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Mr Matthew Schroder
General Manager
Infrastructure and Transport – Access & Pricing Branch
Australian Competition and Consumer Commission
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Dear Mr Schroder

RESPONSE TO DRAFT DETERMINATION – VITERRA’S BULK GRAIN FACILITIES

We write in relation to the Draft Determination issued by the Australian Competition and Consumer Commission in response to Viterra/Glencore’s application for exemption from Parts 3 to 6 of the *Port Terminal Access (Bulk Wheat) Code of Conduct* (‘the Code’)

South Australia is the only state where the Code is fully applied across the major bulk wheat ports, being Viterra’s Thevenard, Port Lincoln, Wallaroo, Port Giles, Inner Harbour (‘IHB’), and Outer Harbour (‘OHB’) sites.

Grain Producers SA (‘GPSA’) supports appropriate regulatory settings to promote a competitive and cost-effective export supply chain in South Australia, noting that in most years 85% of the state’s grain harvest is exported to 55 countries around the world. A profitable and sustainable grain production sector relies upon a transparent and cost-effective export supply chain to attract buyers to compete for South Australian grain.

GPSA’s interests lie in ensuring that producers receive competitive prices for their grain, which is derived in part from grain marketers’ ability to export to world markets in an efficient manner. Despite carrying significant economic risk of the performance of the export supply chain, growers have little oversight and awareness of the commercial dealings between Viterra and its customers. GPSA instead relies on the ACCC’s annual Bulk Grain Ports Monitoring Reports and its ongoing engagement with the industry directly to assess performance. GPSA notes that the ACCC monitors compliance with and enforces breaches of the Code, and provides regulatory oversight under the provisions of the Code applicable to Viterra’s business.

DEVELOPMENTS SINCE VITERRA’S APPLICATION FOR EXEMPTION

Several developments have occurred since Viterra submitted its application for exemption from the Code. These developments tend towards the key issues relevant to the ACCC’s determination.

Eastern Australia drought recovery

We note that Viterra has provided a revised exemption application and a supplementary report from Charles River Associates ('CRA'). The Application is predicated on harvest figures from 2017/18, which produced approximately 6.94 million tonnes of grain in South Australia. This sits far below the long-term average of 7.9 million tonnes.

In addition, the use of 2017/18 data is misleading, in that those years export volumes have generally been low due to large quantities of SA grain moving to the east coast to meet domestic demand due to the drought. This resulted in South Australia's grain supply chain operating in non-traditional and short-term domestic markets to meet demand.

Competitor activity

Viterra's application noted the imminent entry of T-Ports at Lucky Bay. GPSA understands that this facility is now operating, however as at July 2020 the operators informed GPSA that they were still in the process of obtaining the necessary export licenses and phytosanitary certificates required for export shipping. In the absence of those licenses and certificates, only domestic shipping is permitted. This is an inherent, albeit temporary, constraint on the nature of competition provided by T-Ports.

INNER HARBOUR EXEMPTIONS

The previous LINX operation as well as both current Semaphore and Cargill sites at Inner Harbour at Port Adelaide are exempt from Parts 3-6 of the Code. Viterra's application for an exemption from the Code lists both IHB and OHB as unitary port terminal. By contrast, the ACCC's assessment of Viterra's application separately considers both IHB and OHB. GPSA believes that this division is reflective of the distinctly different characteristics of each port by way of;

- Physical location,
- Access by road and rail,
- Port depth- vessel size and capacity,
- Throughput rates, and
- Onsite storage.

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

Both Cargill and Semaphore are limited by their physical geography within Inner Harbour and are incapable of fully loading Panamax sized vessels. This is a key determinant of competition. Both sites are restricted in that they can only intake grain via road receival rates of 1000 t/hr and 350 t/hr,

respectively. By way of comparison, Viterra's sites of IHB and OHB can receive via road at rates of 800 t/hr¹.

Notwithstanding that, Cargill submitted to the ACCC that while its ship loading rate is capable of intake at 1000 t/hr, due to operational reasons (truck availability and the absence of at-port storage) its vessel loading capacity is limited to 400 t/hr. Cargill's at-port storage constraints places its site at a further disadvantage for vessel loading compared with either IHB or OHB. Semaphore has minimal at-port storage and appears to be reliant on direct farm deliveries or the Viterra upcountry network. The combined total of both the Cargill and Semaphore represents a small proportion of Viterra's total storage capacity at IHB and OHB..

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

Analysis of Inner Harbour PTSPs demonstrates that an efficient port and upcountry freight network is a fundamental precursor for securing grain to export in South Australia. When combined with small levels of at-port storage, the absence of an upcountry freight network places a significant impediment on the level of competition that Inner Harbour operators are able to provide, especially when compared to OHB.

CHARLES RIVER ASSOCIATES' ASSESSMENTS

Within the Draft Determinations, the ACCC has formed a preliminary view that an increase in competition justifies a reduction in regulation at Inner Harbour and Outer Harbour. This competition is drawn from Inner Harbour PTSPs, as well as domestic shipments of grain, and greater on-farm storage. The Charles River Associates ('CRA') Report suggests that competition within IHB and OHB port zones would warrant an exemption for the entire Port Adelaide port zone, again noting that IHB and OHB are treated by Viterra as one port. *Table 4²* shows the share of throughput by terminal for 2017/18 with Port Adelaide equating to a total of 40 per cent of the entire state's throughput.

CRA's review of Semaphore's exemption notes that Semaphore had indicated it expected to handle 220,000 tonnes per counter-cyclical marketing period -as per Semaphore's own 2017 exemption submission- yet continued on to conceptualise that Semaphore could actually obtain an annual throughput of 820,000 tonnes³. While it might well be the case that Semaphore can export a greater tonnage than 220,000 tonnes, the counter-cyclical marketing period is the predominant focal point for all exporters including Viterra/Glencore.

¹ DD p19

² P12. CRA report

³ P13, CRA

CRA's assertion that "*Viterra has no incentive to deny access to competing exporters*" is correct to the extent that Viterra have demonstrated a high cost base for the operation of their network and must ensure a certain, albeit unknown, level of throughput in order to effectively spread that cost base. However, CRA is silent on the counter-cyclical marketing period, when Viterra/Glencore is likely to have an incentive to prioritise its own use of port terminal facilities and shipping slots for exports. There is questionable incentive to provide competitors access to Viterra/Glencore port facilities during the counter-cyclical marketing period, especially during average or above -average seasons.

We note that CRA's *Table 6- Vertical Arithmetic* relies on a range of assumptions to demonstrate that Viterra/Glencore would not have an incentive to refuse access to third party exporters based on trading profit results. Put simply, Viterra/Glencore group profit is shown to decrease in the event that there is a denial of access. While GPSA is not in a position to provide detailed economic analysis of the assumptions, **we submit that the ACCC should vigorously test these assumptions to determine whether there is any incentive to deny access, and if so, the cost range of that incentive.**

The ESCOSA report found that "*the decline in Viterra's real operating costs per tonne has not been accompanied by a similar drop in the fees charged to growers for its services.*"⁴ This raises concerns that despite the high costs of compliance, Viterra failed to pass on any reduction in costs to producers. ESCOSA continue, "*the result has been that Viterra's operating surpluses show a strong upward trend...and the corresponding cash flow benefits have been retained to date by Viterra's owners and its shareholders.*"⁵

POTENTIAL BENEFITS OF EXEMPTION

Viterra claim that the benefits of exemption would "*enable Viterra to provide more competitive and flexible services to exporters for bulk grain exports and support lower supply chain cost.*"⁶ GPSA agree that reducing the costs of compliance should provide lower supply chain costs. The caution applied by ESCOSA is suggestive of Viterra's potential predatory behaviour should an exemption be granted. "*If Viterra continues its trend of increasing operating surpluses (notwithstanding potentially incurring losses in poor seasons such as 2018-19), it may start to earn excessive returns for a firm with its risk profile.*"⁷

ESCOSA continue, that it "*would not represent an efficient outcome. In this situation, the competitiveness of the supply chain would become questionable if Viterra did not share its continuing efficiencies with industry through lower fees.*"⁸

CRA's report suggests that "*it is widely recognised among economists, regulators and global antitrust enforcers that contractual freedom and flexibility are important drivers of the efficient function of*

⁴ ESCOSA p2

⁵ ESCOSA p2

⁶ Viterra Exemption Application p2

⁷ ESCOSA p35

⁸ ESCOSA p35

*supply chains.*⁹ GPSA questions whether Viterra/Glencore’s pooling of resources has led to a zero-sum exchange between Viterra and the grain growers who ultimately pay those supply chain costs.

South Australian grain producers have seen little evidence of mutual benefit from Viterra’s efficiencies and consequential reduced costs. As previously identified in GPSA’s initial submission to the ACCC on this matter, we believe that the public interest test must be made with reference to the interests of growers in competition at port, and indeed throughout the entire export supply chain. Given the above, there is no clear public interest or benefit that arises from conferring widespread exemption from the Code to Viterra/Glencore, especially given that any efficiencies, on the one hand, are likely to be absorbed by Viterra/Glencore, and the costs of any lessening in competition will, on the other hand, be borne by growers.

A ‘FINELY BALANCED’ EXEMPTION

GPSA notes that the ACCC indicates *“the exemptions proposed in relation to Viterra’s IHB and OHB facilities are finely balanced and are based on the information available to the ACCC at the time.”*¹⁰ Despite the ‘finely balanced’ reasoning, an exemption of both IHB and OHB has the potential to create a greater monopsony at Port Adelaide and the broader catchment zone.

The reasoning is curious given the ACC’s further statement that *“...if an exemption (or exemptions) were granted so that Parts 3 to 6 of the Code did not apply, there is a risk that Viterra would favour its associated entity, Glencore, particularly during peak periods. Were this to occur Glencore would be able to gain greater access to port terminal services, while third party exporters’ ability to negotiate terms of access would be reduced, particularly in the peak period.”*¹¹

The balancing of exemption and regulation is one which needs a nuanced approach. Given the differences between IHB and OHB, GPSA contends that a blanket exemption across all Port Adelaide port terminals might not provide the level of competition that CRA and Viterra suggest, and the ACCC seeks.

The lack of publicly available evidence from Viterra and CRA as to where costs are incurred or how they will maintain competition during peak times is suggestive that Viterra/Glencore is likely to exercise self-preferential market power. It is therefore GPSA’s belief that a one-size-fits-all approach is ill-suited given the operational, technical, and physical differences that exist between Inner and Outer Harbour port terminals. It would be overly simplistic to exempt both port areas without understanding how Viterra would operate as an exempt port provider.

⁹ P23 CRA

¹⁰ DD p4

¹¹ P16

RESOLUTION OF DISPUTES

Short of a complete denial of access, exemption of Viterra/Glencore from the Code could leave exporters seeking to use IHB and OHB facilities without regulatory oversight of a mediation process, dispute resolution mechanism, or port loading protocols. These are currently provided for in *Clauses 18-26* of the Code. The potential for Viterra to exercise anti-competitive behaviour without regulatory oversight for disputes may place constraints on fair competition within South Australia, especially given the monopoly that Viterra has on the loading/handling of panamax sized vessels.

It appears in the absence of a dispute having been raised under the Code, Viterra argue that no such regulatory oversight is required. Viterra does not provide any details of a mechanism for disputes other than to say, *“Since the Code was introduced, Viterra has not received any dispute notifications under its Port Loading Protocols in relation to the allocation of capacity at its port terminals and has, in fact, received positive feedback about the new long term capacity arrangements.”*¹² Instead, GPSA encourages the ACCC to directly engage with traders and third party users of Viterra’s port facilities to ascertain the impact (if any) from the potential removal of these obligations under the Code. As GPSA highlighted in its original response to Viterra’s application for exemption, there is limited assurance for grain producers about the future conduct of Viterra in the absence of the full application of the Code.

WHOLESALE REFORM OF EXISTING CODE ARRANGMENTS

It is GPSA’s contention that, were the ACCC to consider the regulation of bulk grain exports afresh, it would be apparent that a regulatory instrument that only applies to port loading facilities would be inadequate in establishing competition policy settings in a rapidly changing operating environment for grain producers since wheat export deregulation in 2008. Many of these issues are canvassed in the Viterra exemption application, including the impact of drought, grain imports and the development of new shallow water port terminal loading facilities providing additional capacity.

GPSA considers overall nationwide regulatory reform to be a higher priority issue than a singular assessment of one PTSP’s facilities. We reiterate our call upon the ACCC to address this policy matter as a priority, through consideration of a market study by the Agriculture Commissioner and dedicated Agriculture Unit.

CONCLUSION

GPSA believes that, in considering the full nature of port facilities at Port Adelaide, there is insufficient evidence to support the removal of the Code as it currently applies at Viterra’s OHB facility. GPSA believes that the more appropriate course of action to take is to exempt IHB from the Code.

¹² Viterra Exemption Application 2019, p. 11

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

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

If you have any further queries, please do not hesitate to contact me on 1300 734 884.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Caroline Rhodes', enclosed in a circular scribble.

Caroline Rhodes

Chief Executive Officer