Viterra Operations Pty Ltd

Application under clause 5(2) of the Port Terminal Access (Bulk Wheat) Code of Conduct for exemption from Parts 3 to 6 of the Code in respect of Viterra's port terminals in South Australia

Supplementary submission

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Viterra Operations Pty Ltd
Level 1, 186 Greenhill Road
Parkside SA 5063
+61 8 8304 5000

1 Introduction

Viterra welcomes the opportunity to provide further information to the ACCC in support of its application for exemption from Parts 3 to 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct (**Code**) in respect of its six port terminal facilities in South Australia.

This further information includes the attached independent expert report prepared by Dr Chris Pleatsikas and Dr Andy Baziliauskas at Charles River Associates (**CRA**) in the United States (**CRA Report**), together with Viterra's response to certain issues raised by other market participants in their submissions in response to the ACCC's Issues Paper.

2 The CRA Report

Viterra has engaged CRA to undertake a detailed analysis of the competitive constraints faced by Viterra, and the benefits of exemption under the Code to growers, exporters and Viterra. CRA's analysis shows that:

- Viterra operates in a global environment. It is constrained both by competition in global markets, and the existence of other port terminals in South Australia that have sufficient capacity to load all exports undertaken by Glencore Agriculture's competitors in the past few years. There has been significant new entry over the past few years, with further new port terminal developments underway.

- Given these clear alternatives for exporters, Viterra does not have any incentive to deny or reduce access to its port terminals for Glencore Agriculture's competitors. To the contrary, CRA's analysis shows that any costs to Viterra associated with a reduction or denial of access would materially exceed any benefits that might accrue to Glencore Agriculture.

- There are substantial costs associated with the continued application of the Code, and significant benefits for growers, exporters and Viterra if the ACCC were to grant the requested exemptions.

Viterra is constrained by competition

As set out in the CRA Report, the global market for the supply of grain is highly competitive and the South Australian bulk grain industry is a price taker within this market.

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

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

The total capacity of port terminals in South Australia that currently compete with Viterra (or will commence operations within the next two to three months) exceeds the volumes

exported by exporters who compete with Glencore Agriculture in both 2016/17 (4.6 million tonnes) and 2017/18 (3.7 million tonnes).

The amount of capacity at competing port terminals is likely to increase even further with new bulk grain export terminals proposed in South Australia (T-Ports at Wallaroo, Free Eyre at Port Spencer, and the Cape Hardy terminal), and with recent confirmation that ADM will start exporting grain through Port Pirie.

The competition faced by Viterra imposes significant competitive pressures to ensure that Viterra's supply chain is operating efficiently. If it does not operate efficiently—for the benefit of growers, exporters and Viterra as the infrastructure owner—grain will be exported through other port terminals in South Australia, other States, or exporters will source grain from overseas production regions.

It is critical that the ACCC gives sufficient weight to these competitive constraints in its assessment of Viterra's application for exemption, as well as the benefits to the South Australian economy that an exemption will bring.

Viterra does not have any incentive to deny or reduce access

The competitive threats faced by Viterra mean that it does not have any incentive to deny or reduce access to its port terminals on reasonable terms.

The modelling set out in the CRA Report clearly shows that—even based on highly conservative assumptions—the costs incurred by Viterra if it were to deny or reduce access would substantially outweigh any benefits that might accrue to Glencore Agriculture.

If Viterra were to deny or reduce access to its port terminals on reasonable terms, exporters would simply move to other port terminals (which have more than enough capacity to service their requirements – even without the further terminals that are planned for construction in South Australia). It would therefore not have any impact on the prices payable to growers, and therefore any attempt to deny or reduce access would be self-defeating.

There are substantial costs associated with the Code

Parts 3 to 6 of the Code reduce the contractual and operational flexibility with which Viterra can provide services to exporters and growers. The Code (in particular, the strict requirements around port loading protocol approvals) prevents Viterra from being able to meet changing market conditions and to quickly adopt efficient and flexible practices that would help it, growers and exporters make longer term investment and customer commitments.

To date, the application of the Code has also likely supported smaller inefficient exporters who would not survive in a competitive market. This is not efficient or reflective of competitive outcomes, and has likely resulted in increased supply chain costs.

It is important that the Parts 3 to 6 of the Code are only applied where to do so promotes "competition" rather than individual competitors. As stated by CRA: [1]

> "*It is virtually universally agreed by antitrust enforcers and regulators that the appropriate focus of competition law and access regulation is the protection of competition, not individual competitors*".

Exemption involves significant benefits for growers, exporters and Viterra

If Viterra were to be exempted from the Code—and market forces, rather than regulation, were to determine which exporters receive capacity—economies of scale could be fully exploited, resulting in reduced supply chain costs. In the context of a competitive grain export market and the existence of significant capacity at competing port terminals, these benefits would be passed on to growers.

Exemption from the Code will increase operational and contractual flexibility which will benefit growers and exporters. Viterra will be better able to provide longer term commitments (which in turn will assist exporters with investment decisions and their back-to-back commitments), meet client capacity demand and changes in a flexible and efficient manner and offer individualised pricing arrangements.

Given the competitive constraints referred to above, these benefits will be passed on to, and will benefit, growers and exporters.

3 Viterra's comments on submissions made in response to the ACCC's Issues Paper

Viterra agrees with the submissions by the South Australian Freight Council (**SAFC**), the Pastoralists & Graziers Association of Western Australia and Gypsum Resources Australia Pty Limited, each of which supports the granting of exemptions under the Code. We also agree with comments in a number of other submissions that highlight the distortions caused by the unequal application of the Code.

However, both Viterra and the CRA Report disagree with the characterisation, in certain submissions, of Viterra's port terminals as natural monopoly infrastructure facilities. These submissions largely ignore the significant competition that Viterra faces as demonstrated in the CRA Report (including by downplaying the fact that T-Ports' Lucky Bay port terminal will be operational with substantial capacity in only two months' time).

These submissions also contain very limited substantive analysis or engagement on the key issue – that is, why each individual port terminal should continue to be subject to Parts 3 to 6 of the Code.

3.1 Disadvantages to the South Australian industry caused by the unequal application of the Code

We agree with Grain Producers SA (**GPSA**) that South Australian growers are unfairly disadvantaged by the unequal application of the Code, and that it is "*perverse*" that South

[1] CRA Report, page 25.

Australian port terminals are subject to all Parts of the Code, while Western Australian port terminals are exempt. As stated in GPSA's submission:[2]

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

We also agree with SAFC's submission that the unequal application of the Code is:

> "*perversely affecting SA's national and international competitive position by regulating SA grain ports in disproportionate numbers, increasing compliance costs and lowering flexibility*".

The current unequal application of the Code disadvantages all participants in the South Australian supply chain. It distorts competition and efficient market outcomes, and undermines the ability of South Australian participants to compete in international markets as effectively as growers in neighbouring states or in other grain producing regions globally (where there is no intrusive regulation of the type imposed by the Code).

It is, therefore, not in the interests of the South Australian industry—growers, exporters or Viterra—to continue to apply the Code unequally.

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

3.2 Viterra's port terminals are not monopoly infrastructure facilities

In its submission, GPSA states that:[3]

> *"The Code's existence is predicated on two essential features:*
>
> 1. *The export-orientation of Australia's wheat industry, and*
> 2. *The natural monopoly characteristics of bulk export terminals."*

However, as clearly demonstrated by the CRA Report, Viterra's port terminals are not monopoly assets. Contrary to the submissions of Grain Growers, the structure of the grain industry does not "*foster a potentially anticompetitive market environment*",[4] and, despite Cargill's and T-Port's suggestions to the contrary,[5] Viterra is subject to significant

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2 GPSA, Submission on regulation at Viterra's bulk grain facilities, 27 September 2019, page 8.

3 GPSA, Submission on regulation at Viterra's bulk grain facilities, 27 September 2019, page 2.

4 Grain Growers, Viterra Wheat Code Exemption Assessment, 26 September 2019, page 2.

5 Cargill, Viterra exemption application under the What Port Code of Conduct, 6 September 2019, page 2; T-Ports, Comments in response to ACCC's issues paper, 26 August 2019, pp 3-4.

competitive constraint from port terminal operators around the world, and more locally, from within South Australia.

Cargill's activities in South Australia themselves provide an example to highlight this competition at work. Since the entry of LINX at Port Adelaide, Cargill has stopped exporting grain through Viterra's Inner Harbour and Wallaroo facilities, and has significantly decreased its exports through Outer Harbor, Port Lincoln and Port Giles. These changes clearly show that exporters are able to access alternatives to Viterra to export wheat from across South Australia and that, contrary to the statement in GPSA's submission,[6] the LINX and Semaphore terminals do not effectively operate "*on an opportunistic basis in response to high production years*". Differences in features between different port terminals do not mean that they are not significant competitive constraints.

The entry of T-Ports at Lucky Bay in the next two months will further intensify competition in South Australia.

Given both existing and planned competing terminals (and new entry by port terminal operators in both South Australia and other states), it is clearly not the case that exporters have no other competitive choices, or that export wheat terminals are uneconomic to duplicate.

The report of the Hilmer committee into National Competition Policy stated that:[7]

> "*An 'essential facility' is, by definition, a monopoly, permitting the owner to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole*."

However, as demonstrated in the CRA Report, Viterra does not have any incentive to "*reduce output ... or charge monopoly prices, to the detriment of users and the economy as a whole".* Viterra operates in a market where the products exported are subject to significant production volatility year-on-year, Australia is a price-taker globally, exporters have an ability to source grain from anywhere around the world in response to price changes, and there is sufficient capacity from competing port terminal operators to serve all exports by Glencore Agriculture's competitors. Viterra has an incentive to maximise throughput at its port terminals, and any attempt to deny or reduce access would be self-defeating as the costs would outweigh any benefits.

As further demonstrated by the ESCOSA Report,[8] Viterra's prices for port terminal services are not excessive and do not reflect monopoly prices. In addition, Viterra has not increased these fees relative to other port terminals in Australia.[9]

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6 GPSA, Submission on regulation at Viterra's bulk grain facilities, 27 September 2019, page 3.

7 Commonwealth of Australia (1993) "National Competition Policy: Report by the independent committee of inquiry", August, p 239.

8 In ESCOSA's Final Report in its inquiry into the South Australian bulk grain export supply chain costs, December 2018, ESCOSA stated at page 35 that "*Viterra's fees are not considered excessive at this time, compared with the total fee levels charged by its Australian counterparts*."

9 Viterra notes the statement in GPSA's submission (page 6) that "*GPSA has previously reflected concern about the impact of the 'Receival at Port Service Fee', charged by Viterra for grain from third party storage facilities delivered to port terminals. In the absence of ACCC regulatory oversight, GPSA notes the potential for this to be used as a mechanism to encourage, use of Viterra's up-country storage facilities, rather than third party facilities and from on-farm storage*". As previously explained to the ACCC and GPSA, in practice, this fee has only been used on a limited

3.3 An exemption will not result in Viterra engaging in anti-competitive conduct

In its submission, GPSA raises a potential concern that that, without the full application of the Code, "*there is limited assurance for grain producers about the future conduct of Viterra or likely impact on bulk wheat exporters*".[10] However, this ignores the competitive constraints that are examined in detail in the CRA Report. Given these constraints, it is simply not the case that Viterra is, or will be, able to operate its port terminals "*at its sole discretion*".[11]

Neither GPSA nor any other submission provides any evidence to show that Viterra is unconstrained or would (or has an incentive to) engage in conduct that would result in any harm to competition. Rather, these submissions appear simply to assert that Viterra should be subject to costly regulation (without properly analysing the extent of these costs) because regulation involves some type of "safety net". In Viterra's view, the best "safety net" involves the competitive constraints clearly demonstrated in the CRA Report, and there is no need for costly regulation, particularly when the risk of any harm to competition, growers or exporters is very low.

GPSA's submission also suggests that Viterra should provide commitments to grandfather terms relating to existing bookings, including under LTAs.[12] The basis for this suggestion or concern is unclear, given that Viterra is contractually required to meet its obligations under long term agreements.

3.4 Viterra is not aware of any consumer protection issues in relation to its port terminals

The submission by GPSA also states that:[13]

> "*GPSA is aware of a range of issues more appropriately categorised as consumer protection issues across the grain industry, rather than Part 3A National Access issues arising from monopoly infrastructure providers.*"

GPSA does not elaborate on what these concerns are, where in the supply chain they have arisen and who they involve. Viterra is not aware of any consumer protection complaints in relation to its port terminal, logistics or up-country services. It is therefore surprising that this issue has been raised in relation to an application for exemption from Parts 3 to 6 of the Code.

It is clearly important that the ACCC analyses closely the submissions made to it, including to determine whether they are supported by any substantive analysis or evidence. Viterra considers that the ACCC should not give any weight to statements that are made with little analysis and no evidence. It would be contrary to the interests of participants in the grain supply chain, and the South Australian economy more generally, if Viterra's exemption application was to be rejected as a result of reliance on unsubstantiated allegations or concerns.

number of occasions in the past few years. However, it is important for Viterra to reserve an ability to charge this fee in order to provide additional services (if needed) to ensure the integrity and quality of South Australian grain exports.

10 GPSA, Submission on regulation at Viterra's bulk grain facilities, 27 September 2019, page 5.

11 GPSA, Submission on regulation at Viterra's bulk grain facilities, 27 September 2019, page 4.

12 GPSA, Submission on regulation at Viterra's bulk grain facilities, 27 September 2019, page 7.

13 GPSA, Submission on regulation at Viterra's bulk grain facilities, 27 September 2019, page 9.

It would also be contrary to the principles of procedural fairness if the ACCC were to give any weight to these matters in circumstances where it is not possible for Viterra to respond meaningfully due to the lack of detail provided.

If the ACCC has any questions in relation to this submission, please contact Damian Fitzgerald, General Counsel at Viterra.