



Final Determinations

Viterra Operations Pty Ltd

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

- Port Lincoln
- Thevenard

20 July 2021

Contents

Executive Summary	3
1. Introduction	5
1.1. Exempt service providers.....	5
1.2. Viterra’s exemption applications.....	6
1.3. Public consultation undertaken	6
1.4. Separation of exemption assessments.....	7
1.5. Outline of this document	8
1.6. Terminology used in the Final Determinations	8
1.7. Glossary/Definitions	9
2. Industry response to the Draft Determinations	13
2.1 Viterra and CRA’s responses to the Draft Determinations.....	13
2.2 Stakeholder submissions to the Draft Determinations	16
2.3 Viterra’s response to stakeholder submissions	19
3. Bulk grain export port terminal services	20
3.1 Port terminal facilities and capacity	22
3.2 Exports and exporters.....	42
4. Competition across the bulk grain supply chain, container exports and domestic demand.....	53
4.1 South Australian port terminals’ upcountry links.....	53
4.2 Grain catchment areas by port.....	68
4.3 Containerised exports and domestic demand	79
5. ACCC’s exemption assessment of Viterra’s Port Lincoln and Thevenard port terminals	84
5.1 ACCC’s exemption assessment of Viterra’s Port Port Lincoln.....	84
5.2 Thevenard	107
6. Final Determinations.....	121

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) not to be an exempt service provider of port terminal services provided by means of its port terminal facilities at:

- Port Lincoln; and
- Thevenard.

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

These Final Determinations are consistent with the decisions proposed in relation to each of these facilities in the 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 Lincoln

The ACCC considers that:

- Viterra's Port Lincoln facility likely faces a material level of competitive constraint from T-Ports Pty Ltd's (T-Ports) Lucky Bay facility in certain regions of its catchment area. However the constraint imposed in other regions is likely limited, in particular most of the Lower Eyre Peninsula.
- Viterra's Port Lincoln facility likely faces limited competition from domestic and container markets, meaning that grain grown on the Eyre Peninsula is largely reliant on access to export markets.
- Viterra has a dominant position upcountry on the Eyre Peninsula, where it owns the vast majority of storage.
- Determining Viterra to be an exempt service provider in relation to its Port Lincoln facility at this time would likely be detrimental to exporters' interests and ability to access port terminal services. An exemption is also unlikely to promote competition in upstream and downstream markets.

Thevenard

The ACCC considers that:

- Viterra's Thevenard facility is in a relatively remote location and faces limited competition from domestic and container markets. As such grain grown on the Western Eyre Peninsula is largely reliant on access to export markets.
- Viterra's Thevenard facility is likely to have significant spare capacity available, including during peak periods.
- There is likely some, though limited, overlap between the catchment area of Viterra's Thevenard facility and T-Ports' Lucky Bay facility. As such Lucky Bay likely imposes limited competitive constraint on Thevenard.

- Viterra has a dominant position upcountry on the Eyre Peninsula, where it owns the vast majority of storage.
- Despite the existence of spare capacity, given the other factors above determining Viterra to be an exempt service provider in relation to its Thevenard facility at this time would likely be detrimental to the interests of exporters. An exemption is also unlikely to promote 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 possible 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 Lincoln and Thevenard facilities are based on the information available to the ACCC at the time of making its Final Determinations.

While the ACCC's assessment of T-Ports' Lucky Bay facility's capacity has been informed by its consideration of the peak period of the 2020-21 shipping season, the facility has yet to operate for a complete shipping year. At this time it does not appear that the facility has introduced sufficient competitive constraint across the different regions of the Eyre Peninsula and a number of uncertainties remain around T-Ports' operation. Although the ACCC's assessment did not support exemption at this time the ACCC notes that the level of competitive constraint Lucky Bay imposes has the potential to change in future seasons.

The ACCC also notes that other facilities proposed for the Eyre Peninsula, including the Port Spencer and Cape Hardy proposals, have the potential to impose further competitive constraint on both Port Lincoln and Thevenard. 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.

¹ An exemption assessment can be initiated by either a port terminal service provider or the ACCC. See: Compliance with the Port Terminal Access (Bulk Wheat) Code of Conduct: information for industry participants Guidelines on the ACCC's process for making and revoking exemption determinations October 2014 at <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

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 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).

Viterra provided additional submissions in response to the Draft Determinations, including a submission from CRA.

On 27 April 2021 the ACCC made Final Determinations which exempted Viterra from Parts 3 to 6 of the Code in relation to its Port Adelaide Inner Harbour (IHB) and Port Adelaide Outer Harbor (OHB) facilities, and did not exempt Viterra in relation to its Wallaroo and Port Giles facilities³ (April Determinations).

In making its April Determinations in relation to these 4 Viterra facilities, the ACCC indicated that it would make Final Determinations in relation to Port Lincoln and Thevenard after considering 2020-21 peak period shipping data. The reasons for this approach are outlined in Section 1.4

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,⁴ including Viterra's response to the April Determinations.

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

³ 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

⁴ See: Viterra wheat port exemption assessment. Exemption applications & issues papers at <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/exemption-application-issues-papers>.

COVID-19. At its request, Viterra was also provided additional time to respond to information 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.

Further information regarding the public consultation processes is set out in the April Determinations.⁵

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 the relevant sections of this document.

1.3.1. April Determinations

The ACCC released the April Determinations for IHB, OHB, Wallaroo, and Port Giles on 27 April 2021.⁶ The April Determinations made Viterra an exempt provider of port terminal services in relation to its IHB and OHB port terminal facilities, but not in relation to its Wallaroo and Port Giles facilities.

On 7 May 2021 Viterra wrote to the ACCC in response to the April Determinations.⁷

All public materials received from Viterra and stakeholders are available on the ACCC’s website.⁸

1.4. Separation of exemption assessments

Given recent changes in the Eyre Peninsula port terminal services market, the ACCC considered 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 Viterra’s Port Lincoln and Thevenard facilities.

As such, the ACCC considered it appropriate to separate its Final Determinations in relation to Viterra’s Port Lincoln and Thevenard facilities in order to ensure emerging information of particular relevance to these assessments could be considered.

The ACCC has considered a broad range of matters relating to the SA bulk grain market in making these Final Determinations. Where the analysis undertaken by the ACCC in relation

⁵ ACCC, *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, pp. 8-10.

⁶ ACCC, *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.

⁷ Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021.

⁸ See: Viterra wheat port exemption assessment at <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment>.

to the April Determinations is relevant to its assessment of Viterra's Port Lincoln and Thevenard facilities, this analysis has been referred to in this document.

1.5. Outline of this document

The Final Determinations document is set out as below:

- Chapter 2 outlines stakeholders' responses to the Draft Determinations on Viterra's exemption applications.
- Chapter 3 considers the characteristics of Viterra's 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 Viterra's Port Lincoln and Thevenard facilities.
- Chapter 6 sets out the ACCC's Final Determinations in regard to Viterra's Port Lincoln and Thevenard facilities.

Further information

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

Luke Sheehan
Assistant Director
Infrastructure & Transport - Access & Pricing Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001
Ph: 03 6215 9304
Email: luke.sheehan@acc.gov.au

1.6. Terminology used in the Final Determinations

For the readers' convenience a glossary of key acronyms and terms used in these 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.⁹

The ACCC also notes that Glencore Agriculture Pty Ltd rebranded to Viterra Australia Pty Ltd on 4 May 2021.¹⁰ To maintain consistency with the April Determinations and aid readability, Viterra Australia Pty Ltd will continue to be referred to as Glencore throughout this document.

1.7. Glossary/Definitions

ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ABB Grain	ABB Grain Ltd
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
April Determinations	<i>ACCC 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</i> ¹¹
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

⁹ The ACCC notes that 65% of all bulk grain shipped from SA between the 2011-12 and 31 May 2021 was wheat.

¹⁰ See: <https://www.viterra.com.au/Media/News/2021/Glencore-Agriculture-in-Australia-rebrands-to-Viterra>, viewed 13 July 2021.

¹¹ See: ACCC, *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*. <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/final-determinations-inner-harbour-outer-harbor-wallaroo-and-port-giles>.

	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 ship during a shipping window, as determined by the port terminal service provider that owns or operates the port terminal facility ¹²
CCA	<i>Competition and Consumer Act 2010</i> (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
EPCBH	Eyre Peninsula Cooperative Bulk Handling
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	Viterra Australia Pty Ltd (associated entity to Viterra Operations Pty Ltd), formerly Glencore Agriculture Pty Ltd
GPA	Grain Producers Australia
GPSA	Grain Producers South Australia
GRA	Gypsum Resources Australia Pty. Limited
GrainCorp	GrainCorp Operations Limited

¹² 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: <https://www.viterra.com.au/dam/jcr:889d5770-cf9d-4af6-84e8-cca2d630ec25/Port%20loading%20protocols.pdf> (viewed 13 July 2021) for further information.

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
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)
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
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 <i>Port Terminal Access (Bulk Wheat) Code of Conduct</i>
T-Ports	T-Ports Pty Ltd
Transshipment Vessel	A shallow draft vessel used to move grain from a port terminal facility to an ocean going vessel stationed offshore. Sometimes referred to as a TSV
Vertically integrated	A company that operates at more than one stage of the supply chain
Viterra	Viterra Operations Pty Ltd (associated entity to Viterra Australia Pty Ltd, formerly Glencore Agriculture Pty Ltd)

2. Industry response to the Draft Determinations

On 6 October 2020 the ACCC released Draft Determinations in response to Viterra's exemption applications.¹³ 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 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 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 3 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.

The ACCC has carefully considered the issues raised in submissions from Viterra and CRA, as well as other stakeholders. Detailed consideration of these issues, including the related ACCC views, are set out in the relevant sections of this document.

Some aspects of the submissions to the Draft Determinations relate specifically to Viterra's IHB, OHB, Wallaroo, and Port Giles facilities. These were considered in the April Determinations for those ports.¹⁴ The ACCC has not referred to parts of submissions that relate specifically to those 4 port terminal facilities (except where the issues raised also relate to Viterra's Port Lincoln or Thevenard facilities) below.

Viterra's, CRA's and other stakeholders' responses to the Draft Determinations are available on the ACCC website.¹⁵

2.1 Viterra and CRA's responses to the Draft Determinations

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

¹³ The Draft Determinations can be found at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/draft-determinations>

¹⁴ Final Determinations for IHB, OHB, Wallaroo, and Port Giles can be found at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/final-determinations-inner-harbour-outer-harbor-wallaroo-and-port-giles>

¹⁵ Submissions can be found at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/draft-determinations>.

Viterra's submissions to the Draft Determinations related to IHB, OHB, Wallaroo and Port Giles were considered in detail in Chapter 2 of the April Determinations.¹⁶ Responses to Viterra's submissions which relate to the ACCC's general approach to its analysis were outlined in that chapter and, in the interests of brevity, are not repeated below (although, as noted, are referred to in relevant sections of this document).

2.1.1 Viterra's submission

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.
- Viterra has an incentive to provide fair and transparent access to its facilities.
- The ACCC made unrealistic adjustments to the assumptions in CRA's model in the Draft Determinations. The CRA report, which used conservative assumptions in its modelling, showed Viterra has no incentive to deny access to its facilities.
- 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 broad range of competitive constraints at port, including the presence of alternate PTSPs and the threat of entry by new PTSPs.
- 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 – including Thevenard – export a very small proportion of the wheat produced in Australia, and a small proportion of the wheat produced in SA.

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

In response to the Draft Determinations Viterra submitted that 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:

¹⁶ ACCC, *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*, pp. 17-26.

- 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.

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.

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).

2.1.2 CRA's submission

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

- The ACCC's analysis of CRA's profit and loss model is misguided.
- 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 that there are a number of contradictions and shortcomings in the Draft Determinations, including:

- 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.
- It is inconsistent for Lucky Bay to be granted an exemption while Port Lincoln is not. The ACCC appears to imply Lucky Bay is in a similar position to Port Lincoln (in that both have a freight cost advantage over a large growing area) and it is unclear why the market situations of Lucky Bay and Port Lincoln differ so much that Lucky Bay merits exemption while Port Lincoln does not.

CRA also submitted that the threat of new entry by PTSPs is a particularly relevant constraint on any incentive for Viterra to favour its associated entity (including in relation to Port Lincoln), given the amount of actual entry that has occurred in SA.

2.2 Stakeholder submissions to the Draft Determinations

Key views presented by stakeholders in relation to Viterra's Port Lincoln and Thevenard facilities are summarised below. Stakeholder views regarding broader matters of relevance (such as state-wide matters) are also summarised below.

As previously noted, stakeholder views that specifically relate to Viterra's IHB, OHB, Wallaroo and Port Giles facilities are not set out below. Stakeholder views regarding these 4 port terminal facilities were considered in detail in the April Determinations.

2.2.1 Stakeholders that supported exemptions for Port Lincoln and Thevenard

The SAFC, and Mr Geoff Ryan (grower and Viterra Strategic Site Committee Chair for Wirrulla/Nunjikompita) provided submissions to the Draft Determinations which supported exemptions at all of Viterra's port terminal facilities in SA.

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 previous views were not given appropriate consideration, and it reasserts those positions.
- The Draft Determinations casted unreasonable doubt over T-Ports' operations at Lucky Bay.

- The prospective Peninsula Ports facility at Port Spencer has moved forward significantly in the time it has taken for the ACCC to prepare its Draft Determination.¹⁷ Port Spencer would be a major competitor to Viterra at Port Lincoln.

Mr Ryan supported exemptions in relation to all of Viterra's facilities, in particular Thevenard. Mr Ryan submitted:

- 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 it was supportive of the Draft Determinations to exempt Viterra at its IHB and OHB facilities. GrainCorp did not comment on Port Lincoln or Thevenard specifically. GrainCorp submitted:

- Exporters have viable access to Lucky Bay.
- The exemptions proposed in the Draft Determinations would benefit Viterra's customers and SA 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 Port Lincoln and Thevenard

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 facilities.

Mr Hill submitted that:

- Viterra acquired a monopoly when it purchased ABB Grain's export facilities.¹⁸ Supply chain charges are now \$17 per tonne higher than Co-operative Bulk Handling (CBH) WA's (despite the SA grain handling system having a range of more efficient features) and should be reviewed. This is resulting in unnecessary duplication of infrastructure.
- With 3 new approved grain ports on the Eyre Peninsula to bring the total to 5, a situation arises wherein grain moves in different export pathways undermining current road and infrastructure and resulting in: higher road maintenance costs, massive duplication of grain storage facilities, and major reductions in per-port throughput (resulting in higher unit costs).

T-Ports submitted that:

¹⁷ The ACCC notes that since submissions to the Draft Determinations closed Port Spencer's projected timeline has been pushed back a year to be ready to accept grain by November 2022 for the 2022-23 harvest. See: <https://peninsulaports.com.au/>, viewed 12 May 2021.

¹⁸ ABB Grain Ltd was acquired by Viterra in 2009.

- Viterra and Glencore¹⁹ 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.
- Other than T-Ports’ storage site at Lock 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), which T-Ports assert “are clearly in the defensive/anti-competitive grey scale”.²⁰
- T-Ports questioned a number of the assumptions made by CRA in the analysis in its submission to the Draft Determinations including: the use of 2017-2018 export figures as a representative season; Glencore’s trading margins; Viterra’s port terminal margins; the switching percentage in the event of denial of access by Viterra; and the increase in Glencore’s trading margin as a result of reduced competition from exporters.

While AGE’s submission primarily focused on Viterra’s IHB and OHB facilities,²¹ AGE indicated that it agreed with the ACCC’s proposed non-exemption of Viterra in relation to its Port Lincoln and Thevenard facilities (as well as in relation to OHB, Wallaroo and Port Giles). AGE also submitted that, amongst other things:

- The upcountry storage is intrinsically linked to the port it feeds.
- 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.
- The CRA material is not compelling or persuasive as the ACCC has been unable to test the assumptions, CRA use misleading capacity data (including citing an estimated capacity of 3.6 million tonnes for T-Ports’ Lucky Bay facility) and CRA are not independent.
- The container, domestic and Victorian markets all provide marginal/limited competition to the bulk export market
- Viterra’s bundling of services can have the effect of reducing costs, however reducing the cost in one aspect of the “bundle” (for example Export Select) while maintaining or increasing the cost in others is worrying.

¹⁹ Glencore Agriculture in Australia rebranded to Viterra on 4 May 2021. See: <https://www.viterra.com.au/Media/News/2021/Glencore-Agriculture-in-Australia-rebrands-to-Viterra>, viewed 13 July 2021.

²⁰ T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, pp. 4-5.

²¹ AGE submitted that it was “strongly” opposed to an exemption of OHB, but that it recognised the case for an exemption in relation to IHB. See: AGE, *submission in response to Draft Determinations*, 23 November 2020, p. 5.

GPSA's submission primarily focused on Viterra's IHB and OHB facilities.²² However, GPSA did indicate that, amongst other things:

- 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.
- An exemption (in relation to either IHB or OHB) 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.
- GPSA also noted that, as of July 2020 T-Ports, had not obtained the necessary export licences and phytosanitary certificates required for export shipping.²³

2.3 Viterra's response to stakeholder submissions

Viterra's submission in response to the Draft Determinations responded to a number of stakeholder submissions (T-Ports', GPSA's, AGE's and Mr John Hill's submissions) generally focused on matters related to IHB, OHB, Wallaroo, and Port Giles.²⁴

Viterra's responses to stakeholder submissions which were more directly related to Port Lincoln or Thevenard indicated that:

- AGE's claim that CRA used misleading data in its analysis by estimating Lucky Bay's capacity to be 3.6 million tonnes is incorrect, as CRA analysis uses a capacity figure of 1.93 million tonnes (and the referenced 3.6 million tonnes figure is "Lucky Bay's own capacity claim.")²⁵
- T-Ports' suggestion that Viterra's response to competition behaviour is a misuse of market power is incorrect, and it is actually evidence of competition at work (and clearly demonstrates Viterra feels constrained by the new competition from T-Ports at Lucky Bay).

Viterra's responses are set out in more detail in Chapter 2 of the April Determinations.²⁶

²² GPSA submitted that there was insufficient evidence to support an exemption in relation to OHB, and that a more appropriate course of action would be to exempt IHB from the Code. See: GPSA, *Submission in response to the Draft Determinations*, 27 November 2020, p. 6.

²³ As noted by Viterra in its submission to the Draft Determination's, T-Ports has since acquired such licences and certificates and has commenced export operations. See Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 39.

²⁴ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 36-39.

²⁵ Ibid, p. 39.

²⁶ ACCC, *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, pp. 29-30

3. Bulk grain export port terminal services

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

The availability of, and demand for, port terminal services at Viterra's Port Lincoln and Thevenard 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.

The ACCC notes that Viterra was the sole provider of port terminal services in SA prior to 2015-16. Since that time, there have been a number of new entrants in SA: LINX (formerly Patrick) and Semaphore established mobile loading facilities at Port Adelaide (in the 2015-16 and 2016-17 seasons respectively);²⁷ T-Ports 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.

Prior to T-Ports' entry at Lucky Bay Viterra was the only PTSP on the Eyre Peninsula. Since T-Ports entered the market Viterra has facilitated 87% of all bulk shipments on the Eyre Peninsula.²⁸

This chapter begins with the consideration of the supply of port terminal services on the Eyre Peninsula, including:

- the particular characteristics of each Eyre Peninsula port terminal facility (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 Port Lincoln and Thevenard facilities (Section 3.1.4);
- the level of competitive constraint imposed by proposed port terminal facilities on Viterra's Eyre Peninsula facilities (Section 3.1.5); and
- the constraint international markets place upon Viterra's operations (Section 3.1.6).

The ACCC notes that the entry of T-Ports' Lucky Bay facility provides alternate port capacity outside of the Viterra system on the Eyre Peninsula and imposes a level of competitive constraint on Viterra's operations on the Eyre Peninsula .

As discussed in more detail in this chapter, T-Ports' recent entry at Lucky Bay means that the level of competitive constraint imposed by the facility remains somewhat uncertain. However Port Lincoln likely faces a material level of competitive constraint from Lucky Bay facility in certain regions of its catchment area. However the constraint imposed in other regions is likely limited, in particular most of the Lower Eyre Peninsula. The ACCC also notes that the potential for expanded operations suggests that the level of constraint imposed could increase in future seasons.

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

- capacity utilisation at Viterra's Eyre Peninsula port terminal facilities on an annual and peak period basis (sections 3.2.2 to 3.2.3); and

²⁷ 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.

²⁸ Data up until 31 May 2021.

- whether exporters have historically been able to access Viterra’s Eyre Peninsula port terminal facilities in both peak and off-peak periods (Section 3.2.4).

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 Eyre Peninsula port terminal facilities. Historically third party exporters have been able to access a level of capacity at Viterra’s Eyre Peninsula 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, 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 where relevant. The ACCC consideration of CRA’s economic (denial of access) modelling is set out in the April Determinations.²⁹

The ACCC notes a range of the matters raised during the consideration of Viterra’s exemption applications for Port Lincoln and Thevenard may directly relate to only one of these facilities, while other matters may be broader in nature and potentially of relevance to both of Viterra’s Eyre Peninsula 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 Eyre Peninsula facilities generally. More detailed 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.

²⁹ ACCC, *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, pp. 80-98.

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.

On the Eyre Peninsula there are currently 3 operational bulk grain export facilities. Two of these facilities are operated by Viterra (Port Lincoln and Thevenard), and one by T-Ports (Lucky Bay).

Table 3.1 below provides an overview of the features of bulk grain export port terminal facilities that are currently operational on the Eyre Peninsula. 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 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, viewed 13 July 2021.

Table 3.1: Overview of port terminal facilities on the Eyre Peninsula

Port terminal facility	Rail receival	Road receival	Storage capacity (tonnes)*	Ship loader (tonnes per hour)	Port of anchorage declared depth
Port Lincoln (Viterra)	N/A	4,000 t/hr 14 hoppers	395,600 tonnes	3,000 t/hr	15.2m
Lucky Bay (T-Ports)	N/A	1,000 t/hr 2 hoppers	384,000 tonnes	1,500 t/hr**	15-17m
Thevenard (Viterra)	N/A	1,400 t/hr 6 hoppers	335,925 tonnes	1,000 t/hr	9.8m

Source: Flinders Ports website;³⁰ 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 (<https://www.viterra.com.au/Storage-and-handling#Port%20terminals>, viewed 13 July 2021); T-Ports' exemption application and information request.

Note: * This includes storage which is directly connected to ship loading port facilities, 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: Port Lincoln 395,600 tonnes; Thevenard 172,000 tonnes; and Lucky Bay 24,000 tonnes.

** Lucky Bay's load rate to its transshipment vessel is 1,500t/hr. The load rate from the transshipment vessel to the ocean going vessel is 1,200t/hr.

3.1.1 Receivals

Table 3.1 (above) shows the road and rail receival facilities for each Eyre Peninsula port terminal facility. As shown there is significant variation across the road receival rates, with Port Lincoln having significantly more efficient infrastructure to facilitate grain intake (4,000 tonnes per hour), compared to Thevenard and T-Ports' Lucky Bay facility (1,400 and 1,000 tonnes per hour respectively).

Table 3.1 shows that none of the Eyre Peninsula ports receive grain via rail services. The ACCC notes that Viterra's Port Lincoln facility previously received grain via rail, however Viterra and Genesee & Wyoming Australia (**GWA**) did not renew their rail contract when it expired on 31 May 2019.³¹

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

3.1.2 Storage at Eyre Peninsula port terminal facilities

Table 3.1 shows storage that is directly located at (or near) each Eyre Peninsula 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

³⁰ See: <https://www.flindersports.com.au/ports-facilities/port-lincoln/> & <https://www.flindersports.com.au/ports-facilities/thevenard/>, viewed 28 June 2021.

³¹ See: <https://www.viterra.com.au/Media/News/News-older/Viterra-decision-provides-competitive-supply-chain-to-Eyre-Peninsula-growers>, viewed 28 June 2021.

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 (including storage facilities located close to port as well as further away).

As shown in Table 3.1 all Eyre Peninsula ports have a significant amount of at-or-near port storage. Specifically, T-Ports' Lucky Bay facility has 384,000 tonnes of available at-or-near-port storage; in total this is comparable to the size of the at-or-near-port storage available at Viterra's Port Lincoln facility (395,600 tonnes) and higher than Viterra's storage at Thevenard (335,925 tonnes).

However, the ACCC notes that while T-Ports has substantial at-or-near-port storage, most of this storage is located a short distance (2km) from its port terminal facility: only 24,000 tonnes of T-Ports' storage is directly connected to its port terminal infrastructure. In comparison, all of Port Lincoln's 395,600 tonnes of storage is located at port, and just over half of Thevenard's storage is connected to port (172,000 tonnes).

The location of storage suggests that Viterra may have greater flexibility in managing its port terminal operations (compared to T-Ports at its Lucky Bay facility). However, given the short distance to port T-Ports' storage is located, the ACCC considers it reasonable to expect that T-Ports' 360,000 tonnes of bunker storage (located 2km from port) still provides it with significant flexibility to manage its operations at Lucky Bay.

The ACCC discusses its views on upcountry storage, including T-Ports' Lock facility, further in Section 4.1.1.

3.1.3 Ship loading capacity

Viterra's Port Lincoln facility has the highest ship loading (or elevation) capacity of the Eyre Peninsula ports. This facility is capable of achieving up to 3,000 tonnes per hour (see table 3.1).³² Table 3.1 also shows that T-Ports' Lucky Bay facility has the second highest ship loading capacity on the Eyre Peninsula at 1,500 tonnes per hour,³³ while Thevenard has the lowest at 1,000 tonnes per hour.

The ACCC notes that T-Ports' Lucky Bay facility uses a relatively unique ship loading approach that involves a transshipment vessel. As a result of this operating method, grain is first loaded onto the transshipment vessel before being shipped out to deeper water, where the grain is then transferred from the transshipment vessel to the exporting vessel. As such, the facility 'double handles' grain during its loading process, which may further disadvantage it to Port Lincoln in terms of the rate at which grain can be loaded in practice.

T-Ports' use of this type of ship loading approach is relatively unproven in the context of the Australian grains market and is also subject to other operational constraints in practice; in particular, the ACCC notes that while T-Ports' transshipment vessel has a loading rate to ocean going vessels of 1,200 tonnes per hour, T-Ports' PLPs indicate that certain weather conditions can prevent loading.³⁴

³² Viterra's Port Lincoln facility has the highest ship loading capacity of all SA ports. The next highest ship loading capacity is OHB which is capable of loading grain onto vessels at 2,200 tonnes per hour.

³³ T-Ports' Lucky Bay facility has the third highest ship loading capacity in SA (behind Port Lincoln and OHB).

³⁴ T-Ports, *Lucky Bay Grain Terminal – 20/21 Port Loading Protocols*, October 2020, p. 7 (see: https://tports.com/wp-content/uploads/2020/11/Port-Loading-Protocols_V6-2021_Oct-20-Customer-Issue.pdf, viewed 10 June 2021). The ACCC notes that T-Ports' PLPs for Lucky Bay suggest that certain weather conditions may limit loading operations: specifically, the Port Loading Protocols state that the maximum swell and wind speed for loading is 2.5 metres and 25 knots respectively.

The ACCC also notes that Viterra's Port Lincoln is a fixed deep water port capable of fully loading Panamax class vessels. T-Ports' Lucky Bay facility is able to fully load Panamax class vessels via its transshipment vessel. Viterra's Thevenard facility is unable to fully load Panamax vessels.

Several stakeholders raised the importance of access to deep water ports (i.e. ports capable of fully loading Panamax vessels) in their submissions to the ACCC. While stakeholders generally focussed on the advantage that Viterra's deep water OHB facility has over competing Port Adelaide facilities (which are unable to fully load Panamax vessels), the ACCC considers the advantage of being able to fully load Panamax vessels relevant to the assessment of Viterra's Port Lincoln and Thevenard facilities. Stakeholder comments are discussed in detail in the April Determinations.³⁵

The ACCC considers that the ability to fully load Panamax vessels provides a competitive advantage due to the larger, more economically efficient, nature of these vessels. Consequently, the ACCC's view is that Viterra's Port Lincoln and T-Ports' Lucky Bay facilities are advantaged over those port terminal facilities (in particular Viterra's Thevenard facility) that do not have the ability to fully load Panamax vessels.

3.1.4 Capacity estimates of Eyre Peninsula port terminal facilities

Table 3.2 below shows capacity estimates for each Eyre Peninsula 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 on the Eyre Peninsula, to various capacity estimates of T-Ports' Lucky Bay facility.

The Draft Determinations used Viterra's maximum published available capacity as the estimate of capacity at each of Viterra's port terminal facilities. As discussed in the April Determinations the ACCC considers it appropriate to factor in Viterra's tolerance factor of 10% when assessing capacity at Viterra's port terminal facilities.³⁶

Table 3.2 includes updated tolerance-inclusive capacity data for the 2020-21 and 2021-22 seasons (compared to the table presented in the Draft Determinations which considered up till the end of the 2019-20 season).^{37 38} These changes reflect capacity estimates provided by Viterra to the ACCC subsequent to the release of the Draft Determinations.

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

The ACCC also notes that there is an inherent degree of 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:

³⁵ ACCC, *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, pp. 16-30.

³⁶ See: Section 3.1.4 of the April Determinations.

³⁷ See: *Attachment 2 - UPDATED - Response to 14/11/19 information request - Question 3 - Viterra published available capacity estimates*, & *Viterra – Response to 11/6/21 information request – Port Lincoln and Thevenard published available capacity estimates (2020-21 and 2021-22)*.

³⁸ The ACCC notes Viterra provided updated 2019-20 capacity data to the ACCC since the release of the Draft Determinations. These changes reflected the release of additional short-term capacity in the 2019-20 season (and other minor amendments). The capacity figures used in the Draft Determinations did not include all additional short term capacity released from the 2019-20 season. The ACCC notes the capacity figures used for Port Lincoln and Thevenard in Table 3.2 reflect the tolerance inclusive capacity from the 2021-22 season.

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.³⁹

The ACCC notes that Viterra has submitted 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 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.⁴⁰

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.⁴¹

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.).

³⁹ Viterra, *Exemption Applications*, 2 July 2019, p. 30.

⁴⁰ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 9.

⁴¹ Viterra, *Exemption Applications*, 2 July 2019, p. 11.

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.

Table 3.2: Different capacity estimates at Eyre Peninsula port terminal facilities (mt)

Viterra - Port terminal facility	Maximum published available capacity*	Maximum season	Annualised maximum historical monthly throughput	ACCC capacity estimate
Port Lincoln	2.71	2.42	4.49	2.71
Thevenard	0.88	0.52	1.29	0.88
Viterra total (Eyre Peninsula):	3.59	2.94	5.78	3.59
Alternate - Port terminal facility	Nominal capacity	Maximum season**	Annualised maximum historical monthly throughput	ACCC capacity estimate
Lucky Bay - T-Ports	0.60	N/A	0.80	0.60
Eyre Peninsula total:	4.19	3.54*	6.58	4.19

Source: Viterra, *Response to Draft Determinations Public version*, 8 February 2021; PTSP loading statements; ACF export report; and T-Ports Code exemption application.

Notes: * The figures used for Viterra's maximum released capacity for Port Lincoln and Thevenard are based on the upcoming 2021-22 season. See: Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021, p. 1 (public version).

Prior to the 2021-22 season the maximum amount of capacity Viterra released for Port Lincoln and Thevenard was 2.66 and 0.76 million tonnes respectively.

** T-Ports' Lucky Bay facility has yet to operate for a complete shipping year (having commenced operations in March 2020). The ACCC has instead used its estimate of T-Ports' capacity (0.60 million tonnes) for the maximum year column total.

Maximum published available capacity

As discussed in the April Determinations the ACCC considers that, on balance, Viterra's maximum published available capacity to be the best capacity estimate of Viterra's facilities.⁴² This estimate is likely to provide a reasonable indication of how much capacity is

⁴² ACCC, *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, pp. 38-42.

available at each of Viterra's Eyre Peninsula facilities in practice (as 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).

The ACCC notes that Viterra submitted that the amount of capacity released estimates maximum capacity in a given season, once a 10% tolerance factor is accounted for.⁴³

The ACCC notes that the maximum published available capacities for Viterra's Port Lincoln and Thevenard facilities are based on the upcoming 2021-22 season (2.71 and 0.88 million tonnes respectively).⁴⁴ Prior to the release of 2021-22 season the maximum capacity Viterra released for Port Lincoln and Thevenard was 2.66 and 0.76 million tonnes respectively. Port Lincoln's capacity for the 2021-22 season is comparable with previous seasons, however a materially higher amount of capacity was released at Thevenard.

In considering the increased capacity figures for the 2021-22 season the ACCC notes Viterra is not required to release all of its available capacity in a given year.⁴⁵ The ACCC also notes that infrastructure upgrades (and/or improved operational practices) can increase port terminal capacity (see Section 3.1.4 of the April Determinations).

Maximum seasonal shipments

As discussed in the April Determinations (see Section 3.1.4), the ACCC considers the maximum amount of grain shipped in a single season can provide an indication of a facility's capacity.⁴⁶ However, while maximum seasonal shipments can potentially serve as a useful indicator, it does not necessarily represent the maximum amount of grain a port terminal facility can load.

As shown in Table 3.2, a PTSP does not necessarily use all the capacity it offers to exporters at a 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).

Annualised maximum historic monthly throughput

As discussed in more detail in the April Determinations, the ACCC considers that the annualised maximum historical monthly throughput capacity estimates likely overstate the capacity of Viterra's port terminal facilities.⁴⁷

In particular, the ACCC considers the high throughput level achieved during the maximum historical month may not be achievable on a long-term basis due to several practical limitations (such as maintenance works, vessels being externally delayed, the mix of commodities loaded in a month, and it not being as economically desirable to load grain in off-peak periods).

⁴³ 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.

⁴⁴ See: Viterra, *Response to 11/6/21 information request – Port Lincoln and Thevenard published available capacity estimates*, 18 June 2021.

⁴⁵ As set out in Section 3.1.4 of the April Determinations 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.

⁴⁶ ACCC, *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, p. 42.

⁴⁷ *Ibid*, pp. 43-44.

The ACCC notes that Viterra and CRA used a 9 month period (as opposed to a 12 month period) to calculate annualised capacity estimates for alternate PTSPs.⁴⁸ This is intended to account for downtime and maintenance (rather than necessarily meaning the port only operates for 9 months).

The ACCC acknowledges that this approach (annualising capacity over a 9 month, rather than a 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.⁴⁹

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. As set out in the April Determinations the ACCC considers there are a range of operational factors which may mean it is not feasible to load grain at a rate comparable to the maximum historic month.⁵⁰

As such, 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). Therefore, 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 Port Lincoln and Thevenard facilities is 3.59 million tonnes (see Table 3.2). However the 9 and 12 monthly maximum throughput methodologies result in combined capacity estimates for Viterra's Eyre Peninsula facilities of 4.33 and 5.78 million tonnes respectively. The ACCC notes that the use of these methodologies appear to materially overestimate Viterra's submitted capacity for its own facilities.⁵¹

Capacity estimates of alternate PTSPs on the Eyre Peninsula

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,⁵² Viterra provided Table 3.3 below which summarises the differences in the ACCC's and CRA's estimates of third party capacity. Viterra also submitted that:

⁴⁸ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 8.

⁴⁹ For example the ACCC notes that T-Ports recently indicated its Lucky Bay facility will not be available for In November 2021 due to transshipment vessel maintenance. See: T-Ports shipping stem, viewed 8 July 2021.

⁵⁰ ACCC, *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, pp. 43-47.

⁵¹ 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 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).

⁵² In the Draft Determinations the ACCC considered that: Cargill's facility had 0.30 to 0.54 million tonnes of capacity, Semaphore's facility had 0.40 million tonnes of capacity, and T-Ports' Lucky Bay facility had 0.60 million tonnes of capacity (although significant uncertainty around the capacity of the operation was acknowledged).

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.⁵³

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

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 is best suited to the differing sets of information available.

The ACCC notes that there is significant variation in the available capacity estimates for T-Ports' Lucky Bay facility (see Table 3.2 above). This largely reflects methodological differences in T-Ports' capacity estimates provided to the ACCC, as well as the recent commencement of its operations at Lucky Bay. As per Table 3.2, the ACCC considers that, at this time, the best available estimate of the capacity of T-Ports' Lucky Bay's facility is 0.60 million tonnes per annum.

The ACCC discusses the different estimates of the capacity of T-Ports' Lucky Bay facility, as well as its view on the facility's capacity in detail below.

⁵³ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 10.

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 <i>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</i>	540,000 <i>The approach taken is the same as adopted by the ACCC.</i>
Semaphore, IHB	396,000 <i>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 shipped 370,000 tonnes of grain from its facility in 2016-17.</i>	615,000 <i>This is 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.</i>
T-Ports, Lucky Bay	600,000 <i>The ACCC has used T-Ports' business case estimate of throughput.</i>	1.93 million (lower end of estimate) <i>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.</i>
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.

Notes: In the April Determinations the ACCC estimated Semaphore and Cargill's capacity as 540,000 and 615,000 tonnes respectively.

The ACCC has replicated this table in full (i.e. including content relating to Cargill and Semaphore). The ACCC discusses its views in relation to the capacity of ADM's, Cargill and Semaphore's port terminal facilities in detail in the April Determinations.⁵⁴

⁵⁴ ACCC, *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, pp. 46-48.

T-Ports – Lucky Bay

As noted above the capacity estimates for T-Ports' Lucky Bay facility vary significantly. In this section the ACCC discusses each of the capacity methodologies used in relation to T-Ports' facility.

T-Ports is a new entrant to the SA PTSP market and its Lucky Bay facility (which is the first bulk grain port terminal service in Australia to use a transshipment vessel approach) has only been operational since March 2020. As such, the ACCC considers there to be some uncertainty around how much grain the facility can reasonably be expected to load in a shipping year in practice.

The ACCC notes that T-Ports provided 2 capacity estimate figures in its application for exemption under the Code:

The target loading and unloading time is approximately two hours, based on a nominal load and unload rate of 1,800 tonnes per hour. At this rate, it will be able to load deep water ocean going vessels at a rate of 13,250 tonnes per day. Assuming a 55,000 tonne Panamax, and the load operations working at the maximum design capacity of the TSV and port load out facilities, the vessel can be completely loaded in four days. In practice, maximum load capacity is rarely reached in any port due to a multitude of reasons. As such, it is anticipated that a mean operational rate of 10,800 tonnes per day, equating to 5.1 days loading time, is achievable. Extrapolating this across 7 day operations for a full year equates to a loading capacity of 3.6Mill tonnes, however T-Ports commercial estimates are based on securing up to 600,000mt per annum.⁵⁵

The 2 capacity estimates are distinctly different: while T-Ports indicates the theoretical maximum capacity of Lucky Bay as 3.6 million tonnes per annum, its commercial estimates are based on securing up to 0.6 million tonnes per annum of grain.

The ACCC notes T-Ports' PLPs for the 2020-21 season indicate that Lucky Bay has "...notional shipping capacity nominated as 600,000 tonnes for the season".⁵⁶ The ACCC therefore considers that the 3.6 million tonnes per annum capacity estimate likely significantly overstates the capacity of T-Ports' Lucky Bay facility in practice; when a broadly similar methodology used to calculate its estimate of 3.6 million tonnes per annum for Lucky Bay is applied in relation to Viterra's Port Lincoln and Thevenard facilities it results in estimated capacities of 9.0 and 3.0 million tonnes per annum respectively.⁵⁷ However Viterra has indicated that its Port Lincoln and Thevenard facilities have capacities of 2.71 million tonnes and 0.88 million tonnes per annum respectively⁵⁸ (i.e. this methodology appears to overestimate the capacity of Viterra's Port Lincoln and Thevenard facilities by 232% and 241% respectively).

Viterra and CRA estimate of Lucky Bay capacity

In the Draft Determinations the ACCC considered that T-Ports' commercial estimate figure of 0.6 million tonnes per annum figure was more likely to be a reasonable estimate of Lucky Bay's practical operating capacity at that time (compared to the 3.6 million tonnes per annum

⁵⁵ T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, p. 2.

⁵⁶ T-Ports, *Lucky Bay Grain Terminal – 20/21 Port Loading Protocols*, October 2020, p. 7.

⁵⁷ The ACCC notes that a load rate of 10,800 tonnes per day at T-Ports' Lucky bay facility requires the transshipment vessel's ship loader to be operated at maximum capacity (i.e. the 1,200 tonne per hour loader) for 9 hours a day. T-Ports' exemption application indicates that a mean operational rate of 10,800 tonnes per day achieved across 7 days a week for a full year equates to 3.6 million tonnes per annum, however the ACCC notes that a mean loading rate of 10,800 tonnes a day would achieve 3.6 million tonnes in 333 days, rather than 365 days. Applying the facility's maximum loading rate for 9 hours a day for 333 days a year for Viterra's Port Lincoln (loading rate of 3,000 tonnes per hour) and Thevenard (loading rate of 1,000 tonnes per hour) facilities equates to capacity estimates of 9.0 and 3.0 million tonnes respectively.

⁵⁸ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 5.

estimate). However Viterra disputed the use of this capacity estimate in its submission to the Draft Determinations, stating that this figure is based on T-Ports' business plan estimate, which is not an estimate of actual achievable capacity.⁵⁹

Viterra submitted that the highest achievable practical capacity should instead be used (rather than a commercial estimate) and, for the purposes of its submission, adopted a more conservative estimate of 1.93 million tonnes.⁶⁰ The ACCC notes that this estimate is based on a mean operational rate of 10,800 tonnes per day⁶¹ and assumes Lucky Bay would operate at this rate 5 days per week for 9 months of the year⁶² (or approximately 54% of the time). This estimate also means that the Lucky Bay facility, as currently configured, is broadly capable of loading a similar amount of grain per annum as Viterra's Port Lincoln facility (i.e. in the order of 2 million tonnes per annum).

The ACCC notes the changes made by Viterra and CRA to the estimation of Lucky Bay's per annum capacity estimate likely better account for factors such as the off-peak period and maintenance works. The ACCC also notes that T-Ports states a load rate of "10,000 tonnes per weather working day subject to cargo availability" in its PLPs,⁶³ which is broadly similar to the 10,800 tonnes per day used by CRA in its capacity estimate. While the ACCC acknowledges it may be possible for Lucky Bay to load 10,000 tonnes of grain in a day, the ACCC considers this methodology likely overstates the annualised capacity of Lucky Bay for a number of reasons:

- Adjusting the theoretical capacity figures for Port Lincoln and Thevenard (9.0 and 3.0 million tonnes per annum respectively) to a 5 day per week, 9 month per year basis still appears to result in a significant overestimation of the capacity of those facilities (4.82 and 1.61 million tonnes per annum respectively).⁶⁴
- Lucky Bay's fixed port loader can load grain onto its transshipment vessel at 1,500 tonnes per hour, and the transshipment vessel can unload grain at 1,200 tonnes per hour to ocean going vessels. This is substantially less than Port Lincoln's loading rate of ship loading of 3,000 tonnes per hour. While Lucky Bay's loading and unloading rates are higher than Thevenard's 1,000 tonnes per hour loading rate, the ACCC notes that Lucky Bay's transshipment vessel operation also requires grain to be double handled and the transshipment vessel to move between the fixed port loader and the vessel being loaded.
- Port Lincoln and Thevenard are both able to receive grain faster than Lucky Bay facility (4,000 and 1,400 tonnes per hour compared to 1,000 tonnes per hour).
- While Lucky Bay has similar at-or-near port storage as Port Lincoln and Thevenard (384,000 tonnes, 395,600 tonnes, and 335,925 tonnes respectively) it has substantially less storage connected directly to its loader (Lucky Bay has 24,000 tonnes of storage connected to its loader, compared to 395,600 tonnes at Port Lincoln and 172,000 tonnes at Thevenard).

⁵⁹ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 9.

⁶⁰ Viterra provided this figure on the basis of achievable monthly capacity multiplied by 9 months to account for maintenance and shutdowns, and due to the fact that the majority of exports occur in a 9 month period. See: Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 9-10.

⁶¹ Which Viterra notes is set out in T-Ports' exemption application for Lucky Bay: see *T-Ports Exemption Application*, p. 2. The ACCC notes that T-Ports' 2020-21 PLPs indicate a load rate of "10,000 tonnes per weather working day subject to cargo availability", see: T-Ports, *Lucky Bay Grain Terminal – 20/21 Port Loading Protocols*, October 2020, p. 7.

⁶² CRA, *Supplement to CRA Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 9 January 2020, p. 5.

⁶³ T-Ports, *Lucky Bay Grain Terminal – 20/21 Port Loading Protocols*, October 2020, p. 7.

⁶⁴ These capacity estimates for Port Lincoln and Thevenard are less than their 'annualised maximum historical monthly throughput' – see Table 3.2.

The ACCC also notes that CRA previously submitted that T-Ports could theoretically double the capacity at its Lucky Bay facility by acquiring another transshipment vessel:

*T-Ports' Lucky Bay terminal uses TSVs to transfer grain from the terminal to deep water vessels, and it is our understanding that adding an extra TSV could theoretically double the shipping capacity at the Lucky Bay terminal, although some other supply chain constraints may limit available incremental capacity.*⁶⁵

The ACCC considers it likely that the capacity of most port terminal facilities could be increased with sufficient capital investment,⁶⁶ however the ACCC notes that, at this time, T-Ports' business model appears to contemplate using its existing transshipment vessel across 2 port terminal facilities (Lucky Bay and the proposed Wallaroo facility) rather than investing in a further transshipment vessel to augment operations at Lucky Bay.⁶⁷

Furthermore, T-Ports has entered into a commercial arrangement to tranship logs at Kangaroo Island using its transshipment vessel (the 'Lucky Eyre'). The ACCC understands this agreement is contingent on an application to extend the Kingscote wharf. The ACCC notes that T-Ports stated that it "anticipate[s] [this development] can support the future economic export of grains and pulses using the Lucky Eyre from Kangaroo Island".⁶⁸ The ACCC notes Kangaroo Island produces 40,000 tonnes of grain per annum on average.⁶⁹

Given the above factors, the ACCC considers it unlikely that either T-Ports' theoretical maximum capacity of 3.60 million tonnes per annum, or CRA's downward revision of this estimate (to 1.93 million tonnes per annum), provide appropriate estimates of the practical capacity of Lucky Bay for the purposes of assessing the level of competitive constraint the facility can reasonably be expected to impose at this time.

ACCC estimate of Lucky Bay's capacity

The ACCC notes that T-Ports' exemption application for its Lucky Bay facility stated that "... 7 day operations for a full year equates to a loading capacity of 3.6Mill tonnes, however T-Ports commercial estimates are based on securing up to 600,000mt per annum".⁷⁰ The ACCC also notes that T-Ports' 2020-21 PLPs state that Lucky Bay has "notional shipping capacity" of 0.60 million tonnes.⁷¹ The ACCC also notes the views raised by Viterra and CRA in relation to Lucky Bay's capacity, as well as the significant variation in the available capacity estimates for the facility.

The ACCC considers that, where available, actual shipment volumes can provide a useful indication of a facility's annual capacity (as discussed above).

T-Ports' Lucky Bay facility commenced operations in March 2020 and has not yet operated for a complete shipping year. However, as at 31 May 2021, the facility had loaded 20 shipments (for ADM and Louis Dreyfus) totalling 0.36 million tonnes.⁷² In particular, Lucky Bay exported 0.24 million tonnes during the peak period of the 2020-21 season (or 40% of 0.60 million tonnes).

⁶⁵ CRA, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 18.

⁶⁶ Subject to a range of other considerations.

⁶⁷ See: <https://tports.com/t-ports-to-expand-to-yorke-peninsula-with-wallaroo-port-development/>, viewed 7 June 2021.

⁶⁸ See: <https://tports.com/t-ports-enters-into-agreement-to-tranship-timber-from-kangaroo-island/>, viewed 8 June 2021.

⁶⁹ PIRSA, *Crop and pasture reports – final summary and estimates*, 2012-13 to 2020-21.

⁷⁰ The ACCC notes T-Ports 2020-21 Port Loading Protocols were published after the release of the Draft Determination. T-2020-21 Ports Port Loading Protocols are available at: https://tports.com/wp-content/uploads/2020/11/Port-Loading-Protocols_V6-2021_Oct-20-Customer-Issue.pdf, viewed 13 July 2021.

⁷¹ T-Ports, *Lucky Bay Grain Terminal – 20/21 Port Loading Protocols*, October 2020, p. 7.

⁷² In the 2020-21 season Lucky Bay performed 240,000 tonnes (up till 31 May 2021). T-Ports have loaded a further 48,000 tonnes of grain at Lucky Bay in June 2021, and have 27,500 tonnes scheduled to be loaded in August 2021.

The ACCC has annualised actual maximum monthly shipments (over 9 months) to determine other alternate PTSPs' capacity in the April Determinations.⁷³ As at 31 May 2021, the most Lucky Bay has shipped in a single month is 67,000 tonnes (in March 2021). Using this methodology to estimate Lucky Bay's capacity results in a capacity estimate of 603,000 tonnes, which is in line with T-Ports' stated notional shipping capacity of 600,000 tonnes. However, as Lucky Bay has been in operation for a relatively short amount of time, the ACCC notes that the maximum monthly capacity figure available to date may not reflect the facility's maximum monthly capacity in future seasons (though this is unlikely to be exceeded in the short-term as the peak period of the 2020-21 shipping season has now passed).

In addition, the ACCC notes the Eyre Peninsula, and in particular the Eastern Eyre Peninsula, experienced below average harvests in the past 2 seasons. Specifically, harvests on the Eyre Peninsula were 14% and 6% below average in the 2019-20 and 2020-21 seasons respectively, while harvests on the Eastern Eyre Peninsula were 40% and 18% below average in these 2 seasons respectively. This suggests that Lucky Bay may not have operated at its maximum monthly capacity to date.

The ACCC also notes that T-Ports' Lucky Bay facility may face relatively unique operational issues: its use of a transshipment vessel may mean that weather conditions may affect its ability to use vessels at certain times.⁷⁴ While the relevance of this constraint to the facility's capacity is currently unclear in practice, it may affect the reasonableness of using a maximum monthly approach to estimate the annual capacity of such an operation.

While acknowledging the limitations associated with estimating capacity based on a single month,⁷⁵ the ACCC notes that this methodology appears to align with the 0.60 million tonnes per annum commercial estimate and notional shipping capacity stated by T-Ports (suggesting that 67,000 tonnes may broadly reflect the monthly capacity of Lucky Bay in practice).

On balance the ACCC considers T-Ports' notional shipping capacity estimate of 0.60 million tonnes per annum⁷⁶ to be the best estimate of Lucky Bay's capacity available at this time for the purposes of assessing the level of competitive constraint the facility can reasonably be expected to impose.

However, the ACCC acknowledges the uncertainty around the capacity Lucky Bay will deliver in practice in future seasons (particularly given its use of a transshipment vessel and limited operations to date). In this regard the ACCC notes that Lucky Bay has not yet been in operation during a high demand season (i.e. during a large harvest on the Eyre Peninsula); the facility may therefore have been underutilised to date (relative to its potential capacity). The recent commencement of operations may also mean that T-Ports' commercial relationships (including with exporters) may still be developing. As such, the ACCC acknowledges the potential for Lucky Bay to demonstrate a capacity greater than 0.60 million tonnes per annum in future seasons.

⁷³ As discussed in detail in Section 3.1.4 of the April Determinations the ACCC considered that at the time of publication the best available estimates for Semaphore and ADM's facilities was annualising the maximum monthly exports (over 9 months).

⁷⁴ The ACCC notes that T-Ports' PLPs for Lucky Bay suggest that certain weather conditions may limit loading operations: specifically, the Port Loading Protocols state that the maximum swell and wind speed for loading is 2.5 metres and 25 knots respectively. See: https://tports.com/wp-content/uploads/2020/11/Port-Loading-Protocols_V6-2021_Oct-20-Customer-Issue.pdf, viewed 13 July 2021.

⁷⁵ ACCC, *Final Determinations Viterro 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, pp. 43-44.

⁷⁶ As set out in: T-Ports, *Lucky Bay Grain Terminal – 20/21 Port Loading Protocols*, October 2020, p. 7.

Given uncertainty around the capacity of T-Ports' Lucky Bay facility, the ACCC will continue to closely monitor the capacity and throughput of the facility in future seasons.

Competitive constraint from alternate PTSPs

Viterra has submitted that its Port Lincoln and Thevenard facilities compete with other port terminal operations in Australia, in particular Lucky Bay on the Eyre Peninsula:

Viterra is not only competitively constrained by the global market in which it competes, but also by other port terminal operations in Australia, including Lucky Bay on the Eyre Peninsula...a port terminal need not have been operating for a certain period of time or have exported a specific amount of grain to be a sufficient competitive threat to Viterra. This is particularly the case given the low barriers to entry, as explained below.⁷⁷

...Viterra's port terminals are competitively constrained...locally by port terminal operators in Australia, including, in particular for Thevenard, Lucky Bay on the Eyre Peninsula.⁷⁸

The ACCC discusses the competitive constraint imposed by competing port terminal facilities in SA on Viterra's Port Lincoln and Thevenard facilities below.

ADM, Cargill and Semaphore

The ACCC considers that the Eyre Peninsula and eastern SA predominantly operate as 2 separate and distinct markets (see Section 4.2). Consequently, the ACCC does not consider ADM's, Cargill's and Semaphore's facilities to be of direct relevance to its assessment of Viterra's Port Lincoln and Thevenard facilities.

T-Ports

The ACCC notes T-Ports only began operations at its Lucky Bay facility in March 2020. As of 31 May 2021 T-Ports has completed 20 shipments totalling 0.36 million tonnes of grain (which accounts for 13% of Eyre Peninsula shipments in this period)⁷⁹ for a total of 2 different exporters (ADM and Louis Dreyfus).⁸⁰

In its exemption applications Viterra submitted that T-Ports' Lucky Bay facility will place a significant competitive constraint on its operations, particularly in relation to its Port Lincoln and Thevenard facilities:

On the Eyre Peninsula (the grain growing region that Port Lincoln has traditionally served), there is a strong new competitor, T-Ports. Its new facility at Lucky Bay will be a strong competitor to Port Lincoln on the Eyre Peninsula.⁸¹

Thevenard has traditionally sourced grain from regions including the Eyre Peninsula in South Australia. Along with Thevenard and Port Lincoln, the Lucky Bay port terminal will also export grain from the Eyre Peninsula.⁸²

In considering the impact of T-Ports' Lucky Bay facility, the ACCC notes that several stakeholders submitted that they expect the facility's capacity to materially increase competition, particularly on the Eyre Peninsula. Some stakeholders submitted that the

⁷⁷ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 46-47.

⁷⁸ Ibid, p. 60.

⁷⁹ PTSP loading statements; ACF export report. The ACCC also notes that T-Ports has loaded a further 48,000 tonnes of grain at Lucky Bay in June 2021, and have 27,500 tonnes scheduled to be loaded in August 2021.

⁸⁰ For comparison Port Lincoln and Thevenard have facilitated grain from 8 and 4 different exporters since March 2020 respectively.

⁸¹ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 28.

⁸² Ibid, p. 46.

competitive effects from T-Ports can be expected to vary according to where grain is produced within the Eyre Peninsula (see Section 4.2 for a discussion of grain catchment areas):

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.*⁸³

PGA of WA

*There will be an increase in competition in South Australia from the construction of a bulk grain facility at Lucky Bay on the Eyre Peninsula by the T Ports consortium...*⁸⁴

SAFC

*SAFC notes that T-Ports facility at Lucky Bay is likely to significantly change/restrict the catchment area for Viterra's Port Lincoln facility. There will be significant new competition for EP grain, particularly on the eastern side of the peninsula.*⁸⁵

SAFC notes that in discussions about Port Adelaide IH and OH, the ACCC states 'more generally, the ACCC also acknowledges that the existence of viable, though limited, alternative capacity may be sufficient to provide an incentive for a dominant PTSP to provide fair and transparent access to third party exporters'.

SAFC believes the draft determination casts unreasonable doubt over the Lucky Bay operations of T-Ports, undercuts it's potential (and therefore potential competitive value), and casts doubt over the amounts of grain the new entrant can reasonably handle. SAFC sees no basis for doubting that T-Ports can handle in excess of 600,000 tonnes of grain per annum, although achieving theoretical maximums (in this case 3.6mt) is always reliant on perfect circumstances (and the grain actually being available).

*Annual Grain production on the Eyre Peninsula over the past 5 years has averaged 2.41 million tonnes per annum. Even at the 600,000 tonne per annum T-Ports export target this equates to 25% of the annual average crop – which should exceed the ACCC's self-identified threshold of 'viable, though limited, alternative capacity'.*⁸⁶

T-Ports

*Future service offering (i.e. T-Ports Lucky Bay) will represent a viable competitive alternative to a portion of the Eyre Peninsula (EP) catchment zone. As identified in T-Ports application for exemption, this area comprises mainly the North Eastern parts of the EP, with the western and southern zones retaining their freight advantage to Viterra facilities at Thevenard and Port Lincoln.*⁸⁷

The ACCC notes SAFC's view that the 0.60 million tonnes per annum capacity estimate for T-Ports' Lucky Bay facility equates to 25% of the Eyre Peninsula crop, and that this "...should exceed the ACCC's self-identified threshold of 'viable, though limited, alternative capacity'".⁸⁸

The ACCC acknowledges the potential for T-Ports' Lucky Bay facility to impose a significant level of competitive constraint on Viterra's Port Lincoln facility in future seasons (as well an

⁸³ GrainCorp, *Submission in response to Draft Determinations*, 17 November 2020, p. 1.

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

⁸⁵ SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 2.

⁸⁶ SAFC, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

⁸⁷ T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 4.

⁸⁸ SAFC, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

increased level of competitive constraint on Thevenard). However, at this time the ACCC considers that the level of constraint imposed in the case of Port Lincoln is not sufficient to support an exemption (see Chapter 5 subclause 5(3)(b) and (g)). There is also a range of relevant differences between the competitive constraint imposed on Viterra's Port Lincoln and Thevenard facilities by T-Ports and that imposed on Viterra's Port Adelaide IHB and OHB facilities (which the ACCC exempted on 27 April 2021). In particular:

- ADM's, Cargill's and Semaphore's facilities estimated capacity would be sufficient to export 45% of the eastern SA crop;⁸⁹
- Cargill and Semaphore are located at the same port terminal as Viterra's IHB and OHB facilities, whereas Lucky Bay is located 177km and 412km from Port Lincoln and Thevenard respectively;⁹⁰
- Port Adelaide exports 0.41 million tonnes of grain in containers per season, compared to 0.01 million tonnes on the Eyre Peninsula;
- The ACCC understands most of SA's domestic consumption occurs within the Port Adelaide catchment zone (see Section 4.3.2);
- Viterra's Port Adelaide IHB and OHB facilities are subject to competition from Victorian markets; and
- There is greater competition in upcountry storage markets in eastern SA than on the Eyre Peninsula.

Other stakeholders doubted whether the expected level of added competition was sufficient to support granting Viterra an exemption in relation to its Port Lincoln or Thevenard facilities. In particular, both Cargill and T-Ports suggested the added competition was insufficient to justify exemptions at Viterra's facilities on the Eyre Peninsula:

Cargill

Viterra therefore continues to operate in all of the ports that are the subject of its application relatively unrestrained by competition. The available level of competitive constraint is not sufficient to ensure that Viterra does not have the potential to exert its considerable market power.⁹¹

T-Ports

If Viterra were to deny or limit access to its port terminal services, it is T-Ports view there is not sufficient alternate third party port terminal capacity economically available to third parties. The T-Ports facility could handle a large portion of the Eyre Peninsula (EP) region, but grain grown in the lower EP would be economically disadvantaged if it had to be transported to Luck [sic] Bay.⁹²

In contrast, PGA of WA submitted that all of Viterra's facilities, including Port Lincoln and Thevenard, should be exempted:

...PGA supports Viterra in its application for exemption from Parts 3 to 6 of the Wheat Port Access Code. The PGA does not distinguish between Viterra's individual ports.⁹³

SAFC also submitted that an exemption for Port Lincoln is critical given the recent exemption of T-Ports' Lucky Bay facility, and likely entry of further competition in the future (see Section 3.1.5):

⁸⁹ Excluding the Yorke Peninsula. As per Section 4.2.3 of the April Determinations the ACCC did not consider the Yorke Peninsula to fall within the Port Pirie or Port Adelaide catchment zone.

⁹⁰ Distances obtained using Google Maps. The ACCC also notes Port Pirie is located 221km from Port Adelaide.

⁹¹ Cargill, *Submission in response to Issues Paper*, 6 September 2019, p. 2.

⁹² T-Ports, *Submission in response to Supplementary Issues paper*, 19 June 2020, p. 2.

⁹³ PGA of WA, *Submission in response to Issues Paper*, 3 September 2019, p. 2.

...SAFC believes it is critical that Pt Lincoln is provided an exemption so as to compete on even regulatory terms with T-Ports and (likely) Peninsula Ports.⁹⁴

Table 3.4 below shows that, as at 31 May 2021, T-Ports had performed 13% of total bulk shipments on the Eyre Peninsula since it began operations in March 2020, and 14% of total shipments in the 2020-21 season.

Table 3.4: Grain bulk shipments on the Eyre Peninsula by port terminal facility, 1 March 2020 to 31 May 2021 (million tonnes)

Port Terminal Facility	2019-20 (since March 2020)	2020-21 (up to 31 May 2021)	Total (million tonnes)	Portion of total tonnages
Lucky Bay	0.12	0.24	0.36	13%
Port Lincoln	0.74	1.36	2.10	78%
Thevenard	0.08	0.17	0.24	9%
Eyre Peninsula total:	0.93	1.77	2.35	100%
T-Ports market share	13%	14%	-	13%
Viterra market share	87%	86%	-	87%

Source: PTSP loading statements; ACF export reports.

Given the above, the ACCC considers that T-Ports' Lucky Bay facility likely imposes a material level of competitive constraint on Viterra's Port Lincoln facility in certain regions of its catchment area (however the constraint imposed in other regions is likely limited, in particular most of the Lower Eyre Peninsula - see Chapter 5 subclause 5(3)(b) and (g)). The ACCC also considers that Lucky Bay currently imposes some (albeit limited) competitive constraint on Viterra's Thevenard facility.

The ACCC will continue to closely monitor existing (and proposed) port terminal facilities on the Eyre Peninsula (and in SA more broadly). The ACCC notes the potential for additional competitive constraint to be imposed on Viterra's Eyre Peninsula facilities in future seasons. Given the level of consultation and analysis undertaken in the assessment leading to these Final Determinations regarding Port Lincoln and Thevenard, 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 Port Lincoln and/or Thevenard facilities could be undertaken via a relatively truncated process.

The ACCC also notes CRA's comments in response to the Draft Determinations that it is unclear why the market situations of Lucky Bay and Port Lincoln differ to such an extent to warrant an exemption for Lucky Bay, but not Port Lincoln.⁹⁵ The ACCC discusses this in Chapter 5 (Port Lincoln) subclause 5(3)(b) and (g).

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 for its Port Lincoln and Thevenard facilities.

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

⁹⁴ SAFC, *Submission in response to Supplementary Issues Paper*, 6 September 2019, p. 2.

⁹⁵ CRA, *Submission in response to Draft Determinations*, 18 December 2020, pp. 7-8.

In addition, while the ACCC does not expect that T-Ports' proposed Wallaroo facility would be in direct competition with Viterra's Port Lincoln and Thevenard facilities, the ACCC understands it would use the same transshipment vessel as T-Ports' Lucky Bay facility, and may therefore have implications for the level of competitive constraint imposed by Lucky Bay.

T-Ports has stated it anticipates that the location of the Wallaroo and Lucky Bay facilities, and the shared use of the same transshipment 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 transshipment vessel, the 'Lucky Eyre'.⁹⁶

The ACCC also notes that entry into eastern SA may also provide a general indication of the willingness of parties to enter (or consider entering) the SA (including the Eyre Peninsula) port terminal services market. The ACCC discusses its general views in relation to the competitive constraint imposed by proposed port terminal facilities in more detail in the April Determinations.⁹⁷

In considering future market entrants as a potential source of competitive constraint on the Eyre Peninsula, the ACCC notes that SAFC submitted that Port Spencer would represent a major competitor to Viterra's Port Lincoln facility:

This deep-water, high capacity port would represent a major competitor to Viterra at Port Lincoln, and given its geographic position on the peninsula could isolate Port Lincoln from a significant proportion of grain producers. Many, if not most producers on the peninsula would have a shorter land transport leg to Port Spencer than Port Lincoln, offering a substantial road transport cost competitive advantage to the new port. If a similar figure to 3.6 (on Page 90 of the draft determination – replicated below) was completed to include Port Spencer and its potential catchment areas, it would not leave much of the peninsula left for Port Lincoln to claim a road freight advantage over.

In SAFC's opinion, given the further advancement of this proposal and the approvals now secured, this prospective port must now be heavily weighted in evaluating likely future competition to Port Lincoln. This should alter analysis in section 4.3 (b) and the resultant conclusions.⁹⁸

In addition to being of potential relevance to Port Lincoln, the ACCC also considers that the Port Spencer and Cape Hardy proposals also have the potential to impose a competitive constraint on Viterra's Thevenard facility.

However the ACCC understands that, at the time of publication, further approvals are still needed before Peninsula Ports can begin construction at Port Spencer.⁹⁹ The ACCC also understands the Eyre Peninsula Cooperative Bulk Handling (EPCBH) port proposal at Cape Hardy requires further governmental approvals and other processes before construction can begin.¹⁰⁰

While the ACCC understands that early site works have begun at T-Ports' proposed Wallaroo facility (with grain receivals intended for the 2022-23 harvest),¹⁰¹ the ACCC also

⁹⁶ T-Ports website: <https://tports.com/wallaroo/>, viewed 1 June 2021.

⁹⁷ ACCC, *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, pp. 54-59.

⁹⁸ SAFC, *Submission in response to Draft Determinations*, 17 November 2020, pp. 2-3.

⁹⁹ See: <https://www.premier.sa.gov.au/news/media-releases/news/port-spencer-grain-facility-approved>, viewed 30 June 2021. The ACCC notes Free Eyre plan to be ready to receive grain at Port Spencer in November 2022.

¹⁰⁰ See: <https://www.ironroadlimited.com.au/>, viewed 30 June 2021.

¹⁰¹ See: <https://www.adelaidenow.com.au/business/sa-business/tports-70m-wallaroo-grain-export-facility-to-create-260-jobs/news-story/97418ac68307e177356dbb9e95bf2c8d>, viewed 13 July 2021.

understands the facility is still pending further approval from relevant government authorities before certain stages of the construction process can commence.¹⁰² However, should T-Ports' Wallaroo facility commence and operate as proposed, the ACCC expects that it could change the expected level of competitive constraint imposed upon Viterra's Port Lincoln and Thevenard facilities (as well as on Viterra's eastern SA facilities, in particular Viterra's Wallaroo facility).

As such, the ACCC acknowledges that if the currently proposed facilities proceed this would likely result in significant additional competition amongst PTSPs on the Eyre Peninsula. 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).

The ACCC will continue to closely monitor developments in the SA market.

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*."¹⁰³

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.

The ACCC discusses its views in relation to the competitive constraint imposed by the international market in more detail in the April Determinations.¹⁰⁴ The ACCC also discusses Viterra's fee reductions and the sharing of other efficiencies in the April Determinations.¹⁰⁵

3.2 Exports and exporters

This Section considers the demand for port terminal services in SA, in particular those services located on the Eyre Peninsula. 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 Lincoln and Thevenard 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 relevant to this assessment is discussed above (in section 3.1).

¹⁰² See: <https://soundcloud.com/t-ports/wallaroo-port-development-1>, viewed 13 July 2021.

¹⁰³ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 17.

¹⁰⁴ See Section 3.1.6 of the April Determinations.

¹⁰⁵ Ibid.

3.2.1 Exports and drought related conditions

The ACCC notes that matters relating to future growing conditions and climate change are highly complex.

The ACCC acknowledges that east coast drought has likely had some effect in relation to establishing and/or reinforcing supply chains between SA and interstate markets.

Where possible, the ACCC will monitor growing conditions and interstate grain movements as part of its monitoring of access to bulk grain port terminal facilities.

The ACCC discusses its views in relation to these matters in more detail in the April Determinations.¹⁰⁶

3.2.2 Annual capacity utilisation

As set out in a number of the ACCC's previous exemption determinations (including the April 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).¹⁰⁷

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 differ from 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 smaller 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 Lincoln and Thevenard facilities in the context of the peak period is discussed below (in section 3.2.3). The ACCC also considers annual

¹⁰⁶ See Section 3.2.1 of the April Determinations.

¹⁰⁷ The ACCC notes that Viterra's (ACCC-approved) PLPs provide for a range of 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.

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 3.5 below shows annual capacity utilisation rates based on current capacity at Viterra's Port Lincoln and Thevenard facilities since 2013-14.¹⁰⁸ When considered on an annual basis it appears Viterra's:

- Port Lincoln facility may face capacity constraints in high output seasons; and
- Thevenard facility is unlikely to face capacity constraints.¹⁰⁹

Table 3.5 also shows that:

- capacity utilisation at Viterra's Port Lincoln and Thevenard facilities was highest in the bumper 2016-17 season;
- there have been lower shipment levels since the 2016-17 season (this in part is likely due to lower production levels in this period).¹¹⁰

Table 3.5: Annual capacity utilisation for Viterra's Port Lincoln and Thevenard facilities, 2011-12 to 2019-20

	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	Average
Port Lincoln	79%	57%	75%	73%	73%	89%	59%	58%	55%	69%
Thevenard	42%	21%	51%	48%	34%	59%	15%	27%	22%	35%

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

Notes: The capacity utilisation rates in this table are based on Viterra's current maximum released capacity (see Table 3.2). If the amount of capacity released in each season is used then Port Lincoln and Thevenard have average capacity utilisation rates of 80% and 46% respectively (over the period in which Viterra has submitted yearly released capacity i.e. the 2013-14 to 2019-20 seasons).

3.2.3 Capacity utilisation in peak periods

As discussed in more detail in the April Determinations the ACCC considers that a vertically integrated PTSP will have a greater incentive to discriminate in favour of its associated entity exporter in periods of high demand.¹¹¹ As such, the ACCC considers peak period capacity utilisation to be a relevant consideration when assessing the demand and supply of port terminal services.

Consistent with the view expressed in the April Determinations, the ACCC considers the SA peak shipping period to occur between 1 December and 31 May.¹¹²

¹⁰⁸ Table 3.5 uses the amount of capacity released via long, short, and additional short-term capacity in each season for each port.

¹⁰⁹ 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).

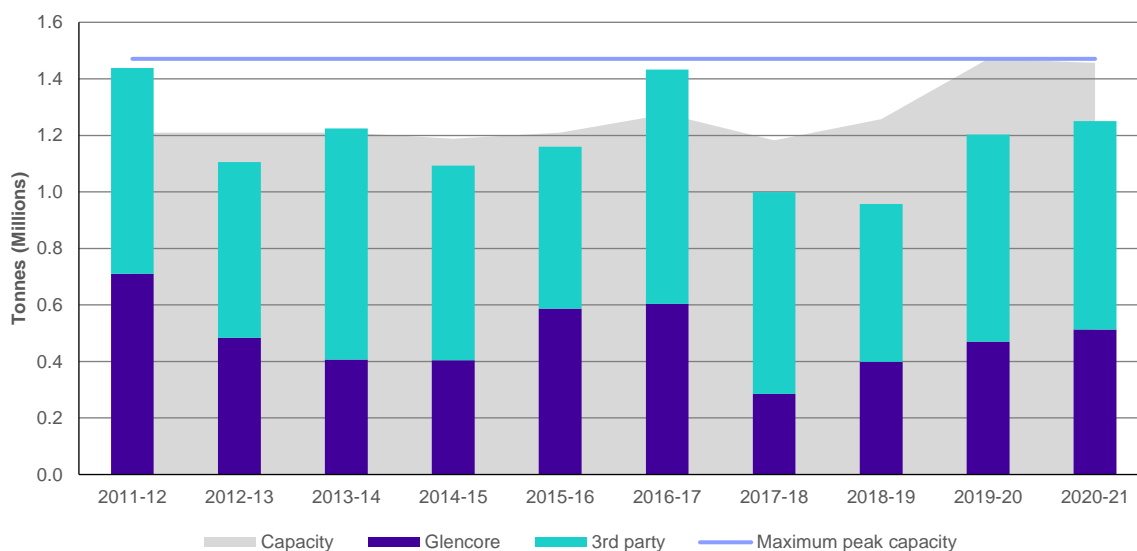
¹¹⁰ The 2017-18, 2018-19 and 2019-20 Eyre Peninsula harvests were 29%, 10% and 14% lower than average respectively (averages from PIRSA's crop reports are over the 2012-13 to 2020-21 period).

¹¹¹ ACCC, *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, pp. 69-73.

¹¹² See Section 3.2.3 of the April Determinations.

Figures 3.2 and 3.3 below compare available capacity to bulk grain shipments, during the peak shipping period across numerous seasons, at Viterra's Port Lincoln and Thevenard facilities (inclusive of tolerance). Figures 3.2 and 3.3 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.

Figure 3.2: Capacity utilisation across the peak period by exporter at Port Lincoln, 2011-12 to 2020-21



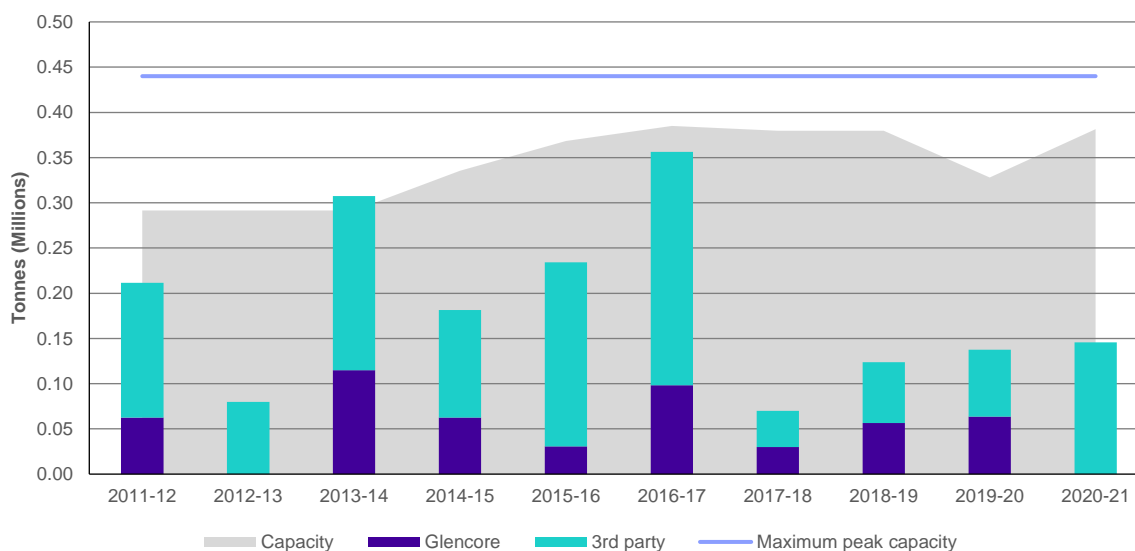
Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 - published available capacity estimates.

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 it does not have Viterra's 2011-12 and 2012-13 capacity figures, Capacity figures in the above chart for these years 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.

(3) The maximum amount of capacity released in any peak period by Viterra at Port Lincoln is indicated by the blue horizontal line. This occurred during the 2019-20 season, where Viterra released 1.47 million tonnes of capacity (inclusive of tolerance). The ACCC notes Viterra has released 1.41 million tonnes of peak period capacity in the 2021-22 season for Port Lincoln

Figure 3.3: Capacity utilisation across the peak period by exporter at Thevenard, 2011-12 to 2020-21



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

Notes: (1) Refer to note (1) from Figure 3.2.

(2) Refer to note (2) from Figure 3.2.

(3) The maximum amount of capacity released by Viterra at Port Lincoln in any peak period is indicated by the blue horizontal line. This occurred in relation to the upcoming 2021-22 season, where Viterra released 0.44 million tonnes of peak period capacity (inclusive of tolerance), and exceeds the peak period of capacity release in the 2016-17 season (of 0.39 million tonnes).

Figure 3.2 suggests that Viterra's Port Lincoln facility has likely experienced capacity constraints in several seasons since 2011-12. However, the ACCC considers it reasonable to expect that the operation of T-Ports' Lucky Bay facility will draw some volume of grain away from Port Lincoln (as well as Thevenard to a lesser extent). While this is expected to reduce the potential for capacity constraints at these facilities in future seasons, the extent of this effect remains uncertain at this time.

Figure 3.3 indicates that Thevenard routinely appears to have had excess capacity available during the peak period. While the bumper 2016-17 season suggests some potential for capacity constraints during large harvests (when compared to previous capacity releases), Viterra's recent release of capacity at Thevenard for the upcoming 2021-22 season indicates that the facility may have excess capacity even during peak periods in high output seasons.

3.2.4 Exporters and bargaining power

The ACCC has considered whether exporters have historically been able to obtain access to Viterra's Port Lincoln and Thevenard 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.¹¹³ 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 42% of all shipments from Viterra facilities (and 40% of all SA's shipments) between 2011-12 and 31 May 2021.¹¹⁴

Glencore accounted for 41% and 27% of shipments at Viterra's Port Lincoln and Thevenard facilities respectively between 2011-12 and 31 May 2021.

The largest third party exporters (by volume) from Viterra's Port Lincoln and Thevenard facilities between 2011-12 and 2019-20 were:

- CBH (13.4%);
- ADM (9.7%);
- Cargill (9.3%); and
- COFCO (5.6%).

Table 3.6 and 3.7 provides a season-by-season breakdown of exporters' market shares at Viterra's Port Lincoln and Thevenard facilities respectively.

Table 3.6: SA bulk shipment market share from Viterra's Port Lincoln facility, 2011-12 to 31 May 2021

Season	Glencore	CBH	Cargill	ADM	COFCO	Others	Number of exporters
2011-12	45%	7%	25%	7%	0%	17%	6
2012-13	46%	10%	15%	5%	0%	25%	9
2013-14	41%	14%	14%	11%	0%	21%	11
2014-15	33%	19%	14%	3%	1%	32%	15
2015-16	46%	15%	5%	6%	13%	16%	10
2016-17	41%	15%	7%	11%	13%	13%	9
2017-18	32%	12%	5%	9%	15%	26%	12
2018-19	37%	23%	1%	4%	12%	22%	10
2019-20	42%	15%	2%	12%	0%	29%	8
2020-21*	46%	19%	4%	5%	0%	26%	8

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

Notes: * 2020-21 data is up to 31 May 2021.

¹¹³ 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.

¹¹⁴ Glencore has on average shipped 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 Thevenard facility, 2011-12 to 31 May 2021

Season	Glencore	ADM	Emerald	AGE	Cargill	Others	Number of exporters
2011-12	28%	24%	30%	0%	12%	5%	5
2012-13	0%	27%	22%	0%	39%	12%	4
2013-14	40%	10%	23%	0%	9%	18%	6
2014-15	26%	11%	18%	1%	9%	34%	10
2015-16	10%	30%	0%	0%	7%	53%	8
2016-17	27%	23%	0%	30%	0%	20%	5
2017-18	23%	46%	0%	0%	0%	31%	4
2018-19	39%	27%	0%	0%	0%	34%	5
2019-20	44%	38%	0%	0%	0%	18%	4
2020-21*	12%	28%	0%	48%	0%	12%	4

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

Notes: * 2020-21 data is up to 31 May 2021.

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.¹¹⁵

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%).¹¹⁶ Glencore’s total SA market share has also marginally declined across the same period (from 41% to 39%).

In relation to Viterra’s Port Lincoln and Thevenard facilities the market share of smaller exporters is consistent since the end of the 2013-14 season (from 22% to 23%). However Glencore’s market share has slightly decreased across the same period at Port Lincoln and Thevenard (from 41% to 37%).¹¹⁷

Table 3.8 below compares average exporter access statistics at CBH, GrainCorp and Viterra’s Port Lincoln and Thevenard 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 Lincoln and Thevenard facilities at the same or higher rates than CBH’s and GrainCorp’s facilities.

Specifically Table 3.8 shows that, on average:

- 10.4 exporters gain access to Viterra’s Port Lincoln and Thevenard facilities each season. This is slightly lower than in relation to CBH, which provides services to an average of 13.2 exporters a season, and marginally higher than GrainCorp at 11.3. However, this is, in part due to considering only 2 of Viterra’s ports, compared to 4

¹¹⁵ Viterra, *Exemption Applications 2019*, 2 July 2019, pp. 4-5.

¹¹⁶ That is the 2 time periods are: the 2011-12 to 2013-14 seasons (17%); and the 2014-15 to 2019-20 seasons (25%).

¹¹⁷ As above footnote.

CBH facilities and 7 GrainCorp facilities; on a state-wide basis 13 exporters secure access to Viterra's facilities each season (on average).

- Glencore secures 39% of Viterra's services (at Port Lincoln and Thevenard), 11 percentage points below that secured by CBH's exporting arm at CBH's facilities, and equal to that secured by GrainCorp's exporting arm at its facilities;
- Viterra's port terminal facilities have the least concentrated exporter access (in terms of the market share of both the top 3 and top 5 exporters), suggesting that smaller exporters have historically been able to secure access to Viterra's Port Lincoln and Thevenard facilities.

Table 3.8: Average exporter market share at CBH, GrainCorp and Viterra's Port Lincoln and Thevenard facilities

	CBH	GrainCorp	Viterra
Average number of exporters per year	13.2	11.3	10.4
Market share of vertically integrated exporter arm	50%	39%	39%
Combined market share of top 3 exporters	72%	73%	62%
Combined market share of top 5 exporters	83%	89%	77%

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

Peak vs off-peak period

As discussed in section 3.2.3, the level of access available during the peak period is an important consideration in the assessment of third party exporter access to Viterra's port terminal facilities. 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. This issue is discussed in more detail in the April Determinations.¹¹⁸

Figure 3.4 below compares the market share of exporters at Viterra's Port Lincoln and Thevenard facilities, as well as total market share between all 6 ports, across peak and off-peak periods (as discussed in section 3.2.3 the peak period in SA refers to shipments performed in December through May).

Figure 3.4 shows that Glencore generally has similar market shares during peak and off-peak periods at Viterra's Port Lincoln facility. Figure 3.4 also shows Glencore has a similar market share in peak and off-peak periods at Port Lincoln (41% for both periods), compared to the average across Viterra's 6 ports (43% and 40% respectively).

At Thevenard Glencore performs a significantly lower portion of shipments in the peak and off-peak period (28% and 24% respectively), than the average across Viterra's facilities (43% and 40% respectively) and Port Lincoln (41% for both periods). Glencore's 28% share of peak period bulk shipments is Glencore's lowest peak period market share at any of Viterra's facilities.¹¹⁹

In addition, the ACCC notes that ADM has performed comparable portions of shipments to Glencore at Thevenard in both the peak and off-peak periods (annually Glencore performed 27% of shipments, compared to 23% for ADM). The ACCC notes that ADM's recent entry at Port Pirie has the potential to reduce demand for services at other port terminal facilities in

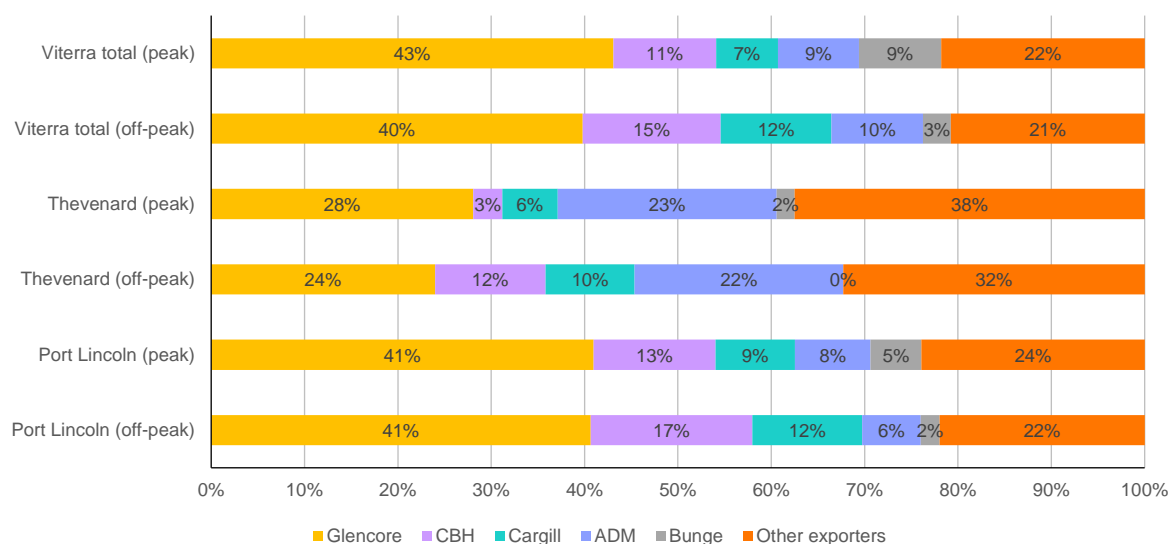
¹¹⁸ See sections 3.2.3 and 3.2.4 of the April Determinations.

¹¹⁹ Viterra's next lowest peak period market share is at Wallaroo, where Glencore performs 34% of peak period shipments.

SA (to the extent ADM focusses its shipment operations through its own facility).¹²⁰ This is expected to become clearer in future seasons.

Exporters' ability to access capacity in relation to Viterra's Port Lincoln and Thevenard facilities is discussed further in subclauses 5(3)(c) and (d) in Chapter 5.

Figure 3.4: Share of bulk grain shipments annually and during peak periods at Viterra's port terminal facilities, 2011-12 to 31 May 2021



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

Contractual arrangements

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.

The ACCC discusses its views on this matter in more detail in the April Determinations.¹²¹

The ACCC notes that Viterra has offered all 2021-22 capacity as short-term capacity (i.e. no capacity will be offered as long-term capacity in 2021-22).¹²²

Additionally, Viterra, in its 7 May 2021 letter to the ACCC, explained that there has been low demand for capacity in the 2021-22 season, with very limited up-take by exporters of available capacity at Viterra facilities. Specifically, Viterra stated:

We are already seeing a lack of demand for capacity at our port terminals for the 2021/22 shipping year. This is symptomatic of the complexity and uncertainty created by the Code and also illustrates that there is no restriction on capacity at our ports.

¹²⁰ ADM had 46,000 tonnes of grain loaded at Thevenard in the 2020-21 peak period; this is comparable to ADM's average peak period shipments from Thevenard (43,000 tonnes). In regards to Port Lincoln, ADM had a reduced amount of shipments in the 2020-21 peak period (63,000 tonnes) compared to average (135,000 tonnes).

¹²¹ See pages 77-79 of the April Determinations.

¹²² See: <https://www.viterra.com.au/dam/jcr:4f9939d7-0ec2-40c6-87eb-1711ad4f6468/202122%20season%20FIFS%20short%20term%20notice.pdf>, viewed 13 July 2021.

It also reflects the significant choices that are available for exporters. Even though the export task is not growing, there has been a significant increase in overall port terminal capacity in South Australia, both through Viterra's productivity gains which have been shared with growers, and new entry by competing port terminals. New domestic supply chains for South Australian grain have also developed.¹²³

As we explained at our meeting, there has been very limited up-take by exporters of the capacity available at Viterra's port terminals.

- *Only 27% of the 8.6 million tonnes of capacity released by Viterra on 20 April 2021 has been booked;*
- *at Port Lincoln, less than 40% of the available capacity of 2.2 million tonnes releases by Viterra has been booked, with exporters only taking up 874,000 tonnes. There are no bookings beyond the first half of April in 2022;*
- *Thevenard has no bookings...¹²⁴*

The ACCC notes that the 2021-22 capacity release appears to have occurred earlier in the year than in previous years,¹²⁵ and Viterra's above comments may indicate that third party exporters have a preference for shorter term arrangements with PTSPs at this time.¹²⁶ The ACCC also notes that Viterra's current PLPs provide that 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.¹²⁷

This is discussed further in Chapter 5 subclause 5(3)(d) for Port Lincoln and Thevenard.

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 historically been able to access a reasonable level of capacity at Viterra's Port Lincoln facility and a greater level of capacity at Viterra's Thevenard facility.¹²⁸ This includes being able to access these facilities during the more desirable peak period.

The ACCC has also considered the potential effect on the level of competition among exporters, if an exemption were granted under the Code in relation to either or both of Viterra's port terminal facilities. The effect of an exemption will likely depend on a range of factors, including: capacity 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 Port Lincoln facility may experience capacity constraints during peak periods, particularly during high output seasons. However, Viterra's Thevenard facility appears to have excess capacity during the peak period.

¹²³ Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021, p. 1 (public version).

¹²⁴ *Ibid*, p. 2 (public version).

¹²⁵ Viterra released capacity to market for the 2021-22 season on 20 April 2021. The ACCC notes that this release occurred earlier than in the 2019-20 and 2020-21 seasons, were Viterra initially sort to release short term capacity in June (however the ACCC notes the release of capacity for the 2020-21 season was delayed due to an issue with the loader at Viterra's Port Adelaide IHB facility).

¹²⁶ The ACCC notes that Viterra released 3.5 million tonnes of capacity for 2019-2020 season in June 2019. This included 2 million tonnes of short term capacity. Only 30,000 tonnes had been booked by 28 June 2019. See: Viterra, *Exemption Applications 2019*, 2 July 2019, p. 20.

¹²⁷ Viterra, Port Loading Protocols, 24 December 2015, clause 3.12(a). See: <https://www.viterra.com.au/dam/jcr:889d5770-cf9d-4af6-84e8-cca2d630ec25/Port%20loading%20protocols.pdf>, viewed 13 July 2021.

¹²⁸ The above analysis is based on data between 2011-12 and 31 May 2020-21.

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 favourable access to certain exporters is increased.

As such, the ACCC considers that if an exemption were granted so that Parts 3 to 6 of the Code did not apply in relation to Viterra's Port Lincoln facility, there is a risk that absent sufficient competitive constraint, Viterra would favour its associated entity exporter, Glencore (see subclause 5(3)(d) in Chapter 5 for further details). This risk is expected to be highest during peak periods where capacity is more likely to be constrained.

In relation to Viterra's Thevenard facility the ACCC notes there is likely to be spare capacity during peak periods; the ACCC therefore considers it unlikely that Viterra (as a vertically integrated PTSP) will face increased incentives to deny, or provide favourable access to certain exporters. However due to Thevenard's remote location (and lack of competitive alternatives in this region) the ACCC considers that, absent Parts 3 to 6 of the Code, Viterra may have the incentive and ability to discriminate in favour of its associated entity exporter, Glencore (see subclause 5(3)(d) in Chapter 5 for further details).

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.¹²⁹

The ACCC acknowledges that third party exporters have been able to secure access to Viterra's Port Lincoln and Thevenard 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 at these facilities.

The ACCC also acknowledges that T-Ports' Lucky Bay facility provides a level of competitive constraint on the Eyre Peninsula. The ACCC will continue to closely monitor existing (and proposed) port terminal facilities on the Eyre Peninsula (and in SA more broadly). The ACCC notes the potential for additional competitive constraint to be imposed on Viterra's Eyre Peninsula facilities in future seasons.

In addition to competition from alternate PTSPs, several other markets must be considered when assessing the total level of competitive constraint a port terminal facility faces (such as upcountry, container and domestic markets, which are discussed in Chapter 4). While a dominant PTSP may not face sufficient competition from alternate PTSPs to constrain its 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 Viterra's Port Lincoln and Thevenard facilities is discussed in detail in Chapter 5.

¹²⁹ Cargill, *Submission in response to Issues Paper*, 6 September 2019, p. 1.

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 (with a particular focus on the provision of these services on the Eyre Peninsula).¹³⁰ 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 Lincoln and Thevenard 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 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.

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

¹³⁰ 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.

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.¹³¹

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.¹³²

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.¹³³

SA has produced 7.2 million tonnes of grain per season on average.¹³⁴ While SA's grain production has typically been relatively stable,¹³⁵ 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 5.5 million tonnes in the 2018-19 season, to a high of 10.7 million tonnes in the bumper 2016-17 season.¹³⁶ On average 2.4 million tonnes of grain is produced on the Eyre Peninsula each season (with a low of 1.7 million tonnes (in 2017-18) and a high of 3.5 million tonnes (in 2016-17)).¹³⁷

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.

Viterra's website indicates that Viterra has a total storage capacity of 10 million tonnes,¹³⁸ and, in its 2017 submission to ESCOSA, stated that it has a 10 year average receipt of 6.3 million tonnes per season.¹³⁹ On the Eyre Peninsula Viterra owns [c-i-c] tonnes of storage.

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 2017.¹⁴⁰

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.¹⁴¹ For example, the ACCC understands that Viterra operated 62 upcountry storage sites for the 2019-20

¹³¹ GPA, *Submission in response to Issues Paper*, 4 October 2019, p. 2.

¹³² T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 2.

¹³³ The ACCC understands that upcountry storage sites which have been previously closed in certain seasons may be opened in response to a larger harvest.

¹³⁴ Since the 2011-12 season. Source: ABARES, *State data underpinning: Australia crop report: June 2021 No. 198*.

¹³⁵ Since 2011-12, every season, with the exception of the 2016-17 season, has had production between 5.5 and 7.5 million tonnes.

¹³⁶ ABARES, *State data underpinning: Australia crop report: June 2021 No. 198*.

¹³⁷ PIRSA, *Crop and pasture reports – final summary and estimates, 2012-13 to 2020-21*.

¹³⁸ Viterra, <https://www.viterra.com.au/Who-we-are>, viewed 27 May 2021.

¹³⁹ Viterra, *Submission to the Inquiry into the South Australian Bulk Grain Export Supply Chain Costs*, May 2017, p. 9.

¹⁴⁰ AEGIC, *Australia's Grain Supply Chains: Costs, Risks and Opportunities*, October 2018, p.42.

¹⁴¹ Ibid.

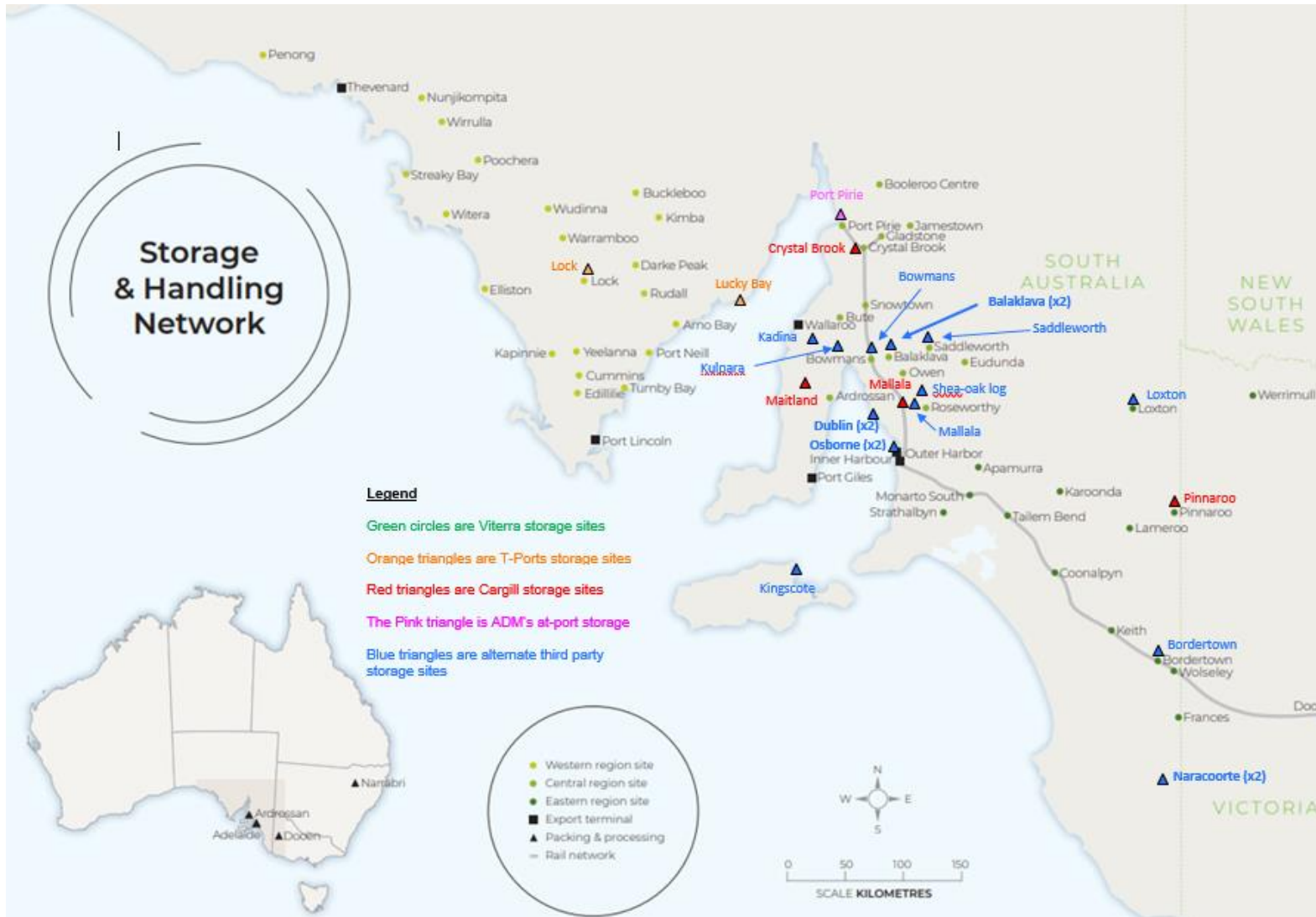
harvest, and 55 upcountry sites for the 2020-21 harvest (these are shown in Figure 4.1 below).¹⁴²

On the Eyre Peninsula, Viterra operated 21 upcountry storage sites in the 2020-21 season. This was down from 25 sites during the 2019-20 season. The ACCC also understands that additional upcountry sites may be opened in response to large harvests.

The ACCC sets out its views on the relevant catchment areas for Viterra's Port Lincoln and Thevenard facilities in detail in Section 4.2. Consistent with these views, the ACCC does not consider upcountry storage and handling facilities in eastern SA to be directly relevant to its assessment of Viterra's Port Lincoln and Thevenard facilities.

¹⁴² These sites have previously taken 97% of total receipts. Viterra media release: <https://www.viterra.com.au/Media/News/News-older/Viterra-adapts-to-provide-more-efficient-supply-chain>, viewed 13 July 2021.

Figure 4.1: SA upcountry storage sites



Source: Viterra 2020-21 upcountry sites, see: Viterra, *Attachment 4 – Response to 14/11/19 information request 2020*, 13 February 2020. 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.*¹⁴³

Viterra submitted that its supply chain is efficient and would be bypassed by exporters in favour of alternative options if it became inefficient.¹⁴⁴ 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.*¹⁴⁵

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.*¹⁴⁶

Viterra also considered the ACCC's theory of harm between upcountry and its operations at port to be unclear:

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...*¹⁴⁷

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.*¹⁴⁸

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

¹⁴³ T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 3.

¹⁴⁴ Viterra, *Exemption Applications*, 2 July 2019, p. 17.

¹⁴⁵ *Ibid* p. 37.

¹⁴⁶ ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 35.

¹⁴⁷ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 27-28

¹⁴⁸ CRA, *Submission in response to Draft Determinations*, 18 December 2020 p. 10.

worrying. Little transparency over the methodology for the setting of export select rates is available.¹⁴⁹

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).

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.

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.

The ACCC's consideration of Viterra's Export Select offering is set out in more detail in the April Determinations.¹⁵⁰ The ACCC considers that the discussion and findings in the April Determinations in relation to Export Select is also relevant to these Final Determinations.

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.

As discussed in detail in the April Determinations,¹⁵¹ concerns were raised in stakeholder submissions that the fees charged by Viterra for grain delivered direct to its port terminal facilities from either third party or on-farm storage discourage the use of alternative storage.¹⁵²

However Viterra submitted that its receipt-at-port fees reflect the need to manage the risk associated with the quality of grain received, and to ensure quality standards for clients.¹⁵³ Viterra 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 this is reflected in the significantly reduced price (compared to the grower direct to port receipt fee).¹⁵⁴

¹⁴⁹ AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 4.

¹⁵⁰ ACCC, *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, p. 104.

¹⁵¹ *Ibid*, p. 106.

¹⁵² GPSA, *Submission in response to Issues Paper*, 27 September 2019, p. 6; AGE, *Submission in response to Draft Determinations*, 23 November 2020, p. 1.

¹⁵³ Viterra, *Further Supplementary submission on Exemption Applications 2020*, 11 March 2020, p. 5.

¹⁵⁴ Viterra, *Further Supplementary submission on Exemption Applications 2020*, 11 March 2020, pp. 6-7.

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.

These matters are discussed in more detail in the April Determinations.¹⁵⁵

Third party/alternate storage providers

Viterra 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.*¹⁵⁶

Viterra also submitted that a significant proportion of SA's grain production bypasses its 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...*¹⁵⁷

*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.*¹⁵⁸

In contrast, T-Ports submitted that 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.*¹⁵⁹

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 10 million tonnes¹⁶⁰).

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 in SA.¹⁶¹ These alternate storage facilities are discussed in greater detail in the April Determinations.¹⁶²

¹⁵⁵ ACCC, *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, p. 106.

¹⁵⁶ Viterra, *Response to 14/11/19 information request from the ACCC, 2020, Question 9 – Catchment Zones*, 13 January 2020, p. 2.

¹⁵⁷ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 27.

¹⁵⁸ *Ibid*, p. 4.

¹⁵⁹ T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

¹⁶⁰ Viterra, <https://www.viterra.com.au/Who-we-are>, viewed 13 July 2021.

¹⁶¹ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 24.

¹⁶² ACCC, *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, pp. 108-9.

T-Ports is the only alternate provider of upcountry storage on the Eyre Peninsula. T-Ports operates a grain receival and storage site at Lock (as well as at Lucky Bay).

T-Ports detailed its storage facilities in its March 2019 application for an exemption in respect of its Lucky Bay facility. The application indicated that the majority of its storage at Lucky Bay (360,000 out of 387,000 tonnes) is located a short distance from port:

The ship loading facilities at Lucky Bay comprise sampling, weighbridges, road receival sheds, ship loader and 27,000mt of steel bins storage silos.

T-Ports operations will be supported by the development and operation of grain receival and storage facilities at Lock (132km from Lucky Bay) and bunker facilities at Lucky Bay (2km from berth). Lock facilities include sampling, weighbridge and 150,000mt of bunker storage. Lucky Bay facilities include sampling, weighbridges and 360,000mt of bunker storage.¹⁶³

As noted in the April Determinations, 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). 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).¹⁶⁴

In its response to the Draft Determinations Viterra submitted that T-Ports has 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...¹⁶⁵

The ACCC notes that T-Ports' storage facilities are located on the Eyre Peninsula, which the ACCC considers to be a separate and distinct market from eastern SA (see Section 4.2). As such, the ACCC considers T-Ports' storage facilities relevant to its assessment of Viterra's Port Lincoln and Thevenard facilities.

The ACCC has considered T-Ports' storage facilities. Given the total volume of storage available (158,000 tonnes at Lock and 542,000 tonnes in total),¹⁶⁶ it appears likely these facilities will provide a level of competition to Viterra's storage facilities on certain parts of the Eyre Peninsula.

The ACCC notes that the establishment of T-Ports' vertically integrated supply chain provides exporters (and growers) with an alternate to Viterra's supply chain on certain parts of the Eyre Peninsula. The ACCC considers that T-Ports' capacity to move grain via its own

¹⁶³ T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, pp. 2-3. Note: T-Ports' application appears to use 'mt' in relation to metric tonnes, rather than million tonnes. The ACCC notes that T-Ports' website indicates that it has 360,000 tonnes of bunker storage at Lucky Bay, 140,000 tonnes of bunker storage at its Lock site and 24,000 of silo storage at Lucky Bay port. See <https://tports.com/lucky-bay/>, viewed 18 May 2021.

¹⁶⁴ ACCC, *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, p. 36.

¹⁶⁵ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 25.

¹⁶⁶ The ACCC notes there are slight discrepancies between the storage figures provided by T-Ports on its website and within its exemption application. For the purposes of these Final Determinations the ACCC has used storage figures provided to the ACCC in response to an information request clarifying these estimates, which states T-Ports' has: 24,000 tonnes of storage at port, 360,000 tonnes of bunker storage a short distance (2km) from Lucky Bay, and 158,000 tonnes at Lock; equating to a total storage of 542,000 tonnes. The ACCC notes that on its website (see: <https://tports.com/lucky-bay/>, viewed 21 May 2021) T-Ports states it has 24,000 tonnes of storage at port, 360,000 tonnes of bunker storage at Lucky Bay, and 140,000 tonnes of storage at Lock; this equates to total storage of 524,000 tonnes (as referenced by Viterra). In addition the ACCC notes T-Ports', in its exemption application (quoted by the ACCC above), states it has 27,000 tonnes of storage at port, 360,000 tonnes of storage at Lucky Bay, and 150,000 tonnes at Lock; this equates to a total storage of 537,000 tonnes.

upcountry storage network likely places greater competitive pressure on Viterra at the port terminal level. This is because T-Ports' is likely to have greater flexibility in storing and transporting grain to its Lucky Bay port terminal facility as the result of not being reliant on a competitor's supply chain.

On-farm storage

As discussed in more detail in the April Determinations,¹⁶⁷ the ACCC considers that on-farm storage has the potential to 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 2017.¹⁶⁸

As submitted by Viterra, this suggests that there is enough on-farm storage to store approximately 9 to 14% of the SA harvest.¹⁶⁹

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.¹⁷⁰ 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 receipt of grain from these sources.¹⁷¹

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.

As set out in the April Determinations, ESCOSA stated that the majority of on-farm storage is located in eastern SA.¹⁷² The ACCC notes that this is also where the majority of third party storage lies.

ESCOSA notes that access to domestic markets influences investment in on-farm storage, and that growers on the Eyre Peninsula are primarily focussed on the export market, with storage primarily used for harvest-related logistical reasons.¹⁷³ GPSA also submitted that growers on the Eyre Peninsula have limited access to the SA domestic market.¹⁷⁴ This is discussed further in Section 4.3.

However the introduction of T-Ports' Lucky Bay facility may encourage greater investment in on-farm storage in the future. The ACCC notes that T-Ports' storage is primarily located at (or close to) its port facility and that the operation appears to be oriented towards grower direct-to-port delivery arrangements.¹⁷⁵ As submitted in T-Ports' 2019 exemption application for its Lucky Bay facility:

¹⁶⁷ ACCC, *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, pp. 111-113.

¹⁶⁸ PIRSA, *Submission to the Inquiry into the South Australian Bulk Grain Export Supply Chain Costs*, May 2017, p. 6.

¹⁶⁹ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 35.

¹⁷⁰ 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.

¹⁷¹ See footnote 322, April Determinations, p. 111.

¹⁷² ACCC, *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, p. 112.

¹⁷³ ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 25.

¹⁷⁴ GPSA, *Submission in response to Issues Paper*, 4 October 2019, pp. 3-4.

¹⁷⁵ Of the 0.54 million tonnes of storage T-Ports owns and operates, 0.38 million tonnes is located at Lucky Bay. See also: <https://tports.com/lucky-bay/>, viewed 13 July 2021.

*In addition to storage facilities at Lock and Lucky Bay, T-ports will also offer an off-farm accumulation service, direct to ship loading service, supporting the development of effective on-farm storage options. The proximity of the port to the growing areas enables such a service to be viable.*¹⁷⁶

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.¹⁷⁷

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).*¹⁷⁸

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.¹⁷⁹

However GPA has questioned whether the increasing volume of on-farm storage in SA indicates that the current upcountry storage market is inefficient.

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).¹⁸⁰

Total alternative storage to Viterra

As discussed 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).¹⁸¹ In comparison, Viterra has total storage capacity of 10 million tonnes across SA, including [c-i-c] tonnes of storage in the Eyre Peninsula.¹⁸²

The ACCC understands the majority of on-farm storage is not located within the Eyre Peninsula, and instead lies within eastern SA.¹⁸³ However, the entry of T-Ports has the potential to encourage investment in on-farm storage.

T-Ports is the only alternative storage provider on the Eyre Peninsula, with a total of 0.54 million tonnes of storage.

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.

¹⁷⁶ T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, p. 6.

¹⁷⁷ ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 24.

¹⁷⁸ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 25.

¹⁷⁹ *Ibid*, pp.25-26.

¹⁸⁰ ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 35.

¹⁸¹ *Ibid*, p. 4.

¹⁸² Viterra, <https://www.viterra.com.au/Who-we-are>, viewed 27 May 2021.

¹⁸³ ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 24.

In particular, the ACCC understands that the majority of alternative storage (both that provided by third party storage providers and via on-farm storage¹⁸⁴) is located in the Lower, Mid and Upper North regions of SA. T-Ports is the only alternative storage provider on the Eyre Peninsula, and the ACCC understands most of SA's on-farm storage is located outside the Eyre Peninsula.

The ACCC's considers Viterra to be the dominant storage provider on the Eyre Peninsula (operating 23 of the 25 storage sites in the 2020-21 seasons, which accounts for [c-i-c] of commercial storage on the Eyre Peninsula). As such given Viterra's dominant presence both at port and upcountry the ACCC considers it reasonable that these services likely interact with one another (given the interconnected nature of these markets within the supply chain). However the ACCC notes that T-Ports' storage facilities at Lucky Bay and Lock are significant in size and will likely provide some level of competitive constraint on Viterra's storage services in the mid and eastern parts of the Eyre Peninsula. However the ACCC understands that Viterra still owns the majority of storage in these regions.

Furthermore, the ACCC understands that Viterra owns all storage services in the Lower Eyre Peninsula and the north-western region of the Eyre Peninsula.

Therefore, the ACCC's view is that, 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 on the Eyre Peninsula.

Barriers to entry

As discussed in more detail in the April Determinations,¹⁸⁵ Viterra is the dominant vertically integrated, provider of port terminal services and upcountry services in the SA bulk grain export market.

Viterra has also occupied an incumbent position in SA markets for a significant period of time.¹⁸⁶

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. As discussed in more detail in the April Determinations, a number of stakeholders made submissions regarding barriers to enter into the upcountry storage market.¹⁸⁷

In its exemption applications, Viterra noted that the Department has suggested that there are relatively low barriers to enter into the upcountry storage market.¹⁸⁸ In its 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.¹⁸⁹

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.¹⁹⁰ Viterra also

¹⁸⁴ 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.

¹⁸⁵ ACCC, *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, pp. 115-18.

¹⁸⁶ 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).

¹⁸⁷ ACCC, *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, pp. 115-17.

¹⁸⁸ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 36.

¹⁸⁹ T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

¹⁹⁰ Viterra, *Exemption Application*, 2 July 2019, p. 36.

rejected that 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.¹⁹¹ Similarly, CRA submitted that the ACCC's analysis of upcountry competition is inconsistent with its view that barriers to entry upcountry are low.¹⁹²

However T-Ports submitted that there has not been significant recent developments by third parties in storage markets, other than its development at Lock.¹⁹³

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 2009¹⁹⁴) 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.

The ACCC notes that T-Ports' operation on the Eyre Peninsula, suggests that entry into the upcountry storage market is likely more feasible when associated with a port terminal facility.

Relevant stakeholder views and the ACCC's consideration of receival fees and the bundling of services are discussed in the April Determinations.¹⁹⁵

Economies of scope and scale

As discussed in detail in the April Determinations, the ACCC expects that a range of supply chain related factors will influence exporters' decisions around moving bulk grain to export markets, including the 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.¹⁹⁶

While these factors are discussed 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.¹⁹⁷

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 operations. 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 locations to take advantage of grain acquisitions. Exporters may also find that smaller sites can't provide access to sufficient quantum of grain and/or certain quality of grain grade.

¹⁹¹ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 36; Viterra, *Submission to the Draft Determinations*, p. 26.

¹⁹² CRA, *Comments on the ACCC's Draft Determinations Regarding Code Exemption for Viterra Grain Export Terminals*, 21 December 2020, p. 10.

¹⁹³ T-Ports, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

¹⁹⁴ As discussed earlier in this chapter, the number of upcountry storage sites operated by Viterra appears to be reducing somewhat.

¹⁹⁵ ACCC, *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, pp. 116-117.

¹⁹⁶ *Ibid*, p. 118.

¹⁹⁷ 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.

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. Growers may also benefit from scale effects when storing and trading their grain in the Viterra upcountry network.

The ACCC's consideration of economies of scope and scale as detailed in the April Determinations are also relevant to these exemption assessments.¹⁹⁸

ACCC view

The ACCC notes that alternate storage providers and growers with on farm storage, now have the opportunity to outturn grain through T-Ports' Lucky Bay facility on the Eyre Peninsula. This has the potential to support the entry and/or continued existence of alternate storage on the Eyre Peninsula (in particular for storage located in the mid to eastern regions of the Eyre Peninsula).

However, the ACCC also notes that exporters may prefer to remain within the Viterra network for a range of reasons, including to avoid transaction costs or to benefit from service offerings that may be made possible by the scope and scale of Viterra's operations. However, 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 on the Eyre Peninsula suggests 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).¹⁹⁹

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 T-Ports accepting their customers' grain at its port terminal facilities at commercially viable rates. This is particularly the case given the limited access to container and domestic markets for grain grown on the Eyre Peninsula.

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's position in the provision of port terminal services on the Eyre Peninsula (see Chapter 3), the ACCC has reached the view that the incentives for competitors to enter into 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 on the Eyre Peninsula is exported in bulk.

Nonetheless, the ACCC acknowledges that the commencement of operations of T-Ports' Lucky Bay facility and its associated storage network provides an alternate access pathway to export markets and may encourage further entry or investment in storage (notably on farm) and handling on the Eyre Peninsula.

¹⁹⁸ ACCC, *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, pp. 118-119.

¹⁹⁹ 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: <https://www.grainflow.com.au/about-grainflow>, viewed 13 July 2021). As such it is unlikely to illustrate a typical example of entry into the upcountry storage market.

The ACCC discussed its views on the state of competition in upcountry storage and handling facilities across SA in detail in the April Determinations.²⁰⁰

4.1.2 Grain transport services

As discussed in more detail in the April Determinations,²⁰¹ 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.

Transport networks, and the associated freight charges to move grain to port, are significant factors for exporters 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.²⁰² The ACCC also notes that Viterra decided not to renew its Eyre Peninsula rail contract with GWA (in February 2019).²⁰³ As such, road transport is expected to account for all grain delivered to port in the Eyre Peninsula going forward.

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.²⁰⁴ This is because the majority of SA grain (including grain grown on the Eyre Peninsula) moves to export through Viterra's Export Select product (which 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).

Rail

The use of rail freight services in SA is discussed in more detail in the April Determinations.²⁰⁵

Viterra does not currently use rail freight services to move grain intended for export to port on the Eyre Peninsula.²⁰⁶ Viterra and GWA previously had a rail agreement for the Eyre Peninsula to transport grain from Kimba and Wudinna down into Viterra's Port Lincoln facility. The ACCC understands that grain was the only commodity moved on the Eyre

²⁰⁰ ACCC, *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, pp. 99-120.

²⁰¹ Ibid, pp. 120-126.

²⁰² Viterra, *Exemption Applications 2019*, 2 July 2019, p. 33.

²⁰³ Viterra, media release, *Viterra decision provides competitive supply chain to Eyre Peninsula growers*, viewed 13 July 2021. See: <https://www.viterra.com.au/Media/News/News-older/Viterra-decision-provides-competitive-supply-chain-to-Eyre-Peninsula-growers>

²⁰⁴ 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 report (2018) Viterra had used 7 different road freight providers.

²⁰⁵ ACCC, *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, pp. 121-122.

²⁰⁶ Ibid, p. 122.

Peninsula rail lines and, on 26 February 2019, Viterra announced its intention to transition all grain movements on the Eyre Peninsula to road transport.²⁰⁷

This resulted in a significant proportion of Eyre Peninsula grain shifting to road freight. As noted by Viterra, between 60 and 70% of grain was previously transported to port by road on the Eyre Peninsula.²⁰⁸

The ACCC understands that neither T-Ports' Lucky Bay facility nor its bunker storage facility at Lock are able to receive grain by rail.

Road

All of the port terminal facilities located on the Eyre Peninsula (and SA more broadly) can receive grain via road transport services.

As discussed in the April Determinations,²⁰⁹ 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.²¹⁰ 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.²¹¹

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.²¹² The ACCC also 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.²¹³ In addition, both AEGIC and ESCOSA considered that the road freight transport industry was competitive, in their respective reviews of the SA market.²¹⁴ ESCOSA also found that road freight transport had low barriers to entry.²¹⁵

The ACCC notes that the efficiency of road transport differs by region in SA due to a variety of factors. In particular, AEGIC found that the transport rates offered in eastern SA were up to 35% higher than those offered in the western region (i.e. the Eyre Peninsula) for an equivalent 150km journey. AEGIC stated that the discrepancy in these costs likely related to:

- Trucks with a load size of 72 tonnes being allowed on the Eyre Peninsula, versus 44 tonnes in the Adelaide region;

²⁰⁷ Viterra, media release, *Viterra decision provides competitive supply chain to Eyre Peninsula growers*, viewed 13 July 2021. See: <https://www.viterra.com.au/Media/News/News-older/Viterra-decision-provides-competitive-supply-chain-to-Eyre-Peninsula-growers>

²⁰⁸ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 33.

²⁰⁹ ACCC, *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, p. 121.

²¹⁰ 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.

²¹¹ T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 4.

²¹² *Ibid*, p. 4.

²¹³ SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 3.

²¹⁴ 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.

²¹⁵ SCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 38.

- Greater demand for trucking services in the east and central regions compared to the Eyre Peninsula (however the ACCC notes that with the closure of rail on the Eyre Peninsula the demand for trucking services will increase on the Eyre Peninsula); and
- The need to pass through the Adelaide Hills on some routes increasing road transportation costs relative to the Eyre Peninsula.

The general efficiency of road transport also appears to have increased over time, with AEGIC finding that the average load size of a truck has increased from approximately 24.5 tonnes in 2009-10, to over 29 tonnes in 2016-17.²¹⁶

Given the above the ACCC's view is that there may be potential for alternate PTSPs to encounter difficulties when attempting to engage with larger road freight service providers which are contracted to Viterro, particularly given the majority of SA grain is sold into Export Select. 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 road freight market, including the advantages of road transport over rail, is discussed in more detail in the April Determinations.²¹⁷

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 costs²¹⁸). In some instances references to catchment areas were likely to envisage a fixed 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,²¹⁹ 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.

²¹⁶ AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 53.

²¹⁷ ACCC, *Final Determinations Viterro 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, pp. 123-4.

²¹⁸ 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 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.

²¹⁹ Kingwell, *Changes in grain handling catchments in Australia: an historical perspective*, 2017. Available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/1467-8489.12206>, viewed 13 July 2021.

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 and extracted 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 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.²²⁰

In relation to the grain catchment areas for each of its facilities, Viterra also submitted the following:

Port Lincoln has traditionally sourced grain from growers on the Eyre Peninsula in South Australia.²²¹

Thevenard has traditionally sourced grain from regions including the Eyre Peninsula in South Australia.²²²

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*

²²⁰ Viterra, *Exemption Applications 2019*, 2 July 2019 (public), p. 1.

²²¹ *Ibid*, p. 26.

²²² *Ibid*, p. 46.

- *the grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, stretching from Doon in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia.*²²³

The ACCC also notes Viterra's statement in response to the Draft Determinations 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.*²²⁴

Additionally, Viterra 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,²²⁵ GrainCorp,²²⁶ Emerald²²⁷ and T-Ports^{228, 229}

The ACCC notes the views of Viterra (and other PTSPs) as to the fluidity of catchment areas. 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.²³⁰

Furthermore, Viterra submitted that the fact there may be some freight advantages on the Eyre Peninsula does not mean other ports do not compete for that grain:

The fact that there may be some freight advantages for delivering to a particular port from a particular area on the peninsula does not mean that the other ports on the peninsula do not compete for grain from that area. This is because, as set out in section 3.2.1 of this submission, freight costs are not the only indicator of grain movements – other relevant considerations include the price that can be achieved for grain at a particular site, port terminal fees and non-price terms such as the timing and availability of services. Importantly, T-Ports has publicly stated that exports through Lucky Bay will be up to 40% cheaper on average to growers than via alternative supply chains. It has also encouraged deliveries direct from on-farm storage, which will encourage deliveries from further afield and an increase in on-farm storage.

²²³ Viterra, *Response to Draft Determinations*, 8 February 2021, p. 3-4.

²²⁴ Viterra, *Response to 14/11/19 information request 2020 - Question 9 – Catchment zones*, 13 January 2020, p. 5.

²²⁵ Viterra footnoted the following statement here (see footnote 15 on page 15 in its 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".*

²²⁶ Viterra footnoted the following statement here (see footnote 16 on page 15 in its 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."*

²²⁷ Viterra footnoted the following statement here (see footnote 1 on page 15 in its 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.*

²²⁸ Viterra footnoted the following statement here (see footnote 18 on page 15 in its response to the Draft Determinations): *T-Ports' submission in response to ACCC's issues paper on Viterra's applications for exemption, 26 August 2019.*

²²⁹ Viterra, *Response to Draft Determinations*, 8 February 2021, p. 15.

²³⁰ Emerald, *Submission in support of exemption for its Melbourne Port Terminal*, 28 November 2014, p. 11.

The fact that distance is not the sole indicator of where grain will be delivered is also reflected in the fact that, as set out in section 3.2.1 of this submission, grain at sites closer to Thevenard is often delivered to Port Lincoln. In addition, Viterra understands that growers as far as a grower at Cungienga in the western region of Eyre Peninsula and Ungarra in the southern region of the Eyre Peninsula have delivered grain by road to Lucky Bay. To put this in context, Lucky Bay is 172 km further from Cungienga than Thevenard and 79 km further from Ungarra than Port Lincoln. In any event, T-Ports' upcountry site is situated at Lock in central Eyre Peninsula which is well situated for growers in all regions of the Eyre Peninsula.²³¹

As above, the ACCC notes there is a level of fluidity to catchment areas and that freight costs are not the only factor which determine where grain will move to. The ACCC also notes that sites located closer to Thevenard often deliver grain to Port Lincoln (see Section 5.2 (Thevenard) subclause 5(3)(i)) and that grain can move outside its traditional catchment area. However, and as discussed further below, the ACCC considers that distance remains an important consideration when determining the economic viability of where grain will be delivered.

The ACCC also notes that T-Ports' Lucky Bay facility likely offers freight advantages for grain grown on the Eastern Eyre Peninsula (see Section 4.2.3).

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.²³²

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.²³³

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.²³⁴

The ACCC recognises that there is a level of fluidity to the catchment areas for different port terminal facilities and that there are a range of factors which will determine where grain will move. 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 remain 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.

Matters relating to catchment areas are discussed in more detail in the April Determinations.²³⁵

²³¹ Viterra, Response to Draft Determination Public version, 8 February 2021, pp. 47-48.

²³² T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 3.

²³³ *Ibid*, p. 4.

²³⁴ T-Ports, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 2.

²³⁵ ACCC, *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, pp. 123-4.

What are the different growing regions in SA?

As discussed in more detail in the April Determinations,²³⁶ AEGIC stated that SA is unlike other Australian states, due to its unique geography. AEGIC considered 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.²³⁷

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 (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, the Eyre Peninsula and eastern SA.²³⁸

Furthermore, it appears that SA's unique geography has resulted in differences in how logistical networks operate across different parts of the state.

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.²³⁹

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.

Export Select freight rates

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.

As discussed in more detail in the April Determinations,²⁴⁰ 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.²⁴¹ CRA's results indicate a pronounced relationship between freight costs and distance. 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.²⁴²

The importance of distance in Export Select rates appears to have reduced over time

Noting that Viterra submitted in its exemption applications that catchment areas were more relevant in the past,²⁴³ the ACCC considers it appropriate to consider the extent to which distance has diminished as a factor in determining freight costs. As discussed in detail in the

²³⁶ Ibid, pp. 129-30.

²³⁷ AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 52.

²³⁸ ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, pp. 42-43.

²³⁹ Viterra, *Response to 14/11/19 information request 2020 – Question 9 – Catchment zones*, 13 January 2020, p. 3.

²⁴⁰ ACCC, *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, pp. 130-1.

²⁴¹ See: CRA, *Supplement to CRA Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 9 January 2020, Appendix A.

²⁴² Ibid, p. 11.

²⁴³ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 13.

April Determinations, while the cost premium associated with freight distance has reduced over time, there continues to be a strong relationship between distance and freight costs.²⁴⁴

ACCC view on the relationship between freight costs and distance

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. These matters are discussed in more detail in the April Determinations.²⁴⁵

4.2.2 Competition for grain between the Eyre Peninsula and eastern SA

As previously discussed ESCOSA considers SA to be comprised of 2 distinct markets: the Eyre Peninsula and eastern SA, with little substitution between these regions.²⁴⁶

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.²⁴⁷ In contrast, T-Ports submitted that Port Lincoln only draws grain from the Eyre Peninsula.²⁴⁸

As part of its response to the Draft Determinations Viterra submitted 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.²⁴⁹

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.²⁵⁰ Furthermore, Melrose is located 71 km 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).

²⁴⁴ ACCC, *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, pp. 130-132.

²⁴⁵ *Ibid*, p. 132.

²⁴⁶ ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, pp. 42-43.

²⁴⁷ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 28 and p. 44.

²⁴⁸ T-Ports, *Submission in response to Supplementary Issues Paper*, 19 June 2020, p. 2.

²⁴⁹ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 3-4.

²⁵⁰ Distances from storage locations to terminals were obtained using Google Maps.

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.²⁵¹ 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 eastern SA ports for grain grown on the Eyre Peninsula it appears highly unlikely that this grain will be exported via a port terminal facility in eastern SA in material quantities under typical market conditions. As such, the ACCC's view is that the vast majority of grain grown on the Eyre Peninsula is unlikely to move to export via eastern SA.

4.2.3 Competition for grain between PTSPs on the Eyre Peninsula

T-Ports' Lucky Bay facility is now operational and is relevant to the consideration of catchment areas on the Eyre Peninsula. Viterra has submitted that T-Ports' Lucky Bay facility will be a strong competitor to its Port Lincoln and Thevenard facilities.²⁵²

With respect to freight advantages on the Eyre Peninsula, T-Ports submitted in its exemption application for its Lucky Bay facility that:

*Lucky Bay export facilities represent a freight advantage for local growers compared to the cost of haulage to Port Lincoln... The catchment zone area is estimated to include the entire Eastern Eyre region where the cost of transporting grain from farm to Lucky Bay would be notably less than transporting to Port Lincoln.*²⁵³

SAFC submitted that T-Ports' Lucky Bay facility is likely to change/restrict the catchment area of Viterra's Port Lincoln facility:

*SAFC notes that T-Ports facility at Lucky Bay is likely to significantly change/restrict the catchment area for Viterra's Port Lincoln facility. There will be significant new competition for EP grain, particularly on the eastern side of the peninsula.*²⁵⁴

SAFC also suggests that the closure of rail transport along the Eyre Peninsula will decrease the Port Lincoln facility's catchment area:

*The cessation of grain transport by rail on the Eyre Peninsula will also change catchment areas. Where previously rail lines funnelled grain towards Pt Lincoln, increasing its catchment area, now trucking distance (and cost) will be a greater factor.*²⁵⁵

In contrast however, T-Ports submitted that the closure of rail is unlikely to affect the Port Lincoln facility's catchment area:

*...Port Lincoln only draws its grain from the Eyre Peninsula. T-ports does not consider the use of or discontinuation of rail on the EP affect the ability to source grain from other growing regions.*²⁵⁶

Figure 4.2 (below) shows T-Ports' estimated freight advantage to Lucky Bay over Port Lincoln. T-Ports considers that its Lucky Bay facility will have a large freight advantage for

²⁵¹ Distances from storage locations to terminals were obtained using Google Maps.

²⁵² Viterra, *Revised exemption applications 2019*, 7 February 2020, p. 28 & p. 44.

²⁵³ T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, p. 3.

²⁵⁴ SAFC, *Submission in response to the Issues Paper*, 6 September 2019, p. 2.

²⁵⁵ Ibid, p. 2.

²⁵⁶ T-Ports, *Submission in response to the Supplementary Issues Paper*, 19 June 2020, p. 2.

the bulk export of grain grown on the Eastern Eyre Peninsula, with smaller freight advantages in parts of the Lower and Western Eyre Peninsula. Specifically, T-Ports submitted that:

Future service offering (i.e. T-Ports Lucky Bay) will represent a viable competitive alternative to a portion of the Eyre Peninsula (EP) catchment zone. As identified in T-Ports application for exemption, this area comprises mainly the North Eastern parts of the EP, with the western and southern zones retaining their freight advantage to Viterra facilities at Thevenard and Port Lincoln.²⁵⁷

The ACCC considers that, in addition to freight costs, catchment areas are also dependent on the relative efficiency and/or capacity of the relevant port terminal facilities. The ACCC notes that T-Ports' Lucky Bay facility, while offering large freight advantages across the mid-to-north eastern regions of the Eyre Peninsula, may prove to be less efficient than a traditional port in practice due to the double handling of grain with its transshipment operation.

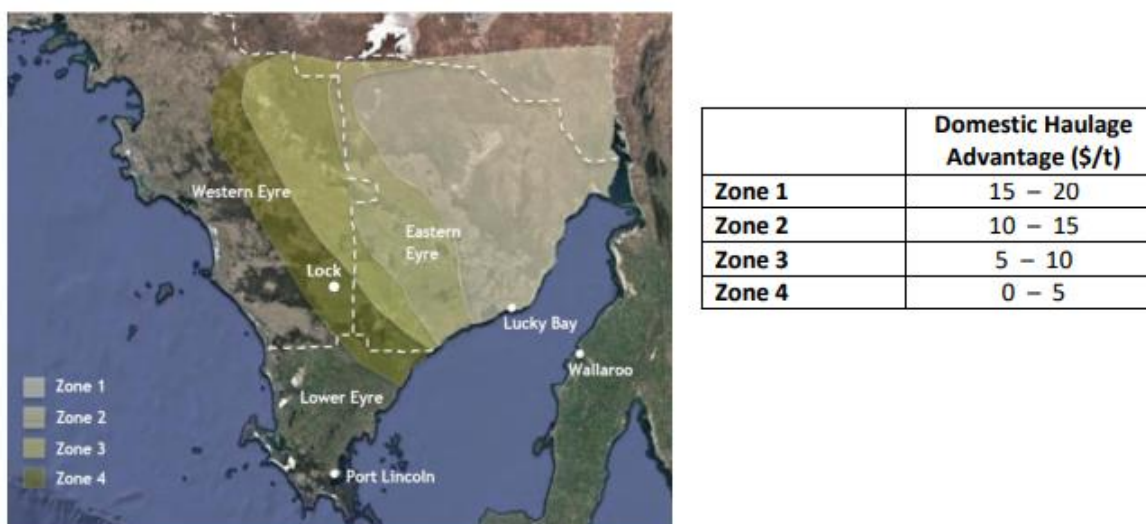
While the efficiency of the Lucky Bay operation remains somewhat uncertain (due to the relatively limited operating period to date), the ACCC notes that T-Ports' operation has facilitated 0.24 million tonnes of exports during the 2020-21 shipping period.²⁵⁸

The ACCC also acknowledges that T-Ports' Lucky Bay facility will compete for grain, particularly on the Eastern Eyre Peninsula. However the limited operating period to date means that the level of competition the facility will offer over a range of market, growing and operating conditions, and the extent to which the facility offers a viable competitive alternative for the export of grain from different regions of the Eyre Peninsula it is not yet fully clear.

Noting the above, the ACCC considers it reasonable to expect that T-Ports' Lucky Bay facility will compete for grain grown within certain parts of the catchment areas of Viterra's Port Lincoln and, to a lesser extent, Thevenard facilities.

The ACCC will continue to closely monitor the effect of T-Ports' Lucky Bay facility on the competitive landscape on the Eyre Peninsula.

Figure 4.2: T-Ports' estimated freight advantage to Lucky Bay harbour



Source: T-Ports exemption application, p. 3.

²⁵⁷ T-Ports, *Submission in response to the Issues Paper*, 26 August 2019, p. 4.

²⁵⁸ As at 31 May 2021.

In the Draft Determinations the ACCC provided its draft views on each port terminal facility's individual catchment area.²⁵⁹ Viterra disagreed with the analysis in the Draft Determinations, and submitted that:

*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.*²⁶⁰

GTA's Location Differentials are discussed in Section 4.2 of the April Determinations.²⁶¹ The ACCC notes that, excluding Lock, freight rates to T-Ports' Lucky Bay facility are not provided by GTA (or Viterra in its Export Select freight rates).²⁶²

Freight based analysis

The ACCC acknowledges grain does not necessarily move to the closest port terminal and that a variety of factors will determine which port terminal facility it will be most profitable for grain to move to. However, as discussed in Section 4.2.1 there continues to be a strong relationship between distance to port and freight costs (however this relationship has likely weakened over time). As freight costs are relevant to the profitability of moving grain to different port terminals, the ACCC considers distance to port likely provides an indication of where grain will move in typical market conditions.

The ACCC discusses distances to port for each region of the Eyre Peninsula below.²⁶³

Eastern Eyre Peninsula

Viterra operated all 5 storage sites located in the Eastern Eyre Peninsula in the 2020-21 season (shown in Table 4.1). All of these sites are located materially closer to Lucky Bay compared to Port Lincoln. Thevenard is located significantly further away from these sites. This suggests T-Ports' facility likely offers material freight advantages for grain grown in the Eastern Eyre Peninsula.

²⁵⁹ See Section 3.2 of 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

²⁶⁰ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 36-39.

²⁶¹ ACCC, *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, pp. 134-5.

²⁶² However GTA provides a freight rate for Lock to Lucky Bay. 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 of the April Determinations).

²⁶³ The ACCC notes that each region produces approximately equal shares of grain: on average the Lower Eyre Peninsula produces the most grain (0.87 million tonnes per year), followed by the Eastern Eyre Peninsula (0.77 million tonnes) and the Western Eyre Peninsula (0.76 million tonnes). Averages are taken over the 2012-13 to 2020-21 seasons. Source: PIRSA, *Crop and pasture reports – final summary and estimates*, 2012-13 to 2020-21.

Table 4.1: Distances from Eastern Eyre Peninsula upcountry sites to port (km)

Site and operator	Lucky Bay	Port Lincoln	Thevenard
Arno Bay (Viterra)	61	118	381
Buckleboo (Viterra)	163	278	323
Darke Peak (Viterra)	106	190	319
Kimba (Viterra)	102	212	316
Rudall (Viterra)	82	134	336

Notes: Distances obtained using Google Maps.

Lower Eyre Peninsula

Viterra operated all 5 storage sites located in the Lower Eyre Peninsula in the 2020-21 season (shown in Table 4.2). Port Lincoln is the closest port terminal to all of these storage sites and is materially closer to 4 of the 5 sites compared to Lucky Bay; the other site, Port Neill, is located an approximately equal distance between Port Lincoln and Lucky Bay. This suggests Port Lincoln likely has a freight advantage over the majority of the Lower Eyre Peninsula, though this advantage appears to reduce the further north east a site is located.

Both Port Lincoln and Lucky Bay are located significantly closer to all 5 sites than Thevenard.

Table 4.2: Distances from Lower Eyre Peninsula upcountry sites to port (km)

Site and operator	Lucky Bay	Port Lincoln	Thevenard
Cummins (Viterra)	168	67	354
Edillilie (Viterra)	188	48	384
Kapinnie (Viterra)	195	95	329
Port Neill (Viterra)	94	87	415
Tumby Bay (Viterra)	130	50	393

Notes: Distances obtained using Google Maps.

Western Eyre Peninsula

The Western Eyre Peninsula is geographically the largest region of the Eyre Peninsula and, with 11 sites, had more upcountry facilities than the Lower and Eastern Eyre Peninsula combined during the 2020-21 season. Given the large geographic area distances to each port, freight advantages therefore differ depending on the exact location of grain. Specifically:

- Six sites are located closest to Thevenard, 3 to Lucky Bay and one to Port Lincoln.
- The sites advantaged to Thevenard are located in the northern parts of the Western Eyre Peninsula, most of which are located significantly closer to Thevenard than either Lucky Bay and Port Lincoln (for example, Nunjikompita and Poochera).

- Lucky Bay is slightly closer than Port Lincoln to the sites located towards the east of the Western Eyre Peninsula (Wudinna, Warramboos and Lock). Lucky Bay's likely freight advantages over Thevenard appears to increase materially the further south sites are located.
- Port Lincoln is located materially closer to Elliston than Lucky Bay and Thevenard.

The ACCC discusses the interaction of grain movements in the Western Eyre Peninsula further in Section 5.2 (Thevenard) subclause (5)(3)(i).

Table 4.3: Distances from Western Eyre Peninsula upcountry sites to port (km)

Site and operator	Lucky Bay	Port Lincoln	Thevenard
Elliston (Viterra)	223	170	238
Lock (T-Ports and Viterra)	132	147	281
Nunjikompita (Viterra)	342	370	69
Penong (Viterra)	479	477	76
Poochera (Viterra)	271	287	144
Streaky Bay (Viterra)	321	296	114
Warramboos (Viterra)	174	189	240
Wirrulla (Viterra)	318	333	97
Witera (Viterra)	282	256	172
Wudinna (Viterra)	200	215	213

Notes: Distances obtained using Google Maps.

ACCC view on Eyre Peninsula catchment areas

As discussed above the ACCC does not consider that catchment areas necessarily have fixed boundaries. Catchment areas can be relatively flexible at times, and are influenced by a range of factors, which themselves affect the profitability of a trade. The ACCC 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 the ACCC considers that transport costs (and therefore distance to port) remain materially relevant to the movement of grain. The ACCC therefore considers that catchment areas remain an important and relevant concept to the assessment of an exemption application under the Code.

The ACCC notes that atypical market conditions can result in large quantities of grain moving outside traditional catchment zones: 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 notes Viterra's view that the Eyre Peninsula should be considered as a single catchment area (at narrowest).²⁶⁴ The ACCC also notes T-Ports' view that its Lucky Bay facility primarily offers freight advantages to growers on the Eastern Eyre Peninsula,²⁶⁵ as well as SAFC's view that Lucky Bay is likely to change/restrict the catchment area of Viterra's Port Lincoln facility (in particular that Lucky Bay will represent significant competition for grain on the eastern side of the Eyre Peninsula).²⁶⁶

Tables 4.1 to 4.3 above suggest that grain grown on the:

- Lower Eyre Peninsula is likely freight advantaged to move to Viterra's Port Lincoln facility;
- Eastern Eyre Peninsula is likely freight advantaged to move to T-Ports' Lucky Bay facility; and
- Western Eyre Peninsula, based on freight advantages, has the potential to move to any one of the 3 Eyre Peninsula port terminals depending on its location.

Based on the above analysis and stakeholder views, the ACCC expects that port terminal facilities on the Eyre Peninsula will typically source grain from the regions set out below:

- **Lucky Bay:** Although only operational for a relatively limited time, it appears that Lucky Bay's catchment area is predominantly located on the Eastern Eyre Peninsula (an area traditionally advantaged to Port Lincoln), with the potential to compete for some grain in the Lower and Western Eyre Peninsula.
- **Port Lincoln:** Port Lincoln has traditionally sourced grain from the Lower and Eastern Eyre Peninsula, as well as some areas of the Western Eyre Peninsula. T-Ports' Lucky Bay facility seems likely to compete for grain with Port Lincoln on the Eastern Eyre Peninsula and certain areas in the Western Eyre Peninsula.
- **Thevenard:** Thevenard is the most remote facility and appears to source most of its grain from the northern area of the Western Eyre Peninsula.

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.*²⁶⁷

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:

²⁶⁴ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 3-4.

²⁶⁵ T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, pp. 3-4; T-Ports submission, 26 August 2018, p. 4.

²⁶⁶ SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 2.

²⁶⁷ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 32.

...[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.²⁶⁸

4.3.1 Containerised exports

Grain can be exported either in bulk or via containers, however the ACCC does not consider the containerised grain exports to be a perfect substitute for bulk grain exports.

As shown in Table 4.5 of the April Determinations,²⁶⁹ the vast majority (95%) of containerised grain in SA is exported from Port Adelaide. In total just 53,613 tonnes of grain were exported via containers on the Eyre Peninsula between the 2016-17 and 2019-20 seasons, representing 3% of SA's container exports in this period.²⁷⁰

As little to no grain is exported via containers from the Eyre Peninsula, the ACCC does not consider containerised exports to be a relevant competitive constraint to PTSPs on the Eyre Peninsula.

Containerised exports are discussed in more detail in the April Determinations.²⁷¹

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 April Determinations set out the ACCC's consideration of Australia's domestic markets, and domestic consumption in SA in detail.²⁷²

SA domestic consumption

In addition to the matters discussed in the April Determinations, 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.*²⁷³

Additionally, 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.*²⁷⁴

²⁶⁸ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 10.

²⁶⁹ ACCC, *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, p. 146.

²⁷⁰ Australian Crop Forecasters, *Export report*.

²⁷¹ ACCC, *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, pp. 146-149.

²⁷² *Ibid*, pp. 150-55.

²⁷³ GPSA, *Submission in response to Issues Paper*, 27 September 2019, pp. 3-4.

²⁷⁴ ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 43, fn. 136.

Furthermore, the ACCC notes that most of the grain grown on the Eyre Peninsula is exported (2.14 million tonnes of the 2.42 million tonnes grown²⁷⁵). This suggests only a small amount of grain grown on the Eyre Peninsula is supplied to the SA domestic market.

Consequently, the ACCC considers that the majority of domestic consumption in SA occurs within the east of the state.²⁷⁶ SA domestic consumption therefore likely presents very limited competition for grain grown on the Eyre Peninsula.

Interstate domestic consumption

As discussed in more detail in the April Determinations, domestic markets in other states have the potential to competitively constrain bulk export facilities in SA in certain circumstances.²⁷⁷

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.

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.

However the ACCC acknowledges that the recent east coast drought has likely had some effect in relation to establishing and/or reinforcing supply chains between SA and WA to the east coast (in particular NSW) markets.

The ACCC notes that 0.85 million tonnes of grain was transported via coastal shipments to the east coast via Eyre Peninsula port terminal facilities over the 2017-18 to 2019-20 drought-affected seasons (compared to 0.45 million tonnes of grain that was transported via coastal shipments to the east coast from the rest of SA). The ACCC notes that, consistent with the increase in production in NSW,²⁷⁸ there were no coastal shipments from SA to the east coast in the 2020-21 season.

This suggests that grain on the Eyre Peninsula is more likely to move via coastal shipments in response to poor growing conditions in eastern Australia than via inland road and rail (compared to eastern SA).²⁷⁹

4.3.3 Competitive constraint faced by Viterra on the Eyre Peninsula

The ACCC acknowledges that Viterra's port terminal facilities can face competition from a range of different sources.

However, as discussed above, the ACCC considers that on the Eyre Peninsula Viterra faces limited competitive constraint from domestic and container markets. Furthermore, the ACCC

²⁷⁵ PTSP loading statements; ACF Shipping stem and market share report; PIRSA, Crop and pasture reports – final summary and estimates, 2012-13 to 2019-20. Figures taken between the 2012-13 and 2019-20 season where both Eyre Peninsula production and shipment figures are available.

²⁷⁶ 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.

²⁷⁷ ACCC, *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, 152-55.

²⁷⁸ NSW produced 19.4 million tonnes of grain in 2020-21 (compared to average production of 5.1 million tonnes over the period 2017-18 to 2019-20).

²⁷⁹ The ACCC does not receive data for overland movements of grain.

considers Viterra faces little to no competition from markets in eastern SA under normal market conditions (see Section 4.2.2).²⁸⁰

The ACCC understands that the domestic market is limited on the Eyre Peninsula (as discussed in Section 4.3.2). In particular, ESCOSA, in its 2018 inquiry, contended the Eyre Peninsula has a limited domestic market and is largely reliant on the export market.²⁸¹ Further, the ACCC notes that GPSA submitted that the Eyre Peninsula is largely confined to the export market.²⁸²

Domestic consumption data is not presented in Table 4.4 as the ACCC is not aware of any data regarding domestic consumption on the Eyre Peninsula.

Table 4.4 shows bulk grain shipments (by Viterra and T-Ports)²⁸³ and container exports as a proportion of the Eyre Peninsula's grain production by season from 2016-17 to the end of the 2020-21 peak shipping period (i.e. till 31 May 2021). The table shows that grain grown on the Eyre Peninsula is heavily reliant on access to the bulk export market: 88% of grain on the Eyre Peninsula was shipped in bulk over the period 2016-17 to 2019-20.²⁸⁴ The ACCC notes that T-Ports entered the bulk export market in March 2020; since that time T-Ports' Lucky Bay facility has performed 13% of bulk shipments on the Eyre Peninsula.

Table 4.4 also shows that the container export market presents little to no competition to the bulk export market, with just 0.6% of grain on the Eyre Peninsula being exported via container over 2016-17 to 2019-20.

The percentage figures in Table 4.4 do not add up to 100% for each shipping season as: the domestic consumption figures have not been included; grain may be moved to, or from, the Eyre Peninsula to interstate or other SA markets; and grain may also be put in storage from one season to the next. In addition, the 2020-21 export percentages presented in the table do not represent the total (or expected) portion of production which has been exported, rather they represent the portion of production which has been exported up to 31 May 2021. This is because 2020-21 production estimates represent the entirety of the Eyre Peninsula's harvest, while 2020-21 bulk shipment data is up to 31 May 2021. For the purposes of comparison, bulk shipments completed up to 31 May over the 2016-17 to 2019-20 seasons represented 64% of production on average.

²⁸⁰ As set out in Section 4.2.2 the ACCC considers that only minimal quantities of grain are likely to be transported to or from the Eyre Peninsula.

²⁸¹ ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 43, fn. 136.

²⁸² GPSA, *Submission in response to Issues Paper*, 27 September 2019, pp. 3-4.

²⁸³ Coastal shipments are included in shipping figures in Table 4.4.

²⁸⁴ Over the 2012-13 to 2019-20 period (i.e. the full dataset available for both Eyre Peninsula production and export figures) 88% of grain on the Eyre Peninsula was exported in bulk. This assumes grain is not moved into or out of the Eyre Peninsula (see Section 4.2.2).

Table 4.4: Eyre Peninsula grain usage, 2016-17 to 31 May 2020-21

	2016-17	2017-18	2018-19	2019-20	2020-21*	Average (16-17 to 19-20)
Total production (mt)	3.45	1.70	2.17	2.06	2.27	2.35
Bulk shipments – Viterra	85%	102%	83%	82%	67%	88%
Bulk shipments – T-Ports**	-	-	-	6%	11%	3%
Container exports	0.1%	0.3%	0.9%	1.3%	N/A	0.6%

Source: PIRSA, Crop and pasture reports – final summary and estimates, 2012-13 to 2020-21; PTSP loading statements; ACF Shipping Stem and Market Share Reports; and ACF, Export Reports.

Notes: * Bulk shipment data up to 31 May 2021. Production figure is an estimate of the entire season's harvest.

** T-Ports began operations in March 2020.

Percentages do not add up to 100% as grain may be: sent to the domestic market; transferred interstate or to/from eastern SA; and/or kept in storage for subsequent seasons.

Averages are recorded over the 2016-17 to 2019-20 period and so bulk shipment averages in Table 4.4 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 Port Lincoln and Thevenard 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, one or both of its port terminal facilities on the Eyre Peninsula 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 ACCC's exemption assessment of Viterra's Port Lincoln facility

(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 Lincoln as they are for Viterra's other port terminal facilities.

The ACCC discusses its views on these matters in detail in Section 5.1 (IHB) subclause (a) of the April Determinations. A brief summary of these views is also provided below.

Matters which relate specifically to Viterra's Port Lincoln facility are set out below.

Viterra's response to the April Determinations

In its 7 May 2021 letter to the ACCC Viterra submitted that the ACCC should give appropriate weight to Viterra's legitimate business interests, including the long-term investment Viterra has made in the SA grain industry and the importance of effective and efficient supply chains. Specifically, Viterra submitted:

It is also important that the ACCC gives appropriate weight to the legitimate business interests of Viterra. The ACCC should take into account the long-term investment that Viterra has made in the South Australian grain industry and the importance of an effective and efficient supply chain connecting growers with international customers. It is critical for the industry that Viterra continues

*to invest in South Australia and that this investment is sustainable for Viterra. The legitimate business interests of Viterra and the success of growers are intrinsically linked.*²⁸⁵

Viterra also submitted that the ACCC's decision to not exempt Port Giles and Wallaroo, as well as deferring the decisions on Thevenard and Port Lincoln, has added significantly to the likely costs of regulation:

*While Viterra acknowledges the ACCC's decision to exempt the Port Adelaide port terminals, the ACCC's decision not to exempt Wallaroo and Port Giles and to defer its decisions on Thevenard and Port Lincoln has significantly added to the uncertainty, complexity – and therefore likely cost of regulation – at Viterra's port terminals in South Australia.*²⁸⁶ ...

*As set out above, the ACCC's decision not to exempt Wallaroo and Port Giles is likely to add further uncertainty and complexity for Viterra and its exporter customers. [c-i-c] Viterra considers that it is critical that the ACCC takes into account the additional costs likely to arise from this increased complexity when making its decisions concerning Port Lincoln and Thevenard. The legitimate interests of all stakeholders – Viterra, exporters and growers – are best served if Viterra is able to reduce complexity and uncertainty, and undertake further investment in the operational efficiency of the South Australian export supply chain.*²⁸⁷

ACCC view regarding Viterra's legitimate business interests

As set out in the April Determinations,²⁸⁸ the ACCC considers the removal of unnecessary regulatory obligations and costs to be in a PTSP's legitimate business interests.

Specifically, the ACCC recognises that the Code imposes both indirect and direct costs on regulated businesses, and that non-exempt PTSPs likely face a higher level of compliance costs than exempt PTSPs. The ACCC considers that an exemption would increase Viterra's operational flexibility.

In particular, in a competitive environment, the increased flexibility which would result from an exemption would be 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.

The ACCC also acknowledges that securing variations to an existing capacity allocation system is unlikely to provide a non-exempt PTSP with the same level of flexibility as an exemption. Variations to a non-exempt PTSP's capacity allocation system are unlikely to be able to resolve all inflexibilities imposed by Parts 3 to 6 of the Code. Seeking approval for changes to a capacity allocation system may also impose additional direct costs on a non-exempt PTSP.

This notwithstanding, and while an exemption is expected to always be in Viterra's interests, in the absence of sufficient competitive constraints an exemption may be detrimental to users of Viterra's facilities, in particular in relation to their ability to obtain fair and transparent access.

²⁸⁵ Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021, p. 4.

²⁸⁶ *Ibid*, p. 1.

²⁸⁷ *Ibid*, pp. 4-5.

²⁸⁸ ACCC, *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, pp. 164-166.

As set out in the April Determinations,²⁸⁹ 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.²⁹⁰

As set out in the April Determinations, the ACCC considers that 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 under the existing regulatory arrangements.²⁹¹ The ACCC also notes that Viterra is able to apply to the ACCC to vary the capacity allocation system in its PLPs (and that any changes to these arrangements must be initiated by Viterra). The ACCC notes that the last time Viterra's protocols were changed was in 2015, and that this involved substantial and fundamental changes to an existing system which elicited strong and divergent views from industry. The ACCC does not expect that future applications to vary the capacity allocation system would necessarily be as substantial and contentious.²⁹²

In relation to Port Lincoln, the ACCC considers that the facility likely faces a material level of competitive constraint from T-Ports' Lucky Bay facility in certain regions of its catchment area. However the constraint imposed in other regions is likely limited, in particular most of the Lower Eyre Peninsula. The ACCC notes that Lucky Bay has not yet operated in the market for a complete shipping year and the level of competitive constraint it imposes upon Viterra's Port Lincoln (and Thevenard) facility has the potential to change in future seasons. The ACCC also notes Viterra's Port Lincoln (and Thevenard) facility is subject to very limited competitive constraint from the domestic and container markets (as discussed below in more detail in relation to subclauses 5(3)(b) and 5(3)(g) of the Code).

As such, the ACCC's view is that an exemption in respect of Viterra's Port Lincoln (and Thevenard) facility is in the legitimate business interests of Viterra. However, the ACCC notes that Viterra's legitimate business interests must also be balanced against the other criteria under subclause 5(3) of the Code.²⁹³

The ACCC has carefully weighed Viterra's legitimate business interests against the other subclause 5(3) criteria. The ACCC's decision not to exempt Viterra in relation to Port Lincoln reflects its view that, although Viterra's legitimate business interests favour exemption, the other interests and factors which the ACCC is required to consider, which are outlined below (including the interests of exporters and the public interest) have led it to conclude that, at

²⁸⁹ ACCC, *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, pp. 165-166.

²⁹⁰ The ACCC notes the matters in subclause 5(3) of the Code are interrelated and 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 precludes their individual consideration (see Section 5.1 subclause (a) of the April Determinations for further discussion).

²⁹¹ ACCC, *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, p. 163.

²⁹² Viterra's 2015 application proposed to replace an annual auction system 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, industry held strong and divergent views on the specifics of Viterra's proposal, adding further complexity to the process. 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 (see Section 5.1 IHB subclause (a) of the April Determinations for further details).

²⁹³ ACCC, *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, pp. 165-166.

this time, Parts 3 to 6 of the Code should continue to apply to Viterra's Port Lincoln facility to meet the Code's purpose of fair and transparent access to port terminal services.

(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

In its 7 May 2021 letter to the ACCC Viterra submitted that it is dedicated to connecting SA grain growers to domestic and overseas end use consumers.²⁹⁴ Viterra also submitted that it makes a significant contribution to SA's economic success and that the ACCC should ascribe greater weight to the broader public and industry interests in the efficiency within, and continued investment in the SA grain supply chain.²⁹⁵

²⁹⁴ Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021, p. 3.

²⁹⁵ *Ibid*, pp. 3-4.

The ACCC's view on the competitiveness of SA's bulk grain exports and the impact the international market has on Viterra's facilities is discussed in detail in Section 5.1 (IHB) subclauses (b) and (g) of the April Determinations.

The ACCC's view is that, in the absence of sufficient competitive constraint, an exemption is unlikely to assist in improving SA's position in international bulk grain markets, when considering all industry participants.

In regards to the broader public interest the ACCC notes that in its 7 May 2021 letter to the ACCC Viterra submitted that it is critical for industry (and the broader public interest) that Viterra's investment in SA continue and noted that Viterra's business interests are linked to the success of growers. Specifically, Viterra submitted:

Viterra has made significant investments in the Port Lincoln and Thevenard port terminals, and in Eyre Peninsula infrastructure more generally. Between 2015-2019 on [the] Eyre Peninsula, Viterra has spent approximately \$80 million on capital expenditure and infrastructure and has annually employed 182 full time equivalent positions. Between 2011-2019, through its economic activity, Viterra has contributed \$370 million to the Port Lincoln, Lower Eyre Peninsula and Ceduna council areas alone.

...

It is also important that the ACCC gives appropriate weight to the legitimate business interests of Viterra. The ACCC should take into account the long-term investment that Viterra has made in the South Australian grain industry and the importance of an effective and efficient supply chain connecting growers with international customers. It is critical for the industry that Viterra continues to invest in South Australia and that this investment is sustainable for Viterra. The legitimate business interests of Viterra and the success of growers are intrinsically linked.

In this regard, it is a significant concern for Viterra that – based on the ACCC's decision concerning Outer Harbor, Inner Harbour, Port Giles and Wallaroo – the ACCC appears to view Viterra's substantial investments in infrastructure, transportation assets, efficiency and other improvements as potential sources of concern or as evidence of a lack of competition, rather than as evidence of the significant competitive and public benefits that Viterra brings to the South Australian industry. Viterra submits that, in its decision concerning Port Lincoln and Thevenard, the ACCC should give significantly greater weight to these public benefits that will be further increased if those port terminals are exempted from the operation of Parts 3-6 of the Code.²⁹⁶

The ACCC acknowledges the potential public benefit associated with the efficient operation of, and investment in, substantial infrastructure assets such as Viterra's Port Lincoln (and Thevenard) facilities. As discussed in relation to subclauses 5(3)(e) and (f), the ACCC considers that efficient investment decisions can generally be expected to occur across the industry in circumstances where adequate competition is present, or where there is sufficient regulatory intervention to ameliorate the absence of competition.

In the context of the public interest in having competition in markets, the ACCC expects that the public benefit associated with the efficient operation and investment in port terminal facilities across an industry will be maximised when there are sufficient competitive constraints, or appropriate regulatory controls (in the absence of competition).

Competition in bulk wheat export operations

Viterra's Port Lincoln facility is one of 3 port terminal facilities currently in operation on the Eyre Peninsula. On average Port Lincoln ships 1.86 million tonnes of grain per season, which accounts for 84% of all bulk grain shipments on the Eyre Peninsula.²⁹⁷ Viterra's other Eyre Peninsula facility, Thevenard, ships 0.31 million tonnes of grain on average per season.

²⁹⁶ Ibid, p. 4.

²⁹⁷ From the beginning of the 2011-12 season to 31 May 2021.

The third facility on the Eyre Peninsula, Lucky Bay, is operated by T-Ports. Operations at Lucky Bay commenced in March 2020. Since this time T-Ports has completed 20 shipments, totalling 0.36 million tonnes of grain (which accounts for 13% of Eyre Peninsula bulk shipments in this period)²⁹⁸ for 2 different exporters (ADM and Louis Dreyfus).²⁹⁹ Furthermore, T-Ports loaded 0.24 million tonnes of this grain in the 2020-21 peak period (or 15% of the Eyre Peninsula's peak period exports in the 2020-21 season).³⁰⁰

In response to the view expressed by the ACCC in the Draft Determinations that Viterra does not face sufficient competitive constraint at Port Lincoln, Viterra submitted that:

There is strong evidence that Viterra's Port Lincoln facility is subject to competition in both a global and regional context and, as recognised by ESCOSA, there is simply no evidence that Viterra has exercised any market power that it may have—including in regard to Port Lincoln or upcountry storage facilities on the Eyre Peninsula—to the detriment of other market participants.

Viterra has provided significant information to the ACCC which shows that:

- *Viterra as a price taker in global grain markets is incentivised to operate an efficient supply chain, the benefits of which it has passed through to other market participants;*
- *Viterra's Port Lincoln and Thevenard facilities are constrained by competition within South Australia and, more locally, on the Eyre Peninsula and are constrained by the credible threat of new entry given planned developments and low barriers to entry; and*
- *Viterra's upcountry storage facilities within South Australia and, more locally, on the Eyre Peninsula are subject to competition and the credible threat of new entry given the low barriers to entry.*

*A decision to exempt Port Lincoln in circumstances where a PTSP has established a significant competitive operation within 177 km is consistent with the ACCC's view of competition between port terminals on the East Coast of Australia, in particular as between the Port of Newcastle and Port Botany. It is also consistent with its previous decisions to exempt port terminals as soon as a competitor who commenced operations in the same region was granted an exemption.*³⁰¹

The ACCC's view is that Viterra's Port Lincoln facility does not face sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code at this time.

The ACCC's view is based on the analysis of the port terminal services markets in Chapter 3, as well as the consideration of upcountry and related markets in Chapter 4. These indicate the following:

Port Lincoln and Lucky Bay's catchment areas appear to overlap in certain regions

Port Lincoln has traditionally sourced grain from the Lower and Eastern Eyre Peninsula, as well as some areas of the Western Eyre Peninsula to a lesser extent. As discussed in Section 4.2, it appears T-Ports' Lucky Bay facility primarily competes for grain with Port Lincoln on the Eastern Eyre Peninsula, and to a lesser extent on the Lower and Western Eyre Peninsula. The shorter distances to port appear to offer T-Ports' Lucky Bay facility a freight advantage in these regions.

The ACCC notes that in response to the Draft Determinations Viterra submitted a range of general views in relation to SA grain catchment areas (see Section 4.2 of the April Determinations for further details). In relation to the ACCC's views on the catchment area for

²⁹⁸ Figures are as of 31 May 2021. T-Ports have loaded a further 48,000 tonnes of grain at Lucky Bay in June 2021, and have 27,500 tonnes scheduled to be loaded in August 2021.

²⁹⁹ For comparison Port Lincoln and Thevenard have facilitated grain from 8 and 4 different exporters since March 2020 respectively.

³⁰⁰ Port Lincoln and Thevenard loaded 1.25 and 0.15 million tonnes of grain respectively in the 2020-21 peak period. This accounts for 76% and 9% of all grain loaded on the Eyre Peninsula in this period.

³⁰¹ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 44.

Port Lincoln specifically, Viterra submitted that Eyre Peninsula ports compete for grain across the entirety of the Eyre Peninsula,³⁰² and that accordingly Viterra competes with Lucky Bay in relation to all grain produced on the Eyre Peninsula.³⁰³

Specifically, Viterra submitted that the fact there may be some freight advantages to a particular port on the Eyre Peninsula does not mean that other ports do not compete for that grain (see Section 4.2 for further details).³⁰⁴

The ACCC acknowledges that distance is not the only factor in determining which port terminal facility grain will move to, and that grain can, and will, move to more distant port terminal facilities for a variety of reasons (see Section 4.2.1 for further details). However, the ACCC considers the distance grain is located from a port terminal facility to be an important determinant when deciding which port terminal facility grain will be exported from (see Section 4.2.1).

As such, the ACCC considers that Viterra's Port Lincoln facility will likely have an advantage in sourcing grain located closer to the facility, in particular grain located on the Lower Eyre Peninsula. Furthermore, the ACCC considers that Lucky Bay likely holds freight advantages for grain located on the Eastern Eyre Peninsula (i.e. as it is closer to that facility), which therefore provides T-Ports with a competitive advantage for grain grown in that region.

Port Lincoln's infrastructure

The ACCC considers that Viterra's Port Lincoln facility has several advantages in terms of its infrastructure over T-Ports' Lucky Bay facility:

- **Receival facilities:** Port Lincoln is able to receive grain via road services at a substantially higher rate than Lucky Bay (4,000 tonnes per hour compared to 1,000 tonnes per hour).³⁰⁵
- **Ship loading rates:** Port Lincoln is able to load grain onto vessels quicker than Lucky Bay. Specifically Port Lincoln can load grain at 3,000 tonnes per hour, while Lucky Bay loads grain at 1,500 tonnes per hour onto its transshipment vessel and at 1,200 tonnes per hour from the transshipment vessel to the ocean going vessel. The ACCC notes that both Port Lincoln and Lucky Bay are able to fully load larger Panamax vessels (though only Port Lincoln is a fixed deep water facility).
- **At-port storage:** Both Port Lincoln and Lucky Bay have substantial at-port storage (395,600 tonnes and 384,000 tonnes respectively). However, while T-Ports has substantial at-or-near-port storage, most of this storage is located a short distance (2km) from its port terminal facility (only 24,000 tonnes of T-Ports' storage is directly connected to its port terminal infrastructure). In comparison, all of Port Lincoln's 395,600 tonnes of storage is located at port.

Lucky Bay imposes a level of competitive constraint on Port Lincoln

Given the above, the ACCC's view is that T-Ports' Lucky Bay facility will impose a level of competitive constraint upon Viterra's Port Lincoln facility. However the level of constraint imposed varies across regions: given the location of Lucky Bay the constraint will be strongest for grain grown in the Eastern Eyre Peninsula. Lucky Bay will also impose a level of competitive constraint on Viterra in the Lower and Western Eyre Peninsula, although this will be to a lesser extent.

³⁰² Ibid, p. 2.

³⁰³ Ibid, p. 48.

³⁰⁴ Ibid, pp. 47-48.

³⁰⁵ The ACCC notes that rail services have now ceased on the Eyre Peninsula, and Port Lincoln no longer receives grain via rail (see Section 4.1.2).

The ACCC notes that since T-Ports began operations at its Lucky Bay facility (in March 2020) it has completed 13% of all Eyre Peninsula bulk shipments, including 15% of 2020-21 peak period exports.³⁰⁶

As noted above T-Ports' Lucky Bay facility uses a transshipment vessel. This approach has not previously been used in the Australian bulk grain market and may be subject to operational constraints in practice (potentially limiting the competitive constraint imposed by the facility).³⁰⁷ Lucky Bay also appears to be heavily reliant on grower direct-to-port deliveries and does not appear to have established a large number of commercial arrangements with third party exporters to date. While the ACCC acknowledges that T-Ports' direct-to-port arrangements have the potential to provide a level of competitive advantage, the ACCC notes that Viterra currently owns the vast majority of upcountry storage sites on the Eyre Peninsula, and that T-Ports' Lucky Bay operation remains relatively unproven at this time (having not yet operated for a complete shipping year).

As such the ACCC considers that Viterra's Port Lincoln facility likely faces a material level of competitive constraint from Lucky Bay in certain regions of its catchment area. However the constraint imposed in other regions is likely limited, in particular most of the Lower Eyre Peninsula. The ACCC will continue to closely monitor existing (and proposed) port terminal facilities on the Eyre Peninsula (and in SA more broadly).

Port Lincoln will likely experience capacity constraints

As discussed in Section 3.2.3, Port Lincoln has likely experienced capacity constraints in several seasons during the peak period. However the ACCC considers it reasonable to expect that T-Ports' Lucky Bay facility will draw grain away from Port Lincoln. To the extent this occurs it is likely to alleviate capacity constraints at Port Lincoln to some degree (although the extent to which this will occur remains somewhat uncertain at this time). The ACCC generally considers that the presence of spare capacity and/or alternate PTSPs (as well as container and domestic markets) has the potential to provide incentives for a vertically integrated PTSP to provide fair and transparent access to third party exporters. Exporters' ability to access capacity is discussed further in relation to subclauses 5(3)(c) and (d).

Proposed port terminal facilities

The ACCC notes that there are a number of proposals to construct additional port terminal facilities on the Eyre Peninsula. However these proposals generally have a number of barriers to overcome before entering the market and commencing operations. Nonetheless the ACCC considers that the threat of entry of new facilities on the Eyre Peninsula, if sufficiently credible, may impose some level of competitive constraint on Port Lincoln.³⁰⁸

Additionally, T-Ports' decision to use the same transshipment vessel (the Lucky Eyre) at its proposed Wallaroo facility may have implications on the level of competitive constraint Lucky Bay can impose on Port Lincoln.³⁰⁹ The ACCC's findings on proposed port terminals are discussed in more detail in Section 3.1.5, as well as its views relating to subclauses 5(3)(e) and (f) below.

³⁰⁶ T-Ports loaded 119,000 tonnes of grain in the 2019-20 season (after beginning in March 2020). As of 31 May 2021 T-Ports has loaded 240,000 tonnes in the 2020-21 season (T-Ports has since loaded a further 48,000 tonnes of grain in June 2021, and has 27,500 tonnes scheduled to be loaded in August).

³⁰⁷ For example, the PLPs for T-Ports' Lucky Bay facility appear to suggest that certain weather conditions may limit loading operations.

³⁰⁸ The ACCC notes that, if these facilities were to become operational, it appears likely they would compete for the same grain as Viterra's Port Lincoln facility.

³⁰⁹ See: Section 5.2 (Thevenard) subclauses (b) and (g).

Exemption of T-Ports' Lucky Bay facility

The ACCC notes that, in response to the Draft Determinations, CRA stated that it considers it unclear why market conditions at Lucky Bay warrant an exemption, but those at Port Lincoln do not. Specifically CRA stated:

T-Ports was granted exemption for its Lucky Bay terminal on the Eyre Peninsula in April 2020. In support of its decision to grant exemption, the ACCC noted that the "T-Ports' facility will face a significant level of competitive constraint (mainly from Viterra's Port Lincoln port terminal facility)" and "T-Ports' facility should promote competition in the Eyre Peninsula market for bulk wheat export port terminal services (and related markets) which was previously serviced by a monopoly service provider." However, in its Final Position document, the ACCC notes that the T-Ports terminal would have up to a \$15-20/tonne 'domestic haulage' advantage over other ports. It would also have a freight cost advantage over virtually all growing areas in Eastern Eyre and, in most of Eastern Eyre, its freight cost advantage is at least \$5/tonne. This appears to imply that the T-Ports terminal is in a similar position to Viterra's Port Lincoln terminal, in that they both have a freight cost advantage over a large growing area.

Given this finding, it is unclear why the market situations of Lucky Bay and Port Lincoln differ so much that Lucky Bay merits exemption while Port Lincoln does not. Port Lincoln is larger and more well established, and Viterra has an exporter that is an 'associated entity', while T-Ports does not (although it is unclear why the ACCC is unconcerned that T-Ports may come to an arrangement or understanding with an exporter to provide that exporter with exclusive, or preferential, access to Lucky Bay, in return for sufficient compensation). However, it is still the case that, to the extent that Port Lincoln purportedly might be viewed as unconstrained by competition, so is Lucky Bay.³¹⁰

...

This inconsistent treatment of Port Lincoln and Lucky Bay by the ACCC does not appear to be justified by the available facts. The benefits of exemption for Port Lincoln are at least as compelling as the benefits for Lucky Bay.³¹¹

The ACCC notes the above comments by CRA, however the ACCC does not consider T-Ports' Lucky Bay facility imposes as significant a level of competitive constraint on Port Lincoln, as Port Lincoln imposes on Lucky Bay.

The ACCC acknowledges CRA's comments that T-Ports will have freight advantages for grain grown on the Eastern Eyre Peninsula. However, as above, Viterra's Port Lincoln facility has more efficient infrastructure than Lucky Bay (in particular as T-Port's transshipment operation requires the double handling of grain) and has a significantly higher estimated annual capacity (2.71 million tonnes compared to 0.60 million tonnes). Therefore, the ACCC considers Port Lincoln is likely able to load grain more efficiently (and load higher amounts of grain) than Lucky Bay. Consequently, the ACCC considers the competitive constraint imposed by Port Lincoln on Lucky Bay to be greater than the competitive constraint imposed by Lucky Bay on Port Lincoln.

Furthermore, Port Lincoln's more efficient infrastructure will mitigate (and potentially exceed) freight advantages T-Ports' Lucky Bay facility has for grain in certain regions. Relatedly, and as explained above, the ACCC recognises that T-Ports' Lucky Bay facility likely imposes a material level of competitive constraint on Port Lincoln in certain regions of its catchment area. However the constraint imposed in other regions is likely limited, in particular most of the Lower Eyre Peninsula. In addition Lucky Bay has not yet operated for a complete shipping year and the level of competitive constraint it imposes has the potential to change in future seasons. As such, the ACCC at this time does not consider the constraint imposed

³¹⁰ CRA, *Submission in response to Draft Determinations*, 18 December 2020, pp. 7-8.

³¹¹ *Ibid*, pp. 8-9.

is sufficient to support exempting Viterra from Parts 3 to 6 of the Code in relation to Port Lincoln.

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 wheat port terminal services.

Storage markets

As discussed above and in Section 4.2 the ACCC considers Port Lincoln's catchment area likely encompasses the Lower and Eastern Eyre Peninsula, as well as some areas of the Western Eyre Peninsula.

Viterra owns the majority of storage in this catchment area and on the Eyre Peninsula in general. Specifically, Viterra operated 21 upcountry storage sites (of a total 22 sites) on the Eyre Peninsula in the 2020-21 season.³¹² T-Ports operates the only other upcountry storage site on the Eyre Peninsula. This facility is located at Lock (located near the centre of the Eyre Peninsula) and has 158,000 tonnes of capacity.

Storage can also be located on-farm and at-port. Specifically, the ACCC notes that T-Ports has a substantial amount of storage located at port, and submitted that its Lucky Bay port terminal facility will largely rely on growers delivering grain direct to its port terminal facility.³¹³

Specifically, T-Ports operates 384,000 tonnes of storage at Lucky Bay, with 360,000 tonnes of this storage located in bunkers 2km from T-Ports' Lucky Bay port terminal facility (see Section 3.1.3) and the remaining 24,000 tonnes located directly at-port. This is comparable to Viterra's total (at and near port) storage at Port Lincoln (395,600 tonnes) and Thevenard (335,925 tonnes), though Port Lincoln and Thevenard both have significantly more storage directly connected to ship loading facilities (395,600 and 172,000 tonnes respectively).

In regards to on-farm storage, the ACCC understands this is relatively limited on the Eyre Peninsula (see Section 4.1.1).³¹⁴ While the limited availability of on-farm storage could restrict the ability of growers to deliver grain directly to Lucky Bay (potentially limiting throughput at the facility), T-Ports' use of a grower direct delivery model may also serve to provide incentives for growers to invest in more on-farm storage, potentially increasing the amount of grain able to move to its Lucky Bay facility.³¹⁵

The ACCC also notes that given Viterra has significant at-port storage at both its Port Lincoln and Thevenard facilities, this could also enable Viterra to compete for grain directly from farm (should, for example, on-farm storage increase as a result of T-Ports' Lucky Bay facility).

³¹² Down from 25 Viterra-operated sites during the 2019-20 season.

³¹³ T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, pp. 3 and 6.

³¹⁴ See ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, pp. 24-25.

³¹⁵ T-Ports submitted on page 6 of its exemption application that: "*The proximity of [Lucky Bay] to the growing areas enables [on-farm storage] to be viable. This service completes the link of providing competition in provision of services in the entire length of the supply chain for a significant portion of eastern [Eyre Peninsula] growers.*"

T-Ports in total has 542,000 tonnes of storage on the Eyre Peninsula, which as submitted by Viterra, accounts for 23% of production.³¹⁶ In comparison, Viterra operated a total of [c-i-c] tonnes of storage on the Eyre Peninsula (which accounts for [c-i-c] of storage on the Eyre Peninsula). However, as submitted by Viterra, upcountry facilities are characterised by low barriers to entry.³¹⁷

Furthermore, the ACCC notes that T-Ports has previously submitted that the vast majority of deliveries to Viterra upcountry sites typically move to Port Lincoln:

[Lucky Bay's] catchment zone area is estimated to include the entire Eastern Eyre region where the cost of transporting grain from farm to Lucky Bay would be notably less than transporting to Port Lincoln (Noting that the vast majority est. 95% of any deliveries to Viterra up-country sites will ultimately be moved to Port Lincoln (at grower cost)).³¹⁸

The ACCC however, notes in response to the Draft Determinations Viterra submitted:

...Viterra provides, and has always provided, open access to its upcountry facilities. Viterra's business is based on providing access and its pricing reflects the competitive nature of the market in which it operates.³¹⁹

Given that Viterra owns the vast majority of storage on the Eyre Peninsula, and that the current level of on-farm storage appears to be limited, the ACCC considers 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.

Domestic markets

The ACCC considers that PTSPs may be competitively constrained by the domestic market. As discussed in detail in the April Final Determinations, grain typically moves to the export market once opportunities in the domestic market have been met.³²⁰ 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).³²¹

Furthermore, as discussed in Section 4.3.2, the ACCC understands that SA's domestic consumption is largely located within the east of the state. Grain grown on the Eyre Peninsula is also heavily reliant on access to the bulk export market.³²² Domestic consumption in SA is therefore likely to place only a very limited constraint on Viterra's Port Lincoln facility.

Domestic markets in other states have the potential to competitively constrain port terminal facilities in SA in certain circumstances, such as in recent drought-affected seasons. However, the ACCC understands that grain grown on the Eyre Peninsula largely moved to the east coast via coastal shipments in response to the drought conditions (see Section

³¹⁶ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 51.

³¹⁷ Ibid.

³¹⁸ T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, p. 3.

³¹⁹ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 51.

³²⁰ See: ACCC, *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, Section 5.1 (IHB) subclauses (b) and (g), pp. 180-181.

³²¹ ACCC, *Bulk grain ports monitoring report 2019-20*, March 2021, Appendix 1 – supplementary spreadsheet – tables and charts.

³²² On average, 2.42 million tonnes of grain is produced on the Eyre Peninsula, while 2.14 million tonnes is exported through Port Lincoln, Thevenard and Lucky Bay (figures over the 2012-13 to 2019-20 seasons).

4.2.2). Demand for port terminal capacity is unlikely to be reduced by interstate domestic demand in these circumstances.

Container markets

The ACCC considers the container market can impose a competitive constraint on PTSPs. However, the SA container market is predominantly located at Port Adelaide (95% of all container exports are from Port Adelaide) and it appears highly unlikely that grain will move from the Eyre Peninsula to Port Adelaide (due to the significant distances involved). As such the ACCC's view is that SA's containerised export market is not a relevant competitive constraint when considering Viterra's Port Lincoln facility.

Conclusion

Given the limited access to container and domestic markets, grain grown on the Eyre Peninsula is largely reliant on access to bulk export markets. As such the ACCC considers that T-Ports' Lucky Bay facility likely provides the only sizeable and direct competitive constraint on the Eyre Peninsula to Viterra's Port Lincoln facility.

The ACCC considers that Viterra's Port Lincoln facility likely faces a material level of competitive constraint from T-Ports' Lucky Bay facility in certain regions of its catchment area. However the constraint imposed in other regions is likely limited, in particular most of the Lower Eyre Peninsula.

At this time the ACCC considers that Viterra's Port Lincoln facility faces 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. At this time an exemption is also unlikely to promote competition in upstream and downstream markets.

The ACCC will continue to closely monitor existing (and proposed) port terminal facilities on the Eyre Peninsula (and in SA more broadly). The ACCC notes the potential for additional competitive constraint to be imposed on Viterra's Eyre Peninsula facilities in future seasons.

(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 which may require access to port terminal services are the same in relation to Port Lincoln as they are in relation to Viterra's IHB facility.

The ACCC's views on these matters are set out in Section 5.1 (IHB) subclause (c) of the April Determinations.

To the extent the ACCC has views on these matters that specifically relate to Viterra's Port Lincoln facility, these are set out below.

Given its view that Lucky Bay does not impose sufficient competitive constraint on Port Lincoln, and the potential for peak period capacity constraints, the ACCC considers that if an exemption from Parts 3 to 6 of the Code were granted to Viterra in relation to its Port Lincoln facility this would likely be detrimental to the interests of exporters who may require access to Viterra's Port Lincoln facility.

Subclauses 5(3)(b), (g) and (d), set out the ACCC's views regarding the level of competitive constraint and capacity constraints at Viterra's Port Lincoln facility.

(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.

Section 5.1 (IHB) subclause (d) of the April Determinations sets out the ACCC's views on the likelihood that exporters will have access to fair and transparent access to port terminal services. ACCC views specifically relating to Viterra's Port Lincoln facility are set out below.

Port Lincoln may experience peak period capacity constraints

As per Section 3.2.3, the ACCC considers that Port Lincoln likely faces a material level of competitive constraint from Lucky Bay in certain regions of its catchment area. However the constraint imposed in other regions is likely limited. Port Lincoln may also experience capacity constraints during the peak period, particularly during high output seasons.

In relation to concerns expressed specifically in relation to the ACCC's views in the Draft Determinations on capacity utilisation at Port Lincoln, the ACCC notes that Viterra submitted:³²³

Viterra does not consider Port Lincoln to be capacity constrained and this finding seems to contradict the ACCC's own statement that Port Lincoln has an average annual capacity utilisation rate of 82%. Viterra notes that the ACCC also states that, if drought affected years were excluded, this would increase to 85%. Viterra considers this to be a poor indicator of Port Lincoln's capacity utilisation, as the bumper crop 2016-17 harvest is also an atypical production year and yet is included in the ACCC's assessment. Viterra considers that a comparison of maximum practical capacity with forecast production on the Eyre Peninsula is a better reference point for determining whether Port Lincoln is likely to be capacity constrained moving forward.

The highest practical capacity at Port Lincoln is 2.55 mtpa, which is the amount of grain Viterra was able to ship from Port Lincoln in 2016-17. Annual throughput at Port Lincoln has been well below 2.55 million tonnes since the unusual bumper crop harvest of 2016-17 and it is unlikely that Viterra will be capacity constrained at Port Lincoln in the foreseeable future, given that its highest practical capacity is higher than forecast production on the Eyre Peninsula (the 2018 Eyre Peninsula Freight Study, commissioned by the SA Department of Planning, Transport and Infrastructure, forecasts annual production of 2.24 million tonnes for the next three years).

In addition, since 2016-17, the highest throughput months were [c-i-c]. This shows that the vast majority of months since 2016-17 (in fact, all but [c-i-c] in the past three seasons) fell short of the maximum monthly capacity of 212,500 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, shutdowns these would take place outside of peak periods).

Therefore, when taking the capacity at Lucky Bay into account, Port Lincoln 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 additional capacity has come onto the Eyre Peninsula (through T-Ports)

³²³ The ACCC notes that the capacity figure provided by Viterra in this extract of its submission appears to be erroneous. The ACCC notes that Viterra submitted its maximum capacity for the 2019-20 season as 2.66 million tonnes (see Table 1.1 of Viterra, *Response to Draft Determination*, Public version, 8 February 2021). Furthermore, the ACCC notes Viterra provided updated 2020-21 and 2021-22 capacity figures following its response to the Draft Determinations: this indicated Port Lincoln has capacity of 2.71 million tonnes (Viterra's 2020-21 and 2021-22 capacity figures exclusive of tolerance for Port Lincoln and Thevenard are available at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/exemption-application-issues-papers>). The ACCC notes the capacity figure of 2.71 million tonnes is consistent with the methodology Viterra has used to calculate the capacity of its other port terminals: as such the ACCC has used this capacity figure for the purposes of this assessment (see Section 3.1.4 for further details).

*such that, even in a rare bumper harvest going forward, Eyre Peninsula ports are unlikely to be capacity constrained.*³²⁴

The ACCC notes that Viterra's Port Lincoln facility has a stated capacity of 2.71 million tonnes per annum.³²⁵ As stated in relation to subclauses 5(3)(b) and (g) Port Lincoln has likely experienced peak period capacity constraints in several seasons since 2011-12, with an average annual and peak period capacity utilisation rate of 69% and 80% respectively.³²⁶ However the ACCC considers it reasonable to expect that the introduction of T-Ports' Lucky Bay facility will draw grain away from Port Lincoln (as well as Thevenard to a lesser extent). This is expected to reduce the potential for capacity constraints at Port Lincoln in future seasons, however the exact extent to which this will occur is uncertain at this time. This notwithstanding the ACCC, at this time, considers Port Lincoln is likely to experience peak period capacity constraints in high output seasons (as well as there also being the potential for capacity constraints during peak periods in more typical seasons).

The ACCC considers that the extent to which Port Lincoln will experience capacity constraints will be heavily influenced by the volume of grain that is facilitated through T-Ports' Lucky Bay facility. To the extent T-Ports' facility offers a credible (or preferable) alternative for exporting grain grown on the Eyre Peninsula the ACCC expects that Viterra's incentive (and ability) to favour certain exporters at its Port Lincoln facility will be reduced. This reflects: the likely reduction in capacity constraints at Port Lincoln as a result of grain moving to T-Ports' facility; and the constraint imposed by a competing facility. Consistent with the ACCC's views in relation to subclauses 5(3)(b) and (g) the ACCC does not consider the competitive constraint imposed by Lucky Bay sufficient to support an exemption from Parts 3 to 6 of the Code for Viterra's Port Lincoln facility at this time.

The ACCC notes that Viterra's associated entity exporter, Glencore, is the largest exporter (by volume) through its Port Lincoln facility, with a market share of 41% in the peak period, and 41% in the off-peak period. On average, 10 exporters per season secure access to Viterra's Port Lincoln's facilities; the largest third party exporters at Port Lincoln are CBH, Cargill, ADM and COFCO, which perform 15%, 10%, 7% and 6% of annual shipments respectively. As shown in Figure 3.4 historically third party exporters appear to have been able to access similar levels of capacity in both the peak and off-peak period at Port Lincoln.

In considering historical exporter market shares, the ACCC notes that Viterra's current PLPs provide that, combined across Viterra's 6 facilities, a minimum of 500,000 tonnes of capacity is reserved for short term capacity per quarter.³²⁷ In addition, no single exporter can apply for more than 40% of the initial long-term capacity in the first 6 months of the calendar year at Port Lincoln (or 50% at all other times).^{328 329} The ACCC notes that exporters' current and historical levels of access were likely influenced by these provisions under Viterra's PLPs

³²⁴ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 49-50.

³²⁵ See: Viterra, *Response to 11/6/21 information request – Port Lincoln and Thevenard published available capacity estimates*, 18 June 2021.

³²⁶ The ACCC notes annual capacity utilisation figures are taken over the 2011-12 to 2019-20 time period. However, peak capacity utilisation is taken over the 2011-12 to 2020-21 period; this is due to the ACCC having an extra peak season of data available (the peak period ends 31 May, see Section 1.7).

³²⁷ See clause 3.12(a), Viterra Port Loading Protocols, 24 December 2015, See: <https://www.viterra.com.au/dam/jcr:889d5770-cf9d-4af6-84e8-cca2d630ec25/Port%20loading%20protocols.pdf>, viewed 13 July 2021.

³²⁸ See clause 3.5(a) and definition of 'Initial Nomination Cap' in clause 1, Viterra Port Loading Protocols, 24 December 2015. See: <https://www.viterra.com.au/dam/jcr:889d5770-cf9d-4af6-84e8-cca2d630ec25/Port%20loading%20protocols.pdf>, viewed 13 July 2021.

³²⁹ The ACCC understands that Viterra has made all 2021-22 capacity available as short-term capacity only.

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.³³⁰

Given the above, the ACCC considers that third party exporters have been able to access a reasonable level of capacity at Port Lincoln, including during the peak period. However, while this has been the case historically, as set out 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 Port Lincoln.

The ACCC considers that Viterra likely faces a material level of competitive constraint from Lucky Bay in certain regions of Port Lincoln's catchment area (and a lesser level of constraint in other regions). However, the overall level of competitive constraint and the potentially high demand for services at Port Lincoln in the peak period (i.e. capacity constraints) means there is potential for Viterra to discriminate between different exporters (including its associated entity) in a way that is detrimental to competition in the absence of Parts 3 to 6 of the Code.

Size of port terminal facility

Section 5.1 (IHB) subclause (d) of the April Determinations 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.³³¹

Viterra's response to the April Determinations

In its 7 May 2021 letter to the ACCC Viterra submitted that there had been very little up-take of its 2021-22 capacity release to date:

We are already seeing a lack of demand for capacity at our port terminals for the 2021/22 shipping year.³³² ...

As we explained at our meeting, there has been very limited up-take by exporters of the capacity available at Viterra's port terminals.

- *Only 27% of the 8.6 million tonnes of capacity released by Viterra on 20 April 2021 has been booked;*
- *at Port Lincoln, less than 40% of the available capacity of 2.2 million tonnes released by Viterra has been booked, with exporters only taking up 874,000 tonnes. There are no bookings beyond the first half of April in 2022;*
- *Thevenard has no bookings...³³³*

Viterra further submitted that:

The recent release of capacity provides strong evidence that, if there was ever any need for regulation to enable access to capacity at Port Lincoln or Thevenard, that need no longer exists.³³⁴

The ACCC notes that as of 9 July 2021 Port Lincoln has 1.15 million tonnes of bookings, all of which is during the peak period (90% of peak period capacity and 47% of annual

³³⁰ CRA discuss a number of examples of capacity allocation practices Viterra could adopt in the case of exemption: CRA, *Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 11 November 2019, pp. 26-28. The ACCC discusses these in Section 5.1 (IHB) subclause (a) of the April Determinations.

³³¹ Viterra, *Response to Draft Determinations*, Public version, 8 February 2020, pp. 2-3.

³³² Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021, p. 1.

³³³ *Ibid*, p. 2.

³³⁴ *Ibid*, p. 3.

capacity).³³⁵ The ACCC discusses exporters' willingness to take on capacity further in Chapter 5 (Thevenard) subclause 5(3)(d).

Conclusion

While the ACCC acknowledges the potential for T-Ports' Lucky Bay facility to reduce capacity constraints at Port Lincoln, the ACCC considers Viterra's Port Lincoln facility will likely experience peak period capacity constraints in future high output seasons, and may also experience capacity constraints during the peak period in more typical seasons.

As discussed above in relation to subclauses 5(3)(b) and (g) the ACCC considers that Viterra's Port Lincoln facility likely faces a material level of competitive constraint from T-Ports' Lucky Bay facility in certain regions of its catchment area. However the constraint imposed in other regions is likely limited, in particular most of the Lower Eyre Peninsula, and the facility faces little to no constraint from container and domestic markets.

On balance, while the ACCC acknowledges there is the potential for T-Ports' Lucky Bay facility to impose a more significant level of competitive constraint on Viterra's Port Lincoln facility in future seasons, the ACCC's view at this time is that Port Lincoln is likely to experience capacity constraints during future seasons and the competitive constraint imposed by Lucky Bay (and other markets) is likely not sufficient by itself to provide Viterra an incentive to provide fair and transparent access to its Port Lincoln facility.

As such the ACCC's view is that exempting Viterra from Parts 3 to 6 of the Code in respect of its Port Lincoln facility at this time would likely 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.

Section 5.1 (IHB) subclauses (e) and (f) of the April Determinations sets out the ACCC's findings on 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's views relating to these matters which are specific to Viterra's Port Lincoln facility are set out below.

³³⁵ Viterra, 2021/22 Available Capacity Table, as at Friday 9 July 2021.

Promotion of the efficient operation and use of Viterra's Port Lincoln facility

As discussed in the April Determinations (see Section 5.1 (IHB) subclauses 5(3)(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 considers that it is generally 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 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 Port Lincoln facility, Viterra would have the incentive (and the ability) to provide favourable access to its associated entity exporter. This is largely due to: the level of competitive constraint imposed by T-Ports' Lucky Bay facility, the relative absence of alternate sources of constraint, and the potential for peak period capacity constraints at the Port Lincoln facility.

Promotion of efficient investment in port terminal facilities

The ACCC considers it is in Viterra's interests to make investment decisions for a range of commercial reasons, including maximising returns to shareholders, irrespective of whether or not exemptions are granted in relation to any of Viterra's facilities.

Proposed alternate port terminal facilities

In considering the investment in port terminal facilities, the ACCC notes that T-Ports' decision to enter the PTSP market at Lucky Bay represents a significant investment on the Eyre Peninsula (and the SA bulk grain export supply chain more broadly). As previously discussed, Lucky Bay likely provides a credible (and potentially preferable) alternative export pathway for grain grown in certain regions of the Eyre Peninsula, and has the potential to impose a more significant level of competitive constraint on Viterra's Port Lincoln facility in future seasons. However, at this time the ACCC considers that while the competitive constraint imposed by Lucky Bay on Port Lincoln is material in certain regions of the Eyre Peninsula, it is likely limited in others, and not sufficient to support an exemption at this time.

The ACCC notes that T-Ports has also proposed to develop a facility at Wallaroo using the same transshipment vessel as its Lucky Bay facility.³³⁶ T-Ports anticipates that the location of the Wallaroo and Lucky Bay facilities, and the shared use of the same transshipment vessel will deliver greater efficiencies and cost savings for its Wallaroo facility:

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 transshipment vessel, the 'Lucky Eyre'.³³⁷

In addition, the ACCC notes that the location and operational interaction between T-Ports' proposed Wallaroo and existing Lucky Bay facilities may provide significant operational flexibility; for example by facilitating split shipments between the 2 facilities. However, the ACCC also notes that the use of a single transshipment vessel between 2 ports may result in operational challenges, possibly affecting the amount of throughput that can be delivered

³³⁶ The use of a transshipment model would allow the proposed Wallaroo site to fully load larger Panamax sized vessels.

³³⁷ T-Ports website: <https://tports.com/wallaroo/>, viewed 16 June 2021.

from each facility. As such this may have potential implications on the level of competitive constraint Lucky Bay imposes on Port Lincoln.

The ACCC also notes there a number of proposals to develop additional port terminal facilities in SA, including at Port Spencer and Cape Hardy (which are both located approximately halfway between Port Lincoln and Lucky Bay). The ACCC understands Peninsula Ports is intending to be ready to receive grain by November 2022 at Port Spencer (which would be in time for the 2022-23 harvest),³³⁸ having commenced site works in late 2020.³³⁹ The ACCC also understands Cape Hardy still has a number of processes to undertake and it is not clear when construction is due to begin or when the facility will become operational.

The ACCC notes that Peninsula Ports gained approval for its revised Public Environmental Report from the SA government for a port terminal facility at Port Spencer in August 2020.³⁴⁰ However the ACCC understands a number of other approvals and pre-work must be completed before Peninsula Ports' construction of Port Spencer can be completed.³⁴¹ Peninsula Ports estimates that the proposed facility will have a capacity of 1 million tonnes per annum,³⁴² will be able to accommodate Panamax sized vessels, and will have 0.80 million tonnes of at-port storage.³⁴³

SAFC submitted Port Spencer would represent a major competitor to Viterra's Port Lincoln facility:

*This deep-water, high capacity port would represent a major competitor to Viterra at Port Lincoln, and given its geographic position on the peninsula could isolate Port Lincoln from a significant proportion of grain producers. Many, if not most producers on the peninsula would have a shorter land transport leg to Port Spencer than Port Lincoln, offering a substantial road transport cost competitive advantage to the new port. If a similar figure to 3.6 (on Page 90 of the draft determination – replicated below) was completed to include Port Spencer and its potential catchment areas, it would not leave much of the peninsula left for Port Lincoln to claim a road freight advantage over.*³⁴⁴

As discussed in Section 3.1.5, the ACCC expects that, in the event either (or both) of these facilities begin operations, they would likely result in significant additional competition on the Eyre Peninsula. However, while the ACCC considers that a sufficiently credible threat of competition can impose a level of competitive constraint, the threat of competition is unlikely to be as effective as actual competition.

The ACCC considers that, at this time, it is unclear if or when the Port Spencer or Cape Hardy facilities will commence bulk grain export operations. In particular, while the ACCC notes Peninsula Ports has stated it hopes to be receiving grain in November 2022,³⁴⁵ the ACCC understands that Peninsula Ports has a number of governmental approval processes it must complete before it can begin progressing on various stages of its construction process (and Cape Hardy still has a number of processes to undertake). As such, while the ACCC recognises the threat of entry by Peninsula Ports (and Cape Hardy) may impose some level of competitive constraint on Viterra's Port Lincoln (and Thevenard) facility, the

³³⁸ See: <https://peninsulaports.com.au/>, viewed 16 June 2021.

³³⁹ See: <https://www.insideconstruction.com.au/news/latest-news/site-works-begin-on-230m-port-spencer-grain-port/>, viewed 16 June 2021.

³⁴⁰ See: <https://www.premier.sa.gov.au/news/media-releases/news/port-spencer-grain-facility-approved>, viewed 13 July 2021.

³⁴¹ Ibid.

³⁴² Jacobs, *Port Spencer Grain Export Facility – Peninsula Ports – Amendment to Public Environment Report*, 8 November 2019, p. 45.

³⁴³ Peninsula Ports, *Media Release – Work to begin on \$230m Port Spencer grain port after public environmental report amendment approved*, 13 August 2020, p. 2.

³⁴⁴ SAFC, *Submission in response to Draft Determinations*, 17 November 2020, p. 2.

³⁴⁵ See: <https://peninsulaports.com.au/>, viewed 16 June 2021.

level of constraint is likely limited by the uncertain timing and status of the project/s. This notwithstanding, the ACCC acknowledges the level of constraint imposed by Peninsula Ports' proposed Port Spencer facility (and EPCBH's proposed Cape Hardy facility) could change rapidly once there is greater certainty around the operation.

The ACCC will continue to closely monitor developments in the SA market, including in relation to Port Spencer and Cape Hardy. Given the level of consultation and analysis undertaken in the assessment leading to this Final Determination regarding Port Lincoln, the ACCC considers 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 Port Lincoln facility could be undertaken via a relatively truncated process.

Promotion of efficient investment more broadly

In considering investment in port terminal facilities, the ACCC notes that some stakeholders have raised concerns around port terminal investment decisions in SA. In particular:

- GPA 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.³⁴⁶
- 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.*³⁴⁷

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 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 facilities 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 competing PTSPs.

As previously noted, the ACCC considers that it is in Viterra's interests to make investment (and operational) decisions for a range of commercial reasons, including so that it can maximise returns to shareholders. Consistent with this view, the ACCC expects that T-Ports

³⁴⁶ GPA, *Submission in response to Issues Paper*, 4 October 2019, p. 3.

³⁴⁷ T-Ports, *Submission in response to Issues Paper*, 26 August 2019, p. 4.

(and other entities proposing to develop port terminal facilities in SA) will also generally face incentives to make investment (and operational) decisions which maximise returns to shareholders (or profits), irrespective of whether Port Lincoln is exempted from Parts 3 to 6 of the Code.

Viterra's incentive to invest in its Port Lincoln facility

Viterra has submitted that it has made significant investment at its Port Lincoln facility in recent years:

In the five years to December 2018, Viterra made significant investments in its port terminal infrastructure and in operational improvements affecting bulk loading facilities at its port terminals. In this period, it invested [c-i-c] at Port Lincoln. Its investments include:

- *installing a belt and replacing the dust plant for the bulk loading facility;*
- *upgrades to conveyor belts, rail weighers and substations; and*
- *concrete and weighbridge remedial works.*

In order to compete with the new port terminal at Lucky Bay, Viterra will have a continued incentive to keep its costs down and make efficient investments in order to attract exporters to use its facility and maximise its return on investment. It is unlikely that applying the full scope of obligations in Parts 3 to 6 of the Code would improve Viterra's existing incentives to keep its costs down and invest in the context of competition from the Lucky Bay and the low barriers to entry in this area, as evidenced by recent and continuing entry.³⁴⁸

Viterra also submitted in its 7 May 2021 letter to the ACCC that it has made significant investments which will be difficult to sustain if Viterra does not have the required operational flexibility. Specifically, Viterra stated:

Viterra has made significant investments in the Port Lincoln and Thevenard port terminals, and in Eyre Peninsula infrastructure more generally. Between 2015-2019 on [the] Eyre Peninsula, Viterra has spent approximately \$80 million on capital expenditure and infrastructure and has annually employed 182 full time equivalent positions. Between 2011-2019, through its economic activity, Viterra has contributed \$370 million to the Port Lincoln, Lower Eyre Peninsula and Ceduna council areas alone.

The current underutilisation of Viterra's assets, and the increasing over-capacity created by new port terminals (including T-Ports' Lucky Bay facility), makes it increasingly difficult to sustain this level of investment particularly if, as a result of the Code, Viterra does not have the operational flexibility to optimise the efficient operation of its supply chain and infrastructure investments.³⁴⁹

Viterra also submitted that it is critical for industry that Viterra's investment in SA continue and noted that Viterra's business interests are linked to the success of growers. Specifically, Viterra submitted:

It is also important that the ACCC gives appropriate weight to the legitimate business interests of Viterra. The ACCC should take into account the long-term investment that Viterra has made in the South Australian grain industry and the importance of an effective and efficient supply chain connecting growers with international customers. It is critical for the industry that Viterra continues to invest in South Australia and that this investment is sustainable for Viterra. The legitimate business interests of Viterra and the success of growers are intrinsically linked.

In this regard, it is a significant concern for Viterra that – based on the ACCC's decision concerning Outer Harbor, Inner Harbour, Port Giles and Wallaroo – the ACCC appears to view Viterra's substantial investments in infrastructure, transportation assets, efficiency and other improvements as potential sources of concern or as evidence of a lack of competition, rather than as evidence of the significant competitive and public benefits that Viterra brings to the South Australian industry. Viterra submits that, in its decision concerning Port Lincoln and Thevenard, the ACCC should give significantly greater weight to these public benefits that will

³⁴⁸ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 39.

³⁴⁹ Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021, p. 4.

*be further increased if those port terminals are exempted from the operation of Parts 3-6 of the Code.*³⁵⁰

The ACCC notes that Viterra has been willing to make investments under the current regulatory arrangements. As previously noted, the ACCC considers that this likely reflects a range of commercial incentives, including the need to generate a return for shareholders.

While the ACCC acknowledges the potential for the more flexible use of Viterra's Port Lincoln facility if an exemption was granted, the absence of a sufficient level of competitive constraint means that an exemption in relation to Port Lincoln has the potential to lead to inefficient market outcomes more broadly (including in relation to the operational and investment decisions of PTSPs on the Eyre Peninsula).

However it is unclear how Viterra's investment decisions would be affected by a decision to exempt or not exempt Viterra in relation to Port Lincoln.

The ACCC discusses its views on how the above matters raised by Viterra relate to the public interest in subclause 5(3)(b).

Conclusion

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.

However, 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 Lincoln is likely insufficient at this time to ensure that Viterra would not have an incentive (and ability) to provide favourable access to certain exporters (in particular its associated entity exporter) in a way that is detrimental to competition.

Consequently while there is the potential for more flexible use of the Port Lincoln facility by Viterra if an exemption was 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 Lincoln'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 Port Lincoln 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 Lincoln as it is in relation to Viterra's other port terminal facilities. Section 5.1 (IHB) subclause (h) of the April Determinations 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

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

³⁵⁰ Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021, p. 4.

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.

Section 5.1 (IHB) subclause (i) of the April Determinations as well as Section 4.2 above sets out the ACCC's findings on catchment areas in relation to SA. ACCC views specific to Viterra's Port Lincoln facility are set out below.

The ACCC notes that, while Viterra submitted that catchment areas are fluid and that grain will move to where it is most economically viable,³⁵¹ Viterra has also indicated that Port Lincoln has traditionally sourced grain from growers on the Eyre Peninsula.³⁵²

Furthermore, in response to the Draft Determinations Viterra submitted that:

...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 Doon in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia.*³⁵³

T-Ports, the other PTSP operating on the Eyre Peninsula, has submitted that it expects its Lucky Bay facility to source grain from the Eastern Eyre Peninsula, though it also noted that the relevant catchment area extends into the Lower and Western Eyre Peninsula:

*The catchment zone area is estimated to include the entire Eastern Eyre region where the cost of transporting grain from farm to Lucky Bay would be notably less than transporting to Port Lincoln (Noting that the vast majority est. 95% of any deliveries to Viterra up-country sites will ultimately be moved to Port Lincoln (at grower cost)). The zone extends into Western Eyre region as far west as Cungena / Poochera at which point the freight advantage to northern sites begins favouring the Thevenard port and southern sites begins favouring Port Lincoln. The Lower Eyre region freight advantage primarily favours Port Lincoln, however on the northern most parts of this region there will be farms that are physically closer to Lucky Bay and as such would be freight advantaged to deliver to Lucky Bay.*³⁵⁴

SAFC submitted that T-Ports' Lucky Bay facility is likely to change/restrict the catchment area of Viterra's Port Lincoln facility:

*SAFC notes that T-Ports facility at Lucky Bay is likely to significantly change/restrict the catchment area for Viterra's Port Lincoln facility. There will be significant new competition for [Eyre Peninsula] grain, particularly on the eastern side of the peninsula.*³⁵⁵

SAFC also submitted that the closure of rail transport along the Eyre Peninsula will decrease the Port Lincoln facility's catchment area:

*The cessation of grain transport by rail on the Eyre Peninsula will also change catchment areas. Where previously rail lines funnelled grain towards Pt Lincoln, increasing its catchment area, now trucking distance (and cost) will be a greater factor.*³⁵⁶

³⁵¹ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 1.

³⁵² *Ibid.*, p. 41.

³⁵³ Viterra, *Response to Draft Determination*, 8 February 2021, p. 4.

³⁵⁴ T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, pp. 3-4.

³⁵⁵ SAFC, *Submission in response to Issues Paper*, 6 September 2019, p. 2.

³⁵⁶ *Ibid.*

In contrast, T-Ports submitted that the closure of rail is unlikely to affect the Port Lincoln facility's catchment area:

It is hard to argue rail provides any advantage in drawing grain from different regions...Port Lincoln only draws its grain from the Eyre Peninsula. T-ports does not consider the use of or discontinuation of rail on the [Eyre Peninsula] affecting the ability to source grain from other growing regions.³⁵⁷

Conclusion

As discussed in Section 4.2 and in subclauses 5(3)(b) and (g) above, the ACCC considers that Port Lincoln sources grain from across the Eyre Peninsula; though some grain in the Eastern Eyre Peninsula will be freight advantaged to move to Lucky Bay (see Section 4.2.3) and some grain in the north-western Eyre Peninsula will be freight advantaged to move to Thevenard (see Section 5.2 (Thevenard) subclause (i)).

The ACCC also acknowledges that freight rates (i.e. distance) are not the only factor in determining which port terminal facility grain will move to, and that grain can, and will, move to more distant port terminal facilities for a variety of reasons (see Section 4.2.1 for further details). However, the ACCC considers the distance grain is located from a port terminal facility to be an important determinant when deciding which port terminal facility grain will be exported from (see Section 4.2.1).

Furthermore, as per Section 4.1.2 the ACCC does not expect closure of rail transport to have a pronounced impact on catchment areas on the Eyre Peninsula.

Consequently, given that T-Ports' Lucky Bay facility is located in the Eastern Eyre Peninsula, the ACCC considers that the catchment area for Port Lincoln contains an exempt PTSP and, further, that this facility likely imposes a material level of competitive constraint in certain regions of Port Lincoln's catchment area (though the constraint imposed in other regions is likely limited) (see subclauses 5(3)(b) and (g)).

As per Section 4.2.2 the ACCC considers that the Eyre Peninsula and eastern SA predominantly operate as 2 separate and distinct markets. Therefore the ACCC does not consider exempt port terminal services at Port Adelaide to be of direct relevance to Viterra's Port Lincoln facility.

(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 Lincoln as it is in relation to Viterra's other facilities. Section 5.1 (IHB) subclause (j) of the April Determinations sets out the ACCC's view in relation to these matters.

To the extent the ACCC has views on these matters that specifically relate to Viterra's Port Lincoln 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 Lincoln facility is unlikely to be subject to sufficient competitive constraint at this time to support an exemption from Parts 3 to 6 of the Code.

³⁵⁷ T-Ports, *Submission in response to Supplementary Issues paper*, 19 June 2020, p. 2.

5.2 Thevenard

(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 Thevenard as they are in relation to Viterra's other port terminal facilities.

Section 5.1 (Port Lincoln) subclause (a) sets out the ACCC's views in relation to Viterra's legitimate business interests.

To the extent the ACCC has views on these matters that specifically relate to Viterra's Thevenard facility, these are set out below.

Gypsum Resources Australia (GRA) ships gypsum via Viterra's Thevenard facility. GRA submitted that its operations are impacted when Viterra shuts down the ship loader at Thevenard for planned maintenance and that this has resulted in GRA incurring hundreds of thousands of dollars in consequential costs.³⁵⁸ GRA's submission states that it understands that Viterra's flexibility in this regard is limited due to the Code:

- *According to Viterra its Port Loading Protocols and associated capacity allocation agreements with grain clients are a key factor in driving the shutdown length and timing. Viterra inform GRA they are:*
 - *unable to split planned shut downs into a more ideal two smaller blocks of 8 days due to the grain slots.*
 - *unable to load any non-grain vessels in slots that have been purposely unsold to grain clients and set aside for planned maintenance.*³⁵⁹

The ACCC is not aware of any requirement in the Code, or within an ACCC-approved capacity allocation system in Viterra's PLPs, which either directly limits Viterra's ability to schedule maintenance or requires Viterra to shut down its facility at certain times of the year (or for a certain length of time), for maintenance purposes.

Relatedly, in its submission in response to the Draft Determinations, Viterra submitted securing variations to its PLPs is highly burdensome and impractical:

*...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.*³⁶⁰

As discussed in the April Determinations (Section 5.1 (IHB) subclauses (a), (e) and (f)) the ACCC notes that Viterra is able to apply to the ACCC to vary the capacity allocation system in its PLPs (and that any changes to these arrangements must be initiated by Viterra). The ACCC notes that the last time Viterra's protocols were changed was in 2015, and that this involved substantial and fundamental changes to an existing system which elicited strong and divergent views from industry. The ACCC does not expect that future applications to vary the capacity allocation system would necessarily be as substantial and contentious.³⁶¹

³⁵⁸ Gypsum Resources Australia, *Submission to Issues Paper*, 5 September 2019, p. 2.

³⁵⁹ *Ibid.*

³⁶⁰ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 43.

³⁶¹ Viterra's 2015 application proposed to replace an annual auction system 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, industry held strong and divergent views on the specifics of Viterra's proposal, adding further complexity to the process. 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 (see Section 5.1 IHB subclause (a) of the April Determinations for further details).

While securing the ACCC's approval for variations to its capacity allocation system would be unlikely to provide Viterra 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.

The PLPs are discussed further in the April Determinations (Section 5.1 subclauses (a), (e) and (f)).

In his submission to the Supplementary Issues Paper and the Draft Determinations Mr Geoff Ryan, while generally supporting exemptions for all of Viterra's port terminal facilities, submitted in relation to Thevenard that:

*Thevenard is a port that would benefit from an exemption from the wheat Code especially given that the majority of commodities that go through the port are non - wheat and yet are bound by the rules that govern wheat.*³⁶²

Additionally, in response to the Draft Determinations Viterra submitted:

*...the proportion of wheat as compared to other commodities exported from Thevenard is minimal (it represented [c-i-c] of all exports from Thevenard in 2019/20, [c-i-c] of all exports from Thevenard in 2018/19 and [c-i-c] of all exports from Thevenard in 2017/18).*³⁶³

The ACCC recognises that bulk grain only accounts for a small proportion of the commodities shipped from Thevenard: as submitted by GRA wheat and barley only accounted for 5% of total throughput at Thevenard in the 2018-19 shipping season.³⁶⁴ However, the ACCC notes that, on average, Viterra ships 0.31 million tonnes of grain annually from Thevenard. As discussed below in relation to subclauses 5(3)(b) and (g), Viterra has significant market power and an incentive to discriminate in favour of its associated entity exporter in the absence of the application of the full Code at Thevenard.

Given the above, as well as the content in Section 5.1 (Port Lincoln) subclause (a), the ACCC's view is that an exemption in respect of Viterra's Thevenard facility is in the legitimate business interests of Viterra. However, the ACCC notes that Viterra's legitimate business interests must also be balanced against the other criteria under subclause 5(3) of the Code.³⁶⁵

The ACCC has carefully weighed Viterra's legitimate business interests against the other subclause 5(3) criteria. The ACCC's decision not to exempt Viterra in relation to Thevenard reflects its view that, although Viterra's legitimate business interests favour exemption, the other interests and factors which the ACCC is required to consider, which are outlined below (including the interests of exporters and the public interest) have led it to conclude that, at this time, Parts 3 to 6 of the Code should continue to apply to Viterra's Thevenard facility to meet the Code's purpose of fair and transparent access to port terminal services.

³⁶² Mr Geoff Ryan, *Submission in response to Supplementary Issues Paper*, 18 June 2020, p. 1; Mr Geoff Ryan, *Submission in response to Draft Determinations*, 7 December 2020, p. 1.

³⁶³ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 58-59.

³⁶⁴ Gypsum Resources Australia, *Submission in response to Issues Paper*, 5 September 2019, p. 1.

³⁶⁵ ACCC, *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, pp. 165-166.

(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 Thevenard are the same as they are in relation to Viterra's other port terminal facilities.

Section 5.1 (Port Lincoln) 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 Thevenard facility, these are set out below.

Competition in bulk wheat export operations

There is a total of 3 bulk grain port terminal facilities currently in operation on the Eyre Peninsula.

Thevenard is one of 2 Viterra-operated port terminal services on the Eyre Peninsula (the other being the large deep water facility at Port Lincoln) and is the most remote port in SA. Historically Thevenard has only accounted for a relatively small proportion of bulk grain shipments on the Eyre Peninsula, averaging just 0.31 million tonnes per annum,³⁶⁶ or just 14%³⁶⁷ of total Eyre Peninsula bulk grain shipments.³⁶⁸

In addition, T-Ports commenced operations at its Lucky Bay facility in March 2020. Since commencing operations, Lucky Bay has completed 20 shipments, totalling 0.36 million tonnes of grain (which accounts for 13% of Eyre Peninsula bulk grain shipments over this period)³⁶⁹ for a total of 2 different exporters (ADM and Louis Dreyfus).³⁷⁰ Furthermore, T-Ports loaded 0.24 million tonnes of this grain in the 2020-21 peak period (or 15% of the Eyre Peninsula's peak period exports in the 2020-21 season).³⁷¹

In response to the view expressed in the Draft Determinations that Viterra does not face sufficient competitive constraint at Thevenard, Viterra submitted:

There is strong evidence that Thevenard 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 Thevenard or upcountry storage facilities on the Eyre Peninsula—to the detriment of other market participants. Viterra has provided significant information to the ACCC which shows that:

³⁶⁶ Over the 2011-12 to 2019-20 seasons.

³⁶⁷ From the beginning of the 2011-12 season to 31 May 2021.

³⁶⁸ The ACCC understands that the Port of Thevenard shut down in July 2017 in order to complete emergency works to the jetty structure to "ensure it remained safe and operational whilst a long-term solution was investigated" (see page 7 of the Port Thevenard Jetty Restoration Report, available at: https://www.dpti.sa.gov.au/data/assets/pdf_file/0003/512571/Combined.pdf). Thevenard was able to re-open in some capacity in September 2017 (see: <https://www.stockjournal.com.au/story/4937804/thevenard-reopens/>), however Flinders Ports was still working to find a long-term solution after re-commencing operations. Flinders Ports announced in June 2019 it would commence a restoration project which would ensure the jetty could continue to be used for commercial and recreational use well into the future (see: <https://www.flindersports.com.au/restoration-works-start-on-thevenard-jetty/>). The ACCC understands these works were completed in October 2020 (see: <https://www.portlincolntimes.com.au/story/6961900/reopening-of-wharf-an-investment-into-region-photos/>). All links viewed 13 July 2021.

³⁶⁹ Figures are as of 31 May 2021. T-Ports has loaded a further 48,000 tonnes of grain at Lucky Bay in June 2021 and has 27,500 tonnes scheduled to be loaded in August 2021.

³⁷⁰ For comparison Port Lincoln and Thevenard facilitated grain from 8 and 4 different exporters since March 2020 respectively.

³⁷¹ Port Lincoln and Thevenard loaded 1.25 and 0.15 million tonnes of grain respectively in the 2020-21 peak period. This accounts for 76% and 9% of all grain loaded on the Eyre Peninsula in this period.

- *Viterra is a price taker in the global grain market and, as such, is incentivised to operate an efficient supply chain, the benefits of which it has passed through to other market participants;*
- *Viterra's Port Lincoln and Thevenard facilities are constrained by competition within South Australia and, more locally, on the Eyre Peninsula. They are also constrained by the credible threat of new entry given planned developments and low barriers to entry; and*
- *Viterra's upcountry storage facilities within South Australia and, more locally, on the Eyre Peninsula are subject to competition and the credible threat of new entry given the low barriers to entry.*³⁷²

The ACCC notes Viterra's view in relation to the Draft Determinations, including the significance of T-Ports' Lucky Bay operation, however the ACCC's view is that Viterra's Thevenard facility does not currently face sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code. This is in large part due to its remote location and the large freight costs required to move grain to alternate markets.

The ACCC's view is based on the analysis of the port terminal services markets in Chapter 3, and the consideration of upcountry and related markets in Chapter 4. These indicate the following:

Thevenard appears to face limited competitive constraint in its catchment area

Thevenard is the most geographically remote port terminal facility in SA. Thevenard appears to source its grain predominantly from the Western Eyre Peninsula, in particular the north-western Eyre Peninsula. Although T-Ports' Lucky Bay facility only recently commenced operations it appears likely that Lucky Bay will compete for grain with Thevenard in certain areas of the Western Eyre Peninsula.³⁷³ However the extent of competition may be limited, as it seems unlikely that significant quantities of grain from the north-western Eyre Peninsula will move to Lucky Bay for export (as the shorter distances to port are expected to give Thevenard a freight advantage over Lucky Bay for grain grown in these regions).

The ACCC also understands that Port Lincoln sources grain from the Western Eyre Peninsula (see Section 5.1 (Port Lincoln) subclause (g)). However, grain grown on the north-western Eyre Peninsula appears to be freight advantaged to move to Thevenard, which may outweigh any efficiencies associated with using the more efficient Port Lincoln facility (see subclause 5(3)(i)).

Furthermore, the ACCC notes that T-Ports' Lucky Bay facility uses a transshipment vessel. This approach has not previously been used in the Australian bulk grain market and may be subject to operational constraints in practice (potentially limiting the competitive constraint imposed by the facility).³⁷⁴ Lucky Bay also appears to be heavily reliant on grower direct-to-port deliveries and does not appear to have established a large number of commercial arrangements with third party exporters to date. While the ACCC acknowledges that T-Ports' direct-to-port arrangements have the potential to provide a level of competitive advantage, the ACCC notes that Viterra currently owns the vast majority of upcountry storage sites on the Eyre Peninsula (see Section 4.1.1), and that T-Ports' Lucky Bay operation remains relatively unproven at this time.

The ACCC therefore considers it unlikely that significant quantities of grain in the north-western Eyre Peninsula will move to Lucky Bay for shipment (due to the shorter distances to Thevenard and T-Ports' use of a transshipment vessel). Consequently, the ACCC considers

³⁷² Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 59-60.

³⁷³ T-Ports submitted that its catchment area will extend as far west as Cungenapoochera. See: T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, pp. 3-4.

³⁷⁴ For example, the PLPs for T-Ports' Lucky Bay facility appear to suggest that certain weather conditions may limit loading operations.

T-Ports' Lucky Bay facility does not impose a sufficient competitive constraint on Thevenard to support an exemption from Parts 3 to 6 of the Code.

The ACCC will continue to closely monitor existing (and proposed) port terminal facilities on the Eyre Peninsula (and in SA more broadly).

Thevenard appears to have significant spare capacity

As discussed in Section 3.2 there generally appears to be significant spare capacity available at Viterra's Thevenard facility (see Figure 3.3 and Table 3.5). While the bumper 2016-17 season suggests some potential for capacity constraints during large harvests (when compared to previous capacity releases), Viterra's recent release of capacity at Thevenard for the upcoming 2021-22 season indicates that the facility may have excess capacity even during peak periods in high output seasons.³⁷⁵ Furthermore, while T-Ports' Lucky Bay facility has the potential to reduce demand at Thevenard, this effect is likely to be limited as the ACCC considers Lucky Bay's and Thevenard's catchment areas to be largely separate (see subclause 5(3)(i)).

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 Thevenard.³⁷⁶ Viterra also raised concerns regarding the up-take of capacity for the 2021-22 shipping year at its facilities (including Thevenard) in its letter of 7 May 2021.³⁷⁷ The ACCC expects the existence of spare capacity will reduce the incentive Viterra has to favour certain exporters. Exporters' ability to access capacity on fair and transparent terms is discussed further in relation to subclauses 5(3)(c) and (d).

Proposed port terminal facilities

The ACCC notes that a number of port terminal proposals on the Eyre Peninsula remain uncertain, and these proposals likely have a number of barriers to overcome before commencing operations. Nonetheless the ACCC acknowledges that the entry of new facilities on the Eyre Peninsula (or threat of entry if sufficiently credible) could impose some degree of competitive constraint on Thevenard.³⁷⁸ However, given Thevenard's location, the ACCC considers that the currently proposed terminals are more likely to competitively constrain Viterra's Port Lincoln facility than Thevenard.³⁷⁹

The ACCC's findings on proposed port terminals are discussed in more detail in Section 3.1.5, as well as in its views relating to subclauses 5(3)(e) and (f) below.

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.

³⁷⁵ As per Section 3.1.4 Viterra has released 0.88 million tonnes of capacity for the upcoming 2021-22 season. Prior to the release of 2021-22 capacity the maximum capacity Viterra released at Thevenard was 0.76 million tonnes (in 2016-17). In considering the increased capacity figures for the 2021-22 season the ACCC notes that Viterra is not required to release all of its available capacity in a given year. The ACCC also notes that infrastructure upgrades (and/or improved operational practices) can increase port terminal capacity (see Section 3.1.4 of the April Determinations).

³⁷⁶ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 62.

³⁷⁷ Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021, pp. 1-4.

³⁷⁸ If these facilities were to become operational they could compete for the same grain as Viterra's Thevenard facility.

³⁷⁹ T-Ports' proposed facility at Wallaroo will use the same transshipment vessel as its Lucky Bay facility, the Lucky Eyre, and as such it may have implications on the level of competitive constraint Lucky Bay can impose on Thevenard.

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.

As discussed in Section 5.1 (Port Lincoln) subclauses (b) and (g) the ACCC considers that Viterra owns the vast majority of total storage on the Eyre Peninsula. This appears to also be the case when considering the Western Eyre Peninsula, with Viterra owning the 10 out of 11 upcountry sites (the one third party storage site on the Western Eyre Peninsula is T-Ports' Lock facility).

As discussed in relation to Viterra's Port Lincoln facility, the ACCC considers that grain grown on the Eyre Peninsula has limited access to SA's domestic and container markets.

Conclusion

The ACCC considers that, given the lack of access to container and domestic markets, grain grown on the Eyre Peninsula is largely reliant on access to bulk grain shipment markets. As such T-Ports' Lucky Bay facility likely represents the most significant competitive constraint on Viterra's Thevenard facility.

As above, the ACCC considers T-Ports' Lucky Bay facility does not provide a sufficient competitive constraint on Viterra's Thevenard facility to warrant an exemption from Parts 3 to 6 of the Code. Given Thevenard's remote location it seems unlikely that significant quantities of grain from the north-western Eyre Peninsula will move to Lucky Bay for shipment.

Given the above the ACCC does not consider Viterra's Thevenard facility to be subject to sufficient competitive constraint to ensure an exemption from Parts 3 to 6 of the Code is in the public interest. An exemption is also unlikely to promote competition in upstream and downstream markets.

The ACCC's view is therefore that exempting Viterra from the full application of the Code in relation to Thevenard is not in the public interest, and is unlikely to promote competition in upstream and downstream markets.

The ACCC will continue to closely monitor existing (and proposed) port terminal facilities on the Eyre Peninsula (and in SA more broadly). The ACCC notes the potential for additional competitive constraint to be imposed on Viterra's Thevenard facility in future seasons.

(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 Thevenard as they are in relation to Viterra's IHB facility.

The ACCC's views on these matters are set out in Section 5.1 (IHB) subclause (c) of the April Determinations.

To the extent the ACCC has views on these matters that specifically relate to Viterra's Thevenard facility, these are set out below.

The ACCC considers that, given the insufficient competitive constraint imposed on Thevenard, an exemption from Parts 3 to 6 of the Code in relation to this facility would likely be detrimental to the interests of exporters who may require access to port terminal services.

Subclauses 5(3)(b), (g) and (d), set out the ACCC's views regarding the level of competitive constraint (and capacity) at Viterra's Thevenard 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) of the April Determinations 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 Thevenard facility are set out below.

Thevenard typically has substantial spare capacity

As per Section 3.2.3, the ACCC considers that Thevenard likely faces limited competitive constraints and appears to have excess capacity available (on both an annual and peak period basis).

In relation to concerns expressed specifically in relation to the ACCC's views expressed in the Draft Determinations on capacity utilisation at Thevenard, the ACCC notes that Viterra submitted:

There is significant excess capacity at Thevenard with a very low annual capacity utilisation rate of 45%.

The highest practical capacity at Thevenard is 0.76 mtpa, which is the amount of grain Viterra was able to ship from Thevenard in 2016-17. Annual throughput at Thevenard has been below 0.76 million tonnes since the unusual bumper crop harvest of 2016-17 and it is unlikely that Viterra will be capacity constrained at Thevenard in the foreseeable future. Since 2016-17, the highest throughput months at Thevenard were [c-i-c]. This shows that the vast majority of months (in fact, [c-i-c]) fell well short of the maximum monthly capacity of 62,975 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).³⁸⁰

The ACCC notes the above extract states Thevenard has capacity of 0.76 million tonnes per annum. However, as per Section 3.1.4, Viterra released 0.88 million tonnes of capacity at Thevenard for the upcoming 2021-22 season.³⁸¹ Consistent with the discussion in Section 3.1.4, the ACCC has therefore used 0.88 million tonnes as Thevenard's capacity for the purposes of this Determination.³⁸²

Thevenard also generally appears to have significant excess capacity available in the peak period, with an average peak capacity utilisation rate of 42% (since 2011-12). While the bumper 2016-17 season suggests some potential for capacity constraints during large harvests (when compared to previous capacity releases), Viterra's recent release of capacity at Thevenard for the upcoming 2021-22 season indicates that the facility may have excess capacity even during peak periods in high output seasons.³⁸³

The ACCC considers it reasonable to expect that T-Ports' Lucky Bay facility will draw grain away from Thevenard to some extent. However, the extent to which this will occur is likely limited given that Thevenard's and Lucky Bay's catchment areas appear relatively separate

³⁸⁰ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, p. 62.

³⁸¹ Viterra released 0.88 million tonnes of capacity for the upcoming 2021-22 season. Prior to the release of 2021-22 capacity the maximum capacity Viterra released at Thevenard was 0.76 million tonnes (in 2016-17). In considering the increased capacity figures for the 2021-22 season the ACCC notes that Viterra is not required to release all of its available capacity in a given year. The ACCC also notes that infrastructure upgrades (and/or improved operational practices) can increase port terminal capacity (see Section 3.1.4 of the April Determinations).

³⁸² Viterra, *Response to 11/6/21 information request – Port Lincoln and Thevenard published available capacity estimates*, 18 June 2021.

³⁸³ Viterra loaded 0.35 million tonnes of grain at Thevenard during the peak period in the 2016-17 peak period, which took up all of the available capacity; however, Viterra released 0.44 million tonnes of peak period capacity for the upcoming 2021-22 season, suggesting that Thevenard may have excess capacity even in high output seasons.

(see analysis relating to subclause 5(3)(i) below for a more detailed consideration of Thevenard's catchment area).

Given the above, the ACCC considers it unlikely that Thevenard will experience capacity constraints during the peak period. As such this likely reduces the incentive Viterra has to provide favourable access to certain exporters (in particular its associated entity exporter) at Thevenard.

In addition the ACCC notes that, while Glencore is the largest exporter through Thevenard by volume, the share of Glencore's shipments is lower at Thevenard than at any other Viterra facility: Glencore has only accounted for 28% of peak period³⁸⁴ shipments and 24% of off-peak period shipments at Thevenard since 2011-12.³⁸⁵ However, due to Thevenard's small throughput, only a small number of exporters are typically able to secure access each season: on average only 5.5 exporters ship from Thevenard each season (compared to an average of 8.0 at Viterra's other facilities). For comparison, the largest third party exporters during peak periods at Thevenard since 2011-12 have been ADM, COFCO, and AGE,³⁸⁶ which have performed 23%, 10% and 9% of peak period shipments on average respectively. In addition Figure 3.4 in Section 3.2.4 suggests that third party exporters have historically been able to access capacity in both the peak and off-peak period at Thevenard.

In considering historical exporter market shares, the ACCC notes that Viterra's current PLPs provide that combined across Viterra's 6 facilities a minimum of 500,000 tonnes of capacity is reserved for short term capacity per quarter.³⁸⁷ In addition no single exporter can apply for more than 50% of the initial long-term capacity at Thevenard.^{388 389} Under the current ACCC-approved capacity allocation system Viterra was also 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.³⁹⁰

In the absence of the full application of the Code, terms such as these can be changed in the PLPs without the need for the ACCC's approval. Consequently, the ACCC considers that the historical level of access by third party exporters was likely influenced by the current PLPs.

The ACCC notes that Viterra elected to release all capacity for the upcoming 2021-22 shipping year at its port terminal facilities (including Port Lincoln and Thevenard) as short term capacity (i.e. no long term capacity has been offered for 2021-22).³⁹¹

In its 7 May 2021 letter to the ACCC Viterra submitted that there is lack of demand for capacity at Viterra's port terminals for the 2021-22 season:

³⁸⁴ The ACCC notes that it has defined the peak period in this document as December through to May.

³⁸⁵ Glencore has accounted for 27% of shipments from Thevenard since 2011-12 on an annual basis.

³⁸⁶ Emerald have not performed any shipments out of Viterra's Thevenard facility since the 2014-15 season.

³⁸⁷ See clause 3.12(a), Viterra Port Loading Protocols, 24 December 2015. See: <https://www.viterra.com.au/dam/jcr:889d5770-cf9d-4af6-84e8-cca2d630ec25/Port%20loading%20protocols.pdf>, viewed 13 July 2021.

³⁸⁸ See clause 3.5(a) and definition of 'Initial Nomination Cap' in clause 1, Viterra Port Loading Protocols, 24 December 2015. See: <https://www.viterra.com.au/dam/jcr:889d5770-cf9d-4af6-84e8-cca2d630ec25/Port%20loading%20protocols.pdf>, viewed 13 July 2021.

³⁸⁹ The ACCC notes that Viterra elected to not offer any long term capacity for the 2021-22 season. See: <https://www.viterra.com.au/dam/jcr:4f9939d7-0ec2-40c6-87eb-1711ad4f6468/202122%20season%20FIFS%20short%20term%20notice.pdf>, viewed 13 July 2021.

³⁹⁰ See definition of "allocation period" in clause 1, Viterra Port Loading Protocols, 24 December 2015. See: <https://www.viterra.com.au/dam/jcr:889d5770-cf9d-4af6-84e8-cca2d630ec25/Port%20loading%20protocols.pdf>, viewed 13 July 2021.

³⁹¹ See: <https://www.viterra.com.au/dam/jcr:4f9939d7-0ec2-40c6-87eb-1711ad4f6468/202122%20season%20FIFS%20short%20term%20notice.pdf>, viewed 13 July 2021.

*We are already seeing a lack of demand for capacity at our port terminals for the 2021/22 shipping year.*³⁹² ...

As we explained at our meeting, there has been very limited up-take by exporters of the capacity available at Viterra's port terminals.

- *Only 27% of the 8.6 million tonnes of capacity released by Viterra on 20 April 2021 has been booked;*
- *at Port Lincoln, less than 40% of the available capacity of 2.2 million tonnes released by Viterra has been booked, with exporters only taking up 874,000 tonnes. There are no bookings beyond the first half of April in 2022;*
- *Thevenard has no bookings...*³⁹³

Viterra further submitted that:

*The recent release of capacity provides strong evidence that, if there was ever any need for regulation to enable access to capacity at Port Lincoln or Thevenard, that need no longer exists.*³⁹⁴

The ACCC notes that as of 9 July 2021 there are no bookings listed for Thevenard for the 2021-22 season.³⁹⁵

The ACCC notes Viterra's concerns regarding the up-take of short term capacity for the 2021-22 season at its facilities. The ACCC also notes Viterra's view that this provides strong evidence that regulation is not needed to ensure access to its Port Lincoln or Thevenard facilities.

The ACCC notes that Viterra's release of all capacity for the 2021-22 shipping year as short term capacity represents a change from previous capacity arrangements (which typically involved some combination of short and long term capacity). The ACCC also notes that Viterra appears to have released capacity for the 2021-22 shipping year earlier than in previous years,³⁹⁶ and that limited early uptake of capacity by exporters appears to have occurred in previous years.³⁹⁷

The ACCC considers that exporter demand for port terminal capacity, and the time at which exporters choose to enter into arrangements for capacity in a future season, reflects a range of factors, including: bulk grain market conditions, harvest expectations, and various commercial considerations (including the commercial attractiveness of PTSPs' capacity offerings). The limited or delayed initial response to the release of capacity by a PTSP may therefore reflect a range of factors, including that third party exporters may have a preference to maximise the flexibility associated with being able to access capacity via shorter-term arrangements. Exporters may also prefer taking on capacity once growing conditions are more certain (thereby reducing the risk associated with take-or-pay arrangements).

³⁹² Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021, p. 1.

³⁹³ *Ibid*, p. 2.

³⁹⁴ *Ibid*, p. 3.

³⁹⁵ Viterra, *2021/22 Available Capacity Table*, as at Friday 9 July 2021.

³⁹⁶ Viterra released capacity to market for the 2021-22 season in April 2021. This is earlier than in the 2019-20 and 2020-21 seasons where Viterra initially sought to release short term capacity in June (the ACCC notes the release of capacity for the 2020-21 season was delayed due to an issue with the ship loader at Viterra's Port Adelaide IHB facility).

³⁹⁷ The ACCC notes that Viterra released 3.5 million tonnes of capacity for 2019-2020 season in June 2019. This included 2 million tonnes of short term capacity. Only 30,000 tonnes had been booked by 28 June 2019. See Viterra, *Exemption Applications 2019*, 2 July 2019, p. 20.

This notwithstanding, the ACCC acknowledges the relatively small demand for capacity at Thevenard (only 0.31 million tonnes of bulk grain shipments on average per season) which typically results in substantial spare capacity available at the facility. However, due to Thevenard's remote location and the lack of competitive alternatives in this region (see subclauses 5(3)(b) and (g)) the ACCC considers that, absent Parts 3 to 6 of the Code, Viterra may have the ability to discriminate in favour of its associated entity exporter, Glencore, in a way that is detrimental to the development of competition.

The ACCC will continue to closely monitor the capacity utilisation at Viterra's Thevenard (and Port Lincoln) facility.

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.³⁹⁸

In relation to Thevenard, Viterra stated that 2% of Australia's wheat exports have been exported through Thevenard in 2019-20.³⁹⁹ Furthermore, Viterra submitted its concern that the ACCC has not adequately taken into account that Thevenard exports only a small proportion of SA's wheat:

Viterra is concerned that the ACCC has had little regard to the fact that Thevenard ships only a very 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 Thevenard and the low proportion of wheat exported from this facility in its decision. These factors provide further support of CRA's analysis, which demonstrates that Viterra does not have an incentive to deny access to exporters or to provide favourable terms of access to Glencore. To do so would lead it to lose much needed throughput at Thevenard, which is contrary to its commercial interests.⁴⁰⁰

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) of the April Determinations.

As per sections 3.2.3 and 3.2.4, the ACCC considers that Thevenard faces limited competitive constraint and limited capacity constraints (insofar as there is often spare capacity available during the peak period, while still facing the possibility of capacity constraints). While the ACCC notes that Thevenard exports a relatively small proportion of SA wheat, the ACCC considers that Viterra likely has significant market power at Thevenard (see Section 4.1.1).

Conclusion

The ACCC's view is that it is appropriate to consider whether the current level of competition among exporters is likely to be affected if an exemption from Parts 3 to 6 of the Code was granted in relation to Thevenard.

The ACCC acknowledges that there is likely to be spare capacity at Thevenard including during the peak period; while the bumper 2016-17 season suggests some potential for capacity constraints during large harvests (when compared to previous capacity releases), Viterra's recent release of capacity at Thevenard for the upcoming 2021-22 season indicates that the facility may have excess capacity even during peak periods in high output seasons.

³⁹⁸ Viterra, *Response to Draft Determination*, Public version, 8 February 2021, pp. 2-3.

³⁹⁹ *Ibid*, p. 59.

⁴⁰⁰ *Ibid*, p. 62.

The ACCC also acknowledges exporters have historically have been able to secure access to the facility. However the ACCC considers that Thevenard's remote location results in the facility facing limited competitive constraint.

As such, the ACCC's view is that, given the facility's remote location and therefore the limited competitive constraint imposed on the facility, exempting Viterra from the full Code in relation to Thevenard may be detrimental to exporters' ability to obtain fair and transparent access to the facility to export bulk grain, particularly in the peak period in high throughput seasons.

(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) of the April Determinations 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. Section 5.1 (Port Lincoln) subclauses (e) and (f) also sets out the ACCC's views relating to these matters with specific regard to the Eyre Peninsula. The ACCC's further views relating to subclauses 5(3)(e) and (f) which are specific to Viterra's Thevenard facility are set out below.

The ACCC notes that the location of the 2 proposed facilities for the Eyre Peninsula (Cape Hardy and Port Spencer) are located on the lower eastern coast of the Eyre Peninsula. As such commencement of operations at (or, to a lesser extent, the threat of entry of) either of these facilities appears more likely to impose a competitive constraint on Viterra's Port Lincoln facility, rather than its Thevenard facility (where any such constraint is expected to be limited due to the distances involved).

The ACCC will continue to closely monitor developments in the SA market, including in relation to Port Spencer and Cape Hardy. Given the level of consultation and analysis undertaken in the assessment leading to this Final Determination regarding Thevenard, the ACCC considers 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 Thevenard facility could be undertaken via a relatively truncated process.

In relation to Viterra's Thevenard facility, Viterra has submitted that it has made a significant number of investments at port in recent years:

... Viterra notes that it has made a number of significant investments at Thevenard in the five year period to 31 December 2018. In this period, it invested [c-i-c] including:

- *recladding the bulk loading facilities;*
- *upgrading and replacing elevator belts;*
- *upgrading electrical switch rooms; and*
- *installing a cable reeler gearbox for the bulk loading facility.*⁴⁰¹

Viterra, in its 7 May 2021 letter, to the ACCC also submitted that it made significant investments in its Port Lincoln and Thevenard facilities, as well as the Eyre Peninsula more broadly over the 2015-2019 period:

Viterra has made significant investments in the Port Lincoln and Thevenard port terminals, and in Eyre Peninsula infrastructure more general. Between 2015-19 on [the] Eyre Peninsula, Viterra has spent approximately \$80 million on capital expenditure and infrastructure and has annually

⁴⁰¹ Viterra, *Exemption Applications 2019*, 2 July 2019, pp. 45-46.

*employed 182 full time equivalent positions. Between 2011-2019, through its economic activity, Viterra has contributed \$370 million to the Port Lincoln, Lower Eyre Peninsula and Ceduna council areas alone.*⁴⁰²

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 by a decision to exempt or not exempt Viterra in relation to this facility.

Given the factors discussed above and those discussed in relation to Viterra's Port Lincoln facility, the ACCC considers that the effect of a decision to exempt or not to exempt Viterra in relation to its Thevenard 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 Thevenard as it is in relation to Viterra's other port terminal facilities. Section 5.1 (IHB) subclause (h) of the April Determinations 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 (Port Lincoln) subclause (i) sets out the ACCC's findings on catchment areas in SA. The ACCC's further views that specifically relate to these matters and Viterra's Thevenard facility are set out below.

The ACCC notes that Viterra has submitted that catchment areas are increasingly outdated and fluid, and that grain will move to where it is most economically viable.⁴⁰³ However Viterra has also submitted that Thevenard has traditionally sourced grain from growers on the Eyre Peninsula.⁴⁰⁴

As discussed in Section 4.2 and above in relation to the analysis relating to subclauses 5(3)(b) and (g), the ACCC considers that Thevenard primarily draws grain from the north-western Eyre Peninsula region. In forming this view the ACCC has considered Viterra's 2020-21 Export Select freight rates (as set out below in Table 5.1).

Table 5.1 includes those storage sites for which freight rates were available for both Port Lincoln and Thevenard. As shown, Thevenard typically has a large freight advantage for grain grown in the north-western Eyre Peninsula. However, as previously noted, the ACCC recognises that grain intended for export may not necessarily move to the closest port terminal facility, and that certain market conditions may result in it being more profitable for grain to move to more distant facilities. However, and as acknowledged by Viterra, distance is a relevant cost driver when outturning grain to a port terminal facility.⁴⁰⁵

The ACCC expects that factors such as available capacity, the ability to secure enough grain for shipment, and the relative efficiency of port terminal facilities likely also influences decisions around where grain is exported from. The ACCC notes that Port Lincoln is a much larger, and likely more efficient, facility than Thevenard.

⁴⁰² Viterra, *Letter to ACCC regarding exemption applications*, 7 May 2021, p. 4.

⁴⁰³ Viterra, *Exemption Applications 2019*, 2 July 2019, p. 1.

⁴⁰⁴ *Ibid*, p. 46.

⁴⁰⁵ Viterra, *Response to 14/11/19 information request – Question 9 – Catchment zones*, 13 January 2020, p. 3.

In considering the movement of grain and Viterra's Export Select freight rates, the ACCC notes that these rates are not provided for Thevenard at 14 (out of 21) of Viterra's Eyre Peninsula upcountry storage sites in GTA's 2020-21 Location Differentials.⁴⁰⁶ All 7 sites which have Export Select freight rates are listed in Table 5.1 (the sites listed are all located in the north-western region of the Eyre Peninsula). The absence of Thevenard freight rates at Viterra's other Eyre Peninsula upcountry sites suggests that grain in those regions is unlikely to move to Thevenard for export.

Given the above, and consistent with the freight advantages shown in Table 5.1, the ACCC expects that grain exported from Thevenard is predominantly sourced from the north-western Eyre Peninsula.

Table 5.1: Viterra's 2020-21 Export Select freight rates for selected Eyre Peninsula sites

Site location	Port Lincoln	Thevenard	Percentage of grain that moves to Thevenard (tonnes received)
Nunjikompita	34.40	9.66	[c-i-c]
Penong	43.12	9.73	[c-i-c]
Poochera	27.74	17.30	[c-i-c]
Streaky Bay	30.04	12.63	[c-i-c]
Wirrulla	32.93	11.71	[c-i-c]
Witera	23.97	18.18	[c-i-c]
Wudinna	19.98	23.67	[c-i-c]

Source: Viterra 2020-21 Export Select freight rates; and Viterra, *Response to 14/11/19 information request - Question 9 – Catchment zones*, 13 January 2020.

T-Ports, the other PTSP currently operating on the Eyre Peninsula, has submitted that Lucky Bay's catchment area extends into the Western Eyre Peninsula. In particular, T-Ports has estimated Lucky Bay's catchment area will extend as far west as Cungenena/Poochera:

The catchment zone area is estimated to include the entire Eastern Eyre region where the cost of transporting grain from farm to Lucky Bay would be notably less than transporting to Port Lincoln (Noting that the vast majority est. 95% of any deliveries to Viterra up-country sites will ultimately be moved to Port Lincoln (at grower cost)). The zone extends into Western Eyre region as far west as Cungenena / Poochera at which point the freight advantage to northern sites begins favouring the Thevenard port and southern sites begins favouring Port Lincoln. The Lower Eyre region freight advantage primarily favours Port Lincoln, however on the northern most parts of this region there will be farms that are physically closer to Lucky Bay and as such would be freight advantaged to deliver to Lucky Bay.⁴⁰⁷

As the ACCC considers that Thevenard's catchment area is likely the north-western Eyre Peninsula, should grain move from as far west as Poochera to Lucky Bay it appears that T-Ports' catchment area will overlap with Thevenard's to some extent. However, to the extent this occurs, Thevenard will likely have a material freight advantage for grain in

⁴⁰⁶ Viterra does not propose to operate 3 of these 25 sites on the Eyre Peninsula in the 2020-21 season.

⁴⁰⁷ T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, pp. 3-4.

Poochera, given the influence of distance on grain movements (Poochera lies 144 km from Thevenard and 271 km from Lucky Bay).

On balance the ACCC considers that the catchment area for Thevenard likely overlaps with T-Ports' Lucky Bay facility to a limited extent. As such, Lucky Bay likely provides some (albeit limited) competition for grain located in the eastern part of Thevenard's catchment area. In forming this view the ACCC notes, in terms of distance, Wudinna is located roughly in the middle of Thevenard and Lucky Bay (a distance of 213 km and 200 km respectively). However the ACCC recognises that distance, while important, is only one factor when deciding which port terminal to export from. As such, the ACCC considers that Lucky Bay's catchment area overlaps with Thevenard's to a limited extent.

In light of the above, the ACCC's view is that the catchment area for Viterra's Thevenard facility contains an exempt PTSP (T-Ports) and, further, that the presence of the relevant facility (Lucky Bay) likely imposes limited competitive constraint on Viterra's operations at Thevenard.

As per Section 4.2.2 the ACCC considers that the Eyre Peninsula and eastern SA predominantly operate as 2 separate and distinct markets. Therefore the ACCC does not consider exempt port terminal facilities at Port Adelaide to be of direct relevance to Viterra's Thevenard facility.

(j) any other matters the ACCC considers relevant

The ACCC's consideration of any other relevant matters is generally the same in relation to Thevenard as it is in relation to Viterra's other facilities. Section 5.1 (IHB) subclause (j) of the April Determinations sets out the ACCC's view in relation to these matters.

To the extent the ACCC has views on these matters that specifically relate to Viterra's Thevenard 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 Thevenard 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 Lincoln 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 Lincoln.

Viterra's Thevenard 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 Thevenard.

ACCC future monitoring

The ACCC's Final Determinations mean that Viterra will not be an exempt port terminal service provider in relation to its Port Lincoln and Thevenard facilities. The ACCC considers exempt and non-exempt 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.