has a capacity of 437,854 tonnes per annum at this time.

The ACCC also recognises that ADM operates a vertically integrated supply chain.[738] ADM has submitted an application for exemption from Parts 3 to 6 of the Code in relation to this facility.

The ACCC considers that ADM's Port Pirie facility provides an alternative export path for third party exporters, which will, to some extent, limit Viterra's incentive (and ability to) discriminate in favour of its associated entity exporter.

Size of port terminal facility

Section 5.1 (IHB) subclause (d) sets out the ACCC's views on Viterra's submission which stated it is constrained from exercising market power at a number of its port terminals, since they export a small proportion of wheat produced in Australia and SA.[739]

Conclusion

The above indicates Viterra's OHB facility will likely have spare capacity available on both a peak and annual basis, with the potential for OHB to experience some capacity constraints during peak periods in high output seasons. However, ADM's, Cargill's and Semaphore's facilities will impose a small but not insignificant level of competitive constraint on Viterra's OHB facility. The existence of this viable, though limited, alternative capacity provides an incentive for Viterra to provide fair and transparent access to third party exporters at its OHB facility and will also likely reduce potential future capacity constraints at OHB.

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[736] Semaphore, *Application for exemption from the Port Terminal (Bulk Wheat) Code of Conduct*, 16 May 2017, p. 6. See footnote 10 for further details.

[737] Viterra, *Response to Draft Determinations,* Public version, 8 February 2020, p. 8.

[738] ADM, *Application for exemption Port Terminal (Bulk Wheat) Code of Conduct*, 14 January 2021, p. 6. See footnote 10 for further details.

[739] Viterra, *Response to Draft Determinations,* Public version, 8 February 2020, pp. 2-3.

As discussed above in relation to subclauses 5(3)(b) and 5(3)(g) of the Code, PTSPs operating at Port Adelaide also face competitive constraint from the local domestic and container markets, as well as from Victorian markets (for certain regions of SA). These markets also constrain the potential for Viterra to discriminate access in favour of its associated entity exporter at its OHB facility to the detriment of competition.

On balance the ACCC considers that the combination of competition from alternate PTSPs located at Port Adelaide and Port Pirie, the SA domestic and container markets, as well as Victorian markets, should impose sufficient competitive constraints on Viterra to ensure fair and transparent access will be provided to its OHB facility absent the full application of the Code.

Furthermore the ACCC notes that its ability to review (and potentially revoke) an exemption decision under subclause 5(3) of the Code is a further incentive for an exempt PTSP to provide fair and transparent access to exporters when no longer subject to Parts 3 to 6 of the Code in relation to its OHB facility.

As such the ACCC's view is that exempting Viterra from Parts 3 to 6 of the Code in respect of its OHB facility will not be detrimental to exporters' ability to obtain fair and transparent access to port terminal services.

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

The ACCC considers that matters relating to the promotion of the economically efficient operation and use of the port terminal facility, and the promotion of efficient investment in port terminal facilities are the same in relation to OHB as they are in relation to Viterra's other port terminal facilities.

Section 5.1 (IHB) subclauses (e) and (f) sets out the ACCC's views on these matters in detail.

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

The ACCC's consideration of whether Viterra is an exporter (or an associated entity of an exporter) is the same in relation to Port Adelaide OHB as it is in relation to Viterra's other port terminal facilities.

Section 5.1 (IHB) subclause (h) sets out the ACCC's view in relation to these matters.

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

The ACCC considers Port Adelaide IHB and OHB to have the same catchment area. As such section 5.1 (IHB) subclause (i) sets out the ACCC's view in relation to these matters.

The ACCC notes it has granted an exemption to Viterra's IHB facility as part of its assessment of Viterra's exemption applications. As both IHB and OHB are located at Port Adelaide the ACCC considers Viterra will also be an exempt service provider in relation to its IHB facility, which is within OHB's catchment area.

(j) any other matters the ACCC considers relevant

The ACCC's consideration of any other relevant matters is the same in relation to OHB as it is in relation to Viterra's IHB facility.

Section 5.1 (IHB) subclause (j) sets out the ACCC's view in relation to these matters.

5.3 Wallaroo

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

The ACCC's findings about Viterra's legitimate business interests are the same in relation to Wallaroo as they are in relation to Viterra's other port terminal facilities.

Section 5.1 (IHB) subclause (a) sets out the ACCC's views on Viterra's legitimate business interests.

(b) the public interest, including the public interest in having competition in markets; and (g) the promotion of competition in upstream and downstream markets

The ACCC's findings about the public interest in relation to Wallaroo are the same as they are in relation to Viterra's other port terminal facilities.

Section 5.1 (IHB) sets out the ACCC's views in relation to subclauses 5(3)(b) and (g).

To the extent the ACCC has views on these matters that specifically relate to Viterra's Wallaroo facility, these are set out below.

Competition in bulk wheat export operations

Wallaroo, which is located on the northern end of the Yorke Peninsula, is one of 2 port terminal facilities located on the Yorke Peninsula: the other being Viterra's Port Giles facility (located on the south east coast of the peninsula). Wallaroo on average facilitates 680,000 tonnes of grain shipments per season (excluding the drought affected 2018-19 and 2019-20 seasons).[740]

In response to the view expressed in the ACCC's Draft Determinations that Viterra does not face sufficient competitive constraint at Wallaroo, Viterra submitted that:

> *There is strong evidence that Wallaroo is subject to competition in both a global and regional context and, as recognised by ESCOSA, there is no evidence that Viterra has exercised any market power that it may have—including in regard to Wallaroo or upcountry storage facilities that deliver grain to Wallaroo—to the detriment of other market participants. Viterra has provided significant information to the ACCC which shows that:*
>
> > *• Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain, the benefits of which it has passed through to other market participants;*
> >
> > *• Wallaroo is constrained by competition within South Australia and, more locally, by ADM at Port Pirie and Cargill and Semaphore at Port Adelaide;*
> >
> > *• Wallaroo is constrained by the credible threat of new entry, including by T-Ports at Wallaroo; and*
> >
> > *• Viterra's upcountry storage facilities are subject to competition and there is a real threat of new entry given the low barriers to entry.*[741]

[740] Including the 2018-19 and 2019-20 seasons Wallaroo facilitates an average of 570,000 tonnes of grain per year. Averages are taken since the 2011-12 season.

[741] Viterra, *Response to Draft Determination* Public version, 8 February 2021, p. 75.

The ACCC notes Viterra's view in relation to the ACCC's Draft Determinations, however the ACCC continues to consider that Viterra's Wallaroo facility does not face sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code.

The ACCC's view is based on the analysis of the bulk grain port terminal services market as set out in chapter 3, as well as the consideration of upcountry and related markets set out in chapter 4. This indicated the following:

<u>Wallaroo appears to be unconstrained in certain parts of its catchment area</u>

The ACCC's analysis of Wallaroo's catchment area indicates that it extends between the Yorke Peninsula and the Mid and Upper North regions of SA: as set out in section 4.2, the ACCC understands that Wallaroo sources the majority of its grain from the Yorke Peninsula. Grain stored on the Yorke Peninsula has a significant freight advantage to move to Wallaroo over PTSPs located at Port Adelaide (see table 4.2) and Port Pirie (see section 4.2).

The ACCC notes that in response to the Draft Determinations Viterra submitted a range of general views in relation to SA grain catchment areas (these views are set out in section 4.2). In relation to the ACCC's views on the catchment area for Wallaroo specifically, Viterra submitted that Wallaroo's catchment area includes both the Yorke Peninsula and a large area surrounding Adelaide[742] and that accordingly, Viterra is subject to a higher level of competition at Wallaroo than the Draft Determinations suggested.[743]

In support of this position, Viterra also submitted that GrainFlow operates an upcountry site on the Yorke Peninsula (in Maitland), and that the majority of grain from this facility will likely be moved to Port Adelaide for export from Cargill's facility:

> *The ACCC's analysis does not properly account for the fact that grain does in fact move between the Yorke Peninsula and the Adelaide region. It is not uncommon for growers to deliver certain commodities grown on the Yorke Peninsula to Port Adelaide. For example, Cargill moves its grain from Maitland on the Yorke Peninsula to IHB for export. Viterra estimates that GrainFlow received between 120,000 and 140,000 tonnes of grain at its Maitland site on the Yorke Peninsula (60 km from Port Giles) in 2020-21, the majority of which will likely be moved to Port Adelaide (which is 215 km from Maitland) and shipped from Berth 20 at IHB.*[744]

The ACCC notes Viterra's comments that GrainFlow's site on the Yorke Peninsula will likely move its grain receivals to Port Adelaide for export. In particular, the ACCC notes that Cargill has not exported grain from Viterra's Wallaroo and Port Giles facilities in the 2020-21 season[745] (and that this is largely consistent with previous seasons).[746]

However, the ACCC notes that:

- Grain stored in GrainFlow's Maitland site represents only a small portion of the estimated grain produced on the Yorke Peninsula in the 2020-21 season (8% to 10%).[747]

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[742] Viterra submitted this area surrounding Adelaide stretches from Dooen in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia. See: Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 4.

[743] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 76.

[744] Viterra, *Response to Draft Determination*, Public version, 8 February 2021 p. 19.

[745] As of 31 March 2021.

[746] Cargill has only exported 0.12 million tonnes of grain from Viterra's Port Giles and Wallaroo facilities since the beginning of the 2015-16 season (representing only 2% of exports from these facilities in this time).

[747] PIRSA estimates that 1.44 million tonnes of grain was produced on the Yorke Peninsula in the 2020-21 season. See: PIRSA, *Crop and pasture reports South Australia 2021 Harvest Report*, January 2021.

- The Location Differential of moving grain from Maitland to Port Adelaide is almost (and more than) double that of moving grain to Port Giles (and Wallaroo) respectively.[748]

- Viterra submitted that *[c-i-c]* of grain grown on the Yorke Peninsula in 2017-18 was exported via its Wallaroo and Port Giles facilities, indicating that grain grown on the Yorke Peninsula is unlikely to move to Adelaide for export.[749]

- While noting the ACCC's views that the domestic market imposes a limited constraint on grain grown in the Yorke Peninsula, grain from GrainFlow's Maitland facility could be sold to domestic markets.

Consequently, the ACCC considers there are likely significant cost advantages associated with moving grain from Maitland to either Port Giles or Wallaroo compared to Port Adelaide. While recognising catchment areas are not a fixed concept and grain can move between regions, the ACCC's view is that it is unlikely that the Port Adelaide catchment area extends to the Yorke Peninsula in general.

Viterra also submit that:

> *In addition, the ACCC's analysis does not account for the fact that there are upcountry storage sites that fall within a particular ACCC-defined zone when the site is in fact closer to port terminals in another ACCC-defined zone. For example, the distance from Edithburgh (to the west of Port Adelaide) to Port Adelaide is 60 km less than from the distance from Bordertown (to the east of Port Adelaide) to Port Adelaide. It is also important that the ACCC also factor in that, for the eastern regions of South Australia, interstate port terminals form part of a competitive "catchment area" assessment. Grain grown in the eastern regions of South Australia is often exported through port terminals in Victoria. As set out in Appendix A of the CRA Supplementary Report, some producers in the eastern region can economically transport wheat to supply chains in Victoria in response to price changes. For example, the price that can be obtained for grain delivered to OHB varies significantly at different times to the price that can be obtained for grain delivered to GrainCorp's Geelong port terminal. This is an important factor for South Australian growers (particularly, in the eastern region) in deciding where to deliver as well as for marketers in determining how to price grain.*[750]

The ACCC notes that Edithburgh is located 229km from Port Adelaide and 14km from Port Giles (and 143km from Wallaroo). The 2 closest ports to Bordertown are Portland (275km) and Port Adelaide (296km).[751] The ACCC considers that the relative distance between competing ports to be a relevant factor in an exporter's decision regarding which port terminal facility they export grain from. In the example provided by Viterra, Bordertown is located approximately equal distances from Port Adelaide and Portland, and therefore grain can reasonably move to either location for export. Edithburgh, however is located substantially closer to Port Giles (and Wallaroo) and therefore has a substantial freight advantage to Port Giles (and Wallaroo) over Port Adelaide.

The ACCC's view is that it is unlikely that the Port Adelaide catchment area extends to the Yorke Peninsula in general. There does however appear to be some competition between Viterra at Wallaroo and alternate PTSPs located at: Port Adelaide for grain grown in the Mid and Upper North regions of SA (see table 4.1); and Port Pire for grain grown in the Upper North region. Accordingly, while the ACCC acknowledges that the catchment areas for Port

[748] GTA have the following location differentials for moving grain from Maitland to OHB, Port Giles and Wallaroo as 20.47, 10.84 and 8.29 respectively,

[749] Viterra, *Response to request for information (Question 9)*, 13 January 2020, p. 4.

[750] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 19.

[751] Distances obtained using Google maps.

Adelaide and Port Pirie overlap with Wallaroo the ACCC does not consider it likely that they comprise a single catchment area, as suggested by Viterra.

Wallaroo faces limited competition from alternate PTSPs

Given the above, the ACCC's view is that PTSPs located at Port Adelaide and Port Pirie likely only compete with Viterra's Wallaroo facility for grain grown in the Mid and/or Upper North regions of SA. Consequently, ADM's, Cargill's and Semaphore's facilities are expected to impose limited competitive constraint on Viterra's Wallaroo facility.

In response to the ACCC's views expressed in the Draft Determinations regarding the level of competition Viterra's Wallaroo facility faces from alternate PTSPs, Viterra submitted that:

- the level of competitive constraint posed by Cargill and Semaphore is not 'limited as these PTSPs not only compete with Wallaroo for grain grown in the Mid and Upper North regions of SA (as suggested by the ACCC), but all regions of SA other than the Eyre Peninsula.[752] Viterra also noted that the combined highest practical capacity of these facilities (1.16 million tonnes)[753] is higher than the highest practical capacity of Wallaroo (0.84 million tonnes), making them 'significant competitors for grain'.[754] Viterra also noted that the fact that Wallaroo has higher recieval rates and at-port storage than Cargill and Semaphore does not diminish the fact that combined these port terminals have equivalent capacity to Port Giles.[755]
- the level of competitive constraint posed by ADM at Port Pirie is now real rather than theoretical, and ADM has already facilitated coastal shipments of grain from Port Pirie and would be capable of facilitating grain exports once it received the relevant accreditation[756] (as it eventually did).[757]

In relation to the combined estimated capacities of these facilities (including those listed by Viterra in relation to Cargill's and Semaphore's facilities), the ACCC considers that the level of throughput that a facility can reasonably be expected to perform in the short-to-medium-term in response to high demand to be the figure most directly relevant to its exemption assessment. The ACCC's views on capacity estimates for each of these facilities is discussed in detail in section 3.1.4.

The ACCC notes that the combined estimated capacity of the alternate facilities (1.59 million tonnes) is higher than the estimated capacity of Viterra's Wallaroo facility (0.84 million tonnes). However, consistent with the views expressed above, the ACCC considers the level of overlap between the catchment areas of Wallaroo, Port Adelaide and Port Pirie is likely to be limited to the Mid and/or Upper North regions. Consequently, the ACCC considers that the level of competitive constraint imposed by ADM's, Cargill's and Semaphore's facilities on Wallaroo will likely be limited (both individually and collectively).

The ACCC also notes that it considers Cargill's and Semaphore's facilities will compete most closely with Viterra's Port Adelaide facilities for grain. A significant portion of these facilities' capacity will therefore compete for grain that is unlikely to move to Wallaroo (or Port Giles). As such, the ACCC does not consider that the full capacity of these facilities will likely be in direct competition for grain with Wallaroo (as it is reasonable to expect that a meaningful amount of these facilities' capacity will be taken by grain from outside the Mid and Upper North regions). The amount of alternate capacity available from these facilities which will act

[752] Ibid, p. 76.

[753] Including the ACCC's estimate of ADM's capacity, alternate capacity at these facilities is 1.59 million tonnes.

[754] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 76.

[755] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 77.

[756] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 77.

[757] The ACCC notes ADM began performing export operations in December 2020.

as a competitive constraint on Wallaroo is therefore expected to be less than their combined capacity of 1.16 million tonnes.[758]

This notwithstanding the ACCC notes that, while this alternate capacity likely only provides limited viable alternative, its presence may be sufficient to provide an incentive for Viterra to provide fair and transparent access at its Wallaroo facility to exporters sourcing grain from the Mid and Upper North regions.

Wallaroo has several infrastructure advantages over alternate PTSPs

The ACCC considers that Wallaroo has several advantages in terms of its port infrastructure over Cargill's and Semaphore's Port Adelaide facilities and ADM's Port Pirie facility:

- **Recieval facilities:** Wallaroo is able to receive grain at significantly higher rates than either Cargill's, Semaphore's or ADM's facilities (see table 3.1).
- **At-port storage:** Wallaroo has a significant amount of at-port storage (757,500 tonnes)[759] whereas Cargill's and Semaphore's facilities have little to no at-port storage,[760] while ADM's facility has 80,000 tonnes (see table 3.1).[761] This is expected to offer Viterra greater flexibility to manage operations at Wallaroo.

Wallaroo is typically capacity constrained

Wallaroo appears to have faced significant capacity constraints, on a peak period basis (see figure 3.7 and table 3.6).[762] The ACCC generally considers that, in the absence of sufficient competitive alternatives, a vertically integrated PTSP will have an incentive (and the ability) to discriminate in favour of its associated entity exporter in a way that is detrimental to the development of competition in circumstances when supply is constrained.

The ACCC notes that in response to the Draft Determinations Viterra expressed a number of concerns regarding the ACCC's draft views on capacity utilisation across a number of its port terminal facilities, including specifically in relation to Wallaroo.[763] The ACCC's views (expressed in the paragraph above) on capacity constraints at Wallaroo (including Viterra's concerns) are discussed further below in relation to subclause 5(3)(d).

Proposed port terminal facilities

The ACCC notes T-Ports has proposed building a port terminal facility at Wallaroo.[764] While the ACCC considers that the credible threat of entry by other PTSPs can be expected to place some level of constraint on Viterra, it does not consider the threat of competition to be as effective as actual competition. Proposed port terminal facilities are discussed further below in relation to subclauses 5(3)(e) and (f). The ACCC notes that since the release of the Draft Determinations ADM has commenced bulk grain export operations from Port Pirie.

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[758] The ACCC notes it is not aware of the portion (or expected portion) of grain that Cargill and Semaphore source from the Mid and Upper North regions, and therefore is unaware of the likely amount of capacity which would be available to constrain Wallaroo.

[759] Viterra, *Attachment 1 – Response to 14/11/19 information request – Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

[760] Cargill has no at-port storage, while Semaphore has just 16,500 tonnes of at-port storage (see table 3.1).

[761] The ACCC notes that ADM's storage is not actually at-port. ADM's Port Pirie site is located 9km from port. While the relative close proximity of the storage likely provides ADM with greater flexibility to manage its operation (compared to storage located a significant distance from port), storage located directly at port and connected to conveyor loading services would provide greater levels of flexibility to ADM.

[762] On an annual basis, Wallaroo also appears to have faced capacity constraints in the 2016-17 season.

[763] Viterra, *Response to Draft Determination,* Public version, 8 February 2021, p. 77.

[764] The ACCC notes that given the Port Adelaide and Wallaroo catchment areas likely overlap (to some extent), T-Ports' proposed Wallaroo facility would likely compete for grain with Port Adelaide PTSPs (in certain regions).

Competition in upstream and downstream markets

The ACCC has considered whether the level of competition in upcountry storage, handling, and transport markets might provide Viterra with market power. Absent the full application of the Code, the potential exists for a vertically integrated PTSP with market power to affect competition in the port terminal service market by, for example, limiting the ability of third party exporters to participate in upstream grain acquisition.

In addition to upstream and downstream markets, the ACCC has also considered the potential for related markets, such as container exports and domestic demand for grain, to affect the promotion of competition in bulk grain export port terminal services.

<u>Storage markets</u>

As discussed in section 4.2, the ACCC considers that Wallaroo's catchment area likely encompasses the Yorke Peninsula (where it appears to source the majority of its grain), and Mid and Upper North regions of SA:

- **Yorke Peninsula:** The ACCC notes that there appears to be a relatively limited number of upcountry storage options on the Yorke Peninsula: of the 5 upcountry storage sites, 2 are owned by Viterra.[765] A significant proportion of storage on the Yorke Peninsula appears to be located at port, with Viterra's Port Giles and Wallaroo facilities able to store 514,100 tonnes and 757,500 tonnes of grain at port respectively.[766] This suggests that Viterra likely owns the majority of storage on the Yorke Peninsula, and that a relatively large portion of grain grown on the Yorke Peninsula is delivered direct to Port Giles or Wallaroo.
- **Mid and Upper North regions of SA:** the Mid and Upper North regions of SA contain a relatively higher number of alternate storage sites, with Viterra expected to operate 11 out of a total of 17 storage sites in this region in the 2020-21 season (see section 4.1). The ACCC notes that determining the extent to which this storage is likely to competitively constrain Viterra's services is difficult to assess due to the lack of information around the size of non-Viterra storage sites. However the ACCC understands that most of these third party sites are relatively small, stand-alone facilities that are predominantly used to service the domestic and container markets.[767]
- **On-farm storage:** The ACCC notes that publicly available and/or detailed information around the specific location of on-farm storage in SA appears to be limited. While the ACCC understands that the majority of SA's estimated 1 million tonnes of on-farm storage[768] is located in eastern SA,[769] the ACCC is not aware of the extent to which on-farm storage is available on the Yorke Peninsula.

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[765] In its exemption applications Viterra submitted that there are 5 upcountry sites on the Yorke Peninsula: Ardrossan (Viterra), Bute (Viterra), Kadina (AGT Foods Australia), Kulpara (San Remo), and Maitland (Cargill). GTA did not include the Kadina and Kulpara sites in its 2019-20 list of upcountry storage sites.

[766] Viterra submit that not all of this at-port storage can be loaded directly from storage onto the shipping conveyor belt for export; some of this storage still needs grain to be transported a short distance before being loaded for export. Of the 514,100 and 757,500 tonnes of storage at Port Giles and Wallaroo, 239,100 tonnes and 192,000 tonnes can be loaded directly from storage onto the conveyor belt for export respectively. The ACCC considers that storage located directly at port likely provides a PTSP with a higher level of operational flexibility compared to storage located off-site (as the PTSP is not reliant on transport services to be able to load grain onto a vessel). However, off-site storage facilities located relatively close to port still likely provide a higher level of operational flexibility than more distant sites (to the extent that shorter transport distances enable greater flexibility in grain movements). See: Viterra, *Attachment 1 – Response to 14/11/19 information request – questions 1 and 2 – Viterra port terminal facility features,* 13 February 2020.

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

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

[769] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 24.

In response to the Draft Determinations Viterra submitted:

> *As set out in section 2.3 of Annexure 1, upcountry storage and handling services in South Australia are characterised by a large number of providers, increasing competition and low barriers to entry and is operating efficiently.*
>
> *In the Adelaide and Yorke Peninsula region, Viterra competes with 14 alternate upcountry storage providers who together offer around 1.4 million tonnes of capacity, and Viterra operates only 40% of the upcountry sites on the Yorke Peninsula and 57% of the upcountry sites in the Lower, Mid and Upper North regions of South Australia in 2020-21. In addition, there is a significant amount of on-farm storage in South Australia and the costs of constructing and expanding on-farm storage are low.*
>
> *Viterra provides, and has always provided, open access to its upcountry facilities, and customers of Viterra's storage facilities in South Australia are also able to move their grain out to third parties.*[770]

Viterra appears to own the majority of total storage on the Yorke Peninsula as well as in the Mid and Upper North regions (though the Mid and Upper North regions appears to contain credible alternatives to Viterra's upcountry system). The ACCC notes the lack of information around the size of third party storage sites.

However the ACCC understands these third party storage sites are likely relatively small (compared to Viterra's sites), and predominantly deliver to the domestic and container markets (with the notable exception of GrainFlow's operations).[771] As discussed in section 4.1.1, the ACCC's view is that on the Yorke Peninsula, absent the application of Parts 3 to 6 of the Code, there is the potential for Viterra's dominant position upcountry to affect competition and impact the ability of third party exporters to gain fair and transparent access at port.

Domestic market

The ACCC considers that PTSPs are competitively constrained by the local domestic market. While the ACCC does not have detailed data on where grain is processed or consumed within a state, the ACCC notes that SA as a whole has the smallest domestic market of any mainland state in Australia (at 1.2 million tonnes of grain).[772]

The ACCC notes that SA's domestic consumption has been fairly consistent since the 2014-15 season.[773] The domestic market offers a reliable and stable source of demand for grain, and typically involves lower supply chain costs (relative to export markets), making it a relatively attractive (but limited) market for grain. As such grain typically moves to the export market once demand in the domestic market has been met.

In addition, the ACCC notes that certain market conditions can create economic incentives to transport large volumes of grain between states to satisfy domestic demand. For example, in response to poor growing conditions on the east coast in recent years large quantities of grain were transported from WA and SA to the east coast to satisfy east coast domestic demand.[774]

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[770] Viterra, *Response to Draft Determination*, Public version, 8 February 2021 p. 78.

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

[772] ACCC, *Bulk grain ports monitoring report 2019-20*, March 2021, Appendix 1 – supplementary spreadsheet – tables and charts.

[773] SA domestic consumption has varied between 1.11 and 1.24 million tonnes per annum since the 2014-15 season.

[774] The ACCC does not receive data on inland grain movements. The ACCC notes that Wallaroo facilitated a combined 0.13 million tonnes of coastal shipments over the 2017-18 to 2019-20 seasons.

As discussed in section 4.3.2, the ACCC understands that SA's domestic consumption is largely located within the east of the state. Therefore it likely draws grain from the same catchment area as Viterra's Wallaroo facility. However, the ACCC also understands that the majority of grain grown on the Yorke Peninsula is exported through either Port Giles or Wallaroo. This suggests that the domestic market in eastern SA draws its grain predominantly from outside the Yorke Peninsula.

As such the ACCC expects that while Wallaroo may experience some competition from the SA domestic market, in large part this is likely limited to the Mid and Upper North regions of SA.

Based on the available information, the ACCC therefore considers that the SA domestic market only places a limited competitive constraint on Viterra's Wallaroo facility.

Container market

The ACCC notes that the containerised grain export market can impose a competitive constraint on PTSPs and Viterra's Wallaroo facility. While the containerised market is located at Port Adelaide, it appears feasible (as above) that grain grown in the Mid and Upper North regions of SA can move to PTSPs at Port Adelaide (and by extension to the container market at Port Adelaide), or to Viterra's Wallaroo facility.

As discussed in section 4.3.1, the SA containerised export market is relatively small (with only 6% of grain in SA being exported via containers since the 2016-17 season).[775] In addition, the Port Adelaide container market exports a different mix of commodities than the bulk export market: for example wheat, barley and canola account for 95% of bulk exports, but only 54% of container exports; and lentils make up 42% of container exports but only 1% of bulk exports. This likely serves to limit the competitive constraint that containers impose on the bulk wheat export market.

As per section 4.2, the ACCC notes that the different mix of commodities exported via the Port Adelaide container market may mean some growers (who grow these different set of commodities – in particular lentils) will deliver grain to the Port Adelaide containerised export market despite being located outside of the traditional Port Adelaide catchment area. However, given the container market is relatively small these movements of grain are expected to be relatively limited.[776] Furthermore, the competitive constraint of any such movements is likely to be limited since bulk and container export markets do not compete for the exact same compositions of grain.

As such, given its small size and different mix of commodities, the container market likely offers a limited alternative export market for grain grown in this region. Consequently, the ACCC considers that the SA container market likely only imposes a limited degree of competitive constraint on Wallaroo.

Conclusion

The ACCC considers that Viterra's Wallaroo facility faces a degree of competitive constraint in relation to grain grown in SA's Mid and Upper North regions as a result of the presence of:

[775] ACF Export report.

[776] For example ADM, which has an exclusive arrangement with Dublin Clean Grain for their facility at Dublin, stated that: "growers from the Yorke Peninsula through to the Upper North now have a new delivery option for their lentils and barley". ADM also stated that: "…these grain products will provide base load volume for Dublin Clean Grain to pack on ADM's behalf and support our export container business and international customer demand." As such the ACCC understands that Clean Grain's Dublin facility will be used by ADM primarily for the container export market, which, as stated by ADM, will offer storage for grain intended for containerised export to growers in the Yorke Peninsula and Upper North region (despite Dublin being located in the Lower North). For further details see: https://www.admgrain.com.au/latest-news/new-harvest-options-at-dublin

alternate PTSPs at Port Adelaide; the SA domestic market; and the containerised market at Port Adelaide. However, grain sourced from the Yorke Peninsula (i.e. the area where the ACCC understands the majority of grain exported via Wallaroo is sourced) appears to have limited access to these alternate markets, and typically needs to be exported via Viterra's Wallaroo (or Port Giles) facility.

In light of the above (and the views set out at Section 5.1 (IHB)), the ACCC's considers that, on balance, Viterra's Wallaroo facility faces an insufficient competitive constraint and that exempting Viterra from Parts 3 to 6 of the Code in relation to this facility is unlikely to be in the public interest, and may also be detrimental to competition in upstream and downstream markets.

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

The ACCC's views in relation to the interests of exporters who may require access to port terminal services are generally the same in relation to Wallaroo as they are in relation to Viterra's IHB facility.

Section 5.1 (IHB) subclause (c) sets out the ACCC's views on these matters in detail.

To the extent the ACCC has views on these matters that specifically relate to Viterra's Wallaroo facility, these are set out below.

The ACCC considers that, given the limited competitive constraint and potential for significant capacity constraints, if an exemption from Parts 3 to 6 of the Code were granted to Viterra in relation to its Wallaroo facility this would likely be detrimental to the interests of exporters who may require access to Viterra's Port Giles facility.

Subclauses 5(3)(b), (g) and (d), sets out the ACCC's views regarding the level of competitive constraint and capacity constraints at Viterra's Wallaroo facility.

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

Section 5.1 (IHB) subclause (d) sets out the ACCC's views on the likelihood that exporters will have access to fair and transparent access to port terminal services if Viterra is granted an exemption/s. ACCC views specifically relating to Viterra's Wallaroo facility are set out below.

Wallaroo is typically capacity constrained

As per section 3.2.3, the ACCC considers that Wallaroo likely faces limited competitive constraints and is likely to face peak period capacity constraints.

In relation to concerns expressed specifically in relation to the ACCC's views expressed in the Draft Determinations on capacity utilisation at Wallaroo, the ACCC notes that Viterra submitted:

> *The ACCC states that Wallaroo appears to have faced significant capacity constraints on both an annual and peak period basis. Viterra does not agree with this finding, which also seems to contradict the ACCC's own statement that Wallaroo had an average annual capacity utilisation rate of 65%. The highest practical capacity at Wallaroo is 0.84 mtpa, which is the amount of grain Viterra was able to ship from Wallaroo in 2016-17. Annual throughput at Wallaroo has been below 1.01 million tonnes since the unusual bumper crop harvest of 2016-17 and it is unlikely that Viterra will be capacity constrained at Wallaroo in the foreseeable future. Since 2016-17, the highest throughput months at Wallaroo were [c-i-c] This shows that the vast majority of months (in fact, all*

but [c-i-c] in the past three seasons) fell well short of the maximum monthly capacity of 70,000 (i.e. the highest practical capacity divided by 12 which likely understates monthly capacity in peak periods once shutdowns are accounted because, as previously noted, these would take place outside of peak periods).

Therefore, taking the capacity at Port Pirie and competitor port terminals using Port Adelaide into account, Wallaroo is unlikely to be capacity constrained going forward. It is important that the ACCC does not seek to base its decision on an unusually high harvest year (2016-17) particularly in circumstances where a significant amount of competitor capacity is available at Port Adelaide and Port Pirie (and there are plans for increased competitor capacity at) such that, even in a rare bumper harvest going forward, Wallaroo is unlikely to be capacity constrained.[777]

The ACCC notes that Viterra's Wallaroo facility has a stated annual capacity of 0.84 million tonnes.[778] As discussed in the analysis relating to subclauses 5(3)(b) and (g) it appears that there could be capacity constraints at Wallaroo in the peak period, with an average annual and peak capacity utilisation rate of 76% and 86% respectively (excluding the drought-affected 2018-19 and 2019-20 seasons).[779] [780] Furthermore, as indicated in figure 3.7, capacity constraints appear to occur at Wallaroo during the peak period on a consistent basis across different shipping seasons.

Despite capacity constraints third party exporters appear to be able to secure some level of access to Wallaroo. Since 2011-12 Glencore, Viterra's associated entity exporter, has only performed 35% of shipments during the peak period, and 38% in the off-peak period (or 36% annually on average). In comparison, the largest third party exporters at Wallaroo (since 2011-12) have been CBH, Bunge, ADM, and Cargill[781] which have performed 11.8%, 11.0%, 10.2% and 9.9% of annual shipments respectively.

In considering historical exporter market shares, the ACCC notes that Viterra's current PLPs ensure that, combined across Viterra's 6 facilities, a minimum of 500,000 tonnes of capacity is reserved for short term capacity per quarter.[782] In addition, no single exporter can apply for more than 50% of the initial long-term capacity at Wallaroo.[783] [784] The ACCC notes that exporters' current and historical levels of access were likely influenced by these provisions under Viterra's PLPs and that if Viterra were granted an exemption, it would be able to vary the capacity allocation system under its PLPs without the need for ACCC approval.

Given the above the ACCC considers that third party exporters have been able to access some level of capacity at Wallaroo during the peak period. However, while this has been the case historically, as explained in section 3.2.4, the ACCC's view is that it is appropriate to consider how competition among exporters (and access) may be affected if an exemption from Parts 3 to 6 of the Code were to be granted in relation to Wallaroo.

The ACCC considers that, given Viterra faces a limited level of competitive constraint at Wallaroo and the potentially high level of demand for services at Wallaroo (i.e. capacity

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[777] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 77.

[778] Ibid, p. 7.

[779] These capacity figures use the maximum capacity released at Wallaroo (over 2011-12 to 2019-20). When capacity is considered on the basis of what is released in each season, Wallaroo has annual and peak period capacity utilisation of 87% and 103% respectively.

[780] The ACCC notes that the entry of ADM will likely draw a small amount of grain away from Viterra's Wallaroo facility (as well as IHB and OHB), therefore likely resulting in slightly lower capacity utilisation figures in both the peak and off-peak periods.

[781] The ACCC notes that Cargill has only exported 0.02 million tonnes out of Wallaroo since the 2014-15 season. Over the 2011-12 to 2014-15 period, Cargill performed 17% of Wallaroo shipments annually.

[782] See clause 3.12(a), Viterra Port Loading Protocols, 24 December 2015, p. 31. (See: https://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf)

[783] See clause 3.5(a) and definition of 'Initial Nomination Cap' in clause 1, Viterra Port Loading Protocols, 24 December 2015, p. 31. (See: https://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf)

[784] The ACCC understands that Viterra intends to make all 2021-22 capacity available as short-term capacity only.

constraints), there is potential for Viterra to discriminate between different exporters (including a PTSP's associated entity) in a way that is detrimental to competition.

However the ACCC notes that grain on the Yorke Peninsula has the potential to move to either Port Giles or Wallaroo to some extent. As such, in the event of capacity constraints at Wallaroo, the potential likely exists for Viterra (and/or exporters) to seek to move grain to Viterra's Port Giles facility to some extent (subject to spare capacity being available at that facility).[785]

Size of port terminal facility

As part of its submission to the Draft Determinations, Viterra stated that it is constrained from exercising market power at a number of its port terminals since they export a small proportion of wheat produced in Australia and SA, in particular at IHB, Thevenard and Wallaroo.[786]

In relation to Wallaroo, Viterra stated that 10% of SA's exports have been exported through Wallaroo since 2011-12.[787] Furthermore, Viterra submitted its concern that the ACCC has not adequately taken into account that Wallaroo exports only a small proportion of South Australia's wheat:

> *Viterra is concerned that the ACCC has had little regard to the fact that Wallaroo ships only a small proportion of South Australia's wheat and is not capacity constrained, despite it stating that it is more concerned about vertical integration where a PTSP is capacity constrained. It is important that the ACCC properly accounts for the low utilisation rate at Wallaroo and the low proportion of wheat exported from this facility in its decision. These factors strengthen Viterra's incentive to increase throughput at Wallaroo, and further account for why Viterra does not have an incentive to deny grain exporters with access to Wallaroo or to provide favourable terms of access to Glencore.*[788]

The ACCC sets out its views on the relevance of a port's size relative to a state's total exports in section 5.1 (IHB) subclause (d).

As per section 3.2.3, the ACCC considers that Wallaroo faces limited competitive constraint and significant capacity constraints. While the ACCC notes that Wallaroo exports a relatively small proportion of SA wheat/grain, the ACCC considers that Viterra likely has significant market power at Wallaroo (see section 4.1.1).

Conclusion

The ACCC's view is that given the lack of competitive constraint and significant capacity constraints, an exemption from Parts 3 to 6 of the Code would likely be detrimental to exporters' ability to secure fair and transparent access at Viterra's Wallaroo facility.

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

Section 5.1 (IHB) subclauses (e) and (f) sets out the ACCC's findings on the promotion of economically efficient operation and use of the port terminal facility, and the promotion of

[785] The ACCC notes that grain on the Yorke Peninsula has the potential to move between Wallaroo and Port Giles to some extent. While there are relatively limited upcountry storage options on the Yorke Peninsula, as shown in table 4.2 there appears to be a degree of substitutability between Port Giles and Wallaroo for grain stored at Ardrossan and Maitland.

[786] Viterra *Response to Draft Determination* Public version, 8 February 2021, pp. 2-3.

[787] Ibid, p. 74.

[788] Ibid, p. 77.

efficient investment in port terminal facilities. The ACCC's views relating to these matters which are specific to Viterra's Wallaroo facility are set out below.

Promotion of the efficient operation and use of Viterra's Wallaroo facility

As discussed in section 5.1 (IHB) subclauses (e) and (f) the ACCC considers that exemptions from Parts 3 to 6 of the Code would assist Viterra to provide greater flexibility for its customers at the relevant facilities. The ACCC also considers that it is in Viterra's interests to make operational decisions that ensure the efficient and profitable operation of its port terminal facilities irrespective of whether or not exemptions are granted.

However, as previously discussed, in circumstances where capacity is constrained and/or sufficient competition is not present, Viterra may have an incentive (and the ability) to favour its associated entity exporter absent the full application of the Code. The ACCC considers that this could lead to inefficient market outcomes more broadly, despite Viterra being able to operate the individual exempt port terminal facility more flexibly.

As set out in its findings relating to subclauses 5(3)(c) and (d), the ACCC's view is that, on balance, if an exemption were granted to Viterra in relation to its Wallaroo facility, Viterra would have the incentive (and the ability) to provide favourable access to its associated entity exporter (largely due to the lack of competitive constraints and capacity constraints at the facility).

Promotion of efficient investment in port terminal facilities

The ACCC considers that it is in Viterra's interests to make investment decisions which ensure Viterra can maximise its return to its shareholders, irrespective of whether or not exemptions are granted in relation to any of Viterra's facilities.

Proposed alternate port terminal facilities

In considering proposed investment in port terminal facilities, the ACCC notes T-Ports' proposed Wallaroo facility has the potential to impose a competitive constraint on Wallaroo.

The ACCC understands that T-Ports' Wallaroo proposal involves the construction of a port terminal facility at Wallaroo and the use of the same transhipment model used at its Lucky Bay facility.[789] The ACCC notes that T-Ports expects the facility will take between 12 and 18 months to build, with initial demolitions and site remediation works in progress as of 8 December 2020.[790] While early site works have begun at T-Ports' proposed Wallaroo facility, the ACCC understands that the facility is still pending further approval from relevant government authorities.[791] It is the ACCC's understanding that T-Ports is aiming to be ready to receive grain for the next harvest.[792]

T-Ports has indicated that its proposed Wallaroo facility will have 260,000 tonnes of storage and will be able to facilitate 500,000 tonnes of grain per annum.[793] [794] In addition the facility will use (i.e. share) the same transhipment vessel used at T-Ports' Lucky Bay facility. T-Ports anticipates that the location of the Wallaroo and Lucky Bay facilities, and the shared use of the same transhipment vessel will deliver greater efficiencies and cost savings:

[789] The use of a transhipment vessel model would allow the proposed Wallaroo site to load larger Panamax sized vessels.

[790] T-Ports Soundcloud, *Wallaroo Port Development*, https://soundcloud.com/t-ports/wallaroo-port-development-1

[791] See: https://soundcloud.com/t-ports/wallaroo-port-development-1, accessed 24 February 2021.

[792] T-Ports website: https://tports.com/wallaroo/, accessed 22 April 2021.

[793] T-Ports website: https://tports.com/t-ports-to-expand-to-yp-with-wallaroo-port/, accessed 22 April 2021.

[794] T-Ports website: https://tports.com/wallaroo/, accessed 22 April 2021.

There are efficiencies and cost savings in building this port on the opposite side of the Spencer Gulf to Lucky Bay as we will utilise the same transhipment vessel, the 'Lucky Eyre'.[795]

The ACCC notes that the location and operational interaction between the Wallaroo and Lucky Bay facilities may provide T-Ports with significant operational flexibility (e.g. by facilitating split shipments between the 2 facilities). However, the ACCC also notes that the use of a single transhipment vessel may also result in operational challenges and possibly affect the amount of throughput that can be delivered by each facility.

Should T-Ports' Wallaroo facility commence and operate as proposed, the ACCC expects that it could impose a significant level of competitive constraint on Viterra's Wallaroo facility. The facility will also likely impose a lesser degree of competitive constraint on Viterra's Port Giles, IHB and OHB facilities.

The ACCC considers that the credibility of the threat of entry by T-Ports at Wallaroo has increased following the commencement of operations at T-Ports' Lucky Bay facility (particularly given the proposed use of the same transhipment vessel by both operations). However, while the ACCC acknowledges that the threat of competition (to the extent it is considered credible) can be expected to impose a level of competitive constraint, the ACCC does not view the threat of competition as being as effective as actual competition.[796]

The ACCC will continue to closely monitor developments in the SA market, including in relation to T-Ports' proposed Wallaroo facility.[797] Given the level of consultation and analysis undertaken in the assessment leading to this Final Determination regarding Wallaroo, it is likely that any future assessment as to whether Viterra should be an exempt service provider of port terminal services provided by means of its Wallaroo facility could be undertaken via a relatively truncated process.

However, the ACCC considers that at this time, it is unclear if or when, T-Ports' Wallaroo facility will commence bulk grain export operations. While the ACCC notes that T-Ports has stated it hopes to be taking grain by harvest time in 2021,[798] the ACCC understands that T-Ports has a number of governmental approval processes before it can begin progressing on various stages of its construction process. As such, while the ACCC recognises the threat of entry by T-Ports may impose some level of competitive constraint on Viterra's Wallaroo facility, the level of constraint is likely limited by the uncertain timing and status of the project.

This notwithstanding, the ACCC acknowledges the level of constraint imposed by T-Ports' proposed Wallaroo facility could change rapidly once there is greater certainty around the operation.

Promotion of efficient investment more broadly

In considering the promotion of efficient investment in port terminal facilities, the ACCC notes that some stakeholders have raised concerns around port terminal investment decisions in SA. In particular, in response to the Issues Paper regarding Viterra's application:

- GPSA submitted that investment in additional port terminal facilities in SA may be inefficient and reflect concerns around access to existing facilities or the service offered.[799]

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[795] Ibid.

[796] The ACCC notes it is closely monitoring the operation of T-Ports' Lucky Bay facility which, as noted, uses the same transhipment and operational approach as the proposed Wallaroo facility.

[797] An exemption assessment can be initiated by either a PTSP or the ACCC. See: https://www.accc.gov.au/system/files/Guidelines%20on%20the%20ACCC%E2%80%99s%20process%20for%20making%20and%20revoking%20exemption%20determinations%20-%20October%202014.pdf

[798] T-Ports Soundcloud, *Wallaroo port development*: https://soundcloud.com/t-ports/wallaroo-port-development-1

[799] GPSA, *Submission in response to Issues Paper*, 4 October 2019, p. 3.

- T-Ports submitted that future investment decisions depend on expectations of a fair and transparent playing field, and the absence of sufficient regulation in the presence of a dominant PTSP risks affecting investment:

  > *Future investment in port terminal facilities will depend upon the expectation of a fair and even playing field in the market. If there is a dominant provider in the market, with little or no regulation on pricing and access, the incentive to invest diminishes with the increased risk of retaliatory behaviour through differential service offerings to customers who may otherwise have supported the new investment.*[800]

While the ACCC has not undertaken a detailed quantitative analysis of the appropriate level of investment in port terminal facilities in SA, consideration has been given to the effect that decisions to exempt (or not exempt) Viterra's facilities will have on Viterra's incentives to invest in its facilities and incentives to invest in port terminal facilities generally.

The ACCC considers that efficient investment decisions can generally be expected to occur in circumstances where adequate competition is present, or where there is sufficient regulatory intervention to ameliorate the absence of competition.

The ACCC also acknowledges that unnecessary regulation has the potential to discourage a PTSP from making otherwise efficient investments in its port terminal facilities (or the supply chain more broadly). However, the ACCC also considers that an inadequate level of regulation risks affecting efficient investment in port terminal services which could result in either: under investment (to the extent the inadequate regulation reduces the incentives for current participants and/or new entrants to invest, due to difficulties gaining access on fair and transparent terms); or over investment (to the extent the inadequate regulation encourages current participants and/or new entrants to unnecessarily duplicate existing infrastructure). The ACCC also notes that different parties are likely to have different investment incentives and that these incentives will be influenced by a range of factors, including the level of regulation imposed on a competing PTSP.

As previously noted, the ACCC considers that it is in Viterra's interests to make investment (and operational) decisions that ensure its profitable operation, and so that Viterra can maximise returns to shareholders. Consistent with this view, the ACCC expects that T-Ports (and any other proposed third party facilities) will also generally have an incentive to make investment (and operational) decisions which maximise returns to shareholders (or profits), irrespective of whether Wallaroo is exempted from Parts 3 to 6 of the Code.

Viterra's incentive to invest in its Wallaroo facility

Viterra has also submitted that it has made significant investment at its Wallaroo facility in recent years:

> *… Viterra notes that it has made a number of significant investments at Wallaroo in the five year period to 31 December 2018. In this period, it invested [c-i-c] at Wallaroo, including:*
>
> - *recladding the bulk loading facilities;*
> - *replacing the trestle legs on the bulk loading facility;*
> - *replacing conveyor and elevator belts; and*
> - *concrete remedial works.*[801]

The ACCC considers that this indicates that Viterra is willing to make investments under the current regulatory arrangements. As previously noted, this likely reflects the need to

[800] T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 34.
[801] Viterra, *Exemption Application 2019, 2 July 2019*, p. 59.

generate a return for shareholders. However it is unclear how Viterra's investment decisions would be affected in relation to a decision to exempt or not exempt Viterra in relation to this facility.

Conclusion

As discussed in relation to subclause 5(3)(d), the ACCC considers that the level of competitive constraint faced by Viterra in relation to Wallaroo is insufficient at this time to ensure that Viterra would not have an incentive to provide favourable access to certain exporters at its facility (in particular its associated entity exporter) in a way that damages competition.

Consequently while there is the potential for the more flexible use of the facility by Viterra if an exemption is granted, the absence of sufficient competition means that an exemption has the potential to lead to inefficient market outcomes more broadly (including in relation to the operational and investment decisions of PTSPs within Wallaroo's catchment area).

Given the factors discussed above, the ACCC considers that the effect of a decision to exempt or not to exempt Viterra in relation to its Wallaroo facility on the investment in port terminal facilities is unclear.

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

The ACCC's consideration of whether Viterra is an exporter (or an associated entity of an exporter) is the same in relation to Wallaroo as it is in relation to Viterra's other port terminal facilities.

Section 5.1 (IHB) subclause (h) sets out the ACCC's views in relation to these matters.

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

Section 5.1 (IHB) subclause (i) sets out the ACCC's findings on SA catchment areas. To the extent the ACCC holds views that specifically relate to these matters and Viterra's Wallaroo facility, these are set out below.

The ACCC notes that, while submitting that catchment areas are fluid and that grain will move to where it is most economically viable,[802] Viterra also submitted that:

> *Wallaroo has traditionally sourced grain from a region that extends from above Melrose down to the Yorke Peninsula.*
>
> *Grain grown in the region from which Wallaroo has traditionally sourced grain is often delivered to Port Adelaide. Therefore, containers from Port Adelaide, and each of LINX and Semaphore at Port Adelaide, are strong competitors to Wallaroo.*[803]

Viterra further submitted that grain grown in the Yorke Peninsula can be delivered to Adelaide:

> *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*

[802] Viterra, *Exemption Application 2019, 2 July 2019*, p. 1.

[803] Ibid, p. 58.

LINX and Semaphore), as well as, more recently, delivering to the east coast, for domestic consumption.[804]

The ACCC also notes that T-Ports submitted that alternate Port Adelaide PTSPs potentially compete with Wallaroo:

> *The only current competitive alternatives are the mobile loader operations offered at Port Adelaide. These services provide an alternative to Viterra Port Adelaide (Inner harbour and Outer Harbor) and potentially to Wallaroo.*[805]

ACCC view

As stated in section 4.2 and in relation to the analysis relating to subclauses 5(3)(b) and (g) above, the ACCC considers that Wallaroo's catchment area extends from the Yorke Peninsula to the Mid and Upper North regions of SA.

As set out in section 4.2.3, Wallaroo has a significant freight advantage for storage sites on the Yorke Peninsula compared to Viterra's OHB facility (and by extension other PTSPs located at Port Adelaide).

In addition the ACCC notes that, on average, 1.35 million tonnes of grain is grown on the Yorke Peninsula per season,[806] with Port Giles and Wallaroo on average exporting 690,000 tonnes and 610,000 tonnes of grain per season respectively (as noted in section 4.2.3 the ACCC understands the vast majority of grain exported by Port Giles is also grown on the Yorke Peninsula).[807] Furthermore, Viterra has submitted that in 2017-18 *[c-i-c]* of grain grown on the Yorke Peninsula was exported via its Wallaroo and Port Giles facilities,[808] indicating that grain grown on the Yorke Peninsula is generally unlikely to move to alternate markets.

As such the ACCC considers it likely that the majority of grain exported through Wallaroo is sourced from the Yorke Peninsula.

In contrast the ACCC considers that Wallaroo and PTSPs located at Port Adelaide likely compete for grain in the Mid and Upper North regions. As shown in table 4.1 Viterra's Wallaroo facility likely has a small freight advantage over transportation to IHB and OHB, both of which are able to receive grain via rail.[809] However, the ACCC notes that the freight advantage to the Wallaroo facility is likely larger when compared to Cargill's and Semaphore's Port Adelaide facilities (neither of which can directly facilitate rail receivals)[810] for storage sites which are able to facilitate grain via rail.[811]

Despite this, the ACCC considers that Cargill's and Semaphore's facilities are likely still competitive options for the export of grain from within this region to some extent. As such, the ACCC considers that the catchment area for Viterra's Wallaroo facility and the Port Adelaide PTSPs overlaps in the Mid and Upper North regions. Consequently, the ACCC's view is that while there are no exempt PTSPs that lie within Wallaroo's catchment area,

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[804] Viterra, *Response to 14/11/19 information request – Question 9 – Catchment Zones*, 13 January 2020.

[805] T Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 4.

[806] PIRSA, *Crop and pasture reports – final summary and estimates*, 2012-13 to 2019-20.

[807] Excluding the drought affected 2018-19 and 2019-20 seasons.

[808] Viterra, *Response to 14/11/19 information request – question 9 – catchment zones,* 13 January 2020, p. 4.

[809] As indicated in section 3.2.3 although Wallaroo has a freight advantage for most sites in this region, when port charges are considered it is cheaper for most grain to be exported through OHB.

[810] The ACCC notes that while Cargill's Inner Harbour facility is not capable of directly receiving grain from rail services, GrainFlow's Crystal Brook site is capable of facilitating movements of grain via rail services.

[811] This is because Viterra's Export Select rates (and therefore GTA's Location Differentials) are likely to take into account that grain in storage sites with rail access can be transported to IHB or OHB via rail services. As such the cost of transporting grain to Cargill's or Semaphore's facilities from these rail accessible upcountry sites via road services would likely be higher than the freight costs to the IHB and OHB (which can receive grain via rail services).

there are 2 exempt PTSPs (Cargill and Semaphore) whose catchment areas likely overlap with Wallaroo's catchment area. However, the level of competitive constraint imposed by these facilities is likely limited.

In addition, and as discussed in the context of IHB and OHB above, the ACCC notes that ADM has commenced bulk grain exports from Port Pirie and has submitted an application for exemption from Parts 3 to 6 of the Code in relation to this facility. As discussed in section 4.2.3 the Port Pirie facility (which is a part of the Upper North region) falls within Wallaroo's catchment area and therefore imposes an additional level of competitive constraint on Viterra at Wallaroo. While Port Pirie likely offers significant freight advantages to growers in the Upper North region over Wallaroo, the ACCC notes that there are several limiting factors which reduces the level of competitive constraint that ADM's facility places upon Wallaroo (see section 4.2.3).

(j) any other matters the ACCC considers relevant

The ACCC's consideration of any other relevant matters is generally the same in relation to Wallaroo as it is in relation to Viterra's IHB facility. To the extent the ACCC has views on these matters that specifically relate to Viterra's Wallaroo facility, these are set out below.

While acknowledging that the ACCC is able to revoke an exemption determination if satisfied that the reasons for granting an exemption no longer apply, the ACCC's view is that Viterra's Wallaroo facility is unlikely to be subject to sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code at this time.

5.4 Port Giles

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

The ACCC's findings about Viterra's legitimate business interests are the same in relation to Port Giles as they are in relation to Viterra's other port terminal facilities.

Section 5.1 (IHB) subclause (a) sets out the ACCC's views on Viterra's legitimate business interests.

(b) the public interest, including the public interest in having competition in markets; and (g) the promotion of competition in upstream and downstream markets

The ACCC's findings about the public interest in relation to Port Giles are the same as the public interest in relation to Viterra's other port terminal facilities.

Section 5.1 (IHB) sets out the ACCC's views in relation to subclauses 5(3)(b) and (g).

To the extent the ACCC has views on these matters that specifically relate to Viterra's Port Giles facility, these are set out below.

Competition in bulk wheat export operations

Port Giles, which is located in the southern Yorke Peninsula, is one of 2 port terminal facilities located on the Yorke Peninsula: the other being Viterra's Wallaroo port terminal facility (located in the northern Yorke Peninsula). Port Giles on average facilitates 740,000 tonnes of grain shipments per season (excluding the 2018-19 and 2019-20 drought affected seasons), and due to its location on the southern Yorke Peninsula is likely relatively isolated from competing markets (as discussed below).

In response to the ACCC's view expressed in the Draft Determinations that Viterra does not face sufficient competitive constraint at Port Giles, Viterra submitted that:

> *There is strong evidence that Port Giles is subject to competition in both a global and regional context and, as recognised by ESCOSA, there is no evidence that Viterra has exercised any market power that it may have—including in regard to Port Giles or upcountry storage facilities that deliver grain to Port Giles —to the detriment of other market participants. Viterra has provided significant information to the ACCC which shows that:*
>
> > *• Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain the benefits of which it has passed through to other market participants;*
> >
> > *• Port Giles is constrained by competition within South Australia and, more locally, by ADM at Port Pirie and Cargill and Semaphore at Port Adelaide;*
> >
> > *• Port Giles is constrained by the credible threat of new entry, including by T-Ports at Wallaroo; and*
> >
> > *• Viterra's upcountry storage facilities are subject to competition and there is a real threat of new entry given the low barriers to entry.*[812]

[812] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 81.

The ACCC notes Viterra's view in relation to the ACCC's Draft Determinations, however the ACCC continues to consider that Viterra's Port Giles facility does not face sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code.

The ACCC's view is based on the analysis of the bulk grain port terminal services markets as set out in chapter 3, as well as the consideration of upcountry and related markets set out in chapter 4. This indicated the following:

Port Giles appears to be largely unconstrained in its catchment area

The ACCC's analysis of Port Giles catchment area indicates that it appears to be largely limited to the Yorke Peninsula. In addition, there appears to be limited opportunity for grain grown in Port Giles' catchment area to move to alternate PTSPs at Port Adelaide (see table 4.2) or Port Pirie (see section 4.2).

In particular GTA's Location Differentials indicate that grain on the Yorke Peninsula has a significant freight advantage to move to Port Giles over port terminal facilities located at Port Adelaide (see table 4.2). While there appears to be some competition between Port Giles and Adelaide in the northern Yorke Peninsula (on the basis of freight costs), grain located on the northern Yorke Peninsula has a large freight advantage to move to Wallaroo over either Port Giles or facilities located at Port Adelaide. As such, the ACCC expects the majority of grain grown on the Yorke Peninsula to be exported via either Port Giles or Wallaroo.

Furthermore, the ACCC considers that the Mid and Upper North regions are not within Port Giles' catchment area due to the large freight advantages associated with moving grain from these regions to Port Adelaide, Port Pirie and Wallaroo (see section 4.2). As such, the ACCC does not consider that the catchment area for ADM's Port Pirie facility overlaps with Port Giles' catchment area (as Port Pirie is expected to draw grain from the Upper North region – see section 4.2).

The ACCC notes that in response to the Draft Determinations Viterra submitted a range of general views in relation to SA grain catchment areas (these views are set out in section 4.2). In relation to the ACCC's views on the catchment area for Port Giles specifically, Viterra submitted that Port Giles' catchment area includes both the Yorke Peninsula and a large area surrounding Adelaide[813] and that accordingly, Viterra is subject to a higher level of competition at Port Giles than the Draft Determinations suggested.[814]

In support of this position, Viterra also submitted that GrainFlow operates an upcountry site on the Yorke Peninsula (in Maitland), and that the majority of grain from this facility will likely be moved to Port Adelaide for export from Cargill's facility:

> *The ACCC's analysis does not properly account for the fact that grain does in fact move between the Yorke Peninsula and the Adelaide region. It is not uncommon for growers to deliver certain commodities grown on the Yorke Peninsula to Port Adelaide. For example, Cargill moves its grain from Maitland on the Yorke Peninsula to IHB for export. Viterra estimates that GrainFlow received between 120,000 and 140,000 tonnes of grain at its Maitland site on the Yorke Peninsula (60 km from Port Giles) in 2020-21, the majority of which will likely be moved to Port Adelaide (which is 215 km from Maitland) and shipped from Berth 20 at IHB.*[815]

The ACCC notes Viterra's comments that GrainFlow's site on the Yorke Peninsula will likely move its grain receivals to Port Adelaide for export. In particular, the ACCC notes that Cargill

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[813] Viterra submitted this area surrounding Port Adelaide stretches from Dooen in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia. See: Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 4.

[814] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 82.

[815] Viterra, *Response to Draft Determination*, Public version, 8 February 2021 p. 19.

has not exported grain from Viterra's Wallaroo and Port Giles facilities in the 2020-21 season[816] (and that this is largely consistent with previous seasons).[817]

However, the ACCC notes that:

- Grain stored in GrainFlow's Maitland site represents only a small portion of the estimated grain produced on the Yorke Peninsula in the 2020-21 season (8% to 10%).[818]

- The Location Differential of moving grain from Maitland to Port Adelaide is almost double that of moving grain to Port Giles and more than double that of moving grain to Wallaroo, respectively.[819]

- Viterra submitted that *[c-i-c]* of grain grown on the Yorke Peninsula in 2017-18 was exported via its Wallaroo and Port Giles facilities, indicating that grain grown on the Yorke Peninsula is unlikely to move to Adelaide for export.[820]

- While noting the ACCC's views that the domestic market imposes a limited constraint on grain grown in the Yorke Peninsula, grain from GrainFlow's Maitland facility could be sold to domestic markets.

Consequently, the ACCC considers there are likely significant cost advantages associated with moving grain from Maitland to either Port Giles or Wallaroo compared to Port Adelaide. While recognising catchment areas are not a fixed concept and grain can move between regions, the ACCC's view is that it is unlikely that the Port Adelaide catchment area extends to the Yorke Peninsula in general.

Viterra also submit that:

> *In addition, the ACCC's analysis does not account for the fact that there are upcountry storage sites that fall within a particular ACCC-defined zone when the site is in fact closer to port terminals in another ACCC-defined zone. For example, the distance from Edithburgh (to the west of Port Adelaide) to Port Adelaide is 60 km less than from the distance from Bordertown (to the east of Port Adelaide) to Port Adelaide. It is also important that the ACCC also factor in that, for the eastern regions of South Australia, interstate port terminals form part of a competitive "catchment area" assessment. Grain grown in the eastern regions of South Australia is often exported through port terminals in Victoria. As set out in Appendix A of the CRA Supplementary Report, some producers in the eastern region can economically transport wheat to supply chains in Victoria in response to price changes. For example, the price that can be obtained for grain delivered to OHB varies significantly at different times to the price that can be obtained for grain delivered to GrainCorp's Geelong port terminal. This is an important factor for South Australian growers (particularly, in the eastern region) in deciding where to deliver as well as for marketers in determining how to price grain.*[821]

The ACCC notes that Edithburgh is located 229km from Port Adelaide and 14km from Port Giles. The 2 closest ports to Bordertown are Portland (275km) and Port Adelaide (296km).[822] The ACCC considers that the relative distance between competing ports to be a relevant

[816] As of 31 March 2021.

[817] Cargill has only exported 0.12 million tonnes of grain from Viterra's Port Giles and Wallaroo facilities since the beginning of the 2015-16 season (representing only 2% of exports from these facilities in this time).

[818] PIRSA estimates that 1.44 million tonnes of grain was produced on the Yorke Peninsula in the 2020-21 season. See: PIRSA, *Crop and pasture reports South Australia 2021 Harvest Report*, January 2021.

[819] GTA has the following Location Differentials for moving grain from Maitland to OHB, Port Giles and Wallaroo as 20.47, 10.84 and 8.29 respectively.

[820] Viterra, *Response to request for information (Question 9)*, 13 January 2020, p. 4.

[821] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 19.

[822] Distances obtained using Google maps.

factor in an exporter's decision regarding which port terminal facility they export grain from. In the example provided by Viterra, Bordertown is located approximately equal distances from Port Adelaide and Portland, and therefore grain can reasonably move to either location for export. Edithburgh, however is located substantially closer to Port Giles and therefore has a substantial freight advantage to Port Giles over Port Adelaide.

The ACCC's view is that it is unlikely that the Port Adelaide catchment area extends to the Yorke Peninsula in general.

Port Giles' has several infrastructure advantages over alternate PTSPs

The ACCC considers that Port Giles has several port infrastructure advantages over alternate PTSPs located at Port Adelaide (i.e. Cargill and Semaphore) and Port Pirie (ADM):

- **Port Giles is a deep water port**: this allows it to load larger vessels than ADM's, Cargill's and Semaphore's facilities (which are only able to accommodate shallower draft vessels).[823]
- **Ship loading rates:** Port Giles' infrastructure means it is able to receive and load grain at significantly faster rates than ADM, Cargill or Semaphore (see table 3.1).
- **At-port storage:** Port Giles has a significant volume of at-port storage (514,100 tonnes) compared to ADM, Cargill's and Semaphore's facilities which have 80,000, zero and 16,500 tonnes of at-port storage respectively. This is expected to offer Viterra greater flexibility to manage operations at Port Giles (see table 3.1).[824]

Port Giles faces limited competition from alternate PTSPs

Given the above noted freight advantages for grain on the Yorke Peninsula and port infrastructure advantages, the ACCC considers that alternate PTSPs located at Port Adelaide and Port Pirie likely place only a limited competitive constraint on Viterra's Port Giles facility.

In response to the ACCC's views expressed in the Draft Determinations regarding the level of competition Viterra's Port Giles facility faces from other PTSPs, Viterra submitted that:

- the level of competitive constraint posed by ADM, Cargill and Semaphore is not limited as these PTSPs not only compete with Wallaroo for grain grown in the Mid and Upper North regions of SA (as suggested by the ACCC), but all regions of SA other than the Eyre Peninsula.[825] Viterra also noted that the combined highest practical capacity of these facilities (1.16 million tonnes)[826] is equivalent to the highest practical capacity of Port Giles (1.17 million tonnes), making them 'significant competitors for grain'.[827] Viterra also noted that the fact that Port Giles has higher recieval and loading rates and more at-port storage than Cargill and Semaphore does not diminish the fact that combined these port terminals have equivalent capacity to Port Giles.[828]

[823] Section 5.1 (OHB) subclauses 5(3)(b) and (g), provides stakeholder comments on the importance of deep water facilities (this is also discussed in section 3.1.3).

[824] The ACCC notes that ADM's storage is not actually at-port. ADM's Port Pirie site is located 9km from port. While the relative close proximity of the storage likely provides ADM with greater flexibility to manage its operation (compared to storage located a significant distance from port), storage located directly at port and connected to conveyor loading services would provide greater levels of flexibility to ADM. The ACCC also notes that of Port Giles 514,100 tonnes of at-port storage just under half of this is directly connected to conveyor services (239,100 tonnes), meaning grain in the remaining storage has to be transported a short distance by road to Viterra's Port Giles facility.

[825] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 76.

[826] This estimate excludes the capacity of ADM. Including the ACCC's capacity estimate of ADM equates to 1.59 million tonnes (see section 3.1.4).

[827] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 76.

[828] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 83.

- the level of competitive constraint posed by ADM at Port Pirie is now real rather than theoretical, and ADM has already facilitated coastal shipments of grain from Port Pirie and would be capable of facilitating grain exports once it received the relevant accreditation[829] (as it eventually did).[830]

In relation to the combined estimated capacities of these facilities (including those listed by Viterra in relation to Cargill's and Semaphore's facilities) the ACCC considers that the level of throughput that a facility can reasonably be expected to perform in the short-to-medium-term in response to high demand to be the figure most directly relevant to its exemption assessment. The ACCC's views on capacity estimates for each of these facilities is discussed in detail in section 3.1.4.

The ACCC notes that the combined estimated capacity of the alternate facilities (1.59 million tonnes) is higher than the estimated capacity of Viterra's Port Giles facility (1.17 million tonnes). However, consistent with the views expressed above, the ACCC considers that grain from the Yorke Peninsula is unlikely to move in significant quantities to Port Adelaide or Port Pirie for export. Consequently, the ACCC considers that the level of competitive constraint posed by ADM, Cargill and Semaphore on Port Giles is likely limited (both individually and collectively).

Port Giles appears to have spare capacity

The ACCC considers that Port Giles generally appears to have spare capacity available both on an annual and peak period basis, as indicated in figure 3.6. However the ACCC also considers that there is some potential for capacity constraints at Port Giles during the peak period in high output seasons (see section 3.2.3). In addition, spare capacity may not provide a sufficient incentive for a vertically integrated PTSP to offer reasonable access to third party exporters, absent the presence of sufficient competitive alternatives. Exporters' ability to access capacity is discussed further in relation to subclauses 5(3)(c) and (d).

The ACCC notes that in response to the Draft Determinations Viterra expressed a number of concerns regarding the ACCC's consideration of capacity utilisation across a number of its ports, including specifically in relation to Port Giles.[831] The ACCC's views (expressed in the paragraph above) on capacity constraints at Port Giles (including Viterra's concerns) are discussed further below in relation to subclause 5(3)(d).

Proposed port terminal facilities

The ACCC notes T-Ports has proposed building a port terminal facility at Wallaroo.[832] While the ACCC considers that the credible threat of entry by other PTSPs can be expected to place some level of constraint on Viterra, it does not consider the threat of competition to be as effective as actual competition. Proposed port terminal facilities are discussed further below in relation to subclauses 5(3)(e) and (f). The ACCC notes that since the release of the Draft Determinations ADM has commenced bulk grain export operations from Port Pirie.

Competition in upstream and downstream markets

The ACCC has considered whether the level of competition in upcountry storage, handling, and transport markets might provide Viterra with market power. Absent the full application of the Code, the potential exists for a vertically integrated PTSP with market power to affect competition in the port terminal services market by, for example, limiting the ability of third party exporters to participate in upstream grain acquisition.

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[829] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 82-83.

[830] ADM began performing export operations in December 2020.

[831] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 83

[832] The ACCC notes that given the Port Adelaide and Wallaroo catchment areas likely overlap (to some extent), T-Ports' proposed Wallaroo facility would likely compete for grain with Port Adelaide PTSPs (in certain regions).

In addition to upstream and downstream markets, the ACCC has also considered the potential for related markets, such as container exports and domestic demand for grain, to affect the promotion of competition in bulk wheat port terminal services.

Storage markets

As discussed in section 4.1.1 Viterra appears to own the majority of total storage on the Yorke Peninsula. A significant proportion of storage on the Yorke Peninsula appears to be located at port, with Viterra's Port Giles and Wallaroo facilities being able to store 514,100 tonnes and 757,500 tonnes of grain at port respectively.[833] [834]

In addition there appears to be a relatively limited number of upcountry storage options on the Yorke Peninsula, with only 5 upcountry storage sites (2 of which are owned by Viterra).[835] This appears to suggest that a relatively large proportion of grain grown on the Yorke Peninsula is delivered directly to Viterra's Port Giles and Wallaroo facilities (which are able to store 514,100 tonnes and 757,500 tonnes of grain at port respectively).[836]

The ACCC understands that the majority of SA's estimated 1 million tonnes of on-farm storage[837] is located in eastern SA.[838] However the ACCC is not aware of the extent to which this on-farm storage is available on the Yorke Peninsula.

In response to the Draft Determinations Viterra submitted:

> *As set out in section 2.3 of Annexure 1, upcountry storage and handling services in South Australia are characterised by a large number of providers, increasing competition and low barriers to entry. It is also operating efficiently. Viterra operated only 40% of the upcountry sites on the Yorke Peninsula and 57% of the upcountry sites in the Lower, Mid and Upper North regions of South Australia in 2020-21. In addition, there is a significant amount of on-farm storage in South Australia and the costs of constructing and expanding on-farm storage are low.*
>
> *Viterra provides, and has always provided, open access to its upcountry facilities, and customers of Viterra's storage facilities in South Australia are also able to move their grain out to third parties.*[839]

The ACCC notes Viterra's comments that it operated only 40% of the upcountry sites on the Yorke Peninsula in 2020-21. However, the ACCC notes there are only 5 upcountry storage sites in this region, with the large majority of storage appearing to be located at port. Consequently, while the ACCC is not aware of the specific size or details of third party storage sites, or the extent to which on-farm storage is used and/or available across specific regions, the ACCC considers that the above factors suggest it is likely that Viterra owns the

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833 Viterra, *Attachment 1 – Response to 14/11/19 information request – Questions 1 and 2 – Viterra port terminal facilities*, 13 February 2020.

834 See footnote 769.

835 In its exemption application Viterra submitted that there are 5 upcountry sites on the Yorke Peninsula: Ardrossan (Viterra), Bute (Viterra), Kadina (AGT Foods Australia), Kulpara (San Remo), and Maitland (Cargill). GTA did not include the Kadina and Kulpara sites in their 2019-20 list of upcountry storage sites.

836 Viterra submit that not all of this at-port storage can be loaded directly from storage onto the shipping conveyor belt for export; some of this storage still needs grain to be transported a short distance before being loaded for export. Of the 514,100 and 757,500 tonnes of storage at Port Giles and Wallaroo, 239,100 tonnes and 192,000 tonnes can be loaded directly from storage onto the conveyor belt for export respectively. The ACCC considers that storage located directly at port likely provides a PTSP with a higher level of operational flexibility compared to storage located off-site (as the PTSP is not reliant on transport services to be able to load grain onto a vessel). However, off-site storage facilities located relatively close to port still likely provide a higher level of operational flexibility than more distant sites (to the extent that shorter transport distances enable greater flexibility in grain movements). See: Viterra, *Attachment 1 – Response to 14/11/19 information request – questions 1 and 2 – Viterra port terminal facility features,* 13 February 2020.

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

838 ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report,* December 2018, p. 24.

839 Viterra, *Response to Draft Determination*, Public version, 8 February 2021 p. 84.

large majority of storage on the Yorke Peninsula. The ACCC therefore considers that there is potential for Viterra's position across the supply chain to affect competition at port.

Domestic markets

The ACCC considers that PTSPs can be competitively constrained by the domestic market. While the ACCC does not have detailed data on where grain is processed or consumed within a state, the ACCC notes that SA as a whole has the smallest domestic market of any mainland state in Australia (at 1.2 million tonnes of grain).[840]

The ACCC notes that SA's domestic consumption has been fairly constant since the 2014-15 season.[841] The domestic market offers a reliable and stable source of demand for grain, and typically involves lower supply chain costs (relative to export markets) making it a relatively attractive (but limited) market for grain. As such grain typically moves to the export market once demand in the domestic market has been met.

In addition, the ACCC notes that certain market conditions can create economic incentives to transport large volumes of grain between states to satisfy domestic demand. For example, in response to poor growing conditions on the east coast in recent years large quantities of grain were transported from WA and SA to the east coast to satisfy east coast domestic demand.[842]

As discussed in section 4.3.2, the ACCC understands that SA's domestic consumption is largely located within the east of the state. Therefore it likely draws grain from the same catchment area as Viterra's Port Giles facility. However, the ACCC also understands that the majority of grain grown on the Yorke Peninsula is exported through either Port Giles or Wallaroo. This suggests that the domestic market in eastern SA draws its grain predominantly from outside the Yorke Peninsula.

Based on the available information, the ACCC therefore considers that the SA domestic market only places a limited competitive constraint on Viterra's Port Giles facility.

Container markets

The ACCC notes that the container market can impose a competitive constraint on PTSPs. However the SA container market is located at Port Adelaide and typically exports a different composition of commodities than bulk exports.

As discussed in Wallaroo subclause 5(3)(d), the ACCC considers that SA's container market likely imposes little to no competitive constraint on the bulk export for growers on the Yorke Peninsula. Consequently, the ACCC's view is that SA's container market likely imposes little to no competitive constraint on Viterra's Port Giles facility.

Conclusion

In light of the above (and the views set out at Section 5.1 (IHB) and Section 5.3 (Wallaroo)), the ACCC considers that Viterra's Port Giles facility faces insufficient competitive constraints and that exempting Viterra from the Parts 3 to 6 of the Code in relation to this facility is not in the public interest, and will likely also be detrimental to competition in upstream and downstream markets.

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[840] ACCC, *Bulk grain ports monitoring report 2019-20*, March 2021, Appendix 1 – supplementary spreadsheet – tables and charts.

[841] SA domestic consumption has varied between 1.11 and 1.24 million tonnes per annum since the 2014-15 season.

[842] The ACCC does not receive data on inland grain movements. Furthermore, the ACCC notes that Port Giles facilitated a combined 0.19 million tonnes of coastal shipments over the 2017-18 to 2019-20 seasons.

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

The ACCC's views in relation to the interests of exporters who may require access to port terminal services are generally the same in relation to Port Giles as they are in relation to Viterra's IHB facility.

Section 5.1 (IHB) subclause (c) sets out the ACCC's views on these matters in detail.

To the extent the ACCC has views on these matters that specifically relate to Viterra's Port Giles facility, these are set out below.

The ACCC considers that, given the limited competitive constraint and potential for peak period capacity constraints, if an exemption from Parts 3 to 6 of the Code were granted to Viterra in relation to its Port Giles facility this would likely be detrimental to the interests of exporters who may require access to Viterra's Port Giles facility.

Subclause 5(3)(b), (g) and (d), sets out the ACCC's views regarding the level of competitive constraint and capacity constraints at Viterra's Port Giles facility.

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

Section 5.1 (IHB) subclause (d) sets out the ACCC's views on the likelihood that exporters will have fair and transparent access to port terminal services if Viterra is granted an exemption/s. ACCC views that specifically relate to Viterra's Port Giles facility are set out below.

Port Giles typically has excess capacity

As per section 3.2.2, the ACCC considers that Port Giles typically has spare capacity in both peak and off peak periods.

In relation to concerns expressed specifically in relation to the ACCC's views in the Draft Determinations on capacity utilisation at Port Giles, the ACCC notes that Viterra submitted:

> *The ACCC states that Port Giles generally appears to have excess capacity on an annual basis and in peak periods, with low annual capacity utilisation of 55%. Viterra agrees. As explained in section 2.1 of the submission, the highest practical capacity at Port Giles is 1.17 mtpa, which is higher than grain throughput at Port Giles in each of the past three seasons. In addition, since 2016-17, the highest throughput months at Port Giles were [c-i-c].*
>
> *This means that, based on maximum monthly capacity of 97,500 tonnes (i.e. the highest practical capacity divided by 12 which likely understates monthly capacity in peak periods once shutdowns are accounted because, as previously noted, these would take place outside of peak periods), Viterra has had excess capacity at Port Giles in all but [c-i-c] during the past 3 seasons. It is clear that Port Giles is not capacity constrained and is therefore incentivised to maximise throughput and compete to source grain from a wide area and to keep its operations efficient and cost effective.*[843]

The ACCC notes that Viterra's Port Giles facility has a stated annual capacity of 1.17 million tonnes.[844] As discussed in relation to subclauses 5(3)(b) and (g) it appears Port Giles will have spare capacity in future seasons, with average annual and peak capacity utilisation rate of 60% and 67% (excluding the drought-affected 2018-19 and 2019-20 seasons).[845]

[843] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 83.

[844] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 7.

[845] The ACCC considers that Port Pirie and Port Giles do not compete for the same grain, as such the entry of ADM is unlikely to draw grain away from Viterra's Port Giles facility.

This suggests that, in average throughput seasons, there is likely to be spare capacity available to exporters during both peak and off peak periods. However, during high throughput seasons it appears that Port Giles could still experience capacity constraints. For example, the maximum amount of capacity released during the peak period (including tolerance) at Port Giles since 2013-14 is 654,500 tonnes (in 2017-18),[846] while the amount of exports performed at Port Giles in 2011-12 and 2016-17 was 630,000 tonnes and 590,000 tonnes respectively.[847]

The ACCC notes that Viterra's associated entity exporter, Glencore, performed 43% of shipments through Port Giles in the peak period and 32% in the off-peak period (on average since 2011-12). In comparison, the largest third party exporters at Port Giles during the peak period since 2011-12 have been Bunge, CBH and ADM, who have performed 16%, 9%, and 7% of exports respectively (and 4%, 9% and 12% in the off-peak period).[848]

While the ACCC notes that Glencore has performed a significantly higher share of peak shipments at Port Giles in the peak period compared to the off-peak period, the ACCC also notes that this appears to reflect Glencore's relatively low levels of off-peak shipments[849] (i.e. Glencore has performed a similar proportion of peak period shipments at Port Giles as it has at OHB and Port Lincoln (43%, 40% and 41% respectively)). Consequently, the ACCC considers that third party exporters have historically been able to access some level of capacity at Port Giles during the peak period.

In considering historical exporter market shares, the ACCC notes that Viterra's current PLPs, ensure that, combined across Viterra's 6 facilities, a minimum of 500,000 tonnes of capacity is reserved for short term capacity per quarter.[850] In addition, no single exporter can apply for more than 50% of the initial long-term capacity at Port Giles.[851] [852] The ACCC notes that exporters' current and historical levels of access were likely influenced by these provisions under Viterra's PLPs and that if Viterra were granted an exemption, it would be able to vary the capacity allocation system under its PLPs without the need for ACCC approval.

In addition to considering historical access levels, the ACCC has also considered whether the current level of access for third party exporters is likely to be affected if an exemption from Parts 3 to 6 of the Code was granted in relation to Port Giles.

While Port Giles appears to have spare capacity available, the ACCC notes that there also appears to be the potential for capacity constraints during the peak period in high output seasons (i.e. when access to capacity is most highly valued by exporters).

As previously noted, the ACCC considers that in periods where the supply of port terminal services is constrained the incentive for a vertically integrated PTSP to provide preferential treatment to itself, or its associated entity exporter compared to third party exporters is increased. As such, and given the relative absence of competitive alternatives, in periods of constraint Viterra likely has an incentive to provide favourable access to certain exporters in a way that is detrimental to competition.

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[846] Ibid.

[847] The ACCC notes it does not have released capacity figures for Viterra's port terminal facilities prior to 2013-14.

[848] Since 2011-12 Cargill has been the largest third party exporter by volume. However, since 2015-16 Cargill have performed significantly less exports from Port Giles (prior to 2015-16 Cargill performed 21% of shipments from Port Giles on average, and since then have performed just 4% of shipments).

[849] The proportion of off-peak shipments performed by Glencore at each of Viterra's facilities is: Port Lincoln, 38%; Thevenard, 22%; IHB, 56%; OHB, 46%; Wallaroo, 39%; Port Giles, 35%.

[850] See clause 3.12. Viterra Port Loading Protocols, 24 December 2015, p. 31. (See: https://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf).

[851] See clause 3.5(a) and definition of 'Initial Nomination Cap' in clause 1. Viterra Port Loading Protocols, 24 December 2015, p. 31. (See: https://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf).

[852] The ACCC understands that Viterra intends to make all 2021-22 capacity available as short-term capacity only.

The ACCC also notes that, in the event capacity constraints are experienced at Port Giles, Viterra (and/or exporters) may seek to move grain through Wallaroo. While the ACCC generally considers Wallaroo to be capacity constrained in peak periods, the ACCC acknowledges that grain grown on the Yorke Peninsula has the potential to move to either Port Giles or Wallaroo to some extent.[853] As such, exporters could potentially be able to access Viterra's Wallaroo facility for certain shipping slots if these certain slots are unavailable at Port Giles (subject to spare capacity being available at that facility).

Size of port terminal facility

As part of its submission in response to the Draft Determinations, Viterra stated that it is constrained from exercising market power at a number of its port terminals, since they export a small proportion of wheat produced in Australia and SA, in particular at IHB, Thevenard and Wallaroo.[854]

In relation to Port Giles, Viterra stated that 12% of SA's exports have been exported through Port Giles since 2011-12.[855] Furthermore, Viterra submitted its concern that the ACCC has not adequately taken into account that Port Giles exports only a small proportion of South Australia's wheat:

> *Viterra is concerned that the ACCC has had little regard to the fact that Port Giles ships only a small proportion of South Australia's wheat and is not capacity constrained, despite it stating that it is more concerned about vertical integration where a PTSP is capacity constrained. It is important that the ACCC properly accounts for the low utilisation rate at Port Giles and the low proportion of wheat exported from this facility in its decision. These factors strengthen Viterra's incentive to increase throughput at Port Giles, and further account for why Viterra does not have an incentive to deny grain exporters with access to Port Giles or to provide favourable terms of access to Glencore.*[856]

The ACCC sets out its views on the relevance of a port's size relative to a state's total exports in section 5 (IHB).

As per section 3.2.3, the ACCC considers that Port Giles faces limited competitive constraints and has the potential to face peak period capacity constraints. While the ACCC notes that Port Giles exports a relatively small proportion of SA wheat/grain, the ACCC considers that Viterra likely has significant market power at Port Giles (see section 4.1.1).

Conclusion

While the ACCC acknowledges there appears to be spare capacity at Port Giles, the ACCC's view is that given the lack of competitive constraints, an exemption from Parts 3 to 6 of the Code would likely be detrimental to exporters' ability to secure fair and transparent access at Viterra's Port Giles facility.

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[853] The ACCC notes that there are relatively limited upcountry options on the Yorke Peninsula, however as shown in table 4.2 there appears to be a degree of substitutability between Port Giles and Wallaroo for grain stored at Ardrossan and Maitland. However the ACCC considers it unlikely that grain stored in at-port storage at Port Giles would move to export via Wallaroo.

[854] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 2-3.

[855] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 80.

[856] Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 83.

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

Section 5.1 (IHB) subclauses (e) and (f) sets out the ACCC's findings on the promotion of economically efficient operation and use of the port terminal facility, and the promotion of efficient investment in port terminal facilities.

ACCC views specifically relating to these matters and Viterra's Port Giles facility are set out below.

Promotion of the efficient operation and use of Viterra's Port Giles facility

As discussed in section 5.1 (IHB) subclause (e) and (f) the ACCC considers that exemptions from Parts 3 to 6 of the Code would assist Viterra to provide greater flexibility for its customers at the relevant facilities. The ACCC also considers that it is in Viterra's interests to make operational decisions that ensure the efficient and profitable operation of its port terminal facilities irrespective of whether or not exemptions are granted.

However, as previously discussed, in circumstances where capacity is constrained and/or sufficient competition is not present, Viterra may have an incentive (and the ability) to favour its associated entity exporter absent the full application of the Code. The ACCC considers that this could lead to inefficient market outcomes more broadly, despite Viterra being able to operate the individual exempt port terminal facility more flexibly.

As set out in the analysis relating to subclauses 5(3)(c) and (d) the ACCC's view is that, if an exemption were granted to Viterra in relation to its Port Giles facility, Viterra would have an incentive (and the ability) to provide favourable access to its associated entity exporter. This is largely due to the lack of competitive alternatives and the potential for capacity constraints at its Port Giles facility.

Promotion of efficient investment in port terminal facilities

The ACCC's findings about the promotion of efficient investment in port terminal facilities in relation to Port Giles are the same as they are in relation to Viterra's Wallaroo facility. Section 5.3 (Wallaroo) subclause (e) and (f) sets out the ACCC's views in relation to subclause 5(3)(f).

To the extent the ACCC has views on these matters that specifically relate to Viterra's Port Giles facility, these are set out below.

The ACCC's considers that it is in Viterra's interests to make investment decisions which ensure Viterra can maximise its return to its shareholders, irrespective of whether or not exemptions are granted in relation to any of Viterra's facilities.

Proposed alternate port terminal facilities

In considering proposed investment in port terminal facilities, the ACCC notes T-Ports' proposed Wallaroo facility has the potential to impose a competitive constraint on Port Giles.

The ACCC understands that T-Ports' Wallaroo proposal involves the construction of a port terminal facility at Wallaroo and the use of the same transhipment model used its Lucky Bay facility.[857] The ACCC notes that T-Ports expects the facility will take between 12 and 18 months to build, with initial demolitions and site remediation works in progress as of 8

[857] The use of a transhipment vessel model would allow the proposed Wallaroo site to load larger Panamax sized vessels.

December 2020.[858] While early site works have begun at T-Ports' proposed Wallaroo facility, the facility is still pending further approval from relevant government authorities.[859] It is the ACCC's understanding that T-Ports is aiming to be ready to receive grain for the next harvest.[860]

T-Ports has indicated that its proposed Wallaroo facility will have 260,000 tonnes of storage and will be able to facilitate 500,000 tonnes of grain per annum.[861] [862] In addition the facility will use (i.e. share) the same transhipment vessel used at T-Ports' Lucky Bay facility. T-Ports anticipates that the location of the Wallaroo and Lucky Bay facilities, and the shared use of the same transhipment vessel will deliver greater efficiencies and cost savings:

> *There are efficiencies and cost savings in building this port on the opposite side of the Spencer Gulf to Lucky Bay as we will utilise the same transhipment vessel, the 'Lucky Eyre'.*[863]

The ACCC notes that the location and operational interaction between the Wallaroo and Lucky Bay facilities may provide T-Ports with significant operational flexibility (e.g. by facilitating split shipments between the 2 facilities). However, the ACCC also notes that the use of a single transhipment vessel may also result in operational challenges and possibly affect the amount of throughput that can be delivered by each facility.

Should T-Ports' Wallaroo facility commence and operate as proposed, the ACCC expects that it could impose a material level of competitive constraint on Viterra's Port Giles facility (as well as on Viterra's Wallaroo, IHB and OHB facilities).

The ACCC considers that the credibility of the threat of entry by T-Ports at Wallaroo has increased following the commencement of operations at T-Ports' Lucky Bay facility (particularly given the proposed use of the same transhipment vessel by both operations). However, while the ACCC acknowledges that the threat of competition (to the extent it is considered credible) can be expected to impose a level of competitive constraint, the ACCC does not view the threat of competition as being as effective as actual competition.[864]

The ACCC will continue to closely monitor developments in the SA market, including T-Ports' proposed Wallaroo facility.

Promotion of efficient investment more broadly

The ACCC's findings about the 'promotion of efficient investment more broadly' in relation to Port Giles are the same as they are in relation to Viterra's Wallaroo facility. Section 5.3 (Wallaroo) subclause (e) and (f) sets out the ACCC's views in relation to subclause 5(3)(f).

Viterra's incentive to invest in its Port Giles facility

Viterra has also submitted that it has made significant investment at Port Giles in recent years:

> *…Viterra notes that it has made a number of significant investments at Port Giles in the five year period to 31 December 2018. In this period, it invested [c-i-c] at Port Giles, including:*
>
> - *recladding the bulk loading facilities;*

[858] T-Ports Soundcloud, *Wallaroo Port Development*, https://soundcloud.com/t-ports/wallaroo-port-development-1.

[859] See: https://soundcloud.com/t-ports/wallaroo-port-development-1, (accessed 24 February 2021)

[860] T-Ports website: https://tports.com/wallaroo/ (accessed 22 April 2021).

[861] Ibid.

[862] T-Ports website: https://tports.com/t-ports-to-expand-to-yp-with-wallaroo-port/. (accessed 22 April 2021)

[863] T-Ports website: https://tports.com/wallaroo/ (accessed 22 April 2021).

[864] The ACCC notes it is closely monitoring the operation of T-Ports' Luck Bay facility which, as noted, uses the same transhipment and operational approach as the proposed Wallaroo facility.

- *installing a 40 metre weighbridge;*
- *silo roof sealing; replacing conveyor and elevator belts; and*
- *electrical switch room upgrades.*[865]

The ACCC considers that this indicates that Viterra is willing to make investments under the current regulatory arrangements. As previously noted, this likely reflects the need to generate a return for shareholders. However it is unclear how Viterra's investment decisions would be affected in relation to a decision to exempt or not exempt Viterra in relation to this facility.

Conclusion

As discussed in relation to subclause 5(3)(d), the ACCC considers that the level of competitive constraint faced by Viterra in relation to Port Giles is insufficient at this time to ensure that Viterra would not have an incentive to provide favourable access to certain exporters at its facility (in particular its associated entity exporter) in a way that damages competition.

Consequently, while there is the potential for the more flexible use of the facility by Viterra if an exemption is granted, the absence of sufficient competition means that an exemption has the potential to lead to inefficient market outcomes more broadly (including in relation to the operational and investment decisions of PTSPs within Port Giles catchment area).

Given the factors discussed above, the ACCC considers that the effect of a decision to exempt or not to exempt Viterra in relation to its Port Giles facility on the investment in port terminal facilities is unclear.

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

The ACCC's consideration of whether Viterra is an exporter (or an associated entity of an exporter) is the same in relation to Port Giles as it is in relation to Viterra's other port terminal facilities.

Section 5.1 (IHB) subclause (h) sets out the ACCC's views in relation to these matters.

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

Section 5.1 (IHB and Wallaroo) subclause (i) sets out the ACCC's findings on SA catchment areas. To the extent the ACCC holds views that specifically relate to these matters and Viterra's Port Giles facility, these are set out below.

The ACCC notes that Viterra has submitted that its Port Giles facility competes for the same grain as PTSPs at Port Adelaide and Port Pirie.[866] As discussed in section 4.2.3, and above in relation to subclauses 5(3)(b) and (g), the ACCC expects the majority of grain grown on the Yorke Peninsula to be exported through Viterra's Port Giles or Wallaroo facilities, with grain in this area only likely to travel to other destinations (i.e. Port Adelaide and/or Port Pirie) in large quantities in unusual market conditions. Furthermore, as discussed in section 4.2 the ACCC does not consider T-Ports' Lucky Bay facility to be in the Port Giles catchment

[865] Viterra, *Exemption Application 2019,* 2 July 2019, p. 63.

[866] Ibid, p. 62.

zone. As discussed in section 4.2 the ACCC generally considers that bulk grain exports on the Eyre Peninsula are largely separate from operations in the rest of SA.

As such, the ACCC does not consider that the catchment area for Port Giles contains an exempt port terminal service provider.

(j) any other matters the ACCC considers relevant

The ACCC's consideration of any other relevant matters is generally the same in relation to Port Giles as it is in relation to Viterra's IHB facility. To the extent the ACCC has views on these matters that specifically relate to Viterra's Port Giles facility, these are set out below.

While acknowledging that the ACCC is able to revoke an exemption determination if satisfied that the reasons for granting an exemption no longer apply, the ACCC's view is that Viterra's Port Giles facility is unlikely to be subject to sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code at this time.

6. Final Determinations

Based on the findings and reasons outlined in chapter 5, the ACCC has made the following final determinations.

Viterra's Port Adelaide Inner Harbour port terminal

The ACCC's final determination is that Viterra is an exempt provider of port terminal services provided by means of its port terminal facility at Port Adelaide IHB.

Viterra's Port Adelaide Outer Harbor port terminal

The ACCC's final determination is that Viterra is an exempt provider of port terminal services provided by means of its port terminal facility at Port Adelaide OHB.

Viterra's Wallaroo port terminal

The ACCC's final determination is that Viterra is not an exempt provider of port terminal services provided by means of its port terminal facility at the port of Wallaroo.

Viterra's Port Giles port terminal

The ACCC's final determination is that Viterra is not an exempt provider of port terminal services provided by means of its port terminal facility at Port Giles.

ACCC future monitoring and assessments

The ACCC's Final Determinations mean that Viterra will be an exempt port terminal service provider in relation to its Port Adelaide IHB and OHB facilities. The ACCC considers exempted facilities in its ongoing monitoring activities, including:

- Industry analysis – this will include examining the shipping activity at each of SA's port terminal facilities. All PTSPs publish and provide to the ACCC ship loading statements under Part 2 of the Code.

- Industry consultation – this will include periodically approaching industry participants, such as exporters and grower groups, to gauge the effect of any exemptions. Industry participants are also encouraged to approach the ACCC directly with any concerns they may have about securing fair and transparent access to Viterra's port terminal facilities.

If the ACCC's monitoring activities indicate that the exporters of bulk wheat do not have fair and transparent access to port terminal services at an exempt port terminal facility, the ACCC will consider whether it should examine revocation of the exemption.

Under subclause 5(6) of the Code, the ACCC may revoke an exemption determination if, after having regard to matters (a) to (j) of subclause 5(3) of the Code, it is satisfied that the reasons for granting the exemption no longer apply. In those circumstances, the ACCC will follow the procedure in its *Guidelines on the ACCC's process for making and revoking exemption determinations*.